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# INTERNATIONAL LAW STUDIES

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U.S. NAVAL WAR COLLEGE



## Partners and Legal Pitfalls

*Brian Finucane*

92 INT'L L. STUD. 407 (2016)

Volume 92

2016

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*Published by the Stockton Center for the Study of International Law*

ISSN 2375-2831

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\* The author serves as an attorney-adviser for Political-Military Affairs at the U.S. Department of State. This article closely derives from a presentation given at the U.S. Naval War College on November 17, 2015. The article and preceding presentation were prepared in the author’s personal capacity and do not necessarily represent the official views of the Department of State or the U.S. government.

## I. INTRODUCTION

The war in Syria is characterized by a complex web of interrelated armed conflicts involving internal and external State and non-State actors. The fighting is also distinguished by the widespread disregard for, or even explicit disavowal of, the law of armed conflict (LOAC) by many of the parties. This article considers the legal implications of LOAC violations by a party to the conflict for the State or States providing it assistance or cooperating with that party. Specifically, it addresses the question: when do your partner's LOAC problems become your LOAC problems?

Although the war in Syria is commonly described as a "proxy war," the term proxy does not adequately capture the range of relationships between the many State and non-State parties to the conflicts. The term "proxy" suggests a hierarchical- or agency-type relationship that overstates the degree of influence that most external actors exert upon the Syrian recipients of their assistance. Although many external actors provide various forms of assistance to groups inside Syria, few non-State actors could be considered to be under the "effective control" of their benefactors.<sup>1</sup>

For this reason, this article discusses "partners" rather than proxies. In speaking of partners, I am attempting to capture some of the legal issues that might arise from cooperation between the Syrian government, Iran, Russia, Hezbollah and various Shia militias on the one hand, and between the United States, other States belonging to the counter-ISIL coalition and local non-State Syrian forces (such as the Kurdish People's Protection Units (YPG)) fighting ISIL on the other. Moreover, I wish to emphasize that in some respects the differences in the legal issues that arise from working with non-State actors rather than States may be differences of degree, rather than differences in kind. This is especially true in the Syrian conflict where some of the most effective military actors—ISIL, Hezbollah and the YPG—are not States. The term "partner" is used to refer to both State and non-State recipients of assistance and "assisting State" to refer to a State providing any of various forms of assistance, including funding, training, arms, intelligence, logistical support, fire support and up to and including personnel conducting combined combat operations.

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1. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27) [hereinafter *Nicaragua*].

The article is divided into three parts. First, it sets out the core LOAC rules that are most relevant to the armed conflicts in Syria. Second, it examines some of the potential legal implications for an assisting State of LOAC violations committed by one its partners. Finally, the article lays out potential measures an assisting State can take to mitigate the risk that its partners will violate LOAC and that the assisting State will be legally implicated in any such violations.

Although the legal issues focused on may be particularly prominent in Syria, they are by no means limited to this particular armed conflict. There are multiple other ongoing armed conflicts involving a mix of internal and external State and non-State actors where these legal issues are also at play.

## II. RELEVANT LOAC FRAMEWORK

### A. Selected LOAC Rules

At the moment in Syria there are a number of interrelated non-international armed conflicts (NIACs).<sup>2</sup> These NIACs include, *inter alia*, conflicts between States and non-State actors such as the fighting between: (1) Syria and Russia on the one hand and Ahrar al-Sham, Jaish al-Islam and al Nusra Front on the other; and (2) the United States and its coalition partners on the one hand and ISIL on the other. There are also NIACs between non-State armed groups, such as the armed conflict between the YPG and ISIL.

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2. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. A non-international armed conflict involves “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995). *See also* Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90 (“Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 87 (Int’l Crim. Trib. for the former Yugoslavia Nov. 30, 2005) (“The Chamber is also conscious of Article 8 of the Statute of the International Criminal Court (ICC) which, *inter alia*, defines, for its purposes, war crimes committed in an armed conflict not of an international character.”); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Appeals Chamber Judgment, ¶ 49 (Int’l Crim. Trib. for the former Yugoslavia Apr. 3, 2008) (listing factors that have bearing on the intensity of hostilities).

Thus, the relevant LOAC rules that will be the focus of this article are those applicable to NIACs, specifically the provisions of Common Article 3 of the 1949 Geneva Conventions governing the treatment of “persons taking no active part in hostilities”<sup>3</sup> and the customary international law rules governing targeting.<sup>4</sup> These rules are binding on all parties to a NIAC, whether they are States or non-State actors. In addition, certain serious LOAC violations, such as intentionally or recklessly<sup>5</sup> attacking civilians or

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3. See, e.g., Geneva Convention IV, *supra* note 2, art. 3.

4. A core set of rules governing targeting are generally accepted to apply in NIACs. See generally Brian Egan, Legal Advisor, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law, Washington, DC: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016), 92 INTERNATIONAL LAW STUDIES 235 (2016), <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1668&context=ils> (identifying some of the targeting rules the United States regards as customary international law applicable to all parties in a NIAC); WILLIAM H. BOOTHBY, THE LAW OF TARGETING 139 (2012); IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 215 (2009); Michael N. Schmitt, *Targeting in Operational Law*, in THE HANDBOOK OF THE LAW OF MILITARY OPERATIONS 245 (Terry Gill & Dieter Fleck eds., 2010).

5. See Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 54 (Int'l Crim. Trib. for the former Yugoslavia Dec. 5, 2003) (describing the Trial Chamber's reliance on the ICRC *Commentary* to Article 85 of Additional Protocol I distinguishing intent from recklessness). In its discussion of the *mens rea* of the crime at issue, the *Galić* Trial Chamber found that the perpetrator must undertake the attack “wilfully,” which it defined as wrongful intent, or recklessness, and explicitly not “mere negligence.” *Id.* The ICRC *Commentary* defines intent for the purposes of Article 51(2) and clearly distinguishes recklessness, “the attitude of an agent who, without being certain of a particular result, accepts the possibility of its happening,” from negligence, which the *Commentary* states describes a person who “acts without having his mind on the act or its consequences.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3474 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). In its review of the *Galić* judgment, the Appeals Chamber held “[t]he Trial Chamber's reasoning in this regard is correct and Galić offers no support for his contention that the Trial Chamber committed an error of law. Thus, to the extent that Galić impugns this specific finding, his argument is without merit and accordingly dismissed.” Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 140 (Int'l Crim. Trib. for the former Yugoslavia Nov. 30, 2006). See also Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment, ¶ 270 (Int'l Crim. Trib. for the former Yugoslavia July 17, 2008) (“The Appeals Chamber has previously ruled that the perpetrator of the crime of attack on civilians must undertake the attack ‘wilfully’ and that the latter incorporates ‘wrongful intent, or recklessness, [but] not ‘mere negligence.’ In other words, the *mens rea* requirement is met if it has been shown that the acts of violence which constitute this crime were willfully directed against civilians, that is, either deliberately against them or through reck-

civilian objects, including specifically protected objects, constitute war crimes entailing individual responsibility.<sup>6</sup>

### B. Competence and LOAC Compliance

In the context of assisting partners in a NIAC, the military competence of partner forces takes on a special significance. LOAC targeting rules presuppose at least minimal competence by those operating weapons systems in armed conflict.<sup>7</sup> LOAC violations by parties to a conflict and war crimes

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lessness. The Appeals Chamber considers that this definition encompasses both the notions of ‘direct intent’ and ‘indirect intent’ mentioned by the Trial Chamber, and referred to by Strugar, as the *mens rea* element of an attack against civilians.”); Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 28, 39 INTERNATIONAL LEGAL MATERIALS 1257 (June 13, 2000), <http://www.icty.org/x/file/Press/nato061300.pdf> [hereinafter NATO Bombing Report] (“Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) . . . may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence.”); Prosecutor v. Novak Dukic, Case No. X-KR-07/394, First Instance Verdict, ¶ 189 (Court of Bosnia and Herzegovina, June 12, 2009) (upheld on appeal), [http://www.worldcourts.com/wcsbih/eng/decisions/2009.06.12\\_Prosecutor\\_v\\_Djukic.pdf](http://www.worldcourts.com/wcsbih/eng/decisions/2009.06.12_Prosecutor_v_Djukic.pdf) (holding that under CIL applicable in both IACs and NIACs the “requisite mens rea for attacks against civilians is that the perpetrator must conduct the attack ‘willfully’, which can also include recklessness, but cannot be committed with mere negligence.”). *But see* U.S. Department of Defense, Manual for Military Commissions, United States, IV-4 (2010), [http://www.mc.mil/Portals/0/2010\\_Manual\\_for\\_Military\\_Commissions.pdf](http://www.mc.mil/Portals/0/2010_Manual_for_Military_Commissions.pdf) (Providing that the *mens rea* for the offense of attacking civilian objects is more akin to a negligence standard. “The accused intended such civilian property to be an object of the attack [and the] accused knew or should have known that such property was not a military objective.”); United States v. Ahmed al Darbi, Stipulation of Fact, at 19 (Military Comm’ns Dec. 20, 2013), <https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/02/Al-Darbi-II-PE001-Stipulation.pdf> (defendant pled guilty to attacking civilians not directly participating in hostilities and attacking civilian property under the standard that he “knew or should have known of the factual circumstances that established their civilian status.”).

6. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009) (codified at 10 U.S.C. § 950p) (2016) (listing the offenses of attacking civilians, civilian objects and protected property as crimes triable by military commission).

7. See Geoffrey S. Corn, *Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide between the Tadić Aspiration and Conflict Realities*, 91 INTERNATIONAL LAW STUDIES 281, 315 (2015).

by individual fighters may arise not only from deliberate and intentional misconduct, but also due to incompetence.

Violations of the LOAC rules resulting from incompetence that may entail responsibility for a State as a party to the conflict (as opposed to criminal responsibility for individual members of the partner force) include violating the prohibitions on making civilians and civilian objects as such the “object of attack.”<sup>8</sup> For example, a partner may mistakenly make a civilian the object of attack due to systematically flawed intelligence or poor coordination between its forces. Although such mistaken targeting would not necessarily implicate individual criminal responsibility, it could still constitute a violation of the underlying customary LOAC rule reflected in Article 51(2) of Additional Protocol I<sup>9</sup> and therefore could incur State responsibility.

Another relevant illustration is the prohibition on indiscriminate attacks and the requirement to take feasible precautions. The prohibition on indiscriminate attacks applies both to the use of per se indiscriminate weapons<sup>10</sup> (such as German V-2 rockets in World War II), as well as the use of lawful weapons in an indiscriminate manner.<sup>11</sup> Such indiscriminate attacks include those in which the weapon system could be aimed but the attacker fails to do so, attacks based on patently unreliable information and attacks in environments that cause weapons to be highly inaccurate.<sup>12</sup> If a partner conducts attacks of this nature due to its inability to properly aim its weapons or obtain reliable intelligence, such attacks may be unlawful even if the at-

8. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(2), June 8, 1977, 1125 U.N.T.S. [hereinafter Additional Protocol I].

9. Compare Article 51(2) which provides that “[c]ivilian objects shall not be made the object of attack” with Article 85(3)(a) defining a grave breach as “*willfully* . . . making the civilian population or individual civilians the object of attack.” (emphasis added).

10. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 78 (referring to the prohibition on indiscriminate weapons as a “cardinal” principal of LOAC).

11. Additional Protocol I, *supra* note 8, art. 51(4)(a).

12. Christopher J. Markham & Michael N. Schmitt, *Precision Air Warfare and the Law of Armed Conflict*, 89 INTERNATIONAL LAW STUDIES 669, 681 (2013) (“At its most basic level, an indiscriminate attack is one where the weapon system could be aimed, but the attacker fails to do so, as in the case of blindly dropping bombs over enemy territory. Other examples include an attack based on patently unreliable information and one in which the weapon is employed in an environment that causes it to be highly inaccurate (e.g., at a very high altitude or in weather that disrupts guidance system functionality).”).

tacker subjectively intends to attack military objectives.<sup>13</sup> Because the standard is an objective one of reasonableness, the relevant inquiries include did the attacker take reasonable measures to verify the target and did the attacker consider all reasonably available information.<sup>14</sup> Although a determination of whether or not an attacker has taken feasible measures will not necessarily focus on specific incidents, an assessment of the reasonableness of an attacker's ultimate decision to attack should consider whether the precautionary measures it has employed have worked adequately in a high percentage of cases.<sup>15</sup>

Not only may ineptitude result in violations of LOAC, but in some circumstances a mistaken targeting decision due to an attacker's incompetence may implicate individual criminal responsibility.<sup>16</sup> The *mens rea* for targeting related war crimes includes not only deliberately directing attacks against civilians, civilian objects or other objects specifically protected under LOAC, but also *recklessly* directing attacks against such persons and ob-

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13. See MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 308 (1982) (Noting in connection with prohibitions on indiscriminate attacks in Article 51(4) and civilian objects in Article 52(1) of Additional Protocol I that the "use of unobserved fire against mobile targets depends for its military effectiveness, as well as *legality*, upon the accuracy and timeliness of target intelligence." (emphasis added)).

14. NATO Bombing Report, *supra* note 5, ¶ 29. See generally John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VIRGINIA JOURNAL OF INTERNATIONAL LAW 84 (2016).

15. NATO Bombing Report, *supra* note 5, ¶ 29 ("Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact that they have not worked in a small number of cases does not necessarily mean they are inadequate.").

16. Corn, *Regulating Hostilities*, *supra* note 7, at 319. See also NATO Bombing Report, *supra* note 5, ¶ 50 (Identifying reasonableness as the touchstone for evaluating the lawfulness of targeting and suggests "that the determination of relative values must be that of the 'reasonable military commander.' Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained."); Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, 77 BROOKLYN JOURNAL OF INTERNATIONAL LAW 437, 450–54 (2011) (discussing reasonableness as the "focal point of compliance with the military objective rule and, by implication, the principle of distinction").



jects.<sup>17</sup> As Geoffrey Corn has argued in the reference to the 2014 shoot-down of flight MH17 in Ukraine, resolving the issue of whether or not the mistaken targeting of a civilian object constitutes a war crime would involve a consideration of the reasonableness of the mistake. “[M]erely utilizing [a weapons] system without sufficient training and preparation could itself establish the unreasonableness of the employment judgment. This is because this type of mistake is a foreseeable consequence of fielding advanced combat capability without properly training forces to use that capability in compliance with IHL obligations.”<sup>18</sup>

The following hypothetical illustrates how the foregoing legal considerations might manifest themselves in the context of Syria. If a partner force (1) has systematic deficiencies in its targeting processes for air operations, (2) these flaws significantly increase the likelihood that the partner will misidentify civilians as combatants or civilian objects as military objectives, (3) the partner is aware of such deficiencies, but (4) nonetheless proceeds with targeting without remedying such deficiencies, such targeting may be characterized as reckless and thus entail individual criminal responsibility for members of the partner force.<sup>19</sup>

### III. INTERNATIONAL LEGAL RESPONSIBILITY FOR A PARTNER’S LOAC VIOLATIONS

By virtue of the assistance provided by an assisting State to a partner (whether a State or non-State actor), LOAC violations by that partner (including by members of a non-State actor) might have legal implications for the assisting State and/or its individual officials. This section examines some of these potential implications.

Any assessment of when an assisting State is legally implicated by its partner’s LOAC violation would involve the following considerations: the degree of confidence that its partner has itself violated LOAC and whether

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17. *Strugar*, *supra* note 5, ¶ 270 n.670 (defining recklessness as “the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences”).

18. *See* Corn, *Regulating Hostilities*, *supra* note 7, at 315.

19. The prohibition on the indiscriminate use of weapons and the criminal offense of recklessly directing attacks against civilians or civilian objects overlap. *See, e.g.*, Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 445, 446 (2005) (“In practice, though, the two prohibitions [on indiscriminate attacks and direct attacks against civilians] often merge.”).

there is the requisite knowledge that its assistance will enable or facilitate the LOAC violation. Any determination will likely turn on the precise nature of the assistance, awareness of how such assistance would be used and intent of the recipient with respect to the use of such assistance.

If a partner violates LOAC, two general frameworks under which the assisting State or individual officials of the assisting State could be argued to bear international legal responsibility are: 1) as a matter of State responsibility and 2) as an aider and abettor of the war crimes committed by the partner receiving the assistance.

#### A. State Responsibility

##### 1. Control

The most straightforward means in principle (and least relevant in practice) by which a State may bear responsibility in relation to the conduct of a non-State partner is if the non-State actor acts on the instruction of or under the direction or control of the State. Article 8 of the Draft Articles on State Responsibility (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 instruction of, or under the control of, that State in carrying out the conduct.”<sup>20</sup> Absent instruction or direction from the State to the non-State partner, the relevant question is whether the State exercised the requisite level of control over the conduct of the partner.

The standard articulated by the International Court of Justice (ICJ) is one of effective control. “For the conduct to give rise to legal responsibility of the [State], it would in principal have to be proved that the state had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>21</sup> A State has effective control

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20. Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 8, Report of the International Law Commission, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (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]; *Nicaragua*, *supra* note 1, ¶ 115; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. Rep. 43, ¶ 413 (Feb. 26) [hereinafter *Genocide case*].

21. *Nicaragua*, *supra* note 1, ¶ 115 (emphasis added).

when it exercises control over a specific operation and the relevant conduct by the non-State actor took place in the course of that operation.<sup>22</sup>

In contrast to the ICJ's effective control standard, an appeals chamber of the International Criminal Tribunal for the former Yugoslavia has indicated that "overall control" is the requisite degree of control for a non-State actor to be considered as forces of the assisting State.<sup>23</sup> A State would have overall control when, in addition to providing general support, it also has a role in organizing, coordinating or planning the military actions of a non-State armed group. This standard, which would be met by a lesser degree of involvement by the State in particular operations than is required by the effective control test, has been less widely accepted than the tests articulated by the ICJ for the purpose of State responsibility.

The standard of effective control appears to be rarely met in practice. In both the *Nicaragua* and *Bosnian Genocide* cases, the ICJ held that the standard was not met despite the substantial support (including training, arming, equipping and financing) provided by States to the non-State actors.<sup>24</sup> Even under the overall control standard, without more, the mere provision of financial assistance or military equipment or training to a non-State armed group is unlikely to result in State responsibility for the conduct of the non-State armed group. Thus, with respect to many of the partner relationships in the Syrian conflict and partnered operations more generally, neither the effective nor overall control standards appear likely to be directly implicated.

## 2. Aid and Assistance

With respect to State responsibility, the more relevant standard is likely to be responsibility that may arise by virtue of aid that an assisting State provides to a *State* partner, rather than responsibility for the actions of non-State actors under the assisting State's control.

Article 16 of the Draft Articles addresses the standard for State responsibility arising as a result of aid or assistance provided to another State. Under Article 16, an assisting State would be responsible for a violation of international law if it aids or assists a partner in the commission of a viola-

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22. *Id.*

23. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 131, 137, 145 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999).

24. *Nicaragua*, *supra* note 1, ¶ 115; *Genocide* case, *supra* note 20, ¶ 413. See also ARSIWA, *supra* note 20, art. 8.

tion of LOAC, if it does so with knowledge of the circumstances of its partner's LOAC violation and if the LOAC violation would be internationally wrongful when committed by the assisting State.

The International Law Commission's (ILC) *Commentary* to the Draft Articles explains that the "aid or assistance must be given with a view to facilitating the commission" of the unlawful act and that "[a] State is not responsible for aid or assistance under Article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct."<sup>25</sup> On its face, the ILC *Commentary's* formulation of "with a view to facilitating" suggests *actual* intent on the part of the assisting State. However, it remains unclear whether some lower form of *mens rea*, such as recklessness, would in some circumstances suffice. The ICJ did not reach the issue of the requisite intent in the *Genocide* case, as the Court held that Bosnia had not established the threshold requirement of knowledge on the part of Serbia.<sup>26</sup>

In light of the uncertainty regarding the precise *mens rea* required to trigger State responsibility on the basis of aid or assistance to another State, there may be risks associated with the provision of assistance to a State partner even if the assisting State did not desire the commission of any wrongful act. For example, if an assisting State continued to provide assistance to its partner with knowledge of systemic deficiencies in its partner's targeting or detention practices that render LOAC violations more likely, there is a risk that the intent by the assisting State to facilitate LOAC violations could be inferred.

### 3. Duty to Ensure Respect for LOAC

Whether or not the assisting State could be viewed as responsible for any LOAC violations by a military partner, it could be argued that the assisting State has an independent obligation to take positive measures to prevent LOAC violations by its partners. The International Committee of the Red Cross (ICRC) has recently argued that Common Article 1 of the Geneva Conventions "has an external dimension related to ensuring respect for the Conventions by others that are Party to a conflict. Accordingly, States,

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25. ARSIWA, *supra* note 20, at 66. Of note, the assisting State would not be responsible for any underlying wrongful act by its partner; rather, on this theory, the assisting State would be responsible for the separate act of providing aid or assistance.

26. *Genocide* case, *supra* note 20, ¶¶ 421–22.

whether neutral, allied or enemy, must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict.<sup>27</sup> Further the ICRC claims that the duty to ensure respect is not limited to the Geneva Conventions but extends to the entire body of LOAC binding upon a particular State.<sup>28</sup> According to the ICRC, a third State has an international legal obligation to ensure respect for LOAC in all circumstances, in both international and non-international armed conflicts.<sup>29</sup> In its view, the obligation is one of due diligence requiring States to make every lawful effort in their power to ensure compliance with LOAC and that the greater the means available to a State, the greater the responsibility.<sup>30</sup> Under this interpretation of Common Article 1,

[t]he duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation . . . . 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.<sup>31</sup>

Thus, assisting States have a heightened responsibility to promote LOAC compliance by their partners, including stopping or preventing further LOAC violations, particularly if their partner is party to an ongoing armed conflict.

The ICRC's interpretation of the obligation to ensure respect, however, is not shared by the United States.<sup>32</sup> More generally, it is unclear to what

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27. INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 153 (2d ed. 2016), <https://ihl-database.s.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>.

28. *Id.*, ¶ 126.

29. *Id.*, ¶ 125.

30. *Id.*

31. *Id.*, ¶ 167.

32. See Egan, *supra* note 4, at 245 (“Some have argued that the obligation in Common Article 1 of the Geneva Conventions to ‘ensure respect’ for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote ad-

extent this expansive understanding of ensure respect is shared by other States as the ICRC's recent *Commentary* does not appear to take into account the views and practice of individual States. This omission is notable as the subsequent practice in the application of the Convention which establishes agreement of the parties regarding its interpretation would be particularly relevant in understanding Common Article 1.<sup>33</sup>

Nonetheless, applying the ICRC's interpretation in the context of the Syrian conflict, if an assisting State were aware of the systematic abuse of law of war detainees by a partner, such as al Nusra Front, the assisting State would be required to use both the carrots and sticks at its disposal in order to remedy the situation.<sup>34</sup> The failure to take every lawful effort in their power to bring about compliance with at least the minimal standards for detainee treatment in Common Article 3 would constitute a violation of the duty to ensure respect.

#### 4. Arms Transfer Restrictions under the Arms Trade Treaty

There could also be an argument that transfer of certain conventional arms by an assisting State to a partner would be inconsistent with the provisions of the Arms Trade Treaty (ATT), if the assisting State knew the arms would be used to commit violations of LOAC.<sup>35</sup> Of particular relevance to the issue of arms transfers in the Syrian context is Article 6(3) which prohibits, *inter alia*, the authorization of the transfer of certain categories of conventional arms, ammunition and munitions if the party "has knowledge at the time of the authorization that the arms or items would be used in the commission of . . . attacks directed against civilian objects or civilians protected as such." The text of Article 6 makes clear that the State party, specifically the official responsible for authorizing the proposed export, must have direct or clear knowledge at the time of the authorization that the intended recipient will use the arms or items in the commission of one or more of the specified crimes in order for the prohibition to apply.

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herence to the law of armed conflict generally and encourage other States to do the same.").

33. See Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

34. See Risk Mitigation *supra* Section IV.

35. Arms Trade Treaty, Apr. 2, 2013, 52 INTERNATIONAL LEGAL MATERIALS 988 (entered into force Dec. 24, 2014).

In addition under Article 7, parties to the ATT are required to “assess the potential that the conventional arms or items . . . could be used to commit or facilitate a serious violation of international humanitarian law” and, if so, to “consider whether there are measures that could be undertaken to mitigate risks.” If, after conducting the assessment and considering available mitigating measures, the exporting State determines there is an “overriding risk” that exported material could be used to further the commission of a serious violation of international humanitarian law, Article 7 obligates the exporting State “not [to] authorize the export.”

There could be a non-frivolous argument that parties to the ATT act in violation of the treaty, in particular with respects to Article 6 and Article 7, if facts supported an inference that they transferred covered items to a partner with knowledge the items would be used to target civilians or civilian objects. Such facts would include any pattern of apparent LOAC violations by a recipient partner or deficiencies in their military operations that would render LOAC violations inevitable.

### B. *Individual Criminal Responsibility*

If individual members of a partner force (State or non-State) receiving assistance commit war crimes, there could also be arguments that officials of the assisting State would be liable under international law for aiding and abetting such offenses even absent control over the partner forces that might entail State responsibility for the assisting State. There remains some debate regarding the standard for aiding and abetting in customary international law, particularly with respect to the relevant *mens rea* of the accomplice.<sup>36</sup> Nonetheless, the overwhelming majority of cases from international criminal tribunals indicate that under international criminal law the *mens rea* for aiding and abetting is some form of knowledge as opposed to a purpose standard.<sup>37</sup>

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36. See, e.g., David P. Stewart, *Can the ICTY Šainović and Perišić Cases Be Reconciled?* 108 AMERICAN JOURNAL OF INTERNATIONAL LAW 475 (2014); Janine Natalya Clark, “*Specific Direction*” and the Fragmentation of International Jurisprudence on Aiding and Abetting: Perišić and Beyond, 15 INTERNATIONAL CRIMINAL LAW REVIEW 411 (2015); Marko Milanovic, *ICTY Appeals Chamber Reverses Šainović and Simatović Acquittal, Orders Retrial, Kills Off Specific Direction (Again)* EJIL TALK! (Dec. 15, 2015), <http://www.ejiltalk.org/icty-appeals-chamber-reverses-stanasic-and-simatovic-acquittal-orders-retrial-kills-off-specific-direction-again/#more-13914>.

37. Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 93 (1947) (Brit. Mil. Ct. 1946) (Two top officials of the

A potentially significant and relevant contribution to State practice and *opinio juris* on the question of the *mens rea* for aiding and abetting under customary international law comes from the U.S. Military Commissions at Guantanamo Bay. In an October 2013 filing, the Chief Prosecutor endorsed the standard for aiding and abetting liability adopted by the Special Court for Sierra Leone in *Prosecutor v. Taylor*.<sup>38</sup> The prosecutor took the po-

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company manufacturing and selling Zyklon B were convicted of aiding and abetting on a knowledge standard and not the shared intent of the Nazi perpetrators.); United States v. Otto Ohlendorf et al. (The Einsatzgruppen Case), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 569 (1951) (Convicting an interpreter for aiding and abetting murder on a knowledge standard. “Klingelhofer has stated that his function in the Einsatzgruppe operation was only that of an interpreter. Even if this were true it would not exonerate him from guilt because in locating, evaluating, and turning over lists of Communist party functionaries to the executive department of his organization he was aware that the people listed would be executed when found. In this function, therefore, he served as an accessory to the crime.”); United States v. Krauch (The I.G. Farben Case), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1169 (1952) (acquitting corporate executives who did not have “any significant knowledge” of the uses to which Zyklon B was being put.); Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the former Yugoslavia May 5, 2009); Prosecutor v. Šainović et al., Case No. IT-05-87-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the former Yugoslavia Jan. 23, 2014); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Chamber Judgment (Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>; Prosecutor v. Popović et al., Case No. IT-05-88-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the former Yugoslavia Jan. 30, 2015); Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-A, Appeals Chamber Judgment, ¶ 106 (Int’l Crim. Trib. for the former Yugoslavia Dec. 9, 2015) (holding that for aiding and abetting liability to attach, an accessory must provide, *inter alia*, practical assistance that has a substantial effect on the perpetration of the crime and have knowledge that his acts assist the commission of the offense, but that it is not necessary to that the that the assistance was “specifically directed” to assist the commission of the underlying crime). *See also* Prosecutor v. Jose Cardoso, Case No. 04/2001, Judgment, ¶ 457 (Dili Dist. Ct. 2003) (“[I]t must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender. The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender’s state of mind. However, the aider and abettor need not share the intent of the principal offender.”). *But see* Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Chamber Judgment, ¶¶ 26–28 (Int’l Crim. Trib. for the former Yugoslavia Dec. 9, 2014) (holding that an aider and abettor must “specifically direct” assistance to the commission of the underlying crime).

38. Government Motion to Make Minor Conforming Charges to the Charge Sheet (AE120B) at 2, United States v. Khalid Shaikh Mohammad et al. (Military Comm’ns Oct.



sition in *United States v. Khalid Shaikh Mohammad, et al.*, that under customary international law, an accused is guilty of aiding and abetting when he/she

- 1) [P]rovided practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offense, and
- 2) Such practical assistance, encouragement, or moral support, had a substantial effect upon the commission of a crime or underlying offense.<sup>39</sup>

Under this standard for aiding and abetting it is not necessary that the assistance constituted a “but for” cause of the crime, nor (in contrast to State responsibility and federal law) that the assistance was specifically directed towards a crime.<sup>40</sup> Assistance having a substantial effect could take a variety of forms, including transportation, providing personnel,<sup>41</sup> weapons, ammunition or fuel.<sup>42</sup>

The Chief Prosecutor has further taken the position that the *mens rea* for aiding and abetting requires that:

The Accused performed an act with the knowledge that such act would assist the commission of a crime or underlying offense, or that he was aware of the substantial likelihood that his acts would assist the commission of an underlying offense, and

The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.<sup>43</sup>

At a minimum, an aider and abettor must be aware of a “substantial likelihood” that he/she would assist in the commission of the offense, a stand-

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18, 2013), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE120B\(Gov%20Sup\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE120B(Gov%20Sup)).pdf) (“The Appellate Chamber of the Special Court for Sierra Leone in *Taylor* discusses in great detail aiding and abetting liability, a form of vicarious liability, by assessing historical international humanitarian law cases and customary international law. As such, the *Taylor* decision is ‘newly decided case law,’ reflecting customary international law on aiding and abetting liability.” (citing *Taylor*, *supra* note 37)).

39. *Id.* at 3 (citing *Taylor*).

40. *Id.* at 3 (citing *Taylor*).

41. *Id.* at 3 (citing *Taylor*).

42. *Taylor*, *supra* note 37, ¶ 369.

43. Government Motion, *supra* note 38, at 4.

ard akin to recklessness.<sup>44</sup> A conscious desire or willingness to achieve the criminal results is not required.<sup>45</sup> However, the *mens rea* requires more than a “general or abstract awareness that any type of crime could be committed” during an armed conflict as “law of war violations are nearly inevitable in any armed conflict.”<sup>46</sup>

Applying this standard to a hypothetical example drawn from the Syrian conflict, it is widely reported that the Syrian government conducts airstrikes that violate LOAC, either because they deliberately target civilians or civilian objects or because the airstrikes are indiscriminate.<sup>47</sup> If officials of an assisting State provided intelligence, fuel, maintenance or munitions that had a “substantial effect” on enabling a Syrian airstrike that constituted a war crime, such assistance would satisfy the *actus reus* for aiding and abetting under the standard endorsed by the Military Commissions Chief Prosecutor in *U.S. v. Khalid Shaikh Mohammad et al.*

With respect to the *mens rea*, it would be sufficient under this standard to show that officials of the assisting State were aware at the time of providing assistance to the Syrian military: (1) of the *substantial likelihood* that their military aid would assist the unlawful airstrikes and (2) that Syrian personnel intended to deliberately or recklessly attack civilian objects, civilians or specifically protected objects such as hospitals. Notably, it would not be necessary to show that officials of the assisting State desired the commission of the underlying crime. Nor would it be necessary to show that officials of the assisting State even had actual knowledge that their military aid would assist the perpetration of a specific crime by their partner.<sup>48</sup>

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44. *Taylor*, *supra* note 37, at 190 n.1289. It should be noted that the precise definition of recklessness and its civil law analogue *dolus eventualis* may vary according to jurisdiction.

45. Government Motion, *supra* note 38, at 4 (citing *Taylor*).

46. *Id.* at 4 (citing *Taylor*).

47. See, e.g., HUMAN RIGHTS WATCH, DEATH FROM THE SKIES, DELIBERATE AND INDISCRIMINATE AIR STRIKES ON CIVILIANS (Apr. 10, 2013), <https://www.hrw.org/report/2013/04/10/death-skies/deliberate-and-indiscriminate-air-strikes-civilians>.

48. See Josh Rogin, *Russia Risks Being Prosecuted for Syria's War Crimes*, BLOOMBERGVIEW (Sept. 30, 2015), <http://www.chicagotribune.com/news/sns-wp-blm-declassified-russia-43dc7028-67b2-11e5-bdb6-6861f4521205-20150930-story.html> (Quoting former U.S. Ambassador-at-Large for Global Criminal Justice, Stephen Rapp as arguing that “[t]he Russians are walking into a situation where they could be held criminally responsible . . . . If you aid the Syrian air force in committing war crimes such as dropping barrel bombs on civilians, you can find yourself held responsible right up to the top, including President Putin. . . . For aiding and abetting, you don’t have to intend for horrible things to happen, you just have to know they are happening.”).

In this hypothetical situation, information supporting an inference that officials of the assisting State were aware of both the substantial likelihood that assistance would facilitate war crimes and of the state of mind of Syrian military personnel could potentially include:

- Statements by Syrian officials indicating an intent by the Syria to target civilian objects or specifically protected property;
- Credible reports that the Syrian military generally does not appropriately distinguish between civilian objects and military objectives in planning air strikes;
- Credible reports indicating the Syrian personnel conducting, planning, or ordering air strikes generally do not understand the difference between civilian objects and military objectives;
- Credible reports indicating that Syria has repeatedly intentionally targeted civilian objects or specifically protected property; and
- Credible reports indicating systematic deficiencies in Syrian air operations (e.g., use of patently unreliable intelligence<sup>49</sup> or failure to match weapons to targets) that significantly increase the risk of unlawful airstrikes, and that Syrian commanders are aware of the deficiencies and have failed to adopt adequate remedies.

Depending upon the nature of assistance to a partner (e.g., which combat missions rely on that assistance), the argument for aiding and abetting liability would likely turn on what the officials of the assisting State were aware of when they provided assistance. The greater the awareness that the partner receiving assistance failed to comply with LOAC, that such violations reflected policy decisions or systematic deficiencies and that violations were likely to continue in the future, the stronger the argument that individual officials of the assisting State would be aiding and abetting war crimes.

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49. See Markham & Schmitt, *supra* note 12, at 681 (“At its most basic level, an indiscriminate attack is one where the weapon system could be aimed, but the attacker fails to do so, as in the case of blindly dropping bombs over enemy territory. Other examples include an attack based on patently unreliable information and one in which the weapon is employed in an environment that causes it to be highly inaccurate (e.g., at a very high altitude or in weather that disrupts guidance system functionality”).

## IV. RISK MITIGATION

The preceding section laid out a number of potential international legal issues associated with working with a range of military partners, be they State militaries that are part of a formal coalition or non-State armed groups receiving various forms of military assistance. This section considers risk mitigation measures that an assisting State should consider in order to reduce its potential legal exposure. Specifically, it addresses mitigating two related types of risk: (1) that the assisted party will violate LOAC and (2) that the assisting party will be legally implicated in any such LOAC violations.

The options discussed below are illustrative, not exhaustive. They vary both with respect to the degree of intrusion into a partner's operations and the effort required by the assisting State to undertake them. The degree of mitigation necessary will depend on the perceived legal risk, itself a function of a partner's underlying conduct and the quantity and quality of assistance provided. What measures an assisting State should adopt may also depend, *inter alia*, on countervailing policy considerations and resource constraints. It is also worth emphasizing that an assisting State might undertake many of these measures for policy reasons regardless of its perception of the legal risk associated with assistance to a partner.

*A. Vetting and Due Diligence*

The first and most basic form of risk mitigation is *ex ante* screening of potential partners, either with respect to individual fighters or leaders or relevant military units. Such assessments may help to eliminate particularly problematic candidates for support or identify deficiencies in potential partners to be addressed through further measures discussed below.

There are a range of potentially relevant factors to be considered in vetting. Most obvious is assessing whether potential partners will engage in deliberate malfeasance that results in violations of LOAC. An assessment of deliberate LOAC violations could take into consideration policies or practices of the potential partner and credible reporting of past violations.<sup>50</sup>

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50. For the purposes of complying with domestic statutory requirements, the U.S. Department of State conducts so-called "Leahy-vetting" of recipients of assistance (for purposes of the Foreign Assistance Act) to foreign security forces, as well as certain Department of Defense training programs, to ensure that recipients have not committed "gross violations of human rights." See Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2378d (2012). Leahy-vetting would not necessarily be required for all forms of

More subtle is the issue of whether, notwithstanding any stated intention or policy of complying with LOAC, a potential partner correctly interprets and applies LOAC in practice. With respect to targeting, a potential partner may misapply the law as to what persons and objects may be made the object of attack. For example, a potential partner may employ an overly inclusive functional standard as to who constitutes an enemy combatant which includes all military age males, all adherents of particular religion or all inhabitants of a particular region. A potential partner may also apply an overly broad interpretation of what objects constitute military objectives (e.g., all civilian bakeries in areas controlled by an opposing party). Unless an assisting State has an operational track record by which to judge a potential partner, assessing the likelihood of LOAC violations resulting from a potential partner's "mistake of law" may be difficult and time consuming and require embedding operational and legal experts with the group in order to observe how their members apply LOAC in practice.

In addition to malice and gross misapplication of LOAC, there are a range of factors related to the institutional and technical capabilities of potential partners that increase the risk of LOAC violations. Examples of institutional deficiencies that can increase the likelihood of LOAC violations include:

- The inability of commanders to exercise effective command and control over their forces;
- Poor collection and analysis of intelligence used in targeting; and
- Poor coordination and information flow within or between elements of the partner military, e.g., air and ground components.

Finally, it would be prudent to assess whether the forces of a prospective partner possess the competence to use specific weapons in a lawful manner. The sophistication and destructive potential of the weapon or weapon system will likely bear on the level of skill required by its operator in order to use the weapon consistent with the principles of distinction and proportionality. If an assisting State is providing light arms to a partner, no special competence beyond marksmanship may be necessary in order to use the weapons in a lawful manner. In contrast, if an assisting State is con-

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assistance discussed in this article, given the narrower scope of "assistance" for Foreign Assistance Act purposes.

sidering whether to provide an anti-aircraft missile system to a partner force, it would be prudent for that State to assess beforehand whether the potential recipient has not only had the appropriate training, but also the necessary ancillary equipment to distinguish in practice between military aircraft and civilian airliners when using the missile system.

Although shortcomings identified during vetting may not be show-stoppers in terms of whether or not an assisting State provides aid to a potential partner, such due diligence should inform whether to pursue additional risk mitigation measures. At a minimum, this research may enable an assisting State to identify components of a partner's military force that are more prone to conduct operations consistent with LOAC and work with or direct assistance to those components.

### *B. Training*

Having identified shortcomings in a military partner, one way to address them is through training. At the most basic level this can involve practical instruction on LOAC rules and the application of those rules to the types of scenarios a partner is likely to face in the conflict. Depending on the sophistication of the partner force, an assisting State may wish to stress overly inclusive bright-line rules rather than instructing a partner on when specific objects normally protected under LOAC lose their protection, or how to weigh anticipated military advantage against expected harm to civilians for the purpose of complying with the principle of proportionality.

Depending on the arms a partner will be using, weapons training may be far more important in promoting LOAC compliance than instruction in the rules and principles of LOAC itself. As a prerequisite for LOAC compliance a partner must be able to reliably (though not necessarily perfectly) direct its weapons at military objectives as opposed to civilian objects. For example, if a partner is conducting airstrikes in the conflict and does not know how as a practical matter to reliably distinguish between military objectives and civilian targets, extensive training would likely be necessary before an assisting State could reasonably expect its partner's combat air operations to comply with LOAC.

### *C. Monitoring and Conditionality*

To further mitigate the risk that an assisting State will be legally implicated in a partner's LOAC violations, assistance can be conditioned on compli-

ance with LOAC. Depending upon the assisting State's physical access to its partner's operations, it may be possible to monitor compliance through the use of liaison officers or other means.

### 1. Monitoring Targeting

In general, it is often difficult to reach definitive conclusions in assessing whether specific attacks by third parties violated LOAC or constituted war crimes.<sup>51</sup> In assessing the lawfulness of targeting decisions, much of the information needed to determine whether a specific target is a lawful military objective or whether the expected harm to civilians is excessive in relation to the anticipated military advantage may be in the exclusive possession of the attacker. Even close coalition partners may not have sufficient information to thoroughly assess the lawfulness of each other's targeting decisions.

One option for addressing the difficulty of monitoring a partner's compliance with LOAC is for the assisting State to embed personnel with the partner's forces in order to observe how the partner conducts targeting. Such monitoring may not only allow for a general assessment of the lawfulness of a partner's operations, but also an assessment of whether aid provided by the assisting State is facilitating LOAC violations. In addition, the presence of such personnel from the assisting State may serve to deter deliberate LOAC violations by the partner's forces.

A more intrusive form of risk mitigation that may be necessary if embedded personnel of the assisting State lack adequate visibility on a partner's operations is to condition assistance on the partner's strict adherence to a no-strike list (NSL) composed of entities that are generally not lawful targets. Using adherence to a NSL as a crude proxy for LOAC compliance overcomes some of the difficulties inherent in third-party targeting assessments and reduces the inquiry to the simple question of whether or not a partner struck a listed facility. Such a list can be composed of some combination of specific objects (e.g., an individual temple at Palmyra) or categories of objects (e.g., mosques or hospitals). Such a list will likely be overly inclusive with respect to the protections afforded by LOAC (e.g., a hospital

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51. See Carolin Wuerzner, *Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects before International Criminal Tribunals*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 907 (2008); Laurie Blank, Geoffrey S. Corn & Eric Jensen, *Surveying Proportionality: Whither the Reasonable Commander*, JUST SECURITY (Mar. 25, 2015), <https://www.justsecurity.org/21474/surveying-proportionality-reasonable-commander/>.

could potentially be converted into a military objective if used as a military headquarters rather than a hospital). Nonetheless, if an assisting State does not have a high degree of confidence in the judgment or capacity its partner to make reasonable targeting decisions<sup>52</sup> (particularly at the lower levels within their military hierarchy), it may be better to ask them to adhere to bright-line rules rather than standards such as proportionality or to make nuanced assessments as to whether a facility is a military objective or a civilian object.

Procedurally, an assisting State could require a partner to (1) only strike objects on the NSL after high-level approval within the partner's chain of command, (2) only strike objects on the NSL after approval from the assisting State ("dual-key approval") or (3) never strike an object on the NSL under any circumstances, regardless of whether or not the partner assesses the object to be a lawful target.

## 2. Monitoring Detention

Regarding detention, if an assisting State has reason to believe that abuse is a systematic problem in its partner's detention facilities, monitoring may be an appropriate tool to reduce both the likelihood of LOAC violations and the likelihood that its assistance will facilitate LOAC violations. For example, it has been widely reported, including by Human Rights Watch<sup>53</sup> and the UN Human Rights Council's Commission of Inquiry,<sup>54</sup> that the abuse and torture of detainees is widespread in detention facilities operated by the Syrian government. Prior to transferring detainees to the custody of the Syrian government, an assisting State could seek credible and reliable assurances not only with respect to the humane treatment of the detainees, but also that the treatment of the detainees would be monitored. Such monitoring could be conducted directly by an assisting State or indirectly by an independent third-party such as a humanitarian organization.

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52. *See supra* notes 16–18 and accompanying text.

53. HUMAN RIGHTS WATCH, IF THE DEAD COULD SPEAK: MASS DEATH AND TORTURE IN SYRIA'S DETENTION FACILITIES (Dec. 16, 2015), <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>.

54. U.N. Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic* U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf).



### 3. “Owning” Targeting and Detention

The most intrusive form of risk mitigation and potentially the least desirable for a range of policy reasons is direct integration into a partner’s military operations or the take over of these operations. It may be the case that in practice a partner is simply unable to comply with LOAC due to institutional shortcomings and that no amount of training, exhortation or conditioning of assistance will remedy their deficiencies in any reasonable timeframe. For example, a partner might lack the technical competence to operate certain weapons systems in a manner that allows them to comply with the principle of distinction in urban warfare. Perhaps discipline among partner forces is so poor that detainees they hold will invariably be abused, if not summarily executed. Or, perhaps a partner simply lacks detention facilities and will not practice “catch-and-release” with respect to detainees.

In such circumstances, an assisting State may be left with few attractive options. There may be a tension between becoming more involved in a partner’s operations and approaching the line of control for State responsibility for a non-State actor and maintaining an arms-length relationship that might still implicate the officials of the assisting State as aiders and abettors for war crimes committed by the partner.<sup>55</sup> Assuming the assisting State feels compelled to assist or work with the deficient partner for operational, strategic or diplomatic reasons; the best solution for addressing its partner’s LOAC violations may be to become more involved in the violator’s operations, not less.

## V. CONCLUSION

The fact that States seek to advance their foreign policy objectives through indirect military means such as working with partners in lieu of, or in order to supplement, their own direct military efforts is not in and of itself a new phenomenon. However, the interplay between partnered operations and LOAC compliance has been thrown into high relief due to the extensive foreign involvement in the Syrian conflict and the atrocities that characterize the war.

Beyond Syria, partnered operations have taken on a new prominence due the nature of to the United States broader counter-ISIL campaign. As President Obama has made clear, the effort to eradicate ISIL “will be dif-

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55. *See supra* Section III.B.

ferent from the wars in Iraq and Afghanistan.”<sup>56</sup> Instead, the U.S. campaign against ISIL will be waged in large part through U.S. support to “partner forces on the ground.”<sup>57</sup>

The significance of such partnered operations has also changed because of the shifting legal environment in which assisting States provide aid to their partners. International law is increasingly imposing additional restrictions, obligations or liability on States and individual officials related to the assistance they render to those fighting on distant battlefields.

The disparities between assisting States and partners magnify the effects of these evolving legal regimes. In any relationship between an assisting State and a partner, an assisting State runs the risk of “mirror imaging”; assuming that its partner’s interests, values and capabilities are the same as its own. Although there will never be perfect alignment, even between the closest allies, the divergence between partners in many contemporary conflicts may be so great as to raise serious legal issues for an assisting State. An assisting State cannot merely rely upon a partner’s pious recitations of humanitarian platitudes. Despite normative claims to the contrary, the humanitarian values embodied in LOAC are by no means universal. Nor can an assisting State assume that the armed group with which it is working will display the same degree of competence as a major NATO ally. A partner’s commitment to and ability to comply with LOAC cannot be assumed, it must instead be demonstrated.

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56. President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), (transcript available at <https://www.whitehouse.gov/the-press-office/2014/09/10/Statement-president-isil-1>).

57. *Id.* See also Lisa O. Monaco, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Council on Foreign Relations: Evolving to Meet the New Terrorist Threat (Mar. 7, 2016) (transcript available at <https://www.whitehouse.gov/the-press-office/2016/03/07/remarks-lisa-o-monaco-council-foreign-relations-kenneth-moskow-memorial>) (“Destroying ISIL starts with going after ISIL abroad. And, as our second pillar recognizes, we can’t do it alone. The United States has built a broad coalition of 66 international partners. We’re sharing vital intelligence. We’re training, equipping, and empowering partners on the ground in Syria and Iraq.”).