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Civilian Protection in Partnered Conflicts: Part I: General Background

DUSTIN A. LEWIS
NAZ K. MODIRZADEH
C. DANAE PATERSON
LISA BREM

I. Overview

This General Background document discusses legal and other considerations relevant for participants in the Partnered Conflicts Case Study exercise. It begins by framing the concept and practice of contemporary partnered operations. Next, it outlines certain aspects of international legal frameworks pertaining to partnered warfare, with a focus on the law of State responsibility and international humanitarian law (IHL). The document concludes by noting certain approaches that might help mitigate some risks concerning partnered operations.

The learning objectives of the case study are:

- To understand key issues and tensions concerning protection of civilians and military effectiveness in contemporary partnered operations, with a focus on State responsibility for internationally wrongful acts and individual responsibility for international crimes; and

Written by Dustin A. Lewis, Senior Researcher, Harvard Law School Program on International Law and Armed Conflict, Naz K. Modirzadeh, Professor of Practice, Harvard Law School and Founding Director, Harvard Law School Program on International Law and Armed Conflict, C. Danae Paterson, JD '16 and Harvard Law School PILAC Research Assistant, and Lisa Brem, Manager, Teaching, Learning & Curriculum Solutions at Harvard Law School. Cases are developed solely as the basis for class discussion. They are not intended to serve as endorsements, sources of primary data, legal advice, or illustrations of effective or ineffective management.

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- To develop and implement sound approaches to addressing those concerns when deciding whether to share intelligence—and, if so, under what conditions—among partners.

II. Introduction

Rarely do States fight contemporary wars without extensive assistance from other States or non-state actors. As of March 2017, for example, the U.S. State Department identified 68 States and international institutions that formed the coalition against the Islamic State of Iraq and Syria (ISIS).[1]

Protection of civilians is a predominant concern in contemporary armed conflicts. Warring parties are legally obliged to take several measures to mitigate adverse effects of military operations on individual civilians, on the civilian population more generally, and on civilian objects, as well as on the natural environment. Indeed, IHL (also known as the law of armed conflict) establishes numerous obligations and other legal protections aimed at protecting civilians, whether in regard to hostilities, humanitarian assistance, medical care, or myriad other ways that civilians may be affected by war.

Partners in armed conflict might include other States, intergovernmental organizations (such as a United Nations-mandated peace-enforcement operation), non-state actors (such as armed groups), or a combination of those entities. "Partner" is not a legal term of art, and in contemporary warfare partnerships might take many forms, such as conducting joint operations under unified command, intelligence-sharing, and the provision of training, advice, and weapons.

A State might pursue partnerships because it expects them to yield such benefits as increased military capabilities, greater intelligence, and stronger claims of political legitimacy. Yet partnerships may also present an array of potential legal, operational, and other challenges and concerns. Coalition members and other actors in partnered warfare must find ways to work together to overcome these issues and achieve satisfactory "interoperability," which under one definition is "[t]he ability to act together coherently, effectively, and efficiently to achieve tactical, operational, and strategic objectives."[2]

Amid the innumerable protective, legal, and strategic issues that may arise in relation to partnered warfare, this case study focuses on certain legal considerations regarding civilian protection and military effectiveness through the lens of intelligence sharing. States have agreed that it is international law (not each State's respective internal legal system) that is the primary normative framework that regulates—at least on the international plane—behavior in relation to war. Some of the oldest provisions of international law govern, for instance, the resort to war between States and how hostilities may, and may not, be waged during armed conflict. Legal consequences concerning intelligence sharing may relate to such concerns as:

- The direct or indirect responsibility of a *State* for an internationally wrongful act;

[1] "The Global Coalition To Counter ISIS: Partners," US State Department, https://www.state.gov/s/seci/c72810.htm <https://perma.cc/FMS8-TU6X>.

[2] *Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms* (Washington, DC, June 2018), 119, http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf?ver=2018-07-06-092813-320 <https://perma.cc/W47Z-69KJ>.

- The direct or indirect responsibility of an *intergovernmental organization* for an internationally wrongful act; and
- The direct or indirect responsibility of an *individual* for an international crime.

These and other legal concerns may arise in relation to each relevant person or entity connected with partnered warfare, whether it be a State; an intergovernmental organization; an individual acting on behalf of, on the instructions of, at the direction of, or otherwise under the control of or sufficiently linked to a State or intergovernmental organization; or an otherwise unaffiliated individual.

Failing to adequately address these concerns risks significant consequences—not only in terms of legal liability and operational effectiveness but also in terms of protection of civilians. Of the three primary sets of international-legal concerns identified above, this Partnered Conflicts Case Study focuses on State responsibility for an internationally wrongful act and on individual responsibility for an international crime.

III. Enduring and Changing Character of Warfare

Partnered Warfare: Interoperability Benefits and Challenges

The *nature* of warfare is often said to be relatively durable. In Clausewitz's well-known phrase, for instance, "[w]ar is . . . an act of force to compel our enemy to do our will."[3] Yet, the *character* of warfare may change and adapt to different circumstances.

Today, most warfare is conducted with and through partners. While partnered warfare is by no means a recent invention, it is vital that those who may be involved in such warfare understand and take steps to sufficiently mitigate or remove relevant risks and challenges, including with a view to protecting civilians. Officials at a 2002 discussion at the U.S. Air Force Academy put it perhaps most succinctly in stating that "alliance and coalitions are demanding, difficult, sometimes divisive, yet increasingly indispensable."[4] The following sub-sections give snapshots of key operational and legal interoperability concerns that may arise as part of partnered warfare.

Operational Interoperability

Effective *operational interoperability* requires sufficiently unifying such elements as differing weapons systems, diverse military cultures, and idiosyncratic national policies of relevant partner States.[5] Implementation of operational interoperability may give rise to many practical challenges. Chief among these challenges may be force planning, weapons selection, arms transfer, and information and intelligence sharing. Moreover, partnered forces often have differing levels of tactical-operations

[3] Carl von Clausewitz, *On War,* ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 75.

[4] Dennis E. Showalter and William J Astore, "Prologue," in *Future Wars: Coalition Operations in Global Strategy 1,* ed. Dennis E. Showalter, (Chicago: Imprint Publications, 2002).

[5] Major Jerrod Fussnecker, "The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations," *The Army* Lawyer 10 (2014), https://www.loc.gov/rr/frd/Military_Law/pdf/05-2014.pdf < https://perma.cc/Y2ZT-K3E3>.

capabilities.[6] Significant technological gaps may exist among members, which can, in turn, frustrate joint operations.[7] Partner personnel may have inadequate training to operate their fellow partners' equipment and systems. Moreover, "even when coalition partners agree on an overall objective and military mission, they may diverge about how to accomplish that objective or about the amount of risk they are willing to assume."[8] Meanwhile, the ability to compromise—which is often considered vital to a successful partnership—"can lead to policies that constrain operational-level effectiveness."[9]

Intelligence-sharing among partners may entail many legal and operational benefits but it may also pose knotty challenges. Obtaining and utilizing solid intelligence is often vital to the success of military operations, including in terms of respecting IHL. The basic idea is that the more accurate, more timely, and more comprehensive the intelligence is, the more likely operations based on that intelligence will lead to outcomes that will ultimately better protect the civilian population from harm while also obtaining legitimate military objectives.

Yet depending on the nature of the operation, information may be highly compartmentalized and therefore not releasable to a partner—or at least to certain partners.[10] In addition, establishing effective and secure communications may be difficult.[11] Poorly coordinated communication-sharing can result in dire outcomes, including death caused by "friendly fire."[12] While in the abstract all partners should ideally be able to gain access to all relevant and necessary information that may affect their missions, this is often far from the case in practice. Because they want "to protect sources and methods as well as to prevent unauthorized leaks from occurring,"[13] military partners are often reluctant to share particularly sensitive information, even with close allies. In order to better protect civilians and to lower legal risk, a partner may impose various requirements before releasing intelligence. For example, they may seek commitments from the intelligence-receiving partner that it will adopt civilian-protection policies and practices that exceed what is required by IHL; that it will conduct regular training on IHL; and that it will allow the intelligence-providing partner to scrutinize military operations that the intelligence-receiving partner undertakes based on that intelligence.

At times, one partner's unwillingness to share information and intelligence may preclude its partners from conducting certain operations. For example, during Operation Enduring Freedom in Afghanistan, "[t]he United States often asked coalition partners to undertake a mission but could not tell them the reasons

[6] See, e.g., Nora Bensahel, "Chapter 6: Preparing for Coalition Operations," from *The US Army and New National Security Strategy*, ed. Lynn E. Davis and Jeremy Shapiro (Santa Monica, CA: RAND Corporation, 2003) 114, http://www.rand.org/pubs/monograph_reports/MR1657.html <https://perma.cc/A4KP-3PSE>.

[7] Bensahel, "Chapter 6," 121.

[8] Myron Hura, Gary McLeod, Eric V. Larson, James Schneider, Dan Gonzales, Daniel M. Norton, Jody Jacobs, Kevin M. O'Connell, William Little, Richard Mesic and Lewis Jamison, *Interoperability: A Continuing Challenge in Coalition Air Operations* (Santa Monica, CA: RAND Corporation, 2000), 21, https://www.rand.org/pubs/monograph_reports/MR1235.html < https://perma.cc/LC46-LUL4>.

[9] Kathleen McInnis, "Lessons in Coalition Warfare: Past, Present and implications for the Future," *International Politics Reviews* no. 1 (2013): 78, http://link.springer.com/article/10.1057%2Fipr.2013.8 < https://perma.cc/7MVR-32PD> and Nora Bensahel, "Chapter 6: Preparing for Coalition Operations," from *The US Army and New National Security Strategy*, ed. Lynn E. Davis and Jeremy Shapiro (Santa Monica, CA: RAND Corporation, 2003) 119, http://www.rand.org/pubs/monograph_reports/MR1657.html <https://perma.cc/A4KP-3PSE>.

[10] Bensahel, "Chapter 6," 118.

[11] Bensahel, "Chapter 6," 114.

[12] Patricia Weitsman, "With a Little Help from Our Friends?: The Costs of Coalition Warfare," *Origins 2*, no. 4 (January 2009), http://origins.osu.edu/article/little-help-our-friends-costs-coalition-warfare <https://perma.cc/P9VS-PUS8>.

[13] Bensahel, "Chapter 6," 117.

for that request. This made it extremely hard for civilian leaders in coalition countries to decide whether they would undertake these missions because they had no way to calculate the costs, benefits, and risks involved."[14] Partners may become especially frustrated with their fellow partners' reticence to share information if they themselves have already shared information. Practically speaking, declassifying information to make it "releasable" can sometimes take so long that, by the time it is accessible, it is no longer relevant.[15] Finally, it is generally recognized that, the more people who possess a piece of information, the higher the likelihood that the information will be intentionally or inadvertently leaked.

Legal Interoperability

IHL is a complex legal framework. Many of its provisions—those that are binding as a matter of customary international law—are applicable in relation to all parties to an armed conflict. The cardinal principles and rules of IHL—such as those entailed in the requirements to distinguish lawful from unlawful targets and to never launch an attack against the latter—are included among those provisions. Yet due to some fragmentation in the law, various States and non-state armed groups may have differing levels or types of IHL-based obligations, at least in certain respects.

It is against that backdrop that each partner brings its own legal obligations, standards, and interpretations—not to mention political considerations—to a partnership. For instance, while the United States is not a party to the Anti-Personnel Mines Treaty, many NATO Allies are. And even where the same obligation binds multiple partners, differences in interpretations can lead to the so-called "classic 'same law, different interpretations' problem."[16]

In short, diversity of partners' legal approaches may give rise to many challenges. For its part, *legal interoperability* has been defined by one commentator "as the ability of the forces of two or more nations to operate effectively together in the execution of assigned missions and tasks and with full respect for their legal obligations, notwithstanding the fact that nations concerned have varying legal obligations and varying interpretations of these obligations."[17] The concept thus concerns the harmonization of partners' efforts to operate under domestic and international legal obligations that may not always align. Partners must seek to effectively address such distinct or countervailing obligations, standards, or interpretations.[18] Lack of shared perspectives may (sometimes significantly) hinder an operation's chance of success as well as raise the risk of legal violations.

[14] Bensahel, "Chapter 6," 118.

[15] Bensahel, "Chapter 6," 118

[16] This paragraph is based on information from: "*UK Armed Forces Personnel and the Legal Framework for Future Applications: Twelfth Report of Session 2013-14*:," House of Commons Defence Committee, HC931 by the authority of the House of Commons (London: The Stationery Office Limited, 2013), 102.

[17] Marten Zwanenburg, "International Humanitarian Law Interoperability in Multinational Operations", *International Review of the Red Cross* 95, no. 891/892 (2013), 684, adapted from *NATO Glossary of Terms and Definitions (English and French)*, AAP-06, NATO Standardization Agency (NSA), (2013): 2-F-5.

[18] Major Jerrod Fussnecker, "The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations," *The Army* Lawyer 10 (2014), https://www.loc.gov/rr/frd/Military_Law/pdf/05-2014.pdf <https://perma.cc/Y2ZT-K3E3>.

IV. Legal Frameworks Concerning Partnered Warfare

Partnered warfare may implicate a diverse set of legal frameworks. It is therefore important to understand the various legal rules and concepts that may be involved. This section highlights some key elements of State responsibility as well as particular international legal frameworks pertaining to armed conflict—especially IHL but also international criminal law (ICL) and international human rights law (IHRL). One way to understand the interactions between these frameworks is to envision State responsibility as the underlying structure and to see IHL, ICL, and IHRL as adding specific substantive and procedural content to that structure.

Combined, these rules and concepts determine when international law has been violated, which actors incur responsibility for those violations, and what consequences arise for those actors. Because partnered warfare is often carried out through the participation and cooperation of multiple States and non-state actors—such as by sharing intelligence with one another—it is important to discern when and to what extent a State may incur responsibility for international law violations committed by its own forces or its partner's forces.

State Responsibility Under International Law[19]

State responsibility underpins international law. The underlying concepts of State responsibility are attribution, breach, excuses, and consequences.[20] In a nutshell, State responsibility entails discerning the content of a relevant rule, identifying a breach of that rule, assigning attribution for that breach to a State, determining available excuses (if any), and imposing measures of remedy. As noted above, while recognizing that it may be salient to operations conducted, for instance, by NATO members, we do not address international-organization responsibility in this case study.

"Attribution" concerns the variety of circumstances under which an act may be attributed to a State.[21] These circumstances include, for instance, the conduct of any State organ, such as the armed forces.[22] Those circumstances also include the conduct of a person or entity empowered by the law of the State to exercise elements of governmental authority (so long as the person or entity is acting in that capacity in a particular instance).[23] In addition, it is generally recognized that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[24]

[19] This section draws extensively on Dustin A. Lewis, Gabriella Blum, and Naz K. Modirzadeh, *War-Algorithm Accountability*, Harvard Law School Program on International Law and Armed Conflict (Cambridge: August 2016), 52–54, https://pilac.law.harvard.edu/waa <https://perma.cc/V4ZU-RVNU>.

[20] *See* James R. Crawford, "State Responsibility," in *Max Planck Encyclopedia of Public International Law* 3 (2006).

[21] *See Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* Articles 4–11, Report of the International Law Commission 53rd Session on April 23-June 1 and July 2-August 10, 2001, UN Doc. A/56/10, UN GAOR 56th Session, Supplement No. 10 (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf <https://perma.cc/S98C-5U6C>.

[22] *Draft Articles,* Article 4(1).

[23] *Draft Articles,* Article 5.

[24] *Draft Articles,* Article 8.

With respect to State responsibility, "breach" concerns the conditions under which conduct—whether in the form of an act or an omission—may qualify as an internationally wrongful act.[25] For instance, IHL and IHRL each establishes what constitutes a "breach" of a relevant provision of those respective normative regimes.

"Excuses" concern the general defenses that may be available to a State in relation to an internationally wrongful act.[26] While many other fields of international law contemplate an array of excuses to (otherwise) wrongful conduct, IHL is somewhat unique in that it is designed not to admit of standalone pleas of "necessity" or the like. That is because IHL is meant to function in general as an absolute floor of minimum obligations in relation to armed conflict under which no one may act. In other words, by striking a balance between considerations of military necessity, on one hand, and humanity, on the other, IHL already bakes these concerns into its rules.

Finally, "consequences" concern the forms of liability that may arise in relation to an internationally wrongful act. A consequence of State responsibility, in general, is the liability to make reparation.[27] Scholars have noted that "[t]he primary function of reparations in international law is the re-establishment of the situation that would have existed if an internationally wrongful act had not been committed and the forms that such reparation may take are various."[28] Individual treaties or rules—such as those established in IHL—"may vary these underlying concepts in some respect; otherwise they are assumed and apply unless excluded."[29]

With respect to State responsibility in relation to partnered warfare, two examples (among various others[30]) merit emphasis. These examples demonstrate how the responsibility of a State could be engaged in relation to a violation of IHL committed either by (1) a non-state partner or (2) a State partner.

The first example concerns instances where a State *directed or controlled the violative conduct of a non-state partner*, such as a non-state organized armed group (OAG). In those instances, such violative conduct is attributable to that State.[31] In this connection, according to Article 8 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (Draft Articles):

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

Consider an armed conflict where State A instructs its OAG Partner B to act in violation of IHL. If that violation of IHL would constitute a breach of an international obligation of State A and if OAG Partner B does in fact so violate IHL based on State A's instructions, then the conduct of OAG Partner B is attributable

[25] *Draft Articles,* Article 12–15.

[26] *Draft Articles,* Article 20–25.

[27] *See* Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (New York: Clarendon Press, 1995), 162).

[28] Pietro Sullo and Julian Wyatt, "War Reparations," in *Max Planck Encyclopedia of Public International Law* 5 (2015).

[29] Crawford, "State," 3.

[30] *See* Bérénice Boutin, "Responsibility in Connection with the Conduct of Military Partners," forthcoming in *Military Law and the Law of War Review*, ASSER Research Paper No. 2018-3 (March 8, 2018), https://ssrn.com/abstract=3134459, <https://perma.cc/HNF3-GGDP>.

[31] The following section is based on Brian Finucane, "Partners and Legal Pitfalls," *International Law Studies* 92 no. 407 (2016), 415–16.

to State A. Yet in that situation, if partner State A did not sufficiently instruct OAG Partner B to so violate IHL, or if OAG Partner B did not act under the direction or control of State A in committing such a violation of IHL, then the conduct of OAG Partner B would not be attributable to State A.

What constitutes acting "under the direction or control of" a State in this context? The International Court of Justice (ICJ) has reasoned that, for certain conduct to give rise to legal responsibility of the State, "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[32] The ICJ has also held that only such control by the State over private conduct (e.g., by an OAG) that was actually exercised "in respect of each operation in which the alleged violation occurred" may lead to attribution.[33] Thus, as one scholar summarizes, at least under the jurisprudence of the ICJ, "[p]rivate conduct that is merely *supported or planned* by the State, *exercised in its interest* or *otherwise on its behalf* is not attributable; the mere possibility of State influence is not sufficient."[34]

The International Criminal Tribunal for the former Yugoslavia (ICTY) criticized elements of the ICJ's "effective control" standard for attribution of private conduct to a State on the theory that the ICJ standard was inconsistent with the "logic of the law of State responsibility" as well as with judicial and State practice.[35] The ICTY instead applied a broader "overall control" test.[36] Yet a scholar critical of that approach has noted that "the ICTY did not decide questions of State responsibility. Rather, it used the concept of control to determine whether certain military units operating within one State may be attributed to another State so as to qualify a conflict as international in terms of the Statute of the [ICTY]."[37]

In any event, even where the conduct of a partner non-state actor may not be *attributable* to its partner State, a partner State may—by, for instance, "training, arming, equipping, financing and supplying" a partner OAG against another State "or otherwise encouraging, supporting and aiding military and paramilitary activities in and against" another State—nonetheless be in breach of its obligation under customary international law *not to intervene* in the internal or foreign affairs of another State.[38]

The second example concerns instances where a *State aided or assisted a partner State in the commission of an internationally wrongful act of that partner State*.[39] In such instances, the internationally wrongful act of the partner State is not directly attributable to the aiding or assisting State. Rather, once the principal act is committed, a form of *complicity* in that wrongful act becomes *an autonomous wrongful*

[32] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports (1986), 14 ¶115.

[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports (2007), 43 ¶400.

[34] Alexander Kees, "Responsibility of States for Private Actors", in *Max Planck Encyclopedia of Public International Law* ¶ 14 (2011), emphasis added.

[35] Prosecutor v. Tadić, ICTY, Judgment, IT-94-1-A, July 15, 1999, ¶ 124.

[36] Prosecutor v. Tadić*,* ¶ 120.

[37] Kees, "Responsibility," ¶ 15.

[38] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports (1986), 14 ¶ 292.

[39] Finucane, "Partners," 416–417.

act triggering responsibility of the aiding or assisting State. In this connection, Article 16 of the Draft Articles provides that:

> 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) [t]hat State does so with knowledge of the circumstances of the internationally wrongful act; and (b) [t]he act would be internationally wrongful if committed by that State.

The International Law Commission's (ILC) *Commentary* on Article 16 of the Draft Articles states that there "is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it *contributed significantly* to that act."[40] An assisting State therefore may be vulnerable to incurring State responsibility if it provides aid or assistance—such as information or intelligence—to a partner State, which in turns relies—either in whole or at least in significant part—on that assistance in committing a wrongful act. The form of international responsibility entailed in such complicity—that is, where a State may incur responsibility through provision of aid or assistance in partnered conflicts—may be of particular concern in this case study.

To incur State responsibility through providing aid or assistance, three conditions must be met. First, "the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful."[41] Second, "the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so."[42] And, third, "the completed act must be such that it would have been wrongful had it been committed by the assisting State itself."[43]

The ILC does not precisely lay down, however, the contours of what it means, in this context, for aid and assistance to be "given with a view to facilitating the commission" of the violative act. The ILC does provide 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."[44] Yet the ILC does not precisely define the parameters of such intent. And as an expert recently explained, "it is unclear from the [ILC] Commentary whether 'intent' is meant in the sense of motive, purpose, wish, desire or intentional conduct, or a combination of these."[45] That expert concludes that, at a minimum, "knowledge or virtual certainty that the recipient state will use the assistance unlawfully is capable of satisfying the intent element under Article 16."[46]

The risk of incurring liability for assisting in a wrongful act is implicated throughout partnered warfare. Partner States often engage in the exchange of information, intelligence, and other resources. The provision of these resources typically qualifies as assistance and may give rise to State responsibility for

[40] ILC Commentary on Article 16, ¶5, emphasis added.

[41] ILC Commentary, ¶3.

[42] ILC Commentary, ¶3.

[43] ILC Commentary, ¶3.

[44] ILC Commentary, ¶5.

[45] Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, (London: Chatham House, November 2016), 19, https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf < https://perma.cc/3V5H-LRHD>.

[46] Moynihan*, Aiding,* 24.

the providing State, should the receiving State rely upon the assistance in committing a wrongful act. States participating in partnered warfare should therefore assess the risks of incurring responsibility under Article 16 in *advance* of offering assistance and *throughout* the provision of such assistance.[47] Participants in the case study are encouraged to keep these principles in mind throughout the exercise.

International Humanitarian Law (IHL)

IHL is the primary field of international law applicable in relation to armed conflict. In general, IHL is a set of rules that seek to limit the effects of armed conflict, principally by protecting persons who are not, or are no longer, participating in hostilities and by restricting the means and methods of warfare. Under contemporary IHL, an armed conflict is considered either *international* in character (e.g., State A vs. State B) or *non-international* in character (e.g., State A vs. non-state OAG B). All parties to an armed conflict—whether State or non-state actors—are bound to comply with applicable IHL. So, too, must individuals even if they are not affiliated with a party.

While only a general sketch, some of the most important IHL rules on conducting hostilities in partnered warfare might be boiled down to the following.

As a general matter, all State parties to the Geneva Conventions of 1949 are obliged to "respect" and "ensure respect" for those instruments "in all circumstances."[48] This means that, at a minimum, a State may not encourage another State or a non-state armed group to contravene the law. Moreover, in all military operations armed forces must take constant care to spare the civilian population, individual civilians, and civilian objects.

In conducting hostilities in the form of a direct attack, a party to an armed conflict must comply with at least three sets of IHL standards, rules, and principles (among others):

- **Distinction**: Each party to an armed conflict must distinguish between civilians and civilian objects, on one hand, and military objectives, one the other. IHL establishes what constitutes a military objective, in terms of both persons (e.g., members of the armed forces who are not recognized as *hors de combat* (out of the fight) in an international armed conflict) and objects (e.g., at least in respect of an international armed conflict, objectives that by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization—in the circumstances ruling at the time—offers a definite military advantage).[49] Additional protections may attach to certain "specially protected" persons or objects, such as medical personnel or medical units. Furthermore, under IHL only military objectives may be the object of a direct attack.[50] In certain circumstances (e.g., for such time as a civilian takes a direct part in hostilities), civilians and civilian objects may forfeit their respective forms of protection against direct attack. But it is only for the duration of such forfeiture that those individuals and objects may be subject to direct attack, and even then, various other IHL rules continue to apply in relation to such attacks.

[47] *See* Moynihan, *Aiding,* 37–44.

[48] Geneva Conventions I–IV (1949), Common Article 1.

[49] See, e.g., Geneva Conventions Additional Protocol I (1977), Article 52(2).

[50] The US Department of Defense appears to be an outlier in the sense that it recently stated that presumption of civilian status is not required. See Office of General Counsel, Department of Defense, Law of War Manual § 5.4.3.2 (December 2016).

- **Proportionality**: Each party to an armed conflict must refrain from conducting an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof that would be excessive in relation to the concrete and direct military advantage anticipated.

- **Precautions**: Each party to an armed conflict must take all feasible precautions to avoid—and, in any event, to minimize—incidental loss of civilian life, injury to civilians, and damage to civilian objects;[51] take all feasible precautions in the choice of means and methods of warfare with a view to avoiding—and, in any event, to minimizing—incidental loss of civilian life, injury to civilians, and damage to civilian objects;[52] and give, unless circumstances do not permit, effective advance warning of attacks that may affect the civilian population.[53]

These rules apply in respect of all parties to an armed conflict and all persons otherwise engaged in hostilities. Failure to fulfill any of these obligations constitutes a breach of a rule of IHL.

Despite the universal character of the provisions outlined above, different States have, in certain important respects, chosen to opt into—or not—additional IHL rules. Not all States, for instance, have contracted into the same treaties, including two of the major IHL treaties.[54] And customary international law does not fill all of the corresponding gaps in the legal landscape (that is, gaps between what customary international obliges as an absolute minimum, on one hand, and additional obligations that may arise from additional treaties, on the other).[55]

Even where States have contracted into the same treaties, they may have diverging interpretations of the underlying IHL rule, thus making it difficult to reach a common understanding of States' respective obligations.[56] For example, the U.S. Department of Defense—in contradistinction to certain NATO allies—interprets the IHL rule concerning the definition of a legitimate military objective as encompassing "war-sustaining" objects.[57] As a result, the United States may consider certain objects as targetable in direct attack whereas certain other NATO members would not. Nonetheless, as noted above, all States and OAGs must respect the provisions concerning distinction, proportionality, and precautions. A violation of any of these provisions (among many others) in partnered warfare gives rise to legal responsibility.

[51] See, e.g., Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross (Cambridge: Cambridge University Press, 2005), Rule 15, https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf < https://perma.cc/CW2B-BMTE>.

[52] See, e.g., Henckaerts and Doswald-Beck, *Customary*, Rule 17.

[53] See, e.g., Henckaerts and Doswald-Beck, *Customary*, Rule 20.

[54] Geneva Conventions Additional Protocol I and II (1977).

[55] Customary international law binds all States and other relevant actors, even if a State has not contracted into a relevant treaty; it is generally considered to be formed through sufficiently dense and widespread State practice accompanied by *opinio juris sive necessitatis*—in other words, the relevant practice is performed out of a sense that it is legally obligatory to do so.

[56] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (October 2011), 32; Marten Zwanenburg, "International Humanitarian Law Interoperability in Multinational Operations", *International Review of the Red Cross* 95, no. 891/892 (2013), 684.

[57] Office of General Counsel, Department of Defense, Law of War Manual § 5.6.8.5 (December 2016). See also Zwanenburg, "International Humanitarian Law": Idea of war-sustaining capability "suggests that objectives that do not directly contribute to war-fighting but that indirectly contribute to it, such as exports that raise funds which are in turn used to finance the armed forces, are considered as legitimate military objectives." Many other States, conversely, understand this to mean that only objects that are of value for the "war-fighting" effort are legitimate targets.

International Criminal Law (ICL)[58]

In general, international criminal law (ICL) establishes a framework through which individual responsibility arises for international crimes, such as war crimes, crimes against humanity, and genocide. ICL may be applied, in practice, by domestic courts (some reaching, under universal-jurisdiction principles, beyond their nationals or borders); by dedicated international tribunals (such as the International Criminal Court (ICC)); or by a range of hybrid courts that merge domestic and international components.

Each international crime is made up of two sets of elements: the material element(s) and the mental element(s). Under the ICC's Statute, for instance, the following acts—"when committed as part of a plan or policy or as part of a large-scale commission of such crimes"[59]—are among the list of acts that constitute the material elements that may give rise to individual responsibility for a war crime:

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;[60] and
- Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.[61]

With respect to the mental element(s), the ICC's Statute requires in general that the material element(s) of an offense must be committed with "intent and knowledge."[62] A person has intent, under the ICC's Statute, where, "[i]n relation to conduct, that person *means to engage in the conduct*" or where, "[i]n relation to a consequence, that person *means to cause that consequence* or is *aware that it will occur in the ordinary course of events*."[63] For purposes of the ICC's Statute, "'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[64]

With respect to war crimes, the ICC's Statute lays down two sets of grounds for individual criminal responsibility. First, under Article 25(3) of the ICC's Statute, an individual may be liable for a war crime if she commits the crime; "[o]rders, solicits or induces the commission of such a crime"; facilitates the execution of such a crime through aiding and abetting by, for example, "providing the means for its commission"; or intentionally "contributes to the commission or attempted commission of such a crime" in any other way.

Second, with respect to responsibility of commanders and other superiors, under Article 28 of the ICC's Statute, a military commander, or a person "effectively acting" as a military commander, may be liable for the crimes committed by those under her "effective command, [authority], or control" if she knew or

[58] This section draws extensively on Dustin A. Lewis, Gabriella Blum, and Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harvard Law School Program on International Law and Armed Conflict (Cambridge: February 2017), 10, https://pilac.law.harvard.edu/indefinite-war <https://perma.cc/WA3E-7GDK>.

[59] ICC, *Rome Statue of the International Criminal Court*, Article 8(1), hereinafter ICC Statute.

[60] ICC Statute, Article 8(2)(b)(i) and (e)(i).

[61] ICC Statute, Article 8(2)(b)(ix) and (e)(iv).

[62] ICC Statute, Article 30(1) ICC Statute, emphasis added.

[63] ICC Statute, Article 30(2)(a)–(b), emphases added.

[64] ICC Statute, Article 30(3).

should have known that her subordinates were committing crimes, and "failed to take all necessary and reasonable measures" to prevent such crimes from taking place.

Individual criminal responsibility may attach to military officers or other actors who—in the ways identified above—aid or facilitate the commission of a war crime. For example, an officer who shares intelligence with a partner State and who, in doing so, intends to facilitate and has knowledge that such information will facilitate the commission of a war crime by another State's agents may herself (also) be subject to criminal liability in respect of that conduct.

International Human Rights Law[65]

IHRL, in its contemporary form, arose out of an attempt to regulate, as a matter of international law and policy, the relationship between the State—through its governmental authority—and its population. Whereas IHL is a relatively narrow war-related field, IHRL spans an ever-growing range of dealings an individual, community, or nation may have with the State. In certain important respects, IHL is generally considered to be a framework that tolerates more harm than IHRL. For example, IHL rules on the conduct of hostilities contemplate that the use of lethal force against persons is inherent to waging war; in comparison, under law-enforcement principles governed by IHRL, the use of lethal force may be used only as a last resort to save human life and only when other means are ineffective.[66]

The links between IHL and IHRL have been the subject of a growing interest by States, adjudicatory bodies, and international institutions, as well as in scholarly commentary. The debate over this connection largely centers on three issues:

- Whether IHRL applies extraterritorially such that States bring all, some, or none of their IHRL obligations with them when they engage in armed conflicts outside of their territories;
- Whether non-state actors (especially OAGs) have *de jure* IHRL obligations or, at least, *de facto* IHRL-related responsibilities; and
- What is the applicable interpretive procedure or principle to use when discerning the content of a particular right or obligation under the relevant framework(s). This last point is especially pertinent where IHL and IHRL are considered to apply simultaneously—a set of concerns that may give rise to significant disagreements among partner States.

The first and last issues may especially implicate partnered warfare. For example, some States may consider themselves bound to uphold IHRL-rooted rules that are relatively (compared to IHL) less tolerant of harm. In partnered warfare, States' differing perspectives on the extent that IHRL rules apply in a conflict may influence cooperation between relevant States.

[65] This section draws extensively from Lewis et al., *Indefinite War*, 9–10.

[66] See, e.g., Jelena Pejic, "Conflict Classification and the Law Applicable to Detention and the Use of Force," *International Law and the Classification of Conflicts* 105, ed. Elizabeth Wilmshurst (2012).

V. Managing Responsibility Concerning Partnered Warfare

Effectively managing legal responsibility concerning partnered warfare presents an array of opportunities and challenges. Synthesizing some of the main legal issues raised above, this section aims to encapsulate some of the chief concerns. While not discounting the importance of the legal issues, it should also be borne in mind that the law imposes a floor of minimum obligations and that concerns regarding protection of civilians, military success, and other considerations may militate in favor of utilizing even more protective approaches that go beyond the minimum legal obligations.

Responsibility Where a Partner Violates IHL[67]

In light of the uncertainty regarding an assisting State's responsibility for its partner State's actions, there are risks with providing partner support, even if the assisting State neither desires nor intends for its partner to commit a wrongful act with its assistance. Criteria for considering whether a State is legally responsible for a partner's IHL violations include whether the State knew that its partner had previously violated IHL and whether the State knew that its assistance would enable its partner to commit an IHL violation.

For example, consider the situation where the assisting State knows that its partner has weak intelligence that has led to targeting or detention practices that increase the likelihood of committing IHL violations. In such circumstances, the assisting State's decision to provide aid despite this known risk of IHL violations could arguably be interpreted as intent to violate IHL. It therefore becomes critical for assisting States to take adequate measures to help ensure that their partners do not violate IHL and, in the event of possible violations, take sufficient corrective measures to ensure that future operations will comport with the law.[68]

Furthermore, under the 2013 Arms Trade Treaty, responsibility may arise if a State party authorizes the transfer of certain arms despite knowing that there is an "overriding risk" that those arms will be used by the recipient to commit certain violations of IHL.[69]

Incompetence[70]

In addition to deliberate misconduct, results and actions deriving from various forms of incompetence may constitute violations of IHL or other applicable provisions of international law. Examples include inadvertently attacking civilians or protected objects due to poor communication between partners, inaccurate or insufficient information, or the use of (otherwise) lawful weapons in a reckless manner. In general, determining whether a specific act or omission committed in connection with an armed conflict violates IHL depends on a reasonableness standard. Concerning the conduct of hostilities, a key evaluative element is whether the decision to go forward with an attack was made with appropriate precautions, including, where applicable, precautions that have been successfully used in past situations.

[67] Finucane, "Partners," 414–415.

[68] Finucane, "Partners," 418.

[69] United Nations General Assembly, *Arms Trade Treaty* (December 24, 2014), Articles 6(3) and 7.

[70] Finucane, "Partners," 412–413.

Individual Criminal Responsibility[71]

In certain circumstances, even if an assisting State does not explicitly exercise sufficient control over a partner and an individual member of that partner commits a war crime in connection with that assistance, an agent of the assisting State may be individually responsible for having contributed to the commission of that war crime. It has been arguably established that an agent of an assisting State may be considered to be aiding and abetting a partner's war crime where (among other things) the assisting-State agent had *knowledge* of the partner-State agent's intent to commit a war crime. Thus, such liability may attach even where that agent of the assisting State did not act with a *purpose* of contributing to the commission of the relevant war crime.[72] In such a context, the minimum standard to hold an individual agent of an assisting State criminally responsible under international law appears to be a "substantial likelihood" that the agent knew that such a violation would be committed.

Under certain circumstances, individual criminal responsibility under international law may attach not only to knowing and intentional conduct (as outlined above) but also to *reckless* conduct. In general terms, recklessness "applies when the agent, although aware of the likely pernicious and prohibited consequences of his conduct, knowingly takes the risk of so acting, bringing about such consequences."[73] As an example, for fault to arise, an IHL treaty provision—in particular, Article 85(3)(b) and (c) of Additional Protocol I (1977)—imposes a standard of recklessness with respect to launching an attack "in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects." In addition, "[r]ecklessness is also envisaged in the rules concerning the responsibility of a superior, since the superior is criminally responsible for the crimes of his subordinates if he is aware that failure to prevent the action of subordinates risks bringing about the commission of a crime, and nevertheless he ignores the risk and does not prevent the action in question."[74]

While it is adjudicated more rarely, *culpable negligence* is another form of fault. It "arises when the person, although aware of the risk involved in his conduct, is nevertheless convinced that the prohibited consequence will not occur."[75] One example concerns "cases of responsibility of the superior, whereby the superior did not know, but should have known, that war crimes were about to be committed by his subordinates."[76]

Vetting and Due Diligence[77]

A way to help lower legal risk is for an assisting State to vet current and prospective partners. Conducting appropriate vetting before entering a partnership may help avoid certain problems altogether or identify red flags that invite further investigation. Appropriate vetting should include, at a minimum, assessing whether (current and future) partners are likely to commit IHL violations. Lawyers may help identify the appropriate standards by which to ascertain whether IHL violations have been committed in the past.

[71] Finucane, "Partners," 420–423.

[72] Finucane, "Partners," 420.

[73] Giuseppe Palmisano, "Fault," in *Max Planck Encyclopedia of Public International Law* (2007), ¶ 43.

[74] Palmisano, "Fault," ¶ 43.

[75] Palmisano, "Fault," ¶ 44.

[76] Palmisano, "Fault."

[77] Finucane, "Partners," 425–427.

Assisting States must not only consider any "malice and gross misapplication of IHL"[78] of (current or future) partners but also judge a partner's technical and institutional capabilities to comport with IHL.

Addressing concerns that arise as part of a partner-vetting process is vital to mitigating risk that a partner might violate international law pertaining to armed conflict. Actions that might be taken include training on "practical instruction on IHL rules and the application of those rules to the types of scenarios a partner is likely to face in the conflict."[79]

Monitoring and Conditionality[80]

To help ensure that a (current or future) partner does not violate IHL or another applicable provision of international law, an assisting State may make monitoring of the partner's operations a condition of partnership. The assisting State may choose, for example, to embed its own personnel within its partner's operations in order to gain firsthand knowledge as to whether a partner has committed, or is likely to commit, IHL violations. The assisting State may also impose relatively strict conditions, such as insistence on an agreed-to no-strike list of entities that are generally not lawful targets.[81] Such conditions, where scrupulously applied, may lessen the likelihood of IHL violations committed by a partner and, accordingly, lower the risk that the State's assistance will cause, or create conditions conducive to, IHL violations. Yet in certain respects, such intrusive actions may lead the assisting State either to take over a potential partner's military operations or integrate into them directly—which may raise, in turn, manifold other concerns for each partner.

VI. Conclusion

For many States, the only form of contemporary warfare that they are likely to conduct is with and through partners. Working toward legal interoperability, accurately assessing and managing risk, and establishing conditions to help ensure partners' legal compliance (among many other issues) will likely continue to give rise to numerous challenges, concerns, and opportunities in relation to partnered conflicts for years to come.

A key first step in calibrating an approach that prioritizes protecting civilians while pursuing legitimate military objectives is to grasp the applicable legal framework. That includes discerning what forms of responsibility may attach to various aspects of partnered operations. In addition to never following below the minimal floor established by law, a State may pursue these objectives by imposing conditions on engaging in various forms of partnership, including by requiring that partners undertake various protective measures; by vetting and actively monitoring partners; and by requiring partners to adhere to protective policy standards and practices that exceed what the law requires.

[78] Finucane, "Partners," 426.

[79] Finucane, "Partners," 427.

[80] Finucane, "Partners," 427–430.

[81] Finucane, "Partners," 428.