

# State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict

PhD in Law

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# **State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict**

## **Abstract**

Contemporary conflict is replete with examples of states acting through private partners or proxies to pursue their foreign policy and security goals. Frequently, however, non-state actors (NSA) in receipt of state support act in a manner that potentially violates international law. This thesis considers states' international responsibility for such breaches, examining the circumstances in which the law of state responsibility attributes an NSA's conduct to a state. The principal objectives of the study are threefold: to clarify the precise circumstances in which private conduct is attributable to a state in contemporary conflict; to evaluate the sufficiency of the rules of attribution; and to assess how any inadequacies in the regulation of states' support to NSAs in conflict situations should be remedied.

Having examined the law's practical impact, using three contemporary conflicts as case studies, the thesis argues that there is a gap in accountability that allows states to act via proxy in a manner that they could not lawfully act via their own organs. While this lacuna is partially filled by primary norms of international law, these are fragmented and incomplete in their effects. To properly regulate states' dealings with NSAs in armed conflict, therefore, international law must evolve. First, a less stringent interpretation of the rules of attribution is necessary, to better meet the object and purpose of the law of state responsibility in light of the realities of states' contemporary interactions with NSAs. Second, international law must hold states to account for their own actions in facilitating NSA conduct that would be internationally wrongful if perpetrated directly by the state. This can be addressed not only via the law of state responsibility but also by strengthening relevant primary norms of international law.

## **Declaration of Original Authorship**

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

Jennifer Helen Maddocks

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## List of Abbreviations

AP1	Additional Protocol I to the Geneva Conventions
ARIO	Articles on the Responsibility of International Organisations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CA1	Common Article 1 to the Geneva Conventions
CA3	Common Article 3 to the Geneva Conventions
CIA	United States' Central Intelligence Agency
CNDP	National Congress for the Defence of the People
DNR	Donetsk People's Republic
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FARDC	Armed Forces of the Democratic Republic of the Congo
FDLR	Democratic Forces for the Liberation of Rwanda
FRY	Federal Republic of Yugoslavia
FSA	Free Syrian Army
GRU	The Russian General Staff Main Intelligence Directorate
HTS	Hayat Tahrir al-Sham
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International humanitarian law
IHRL	International human rights law
ILC	International Law Commission
ILC YB	Yearbook of the International Law Commission
IO	International organisation
Iran-US CTR	Iran-United States Claims Tribunal Reports
IRGC	Iranian Revolutionary Guard Corps

ISIS	Islamic State in Iraq and Syria
LNR	Luhansk People's Republic
M23	Movement of 23 March
NATO	North Atlantic Treaty Organisation
NATO CCDCOE	NATO Cooperative Cyber Defence Centre of Excellence
NDF	Syrian National Defence Force
NIAC	Non-international armed conflict
NLF	National Liberation Front
NSA	Non-state actor
OSCE	Organisation for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
PKK	Kurdistan Workers' Party
PMF	Popular Mobilisation Forces
PMSC	Private military and security company
RDF	Rwandan Defence Force
RIAA	Reports of International Arbitral Awards
SDF	Syrian Democratic Forces
SNA	Syrian National Army
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UN GGE	United Nations Group of Governmental Experts
UNHRC	United Nations Human Rights Council
UN HRCttee	United Nations Human Rights Committee
UN OHCHR	Office of the United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNTS	United Nations Treaty Series
US	United States
VRS	Army of the Republika Srpska
YPG	Kurdish People's Protection Units

## Chapter 1 – Introduction

Contemporary conflict is replete with examples of states acting through private partners or proxies. It is necessary to look no further than the conflict in Syria to find a plethora of non-state actors (NSA) on the battlefield,<sup>1</sup> many of which receive at least some degree of state support. In the early stages of the conflict, for instance, the Syrian regime used local militias to repress the protests.<sup>2</sup> Shi'a militia groups, including Hezbollah, later bolstered the regime's forces, with backing from Iran.<sup>3</sup> Once Russia became involved in the fight, it employed private military and security companies (PMSC) such as the Wagner Group to reinforce the regime.<sup>4</sup> Turkey acted through Syrian militias in its operations against the Kurds in the north of the country.<sup>5</sup> And the United States and its allies assisted, first, the rebels opposing the government<sup>6</sup> before switching focus to the fight against ISIS, conducted in large part via another NSA, the Syrian Democratic Forces (SDF).<sup>7</sup>

The conflict in Syria additionally exemplifies other common features of contemporary conflict: the diversity of the NSAs on the battlefield; the varied relationships between those NSAs and their state sponsors; and the prevalence of conduct that potentially violates international law.<sup>8</sup> Abuses against

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<sup>1</sup> One study estimated that the forces opposing the Syrian government in the early years of the conflict comprised 1,500 armed groups. See Christopher M Blanchard, Carla E Humud and Mary Beth D Nikitin, 'Armed Conflict in Syria, Overview and US Response' (2014) 5 *Current Politics and Economics of the Middle East* 237, 243.

<sup>2</sup> Brian Michael Jenkins, 'The Dynamics of Syria's Civil War' (*RAND Corporation*, 2014) 6-7 <[www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE115/RAND\\_PE115.pdf](http://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE115/RAND_PE115.pdf)> accessed 21 December 2020.

<sup>3</sup> Michael Knights, 'Iran's Foreign Legion: The Role of Iraqi Shiite Militias in Syria' (*Washington Institute*, 27 June 2013) <[www.washingtoninstitute.org/policy-analysis/irans-foreign-legion-role-iraqi-shiite-militias-syria](http://www.washingtoninstitute.org/policy-analysis/irans-foreign-legion-role-iraqi-shiite-militias-syria)> accessed 21 December 2020; Marisa Sullivan, 'Middle East Security Report 19: Hezbollah in Syria' (*Institute for the Study of War*, April 2014) <[www.understandingwar.org/sites/default/files/Hezbollah\\_Sullivan\\_FINAL.pdf](http://www.understandingwar.org/sites/default/files/Hezbollah_Sullivan_FINAL.pdf)> accessed 27 February 2018.

<sup>4</sup> Metin Gurcan, 'Private Military Companies: Moscow's Other Army in Syria' (*AL-Monitor*, 29 November 2017) <[www.al-monitor.com/pulse/originals/2017/11/turkey-russia-private-army-in-syria.html](http://www.al-monitor.com/pulse/originals/2017/11/turkey-russia-private-army-in-syria.html)> accessed 9 January 2018.

<sup>5</sup> Sarah El Deeb and Joseph Krauss, 'Money, Hatred for the Kurds Drives Turkey's Syrian Fighters' (*AP News*, 15 October 2019) <<https://apnews.com/7386b1149d2642afb3258e3d07d167dc>> accessed 18 December 2019.

<sup>6</sup> Mark Mazzetti and Matt Apuzzo, 'US Relies Heavily on Saudi Money to Support Syrian Rebels' (*The New York Times*, 23 January 2016) <[www.nytimes.com/2016/01/24/world/middleeast/us-relies-heavily-on-saudi-money-to-support-syrian-rebels.html?\\_r=1](http://www.nytimes.com/2016/01/24/world/middleeast/us-relies-heavily-on-saudi-money-to-support-syrian-rebels.html?_r=1)> accessed 21 December 2020; John Walcott, 'Trump Ends CIA Arms Support for Anti-Assad Syria Rebels: US Officials' (*Reuters*, 19 July 2017) <[www.reuters.com/article/us-mideast-crisis-usa-syria-idUSKBN1A42KC](http://www.reuters.com/article/us-mideast-crisis-usa-syria-idUSKBN1A42KC)> accessed 21 December 2020.

<sup>7</sup> Aron Lund, 'Origins of the Syrian Democratic Forces: A Primer' (*The New Humanitarian*, 22 January 2016) <<https://deeply.thenewhumanitarian.org/syria/articles/2016/01/22/origins-of-the-syrian-democratic-forces-a-primer>> accessed 21 December 2020; William Rosenau and Zack Gold, "'The Cheapest Insurance in the World'?: The United States and Proxy Warfare' (*CNA*, July 2019) 29-40 <[www.cna.org/CNA\\_files/PDF/DRM-2019-U-020227-1Rev.pdf](http://www.cna.org/CNA_files/PDF/DRM-2019-U-020227-1Rev.pdf)> accessed 21 December 2020.

<sup>8</sup> See Ch 2 s 2.1.

civilians are rife in Syria, as well as in other conflicts around the world, and frequently, these are perpetrated by NSAs in receipt of state support.<sup>9</sup>

This reality presents challenges to the traditional framework of international law, which assumes that states are the predominant actors on the world stage, with a monopoly on the use of force. It raises questions, moreover, regarding the circumstances in which an NSA's harmful conduct, committed during armed conflict, is attributable to a state. Such questions are important because a state bears international responsibility only in respect of conduct that is attributable to it.<sup>10</sup> If the conduct at issue is not attributable to a state, it remains private in character and cannot lead to state responsibility. Thus, by choosing to act via proxy, a state can potentially evade its international legal obligations.

Although much has been written regarding attribution in the law of state responsibility, the precise circumstances in which private conduct is attributable to a state remain unclear. Adding clarity to that issue, in situations of armed conflict, is the primary focus of this research. Before addressing the law, however, it is first critical to put the issue in context, by exploring states' relationships with NSAs in contemporary conflict.

## **1.1 States and non-state actors in armed conflict**

States' reliance on NSAs to promote their foreign policy objectives is not a new phenomenon. Yet, the number of NSAs on the battlefield has increased dramatically in recent years. In 2018, for instance, the International Committee of the Red Cross (ICRC) reported that more armed groups had emerged in the previous six years than in the preceding six decades.<sup>11</sup> Meanwhile, the character of certain NSAs has changed, particularly in terms of their power and autonomy. ISIS is a clear example; the group was able to exert its authority over large swathes of Syria and Iraq from 2014

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<sup>9</sup> See s 1.1.2.

<sup>10</sup> See s 1.2.

<sup>11</sup> Peter Maurer, 'Moving from Outrage to Action on Civilian Suffering' (*ICRC President's Speech to UNGA Event on the Protection of Civilians and Respect for IHL*, 26 September 2018) <[www.icrc.org/en/document/moving-outrage-action-civilian-suffering](http://www.icrc.org/en/document/moving-outrage-action-civilian-suffering)> accessed 23 December 2020. See also ICRC, 'The Roots of Restraint in War' (December 2018) 13 <[www.icrc.org/en/publication/4352-roots-restraint-war](http://www.icrc.org/en/publication/4352-roots-restraint-war)> accessed 14 April 2021; ICRC, 'Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War' (March 2021) 16-17 <[www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce](http://www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce)> accessed 14 April 2021.

until it lost control of its remaining stronghold in March 2019.<sup>12</sup> Hezbollah also illustrates the trend. Since its formation in the early 1980s, the group has played an increasingly important role not only in Lebanese politics<sup>13</sup> but also in conflicts across the region.<sup>14</sup> Thus, while in the past territorial competition occurred principally between states, today it is NSAs that more frequently challenge states for control over elements of their geography and their people.<sup>15</sup> In 2017, for example, the Syrian regime was estimated to exert control over less than 20 percent of its territory, with the vast majority of the remainder controlled by NSAs including ISIS, the SDF, and various rebel and Islamic factions.<sup>16</sup>

Statistics such as these illustrate the increased importance of NSAs as well as the state-like role they often play.<sup>17</sup> Today, states share their power not only with international organisations but with a wide range of NSAs.<sup>18</sup> This is particularly apparent in contemporary conflict, where non-international armed conflicts (NIACs) involving NSAs predominate over state-on-state conflict.<sup>19</sup> Most of the armed conflicts taking place in the world today are internal in character, featuring militias, insurrectional movements, paramilitary groups, and armed bands, fighting either against the established government or amongst themselves.<sup>20</sup> Yet, despite their increased prominence, NSAs rarely act with complete autonomy. More often, to achieve their aims, NSAs rely to a greater or

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<sup>12</sup> BBC News, 'Islamic State Group Defeated as Final Territory Lost, US-Backed Forces Say' (23 March 2019) <[www.bbc.com/news/world-middle-east-47678157](http://www.bbc.com/news/world-middle-east-47678157)> accessed 26 May 2020.

<sup>13</sup> Counter Extremism Project, 'Hezbollah's Influence in Lebanon' (April 2018) <[www.counterextremism.com/sites/default/files/Hezbollah%20Influence%20in%20Lebanon\\_043018.pdf](http://www.counterextremism.com/sites/default/files/Hezbollah%20Influence%20in%20Lebanon_043018.pdf)> accessed 27 August 2019.

<sup>14</sup> Catherine Bloom, 'The Classification of Hezbollah in Both International and Non-International Armed Conflicts' (2008) 14 *Annual Survey of Intl & Comparative L* 61; Sullivan (n 3); Matthew Levitt, 'Waking Up the Neighbors: How Regional Intervention is Transforming Hezbollah' (*Washington Institute*, 23 July 2015) <[www.washingtoninstitute.org/policy-analysis/view/waking-up-the-neighbors-how-regional-intervention-is-transforming-hezbollah](http://www.washingtoninstitute.org/policy-analysis/view/waking-up-the-neighbors-how-regional-intervention-is-transforming-hezbollah)> accessed 27 August 2019.

<sup>15</sup> Efraim Halevy, 'Non-State Actors will be Key Players in Future' (*Observer Research Foundation*, 28 October 2009) <[www.orfonline.org/research/non-state-actors-will-be-key-players-in-future/](http://www.orfonline.org/research/non-state-actors-will-be-key-players-in-future/)> accessed 2 March 2020.

<sup>16</sup> Syrian Observatory for Human Rights, 'A Year on Astana Agreement, the Winners are Iranians, Russians, Turks, the Regime, and the Biggest Losers are the Opposition Factions, Tahrir al-Sham and ISIS' (4 May 2018) <[www.syria.hr.com/en/91151/](http://www.syria.hr.com/en/91151/)> accessed 10 September 2020.

<sup>17</sup> Shane R Reeves and Ronald T P Alcalá, 'Five Legal Takeaways from the Syrian War' (*Harvard Nat Sec J Online*, 30 September 2019) 4-6 <[https://harvardnsj.org/wp-content/uploads/sites/13/2020/04/Reeves-Alcala\\_Five-Legal-Takeaways-from-the-Syrian-War\\_FINAL.pdf](https://harvardnsj.org/wp-content/uploads/sites/13/2020/04/Reeves-Alcala_Five-Legal-Takeaways-from-the-Syrian-War_FINAL.pdf)> accessed 24 December 2020.

<sup>18</sup> See Jessica T Mathews, 'Power Shift' (*Foreign Affairs*, January/February 1997) <[www.foreignaffairs.com/articles/1997-01-01/power-shift](http://www.foreignaffairs.com/articles/1997-01-01/power-shift)> accessed 1 January 2021.

<sup>19</sup> Annyssa Bellal, 'The War Report: Armed Conflicts in 2018' (*Geneva Academy*, April 2019) 19 <[www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf](http://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf)> accessed 27 December 2020.

<sup>20</sup> Gérard Cahin, 'The Responsibility of Other Entities: Armed Bands and Criminal Groups' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 332.



lesser extent on the support of one or more states.<sup>21</sup> And from the states' perspective, they often perceive a distinct advantage in participating indirectly in conflict via NSAs rather than committing their own forces to the fight.<sup>22</sup>

### **1.1.1 State support to non-state actors**

While states developed and maintained relationships with proxies prior to 1945, the Cold War era saw a dramatic increase in states' support to NSAs engaged in conflict.<sup>23</sup> Today, the practice continues unabated and surrogate warfare remains a prominent feature of states' management of violence.<sup>24</sup> Minor as well as major powers act through militia groups, PMSCs, and private individuals in conflicts across the globe.<sup>25</sup> It is pertinent, therefore, to consider the reasons behind this trend.

#### *1.1.1.1 The rationale for states' support to non-state actors*

States' motives for employing proxies in conflict situations are both simple and compelling: 'Rather than bearing the political, financial, and military burden of direct intervention, states can in effect hire surrogate forces to fight and die on their behalf'.<sup>26</sup> Proxy intervention thus allows states 'to maximise their interests while minimising their political and military exposure'.<sup>27</sup> This is particularly attractive to states wishing to influence the outcome of conflicts in which their key national interests are not at stake,<sup>28</sup> or in which they wish to avoid direct conflict with an adversary. In the Cold War,

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<sup>21</sup> Idean Salehyan, David Siroky and Reed M Wood, 'External Rebel Sponsorship and Civilian Abuse: A Principal-Agent Analysis of Wartime Atrocities' (2014) 68 *Intl Organization* 633, 634.

<sup>22</sup> Richard D Newton, 'The Seeds of Surrogate Warfare' (*Joint Special Operations University Report 09-3*, February 2009); Joseph L Votel and Eero R Keravuori, 'The By-With-Through Operational Approach' (*Joint Force Quarterly* 89, 12 April 2018) <<https://ndupress.ndu.edu/Media/News/News-Article-View/Article/1491891/the-by-with-through-operational-approach/>> accessed 22 December 2020; Daniel L Byman, 'Why Engage in Proxy War? A State's Perspective' (*Brookings*, 21 May 2018) <[www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/](http://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/)> accessed 21 December 2020; Andreas Krieg and Jean-Marc Rickli, 'Surrogate Warfare: The Art of War in the 21<sup>st</sup> Century?' (2018) 18 *Defence Studies* 113, 124-26.

<sup>23</sup> Patrick M Regan, 'Third Party Interventions and the Duration of Intrastate Conflicts' (2002) 46 *J Conflict Resolution* 55; Andrew Mumford, *Proxy Warfare* (Polity Press 2013) 2-3.

<sup>24</sup> Krieg and Rickli (n 22) 116.

<sup>25</sup> Geraint Hughes, *My Enemy's Enemy: Proxy Warfare in International Politics* (Sussex Academic Press 2014) 6.

<sup>26</sup> Rosenau and Gold (n 7) 1. See also Jack Watling and Nick Reynolds, 'War by Others' Means' (*Royal United Services Institute*, 2020) 10-27; Diane M Zorri, Houman A Sadri and David C Ellis, 'Iranian Proxy Groups in Iraq, Syria, and Yemen: A Principal-Agent Comparative Analysis' (*Joint Special Operations University Report 20-5*, December 2020) 4-5.

<sup>27</sup> Mumford (n 23) 8. See also Krieg and Rickli (n 22) 116.

<sup>28</sup> Mumford (n 23) 2; Hughes (n 25) 3-4; Andreas Krieg, 'Externalising the Burden of War: The Obama Doctrine and US Foreign Policy in the Middle East' (2016) 92 *Intl Affairs* 97, 102, 107-08; Krieg and Rickli (n 22) 117-18.

for instance, the superpowers and their respective allies supported NSAs in numerous conflicts, aiming to weaken their opponent without commencing a further global war.<sup>29</sup>

Avoiding escalation is therefore a key goal in states' decisions to intervene in conflicts via proxies. As Hughes put it, 'If governments are faced with the equally unpalatable options of a risky intervention or either tolerating the existence of a hostile regime or the overthrow of a friendly one, clandestine aid offers a tempting alternative to action'.<sup>30</sup> Intervening covertly not only obviates the risks associated with a direct intervention but also offers states plausible deniability.<sup>31</sup> This is clearly illustrated by Russia's use of PMSCs such as the Wagner Group to promote its interests in the conflicts in Syria, Ukraine, and across the globe.<sup>32</sup> When members of the PMSC attacked US forces in Syria in February 2018, Moscow denied all knowledge of their activities.<sup>33</sup> The Kremlin furthermore avoided the domestic criticism it would have received had an equivalent number of its soldiers died in battle.<sup>34</sup> Members of a PMSC or any other NSA are expendable in a way that a state's own service personnel are not.<sup>35</sup>

Acting indirectly via NSAs additionally provides a means of countering adversaries that are militarily superior, against which the state's conventional forces cannot compete.<sup>36</sup> Iran's support to the insurgencies in Iraq and Afghanistan, for example, allowed the state to frustrate and defeat the aims of the United States and its allies without the costs of committing its own forces to the fight.<sup>37</sup>

Proxy networks can also bolster states' deterrence strategies,<sup>38</sup> and preserve or enhance states'

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<sup>29</sup> Belgin San Akca, 'Supporting Non-State Armed Groups: A Resort to Illegality?' (2009) 32 J Strategic Studies 589, 610-11; Mumford (n 23) 38-41. Hughes (n 25) 26-27, 139.

<sup>30</sup> Hughes (n 25) 22-23. See also Mumford (n 23) 41-44.

<sup>31</sup> San Acka (n 29) 590; Hughes (n 25) 15-16; Krieg (n 28) 102.

<sup>32</sup> Gurcan (n 4); Kimberley Marten, 'Russia's Use of Semi-State Security Forces: The Case of the Wagner Group' (2019) 35 Post-Soviet Affairs 181; Mike Giglio, 'Inside the Shadow War Fought by Russian Mercenaries' (*Buzzfeed*, 17 April 2019) <<https://www.buzzfeednews.com/article/mikegiglio/inside-wagner-mercenaries-russia-ukraine-syria-prigozhin>> accessed 9 August 2019; Neil Hauer, 'Russia's Favorite Mercenaries' (*The Atlantic*, 27 August 2019) <[www.theatlantic.com/international/archive/2018/08/russian-mercenaries-wagner-africa/568435/](http://www.theatlantic.com/international/archive/2018/08/russian-mercenaries-wagner-africa/568435/)> accessed 15 December 2020.

<sup>33</sup> Tomas Gibbons-Neff, 'How a 4-Hour Battle Between Russian Mercenaries and US Commandos Unfolded in Syria' (*The New York Times*, 24 May 2018) <[www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html](http://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html)> accessed 2 December 2020.

<sup>34</sup> *ibid.* See also Sabra Ayres, 'Russia's Shadowy World of Military Contractors: Independent Mercenaries, or Working for the Kremlin?' (*The Los Angeles Times*, 18 February 2018) <[www.latimes.com/world/europe/la-fg-russia-mercenaries-20180218-story.html](http://www.latimes.com/world/europe/la-fg-russia-mercenaries-20180218-story.html)> accessed 11 August 2019; Marten (n 32) 193; Giglio (n 32).

<sup>35</sup> Mumford (n 23) 76; Hughes (n 25) 25; Krieg and Rickli (n 22) 121-22; Watling and Reynolds (n 26) 22-26.

<sup>36</sup> Mumford (n 23) 51.

<sup>37</sup> *ibid.* 51-53; Hughes (n 25) 14; Zorri, Sadri and Ellis, (n 26) 1-2, 19.

<sup>38</sup> Hughes (n 25) 26-27, 140; Ariane Tabatabai, 'The Fruits of Iran's Victory in Syria' (*Lawfare*, 15 April 2018) <[www.lawfareblog.com/fruits-irans-victory-syria](http://www.lawfareblog.com/fruits-irans-victory-syria)> accessed 27 August 2019; Jack Watling, 'Iran's Objectives and

spheres of influence.<sup>39</sup> This is evident not only with regard to Iran, but also in Russia's interactions with NSAs in regions that formed part of the former Soviet Union.<sup>40</sup>

In Ukraine, for instance, Moscow sought to preserve its regional hegemony by providing significant support to the rebels fighting against the pro-Western regime in Kiev.<sup>41</sup> Intervention in the conflict additionally offered Russia an opportunity to support NSAs with which it shared significant cultural ties, expressed through a common language, history, religion, and customs.<sup>42</sup> Thus, it is not uncommon for states to back NSAs with which they share national, ethnic, or ideological links.<sup>43</sup> Religious ties, for instance, were important to Iran when mobilising Shi'a Muslims from across the region to fight in Syria in support of the Assad regime.<sup>44</sup> But despite such similarities in motivation, the relationships that states establish and maintain with NSAs vary across a wide spectrum. These may differ not only in duration, but also in terms of the nature and extent of support provided to the NSA, and the dynamics of the relationship itself.<sup>45</sup>

#### *1.1.1.2 The varied relationships between states and non-state actors*

States provide a multiplicity of support to NSAs involved in conflict.<sup>46</sup> This can range from non-lethal assistance, such as the communications and medical equipment the Obama administration provided to Syrian rebels in the early stages of the conflict,<sup>47</sup> to extensive military aid. Frequently,

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Capabilities: Deterrence and Subversion' (*RUSI Occasional Paper*, February 2019) 16-17

<[https://rusi.org/sites/default/files/20190219\\_op\\_irans\\_objectives\\_and\\_capabilities\\_web.pdf](https://rusi.org/sites/default/files/20190219_op_irans_objectives_and_capabilities_web.pdf)> accessed 23 August 2019.

<sup>39</sup> Hughes (n 25) 31; Ariane M Tabatabai, Jeffrey Martini and Becca Wasser, 'The Iran Threat Network: Four Models of Iran's Nonstate Client Partnerships' (*RAND Corporation*, 2021) <[www.rand.org/pubs/research\\_reports/RR4231.html](http://www.rand.org/pubs/research_reports/RR4231.html)> accessed 19 July 2021.

<sup>40</sup> Hughes (n 25) 31.

<sup>41</sup> See Ch 2 s 2.2.

<sup>42</sup> Anna Matveeva, *Through Times of Trouble: Conflict in Southeastern Ukraine Explained from Within* (Lexington Books 2018) 9, 24-34.

<sup>43</sup> Mumford (n 23) 34-38; Hughes (n 25) 25-26, 29-30; Tim Maurer, "'Proxies" and Cyberspace' (2016) 21 *J Conflict and Security L* 383, 387.

<sup>44</sup> Jeffrey White, 'Hezbollah's Declaration of War in Syria: Military Implications' (*The Washington Institute*, 29 May 2013) <[www.washingtoninstitute.org/policy-analysis/view/hezbollahs-declaration-of-war-in-syria-military-implications](http://www.washingtoninstitute.org/policy-analysis/view/hezbollahs-declaration-of-war-in-syria-military-implications)> accessed 8 January 2018; Ben Farmer and Akhtar Makoi, 'Thirsty for Martyrdom and a Living Wage: Why Thousands of Afghans Signed up to Iran's Shadowy War in Syria' (*The Telegraph*, 26 January 2020) <[www.telegraph.co.uk/news/2020/01/26/thirsty-martyrdom-living-wage-thousands-afghans-signed-irans/](http://www.telegraph.co.uk/news/2020/01/26/thirsty-martyrdom-living-wage-thousands-afghans-signed-irans/)> accessed 15 February 2020.

<sup>45</sup> Mumford (n 23) 19-20.

<sup>46</sup> *ibid* 61-69.

<sup>47</sup> Mark Hosenball, 'Exclusive: Obama Authorizes Secret US Support for Syrian Rebels' (*Reuters*, 1 August 2012) <[www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801](http://www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801)> accessed 25 November 2019.

states provide NSAs with material support, such as arms, ammunition, equipment, and finance. But states' assistance can also take the form of training, the provision of intelligence, or messaging in the information environment.<sup>48</sup> Alternatively, states may offer a safe haven from which an NSA can operate,<sup>49</sup> as the Taliban government in Afghanistan did to Al Qaeda prior to the terrorist attacks on 9/11.<sup>50</sup>

Sometimes states intervene directly in a conflict alongside their support to an NSA. In Libya, for instance, certain NATO states engaged in an air campaign to directly assist rebel forces fighting the Gaddafi regime while simultaneously supplying equipment and other support to the rebels.<sup>51</sup> The US-led coalition's fight against ISIS in Syria also follows this model.<sup>52</sup> States may, alternatively, intervene in conflicts solely via the provision of assistance to NSAs. For example, Iran bolsters the Houthis in Yemen not through the deployment of its conventional military forces but rather via the provision of financial, military, and political aid.<sup>53</sup>

The nature and extent of support a state provides to an NSA influences the relationship between the parties. In general, the more the NSA relies on the state for assistance, the greater the degree of control that the state can exercise over the NSA's conduct. If an NSA has other sources of support, this increases the likelihood that it will pursue objectives that run counter to those of the state.<sup>54</sup> To maintain their local legitimacy, NSAs often go to great lengths to preserve their independence, distancing themselves from their state sponsor or playing competing sponsors off against each other.<sup>55</sup> Thus, although foreign sponsorship implies some degree of state authority over the

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<sup>48</sup> See Ch 2. Regarding states' support to NSAs in the information environment, see Mumford (n 23) 68-69; Ben Norton, 'Leaked Docs Expose Massive Syria Propaganda Operation Waged by Western Government Contractors and Media' (*The Grayzone*, 23 September 2020) <<https://thegrayzone.com/2020/09/23/syria-leaks-uk-contractors-opposition-media/>> accessed 19 December 2020.

<sup>49</sup> San Acka (n 29) 592.

<sup>50</sup> See UNSC Res 1378 (14 November 2001) UN Doc S/RES/1378.

<sup>51</sup> Mark Urban, 'Inside Story of the UK's Secret Mission to Beat Gaddafi' (*BBC News*, 19 January 2012) <[www.bbc.co.uk/news/magazine-16573516](http://www.bbc.co.uk/news/magazine-16573516)> accessed 23 December 2020; Mumford (n 23) 25-26.

<sup>52</sup> See Ch 2 s 2.1.3.

<sup>53</sup> Zorri, Sadri and Ellis (n 26) 86-89.

<sup>54</sup> Tyrone Groh, 'The Utility of Proxy War' (*Lawfare*, 28 April 2019) <[www.lawfareblog.com/utility-proxy-war](http://www.lawfareblog.com/utility-proxy-war)> accessed 27 December 2020.

<sup>55</sup> *ibid*; American Bar Association's Center for Human Rights & Rule of Law Initiative, 'The Legal Framework Regulating Proxy Warfare' (December 2019) 16 <[www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-proxy-warfare-report-2019.pdf](http://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf)> accessed 23 December 2020.

recipient, the respective levels of dependence and control in the relationships between states and NSAs are subject to wide variation.<sup>56</sup>

The terminology used to describe states' relationships with NSAs, such as the term 'proxy' or references to NSAs acting as a state's 'agent', is therefore not always accurate. These terms imply an unequal affiliation, in which a powerful state sponsors a weaker NSA.<sup>57</sup> But while such hierarchical relationships undoubtedly abound in contemporary conflict, they do not typify all interactions between states and NSAs. One study found, for instance, that while Iran maintains a 'network of influence' with regional NSAs, it does not uniformly control or orchestrate their activities.<sup>58</sup> Instead, Iran's relationships with NSAs vary across a spectrum; although some Shi'a militia groups are dependent on Iranian support to survive, other NSAs, such as the Houthis in Yemen, would continue to pursue their objectives, albeit with diminished resources, if Tehran ceased its assistance.<sup>59</sup>

Other features of the relationships between states and NSAs are similarly diverse. While some rebel groups are almost entirely the creation of their external sponsor, others originate from grassroots political movements, only later receiving state support.<sup>60</sup> Some alliances, such as Iran's relationship with Hezbollah, endure for decades,<sup>61</sup> while others last for no longer than is necessary for the state to issue instructions to the NSA to perform a task on its behalf.<sup>62</sup> The means and the degree of contact between the state and the NSA may also fluctuate. While in some cases, members of the state's armed forces might be co-located with the NSA to provide direct advice and support, in others, the state might provide training or other assistance remotely, without any physical contact with the NSA.<sup>63</sup>

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<sup>56</sup> Maurer "Proxies" and Cyberspace' (n 43) 395-97.

<sup>57</sup> *ibid* 387.

<sup>58</sup> International Institute for Strategic Studies, 'Iran's Networks of Influence in the Middle East' (November 2019) <[www.iiss.org/publications/strategic-dossiers/iran-dossier/iran-19-02-introduction](http://www.iiss.org/publications/strategic-dossiers/iran-dossier/iran-19-02-introduction)> accessed 24 December 2020. See also Tabatabai, Martini and Wasser (n 39).

<sup>59</sup> International Institute for Strategic Studies (n 58).

<sup>60</sup> Salehyan, Siroky and Wood (n 21) 638.

<sup>61</sup> See generally Matthew Levitt, *Hezbollah: The Global Footprint of Lebanon's Party of God* (Hurst 2013).

<sup>62</sup> See Ch 5 s 5.3.

<sup>63</sup> Cordula Droege and David Tuck, 'Fighting Together: Obligations and Opportunities in Partnered Warfare' (ICRC, 27 March 2017) <<https://medium.com/law-and-policy/fighting-together-obligations-and-opportunities-in-partnered-warfare-362c9dfb741a>> accessed 22 December 2020.

Another area of significant divergence relates to the character of the NSA. Although many of the NSAs involved in armed conflict are armed groups, states task myriad different individuals and groups to act on their behalf, ranging from warlords to criminal gangs.<sup>64</sup> PMSCs are frequently employed by states to secure and promote their interests in conflicts across the globe.<sup>65</sup> And states increasingly use private hackers to project their power and influence through cyberspace.<sup>66</sup> Proxy strategies are particularly attractive to states in this domain, given the technical challenges of determining the origin of harmful cyber operations and the increased opportunities for plausible deniability.<sup>67</sup>

The character of the NSA, the nature and extent of the state's support, and other features in states' relationships with NSAs are all pertinent to the degree of control a state exerts over an NSA's activities.<sup>68</sup> A state is more likely to exercise a high degree of control if it maintains a close, enduring, alliance with an NSA, in which the NSA is highly dependent on the state for its continued operations. But a state's control over an NSA's activities cannot be assumed. Sometimes, states assist NSAs without exerting any degree of control over their activities.<sup>69</sup> In other cases, NSAs exhibit significant autonomy, despite receiving long-standing and extensive state support.<sup>70</sup> Moreover, while state control is more likely if members of the state's armed forces operate alongside an NSA, it does not automatically follow in such circumstances that the state commands the NSA's operations.<sup>71</sup>

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<sup>64</sup> See eg Daniel Byman and Israa Saber, 'A Foreign Policy Toward Warlords' (*Lawfare*, 30 March 2020) <[www.lawfareblog.com/foreign-policy-toward-warlords](http://www.lawfareblog.com/foreign-policy-toward-warlords)> accessed 24 December 2020.

<sup>65</sup> Mumford (n 23) 8-9, 80-81; Krieg and Rickli (n 22) 121; Sean McFate, 'Mercenaries and War: Understanding Private Armies Today' (*National Defense University*, December 2019) <<https://apps.dtic.mil/sti/pdfs/AD1115550.pdf>> accessed 23 July 2021.

<sup>66</sup> Maurer "'Proxies' and Cyberspace' (n 43) 383-84. See also George H Wittman 'China's Cyber Militia' (*The American Spectator*, 21 October 2011) <[https://spectator.org/36718\\_chinas-cyber-militia/](https://spectator.org/36718_chinas-cyber-militia/)> accessed 23 October 2017; Dorothy Denning, 'Following the Developing Iranian Cyberthreat' (*The Conversation*, 12 December 2017) <<https://theconversation.com/following-the-developing-iranian-cyberthreat-85162>> accessed 22 December 2020; Ed Caesar, 'The Incredible Rise of North Korea's Hacking Army' (*The New Yorker*, 19 April 2021) <[www.newyorker.com/magazine/2021/04/26/the-incredible-rise-of-north-koreas-hacking-army](http://www.newyorker.com/magazine/2021/04/26/the-incredible-rise-of-north-koreas-hacking-army)> accessed 11 September 2021.

<sup>67</sup> Mumford (n 23) 86-90.

<sup>68</sup> ICRC, 'Allies, Partners and Proxies' (n 11) 25.

<sup>69</sup> Michael Knights, 'The Houthi War Machine: From Guerrilla War to State Capture' (*CTC Sentinel*, September 2018) <<https://ctc.usma.edu/houthi-war-machine-guerrilla-war-state-capture/>> accessed 15 September 2019; Bruce Riedel, 'In Yemen, the Houthi Strategy has Promise and Risk' (*Brookings*, 16 May 2019) <[www.brookings.edu/blog/order-from-chaos/2019/05/16/in-yemen-the-houthi-strategy-has-promise-and-risk/](http://www.brookings.edu/blog/order-from-chaos/2019/05/16/in-yemen-the-houthi-strategy-has-promise-and-risk/)> accessed 23 December 2020; Watling (n 38).

<sup>70</sup> This is true of Hezbollah. See Levitt, 'Waking Up the Neighbors' (n 14).

<sup>71</sup> See Ch 5 s 5.4.

In reality, working with local partners necessarily involves some relinquishment of control.<sup>72</sup> States rarely have the same level of confidence in the conduct of an NSA as they would in their own armed forces. Regardless of the degree of cooperation between a state and an NSA, ‘surrogates are ultimately autonomous actors who always have an agenda of their own to pursue’.<sup>73</sup> State sponsorship of NSAs can therefore lead to unintended consequences that undermine the sponsor’s goals, including the diversion of weapons and the emergence of criminal organisations.<sup>74</sup> It can also lead to the empowerment of NSAs and an increase in the prevalence and severity of the abuses they perpetrate against the civilian population.<sup>75</sup>

### ***1.1.2 Non-state actors’ involvement in international law violations***

Violence against civilians is a prominent feature of conflict, and often, this is perpetrated by NSAs in receipt of state support.<sup>76</sup> As one report relating to the Syrian conflict noted, ‘introducing new, as well as more sophisticated and/or more powerful weapons, into a civil war – increasingly being fought in urban areas in some cases by people with very little or no formal training – will almost certainly increase risks to civilians’.<sup>77</sup> Thus, states’ provision of material assistance, such as arms and ammunition, frequently delivers the means through which an NSA harms the civilian population.<sup>78</sup>

State sponsorship can additionally increase the likelihood that NSAs will target civilians, on the basis that the external support they receive reduces their reliance on the local population.<sup>79</sup> As Pfaff and Granfield observe:

at the moment a benefactor intervenes, it immediately changes the conflict by changing a proxy’s calculations. With insurance from a powerful benefactor, proxies have greater reason

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<sup>72</sup> Hughes (n 25) 144; Melissa Dalton and others, ‘Civilians and “By, With, and Through”: Key Issues and Questions related to Civilian Harm and Security Partnership’ (*Center for Strategic and International Studies*, April 2018) 3 <[www.csis.org/analysis/civilians-and-and-through](http://www.csis.org/analysis/civilians-and-and-through)> accessed 23 December 2020.

<sup>73</sup> Krieg (n 28) 109. See also Dalton and others (n 72) 7.

<sup>74</sup> American Bar Association (n 55) 5-7; Mumford (n 23) 108-110; Hughes (n 25) 143-44.

<sup>75</sup> Dalton and others (n 72) 3.

<sup>76</sup> Salehyan, Siroky and Wood (n 21) 637; Rosenau and Gold (n 7) 45.

<sup>77</sup> Center for Civilians in Conflict, ‘Issue Brief: Civilian Protection in Syria’ (December 2012) 1 <<https://civiliansinconflict.org/wp-content/uploads/2017/09/Syria-2012-Brief.pdf>> accessed 24 December 2020.

<sup>78</sup> Droege and Tuck (n 63).

<sup>79</sup> Salehyan, Siroky and Wood (n 21) 639.

to choose violence over compromise. They have greater reason – and greater resources – to raise a conflict’s stakes, creating risks for themselves and their benefactors.<sup>80</sup>

Whether or not this hypothesis is correct, it is undoubtedly true that abuses on the part of supported NSAs are rife.<sup>81</sup> Unlike state armed forces, many NSAs in receipt of state support are not formally trained in international humanitarian law (IHL) and remain unaware of its key principles.<sup>82</sup> The Center for Civilians in Conflict found that in Syria, for example, while defectors from the regime’s military forces understood the distinction between civilians and combatants due to their prior military training, many other rebels did not.<sup>83</sup> Instead, the study found that ‘many fighters still perceive themselves as civilians and some see Alawite civilians as a legitimate military target, a perception compounded by the Assad regime’s use of Alawite proxy militias’.<sup>84</sup>

Rebel groups and other NSAs in receipt of state support frequently lack not only training, but also the discipline and control that typically characterises a state’s armed forces.<sup>85</sup> This reality further contributes towards the number of abuses committed by NSAs engaged in hostilities.<sup>86</sup> For instance, although opposition groups in Syria signed codes of conduct to address allegations of abuse, such as the mistreatment of detainees, enforcement was difficult in the absence of an effective chain of

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<sup>80</sup> C Anthony Pfaff and Patrick Granfield, ‘How (Not) to Fight Proxy Wars’ (*The National Interest*, 27 March 2018) <<https://nationalinterest.org/feature/how-not-fight-proxy-wars-25102>> accessed 21 December 2020.

<sup>81</sup> Regarding abuses in Syria, see Human Rights Watch, ‘Syria: End Opposition Use of Torture, Executions’ (17 September 2012) <[www.hrw.org/news/2012/09/17/syria-end-opposition-use-torture-executions#torture](http://www.hrw.org/news/2012/09/17/syria-end-opposition-use-torture-executions#torture)> accessed 24 December 2020; Amnesty International, ‘Syria: Summary Killings and Other Abuses by Armed Opposition Groups’ (14 March 2013) <[www.amnestyusa.org/pdfs/summary\\_killings\\_by\\_armed\\_opposition\\_groups.pdf](http://www.amnestyusa.org/pdfs/summary_killings_by_armed_opposition_groups.pdf)> accessed 24 December 2020. Regarding abuses in Yemen, see Relief Web, ‘Yemen: UAE Backs Abusive Local Forces’ (22 June 2017) <<https://reliefweb.int/report/yemen/yemen-uae-backs-abusive-local-forces>> accessed 27 December 2020. Regarding abuses in Afghanistan, see Patricia Gossman, ‘CIA-Backed Afghan Paramilitaries Behind Unlawful Killing Surge’ (*Just Security*, 7 November 2019) <[www.justsecurity.org/67072/cia-backed-afghan-paramilitaries-behind-unlawful-killing-surge/](http://www.justsecurity.org/67072/cia-backed-afghan-paramilitaries-behind-unlawful-killing-surge/)> accessed 8 November 2019.

<sup>82</sup> American Bar Association (n 55) 27; ICRC, ‘Allies, Partners and Proxies’ (n 11) 38-39.

<sup>83</sup> Center for Civilians in Conflict (n 77) 5-6.

<sup>84</sup> *ibid* 5. See also The New Humanitarian, ‘“Sometimes You Cannot Apply the Rules” – Syrian Rebels and IHL’ (13 May 2013) <[www.thenewhumanitarian.org/analysis/2013/05/13/sometimes-you-cannot-apply-rules-syrian-rebels-and-ihl](http://www.thenewhumanitarian.org/analysis/2013/05/13/sometimes-you-cannot-apply-rules-syrian-rebels-and-ihl)> accessed 24 December 2020.

<sup>85</sup> American Bar Association (n 55) 27; Center for Civilians in Conflict (n 77) 5-6. Regarding the indiscipline of NSAs operating in Syria, see Saskia Baas, ‘Syria’s Armed Opposition: A Spotlight on the Moderates’ (*Small Arms Survey*, January 2016) 10 <[www.smallarmssurvey.org/fileadmin/docs/R-SANA/SANA-Dispatch5-Syria-armed-opposition.pdf](http://www.smallarmssurvey.org/fileadmin/docs/R-SANA/SANA-Dispatch5-Syria-armed-opposition.pdf)> accessed 12 December 2017; El Deeb and Krauss (n 5). Regarding rebels in Libya, see Robin Wigglesworth, ‘Libyan Rebels’ Limitations Hinder Progress’ (*The Financial Times*, 25 April 2011) <[www.ft.com/content/abd48080-6f5a-11e0-952c-00144feabdc0](http://www.ft.com/content/abd48080-6f5a-11e0-952c-00144feabdc0)> accessed 21 December 2020; Al Jazeera, ‘Evidence of Mass Murder After Gaddafi’s Death’ (17 October 2012) <[www.aljazeera.com/news/2012/10/17/evidence-of-mass-murder-after-gaddafis-death](http://www.aljazeera.com/news/2012/10/17/evidence-of-mass-murder-after-gaddafis-death)> accessed 21 December 2020.

<sup>86</sup> Graham Cronogue, ‘Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors’ (2013) 23 *Duke J Comparative & Intl L* 365, 366.



command.<sup>87</sup> States' empowerment of armed groups through the provision of weapons and other support therefore entails a clear risk that the NSA will act abusively, outside the remit of the state's control, with little prospect of responsible disarmament and demobilisation.<sup>88</sup>

Some states address this risk by imposing intrusive monitoring and reporting requirements on their interactions with NSAs. The United States, for instance, vetted opposition fighters in Syria before providing them with material support.<sup>89</sup> Such measures are, however, time-consuming, expensive, and reduce states' ability to plausibly deny their activity.<sup>90</sup> Given these drawbacks, states often choose instead to maintain distance from the beneficiary of their assistance, thereby reducing their level of authority or control over the NSA's conduct.<sup>91</sup> This practice can make it difficult to identify where responsibility for any harmful conduct should lie;<sup>92</sup> a challenge that becomes particularly apparent when seeking to determine the potential responsibility of an NSA's state sponsor.

## 1.2 Introduction to the law of state responsibility

A state's responsibility in connection with any violations of international law involving an NSA it supports is determined by the law of state responsibility. This body of law regulates when states bear responsibility for conduct that international law deems to be wrongful and the consequences that flow from that responsibility.<sup>93</sup> Its primary purpose, therefore, is to enhance the enforcement of, and compliance with, states' international legal obligations.<sup>94</sup>

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<sup>87</sup> Center for Civilians in Conflict (n 77) 7-8; The New Humanitarian (n 84).

<sup>88</sup> Droege and Tuck (n 63).

<sup>89</sup> Watling and Reynolds (n 26) 30-31; Erica L. Gaston, 'Regulating Irregular Actors: Can Due Diligence Checks Mitigate the Risks of Working with Non-State and Substate Forces?' (*Global Public Policy Institute*, May 2021) 26-47 <<https://odi.org/en/publications/regulating-irregular-actors-can-due-diligence-checks-mitigate-the-risks-of-working-with-non-state-and-substate-forces/>> accessed 20 June 2021.

<sup>90</sup> Byman (n 22); Stephen Biddle, Julia Macdonald and Ryan Baker, 'Small Footprint, Small Payoff: The Military Effectiveness of Security Force Assistance' (2018) 41 *J Strategic Studies* 89, 101-02.

<sup>91</sup> Erica D. Borghard, 'Proxy War Can Have Dangerous Consequences' (*The Washington Post*, 25 July 2014) <[www.washingtonpost.com/news/monkey-cage/wp/2014/07/25/proxy-war-can-have-dangerous-consequences/](http://www.washingtonpost.com/news/monkey-cage/wp/2014/07/25/proxy-war-can-have-dangerous-consequences/)> accessed 22 December 2020; Groh (n 54); ICRC, 'The Roots of Restraint in War' (n 11) 14-15.

<sup>92</sup> Droege and Tuck (n 63).

<sup>93</sup> Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *Eur J Int L* 387, 395.

<sup>94</sup> Alan Nissel, 'The ILC Articles on State Responsibility: Between Self-Help and Solidarity' (2006) 38 *New York U J Intl L and Politics* 355, 355-56, 369.

The starting point for any contemporary study of the law of state responsibility is the work on the subject by the International Law Commission (ILC).<sup>95</sup> While the topic formed the subject of significant prior scholarship and codification efforts,<sup>96</sup> the ILC's comprehensive work on the issue constitutes the benchmark for any critical analysis of the field.

### **1.2.1 The work of the International Law Commission**

The ILC's role, in accordance with Article 13 of the UN Charter, is to 'initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification'.<sup>97</sup> Thus, the ILC does not create international law; its dual roles are to codify existing customary international law and to advance the law's progressive development. During its first session in 1949, the ILC selected state responsibility as one of the initial topics for codification.<sup>98</sup> The Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) with commentaries were finally complete in 2001, the product of nearly five decades of work involving five different Special Rapporteurs.<sup>99</sup>

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<sup>95</sup> International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (ARSIWA).

<sup>96</sup> For a summary of prior codification efforts, see Roberto Ago, 'First Report on State Responsibility – Review of Previous Work on Codification of the Topic of the International Responsibility of States' (1969) UN Doc A/CN.4/217 and Add.1. See also Louis B Sohn and RR Baxter, 'Convention on the International Responsibility of States for Injuries to Aliens' (1961) 55 *American J Intl L* 548; Pierre-Marie Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States' (1992) 3 *Eur J Intl L* 139; Daniel M Bodansky and John R Crook, 'Symposium on the ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 *American J Intl L* 773, 776-777; Jan Arno Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *New York U J Intl L Politics* 265; 776-777; Lucie Laithier, 'Private Codification Efforts' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 53; James Crawford, *State Responsibility: The General Part* (CUP 2013) 3-35.

<sup>97</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 13. See also ILC YB 1949, 'Summary Records and Documents of the First Session including the Report of the Commission to the General Assembly' UN Doc A/CN.4/SR.1-38 9 paras 2-3; Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 *Intl & Comp L Q* 535, 555.

<sup>98</sup> ILC YB 1949 (n 97) 49-50.

<sup>99</sup> The five rapporteurs were Garcia Amador, Roberto Ago, Willem Riphagen, Gaetano Arangio-Ruiz, and James Crawford. For a summary of their respective work as Special Rapporteur, see ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' (23 April to 1 June and 2 July to 10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 20-21; James Crawford, 'State Responsibility' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2015) paras 6-15; Bodansky and Crook (n 96) 777-79. For a critique of the ILC's work, see Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard Intl L J* 1.

### 1.2.1.1 *The development of the draft articles*

The ILC's work on the law of state responsibility was initially slow to progress.<sup>100</sup> Roberto Ago's appointment as Special Rapporteur from 1969, however, gave the project new momentum. Under Ago's leadership, the ILC made the key decision to no longer address contentious issues surrounding the scope of states' international obligations, as articulated within substantive or 'primary' rules. Instead, the ILC focused exclusively on codifying general or 'secondary' rules, meaning the principles that govern states' responsibility when they violate a primary norm.<sup>101</sup>

To illustrate, when states are party to an armed conflict they are bound by primary obligations, including those arising under IHL such as the rule prohibiting indiscriminate attacks.<sup>102</sup> It is the secondary law of state responsibility, however, that determines when an IHL violation engages the state's responsibility, as well as the legal consequences of that breach.<sup>103</sup> These secondary rules apply to all substantive areas of international law, regardless of the primary norm that is violated, the nature of the obligation, or the identity of the state or other actor to which the duty is owed.<sup>104</sup> Their key characteristic is, therefore, their generality of application, across all substantive areas of international law.<sup>105</sup>

The differentiation between primary and secondary norms has been described as 'a distinction of expedience rather than principle'.<sup>106</sup> But although the division between the different categories of norm is not always clear,<sup>107</sup> the ILC's change in focus allowed its state responsibility project to

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<sup>100</sup> ILC YB 1969 vol II 'Documents of the Twenty-First Session Including the Report of the Commission to the General Assembly' UN Doc A/CN.4/SER.A/1969/Add.1 133-37. See also Bodansky and Crook (n 96) 777; James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 Eur J Intl L 435, 436.

<sup>101</sup> See Roberto Ago, 'Second Report on State Responsibility – the Origin of International Responsibility' (1970) UN Doc A/CN.4/233 178 para 7.

<sup>102</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 arts 48, 51 (AP1); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), 'Customary International Humanitarian Law vol I: Rules' (2005) rr 1, 11, 12 <[www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)> accessed 24 October 2017 (ICRC Customary IHL Study).

<sup>103</sup> ARSIWA (n 95) general commentary para 1.

<sup>104</sup> ARSIWA (n 95) general commentary para 5. The position is different, however, when responsibility is governed by special rules of international law. See *ibid* art 55.

<sup>105</sup> Bodansky and Crook (n 96) 780-81.

<sup>106</sup> Robert D Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 American J Intl L 447, 491. See also ILC YB 2000 vol II pt 2, 'Report of the Commission to the General Assembly on the Work of its Fifty-Second Session' UN Doc A/CN.4/SER.A/2000/Add.1(Part 2)/Rev.1 21 para 60; Remy Jorritsma, 'Where General International Law Meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts' (2018) 23 J Conflict and Security L 405, 414-17.

<sup>107</sup> This is case, for example, with art 16. See ARSIWA (n 95) art 16; Ch 8 s 8.2.1.

progress. During his time as Special Rapporteur, Ago completed work on the general conditions relevant to state responsibility, including the draft rules of attribution.<sup>108</sup> Adopted in 1980,<sup>109</sup> the first draft articles form the basis of the law of state responsibility now reflected in ARSIWA.<sup>110</sup> The first reading of the ILC's work, including a full set of draft articles, was then completed in 1996.<sup>111</sup>

James Crawford was nominated Special Rapporteur in 1997 with a mandate of completing a final draft of the project by 2001. In the second reading from 1998 to 2001, Crawford succeeded in resolving the most controversial outstanding issues including those relating to countermeasures, the settlement of disputes, and the notion of state crimes.<sup>112</sup> The substance of the rules of attribution, however, remained largely unaltered from Ago's time.<sup>113</sup>

#### *1.2.1.2 Elements of an internationally wrongful act*

The basic principle that underpins ARSIWA is articulated in its foundational rule: 'Every internationally wrongful act of a State entails the international responsibility of that State'.<sup>114</sup> The term 'international responsibility' refers to the new legal relations arising under international law pursuant to a state's internationally wrongful act.<sup>115</sup> These include obligations on the responsible state to cease its harmful conduct and to make reparation for any injury or damage caused.<sup>116</sup>

There are two elements to an internationally wrongful act, as articulated in Article 2 ARSIWA.<sup>117</sup> First, the conduct in question is attributable to the state under international law and second, the conduct breaches an international obligation of the state.<sup>118</sup>

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<sup>108</sup> Crawford, *State Responsibility: The General Part* (n 96) 36.

<sup>109</sup> ILC YB 1980 vol II(2), 'Report of the Commission to the General Assembly on the Work of its Thirty-Second Session' UN Doc A/CN.4/SER.A.1980/Add.1(Part 2) 30-34.

<sup>110</sup> ARSIWA (n 95) general commentary para 2; Hessbruegge (n 96) 269.

<sup>111</sup> Crawford, *State Responsibility: The General Part* (n 96) 37.

<sup>112</sup> ILC YB 2001 vol II pt 2 (n 99) 22-23; Crawford, *State Responsibility: The General Part* (n 96) 39-41.

<sup>113</sup> Crawford, 'Revising the Draft Articles on State Responsibility' (n 100) 438-39.

<sup>114</sup> ARSIWA (n 95) art 1.

<sup>115</sup> *ibid* art 1 commentary para 1. See also *ibid* arts 28-41.

<sup>116</sup> *ibid* arts 30-31, 34-39.

<sup>117</sup> *ibid* art 2.

<sup>118</sup> *ibid*. See also Brigitte Stern, 'The Elements of an Internationally Wrongful Act in in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 200-18. The ICJ confirmed these two requirements in its jurisprudence. See *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 [56] (*Tehran Hostages*).

The requirement for attribution provides the ‘human link’ between the conduct in potential violation of international law and the artificial entity of the state.<sup>119</sup> As states are abstract entities, they ‘can act only by and through their agents and representatives’.<sup>120</sup> Therefore, to determine whether a state’s international responsibility is engaged, it is necessary to ascertain whether the conduct in question is characterised as an act of the state.<sup>121</sup> This is decided via various rules of attribution. If one of these rules applies, the relevant individual or group is considered ‘a tool of the State’ for the purposes of the law of state responsibility.<sup>122</sup> But if the conduct in question is not attributable to a state, it remains private in character and cannot constitute an internationally wrongful act.<sup>123</sup>

The second element of an internationally wrongful act is the violation of any international obligation that is binding on the responsible state, whether this arises under treaty or customary international law.<sup>124</sup> As the ARSIWA commentary makes clear, ‘What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State’.<sup>125</sup> In the context of an armed conflict, for instance, a state might breach its IHL obligations if members of its armed forces direct their attacks against the civilian population.<sup>126</sup> In such circumstances, the indiscriminate attacks violate the state’s obligations under IHL, and those acts are attributable to the state because they were committed by the state’s armed forces.<sup>127</sup> Therefore, the two elements of an internationally wrongful act are satisfied, and the state’s responsibility is engaged.

Omissions can also constitute internationally wrongful acts.<sup>128</sup> Responsibility arises in such circumstances when the state is under a positive duty to act but fails to do so. For example, a state’s responsibility might be engaged if its organs fail to exercise due diligence to stop an armed group’s activities within its territory from causing harm to other states.<sup>129</sup>

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<sup>119</sup> Chinkin (n 93) 395.

<sup>120</sup> *Questions relating to Settlers of German Origin in Poland* (Advisory Opinion) (1923) PCIJ ser B no 6 [34].

<sup>121</sup> ARSIWA (n 95) art 2 commentary para 5.

<sup>122</sup> Luigi Condorelli and Claus Kress, ‘The Rules of Attribution: General Considerations’ in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 221.

<sup>123</sup> ARSIWA (n 95) art 2. See also *ibid* chapeau to pt 1 ch II commentary para 3.

<sup>124</sup> *ibid* art 2 commentary para 7; *ibid* art 12 commentary para 3. See also Stern (n 118) 210-12.

<sup>125</sup> *ibid* art 2 commentary para 13. The duties to which states are bound vary from one state to the next, due to their different interests and varying treaty commitments. See Crawford, ‘State Responsibility’ (n 99) para 2.

<sup>126</sup> AP1 (n 102) arts 48, 51; ICRC Customary IHL Study (n 102) r 1.

<sup>127</sup> ARSIWA (n 95) art 4.

<sup>128</sup> *ibid* art 2. See also Gordon Christenson, ‘Attributing Acts of Omission to the State’ (1991) 12 Michigan J Intl L 312; Franck Latty, ‘Actions and Omissions’ in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 357-63.

<sup>129</sup> See Ch 6 s 6.4.

A further requirement of an internationally wrongful act, not expressly stated in Article 2, is the absence of any circumstances precluding wrongfulness.<sup>130</sup> The six circumstances articulated in ARSIWA provide ‘a shield against an otherwise well-founded claim for the breach of an international obligation’.<sup>131</sup> These include lawful acts of self-defence in accordance with the UN Charter,<sup>132</sup> and acts taken due to *force majeure*, when the state is compelled to act in a manner that is inconsistent with its international legal obligations.<sup>133</sup>

But there are no additional elements to an internationally wrongful act. Therefore, a state’s responsibility could be engaged even if no damage or injury results from its breach of an international obligation.<sup>134</sup> A state might bear responsibility for conducting indiscriminate attacks in an armed conflict, for instance, even in the absence of evidence that civilians were harmed.<sup>135</sup> The law of state responsibility also includes no requirement for ‘fault’ in terms of a particular level of knowledge or intent on the part of a state, beyond that required by the particular primary norm that is breached.<sup>136</sup> Instead, a state’s responsibility might arise irrespective of the subjective intention of the perpetrator.<sup>137</sup> When assessing a state’s potential responsibility for conduct in breach of its international obligations, therefore, a key question to determine is not the aims of the perpetrator but rather the perpetrator’s relationship with the state.

### 1.2.1.3 *The attribution of private conduct to a state*

The concept of state responsibility rests upon a strict division between the public and private domains. Conduct is either public in nature, in which case it is attributable to a state and can constitute an internationally wrongful act, or it is private and cannot lead to state responsibility.<sup>138</sup> References to attribution thus denote ‘the operation of attaching a given action or omission to a

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<sup>130</sup> Condorelli and Kress (n 122) 224; Stern (n 118) 217.

<sup>131</sup> ARSIWA (n 95) chapeau to pt 1 ch V commentary para 1. See also *ibid* arts 20-25.

<sup>132</sup> *ibid* art 21. See also UN Charter (n 97) art 51.

<sup>133</sup> ARSIWA (n 95) art 23. The other circumstances precluding wrongfulness are consent, countermeasures, distress, and necessity. See *ibid* arts 20, 22, 24-25.

<sup>134</sup> James Crawford, ‘First Report on State Responsibility’ (1998) UN Doc A/CN.4/490 and Add.1-7 28-29. Note, however, that certain primary norms are only violated if damage is caused. See *ibid* 29 para 117a; ARSIWA (n 95) art 2 commentary para 9; Crawford, *State Responsibility: The General Part* (n 96) 54-60.

<sup>135</sup> ICRC Customary IHL Study (n 102) r 1. However, the level of damage or injury will impact the nature and quantum of any reparations owed to the injured state. See ARSIWA (n 95) arts 31, 34-38.

<sup>136</sup> Crawford’s First Report on State Responsibility (n 100) 29-30. See also Crawford, ‘Revising the Draft Articles on State Responsibility’ (n 100) 438.

<sup>137</sup> Stern (n 118) 209-10.

<sup>138</sup> ARSIWA (n 95) art 2. See also Chinkin (n 93).

State'.<sup>139</sup> Or as Caron put it, the rules of attribution 'delineate the edge of State Responsibility, separating the public realm for which the State may be held responsible from the private realm' for which it is not.<sup>140</sup>

The principle that underlies the attribution standards reflected in ARSIWA is that states should bear responsibility only for conduct that can properly be categorised as their own.<sup>141</sup> Earlier versions of the ILC's work included a specific article to this effect that was later deleted.<sup>142</sup> The intent of that article, however, is firmly embedded in the remaining rules of attribution. Thus, the fact that a particular act takes place within a state's territory or by one of its nationals is an insufficient basis for attributing the relevant conduct to the state.<sup>143</sup> Instead, a far stronger link must exist between the state and the private conduct at issue.

That link can be established either by law or by fact. A primary question when considering the issue of attribution is whether the relevant individual or group is characterised as a state organ under the terms of the state's domestic law. If it is, the entity is a *de jure* state organ and the state bears responsibility for all its conduct when acting in that capacity, as reflected in Article 4 ARSIWA.<sup>144</sup> Clear examples of actors that fall within this category are soldiers within a state's armed forces, police officers, and government ministers.

Article 4 applies equally to the conduct of *de facto* state organs.<sup>145</sup> This term refers to those entities that are not labelled as organs of state by domestic law but are nonetheless analogous to state organs in terms of their complete dependence on the state and their lack of autonomy.<sup>146</sup> This status

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<sup>139</sup> ARSIWA (n 95) art 2 commentary para 12.

<sup>140</sup> David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (ASIL 1998). See also See ILC YB 1970 vol II, 'Documents of the Twenty-Second Session Including the Report of the Commission to the General Assembly' UN Doc A/CN.4/SERA/1970/Add.1 189-90; Chinkin (n 93) 387.

<sup>141</sup> ARSIWA (n 95) chapeau to pt 1 ch II commentary para 2. See also Crawford's First Report on State Responsibility (n 134) 33 para 154; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart 2006) 24-42; Condorelli and Kress (n 122) 224; Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 260-61.

<sup>142</sup> Draft Article 11 provided: 'The conduct of a person or a group of persons not acting on behalf of the state shall not be considered as an act of the State under international law...' See Crawford's First Report on State Responsibility (n 134) 48-49.

<sup>143</sup> *ibid* 33 para 154. See also Caron, 'The Basis of Responsibility' (n 140) 127.

<sup>144</sup> ARSIWA (n 95) art 4. See also Ch 3.

<sup>145</sup> ARSIWA (n 95) art 4 commentary para 11. See also Ch 3 s 3.3.

<sup>146</sup> *ibid*.

could apply, for instance, to a militia group that acts as a state police force if the required levels of dependence and control are met.

Control is also a key factor when considering attribution under the rule reflected in Article 8. This applies when an NSA acts on the state's instructions, or under its direction or control.<sup>147</sup> The broad purpose of the rule is to attribute to a state private conduct that, in fact, is performed on the state's behalf. For instance, if a state tasks an armed group to assault a village and during that operation the NSA targets civilians, the NSA's conduct in violation of IHL is potentially attributable to the state.<sup>148</sup>

In contrast to Article 8, the presence or absence of state control over an entity's activities is irrelevant to the issue of attribution under the rule reflected in Article 5.<sup>149</sup> This rule applies when states empower NSAs, via their domestic law, to exercise public functions on the states' behalf. For instance, if a state delegates the task of interrogating individuals detained during an armed conflict to a PMSC and the contractors working for that PMSC mistreat detainees, their conduct in potential violation of IHL is attributable to the state.<sup>150</sup>

The remaining rules of attribution, reflected in Articles 9, 10, and 11 ARSIWA, address certain exceptional categories of attribution.<sup>151</sup> Although their scope of application is limited, these rules could apply to the situations of contemporary conflict addressed in this study. For instance, the conduct of an armed group that launches an attack against civilians could be attributable to a state on the basis that the state subsequently acknowledges and adopts the NSA's conduct as its own within the meaning of the rule reflected in Article 11.<sup>152</sup>

More than one of the rules of attribution expressed in ARSIWA could potentially apply to the same factual scenario. The attack against civilians referred to in the context of Article 11, for example, could equally be attributable to the state because the NSA acted under the state's control at the relevant time.<sup>153</sup> Thus, the rules are cumulative, but they are also limitative, in the sense that states

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<sup>147</sup> ARSIWA (n 95) art 8. See also Ch 5.

<sup>148</sup> ICRC Customary IHL Study (n 102) r 1. See also Ch 5 s 5.3.

<sup>149</sup> ARSIWA (n 95) art 5. See also *ibid* commentary para 7.

<sup>150</sup> ICRC Customary IHL Study (n 102) rr 87-90. See also Ch 4.

<sup>151</sup> ARSIWA (n 95) arts 9-11.

<sup>152</sup> *ibid* art 11.

<sup>153</sup> *ibid* art 8. See also Ch 5 s 5.4.



bear responsibility for an NSA's conduct only if the threshold for attribution relevant to one or more of those rules is satisfied.<sup>154</sup>

In this way, the rules of attribution create a strict public private divide, which allows for no middle ground to address harmful conduct involving both state and private actors. Special Rapporteur Ago asserted in 1972 that 'since a private individual cannot violate an international obligation, complicity between the individual and the State for the purpose of such a violation would be inconceivable'.<sup>155</sup> Due to NSAs' lack of international legal personality, therefore, ARSIWA does not provide for states to bear responsibility when they facilitate harmful conduct on the part of NSAs.<sup>156</sup> This omission raises questions regarding the evolution of the law of state responsibility, in light of the realities of modern warfare, as well as ARSIWA's status in customary international law.<sup>157</sup>

### **1.2.2 ARSIWA's status in customary international law**

After the ILC finalised and adopted ARSIWA in 2001,<sup>158</sup> the UN General Assembly took note of the draft articles and commended them to governments.<sup>159</sup> The Resolution postponed future consideration of the articles, leaving open the question whether these should be addressed in a subsequent convention.<sup>160</sup> States that commented in relation to this possibility largely expressed reservations, arguing that moving towards the adoption of a convention would risk undermining the broad consensus that had been reached regarding ARSIWA's content and scope.<sup>161</sup>

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<sup>154</sup> Crawford's First Report on State Responsibility (n 134) 34 para 155.

<sup>155</sup> Roberto Ago, 'Fourth Report on State Responsibility – the Internationally Wrongful Act of the State, Source of International Responsibility' (1972) UN Doc A/CN.4/264 and Add.1 96 para 64.

<sup>156</sup> For further discussion regarding the consequences of NSAs' lack of international legal personality, see eg Jan Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martius Nijhoff 2003); Andrea Bianchi, 'The Fight for Inclusion: Non-State Actors and International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011). See also Ch 8.

<sup>157</sup> James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American J Intl L* 874, 888.

<sup>158</sup> ILC YB 2001 vol II pt 2 (n 99) 25.

<sup>159</sup> UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

<sup>160</sup> *ibid* para 4.

<sup>161</sup> UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (9 March 2007) UN Doc A/62/63 6 para 7 (comments of the United Kingdom); US Department of State, 'Draft Articles on State Responsibility: Comments of the Government of the United States of America' (1 March 2001). For an outline of opposing views on the issue, see ILC YB 2001 vol II pt 2 (n 99) 24-25; David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 *American J Intl L* 857, 862-66; James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 *Intl and Comparative L Quarterly* 959; Crawford, *State Responsibility: The General Part* (n 96) 90-92; Federica L Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility:

Notwithstanding ARSIWA's continued status as draft articles, which are not binding on states,<sup>162</sup> the ILC's work is considered 'the most authoritative statement available on questions of state responsibility'.<sup>163</sup> As the United Kingdom put it:

States generally have accepted the draft articles in their current form. At present, the draft articles reflect an authoritative statement of international law and have been referred to by international courts and tribunals, writers and, more recently, domestic courts... [S]ince 2001 the draft articles have gained widespread recognition and approval. Many States, including the United Kingdom, regularly turn to the draft articles and the commentaries as guidance on issues of State responsibility that arise in day-to-day practice.<sup>164</sup>

ARSIWA is thus widely accepted and is generally considered to have codified well-established rules of customary international law.<sup>165</sup> The articles and their commentaries were cited by international courts, tribunals, and other bodies in 163 cases by 2016<sup>166</sup> and in a further 83 cases by 2019.<sup>167</sup> But a review of the relevant practice reveals that these frequent citations are not always accompanied by a quality of reasoning or approval in state practice.<sup>168</sup> As Caron observed, 'when there is a "legal vacuum" of authority relevant to an issue, courts and arbitral panels will turn to whatever is available. In that situation, a set of articles adopted by the ILC will be quite influential, perhaps even more influential than a treaty'.<sup>169</sup>

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Recent Developments' (2018) 21 Max Planck YB UN L 83; Arman Sarvarian, 'The Ossified Debate on a UN Convention on State Responsibility' (2021) 70 Intl & Comparative L Q 769.

<sup>162</sup> ARSIWA represents a 'subsidiary means for the determination of rules of law'. See Statute of the International Court of Justice (entered into force 24 October 1945) TS 993 art 38(1). See also Caron 'The ILC Articles on State Responsibility' (n 161) 867-68; Bordin (n 97) 537.

<sup>163</sup> UNGA, 'Comments and Information Received from Governments' (n 161) 3 para 2 (comments of Norway on behalf of the Nordic countries).

<sup>164</sup> UNGA, 'Comments and Information Received from Governments' (n 161) 6 para 5.

<sup>165</sup> *ibid* 3 para 2 (comments of Norway on behalf of the Nordic countries); *ibid* 17 para 40 (comments of Germany). See also Crawford, *State Responsibility: The General Part* (n 96) 43; Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 79.

<sup>166</sup> UNGA, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies' (20 June 2017) UN Doc A/71/80/Add.1 paras 5-6. See also UN Legislative Series, 'Materials on the Responsibility of States for Internationally Wrongful Acts' (2012) UN Doc ST/LEG/SER B/25 viii.

<sup>167</sup> UNGA, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies' (23 April 2019) UN Doc A/74/83 para 5. See also UNGA Res 74/180 (27 December 2019) UN Doc A/RES/74/180 paras 1, 4.

<sup>168</sup> Martins Paporinskis, 'The Once and Future Law of State Responsibility' (2020) 114 American J Intl L 618, 624-25.

<sup>169</sup> Caron, 'The ILC Articles on State Responsibility' (n 161) 866. See also Allott (n 99) 11; Robert Rosenstock, 'The ILC and State Responsibility' (2002) 96 American J Intl L 792, 792; Bordin (n 97); Georgio Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 Brit YB Intl L 10, 11.

When considering the status of the work, it is important to recall that ARSIWA's adoption followed a period of 'intense negotiation and compromise' with the result that 'the text of the draft articles in its entirety is not wholly satisfactory to any State'.<sup>170</sup> The ILC necessarily made legal and policy judgments when finalising the work, particularly in light of the numerous pressures to which it was subject.<sup>171</sup> As such, ARSIWA is not a complete or perfect representation of the law of state responsibility; it is the best depiction of the law that the ILC was able to agree at that time.<sup>172</sup>

There is, moreover, a danger that the process of codification undertaken by the ILC entailed a process of simplification and compromises that fails to reflect the true complexity of this body of law.<sup>173</sup> The alacrity with which international courts and tribunals have sought to 'apply' the articles illustrates ARSIWA's appeal but also, perhaps, masks the more nuanced interpretations of the law that might have been made in the articles' absence.

Each of ARSIWA's provisions, therefore, should be treated not as binding law but rather as evidence of the particular international rule upon which it is founded.<sup>174</sup> Given the ILC's dual mandates of codification and progressive development, there are inevitably elements of each within the text.<sup>175</sup> While many provisions are uncontroversial and clearly reflective of customary international law,<sup>176</sup> others remain 'in a state of development'.<sup>177</sup> The status of any one article therefore cannot be assumed and in some cases, it may be far from straightforward to ascertain whether a provision is customary in nature or representative of *lex ferenda*.<sup>178</sup>

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<sup>170</sup> UNGA, 'Comments and Information Received from Governments' (n 161) 6 para 4 (comments of the United Kingdom). See also United States Department of State (n 161).

<sup>171</sup> See Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (n 157) 888. See also Crawford, *State Responsibility: The General Part* (n 96) 3-44.

<sup>172</sup> For a summary of some of the issues raised by states and legal scholars, see Crawford, *State Responsibility: The General Part* (n 96) 85-90.

<sup>173</sup> Nissel (n 94) 358 fn 13.

<sup>174</sup> Bodansky and Crook (n 96) 775; Bordin (n 97) 560.

<sup>175</sup> ARSIWA (n 95) general commentary para 1. See also United States Department of State (n 161).

<sup>176</sup> Article 4 ARSIWA falls into this category. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [385] (*Bosnian Genocide*). See also ARSIWA (n 95) art 4 commentary para 13.

<sup>177</sup> The legal regime relating to serious breaches of peremptory norms falls into this category. See ARSIWA (n 95) art 41 commentary para 14. See also United States Department of State (n 161).

<sup>178</sup> Gilbert Guillaume, 'Overview of Part One of the Articles on State Responsibility' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 188.

A further factor impacting upon ARSIWA's status is the continued development of the law of state responsibility.<sup>179</sup> This is a particularly pertinent consideration in the context of armed conflict given the articles' state-centric focus, founded on the international legal order's recognition of states as the primary bearers of rights and obligations.<sup>180</sup> Both prior to and since ARSIWA's adoption, the world has witnessed an increased complexity of international actors, including a multiplicity of powerful NSAs.<sup>181</sup> This reality is not adequately addressed within ARSIWA.<sup>182</sup> But the possibility cannot be excluded that the customary law of state responsibility that underlies the ILC's work is already adapting in response to this change.<sup>183</sup>

### 1.3 Research overview

The ILC's work on the law of state responsibility highlights the difficulties that arise when seeking to determine states' responsibility in respect of conduct involving actors that fall outside the structure of the state. This is particularly apparent when delineating between public conduct that is attributable to a state and private conduct that is not.<sup>184</sup> In determining where the relevant attribution thresholds should lie, tensions between competing interests become clear. In conflict situations, humanitarian concerns call for less stringent rules of attribution to ensure that states are held to account when the NSAs they support violate international law. But counter to this is the principle that states should bear responsibility only for conduct that can be truly categorised as their own.<sup>185</sup> Holding states accountable for a wide range of private conduct, with which they might be only marginally involved, would extend states' responsibility too far, particularly in situations of contemporary conflict in which NSAs often act with considerable autonomy and with varying levels of state support. A delicate balance must therefore be struck.

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<sup>179</sup> Caron, 'The ILC Articles on State Responsibility' (n 161) 859. The ILC's work on the responsibility of international organisations reflects the continuing development of the law in this area. See ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' in ILC YB 2011 vol II(2), 'Report of the ILC on its Sixty-Third Session' UN Doc A/CN.4/SER.A/2011/Add.1(Part 2).

<sup>180</sup> Bianchi (n 156) 39-40.

<sup>181</sup> Caron, 'The ILC Articles on State Responsibility' (n 161) 859; Krieg and Rickli (n 22) 120; Cahin (n 20) 331-41.

<sup>182</sup> Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American J Intl L* 798, 799; Bodansky and Crook (n 96) 790.

<sup>183</sup> The articles' endorsement by the General Assembly as opposed to their adoption as a convention purposively allows for flexibility in the law's further development. See Crawford, *State Responsibility: The General Part* (n 96) 90-91.

<sup>184</sup> Chinkin (n 93).

<sup>185</sup> See *Bosnian Genocide* (n 176) [406].

### 1.3.1 *Objectives and scope*

This study explores that balance, seeking to ascertain whether it is correctly poised or tips too far in either direction. The principal objectives of the research project are thus threefold: first, to clarify the precise circumstances in which private conduct is attributable to a state in contemporary conflict; second, to evaluate the sufficiency of the rules of attribution reflected in ARSIWA in holding states that choose to act via NSAs to account; and third, to assess how any inadequacies in the regulation of states' support to NSAs in conflict situations should be remedied.

The thesis argues that there is a gap in accountability, which allows states to act via proxy in a manner that they could not lawfully act via their own organs. The 'all or nothing' approach that results from the process of attribution fails to address either the myriad ways in which states contribute towards abuses perpetrated by NSAs, or the power that some NSAs exert in their relationships with states. This lacuna is partially filled by primary norms of international law such as international human rights law (IHRL) and the principle of non-intervention. However, such norms are fragmented and incomplete in their effects and an accountability gap persists.

Two primary arguments result. First, the study contends that the preponderant interpretations of the respective rules of attribution are too inflexible to be of practical relevance in situations of armed conflict. A less stringent formulation of these rules would better meet the object and purpose of the law of state responsibility in view of the realities of states' contemporary interactions with NSAs. Second, the thesis asserts that even if this proposed relaxation of the attribution thresholds is applied, this alone is insufficient to close the gap in accountability. International law must additionally hold states to account for their own actions in facilitating NSAs' harmful conduct, in the event that they enable an NSA to commit acts that would be internationally wrongful if perpetrated directly by the state.

In terms of scope, the focus of the research is the application of the law of state responsibility to situations of armed conflict. The international law violations that are most relevant in this context are therefore breaches of IHL. However, as the precise point at which a NIAC commences is often unclear,<sup>186</sup> the thesis also addresses situations below the armed conflict threshold, such as the early

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<sup>186</sup> Two criteria must be met before disturbances are classified as a NIAC: the hostilities must reach a minimum level of intensity; and the NSAs involved in the conflict must be sufficiently organised. See *Prosecutor v Tadić* (Decision on the

stages of the disturbances in Syria and Ukraine. In such circumstances, IHRL is often the most relevant body of law that states might breach through their support to NSAs.

The research centres primarily on states' use of proxies in conventional warfighting scenarios. It is increasingly common, however, for states to engage with NSAs in the cyber domain.<sup>187</sup> When cyber operations are linked to armed conflict, as occurred in the 2008 hostilities between Georgia and Russia,<sup>188</sup> these fall within the thesis's scope. In light of the growing consensus among states that international law, including the law of state responsibility, applies to cyberspace,<sup>189</sup> the study proceeds on the basis that the rules of attribution reflected in ARSIWA are equally applicable to this domain.

NSAs are defined in the negative, namely as any person, group, or entity falling outside the structure of a state. In contemporary conflict, therefore, the term encompasses a broad spectrum of actors, ranging from armed groups, to PMSCs, to individual hackers engaged in hostile cyber operations. This study considers states' relationships with all categories of NSA engaged in conflict, whether the NSA is based within or outside the state's own territory.<sup>190</sup> It does not, however, address the potential responsibility of NSAs for their own conduct,<sup>191</sup> or states' responsibility for the conduct of other states.<sup>192</sup>

While the relationships between states and NSAs involve a minimum of two actors, they are often more complex.<sup>193</sup> It is common, for instance, for armed groups involved in conflict to receive support from more than just one state.<sup>194</sup> These multifaceted relationships raise important issues of

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Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1-A (1995) [70]; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 155-211.

<sup>187</sup> See Ch 4 s 4.2.2.

<sup>188</sup> John Markoff, 'Before the Gunfire, Cyberattacks' (*The New York Times*, 12 August 2008) <[www.nytimes.com/2008/08/13/technology/13cyber.html](http://www.nytimes.com/2008/08/13/technology/13cyber.html)> accessed 19 January 2018.

<sup>189</sup> UNGA, Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security (14 July 2021) UN Doc A/76/135 18 para 71(g). See also Tallinn Manual 2.0 (n 165) rr 14-30.

<sup>190</sup> This contrasts with much of the scholarship relating to 'proxy warfare', which focuses solely on external states' support to actors involved in conflict. See eg Mumford (n 23) 11, 45; Hughes (n 25) 11.

<sup>191</sup> See eg Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *Intl Rev Red Cross* 491; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP 2017).

<sup>192</sup> See ARSIWA (n 95) arts 17, 18.

<sup>193</sup> Mumford (n 23) 103.

<sup>194</sup> For example, the rebel group M23 received substantial support from both Rwanda and Uganda. See Ch 2 s 2.3.

shared responsibility between states, as well as the potential for shared responsibility between states and NSAs.<sup>195</sup> Although highly relevant, such issues are beyond the scope of the research.

Regarding the law of state responsibility, the thesis focuses on the rules of attribution reflected in Articles 4, 5 and 8 ARSIWA.<sup>196</sup> In the case of Articles 4 and 5, attribution is based on the state's domestic law, which either designates individuals or entities as state organs or authorises them to exercise elements of governmental authority.<sup>197</sup> Attribution under the rule expressed in Article 8, meanwhile, as well as *de facto* state organ status for the purposes of Article 4, is founded on the existence of a *de facto* principal-agent relationship in which the NSA is subordinate to the state and does its bidding.<sup>198</sup> The remaining attribution standards reflected in ARSIWA that are applicable to the actions of NSAs provide for the attribution of private conduct to the state in very specific circumstances,<sup>199</sup> which are less prevalent in the contemporary conflicts addressed by this research. Therefore, the study does not consider every possible basis of attribution, but only those grounds on which attribution is most likely to occur.

### **1.3.2 Methodology**

This thesis predominantly comprises a doctrinal study of the norms governing states' international responsibility.<sup>200</sup> It is concerned primarily with the customary international law reflected in ARSIWA and its commentaries, including the underlying sources of law upon which the individual articles are based. The jurisprudence of the ICJ on the issue of attribution, and the academic scholarship relating to that jurisprudence, are of particular importance.

The research applies the rules of attribution reflected in ARSIWA to several case studies. While the law of state responsibility is of general application, understanding its impact in contemporary conflict requires a focus on specific hostilities. Therefore, the thesis examines three conflicts in

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<sup>195</sup> See eg Jean d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 Netherlands Intl L Rev 49; Veronika Bilkova, 'Armed Opposition Groups and Shared Responsibility' (2015) 62 Netherlands Intl L Rev 69; Kimberley N Trapp, 'Shared Responsibility and Non-State Terrorist Actors' (2015) 62 Netherlands Intl L Rev 141; André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan J Intl L 359; André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 Eur J Intl L 15.

<sup>196</sup> See Chs 3-5.

<sup>197</sup> See Chs 3, 4.

<sup>198</sup> See Ch 3 s 3.3; Ch 5. See also Becker (n 141) 42.

<sup>199</sup> See ARSIWA (n 95) arts 9-11.

<sup>200</sup> On the meaning of this categorisation of legal research, see eg Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 101-05.

depth, focusing on the relationships between the relevant states and NSAs, the nature and extent of the state support provided, and the international law violations involving those NSAs. It then applies the rules of attribution to situations arising within those conflicts, aiming to clarify the precise meaning and scope of the attribution standards.

In addition to the law of state responsibility, the research considers primary norms of international law to the extent necessary to determine whether their breach gives rise to an internationally wrongful act. Given the study's focus on contemporary conflict, the main bodies of law that are relevant in this context are IHL and IHRL. The thesis also addresses additional primary norms of international law in the context of assessing the existence and scope of a potential gap in accountability. Here, the research examines norms arising from both treaty and customary international law that apply to states' dealings with NSAs in conflict situations including the prohibition on the use of force, the principle of non-intervention, and the duty under the Geneva Conventions for states to respect and ensure respect for IHL.<sup>201</sup> The purpose in each case is not to analyse these norms in detail or to reach a conclusion regarding their precise scope, but rather to consider the extent to which they fill the accountability gap that emerges due to the stringent attribution thresholds.

The principal focus of the study is on what the law is (*lex lata*) as opposed to what the law should be (*lex ferenda*). While admitting that this distinction is 'in large measure a false dichotomy',<sup>202</sup> the research considers the existing norms within the law of state responsibility that are relevant to the issue of attribution and the proper interpretation of those norms to meet the law's object and purpose.<sup>203</sup> In so doing, the research acknowledges that although the ILC sought to codify the law of state responsibility as it stood in 2001, that law is not inflexible and must continue to adapt to meet the challenges of the modern world, including those arising in contemporary conflict.

### **1.3.3 Structure**

The thesis begins by examining three contemporary conflicts in detail: the hostilities in Syria that commenced in 2011; the conflict in eastern Ukraine that began in 2014; and the 2012 conflict in the

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<sup>201</sup> See Ch 6.

<sup>202</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995) 10.

<sup>203</sup> Although not strictly applicable to the interpretation of customary international law, the study's interpretive approach is based on the relevant rules of the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).



Democratic Republic of Congo involving the rebel group M23. Each of these conflicts is characterised by significant state support to NSAs, together with numerous IHL violations.

Having set the scene, Chapters 3 to 5 address, in turn, the rules of attribution reflected in Articles 4, 5 and 8 ARSIWA. These are the rules that are most likely to apply to attribute private conduct to a state in situations of armed conflict. In each case, the chapter seeks to clarify the practical meaning of the relevant attribution standard through its application to the contemporary conflict situations outlined in Chapter 2. In addition, the research assesses the sufficiency of the rules in this context, seeking to determine whether these adequately meet the object and purpose of the law of state responsibility.

The analysis in Chapters 3 to 5 leads to a conclusion that the relevant rules of attribution, as interpreted by authoritative bodies such as the ILC and the ICJ, fail to hold states properly to account when they act through NSAs in conflict situations. In Chapter 6, therefore, the thesis turns to primary norms of international law to assess the extent to which these hold states to account for their own organs' conduct in such circumstances. Chapter 7 then draws together the issues highlighted in the preceding enquiry to, first, define the scope of the accountability gap that remains and, second, to assess the extent to which that lacuna can be narrowed through a more flexible interpretation of the rules of attribution.

Chapter 7's analysis reveals that a loosening of all three attribution standards, although an important development in the law of state responsibility, would, alone, be insufficient to close the accountability gap. Frequently, states provide intelligence, training, or other assistance to NSAs without also exercising the high degree of control over their conduct that is the prerequisite of attribution. Even if a state's support clearly facilitates an NSA's conduct in potential violation of international law, ARSIWA includes no mechanism through which the state can bear responsibility for its contribution towards that wrong. Chapter 8 therefore examines potential ways in which states could be held to account in respect of their support to NSAs in situations where the rules of attribution do not apply.

#### ***1.3.4 The importance of the research***

This analysis fills a critical gap in the existing literature. Although scholarship abounds on the issue of attribution, there is currently little in-depth analysis regarding the precise meaning of the

attribution thresholds in situations of conflict. Using examples from case studies, the research demonstrates that the predominant interpretations of the relevant rules of attribution are overly stringent and inflexible, meaning that they fail to attribute private conduct to a state in all circumstances in which it is appropriate to do so. This, in turn, acts as an incentive to states to conduct their foreign policy via proxy and imposes a heavy evidential burden on injured states seeking redress.

Having identified a gap in accountability, the research explores potential ways in which international law could evolve to fill that lacuna. Again, this enquiry builds significantly upon current scholarship, particularly in its exploration of the potential application of Article 16 ARSIWA, relating to states' aid or assistance towards other states' international wrongs, to the facilitation of private harms.<sup>204</sup> The research additionally offers a new perspective on the attribution standards reflected in Articles 4, 5 and 8 ARSIWA, proposing a more effective interpretation of each of these rules to better meet the object and purpose of the law of state responsibility.<sup>205</sup>

The importance of the research is clear. The future of warfare is unlikely to see any diminution in either the power and autonomy of NSAs, or of states' desire to defend their interests without becoming directly embroiled in conflict.<sup>206</sup> States will, in all likelihood, continue to 'externalize the burden of warfare',<sup>207</sup> particularly as their focus shifts towards great power competition and the necessity to compete while avoiding direct confrontation.<sup>208</sup> Meanwhile, future hostilities that involve NSAs are likely to continue to feature numerous IHL and other international legal violations.

As such, the need to hold states to account for their contributions towards the harms perpetrated by NSAs remains paramount. While concurrent developments in international law to hold NSAs directly responsible for their own conduct are critical, these must be accompanied by the effective accountability of states. Despite NSAs' increasing power and influence in international affairs, it is state support that frequently enhances not only their authority but also their ability to cause harm. The law of state responsibility must therefore evolve to reflect that reality.

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<sup>204</sup> See Ch 8.

<sup>205</sup> See Ch 7 s 7.2.

<sup>206</sup> Krieg (n 28) 107-08.

<sup>207</sup> Krieg and Rickli (n 22) 114.

<sup>208</sup> Pfaff and Granfield (n 80); ICRC, 'Allies, Partners and Proxies' (n 11) 19.

## Chapter 2 – State Support to Non-State Actors in Contemporary Conflict

Acting through NSAs is an ancient technique of foreign policy, used by states throughout history to further their national interests. As early as the Peloponnesian War, the Spartans and the Athenians each provided support to local rebellions against their enemies.<sup>1</sup> The trend did not diminish in the centuries that followed and examples of states' support to NSAs abound. These range from the French assistance to patriots during the American Revolution<sup>2</sup> to the allied support provided to resistance movements in occupied Europe during the Second World War.<sup>3</sup>

States' use of NSAs to promote their foreign policy goals became increasingly prevalent after 1945. During the Cold War, inter-state rivalries were rife but numerous factors, including the ever-present threat of nuclear confrontation, militated against the outbreak of largescale war.<sup>4</sup> States accordingly looked for means other than state-on-state conflict to achieve their aims, often intervening in smaller, regional conflicts, such as independence struggles against colonial rule.<sup>5</sup> Rebel movements fighting against the Portuguese in Angola, for instance, received significant external assistance, causing the conflict to escalate and descend into civil war.<sup>6</sup>

This chapter examines states' support to NSAs in more recent times, focusing on the hostilities in Syria, eastern Ukraine, and the Democratic Republic of the Congo (DRC). Each of these conflicts features substantial state support to NSAs, as well as countless IHL violations. Chapters 3 to 5 then draw upon these case studies to analyse the issue of attribution, namely whether private conduct committed in potential violation of international law during these conflicts is attributable to a supporting state.

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<sup>1</sup> Max Boot, 'Countering Hybrid Warfare' in Nigel Inkster (ed), *The Armed Conflict Survey 2015* (Routledge 2015) 11-12.

<sup>2</sup> Neil Longley York, *Turning the World Upside Down: The War of American Independence and the Problem of Empire* (Praeger 2003) 118-20; Jeffrey Record, 'External Assistance: Enabler of Insurgent Success' (2006) 36 *The US Army War College Quarterly: Parameters* 36, 37-40.

<sup>3</sup> Travis L Homiak, 'Expanding the American Way of War: Working "Through, With, or By" Non-US Actors' (*Joint Special Operations University Report 09-3*, February 2009) 27-28; Boot (n 1) 16-17.

<sup>4</sup> Andrew Mumford, *Proxy Warfare* (Polity Press 2013) 38-44. See also Michael Poznansky, 'The United Nations and the Accidental Rise of Covert Intervention' (*Lawfare*, 28 June 2020) <[www.lawfareblog.com/united-nations-and-accidental-rise-covert-intervention](http://www.lawfareblog.com/united-nations-and-accidental-rise-covert-intervention)> accessed 19 December 2020.

<sup>5</sup> Richard D Newton, 'The Seeds of Surrogate Warfare' (*Joint Special Operations University Report 09-3*, February 2009); Geraint Hughes, *My Enemy's Enemy: Proxy Warfare in International Politics* (Sussex Academic Press 2014) 21.

<sup>6</sup> Hughes (n 5) 62-86.

## 2.1 Syria

The Syrian civil war began in early 2011, with largely peaceful protests against the government of Bashar al-Assad.<sup>7</sup> Government forces responded with violence and in the ensuing months, armed conflict broke out in parts of the country.<sup>8</sup> The hostilities then evolved into a complex, sectarian war, involving numerous armed groups, frequent violations of international law, and significant state intervention.<sup>9</sup>

Various states initially rallied behind the forces opposing President Assad.<sup>10</sup> Saudi Arabia, for instance, viewed the conflict as an opportunity to weaken the Syrian regime and so to isolate Iran.<sup>11</sup> But with the rise of ISIS in 2014, the focus of many states shifted from regime change to counter terrorism. From that time on, the United States and its allies prioritised their support to NSAs involved in the fight against ISIS, principally the Kurdish People's Protection Units (YPG).<sup>12</sup> Turkey, however, perceived the YPG's rise as a threat due to the Kurds' links to the terrorist group the PKK, and thus used Syrian opposition forces for its own ends, to seize control of territory held by the Kurds along its southern border.<sup>13</sup>

A myriad of forces also supported the Syrian government. These included not only the Iranian and Russian militaries but also Hezbollah and other Shi'a militia groups, with the benefit of significant

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<sup>7</sup> See generally Brian M Jenkins 'The Dynamics of Syria's Civil War' (*RAND Corporation*, 2014) <[www.rand.org/pubs/perspectives/PE115.html](http://www.rand.org/pubs/perspectives/PE115.html)> accessed 12 December 2017; Christopher M Blanchard, Carla E Humud and Mary Beth D Nikitin, 'Armed Conflict in Syria, Overview and US Response' (2014) 5 *Current Politics and Economics of the Middle East* 237; Zachary Laub, 'Syria's Civil War: The Descent into Horror' (*Council on Foreign Relations*, 17 March 2021) <[www.cfr.org/article/syrias-civil-war](http://www.cfr.org/article/syrias-civil-war)> accessed 27 March 2021.

<sup>8</sup> *ibid.*

<sup>9</sup> Jenkins (n 7); Blanchard, Humud and Nikitin (n 7) 243; Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92 *Intl L Studies* 353; Laub (n 7).

<sup>10</sup> Saskia Baas, 'Syria's Armed Opposition: A Spotlight on the Moderates' (*Small Arms Survey*, January 2016) 3-4 <[www.smallarmssurvey.org/fileadmin/docs/R-SANA/SANA-Dispatch5-Syria-armed-opposition.pdf](http://www.smallarmssurvey.org/fileadmin/docs/R-SANA/SANA-Dispatch5-Syria-armed-opposition.pdf)> accessed 12 December 2017.

<sup>11</sup> Athina Tzemprin, Jugoslav Jozić and Henry Lambare, 'The Middle East Cold War: Iran-Saudi Arabia and the Way Ahead' (2015) 52 *Croatian Political Science Rev* 187, 193-4.

<sup>12</sup> See s 2.1.3.

<sup>13</sup> See s 2.1.4.

aid from Iran.<sup>14</sup> From 2016, the Russian NSA the Wagner Group additionally bolstered pro-regime forces, with backing from Moscow.<sup>15</sup>

This mélange of ever-evolving state and non-state participants to the Syrian conflict is a distinct feature of the hostilities. Another is the parties' propensity to violate international law.<sup>16</sup> During the first year of the conflict, the UN Human Rights Council established a Commission of Inquiry, mandated to investigate all alleged IHRL violations in Syria since March 2011.<sup>17</sup> The Commission has since produced numerous reports, documenting countless abuses involving all parties to the hostilities.<sup>18</sup>

This section is divided into four parts, focusing respectively on the rebels opposing the Assad regime, NSAs bolstering Syrian government forces, Kurdish groups involved in the fight against

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<sup>14</sup> International Institute of Strategic Studies, 'Iran's Networks of Influence in the Middle East' (November 2019) <<https://www.iiss.org/publications/strategic-dossiers/iran-dossier/iran-19-03-ch-1-tehrans-strategic-intent>> accessed 27 March 2021. See also s 2.1.2.

<sup>15</sup> Metin Gurcan, 'Private Military Companies: Moscow's Other Army in Syria' (*AL-Monitor*, 29 November 2017) <[www.al-monitor.com/pulse/originals/2017/11/turkey-russia-private-army-in-syria.html](http://www.al-monitor.com/pulse/originals/2017/11/turkey-russia-private-army-in-syria.html)> accessed 9 January 2018. See also s 2.1.2.2.

<sup>16</sup> See generally Beth Van Schaack, *Imagining Justice for Syria* (OUP 2020); Syria Justice and Accountability Centre, 'The State of Justice: Syria 2021' (March 2021) <<https://syriaaccountability.org/wp-content/uploads/SJS-English-Compressed.pdf>> accessed 1 May 2021.

<sup>17</sup> UNHRC Res S-17/1 'Situation of Human Rights in the Syrian Arab Republic' (2011). See also UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (23 November 2011) UN Doc A/HRC/S-17/2/Add-1 4 para 4.

<sup>18</sup> These include UNHRC Report of 23 November 2011 (n 17); UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 August 2012) UN Doc A/HRC/21/50; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (5 February 2013) UN Doc A/HRC/22/59; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (4 June 2013) UN Doc A/HRC/23/58; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 August 2013) UN Doc A/HRC/24/46; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (12 February 2014) UN Doc A/HRC/25/65; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (13 August 2015) UN Doc A/HRC/30/48; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (11 August 2016) UN Doc A/HRC/33/55; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 February 2017) UN Doc A/HRC/34/64; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (1 February 2018) UN Doc A/HRC/37/72; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (9 August 2018) UN Doc A/HRC/39/65; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (31 January 2019) UN Doc A/HRC/40/70; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 August 2019) UN Doc A/HRC/42/51; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (28 January 2020) UN Doc A/HRC/43/57; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 July 2020) UN Doc A/HRC/44/61; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (14 August 2020) UN Doc A/HRC/45/31; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (3 September 2020) UN Doc A/HRC/44/61; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 March 2021) UN Doc A/HRC/46/55.

ISIS, and militias acting for Turkey. In each case, the section considers the nature and extent of the state support provided before outlining examples of international law violations involving the relevant NSAs.

### ***2.1.1 Rebels fighting the Assad regime***

Following the initial protests, increasing numbers of the Syrian regime's military forces defected, leading to the establishment of the Free Syrian Army (FSA) in July 2011.<sup>19</sup> But while many armed factions operated under this banner, there was little coordination between the groups.<sup>20</sup> Opposition forces comprised a vast array of insurgents, with widely varying capabilities, ideology, and political goals. Rebel groups would frequently amalgamate and divide, transferring their loyalties on a regular basis.<sup>21</sup> Thus, despite efforts to create a central command, the FSA remained little more than a 'brand name' under which the various factions would fight.<sup>22</sup>

#### *2.1.1.1 The nature and extent of the support provided*

The rebels' continual re-alignments and internal rivalries created considerable complications for external states wishing to offer their support. But this did not deter states' interventions. From the early days of the conflict, Turkey allowed FSA members to use its territory for planning and established cross-border rebel supply lines.<sup>23</sup> Meanwhile, Saudi Arabia and Qatar supplied significant quantities of weaponry to rebel fighters.<sup>24</sup>

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<sup>19</sup> Joshua Landis, 'Free Syrian Army Founded by Seven Officers to Fight the Syrian Army' (*Syria Comment*, 29 July 2011) <[www.joshualandis.com/blog/free-syrian-army-established-to-fight-the-syrian-army/](http://www.joshualandis.com/blog/free-syrian-army-established-to-fight-the-syrian-army/)> accessed 12 December 2017; Joseph Holliday 'Syria's Armed Opposition' (*Institute for the Study of War*, March 2012) <[www.understandingwar.org/sites/default/files/Syrias\\_Armed\\_Opposition.pdf](http://www.understandingwar.org/sites/default/files/Syrias_Armed_Opposition.pdf)> accessed 12 December 2017.

<sup>20</sup> Baas (n 10) 3; Joshua Landis, 'America's Failure – and Russia and Iran's Success – in Syria's Cataclysmic Civil War' (*Syria Comment*, 10 January 2017) <[www.joshualandis.com/blog/americas-failure-russia-irans-success-syrias-cataclysmic-civil-war-joshua-landis/](http://www.joshualandis.com/blog/americas-failure-russia-irans-success-syrias-cataclysmic-civil-war-joshua-landis/)> accessed 15 December 2017; Van Schaack (n 16) 27-28.

<sup>21</sup> Jenkins (n 7) 8.

<sup>22</sup> UNHRC Report of 5 February 2013 (n 18) 8 para 25. See also Elizabeth O'Bagy, 'The Free Syrian Army' (*Institute for the Study of War*, March 2013) <[www.understandingwar.org/sites/default/files/The-Free-Syrian-Army-24MAR.pdf](http://www.understandingwar.org/sites/default/files/The-Free-Syrian-Army-24MAR.pdf)> accessed 15 December 2017.

<sup>23</sup> Liam Stack, 'In Slap at Syria, Turkey Shelters Anti-Assad Fighters' (*The New York Times*, 27 October 2011) <[www.nytimes.com/2011/10/28/world/europe/turkey-is-sheltering-antigovernment-syrian-militia.html](http://www.nytimes.com/2011/10/28/world/europe/turkey-is-sheltering-antigovernment-syrian-militia.html)> accessed 15 December 2017; Faisal Mohammad Rather, Balal Ali and Shahnawaz Abbas, 'From Civil Uprising to Sectarian conflict in Syria' (2012) 3 Q J Chinese Studies 38, 41; Faysal Itani and Aaron Stein, 'Turkey's Syria Predicament' (*Atlantic Council*, May 2016) 1, 3 <[www.atlanticcouncil.org/wp-content/uploads/2016/05/Turkey\\_s\\_Syria\\_Predicament.pdf](http://www.atlanticcouncil.org/wp-content/uploads/2016/05/Turkey_s_Syria_Predicament.pdf)> accessed 27 March 2021.

<sup>24</sup> Roula Khalaf and Abigail Fielding-Smith, 'How Qatar Seized Control of the Syrian Revolution' (*The Financial Times*, 17 May 2013) <[www.ft.com/content/f2d9bbc8-bdbc-11e2-890a-00144feab7de](http://www.ft.com/content/f2d9bbc8-bdbc-11e2-890a-00144feab7de)> accessed 15 December 2017; Mark Mazzetti, C J Chivers and Eric Schmitt, 'Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels' (*The New York*

The United States took longer to intervene. While the government called in 2011 for President Assad to step down, it was not until the following year that the Obama administration began to supply ‘non-lethal’ aid, such as communications equipment, to the rebels.<sup>25</sup> In addition, the Central Intelligence Agency (CIA) operated covertly in Turkey, assisting allies to allocate arms to the rebels,<sup>26</sup> and organising training.<sup>27</sup>

As well as providing direct support to opposition forces, the United States sought to unite the international community behind them. In 2012, an alliance known as the ‘Friends of Syria’ was established to bolster and unify the FSA.<sup>28</sup> Military Operations Centres were established to coordinate the flow of arms and ammunition to select rebel groups and assist in the development of campaigns.<sup>29</sup> Rebel fighters were subjected to a rigorous vetting process, in order to exclude those with links to extremist elements.<sup>30</sup> Those that passed received a salary from the coalition, while their commanders met with state officials, proposed battle plans and lobbied for weapons.<sup>31</sup>

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*Times*, 29 June 2013) <[www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-in.html](http://www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-in.html)> accessed 15 December 2017; Tzemprin, Jozić and Lambare (n 11).

<sup>25</sup> Mark Hosenball, ‘Exclusive: Obama Authorizes Secret US Support for Syrian Rebels’ (*Reuters*, 1 August 2012) <[www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801](http://www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801)> accessed 25 November 2019. See also James Robbins, ‘UK Doubles Aid to Syria Opposition Groups’ (*BBC News*, 30 March 2012) <[www.bbc.co.uk/news/uk-17558417](http://www.bbc.co.uk/news/uk-17558417)> accessed 27 March 2021.

<sup>26</sup> Eric Schmitt, ‘CIA said to Aid in Steering Arms to Syrian Opposition’ (*The New York Times*, 21 June 2012) <[www.nytimes.com/2012/06/21/world/middleeast/cia-said-to-aid-in-steering-arms-to-syrian-rebels.html?pagewanted=all&\\_r=1&\\_r=0](http://www.nytimes.com/2012/06/21/world/middleeast/cia-said-to-aid-in-steering-arms-to-syrian-rebels.html?pagewanted=all&_r=1&_r=0)> accessed 15 December 2017; C J Chivers and Eric Schmitt, ‘Arms Airlift to Syria Rebels Expands, With Aid from CIA’ (*The New York Times*, 24 March 2013) <[www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html?pagewanted=all&_r=0)> accessed 15 December 2017; Mark Mazzetti and Matt Apuzzo, ‘US Relies Heavily on Saudi Money to Support Syrian Rebels’ (*The New York Times*, 23 January 2016) <[www.nytimes.com/2016/01/24/world/middleeast/us-relies-heavily-on-saudi-money-to-support-syrian-rebels.html?\\_r=1](http://www.nytimes.com/2016/01/24/world/middleeast/us-relies-heavily-on-saudi-money-to-support-syrian-rebels.html?_r=1)> accessed 21 December 2020.

<sup>27</sup> Raf Sanchez, ‘First Syria Rebels Armed and Trained by CIA “On Way to Battlefield”’ (*The Telegraph*, 3 September 2013) <[www.telegraph.co.uk/news/worldnews/middleeast/syria/10283758/First-Syria-rebels-armed-and-trained-by-CIA-on-way-to-battlefield.html](http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10283758/First-Syria-rebels-armed-and-trained-by-CIA-on-way-to-battlefield.html)> accessed 15 December 2017; Greg Miller, ‘CIA Ramping Up Covert Training Program for Moderate Syrian Rebels’, (*The Washington Post*, 2 October 2013) <[www.washingtonpost.com/world/national-security/cia-ramping-up-covert-training-program-for-moderate-syrian-rebels/2013/10/02/a0bba084-2af6-11e3-8ade-a1f23cda135e\\_story.html?tid=a\\_inl&utm\\_term=.80f5a02b7865](http://www.washingtonpost.com/world/national-security/cia-ramping-up-covert-training-program-for-moderate-syrian-rebels/2013/10/02/a0bba084-2af6-11e3-8ade-a1f23cda135e_story.html?tid=a_inl&utm_term=.80f5a02b7865)> accessed 15 December 2017.

<sup>28</sup> Al Jazeera, ‘“Friends of Syria” Recognise Opposition’ (12 December 2012) <[www.aljazeera.com/news/2012/12/12/friends-of-syria-recognise-opposition](http://www.aljazeera.com/news/2012/12/12/friends-of-syria-recognise-opposition)> accessed 28 March 2021.

<sup>29</sup> Baas (n 10) 5; The Carter Center, ‘Syria: Countrywide Conflict Report No 5’ (February 2015) 10, 21, 23 <[www.cartercenter.org/resources/pdfs/peace/conflict\\_resolution/syria-conflict/nationwideupdate-feb-28-2015.pdf](http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/nationwideupdate-feb-28-2015.pdf)> accessed 28 March 2021.

<sup>30</sup> Baas (n 10) 5; Erica L Gaston, ‘Regulating Irregular Actors: Can Due Diligence Checks Mitigate the Risks of Working with Non-State and Substate Forces?’ (*Global Public Policy Institute*, May 2021) 27-36 <<https://odi.org/en/publications/regulating-irregular-actors-can-due-diligence-checks-mitigate-the-risks-of-working-with-non-state-and-substate-forces/>> accessed 20 June 2021.

<sup>31</sup> Erika Solomon, ‘The Rise and Fall of a US-backed Rebel Commander in Syria’ (*The Financial Times*, 9 February 2017) <[www.ft.com/content/791ad3bc-ecfc-11e6-930f-061b01e23655](http://www.ft.com/content/791ad3bc-ecfc-11e6-930f-061b01e23655)> accessed 12 April 2018.

The overall scheme, however, was ineffective. Disagreements between states disrupted the flow of weapons,<sup>32</sup> and delays in approving commanders' plans hindered operations.<sup>33</sup> Further difficulties arose due to the vetting process.<sup>34</sup> The 'moderate' rebels, who satisfied the ideology of the United States and its allies were frequently the weakest and were further enfeebled by restrictions imposed by supporting states on their ability to form coalitions.<sup>35</sup> Western-backed rebels thus lost considerable ground to better organised, better funded Islamist groups.<sup>36</sup> Concurrently, the priorities of their state backers turned from toppling President Assad towards stemming the flow of refugees from Syria and combatting terrorism. Acknowledging this reality, the Trump administration announced the conclusion of the CIA programme in July 2017.<sup>37</sup>

#### *2.1.1.2 International law violations involving rebels fighting the Assad regime*

The Syrian rebels' shifting loyalties inevitably led to a breakdown in relationships of command and control. Armed groups did not consistently recognise the FSA leadership and any rules of engagement were made up by commanders in the field.<sup>38</sup> Moreover, when a fighter did not like an order he was given, he was free to leave, particularly as his weapon was his own property.<sup>39</sup> This absence of military discipline is a likely contributing factor towards the numerous international law violations involving rebel groups.

The UN Commission of Inquiry first published details of abuses involving members of the FSA in February 2012.<sup>40</sup> The Commission used the term 'FSA group' to refer to any local armed group whose members identified themselves with the FSA,<sup>41</sup> meaning that 'moderate' rebels in receipt of

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<sup>32</sup> Baas (n 10) 7; Solomon (n 31).

<sup>33</sup> Adam Entous, 'Covert CIA Mission to Arm Syrian Rebels goes Awry' (*The Wall Street Journal*, 26 January 2015) <[www.wsj.com/articles/covert-cia-mission-to-arm-syrian-rebels-goes-awry-1422329582](http://www.wsj.com/articles/covert-cia-mission-to-arm-syrian-rebels-goes-awry-1422329582)> accessed 12 April 2018.

<sup>34</sup> Gaston (n 30) 29-31.

<sup>35</sup> Baas (n 10) 2; Joshua Landis, "Regime-Change Without State Collapse is Impossible in Syria" Landis Interviewed by RT's Sophie&Co' (*Syria Comment*, 9 November 2015) <[www.joshualandis.com/blog/regime-change-without-state-collapse-is-impossible-in-syria-landis-interviewed-by-rt-sophieco-2/](http://www.joshualandis.com/blog/regime-change-without-state-collapse-is-impossible-in-syria-landis-interviewed-by-rt-sophieco-2/)> accessed 28 March 2021.

<sup>36</sup> Baas (n 10) 7-8; Entous (n 33); Sam Heller, 'America Had Already Lost its Covert War in Syria – Now it's Official' (*The Century Foundation*, 21 July 2017) <<https://tcf.org/content/commentary/america-already-lost-covert-war-syria-now-official/>> accessed 28 March 2021.

<sup>37</sup> John Walcott, 'Trump Ends CIA Arms Support for Anti-Assad Syria Rebels: US Officials' (*Reuters*, 19 July 2017) <[www.reuters.com/article/us-mideast-crisis-usa-syria-idUSKBN1A42KC](http://www.reuters.com/article/us-mideast-crisis-usa-syria-idUSKBN1A42KC)> accessed 21 December 2020; Heller, 'America Had Already Lost its Covert War in Syria' (n 36).

<sup>38</sup> UNHRC Report of 22 February 2012 (n 18) 20 paras 107-08. See also Center for Civilians in Conflict, 'Issue Brief: Civilian Protection in Syria' (December 2012) 5-6 <<https://civiliansinconflict.org/wp-content/uploads/2017/09/Syria-2012-Brief.pdf>> accessed 24 December 2020.

<sup>39</sup> Baas (n 10) 10.

<sup>40</sup> UNHRC Report of 22 February 2012 (n 18) 21-21 paras 110-120.

<sup>41</sup> *ibid* 6 para 13.



support from the US-led coalition were not necessarily responsible for the conduct at issue. But the sheer number of documented abuses raises the likelihood that at least a proportion of these were committed by rebels in receipt of external state support.

Such abuses included allegations of torture, executions, abductions, and hostage-taking.<sup>42</sup> If committed in the context of an armed conflict, the FSA's conduct seemingly violated IHL,<sup>43</sup> particularly the fundamental guarantees that must be afforded to all civilians in the power of a party to the conflict and to persons *hors de combat*.<sup>44</sup> In addition, the alleged behaviour potentially violated IHRL, including the right to life and the prohibitions on torture and arbitrary detention.<sup>45</sup>

The abuses involving FSA-linked groups continued as the conflict progressed. In 2013, for instance, Amnesty International documented further potential IHL violations including summary killings, torture, and abductions on the part of opposition groups, as well as their use of children in a military capacity.<sup>46</sup> Furthermore, the armed groups committed similar abuses in areas under their control in northwest Syria such as Idlib and Aleppo.<sup>47</sup>

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<sup>42</sup> *ibid* 21-21 paras 110-120.

<sup>43</sup> IHL applies only if the disturbances at the relevant time constituted a NIAC. This depends on the intensity of the hostilities and the level of organisation of the armed groups involved. See *Prosecutor v Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) ICTY IT-94-1 (2 October 1995) [70]. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 155-211; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016) art 3 paras 422-37.

<sup>44</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), 'Customary International Humanitarian Law Volume I: Rules' (2005) rr 87-99 <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> accessed 15 February 2018 (ICRC Customary IHL Study).

<sup>45</sup> ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 arts 6, 7, 9. Regarding the continued application of IHRL in situations of armed conflict, see eg Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *Intl Rev Red Cross* 737; Marko Milanović, 'The Lost Origins of Lex Specialis: Rethinking the Relationship Between Human Rights and International Humanitarian Law' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016).

<sup>46</sup> Amnesty International, 'Syria: Summary Killings and Other Abuses by Armed Opposition Groups' (14 March 2013) <[www.amnestyusa.org/pdfs/summary\\_killings\\_by\\_armed\\_opposition\\_groups.pdf](http://www.amnestyusa.org/pdfs/summary_killings_by_armed_opposition_groups.pdf)> accessed 28 March 2021. See also UNHRC Report of 5 February 2013 (n 18) 16-17 para 100-103; UNHRC Report of 2 March 2021 (n 18) 11-12 paras 29-31. Such abuses potentially violate the IHL fundamental guarantees that must be afforded to civilians and persons *hors de combat*, as well as the prohibition on children's participation in hostilities. See ICRC Customary IHL Study (n 44) rr 87-90, 98-99, 137.

<sup>47</sup> Amnesty International, "'Torture was my Punishment': Abductions, Torture and Summary Killings under Armed Group Rule in Aleppo and Idleb, Syria' (July 2016) <[www.amnesty.org/en/documents/mde24/4227/2016/en/](http://www.amnesty.org/en/documents/mde24/4227/2016/en/)> accessed 28 March 2021.

## 2.1.2 *Non-state actors fighting in support of the Syrian regime*

The considerable combat losses, desertions, and defections suffered by the Syrian Army forced the government to rely increasingly upon NSAs, including Hezbollah and other Shi'a militia groups.<sup>48</sup> By 2015, the size of the Syrian Army had reportedly depleted by half, with the shortfall made up from pro-government militias including Iranian-backed Iraqis, Pakistanis, and Afghan Hazaras.<sup>49</sup> Government forces were also supplemented by local Syrian paramilitary groups, the most important of which were the Jaysh al-Shaabi (Popular Army) and the so-called *Shabbiha*, or 'ghost' forces.<sup>50</sup>

### 2.1.2.1 *State support to pro-government militias*

Iran's influence was instrumental in securing Hezbollah's involvement in the Syrian conflict.<sup>51</sup> The group has played a critical role in the hostilities since 2013, with its fighters and commanders leading battles and training countless Shi'a militia fighters.<sup>52</sup> Although it operates with considerable autonomy, Hezbollah has received significant support throughout its existence from both Iran and Syria.<sup>53</sup> Indeed, an important reason for Iran's intervention in the Syrian conflict was to secure its logistical supply routes to Hezbollah in Lebanon.<sup>54</sup> But as the conflict progressed, Iran's proxy

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<sup>48</sup> Jeffrey White, 'Hezbollah's Declaration of War in Syria: Military Implications' (*The Washington Institute*, 29 May 2013) <[www.washingtoninstitute.org/policy-analysis/view/hezbollahs-declaration-of-war-in-syria-military-implications](http://www.washingtoninstitute.org/policy-analysis/view/hezbollahs-declaration-of-war-in-syria-military-implications)> accessed 8 January 2018; Marisa Sullivan, 'Middle East Security Report 19: Hezbollah in Syria' (*Institute for the Study of War*, April 2014) 4 <[www.understandingwar.org/sites/default/files/Hezbollah\\_Sullivan\\_FINAL.pdf](http://www.understandingwar.org/sites/default/files/Hezbollah_Sullivan_FINAL.pdf)> accessed 27 February 2018; Anne Barnard, Hwaida Saad and Eric Schmitt, 'An Eroding Syrian Army Points to Strain' (*The New York Times*, 28 April 2015) <[www.nytimes.com/2015/04/29/world/middleeast/an-eroding-syrian-army-points-to-strain.html](http://www.nytimes.com/2015/04/29/world/middleeast/an-eroding-syrian-army-points-to-strain.html)> accessed 28 March 2021; Nadav Pollak, 'The Transformation of Hezbollah by its Involvement in Syria' (*Washington Institute*, 4 August 2016) <[www.washingtoninstitute.org/policy-analysis/transformation-hezbollah-its-involvement-syria](http://www.washingtoninstitute.org/policy-analysis/transformation-hezbollah-its-involvement-syria)> accessed 28 March 2021.

<sup>49</sup> Barnard, Saad and Schmitt (n 48).

<sup>50</sup> Sullivan (n 48) 14.

<sup>51</sup> Samia Nakhoul, 'Special Report: Hezbollah Gambles All in Syria' (*Reuters*, 26 September 2013) <[www.reuters.com/article/us-syria-hezbollah-special-report/special-report-hezbollah-gambles-all-in-syria-idUSBRE98P0AI20130926](http://www.reuters.com/article/us-syria-hezbollah-special-report/special-report-hezbollah-gambles-all-in-syria-idUSBRE98P0AI20130926)> accessed 27 August 2019; Sullivan (n 48) 14; Matthew Levitt, 'Waking up the Neighbors: How Regional Intervention is Transforming Hezbollah' (*The Washington Institute*, 23 July 2015) <[www.washingtoninstitute.org/policy-analysis/view/waking-up-the-neighbors-how-regional-intervention-is-transforming-hezbollah](http://www.washingtoninstitute.org/policy-analysis/view/waking-up-the-neighbors-how-regional-intervention-is-transforming-hezbollah)> accessed 27 February 2018.

<sup>52</sup> Pollak (n 48).

<sup>53</sup> Emile El-Hokayem, 'Hizballah and Syria: Outgrowing the Proxy Relationship' (2007) 30 *Washington Quarterly* 35; Matthew Levitt, *Hezbollah: The global footprint of Lebanon's Party of God* (Georgetown University Press 2013) 12; Jack Watling, 'Iran's Objectives and Capabilities: Deterrence and Subversion' (*RUSI Occasional Paper*, February 2019) 17 <[https://rusi.org/sites/default/files/20190219\\_op\\_irans\\_objectives\\_and\\_capabilities\\_web.pdf](https://rusi.org/sites/default/files/20190219_op_irans_objectives_and_capabilities_web.pdf)> accessed 23 August 2019.

<sup>54</sup> Sullivan (n 48) 5; Pollak (n 48) 2.

network in Syria fulfilled a further strategic goal, enabling the state to amplify its power in the region and provide a deterrent against any future conflict with Israel or the United States.<sup>55</sup>

Iran's support to Hezbollah includes significant funding, as well as political, diplomatic, and organisational aid.<sup>56</sup> Moreover, in cooperation with the Syrian government, Iran supplied Hezbollah with 'increasingly sophisticated weapons, including a wide array of missiles and rockets'.<sup>57</sup> These weapons deliveries continued throughout the Syrian conflict, causing Israel to intervene militarily on numerous occasions to interdict the supply chain.<sup>58</sup>

Tehran additionally dispatched members of the Islamic Revolutionary Guard Corps (IRGC) to Syria to guide pro-government military efforts and manage its network of proxies.<sup>59</sup> These included numerous Shi'a militias recruited from across the region, including from Lebanon, Iraq, Pakistan, and Afghanistan.<sup>60</sup> Iran supplied these groups with training and equipment, enabling them not only to fight in the conflict but also to secure key supply routes and extend Tehran's regional influence.<sup>61</sup>

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<sup>55</sup> Ali Alfoneh, 'Tehran's Shia Foreign Legions' (*Carnegie Endowment for International Peace*, 30 January 2018) <<https://carnegieendowment.org/2018/01/30/tehran-s-shia-foreign-legions-pub-75387>> accessed 28 March 2021; Ben Hubbard, Isabel Kershner and Anne Barnard, 'Iran, Deeply Embedded in Syria, Expands "Axis of Resistance"' (*The New York Times*, 19 February 2018) <[www.nytimes.com/2018/02/19/world/middleeast/iran-syria-israel.html](http://www.nytimes.com/2018/02/19/world/middleeast/iran-syria-israel.html)> accessed 28 March 2021; Ariane Tabatabai, 'The Fruits of Iran's Victory in Syria' (*Lawfare*, 15 April 2018) <[www.lawfareblog.com/fruits-irans-victory-syria](http://www.lawfareblog.com/fruits-irans-victory-syria)> accessed 28 March 2021; Navvar Saban, 'Factbox: Iranian Influence and Presence in Syria' (*Atlantic Council*, 5 November 2020) <[www.atlanticcouncil.org/blogs/menasource/factbox-iranian-influence-and-presence-in-syria/](http://www.atlanticcouncil.org/blogs/menasource/factbox-iranian-influence-and-presence-in-syria/)> accessed 28 March 2021.

<sup>56</sup> US Department of the Treasury, 'Treasury Targets Hizballah for Supporting the Assad Regime' (8 October 2012) <[www.treasury.gov/press-center/press-releases/Pages/tg1676.aspx](http://www.treasury.gov/press-center/press-releases/Pages/tg1676.aspx)> accessed 28 March 2021.

<sup>57</sup> US Department of Defense, 'Annual Report on Military Power of Iran' (April 2012) <<https://fas.org/man/eprint/dod-iran.pdf>> accessed 28 March 2021. See also Daniel C Kurtzer, 'Israel and Hezbollah: Deterrence and the Threat of Miscalculation' (*Council on Foreign Relations*, 11 September 2017) <[www.cfr.org/report/israel-and-hezbollah-deterrence-and-threat-miscalculation](http://www.cfr.org/report/israel-and-hezbollah-deterrence-and-threat-miscalculation)> accessed 28 March 2021; Seth G Jones, 'The Escalating Conflict with Hezbollah in Syria' (*Center for Strategic & International Studies*, 20 June 2018) <[www.csis.org/analysis/escalating-conflict-hezbollah-syria](http://www.csis.org/analysis/escalating-conflict-hezbollah-syria)> accessed 26 May 2020; Yaniv Kubovic, 'Iran Accelerating Hezbollah's Precision Missile Program After Years of Failure, Israel Says' (*Haaretz*, 29 August 2019) <[www.haaretz.com/israel-news/iran-accelerating-hezbollah-s-precision-missile-program-israel-says-1.7767332](http://www.haaretz.com/israel-news/iran-accelerating-hezbollah-s-precision-missile-program-israel-says-1.7767332)> accessed 26 May 2020.

<sup>58</sup> Kurtzer (n 57); Jones (n 57); Suleiman Al-Khalidi, 'Israel Intensifying Air War in Syria Against Iranian Encroachment' (*Reuters*, 22 April 2021) <[www.reuters.com/world/middle-east/israel-intensifying-air-war-syria-against-iranian-encroachment-2021-04-22/](http://www.reuters.com/world/middle-east/israel-intensifying-air-war-syria-against-iranian-encroachment-2021-04-22/)> accessed 15 November 2021.

<sup>59</sup> Dexter Filkins, 'The Shadow Commander' (*The New Yorker*, 23 September 2013) <[www.newyorker.com/magazine/2013/09/30/the-shadow-commander](http://www.newyorker.com/magazine/2013/09/30/the-shadow-commander)> accessed 29 March 2021; Paul Bucala and Frederick W Kagan, 'Iran's Evolving Way of War: How the IRGC Fights in Syria' (*Critical Threats*, March 2016) 12-13 <[www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans\\_Evolving\\_Way\\_of\\_War\\_IRGC\\_in\\_Syria\\_FINAL-1.pdf](http://www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans_Evolving_Way_of_War_IRGC_in_Syria_FINAL-1.pdf)> accessed 28 March 2021.

<sup>60</sup> Diane M Zorri, Houman A Sadri and David C Ellis, 'Iranian Proxy Groups in Iraq, Syria, and Yemen: A Principal-Agent Comparative Analysis' (*Joint Special Operations University Report 20-5*, December 2020) 53-54, 69.

<sup>61</sup> *ibid*; Michael Knights, 'Iran's Foreign Legion: The Role of Iraqi Shiite Militias in Syria' (*Washington Institute*, 27 June 2013) <[www.washingtoninstitute.org/policy-analysis/irans-foreign-legion-role-iraqi-shiite-militias-syria](http://www.washingtoninstitute.org/policy-analysis/irans-foreign-legion-role-iraqi-shiite-militias-syria)> accessed 21

Iran similarly supported the Syrian paramilitary groups that fought alongside government forces. One such group, Jaysh al-Shaabi, was reportedly modelled upon the Iranian Basij militia.<sup>62</sup> The IRGC and Hezbollah provided training, advice, weapons and equipment for Jaysh al-Shaabi as well as significant funding.<sup>63</sup> Another militia, known as the *Shabbiba*, played a critical role in crushing the protests during the early stages of the conflict and assisted in controlling territory after it was secured by Syrian security forces.<sup>64</sup> These forces derived from local criminal gangs and reportedly included ex-convicts, released from prison in exchange for loyalty to the Assad regime.<sup>65</sup>

In 2013, the *Shabbiba* and Jaysh al-Shaabi were reorganised into the Syrian National Defence Force (NDF), provided with uniforms, and placed under the command of the Syrian military.<sup>66</sup> Iran was heavily involved in the process, with members of the NDF reportedly receiving combat training from Iranian advisers and from Hezbollah.<sup>67</sup>

### 2.1.2.2 Russia and the Wagner Group

While support for the various militias participating in the conflict derived principally from Iran and Syria, reporting indicates that Russia also provided some assistance to these groups.<sup>68</sup> Moscow's links

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December 2020; Farzin Nadimi, 'Iran's Afghan and Pakistani Proxies: In Syria and Beyond?' (*Washington Institute*, 22 August 2016) <[www.washingtoninstitute.org/policy-analysis/irans-afghan-and-pakistani-proxies-syria-and-beyond](http://www.washingtoninstitute.org/policy-analysis/irans-afghan-and-pakistani-proxies-syria-and-beyond)> accessed 29 March 2021; Colin Clarke and Phillip Smyth, 'The Implications of Iran's Expanding Shi'a Foreign Fighter Network?' (*CTC Sentinel*, November 2017) <<https://ctc.usma.edu/the-implications-of-irans-expanding-shia-foreign-fighter-network/>> accessed 28 March 2021; Ahmad Shuja Jamal, 'Mission Accomplished? What's Next for Iran's Afghan Fighters in Syria?' (*War on the Rocks*, 13 February 2018) <<https://warontherocks.com/2018/02/mission-accomplished-whats-next-irans-afghan-fighters-syria/>> accessed 16 May 2021; Ben Farmer and Akhtar Makoi, 'Thirsty for Martyrdom and a Living Wage: Why Thousands of Afghans Signed up to Iran's Shadowy War in Syria?' (*The Telegraph*, 26 January 2020) <[www.telegraph.co.uk/news/2020/01/26/thirsty-martyrdom-living-wage-thousands-afghans-signed-irans/](http://www.telegraph.co.uk/news/2020/01/26/thirsty-martyrdom-living-wage-thousands-afghans-signed-irans/)> accessed 15 February 2020.

<sup>62</sup> Jenkins (n 7) 7.

<sup>63</sup> US Department of the Treasury, 'Treasury Sanctions Al-Nusra Front Leadership in Syria and Militias Supporting the Assad Regime' (11 December 2012) <[www.treasury.gov/press-center/press-releases/pages/tg1797.aspx](http://www.treasury.gov/press-center/press-releases/pages/tg1797.aspx)> accessed 29 March 2021.

<sup>64</sup> *ibid*; UNHRC Report of 23 November 2011 (n 17) 6 para 20; Aron Lund 'Who Are the Pro-Assad Militias?' (*Carnegie Middle East Center*, 2 March 2015) <<http://carnegie-mec.org/diwan/59215?lang=en>> accessed 20 October 2017. See also Ewan Brown, 'Expert Report' (*United States District Court for the District of Columbia, Cathleen Colvin et al v Syrian Arab Republic*, 22 March 2018) 61-66 paras 126-37 <[https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018\\_Redacted.pdf](https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018_Redacted.pdf)> accessed 15 December 2020.

<sup>65</sup> Jenkins (n 7) 6; Lund, 'Who Are the Pro-Assad Militias?' (n 64).

<sup>66</sup> The Carter Center, 'Syria: Pro-Government Paramilitary Forces' (5 November 2013) 8 <[www.cartercenter.org/resources/pdfs/peace/conflict\\_resolution/syria-conflict/pro-governmentparamilitaryforces.pdf](http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/pro-governmentparamilitaryforces.pdf)> accessed 13 February 2013; Lund 'Who Are the Pro-Assad Militias?' (n 64).

<sup>67</sup> Erika Solomon, 'Insight: Syrian Government Guerrilla Fighters Being Sent to Iran for Training?' (*Reuters*, 4 April 2013) <[www.reuters.com/article/us-syria-iran-training-insight-idUSBRE9330DW20130404](http://www.reuters.com/article/us-syria-iran-training-insight-idUSBRE9330DW20130404)> accessed 29 March 2021; The Carter Center, 'Syria: Pro-Government Paramilitary Forces' (n 66) 4, 10.

<sup>68</sup> Anatoly Baronin, 'Russia reinforces Hezbollah in the Middle East' (*Inform Napalm*, 8 March 2016)

<<https://informnapalm.org/en/aug03-russia-hezbollah/>> accessed 8 January 2018; Amir Toumaj, 'Russian Influence

are closer, however, to another NSA involved in the conflict: the Wagner Group.<sup>69</sup> Although the group is commonly categorised as a private military and security company, it does not fit into the traditional mould of PMSCs employed by nations such as the United States.<sup>70</sup> Instead, rather than a true commercial entity, the Wagner Group is believed to have intimate connections to the Russian state, particularly the military intelligence service, the GRU.<sup>71</sup> The group reportedly trained at a site adjacent to a GRU facility, received GRU-issued passports, and used Russian military equipment.<sup>72</sup> But the full extent of the NSA's links to Moscow remain unclear, obfuscated by factors such as the involvement of the Russian oligarch Yevgenii Prigozhin in the group's funding and establishment.<sup>73</sup>

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Evident in Palestinian Militia in Syria' (*FDD's Long War Journal*, 14 October 2016)

<[www.longwarjournal.org/archives/2016/10/russian-influence-evident-in-palestinian-militia-in-syria.php](http://www.longwarjournal.org/archives/2016/10/russian-influence-evident-in-palestinian-militia-in-syria.php)> accessed 29 March 2021; Afghanistan Analysis, 'Russia Trains Iran-Sponsored Shia Militias in Syria' (1 December 2017) <<https://afghanistananalysis.wordpress.com/2017/12/01/russia-trains-iran-sponsored-shia-militias-in-syria/>> accessed 16 May 2021.

<sup>69</sup> Gurcan (n 15); BBC News, 'Syria War: Who Are Russia's Shadowy Wagner Mercenaries?' (23 February 2018) <[www.bbc.co.uk/news/world-europe-43167697](http://www.bbc.co.uk/news/world-europe-43167697)> accessed 9 August 2019; Mike Giglio, 'Inside the Shadow War Fought by Russian Mercenaries' (*Buzzfeed*, 17 April 2019) <<https://www.buzzfeednews.com/article/mikegiglio/inside-wagner-mercenaries-russia-ukraine-syria-prigozhin>> accessed 9 August 2019; Nathaniel Reynolds, 'Putin's Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group' (*Carnegie Endowment for International Peace*, 8 July 2019) <<https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442>> accessed 31 March 2021.

<sup>70</sup> Sergey Sukhankin, "'Continuing War by Other Means": The Case of Wagner, Russia's Premier Private Military Company in the Middle East' (*Jamestown Foundation*, 13 July 2018) <<https://jamestown.org/program/continuing-war-by-other-means-the-case-of-wagner-russias-premier-private-military-company-in-the-middle-east/>> accessed 1 April 2021; Kimberley Marten, 'Russia's Use of Semi-State Security Forces: The Case of the Wagner Group' (2019) 35 *Post-Soviet Affairs* 181, 183-84.

<sup>71</sup> Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 187, 192; Reynolds (n 69); Giglio (n 69); Kimberly Marten, 'The GRU, Yevgeny Prigozhin, and Russia's Wagner Group: Malign Russian Actors and Possible US Responses' (*Testimony before the Committee on Foreign Affairs Subcommittee on Europe Eurasia Energy and the Environment, US House of Representatives*, 7 July 2020) 7 <[www.congress.gov/116/meeting/house/110854/witnesses/HHRG-116-FA14-Wstate-MartenK-20200707.pdf](http://www.congress.gov/116/meeting/house/110854/witnesses/HHRG-116-FA14-Wstate-MartenK-20200707.pdf)> accessed 25 October 2021.

<sup>72</sup> Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 192; Sukhankin (n 70); András Rácz, 'Band of Brothers: The Wagner Group and the Russian State' (*Center for Strategic and International Studies*, 21 September 2020) <[www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state#:~:text=The%20career%20of%20Dmitry%20Utkin&text=In%202014%2C%20he%20quit%20Moran%20and%20established%20the%20Wagner%20Group.&text=These%20conversations%20indicated%20that%20Utkin,to%20the%20Russian%20military%20command.](http://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state#:~:text=The%20career%20of%20Dmitry%20Utkin&text=In%202014%2C%20he%20quit%20Moran%20and%20established%20the%20Wagner%20Group.&text=These%20conversations%20indicated%20that%20Utkin,to%20the%20Russian%20military%20command.)> accessed 31 March 2021. See also UNSC, 'Final Report of the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011)' (8 March 2021) UN Doc S/2021/229 448 para 3.

<sup>73</sup> Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 182, 187; Reynolds (n 69); Bradley Hanlon, 'Weak US Response to Russian Proxies Undermines Deterrence in Middle East and Eastern Europe' (*Institute for the Study of War*, 16 February 2018) <[www.iswresearch.org/2018/02/weak-us-response-to-russian-proxies.html](http://www.iswresearch.org/2018/02/weak-us-response-to-russian-proxies.html)> accessed 31 March 2021; Kimberly Marten, 'Where's Wagner? The All-New Exploits of Russia's "Private" Military Company' (*Ponars Eurasia*, 15 September 2020) <[www.ponarseurasia.org/where-s-wagner-the-all-new-exploits-of-russia-s-private-military-company/](http://www.ponarseurasia.org/where-s-wagner-the-all-new-exploits-of-russia-s-private-military-company/)> accessed 31 March 2021; Amy Mackinnon, 'Russia's Wagner Group Doesn't Actually Exist' (*Foreign Policy*, 6 July 2021) <<https://foreignpolicy.com/2021/07/06/what-is-wagner-group-russia-mercenaries-military-contractor/>> accessed 9 July 2021.

Thus, it is not known whether the Wagner Group deployed to Syria on Moscow's direction, or whether the Assad regime contracted its services to bolster regime forces. But reporting indicates that fighters were transported into Syria with the agreement of both states,<sup>74</sup> and that the group received additional assistance, including payments and equipment, from the Syrian government.<sup>75</sup> The group's direct participation in the conflict is also clear, including its contribution towards regime forces' success in capturing Palmyra from ISIS in March 2016.<sup>76</sup>

Wagner Group fighters were involved in one particularly notable incident in February 2018. Pro-government forces, including members of the PMSC, launched an attack against a Syrian oilfield where US forces were based alongside Kurdish fighters.<sup>77</sup> As the attack unfolded, the United States made contact with Russian military officials, who denied any knowledge of the advancing force.<sup>78</sup> US forces repelled the attack with airstrikes, causing large numbers of casualties among Wagner Group personnel.<sup>79</sup> Moscow then provided direct assistance to the wounded following their transfer to a Russian airbase, evacuating them for treatment in Russian military hospitals.<sup>80</sup>

This incident suggests that Moscow views the Wagner Group as an expendable force that it can use to conduct new and potentially hazardous deployments in its behalf.<sup>81</sup> Although the group's activities are subject to frequent change, it consistently 'carries out experimental and high-risk military and security activities on behalf of the Russian state...'<sup>82</sup> Use of the NSA thereby allows Moscow to

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<sup>74</sup> Rinat Sagdiev, Maria Tsvetkova and Olena Vasina, 'How a Secret Russian Airlift Helps Syria's Assad' (*Reuters*, 6 April 2018) <[www.reuters.com/article/us-russia-flights-idUSKCN1HD18Y](http://www.reuters.com/article/us-russia-flights-idUSKCN1HD18Y)> accessed 11 August 2019.

<sup>75</sup> Reynolds (n 69); Sukhankin (n 70).

<sup>76</sup> Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 193; Sukhankin (n 70).

<sup>77</sup> Neil Hauer, 'Russia's Mercenary Debacle in Syria: Is the Kremlin Losing Control?' (*Foreign Affairs*, 26 February 2018) <[www.foreignaffairs.com/articles/syria/2018-02-26/russias-mercenary-debacle-syria](http://www.foreignaffairs.com/articles/syria/2018-02-26/russias-mercenary-debacle-syria)> accessed 5 April 2018; Tomas Gibbons-Neff, 'How a 4-Hour Battle Between Russian Mercenaries and US Commandos Unfolded in Syria' (*The New York Times*, 24 May 2018) <[www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html](http://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html)> accessed 2 December 2020; Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 194-95.

<sup>78</sup> Gibbons-Neff (n 77); Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 194. But see also Ellen Nakashima, Karen DeYoung and Liz Sly, 'Putin Ally Said to be in Touch with Kremlin, Assad Before his Mercenaries attacked US Troops' (*The Washington Post*, 22 February 2018) <[www.washingtonpost.com/world/national-security/putin-ally-said-to-be-in-touch-with-kremlin-assad-before-his-mercenaries-attacked-us-troops/2018/02/22/f4ef050c-1781-11e8-8b08-027a6ccb38eb\\_story.html?utm\\_term=.445c32e8d770](http://www.washingtonpost.com/world/national-security/putin-ally-said-to-be-in-touch-with-kremlin-assad-before-his-mercenaries-attacked-us-troops/2018/02/22/f4ef050c-1781-11e8-8b08-027a6ccb38eb_story.html?utm_term=.445c32e8d770)> accessed 29 March 2018.

<sup>79</sup> Gibbons-Neff (n 77); Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 195.

<sup>80</sup> Marten, 'Russia's Use of Semi-State Security Forces' (n 70) 195.

<sup>81</sup> Reynolds (n 69); Marten, 'The GRU, Yevgeny Prigozhin, and Russia's Wagner Group' (n 71) 9.

<sup>82</sup> Marten, 'Where's Wagner?' (n 73).

expand its footprint and influence overseas while avoiding direct state involvement or casualties amongst Russia's regular forces.<sup>83</sup>

### 2.1.2.3 International law violations involving NSAs fighting for the Syrian regime

Like the other NSAs fighting for the Syrian regime, the Wagner Group has committed acts that potentially violate international law. The most well-publicised allegation against the group in Syria is the reported torture and killing of a man in 2017.<sup>84</sup> Similar allegations, but on a much larger scale, have been made against the local Syrian militias. The UN Commission of Inquiry identified the *Shabbiba* as the perpetrators of numerous abuses, including murder, torture, arbitrary arrest and detention, rape, pillage, and destruction of property.<sup>85</sup> If the hostilities crossed the armed conflict threshold at the relevant time,<sup>86</sup> such abuses breach the IHL prohibitions on sexual violence and pillage, as well as the fundamental guarantees that must be afforded to civilians and persons *hors de combat*.<sup>87</sup> Moreover, the conduct potentially violates IHRL norms, including the right to life.<sup>88</sup>

Given such behaviour, the *Shabbiba* were described by one commentator as Syria's 'weapons of mass destruction'.<sup>89</sup> But the abuses did not cease once the militias were reorganised into the NDF.<sup>90</sup> Amongst other atrocities, NDF fighters were reportedly involved in the massacre of hundreds of civilians in the village of al-Bayda in May 2013,<sup>91</sup> in violation of the IHL obligation to direct attacks only against military targets.<sup>92</sup>

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<sup>83</sup> Marten, 'Where's Wagner?' (n 73); Rácz (n 72); Amy Mackinnon, 'Putin's Shadow Warriors Stake Claim to Syria's Oil' (*Foreign Policy*, 17 May 2021) <<https://foreignpolicy.com/2021/05/17/putin-shadow-warriors-stake-claim-syria-oil-energy-wagner-prigozhin-libya-middle-east/>> accessed 20 May 2021.

<sup>84</sup> Amy MacKinnon, 'New Report Exposes Brutal Methods of Russia's Wagner Group' (*Foreign Policy*, 11 June 2020) <<https://foreignpolicy.com/2020/06/11/russia-wagner-group-methods-bouta-killing-report/>> accessed 31 March 2021; Andrew E Kramer, 'Grisly Killing in Syria Spawns Legal Case Against Russian Mercenaries' (*The New York Times*, 15 March 2021) <[www.nytimes.com/2021/03/15/world/europe/russia-syria-mercenaries.html](http://www.nytimes.com/2021/03/15/world/europe/russia-syria-mercenaries.html)> accessed 31 March 2021.

<sup>85</sup> UNHRC Report of 16 August 2012 (n 18) 12-13 paras 52-57, 15-16 paras 74-86, 17-18 paras 96-102, 18-19 paras 104-112, 20-21 paras 126-29; US Department of the Treasury, 'Treasury Sanctions Al-Nusra Front Leadership in Syria and Militias Supporting the Assad Regime' (n 63).

<sup>86</sup> See fn 43.

<sup>87</sup> ICRC Customary IHL Study (n 44) rr 52, 87-90, 93, 98-100.

<sup>88</sup> ICCPR (n 45) arts 6, 7, 9.

<sup>89</sup> Jenkins (n 7) 7.

<sup>90</sup> UNHRC Report of 16 August 2013 (n 18) 11 para 69, 14 paras 96, 100, 103, 30 para 5. See also ICRC Customary IHL Study (n 44) rr 87-90, 93, 136.

<sup>91</sup> UNHRC Report of 4 June 2013 (n 18) 9 para 41; Human Rights Watch, "'No One's Left': Summary Executions by Syrian Forces in al-Bayda and Baniyas' (13 September 2013) <[www.hrw.org/report/2013/09/13/no-ones-left/summary-executions-syrian-forces-al-bayda-and-baniyas](http://www.hrw.org/report/2013/09/13/no-ones-left/summary-executions-syrian-forces-al-bayda-and-baniyas)> accessed 13 February 2018.

<sup>92</sup> ICRC Customary IHL Study (n 44) rr 1-9.

Allegations have also been made against Hezbollah. During the assault on Qusayr in 2013, for instance, the group's fighters reportedly prevented the provision of food and water to civilians in towns and villages under siege,<sup>93</sup> thereby violating the prohibition on the use of starvation as a method of warfare.<sup>94</sup> Further alleged IHL violations involving the group include the positioning of military objectives inside civilian areas,<sup>95</sup> and subjecting injured fighters to beatings.<sup>96</sup>

More recently, Shi'a militia groups participated in the assaults on Aleppo in late 2016<sup>97</sup> and eastern Ghouta in early 2018,<sup>98</sup> during which pro-government forces committed numerous IHL violations. These included indiscriminate attacks on civilian infrastructure,<sup>99</sup> siege warfare,<sup>100</sup> executions,<sup>101</sup> and forced conscription.<sup>102</sup> The UN Commission additionally reported the militias' involvement in sexual violence<sup>103</sup> and abuses against children.<sup>104</sup>

### ***2.1.3 Non-state actors supported by the US-led coalition in the fight against ISIS***

From 2014 onwards, the principal focus of the United States and its allies shifted from opposing the Assad regime towards combatting terrorism.<sup>105</sup> The US-led coalition began air strikes in Syria,

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<sup>93</sup> UNHRC Report of 16 August 2013 (n 18) 34 para 6, 35 para 11.

<sup>94</sup> ICRC Customary IHL Study (n 44) r 53.

<sup>95</sup> UNHRC Report of 16 August 2013 (n 18) 38 para 34. See also ICRC Customary IHL Study (n 44) r 23.

<sup>96</sup> UNHRC Report of 16 August 2013 (n 18) 39 para 41. See also ICRC Customary IHL Study (n 44) rr 87-91.

<sup>97</sup> Tom Perry and others, 'Hezbollah, Other Shi'ite Allies Helped Assad Win in Aleppo' (*Reuters*, 14 December 2016) <[www.reuters.com/article/us-mideast-crisis-syria-aleppo-fall-insi-idUSKBN1431PV](http://www.reuters.com/article/us-mideast-crisis-syria-aleppo-fall-insi-idUSKBN1431PV)> accessed 2 November 2020; UNHRC Report of 2 February 2017 (n 18) 7 para 23.

<sup>98</sup> UNHRC, 'The Siege and Recapture of Eastern Ghouta' (20 June 2018) UN Doc A/HRC/38/CRP.3 6 para 14.

<sup>99</sup> UNHRC Report of 2 February 2017 (n 18) 7-11 paras 25-50; UNHRC, 'The Siege and Recapture of Eastern Ghouta' (n 98) 9 para 27; *ibid* 12-14 paras 43-50. See also ICRC Customary IHL Study (n 44) rr 1, 7, 11, 12.

<sup>100</sup> UNHRC Report of 2 February 2017 (n 18) 19 para 95; UNHRC Report of 1 February 2018 (n 18) 15-16 paras 70-71; UNHRC, 'Sieges as a Weapon of War: Encircle, Starve, Surrender, Evacuate' (29 May 2018) 5-6 <[www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges\\_29May2018.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges_29May2018.pdf)> accessed 21 November 2021; UNHRC, 'The Siege and Recapture of Eastern Ghouta' (n 98) 8 para 24. See also ICRC Customary IHL Study (n 44) rr 1, 53.

<sup>101</sup> UNHRC Report of 2 February 2017 (n 18) 19 para 91. See also ICRC Customary IHL Study (n 44) rr 87-90; UNHRC, 'Sieges as a Weapon of War' (n 100) 4.

<sup>102</sup> UNHRC Report of 2 February 2017 (n 18) 18-19 para 90. Forced conscription may amount to a breach of the prohibition on forced labour, as well as the human right to freedom of thought, conscience, and religion. See ICRC Customary IHL Study (n 44) r 95; UNHRC Report of 2 February 2017 (n 18) 34 para 52.

<sup>103</sup> UNHRC, "'I Lost my Dignity': Sexual and Gender-Based Violence in the Syrian Arab Republic' (8 March 2018) UN Doc A/HRC/37/CRP.3 6-7 paras 13, 16; *ibid* 25-26 paras 119-124. See also ICRC Customary IHL Study (n 44) r 93.

<sup>104</sup> UNHRC, "'They have Erased the Dreams of my Children': Children's Rights in the Syrian Arab Republic' (13 January 2020) UN Doc A/HRC/43/CRP.6 10 para 33. See also ICRC Customary IHL Study (n 44) rr 135-37.

<sup>105</sup> Aaron Stein, 'Partner Operations in Syria' (*Atlantic Council*, July 2017) <[www.atlanticcouncil.org/in-depth-research-reports/report/partner-operations-in-syria/](http://www.atlanticcouncil.org/in-depth-research-reports/report/partner-operations-in-syria/)> accessed 14 June 2021; Van Schaack (n 16) 31-33.



targeting ISIS,<sup>106</sup> and the US Congress approved a new programme to train and equip Syrian rebels to fight the Islamists on the ground.<sup>107</sup> However, the scheme ran into difficulties, training only a handful of rebels who were subsequently defeated by the al-Nusra Front.<sup>108</sup> The United States therefore suspended the scheme in October 2015, with the funds directed instead towards arming and equipping other rebel groups that were already engaged in the fight against the extremists.<sup>109</sup>

The same month, a new military coalition formed, known as the Syrian Democratic Forces (SDF).<sup>110</sup> The alliance was established with Pentagon assistance, aimed at defeating ISIS and providing information to support US airstrikes.<sup>111</sup> Although it included rebels of diverse ethnicity and religion, the Kurdish YPG were the predominant force.<sup>112</sup> The YPG had already defeated ISIS in Kobani and other towns in northern Syria with limited US air support.<sup>113</sup> The re-branding, however, allowed the United States and its allies to provide more substantial support to the SDF by blurring the group's links to the PKK, a terrorist group that has fought a decades-long insurgency against Turkey.<sup>114</sup>

The YPG's success in Kobani provided momentum for the Kurds to establish an interim administration to fill the vacuum left after the withdrawal of Assad's forces from northeast Syria.<sup>115</sup>

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<sup>106</sup> The White House, 'Statement by the President on Airstrikes in Syria' (23 September 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>> accessed 27 March 2021.

<sup>107</sup> US Congress, 'HJ Res 124 Joint Resolution' (17 September 2014) s 149 <[www.congress.gov/113/bills/hjres/124/BILLS-113hjres124eh.xml](http://www.congress.gov/113/bills/hjres/124/BILLS-113hjres124eh.xml)> accessed 27 March 2021. See also Patricia Zengerle and David Lawder, 'US Congress Approves Arming Syrian Rebels, Funding Government' (*Reuters*, 19 September 2014) <[www.reuters.com/article/us-iraq-crisis-congress-vote-idUSKBN0HD2P820140919](http://www.reuters.com/article/us-iraq-crisis-congress-vote-idUSKBN0HD2P820140919)> accessed 27 March 2021; Christopher M Blanchard and Amy Belasco, 'Train and Equip Program for Syria: Authorities, Funding and Issues for Congress' (*Congressional Research Service*, 9 June 2015) <<https://fas.org/sgp/crs/natsec/R43727.pdf>> accessed 27 March 2021; Gaston (n 30) 36-39.

<sup>108</sup> Kareem Shanean, 'US-Trained Syrian Rebels Killed and Leaders Captured by al-Qaeda Affiliate' (*The Guardian*, 31 July 2015) <[www.theguardian.com/world/2015/jul/31/us-trained-rebels-killed-captured-syrian-al-qaida-affiliate-nusra](http://www.theguardian.com/world/2015/jul/31/us-trained-rebels-killed-captured-syrian-al-qaida-affiliate-nusra)> accessed 27 March 2021; BBC News, 'Syria Crisis: "Only Four or Five" UK-Trained Syrian Rebels are Still Fighting' (17 September 2015) <[www.bbc.co.uk/news/world-middle-east-34278233](http://www.bbc.co.uk/news/world-middle-east-34278233)> accessed 27 March 2021; Gaston (n 30) 36-39.

<sup>109</sup> Michael D Shear, Helene Cooper and Eric Schmitt, 'Obama Administration Ends Effort to Train Syrians to Combat ISIS' (*The New York Times*, 9 October 2015) <[www.nytimes.com/2015/10/10/world/middleeast/pentagon-program-islamic-state-syria.html?\\_r=0](http://www.nytimes.com/2015/10/10/world/middleeast/pentagon-program-islamic-state-syria.html?_r=0)> accessed 27 March 2021.

<sup>110</sup> Aron Lund, 'Origins of the Syrian Democratic Forces: A Primer' (*The New Humanitarian*, 22 January 2016) <<https://deeply.thenewhumanitarian.org/syria/articles/2016/01/22/origins-of-the-syrian-democratic-forces-a-primer>> accessed 26 March 2021; William Rosenau and Zack Gold, "'The Cheapest Insurance in the World"? The United States and Proxy Warfare' (*CNA*, July 2019) 29-40 <[www.cna.org/CNA\\_files/PDF/DRM-2019-U-020227-1Rev.pdf](http://www.cna.org/CNA_files/PDF/DRM-2019-U-020227-1Rev.pdf)> accessed 21 December 2020.

<sup>111</sup> Lund 'Origins of the Syrian Democratic Forces' (n 110); Gaston (n 30) 40-46.

<sup>112</sup> Lund 'Origins of the Syrian Democratic Forces' (n 110).

<sup>113</sup> Stein (n 105) 8; Luke Mogelson, 'Dark Victory in Raqqa' (*The New Yorker*, 30 October 2017) <[www.newyorker.com/magazine/2017/11/06/dark-victory-in-raqqa](http://www.newyorker.com/magazine/2017/11/06/dark-victory-in-raqqa)> accessed 27 March 2021.

<sup>114</sup> Lund 'Origins of the Syrian Democratic Forces' (n 110).

<sup>115</sup> International Crisis Group, 'Syria's Kurds: A Struggle Within a Struggle' (22 January 2013) <[www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/syria-s-kurds-struggle-within-struggle](http://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/syria-s-kurds-struggle-within-struggle)>

The new administration established its own institutions and governance structures, including courts and a police force, seeking to consolidate its control over the area and gain legitimacy at local and international levels.<sup>116</sup> While the administration succeeded to some extent in this goal, it faces significant challenges and continues to rely on US sponsorship for its continued survival.<sup>117</sup>

### 2.1.2.1 *The nature and extent of support provided*

The United States commenced its assistance to the SDF within days of the group's formation.<sup>118</sup> This included air and artillery support, transporting SDF fighters across enemy lines, and the supply of weaponry and equipment.<sup>119</sup> Moreover, the Obama administration authorised US forces to deploy to Syria, principally to act in an advisory role.<sup>120</sup> According to a military spokesman, US forces were 'advising the Syrian fighters on the ground' but were 'not involved in direct, front-line combat'.<sup>121</sup>

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accessed 1 October 2020; Robert S Ford and Ali El Yassir, 'The Kurdish PYD and the Challenge of Rebuilding a Syrian State' (*Middle East Institute*, 25 August 2015) <[www.mei.edu/publications/kurdish-pyd-challenge-rebuilding-syrian-state](http://www.mei.edu/publications/kurdish-pyd-challenge-rebuilding-syrian-state)> accessed 27 March 2021; Ghadi Sary, 'Kurdish Self-Governance in Syria: Survival and Ambition' (*Chatham House*, September 2016) 10 <<https://syria.chathamhouse.org/assets/documents/2016-09-15-kurdish-self-governance-syria-sary.pdf>> accessed 27 March 2021.

<sup>116</sup> Sary (n 115) 11-14; Rana Khalaf, 'Governing Rojava: Layers of Legitimacy in Syria' (*Chatham House*, December 2016) <<https://syria.chathamhouse.org/assets/documents/2016-12-08-governing-rojava-khalaf.pdf>> accessed 13 September 2020; The Rojava Information Center, 'Beyond the Frontlines: The Building of the Democratic System in North and East Syria' (19 December 2019) <<https://rojavainformationcenter.com/storage/2019/12/Beyond-the-frontlines-The-building-of-the-democratic-system-in-North-and-East-Syria-Report-Rojava-Information-Center-December-2019-V4.pdf>> accessed 13 September 2020.

<sup>117</sup> Vladimir van Wilgenburg, 'The Future of the Syrian Democratic Forces: One Year after the Liberation of Baghouz and the Turkish Invasion' (*LSE Middle East Centre*, 14 December 2020) <<https://blogs.lse.ac.uk/mec/2020/12/14/the-future-of-the-syrian-democratic-forces-one-year-after-the-liberation-of-baghouz-and-the-turkish-invasion/>> accessed 27 March 2021; International Crisis Group, 'The SDF Seeks a Path Toward Durable Stability in North East Syria' (*Relief Web*, 25 November 2020) <<https://reliefweb.int/report/syrian-arab-republic/sdf-seeks-path-toward-durable-stability-north-east-syria>> accessed 27 March 2021.

<sup>118</sup> Mogelson (n 113); BBC News, 'Syria Conflict: US Air Drop for Anti-IS Forces in Hassakeh' (13 October 2015) <[www.bbc.co.uk/news/world-middle-east-34509793](http://www.bbc.co.uk/news/world-middle-east-34509793)> accessed 27 March 2021.

<sup>119</sup> Lund, 'Origins of the Syrian Democratic Forces' (n 110); Rosenau and Gold (n 110) 34-36; Michael R Gordon and Anne Barnard, 'US Airlifts Hundreds of Militia Fighters in Attack to Cut Off Raqqa, Syria' (*The New York Times*, 22 March 2017) <[www.nytimes.com/2017/03/22/world/middleeast/us-airlift-raqqa-syria.html](http://www.nytimes.com/2017/03/22/world/middleeast/us-airlift-raqqa-syria.html)> accessed 27 March 2021; Michael R Gordon and Eric Schmitt, 'Trump to Arm Syrian Kurds, Even as Turkey Strongly Objects' (*The New York Times*, 9 May 2017) <[www.nytimes.com/2017/05/09/us/politics/trump-kurds-syria-army.html](http://www.nytimes.com/2017/05/09/us/politics/trump-kurds-syria-army.html)> accessed 27 March 2021.

<sup>120</sup> Phil Stewart, 'Exclusive: US-Backed Syria Forces Launch Offensive for Manbij Pocket – US Officials' (*Reuters*, 1 June 2016) <[www.reuters.com/article/us-mideast-crisis-syria-offensive-idUSKCN0YN377](http://www.reuters.com/article/us-mideast-crisis-syria-offensive-idUSKCN0YN377)> accessed 27 March 2021; John Ismay, 'US Says 2,000 Troops are in Syria, a Fourfold Increase' (*The New York Times*, 6 December 2017) <[www.nytimes.com/2017/12/06/world/middleeast/us-troops-syria.html](http://www.nytimes.com/2017/12/06/world/middleeast/us-troops-syria.html)> accessed 27 March 2021. See also Roy Gutman, 'Turkey Leaks Secret Locations of US Troops in Syria' (*The Daily Beast*, 19 July 2017) <[www.thedailybeast.com/turkey-leaks-secret-locations-of-us-troops-in-syria](http://www.thedailybeast.com/turkey-leaks-secret-locations-of-us-troops-in-syria)> accessed 27 March 2021.

<sup>121</sup> Gordon and Barnard (n 119).

Other states also assisted the SDF's counter-ISIS mission, although their support was largely restricted to airstrikes.<sup>122</sup> These efforts successfully displaced ISIS in large areas of northern Syria, including the Islamists' *de facto* capital of Raqqa in late 2017.<sup>123</sup> As the SDF gained control over areas previously held by the terrorist group, it detained ISIS fighters and their families in makeshift camps and prisons.<sup>124</sup> The numbers within these facilities increased dramatically after the fall of ISIS's last stronghold in Baghouz in March 2019.<sup>125</sup>

The United States and its allies assisted the SDF to detain ISIS fighters, funding security measures such as fencing, the installation of bars on windows, and the construction of new facilities.<sup>126</sup> After riots at two of the facilities erupted in early 2020, allowing the escape of several detainees,<sup>127</sup> the US-led coalition provided training to the guards and supplied riot-control equipment to deter further unrest.<sup>128</sup> The coalition additionally assisted in securing the perimeter of Al-Hawl camp, housing

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<sup>122</sup> Anthony Dworkin, 'Europe's New Counter-Terrorism Wars' (*European Council on Foreign Relations*, October 2016) 5-10 <[https://ecfr.eu/archive/page/-/ECFR192\\_-\\_EUROPES\\_NEW\\_COUNTER-TERROR\\_WARS\\_FINAL.pdf](https://ecfr.eu/archive/page/-/ECFR192_-_EUROPES_NEW_COUNTER-TERROR_WARS_FINAL.pdf)> accessed 27 March 2021.

<sup>123</sup> Anne Barnard and Hwaida Saad, 'Raqqa, ISIS "Capital," Is Captured, US-Backed Forces Say' (*The New York Times*, 17 October 2017) <<https://www.nytimes.com/2017/10/17/world/middleeast/isis-syria-raqqa.html>> accessed 5 January 2018; The Wilson Center, 'Timeline: The Rise, Spread, and Fall of the Islamic State' (28 October 2019) <[www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state](http://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state)> accessed 27 March 2021.

<sup>124</sup> Eric Schmitt, 'Pentagon Wades Deeper into Detainee Operations in Syria' (*The New York Times*, 5 April 2018) <[www.nytimes.com/2018/04/05/world/middleeast/pentagon-detainees-syria-islamic-state.html](http://www.nytimes.com/2018/04/05/world/middleeast/pentagon-detainees-syria-islamic-state.html)> accessed 27 March 2021; US Department of Defense, 'Operation Inherent Resolve: Lead Inspector General Report to the United States Congress' (1 April 2019 to 30 June 2019) 23-25 <[https://media.defense.gov/2019/Aug/09/2002169448/-1/-1/1/Q3FY2019\\_LEADIG\\_OIR\\_REPORT.PDF](https://media.defense.gov/2019/Aug/09/2002169448/-1/-1/1/Q3FY2019_LEADIG_OIR_REPORT.PDF)> accessed 28 March 2021.

<sup>125</sup> Al Jazeera, 'Hundreds of ISIL Fighters Surrender in Syria's Baghouz: SDF' (7 March 2019) <[www.aljazeera.com/news/2019/3/7/hundreds-of-isil-fighters-surrender-in-syrias-baghouz-sdf](http://www.aljazeera.com/news/2019/3/7/hundreds-of-isil-fighters-surrender-in-syrias-baghouz-sdf)> accessed 21 March 2021; Elizabeth Dent, 'The Unsustainability of ISIS Detentions in Syria' (*Middle East Institute*, March 2019) <[www.mei.edu/sites/default/files/2019-03/The%20Unsustainability%20of%20ISIS%20Detentions%20in%20Syria\\_reduced.pdf](http://www.mei.edu/sites/default/files/2019-03/The%20Unsustainability%20of%20ISIS%20Detentions%20in%20Syria_reduced.pdf)> accessed 21 March 2021; UNHRC Report of 15 August 2019 (n 18) 4 para 13, 15 paras 82-83; Miriam Berger, 'Here's What We Know About the ISIS Prisons Controlled by the Syrian Kurds' (*The Washington Post*, 14 October 2019) <[www.washingtonpost.com/world/2019/10/12/inside-isis-prisons-controlled-by-syrian-kurds/](http://www.washingtonpost.com/world/2019/10/12/inside-isis-prisons-controlled-by-syrian-kurds/)> accessed 21 March 2021; UNHRC Report of 14 August 2020 (n 18) 15-16 paras 71-74.

<sup>126</sup> Schmitt, 'Pentagon Wades Deeper into Detainee Operations in Syria' (n 124); Van Schaack (n 16) 278-79; Katie Bo Williams, 'Coalition Plans to Expand Giant ISIS Prison in Syria' (*Defense One*, 24 February 2021) <[www.defenseone.com/policy/2021/02/coalition-plans-expand-giant-isis-prison-syria/172270/](http://www.defenseone.com/policy/2021/02/coalition-plans-expand-giant-isis-prison-syria/172270/)> accessed 21 March 2021.

<sup>127</sup> Bethan McKernan, 'Islamic State Prisoners Escape from Syrian Jail After Militants Riot' (*The Guardian*, 30 March 2020) <[www.theguardian.com/world/2020/mar/30/islamic-state-prisoners-escape-from-syrian-jail-after-militants-riot](http://www.theguardian.com/world/2020/mar/30/islamic-state-prisoners-escape-from-syrian-jail-after-militants-riot)> accessed 3 June 2020; UNHRC Report of 14 August 2020 (n 18) 2 para 5.

<sup>128</sup> North Press Agency, 'Global Coalition Trains SDF to Deter Riots in Prisons' (21 May 2020) <[https://npasyria.com/en/blog.php?id\\_blog=2620&sub\\_blog=15&name\\_blog=Global%20Coalition%20trains%20SDF%20to%20deter%20riots%20in%20prisons](https://npasyria.com/en/blog.php?id_blog=2620&sub_blog=15&name_blog=Global%20Coalition%20trains%20SDF%20to%20deter%20riots%20in%20prisons)> accessed 3 June 2020.

numerous ISIS women and children, and supported the Kurdish administration to identify individuals within the camp via biometric enrolment.<sup>129</sup>

#### *2.1.2.2 International law violations involving armed groups supported by the US-led coalition*

The Kurdish YPG is reportedly alone amongst rebel forces operating in Syria in having a systematic approach to discipline within its ranks.<sup>130</sup> But allegations of abuses have, nonetheless, been made against the group and its associated civilian administration.<sup>131</sup> In 2015, for instance, Amnesty International reported that the YPG forced civilians to leave their homes and razed entire villages, often in retaliation for residents' perceived ties to ISIS.<sup>132</sup> The UN Commission of Inquiry documented similar abuses by the wider SDF.<sup>133</sup> During the 2016 offensive to capture Manbij, for instance, SDF forces ordered civilians to leave their villages and some remained internally displaced, living in dire humanitarian conditions.<sup>134</sup> Such conduct potentially violates the SDF's IHL obligations towards displaced persons, such as the duty to provide adequate shelter and to allow individuals to return home once the reason for their displacement ceases.<sup>135</sup>

Forces linked to the SDF also forcibly conscripted children for military service,<sup>136</sup> in breach of the IHL prohibition on the recruitment of child soldiers.<sup>137</sup> In one instance, the YPG reportedly arrested a 17-year-old and detained him for over a year, during which time he was held in inhumane conditions and subjected to torture due to his unwillingness to join the group.<sup>138</sup> Moreover, SDF

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<sup>129</sup> US Department of Defense (n 124) 25; Louisa Loveluck, 'In Syrian Camp for Women and Children Who Left ISIS Caliphate, a Struggle Even to Register Names' (*The Washington Post*, 28 June 2020) <[www.washingtonpost.com/world/middle\\_east/syria-al-hol-annex-isis-caliphate-women-children/2020/06/28/80ddabb4-b71b-11ea-9a1d-d3db1cbe07ce\\_story.html](http://www.washingtonpost.com/world/middle_east/syria-al-hol-annex-isis-caliphate-women-children/2020/06/28/80ddabb4-b71b-11ea-9a1d-d3db1cbe07ce_story.html)> accessed 22 March 2021.

<sup>130</sup> Baas (n 10) 12; Gaston (n 30) 43.

<sup>131</sup> Human Rights Watch, 'Under Kurdish Rule: Abuses in PYD-Run Enclaves of Syria' (19 June 2014) <[www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria](http://www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria)> accessed 27 March 2021.

<sup>132</sup> Amnesty International, 'Syria: US Ally's Razing of Villages Amounts to War Crimes' (13 October 2015) <[www.amnesty.org/en/latest/news/2015/10/syria-us-allys-razing-of-villages-amounts-to-war-crimes/](http://www.amnesty.org/en/latest/news/2015/10/syria-us-allys-razing-of-villages-amounts-to-war-crimes/)> accessed 27 March 2021. The razing of villages violates the IHL principle of distinction and the duty to direct attacks only at military objectives. See ICRC Customary IHL Study (n 44) rr 1, 7.

<sup>133</sup> UNHRC, 'Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic, 21 July 2016-28 February 2017' (10 March 2017) UN Doc A/HRC/34/CRP.3 19-21 paras 86-93, 95.

<sup>134</sup> *ibid* 19 para 87.

<sup>135</sup> ICRC Customary IHL Study (n 44) rr 131-33.

<sup>136</sup> UNHRC Report of 1 February 2018 (n 18) 10 para 42; Human Rights Watch, 'Syria: Armed Group Recruiting Children in Camps' (3 August 2018) <[www.hrw.org/news/2018/08/03/syria-armed-group-recruiting-children-camps#](http://www.hrw.org/news/2018/08/03/syria-armed-group-recruiting-children-camps#)> accessed 27 March 2021; UNHRC Report of 28 January 2020 (n 18) 13 para 65; UNHRC Report of 14 August 2020 (n 18) 17 para 79; UNHRC 'They have Erased the Dreams of my Children' (n 104) 11-12 para 40.

<sup>137</sup> ICRC Customary IHL Study (n 44) rr 135-37.

<sup>138</sup> UNHRC, 'Human Rights Abuses' (n 133) 21 para 94. See also ICRC Customary IHL Study (n 44) rr 87-91.

fighters were reportedly involved in additional IHL violations, such as the conduct of indiscriminate attacks<sup>139</sup> and the torture of detainees.<sup>140</sup>

Regarding the detention facilities run by the Kurdish administration, reporting indicates severe overcrowding, limited access to food and water, and minimal opportunities for detainees to undertake activities outside their cells.<sup>141</sup> Such conditions potentially amount to inhumane treatment, in violation of IHL and IHRL.<sup>142</sup> The UN Commission also received allegations of torture, sexual violence and deaths in detention.<sup>143</sup> On occasion, detainees were reportedly held in camps located close to combat zones, requiring them to live ‘under near-constant bombardment’.<sup>144</sup> Meanwhile, tens of thousands of women and children have been held in ‘squalid’ conditions at Al-Hawl camp, without any opportunity to challenge their continued detention.<sup>145</sup>

#### ***2.1.4 Militias fighting on Turkey’s behalf***

Turkey strongly opposed the US-led coalition’s support to the SDF due to the group’s links to the terrorist group, the PKK.<sup>146</sup> In 2015, therefore, Ankara’s priority evolved from toppling President Assad to preventing the emergence of an autonomous Kurdish region on its southern border.<sup>147</sup> The

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<sup>139</sup> UNHRC Report of 9 August 2018 (n 18) 5 para 17; *ibid* 6 para 24. See also ICRC Customary IHL Study (n 44) rr 1, 7, 11, 12.

<sup>140</sup> Roy Gutman, ‘Video Shows US Allies in Syria Torturing Prisoners’ (*The Daily Beast*, 11 July 2017) <[www.thedailybeast.com/video-shows-us-allies-in-syria-torturing-prisoners](http://www.thedailybeast.com/video-shows-us-allies-in-syria-torturing-prisoners)> accessed 25 March 2021; UNHRC, ‘I Lost my Dignity’ (n 103) 19 para 90; UNHRC Report of 14 August 2020 (n 18) 16 para 76; UNHRC Report of 2 March 2021 (n 18) 16 para 50. See also ICRC Customary IHL Study (n 44) rr 87-91.

<sup>141</sup> UNHRC Report of 28 January 2020 (n 18) 12-13 para 64; UNHRC Report 2 March 2021 (n 18) 15 para 51; Human Rights Watch, ‘Thousands of Foreigners Unlawfully Held in NE Syria’ (23 March 2021) <[www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria](http://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria)> accessed 31 March 2021.

<sup>142</sup> ICRC Customary IHL Study (n 44) r 87; ICCPR (n 45) art 7.

<sup>143</sup> UNHRC Report 2 March 2021 (n 18) 15-16 paras 52, 54; *ibid* 23-24 paras 95-96. See also ICRC Customary IHL Study (n 44) rr 87-93.

<sup>144</sup> UNHRC Report of 31 January 2019 (n 18) 17-18 paras 90, 93; UNHRC Report of 15 August 2019 (n 18) 15 para 82. See also ICRC Customary IHL Study (n 44) r 121.

<sup>145</sup> UNHRC Report of 14 August 2020 (n 18) 15 para 71. See also Human Rights Watch, ‘Syria: Dire Conditions for ISIS Suspects’ Families’ (23 July 2019) <[www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families#](http://www.hrw.org/news/2019/07/23/syria-dire-conditions-isis-suspects-families#)> accessed 27 March 2021; Human Rights Watch, ‘Thousands of Foreigners Unlawfully Held in NE Syria’ (n 141); Syria Justice and Accountability Centre (n 16) 10-11; UNHRC Report of 15 August 2019 (n 18) 15 para 83; UNHRC Report of 28 January 2020 (n 18) 12 paras 61-62; UNHRC Report of 2 March 2021 (n 18) 17 para 55. Such conditions potentially violate humane treatment obligations under IHL and IHRL and could constitute arbitrary detention. See ICRC Customary IHL Study (n 44) rr 87, 99; ICCPR (n 45) arts 7, 9; UNGA, ‘Report of the Working Group on Arbitrary Detention’ (24 December 2012) UN Doc A/HRC/22/44.

<sup>146</sup> Lund ‘Origins of the Syrian Democratic Forces’ (n 110); Nicholas Norberg, ‘US Syria Withdrawal Impact on Kurdish Partners’ (*Lanfare*, 8 January 2019) <[www.lanfareblog.com/us-syria-withdrawal-impact-kurdish-partners](http://www.lanfareblog.com/us-syria-withdrawal-impact-kurdish-partners)> accessed 21 March 2021.

<sup>147</sup> Itani and Stein (n 23) 6; Sam Heller, ‘Turkey’s “Turkey First” Syria Policy’ (*The Century Foundation*, 12 April 2017) <<https://tcf.org/content/report/turkeys-turkey-first-syria-policy/?agreed=1>> accessed 26 March 2021; Engin Yüksel, ‘Strategies of Turkish Proxy Warfare in Northern Syria: Back With a Vengeance’ (*Netherlands Institute of International*

following year, Turkey supported a Syrian rebel offensive to defeat ISIS militants in Operation Euphrates Shield, aiming simultaneously to prevent the SDF from creating a zone along Turkey's southern border from which the PKK could operate.<sup>148</sup>

By the end of 2017, the disparate militia groups acting for Turkey had unified, becoming known as the Syrian National Army (SNA).<sup>149</sup> SNA fighters subsequently participated in two further operations alongside Turkish armed forces, each of which gained control over additional areas of Syrian territory along Turkey's southern border. The first, Operation Olive Branch, aimed at clearing Kurdish forces from Afrin.<sup>150</sup> This was followed in October 2019 by Operation Peace Spring, targeting territory held by the Kurds in northeast Syria.<sup>151</sup>

Turkey also supported Syrian rebels to resist advances by the Syrian regime in Idlib province in northwest Syria.<sup>152</sup> Idlib is the last opposition stronghold in Syria and 'an important buffer between Turkey and the Syrian regime'.<sup>153</sup> Here, Turkey sought to merge and consolidate a number of Islamist groups under a new umbrella organisation, the National Liberation Front (NLF).<sup>154</sup> In addition, Ankara reached an accommodation with the dominant NSA in the region, the al-Qaeda affiliate Hayat Tahrir al-Sham (HTS), on matters such as border crossings and the delivery of humanitarian aid.<sup>155</sup>

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*Relations*, November 2019) 1, 3 <[www.clingendael.org/sites/default/files/2019-11/strategies-turkish-proxy-warfare-in-northern-syria.pdf](http://www.clingendael.org/sites/default/files/2019-11/strategies-turkish-proxy-warfare-in-northern-syria.pdf)> accessed 25 March 2021; Asli Aydintaşbaş, 'A New Gaza: Turkey's Border Policy in Northern Syria' (*European Council on Foreign Relations*, 28 May 2020)

<[https://ecfr.eu/publication/a\\_new\\_gaza\\_turkeys\\_border\\_policy\\_in\\_northern\\_syria/](https://ecfr.eu/publication/a_new_gaza_turkeys_border_policy_in_northern_syria/)> accessed 22 March 2021.

<sup>148</sup> Göktug Sönmez, 'Turkey's Euphrates Shield Operations: al-Bab and Beyond' (*The Jamestown Foundation*, 24 February 2017) <<https://jamestown.org/program/turkeys-euphrates-shield-operation-al-bab-beyond/>> accessed 21 March 2021; Heller, 'Turkey's "Turkey First" Syria Policy' (n 147); Stein (n 105) 13-15; Aydintaşbaş (n 147).

<sup>149</sup> Dilara Hamit and Erdogan Çagatay Zontur, 'Free Syrian Army Transforms into Syrian National Army' (*Anadolu Agency*, 9 October 2019) <[www.aa.com.tr/en/middle-east/free-syrian-army-transforms-into-syrian-national-army/1607384](http://www.aa.com.tr/en/middle-east/free-syrian-army-transforms-into-syrian-national-army/1607384)> accessed 21 March 2021; Elizabeth Tsurkov, 'Who Are Turkey's Proxy Fighters in Syria?' (*NYR Daily*, 27 November 2019) <[www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/](http://www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/)> accessed 16 June 2020; UNHRC Report of 2 March 2021 (n 18) 13 para 55.

<sup>150</sup> UNHRC Report of 9 August 2018 (n 18) 3 para 4; *ibid* 5 para 14.

<sup>151</sup> UNHRC Report of 28 January 2020 (n 18) 4 para 12, 10 paras 45-47.

<sup>152</sup> Orhan Coskun and Suleiman Al-Khalidi, 'Turkish-Backed Rebels Say They Seized Town in Syria's Idlib in First Advance' (*Reuters*, 25 February 2020) <[www.reuters.com/article/us-syria-security/turkish-backed-rebels-say-they-seized-town-in-syrias-idlib-in-first-advance-idUSKCN20J0SO](http://www.reuters.com/article/us-syria-security/turkish-backed-rebels-say-they-seized-town-in-syrias-idlib-in-first-advance-idUSKCN20J0SO)> accessed 21 March 2021.

<sup>153</sup> Aydintaşbaş (n 147).

<sup>154</sup> Yüksel (n 147) 9-12.

<sup>155</sup> Aydintaşbaş (n 147); Yüksel (n 147) 13; Sultan Al Kanj, 'Reviewing the Turkey-HTS Relationship' (*Chatham House*, May 2019) <<https://syria.chathamhouse.org/research/reviewing-the-turkey-hts-relationship>> accessed 25 March 2021.

#### 2.1.4.1 *The nature and extent of the support provided*

In its operations targeting the Syrian Kurds, Turkey employed FSA groups that it had previously supported in the fight against the Assad regime.<sup>156</sup> By centralising and professionalising these militias under the banner of the SNA, Turkey ‘effectively resurrected the Syrian armed opposition as a viable fighting force’ and extended its sphere of influence in northern Syria.<sup>157</sup> Turkey provided significant support to the militias, including training, salaries, and weapons.<sup>158</sup> It additionally encouraged new recruits to join the SNA, including Syrian refugees located in Turkey, with the offer of cash stipends.<sup>159</sup>

Turkey provided similar support to the NLF until, in 2019, Ankara persuaded the group to merge with the SNA.<sup>160</sup> That these diverse militias agreed to unite demonstrates Ankara’s considerable leverage over their conduct.<sup>161</sup> This is equally evident in the NSAs’ wider operations, which furthered Turkey’s national goals rather than the militias’ priority of combatting President Assad.<sup>162</sup> For instance, Aleppo’s fall to pro-government forces has been linked, in part, to Turkey’s decision to draw Syrian fighters away from the battle to combat ISIS and the Kurds, thereby weakening opposition lines.<sup>163</sup>

Having taken control of areas of northern Syria, Turkey put in place new governance structures.<sup>164</sup> In areas such as Afrin, local councils govern on a day-to-day basis but the ‘real authority’ lies with Turkish governors.<sup>165</sup> The salaries of all local civilian and military personnel are paid by Turkey,<sup>166</sup>

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<sup>156</sup> Yüksel (n 147) 6. See also s 2.1.1.

<sup>157</sup> Yüksel (n 147) 1.

<sup>158</sup> Tsurkov (n 149); Aydıntaşbaş (n 147).

<sup>159</sup> Aaron Stein, Hossam Abouzahr and Rao Komar, ‘Post Conflict Stabilization: Turkey and the End of Operation Euphrates Shield’ (*Atlantic Council*, 13 July 2017) <[www.atlanticcouncil.org/blogs/syriasource/post-conflict-stabilization-turkey-and-the-end-of-operation-euphrates-shield/](http://www.atlanticcouncil.org/blogs/syriasource/post-conflict-stabilization-turkey-and-the-end-of-operation-euphrates-shield/)> accessed 21 March 2020; Tsurkov (n 149).

<sup>160</sup> Yüksel (n 147) 10-12.

<sup>161</sup> Charles Lister, ‘Turkish-Backed Syrian Armed Opposition Groups to Unite Under One Banner’ (*Middle East Institute*, 4 October 2019) <[www.mei.edu/blog/turkish-backed-syrian-armed-opposition-groups-unite-under-one-banner](http://www.mei.edu/blog/turkish-backed-syrian-armed-opposition-groups-unite-under-one-banner)> accessed 12 November 2021.

<sup>162</sup> Al Kanj (n 155); Tsurkov (n 149); Yüksel (n 147) 11-12, 16.

<sup>163</sup> Aron Lund, ‘Another Change of Fortune in Aleppo’ (*Carnegie Middle East Center*, 5 September 2016) <<https://carnegie-mec.org/diwan/64474>> accessed 26 March 2021.

<sup>164</sup> Stein, Abouzahr and Komar (n 159); UN OHCHR, ‘Between a Rock and a Hard Place – Civilians in North-Western Syria’ (June 2018) 4-5 <[https://reliefweb.int/sites/reliefweb.int/files/resources/ohchr\\_-\\_syria\\_monthly\\_human\\_rights\\_digest\\_-\\_june\\_2018.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/ohchr_-_syria_monthly_human_rights_digest_-_june_2018.pdf)> accessed 25 March 2021; UNHRC Report of 9 August 2018 (n 18) 6 para 25; *ibid* 7 para 29; UNHRC Report of 31 January 2019 (n 18) 14 paras 69-70.

<sup>165</sup> Aydıntaşbaş (n 147).

<sup>166</sup> *ibid*; Tsurkov (n 149).

Turkish-trained police officers provide security, and local officials collaborate closely with Ankara.<sup>167</sup> Turkey's influence over the local administrations is equally apparent in the transfer of some Syrian nationals detained by the SNA across the border into Turkey, for prosecution under Turkish criminal law.<sup>168</sup>

#### 2.1.4.2 International law violations involving Turkish-backed militias

Allegations of abuses involving Turkish-backed militias proliferate.<sup>169</sup> The NSAs gained particular notoriety during Operation Peace Spring, during which their members were filmed chanting extremist slogans, executing prisoners, and engaging in numerous other atrocities against Kurdish civilians.<sup>170</sup> Such conduct clearly violates fundamental norms of IHL, including the obligations of humane treatment and non-discrimination towards civilians and persons *hors de combat*.<sup>171</sup>

Abuses were also rife in regions controlled by Turkish-supported groups. Residents in these areas reported systematic arrests, beatings and kidnappings.<sup>172</sup> Women were subjected to rape and other forms of sexual violence, while those in SNA detention were reportedly tortured to extract confessions regarding their alleged links to the Kurdish administration.<sup>173</sup> In addition, SNA members

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<sup>167</sup> UNHRC Report of 2 March 2021 (n 18) 15 para 45; UNHRC Report of 14 August 2020 (n 18) 13 para 60.

<sup>168</sup> UNHRC Report of 14 August 2020 (n 18) 13 para 47, 14-15 para 69. See also Human Rights Watch, 'Illegal Transfers of Syrians to Turkey: Over 60 Detained, Forcibly Moved from Occupied Territories' (3 February 2021) <[www.hrw.org/news/2021/02/03/illegal-transfers-syrians-turkey?fbclid=IwAR3OPID7fRlmbYzTcpm6VoAHJ7N5c7VuNqRNia9MOK\\_zvoatbZO7mUGP4lQ](http://www.hrw.org/news/2021/02/03/illegal-transfers-syrians-turkey?fbclid=IwAR3OPID7fRlmbYzTcpm6VoAHJ7N5c7VuNqRNia9MOK_zvoatbZO7mUGP4lQ)> accessed 28 March 2021.

<sup>169</sup> See eg Syria Justice and Accountability Centre (n 16) 9.

<sup>170</sup> Tsurkov (n 149); Human Rights Watch, 'Syria: Civilians Abused in "Safe Zones"' (27 November 2019) <[www.hrw.org/news/2019/11/27/syria-civilians-abused-safe-zones](http://www.hrw.org/news/2019/11/27/syria-civilians-abused-safe-zones)> accessed 29 November 2019; Ben Hubbard and others, 'Syrian Arab Fighters Backed by Turkey Kill Two Kurdish Prisoners' (*The New York Times*, 12 October 2019) <[www.nytimes.com/2019/10/12/world/middleeast/turkey-invasion-syria-kurds.html](http://www.nytimes.com/2019/10/12/world/middleeast/turkey-invasion-syria-kurds.html)> accessed 18 December 2019; Martin Chulov and Mohammed Rasool, 'Kurdish Politician Among Nine Civilians Shot Dead by Pro-Turkey Forces in Syria' (*The Guardian*, 13 October 2019) <[www.theguardian.com/world/2019/oct/13/female-kurdish-politician-among-nine-civilians-killed-by-pro-turkey-forces-in-syria-observers-say](http://www.theguardian.com/world/2019/oct/13/female-kurdish-politician-among-nine-civilians-killed-by-pro-turkey-forces-in-syria-observers-say)> accessed 18 December 2019; Stephanie Nebehay, 'UN Urges Turkey to Investigate Executions in Syria' (*Reuters*, 15 October 2019) <[www.reuters.com/article/us-syria-security-turkey-un/un-urges-turkey-to-investigate-executions-in-syria-idUSKBN1WU19W](http://www.reuters.com/article/us-syria-security-turkey-un/un-urges-turkey-to-investigate-executions-in-syria-idUSKBN1WU19W)> accessed 18 December 2019; Amnesty International, 'Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies' (18 October 2019) <[www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/](http://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/)> accessed 18 December 2019; UNHRC Report of 28 January 2020 (n 18) 11 para 54.

<sup>171</sup> ICRC Customary IHL Study (n 44) rr 87-90.

<sup>172</sup> Amnesty International, 'Syria: Turkey Must Stop Serious Violations by Allied Groups and its Own Forces in Afrin' (2 August 2018) <[www.amnesty.org/en/latest/news/2018/08/syria-turkey-must-stop-serious-violations-by-allied-groups-and-its-own-forces-in-afrin/](http://www.amnesty.org/en/latest/news/2018/08/syria-turkey-must-stop-serious-violations-by-allied-groups-and-its-own-forces-in-afrin/)> accessed 27 March 2021; UNHRC Report of 9 August 2018 (n 18) 6-7 para 26; UNHRC Report of 14 August 2020 (n 18) 12-13 paras 52-58; UNHRC Report of 2 March 2021 (n 18) 14 para 38.

<sup>173</sup> UNHRC Report of 2 March 2021 (n 18) 15 paras 43-44. See also Tsurkov (n 149); UNHRC Report of 14 August 2020 (n 18) 13 paras 59-62.



frequently engaged in looting.<sup>174</sup> This extended to appropriating property owned by Kurds, who were informed by the militias that ‘their real or presumed support for the YPG precluded them from living in the area’.<sup>175</sup> Such behaviour is, again, in clear breach of IHL, particularly the prohibitions on pillage, sexual violence, and torture.<sup>176</sup>

## 2.2 Ukraine

In common with the Syrian hostilities, the conflict in Ukraine began with largely peaceful protests in the state’s capital, Kiev.<sup>177</sup> Known as the Euro-Maidan, the wave of demonstrations that commenced in November 2013 was triggered by the government’s decision to prioritise closer ties with Russia, rather than sign an Association Agreement with the European Union.<sup>178</sup> Ukrainian security forces responded with excessive force, thereby escalating the demonstrations into violent clashes and further radicalising the protest movement.<sup>179</sup> President Yanukovich fled to Russia in late February 2014, leading to the establishment of a new government.<sup>180</sup>

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<sup>174</sup> UNHRC Report of 31 January 2019 (n 18) 14 para 67; UNHRC ‘Between a Rock and a Hard Place’ (n 164) 6-7; Human Rights Watch, ‘Syria: Civilians Abused in “Safe Zones”’ (n 170); Tsurkov (n 149); UNHRC Report of 14 August 2020 (n 18) 11-12 paras 47-51; UNHRC Report of 2 March 2021 (n 18) 7 para 28.

<sup>175</sup> UNHRC Report of 9 August 2018 (n 18) 7 para 30. See also UNHRC Report of 28 January 2020 (n 18) 9 para 41-42, 11 paras 56-57; UNHRC Report of 2 March 2021 (n 18) 14 para 40.

<sup>176</sup> ICRC Customary IHL Study (n 44) rr 52, 87-90, 93. See also UNHRC Report of 14 August 2020 (n 18) 13 para 65; UNHRC Report of 2 March 2021 (n 18) 7 para 31.

<sup>177</sup> See generally Steven Woehrel, ‘Ukraine: Current Issues and US Policy’ (*Congressional Research Service*, 24 March 2014) <<https://apps.dtic.mil/dtic/tr/fulltext/u2/a602711.pdf>> accessed 11 July 2019 (Woehrel Report of March 2014); ICC, The Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2016’ (14 November 2016) 34-37 <[www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](http://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf)> accessed 11 July 2019 (ICC Report 2016); Michael Kofman and others, ‘Lessons from Russia’s Operations in Crimea and Eastern Ukraine’ (*RAND Corporation*, 2017) 33-45 <[www.rand.org/content/dam/rand/pubs/research\\_reports/RR1400/RR1498/RAND\\_RR1498.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR1400/RR1498/RAND_RR1498.pdf)> accessed 27 February 2018; Anna Matveeva, *Through Times of Trouble: Conflict in South Eastern Ukraine Explained from Within* (Lexington Books 2018); Thomas de Waal, ‘Uncertain Ground: Engaging with Europe’s de facto States and Breakaway Territories’ (*Carnegie Europe*, 3 December 2018) 61-70 <<https://carnegieeurope.eu/2018/12/03/uncertain-ground-engaging-with-europe-s-de-facto-states-and-breakaway-territories-pub-77823>> accessed 30 August 2020; Sabine Fischer, ‘The Donbas Conflict: Opposing Interests and Narratives, Difficult Peace Process’ (*German Institute for International and Security Affairs*, April 2019) <[www.swp-berlin.org/10.18449/2019RP05/](http://www.swp-berlin.org/10.18449/2019RP05/)> accessed 4 April 2021.

<sup>178</sup> Woehrel Report of March 2014 (n 177) 8; ICC Report 2016 (n 177) 34; Kofman and others (n 177) 1; Matveeva (n 177) 34-36.

<sup>179</sup> UNHRC, ‘Report on the Human Rights Situation in Ukraine’ (15 April 2014) 3 <[https://reliefweb.int/sites/reliefweb.int/files/resources/Ukraine\\_Report\\_15April2014.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Ukraine_Report_15April2014.pdf)> accessed 13 November 2021; Steven Woehrel, ‘Ukraine: Current issues and US Policy’ (*Congressional Research Service*, 4 September 2014) 1 <[www.everycrsreport.com/files/20140904\\_RL33460\\_ac8f6d5380c670426d952dc39e784d173dac9739.pdf](http://www.everycrsreport.com/files/20140904_RL33460_ac8f6d5380c670426d952dc39e784d173dac9739.pdf)> accessed 11 July 2019 (Woehrel Report of September 2014); Matveeva (n 177) 36-40.

<sup>180</sup> Woehrel Report of March 2014 (n 177) 8; ICC Report 2016 (n 177) 34; Kofman and others (n 177) 1.

The formation of a pro-Western regime in Ukraine posed a significant threat to Russia's regional hegemony.<sup>181</sup> Following the collapse of the Soviet Union and Ukraine's attainment of independence in 1991, Russia had retained considerable influence over its neighbour, particularly in eastern and southern Ukraine where Russian is the first language of many inhabitants.<sup>182</sup> The east also retained economic ties to Russia,<sup>183</sup> while the stationing of the Black Sea Fleet on the Crimean peninsula preserved an important Russian military foothold on Ukrainian territory.<sup>184</sup>

Aiming, in part, to retain control of its crucial naval facilities following the departure of President Yanukovich,<sup>185</sup> Russia mounted a covert operation in Crimea, mobilising its naval infantry forces based on the peninsula and transporting in special forces to occupy the territory.<sup>186</sup> Moscow initially denied that the 'little green men' operating without insignia were Russian troops, insisting that they were 'self-defence groups' or 'volunteers'.<sup>187</sup> By the time the full extent of Russian involvement became clear, the confusion created by Moscow's policy of 'maskirovka', or denial and deception, had deterred any significant international intervention in Ukraine's support.<sup>188</sup>

Russian 'maskirovka' is also apparent in the concurrent events in eastern Ukraine. While international attention focused primarily on Crimea, a political protest movement gathered pace in the eastern Donbas region.<sup>189</sup> Anti-government demonstrators waving Russian flags seized administrative buildings and the protest leaders declared themselves 'people's mayors' and 'people's

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<sup>181</sup> Geraint Hughes, 'Ukraine: Europe's New Proxy War?' (2014) Fletcher Security Rev 105, 112; Franklin Holcomb, 'The Kremlin's Irregular Army: Ukrainian Separatist Order of Battle' (*Institute for the Study of War*, September 2017) 7 <[www.understandingwar.org/sites/default/files/ISW%20Separatist%20ORBAT%20Holcomb%202017\\_Final.pdf](http://www.understandingwar.org/sites/default/files/ISW%20Separatist%20ORBAT%20Holcomb%202017_Final.pdf)> accessed 4 April 2021; Simon Saradzhyan, 'When Does Vladimir Putin's Russia Send in Troops?' (*Belfer Center*, 7 August 2018) <[www.russiamatters.org/analysis/when-does-vladimir-putins-russia-send-troops](http://www.russiamatters.org/analysis/when-does-vladimir-putins-russia-send-troops)> accessed 4 April 2021.

<sup>182</sup> Woehrel Report of September 2014 (n 179) 6; Kofman and others (n 177) 49.

<sup>183</sup> *ibid.*

<sup>184</sup> Luke Harding, 'Ukraine Extends Lease for Russia's Black Sea Fleet' (*The Guardian*, 21 April 2010) <[www.theguardian.com/world/2010/apr/21/ukraine-black-sea-fleet-russia](http://www.theguardian.com/world/2010/apr/21/ukraine-black-sea-fleet-russia)> accessed 11 July 2019.

<sup>185</sup> Daniel Treisman, 'Why Putin Took Crimea' (*Foreign Affairs*, May/June 2016) <[www.foreignaffairs.com/articles/ukraine/2016-04-18/why-putin-took-crimea](http://www.foreignaffairs.com/articles/ukraine/2016-04-18/why-putin-took-crimea)> accessed 9 July 2019; Leonid Ragozin, 'Annexation of Crimea: A Masterclass in Political Manipulation' (*Al Jazeera*, 16 March 2019) <[www.aljazeera.com/indepth/opinion/annexation-crimea-masterclass-political-manipulation-190315174459207.html](http://www.aljazeera.com/indepth/opinion/annexation-crimea-masterclass-political-manipulation-190315174459207.html)> accessed 12 July 2019; Matveeva (n 177) 275.

<sup>186</sup> Hughes (n 181)106; Kofman and others (n 177) 5-12; Matveeva (n 177) 57-66.

<sup>187</sup> Vitaly Shevchenko, "'Little green men' or 'Russian invaders'?" (*BBC News*, 11 March 2014) <[www.bbc.com/news/world-europe-26532154](http://www.bbc.com/news/world-europe-26532154)> accessed 9 July 2014. President Putin subsequently admitted to the involvement of Russian troops in the Crimea operation. See BBC News, 'Putin Reveals Secrets of Russia's Crimea Takeover Plot' (9 March 2015) <[www.bbc.com/news/world-europe-31796226](http://www.bbc.com/news/world-europe-31796226)> accessed 12 July 2019.

<sup>188</sup> US Defence Intelligence Agency, 'Russia Military Power' (2017) 45 <[www.dia.mil/portals/27/documents/news/military%20power%20publications/russia%20military%20power%20report%202017.pdf](http://www.dia.mil/portals/27/documents/news/military%20power%20publications/russia%20military%20power%20report%202017.pdf)> accessed 12 July 2019.

<sup>189</sup> Kofman and others (n 177) 33-45.

governors'.<sup>190</sup> In April 2014, local Donbas leaders declared the establishment of the 'Donetsk People's Republic' (DNR) and the 'Luhansk People's Republic' (LNR), followed in each case by a referendum on self-rule.<sup>191</sup> Meanwhile, President Putin spoke of the obligation he felt to protect ethnic Russians in the region, referring to south-eastern Ukraine as 'Novorossia'.<sup>192</sup>

In mid-April 2014, the Ukrainian government deployed forces to the east of the country in an 'anti-terror operation', aimed at regaining control of the Donbas.<sup>193</sup> This involved the nation's security forces and also a number of volunteer battalions.<sup>194</sup> The latter, committed to fighting for the unity of Ukraine, stepped in to fill the void left by the Donbas-based security forces, who proved 'helpless' in the face of rebel advances.<sup>195</sup> Russia, meanwhile, aided the rebels in their fight against the Ukrainian government and also deployed the Wagner Group to bolster rebel forces.

### **2.2.1 Russian support to non-state actors in the Donbas**

Despite assertions within Ukraine and the wider international community that responsibility for the insurgency in the Donbas lay solely with Moscow,<sup>196</sup> the conflict's origins were predominantly local.<sup>197</sup> Although Russian citizens participated in the protests, the vast majority of demonstrators

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<sup>190</sup> Kofman and others (n 177) 33.

<sup>191</sup> Woehrel Report of September 2014 (n 179) 3; Matveeva (n 177) 102-06, 111-13; Fischer (n 177) 9.

<sup>192</sup> 'Novorossia' means 'New Russia' and is a historical term for the area north of the Black Sea that the Russian empire conquered in the 1700s. See David M Herszenhorn, 'What is Putin's "New Russia"?' (*The New York Times*, 18 April 2014) <[www.nytimes.com/2014/04/19/world/europe/what-is-putins-new-russia.html](http://www.nytimes.com/2014/04/19/world/europe/what-is-putins-new-russia.html)> accessed 13 July 2019; Adrian A Basora and Aleksandr Fisher, 'Putin's "Greater Novorossiya" – The Dismemberment of Ukraine' (*Foreign Policy Research Institute*, 2 May 2014) <[www.fpri.org/article/2014/05/putins-greater-novorossiya-the-dismemberment-of-ukraine/](http://www.fpri.org/article/2014/05/putins-greater-novorossiya-the-dismemberment-of-ukraine/)> accessed 13 July 2019; Matveeva (n 177) 79-80, 113-17.

<sup>193</sup> BBC News, 'Ukraine Says Donetsk 'Anti-Terror Operation' Under Way' (16 April 2014) <[www.bbc.com/news/world-europe-27035196](http://www.bbc.com/news/world-europe-27035196)> accessed 5 June 2020.

<sup>194</sup> UNHRC 'Report on the human rights situation in Ukraine' (15 July 2014) 3 para 3 <[www.un.org.ua/images/stories/OHCHR\\_Report\\_15\\_July\\_Ukraine\\_FINAL.pdf](http://www.un.org.ua/images/stories/OHCHR_Report_15_July_Ukraine_FINAL.pdf)> accessed 25 February 2018.

<sup>195</sup> Woehrel Report of September 2014 (n 179) 3. See also Rosaria Puglisi, 'Heroes or Villains? Volunteer Battalions in Post-Maidan Ukraine' (*Istituto Affari Internazionali*, 8 March 2015) 5 <[www.iai.it/sites/default/files/iaiw1508.pdf](http://www.iai.it/sites/default/files/iaiw1508.pdf)> accessed 9 July 2019; Matveeva (n 177) 123-26.

<sup>196</sup> See eg Lina Kushch and Thomas Grove, 'Pro-Russia Protesters Seize Ukraine Buildings, Kiev Blames Putin' (*Reuters*, 6 April 2014) <[www.reuters.com/article/us-ukraine-crisis-storm-idUSBREA350B420140406](http://www.reuters.com/article/us-ukraine-crisis-storm-idUSBREA350B420140406)> accessed 24 July 2019; Ivo Daalder and others, 'Preserving Ukraine's Independence, Resisting Russian Aggression: What the United States and NATO Must Do' (*Brookings*, February 2015) 2 <[www.brookings.edu/wp-content/uploads/2016/06/UkraineReport\\_February2015\\_FINAL.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/UkraineReport_February2015_FINAL.pdf)> accessed 24 July 2019; Donald N Jensen, 'Moscow in the Donbas: Command, Control, Crime and the Minsk Peace Process' (*NATO Defense College Research Report*, March 2017) 2 <[www.ndc.nato.int/news/news.php?icode=1029](http://www.ndc.nato.int/news/news.php?icode=1029)> accessed 24 July 2019; Radio Free Europe Radio Liberty, 'Tillerson Praises Turks for Standing Up to Coup Plotters, Delivers Blunt Message To Russia on Ukraine' (9 July 2017) <[www.rferl.org/a/tillerson-ukraine-poroshenko-kyiv-united-states/28604023.html](http://www.rferl.org/a/tillerson-ukraine-poroshenko-kyiv-united-states/28604023.html)> accessed 1 March 2018; Holcomb (n 181) 7.

<sup>197</sup> Matveeva (n 177) 1-16, 80-88, 93, 271-79.

were Donbas residents who felt threatened by recent developments within their country, such as the decision to repeal the official status of the Russian language.<sup>198</sup>

It remains unclear whether the Kremlin had any involvement in the initial assaults on government buildings.<sup>199</sup> But when Kiev's authorities arrested the self-proclaimed mayors and governors of the Donbas in April 2014, Moscow's influence over the rebel campaign became apparent. From that time on, individuals with links to Russia were placed into positions of authority.<sup>200</sup> A Russian citizen, Aleksander Borodai, was proclaimed 'Prime Minister' of the DNR, while a former Russian intelligence operative known as Strelkov took command of rebel fighters.<sup>201</sup>

The rebel forces were diverse, with paramilitary groups, local recruits from the Donbas, and defectors from the Ukrainian security services fighting alongside each other.<sup>202</sup> They included volunteers from Russia, who joined the fight with the open encouragement of the government.<sup>203</sup> Moscow additionally massed troops and armoured vehicles along Ukraine's eastern border, offering an ever-present threat of invasion.<sup>204</sup> Training camps were set up for this purpose, housing soldiers and military equipment ready for deployment into the Donbas.<sup>205</sup> Russia directly supported rebel operations, often from these locations, firing artillery from Russian territory into Ukraine.<sup>206</sup>

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<sup>198</sup> Kofman and others (n 177) 33; Matveeva (n 177) 27-30. See also Roger N McDermott, 'Brothers Disunited: Russia's Use of Military Power in Ukraine' (*Foreign Military Studies Office*, 8 April 2015) 37-38 <<https://community.afan.org/wg/tradoc-g2/fmsso/m/fmsso-monographs/197162>> accessed 25 July 2019.

<sup>199</sup> Kofman and others (n 177) 39.

<sup>200</sup> UNHRC Report of July 2014 (n 194) 4; Kofman and others (n 177) 38; James Marson, 'Kremlin Envoy Played Central Role in Eastern Ukraine' (*The Wall Street Journal*, 20 August 2017) <[www.wsj.com/articles/kremlin-envoy-played-central-role-in-eastern-ukraine-1503258417](http://www.wsj.com/articles/kremlin-envoy-played-central-role-in-eastern-ukraine-1503258417)> accessed 25 July 2019; Aric Toler and Melinda Haring, 'Russia Funds and Manages Conflict in Ukraine, Leaks Show' (*Atlantic Council*, 24 April 2017) <[www.atlanticcouncil.org/blogs/ukrainealert/russia-funds-and-manages-conflict-in-ukraine-leaks-show](http://www.atlanticcouncil.org/blogs/ukrainealert/russia-funds-and-manages-conflict-in-ukraine-leaks-show)> accessed 25 July 2019.

<sup>201</sup> Gabriela Baczynska and Aleksandar Vasovic, 'Pushing Locals Aside, Russians Take Top Rebel Posts in East Ukraine' (*Reuters*, 27 July 2014) <[www.reuters.com/article/us-ukraine-crisis-rebels-insight-idUSKBN0FW07020140727](http://www.reuters.com/article/us-ukraine-crisis-rebels-insight-idUSKBN0FW07020140727)> accessed 25 July 2019; Kofman and others (n 177) 38-40, 57-58, 60; Holcomb (n 181) 7; Matveeva (n 177) 95-96, 106-07, 132-33.

<sup>202</sup> Kofman and others (n 177) 53.

<sup>203</sup> Tatyana Voltskaya and Daisy Sindelar, 'Volunteer Now! Russia Makes it Easy to Fight in Ukraine' (*Radio Free Europe Radio Liberty*, 3 February 2015) <[www.rferl.org/a/russia-ukraine-volunteers-kremlin-easy-to-fight-/26828559.html](http://www.rferl.org/a/russia-ukraine-volunteers-kremlin-easy-to-fight-/26828559.html)> accessed 25 July 2019; Matveeva (n 177) 96-99; Fischer (n 177) 15.

<sup>204</sup> Steven Lee Myers and Alison Smale, 'Russian Troops Mass at Border with Ukraine' (*The New York Times*, 13 March 2014) <[www.nytimes.com/2014/03/14/world/europe/ukraine.html](http://www.nytimes.com/2014/03/14/world/europe/ukraine.html)> accessed 25 July 2019; Matveeva (n 177) 122.

<sup>205</sup> Maksymilian Czapurski and others, 'Hiding in Plain Sight: Putin's War in Ukraine' (*Atlantic Council*, May 2015) 13 <[www.atlanticcouncil.org/in-depth-research-reports/report/hiding-in-plain-sight/](http://www.atlanticcouncil.org/in-depth-research-reports/report/hiding-in-plain-sight/)> accessed 25 July 2019.

<sup>206</sup> Czapurski and others (n 205) 5; Matveeva (n 177) 155.

Furthermore, Moscow supplied the rebels with funding as well as sophisticated military equipment including tanks, rocket launchers and other heavy weapons.<sup>207</sup>

The rebels also obtained air-defence weaponry, used to down numerous Ukrainian aircraft.<sup>208</sup> Of note, the team investigating the downing of civilian Flight MH17 over rebel-held territory in July 2014 concluded that the Buk surface-to-air missile system from which the warhead was fired originated from a Russian Army unit.<sup>209</sup> The Netherlands subsequently announced charges against one Ukrainian and three Russians in connection with the incident, including Strelkov.<sup>210</sup>

Meanwhile, the Ukrainian ‘anti-terror’ campaign continued, initially meeting with considerable success.<sup>211</sup> By August 2014, the rebels were ‘on the precipice of failure’.<sup>212</sup> But failure was not an outcome that Moscow could contemplate.<sup>213</sup> It therefore changed its approach to one of more direct intervention by sending in its regular forces, increasing supplies of military equipment, and coordinating the rebels’ military strategy.<sup>214</sup>

Russian troops in eastern Ukraine not only participated in the hostilities as coherent fighting formations but also acted in a command role.<sup>215</sup> By January 2015, large numbers of Russian military and GRU officers were in the Donbas serving as advisers and trainers.<sup>216</sup> Moscow further strengthened command and control by reorganising the rebel units into a formal military structure,

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<sup>207</sup> Czuperski and others (n 205) 5; Daalder and others (n 196) 8; Matveeva (n 177) 127, 150-51; Andrew E Kramer, ‘Weapons Tracing Study Implicates Russia in Ukraine Conflict’ (*The New York Times*, 3 November 2021) <[www.nytimes.com/2021/11/03/world/weapons-ukraine-russia.html](http://www.nytimes.com/2021/11/03/world/weapons-ukraine-russia.html)> accessed 9 November 2021.

<sup>208</sup> Daalder and others (n 196) 8; Matveeva (n 177) 129, 157.

<sup>209</sup> Radio Free Europe Radio Liberty, ‘Linking MH17 to Russia’s 53<sup>rd</sup> Brigade’ (24 May 2018) <[www.rferl.org/a/linking-mh17-to-russia-s-53rd-brigade-ukraine/29247990.html](http://www.rferl.org/a/linking-mh17-to-russia-s-53rd-brigade-ukraine/29247990.html)> accessed 4 April 2021; Matveeva (n 177) 157-58. See also Marko Milanović, ‘The Netherlands and Australia Attribute the Downing of MH17 to Russia’ (*EJIL:Talk!*, 25 May 2018) <[www.ejiltalk.org/the-netherlands-and-australia-attribute-the-downing-of-mh17-to-russia/](http://www.ejiltalk.org/the-netherlands-and-australia-attribute-the-downing-of-mh17-to-russia/)> accessed 4 April 2021.

<sup>210</sup> BBC News, ‘MH17: Four Charged with Shooting Down Plane over Ukraine’ (19 June 2019) <[www.bbc.co.uk/news/world-europe-48691488](http://www.bbc.co.uk/news/world-europe-48691488)> accessed 4 April 2021; Marko Milanović, ‘Russian Agents Charged with Downing of MH17; MH17 Cases in Strasbourg’ (*EJIL:Talk!*, 20 June 2019) <[www.ejiltalk.org/russian-agents-charged-with-downing-of-mh17-mh17-cases-in-strasbourg/](http://www.ejiltalk.org/russian-agents-charged-with-downing-of-mh17-mh17-cases-in-strasbourg/)> accessed 4 April 2021.

<sup>211</sup> Czuperski and others (n 205) 5; Matveeva (n 177) 150-54, 161-63.

<sup>212</sup> Kofman and others (n 177) 57.

<sup>213</sup> Matveeva (n 177) 215.

<sup>214</sup> Czuperski and others (n 205) 5; US Department of State, ‘Attacks in Ukraine by Russia-Backed Separatists’ (*Press Statement by John Kerry*, 24 January 2015) <<https://2009-2017.state.gov/secretary/remarks/2015/01/236276.htm>> accessed 4 April 2021; Igor Sutyagin, ‘Russian Forces in Ukraine’ (*Royal United Services Institute*, March 2015) 4 <[https://rusi.org/sites/default/files/201503\\_bp\\_russian\\_forces\\_in\\_ukraine.pdf](https://rusi.org/sites/default/files/201503_bp_russian_forces_in_ukraine.pdf)> accessed 2 April 2021; ICC Report 2016 (n 177) 37 para 166; Kofman and others (n 177) xiii; Holcomb (n 181) 9; Matveeva (n 177) 163-66.

<sup>215</sup> Sutyagin (n 214) 9.

<sup>216</sup> Daalder and others (n 196) 10; Robert Coalson, ‘Who are the Russian Generals that Ukraine says are Fighting in the Donbas?’ (*Radio Free Europe Radio Liberty*, 3 July 2015) <[www.rferl.org/a/russian-generals-fighting-in-ukraine/27108296.html](http://www.rferl.org/a/russian-generals-fighting-in-ukraine/27108296.html)> accessed 4 April 2021; McDermott (n 198) 26-27.

with Russian officers in command from battalion level upwards.<sup>217</sup> Russia additionally conducted a purge of rebel leaders.<sup>218</sup> Commanders who refused to integrate into the new command structure were reportedly ‘killed in mysterious incidents or arrested and replaced by individuals more loyal to Moscow’.<sup>219</sup> Wagner Group fighters assisted in this respect, acting as ‘Moscow’s enforcers, intimidating and assassinating rebel leaders who wouldn’t fall into line’.<sup>220</sup>

Russia’s actions resulted in the swift defeat of Ukrainian forces at the battle of Ilovaisk, adding urgency to the peace negotiations in Minsk, Belarus.<sup>221</sup> A ceasefire was agreed on 5 September 2014<sup>222</sup> and the subsequent lull in fighting allowed Moscow to commence a ‘robust train-and-equip mission’ aimed at improving the rebels’ capabilities in advance of future operations.<sup>223</sup> A Russian offensive to seize Donetsk airport concluded in December 2014, followed by further offensive action to take control of the railway hub at Debaltseve.<sup>224</sup> The battle for Debaltseve involved rebel forces and Wagner Group fighters, acting with significant Russian support.<sup>225</sup> Some of the Wagner Group’s members who were killed in the battle were subsequently awarded the Russian military Medal for Courage in Death.<sup>226</sup>

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<sup>217</sup> Daalder and others (n 196) 10; International Crisis Group, ‘Russia and the Separatists in Eastern Ukraine’ (*Europe and Central Asia Briefing* 79, 5 February 2016) 8 <<https://d2071andvip0wj.cloudfront.net/b79-russia-and-the-separatists-in-eastern-ukraine.pdf>> accessed 14 February 2018; McDermott (n 198) 20.

<sup>218</sup> Anders Åslund, ‘Putin Moves to Direct Rule in the Donbas’ (*Newsweek*, 1 June 2016) <[www.newsweek.com/putin-moves-direct-rule-donbas-412411](http://www.newsweek.com/putin-moves-direct-rule-donbas-412411)> accessed 27 February 2018; International Crisis Group (n 217) 3-4; Matveeva (n 177) 180-81, 216-17, 279-80.

<sup>219</sup> Jensen (n 196) 3. See also Åslund (n 218); Jack Losh, ‘Ukrainian Rebel Leaders Divided by Bitter Purge’ (*The Washington Post*, 3 October 2016) <[www.washingtonpost.com/world/europe/ukrainian-rebel-leaders-divided-by-bitter-purge/2016/10/03/2e0076ac-8429-11e6-b57d-dd49277af02f\\_story.html?utm\\_term=.84bb0b292a57http://iswresearch.blogspot.com/2016/11/ukraine-update-october-13-november-9.html](http://www.washingtonpost.com/world/europe/ukrainian-rebel-leaders-divided-by-bitter-purge/2016/10/03/2e0076ac-8429-11e6-b57d-dd49277af02f_story.html?utm_term=.84bb0b292a57http://iswresearch.blogspot.com/2016/11/ukraine-update-october-13-november-9.html)> accessed 4 April 2021; Holcomb (n 181) 10; Matveeva (n 177) 176-79, 217; Fischer (n 177) 15-16.

<sup>220</sup> Giglio (n 69). See also Marten, ‘Russia’s Use of Semi-State Security Forces’ (n 70) 192.

<sup>221</sup> Matveeva (n 177) 164-66, 169-70.

<sup>222</sup> BBC News, ‘Ukraine Ceasefire: The 12-Point Plan’ (9 February 2015) <[www.bbc.co.uk/news/world-europe-29162903](http://www.bbc.co.uk/news/world-europe-29162903)> accessed 28<sup>th</sup> December 2018.

<sup>223</sup> Kofman and others (n 177) 44.

<sup>224</sup> Czuperski and others (n 205) 5; Matveeva (n 177) 171-73.

<sup>225</sup> Tom Parfitt, ‘Separatist Fighter Admits Russian Tanks, Troops “Decisive in Eastern Ukraine Battles”’ (*The Telegraph*, 31 March 2015) <[www.telegraph.co.uk/news/worldnews/europe/russia/11506774/Separatist-fighter-admits-Russian-tanks-troops-decisive-in-eastern-Ukraine-battles.html](http://www.telegraph.co.uk/news/worldnews/europe/russia/11506774/Separatist-fighter-admits-Russian-tanks-troops-decisive-in-eastern-Ukraine-battles.html)> accessed 9 August 2019; Marten, ‘Russia’s Use of Semi-State Security Forces’ (n 70) 193; Matveeva (n 177) 172; Marten, ‘The GRU, Yevgeny Prigozhin, and Russia’s Wagner Group’ (n 71) 7.

<sup>226</sup> Marten, ‘Russia’s Use of Semi-State Security Forces’ (n 70) 193.

The renewed fighting led to a fresh round of negotiations and the second Minsk accord was agreed on 12 February 2015.<sup>227</sup> Thereafter, Russian intelligence officers known as ‘curators’ controlled the ceasefire.<sup>228</sup> If rebel fighters responded to Ukrainian fire, they reportedly faced punishment, or a reduction in military supplies.<sup>229</sup> Although some military commanders spoke out against such measures, the rebels’ dependence on Russia for weapons and equipment acted as a strong deterrent against challenging Moscow’s authority.<sup>230</sup>

The Kremlin’s control did not, however, extend to all areas of rebel activity. Corruption, smuggling, and organised crime were reportedly allowed to flourish.<sup>231</sup> Moreover, rivalries and infighting amongst the rebels remained rife.<sup>232</sup> This may have contributed towards the sporadic ceasefire violations that continued in the years following the Minsk agreements.<sup>233</sup> But despite such incidents, Moscow’s influence in the Donbas persists. Russian financial support keeps the *de facto* administrations afloat.<sup>234</sup> And meanwhile, the Line of Contact continues to harden into an ever-stronger dividing line between the Donbas and the remainder of Ukraine.<sup>235</sup>

### ***2.2.2 International law violations involving non-state actors in the Donbas***

The battle for Debaltseve in early 2015 featured persistent indiscriminate attacks on residential areas<sup>236</sup> in violation of the IHL principle of distinction.<sup>237</sup> According to Amnesty International, thousands of civilians were trapped within the strategic railway hub and subjected to ‘constant

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<sup>227</sup> BBC News, ‘Ukraine Ceasefire: New Minsk Agreement Key Points’ (12 February 2015) <[www.bbc.co.uk/news/world-europe-31436513](http://www.bbc.co.uk/news/world-europe-31436513)> accessed 2 April 2021.

<sup>228</sup> Jensen (n 196) 3; International Crisis Group (n 217) 3, 12; Matveeva (n 177) 180; Fischer (n 177) 24.

<sup>229</sup> International Crisis Group (n 217) 9; Matveeva (n 177) 174.

<sup>230</sup> International Crisis Group (n 217) 6.

<sup>231</sup> *ibid* 13-14; Matveeva (n 177) 175.

<sup>232</sup> Jensen (n 196) 9; Losh (n 219).

<sup>233</sup> Andrew E Kramer, ‘Fighting Escalates in Eastern Ukraine, Signaling the End to Another Cease-Fire’ (*The New York Times*, 30 March 2021) <[www.nytimes.com/2021/03/30/world/europe/ukraine-russia-fighting.html?referringSource=articleShare](http://www.nytimes.com/2021/03/30/world/europe/ukraine-russia-fighting.html?referringSource=articleShare)> accessed 4 April 2021.

<sup>234</sup> Åslund (n 218); International Crisis Group (n 217) 5-7; Julian Röpcke, ‘How Russia Finances the Ukrainian Rebel Territories’ (*Bild*, 16 January 2016) <[www.bild.de/politik/ausland/ukraine-konflikt/russia-finances-donbass-44151166.bild.html](http://www.bild.de/politik/ausland/ukraine-konflikt/russia-finances-donbass-44151166.bild.html)> accessed 4 April 2021; Matveeva (n 177) 247-48.

<sup>235</sup> de Waal (n 177) 61-68; Fischer (n 177) 17, 25, 28.

<sup>236</sup> Amnesty International, ‘Ukraine: Horror of Civilian Bloodshed in Indiscriminate Attacks’ (2 February 2015) <[www.amnesty.org/en/press-releases/2015/02/ukraine-horror-civilian-bloodshed-indiscriminate-attacks/](http://www.amnesty.org/en/press-releases/2015/02/ukraine-horror-civilian-bloodshed-indiscriminate-attacks/)> accessed 5 August 2019; Joanne Mariner, ‘Dabaltseve Under Fire’ (*Huffpost*, 14 February 2015) <[www.huffpost.com/entry/debaltseve-under-fire\\_b\\_6684642](http://www.huffpost.com/entry/debaltseve-under-fire_b_6684642)> accessed 5 August 2015; Matveeva (n 177) 172.

<sup>237</sup> ICRC Customary IHL Study (n 44) rr 1, 7, 11-12.

shelling'.<sup>238</sup> The UN Monitoring Mission subsequently found that 'up to 80 per cent of residential buildings and public facilities were destroyed'.<sup>239</sup>

Since it first deployed to Ukraine in March 2014, the UN Monitoring Mission has documented frequent international legal violations, involving all parties to the conflict.<sup>240</sup> These include numerous allegations against the rebels, including the mistreatment of detained Ukrainian forces in potential breach of IHL and IHRL.<sup>241</sup> In late September 2014, for instance, one wounded serviceman detained by rebels was beaten and his arm was cut off with an axe.<sup>242</sup> The UN Monitoring Mission additionally documented incidents in which captured Ukrainian soldiers were executed by rebel forces.<sup>243</sup>

Abuses were particularly prevalent during the more active phases of the hostilities, in 2014 and early 2015. During this period, abductions, detentions, and acts of ill-treatment and torture by rebel groups were prevalent, leading to 'an atmosphere of intimidation and consequent fear' among citizens of the Donbas.<sup>244</sup> Such conduct potentially violates the fundamental IHL obligations owed to civilians in the power of a party to an armed conflict, as well as certain norms of IHRL.<sup>245</sup> While the number of allegations declined in subsequent years, abuses nevertheless persist in the areas of the Donbas that remain under rebel control.<sup>246</sup>

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<sup>238</sup> Amnesty International, 'Ukraine: Horror of Civilian Bloodshed in Indiscriminate Attacks' (n 236).

<sup>239</sup> UNHRC, 'Report on the human rights situation in Ukraine' (16 February 2015 to 15 May 2015) 18 para 83 <[www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf](http://www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf)> accessed 5 August 2019.

<sup>240</sup> UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Ukraine' (19 September 2014) UN Doc A/HRC/27/75 4-7.

<sup>241</sup> ICRC Customary IHL Study (n 44) rr 87-91; ICCPR (n 45) art 7.

<sup>242</sup> UNHRC, 'Report on the Human Rights Situation in Ukraine' (15 November 2014) 12 para 51 <[www.un.org.ua/images/stories/FINAL\\_OHCHR\\_seventh\\_report\\_Ukraine\\_20.11.14\\_before\\_launch.pdf](http://www.un.org.ua/images/stories/FINAL_OHCHR_seventh_report_Ukraine_20.11.14_before_launch.pdf)> accessed 4 April 2021. See also UNHRC, 'Report on the human rights situation in Ukraine' (1 December 2014 to 15 February 2015) 9-10 para 33 <[www.un.org.ua/images/stories/9thOHCHRreportUkraine\\_1.pdf](http://www.un.org.ua/images/stories/9thOHCHRreportUkraine_1.pdf)> accessed 21 August 2019.

<sup>243</sup> UNHRC, 'Human Rights Violations and Abuses and International Humanitarian Law Violations Committed in the Context of the Ilovaik Events in August 2014' 19-20 paras 84-87 <[www.ohchr.org/Documents/Countries/UA/ReportOnIlovaik\\_EN.pdf](http://www.ohchr.org/Documents/Countries/UA/ReportOnIlovaik_EN.pdf)> accessed 21 November 2020.

<sup>244</sup> UNHRC, 'Report on the Human Rights Situation in Ukraine' (15 June 2014) 3 para 4 <[www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf](http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf)> accessed 4 April 2021. See also *ibid* 33-37 paras 196-219.

<sup>245</sup> ICRC Customary IHL Study (n 44) rr 87-91; ICCPR (n 45) arts 7, 9.

<sup>246</sup> UNHRC, 'Report on the Human Rights Situation in Ukraine' (1 August 2020 to 31 January 2021) 1 para 6, 12-14 paras 52-56 <[www.ohchr.org/Documents/Countries/UA/31stReportUkraine-en.pdf](http://www.ohchr.org/Documents/Countries/UA/31stReportUkraine-en.pdf)> accessed 4 April 2021.



### 2.2.3 Support to non-state actors operating in the cyber domain

Any overview of NSAs' involvement in the conflict in Ukraine would be incomplete without reference to the many cyberattacks that accompanied the hostilities.<sup>247</sup> Cyber operators supporting both Moscow and Kiev were active from the early stages of the conflict,<sup>248</sup> with the number and severity of cyberattacks rising in parallel with ongoing political events.<sup>249</sup> It was Ukraine, however, that suffered the most significant barrage of hostile cyber activity.<sup>250</sup>

From the conflict's commencement, 'a plague of cyberattacks' repeatedly hit Ukrainian companies and government agencies.<sup>251</sup> These commenced with low level digital attacks during the Maidan protests and progressed in intensity and severity, culminating in the NotPetya operation of June 2017.<sup>252</sup> This section considers the most significant cyber activity in the context of the conflict, including the perpetrators' links to Russia and the manner in which their operations potentially violate international law.

#### 2.2.3.1 Cyber activity against Ukraine

There is a clear nexus between the cyberattacks experienced by Ukraine and the armed conflict that commenced in 2014.<sup>253</sup> This is evident not only from the timing of the attacks but also their nature; they were evidently designed to weaken and destabilize the new government, while promoting a pro-Russian agenda.<sup>254</sup> One significant early attack compromised the Central Election Commission at the

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<sup>247</sup> Except where otherwise indicated, the use of the term 'cyberattack' or 'attack' in this section refers to a cyber operation in the generic sense, rather than an attack within the meaning of IHL.

<sup>248</sup> Tim Maurer, 'Cyber Proxies and the Crisis in Ukraine' in Kenneth Geers (ed), *Cyber War in Perspective: Russian Aggression Against Ukraine* (NATO Cooperative Cyber Defence Centre of Excellence 2015) 85 <[https://ccdcoe.org/uploads/2018/10/CyberWarinPerspective\\_full\\_book.pdf](https://ccdcoe.org/uploads/2018/10/CyberWarinPerspective_full_book.pdf)> accessed 12 August 2019; Vijai Maheshwari, 'Ukraine's Lonely Cyberwarrior vs Russia' (*The Daily Beast*, 18 February 2015) <[www.thedailybeast.com/ukraines-lonely-cyberwarrior-vs-russia](http://www.thedailybeast.com/ukraines-lonely-cyberwarrior-vs-russia)> accessed 6 April 2021.

<sup>249</sup> Nikolay Koval, 'Revolution Hacking' in Kenneth Geers (ed), *Cyber War in Perspective: Russian Aggression Against Ukraine* (NATO Cooperative Cyber Defence Centre of Excellence 2015) 55 <[https://ccdcoe.org/uploads/2018/10/CyberWarinPerspective\\_full\\_book.pdf](https://ccdcoe.org/uploads/2018/10/CyberWarinPerspective_full_book.pdf)> accessed 12 August 2019.

<sup>250</sup> Laurens Cerulus, 'How Ukraine Became a Test Bed for Cyberweaponry' (*Politico*, 14 February 2019) <[www.politico.eu/article/ukraine-cyber-war-frontline-russia-malware-attacks/](http://www.politico.eu/article/ukraine-cyber-war-frontline-russia-malware-attacks/)> accessed 11 April 2021.

<sup>251</sup> Andy Greenberg, *Sandworm: A New Era of Cyberwar and the Hunt for the Kremlin's Most Dangerous Hackers* (Doubleday 2019) 2. See also *ibid* 136-37.

<sup>252</sup> Greenberg (n 251) 45, 182-83.

<sup>253</sup> Koval (n 249) 56.

<sup>254</sup> Michael Connell and Sarah Vogler, 'Russia's Approach to Cyber Warfare' (*CNA*, March 2017) 19 <[www.cna.org/cna\\_files/pdf/DOP-2016-U-014231-1Rev.pdf](http://www.cna.org/cna_files/pdf/DOP-2016-U-014231-1Rev.pdf)> accessed 8 April 2021.

time of the first Presidential election following the Euro-Maidan revolution.<sup>255</sup> The pro-Russian hacker group CyberBerkut claimed responsibility.<sup>256</sup> And despite the short period of time that the fake election results appeared online, they were immediately broadcast on Russian state-owned television, suggesting at least tacit state approval for the group's activities.<sup>257</sup> At that time, however, any stronger links between the cyber operators and the state were difficult to discern.<sup>258</sup>

In some cases, the sophistication of the cyber weapon employed against Ukraine implied at least some degree of state involvement in the operation.<sup>259</sup> For instance, the complex malware Snake, believed to have been developed in Russia, infected dozens of Ukrainian computer networks in the early stages of the conflict.<sup>260</sup> Later, sophisticated cyberattacks targeted the Ukrainian power network. The first occurred on 23 December 2015, involving significant power outages.<sup>261</sup> These were 'synchronized and coordinated, probably following extensive reconnaissance of the victim networks'.<sup>262</sup> Cyber security experts subsequently assessed that the Russian hacker group known as Sandworm was responsible.<sup>263</sup>

Sandworm was identified prior to the power network attack as the hacker team responsible for planting BlackEnergy malware on wide-ranging targets, both within and outside Ukraine.<sup>264</sup> A 'known cybercrime toolkit', BlackEnergy was previously used during the 2008 conflict between Russia and Georgia.<sup>265</sup> A new version emerged in Ukraine, employed against varying targets

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<sup>255</sup> Koval (n 249) 56-58; Jeff Stone, 'Meet CyberBerkut, the Pro-Russian Hackers Waging Anonymous-Style Cyberwarfare Against Ukraine' (*IB Times*, 17 December 2015) <[www.ibtimes.com/meet-cyberberkut-pro-russian-hackers-waging-anonymous-style-cyberwarfare-against-2228902](http://www.ibtimes.com/meet-cyberberkut-pro-russian-hackers-waging-anonymous-style-cyberwarfare-against-2228902)> accessed 5 April 2021; Maurer (n 248) 81; Greenberg (n 251) 46-47.

<sup>256</sup> *ibid.*

<sup>257</sup> Koval (n 249) 56; Henry Rōigas, 'The Ukraine Crisis as a Test for Proposed Cyber Norms' in Kenneth Geers (ed), *Cyber War in Perspective: Russian Aggression Against Ukraine* (NATO Cooperative Cyber Defence Centre of Excellence 2015) 140 <[https://ccdcoc.org/uploads/2018/10/CyberWarinPerspective\\_full\\_book.pdf](https://ccdcoc.org/uploads/2018/10/CyberWarinPerspective_full_book.pdf)> accessed 12 August 2019.

<sup>258</sup> Stone (n 255); Maurer (n 248) 85; Koval (n 249) 57.

<sup>259</sup> Rōigas (n 257) 139; Vincent L Morelli, 'Ukraine: Current Issues and US Policy' (*Congressional Research Service*, 3 January 2017) 20 <<https://fas.org/sgp/crs/row/RL33460.pdf>> accessed 2 April 2021.

<sup>260</sup> Sam Jones, 'Cyber Snake Plagues Ukraine Networks' (*The Financial Times*, 7 March 2014) <[www.ft.com/content/615c29ba-a614-11e3-8a2a-00144feab7de](http://www.ft.com/content/615c29ba-a614-11e3-8a2a-00144feab7de)> accessed 7 April 2021.

<sup>261</sup> US Cybersecurity and Infrastructure Security Agency, 'Cyber-Attack Against Ukrainian Critical Infrastructure' (*ICS Alert*, 25 February 2016) <<https://us-cert.cisa.gov/ics/alerts/IR-ALERT-H-16-056-01>> accessed 7 April 2021; Connell and Vogler (n 254) 20-21; Greenberg (n 251) 51-52.

<sup>262</sup> Cybersecurity and Infrastructure Security Agency (n 261).

<sup>263</sup> Dragos, 'Crashoverride: Analysis of the Threat to Electric Grid Operations' (13 June 2017) 10 <[www.dragos.com/wp-content/uploads/CrashOverride-01.pdf](http://www.dragos.com/wp-content/uploads/CrashOverride-01.pdf)> accessed 7 April 2021; Jim Finkle, 'US Firm Blames Russian "Sandworm" Hackers for Ukraine Outage' (*Reuters*, 8 January 2016) <[www.reuters.com/article/us-ukraine-cybersecurity-sandworm-idUSKBN0UM00N20160108](http://www.reuters.com/article/us-ukraine-cybersecurity-sandworm-idUSKBN0UM00N20160108)> accessed 7 April 2021; Greenberg (n 251) 52.

<sup>264</sup> Greenberg (n 251) 5-34.

<sup>265</sup> Morelli (n 259) 20. See also Greenberg (n 251) 94.

including government ministries and the Ukrainian railway.<sup>266</sup> In December 2016, a year after the first attack on the Ukrainian power grid, the network was hit again; this time with a more sophisticated cyber weapon.<sup>267</sup> Experts again traced the attack to Sandworm.<sup>268</sup>

The effects of a subsequent ransomware attack directed against Ukraine in June 2017 were yet more profound.<sup>269</sup> The NotPetya worm shut down much of the government, as well as power companies, hospitals, banks, and airports, and extended beyond Ukraine's borders to disable companies across the globe.<sup>270</sup> Although disguised as a criminal enterprise, experts concluded that this was an intentional attack targeting Ukraine.<sup>271</sup> Once again, Sandworm was implicated.<sup>272</sup> Some months later, a number of states formally attributed the attack to Russia.<sup>273</sup>

In October 2018, the British government went further, asserting that the GRU was associated not only with Sandworm, but also with 'BlackEnergy Actors', 'Cyber Berkut', and other named hacking groups.<sup>274</sup> The National Cyber Security Centre assessed with 'high confidence' that the GRU was 'almost certainly responsible' not only for NotPetya, but also other cyberattacks.<sup>275</sup> Yet, as with many government statements, the pronouncement did not include details of the supporting facts. It remains unclear, for instance, whether all the individuals involved in the cyberattacks worked directly

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<sup>266</sup> Morelli (n 259) 20; Greenberg (n 251) 126.

<sup>267</sup> Dragos (n 263) 11; Greenberg (n 251) 128-33, 141-45.

<sup>268</sup> Dragos (n 263) 4.

<sup>269</sup> Nicholas Weaver, 'Thoughts on the NotPetya Ransomware Attack' (*Lawfare*, 28 June 2017) <<https://www.lawfareblog.com/thoughts-notpetya-ransomware-attack>> accessed 8 April 2021.

<sup>270</sup> Greenberg (n 251) 180-89.

<sup>271</sup> Mark Landler and Scott Shane, 'US Condemns Russia for Cyberattack, Showing Split in Stance on Putin' (*The New York Times*, 15 February 2018) <[www.nytimes.com/2018/02/15/us/politics/russia-cyberattack.html](http://www.nytimes.com/2018/02/15/us/politics/russia-cyberattack.html)> accessed 8 April 2021.

<sup>272</sup> Greenberg (n 251) 207.

<sup>273</sup> Pavel Polityuk, 'Ukraine Points Finger at Russian Security Services in Recent Cyber Attack' (*Reuters*, 1 July 2017) <[www.reuters.com/article/us-cyber-attack-ukraine-idUSKBN19M39P](http://www.reuters.com/article/us-cyber-attack-ukraine-idUSKBN19M39P)> accessed 8 April 2021; Ellen Nakashima, 'Russian Military was Behind "NotPetya" Cyberattack in Ukraine, CIA Concludes' (*The Washington Post*, 12 January 2018) <[www.washingtonpost.com/world/national-security/russian-military-was-behind-notpetya-cyberattack-in-ukraine-cia-concludes/2018/01/12/048d8506-f7ca-11e7-b34a-b85626af34ef\\_story.html](http://www.washingtonpost.com/world/national-security/russian-military-was-behind-notpetya-cyberattack-in-ukraine-cia-concludes/2018/01/12/048d8506-f7ca-11e7-b34a-b85626af34ef_story.html)> accessed 11 April 2021; Phil Muncaster, 'Five Eyes Nations United in Blaming Russia for NotPetya' (*Info Security*, 19 February 2018) <[www.infosecurity-magazine.com/news/five-eyes-united-blaming-russia/](http://www.infosecurity-magazine.com/news/five-eyes-united-blaming-russia/)> accessed 11 April 2021; Landler and Shane (n 271); Greenberg (n 251) 243-45; Samantha Fry and Samuel Rebo, 'Summary: Justice Department Charges Six Russian GRU Officers' (*Lawfare*, 20 October 2020) <[www.lawfareblog.com/summary-justice-department-charges-six-russian-gru-officers](http://www.lawfareblog.com/summary-justice-department-charges-six-russian-gru-officers)> accessed 7 November 2020.

<sup>274</sup> UK National Cyber Security Centre, 'Reckless Campaign of Cyber Attacks by Russian Military Intelligence Service Exposed' (3 October 2018) <[www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed](http://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed)> accessed 11 April 2021.

<sup>275</sup> *ibid.*

for the GRU, or whether some were NSAs acting in support of the GRU's activities.<sup>276</sup> It is not known whether just one group carried out the operations targeting Ukraine or if a range of individuals were involved, with varying relationships to the state.<sup>277</sup> Thus, notwithstanding states' assertions regarding Russia's responsibility for the cyberattacks, some ambiguity remains.

### 2.2.3.2 *International law violations in the cyber domain*

Assuming the NotPetya attack is legally attributable to Russia, it constitutes an internationally wrongful act only if it violates international law.<sup>278</sup> Under peacetime law, the operation may have violated the sovereignty of other states in which the affected cyber infrastructure was located, due to the serious degradations caused.<sup>279</sup> But given the context in which the operation occurred, during the ongoing armed conflict in Ukraine, it may violate IHL.

Although NotPetya did not cause physical damage, injury, or death, if such effects were foreseeable, the operation likely rose the level of an attack<sup>280</sup> and violated the prohibition on attacking civilian objects.<sup>281</sup> The indiscriminate nature of the attack, moreover, raises questions regarding the lawfulness of the cyber weapon employed.<sup>282</sup> If the operation did not qualify as an attack, it may nevertheless have breached the IHL obligations to exercise 'constant care' to spare the civilian

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<sup>276</sup> In April 2021, for instance, the US Treasury sanctioned several Russian technology companies for supporting the state's intelligence services to conduct harmful cyber operations. See US Department of the Treasury, 'Treasury Sanctions Russia with Sweeping New Sanctions Authority' (15 April 2021) <<https://home.treasury.gov/news/press-releases/jy0127>> accessed 18 April 2021. See also Greenberg (n 251) 241-42; Bilyana Lilly and Joe Cheravitch, 'The Past, Present, and Future of Russia's Cyber Strategy and Forces' (*NATO CCDCOE*, 2020) 139-42 <[https://ccdcoe.org/uploads/2020/05/CyCon\\_2020\\_8\\_Lilly\\_Cheravitch.pdf](https://ccdcoe.org/uploads/2020/05/CyCon_2020_8_Lilly_Cheravitch.pdf)> accessed 12 July 2021.

<sup>277</sup> Greenberg (n 251) 277-79.

<sup>278</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) art 2.

<sup>279</sup> Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) rr 1-4 (Tallinn Manual 2.0); Michael Schmitt and Jeffrey Biller, 'The NotPetya Cyber Operation as a Case Study of International Law' (*EJIL:Talk!*, 11 July 2017) <[www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/#more-15401](http://www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/#more-15401)> accessed 11 April 2021; NATO CCDCOE, 'NotPetya and WannaCry Call for a Joint Response from International Community' (2017) <<https://ccdcoe.org/news/2017/notpetya-and-wannacry-call-for-a-joint-response-from-international-community/>> accessed 11 April 2021. Note, however, that not all states accept that sovereignty is a rule that can be violated. See Jeremy Wright QC, 'Cyber and International Law in the 21<sup>st</sup> Century' (*Speech Delivered at Chatham House, London*, 23 May 2018) <[www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century](http://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century)> accessed 26 June 2018; Jack Goldsmith and Alex Looms, "'Defend Forward' and Sovereignty" (*Lawfare*, 30 April 2021) <[www.lawfareblog.com/defend-forward-and-sovereignty](http://www.lawfareblog.com/defend-forward-and-sovereignty)> accessed 2 May 2021.

<sup>280</sup> Tallinn Manual 2.0 (n 280) r 92 commentary para 5; Schmitt and Biller (n 280).

<sup>281</sup> ICRC Customary IHL Study (n 44) rr 1, 7; Tallinn Manual 2.0 (n 280) rr 93, 99; Schmitt and Biller (n 280).

<sup>282</sup> ICRC Customary IHL Study (n 44) r 71; Tallinn Manual 2.0 (n 280) r 105; Schmitt and Biller (n 280).

population<sup>283</sup> and to ‘respect and protect’ medical units of a party to the conflict due to its effects on healthcare providers within Ukraine.<sup>284</sup>

Similar legal considerations apply in respect of the myriad other cyberattacks to which Ukraine was subjected. If these are legally attributable to Russia, in many cases the state may have breached its ‘constant care’ obligation under IHL in view of the widespread effects on the civilian population. Moreover, some of the more serious cyber incidents may have violated other international law norms. The operation causing the power outage in December 2015, for instance, might qualify as an indiscriminate attack contrary to IHL<sup>285</sup> due to the loss of functionality caused within civilian systems.<sup>286</sup>

### 2.3 The Democratic Republic of the Congo

In contrast with the conflicts in Ukraine and Syria, the decades-long hostilities in the DRC began in the 1990s, triggered in part by the reverberating effects of the genocide in neighbouring Rwanda.<sup>287</sup> From the outset, the conflict was characterised by the participation of numerous armed groups, acting with the benefit of significant external state support, and the commission of egregious abuses against the civilian population.<sup>288</sup> This section focuses on just one small aspect of the wider conflict in the DRC, involving the rebel group M23.

M23’s full name is the Movement of 23 March; a reference to an agreement formalised on that date in 2009.<sup>289</sup> This provided for senior officers from another armed group, the National Congress for the Defence of the People (CNDP), to be granted the status of a political party and appointed to

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<sup>283</sup> ICRC Customary IHL Study (n 44) r 15; Tallinn Manual 2.0 (n 280) r 114.

<sup>284</sup> ICRC Customary IHL Study (n 44) r 28; Tallinn Manual 2.0 (n 280) r 131; Schmitt and Biller (n 280).

<sup>285</sup> Tallinn Manual 2.0 (n 280) rr 92, 93.

<sup>286</sup> Cybersecurity and Infrastructure Security Agency (n 261). See also Tallinn Manual 2.0 (n 280) r 92 commentary para 10.

<sup>287</sup> See generally Emizet F Kisangani, ‘Conflict in the Democratic Republic of Congo: A Mosaic of Insurgent Groups’ (2003) 20 *Intl J World Peace* 51; Phoebe Okawa, ‘Congo’s War: The Legal Dimension of a Protracted Conflict’ (2006) 77 *Brit YB Intl L* 203; Christopher Williams, ‘Explaining the Great War in Africa: How Conflict in the Congo Became a Continental Crisis’ (2013) 37 *Fletcher Forum of World Affairs* 81.

<sup>288</sup> *ibid*; UN OHCHR, ‘Democratic Republic of the Congo 1993-2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003’ (August 2010) <[https://www.ohchr.org/Documents/Countries/CD/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](https://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf)> accessed 22 July 2021.

<sup>289</sup> Jason Stearns, ‘From CNDP to M23: The Evolution of an Armed Movement in Eastern Congo’ (*Rift Valley Institute*, 2012) 44-45 <<https://riftvalley.net/sites/default/files/publication-documents/RVI%20Usalama%20Project%201%20CNDP-M23.pdf>> accessed 31 March 2021.

key positions within the DRC's national army, the FARDC.<sup>290</sup> In early 2012, two ex-CNDP officers, General Ntaganda and Colonel Makenga, founded M23, arguing that the DRC government had failed to live up to the terms of the 2009 deal.<sup>291</sup>

With extensive support from the governments of Rwanda and Uganda, M23 rapidly gained territory in eastern DRC.<sup>292</sup> For the remainder of 2012, violence escalated, and the group ultimately gained control of Goma, the provincial capital bordering Rwanda.<sup>293</sup> The NSA later weakened following a split into factions, however, and was defeated in November 2013.<sup>294</sup>

### **2.3.1 Rwandan support to M23**

Rwanda provided significant backing to armed groups within eastern DRC from the early days of the conflict.<sup>295</sup> Kigali's principal rationale was its distrust of the Congolese authorities' ability to adequately secure the border and protect Rwanda from the threat posed by Hutu militias such as the Democratic Forces for the Liberation of Rwanda (FDLR).<sup>296</sup> From late 2011, Rwandan officials established alliances with armed groups to facilitate targeted assassinations of key FDLR officers.<sup>297</sup> Rwandan involvement in the region then intensified with the commencement of the M23 rebellion in 2012.<sup>298</sup>

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<sup>290</sup> Stearns (n 290) 41; Cathy Nangini and others, 'Visualizing Armed Groups: The Democratic Republic of the Congo's M23 in Focus' (2014) 3 *Intl J Security and Development* 1, 3 <<https://igarape.org.br/wp-content/uploads/2014/02/Congo-M23.pdf>> accessed 1 April 2021.

<sup>291</sup> Stearns (n 290) 44; Nangini and others (n 291) 3-4; UNSC, 'Letter dated 21 June 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council: Annex' (21 June 2012) UN Doc S/2012/348 26-27 paras 103-07.

<sup>292</sup> Stearns (n 290) 44-45; UNSC, 'Letter dated 12 November 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council: Annex' (15 November 2012) UN Doc S/2012/843 6, 19-27 (Group of Experts' Final Report).

<sup>293</sup> Pete Jones and David Smith, 'Congo Rebels Take Goma with Little Resistance and to Little Cheer' (*The Guardian*, 20 November 2012) <[www.theguardian.com/world/2012/nov/20/congo-rebel-m23-take-goma](http://www.theguardian.com/world/2012/nov/20/congo-rebel-m23-take-goma)> accessed 1 April 2021.

<sup>294</sup> UNSC, 'Letter dated 19 July 2013 from the Chair of the Security Council Committee Established Pursuant to Resolution 1322 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council: Midterm Report' (19 July 2013) UN Doc S/2013/433 8-9 paras 27-29 (Group of Experts' Midterm Report); Nicholas Bariyo, 'M23 Rebels Call Halt to Congolese Insurgency' (*The Wall Street Journal*, 5 November 2013) <[www.wsj.com/articles/SB10001424052702303936904579179181600437224](http://www.wsj.com/articles/SB10001424052702303936904579179181600437224)> accessed 1 April 2021; Richard Lough, 'Congo Signs Peace Deal with M23 Rebels' (*Reuters*, 12 December 2013) <<https://www.reuters.com/article/uk-congo-democratic-deal-idUKBRE9BB0WZ20131212>> accessed 1 April 2021.

<sup>295</sup> Okawa (n 288) 206-07; Williams (n 288) 86-87.

<sup>296</sup> Stearns (n 290) 14-15.

<sup>297</sup> UNSC, 'Letter dated 26 June 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council: Annex' (27 June 2012) UN Doc S/2012/348/Add.1 3 para 3 (Group of Experts' Interim Report).

<sup>298</sup> Stearns (n 290) 44.

The same year, the UN Group of Experts tasked with examining the situation in the DRC produced two detailed and damning reports regarding Rwandan involvement in the conflict.<sup>299</sup>

Notwithstanding categorical denials by the Rwandan government, the Group of Experts stood by its findings<sup>300</sup> and many of its allegations are supported by other organisations.<sup>301</sup> The Group documented systematic state support for M23, finding that ‘Rwandan officials ... coordinated the creation of the rebel movement and its major military operations...’<sup>302</sup>

Much of the aid supplied to M23 derived from the Rwandan Defence Force (RDF). Prior to the group’s establishment, the RDF provided Makenga and his troops with uniforms and military equipment and facilitated their transportation within Rwanda then into the DRC.<sup>303</sup> In addition, the RDF instructed recruits at M23’s four training camps<sup>304</sup> and played a significant role in the NSA’s recruitment.<sup>305</sup> According to the Group of Experts, RDF commanders established a network of recruiters operating for M23 in many villages in western Rwanda, as well as in refugee camps.<sup>306</sup> RDF soldiers then escorted the new recruits to the border and sent them into the DRC.<sup>307</sup>

Rwandan forces additionally provided direct combat support to M23.<sup>308</sup> The RDF reinforced all major rebel operations and deployed permanently alongside the NSA to assist in controlling territory.<sup>309</sup> Rwandan officers and special forces units, supposedly deployed with the FARDC, also supplied covert support and intelligence to M23 operations.<sup>310</sup> Communications equipment was harmonised between the RDF and M23, thereby facilitating the coordination of operations.<sup>311</sup>

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<sup>299</sup> Group of Experts’ Interim Report (n 298); Group of Experts’ Final Report (n 293).

<sup>300</sup> Group of Experts’ Interim Report (n 298) 36; Group of Experts’ Final Report (n 293) 62-81.

<sup>301</sup> Amnesty International, ‘UN Must put Pressure on Rwanda over Eastern DRC Conflict’ (11 July 2012) <[www.amnesty.org.uk/press-releases/un-must-put-pressure-rwanda-over-eastern-drc-conflict](http://www.amnesty.org.uk/press-releases/un-must-put-pressure-rwanda-over-eastern-drc-conflict)> accessed 1 April 2021; Human Rights Watch, ‘DR Congo: M23 Rebels Committing War Crimes’ (11 September 2012) <[www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes](http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes)> accessed 1 April 2021; Human Rights Watch, ‘DR Congo: M23 Rebels Kill, Rape Civilians’ (22 July 2013) <[www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians](http://www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians)> accessed 1 April 2021.

<sup>302</sup> Group of Experts’ Final Report (n 293) 6 para 4.

<sup>303</sup> Group of Experts’ Interim Report (n 298) 4-7 paras 8-13.

<sup>304</sup> Group of Experts’ Final Report (n 293) 11 para 25. See also Human Rights Watch, ‘M23 Rebels Kill, Rape Civilians’ (n 302).

<sup>305</sup> Group of Experts’ Interim Report (n 298) 7-9 paras 14-21; Human Rights Watch, ‘M23 Rebels Committing War Crimes’ (n 302).

<sup>306</sup> Group of Experts’ Final Report (n 293) 138; Human Rights Watch, ‘M23 Rebels Committing War Crimes’ (n 302).

<sup>307</sup> Group of Experts’ Interim Report (n 298) 7-8 paras 16-18; Group of Experts’ Final Report (n 293) 11 paras 22-23.

<sup>308</sup> Group of Experts’ Interim Report (n 298) 14-16 paras 31-32; Human Rights Watch, ‘M23 Rebels Kill, Rape Civilians’ (n 302).

<sup>309</sup> Group of Experts’ Final Report (n 293) 7 para 8.

<sup>310</sup> *ibid* 8 paras 11-12, 138.

<sup>311</sup> *ibid* 8-9 para 15.

Furthermore, the RDF supported M23 logistically, providing the group with significant quantities of military and non-military equipment and assisting with the evacuation of M23 casualties into Rwanda.<sup>312</sup>

Additional assistance was provided by senior Rwandan officials.<sup>313</sup> Rwanda's Minister of Defence, for instance, reportedly selected individuals to join M23's political branch, naming the group's political coordinator and appointing members of M23's government.<sup>314</sup> Rwandan officials also formed part of the M23 chain of command, participating in the planning of M23 operations and meeting regularly with M23 commanders for this purpose.<sup>315</sup> The Group of Experts concluded that 'Rwandan officials [exercised] overall command and strategic planning for M23', with Ntaganda and Makenga receiving 'direct military orders from the Chief of Staff of the [RDF] who in turn acted on instructions from the Minister of Defence...'<sup>316</sup>

When M23 split into factions in early 2013, Rwanda backed the faction headed by Makenga against that of Ntaganda.<sup>317</sup> Once again, the Rwandan authorities provided important assistance, enabling Makenga's faction to defeat Ntaganda's group militarily and dismantling Ntaganda's support network in Rwanda.<sup>318</sup> Kigali's support for M23 did not cease, therefore, until the group's final demise in late 2013.<sup>319</sup>

### ***2.3.2 Ugandan support to M23***

In common with its neighbour, Rwanda, Uganda's support to rebels in eastern DRC spanned decades.<sup>320</sup> Through its interventions, Uganda sought to minimise the threat from hostile armed groups operating near its western border and also profited economically from the DRC's vast

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<sup>312</sup> Group of Experts' Interim Report (n 298) 9-11 paras 22-25; Group of Experts' Final Report (n 293) 8 para 14.

<sup>313</sup> Group of Experts' Interim Report (n 298) 11-12 paras 26-27, 17 paras 33-34; Group of Experts' Final Report (n 293) 13 para 32.

<sup>314</sup> Group of Experts' Final Report (n 293) 12 para 28.

<sup>315</sup> Group of Experts' Interim Report (n 298) 17 para 34; Group of Experts' Final Report (n 293) 13 para 33. See also Human Rights Watch, 'M23 Rebels Committing War Crimes' (n 302); Human Rights Watch, 'M23 Rebels Kill, Rape Civilians' (n 302).

<sup>316</sup> Group of Experts' Final Report (n 293) 13 para 32.

<sup>317</sup> Group of Experts' Midterm Report (n 295) 4 para 10, 7 para 21.

<sup>318</sup> *ibid* 4 para 10, 6 paras 16-17, 7-8 paras 22-26; Human Rights Watch, 'M23 Rebels Kill, Rape Civilians' (n 302).

<sup>319</sup> Nangini and others (n 291) 4.

<sup>320</sup> The issue of Uganda's support to armed groups in the DRC came before the ICJ in the *Armed Activities* case. See *Armed Activities on the Territory of the Congo (The Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ 168.



mineral wealth.<sup>321</sup> Although Uganda's support to M23 was less significant than that provided by Rwanda, the authorities in Kampala nevertheless played a critical role in facilitating the group's activities.<sup>322</sup>

Importantly, Ugandan officials permitted M23 to establish a permanent presence in Kampala and provided the group with political advice and technical assistance.<sup>323</sup> In addition, the Ugandan military provided significant support to the group. This included assistance with recruitment,<sup>324</sup> participation in the planning of M23's operations, and the provision of military advice.<sup>325</sup> Furthermore, Ugandan troops intervened directly in the conflict alongside M23 fighters, provided fire support to the NSA's operations,<sup>326</sup> and assisted the group logistically.<sup>327</sup>

### ***2.3.3 International law violations involving M23***

During M23's short period of existence, the UN Group of Experts documented numerous abuses involving the group. The NSA's treatment of children was particularly egregious. Both male and female children were forcibly recruited to serve in a variety of roles,<sup>328</sup> in breach of the IHL prohibitions on the recruitment of children into armed groups and their participation in hostilities.<sup>329</sup> Despite warnings that they would be killed if they tried to escape, considerable numbers of recruits deserted. In response, M23's leaders 'summarily executed dozens of children who attempted to escape', while other runaways were reportedly buried alive.<sup>330</sup> Adult deserters and detainees were subjected to similar treatment, in violation of fundamental norms of IHL.<sup>331</sup> Human

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<sup>321</sup> *Armed Activities* (n 321) [35]-[41], [237]-[250]; Group of Experts' Final Report (n 293) 43-44 paras 178-79, 45-46 paras 190-93.

<sup>322</sup> Group of Experts' Final Report (n 293) 6 para 4.

<sup>323</sup> *ibid* 17-18 paras 48-50.

<sup>324</sup> *ibid* 16-17 paras 44-47.

<sup>325</sup> *ibid* 13 para 35, 18 paras 51-54.

<sup>326</sup> *ibid* 14 paras 38-40, 16.

<sup>327</sup> *ibid* 15 paras 42-43.

<sup>328</sup> *ibid* 39 paras 155-56. See also Human Rights Watch, "'Our School Became the Battlefield': Using Schools for Child Recruitment and Military Purposes in the Eastern Democratic Republic of Congo" (27 October 2017) <[www.hrw.org/report/2015/10/27/our-school-became-battlefield/using-schools-child-recruitment-and-military](http://www.hrw.org/report/2015/10/27/our-school-became-battlefield/using-schools-child-recruitment-and-military)> accessed 2 April 2021.

<sup>329</sup> ICRC Customary IHL Study (n 44) rr 135-37.

<sup>330</sup> Group of Experts' 2012 Final Report (n 293) 39 paras 155-57.

<sup>331</sup> ICRC Customary IHL Study (n 44) rr 87-90.

Rights Watch documented the severe beating of certain members of the FARDC,<sup>332</sup> while other detained soldiers were allegedly stabbed to death or died of thirst and starvation.<sup>333</sup>

Other atrocities were equally widespread. During their occupation of Goma, for instance, M23 fighters raped women and girls<sup>334</sup> and engaged in extensive looting,<sup>335</sup> thereby violating the IHL prohibitions on sexual violence and pillage.<sup>336</sup> The NSA's members additionally violated the IHL principle of distinction by directing attacks against the civilian population, reportedly killing more than 20 ethnic Hutu civilians in April and May 2013 to 'punish' villagers for their alleged collaboration with Hutu militias.<sup>337</sup> The group also detained civilians on similar grounds, subjecting them to harsh beatings.<sup>338</sup> It is unsurprising, therefore, that the UN High Commissioner for Human Rights identified five M23 leaders as 'among the worst perpetrators of human rights violations in the DRC, or in the world'.<sup>339</sup>

## 2.4 Conclusion

The atrocities committed by M23, during a timeframe of less than two years, were considerable. But although particularly brutal, the NSA's behaviour is not atypical. Armed groups engaged in conflict commit acts of violence against civilians and detainees all too frequently, as illustrated by the conduct of all the NSAs addressed in this chapter. Moreover, as the conflicts in Syria, Ukraine and the DRC vividly demonstrate, such abuses are often facilitated by one or more states.

States' support to NSAs in contemporary conflict is wide-ranging and can vary considerably in its nature and scope. Rwanda's dealings with M23 offer a particularly stark example of state sponsorship of an armed group. In many cases, however, the available evidence is not so compelling. Consider, for instance, the hazy relationships that subsist between Iran and the many Shi'a militia

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<sup>332</sup> Human Rights Watch, 'M23 Rebels Kill, Rape Civilians' (n 302).

<sup>333</sup> UNSC, 'Letter dated 12 December 2013 from the Group of Experts on the Democratic Republic of the Congo Addressed to the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo: Final Report' (12 December 2013) 33 paras 153-55 <[http://africanarguments.org/wp-content/uploads/2014/01/FINAL-REPORT-GoE\\_DRC.pdf](http://africanarguments.org/wp-content/uploads/2014/01/FINAL-REPORT-GoE_DRC.pdf)> accessed 2 April 2021.

<sup>334</sup> Human Rights Watch, 'M23 Rebels Kill, Rape Civilians' (n 302). See also Human Rights Watch, 'Our School Became the Battlefield' (n 329).

<sup>335</sup> Group of Experts' 2013 Midterm Report (n 295) 6.

<sup>336</sup> ICRC Customary IHL Study (n 44) rr 52, 93.

<sup>337</sup> Human Rights Watch, 'M23 Rebels Kill, Rape Civilians' (n 302). See also ICRC Customary IHL Study (n 44) r 1.

<sup>338</sup> Human Rights Watch, 'M23 Rebels Kill, Rape Civilians' (n 302).

<sup>339</sup> Human Rights Watch, 'M23 Rebels Committing War Crimes' (n 302).

groups it supports, or between Russia and the Wagner Group. Even when it is apparent that states are choosing to act via NSAs, the precise association between the parties is frequently opaque.

Understanding the relationships between states and NSAs is crucial to the issue of attribution. An international law violation involving an NSA only amounts to an internationally wrongful act engaging a state's responsibility if it is attributable to a state pursuant to one of the rules of attribution reflected in ARSIWA.<sup>340</sup> The following chapters explore the three most important of those rules, drawing in each case upon examples arising in the conflicts in Syria, Ukraine, and the DRC.

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<sup>340</sup> See Ch 1 s 1.2.1.

## Chapter 3 – Organs of State

### 3.1 Introduction

As a general rule, states bear responsibility only for their own conduct, namely the acts of those persons or entities that qualify as organs of government.<sup>1</sup> The first principle of attribution formulated by the ILC in ARSIWA accordingly relates to the conduct of state organs.<sup>2</sup> Although, at first glance, this basis of attribution appears to be of no relevance to the activities of private individuals or groups, in certain circumstances it is broad enough to encompass the conduct of NSAs.

Article 4 ARSIWA provides:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.<sup>3</sup>

This rule has been described by the ICJ as ‘one of the cornerstones of the law of State responsibility’.<sup>4</sup> Given its general acceptance by states, as well as by international courts and tribunals,<sup>5</sup> there is little doubt that the ICJ was correct to describe the rule as ‘one of customary international law’.<sup>6</sup>

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<sup>1</sup> International Law Commission (ILC), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ in ILC YB 2001 vol II pt 2, ‘Report of the ILC on the Work of its Fifty-third Session’ UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) chapeau to pt I ch II commentary para 2 (ARSIWA).

<sup>2</sup> *ibid* art 4.

<sup>3</sup> *ibid*.

<sup>4</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [385] (*Bosnian Genocide*). See also ARSIWA (n 1) art 4 commentary para 13. A similar provision appeared in the 1961 Harvard Draft Convention on State Responsibility. See Louis B Sohn and R R Baxter, ‘Convention on the International Responsibility of States for Injuries to Aliens’ (1961) 55 *American J Intl L* 548, 576 arts 16, 17.

<sup>5</sup> ARSIWA (n 1) art 4 commentary paras 3-4.

<sup>6</sup> *Bosnian Genocide* (n 4) [385]. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999) ICJ 62 [62]; *Armed Activities on the Territory of the Congo (The Democratic Republic of the Congo v Uganda)* (Judgment) (2005) ICJ 168 [213] (*Armed Activities*); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), ‘Customary

The reference to a state organ is intended in ‘the most general sense’, irrespective of an organ’s function, location, or position in the state hierarchy.<sup>7</sup> It includes territorial governmental entities, together with all the individual or collective entities making up the organisation of the state and acting on its behalf.<sup>8</sup> Any activity undertaken by the intelligence, military, security, or other state agencies therefore engages the state’s responsibility under international law if it violates an international legal obligation applicable to that state.<sup>9</sup> For the purposes of the rule reflected in Article 4, there is no distinction between the activities of government ministers, police officers, military personnel, or members of the judiciary.<sup>10</sup>

Nations are free, by virtue of their sovereignty, to organise themselves as they wish and determine those organs that make up the machinery of state.<sup>11</sup> The status of an entity under the state’s own internal legal regime is, therefore, the most important factor in determining whether that entity is an organ of the state.<sup>12</sup> But that is not the end of the matter. If it were, a state could avoid responsibility simply by choosing not to designate an entity that forms part of the structure of the state as one of its organs.<sup>13</sup>

There are thus two forms of state organ within the meaning of the rule reflected in Article 4: *de jure* organs, which are characterised as organs of the state under the state’s domestic law, and *de facto* organs, which have that status because of their exceptional relationship with the state. This chapter examines each category of state organ in turn before exploring the circumstances in which a state organ is deemed to be acting in its official capacity, with the result that all its conduct is attributable to the state.

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International Humanitarian Law Volume I: Rules’ (2005) r 149 <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> accessed 15 February 2018 (ICRC Customary IHL Study).

<sup>7</sup> ARSIWA (n 1) art 4 commentary para 6.

<sup>8</sup> *ibid* art 4 commentary para 1.

<sup>9</sup> *ibid* art 2. See also Ch 1 s 1.2.1.2.

<sup>10</sup> Djamchid Momtaz, ‘Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority’ in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 239.

<sup>11</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [205] (*Nicaragua*). See also Momtaz (n 10) 237.

<sup>12</sup> ARSIWA (n 1) art 4. See also David D Caron, ‘The Basis of Responsibility: Attribution and Other Trans-Substantive Rules of State Responsibility’ in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (ASIL 1998) 130.

<sup>13</sup> ARSIWA (n 1) art 4 commentary para 11.

### 3.2 *De jure* state organs

When a state's internal law characterises an entity as an organ of state, the state bears responsibility for that entity's conduct from the date of its incorporation into the state's structure.<sup>14</sup> Thus, the IRGC, established in the early days of the Iranian Revolution, was officially recognised as an organ of the Iranian state by a decree issued by the Supreme Leader, Ayatollah Khomeini, in May 1979.<sup>15</sup> The IRGC's conduct from this date is therefore attributable to Iran,<sup>16</sup> including any acts in breach of Iran's international legal obligations committed during its operations in Syria and elsewhere.<sup>17</sup>

Russia similarly bears responsibility for the conduct of its own *de jure* state organs, including the actions of the state's military intelligence agency, the GRU. Accordingly, the harmful cyber operations mounted by certain GRU officers against Ukraine are attributable to Russia<sup>18</sup> and potentially constitute internationally wrongful acts.<sup>19</sup> The same is true in respect of the downing of

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<sup>14</sup> The only exception to this principle is when the state organ is not acting in its public capacity at the relevant time. See s 3.4.

<sup>15</sup> *Kenneth P. Yeager v The Islamic Republic of Iran* (1987) 17 Iran-US Claims Tribunal Rep 92 [40] (*Yeager*). See also Kenneth Katzman, *The Warriors of Islam: Iran's Revolutionary Guard* (Westview Press 1993) 51. The IRGC's role in the Iranian state was subsequently enshrined in the Iranian constitution. See Constitution of the Islamic Republic of Iran (1979) art 150 <[www.constituteproject.org/constitution/Iran\\_1989.pdf?lang=en](http://www.constituteproject.org/constitution/Iran_1989.pdf?lang=en)> accessed 11 September 2021.

<sup>16</sup> *William L Pereira Associates v Islamic Republic of Iran* (1984) 5 Iran-US Claims Tribunal Reports 198, 226. See also Caron (n 12) 139-40.

<sup>17</sup> Regarding the IRGC's role in the Syrian conflict, see Amir Toumaj, 'Array of Pro-Syrian Government Forces Advances in Aleppo' (*FDD's Long War Journal*, 9 December 2016) <[www.longwarjournal.org/archives/2016/12/array-of-pro-syrian-government-forces-advance-in-aleppo.php](http://www.longwarjournal.org/archives/2016/12/array-of-pro-syrian-government-forces-advance-in-aleppo.php)> accessed 20 February 2018; Paul Bucala and Frederick W Kagan, 'Iran's Evolving Way of War: How the IRGC Fights in Syria' (*Critical Threats*, March 2016) <[www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans\\_Evolving\\_Way\\_of\\_War\\_IRGC\\_in\\_Syria\\_FINAL-1.pdf](http://www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans_Evolving_Way_of_War_IRGC_in_Syria_FINAL-1.pdf)> accessed 28 March 2021. Regarding potential international law violations involving the IRGC in Syria and elsewhere see eg Amnesty International, 'Report 2017/18: The State of the World's Human Rights' (2018) 351 <[www.amnesty.org.uk/files/2018-02/annualreport2017.pdf](http://www.amnesty.org.uk/files/2018-02/annualreport2017.pdf)> accessed 9 November 2020; Andrew Hanna and Garrett Nada, 'Timeline: Iran's Assassinations and Plots' (*United States Institute for Peace*, 16 September 2020) <<https://iranprimer.usip.org/blog/2020/sep/16/timeline-iran-assassinations-and-plot>> accessed 14 November 2020.

<sup>18</sup> See Ch 2 s 2.2.3. See also UK National Cyber Security Centre, 'Reckless Campaign of Cyber Attacks by Russian Military Intelligence Service Exposed' (3 October 2018) <[www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed](http://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed)> accessed 7 November 2020; Samantha Fry and Samuel Rebo, 'Summary: Justice Department Charges Six Russian GRU Officers' (*Lawfare*, 20 October 2020) <[www.lawfareblog.com/summary-justice-department-charges-six-russian-gru-officers](http://www.lawfareblog.com/summary-justice-department-charges-six-russian-gru-officers)> accessed 7 November 2020; Peter Machtiger, 'The Latest GRU Indictment: A Failed Exercise in Deterrence' (*Just Security*, 29 October 2020) <[www.justsecurity.org/73071/the-latest-gru-indictment-a-failed-exercise-in-deterrence/](http://www.justsecurity.org/73071/the-latest-gru-indictment-a-failed-exercise-in-deterrence/)> accessed 7 November 2020.

<sup>19</sup> See Ch 2 s 2.2.3.2. See also Michael N Schmitt, "'Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law' (2014) 54 *Virginia J Intl L* 697, 707-08; Michael Schmitt and Jeffrey Biller, 'The NotPetya Cyber Operation as a Case Study of International Law' (*EJIL:Talk!*, 11 July 2017) <[www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/#more-15401](http://www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/#more-15401)> accessed 11 April 2021.

Flight MH17 in July 2014 if the Dutch and the Australian governments are correct in their assertion that Russian officials were directly involved in the incident.<sup>20</sup>

When assessing whether conduct is attributable to a state, the primary consideration is thus whether the actor concerned is a *de jure* state organ. Although this status will normally be clear from a review of the state's internal law, it is, on occasion, the subject of dispute. The ICJ addressed this issue when determining whether the acts of genocide committed in Srebrenica were attributable to the Federal Republic of Yugoslavia (FRY).<sup>21</sup> While the applicant, Bosnia and Herzegovina, argued that the perpetrators of the genocide were *de jure* organs of the FRY, the respondent contested this characterisation.<sup>22</sup>

The genocide in Srebrenica occurred following the breakup of the former Yugoslavia and the emergence of several new sovereign states. Within Bosnia and Herzegovina, the Republika Srpska had *de facto* control over significant territory, as well as the loyalty of many Bosnian Serbs.<sup>23</sup> The Republika Srpska never attained international recognition as a sovereign state but had its own army, the VRS, from May 1992.<sup>24</sup> In the same month, the Yugoslav army officially withdrew from Bosnia and Herzegovina. Most of its units, however, remained in place, transferring into the VRS together with their weapons and equipment.<sup>25</sup> Moreover, VRS officers continued to be administered from Belgrade and their salaries and pensions were paid by the FRY.<sup>26</sup> Bosnia and Herzegovina argued before the ICJ that in light of these factors, VRS officers remained *de jure* organs of the FRY.<sup>27</sup> The ICJ disagreed, however, finding no evidence that such individuals were officers of the FRY's army under the terms of that state's internal law.<sup>28</sup> Further, the ICJ emphasised that the payment of

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<sup>20</sup> Government of the Netherlands, 'MH17: The Netherlands and Australia Hold Russia Responsible' (25 May 2018) <[www.government.nl/latest/news/2018/05/25/mh17-the-netherlands-and-australia-hold-russia-responsible](http://www.government.nl/latest/news/2018/05/25/mh17-the-netherlands-and-australia-hold-russia-responsible)> accessed 7 November 2020; Marko Milanović, 'The Netherlands and Australia Attribute the Downing of MH17 to Russia' (*EJIL:Talk!*, 25 May 2018) <[www.ejiltalk.org/the-netherlands-and-australia-attribute-the-downing-of-mh17-to-russia/](http://www.ejiltalk.org/the-netherlands-and-australia-attribute-the-downing-of-mh17-to-russia/)> accessed 7 November 2020; Luke Harding, 'Three Russians and One Ukrainian to Face MH17 Murder Charges' (*The Guardian*, 19 June 2019) <[www.theguardian.com/world/2019/jun/19/mh17-criminal-charges-ukraine-russia](http://www.theguardian.com/world/2019/jun/19/mh17-criminal-charges-ukraine-russia)> accessed 7 November 2020.

<sup>21</sup> *Bosnian Genocide* (n 4) [386].

<sup>22</sup> *ibid* [387].

<sup>23</sup> *ibid* [235]. See also André JJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, The Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72 *Brit YB Intl L* 255, 258-60; Vojin Dimitrijević and Marko Milanović, 'The Strange Story of the Bosnian Genocide Case' (2008) 21 *Leiden J Intl L* 65, 67.

<sup>24</sup> *Bosnian Genocide* (n 4) [235], [238].

<sup>25</sup> *Prosecutor v Tadić* (Trial Chamber Judgment) ICTY IT-94-1-T (1997) [115]; *Bosnian Genocide* (n 4) [238];

<sup>26</sup> *ibid*.

<sup>27</sup> *Bosnian Genocide* (n 4) [387].

<sup>28</sup> *ibid* [386], [388]. But see also *ibid* dissenting opinion of Judge Mahiou para 108.

salaries and other benefits to some officers of the VRS did not automatically make them organs of the FRY.<sup>29</sup>

The ICJ's conclusion is consistent with Article 4 ARSIWA and the commentary thereto.<sup>30</sup> For an entity to constitute a *de jure* organ of state, nothing less than that status under the state's internal law will suffice.<sup>31</sup> Attribution on this basis is, nevertheless, of relevance when considering private entities' conduct. Although relatively rare, contemporary conflict includes several examples of NSAs' integration into a state's apparatus, meaning that from that time on, all the entity's conduct is attributable to the state under the rule reflected in Article 4.

### **3.2.1 Non-state actors that become de jure state organs**

A pertinent example of an NSA attaining the status of a *de jure* state organ arose in 1997, in the context of Papua New Guinea's attempts to quash an internal rebellion.<sup>32</sup> The government entered into a contract with the PMSC Sandline International, in which it authorised the entity to support its armed forces in suppressing the uprising.<sup>33</sup> To circumvent the provisions of the country's constitution, which prohibited paramilitary and mercenary activities, the contract provided for the enrolment of all Sandline personnel into Papua New Guinea's national police force as 'special constables'.<sup>34</sup> Therefore, for the short period of time prior to the contract's termination, Sandline personnel were *de jure* state organs and any conduct on their part that violated Papua New Guinea's IHRL obligations engaged the responsibility of the state.<sup>35</sup>

A more recent example of an NSA's incorporation into a state's armed forces arose in Syria. In early 2013, the local *Shabbiha* and Jaysh al-Shaabi paramilitary groups were reorganised into a National

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<sup>29</sup> *ibid* [386], [388].

<sup>30</sup> ARSIWA (n 1) art 4 commentary paras 1 to 13. See also Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *Eur J Intl L* 669, 674.

<sup>31</sup> See Stefan Talmon 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493, 495.

<sup>32</sup> Virginia Newell and Benedict Sheehy, 'Corporate Militaries and States: Actors, Interactions, and Reactions' (2006) 41 *Texas Intl L J* 67, 74-75; Oliver R Jones, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms' (2009) 24 *Connecticut J Intl L* 239, 274; Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2011) 85.

<sup>33</sup> *ibid*.

<sup>34</sup> Agreement for the Provision of Military Assistance between the Independent State of Papua New Guinea and Sandline International (31 January 1997) <[www.michie.net/pnginfo/sandline-c.html](http://www.michie.net/pnginfo/sandline-c.html)> accessed 20 February 2018.

<sup>35</sup> This position is reflected in the Montreux Document, agreed by 17 states in 2008. See UNGA, 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict' (17 September 2008) UN Doc A/63/467-S/2008/636 Pt 1 para 7.



Defence Force (NDF) and placed under the command of the Syrian military.<sup>36</sup> Reporting indicates that the NDF was established in accordance with Syrian law as a branch of the Syrian Arab Army.<sup>37</sup> If that is correct, the group's status as a *de jure* state organ means that from the date of its incorporation into the state's structure, Syria bears responsibility for all international law violations with which NDF fighters were involved, including the alleged massacres of civilians committed in the town of al-Bayda in May 2013.<sup>38</sup> Moreover, the NDF's conduct is attributable to Syria irrespective of any reported indiscipline on the part of its fighters.<sup>39</sup> The rule reflected in Article 4 requires only that the conduct in question was committed by an organ of state acting in its official capacity, not that the act was committed under the state's control.<sup>40</sup>

This is particularly pertinent when considering Ukraine's responsibility for the conduct of the volunteer battalions that fought on the state's behalf in the conflict in the Donbas.<sup>41</sup> These militia groups first emerged in April 2014 to protect their neighbourhoods from rebel forces but were later integrated into the structure of the Ukrainian state and placed under the authority of Ukrainian ministries of government.<sup>42</sup> From that date on the battalions were *de jure* organs of state, meaning that Ukraine bears responsibility for the many international law violations they committed whilst

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<sup>36</sup> The Carter Center, 'Syria: Pro-Government Paramilitary Forces' (5 November 2013) 8

<[www.cartercenter.org/resources/pdfs/peace/conflict\\_resolution/syria-conflict/pro-governmentparamilitaryforces.pdf](http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/pro-governmentparamilitaryforces.pdf)> accessed 13 February 2018. See also Ch 2 s 2.1.2.

<sup>37</sup> Reuters, 'Insight: Battered by War, Syrian Army Creates its Own Replacement' (21 April 2013)

<[www.reuters.com/article/us-syria-crisis-paramilitary-insight-idUSBRE93K02R20130421](http://www.reuters.com/article/us-syria-crisis-paramilitary-insight-idUSBRE93K02R20130421)> accessed 12 September 2021; South Front, 'Iran Calls on Syria to "Legalize" National Defense Forces' (24 November 2017)

<<https://southfront.org/iran-calls-on-syria-to-legalize-national-defense-forces/>> accessed 14 February 2018; Abdullah Al-Jabassini, 'From Insurgents to Soldiers: The Fifth Assault Corps in Daraa, Southern Syria' (*European University Institute*, 14 May 2019) 5

<[https://cadmus.eui.eu/bitstream/handle/1814/62964/RR\\_2019\\_09\\_EN.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/62964/RR_2019_09_EN.pdf?sequence=1&isAllowed=y)> accessed 7 May 2020. Certain reports indicate, however, that NDF fighters are not officially integrated into Syrian military forces.

See Sirwan Kajjo, 'Who are Syria's National Defense Forces?' (*Voice of America*, 26 August 2020)

<[www.voanews.com/extremism-watch/who-are-syrias-national-defense-forces](http://www.voanews.com/extremism-watch/who-are-syrias-national-defense-forces)> accessed 9 November 2020.

<sup>38</sup> Human Rights Watch, "'No One's Left': Summary Executions by Syrian Forces in al-Bayda and Baniyas' (13 September 2013) <[www.hrw.org/report/2013/09/13/no-ones-left/summary-executions-syrian-forces-al-bayda-and-baniyas](http://www.hrw.org/report/2013/09/13/no-ones-left/summary-executions-syrian-forces-al-bayda-and-baniyas)> accessed 13 February 2018.

<sup>39</sup> The Carter Center (n 36) 6.

<sup>40</sup> ARSIWA (n 1) art 4 commentary para 13; *ibid* art 7. See also s 3.4.

<sup>41</sup> Ilmari Käihkö, 'A Nation in the Making, in Arms: Control of Force, Strategy and the Ukrainian Volunteer Battalions' (2018) 18 *Defence Studies* 147; Rosaria Puglisi, 'Heroes or Villains? Volunteer Battalions in Post-Maidan Ukraine' (*Istituto Affari Internazionali*, 8 March 2015) 5 <[www.iai.it/sites/default/files/iaiw1508.pdf](http://www.iai.it/sites/default/files/iaiw1508.pdf)> accessed 9 July 2019.

<sup>42</sup> UNHRC, 'Report on the Human Rights Situation in Ukraine' (15 July 2014) 15 para 74

<[www.un.org.ua/images/stories/OHCHR\\_Report\\_15\\_July\\_Ukraine\\_FINAL.pdf](http://www.un.org.ua/images/stories/OHCHR_Report_15_July_Ukraine_FINAL.pdf)> accessed 25 February 2018;

UNHRC, 'Report on the Human Rights Situation in Ukraine' (17 August 2014) 4 para 10

<[www.un.org.ua/images/stories/OHCHR\\_Ukraine\\_5th\\_report.pdf](http://www.un.org.ua/images/stories/OHCHR_Ukraine_5th_report.pdf)> accessed 23 February 2018; UNHRC, 'Human Rights Violations and Abuses and International Humanitarian Law Violations Committed in the Context of the Ilovaisk Events in August 2014' 1 fn 5, 8 fn 52 <[www.ohchr.org/Documents/Countries/UA/ReportOnIlovaisk\\_EN.pdf](http://www.ohchr.org/Documents/Countries/UA/ReportOnIlovaisk_EN.pdf)>

accessed 21 November 2020; Käihkö (n 41) 159.

acting in their official capacity, notwithstanding Kiev's apparent lack of control over the groups' activities.<sup>43</sup>

The same is true of the Popular Mobilisation Forces (PMF) in Iraq.<sup>44</sup> These groups initially emerged in 2014 in response to a call by clerics to support Iraq's collapsing security forces in the fight against ISIS.<sup>45</sup> Two years later, the Iraqi government formally integrated the PMF into the state's structure as 'an independent military formation and a part of the Iraqi armed forces'.<sup>46</sup> Some factions remained under considerable Iranian influence, however, leading the Iraqi government to issue further decrees ordering PMF units to relinquish any political or external affiliations and come under the full control of the Prime Minister.<sup>47</sup> Despite this, certain militias continued to ignore Baghdad's authority, engaging in human rights abuses against peaceful protestors and targeting coalition forces in rocket

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<sup>43</sup> See eg Amnesty International, 'Ukraine: Abuses and War Crimes by the Aidar Volunteer Battalion in the North Luhansk Region' (8 September 2014) <[www.amnesty.org/en/documents/EUR50/040/2014/en/](http://www.amnesty.org/en/documents/EUR50/040/2014/en/)> accessed 25 July 2019; UNHRC, 'Human Rights Violations and Abuses and International Humanitarian Law Violations Committed in the Context of the Ilovaik Events in August 2014' (n 42) 10-16.

<sup>44</sup> Kirk H Sowell, 'The Rise of Iraq's Militia State' (*Carnegie Endowment for International Peace*, 23 April 2015) <<http://carnegieendowment.org/sada/?fa=59888>> accessed 28 November 2017; Garrett Nada and Mattisan Rowan, 'Pro-Iran Militias in Iraq' (*Wilson Center*, 27 April 2018) <[www.wilsoncenter.org/article/part-2-pro-iran-militias-iraq](http://www.wilsoncenter.org/article/part-2-pro-iran-militias-iraq)> accessed 11 April 2020.

<sup>45</sup> Bill Roggio and Amir Toumaj, 'Iraq's Prime Minister Establishes Popular Mobilization Forces as a Permanent "Independent Military Formation"' (*FDD's Long War Journal*, 28 July 2016) <[www.longwarjournal.org/archives/2016/07/iraqs-prime-minister-establishes-popular-mobilization-front-as-a-permanent-independent-military-formation.php](http://www.longwarjournal.org/archives/2016/07/iraqs-prime-minister-establishes-popular-mobilization-front-as-a-permanent-independent-military-formation.php)> accessed 28 November 2017; Nada and Rowan (n 44); Nancy Ezzeddine and Erwin Van Veen, 'Who's Afraid of Iraq's Hashd?' (*War on the Rocks*, 10 September 2019) <<https://warontherocks.com/2019/09/whos-afraid-of-iraqs-hashd/>> accessed 18 November 2019; Seth J Frantzman, 'Who is Kataib Hezbollah, the Group the US Attacked in Iraq and Syria?' (*The Jerusalem Post*, 30 December 2019) <[www.jpost.com/Middle-East/What-is-Kataib-Hezbollah-the-group-the-US-attacked-in-Iraq-and-Syria-612556](http://www.jpost.com/Middle-East/What-is-Kataib-Hezbollah-the-group-the-US-attacked-in-Iraq-and-Syria-612556)> accessed 9 November 2020.

<sup>46</sup> Roggio and Toumaj (n 45). See also Nada and Rowan (n 44); Ezzeddine and Van Veen (n 45); Crispin Smith and Jacques Singer-Emery, 'Servants of Two Masters: The Risks Inherent in Iraq's Hashd Al-Sha'abi Legislation' (2019) 52 *New York U J Intl L Politics* 167.

<sup>47</sup> Ali Mamouri, 'Iraq Orders Militia to Fully Integrate into State Security Forces' (*Al-Monitor*, 2 July 2019) <[www.al-monitor.com/pulse/originals/2019/07/iraq-pmu-iran-abdul-mahdi-shiite-militias.html](http://www.al-monitor.com/pulse/originals/2019/07/iraq-pmu-iran-abdul-mahdi-shiite-militias.html)> accessed 18 November 2019; Michael Knights, 'Normalizing Security in the Nineveh Plains' (*The Washington Institute*, 5 July 2019) <[www.washingtoninstitute.org/policy-analysis/view/normalizing-security-in-the-nineveh-plains](http://www.washingtoninstitute.org/policy-analysis/view/normalizing-security-in-the-nineveh-plains)> accessed 2 March 2020; Geneive Abdo, 'Iran and the United States Battle it Out in Iraq' (*Foreign Policy*, 8 July 2019) <<https://foreignpolicy.com/2019/07/08/iran-and-the-united-states-battle-it-out-in-iraq/>> accessed 18 December 2019.

attacks.<sup>48</sup> Yet, assuming such conduct was performed in the militias' official capacity, it is attributable to Iraq by virtue of the rule reflected in Article 4 even if it was unauthorised.<sup>49</sup>

Given Tehran's considerable influence over some PMF factions, questions arise whether any of their acts in breach of Iraq's international legal obligations are attributable to Iran<sup>50</sup> or whether responsibility should be shared between the two states.<sup>51</sup> Such considerations are beyond the scope of this chapter. However, the ICJ addressed a related issue in the *Bosnian Genocide* case, namely, where responsibility should lie when a *de jure* state organ acts not on behalf of another state, but for a non-state public authority. According to the Court, the state organ's conduct in such circumstances is attributable not to the state to which it belongs but rather to the NSA for which it acts.<sup>52</sup>

### ***3.2.2 State organs that act on behalf of a non-state public authority***

In the *Bosnian Genocide* case, the ICJ examined the status of a paramilitary unit involved in the Srebrenica genocide, known as the Scorpions.<sup>53</sup> Bosnia and Herzegovina claimed that the group was incorporated into the FRY's armed forces and was therefore a *de jure* state organ. Rejecting this submission due to insufficient evidence, the ICJ noted that 'in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed'.<sup>54</sup>

Through this passing comment, the ICJ seems to refer to the rule of attribution reflected in Article 6 ARSIWA, according to which the conduct of an organ of one state that performs governmental functions for another state is attributable to the latter rather than the former.<sup>55</sup> But the ICJ broadens

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<sup>48</sup> Michael Georgy, 'Exclusive: Iran-Backed Militias Deployed Snipers in Iraq Protests – Sources' (*Reuters*, 17 October 2019) <[www.reuters.com/article/us-iraq-protests-iran-snipers-exclusive/exclusive-iran-backed-militias-deployed-snipers-in-iraq-protests-sources-idUSKBN1WW0B1](http://www.reuters.com/article/us-iraq-protests-iran-snipers-exclusive/exclusive-iran-backed-militias-deployed-snipers-in-iraq-protests-sources-idUSKBN1WW0B1)> accessed 14 November 2019; Frantzman (n 45). See also Amnesty International, 'Iraq: Turning a Blind Eye: The Arming of the Popular Mobilization Units' (2017) <[www.amnestyusa.org/files/iraq\\_report\\_turning\\_a\\_blind\\_eye.pdf](http://www.amnestyusa.org/files/iraq_report_turning_a_blind_eye.pdf)> accessed 9 November 2020; Smith and Singer-Emery (n 46) 188-91.

<sup>49</sup> Smith and Singer-Emery (n 46) 200-02; Crispin Smith, 'It's Time Iraq Accepts Legal Responsibility for its Iran-Backed Militias' (*Just Security*, 23 March 2020) <[www.justsecurity.org/69273/its-time-iraq-accepts-legal-responsibility-for-its-iran-backed-militias/](http://www.justsecurity.org/69273/its-time-iraq-accepts-legal-responsibility-for-its-iran-backed-militias/)> accessed 24 March 2020. See also s 3.4.

<sup>50</sup> ARSIWA (n 1) art 17.

<sup>51</sup> *ibid* art 47. See also André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan J Intl L* 359; André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 *Eur J Intl L* 15.

<sup>52</sup> *Bosnian Genocide* (n 4) [389].

<sup>53</sup> *ibid*.

<sup>54</sup> *ibid*. See also Milanović 'State Responsibility for Genocide: A Follow-Up' (n 30) 675; Talmon (n 31) 495.

<sup>55</sup> ARSIWA (n 1) art 6.

Article 6's scope so that it applies when a state places one of its organs at the disposal of a 'public authority', even if that authority is an NSA with no legal personality of its own.<sup>56</sup> Had the evidence established that the Scorpions were a *de jure* organ of the FRY, therefore, their conduct would not have been attributable to the state because they were acting on behalf of the Republika Srpska.

The ICJ's approach thus limits Article 4's application in situations where a state organ acts on behalf of a public authority outside the structure of the state. To illustrate, consider the conflict in eastern Ukraine in which Russian troops reportedly acted alongside rebel forces.<sup>57</sup> If those personnel were ordered by their chain of command to participate in the conflict, they were acting in their official capacity as *de jure* state organs notwithstanding the absence of any Russian insignia on their uniforms at the time.<sup>58</sup> As such, Russia bears responsibility for any international law violations with which they were involved.<sup>59</sup> But if Russia placed the troops at the disposal of one of the non-state administrations in eastern Ukraine, the ICJ's approach may mean that they were acting on behalf of another public authority, with the result that Russia bears no responsibility for their conduct.

Such a conclusion appears anomalous. But assuming that the ICJ's approach would not impact the other elements of the rule reflected in Article 6, these would limit its scope of application. Thus, attribution would only be appropriate if the state organ acts under the 'exclusive direction and control' of the local administration rather than 'on instructions from the sending State'.<sup>60</sup> Given the reporting indicating Russian control over key military decisions in the Donbas and the probability that Moscow retained authority over its military personnel,<sup>61</sup> the threshold for attribution seems unlikely to be met.

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<sup>56</sup> Milanović 'State Responsibility for Genocide: A Follow-Up' (n 30) 676; Simon Olleson, 'The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts' (*British Institute of International and Comparative Law*, 10 October 2007) 25-26 <[www.biicl.org/files/3107\\_impactofthearticlesonstate\\_responsibilitypreliminarydraftfinal.pdf](http://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf)> accessed 15 November 2020.

<sup>57</sup> See Ch 2 s 2.2.

<sup>58</sup> *ibid.*

<sup>59</sup> This might include, for example, Russian involvement in the downing of Flight MH17. See Government of the Netherlands (n 20).

<sup>60</sup> ARSIWA (n 1) art 6 commentary para 2.

<sup>61</sup> See Ch 2 s 2.2. See also International Crisis Group, 'Russia and the Separatists in Eastern Ukraine' (*Europe and Central Asia Briefing* 79, 5 February 2016) 8 <<https://d2071andvip0wj.cloudfront.net/b79-russia-and-the-separatists-in-eastern-ukraine.pdf>> accessed 14 February 2018.

The same is likely to be true in many other contemporary conflict situations. Although local administrations are frequently bolstered by external states' assistance,<sup>62</sup> any of the supporting state's organs that are placed at the disposal of the NSA would normally retain their own autonomy and status and continue to act, at least in part, for the state to which they belong.<sup>63</sup> In most cases, therefore, it will be difficult to establish that state officials are completely subject to the NSA's direction and control, meaning that their conduct is still attributable to the state to which they belong.<sup>64</sup>

The question nonetheless remains whether, if a state organ truly acts 'under the authority of and for the purposes of' a non-state public authority,<sup>65</sup> the ICJ's approach limits the scope of the rule reflected in Article 4. It is notable, first, that such a conclusion appears to accord with Article 4's commentary. This asserts that the reference to a state organ covers all the entities that make up the organisation of the state 'and act on its behalf'.<sup>66</sup> If an entity acts on behalf of another public authority, therefore, doubt arises whether attribution pursuant to the rule reflected in Article 4 is appropriate.<sup>67</sup>

But there remains a distinction between attributing a state organ's conduct to another state, as envisaged by Article 6, and attributing it to an NSA. Although non-state public authorities increasingly resemble states in the way they act and the powers they exercise, they do not possess international legal personality in the same manner as states. NSAs cannot be held directly to account for their conduct in violation of international law. The ICJ's approach therefore exposes a clear gap in accountability: if the state is not responsible for the conduct of its own organs when they act for an NSA, no entity can be held to account when those organs violate international law.<sup>68</sup>

There are, accordingly, clear policy grounds for the continued application of the rule reflected in Article 4. A state should not be absolved of responsibility if it chooses to place its organs at the

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<sup>62</sup> See eg Thomas de Waal, 'Uncertain Ground: Engaging with Europe's de facto States and Breakaway Territories' (*Carnegie Europe*, 3 December 2018) 61, 64 <<https://carnegieeurope.eu/2018/12/03/uncertain-ground-engaging-with-europe-s-de-facto-states-and-breakaway-territories-pub-77823>> accessed 30 August 2020.

<sup>63</sup> See ARSIWA (n 1) art 6 commentary para 4.

<sup>64</sup> *ibid* art 6 commentary para 2. See also Talmon (n 31) 495-96.

<sup>65</sup> ARSIWA (n 1) art 6 commentary para 2.

<sup>66</sup> *ibid* art 4 commentary para 1.

<sup>67</sup> See ECtHR *Bebrami v France, Saramati v France, Germany and Norway* (2 May 2007) App Nos 71412/01 and 78166/01. For a critique of the Court's decision, see Marko Milanović and Tatjana Papić, 'As Bad as it Gets: The European Court of Human Rights' *Bebrami and Saramati* Decision and General International Law' (2009) 58 *Intl Comp L Quarterly* 267.

<sup>68</sup> Milanović 'State Responsibility for Genocide: A Follow-Up' (n 30) 676.

disposal of a *de facto* administration, particularly if that administration is closely linked to the state and only survives by virtue of the state's support. Moreover, it is highly questionable whether this isolated observation by the ICJ, in the absence of any legal analysis or justification, reflects customary international law.<sup>69</sup> It remains to be seen whether the scope of the rule expressed in Article 6 will expand in future to address situations in which state organs are placed at the disposal of non-state public authorities. But for the time being, the rule reflected in Article 4 should continue to apply to attribute state organs' conduct to the state to which they belong.

### 3.3 *De facto* state organs

Earlier versions of Article 4 ARSIWA provided only for the conduct of *de jure* state organs to be attributable to the state.<sup>70</sup> During the ILC's discussions in 1998, however, Special Rapporteur Crawford noted that 'internal law was not always sufficient for determining such status'.<sup>71</sup> The fact that a state's police are not characterised as a state organ by domestic law, for example, 'cannot mean that for international law purposes they are not organs of the State'.<sup>72</sup> The version of Article 4 that was ultimately adopted provides in its second paragraph that 'An organ *includes* any person or entity which has that status in accordance with the internal law of the State',<sup>73</sup> indicating that domestic law is the most important, but not the only factor to be taken into account. The ARSIWA commentary then explains that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'.<sup>74</sup>

While *de jure* state organs are generally easy to identify through an examination of the state's internal law, the same is not true of those entities that, *de facto*, amount to an organ of state. The latter form part of the machinery of government because of their actual relationship with the state, rather than their characterisation by domestic law. But the ARSIWA commentary does not provide any guidance regarding the specific relationship that must exist between the state and an entity for the latter to

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<sup>69</sup> Milanović 'State Responsibility for Genocide: A Follow-Up' (n 30) 676.

<sup>70</sup> See Roberto Ago, 'Third Report on State Responsibility – the Internationally Wrongful Act of the State, Source of International Responsibility' (1971) UN Doc A/CN.4/246 and Add.1-3 243, 253 (draft arts 5 and 6). See also James Crawford, 'First Report on State Responsibility' (1998) UN Doc A/CN.4/490 and Add.1-7 34.

<sup>71</sup> ILC YB 1998 vol I, 'Summary Records of the Meetings of the Fiftieth Session' UN Doc A/CN.4/SER.A/1998 229 para 3.

<sup>72</sup> ARSIWA (n 1) art 4 commentary para 11.

<sup>73</sup> *ibid* art 4 (emphasis added).

<sup>74</sup> *ibid* art 4 commentary para 11.

gain the status of a *de facto* organ.<sup>75</sup> Further assistance regarding this issue derives, instead, from the jurisprudence of the ICJ.

### **3.3.1 Guidance provided by the ICJ**

#### *3.3.1.1 Nicaragua*

The *Nicaragua* case concerned the United States' responsibility for the activities of opposition groups fighting against the Nicaraguan government, known as the *contras*.<sup>76</sup> In its judgment, the ICJ assessed the relationship between the United States and the NSA, finding that the state:

- (i) financed, organised, trained, supplied, equipped, and armed the *contras*;<sup>77</sup>
- (ii) provided the *contras* with intelligence, including information on the location and movements of government troops;<sup>78</sup>
- (iii) provided the *contras* with aircraft suitable for supply-dropping and reconnaissance;<sup>79</sup>
- (iv) decided and planned, or at least closely collaborated in deciding and planning, some of the *contras*' military and paramilitary operations;<sup>80</sup>
- (v) devised and directed specific strategies and tactics, for example regarding when to seize and hold Nicaraguan territory;<sup>81</sup>
- (vi) selected some of the *contras*' military and paramilitary targets;<sup>82</sup>
- (vii) selected, installed, and paid the *contras*' leaders;<sup>83</sup> and
- (viii) provided operational support to the *contras*.<sup>84</sup>

Taking these factors into account, the ICJ examined whether the *contras*' conduct in violation of international law was attributable to the United States. The Court identified that the first question it needed to answer was whether 'the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to

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<sup>75</sup> De Hoogh (n 23) 289-90.

<sup>76</sup> *Nicaragua* (n 11).

<sup>77</sup> *ibid* [99]-[101], [106]-[108], [112], [115].

<sup>78</sup> *ibid* [101], [104], [106].

<sup>79</sup> *ibid* [101], [104], [106], [115].

<sup>80</sup> *ibid* [106], [112], [115].

<sup>81</sup> *ibid* [104].

<sup>82</sup> *ibid* [112], [115].

<sup>83</sup> *ibid* [112].

<sup>84</sup> *ibid* [112], [115].

equate the *contras*, for legal purposes, with an organ of the United States Government...<sup>85</sup> Thus, the two essential elements for an NSA to qualify as a *de facto* state organ are the NSA's dependence on the state and the state's exercise of control over the NSA's activities.

In respect of the dependence requirement, the ICJ found that the *contras* could not initially conduct their most important military and paramilitary activities without the wide-ranging support provided by the United States.<sup>86</sup> However, this was not true in later years, when the *contras* were able to continue their activities despite the cessation of state support.<sup>87</sup> The Court concluded, therefore, that although the assistance provided to the *contras* by the United States had been 'crucial to the pursuit of their activities', it was 'insufficient to demonstrate their complete dependence on United States aid'.<sup>88</sup>

Regarding the control element of the test, the ICJ found that a 'potential for control' was inherent in the *contras'* high level of dependence on the state.<sup>89</sup> Nonetheless, the Court considered that the evidence before it was insufficient to reach a finding on whether the US government made use of that potential.<sup>90</sup> In sum, the Court determined that there was 'no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf'.<sup>91</sup> Therefore, the Court was 'unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States'.<sup>92</sup>

### 3.3.1.2 *Bosnian Genocide*

The ICJ elaborated on the test for establishing *de facto* state organ status in the *Bosnian Genocide* case. Here, it framed the relevant question as 'whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs...'<sup>93</sup>

The Court then clarified that to achieve this status, the persons or groups must:

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<sup>85</sup> *ibid* [109].

<sup>86</sup> *ibid* [110]-[111].

<sup>87</sup> *ibid* [110].

<sup>88</sup> *ibid* [110].

<sup>89</sup> *ibid* [109]-[110].

<sup>90</sup> *ibid* [110].

<sup>91</sup> *ibid* [109].

<sup>92</sup> *ibid* [110].

<sup>93</sup> *Bosnian Genocide* (n 4) [391].



in fact ... act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent...<sup>94</sup>

The ICJ applied this test of 'complete dependence' and 'strict control' to the facts of the FRY's relationship with the Bosnian Serb forces that perpetrated the genocide in Srebrenica. On the evidence put forward in the case:

- (i) close ties existed between the FRY and the authorities of the Republika Srpska, both of a political and financial nature and also relating to the administration and control of Bosnian Serb forces;<sup>95</sup>
- (ii) the FRY conceived and shared with the Republika Srpska the vision of a 'Greater Serbia';<sup>96</sup>
- (iii) troops of Bosnian Serb origin within the Yugoslav Peoples' Army were transformed into, or joined, the Bosnian Serb forces;<sup>97</sup>
- (iv) from 1993 onwards, about 1,800 officers within the Bosnian Serb forces were 'administered' from Belgrade, including in relation to their pay, promotions, and pensions;<sup>98</sup>
- (v) Bosnian Serb forces were armed and equipped by the FRY;<sup>99</sup> and
- (vi) the economies of the FRY and Republika Srpska were integrated through the creation of a single economic entity, thus enabling the FRY government to finance the Bosnian Serb forces.<sup>100</sup>

Notwithstanding the extremely close relationship between Bosnian Serb forces and the state, the ICJ concluded that those forces could not be regarded as 'mere instruments through which the FRY was acting, and as lacking any real autonomy'.<sup>101</sup> While the relations between the parties had been 'strong and close in previous years ... and these ties undoubtedly remained powerful', at the time of the

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<sup>94</sup> *ibid* [392].

<sup>95</sup> *ibid* [237].

<sup>96</sup> *ibid* [237].

<sup>97</sup> *ibid* [238].

<sup>98</sup> *ibid* [283].

<sup>99</sup> *ibid* [239].

<sup>100</sup> *ibid* [240].

<sup>101</sup> *ibid* [394].

genocide they were ‘not such that the Bosnian Serbs’ political and military organizations should be equated with organs of the FRY’.<sup>102</sup> Therefore, the requirements for attribution relevant to the rule reflected in Article 4 ARSIWA were not satisfied.

### 3.3.1.3 *A test of ‘complete dependence and control’*

The ICJ’s judgments reveal several factual circumstances that may assist in determining whether the relationship between a state and an NSA is sufficiently strong for the latter to qualify as a *de facto* state organ. No one factor is, by itself, decisive, but each of the following may point towards a conclusion that an entity, in fact, acts as an organ of state:

- (i) the state created the entity;<sup>103</sup>
- (ii) the state selected, installed, and paid the group’s political leaders;<sup>104</sup>
- (iii) the state devised the entity’s strategy and directed its tactics;<sup>105</sup> and
- (iv) the support provided by the state, in areas such as the organisation, training and equipping of the force, the planning of operations and the choosing of targets, was crucial to the pursuit of the entity’s activities.<sup>106</sup>

Additional criteria may also be relevant, particularly the entity’s performance of governmental functions and its degree of integration into the state. While not specifically articulated by the ICJ, arbitral tribunals have taken these factors into account when examining entities’ potential status as *de facto* state organs.<sup>107</sup> And their significance is clear. If the purpose of *de facto* state organ status is to attribute to a state the conduct of entities that, in fact, act as its organs, those entities’ integration into the state’s structures and their performance of functions that are normally accomplished by state organs must be of relevance.<sup>108</sup>

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<sup>102</sup> *ibid.*

<sup>103</sup> *Nicaragua* (n 11) [93]-[94]; *Armed Activities* (n 6) [158]-[160]. See also Talmon (n 31) 499.

<sup>104</sup> *Nicaragua* (n 11) [112].

<sup>105</sup> *ibid* [110]; *Bosnian Genocide* (n 4) [394].

<sup>106</sup> *Nicaragua* (n 11) [112].

<sup>107</sup> *Emilio Agustín Maffezini v The Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction) (25 January 2000) [75]-[89] <[www.italaw.com/sites/default/files/case-documents/ita0479.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf)> accessed 26 September 2021; *Flemingo Duty Free Shop Private Limited v The Republic of Poland* (Arbitral Award) (12 August 2016) [418]-[435] <[www.italaw.com/sites/default/files/case-documents/italaw7709\\_3.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf)> accessed 26 September 2021.

<sup>108</sup> For further discussion regarding governmental functions see Ch 4 s 4.3.1.

The factors outlined above all feed into an assessment of the key question at issue, namely whether the relationship between the parties is one of complete dependence and control.<sup>109</sup> Regarding the first element of the test, if an NSA has ‘some qualified, but real, margin of independence’ from the state, such as an ability to express differences over strategic options, its complete dependence cannot be assumed.<sup>110</sup> The entity must have no real autonomy of its own but rely wholly on the state in all areas of its activity.<sup>111</sup> In other words, the NSA cannot conduct its activities without the state’s support and the cessation of aid would result in the end of these activities.<sup>112</sup> An NSA might demonstrate this high degree of dependence by acting consistently in accordance with the state’s wishes for fear that if it failed to do so, the state would withdraw the support upon which the NSA relies for its continued operations.<sup>113</sup>

In the event that the ‘complete dependence’ threshold is met, the potential for control that exists as a result of that dependence must actually be exercised by the state, to ‘a particularly great degree’, in all the entity’s fields of activity.<sup>114</sup> This does not mean, however, that state control must be demonstrated over the particular act or omission that amounts to a breach of the state’s international legal obligations.<sup>115</sup> Instead, a more general appraisal is required, assessing the level of control exercised by the state over the entire range of the entity’s activities at the relevant time. If that assessment reveals a consistent freedom of action or an indiscipline in certain areas of the entity’s operations, thereby indicating an absence of ‘strict control’ by the state, the second element of the ICJ’s test is not satisfied.<sup>116</sup>

The preceding analysis demonstrates the stringency of the test to establish *de facto* state organ status. To date, neither the ICJ nor any other court or tribunal has applied this test and concluded that an

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<sup>109</sup> For commentary regarding this test, see de Hoogh (n 23) 269-74; Marko Milanović, ‘State Responsibility for Genocide’ (2006) 17 Eur J Intl L 553, 576-77; Olivier Corten, ‘L’Arrêt Rendu par la CIJ dans l’Affaire du Crime de Génocide (Bosnie-Herzégovine c Serbie): vers un Assouplissement des Conditions Permettant d’Engager la Responsabilité d’un État pour Génocide?’ (2007) 53 Annuaire Français de Droit International 249, 265-67; Olleson (n 56) 26-28; Marko Milanović, ‘State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken’ (2009) 22 Leiden J Intl L 307, 315-18; Talmon (n 31) 497-502; Tonkin (n 32) 93-95; James Crawford, *State Responsibility: The General Part* (CUP 2013) 124-26.

<sup>110</sup> *Bosnian Genocide* (n 4) [394]. See also Corten (n 109) 266; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) 313.

<sup>111</sup> *Bosnian Genocide* (n 4) [391]; *Nicaragua* (n 11) [109].

<sup>112</sup> Talmon (n 31) 499-500.

<sup>113</sup> Corten (n 109) 267.

<sup>114</sup> *Nicaragua* (n 11) [110]; *Bosnian Genocide* (n 4) [393].

<sup>115</sup> In this respect, the test for *de facto* state organs differs from the test relevant to art 8 ARSIWA. See Ch 5 s 5.4.3. See also Talmon (n 31) 501.

<sup>116</sup> *Bosnian Genocide* (n 4) [391].

NSA qualifies as a *de facto* organ of state.<sup>117</sup> Given that this status serves to attribute all the entity's conduct to the state, even if it acts outside the scope of its authority or contravenes instructions,<sup>118</sup> it is right that *de facto* state organ status should be 'exceptional' in nature and arise only rarely.<sup>119</sup>

However, the test formulated by the ICJ is so demanding that it is questionable whether a state's relationship with an NSA could ever satisfy this high threshold.<sup>120</sup> This may be illustrated through applying the test to the case studies outlined in Chapter 2.

### ***3.3.2 Application of the ICJ guidance to non-state actors in contemporary conflict***

Of the NSAs considered in Chapter 2, the rebel group M23 had particularly close ties with a supporting state.<sup>121</sup> Both Rwanda and Uganda sustained M23's activities, but the group's relationship with the Rwandan government was exceptionally strong. Officials in Kigali were involved in planning the M23 rebellion and in April 2012, the Rwandan government took overt steps to aid the group's establishment.<sup>122</sup> The RDF provided M23 fighters with uniforms and military equipment and also facilitated their transportation within Rwanda, then back into the DRC to launch the rebellion.<sup>123</sup> In light of such activity, the Group of Experts determined that 'Rwandan officials ... coordinated the creation of the rebel movement'.<sup>124</sup> These circumstances therefore point towards M23's status as a *de facto* state organ of Rwanda.<sup>125</sup>

A further factor that supports this conclusion is the Rwandan government's involvement in the selection and installation of the group's leaders.<sup>126</sup> The UN Group of Experts found that 'Rwandan

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<sup>117</sup> Arbitral tribunals have, however, found entities to qualify as *de facto* state organs based on a looser test. See *Maffezini* (n 107) [75]-[89]; *Fleming Duty Free Shop* (n 107) [418]-[435].

<sup>118</sup> ARSIWA (n 1) art 7. See also s 3.4.

<sup>119</sup> *Bosnian Genocide* (n 4) [393].

<sup>120</sup> Talmon (n 31) 501; Jörn Griebel and Milan Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v Serbia*' (2008) 21 *Leiden J Intl L* 601, 613. But see also Milanović, 'Comment on Griebel and Plücken' (n 109) 317-8.

<sup>121</sup> See Ch 2 s 2.3.

<sup>122</sup> Jason Stearns, 'From CNDP to M23: The evolution of an armed movement in eastern Congo' (*Rift Valley Institute Usalama Project*, 2012) 44 <[www.vredesweek.be/sites/default/files/pdf/RVI%20Usalama%20Project%201%20CNDP-M23.pdf](http://www.vredesweek.be/sites/default/files/pdf/RVI%20Usalama%20Project%201%20CNDP-M23.pdf)> accessed 20 February 2018; UNSC, 'Letter dated 26 June 2012 from the Chair of the Security Council Committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council: Annex' (27 June 2012) UN Doc S/2012/348/Add.1 4-7 (Group of Experts' Interim Report). See also Ch 2 s 2.3.1.

<sup>123</sup> Group of Experts' 2012 Interim Report (n 122) 4-7.

<sup>124</sup> UNSC, 'Letter dated 12 November 2012 from the Chair of the Security Council Committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council: Annex' (15 November 2012) UN Doc S/2012/843 6 (Group of Experts' Final Report).

<sup>125</sup> *Nicaragua* (n 11) [93]-[94]; *Armed Activities* (n 6) [158]-[160].

<sup>126</sup> *Nicaragua* (n 11) [112].

officials nominated the political leadership and government of M23', with the Rwandan Minister of Defence unilaterally appointing the group's political coordinator and the individual members of its governing body.<sup>127</sup> In addition, senior Rwandan officials assisted the group to obtain funding through mobilising financial backers.<sup>128</sup>

Following the group's establishment, Rwandan authorities played a significant role in M23's operations, with regular meetings taking place between M23 commanders and RDF officers.<sup>129</sup> RDF units commonly operated alongside M23, acting as force multipliers in all major rebel operations.<sup>130</sup> According to the UN Group of Experts, M23's military leaders received orders from the RDF's Chief of Staff, who himself acted on the instructions of the Rwandan Minister of Defence.<sup>131</sup> Rwandan officials additionally oversaw the provision of logistical support to M23,<sup>132</sup> furnishing significant quantities of equipment to the group, with increased deliveries of heavy weapons and ammunition prior to specific operations.<sup>133</sup> By virtue of such findings, the Group of Experts concluded that 'Rwandan officials [exercised] overall command and strategic planning for M23'.<sup>134</sup>

Rwandan support to M23 was thus crucial to the pursuit of its activities.<sup>135</sup> Rwanda not only supported the group logistically, with significant supplies of military and non-military equipment, but also mobilised political and financial support, supplied the group with intelligence, organised a systematic recruitment campaign on M23's behalf, and provided training for those recruits.<sup>136</sup> In accordance with the ICJ's jurisprudence, therefore, these factors are all indicative of M23's status as a *de facto* state organ of Rwanda.<sup>137</sup>

But those circumstances, alone, are insufficient to conclude that M23 attained that status. The existence of a relationship of complete dependence and control must also be established, meaning

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<sup>127</sup> Group of Experts' Final Report (n 124) 12. See also Stearns (n 122) 44-45.

<sup>128</sup> Group of Experts' Interim Report (n 122) 11.

<sup>129</sup> *ibid* 17.

<sup>130</sup> Group of Experts' Final Report (n 124) 7.

<sup>131</sup> *ibid* 13.

<sup>132</sup> *ibid*.

<sup>133</sup> *ibid* 9-10.

<sup>134</sup> *ibid*.

<sup>135</sup> See *Nicaragua* (n 11) [112].

<sup>136</sup> Group of Experts' Interim Report (n 122) 9-11; Group of Experts' Final Report (n 124) 8, 11, 138; John Emerson, 'DR Congo: M23 Rebels Committing War Crimes' (*Human Rights Watch*, 11 September 2012) <[www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes](http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes)> accessed 21 February 2018.

<sup>137</sup> See s 3.3.1.

that M23 was entirely dependent upon Rwanda, with no real autonomy of its own.<sup>138</sup> Thus, M23 can only qualify as a *de facto* state organ if it was, in all respects other than its legal status, effectively a branch of the Rwandan armed forces, subject to the same degree and quality of state control as the RDF, both in terms of its adherence to orders and its reliance on the state.<sup>139</sup>

While in many respects it appears that this stringent threshold is met, other factors point away from that conclusion. In particular, within the detailed reports compiled by the UN Group of Experts, there is nothing to indicate that Rwanda paid salaries to any M23 leaders or fighters. Indeed, one report makes clear that the group had other sources of income, for example from taxation and smuggling,<sup>140</sup> suggesting that M23 was not financially dependent on the Rwandan government. Furthermore, M23 received significant support not only from Rwanda, but also from Uganda.<sup>141</sup> Such assistance included the supply of weapons and ammunition and also the provision of political advice and technical assistance.<sup>142</sup> This, again, suggests that M23's dependence upon Rwanda was not 'complete'.<sup>143</sup> On balance, therefore, despite the significant support provided by the Rwandan government to M23 and the high level of control Kigali exercised over M23's operations, it is far from certain that the group qualifies as a *de facto* state organ of Rwanda.

It is nevertheless instructive to assess whether the position is any different in respect of the other NSAs involved in the conflicts addressed in Chapter 2. In Syria, for instance, the *Shabbiha* militia had very close links to the Assad regime prior to the group's incorporation into the NDF.<sup>144</sup> Thus, the UN Commission of Inquiry examining the conflict in Syria described the *Shabbiha* as 'de facto agents' of the state,<sup>145</sup> while the US Treasury Department asserted that the group 'operated as a direct action arm of the Government of Syria and its security forces'.<sup>146</sup>

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<sup>138</sup> *Nicaragua* (n 11) [109]; *Bosnian Genocide* (n 4) [391].

<sup>139</sup> ARSIWA (n 1) art 4 commentary para 11; Milanović, 'State Responsibility for Genocide' (n 109) 577, 587.

<sup>140</sup> Group of Experts' Final Report (n 124) 140-1.

<sup>141</sup> See Ch 2 s 2.3.2.

<sup>142</sup> Group of Experts' Final Report (n 124) 15, 17.

<sup>143</sup> See *Bosnian Genocide* (n 4) [394].

<sup>144</sup> See Ch 2 s 2.1.2.

<sup>145</sup> UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69 17 para 93.

<sup>146</sup> United States Department of the Treasury, 'Treasury Sanctions Al-Nusra Front Leadership in Syria and Militias Supporting the Assad Regime' (11 December 2012) <[www.treasury.gov/press-center/press-releases/pages/tg1797.aspx](http://www.treasury.gov/press-center/press-releases/pages/tg1797.aspx)> accessed 21 February 2018.

In common with these assessments, certain factors point towards a conclusion that, *de facto*, the *Shabbiba* qualified as an organ of the Syrian state. First, the Assad regime effectively created the entity, transforming it from a criminal gang into a loyal defender of the government.<sup>147</sup> Second, Syrian officials paid, armed, and informally organised the *Shabbiba*.<sup>148</sup> And third, the group frequently acted in concert with government forces, leading the UN Commission of Inquiry to continually refer to ‘government forces and *Shabbiba*’ when addressing the issue of those responsible for the numerous international law violations referenced in its reports.<sup>149</sup> Given these factors, it is possible that the ‘complete dependence’ element of the test for *de facto* state organ status is satisfied.

There remains some doubt, however, whether the Assad regime exercised sufficient control over the *Shabbiba*’s activities for the group to be considered a *de facto* organ of state. The *Shabbiba* reportedly acted with a sense of impunity, with no real limits on the way in which its members behaved.<sup>150</sup> The decision to create the NDF in 2013 is also indicative of an absence of state control. This has been described as an attempt to ‘reinstitutionalize a chaotic militia movement’ and connect the militias more firmly to the central government.<sup>151</sup> Although heavily reliant on the Assad regime, therefore, the group’s freedom of action appears too great for it to constitute a *de facto* arm of the nation’s security forces.<sup>152</sup>

Turning to the hostilities in Ukraine, Russia’s relationship with rebel forces in the east of the country intensified following the initial months of the conflict.<sup>153</sup> Reporting indicates that from August 2014 onwards, the rebels were highly dependent on Russia. The significant funding provided by Moscow, amounting to potentially 90 percent of the local administrations’ budgets, together with the considerable quantities of equipment and weaponry supplied, suggest that the rebel movement

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<sup>147</sup> Brian M Jenkins, ‘The Dynamics of Syria’s Civil War’ (*RAND Corporation*, 2014) 6 <[www.rand.org/pubs/perspectives/PE115.html](http://www.rand.org/pubs/perspectives/PE115.html)> accessed 12 December 2017; Aron Lund, ‘Who Are the Pro-Assad Militias?’ (*Carnegie Middle East Center*, 2 March 2015) <<http://carnegie-mec.org/diwan/59215?lang=en>> accessed 20 October 2017.

<sup>148</sup> UNHRC, ‘Report of 22 February 2012’ (n 145) 17 para 93.

<sup>149</sup> UNHRC, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (16 August 2012) UN Doc A/HRC/21/50 1-2; UNHRC, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (5 February 2013) UN Doc A/HRC/22/59 Annex IV para 4.

<sup>150</sup> *ibid* Annex V para 6; Salwa Amor and Ruth Sherlock, ‘How Bashar al-Assad Created the Feared Shabiha Militia: An Insider Speaks’ (*The Telegraph*, 23 Mar 2014) <[www.telegraph.co.uk/news/worldnews/middleeast/syria/10716289/How-Bashar-al-Assad-created-the-feared-shabiha-militia-an-insider-speaks.html](http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10716289/How-Bashar-al-Assad-created-the-feared-shabiha-militia-an-insider-speaks.html)> accessed 27 February 2018.

<sup>151</sup> Lund (n 147).

<sup>152</sup> *Nicaragua* (n 11) [109].

<sup>153</sup> See Ch 2 s 2.2.

could not continue to survive and function without Russian support.<sup>154</sup> This conclusion is supported by the fact that the rebels were on the verge of defeat prior to Russia's intervention in the conflict in late July 2014.<sup>155</sup> At certain points in time, therefore, it seems that the 'complete dependence' element of the test for *de facto* state organ status may have been met.

From the summer of 2014 onwards, Russia additionally exercised increasing levels of control over the rebels' activities.<sup>156</sup> Moscow reorganised the rebels into a formal military structure commanded by Russian officers, seeking to eliminate those battalions and commanders who refused to toe the line.<sup>157</sup> Russian officers commanded the rebel units from battalion level up, thereby indicating that the higher-level decision making regarding military operations was the responsibility of Russian state organs.<sup>158</sup>

Russian control also extended to the political sphere of rebel activity. Reporting demonstrates that Moscow selected, installed and paid the rebels' political leaders, replacing members of the DNR and LNR leadership as necessary to ensure that individuals with sufficient loyalty to Moscow were in post.<sup>159</sup> From August 2014, it appears that Russia additionally devised the rebels' strategy and directed their tactics, acting via its political appointees, military officers and curators based in the Donbas.<sup>160</sup> The comments of the US Secretary of State in July 2017 certainly support this conclusion. He asserted that Moscow exercised 'complete control' over the rebels and urged Russian officials to 'immediately call upon their proxies to cease the violence'.<sup>161</sup>

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<sup>154</sup> International Crisis Group (n 61) 7; Michael Kofman and others, 'Lessons from Russia's Operations in Crimea and Eastern Ukraine' (*RAND Corporation*, 2017) xiii <[www.rand.org/content/dam/rand/pubs/research\\_reports/RR1400/RR1498/RAND\\_RR1498.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR1400/RR1498/RAND_RR1498.pdf)> accessed 27 February 2018.

<sup>155</sup> Anna Matveeva, *Through Times of Trouble: Conflict in South Eastern Ukraine Explained from Within* (Lexington Books 2018) 161-166.

<sup>156</sup> See Ch 2 s 2.2.

<sup>157</sup> International Crisis Group (n 61) 8; Donald N Jensen, 'Moscow in the Donbas: Command, Control, Crime and the Minsk Peace Process' (*NATO Defence College*, March 2017) 10 <[www.ndc.nato.int/news/news.php?icode=1029](http://www.ndc.nato.int/news/news.php?icode=1029)> accessed 27 February 2018; Matveeva (n 155) 175.

<sup>158</sup> International Crisis Group (n 61) 8.

<sup>159</sup> Anders Åslund, 'Putin Moves to Direct Rule in the Donbas' (*Newsweek*, 1 June 2016) <[www.newsweek.com/putin-moves-direct-rule-donbas-412411](http://www.newsweek.com/putin-moves-direct-rule-donbas-412411)> accessed 27 February 2018; International Crisis Group (n 61) 3, 12; Jensen (n 157) 7-8.

<sup>160</sup> See Ch 2 s 2.2.1.

<sup>161</sup> Radio Free Europe Radio Liberty, 'Tillerson Praises Turks for Standing Up to Coup Plotters, Delivers Blunt Message to Russia on Ukraine' (9 July 2017) <[www.rferl.org/a/tillerson-ukraine-poroshenko-kyiv-united-states/28604023.html](http://www.rferl.org/a/tillerson-ukraine-poroshenko-kyiv-united-states/28604023.html)> accessed 1 March 2018.



Notwithstanding such elevated levels of dependence and control, however, several factors point away from the rebels' status as *de facto* state organs. First, the rebel movement in eastern Ukraine was local in its origins; it was not created by Moscow.<sup>162</sup> Second, the rebels received assistance from sources other than the Russian state such as wealthy oligarchs, particularly during the early stages of the conflict.<sup>163</sup> The rebels' dependence on Moscow thus varied over time and may not have been 'complete' throughout the conflict. Third, reporting indicates a level of indiscipline and infighting on the part of rebel leaders that appears incompatible with Russia's exercise of 'strict control'.<sup>164</sup> Some fighters reportedly operated in 'rogue' units, not under Russian command.<sup>165</sup> Furthermore, certain areas of the rebels' activities, such as their relationships with local politicians and oligarchs, remained outside the scope of Russian influence.<sup>166</sup>

These issues raise doubts as to whether the Donbas rebels may be regarded as integral to the apparatus of the Russian state and 'mere instruments through which [Russia] was acting'.<sup>167</sup> Although the complete dependence and control threshold may have been satisfied in respect of certain rebel units, at certain times during the conflict, it appears that the rebels more broadly cannot accurately be categorised as *de facto* state organs. Instead, a case-by-case assessment is required to determine whether the rebels involved in specific IHL violations, such as the alleged incidents of detainee abuse,<sup>168</sup> are attributable to Russia by virtue of the rule reflected in Article 4.

Finally, it is pertinent to consider Russia's relationship with any NSAs involved in the numerous cyber operations targeting Ukraine.<sup>169</sup> When states act through NSAs in the cyber domain, the same attribution thresholds must be met but in practice, the requisite evidence is more difficult to gather. Even if technical attribution is possible, meaning that an injured state is able and willing to identify the particular individual or group of cyber operators responsible for a harmful operation, any links

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<sup>162</sup> Kofman and others (n 154) 33, 57-9; Matveeva (n 155) 93-117.

<sup>163</sup> Kofman and others (n 154) 55, 60-62.

<sup>164</sup> See Ch 2 s 2.2; Jensen (n 157) 9.

<sup>165</sup> Ivo Daalder and others, 'Preserving Ukraine's Independence, Resisting Russian Aggression: What the United States and NATO Must Do' (*Atlantic Council*, February 2015) 12 <[www.brookings.edu/wp-content/uploads/2016/06/UkraineReport\\_February2015\\_FINAL.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/UkraineReport_February2015_FINAL.pdf)> accessed 1 March 2018.

<sup>166</sup> Jensen (n 157) 9.

<sup>167</sup> *Bosnian Genocide* (n 4) [394].

<sup>168</sup> See eg UNHRC, 'Report on the Human Rights Situation in Ukraine' (15 November 2014) 12-3 <[www.un.org.ua/images/stories/FINAL\\_OHCHR\\_seventh\\_report\\_Ukraine\\_20.11.14\\_before\\_launch.pdf](http://www.un.org.ua/images/stories/FINAL_OHCHR_seventh_report_Ukraine_20.11.14_before_launch.pdf)> accessed 1 March 2018. See also Ch 2 s 2.2.2.

<sup>169</sup> See Ch 2 s 2.2.3.

between those cyber operators and a state are often indistinct.<sup>170</sup> Thus, *de facto* state organ status is likely to be of limited relevance in the cyber domain, due to the considerable challenge of obtaining the requisite evidence to prove a relationship of complete dependence and control between a particular cyber operator and the state.<sup>171</sup>

### 3.4 *Ultra vires* acts

In the unlikely event that an NSA qualifies as a *de facto* state organ, it is no different from one established in law.<sup>172</sup> This means that the entirety of the organ's conduct, performed in its official capacity, is attributable to the state.<sup>173</sup> Or as Milanović puts it, 'the mere identity of the actor as a state organ suffices for attribution to occur'.<sup>174</sup> The principle is reflected in Article 7 ARSIWA: 'The conduct of an organ of State ... shall be considered an act of the State under international law if the organ ... acts in that capacity, even if it exceeds its authority or contravenes instructions'.<sup>175</sup>

The rationale behind the rule is teleological. If an injured state had to prove that a state organ was acting within the scope of its authority at the time it committed an act in potential violation of international law, this would afford states 'a ready loop-hole by which to evade responsibility' and place an impossible burden on injured states.<sup>176</sup> Moreover, the rule expressed in Article 7 enhances compliance with international law by encouraging states to oversee their organs' conduct and ensure that they abide by the state's international legal obligations.<sup>177</sup> If a state fails in this respect, it bears

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<sup>170</sup> Tim Maurer, *Cyber Mercenaries: The State, Hackers, and Power* (CUP 2018) 22-25.

<sup>171</sup> For commentary regarding *de facto* state organ status in the cyber domain see eg Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) r 15 commentary paras 3-4; Michael N Schmitt, "'Virtual' Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' (2018) 19 *Chicago J Intl L* 30, 60; Nicholas Tsagourias and Michael Farrell, 'Cyber Attribution: Technical and Legal Approaches and Challenges' (2020) 31 *Eur J Intl L* 941, 952.

<sup>172</sup> Crawford, *State Responsibility: The General Part* (n 109) 126.

<sup>173</sup> Theodore Meron, 'International Responsibility of States for Unauthorized Acts of their Officials' (1957) *Brit YB Intl L* 85.

<sup>174</sup> Milanović, 'Comment on Griebel and Plücken' (n 109) 315.

<sup>175</sup> ARSIWA (n 1) art 7. For a review of judicial pronouncements regarding art 7, see Olleson (n 56) 76-81.

<sup>176</sup> ILC YB 1972 vol II, 'Documents of the Twenty-Fourth Session Including the Report of the Commission to the General Assembly' UN Doc A/CN.4/SER.A/1972/Add.1 79 para 19. See also ILC YB 1986 vol II pt 1, 'Documents of the Thirty-Eighth Session' UN Doc A/CN.4/SER.A/1986/Add.1(Part 1) 12 para 5 (comments of Special Rapporteur Mr Willem Riphagen); Meron (n 173) 88-89; Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 263-64; Tonkin (n 32) 98.

<sup>177</sup> Monica Hakimi, 'Toward a Legal Theory on the Responsibility to Protect' (2014) 39 *Yale J Intl L* 247, 264.

responsibility for all the legal violations committed, whether or not the organ was acting under the state's authority or control at the relevant time.

Activities of this nature, performed in excess of authority but nevertheless attributable to the state, are described as *ultra vires* acts. In the *Union Bridge Company* case, for example, Great Britain was held responsible for the *ultra vires* conduct of one of its officers who was authorised to seize belligerent property during the Boer War, but who mistakenly appropriated material belonging to a neutral party.<sup>178</sup> Similarly, if members of the PMF were acting contrary to specific instructions from the Iraqi government when they fired upon protesters in Baghdad, their conduct in breach of Iraq's IHRL obligations was *ultra vires* but nevertheless attributable to the state.<sup>179</sup> The position would only be different if the PMF members were acting in a private capacity at the relevant time.<sup>180</sup>

### **3.4.1 The distinction between *ultra vires* and private acts**

The key consideration when characterising conduct as either *ultra vires* or private is whether the individuals concerned were acting in their capacity as organs of state.<sup>181</sup> In the case of a *de jure* organ, this assessment focuses on the range of powers that the entity is granted by the state's internal law.<sup>182</sup> *De facto* state organs, in contrast, have no official function or capacity in accordance with domestic law, nor, in all likelihood, any rules governing their conduct or operations.

Accordingly, it may be more challenging when considering the latter's activities to determine whether these were performed in exercise of authority granted by the state.<sup>183</sup>

The General Claims Commission considered the distinction between private and *ultra vires* conduct in the *Mallén* case, concerning two assaults by an American police officer on a Mexican national.<sup>184</sup>

The first assault was considered 'a malevolent and unlawful act of a private individual who happened

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<sup>178</sup> *Union Bridge Company (United States) v Great Britain* (1924) 4 RIAA 138, 141-2 <[http://legal.un.org/riaa/cases/vol\\_VI/138-142\\_Union.pdf](http://legal.un.org/riaa/cases/vol_VI/138-142_Union.pdf)> accessed 18 February 2018. See also Meron (n 173) 94, 96.

<sup>179</sup> Georgy (n 48); Patrick Cockburn, 'How Tehran-Backed Forces are Taking Over in Iraq: "The Iranians Always Have a Plan"' (*The Independent*, 10 November 2019) <[www.independent.co.uk/news/world/middle-east/iraq-protests-police-shoot-baghdad-green-zone-death-toll-a9197476.html](http://www.independent.co.uk/news/world/middle-east/iraq-protests-police-shoot-baghdad-green-zone-death-toll-a9197476.html)> accessed 23 November 2020.

<sup>180</sup> ARSIWA (n 1) art 7.

<sup>181</sup> *ibid* commentary para 7. See also Caron (n 12) 136.

<sup>182</sup> Crawford, *State Responsibility: The General Part* (n 109) 136.

<sup>183</sup> Vladislav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 Eur J Intl L 563, 576.

<sup>184</sup> *Francisco Mallén (United Mexican States) v USA* (1927) 4 RIAA 173 <[http://legal.un.org/riaa/cases/vol\\_IV/173-190.pdf](http://legal.un.org/riaa/cases/vol_IV/173-190.pdf)> accessed 15 February 2018.

to be an official'.<sup>185</sup> This, therefore, was not attributable to the United States. But the Commission's assessment was different regarding the second assault. Although this seemed 'a private act of revenge', it was attributable to the United States on the basis that the perpetrator showed his badge, thereby asserting his official capacity, and took Mallén to jail following the assault.<sup>186</sup>

Similar considerations arose in the *Caire* case, in which Mexico was found to be internationally responsible for the acts of two of its army officers who unlawfully shot a French national after he refused to give them a sum of money.<sup>187</sup> Taking into account the officers' use of their insignia when carrying out the arrest, the arbitration panel concluded that they 'acted under cover of their status as officers and used means placed at their disposal on account of that status'.<sup>188</sup> Despite the fact that the officers were seeking private gain at the time of the incident, this conclusion is cited with approval by the ILC.<sup>189</sup> Had the facts been different, however, in that the officers were clearly off duty and out of uniform at the relevant time, the opposite conclusion may have been reached.

Each case will turn on its own facts. But as the *Mallén* and the *Caire* cases illustrate, it is the perception that the state organ creates through its actions that is key, rather than the purpose for which it acts.<sup>190</sup> The ARSIWA commentary reflects this principle, providing that whenever a state organ acts in 'an apparently official capacity, or under colour of authority', such actions are attributable to the state even if the person or entity concerned had ulterior or improper motives or was abusing public power.<sup>191</sup> Therefore, if NDF fighters used the official identification cards with which they were issued to facilitate looting or other abuses,<sup>192</sup> such activity is likely to be attributable to the state even if the fighters' motivation was personal gain.

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<sup>185</sup> *ibid* 174-5.

<sup>186</sup> *ibid* 177. See also Meron (n 173) 109-111.

<sup>187</sup> *Estate of Jean-Baptiste Caire (France) v The United Mexican States* (1929) 5 RIAA 516 <[http://legal.un.org/riaa/cases/vol\\_V/516-534\\_Caire.pdf](http://legal.un.org/riaa/cases/vol_V/516-534_Caire.pdf)> accessed 15 February 2018.

<sup>188</sup> *ibid* 531. See also Meron (n 173) 109-10.

<sup>189</sup> ARSIWA (n 1) art 7 commentary para 5.

<sup>190</sup> ILC YB 1972 vol II (n 176) 93 para 55. But see also *Yeager* (n 15) [64]-[66]. For a critique of the Tribunal's judgment in the *Yeager* case, see Caron (n 12) 136-8.

<sup>191</sup> ARSIWA (n 1) art 4 commentary para 13. See also ILC YB 1975 vol II 'Report to the General Assembly' UN Doc A/CN.4/SER.A/1975/Add.1 67 commentary to draft art 10 para 17; ILC YB 1986 vol II pt 1 (n 176) 12 para 5; Crawford's First Report on State Responsibility (n 70) 48 para 240; Meron (n 173) 93; de Frouville (n 176) 263-64.

<sup>192</sup> The Carter Center (n 36) 6, 8; Sam Dagher, 'Syria's Alawite Force Turned Tide for Assad' (*The Wall Street Journal*, 26 August 2013) <[www.wsj.com/articles/syrias-alawite-force-turned-tide-for-assad-1377568628](http://www.wsj.com/articles/syrias-alawite-force-turned-tide-for-assad-1377568628)> accessed 14 February 2018.

The use of equipment provided by the state is not, however, sufficient to prove that conduct is public rather than private in character.<sup>193</sup> Thus, if a member of the NDF uses a weapon issued by the Syrian government to kill a foreign national during a private dispute, that fact alone is insufficient to attribute the act to Syria. The key issue, instead, is whether the NDF fighter exploited his official position to make it appear to the victim that he was ‘cloaked with governmental authority’.<sup>194</sup> Depending on the context, this may be far from easy to establish. If a state organ operates covertly, for example, it might display no outward manifestation of the authority under which it acts.<sup>195</sup>

The distinction between official and private conduct may be easier to discern when *de jure* state organs rebel against the state. Syrian soldiers, for instance, began defecting from the regime’s armed forces in mid-2011, leading to the formation of the Free Syrian Army.<sup>196</sup> If those soldiers were still *de jure* members of the state’s armed forces at the time of their involvement in potential international law violations,<sup>197</sup> the question arises whether their acts are attributable to Syria. Although such conduct could be construed as *ultra vires* rather than private, thereby leading to Syrian responsibility, logic dictates the opposite conclusion. Assuming the soldiers concerned were clearly engaged in hostilities against the state at the relevant time, they were not acting in their official capacity as state organs therefore Syria should bear no responsibility for their actions.<sup>198</sup>

The commentary highlights one exception to the normal distinction between *ultra vires* and private behaviour. If an organ’s private conduct is systematic, to the extent that the state knew or should have known about it and taken appropriate preventative steps, then attribution is appropriate notwithstanding the private nature of the relevant acts.<sup>199</sup> Therefore, even if members of the Iraqi PMF were acting in a private capacity when they first used lethal force against protesters in Baghdad,<sup>200</sup> their subsequent conduct in violation of Iraq’s IHRL obligations is attributable to the

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<sup>193</sup> ILC YB 1975 vol II (n 191) 69-70 commentary to draft art 10 para 26. But see also Meron (n 173) 113.

<sup>194</sup> *Petrolane Inc v Islamic Republic of Iran* (1991) 27 Iran-US Claims Tribunal Rep 64 [82]-[83]. See also ARSIWA (n 1) art 7 commentary para 7.

<sup>195</sup> Kimberly N Trapp, *State Responsibility for International Terrorism* (OUP 2011) 35.

<sup>196</sup> Charles Lister, ‘The Free Syrian Army: A Decentralized Insurgent Brand’ (*Brookings*, November 2016) 5 <[www.brookings.edu/wp-content/uploads/2016/11/iwr\\_20161123\\_free\\_syrian\\_army.pdf](http://www.brookings.edu/wp-content/uploads/2016/11/iwr_20161123_free_syrian_army.pdf)> accessed 18 November 2020.

<sup>197</sup> See Ch 2 s 2.1.1.

<sup>198</sup> See Michael Akehurst, ‘State Responsibility for the Wrongful Acts of Rebels – An Aspect of the Southern Rhodesian Problem’ (1968-1969) 43 *British YB Intl L* 49, 63.

<sup>199</sup> ARSIWA (n 1) art 7 commentary para 8.

<sup>200</sup> Georgy (n 48).

state due to the state's knowledge of the militias' behaviour and its failure to prevent its reoccurrence.

### **3.4.2 The conduct of a state's armed forces**

As the preceding examples illustrate, the principle reflected in Article 7 ARSIWA is particularly relevant when considering the behaviour of a state's armed forces, or militias that qualify as state organs. Although conduct in breach of the state's IHL obligations is invariably committed in disobedience to orders, international courts and tribunals have consistently held states accountable for their troops' conduct on the basis that this is *ultra vires* rather than private behaviour.<sup>201</sup> Moreover, even if the actions of military personnel can properly be characterised as private, it is arguable that in conflict situations, the entirety of the armed forces' conduct is attributable to the state.

This results from Article 3 of the 1907 fourth Hague Convention and Article 91 of the 1977 first Additional Protocol to the Geneva Conventions (AP1).<sup>202</sup> According to both provisions, in international armed conflicts, a state is responsible for 'all acts committed by persons forming part of its armed forces'.<sup>203</sup> This principle has been described by the ICJ as 'a well-established rule of a customary nature'.<sup>204</sup> Yet, ambiguity persists regarding its precise meaning and effects.<sup>205</sup>

In the *Armed Activities* case, the ICJ noted when referring to Articles 3 and 91 that it was 'irrelevant for the attribution of their conduct to Uganda whether [Ugandan armed forces] acted contrary to the instructions given or exceeded their authority'.<sup>206</sup> This wording reflects the principle set out in Article 7 ARSIWA and does not obviously ascribe any broader meaning to these provisions.

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<sup>201</sup> *Thomas H Youmans (USA) v United Mexican States* (1926) 4 RIAA 110, 116  
<[http://legal.un.org/riaa/cases/vol\\_IV/110-117.pdf](http://legal.un.org/riaa/cases/vol_IV/110-117.pdf)> accessed 15 February 2018; *D Earnshaw and Others (Great Britain) v United States (Zafiro case)* (1925) UN Rep of Intl Arbitral Awards vol VI 160, 162  
<[http://legal.un.org/docs/?path=../riaa/cases/vol\\_VI/160-165\\_Earnshaw.pdf&lang=E](http://legal.un.org/docs/?path=../riaa/cases/vol_VI/160-165_Earnshaw.pdf&lang=E)> accessed 24 October 2017.  
See also Ian Brownlie, *State Responsibility: Part 1* (OUP 1983) 146-7; Meron (n 173).

<sup>202</sup> Convention (IV) Respecting the Laws and Customs of War on Land (signed at the Hague, 18 October 1907) art 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 art 91 (AP1).

<sup>203</sup> *ibid.*

<sup>204</sup> *Armed Activities* (n 6) [214]. But see also *ibid* dissenting opinion of Judge ad hoc Kateka para 54.

<sup>205</sup> See generally Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond' (1991) 40 Intl and Comparative L Quarterly 827.

<sup>206</sup> *Armed Activities* (n 6) [214].

Similarly, the commentaries to Article 91 AP1 and Article 7 ARSIWA indicate that only *ultra vires* acts, not private acts, of a state's armed forces are attributable to the state.<sup>207</sup>

The *opinio juris* of the United States supports this construction.<sup>208</sup> But many commentators consider that in situations of international armed conflict, Articles 3 and 91 operate more broadly than the principle reflected in Article 7.<sup>209</sup> The ILC, in its earlier deliberations, also regarded these IHL provisions as forming an exception to the general rule now expressed in Article 7.<sup>210</sup> And the ICTY referred to Article 91 as establishing 'a special regime of State responsibility' according to which armed forces' acts are attributable to a state during armed conflict, whether or not they act in a private capacity.<sup>211</sup>

To illustrate the distinction, consider the conduct of Ukraine's volunteer battalions. As discussed in Section 3.2.1, these became *de jure* state organs in 2014 and were implicated in numerous IHL violations. It is possible that the battalions' members committed some of these abuses in their private capacity, particularly given that they were operating in home territory. Individuals might have committed acts of theft, for instance, whilst on leave from their official duties.<sup>212</sup> In such circumstances, neither the rule reflected in Article 4 nor any of the other rules of attribution outlined in ARSIWA would attribute their conduct to Ukraine.<sup>213</sup> But if the conflict was international in character<sup>214</sup> and Article 91 AP1 operates as an exception to the general principle reflected in Article 7 ARSIWA, the volunteer battalions' private conduct is nevertheless attributable to the state.

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<sup>207</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 3660; ARSIWA (n 1) art 7 commentary para 4.

<sup>208</sup> ICRC Customary IHL Study (n 6) r 149.

<sup>209</sup> Kalshoven (n 205) 837-38, 853; Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 Intl Rev Red Cross 401, 405-06; Luigi Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 Israel YB on Human Rights 233, 236; Tonkin (n 32) 95-7; Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (CUP 2013) 163-164.

<sup>210</sup> ILC YB 1975 vol I, 'Summary Records of the Twenty-Seventh Session' UN Doc A/CN.4/SER.A/1975 16 para 4 (Mr Ago); *ibid* 7 para 5 (Mr Reuter); ILC YB 1975 vol II (n 191) 69 (commentary to draft art 10 para 26).

<sup>211</sup> *Prosecutor v Tadić* (Appeals Chamber Judgment) ICTY IT-94-1-A (1999) [98] fn 117.

<sup>212</sup> Amnesty International, 'Ukraine: Abuses and War Crimes by the Aidar Volunteer Battalion' (n 43).

<sup>213</sup> ARSIWA (n 1) art 7; *ibid* art 4 commentary para 13; *ibid* art 8 commentary para 8.

<sup>214</sup> See ICC, 'Report on Preliminary Examination Activities 2016' (*Office of the Prosecutor*, 14 November 2016) 37 <[www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](http://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf)> accessed 12 April 2018; Amnesty International, 'Ukraine: Mounting Evidence of War Crimes and Russian Involvement' (7 September 2014) <[www.amnesty.org/en/latest/news/2014/09/ukraine-mounting-evidence-war-crimes-and-russian-involvement/](http://www.amnesty.org/en/latest/news/2014/09/ukraine-mounting-evidence-war-crimes-and-russian-involvement/)> accessed 23 February 2018.

This broader interpretation of Article 91 is likely to be most significant when the relevant conflict occurs in the state's own territory. More often, however, when a state participates in an international armed conflict its forces are deployed away from home, meaning that their presence in the conflict zone is due solely to the role they perform for the state.<sup>215</sup> In such circumstances, military personnel would rarely act in a truly private capacity.<sup>216</sup> Instead, throughout their deployment, a state's armed forces typically act in exercise of their official functions, leading to the attribution of their conduct to the state.<sup>217</sup> The differing interpretations of Article 91 AP1 appear, therefore, to be of minimal practical import.

The rule's impact is potentially greater regarding the conduct of NSAs. Some scholars argue that when read in light of the definition of a state's armed forces in Article 43 AP1,<sup>218</sup> Article 91 operates as a *lex specialis* rule of attribution.<sup>219</sup> In other words, in conflicts to which AP1 applies, the conduct of all groups acting under a state's responsible command within the meaning of Article 43, and therefore forming part of its armed forces, is attributable to the state.<sup>220</sup> Applied to the conflict in the DRC,<sup>221</sup> this would mean that even if the attribution thresholds relevant to the rules reflected in ARSIWA are not met, the many IHL violations involving M23 fighters are nevertheless attributable to Rwanda.<sup>222</sup> The only requirement would be that M23 fighters acted on the state's behalf and subordinated themselves to Rwanda's command within the meaning of Article 43.

It is far from certain, however, that Article 91 has that effect. While the ICRC's study of customary IHL supports the broad interpretation of a state's armed forces in Article 43,<sup>223</sup> it does not translate this into a special rule of attribution.<sup>224</sup> Instead, when addressing the issue of responsibility, the

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<sup>215</sup> Sassòli (n 209) 405-06; Tonkin (n 32) 95-98.

<sup>216</sup> One exception might be if military personnel commit private acts whilst on leave from their duties in occupied territory. See Kalshoven (n 205).

<sup>217</sup> Sassòli (n 209) 405-06; Tonkin (n 32) 95-98.

<sup>218</sup> AP1 (n 202) art 43. See also Sandoz, Swinarski and Zimmermann (n 207) paras 1672-81; Kubo Mačák, *Internationalized Armed Conflicts in International Law* (OUP 2018) 179-80.

<sup>219</sup> Kalshoven (n 205) 847-48; Knut Ipsen, 'Combatants and Non-Combatants' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2008) 85; Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 Eur J Intl L 989, 1005-12; Tonkin (n 32) 82-84; Frauke Renz, *State Responsibility and New Trends in the Privatization of Warfare* (Edward Elgar 2020) 106-10, 216-17. In addition, the 2008 Montreux Document uses of the language of art 43 AP1 when addressing a hiring state's responsibility for a PMSC's violations of international law. See Montreux Document (n 35) Pt 1 para 7. But see also Katherine Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law' (2010) 21 Eur J Intl L 105, 120-21.

<sup>220</sup> Marko Milanović, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 Intl L Studies 295, 324-29.

<sup>221</sup> See Ch 2 s 2.3.

<sup>222</sup> See Ch 2 s 2.3.3.

<sup>223</sup> ICRC Customary IHL Study (n 6) r 4.

<sup>224</sup> *ibid* r 149.



ICRC replicates ARSIWA's attribution framework without any modification to the rule reflected in Article 4.<sup>225</sup>

The commentary to Article 91 also makes no reference to the provision's operation as a special rule of attribution.<sup>226</sup> Instead, this refers to the general rules reflected in Articles 4 and 7 ARSIWA and, in the context of damage caused by individuals who are not members of the state's armed forces, it indicates that states might bear responsibility for their own organs' failure to exercise due diligence to prevent such acts from occurring.<sup>227</sup> The more authoritative view of Article 91, therefore, is that it is not a *lex specialis* rule of attribution, but that it merely refers to a state's responsibility for acts that are attributable to it in accordance with the general rules reflected in ARSIWA.<sup>228</sup>

### 3.5 Conclusion

Notwithstanding its application to organs of state, the rule reflected in Article 4 ARSIWA is of clear relevance to the issue of state responsibility for the conduct of NSAs. In contemporary conflict, this applies primarily when NSAs are integrated into a state's structure via the state's internal laws. While not a frequent occurrence, several conflict parties have incorporated militia groups into their state apparatus, as illustrated by the NDF in Syria and the Ukrainian volunteer battalions. Once these entities gain the status of *de jure* state organs, the entirety of their conduct in that capacity is attributable to the state, even if it is *ultra vires*. The rule outlined in Article 7 thus performs an important function by holding states to account when they fail to exert sufficient control over their organs to ensure their compliance with international law.

The principle expressed in Article 7 should, in theory, apply equally to entities that attain the status of state organs due to the strength of their *de facto* relationship with the state. In practice, however, it is questionable whether an entity with sufficient autonomy to commit *ultra vires* acts could ever qualify as a *de facto* state organ.<sup>229</sup> The requirement for the state's exercise of 'strict control' over the entity's conduct, in all its fields of activity, likely excludes this possibility.<sup>230</sup>

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<sup>225</sup> *ibid.* See also Milanović, 'Special Rules of Attribution' (n 220) 329.

<sup>226</sup> Sandoz, Swinarski and Zimmermann (n 207) para 3660.

<sup>227</sup> *ibid.* See also Del Mar (n 219) 121-23; Milanović, 'Special Rules of Attribution' (n 220) 328-29. Regarding states' due diligence obligations see Ch 6 s 6.4.

<sup>228</sup> Milanović, 'Special Rules of Attribution' (n 220) 329.

<sup>229</sup> See ILC YB 1972 vol II (n 176) 72 fn 4.

<sup>230</sup> de Frouville (n 176) 268.

Even if evidence of a high degree of state control is available, an entity only constitutes a *de facto* state organ if it also exhibits ‘complete dependence’ on the state. As the examples in this chapter illustrate, however, these dual requirements are rarely, if ever, satisfied. The test formulated by the ICJ potentially excludes militias such as M23 from qualifying as *de facto* state organs, without any opportunity to assess whether their overall relationship with the state mirrors that of a *de jure* organ.

Such an outcome appears inconsistent with the ILC’s aims in broadening the wording of Article 4 ARSIWA to encompass *de facto* state organs, as well as the comments of governments upon which this change was based.<sup>231</sup> Although an NSA’s conduct might be attributable to a state on other grounds if the criteria relevant to Article 4 are not met,<sup>232</sup> each of the rules of attribution reflected in ARSIWA is designed to address a different set of circumstances. When an NSA is integrated into a state’s apparatus and acts for the state in all its fields of activity, the rule reflected in Article 4 should apply to attribute its conduct performed in an official capacity to the state.

The ICJ acknowledged the importance of *de facto* state organ status in the *Bosnian Genocide* case, noting that a restriction of the rule of attribution to *de jure* state organs ‘would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.’<sup>233</sup> But the inflexibility of the test relevant to *de facto* state organs deprives it of practical significance and potentially requires a state to maintain a closer relationship with an NSA than it sustains with its *de jure* organs. The parameters of a more flexible test, which better meets the object and purpose of the law of state responsibility, are discussed in Chapter 7.<sup>234</sup>

If private conduct is not attributable to the state under the rule reflected in Article 4, further enquiry is necessary to establish whether another basis of attribution applies. It may be that the NSA was acting under the state’s instructions, direction, or control.<sup>235</sup> Alternatively, if the entity was exercising governmental functions at the relevant time, the attribution standard reflected in Article 5 ARSIWA may apply. This latter rule of attribution is the focus of Chapter 4.

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<sup>231</sup> Crawford’s First Report on State Responsibility (n 70) 35; ILC YB 1998 vol I (n 71) 229 para 3. See also ILC YB 1975 vol II (n 191) 80 para 32.

<sup>232</sup> See Chs 4, 5.

<sup>233</sup> *Bosnian Genocide* (n 4) [392].

<sup>234</sup> See Ch 7 s 7.2.1.

<sup>235</sup> ARSIWA (n 1) art 8. See also Ch 5.

## Chapter 4 – Persons or Entities Exercising Elements of Governmental Authority

### 4.1 Introduction

It is common today for NSAs to carry out activities that, in years past, were considered governmental in nature. Privatisation and outsourcing have increased markedly across all sectors of government, including in the context of military-related activities in combat zones. The trend is equally apparent in the cyber domain where private actors not only play a significant role in upholding cybersecurity, but also engage in hostile operations on states' behalf.<sup>1</sup> This blurring of the boundaries between public and private sector activity has led to concerns regarding accountability for the wrongful behaviour of the private entities concerned. The abuses committed by contractors working for PMSCs at Abu Ghraib in Iraq are a case in point.<sup>2</sup> While the individual contractors were personally liable under criminal law for their misconduct, the question of state responsibility remains.<sup>3</sup>

This chapter assesses the circumstances in which states bear responsibility for the conduct of NSAs exercising governmental functions. The applicable rule, enshrined in Article 5 ARSIWA, provides:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.<sup>4</sup>

Conduct falling within the scope of Article 5 is distinct from that carried out by organs of state.<sup>5</sup>

The ARSIWA commentary clarifies that the rule is intended to encompass the activities of private

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<sup>1</sup> In December 2017 for example, several governments publicly attributed the 'WannaCry' ransomware attack to Lazarus Group, a hacking entity that works on behalf of the North Korean government. See eg Dustin Volz, 'US Blames North Korea for "WannaCry" Cyber Attack' (*Reuters*, 18 December 2017) <[www.reuters.com/article/us-usa-cyber-northkorea/u-s-blames-north-korea-for-wannacry-cyber-attack-idUSKBN1ED00Q](http://www.reuters.com/article/us-usa-cyber-northkorea/u-s-blames-north-korea-for-wannacry-cyber-attack-idUSKBN1ED00Q)> accessed 22 January 2018.

<sup>2</sup> Rachel Weiner, 'A Suit over Abu Ghraib: Getting to What Actually Happened' (*The Washington Post*, 22 September 2017) <[www.washingtonpost.com/local/public-safety/abu-ghraib-contractor-treatment-deplorable-but-not-torture/2017/09/22/4efc16f4-9e3b-11e7-9083-fbdfdf6804c2\\_story.html?utm\\_term=.b7417c8be7bf](http://www.washingtonpost.com/local/public-safety/abu-ghraib-contractor-treatment-deplorable-but-not-torture/2017/09/22/4efc16f4-9e3b-11e7-9083-fbdfdf6804c2_story.html?utm_term=.b7417c8be7bf)> accessed 19 October 2017.

<sup>3</sup> Katja Nieminen, 'Rules of Attribution and the Private Military Contractors at Abu Ghraib: Private Acts or Public Wrongs?' (2004) 15 Finnish YB Intl L 289.

<sup>4</sup> International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) art 5 (ARSIWA).

<sup>5</sup> See Ch 3.

entities exercising elements of governmental authority in place of state organs, as well as those of formerly state-owned corporations that retain certain public or regulatory functions following privatisation.<sup>6</sup> This basis of attribution is intended to prevent a state from avoiding responsibility by outsourcing or privatising functions that were traditionally carried out by the state's own organs.<sup>7</sup> For example, if a state delegates the management of a detention facility in a conflict zone to a private company and that company's employees commit acts in breach of the state's IHL obligations, the rule reflected in Article 5 operates to attribute the employees' conduct to the state.

To date, however, the practical application of the attribution standard remains unclear. This is largely due to uncertainty as to the types of activity that fall within the sphere of governmental authority, as well as ambiguity regarding the nature of the delegation that is required for an entity to be 'empowered by the law' of the state. This chapter seeks to address such issues, focusing principally on security-related activities carried out by private entities operating either in zones of conflict, or in the cyber domain. Both are areas in which government outsourcing has increased in recent years.

## **4.2 Outsourcing in the contemporary security environment**

### ***4.2.1 States' use of private military and security companies***

Since the early 1990s, states' reliance on contractors during combat operations has increased significantly.<sup>8</sup> The United States and United Kingdom have been at the forefront of this development, with PMSCs involved in every major US military operation since the 1991 Gulf War.<sup>9</sup> There are several reasons for this change. These include the reduction in the size of states' military forces following the end of the Cold War, the protracted nature of the deployments to Bosnia, Iraq, and Afghanistan, and the absence of the requisite skills amongst military personnel to operate

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<sup>6</sup> ARSIWA (n 4) art 5 commentary para 1.

<sup>7</sup> *ibid* chapeau to pt I ch II commentary para 7; ILC YB 1998 vol I, 'Summary Records of the Meetings of the Fiftieth Session' UN Doc A/CN.4/SER.A/1998 228 (comments of Special Rapporteur James Crawford).

<sup>8</sup> Matthew Uttley, 'Private Contractors on Deployed Military Operations: Inter-Agency Opportunities and Challenges' (*The Heritage Foundation*, 31 October 2006) 2 <[www.heritage.org/defense/report/private-contractors-deployed-military-operations-inter-agency-opportunities-and](http://www.heritage.org/defense/report/private-contractors-deployed-military-operations-inter-agency-opportunities-and)> accessed 23 October 2017; Rod Nordland, 'Risks of Afghan War Shift from Soldiers to Contractors' (*The New York Times*, 11 February 2012) <[www.nytimes.com/2012/02/12/world/asia/afghan-war-risks-are-shifting-to-contractors.html](http://www.nytimes.com/2012/02/12/world/asia/afghan-war-risks-are-shifting-to-contractors.html)> accessed 26 June 2018.

<sup>9</sup> US Government Accountability Office, 'Report to the Subcommittee on Readiness and Management Support, Committee on Armed Services, US Senate' (*Report No GAO-03-695*, 2003) 1 <[www.gao.gov/assets/240/238667.pdf](http://www.gao.gov/assets/240/238667.pdf)> accessed 23 October 2017. See also Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34 *Stanford J Intl L* 75, 103-15.

sophisticated equipment.<sup>10</sup> In 2009, for instance, US Central Command contracted the services of over 20,000 civilians in support of combat operations in Iraq and Afghanistan<sup>11</sup> while in 2010, expenditure on contractor support amounted to an estimated sixty per cent of the UK's overseas operational defence spending.<sup>12</sup>

States' use of contractors and other NSAs to fulfil their foreign policy goals shows no signs of slowing today.<sup>13</sup> This is evident in Russia's use of Wagner Group fighters to promote its aims in Syria and Ukraine, and across many parts of Africa.<sup>14</sup> It is apparent in the Libyan conflict, where private contractors fought alongside state-sponsored Syrian militias.<sup>15</sup> And it is manifest in the increased propensity of states such as China to employ PMSCs to protect their interests overseas.<sup>16</sup> The importance of determining when such NSAs' conduct is attributable to a state is therefore clear.

The issue of attribution turns, in part, upon the nature of the activities undertaken by the NSA.<sup>17</sup> During armed conflict, states have entrusted PMSCs with a wide variety of responsibilities ranging

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<sup>10</sup> US Government Accountability Office (n 9) 1; Uttley (n 8) 2.

<sup>11</sup> United States Department of Defense, 'Contractor Support of US Operations in the USCENTCOM AOR, Iraq, and Afghanistan' (November 2009). See also Michael E Guillory, 'Civilianizing the Force: Is the United States Crossing the Rubicon?' (2001) 51 *Air Force L Rev* 111; Oliver R Jones, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms' (2009) 24 *Connecticut J Intl L* 239, 281-84.

<sup>12</sup> Henrik Heidenkamp, 'Sustaining the UK's Defence Effort: Contractor Support to Operations Market Dynamics' (*Royal United Services Institute*, April 2012) 4  
<[https://rusi.org/sites/default/files/201504\\_whr\\_contractor\\_support\\_to\\_operations\\_0.pdf](https://rusi.org/sites/default/files/201504_whr_contractor_support_to_operations_0.pdf)> accessed 23 October 2017.

<sup>13</sup> See generally Sean McFate, 'Mercenaries and War: Understanding Private Armies Today' (*National Defense University*, December 2019) <<https://apps.dtic.mil/sti/pdfs/AD1115550.pdf>> accessed 23 July 2021.

<sup>14</sup> Kimberley Marten, 'Russia's Use of Semi-State Security Forces: The Case of the Wagner Group' (2019) 35 *Post-Soviet Affairs* 181; Amy Mackinnon, 'Who Blessed the Vlads Down in Africa?' (*Foreign Policy*, 24 September 2021)  
<<https://foreignpolicy.com/2021/09/24/russia-wagner-group-mali-africa-putin-libya/>> accessed 28 September 2021.

<sup>15</sup> Anchal Vohra, 'It's Syrian vs Syrian in Libya' (*Foreign Policy*, 5 May 2020)  
<<https://foreignpolicy.com/2020/05/05/libya-civil-conflict-syrian-mercenaries-turkey-russia-gna-haftar/>> accessed 11 July 2021; UNSC, 'Final Report of the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011)' (8 March 2021) UN Doc S/2021/229 7-8 paras 16-23, 30-33 paras 86-100; Alia Brahimi, 'Libya has a Mercenaries Problem. It's Time for the International Community to Step Up' (*Atlantic Council*, 21 May 2021)  
<[www.atlanticcouncil.org/blogs/menasource/libya-has-a-mercenaries-problem-its-time-for-the-international-community-to-step-up/](http://www.atlanticcouncil.org/blogs/menasource/libya-has-a-mercenaries-problem-its-time-for-the-international-community-to-step-up/)> accessed 11 July 2021.

<sup>16</sup> Zi Yang, 'China's Private Security Companies: Domestic and International Roles' (*The Jamestown Foundation*, 4 October 2016) <<https://jamestown.org/program/chinas-private-security-companies-domestic-international-roles/>> accessed 7 December 2020; Charles Clover, 'Chinese Private Security Companies Go Global' (*The Financial Times*, 26 February 2017)  
<[www.ft.com/content/2a1ce1c8-fa7c-11e6-9516-2d969e0d3b65](http://www.ft.com/content/2a1ce1c8-fa7c-11e6-9516-2d969e0d3b65)> accessed 7 December 2020; Helena Legarda and Meia Nouwens, 'Guardians of the Belt and Road: The Internationalization of China's Private Security Companies' (*Merics China Monitor*, 16 August 2018) <<https://merics.org/en/report/guardians-belt-and-road>> accessed 7 December 2020.

<sup>17</sup> See s 4.3.1.

from support functions to offensive combat.<sup>18</sup> These may be loosely divided into four categories.<sup>19</sup> First, contractors frequently provide services in support of personnel working in deployed locations. In the relatively stable environment of the Balkans, for instance, contractors provided a range of base operations support services, including food and waste management and recreational services.<sup>20</sup>

Second, contractors commonly provide equipment and logistical support services, such as maintaining and servicing weapons systems and other equipment. The growing sophistication of technology on the battlefield means that specialist contract support to operations is increasingly important.<sup>21</sup>

Also critical to military operations is the third category of activity: the provision of security. Particularly in volatile environments, contractors often engage in security tasks that previously fell within the exclusive purview of the armed forces. Such functions include the physical protection of individuals and convoys travelling through unsecured areas, as well as the protection of fixed assets such as military facilities or government buildings.<sup>22</sup>

The fourth and final category of function undertaken by PMSCs encompasses roles with a direct operational effect. In contrast with the other three categories, contractors performing such roles contribute directly towards the state's military operations. The United States' use of contractors to undertake operational roles such as interrogation, the operation of military equipment, and intelligence analysis falls within this category.<sup>23</sup> It also encompasses states' use of NSAs to engage in combat operations, as illustrated by Angola and Sierra Leone's use of the PMSCs Executive Outcomes and Sandline International in the 1990s.<sup>24</sup>

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<sup>18</sup> Ian Ralby and Hannah Tonkin, 'Regulation of Private Military Security Companies in Armed Conflict' (*Chatham House*, 7 October 2011) 2-6 <[www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/071011ralby%26tonkin.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/071011ralby%26tonkin.pdf)> accessed 23 October 2017; Frauke Renz, *State Responsibility and New Trends in the Privatization of Warfare* (Edward Elgar 2020) 5-8.

<sup>19</sup> Heidenkamp (n 12) 4.

<sup>20</sup> US Government Accountability Office (n 9) 7.

<sup>21</sup> Guillory (n 11) 123-26.

<sup>22</sup> Ralby and Tonkin (n 18) 4.

<sup>23</sup> Heidenkamp (n 12) 4; James Risen and Mark Mazzetti, 'Blackwater Guards Tied to Secret CIA Raids' (*The New York Times*, 10 December 2009) <[www.nytimes.com/2009/12/11/us/politics/11blackwater.html](http://www.nytimes.com/2009/12/11/us/politics/11blackwater.html)> accessed 23 October 2017. See also Simon Chesterman, "'We Can't Spy ... If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'" (2008) 19 *Eur J Intl L* 1055.

<sup>24</sup> Ralby and Tonkin (n 18) 3. See also Zarate (n 9) 93-103; Jones, 'Implausible Deniability' (n 11) 273-77; McFate (n 13) 17-18.

Today, while states rarely acknowledge PMSCs' engagement in such activities, reporting reveals contractors' direct participation in hostilities across the globe, including in Syria, Yemen, and many parts of Africa.<sup>25</sup> And it is not only PMSCs that states employ for this purpose. Turkey and Russia empowered Syrian militias to fight on opposing sides of the Libyan conflict, for example,<sup>26</sup> while Iran deployed members of the Afghan Hazara minority to fight on its behalf in Syria.<sup>27</sup> States' outsourcing of combat functions to NSAs thus appears likely to remain a prominent feature of conflict in the years to come.

#### **4.2.2 States' use of non-state actors in the cyber domain**

As in the physical domain, states make frequent use of NSAs to achieve their goals in cyberspace. Often, a state's own organs do not have the required expertise to effectively compete in the cyber domain, leading to a reliance by states on the private sector both to defend their networks and to act offensively.<sup>28</sup> States also gain advantage from the anonymity and ambiguities of cyberspace, which enhance plausible deniability. Thus, attribution can be particularly challenging in this context.<sup>29</sup> Even if the difficulties of technical attribution can be overcome, meaning that a state or cybersecurity company can name the actor it considers responsible for a particular cyber operation, the precise links that exist between the actor and the state are often difficult to discern.

Operating in cyberspace appeals to states for exactly these reasons. Cyber operations are particularly attractive to less developed nations as a relatively inexpensive asymmetric tool against an enemy with kinetic battlefield superiority. North Korea, for instance, reportedly grooms cyber specialists, including criminal groups, as a cost-effective means to counter adversaries such as South Korea and

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<sup>25</sup> Marten (n 14) 182-3; Metin Gurcan, 'Private Military Companies: Moscow's Other Army in Syria' (*AL-Monitor*, 29 November 2017) <[www.al-monitor.com/pulse/originals/2017/11/turkey-russia-private-army-in-syria.html](http://www.al-monitor.com/pulse/originals/2017/11/turkey-russia-private-army-in-syria.html)> accessed 9 January 2018; Emily Hager and Mark Mazzetti, 'Emirates Secretly Sends Colombian Mercenaries to Yemen Fight' (*The New York Times*, 25 November 2015) <[www.nytimes.com/2015/11/26/world/middleeast/emirates-secretly-sends-colombian-mercenaries-to-fight-in-yemen.html?\\_r=0](http://www.nytimes.com/2015/11/26/world/middleeast/emirates-secretly-sends-colombian-mercenaries-to-fight-in-yemen.html?_r=0)> accessed 26 June 2018; Matthew Hill and Borges Nhamirre, 'Mercenaries Fighting Insurgents in Mozambique Set to Exit' (*Bloomberg*, 31 March 2021) <[www.bloomberg.com/news/articles/2021-03-31/military-contractor-fighting-mozambique-militants-set-to-exit](http://www.bloomberg.com/news/articles/2021-03-31/military-contractor-fighting-mozambique-militants-set-to-exit)> accessed 28 September 2021.

<sup>26</sup> Vohra (n 15).

<sup>27</sup> Phillip Smyth, 'Iran's Afghan Shiite Fighters in Syria' (*Washington Institute*, 3 June 2014) <<https://www.washingtoninstitute.org/policy-analysis/irans-afghan-shiite-fighters-syria>> accessed 11 July 2021; Arian Sharifi, 'The Fatemiyoun Army: Iran's Afghan Crusaders in Syria' (*The Diplomat*, 23 April 2021) <<https://thediplomat.com/2021/04/the-fatemiyoun-army-irans-afghan-crusaders-in-syria/>> accessed 24 May 2021.

<sup>28</sup> Kristen E Eichensehr, 'Public-Private Cybersecurity' (2017) 95 *Texas L Rev* 467; Jamie Collier, 'Proxy Actors in the Cyber Domain: Implications for State Strategy' (2017) 13 *St Antony's Intl Rev* 25.

<sup>29</sup> See generally Tim Maurer, *Cyber Mercenaries: The State, Hackers, and Power* (CUP 2018) 22-25; Nicholas Tsagourias and Michael Farrell, 'Cyber Attribution: Technical and Legal Approaches and Challenges' (2020) 31 *Eur J Intl L* 941.

the United States with which it cannot compete militarily.<sup>30</sup> Iran similarly uses offensive cyber operations as a response to economic sanctions, acting via NSAs including private contractors and universities.<sup>31</sup> But powerful nations cultivate cyber expertise too. China's People's Liberation Army reportedly funds a vast network of private cyber operators to supplement and complement the state's official structures.<sup>32</sup> In contrast with the contractual arrangements that are common when states outsource functions to PMSCs, however, such individuals frequently have an informal, ill-understood, relationship with the state.<sup>33</sup>

To illustrate, consider the Syrian Electronic Army, which emerged during the early stages of the conflict in Syria. The group initially offered a pro-Assad counter-narrative to the unfavourable reporting emanating from Syria and maintained close ties to the Assad regime.<sup>34</sup> Later, however, the NSA became more akin to a 'loose hacking collective, than a state-sponsored brigade'.<sup>35</sup> The ambiguous and evolving nature of the group's relationship with the state therefore adds significant

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<sup>30</sup> Jenny Jun, Scott LaFoy and Ethan Sohn, 'North Korea's Cyber Operations: Strategy and Responses' (*Center for Strategic and International Studies*, December 2015) <[http://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/151216\\_Cha\\_NorthKoreasCyberOperations\\_Web.pdf](http://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/151216_Cha_NorthKoreasCyberOperations_Web.pdf)> accessed 24 November 2021; David E Sanger, David D Kirkpatrick and Nicole Perlroth, 'The World Once Laughed at North Korean Cyberpower. No More' (*The New York Times*, 15 October 2017) <[www.nytimes.com/2017/10/15/world/asia/north-korea-hacking-cyber-sony.html](http://www.nytimes.com/2017/10/15/world/asia/north-korea-hacking-cyber-sony.html)> accessed 9 January 2018; Volz (n 1); UK House of Commons Defence Committee, 'Rash or Rational? North Korea and the Threat it Poses' (*Fourth Report of Session 2017-19*, 27 March 2018) 18-24 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmdfence/327/327.pdf>> accessed 26 June 2018; Ed Caesar, 'The Incredible Rise of North Korea's Hacking Army' (*The New Yorker*, 19 April 2021) <[www.newyorker.com/magazine/2021/04/26/the-incredible-rise-of-north-koreas-hacking-army](http://www.newyorker.com/magazine/2021/04/26/the-incredible-rise-of-north-koreas-hacking-army)> accessed 11 September 2021.

<sup>31</sup> Dorothy Denning, 'Following the Developing Iranian Cyberthreat' (*The Conversation*, 12 December 2017) <<https://theconversation.com/following-the-developing-iranian-cyberthreat-85162>> accessed 22 December 2020; Levi Gundert, Sanil Chohan and Greg Lesnewich, 'Iran's Hacker Hierarchy Exposed: How the Islamic Republic of Iran uses Contractors and Universities to Conduct Cyber Operations' (*Recorded Future*, 2018) <<https://go.recordedfuture.com/hubfs/reports/cta-2018-0509.pdf>> accessed 15 December 2020; James Andrew Lewis, 'Iran and Cyber Power' (*Center for Strategic and International Studies*, 25 June 2019) <[www.csis.org/analysis/iran-and-cyber-power](http://www.csis.org/analysis/iran-and-cyber-power)> accessed 1 October 2021; Congressional Research Service, 'Iranian Offensive Cyber Attack Capabilities' (13 January 2020) <<https://sgp.fas.org/crs/mideast/IF11406.pdf>> accessed 1 October 2021.

<sup>32</sup> George H Wittman, 'China's Cyber Militia' (*The American Spectator*, 21 October 2011) <[https://spectator.org/36718\\_chinas-cyber-militia/](https://spectator.org/36718_chinas-cyber-militia/)> accessed 23 October 2017. See also Bryan Krekel, 'Capability of the People's Republic of China to Conduct Cyber Warfare and Computer Network Exploitation' (*US-China Economic and Security Review Commission*, 9 October 2009) 33-50 <<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB424/docs/Cyber-030.pdf>> accessed 27 February 2018; Mikk Raud, 'China and Cyber: Attitudes, Strategies, Organisation' (*NATO Cooperative Cyber Defence Centre of Excellence*, 2016) 26-27 <[https://ccdcoe.org/sites/default/files/multimedia/pdf/CS\\_organisation\\_CHINA\\_092016\\_FINAL.pdf](https://ccdcoe.org/sites/default/files/multimedia/pdf/CS_organisation_CHINA_092016_FINAL.pdf)> accessed 27 February 2018; Maurer (n 29) 107-119. Regarding Russia's use of NSAs in the cyber domain, see Bilyana Lilly and Joe Cheravitch, 'The Past, Present, and Future of Russia's Cyber Strategy and Forces' (*NATO CCDCOE*, 2020) 139-40 <[https://ccdcoe.org/uploads/2020/05/CyCon\\_2020\\_8\\_Lilly\\_Cheravitch.pdf](https://ccdcoe.org/uploads/2020/05/CyCon_2020_8_Lilly_Cheravitch.pdf)> accessed 12 July 2021.

<sup>33</sup> Eichensehr (n 28) 510; Collier (n 28) 39-40.

<sup>34</sup> Nicole Perlroth, 'Hunting for Syrian Hackers' Chain of Command' (*The New York Times*, 17 May 2013) <[www.nytimes.com/2013/05/18/technology/financial-times-site-is-hacked.html](http://www.nytimes.com/2013/05/18/technology/financial-times-site-is-hacked.html)> accessed 1 October 2021.

<sup>35</sup> *ibid.*



complexity to any attempt to determine the level of state involvement in the NSA's harmful activities, such as its defacing of websites or hijacking of social media accounts.<sup>36</sup>

The activities of the Syrian Electronic Army additionally demonstrate the broad range of functions that NSAs may perform on states' behalf in the cyber domain. The group's actions varied across a wide spectrum, ranging from stealing data relating to government opponents to an attempted offensive operation targeting the computer network controlling an Israeli water system.<sup>37</sup> Such operations often have criminal undertones and defy neat classification as an exercise of either 'public' or 'private' functions.<sup>38</sup> This is pertinent when considering the potential attribution of cyber activity to a state based on the rule expressed in Article 5 ARSIWA.

### **4.3 Attribution pursuant to the rule reflected in Article 5**

As the preceding analysis reveals, NSAs acting on behalf of a state can take many different forms including commercial entities, militia groups, criminals, and volunteer hackers. Provided that they are not classified as state organs under the state's domestic law, however, their character and status is immaterial to the rule expressed in Article 5.<sup>39</sup> Thus, the NSAs to which the rule applies may be totally or partially state-owned or state-funded, or they may be entirely private in nature, such as commercial companies specialising in cybersecurity or operating as PMSCs.<sup>40</sup> They may equally be private individuals or groups, such as an individual contractor, or a loosely associated group of hackers.

The presence or absence of state control over an entity's activities is equally irrelevant to the rule's application.<sup>41</sup> In this respect, the ARSIWA commentary makes clear that 'an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State'.<sup>42</sup> From an evidential perspective, therefore, it may be easier for an injured state to prove attribution on this basis than

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<sup>36</sup> *ibid*; Edwin Grohe, 'The Cyber Dimensions of the Syrian Civil War: Implications for Future Conflict' (2015) 34 *Comparative Strategy* 133, 134-37.

<sup>37</sup> Grohe (n 36) 134-37.

<sup>38</sup> Collier (n 28) 29-31.

<sup>39</sup> ARSIWA (n 4) art 5 commentary paras 2 and 3.

<sup>40</sup> *ibid*.

<sup>41</sup> *ibid* art 5 commentary para 7.

<sup>42</sup> *ibid*.

pursuant to the rule reflected in Article 8, which requires proof of state instructions, direction, or control.<sup>43</sup>

The commentary to Article 5 sets out three conditions that must be satisfied for the rule to apply.<sup>44</sup> First, the NSA's conduct must amount to an exercise of governmental authority. Second, the private actor must be empowered by the domestic law of the state to exercise such authority. And third, the private actor must in fact be acting in the exercise of governmental authority, as opposed to in a purely private capacity, at the relevant time.<sup>45</sup> The following sections address each of these criteria in turn.

### ***4.3.1 Elements of governmental authority***

When assessing whether the actions of an NSA are potentially attributable to a state based on the rule expressed in Article 5, a first consideration is whether the functions performed amount to an exercise of governmental authority. Article 5's commentary describes the notion as encompassing 'functions of a public character normally exercised by State organs'.<sup>46</sup> The emphasis is therefore upon those functions performed in the public interest that are conventionally carried out by government bodies or agencies, as opposed to by private entities.

It is, however, far from easy to identify the precise activities that a state traditionally performs.<sup>47</sup> The ARSIWA commentary provides limited guidance in this respect, stating that 'Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions'.<sup>48</sup> To exacerbate the issue, there is no common understanding in international law regarding what constitutes a governmental or public act.<sup>49</sup> Such ambiguity engenders uncertainty as to the scope of

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<sup>43</sup> See Ch 5.

<sup>44</sup> ARSIWA (n 4) art 5 commentary para 2.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid* commentary para 2. See also ILC 'Draft Articles on State Responsibility with Commentaries thereto Adopted by the ILC on First Reading' (January 1997) art 7 commentary para 18

<[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_1996.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf)> accessed 19 October 2017.

<sup>47</sup> See David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 *American J Intl L* 857, 861.

<sup>48</sup> ARSIWA (n 4) art 5 commentary para 6. The ILC did not intend to define the scope of governmental authority. See James Crawford, 'First Report on State Responsibility (1998) UN Doc A/CN.4/490 and Add.1-7 39 para 190; ILC YB 1998 vol I (n 7) 229; ILC YB 2001 vol I, 'Summary Records of the Meetings of the Fifty-Third Session' UN Doc A/CN.4/SER.A/2001 92 para 21.

<sup>49</sup> *Noble Ventures Inc v Romania* (2005) ICSID Case No ARB/01/11 [82]. See also Crawford's First Report on State Responsibility (n 48) 33-34; University Centre for International Humanitarian Law, 'Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions' (29-30 August 2005) 18-20 <[www.ucihl.org/communication/Private\\_Military\\_Companies\\_report.pdf](http://www.ucihl.org/communication/Private_Military_Companies_report.pdf)> accessed 9 December 2020.

the rule reflected in Article 5 and potentially leads to a lack of parity between states. As Special Rapporteur Ago noted, 'If the same public function were performed in one State by organs of the State proper and in another by para-State institutions, it would indeed be absurd if the international responsibility of the State were engaged in one case and not in the other'.<sup>50</sup> For instance, it would make little sense to attribute armed security activities to one state on the basis that the activity is normally performed by military personnel, but not to another where the function is commonly outsourced.

Further difficulties arise due to the prevalence of outsourcing in recent years. As public functions are increasingly privatised or outsourced, activities that were historically performed by the state may cease to serve as relevant indicators of what is truly governmental in nature.<sup>51</sup> If states continue to outsource functions to private entities, the range of activities that are considered governmental may steadily diminish, leading to further ambiguity regarding the scope of Article 5 and a reduction in states' responsibility.<sup>52</sup>

A better approach, therefore, is to identify factors that apply to all states, irrespective of their individual outsourcing practices, and apply them to an evaluation of the functions that states empower NSAs to perform. This provides greater certainty regarding the meaning of governmental activity and bypasses the difficulties arising through states' varying attitudes towards privatisation. Several criteria may assist in this analysis.

#### *4.3.1.1 Guidance within the ARSIWA Commentary*

The ARSIWA commentary identifies four factors that are of particular importance when determining whether a function performed by an NSA falls within the sphere of governmental authority. These are (1) the content of the powers, (2) the way they are conferred on an entity, (3)

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<sup>50</sup> ILC YB 1974 vol I, 'Summary Records of the Twenty-Sixth Session UN Doc A/CN.4/SER.A/1974 8 para 17.

<sup>51</sup> Hannah Tonkin *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2011) 101; James Crawford, *State Responsibility: The General Part* (CUP 2013) 129. In 1971, for example, Special Rapporteur Ago included 'public transport' and 'postal communications' within the examples he gave of public tasks – functions that, today, are unlikely to be considered governmental in nature. See Roberto Ago, 'Third Report on State Responsibility – the Internationally Wrongful Act of the State, Source of International Responsibility' (1971) UN Doc A/CN.4/246 and Add.1-3 263 para 190.

<sup>52</sup> Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 Eur J Intl L 387, 390; University Centre for IHL (n 49) 18-19; Renz (n 18) 253.

the purposes for which the powers are to be exercised, and (4) the extent to which the entity is accountable to the government in the exercise of the powers.<sup>53</sup>

The content of the powers delegated to an NSA is key to determining the public or private status of a particular function. This analysis focuses on the activities that the state empowers the entity to perform and, in particular, whether those activities are normally reserved to the state or can be freely carried out by private individuals.<sup>54</sup> For instance, the exercise of powers involving the use of force or the right to constrain or control the activities of private individuals strongly indicates that the function concerned is governmental in nature.<sup>55</sup>

On closer examination, however, the latter three criteria are of limited assistance. The manner in which the powers are conferred relates to the ‘empowered by the law’ requirement.<sup>56</sup> A state might enact legislation authorising the delegation of a particular function to a PMSC, for example, thereby indicating the importance of its decision and perhaps a likelihood that the delegated task is governmental. But that may equally be the case if a lesser means of empowerment is used, such as a contract. Thus, the way the powers are conferred to an NSA has no bearing on the status of the delegated activity.

The purpose of the powers is of greater relevance but is rarely determinative of the issue. For instance, the fact that delegated powers are to be exercised in the public interest may indicate a governmental nexus. However, this criterion encompasses a broader range of functions, such as education or the postal service, than those amounting to an exercise of governmental authority.<sup>57</sup>

The final factor referred to in the commentary relates to accountability, in terms of government supervision over the delegated activity.<sup>58</sup> This criterion captures the premise that states may wish to exercise greater control over private entities performing governmental functions than those that are not. But the fact that an NSA is not accountable to the government does not automatically mean

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<sup>53</sup> ARSIWA (n 4) art 5 commentary para 6.

<sup>54</sup> Crawford (n 51) 129-130.

<sup>55</sup> Alexis P Kontos, ‘“Private” Security Guards: Privatized Force and State Responsibility under International Human Rights Law’ (2004) 4 *Non-State Actors and Intl L* 199, 221-22; Alexander Kees, ‘Responsibility of States for Private Actors’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2011) para 12; Renz (n 18) 131-33.

<sup>56</sup> See s 4.3.2.

<sup>57</sup> Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (CUP 2013) 174.

<sup>58</sup> ARSIWA (n 4) art 5 commentary para 6. See also Crawford (n 51) 131.

that it is not performing governmental functions. The commentary to Article 5 makes clear that there is no requirement for state control over the activities in question for the rule to apply.<sup>59</sup> Indeed, if accountability were given too much weight when assessing potential attribution on this basis, it could undermine the rule's entire application.<sup>60</sup> As Tonkin writes in the context of PMSCs, 'it is precisely in those cases where the government authorises a PMSC to carry out a particular function, and yet fails to hold that PMSC accountable for its actions, that the rationale for the attribution of PMSC misconduct to the state is the strongest'.<sup>61</sup> It is therefore necessary to look to other factors, in addition to those highlighted within the commentary, to determine whether a particular activity amounts to an exercise of governmental authority.<sup>62</sup>

#### 4.3.1.2 *Quintessentially governmental functions*

A first such consideration is whether the task is 'quintessentially' governmental. This encompasses functions typically performed by the state that are central to the nature and purposes of government.<sup>63</sup> Thus, the levying of taxes, the conduct of foreign affairs, and the enactment of laws are all inherently governmental. But identifying the full range of tasks falling within this category is increasingly complex. As one scholar noted:

When private companies are now rendering logistical support for military operations, running prisons and conducting interrogations, providing armed escort for personnel and convoys, doing general policing work, and carrying out surveillance, it is becoming more and more difficult, without offending either logic or common sense, to insist on maintaining that a particular activity is "quintessentially sovereign" or "typically private".<sup>64</sup>

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<sup>59</sup> ARSIWA (n 4) art 5 commentary para 7.

<sup>60</sup> Chia Lehnardt, 'Private Military Companies and State Responsibility' in Simon Chesterton and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007) 145; Tonkin (n 51) 103; Cameron and Chetail (n 57) 174.

<sup>61</sup> Tonkin (n 51) 103. See also Lehnardt (n 60) 145.

<sup>62</sup> The ARSIWA commentary itself indicates that the four factors are of 'particular importance' but not the only criteria to be considered. See ARSIWA (n 4) art 5 commentary para 6.

<sup>63</sup> There is no definition in international law of those functions that are inherently governmental. However, guidance as to the meaning of the term may be found in the domestic law and policy of states. See eg US Office of Federal Procurement Policy, 'Policy Letter 11-01: Performance of Inherently Governmental and Critical Functions' (*Fed Reg* 176, 56227, 12 September 2011) <[www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf)> accessed 27 June 2018. See also Lindsay Windsor, 'James Bond, Inc.: Private Contractors and Covert Action' (2013) 101 *Georgetown L J* 1427, 1431-1440; James R Lisher, 'Outsourcing Cyberwarfare: Drawing the Line for Inherently Governmental Functions in Cyberspace' (2014) *J Contract Management* 7, 8-10.

<sup>64</sup> Ziaodong Yang, *State Immunity in International Law* (CUP 2012) 59-60.

The assessment is particularly problematic in the cyber domain where, due to the novelty of cyber operations and the proliferation of NSAs, it appears challenging to identify any functions that are traditionally reserved to the state.

Nonetheless, if the focus remains on the functions themselves, certain activities qualify as inherently governmental irrespective of the domain in which they are undertaken. The ARSIWA commentary sets out a number of activities falling within the scope of Article 5 that may be considered quintessentially governmental. These include ‘powers of detention and discipline pursuant to a judicial sentence or to prison regulations ... powers in relation to immigration control or quarantine ... identification of property for seizure’<sup>65</sup> and the activities of the police.<sup>66</sup> Thus, the law enforcement functions performed by the *Shabbiba* militia in support of the Assad regime during the early stages of the Syrian conflict were inherently governmental in nature.<sup>67</sup>

Offensive combat also falls within this category, as a corollary of the state monopoly on the legitimate use of force.<sup>68</sup> Accordingly, the PMSCs that participated in the conflicts in Sierra Leone and Angola were engaged in governmental activity, as were members of the Wagner Group when they fought on Russia’s behalf in Ukraine, Syria, and elsewhere.<sup>69</sup> Similarly, the Syrian militias that Turkey employed to promote its foreign policy goals in the conflicts in northern Syria, Libya, and Nagorno-Karabakh exercised elements of Ankara’s governmental authority.<sup>70</sup> And the same is true of private individuals or groups tasked by states to undertake covert missions on their behalf, in the event that these involve the use of offensive force.<sup>71</sup>

Purely defensive functions may equally qualify as inherently governmental. For instance, an armed contractor protecting a military objective against enemy attack in the context of an ongoing conflict

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<sup>65</sup> ARSIWA (n 4) art 5 commentary para 2.

<sup>66</sup> *ibid* chapeau to Pt I Ch II commentary para 6.

<sup>67</sup> See Ch 2 s 2.1.2.

<sup>68</sup> UNHRC, ‘Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination’ (2 July 2010) UN Doc A/HRC/15/25 13. See also Nieminen (n 3) 291.

<sup>69</sup> Ralby and Tonkin (n 18) 3; Marten (n 14); Gurcan (n 25).

<sup>70</sup> Ben Hubbard and others, ‘Syrian Arab Fighters Backed by Turkey Kill Two Kurdish Prisoners’ (*The New York Times*, 12 October 2019) <[www.nytimes.com/2019/10/12/world/middleeast/turkey-invasion-syria-kurds.html](http://www.nytimes.com/2019/10/12/world/middleeast/turkey-invasion-syria-kurds.html)> accessed 18 December 2019; Tom Allinson and Abderrahmane Ammar, ‘Libya: Are Turkey’s Syrian Mercenaries a New Threat?’

(*Deutsche Welle*, 11 February 2020) <[www.dw.com/en/libya-are-turkeys-syrian-mercenaries-a-new-threat/a-52329943](http://www.dw.com/en/libya-are-turkeys-syrian-mercenaries-a-new-threat/a-52329943)> accessed 17 February 2020; Dror Zeevi, ‘Turkey Fuels Nagorno-Karabakh Conflict: Drones, Mercenaries and Dreams of

Imperial Resurgence’ (*Just Security*, 16 October 2020) <[www.justsecurity.org/72910/turkey-fuels-nagorno-karabakh-conflict-drones-mercenaries-and-dreams-of-imperial-resurgence/](http://www.justsecurity.org/72910/turkey-fuels-nagorno-karabakh-conflict-drones-mercenaries-and-dreams-of-imperial-resurgence/)> accessed 18 October 2020.

<sup>71</sup> Ago’s Third Report on State Responsibility (n 51) 263 para 190.

is directly participating in hostilities.<sup>72</sup> While controversy remains as to the precise activities that amount to a direct participation in hostilities,<sup>73</sup> any contractor conduct that meets this threshold is so closely associated with the hiring state's military operations that it is inherently governmental in nature.<sup>74</sup> The same is true of all PMSC activities with a direct operational effect, such as providing convoy security for military operations, interrogating detainees, or operating military equipment.<sup>75</sup> In addition, the running of prisoner of war camps or places of civilian internment in international armed conflict is quintessentially governmental, as treaty obligations prohibit states from outsourcing such tasks.<sup>76</sup>

Equivalent functions performed in the cyber domain also qualify as inherently governmental. Therefore, if in the context of an armed conflict, a state empowers an NSA to undertake certain cyber activities in support of the state's kinetic operations, the entity's conduct in this respect amounts to an exercise of governmental authority. The 2008 cyber operations targeting government, media, and communications websites in Georgia, which were timed to coincide with the Russian military invasion into South Ossetia, fall within this category.<sup>77</sup> Equally, an offensive cyber operation that results in physical damage to, or a loss in functionality of, the target's governmental cyber infrastructure is public in character due to its potential to breach the state's international legal obligations and thus implicate its foreign policy.<sup>78</sup> The same is true in respect of other cyber

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<sup>72</sup> ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (May 2009) 38 <[www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf)> accessed 23 October 2017. But see also Allison Stanger, 'Transparency as a Core Public Value and Mechanism of Compliance' (2012) 31 Criminal Justice Ethics 287, 295.

<sup>73</sup> See eg Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 New York U J Intl L Politics 641; Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 New York U J Intl L Politics 697; Bill Boothby, '"And for Such Time As": The Time Dimension to Direct Participation in Hostilities' (2010) 42 New York U J Intl L Politics 741; Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 New York U J Intl L Politics 769. See also Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques on the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 New York U J Intl L Politics 831.

<sup>74</sup> For example, Renz notes that the analysis of tactical intelligence amounts to a direct participation in hostilities and is therefore governmental in nature, whereas the analysis of strategic intelligence does not. See Renz (n 18) 217-18, 220-21.

<sup>75</sup> Lehnardt (n 60) 146; Tonkin (n 51) 101; Cameron and Chetail (n 57) 200-201.

<sup>76</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War (1949) 6 UST 3316 75 UNTS 135 art 39; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) 6 UST 3516 75 UNTS 287 art 99. See also University Centre for IHL (n 49) 7, 19-20.

<sup>77</sup> John Markoff, 'Before the Gunfire, Cyberattacks' (*The New York Times*, 12 August 2008) <[www.nytimes.com/2008/08/13/technology/13cyber.html](http://www.nytimes.com/2008/08/13/technology/13cyber.html)> accessed 19 January 2018.

<sup>78</sup> See Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) rr 4, 66, 68, 69.

operations conducted for a governmental purpose, such as the collection of intelligence through cyber means regarding the threats posed to a state's military forces.<sup>79</sup>

In sum, if an NSA's activities in the cyber domain involve public functions such as law enforcement or the conduct of foreign affairs, these activities should properly be considered as an exercise of governmental authority.<sup>80</sup> When assessing the functions performed by any private entity, however, it is important to disaggregate the various tasks the NSA carries out and address the issue of attribution separately in each case.<sup>81</sup> For instance, if a PMSC performs a range of tasks within a detention facility located in a combat zone, its conduct in interrogating detainees should be considered separately from its other functions, such as cleaning or feeding the troops. While the former is quintessentially governmental in nature, the latter tasks are not.

But the fact that activities like cleaning are not inherently governmental does not automatically exclude such tasks from amounting to an exercise of governmental authority. Instead, further enquiry is required to determine whether these functions nevertheless have a sufficient governmental nexus to fall within the scope of the rule expressed in Article 5.

#### 4.3.1.3 *The 'private person' test*

The disaggregation of an NSA's activities serves to separate any public functions it performs from those that are private or commercial in nature, and therefore do not amount to an exercise of governmental authority.<sup>82</sup> A key characteristic of private and commercial conduct is that it can be carried out by private entities without authorisation from the state. Conversely, functions within the sphere of governmental authority imply the exercise of powers that 'the state ordinarily reserves ... for itself'.<sup>83</sup> If such powers are to be exercised by an NSA, explicit government permission is first required.<sup>84</sup>

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<sup>79</sup> For further examples of inherently governmental functions in the cyber domain see eg Michael N Schmitt and Liis Vihul, 'Proxy Wars in Cyberspace: The Evolving International Law of Attribution' (2014) *Fletcher Security Rev* 54, 62; Michael N Schmitt, "'Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law' (2014) 54 *Virginia J Intl L* 697, 709.

<sup>80</sup> Regarding the governmental character of cybersecurity activities, see Jennifer Maddocks, 'Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution' (2019) 59 *Virginia J Intl L* 47, 67-69.

<sup>81</sup> *Bosh International Inc and Be&P Ltd Foreign Investments Enterprise v Ukraine* (2012) ICSID Case No ARB/08/11 [176].

<sup>82</sup> ARSIWA (n 4) art 5 commentary para 5.

<sup>83</sup> Crawford (n 51) 130.

<sup>84</sup> *ibid*; University Centre for IHL (n 49) 33; Tonkin (n 51) 101-2; Cameron and Chetail (n 57) 198.



By way of example, the ARSIWA commentary refers to a railway company that exercises some police powers, as well as carrying out other activities such as ticket sales.<sup>85</sup> While the former may amount to an exercise of governmental authority, necessitating state consent, the latter do not. In the context of PMSCs, a contractor's activities relating to the supply of military equipment to the state are private and commercial in nature and thus analogous in this respect to the sale of tickets. In the cyber domain, setting up a computer network for use by a state's military is similarly private and commercial. Such conduct, therefore, falls outside the scope of governmental authority.<sup>86</sup>

This 'private person' test is often used in the law of state immunity to distinguish between those activities that involve sovereign authority and are therefore immune from the jurisdiction of other states and those that do not.<sup>87</sup> The test also assists in determining whether a particular activity falls within the scope of governmental authority for the purposes of Article 5 ARSIWA.<sup>88</sup> The key determination is whether the function concerned is one that an NSA could lawfully perform pursuant to a relationship with a private client rather than a state.<sup>89</sup> For example, private individuals cannot lawfully provide military advice to local militias involved in armed conflict or engage in official government communications without express state approval.<sup>90</sup> In contrast, private citizens can post information about terrorist organisations on a website or provide training on interrogation techniques without such permission.<sup>91</sup> It follows that the former activities are public in nature, whereas the latter are not. Equally, a contractor may lawfully collect information from open sources for a private client, but it cannot use intrusive methods to gather intelligence, in potential violation of privacy laws, without state authorisation.<sup>92</sup> The latter, if performed pursuant to an empowerment by the state, is therefore likely to amount to an exercise of governmental authority.

While a conclusion that state permission is required for a private actor to perform a given task strongly indicates its governmental nature, the converse is not always true. Actions which do not by their nature require state permission, but which were requested by, or conducted in the service of

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<sup>85</sup> ARSIWA (n 4) art 5 commentary para 5.

<sup>86</sup> For a critique of this distinction in the context of state-owned entities, see Jane Chalmers, 'State Responsibility for Acts of Parastatals Organized in Corporate Form' (1990) 84 Proceedings of the American Society Intl L Annual Meeting 60.

<sup>87</sup> Yang (n 64) 82–108. See also Tonkin (n 51) 103-08; Cameron and Chetail (n 57) 182.

<sup>88</sup> Crawford (n 51) 130.

<sup>89</sup> Tonkin (n 51) 101-02.

<sup>90</sup> *ibid*; Tallinn Manual 2.0 (n 78) r 4 commentary para 17.

<sup>91</sup> Tallinn Manual 2.0 (n 78) r 4 commentary para 17.

<sup>92</sup> Tonkin (n 51) 102.

the state, may still be attributable. For example, if a contractor gathers and analyses open-source intelligence on behalf of the state, this nexus to governmental activity should be considered when assessing whether the task falls within the scope of governmental authority. Similarly, although PMSC contractors could lawfully serve as armed guards for a mining company operating within a hostile environment without state authorisation, this does not mean that equivalent services performed for the benefit of the state are not governmental in nature.<sup>93</sup> For further guidance as to its status, therefore, it is necessary to look to the broader context in which an activity is performed.

#### 4.3.1.4 *The overall context*

English courts considering the distinction between sovereign and private powers for the purposes of state immunity have looked beyond the ‘private person’ test to the wider environment in which the relevant functions are carried out.<sup>94</sup> The courts concluded that, when viewed in context, the provision of educational and medical services for military personnel located at US air bases in the United Kingdom was sovereign in nature.<sup>95</sup> Lord Hoffman stated, ‘I do not think that there is a single test or “bright line” by which cases on either side can be distinguished. Rather, there are a number of factors which may characterise the act as nearer to or further from the central military activity’.<sup>96</sup> He went on to articulate the most important factors to consider when making this determination, including the location where the relevant activities are conducted, whom they involve, and the nature of the act.<sup>97</sup>

Assessing tasks in context may prove particularly important when determining the status of PMSC activities that are not inherently governmental, such as the provision of armed guarding services or logistical support. Functions performed by a PMSC in a combat zone are more likely to amount to governmental activity than those carried out in a benign environment. However, the location itself is not determinative. For example, the activities of armed security guards protecting a private oil field within an area of combat are not governmental in nature.<sup>98</sup> Conversely, private contractors operating

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<sup>93</sup> Tonkin (n 51) 101-2; Crawford (n 51) 130.

<sup>94</sup> *I Congreso del Partido* [1983] 1 AC 244, 267; *Littrell v USA (No. 2)* [1995] 1 WLR 82, 91, 94-5; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1577. See also Yang (n 64) 105-7.

<sup>95</sup> *Littrell* (n 94) 91, 94-5; *Holland v Lampen-Wolfe* (n 94) 1577.

<sup>96</sup> *Littrell* (n 94) 95.

<sup>97</sup> *ibid.*

<sup>98</sup> Tonkin (n 51) 101-2, 108.

unmanned aerial systems in support of combat operations are engaged in governmental activity, even if they are far removed from the battlefield.<sup>99</sup>

Further factors therefore need to be considered, including the identity of the personnel for whose benefit the function is performed. In the guarding context, if the assets or personnel of a private company are protected, the activity is unlikely to be governmental in nature. Alternatively, if the intent is to protect military assets or civilian officials, the activity is for the benefit of the state and is more likely to fall within the sphere of governmental authority. Finally, it may be relevant to consider the nature of any equipment provided to PMSC personnel for use in the performance of their duties, such as firearms. While not conclusive on their own, when considered together, these factors may assist in determining whether the PMSC is exercising elements of governmental authority.

A grey area nevertheless remains, particularly regarding those PMSC functions with the weakest nexus to military action such as cleaning and the delivery of goods. An assessment whether such activities are governmental in nature is especially difficult in contemporary conflicts, in which armed groups often fail to discriminate between military and non-military targets.<sup>100</sup> Thus, in recent combat environments, even functions with a weak military nexus have drawn contractors into hostilities, as illustrated by the deaths of four Blackwater employees in Fallujah, Iraq, while collecting non-military equipment.<sup>101</sup>

This development tends to expand the range of circumstances in which a contractor's activities within a combat zone may amount to an exercise of governmental authority. The decisions of the English courts relating to the provision of medical and educational services on a military base also support a more inclusive interpretation of the scope of governmental functions.<sup>102</sup> Although determinations as to the status of contractors' activities will be fact-specific, many services provided by a PMSC in a conflict zone, for the benefit of state armed forces or government officials, may therefore fall within the scope of governmental authority.<sup>103</sup>

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<sup>99</sup> Renz (n 18) 212-43.

<sup>100</sup> Lehnardt (n 60) 148.

<sup>101</sup> David Barstow, 'The Struggle for Iraq: The Contractors; Security Firm Says its Workers were Lured into Iraqi Ambush' (*The New York Times*, 9 April 2004) <[www.nytimes.com/2004/04/09/world/struggle-for-iraq-contractors-security-firm-says-its-workers-were-lured-into.html](http://www.nytimes.com/2004/04/09/world/struggle-for-iraq-contractors-security-firm-says-its-workers-were-lured-into.html)> accessed 24 October 2017. See also Guillory (n 11) 131-32.

<sup>102</sup> *Littrell* (n 94); *Holland* (n 94).

<sup>103</sup> *Tonkin* (n 51) 107-108. But see also *Cameron and Chetail* (n 57) 202.

In the cyber domain, the context in which an activity is performed is equally relevant when considering its public or private character. While cyber operations can be carried out remotely, rendering the location potentially immaterial, other contextual factors may assist in this determination. Any tools or information a government provides in connection with a cyber operation, such as malware or intelligence, may point towards its governmental nature.<sup>104</sup> Furthermore, the nexus between a cyber operation and government activity is of particular importance. For example, although the maintenance of computer networks is not an inherently governmental function, if a private company is tasked with maintaining and defending the computer network that supports a state's integrated air defence system, the close nexus between this function and the state's military activity is likely to lead to the conclusion that it falls within the scope of governmental authority.

#### *4.3.1.5 Powers conferred on ordinary citizens*

As the preceding examples illustrate, conduct that is closely linked to military activity generally amounts to an exercise of governmental authority. Similarly, powers that involve the use of force are normally governmental in nature. The ARSIWA commentary, however, includes one important caveat in this respect, stating that Article 5 'does not extend to cover ... situations where internal law authorises or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorises conduct by citizens or residents generally'.<sup>105</sup> The use of force by private individuals acting purely to defend themselves, or to exercise a power of citizen's arrest in accordance with domestic law, therefore falls outside the scope of the rule reflected in Article 5.

Notwithstanding this limitation, if a state delegates a function to a private entity and authorises that entity to exercise specific powers in the performance of the task, the entity's conduct is likely to fall within Article 5's scope.<sup>106</sup> Clarity may be gained in such circumstances by assessing whether the powers exercised by the NSA are greater than those at the disposal of ordinary citizens under the state's domestic law. That may be the case if the delegated activity involves, for example, a power to

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<sup>104</sup> Sam Jones, 'Cyber Crime: States Use Hackers to do Digital Dirty Work' (*The Financial Times*, 4 September 2015) <[www.ft.com/content/78c46db4-52da-11e5-b029-b9d50a74fd14](http://www.ft.com/content/78c46db4-52da-11e5-b029-b9d50a74fd14)> accessed 30 November 2017.

<sup>105</sup> ARSIWA (n 4) art 5 commentary para 7.

<sup>106</sup> Kontos (n 55) 221; Cameron and Chetail (n 57) 170-1.

constrain, supervise, regulate, or control the activities of private individuals, if necessary, through the use of force.<sup>107</sup>

Consider, in this respect, the decision taken by various states in 2011 to authorise their merchant vessels to carry weapons for the purpose of countering the threat from Somali-based pirates.<sup>108</sup> At that time, a number of governments ‘reversed longstanding legal bans or serious restrictions on the direct arming of merchant ships’, thereby allowing armed crew members or guards to forcefully prevent an illegal boarding.<sup>109</sup> While the use of force by such individuals is governed by national laws of self-defence, the authorisation to carry and potentially use firearms for this purpose is provided by the state.<sup>110</sup> The question therefore arises as to the state’s responsibility in respect of an unlawful use of force by the armed guards on board the vessel. Applying the ‘private person’ test, a private individual cannot use weapons to protect a state-flagged vessel without government authorisation. Thus, even though the armed guards in these circumstances act in accordance with national laws of self-defence, their powers are greater than those of ordinary citizens. As such, their conduct amounts to an exercise of governmental authority and potentially engages the responsibility of the state.<sup>111</sup>

#### *4.3.1.6 Conclusions as to the scope of governmental authority*

In summary, governmental authority for the purposes of the rule enshrined in Article 5 ARSIWA encompasses those traditional powers that undergird the state’s existence as a public authority.<sup>112</sup> But it is far from easy, in practice, to identify where exactly the boundaries lie. When assessing whether a delegated function is public or private in character, the first requirement is to identify the specific powers involved and to disaggregate them if appropriate. The following questions may then assist in

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<sup>107</sup> Cameron and Chetail (n 57) 198.

<sup>108</sup> William Marmon, ‘Merchant Ships Starting to Carry Armed Guards Against Somali Pirates’ (*The European Institute*, November 2011) <[www.europeaninstitute.org/index.php/ei-blog/137-november-2011/1471-merchant-ships-start-to-carry-armed-guards-against-somali-pirates-1122](http://www.europeaninstitute.org/index.php/ei-blog/137-november-2011/1471-merchant-ships-start-to-carry-armed-guards-against-somali-pirates-1122)> accessed 28 November 2017.

<sup>109</sup> *ibid.*

<sup>110</sup> See eg UK Department for Transport, ‘Interim Guidance to UK Flagged Shipping on the Use of Armed Guards’ (1 December 2015) <[www.gov.uk/government/publications/interim-guidance-to-uk-flagged-shipping-on-the-use-of-armed-guards-to-defend-against-the-threat-of-piracy-in-exceptional-circumstances/dddd](http://www.gov.uk/government/publications/interim-guidance-to-uk-flagged-shipping-on-the-use-of-armed-guards-to-defend-against-the-threat-of-piracy-in-exceptional-circumstances/dddd)> accessed 2 October 2021.

<sup>111</sup> For discussion of a similar incident in the context of the law of state immunity, see Aurel Sari, ‘Part 1 - Tanker, Jailer, Soldier, Sailor: Functional Immunity and the Enrica Lexie Award’ (*Just Security*, 4 September 2020) <[www.justsecurity.org/72284/part-1-tanker-jailer-soldier-sailor-functional-immunity-and-the-enrica-lexie-award/](http://www.justsecurity.org/72284/part-1-tanker-jailer-soldier-sailor-functional-immunity-and-the-enrica-lexie-award/)> accessed 15 December 2020.

<sup>112</sup> Nwamaka R Okany, ‘State Delegation of Functions to Private and Autonomous Entities: A Basis for Attribution under the Rules of State Responsibility’ in Kalliopi Koufa (ed), *Thesaurus Acroasium Volume 34: State Responsibility and the Individual* (Sakkoulas Publications 2006) 335.

evaluating whether a particular activity performed by an NSA amounts to an exercise of governmental authority.

1. Is the function quintessentially governmental, involving, for example, law enforcement or offensive combat?
2. Does the exercise of the function by an NSA require government authorisation, in the sense that it cannot lawfully be performed pursuant to a relationship between two private entities?
3. In what context will the function be performed? Relevant factors include:
  - a. The location where the activity is carried out;
  - b. Its nexus to military or other governmental activity;
  - c. The identity of the personnel for whose benefit the activity is performed; and
  - d. The nature of any tools, equipment, or information that the state provides to the entity for use in connection with the performance of the function.
4. Does the activity involve greater powers than those at the disposal of ordinary citizens? For example, does it involve a power to constrain, supervise, regulate, or control the activities of private individuals, if necessary, through the use of force?
5. Is the activity carried out in the public interest?

While a positive answer to the first or second questions might conclusively indicate that the relevant activity falls within the scope of governmental authority, a negative response to these questions is merely indicative towards the contrary conclusion. Further enquiry into the matter is then required, including consideration of the issues raised in questions three to five. Once all the questions are addressed, it may be clear that the conduct in question either is, or is not, an exercise of governmental authority. But ambiguity may remain in relation to some borderline activities. If courts or tribunals are called upon to determine the issue of attribution in such marginal cases, the outcome is likely to depend upon the weight the court gives to the various factors outlined above. In addition, the court will need to assess whether the entity was properly empowered by the state to perform the activities concerned.

### 4.3.2 *Empowered by the law*

The ILC's formulation of Article 5 includes a specific requirement that the person or entity exercising governmental functions must be 'empowered by the law of that State' to do so.<sup>113</sup>

ARSIWA thus incorporates an express condition referring to a state's domestic law, without which responsibility will not arise. In the view of one ILC member, the inclusion of this requirement was justified because 'the entities in question were not part of the formal structure of the State, and only internal law could authorize them to exercise elements of the governmental authority'.<sup>114</sup> However, the ILC's deliberations and the ARSIWA commentary do not specify what form the relevant legal authorisation must take.

#### 4.3.2.1 *The nature of the empowerment requirement*

Specific legislation authorising a state to delegate elements of its governmental authority to an NSA clearly meets the empowerment requirement articulated within Article 5.<sup>115</sup> But the question remains whether any other basis will suffice. The ARSIWA commentary gives the example of private security firms 'contracted to act as prison guards', thereby indicating that the rule also applies when states delegate governmental authority via contract.<sup>116</sup> Given the prevalence of contractual arrangements between governments and PMSCs, this is an important clarification. Nevertheless, a contract is not *per se* the law of the state; it is, instead, an instrument authorised by law that has effect within the national legal order.<sup>117</sup> A more general legal authority is therefore required, empowering a government agency to delegate certain powers to a private company via contract. In Crawford's view, 'If such functions are lawfully conferred by public contract, then the empowering law would qualify for the purposes of an Article 5 delegation'.<sup>118</sup>

To illustrate, consider the actions of the Wagner Group in Syria.<sup>119</sup> Reporting indicates that from January 2018, members of the PMSC acted to defend Syria's oil fields pursuant to a contract agreed

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<sup>113</sup> ARSIWA (n 4) art 5. See also *ibid* commentary para 7.

<sup>114</sup> ILC YB 1998 vol I (n 7) 236 para 23 (comments of Mr Herdocia Sacasa).

<sup>115</sup> See eg *Phillips Petroleum Co Iran v Islamic Republic of Iran* (1989) 21 Iran-US Claims Tribunal Rep 29 [89] fn 22; *Flemingo Duty Free Shop Private Limited v The Republic of Poland* (Arbitral Award) (12 August 2016) [436]-[439] <[www.italaw.com/sites/default/files/case-documents/italaw7709\\_3.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf)> accessed 26 September 2021.

<sup>116</sup> ARSIWA (n 4) art 5 commentary para 2.

<sup>117</sup> Cameron and Chetail (n 57) 169.

<sup>118</sup> Crawford (n 51) 131. See also Tsagourias and Farrell (n 29) 952-53.

<sup>119</sup> See Ch 2 s 2.1.2.2.

between a Russian company, Evro Polis, and the Syrian Energy Ministry.<sup>120</sup> The terms of this agreement reflected an earlier Memorandum of Understanding signed in 2016, which could not be enforced until a new Syrian law was passed to recognise it.<sup>121</sup> Assuming that the requisite law was in effect in 2018, it seems that the Wagner Group was properly empowered by Syrian domestic law to protect oil fields on the state's behalf, meaning that any of the NSA's actions when performing those functions that violated Syria's international legal obligations are attributable to the state.<sup>122</sup>

The nature of the legal authorisation required to enable a delegation of governmental authority varies according to the domestic legal traditions of the country concerned. For instance, while the United Kingdom government may enter into contracts with private persons without statutory authority, as an exercise of its executive powers,<sup>123</sup> other states require specific legislation in order for such contractual arrangements to be lawful.<sup>124</sup> Empowerment by law may thus take varying guises. It could be established via statutory or executive order, for example. Equally, it could be founded through other domestic legal instruments such as regulations, bye-laws, or administrative acts, or via delegations made thereunder, including contracts, charters, operating licences, and concessions.<sup>125</sup> In essence, any form of delegation that complies with the requirements of the relevant state's domestic law will suffice.

Ambiguity remains, however, regarding the level of detail that must be included within the relevant legal authorisation. In particular, it is unclear whether a contract that specifies a broad delegated function will suffice, or whether the instrument must articulate the precise activities that the NSA is authorised to carry out in performance of that function. Article 5's commentary suggests that the delegated public powers must be specified within the authorisation.<sup>126</sup> But in Crawford's opinion,

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<sup>120</sup> Marten (n 14) 194; Irina Malkova, Anastasia Stogney and Anastasia Yakoreva, 'Russian Mercenary Army Financier Made an Oil Deal with Syria Just Before Clash with US Troops' (*The Bell*, 27 February 2018) <<https://thebell.io/en/russian-mercenary-army-financier-made-oil-deal-syria-just-clash-u-s-troops/>> accessed 2 October 2021.

<sup>121</sup> Marten (n 14) 194.

<sup>122</sup> See generally Michael A Rizzotti, 'Russian Mercenaries, State Responsibility and Conflict in Syria: Examining the Wagner Group Under International Law' (2020) 37 *Wisconsin Intl L J* 569, 599-604.

<sup>123</sup> For discussion regarding such prerogative powers, see eg UK House of Commons Library, Briefing Paper: The Royal Prerogative' (*No 03861*, 17 August 2017) s 2.4

<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861>> accessed 24 October 2017.

<sup>124</sup> For example, France has enacted legislation relating to the outsourcing of public functions. See eg V Capdevielle, 'The Regulatory Context of Private Military and Security Services in France' (*Priv-War Report – France, National Reports Series 11/09*, 2009) <[http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/privwar\\_national-report\\_capdevielle.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/privwar_national-report_capdevielle.pdf)> accessed 28 June 2018.

<sup>125</sup> Crawford (n 51) 130; Cameron and Chetail (n 57) 168; Okany (n 112) 336. See also *Bosh International* (n 81) [173].

<sup>126</sup> ARSIWA (n 4) art 5 commentary para 7.



there is no requirement that the empowering law should comprehensively define the entity's roles and responsibilities.<sup>127</sup> This latter view is persuasive, as otherwise few delegations of authority would likely be detailed enough to lead to attribution. For instance, a contract delegating guarding functions to a PMSC might specify the categories of personnel or facilities to be protected, the equipment that contractors may use for this purpose and whether they are entitled to use force but would not normally include details such as day-to-day patrolling requirements or the rules of engagement under which the contractors operate.<sup>128</sup>

Questions also arise regarding the attribution of conduct to a state when the relevant government functions are performed not by the entity to which they are delegated but by a different NSA. If the contract or other legal instrument specifically provides for the entity to sub-contract the functions concerned to another NSA, the actions of the sub-contractor when exercising those powers are potentially attributable to the state.<sup>129</sup> If, however, the contract or other form of legal authorisation does not envisage a right to sub-contract, the issue of attribution is less clear.

For example, if a state grants PMSC A authorisation to operate military equipment and PMSC A then sub-contracts those functions to PMSC B without the state's consent, the state has not directly empowered PMSC B to exercise elements of its governmental authority.<sup>130</sup> It seems, therefore, that any acts committed by PMSC B when operating that equipment are not attributable to the state. That is particularly the case if the state acts, as soon as it becomes aware of the unauthorised sub-contracting, to prevent the continued operation of the equipment by PMSC B. The position may be different, however, if the state is aware of, and tolerates, PMSC B's performance of the function, or authorises PMSC B's conduct in a way that does not accord with the state's domestic law. In such circumstances, the state's empowerment of PMSC B is effected not by law but rather via informal means, though its implicit acceptance or authorisation of PMSC B's activities.

#### *4.3.2.2 Empowerment by means other than law*

The position of PMSC B in the preceding example is comparable to that of NSAs, such as militia groups, that engage in governmental activities on a state's behalf without any formal delegation of

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<sup>127</sup> Crawford (n 51) 132.

<sup>128</sup> Regarding the development of PMSCs' rules of engagement see Renz (n 18) 163.

<sup>129</sup> University Centre for IHL (n 49) 22; Tonkin (n 51) 111.

<sup>130</sup> It may also be the case that the original contractor acted outside the terms of the contract when sub-contracting. See s 4.3.3.

authority via the state's domestic law. Consider, for instance, the *Shabbiha* militias that fought on behalf of the Syrian regime during the early stages of the conflict.<sup>131</sup> These groups were armed by the government and acted alongside the state's national security forces, using violence to crush peaceful demonstrations.<sup>132</sup> Although such forces were integrated into the government in early 2013,<sup>133</sup> their status prior to that date is unclear. It may be that they qualified as *de facto* state organs of the Syrian regime or acted under the state's instructions, direction, or control.<sup>134</sup> But it may equally be the case that neither control test is satisfied, particularly given that the group reportedly acted with a sense of total impunity.<sup>135</sup>

The *Shabbiha* clearly exercised public powers in Syria prior to 2013 in that they acted alongside state security forces, conducting law enforcement functions on behalf of the regime.<sup>136</sup> It appears, however, that the requisite authority to do so was not delegated to the *Shabbiha* in accordance with Syrian law. Instead, in early 2011, the Syrian regime reportedly 'began to use money and services to buy the allegiance of unemployed youth, to distribute guns, cars, and security clearances to trusted loyalists and their families, essentially weaponizing the vast web of client networks constructed over four decades of Assad family rule'.<sup>137</sup> In this way, it seems that the regime empowered the *Shabbiha* to act but did not do so by law, meaning that the rule reflected in Article 5 would not apply to attribute the *Shabbiha's* conduct to the state.

The situation of the *Shabbiha* is by no means unique. Also in Syria, Shi'a militia groups, including Hezbollah, augmented government forces on the battlefield with the apparent sanction of the Syrian

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<sup>131</sup> See Ch 2 s 2.1.2. See also Ewan Brown, 'Expert Report' (*United States District Court for the District of Columbia, Cathleen Colvin et al v Syrian Arab Republic*, 22 March 2018) 61-66 paras 126-37 <[https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018\\_Redacted.pdf](https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018_Redacted.pdf)> accessed 15 December 2020.

<sup>132</sup> UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (23 November 2011) UN Doc A/HRC/S-17/2/Add.1 6 para 20. See also US Department of the Treasury, 'Treasury Sanctions Al-Nusra Front Leadership in Syria and Militias Supporting the Assad Regime' (11 December 2012) <[www.treasury.gov/press-center/press-releases/pages/tg1797.aspx](http://www.treasury.gov/press-center/press-releases/pages/tg1797.aspx)> accessed 22 January 2018.

<sup>133</sup> The Carter Center, 'Syria Pro-Government Paramilitary Forces' (5 November 2013) 8 <[www.cartercenter.org/resources/pdfs/peace/conflict\\_resolution/syria-conflict/pro-governmentparamilitaryforces.pdf](http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/pro-governmentparamilitaryforces.pdf)> accessed 20 October 2017. See also Ch 2 s 2.1.2; Ch 3 s 3.2.1.

<sup>134</sup> See Ch 3 s 3.3; Ch 5.

<sup>135</sup> UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (5 February 2013) UN Doc A/HRC/22/59 Annex V para 6.

<sup>136</sup> See s 4.3.1.

<sup>137</sup> Aron Lund 'Who Are the Pro-Assad Militias?' (*Carnegie Middle East Center*, 2 March 2015) <<http://carnegie-mec.org/diwan/59215?lang=en>> accessed 20 October 2017.

regime, but with no clear legal authority to do so.<sup>138</sup> In some cases, Hezbollah fighters even exerted tactical control over Syrian soldiers on the battlefield;<sup>139</sup> an undisputable exercise of Syria's governmental authority. Turkey similarly employs militias to fight on its behalf in the north of the country, without openly formalising this arrangement via its internal law.<sup>140</sup> And Russia makes prolific use of NSAs such as the Wagner Group to enhance its strategic interests in Syria and elsewhere,<sup>141</sup> while prohibiting the use of PMSCs in its domestic legal regime.<sup>142</sup>

In all such cases, it appears likely that the respective states' use of NSAs to fight on their behalf was authorised at the highest levels of government. Such approvals might, therefore, satisfy the 'empowered by law' requirement within Article 5. But given that states commonly prefer their dealings with NSAs to remain covert, details of any domestic authorisations rarely enter the public domain. Consider, for example, the United States' engagements with NSAs that support or facilitate its special forces' counter-terrorism operations.<sup>143</sup> While the relevant fiscal authority is in the public domain,<sup>144</sup> any operations conducted in reliance of this authorisation remain classified. As such, it

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<sup>138</sup> Michael Knights, 'Iran's Foreign Legion: The Role of Iraqi Shiite Militias in Syria' (*The Washington Institute*, 27 June 2013) <[www.washingtoninstitute.org/policy-analysis/view/irans-foreign-legion-the-role-of-iraqi-shiite-militias-in-syria](http://www.washingtoninstitute.org/policy-analysis/view/irans-foreign-legion-the-role-of-iraqi-shiite-militias-in-syria)> accessed 27 June 2018; Nicholas Blanford, 'The Battle for Qusayr: How the Syrian Regime and Hizb Allah Tipped the Balance' (*CTC Sentinel*, August 2013) 18-22 <<https://ctc.usma.edu/app/uploads/2013/08/CTCSentinel-Vol6Iss86.pdf>> accessed 27 June 2018; Marisa Sullivan, 'Hezbollah in Syria' (*Institute for the Study of War*, April 2014) <[http://www.understandingwar.org/sites/default/files/Hezbollah\\_Sullivan\\_FINAL.pdf](http://www.understandingwar.org/sites/default/files/Hezbollah_Sullivan_FINAL.pdf)> accessed 27 June 2018; Anne Barnard, Hwaida Saad and Eric Schmitt, 'An Eroding Syrian Army Points to Strain' (*The New York Times*, 28 April 2015) <[www.nytimes.com/2015/04/29/world/middleeast/an-eroding-syrian-army-points-to-strain.html](http://www.nytimes.com/2015/04/29/world/middleeast/an-eroding-syrian-army-points-to-strain.html)> accessed 27 June 2018.

<sup>139</sup> Blanford (n 138).

<sup>140</sup> Hubbard and others (n 70). Turkey also employed the same Syrian militias to fight on its behalf in Libya and in Nagorno-Karabakh. See Allinson and Ammar (n 70); Zeevi (n 70).

<sup>141</sup> Marten (n 14); Gurcan (n 25); Michelle Nichols, 'Up to 1,200 Deployed in Libya by Russian Military Group: UN Report' (*Reuters*, 6 May 2020) <[www.reuters.com/article/us-libya-security-sanctions/up-to-1200-deployed-in-libya-by-russian-military-group-un-report-idUSKBN2212XW](http://www.reuters.com/article/us-libya-security-sanctions/up-to-1200-deployed-in-libya-by-russian-military-group-un-report-idUSKBN2212XW)> accessed 26 May 2020.

<sup>142</sup> Marten (n 14) 184-88; Sabra Ayres, 'Russia's Shadowy World of Military Contractors: Independent Mercenaries, or Working for the Kremlin?' (*The Los Angeles Times*, 18 February 2018) <[www.latimes.com/world/europe/la-fg-russia-mercenaries-20180218-story.html](http://www.latimes.com/world/europe/la-fg-russia-mercenaries-20180218-story.html)> accessed 11 August 2019; Nathaniel Reynolds, 'Putin's Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group' (*Carnegie Endowment for International Peace*, 8 July 2019) <<https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442>> accessed 31 March 2021.

<sup>143</sup> Wesley Morgan, 'Behind the Secret US War in Africa' (*Politico*, 2 July 2018) <[www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005](http://www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005)> accessed 29 September 2020; Tommy Ross, 'House and Senate Chart Different Courses on US Clandestine Support of Foreign Militias' (*Just Security*, 20 August 2020) <[www.justsecurity.org/72098/house-and-senate-chart-different-courses-on-us- clandestine-support-of-foreign-militias/](http://www.justsecurity.org/72098/house-and-senate-chart-different-courses-on-us- clandestine-support-of-foreign-militias/)> accessed 29 September 2020; Daniel R Mahanty and Elias Youssef, 'Exception(s) to the Rule(s): Civilian Harm, Oversight, and Accountability in the Shadow Wars' (*Center for Civilians in Conflict*, November 2020) 13-14 <[www.stimson.org/wp-content/uploads/2020/11/CIVIC\\_US\\_Report\\_ETR-FINAL1.pdf](http://www.stimson.org/wp-content/uploads/2020/11/CIVIC_US_Report_ETR-FINAL1.pdf)> accessed 2 October 2021.

<sup>144</sup> Legal Information Institute, '10 US Code s 127e – Support of Special Operations to Combat Terrorism' <[www.law.cornell.edu/uscode/text/10/127e](http://www.law.cornell.edu/uscode/text/10/127e)> accessed 29 September 2020. See also US Deputy Secretary of Defense,

would not be apparent to any parties injured by the relevant NSAs' conduct whether those NSAs were properly empowered to act in accordance with US law.

The same is likely to be true when states task proxies to act on their behalf in the cyber domain. In contrast with the contractual relationships common between states and PMSCs, 'the public-private collaborations in cybersecurity are informal, de facto partnerships, operating outside a contractual framework'.<sup>145</sup> As such, the relationships that exist between cyber operators and the state are frequently nebulous and ill-understood.<sup>146</sup> Within China, for example, private individuals, companies and civilian agencies are all involved in cyber activity for the benefit of the state, with variable levels of government involvement in their actions.<sup>147</sup> In such circumstances, even if it is possible to establish that the state empowered a particular hacker group to act, the likelihood of proving that this was done in accordance with the state's domestic law appears extremely slim.

It is possible, of course, that if the criteria relevant to Article 5 are not satisfied, another rule might attribute the NSA's conduct to the state, particularly the rule expressed in Article 8 ARSIWA relating to a state's instructions, direction, or control.<sup>148</sup> When a state authorises an NSA to perform governmental functions on its behalf, however, Article 8 may not be the most appropriate basis of attribution. For instance, when the militias in Syria switched focus at Turkey's behest to fight against the Kurds rather than President Assad, they abandoned their own goals and acted purely for Turkey.<sup>149</sup> From that time on, they were exercising combat functions on Ankara's behalf and their conduct should be attributable to Turkey, regardless of the state's issuance of instructions, or its exercise of direction or control. States should not be able to hide behind the covert or informal manner in which they empower NSAs to avoid attribution. Viewed in light of states' contemporary use of proxies in conflict situations, therefore, the requirement for legal empowerment overly

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'Directive-type Memorandum 18-005 – Authority for Support of Special Operations for Irregular Warfare' (3 August 2018) <<https://fas.org/irp/doddir/dod/dtm-18-005.pdf>> accessed 6 December 2020.

<sup>145</sup> Eichensehr (n 28) 510.

<sup>146</sup> Maurer (n 29) 16-18.

<sup>147</sup> Mara Hvistendahl, 'China's Hacker Army' (*Foreign Policy*, 3 March 2010)

<<http://foreignpolicy.com/2010/03/03/chinas-hacker-army/>> accessed 24 October 2017. See also Maurer (n 29) 107-119; Krekel (n 32) 33; Raud (n 32) 26-27; FireEye, 'Red Line Drawn: China Recalculates its Use of Cyber Espionage' (June 2016) 15 <[www.fireeye.com/content/dam/fireeye-www/current-threats/pdfs/rpt-china-espionage.pdf](http://www.fireeye.com/content/dam/fireeye-www/current-threats/pdfs/rpt-china-espionage.pdf)> accessed 27 February 2018.

<sup>148</sup> ARSIWA (n 4) art 8. See also Ch 5.

<sup>149</sup> See Ch 2 s 2.1.4.

restricts the application of the rule expressed in Article 5 and in some cases, deprives it of practical effect.

#### 4.3.2.3 The 'legal' aspect of the empowerment requirement

This limitation to Article 5's scope of application does not accord well with the overall aims of the law of state responsibility. While the ARSIWA commentary acknowledges the relevance of states' internal laws when assessing responsibility,<sup>150</sup> it also emphasises the primacy of international law.<sup>151</sup>

The focus of international law, moreover, is upon the reality of a situation, rather than the apparent structures created by a state's domestic law.<sup>152</sup> Thus, in the words of the ICTY Appeals Chamber, 'States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law'.<sup>153</sup>

Although the ICTY's observation related to attribution pursuant to the rule reflected in Article 8, the ARSIWA commentary highlights the overarching principle that 'States cannot use their internal law as a means of escaping international responsibility'.<sup>154</sup>

It would be anomalous if the same theory did not apply to the role of internal law within the terms of Article 5. As illustrated by the example of the *Shabbiba*, a state should not be able to delegate elements of its governmental functions in a manner that does not accord with the requirements of its domestic law and thereby evade international responsibility for any unlawful acts committed by that entity.<sup>155</sup> Instead, there is force in the argument made by the government of Japan that 'an internal law is only a presumptive factor in determining whether an act of an entity is attributed to the State'.<sup>156</sup> Under this rationale, the definitive factor is the exercise of elements of governmental authority. Thus, as Cameron and Chetail argue, a state should bear responsibility where outsourcing is carried out contrary to or in the absence of authorising national laws, on the basis that it has

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<sup>150</sup> ARSIWA (n 4) art 3 commentary para 8.

<sup>151</sup> *ibid* art 3; *ibid* commentary para 8.

<sup>152</sup> *Dame Mousse* Case (1953) 13 RIAA 493 <[http://legal.un.org/docs/?path=../riaa/cases/vol\\_XIII/486-500.pdf&lang=O](http://legal.un.org/docs/?path=../riaa/cases/vol_XIII/486-500.pdf&lang=O)> accessed 20 October 2017; *Prosecutor v Tadić* (Appeals Chamber Judgment) (1999) ICTY IT-94-1-A [121].

<sup>153</sup> *Tadić* (n 152) [117]. See also *Kenneth P Yeager v The Islamic Republic of Iran* (1987) 17 Iran-US Claims Tribunal Rep 92 [45].

<sup>154</sup> ARSIWA (n 4) art 3 commentary para 8.

<sup>155</sup> Kees (n 55) para 13.

<sup>156</sup> ILC, 'Comments and Observations Received from Governments' (March to June 2001) UN Doc A/CN.4/515 and Add.1-3 48-49.

either interpreted its domestic legal regime so as to allow for the delegation, or it has knowingly derogated from such laws.<sup>157</sup>

Such a loosening of the requirement for legal empowerment does not align with the wording of Article 5 ARSIWA but is nevertheless consistent with certain case law on the issue, as well as the earlier work of the ILC. In the *Armed Activities* and *Bosnian Genocide* cases, the ICJ failed to mention any need for empowerment through domestic law in the context of Article 5.<sup>158</sup> An arbitral tribunal concluded in 2006 that an NSA's conduct was attributable to Egypt based on the rule expressed in Article 5, 'even if [the entity] has not been officially empowered by law to exercise elements of the governmental authority'.<sup>159</sup> And the ILC did not initially consider legal empowerment to be a prerequisite for attribution, emphasising the significance of the public nature of the functions carried out by the private entity as opposed to the formal relationship between that entity and the state.<sup>160</sup> As Special Rapporteur Ago stated in 1971, 'it is logical that the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the state at the international level'.<sup>161</sup>

In his third report on state responsibility, Ago referred to certain case law supporting this proposition.<sup>162</sup> The *Zafiro* case, for example, concerned the attribution to the United States of certain acts performed by the crew of a merchant vessel.<sup>163</sup> The Arbitral Tribunal held that 'the liability of the State for [the *Zafiro*'s] actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed'.<sup>164</sup> Irrespective of the legal regime under which the vessel operated, the Tribunal concluded that it functioned as a supply ship for the US Navy, under the command of the officer on board.<sup>165</sup> Therefore, by virtue of the 'nature of service

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<sup>157</sup> Cameron and Chetail (n 57) 169-70.

<sup>158</sup> *Armed Activities on the Territory of the Congo (The Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ 168 [160]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [414].

<sup>159</sup> *Helnan International Hotels A/S v The Arab Republic of Egypt* (2006) ICSID Case No ARB 05/19 [93].

<sup>160</sup> Ago's Third Report on State Responsibility (n 51) 264 para 191.

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid* 264 para 192.

<sup>163</sup> *D Earnshaw and Others (Great Britain) v United States (Zafiro case)* (1925) 6 RIAA 160

<[http://legal.un.org/docs/?path=../riaa/cases/vol\\_VI/160-165\\_Earnshaw.pdf&lang=E](http://legal.un.org/docs/?path=../riaa/cases/vol_VI/160-165_Earnshaw.pdf&lang=E)> accessed 24 October 2017.

<sup>164</sup> *ibid* 162.

<sup>165</sup> *ibid* 160, 163. See also Ago's Third Report on State Responsibility (n 51) 264.

and purpose for which [the vessel was] employed’, the United States was responsible for the crew’s actions.<sup>166</sup>

The draft article formulated by Ago to express this principle made no reference to any requirement for the entity exercising public functions to be empowered by law.<sup>167</sup> When, three years later, the wording of the draft article changed to incorporate a requirement for legal empowerment, the ILC did not clearly articulate the basis for this amendment, or cite any precedents in its support.<sup>168</sup> The requirement appears to be grounded in the fact that entities exercising elements of governmental authority normally do so pursuant to a delegation under the state’s domestic law, while situations involving a lesser means of empowerment are adequately covered by Article 8.<sup>169</sup> However, the conduct of NSAs such as the *Shabbiba* and the Syrian militias acting on Turkey’s behalf illustrates the accountability gap often left unaddressed by Article 8 when there is insufficient evidence to prove the existence of state instructions, direction, or control regarding the entity’s activities.<sup>170</sup>

It is arguable, therefore, that the requirement for legal empowerment included within the ILC’s formulation of Article 5 is not reflective of customary international law.<sup>171</sup> This conclusion is supported by the ICRC’s study of customary IHL, according to which ‘A State is responsible for violations of [IHL] attributable to it, including: ... violations committed by persons or entities it empowered to exercise elements of governmental authority’.<sup>172</sup> Again, there is no stipulation that the requisite empowerment must be effected by the state’s domestic law. In the absence of such a requirement, it follows that all forms of state authorisation, whether they accord with the domestic

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<sup>166</sup> *Zafiro* case (n 163) 160.

<sup>167</sup> Ago’s Third Report on State Responsibility (n 51) 267 (draft art 8).

<sup>168</sup> ILC YB 1974 vol II, ‘Report of the Commission to the General Assembly’ UN Doc A/CN.4/SER.A/1974/Add.1 (Part One) 277 (draft art 7(2)). See also *ibid* 282 (draft art 7 commentary para 18); ILC YB 1974 vol 1 (n 50) 36 (comments of Mr Tsuruoka); *ibid* 38 (comments of Mr Pinto).

<sup>169</sup> See Crawford’s First Report on State Responsibility (n 48) 56 (draft art 7 commentary para 4); ILC YB 1998 vol I (n 7) 246 (comments of Mr Crawford).

<sup>170</sup> See Ch 5.

<sup>171</sup> There is little state practice or *opinio juris* to demonstrate states’ views regarding this basis of attribution. Governments did not raise objections to draft art 5, although several states sought greater clarification as to its terms. See Crawford’s First Report on State Responsibility (n 48) 38-9; Comments and Observations Received from Governments (n 156) 48–49; Kees (n 55) para 13.

<sup>172</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds), ‘Customary International Humanitarian Law vol I: Rules’ (2005) r 149 <[www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)> accessed 24 October 2017.

legal regime or not, should be considered when examining whether the state has empowered an NSA to perform governmental functions.<sup>173</sup>

If one accepts this principle, there is nevertheless a need to consider how far it extends. State empowerment remains a clear requirement of the attribution standard, implying a necessity for positive action by the state in delegating public functions, rather than a simple failure to prevent the exercise of such powers. Accordingly, evidence of a clear link between the state and the NSA must exist; the mere performance of governmental functions without such evidence should be insufficient to lead to attribution on this basis.<sup>174</sup> The question of the types of state behaviour that should suffice to empower an NSA to perform governmental functions on its behalf, in the absence of authorisation under the state's internal law, is addressed further in Chapter 7.<sup>175</sup>

### **4.3.3 *Ultra vires acts***

Once it is determined that a state has empowered an NSA to exercise elements of its governmental authority, the third criterion for attribution under the rule expressed in Article 5 requires that the entity was, in fact, acting in that capacity at the time it committed the act in question. There is no additional requirement for the state to direct or control the way in which the delegated task is carried out.<sup>176</sup> Instead, the public powers exercised by an NSA may involve 'an independent discretion or power to act',<sup>177</sup> meaning that the entity makes its own decisions regarding its day-to-day conduct, without governmental oversight.

A state may bear international responsibility even if the entity's conduct was *ultra vires*, meaning that it was carried out in excess of its authority or in contravention of any instructions given by the state. This position is reflected in Article 7 ARSIWA, which articulates the general rule regarding states' responsibility for *ultra vires* acts.<sup>178</sup> But the principle holds true only if, during the incident in question, the entity was performing governmental functions. It is therefore necessary to distinguish between conduct that is deemed 'official', in exercise of the delegated public tasks, and that which is

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<sup>173</sup> Such a conclusion seems to be supported by certain comments made by Crawford in 1998. See ILC YB 1998 vol I (n 7) 243.

<sup>174</sup> The performance of governmental function in the absence or default of the official authorities may, however, lead to attribution on a different basis. See ARSIWA (n 4) art 9.

<sup>175</sup> See Ch 7 s 7.2.2.

<sup>176</sup> ARSIWA (n 4) art 5 commentary para 7.

<sup>177</sup> *ibid.*

<sup>178</sup> *ibid* art 7. See Ch 3 s 3.4 for discussion regarding art 7 in the context of art 4 ARSIWA.



‘private,’ and carried out either in an entity’s personal capacity or on behalf of a client other than the state.

This distinction may be illustrated by the abuses committed by contractors working for PMSCs. Legal commentators have raised considerable concerns regarding the issue of accountability for legal breaches involving PMSCs, such as the detainee abuse at Abu Ghraib.<sup>179</sup> When working in combat zones, contractors have additionally been involved in incidents involving civilian deaths such as the killing of seventeen Iraqis by Blackwater employees escorting a US convoy.<sup>180</sup> Despite the frequency with which PMSC misconduct occurs, it is rare for such activity to be authorised by the hiring state. It is therefore necessary to determine whether the abuses committed were private acts that are not attributable to the state, or *ultra vires* activities carried out in the contractors’ official capacity, leading to state responsibility.

The determination whether particular conduct relates to an exercise of governmental authority is a question of fact in each case.<sup>181</sup> As the ARSIWA commentary makes clear, ‘If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must ... concern governmental activity and not other private or commercial activity in which the entity may engage’.<sup>182</sup> A clear disaggregation of the activities carried out by an entity assists in this respect. It must then be determined whether the act in question was connected to the performance of public functions, or to another task carried out either for the state, or for another beneficiary.

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<sup>179</sup> See eg Nieminen (n 3); Peter Warren Singer, ‘War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law’ (2004) 42 Columbia J Transnational L 521; Mark W Bina, ‘Private Military Contractor Liability and Accountability after Abu Ghraib’ (2005) 38 John Marshall L Rev 1237; Laura A Dickinson, ‘Governments for Hire: Privatising Foreign Affairs and the Problem of Accountability under International Law’ (2005) 47 William and Mary L Rev 135; Carsten Hoppe, ‘Passing the Buck: State Responsibility for Private Military Companies’ (2008) 19 Eur J Intl L 989; Shannon Bosch, ‘Private Security Contractors and State Responsibility: Are State Exempt from Responsibility for Violations of Humanitarian Law Perpetrated by Private Security Contractors?’ (2008) 41 The Comparative and Intl L J of Southern Africa 353; Michael Hurst, ‘After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors during Contingency Operations’ (2008) 76 The George Washington L Rev 1308; Charles Tiefer, ‘No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After’ (2009) 88 Oregon L Rev 745; Nigel D White, ‘Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs’ (2012) 31 Crim Justice Ethics 233; Stanger (n 72) 84; Jones, ‘Implausible Deniability’ (n 11); Kontos (n 55); Zarate (n 9).

<sup>180</sup> Hurst (n 179); Tiefer (n 179). See also Michael Safi, ‘Trump Pardons Blackwater Contractors Jailed for Massacre of Iraq Civilians’ (*The Guardian*, 23 December 2020) <[www.theguardian.com/world/2020/dec/23/trump-pardons-blackwater-contractors-jailed-for-massacre-of-iraq-civilians](http://www.theguardian.com/world/2020/dec/23/trump-pardons-blackwater-contractors-jailed-for-massacre-of-iraq-civilians)> accessed 24 December 2020.

<sup>181</sup> ARSIWA (n 4) art 7 commentary para 7-8.

<sup>182</sup> *ibid* art 5 commentary para 5.

When a company acts pursuant to private contracts entirely distinct from the public functions performed for the state, such conduct will not lead to state responsibility.<sup>183</sup> Therefore, if a PMSC provides armed security to protect a military base in a combat zone as well as security services for a mineral extraction company operating in the region, only its activities in relation to the former are attributable to the state. Similarly, if a cybersecurity company that is empowered to conduct cyber defence of military networks also performs information security services for private clients, its conduct in respect of the latter is not attributable to the state.<sup>184</sup>

Activities carried out in a contractor's personal capacity likewise do not engage the state's responsibility. To be considered private in nature, the relevant conduct must be 'so removed from the scope of [the individual's] official functions that it should be assimilated to that of private individuals, not attributable to the State'.<sup>185</sup> Accordingly, an offence committed by a PMSC contractor when he is off duty and away from his place of work is unlikely to engage the responsibility of the state. Equally, if the employees of a cybersecurity company performing digital forensics functions on behalf of the state engage in activities that are unrelated to the government mandate, such as cyber-crime, the state bears no responsibility for their conduct.<sup>186</sup>

Where, however, the conduct in question is 'carried out by persons cloaked with governmental authority',<sup>187</sup> it is attributable to the state, even if it exceeds the scope of the delegated powers. Consider, for instance, the detainee abuse committed by interrogators working for CACI International Inc. at Abu Ghraib.<sup>188</sup> While such conduct was not authorised by the US government and may have been specifically prohibited under the terms of the contract, it was undoubtedly carried out in the exercise of delegated governmental authority because the mistreatment was incidental to the contractors' official role as interrogators within the prison.<sup>189</sup> Therefore, the IHL violations involving private contractors at Abu Ghraib in 2003 are attributable to the United States.<sup>190</sup> The same reasoning applies to the killings in Baghdad's Nisour Square by Blackwater

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<sup>183</sup> *ibid* art 7 commentary para 7. See also Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 ICSID Rev 457, 472-73.

<sup>184</sup> Tallinn Manual 2.0 (n 78) r 15 commentary para 11.

<sup>185</sup> ARSIWA (n 4) art 7 commentary para 7.

<sup>186</sup> Tallinn Manual 2.0 (n 78) r 15 commentary para 12.

<sup>187</sup> *Petrolane Inc v Islamic Republic of Iran* (1991) 27 Iran-US Claims Tribunal Rep 64 [82]-[83]. See also ARSIWA (n 4) art 7 commentary para 7.

<sup>188</sup> *Weiner* (n 2).

<sup>189</sup> *Tonkin* (n 51) 113.

<sup>190</sup> *ibid*.

employees, committed while the contractors were acting in their official capacity, providing convoy security.<sup>191</sup>

Equivalent considerations apply in the cyber domain. Thus, the Tallinn Manual 2.0 gives the example of a state that empowers a private company to use passive measures in defence of governmental cyber infrastructure.<sup>192</sup> If the company also engages in active defence, by ‘hacking back’ in excess of the delegated governmental authority, such *ultra vires* conduct is attributable to the state as it is incidental to the company’s activities in defending the government networks.<sup>193</sup>

A corresponding analysis would also be appropriate regarding the conduct of certain militia groups in the event that they were appropriately empowered to perform combat functions on a state’s behalf.<sup>194</sup> Consider, for instance, the atrocities perpetrated by Syrian militias during Turkey’s October 2019 operation to take control of territory previously held by the Kurds in northern Syria.<sup>195</sup> If the ‘empowerment’ requirement within the rule reflected in Article 5 was interpreted more broadly, thereby allowing for the attribution of the militias’ conduct during the incursion to Turkey, the abuses they committed were clearly *ultra vires* acts and attributable to the state, rather than conduct performed in the fighters’ private capacities. The same is true of any violations of Russia’s international legal obligations committed by members of the Wagner Group during the Syrian conflict, such as the alleged torture and killing of a detainee.<sup>196</sup>

The distinction between public and private acts is not, however, always clear. For example, the UK government raised a query with the ILC regarding the conduct of a private security firm empowered to act as railway police.<sup>197</sup> The facts of that example may apply equally to a PMSC that is authorised to use force in guarding a facility within a military base in a combat zone. Consider the position if

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<sup>191</sup> Hurst (n 179); Tiefer (n 179).

<sup>192</sup> Tallinn Manual 2.0 (n 78) ¶ 15 commentary para 12.

<sup>193</sup> *ibid.*

<sup>194</sup> See s 4.3.2.

<sup>195</sup> Hubbard and others (n 70); Stephanie Nebehay, ‘UN Urges Turkey to Investigate Executions in Syria’ (*Reuters*, 15 October 2019) <[www.reuters.com/article/us-syria-security-turkey-un/un-urges-turkey-to-investigate-executions-in-syria-idUSKBN1WU19W](http://www.reuters.com/article/us-syria-security-turkey-un/un-urges-turkey-to-investigate-executions-in-syria-idUSKBN1WU19W)> accessed 18 December 2019; Amnesty International, ‘Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies’ (18 October 2019) <[www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/](http://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/)> accessed 18 December 2019.

<sup>196</sup> Marc Bennetts, ‘Investigators Say Man Filmed Beheading Syrian is Russian Mercenary’ (*The Times*, 22 November 2019) <[www.thetimes.co.uk/article/man-in-syrian-torture-video-identified-as-wagner-group-mercenary-fqss9q2qm](http://www.thetimes.co.uk/article/man-in-syrian-torture-video-identified-as-wagner-group-mercenary-fqss9q2qm)> accessed 23 November 2019.

<sup>197</sup> ILC YB 1998 vol II, ‘Documents of the Fiftieth Session’ UN Doc A/CN.4/SER.A/1998/Add.1 (Part 1) 109 para 4.

contractors working for the PMSC act, whilst in uniform, in excess of the authority granted by the state by using force to detain an individual whose conduct does not threaten the security of the facility, at a location not in its immediate vicinity. The question arises whether that would be an example of an *ultra vires* act attributable to the state, or conduct committed in the individuals' private capacity.

In this situation, further information would be required to determine whether the contractors were 'purportedly or apparently carrying out their official functions' at the time of the incident.<sup>198</sup> If at the relevant time they were on duty and relied upon their uniforms or the appearance of authority that this bestowed upon them when detaining the individual, thereby giving the impression that they were acting in their official capacity, their actions are likely to be attributable to the state.<sup>199</sup> If, however, they were off duty and detained the individual with no reliance whatsoever upon their uniforms as an indication of authority, their actions may be considered those of ordinary citizens and not attributable to the state.<sup>200</sup>

According to the ARSIWA commentary, the distinction between official and private acts 'may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it'.<sup>201</sup> This can, again, be illustrated through the example of the PMSC empowered to guard an installation on a military base. Consider, for instance, the situation if contractors working for the PMSC exceed their authority on a regular basis by repeatedly using unauthorised violence against civilians seeking to enter the site. If such conduct should have come to the attention to the state but the state does nothing to address it, attribution is appropriate. That is the case even if, on a one-off basis, it is found that the contractor concerned was acting in a private capacity, rather than in the exercise of public powers.<sup>202</sup>

Examples such as these illustrate the difficulty, in certain cases, in determining whether an NSA is exercising public powers at the time it commits an act potentially engaging the state's responsibility. This is a question of fact in each case that rests largely on the nexus between the activity concerned and the relevant governmental function. It also depends, to an extent, upon how broadly the notion

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<sup>198</sup> ARSIWA (n 4) art 7 commentary para 8.

<sup>199</sup> *Estate of Jean-Baptiste Caire (France) v The United Mexican States* (1920) 5 RIAA 516. See also Ch 3 s 3.4.

<sup>200</sup> *ibid.*

<sup>201</sup> ARSIWA (n 4) art 7 commentary para 8.

<sup>202</sup> *ibid.*

of an entity's capacity, when exercising such public functions, is defined. But although its application can be problematic, the rule expressed in Article 7 ARSIWA is a necessary means to exclude private conduct from the scope of the attribution standard. It also ensures that any conduct that is related to an NSA's performance of governmental functions is properly attributable to the state.

#### **4.4 Conclusion**

The privatisation of military and security functions in recent years is symptomatic of an ongoing shift in international relations, whereby states are no longer the sole and predominant actors on the international stage.<sup>203</sup> This development has blurred the lines between public and private activity, leading to difficulties in identifying 'elements governmental authority' for the purposes of Article 5 ARSIWA, particularly in new domains such as cyber.

Nonetheless, some functions, such as offensive combat and law enforcement, retain an inherently governmental character. Other conduct that is not a quintessentially public in nature may also fall within the scope of governmental authority when viewed through the lens of the 'private person' test, or in its wider context. In respect of the latter, it may assist to consider factors such as the location where the relevant activities are carried out and the identity of the persons for whose benefit they are performed. Although such considerations may bring a broader range of functions within the scope of governmental authority, it is only those activities that amount to a breach of the state's international obligations that engage the responsibility of the state. In respect of PMSC conduct, this is far more likely to arise in the context of armed security or functions with a direct operational effect than it is in relation to tasks performed in support of personnel or equipment, such as maintenance or cleaning.

In the cyber domain, equivalent considerations apply when determining whether a private cyber operator's conduct amounts to an exercise of governmental authority. Cyber activity undertaken in support of military operations, as well as law enforcement functions undertaken by cybersecurity companies, are likely to be governmental in nature. The scope of Article 5 regarding activities in the cyber domain may thus be wider than commonly perceived. The Tallinn Manual 2.0, for example, includes scenarios within the commentary relating to Article 8 ARSIWA that may equally fall within

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<sup>203</sup> Renz (n 18) 4.

the scope of Article 5.<sup>204</sup> These involve the defence of government computer networks, offensive cyber operations against another state, or cyber support to ongoing military operations;<sup>205</sup> activities that are all likely to amount to an exercise of governmental authority.

The conduct of an NSA performing governmental functions is attributable to the state provided that the entity acts in its public capacity when committing the acts in question. Evidence that the state empowered the entity to exercise such functions is also required. When considering the issue of empowerment, a primary consideration is whether the relevant powers were delegated in accordance with the state's internal law. In this respect, any form of legal empowerment will suffice, whether this is effected through legislation, regulation, contract, or any other means permitted under the domestic legal regime. In the absence of legal empowerment, however, it is submitted that other forms of state authorisation should become relevant. Provided the state positively empowered the NSA to act, even if in a manner inconsistent with the state's domestic laws, the conduct of the entity should be attributable to the state. The contrary conclusion goes against the spirit of ARSIWA and offers an incentive to states to outsource public functions in an illegitimate manner.

A more inclusive interpretation of the basis of attribution reflected in Article 5 is justified in view of the nature of the functions concerned, which are traditionally reserved to the state and frequently affect the rights of individuals. Moreover, this construction of the attribution standard closes, to some extent, the accountability gap that emerges when considering the activities of NSAs such as the *Shabbiba* and the Wagner Group. As the rule of attribution expressed in Article 5 does not include any requirement for state supervision over the entity's activities, a state may bear responsibility for the actions of an NSA exercising public functions without evidence of any degree of state control. This is particularly relevant in the contemporary conflict environment, in which states frequently fail to ensure that NSAs acting on their behalf comply with the state's international legal obligations. If, however, the requirements of Article 5 are not met, the issue of state control becomes paramount. This is discussed further in Chapter 5.

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<sup>204</sup> Tallinn Manual 2.0 (n 78) r 17 commentary.

<sup>205</sup> *ibid* commentary paras 4, 7, 12, 14.

## Chapter 5 – Persons or Entities Acting on the State’s Instructions or Under its Direction or Control

### 5.1 Introduction

It has long been recognised as a principle of international law that a state should bear responsibility for the conduct of those persons who act on its behalf.<sup>1</sup> In 1927, for example, the US-Mexico Claims Commission found Mexico responsible for the conduct of a private citizen who shot and killed a US national.<sup>2</sup> The Commission concluded, ‘It is difficult to determine with precision the status of these guards ... but at any rate they were “acting for” Mexico or for its political subdivisions’.<sup>3</sup> Authorities such as this were taken into account by the ILC when formulating the attribution standard now reflected in Article 8 ARSIWA.<sup>4</sup>

Article 8 provides that ‘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’.<sup>5</sup> This is a residual rule of attribution, meaning that it only applies if an assessment has first been made that the person or entity concerned is not a state organ for the purposes of Article 4 ARSIWA, and is not empowered to exercise elements of governmental authority within the meaning of Article 5.

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<sup>1</sup> International Law Commission (ILC), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ in ILC YB 2001 vol II pt 2, ‘Report of the ILC on the Work of its Fifty-third Session’ UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) art 8 commentary para 2 (ARSIWA).

<sup>2</sup> *Charles S Stephens and Bowman Stephens (USA) v United Mexican States* (1927) 4 RIAA 265 <[http://legal.un.org/riaa/cases/vol\\_IV/265-268.pdf](http://legal.un.org/riaa/cases/vol_IV/265-268.pdf)> accessed 4 April 2018.

<sup>3</sup> *ibid* 267.

<sup>4</sup> See eg Roberto Ago, ‘Third Report on State Responsibility – the Internationally Wrongful Act of the State, Source of International Responsibility’ (1971) UN Doc A/CN.4/246 and Add.1-3 264 para 192.

<sup>5</sup> ARSIWA (n 1) art 8. The principle reflected in art 8 is widely recognised as one of customary international law. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), ‘Customary International Humanitarian Law Volume I: Rules’ (2005) r 149 <[www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)> accessed 24 October 2017 (ICRC Customary IHL Study); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [398] (*Bosnian Genocide*). This basis of attribution is also supported by the *opinio juris* of states. See eg Brian J Egan ‘Remarks on International Law and Stability in Cyberspace’ (*Berkeley Law School*, 10 November 2016) <<https://2009-2017.state.gov/s/1/releases/remarks/264303.htm>> accessed 10 April 2018; Government of the Netherlands, ‘Letter to Parliament on the International Legal Order in Cyberspace’ (*Appendix: International Law in Cyberspace*, 26 September 2019) 6 <[www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace](http://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace)> accessed 4 April 2020; Federal Government of Germany, ‘On the Application of International Law in Cyberspace’ (March 2021) 11 <[www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf](http://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf)> accessed 14 August 2021.

By referring specifically to the conduct of a person or group, Article 8 looks to the state's influence over the particular behaviour that amounts to a breach of the state's international legal obligations. This is in contrast with Article 4, which focuses on the wider relationship between the state and the NSA.<sup>6</sup> To determine attribution in the context of Article 8, therefore, a detailed assessment is required as to the state's influence over, or involvement in, the specific acts committed by the NSA that violate the state's international legal obligations.

The rule of attribution reflected in Article 8 has been the subject of considerable academic comment.<sup>7</sup> This has largely addressed the conflicting jurisprudence of the ICJ and the ICTY regarding the appropriate control threshold.<sup>8</sup> But despite the significant attention the issue has received, the precise meaning of control in this context remains unclear. There is, moreover, additional ambiguity regarding the concepts of instructions and direction. These have received relatively little attention from commentators in comparison with the notion of control and, in practice, the three terms are often conflated. This chapter therefore seeks to add clarity regarding the meaning of all three rules of attribution encompassed within Article 8, examining their potential application in situations of contemporary conflict.

Section 5.2 considers, first, Article 8's drafting history, to assess how the formulation of the attribution standard evolved over time. It then examines the general features of attribution pursuant to Article 8 before moving, in Section 5.3, to consider the concept of state instructions in conflict

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<sup>6</sup> See Ch 3.

<sup>7</sup> See eg André J J de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, The Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72 *Brit YB Intl L* 255; Leo van den Hole, 'Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadić' (2005) 32 *Syracuse J Intl and Comparative L* 269; Marko Milanović 'State Responsibility for Genocide' (2006) 17 *Eur J Intl L* 553; Davis B Tyner, 'Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in Tadić' (2006) 18 *Florida J Intl L* 843; Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5 *J Intl Criminal Justice* 829; Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *Eur J Intl L* 649; Stefan Talmon 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *Intl and Comparative L Quarterly* 493; Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 257; Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2011) 113-121; Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (CUP 2013) 204-225; James Crawford, *State Responsibility: The General Part* (CUP 2013) 141-165; Kubo Mačák, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) 21 *J Conflict and Security L* 405; Remy Jorritsma, 'Where General International Law Meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts' (2018) 23 *J Conflict and Security L* 405.

<sup>8</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*); *Prosecutor v Tadić* (Appeals Chamber Judgment) ICTY IT-94-1-A (1999) (*Tadić Appeals Chamber*); *Bosnian Genocide* (n 5). See also s 5.4.



situations. Section 5.4 begins by considering direction and control together, examining the relevant jurisprudence of the ICJ and the ICTY on this issue, as well as the view of the ICRC.<sup>9</sup> Finally, the chapter explores the concepts of direction and control independently, evaluating whether each has an autonomous meaning and the circumstances in which this applies to attribute NSAs' conduct during armed conflict to a state.

## 5.2 Attribution pursuant to Article 8

### 5.2.1 Drafting history

The first version of the rule of attribution now reflected in Article 8 ARSIWA was proposed by Special Rapporteur Roberto Ago in the 1970s. This provided that the conduct of persons or groups of persons who 'in fact ... act on behalf of the State' should be considered an act of state in international law.<sup>10</sup> The intent was to encompass 'groups which, though not belonging to the regular army of the State, carried out military activities in times of war'.<sup>11</sup> Ago gave the example of 'private persons who exceptionally performed the functions of auxiliaries of the regular armed forces, as the Paris taxi-drivers had done in the First World War during the battle of the Marne' and also 'the "volunteers" which certain Powers sent, or allowed to go, to countries where a civil war was in progress'.<sup>12</sup> In addition, the ILC referred in this context to 'abductions carried out in foreign territory by private persons acting, in fact, on behalf of the State',<sup>13</sup> noting that 'if the persons in question could be proved to have acted in concert with and at the instigation of the organs of a State, the action of abduction must be regarded as an act of that State'.<sup>14</sup>

The ILC's choice of language indicates that it envisaged the rule applying when a state establishes an agency relationship with an NSA, during which the state directs the NSA to perform a particular act

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<sup>9</sup> *ibid*; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016) art 2 paras 265-273 (2016 commentary to GC1).

<sup>10</sup> Ago's Third Report on State Responsibility (n 4) 267 (draft art 8). See also ILC YB 1974 vol II, 'Report of the Commission to the General Assembly' UN Doc A/CN.4/SER.A/1974/Add.1 (Part One) 283. The ILC adopted all the draft articles relating to attribution in 1996. See ILC YB 1996 vol II pt 2, 'Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session' UN Doc A/CN.4/SER.A/1996/Add.1 (Part Two) 59.

<sup>11</sup> ILC YB 1974 vol I, 'Summary Records of the Twenty-Sixth Session 6 May-26 July 1974' UN Doc A/CN.4/SER.A/1974 32 para 5.

<sup>12</sup> *ibid* 32 paras 5, 7.

<sup>13</sup> *ibid* 32-33 para 7.

<sup>14</sup> ILC YB 1974 vol II (n 10) 284.

on its behalf.<sup>15</sup> Thus, the commentary to the initial draft article stipulated: ‘it must be genuinely proved that the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, that they performed a given task at the instigation of those organs’.<sup>16</sup>

Other ILC comments in the 1970s, however, suggest a potentially broader conception of the rule. These refer to states bearing responsibility for the conduct of groups formed with the encouragement of the state that are provided with financial assistance, training, and weapons and with which the state coordinates its own forces’ operations.<sup>17</sup> The ILC asserted that such groups:

cease to be individuals from the standpoint of international law. They become formations which act in concert with, and at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State. They then fall into the category of persons or groups which are linked, in fact if not formally, with the State machinery...<sup>18</sup>

Special Rapporteur James Crawford addressed the ambiguity inherent in the wording of the attribution standard when, in 1998, the ILC again considered the rule’s formulation. Crawford noted that ‘as a matter of ordinary language, a person may be said to act “on behalf of” another person without any actual instruction or mandate from that other person’.<sup>19</sup> Taking into account the ICJ’s judgment in *Nicaragua*, in which the Court envisaged attribution based on the state’s exercise of ‘effective control’,<sup>20</sup> Crawford considered the extent to which the language of Article 8 should encompass a state’s *de facto* control over a person or group, in addition to cases of ‘express agency’ involving an ‘actual instruction or mandate’ from the state.<sup>21</sup> Crawford proposed revised wording whereby the conduct of persons or groups ‘in fact acting on the instructions of, or under the direction and control of...’ the state should be considered an act of state under international law.<sup>22</sup> While this change could be viewed as a mere elucidation of the nebulous concept of an entity acting

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<sup>15</sup> James Crawford, ‘First Report on State Responsibility’ (1998) UN Doc A/CN.4/490 and Add.1-7 34 para 158. See also Mačák, ‘Decoding Article 8’ (n 7) 414-15.

<sup>16</sup> ILC YB 1974 vol II (n 10) 284-5 (commentary to draft art 8 para 8).

<sup>17</sup> ILC YB 1975 vol II ‘Documents of the Twenty-Seventh Session Including the Report of the Commission to the General Assembly’ UN Doc A/CN.4/SER.A/1975/Add.1 80 para 32.

<sup>18</sup> *ibid* 80 (commentary to draft art 11 para 32).

<sup>19</sup> Crawford’s First Report on State Responsibility (n 15) 40 para 197.

<sup>20</sup> *Nicaragua* (n 8) [115]. See also s 5.4.1.1.

<sup>21</sup> Crawford’s First Report on State Responsibility (n 15) 40 para 197.

<sup>22</sup> *ibid* 43, 56.

‘on behalf of’ a state<sup>23</sup> it also expands, to a limited extent, the scope of the rule by allowing a degree more flexibility when determining whether the conduct at issue was performed on a state’s behalf.<sup>24</sup>

The final development in Article 8’s evolution was a minor change to Crawford’s proposed wording made by the ILC Drafting Committee. The latter amended Crawford’s reference to ‘direction and control’, using instead the disjunctive ‘or’.<sup>25</sup> The Drafting Committee thus emphasised that the requirements for direction or control are alternative, not cumulative.<sup>26</sup> This drafting history perhaps explains the inconsistency in the commentary to Article 8, which on the one hand refers to direction and control together as a single attribution standard<sup>27</sup> but on the other, indicates that it is sufficient to establish either one of these criteria.<sup>28</sup> The disjunctive formulation was subsequently included in the text adopted by the General Assembly in 2001.<sup>29</sup>

### **5.2.2 General features of the attribution standard**

While Article 8’s text indicates that a state’s instructions, its direction, and its control are separate and distinct grounds of attribution, several factors are common to all three. First, there must exist a ‘specific factual relationship’ amounting to ‘a real link between the person or group performing the act and the State machinery’.<sup>30</sup> Article 8 is not concerned with formal or legal associations between a private entity and the state but instead the connections that exist, in fact, as a result of the state’s decision to act via an NSA.<sup>31</sup> Thus, private conduct is not attributable to a state solely due to an

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<sup>23</sup> See ILC YB 1998 vol I, ‘Summary Records of the Meetings of the Fiftieth Session’ (20 April-12 June 1998 27 July-14 August 1998) UN Doc A/CN.4/SER.A/1998 230 para 8 (comments of Mr Crawford).

<sup>24</sup> In his separate opinion in *Nicaragua* case, Judge Ago criticised the majority for referring to ‘control’ in the context of attribution, viewing this as a ‘less precise’ basis on which to attribute private conduct to a state. See *Nicaragua* (n 8) Separate Opinion of Judge Ago [18] fn 1. See also ILC YB 1998 vol I (n 23) 289 para 79 (comments of Mr Simma); Claus Kress, ‘L’Organe *de facto* en Droit International Public: Réflexions sur l’Imputation à l’État de l’Acte d’un Particulier à la Lumière des Développements Récents’ (2001) 105 *Revue Générale de Droit International Public* 93, 119-20; Mačák, ‘Decoding Article 8’ (n 7) 414.

<sup>25</sup> ILC YB 1998 vol I (n 23) 289 para 79; ILC YB 2000 vol II pt 2, ‘Report of the Commission to the General Assembly on the Work of its Fifty-Second Session’ UN Doc A/CN.4/SER.A/2000/Add.1(Part 2)/Rev.1 65.

<sup>26</sup> ILC YB 1998 vol I (n 23) 289 para 79.

<sup>27</sup> ARSIWA (n 1) art 8 commentary para 1.

<sup>28</sup> *ibid* art 8 commentary para 7.

<sup>29</sup> ARSIWA (n 1) art 8. See also UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83.

<sup>30</sup> ARSIWA (n 1) art 8 commentary para 1.

<sup>31</sup> de Frouville (n 7) 271.

NSA's behaviour, but rather due to the actions of a state organ in interacting with that NSA, namely by issuing it with instructions, or exercising direction or control over its activities.<sup>32</sup>

Second, the relationship between the NSA and the state must be hierarchical in nature, meaning that the entity is subordinate to the state and does its bidding. This may be demonstrated by the fact that the entity accepts the instructions given and agrees to act upon them or conducts itself in compliance with the state's direction or control.<sup>33</sup> Such a relationship must exist at the time at which the instructions are issued, or the direction or control over the relevant operation is exercised.<sup>34</sup>

Accordingly, a horizontal alliance between partners, such as one that arises through the provision of training and support, will not lead to attribution.<sup>35</sup>

Third, in contrast with the test relating to *de facto* state organs considered in Chapter 3,<sup>36</sup> the links between the entity and the state must pertain to the specific conduct at issue. It is not sufficient for the purposes of Article 8 for the state to issue general instructions, or to exercise broad control over an entity in respect of the entire range of its activities. Instead, 'the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act'.<sup>37</sup> The practical meaning of this requirement is considered further below.<sup>38</sup>

An NSA's status or identity is irrelevant to this basis of attribution.<sup>39</sup> Thus, the rule applies to the conduct of private individuals and groups, as well as to the activities of corporate and other entities, irrespective of whether they have legal personality.<sup>40</sup> Furthermore, the rule potentially applies to any form of conduct. In contrast with attribution arising under the rule reflected in Article 5, there is no requirement for the NSA's acts to involve governmental activity.<sup>41</sup> Instead, a state may bear responsibility for any type of conduct provided that this was performed on the state's instructions, or under its direction or control.

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<sup>32</sup> Gordon A Christenson, 'Attributing Acts of Omission to the State' (1990) 12 Michigan J Intl L 312, 346; Talmon (n 7) 502.

<sup>33</sup> Mačák, 'Decoding Article 8' (n 7) 415.

<sup>34</sup> Cameron and Chetail (n 7) 205.

<sup>35</sup> Mačák, 'Decoding Article 8' (n 7) 427.

<sup>36</sup> See Ch 3 s 3.3.

<sup>37</sup> ARSIWA (n 1) art 8 commentary para 7.

<sup>38</sup> See ss 5.3-5.4.

<sup>39</sup> ARSIWA (n 1) art 8 commentary para 2.

<sup>40</sup> *ibid* commentary para 9.

<sup>41</sup> See Ch 4.

If, however, an NSA acts outside the scope of the state's instructions, direction, or control, that behaviour is not normally attributable to the state. The rule reflected in Article 7 ARSIWA, relating to the attribution of *ultra vires* conduct to the state, applies only to state organs and to entities empowered to exercise elements of governmental authority.<sup>42</sup> When dealing with NSAs falling outside these categories, the state will not normally assume the risk that its instructions or direction will be followed in an internationally wrongful manner.<sup>43</sup> However, that is not the end of the matter. The ARSIWA commentary provides that the state may nevertheless bear responsibility for unauthorised conduct if this was 'incidental to the mission' and did not clearly exceed its scope.<sup>44</sup> The practical implications of this guidance are considered further in Sections 5.3 and 5.4.<sup>45</sup>

Despite the supposedly disjunctive nature of instructions, direction, and control,<sup>46</sup> the latter two terms are ordinarily considered together, as a single attribution standard. Accordingly, direction and control have several features in common. One such shared characteristic is that both require an ongoing relationship between the entity and the state that endures for an undefined period. Thus, according to Tallinn Manual 2.0, 'the two terms refer to a continuing process of exercising authority over an activity such as a cyber operation'.<sup>47</sup> Additionally, for conduct to be attributable to a state on the basis of direction or control, a 'core relationship of subordination' must exist between the state and its agent.<sup>48</sup> In contrast, instructions may be issued on a one-off basis, meaning that the NSA remains a 'free agent' and the relationship between the entity and the state might endure only for the limited period in time during which the instructions are issued.<sup>49</sup>

## 5.3 State instructions

### 5.3.1 *The meaning of instructions*

When a state's organs instruct an NSA to perform an act that violates the state's international legal obligations, that act is attributable to the state.<sup>50</sup> To illustrate the principle, the ARSIWA commentary

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<sup>42</sup> ARSIWA (n 1) art 7. See also Ch 3 s 3.4; Ch 4 s 4.3.3.

<sup>43</sup> ARSIWA (n 1) art 8 commentary para 8.

<sup>44</sup> *ibid.*

<sup>45</sup> See ss 5.3.1.2 and 5.4.3.2.

<sup>46</sup> ARSIWA (n 1) art 8 commentary para 7.

<sup>47</sup> Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) ¶ 17 commentary para 5.

<sup>48</sup> Crawford (n 7) 146.

<sup>49</sup> *ibid.* See also de Frouville (n 7) 271.

<sup>50</sup> ARSIWA (n 1) art 8 commentary paras 1-2.

replicates the ILC's earlier references to individuals 'employed as auxiliaries or ... sent as "volunteers" to neighbouring countries, or ... instructed to carry out particular missions abroad'.<sup>51</sup> Thus, the conduct of the NSAs who committed acts of sabotage in the United States on the orders of the German government during World War I, in violation of laws of neutrality, were attributable to Germany.<sup>52</sup> Similarly, if the individual responsible for the 2019 killing of a former Chechen rebel in Berlin was acting on the instructions of Russian officials, the assassination is attributable to Russia.<sup>53</sup>

As these examples illustrate, the essence of 'instructions' as a basis of attribution is the issuance of some form of order or command by a state organ to an NSA that prompts the NSA to act in a manner that violates the state's international legal obligations.<sup>54</sup> There is no requirement for the state to also supervise the NSA's conduct at the time it acts upon those instructions.<sup>55</sup> It suffices if the state engages with the NSA prior to the event and thereby causes the NSA to act in the manner complained of. For example, if the perpetrator of the Berlin assassination was acting on Moscow's instructions,<sup>56</sup> that act is attributable to Russia even if state officials did not also oversee the actual killing.

It is insufficient, however, if an NSA simply acts in accordance with a common goal it shares with the state. For instance, the conduct of patriotic hackers who act of their own accord in launching malicious cyber operations against a perceived enemy of the state does not lead to attribution.<sup>57</sup> Instead, the state must positively assign the task in question to the NSA. But the NSA's motivation for following the state's instructions is immaterial; it might act for financial gain or solely out of

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<sup>51</sup> *ibid* commentary para 2. See also s 5.2.1.

<sup>52</sup> See *Lehigh Valley Railroad Company and others (United States) v Germany (Sabotage Cases)* (1939) 8 RIAA 225. See also Dayna L Kaufman, 'Don't Do What I Say, Do What I Mean!: Assessing a State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State' (2002) 70 *Fordham L Rev* 2603, 2623-25.

<sup>53</sup> Tom Parfitt and Oliver Moody, 'Russia's FSB "Guided Alleged Assassin of Chechen Zelimkhan Khangoshvili in Berlin"' (*The Times*, 18 February 2020) <[www.thetimes.co.uk/article/russias-fsb-guided-alleged-assassin-of-chechen-zelimkhan-khangoshvili-in-berlin-6pf7j2q8b](http://www.thetimes.co.uk/article/russias-fsb-guided-alleged-assassin-of-chechen-zelimkhan-khangoshvili-in-berlin-6pf7j2q8b)> accessed 18 February 2020; BBC News, 'Germany Accuses Russia of Berlin Park Assassination' (18 June 2020) <[www.bbc.co.uk/news/world-europe-53091298](http://www.bbc.co.uk/news/world-europe-53091298)> accessed 15 February 2021. Regarding attribution in the context of the assassination of Alexander Litvinenco, see ECtHR, *Carter v Russia* (21 September 2021) App No 20914/07 [162]-[169].

<sup>54</sup> Kress (n 24) 126; Frauke Renz, *State Responsibility and New Trends in the Privatization of Warfare* (Edward Elgar 2020) 138.

<sup>55</sup> University Centre for International Humanitarian Law, 'Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions' (29-30 August 2005) 19 <[www.ucihl.org/communication/Private\\_Military\\_Companies\\_report.pdf](http://www.ucihl.org/communication/Private_Military_Companies_report.pdf)> accessed 9 December 2020.

<sup>56</sup> Parfitt and Moody (n 53).

<sup>57</sup> Regarding patriotic hackers acting against Estonia in 2007, see Eneken Tikk, Kadri Kaska and Liis Vihul, 'International Cyber Incidents: Legal Considerations' (*NATO Cooperative Cyber Defence Centre of Excellence*, 2010) 31-2 <<https://ccdcoe.org/publications/books/legalconsiderations.pdf>> accessed 24 October 2017.

patriotism.<sup>58</sup> Equally, it is not important what form the instructions take. These could be incorporated into the terms of a contract with a PMSC, for example, or issued as orders in the field.<sup>59</sup> The content of the instruction, however, is key to determining whether the state's responsibility is engaged.

#### 5.3.1.1 *The content of the instruction*

Often, the requisite evidence of state instructions is simply not available.<sup>60</sup> For this reason, few courts or tribunals have found that conduct is attributable to a state on this basis.<sup>61</sup> One exception is the *Nicaragua* case, in which the ICJ concluded that the actions of a group of NSAs known as Unilaterally Controlled Latino Assets, or UCLAs, were attributable to the United States because they acted 'on the direct instructions' of US officials when laying mines in Nicaraguan ports.<sup>62</sup> But despite evidence that US officials also issued instructions to the *contras*, for example by 'urging' them to launch an offensive to take Nicaraguan territory and by promulgating a tactical directive to destroy farms and crops,<sup>63</sup> the ICJ deemed this insufficient to lead to attribution and focused instead on the United States' exercise of control.<sup>64</sup> The Court's reasoning is not clearly stated in the judgment but could relate to the specificity of the instructions concerned.<sup>65</sup>

It is apparent from the ICJ's earlier jurisprudence relating to the 1979 Iranian revolution that a broad pronouncement from the state is insufficient to amount to 'instructions' for the purposes of attribution.<sup>66</sup> Thus, Ayatollah Khomeini's general call on the youth of Iran to 'expand with all their might their attacks against the United States and Israel' did not amount to 'an authorisation from the State to undertake the specific operation of invading and seizing the United States Embassy'.<sup>67</sup> The

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<sup>58</sup> Michael N Schmitt, "Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' (2018) 19 Chicago J Intl L 30, 61-61.

<sup>59</sup> Tonkin (n 7) 114-117; Crawford (n 7) 145; Cameron and Chetail (n 7) 206.

<sup>60</sup> The ILC acknowledged this during its discussions regarding art 8. See Crawford's First Report on State Responsibility (n 15) 43 para 212; ILC YB 1998 vol I (n 23) 289 para 79. See also ARSIWA (n 1) art 7 commentary para 3.

<sup>61</sup> In the *Bosnian Genocide* case, for instance, the ICJ found that 'The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres...' See *Bosnian Genocide* (n 5) [398], [413].

<sup>62</sup> *Nicaragua* (n 8) [75]. See also *ibid* [80].

<sup>63</sup> *ibid* [104]. See also Kaufman (n 52) 2642-45.

<sup>64</sup> *Nicaragua* (n 8) [109]. See also s 5.4.1.1.

<sup>65</sup> This was the view taken by the ICTY Appeal Chamber. See *Tadić Appeals Chamber* (n 8) [114]. It is also possible that the ICJ took the *contras*' level of autonomy into account if this enabled the NSA to choose whether to follow the state's instructions. See *Nicaragua* (n 8) [108]-[109].

<sup>66</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 [57]-[59] (*Tehran Hostages*). See also *Alfred Short v Islamic Republic of Iran* (1987) 16 Iran-US Claims Tribunal Rep 76 [35].

<sup>67</sup> *Tehran Hostages* (n 66) [59].

ICJ affirmed that for attribution to arise, the relevant instruction must be explicit in its purpose, thereby demonstrating that ‘in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation’.<sup>68</sup>

It is unclear, however, whether the ICJ applied this same test when addressing Iran’s responsibility for the second phase of events, following the initial seizure of the Embassy.<sup>69</sup> In this context, the Court noted that numerous Iranian authorities expressed approval regarding the militants’ actions<sup>70</sup> and cited a decree issued by Ayatollah Khomeini in which he declared that Iran would not give permission for the majority of hostages to be released until the United States had handed over the former Shah for trial.<sup>71</sup> The ICJ concluded that this policy, announced by Ayatollah Khomeini, was sufficient ‘fundamentally to transform the legal nature of the situation’ so that ‘[t]he militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible’.<sup>72</sup> While the Court did not fully articulate the basis for this conclusion, it may be that the specificity of the instruction was key.<sup>73</sup> Thus, a vague call to unspecified individuals to act in a particular manner will not give rise to attribution but a more precise direction to particular persons or groups, who then act in accordance with that instruction, engages the state’s responsibility.<sup>74</sup>

The ICJ confirmed the requirement for specific instructions in its later judgment in the *Bosnian Genocide* case. Here, the Court stipulated that instructions must be given ‘in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations’.<sup>75</sup> The practical meaning of this requirement is somewhat ambiguous, however, resting as it does upon the concept of an ‘operation’ that may be broadly or more narrowly defined.<sup>76</sup> In general, an operation is deemed to consist of a

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<sup>68</sup> *Tebran Hostages* (n 66) [58]. See also Kress (n 24) 102; Kaufman (n 52) 2621-25; Nicholas Tsagourias and Michael Farrell, ‘Cyber Attribution: Technical and Legal Approaches and Challenges’ (2020) 31 *Eur J Intl L* 941, 954-55.

<sup>69</sup> *Tebran Hostages* (n 66) [69]-[75]. See also Kress (n 24) 102.

<sup>70</sup> *Tebran Hostages* (n 66) [71].

<sup>71</sup> *ibid* [73].

<sup>72</sup> *ibid* [74].

<sup>73</sup> Luigi Condorelli, ‘The Imputability to States of Acts of International Terrorism’ (1989) 19 *Israel YB on Human Rights* 233, 238; Kaufman (n 52) 2622-23.

<sup>74</sup> This conclusion is supported by the judgment of the ICTY Appeals Chamber in the *Tadić* case. See *Tadić Appeals Chamber* (n 8) [133].

<sup>75</sup> *Bosnian Genocide* (n 5) [400]. See also *Tebran Hostages* (n 66) [58].

<sup>76</sup> Crawford (n 7) 145.



number of constituent acts,<sup>77</sup> any one of which could amount to a violation of the state's international legal obligations. But whether the state's instructions should relate to the operation as a whole or to the individual acts committed within that operation remains unclear.

To illustrate, consider the conduct of the Syrian militias involved in Turkey's incursion into areas of northeast Syria in October 2019.<sup>78</sup> Reporting indicates that the militias were acting on the orders of Turkish officials.<sup>79</sup> But while Turkey's instructions clearly encompassed the militias' broader conduct in taking control of territory previously held by the SDF, it seems unlikely that Turkey ordered the militias to carry out the particular atrocities during those operations that violated Turkey's IHL obligations.<sup>80</sup> Indeed, the militias' reported lawlessness and lack of discipline suggests that such abuses occurred of the NSAs' own volition rather than under Turkey's orders.<sup>81</sup> The question therefore arises whether Turkey's responsibility is engaged pursuant to its broad instructions to the militias to participate in the operation, if those instructions did not also include orders relating to the specific acts committed in the course of the operation that violated international law.

The ARSIWA commentary appears to answer this question in the negative. This declares that Article 8 applies if an NSA acts 'on the instructions of the State in carrying out the wrongful conduct'<sup>82</sup> and later stipulates that the state's instructions 'must relate to the conduct which is said to have amounted to an internationally wrongful act'.<sup>83</sup> It seems that from the ILC's perspective, therefore, attribution is appropriate only if the state specifically charges the NSA to act a way that breaches the state's international legal obligations. This strict interpretation also finds support in the ICJ's

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<sup>77</sup> NATO defines operations as 'a sequence of coordinated actions with a defined purpose which are military and contribute to a broader approach including non-military actions'. See NATO, 'Allied Joint Doctrine for the Conduct of Operations' (*AJP-3, Edition C Version 1*, February 2019) 1-2 para 1.4 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/797323/doctrine\\_nato\\_conduct\\_of\\_ops\\_ajp\\_3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797323/doctrine_nato_conduct_of_ops_ajp_3.pdf)> accessed 2 February 2021.

<sup>78</sup> See Ch 2 s 2.1.4.

<sup>79</sup> Elizabeth Tsurkov, 'Who Are Turkey's Proxy Fighters in Syria?' (*NYR Daily*, 27 November 2019) <[www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/](http://www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/)> accessed 16 June 2020.

<sup>80</sup> Amnesty International, 'Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies' (18 October 2019) <[www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/](http://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/)> accessed 18 December 2019; Martin Chulov, 'Syria: Videos of Turkey-Backed Militias Show "Potential War Crimes"' (*The Guardian*, 26 October 2019) <[www.theguardian.com/world/2019/oct/26/syria-turkey-arab-videos-torture-kurdish-bodies-militia](http://www.theguardian.com/world/2019/oct/26/syria-turkey-arab-videos-torture-kurdish-bodies-militia)> accessed 5 June 2020.

<sup>81</sup> Tsurkov (n 79).

<sup>82</sup> ARSIWA (n 1) art 8 commentary para 1.

<sup>83</sup> *ibid* para 7.

jurisprudence.<sup>84</sup> But the ILC commentary nevertheless recognises that some borderline cases may arise.<sup>85</sup> Such cases may be clarified further by examining the notion of *ultra vires* acts.

### 5.3.1.2 State instructions and *ultra vires* acts

While affirming that a state will not generally assume the risk that its instructions will be performed in an internationally unlawful manner, the ARSIWA commentary recognises that an NSA's harmful conduct might be so closely linked to the mission it undertakes on the state's behalf that the state's responsibility should be engaged.<sup>86</sup> Thus, according to the ILC, cases involving potentially *ultra vires* acts 'can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it'.<sup>87</sup> But determining, in practice, where the line should be drawn between acts that are attributable to a state and those which are *ultra vires* may prove problematic. For instance, were the Syrian militias' actions in executing Kurdish prisoners<sup>88</sup> incidental to the mission they were tasked by Turkey to perform, or did they clearly go beyond it?

This is a question of fact, to be determined considering all the relevant circumstances. It seems, in this case, that the most likely conclusion is that the militias' actions went beyond the scope of the mission, meaning that the abuses were *ultra vires* and not attributable to Turkey. Certainly, the militias' conduct did not assist in the accomplishment of the operation; it was not necessary for them to act in this manner to comply with Turkey's instructions.<sup>89</sup> Thus, notwithstanding moral and policy arguments that the militias' abuses should engage Turkey's responsibility, there is considerable doubt whether they are attributable to Turkey based on the state's instructions.<sup>90</sup>

The position may be clearer in other scenarios involving states' instructions to NSAs. For instance, if contractors working for a PMSC are instructed to interrogate detainees on behalf of a state and

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<sup>84</sup> *Tebran Hostages* (n 66) [58].

<sup>85</sup> ARSIWA (n 1) art 8 commentary para 8.

<sup>86</sup> *ibid.*

<sup>87</sup> ARSIWA (n 1) art 8 commentary para 8.

<sup>88</sup> Ben Hubbard and others, 'Syrian Arab Fighters Backed by Turkey Kill Two Kurdish Prisoners' (*The New York Times*, 12 October 2019) <[www.nytimes.com/2019/10/12/world/middleeast/turkey-invasion-syria-kurds.html](http://www.nytimes.com/2019/10/12/world/middleeast/turkey-invasion-syria-kurds.html)> accessed 18 December 2019; Martin Chulov and Mohammed Rasool, 'Kurdish Politician Among Nine Civilians Shot Dead by Pro-Turkey Forces in Syria' (*The Guardian*, 13 October 2019) <[www.theguardian.com/world/2019/oct/13/female-kurdish-politician-among-nine-civilians-killed-by-pro-turkey-forces-in-syria-observers-say](http://www.theguardian.com/world/2019/oct/13/female-kurdish-politician-among-nine-civilians-killed-by-pro-turkey-forces-in-syria-observers-say)> accessed 18 December 2019; Stephanie Nebehay, 'UN Urges Turkey to Investigate Executions in Syria' (*Reuters*, 15 October 2019) <[www.reuters.com/article/us-syria-security-turkey-un/un-urges-turkey-to-investigate-executions-in-syria-idUSKBN1WU19W](http://www.reuters.com/article/us-syria-security-turkey-un/un-urges-turkey-to-investigate-executions-in-syria-idUSKBN1WU19W)> accessed 18 December 2019.

<sup>89</sup> Cameron and Chetail (n 7) 207.

<sup>90</sup> For discussion whether the militias' abuses were conducted under Turkey's 'effective control' see s 5.4.4.

mistreat the detainees during an interrogation, that mistreatment should be attributable to the state in view of the close link between the abuse and the task the PMSC was instructed to undertake.<sup>91</sup> But when the connection between the state's instructions and the NSA's misconduct is more attenuated, greater ambiguity arises. For instance, if the state's instructions relate solely to the capture of an individual but do not address the manner in which the detainee should be treated thereafter, the question arises whether any subsequent detainee abuse engages the state's responsibility.<sup>92</sup>

One possible answer is that the abuse is not attributable to the state, because the state's instructions did not relate to the specific conduct that amounts to the potential internationally wrongful act.<sup>93</sup> Moreover, the detainee abuse occurred after the capture mission was complete and therefore did not assist in its accomplishment.<sup>94</sup> But all the facts should be considered before reaching a conclusion in this respect. For instance, how soon after the capture did the detainee abuse take place? Was this perpetrated by the same individuals who conducted the capture mission? Did state officials know that the NSA was likely to abuse the detainee but turn a blind eye to this possibility when issuing instructions? Ultimately, the closer the connection between the mission the state tasks the NSA to undertake and the potential violation of international law, the greater the likelihood of attribution. However, if the state expressly instructs the NSA to treat detainees humanely and the NSA breaches that instruction, its acts are *ultra vires* and therefore not attributable to the state.<sup>95</sup>

It may be particularly difficult to determine whether an NSA's acts fall within the scope of a state's instructions when those instructions are ambiguous in scope. To illustrate, consider the indiscriminate attacks conducted by rebels in eastern Ukraine during the 2015 Debaltseve offensive.<sup>96</sup> If evidence is available to prove that Russian officials commanded the rebels to attack

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<sup>91</sup> ARSIWA (n 1) art 8 commentary para 8. See also Katja Nieminen, 'Rules of Attribution and the Private Military Contractors at Abu Ghraib: Private Acts or Public Wrongs?' (2004) 15 Finnish YB Intl L 289, 317-18.

<sup>92</sup> de Hoogh (n 7) 284-5.

<sup>93</sup> ARSIWA (n 1) art 8 commentary paras 1, 7.

<sup>94</sup> Cameron and Chetail (n 7) 207.

<sup>95</sup> ARSIWA (n 1) art 8 commentary para 8; Kress (n 24) 136. For a contrary view, see *Tadić Appeals Chamber* (n 8) [119], [121].

<sup>96</sup> Amnesty International, 'Ukraine: Horror of Civilian Bloodshed in Indiscriminate Attacks' (2 February 2015) <[www.amnesty.org/en/press-releases/2015/02/ukraine-horror-civilian-bloodshed-indiscriminate-attacks/](http://www.amnesty.org/en/press-releases/2015/02/ukraine-horror-civilian-bloodshed-indiscriminate-attacks/)> accessed 5 August 2019; Joanne Mariner, 'Dabaltseve Under Fire' (*Huffpost*, 14 February 2015) <[www.huffpost.com/entry/debaltseve-under-fire\\_b\\_6684642](http://www.huffpost.com/entry/debaltseve-under-fire_b_6684642)> accessed 5 August 2015; UNHRC, 'Report on the human rights situation in Ukraine' (16 February 2015 to 15 May 2015) 18 para 83 <[www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf](http://www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf)> accessed 5 August 2019.

the city in this manner, the rebels' conduct in violation of IHL is attributable to the state. However, if Russia's instructions were broader in nature, the legal position is less clear. For example, Russian officers might have ordered the rebels to re-take the city without issuing any tactical direction as to how this should be done. In that situation, it is doubtful whether the relevant orders were sufficiently precise to lead to attribution.<sup>97</sup> Alternatively, Russia might have given more detailed directions that implicitly authorised the rebels' use of indiscriminate attacks, in which case the rebels' conduct should be attributable to the state.<sup>98</sup> But a third possibility is that Russia's commands were ambiguous, in that they could have been interpreted either lawfully, by directing attacks only at military objectives, or unlawfully, by targeting the city indiscriminately.

Determining attribution in this context depends on the particular facts. But a general instruction that leaves open the method of fulfilling the state's directive should suffice to engage the state's responsibility.<sup>99</sup> Given that there is no requirement for a state to exercise control over the way in which its instructions are carried out once issued,<sup>100</sup> the opposite conclusion provides an incentive to states to issue vague instructions and thereby evade responsibility.<sup>101</sup> States should, instead, bear the risk that their instructions are interpreted in an unlawful manner and therefore take all feasible steps to ensure that in executing those instructions, the NSA acts in accordance with the state's international legal obligations.

### ***5.3.2 The issuance of instructions to non-state actors in contemporary conflict***

Evidence that a state instructed an NSA to act in an internationally wrongful manner is rare. As the case studies in Chapter 2 illustrate, the available evidence normally relates to the state's provision of

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<sup>97</sup> See ARSIWA (n 1) art 8 commentary paras 1, 7; *Tehran Hostages* (n 66) [58]. For discussion whether Russia exercised effective control over the rebels, see s 5.4.4.

<sup>98</sup> Tonkin (n 7) 115-6.

<sup>99</sup> Crawford (n 7) 145; Kress (n 24) 136; Oliver R Jones, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms' (2009) 24 *Connecticut J Intl L* 239, 271.

<sup>100</sup> This follows from the disjunctive nature of instructions and control. See ARSIWA (n 1) art 8 commentary para 7. See also University Centre for IHL (n 55) 19.

<sup>101</sup> *ibid* 21-22.

material or other support to the NSA, not its issuance of instructions. Nonetheless, there are a few examples within the case studies that illustrate the potential for attribution on this basis.

During the conflict in the DRC, for example, Rwanda provided support not only to the rebel group M23 but also to other armed groups.<sup>102</sup> In 2012, the UN Group of Experts reported that Rwandan officials were in direct contact with the commander of one armed group, Nduma Defence of Congo, and entrusted him with the task of killing the leader of a rival group.<sup>103</sup> Once he had completed the task, the commander surrendered to the DRC's armed forces and Rwanda's head of military intelligence arranged for his evacuation to Rwanda.<sup>104</sup> If accurate, this reporting provides a clear example of a private individual acting on the instructions of a state, in a manner that violates the state's international legal obligations. Accordingly, Rwanda bears responsibility for the unlawful use of force that the assassination entailed.<sup>105</sup>

Moving to the Syrian conflict, it appears that the Syrian regime issued instructions to members of the *Shabbiha* to act on its behalf.<sup>106</sup> According to one report, President Assad's brother, Maher al-Assad, organised a meeting in July 2011 during which he and a cousin charged individuals with responsibility for leading the *Shabbiha* in different parts of the country, briefing the commanders that the NSA 'should set out to terrify protesters'.<sup>107</sup> The intention was reportedly to 'create a paramilitary group to do the dirty work' so that the Syrian army would not be viewed on world media shooting at protesters.<sup>108</sup> One of the *Shabbiha* commanders who was present claimed that specific instructions were issued: 'they told us to kill protesters, armed or unarmed, and torture

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<sup>102</sup> See Ch 2 s 2.3.

<sup>103</sup> UNSC, 'Letter dated 26 June 2012 from the Chair of the Security Council Committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council' (27 June 2012) UN Doc S/2012/348/Add.1 18 para 36.

<sup>104</sup> *ibid.*

<sup>105</sup> The same reasoning applies in respect of other instructions issued by Rwandan state organs to rebel groups. See eg UNSC, 'Letter dated 12 November 2012 from the Chair of the Security Council Committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council' (15 November 2012) UN Doc S/2012/843 (Group of Experts' Final Report).

<sup>106</sup> See Ch 2 s 2.1.2.

<sup>107</sup> Salwa Amor and Ruth Sherlock, 'How Bashar al-Assad Created the Feared Shabiha Militia: An Insider Speaks' (*The Telegraph*, 23 Mar 2014) <[www.telegraph.co.uk/news/worldnews/middleeast/syria/10716289/How-Bashar-al-Assad-created-the-feared-shabiha-militia-an-insider-speaks.html](http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10716289/How-Bashar-al-Assad-created-the-feared-shabiha-militia-an-insider-speaks.html)> accessed 27 February 2018.

<sup>108</sup> *ibid.*

those you capture'.<sup>109</sup> Commanders across the country would then report back to Mahar al-Assad regarding their activities and were sometimes given 'hit lists' of people to assassinate.<sup>110</sup>

While this report is unsubstantiated, the United States<sup>111</sup> and the European Union<sup>112</sup> both imposed sanctions on Mahar al-Assad, the latter describing him as the 'principal overseer of violence against demonstrators'.<sup>113</sup> This lends some weight to the allegations. If the reporting is correct and assuming Mashar al-Assad was a regime official at the time of the meeting, the abuses committed pursuant to such orders are attributable to Syria. This includes not only the actions of the commanders to whom the instructions were issued, but also the conduct of any members of the *Shabbiha* who acted on those commanders' orders.

The instructions that Mahar-al-Assad is alleged to have issued are quite explicit. But evidence also exists of more ambiguous orders promulgated to paramilitary groups in the early stages of the Syrian conflict. For example, in August 2011, the Syrian National Security Bureau reportedly issued an instruction to NSAs to 'maintain control' of areas that had been previously 'cleansed of wanted persons' during security operations.<sup>114</sup> These groups subsequently committed numerous atrocities against civilians.<sup>115</sup> For such conduct to be attributable to Syria, however, further evidence would be required to establish a link between the instruction to 'maintain control' and the subsequent behaviour of the NSAs. It may be that, considering all the relevant circumstances, the instruction implicitly authorised the NSAs to act in a manner that violated Syria's human rights obligations. But when examining an ongoing relationship, such as the Syrian regime's associations with paramilitary

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<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> US Presidential Executive Order 13572 of 29 April 2011, 'Blocking Property of Certain Persons with respect to Human Rights Abuses in Syria' (*Federal Register vol 76 no 85*, 3 May 2011) <[www.gpo.gov/fdsys/pkg/FR-2011-05-03/pdf/2011-10910.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-05-03/pdf/2011-10910.pdf)> accessed 12 April 2018.

<sup>112</sup> Council of the European Union, 'Decision Concerning Restrictive Measures Against Syria and Repealing Decision 2011/782/CFSP' (2012/739/CFSP, 29 November 2012) Annex 1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0739&from=GA>> accessed 29 October 2021.

<sup>113</sup> *ibid.* This reference could simply refer to Mahar al-Assad's role in overseeing violence committed by government forces. However, a conclusion that the Syrian state played a role in the *Shabbiha*'s activities is supported by the findings of the UN Commission of Inquiry. See UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 August 2012) UN Doc A/HRC/21/50 21-22 para 133.

<sup>114</sup> Ewan Brown, 'Expert Report' (*United States District Court for the District of Columbia, Cathleen Colvin et al v Syrian Arab Republic*, 22 March 2018) 65-66 <[https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018\\_Redacted.pdf](https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018_Redacted.pdf)> accessed 15 December 2020.

<sup>115</sup> *ibid.* 66. See also Ch 2 s 2.1.2.

groups, it may be more appropriate to consider the broader context in which the relevant conduct was performed and in particular, whether the entity was acting under the state's direction or control.

## 5.4 State direction or control

### 5.4.1 Guidance provided by the ICJ and ICTY

Despite the inclusion of direction and control within Article 8 ARSIWA as potentially distinct grounds of attribution,<sup>116</sup> courts and tribunals when applying the rule have focused largely on the notion of control. The issue of the requisite type and degree of state control has generated considerable debate. This commenced with the ICJ's 1986 judgment in *Nicaragua*.<sup>117</sup>

#### 5.4.1.1 *Nicaragua*

In its *Nicaragua* judgment, the ICJ examined the United States' support to a rebel group known as the *contras*.<sup>118</sup> US officials provided substantial assistance to the NSA, including involvement in planning the *contras*' operations and developing the group's strategies and tactics.<sup>119</sup> In light of such support, the ICJ considered, first, whether the *contras*' activities were attributable to the United States on the basis that the group amounted to a *de facto* state organ.<sup>120</sup> Having decided that issue in the negative,<sup>121</sup> the court moved on to consider the potential application of the rule now reflected in Article 8.

In this context, the ICJ stated:

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the

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<sup>116</sup> ARSIWA (n 1) art 8 commentary para 7.

<sup>117</sup> *Nicaragua* (n 8). While the ICJ had previously considered the rule of attribution now reflected in art 8 in *Tehran Hostages*, its judgment in that case focused on the 'instructions' element of the rule; it did not mention direction or control. See *Tehran Hostages* (n 66) [57]-[60]. See also s 5.3.1.

<sup>118</sup> For a summary of the United States' support to the *contras*, see Ch 3 s 3.3.1.

<sup>119</sup> *Nicaragua* (n 8) [104], [106], [112].

<sup>120</sup> See Ch 3 s 3.3.

<sup>121</sup> *Nicaragua* (n 8) [110].

control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>122</sup>

This paragraph of the ICJ's judgment gave rise to the oft-debated 'effective control' test. While the Court went on to find that the test was not satisfied in respect of the United States' support to the *contras*, it did not clearly set out the basis for this conclusion.<sup>123</sup> It may be founded on a lack of evidence to indicate a direct link between the United States' assistance to the *contras* and the latter's commission of acts in violation of the state's international legal obligations. But this is far from clear, particularly given the Court's earlier conclusion that the conduct of another NSA, the UCLAs, was attributable to the United States.<sup>124</sup> Here, the ICJ established that US personnel participated 'in the planning, direction, support and execution of the [UCLAs'] operations'<sup>125</sup> but failed to clarify why, in contrast with its conclusion regarding the *contras*, such participation was sufficient to attribute the UCLAs' conduct to the state.

It may be that, in the ICJ's view, the United States exercised effective control over the UCLAs' conduct in launching attacks against Nicaragua.<sup>126</sup> It is equally possible, however, that attribution arose on a different basis.<sup>127</sup> Additional questions arise due to the dearth of legal reasoning to substantiate the Court's position; a point that Judge Ago commented on in his separate opinion in the case.<sup>128</sup> In Ago's view, state responsibility should arise only when a state specifically authorises the conduct in potential violation of international law,<sup>129</sup> as reflected in the earlier version of Article 8 that he was responsible for drafting when Special Rapporteur.<sup>130</sup> Ago noted the imprecision and

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<sup>122</sup> *ibid* [115].

<sup>123</sup> *ibid* [116].

<sup>124</sup> *ibid* [80], [86]. See also s 5.3.1.1.

<sup>125</sup> *ibid* [86].

<sup>126</sup> Cameron and Chetail (n 7) 213; Nieminen (n 91) 307.

<sup>127</sup> Judge Ago, for instance, concluded that the UCLAs' conduct was attributable to the United States on the basis that they belonged 'to public entities empowered within its domestic legal order to exercise certain elements of the governmental authority'. See *Nicaragua* (n 8) Separate Opinion of Judge Ago [15]. Cassese considered that the United States' responsibility was engaged because the UCLAs were 'totally dependent' on the state. See Cassese (n 7) 652. The ICTY Appeals Chamber, meanwhile, determined that attribution arose because the UCLAs acted under the United States' instructions. See *Tadić Appeals Chamber* (n 8) [114].

<sup>128</sup> *Nicaragua* (n 8) Separate Opinion of Judge Ago [18]. See also Cassese (n 7) 653.

<sup>129</sup> *Nicaragua* (n 8) Separate Opinion of Judge Ago [16]. See also Crawford's First Report on State Responsibility (n 15) 40 para 200.

<sup>130</sup> See s 5.2.1.



‘apparent contradictions’ resulting from the way in which the ICJ majority addressed the notion of control.<sup>131</sup> Such deficiencies have contributed to the debate surrounding the effective control test and have led to varying interpretations of the court’s conclusions in subsequent case law and academic comment.

#### 5.4.1.2 *Tadić*

An extensive review of the *Nicaragua* judgment was conducted by both the Trial Chamber<sup>132</sup> and the Appeals Chamber<sup>133</sup> of the ICTY in the *Tadić* case. The case concerned Duško Tadić, a guard in one of the Bosnian internment camps in Bosnia Herzegovina who was involved in the massacre of numerous individuals. To determine whether he was guilty of grave breaches of the Geneva Conventions, it was necessary for the ICTY to consider whether the conflict during which the offences were committed was international in character. This was relevant to the issue of jurisdiction. If the forces that committed the atrocities were acting on behalf of the Federal Republic of Yugoslavia (FRY), Tadić could be tried under Article 2 of the ICTY Statute for breaching the Fourth Geneva Convention.<sup>134</sup> If, however, the forces were not acting on the FRY’s behalf, meaning that the conflict was non-international in character, the ICTY had no jurisdiction to consider such charges.

*Trial Chamber Judgment.* To determine the correct classification of the conflict, the ICTY Trial Chamber concluded that the applicable legal test was whether the acts of the Bosnian Serb forces, in committing the atrocities, could be attributed to the FRY. This, in turn, depended upon the level of control exercised by the FRY over the Bosnian Serb forces.<sup>135</sup>

The Trial Chamber reviewed the judgment in *Nicaragua* and concluded that the ICJ had set just one test of effective control. Thus, the Chamber considered that the court’s reference to ‘dependence on the one side and control on the other’ related directly to the threshold set for effective control, rather than setting a separate test relevant to *de facto* state organs.<sup>136</sup> Applying that threshold, the Trial

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<sup>131</sup> *Nicaragua* (n 8) Separate Opinion of Judge Ago [18] and fn 1.

<sup>132</sup> *Prosecutor v Tadić* (Trial Chamber Judgment) ICTY IT-94-1-T (1997) (*Tadić Trial Chamber*).

<sup>133</sup> *Tadić Appeals Chamber* (n 8).

<sup>134</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted by UNSC Res 827, 25 May 1993) art 2; Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV).

<sup>135</sup> *Tadić Trial Chamber* (n 132) [584].

<sup>136</sup> *ibid* [585].

Chamber concluded that the requisite level of control was not reached due to a lack of evidence that the Bosnian Serbs ‘were anything more than mere allies, albeit highly dependent allies’, of the FRY.<sup>137</sup>

Presiding Judge McDonald dissented, finding that the Bosnian Serb forces were indeed dependent upon and controlled by the FRY, meaning that the conflict was international in character.<sup>138</sup> In Judge McDonald’s view, *Nicaragua* established two distinct tests for attribution, or two bases upon which the actions of the Bosnian Serb forces could be attributed to the FRY.<sup>139</sup> She concluded that an agency relationship existed between the FRY and the Bosnian Serb forces under the more stringent test of complete dependence and control, meaning that there was no need to consider attribution under the subsidiary effective control test.<sup>140</sup>

*Appeals Chamber Judgment.* When the ICTY Appeals Chamber considered the issue, it departed both from the view of the Trial Chamber majority and that of Judge McDonald. The Appeals Chamber again looked for guidance to the ICJ’s judgment in *Nicaragua* and concluded that the same test should apply to determine both the attribution of acts to the state for the purposes of state responsibility and the classification of the conflict as international or non-international.<sup>141</sup> The Chamber rejected the submission of the Prosecution, following the dissenting judgment of Judge McDonald, that the ICJ had put forward two bases of attribution.<sup>142</sup>

Instead, the Appeals Chamber considered that the ICJ had distinguished between three categories of individuals: those with the status of officials (namely members of government administration or armed forces); those who acted in the pay and on the direct instructions and under the supervision of state personnel (the UCLAs); and those who fall into neither of the previous categories (the *contras*).<sup>143</sup> Like the Trial Chamber, the Appeals Chamber considered that the ICJ’s reference to effective control amounted to an elaboration of the dependence and control test that it had

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<sup>137</sup> *ibid* [606].

<sup>138</sup> *Tadić Trial Chamber* (n 132) Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute [34].

<sup>139</sup> *ibid* [22]-[25].

<sup>140</sup> *ibid* [34].

<sup>141</sup> *Tadić Appeals Chamber* (n 8) [99]-[104].

<sup>142</sup> *ibid* [106]-[107], [111]-[112].

<sup>143</sup> *ibid* [109].

previously articulated.<sup>144</sup> However, in a clear departure from the Trial Chamber, the Appeals Chamber rejected that test and instead put forward one of its own: overall control.

The Appeals Chamber considered the version of Article 8 adopted by the ILC drafting committee in 1998 and concluded that a high threshold of control is not required in every situation.<sup>145</sup> Instead, the degree of control might vary according to the factual circumstances of each case. Regarding the conduct of a private individual or unorganised group, the Chamber considered it necessary to show that the state issued specific instructions concerning the commission of the breach of international law.<sup>146</sup> But with regard to the acts of individuals in an organised and hierarchically structured group, a standard of ‘overall control’ is sufficient.<sup>147</sup> In this respect, after setting out the grounds on which it considered that the ICJ’s judgment in *Nicaragua* was at variance with judicial and state practice,<sup>148</sup> the Appeals Chamber stated:

in order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the state be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the state should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.<sup>149</sup>

The focus of the overall control test is therefore the overarching control by the state over the NSA, rather than the state’s control over any specific act. The Appeals Chamber went on to clarify that for this threshold to be met, the state must have ‘a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’.<sup>150</sup> There are thus two essential requirements: support to the NSA and some form of co-ordination of its actions.<sup>151</sup> If these conditions are fulfilled, then according to

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<sup>144</sup> *ibid* [112].

<sup>145</sup> *ibid* [117]-[120].

<sup>146</sup> *ibid* [120], [132].

<sup>147</sup> *ibid* [116]-[123].

<sup>148</sup> *ibid* [124]-[130].

<sup>149</sup> *ibid* [131].

<sup>150</sup> *ibid* [137].

<sup>151</sup> These dual requirements were confirmed by the ICTY in its subsequent jurisprudence. See eg *Prosecutor v Kordić and Čerkez* (Appeals Chamber Judgment) ICTY IT-95-14/2-A (2004) [361] (*Kordić Appeals Chamber*).

the ICTY, the conduct of the group may be regarded as ‘acts of *de facto* State organs’, regardless of any specific instruction given by the state regarding the commission of particular acts.<sup>152</sup>

In the Appeal Chamber’s view, therefore, both tests formulated by the ICJ in *Nicaragua* should be subsumed into one, much looser, test of overall control.<sup>153</sup> The Appeals Chamber concluded that the FRY did exercise overall control over the Bosnian Serb forces, noting that it was not necessary to show that the particular operations carried out by such forces, during which the alleged crimes were committed, were specifically ordered or planned by the FRY.<sup>154</sup> Accordingly, the conflict was international in character.

The ICTY did not make a specific finding as to the FRY’s responsibility for the Bosnian Serbs’ actions, as that issue was not within its mandate. It may, however, be inferred from the judgment that in the Appeals Chamber’s opinion, overall control is the appropriate test for the purposes of both conflict classification and state responsibility.<sup>155</sup> Therefore, given the overall control exercised by the FRY, the state should bear responsibility for all the Bosnian Serbs’ conduct.

*Reactions to Tadić.* The Appeals Chamber’s judgment in *Tadić* has been the subject of considerable academic comment: some positive,<sup>156</sup> but much of it negative.<sup>157</sup> Those who criticise the judgment point out that in formulating just one test to determine the issues of both conflict classification and attribution, the ICTY has conflated the secondary rules of state responsibility with the primary rules

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<sup>152</sup> *Tadić Appeals Chamber* (n 8) [137].

<sup>153</sup> Talmon (n 7) 506-07.

<sup>154</sup> *Tadić Appeals Chamber* (n 8) [156].

<sup>155</sup> *ibid* [103], [117]-[123].

<sup>156</sup> See eg *Bosnian Genocide* (n 5) dissenting opinion of Vice-President Al-Khasawneh; *ibid* dissenting judgment of Judge ad hoc Mahiou; Cassese (n 7); Spinedi (n 7); Luigi Condorelli and Claus Kress, ‘The Rules of Attribution: General Considerations’ in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 234-35; Scott J Shackelford and Richard B Andres, ‘State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem’ (2010) 42 *Georgia J Intl L* 971, 984-88; Kimberly N Trapp, *State Responsibility for International Terrorism* (OUP 2011) 40-45; Tom Gal, ‘Unexplored Outcomes of *Tadić*’ (2014) 12 *J Intl Crim Justice* 59, 63-64; Robert Heinsch, ‘Conflict Classification in Ukraine: The Return of the “Proxy War”?’ (2015) 91 *Intl L Studies* 323; Jorritsma (n 7); Tsagourias and Farrell (n 68) 962-65.

<sup>157</sup> See eg Theodor Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout’ (1998) 92 *American Journal of Intl Law* 235; Kaufman (n 52) 2650-52; Tyner (n 7) 852; Milanović ‘State Responsibility for Genocide’ (n 7) 583; Talmon (n 7) 506-07; Katherine Del Mar, ‘The Requirement of “Belonging” under International Humanitarian Law’ (2010) 21 *Eur J Intl L* 105; Tonkin (n 7) 118-119; Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 57-62; Djemila Carron ‘When is a Conflict International? Time for New Control Tests in IHL’ (2016) 98 *Intl Rev Red Cross* 1019, 1025-28; Kubo Mačák, *Internationalized Armed Conflicts in International Law* (OUP 2018) 43-47.

international law.<sup>158</sup> This was an unnecessary step for the Tribunal to take when classifying the conflict.<sup>159</sup> In addition, as an international criminal tribunal with a jurisdiction limited to individuals, the ICTY was not competent to tackle issues of state responsibility.<sup>160</sup>

This latter critique is implied in the commentary to Article 8 ARSIWA, which highlights that the legal issue facing the ICTY was individual criminal responsibility, not state responsibility.<sup>161</sup> However, the commentary does not directly pronounce upon the applicability or appropriateness of overall control as opposed to effective control, instead asserting that the extent of state control should be assessed on the facts of each case.<sup>162</sup> Both control standards, therefore, are arguably consistent with the wording of Article 8 and the commentary thereto.<sup>163</sup>

But the ARSIWA commentary makes no reference to the ICTY's assertion that there should be a different control test depending upon the nature of the controlled entity.<sup>164</sup> This omission indicates that in the ILC's view, the same standard of control should apply whether the NSA concerned is an individual or a non-organised group on the one hand, or an organised group on the other.<sup>165</sup> The basis for this distinction, as set out by the Appeals Chamber, is that:

an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.<sup>166</sup>

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<sup>158</sup> See eg Meron (n 157) 237; Tyner (n 7) 852; Milanović 'State Responsibility for Genocide' (n 7) 583; del Mar (n 157) 108-09; Tonkin (n 7) 118-119; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 227; Mačák, *Internationalized Armed Conflicts in International Law* (n 157) 44. For contrary views, see Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *Intl Rev Red Cross* 401, 408; Spinedi (n 7) 832-3; Jorritsma (n 7).

<sup>159</sup> *Tadić Appeals Chamber* (n 8) Separate Opinion of Judge Shahabuddeen para 17.

<sup>160</sup> Milanović, 'State responsibility for genocide' (n 7) 578; Crawford (n 7) 150; Carron (n 157) 1025-26.

<sup>161</sup> ARSIWA (n 1) art 8 commentary para 5.

<sup>162</sup> *ibid* commentary paras 4, 5. For a critique of the ILC's stance, see Tyner (n 7) 876.

<sup>163</sup> Trapp (n 156) 42; Heinsch (n 156) 348.

<sup>164</sup> ARSIWA (n 1) art 8 commentary paras 1-9.

<sup>165</sup> Kaufman (n 52) 2651; Crawford (n 7) 153-154.

<sup>166</sup> *Tadić Appeals Chamber* (n 8) [120].

As Crawford points out, however, this distinction loses its force when the ICTY's rationale is applied to an individual, such as a single terrorist.<sup>167</sup> If the actions of an organised group can be attributed to a state further to that state's exercise of overall control over the group, the same logic should apply if a state exerts an equivalent level of control over the actions of a single terrorist,<sup>168</sup> or an unorganised group of hackers acting for a state in the cyber domain.<sup>169</sup>

The Appeals Chamber has also faced criticism due to its misinterpretation of the judgment in *Nicaragua*, illustrated by its failure to distinguish between the test applicable to *de facto* state organs relevant to Article 4 ARSIWA and the test to determine attribution under the rule reflected Article 8.<sup>170</sup> The ICTY is not alone in failing to make this differentiation; notably, the ILC also conflated the two tests in its commentary to Article 8.<sup>171</sup> The distinction is important, however, due to its impact on the effects of attribution. If an entity qualifies as a *de facto* state organ, all its conduct performed in that capacity is attributable to the state.<sup>172</sup> In contrast, if a state exerts effective control over an NSA's conduct, the resulting attribution relates only to the specific acts that were performed under the state's control. The overall control test's focus on the wider relationship between an entity and a state renders this distinction nugatory, and significantly lowers the level of control necessary for a state's responsibility to be engaged. This, in turn, has given rise to further criticism, on the basis that a state's legal responsibility should arise only in relation to acts carried out that are really its own.<sup>173</sup>

Finally, the Appeals Chamber's judgment has been criticised due to its reliance on facts and precedents that do not fully support its conclusions.<sup>174</sup> Sassòli and Olson point out that most of the

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<sup>167</sup> Crawford (n 7) 153-154. See also Kress (n 24) 130-31; Kaufman (n 52) 2650-51.

<sup>168</sup> Crawford (n 7) 153-154.

<sup>169</sup> Tsagorias and Farrell (n 68) 964.

<sup>170</sup> Milanović, 'State Responsibility for Genocide' (n 7) 581; Olivier Corten, 'L'Arrêt Rendu par la CIJ dans l'Affaire du Crime de Génocide (Bosnie-Herzégovine c Serbie): vers un Assouplissement des Conditions Permettant d'Engager la Responsabilité d'un État pour Génocide?' (2007) 53 *Annuaire Français de Droit International* 249, 267; Talmon (n 7) 506-507; Akande (n 157) 59; Crawford (n 7) 152.

<sup>171</sup> See ARSIWA (n 1) art 8 commentary para 4.

<sup>172</sup> See Ch 3.

<sup>173</sup> Marko Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights L Rev* 411, 440; Akande (n 157) 60.

<sup>174</sup> Marco Sassòli and Laura M Olson, 'Prosecutor v Tadić (Judgement) Case No IT-94-a-A 38 ILM 1518 (1999)' (2000) 94 *American J Intl Law* 571, 575; Marco Sassòli, 'The Legal Qualification of the Conflict in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' in Sienho Yee and Wang Tieya (eds),

*International Law on the Post-Cold War World: Essays in Memory of Li Happei* (Routledge 2001) 327; Mačák, *Internationalized Armed Conflicts in International Law* (n 157) 43; Tatyana Jane Eatwell, 'State Responsibility for the Unlawful Conduct of Armed Groups' (*DPhil thesis, Trinity College University of Cambridge*, 2019) s 3.4

<[www.repository.cam.ac.uk/bitstream/handle/1810/302004/Eatwell%20Thesis%20May%202020%20updated%20Electronic%20Final.pdf?sequence=8&isAllowed=y](http://www.repository.cam.ac.uk/bitstream/handle/1810/302004/Eatwell%20Thesis%20May%202020%20updated%20Electronic%20Final.pdf?sequence=8&isAllowed=y)> accessed 22 June 2021.

cases on which the Chamber relies relate to a state's control over armed groups operating on its own territory, where territorial control may have been the decisive factor.<sup>175</sup> A further case relied on, the decision of the European Court of Human Rights (ECtHR) in *Loizidou v Turkey*, relates to occupied territory where the armed forces of the occupying power were present, and specific IHL rules applied regarding that power's responsibilities.<sup>176</sup> Here, the ECtHR's references to Turkey's exercise of 'effective overall control'<sup>177</sup> related not to control over persons, but to control over territory.<sup>178</sup> Moreover, the use of control tests in the human rights context is aimed primarily at determining whether persons within the relevant territory fall within the state's jurisdiction.<sup>179</sup> That is an entirely separate issue to the attribution of private conduct to the state.<sup>180</sup>

So far as international courts and tribunals are concerned, the ICTY continued to apply the overall control test in its subsequent cases.<sup>181</sup> The International Criminal Court (ICC) additionally followed the *Tadić* approach, but without explaining whether its use of the test was grounded in the secondary law of state responsibility or the primary rules of IHL.<sup>182</sup> In all such jurisprudence, the ICTY and the ICC adopted the overall control test for the purpose only of determining conflict classification. The appropriate threshold of control was then considered again by the ICJ, in the context of state responsibility, in the *Armed Activities* case.<sup>183</sup>

#### 5.4.1.3 *Armed Activities*

One of the issues to be determined by the ICJ in *Armed Activities* was the nature of the support provided by Uganda to a rebel group opposing the DRC's government. The DRC alleged that Uganda was closely involved in the recruitment, training and supplying of the Congo Liberation

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<sup>175</sup> Sassòli and Olson (n 174) 575. But see also *Tadić Appeals Chamber* (n 8) [138].

<sup>176</sup> Sassòli and Olson (n 174) 327. See also ECtHR *Loizidou v Turkey* (Merits) (18 December 1996) App No 15318/89 [56]-[57].

<sup>177</sup> *Loizidou* (n 176) [49], [56].

<sup>178</sup> Corten (n 170) 268; Milanović, 'From Compromise to Principle' (n 173) 444-5; Eatwell (n 174) s 3.4.2.

<sup>179</sup> Milanović, 'From Compromise to Principle' (n 173) 441, 447. See also Miles Jackson, *Complicity in International Law* (OUP 2015) 195.

<sup>180</sup> Milanović 'From Compromise to Principle' (n 173) 446; de Frouville (n 7) 269. See also Ch 6 s 6.5.

<sup>181</sup> See eg *Prosecutor v Aleksovski* (Appeals Chamber Judgment) ICTY IT-95-14/I-A (2000); *Prosecutor v Blaškić* (Trial Chamber Judgment) ICTY IT-95-14/T (2000); *Kordić Appeals Chamber* (n 151); *Prosecutor v Delalić et al* (Appeals Chamber Judgment) ICTY IT-96-21-A (2001).

<sup>182</sup> *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) (14 March 2012) ICC-01/04-01/06-2842 [541]. See also Marko Milanović, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 Intl L Studies 295, 320-21.

<sup>183</sup> *Armed Activities on the Territory of the Congo (The Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ 168 (*Armed Activities*).

Movement, or MLC, and its military wing.<sup>184</sup> In addition, it contended that Ugandan troops acted in close cooperation with MLC fighters in battles against the Congolese army and provided them with tactical support, including artillery cover.<sup>185</sup> Uganda, for its part, admitted providing political and military assistance to the MLC but denied any role in the formation of the group and asserted that such assistance was limited to the requirements of self-defence.<sup>186</sup>

The ICJ concluded that there was no credible evidence that Uganda created the MLC, or that Uganda controlled or could control the manner in which the assistance it provided was put to use.<sup>187</sup> Furthermore, the ICJ further found that there was no probative evidence upon which to conclude that the MLC acted on the instructions or under the direction or control of Uganda.<sup>188</sup>

In reaching this conclusion, the ICJ did not mention effective control or discuss the relevant attribution threshold. The Court referred to its earlier judgment in *Nicaragua* but made no reference to the ICTY Appeal Chamber's judgment in *Tadić*.<sup>189</sup> In so doing, the ICJ implicitly rejected the ICTY's approach, but did not do so explicitly until two years later in its judgment in the *Bosnian Genocide* case.<sup>190</sup>

#### 5.4.1.4 *Bosnian Genocide*

In *Bosnian Genocide*, the Court considered the issue of state responsibility in relation to the massacres at Srebrenica.<sup>191</sup> The ICJ first assessed whether the Bosnian Serb forces of the Republika Srpska were acting as *de jure* or *de facto* organs of the FRY.<sup>192</sup> Having reached a negative conclusion,<sup>193</sup> the Court went on to consider whether the massacres had been committed by persons acting on the FRY's instructions, or under its direction or control. Referring to Article 8 ARSIWA and to its earlier judgment in *Nicaragua*, the court emphasised that it had previously put forward two separate tests for attribution and highlighted the differences between them.<sup>194</sup> With regard to effective control, the ICJ

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<sup>184</sup> *ibid* [32].

<sup>185</sup> *ibid* [32].

<sup>186</sup> *ibid* [41].

<sup>187</sup> *ibid* [160].

<sup>188</sup> *ibid*.

<sup>189</sup> For a critique of this omission see *Armed Activities* (n 183) Separate Opinion of Judge Kooijmans [25].

<sup>190</sup> *Bosnian Genocide* (n 5).

<sup>191</sup> For further discussion regarding the background to the case see Ch 3 ss 3.2, 3.3.1.

<sup>192</sup> *ibid*.

<sup>193</sup> *Bosnian Genocide* (n 5) [394].

<sup>194</sup> *ibid* [396]-[400].



asserted that this must be exercised, ‘in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations’.<sup>195</sup>

The ICJ then addressed the judgment of the ICTY Appeals Chamber in *Tadić*. Conceding that the test of overall control may be applicable and suitable to determine the issue of conflict characterisation, the court stressed the ICTY’s lack of jurisdiction to rule on questions of state responsibility and described the test as ‘unpersuasive’ in that context.<sup>196</sup> In the ICJ’s view, there is no requirement for the same test to be adopted to determine these very different issues<sup>197</sup> and the concept of overall control is far too broad to determine attribution for the purposes of state responsibility. This ‘stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility’.<sup>198</sup>

Having reaffirmed the effective control test, the ICJ applied it to the Bosnian Serbs’ conduct relating to the genocide in Srebrenica. The Court found that the FRY was ‘making its considerable military and financial support available to the Republika Srpska’<sup>199</sup> and that had the FRY withdrawn its support, ‘this would have greatly constrained the options that were available to the Republika Srpska authorities’.<sup>200</sup> However, despite the FRY’s ‘undeniable influence’ over the Bosnian Serbs,<sup>201</sup> the genocide was not attributable to the FRY. According to the ICJ, insufficient proof was provided that ‘instructions were issued’ by the FRY regarding the commission of the massacre.<sup>202</sup> Instead, the evidence indicated that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by members of the Bosnian Serb forces, ‘without instructions from or effective control by the FRY’.<sup>203</sup>

Judge Al-Khasawneh dissented, describing the majority’s conclusions on the issue of control as ‘unconvincing’.<sup>204</sup> He considered there to be ‘massive and compelling evidence’ of the FRY’s

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<sup>195</sup> *ibid* [400].

<sup>196</sup> *ibid* [403]-[404]. For contrary views, see Pierre-Marie Dupuy, ‘A Crime without Punishment’ (2016) 14 *J Intl Crim Justice* 879, 889; Jorritsma (n 7).

<sup>197</sup> *Bosnian Genocide* (n 5) [405].

<sup>198</sup> *ibid* [406].

<sup>199</sup> *ibid* [241]. Regarding the support provided, see Ch 3 s 3.3.1.

<sup>200</sup> *Bosnian Genocide* (n 5) [241].

<sup>201</sup> *ibid* [438].

<sup>202</sup> *ibid* [413].

<sup>203</sup> *ibid* [413].

<sup>204</sup> *Bosnian Genocide* (n 5) dissenting opinion of Vice-President Al-Khasawneh [39].

involvement in the genocide,<sup>205</sup> opining that the court could have found the FRY responsible had it followed a different methodology.<sup>206</sup> Regarding the requisite level of control, Judge Al-Khasawneh asserted that this is varying in nature: ‘different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution’.<sup>207</sup> He referred to the factual background to the *Nicaragua* judgment, highlighting the shared objectives of the United States and the *contras* to overthrow the Nicaraguan government, but noting that these could have been achieved without the commission of IHL violations. He contrasted that situation with one in which the shared objective is the commission of international crimes, declaring that:

to require both control over the non-state actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.<sup>208</sup>

Judge Mahiou dissented on similar grounds, concluding that in view of the close links between the respective forces of the FRY and the Bosnian Serbs, ‘instructions and directions were in a way practically automatic as regards both the planning and implementation of the military operations carried out by the [Bosnian Serbs]’.<sup>209</sup> Judge Mahiou distinguished the facts of the *Nicaragua* case from those at issue in *Bosnian Genocide* on the basis that in the latter, ‘there was a perfect similarity of views between the Respondent and the Republika Srpska on the Greater Serbia project bringing together all the Serbs under the authority of the two entities’.<sup>210</sup> In such cases, in Judge Mahiou’s view, there is no requirement to prove precise state control over each operation; instead the looser standard of overall control should suffice.<sup>211</sup>

The objections raised by Judges Al-Khasawneh and Mahiou are echoed and expanded upon by certain commentators.<sup>212</sup> Antonio Cassese, one of the ICTY Appeals Chamber judges in *Tadić*, points to the lack of reasoned argument on the part of the ICJ to support its rejection of the overall

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<sup>205</sup> *ibid* [3].

<sup>206</sup> *ibid* [34].

<sup>207</sup> *ibid* [39].

<sup>208</sup> *ibid*.

<sup>209</sup> *Bosnian Genocide* (n 5) dissenting opinion of Judge ad hoc Mahiou [112].

<sup>210</sup> *ibid* [117].

<sup>211</sup> *ibid*.

<sup>212</sup> See eg Cassese (n 7); Spinedi (n 7); Mark Gibney, ‘Genocide and State Responsibility’ (2007) 7 Human Rights Law Review 760; Jörn Griebel and Milan Plücker, ‘New Developments Regarding the Rules of Attribution? The International Court of Justice’s Decision in *Bosnia v Serbia*’ (2008) 21 Leiden Journal of Intl L 601.

control test.<sup>213</sup> Whereas the ICTY carried out a detailed review of previous authorities to support its argument, the ICJ looked only to its previous judgment in *Nicaragua*, together with the work of the ILC. Moreover, in Cassese's view, the test formulated by the ICJ is inconsistent with the basic principles of state responsibility, according to which a state cannot evade responsibility towards other states by acting through NSAs.<sup>214</sup> Some commentators additionally condemn the court's failure to consider degrees of state involvement in a wrongful act, by setting an 'either or' test under which a state is either fully responsible, or it is not responsible at all.<sup>215</sup>

Other scholars, in contrast, welcomed the ICJ's judgment.<sup>216</sup> In Crawford's words, the determination in the *Bosnian Genocide* case 'effectively ends the debate as to the correct standard of control to be applied under Article 8. Moreover it does so in a manner that reflects the ILC's thinking on the subject from the time the term "control" was introduced into then-Draft Article 8'.<sup>217</sup>

#### **5.4.2 ICRC commentary to common Article 2**

Whilst the debate, in Crawford's view, may be at an end, the ICRC advocated a different stance in its revised commentaries to the Geneva Conventions.<sup>218</sup> In its commentary to common Article 2, relating to the application of the Conventions, the ICRC considered the circumstances in which state control over an NSA internationalises a conflict. In the absence of a specific test within IHL to determine whether an armed group 'belongs' to a supporting state, the ICRC echoed the approach taken by the ICTY in *Tadić*.<sup>219</sup>

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<sup>213</sup> Cassese (n 7) 651, 653.

<sup>214</sup> *ibid* 654.

<sup>215</sup> See eg Gibney (n 212) 771; Oona A Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 *Texas L Rev* 539, 545.

<sup>216</sup> Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *Eur J Intl L* 669; Akande (n 157) 59-60; Crawford (n 7) 156.

<sup>217</sup> Crawford (n 7) 156.

<sup>218</sup> 2016 commentary to GC1 (n 9) art 2; ICRC, *Commentary on the Second Geneva Convention* (CUP 2017) art 2 (2017 commentary to GCII); ICRC, *Commentary on the Third Geneva Convention* (CUP 2020) art 2 (2020 commentary to GCIII).

<sup>219</sup> 2016 commentary to GC1 (n 9) para 267; 2017 commentary to GCII (n 218) para 289; 2020 commentary to GCIII (n 218) para 300. For comment in relation to the ICRC's approach, see Milanović, 'Special Rules of Attribution of Conduct in International Law' (n 182) 321-23.

The ICRC referred to the law of state responsibility and the debate surrounding the requisite level of control, as well as the relevant judgments of the ICJ, ICTY, and ICC.<sup>220</sup> In the ICRC's view, overall control is the appropriate test:

because the notion of overall control better reflects the real relationship between the armed group and the third State, including for the purpose of attribution. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency. Additionally, recourse to the overall control test enables the assessment of the level of control over the *de facto* entity or non-State armed group as a whole, and thus allows for the attribution of several actions to the third State.<sup>221</sup>

Thus, for the ICRC, the test used to identify the relationship between a group of individuals and a state should be the same for the purposes both of conflict classification and attribution under the law of state responsibility.<sup>222</sup> This approach diverges from that of the ILC<sup>223</sup> and also the jurisprudence of the ICJ, according to which 'logic does not require the same test to be adopted in resolving the two issues, which are very different in nature'.<sup>224</sup> Indeed, it is unsurprising that different tests have arisen, given that the issue of conflict classification is governed by the primary rules of international law, whereas the rules of state responsibility are secondary in nature.<sup>225</sup>

In asserting that the two tests should be identical, the ICRC's focus is not on the origin of the relevant rules but rather their purpose. The ICRC argues that the question of attribution plays a significant role in defining an armed conflict as international since, by virtue of such attribution, the actions of the armed group can be considered as those of the intervening state.<sup>226</sup> This view is supported by other commentators, who note that the issue of conflict classification turns upon whether or not an armed conflict exists between states, 'which cannot mean anything other than that

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<sup>220</sup> 2016 commentary to GC1 (n 9) paras 269-70; 2017 commentary to GCII (n 218) paras 291-92; 2020 commentary to GCIII (n 218) paras 303-04.

<sup>221</sup> 2016 commentary to GC1 (n 9) para 271; 2017 commentary to GCII (n 218) para 293; 2020 commentary to GCIII (n 218) para 304.

<sup>222</sup> *ibid.*

<sup>223</sup> ARSIWA (n 1) art 8 commentary para 5.

<sup>224</sup> *Bosnian Genocide* (n 5) [405].

<sup>225</sup> Milanović, 'State Responsibility for Genocide' (n 7) 587.

<sup>226</sup> 2016 commentary to GC1 (n 9) para 268; 2017 commentary to GCII (n 218) para 290; 2020 commentary to GCIII (n 218) para 301. See also Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict' (2015) 97 *Intl Rev Red Cross* 1227, 1235-36.

the armed forces involved form part of the “formal” or “effective” organization of the States which are party to the conflict’.<sup>227</sup> In other words, both tests are applied to achieve the same end result, namely to impute the acts of an NSA to the state, albeit in different factual contexts.<sup>228</sup>

If the overall control test applies for the purposes of conflict classification while the stricter test of effective control determines the issue of attribution, the ICRC commentary highlights a potential gap in accountability.<sup>229</sup> This means that the state could become a party to the conflict, with the full panoply of rights and obligations under IHL coming into play, without also bearing responsibility for any IHL violations committed by the NSA it supports.<sup>230</sup> The only recourse in such a situation would be against the NSA itself on the basis of its members’ individual criminal responsibility or against the state for its failure to comply with its positive duties to respect and ensure respect for IHL.<sup>231</sup>

There is thus a good deal of logic to the ICRC’s reasoning. It makes little practical sense for a more lenient test to apply for the purposes of conflict classification than for the attribution of an NSA’s conduct to the state. But the converse is not true; if a stricter test applied for the purpose of conflict classification, all acts governed by the law of international armed conflict would then be attributable to a state.<sup>232</sup> That the ICRC did not suggest a more stringent test is unsurprising. The whole tone of its commentary relating to common Article 2 is aimed at expanding, rather than limiting, the circumstances in which the full range of rights and obligations under IHL come into effect.

In sum, the ICRC’s approach suffers from the same flaws as those highlighted in the context of the appeals judgment in *Tadić*.<sup>233</sup> For the purposes of determining a state’s responsibility, the test of

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<sup>227</sup> Condorelli and Kress (n 156) 234. See also Spinedi (n 7) 832-3; Jorritsma (n 7) 419-21.

<sup>228</sup> Manuel J Ventura, ‘Two Controversies in the Lubanga Trial Judgment of the ICC: The Nature of Co-Perpetration’s Common Plan and the Classification of the Armed Conflict’ in Stuart Casey-Maslen (ed), *The War Report 2012* (OUP 2013). But see also Carron (n 157) 1026-28.

<sup>229</sup> 2016 commentary to GC1 (n 9) para 273; 2017 commentary to GCII (n 218) para 295; 2020 commentary to GCIII (n 218) para 306.

<sup>230</sup> Spinedi (n 7) 836; Gal (n 156) 63.

<sup>231</sup> See Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 art 1; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 art 1; Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 21 August 1949, entered into force 21 October 1950) 75 UNTS 135 art 1; GCIV (n 134) art 1. See also Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 art 1(1). For further analysis regarding common art 1 see Ch 6 s 6.6.

<sup>232</sup> See Carron (n 157) 1028-37; Jorritsma (n 7) 425-26.

<sup>233</sup> See s 5.4.1.2.

overall control is not supported by the jurisprudence of the ICJ, the work of the ILC, or by many legal commentators.<sup>234</sup> For the time being, therefore, the effective control test remains *lex lata*. But the practical meaning of this threshold and its implications for those states that choose to act via NSAs nevertheless remains unclear.

### 5.4.3 *The meaning of control*

The overall and effective control tests differ not in their nature but rather in the extent of control that is required for private conduct to be attributed to a state. Both tests require evidence of an ongoing, agency-type relationship between the entity and the state that extends beyond mere state financing or the provision of equipment or training.<sup>235</sup> Before examining the precise meaning of effective control, it is first pertinent to consider in more detail the requirements of the overall control test, in order to better assess the practical differences between the respective thresholds.

#### 5.4.3.1 *Overall control*

The ICTY's test is satisfied if a state 'wields overall control' over a hierarchically organised group not only by equipping and financing the group but also by coordinating or assisting in the planning of its military activity.<sup>236</sup> The assessment of these two factors is made in respect of the entire relationship between the entity and the state, rather than focusing on the specific operations in which the relevant violations occurred. Importantly, there is no requirement for the state to plan or direct the particular private conduct that violates its international legal obligations; it is sufficient if those acts form part of broader activity on the part of the NSA over which the state exerts control.<sup>237</sup> The threshold might therefore be met if an NSA is not strictly subordinated to the state's

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<sup>234</sup> Tribunals dealing with investment treaty arbitration have also applied the effective control test to determine the issue of attribution. See eg *White Industries Australia Limited v The Republic of India* (Final Award) (30 November 2011) [8.1.1]-[8.1.21] <[www.italaw.com/sites/default/files/case-documents/ita0906.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf)> accessed 16 October 2021; *Teinver SA Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic* (21 July 2017) ICSID Case No ARB/09/1 [721]-[724] <[www.italaw.com/sites/default/files/case-documents/italaw9235.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw9235.pdf)> accessed 16 October 2021; *Georg Gavrilović and Gavrilović DOO v Republic of Croatia* (26 July 2018) ICSID Case No ARB/12/39 [828]-[831] <<https://www.italaw.com/sites/default/files/case-documents/italaw9887.pdf>> accessed 16 October 2021. See also Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 ICSID Rev 457, 473.

<sup>235</sup> Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Publishing 2006) 70-1.

<sup>236</sup> *Tadić Appeals Chamber* (n 8) [131], [137].

<sup>237</sup> Kress (n 24) 127-28; Ferraro (n 226) 1237; Renz (n 54) 142.

authority but, instead, has ‘autonomous choices of means or tactics’ in the conduct of its operations.<sup>238</sup>

In practice, the ICTY has considered a broader range of circumstances when assessing a state’s potential exercise of overall control than the two key criteria articulated in *Tadić*. These include the transfer of officials from the state’s armed forces to the NSA,<sup>239</sup> the sharing of forces,<sup>240</sup> the payment of fighters’ wages by the state,<sup>241</sup> and shared military objectives and strategies between the entity and the state.<sup>242</sup>

Some of these factors are evident in Moscow’s relationship with the rebels operating in eastern Ukraine.<sup>243</sup> Russia’s potential exercise of overall control in this context has been considered by the ICC in its preliminary examination of the Ukraine conflict.<sup>244</sup> Having classified the conflict as international due to Russia’s direct involvement in the hostilities, the ICC has, to date, stopped short of determining whether the parallel NIAC between Ukraine and the rebels was internationalised through Russia’s exercise of overall control.<sup>245</sup> This issue has, however, been addressed by legal commentators. While some determined that there was insufficient information to reach a definitive view,<sup>246</sup> others asserted that Russia’s relationship with the rebels did amount to overall control.<sup>247</sup>

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<sup>238</sup> *Delalić Appeals Chamber* (n 181) [47]. See also *Aleksovski Appeals Chamber* (n 181) [143]; Kress (n 24) 128-31, 138; Gal (n 156) 66-67.

<sup>239</sup> *Tadić Appeals Chamber* (n 8) [150]; *Kordić Appeals Chamber* (n 151) [362]-[369].

<sup>240</sup> *Blaškić Trial Chamber* (n 181) [114].

<sup>241</sup> *Tadić Appeals Chamber* (n 8) [150]; *Kordić Appeals Chamber* (n 151) [366].

<sup>242</sup> *Tadić Appeals Chamber* (n 8) [151]; *Blaškić Trial Chamber* (n 181) [108]. See also Sivakumaran (n 158) 227.

<sup>243</sup> See Ch 2 s 2.2.

<sup>244</sup> ICC, ‘Report on Preliminary Examination Activities 2016’ (*Office of the Prosecutor*, 14 November 2016) 37-38 paras 168-170 <[www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](http://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf)> accessed 12 April 2018; ICC, ‘Report on Preliminary Examination Activities 2017’ (*Office of the Prosecutor*, 4 December 2017) 22 para 95 <[www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](http://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf)> accessed 12 April 2018 (ICC 2017 Report); ICC, ‘Report on Preliminary Examination Activities 2018’ (*Office of the Prosecutor*, 5 December 2018) 21-22 paras 72-73 <[www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf](http://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf)> accessed 8 February 2021; ICC, ‘Report on Preliminary Examination Activities 2019’ (*Office of the Prosecutor*, 5 December 2019) 70 para 277 <[www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf](http://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf)> accessed 21 October 2020; ICC, ‘Report on Preliminary Examination Activities 2020’ (*Office of the Prosecutor*, 14 December 2020) 68-72 <[www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf](http://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf)> accessed 8 February 2021.

<sup>245</sup> *ibid.*

<sup>246</sup> See eg Noelle Quenivet, ‘Trying to Classify the Conflict in Eastern Ukraine’ (*IntLawGrrls*, 28 August 2014) <<https://ilg2.org/2014/08/28/trying-to-classify-the-conflict-in-eastern-ukraine/>> accessed 9 February 2021; Shane R Reeves and David Wallace, ‘The Combatant Status of the “Little Green Men” and Other Participants in the Ukraine Conflict’ (2015) 91 *Intl L Studies* 361, 382; Rule of Law in Armed Conflicts, ‘International Armed Conflict in Ukraine’ (*Geneva Academy*, 23 November 2020) <[www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine](http://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine)> accessed 4 April 2021.

<sup>247</sup> See eg Heinsch (n 156) 360; Patycja Grzebyk, ‘Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)’ (2015) 34 *Polish YB Intl L* 39, 56. For analysis of the overall control

Reporting on the conflict since August 2014 certainly points towards the latter conclusion. In particular, the integration of the rebel movement into the Russian military structure, the presence of Russian officers in command roles, the appointment of political leaders loyal to Moscow, together with the harsh measures taken against those commanders who refused to toe the line, all indicate an elevated degree of state control.<sup>248</sup> In addition, the location of the Donbas next to the Russian border, together with the shared military objectives between Russia and the NSAs, suggest an enhanced ability on Russia's part to produce effects outside its own territory.<sup>249</sup> Importantly, the two essential requirements highlighted by the ICTY Appeals Chamber in the *Tadić* case appear to be met.<sup>250</sup> Moscow provided considerable financial and other support to the rebels, and it played a significant role in coordinating and planning the groups' military activities.<sup>251</sup> The available evidence therefore indicates that the NIAC between Ukraine and the rebels was internationalised through Russia's exercise of overall control.

If that is correct, it is pertinent to consider the impact this would have from a state responsibility perspective, if the overall control test applied to determine issues of attribution as well as conflict classification. First, it is important to recall the ICTY's distinction between different categories of NSA.<sup>252</sup> As the rebels in Ukraine constitute an organised and hierarchically structured group, the overall control test assumes that they act under the state's authority, even in the absence of evidence that their acts in potential violation of international law were conducted under the state's supervision.<sup>253</sup> Therefore, Russia's exercise of overall control would mean that the state bears responsibility for all the rebels' conduct in breach of its international legal obligations, unless such behaviour is *ultra vires*.<sup>254</sup> For instance, Russia would bear international responsibility for rebel forces' mistreatment of Ukrainian service personnel,<sup>255</sup> even if it had no involvement in, influence over, or

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test in the context of the Syrian conflict, see Mohamad Ghazi Janaby, 'The Legal Status of Hezbollah in the Syrian Conflict: An International Humanitarian Perspective' (2016) 33 *Arizona J Intl and Comparative L* 383, 414-18.

<sup>248</sup> See Ch 2 s 2.2.

<sup>249</sup> *Tadić Appeals Chamber* (n 8) [138]-[140]. See also *Bosnian Genocide* (n 5) dissenting opinion of Judge ad hoc Mahiou [117].

<sup>250</sup> *Tadić Appeals Chamber* (n 8) [137].

<sup>251</sup> See Ch 2 s 2.2.

<sup>252</sup> *Tadić Appeals Chamber* (n 8) [120].

<sup>253</sup> *ibid* [121]-[122].

<sup>254</sup> ARSIWA (n 1) art 8 commentary para 8.

<sup>255</sup> See Ch 2 s 2.2.2.



knowledge of, the particular operations during which such abuses occurred. It is likely that Russia would only avoid such responsibility if the rebels acted contrary to specific state instructions.<sup>256</sup>

#### 5.4.3.2 *Effective control*

The ICJ's effective control test is more stringent in nature. This requires a hierarchical relationship between the entity and the state, enabling the latter to compel the NSA to follow a particular course of action. Such a relationship will normally arise due to the NSA's dependence on the state, which provides the state with authority and influence over the way in which the NSA behaves.<sup>257</sup> Russia, for instance, reportedly maintained control over the ceasefire agreed at Minsk by punishing or withholding military supplies from those fighters that acted in its breach.<sup>258</sup>

NSAs are not acting under a state's effective control, therefore, when they support a state of their own free will. The actions of patriotic hackers, for instance, are unlikely to be attributable to a state because the state lacks the leverage to compel them to follow a particular course of action. To be acting under a state's effective control, an NSA must know that consequences will ensue, such as the withdrawal of financial support, if it fails to act in accordance with the state's direction. While the NSA's reliance on the state need not be 'complete', as discussed in Chapter 3,<sup>259</sup> it must be sufficient to establish a potential for control that is then exercised by the state.<sup>260</sup>

An additional requirement is that the state exerts its control 'over the operations in the course of which the alleged violations were committed'.<sup>261</sup> The ICJ's wording implies that a state's broad control over an operation suffices, rather than requiring the exercise of control over the individual elements of the operation that violate the state's international legal obligations. The Tallinn Manual 2.0 thus construes effective control as including 'both the ability to cause constituent activities of the operation to occur, as well as the ability to order the cessation of those that are underway'.<sup>262</sup>

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<sup>256</sup> ARSIWA (n 1) art 8 commentary para 8. See also s 5.3.1.2.

<sup>257</sup> Talmon (n 7) 502.

<sup>258</sup> International Crisis Group, 'Russian and the Separatists in Eastern Ukraine' (*Europe and Central Asia Briefing* 79, 5 February 2016) 6, 9 <<https://d2071andvip0wj.cloudfront.net/b79-russia-and-the-separatists-in-eastern-ukraine.pdf>> accessed 27 January 2021.

<sup>259</sup> See Ch 3 s 3.3.

<sup>260</sup> Crawford's First Report on State Responsibility (n 15) 56.

<sup>261</sup> *Nicaragua* (n 8) [115].

<sup>262</sup> Tallinn Manual 2.0 (n 47) r 17 commentary para 6. See also Talmon (n 7) 503; Michael N Schmitt and Sean Watts 'Beyond State-Centrism: International Law and Non-state Actors in Cyberspace' (2016) 21 J Conflict and Security L 595, 604; Schmitt, 'Virtual Disenfranchisement' (n 58) 62.

Support for this interpretation can be found in the jurisprudence of the Iran-US Claims Tribunal<sup>263</sup> as well as in the *opinio juris* of Germany.<sup>264</sup> In the context of attribution in the cyber domain, the German government expressed the view that although a sufficient degree of control is necessary, ‘the State is not required to have detailed insight into or influence over all particulars, especially those of a technical nature, of the cyber operation’.<sup>265</sup>

On this construction of the test, it is the capacity of the state to exercise control over the individual elements of an operation that is important, rather than the state’s actual influence over the relevant violations. In June 2017, for example, the US Mission to the Organisation for Security and Cooperation in Europe (OSCE) called upon Russia to ‘direct its separatist proxies to immediately stop this behaviour that puts OSCE personnel at risk’.<sup>266</sup> This language reveals a belief that Russia had the ability, at that time, to prevent the rebels in eastern Ukraine from firing warning shots that endangered OSCE personnel. If Russia had such a capacity, further to its exercise of control over the wider operation during which the shots were fired, then on the Tallinn Manual’s reading of the effective control test, Russia bears responsibility for the rebels’ potential breach of the IHL principle of distinction.<sup>267</sup> Moreover, that is the case even if Russian officials did not exercise control over the rebels’ specific conduct in firing the shots complained of.

A close reading of the ICJ’s jurisprudence, however, raises doubts regarding this interpretation. In the *Nicaragua* case, the Court stipulated that evidence is required demonstrating that the state ‘directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the [injured] state’.<sup>268</sup> It is not clear from the judgment whether the ICJ viewed this requirement as a constituent element of effective control or a separate basis of attribution.<sup>269</sup> But if the former interpretation is correct, a mere ability by the state to control an NSA’s conduct during the operation in which a violation is committed is not, by itself, sufficient to lead to attribution.

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<sup>263</sup> *Kenneth P Yeager v The Islamic Republic of Iran* (1987) 17 Iran-US Claims Tribunal Rep 92 [45]. See also Kress (n 24) 111-12.

<sup>264</sup> Federal Government of Germany (n 5) 11.

<sup>265</sup> *ibid.*

<sup>266</sup> US Mission to the OSCE, ‘Ongoing Violations of International Law and Defiance of OSCE Principles by Russia in Ukraine’ (*Delivered by Chargé d’Affaires Kate M Byrnes to the Permanent Council*, 8 June 2017) <<https://osce.usmission.gov/ongoing-violations-international-law-defiance-osce-principles-russia-ukraine-3/>> accessed 27 January 2021.

<sup>267</sup> See ICRC Customary IHL Study (n 5) r 1.

<sup>268</sup> *Nicaragua* (n 8) [115].

<sup>269</sup> Kress (n 24) 105.

Some clarity on this issue can be gained from Special Rapporteur Crawford's first report on state responsibility. In Crawford's view, 'it is only if the State directed and controlled the specific operation and the conduct complained of was a necessary, integral or intended part of that operation, that the conduct should be attributable to the State'.<sup>270</sup> He added, 'The principle should not extend to conduct which was only incidentally or peripherally associated with an operation, or which escaped from the State's direction and control'.<sup>271</sup> Therefore, provided the state controlled the operation in which the relevant conduct took place, there is no requirement that the state's influence extended to the particular act at issue, for example by giving orders regarding its commission. It is necessary only that the relevant conduct formed an integral part of the operation conducted under the state's control.

The ILC Drafting Committee, however, adopted a more stringent approach.<sup>272</sup> While the commentary to Article 8 initially replicates Crawford's language,<sup>273</sup> it later declares that the state's control 'must relate to the conduct which is said to have amounted to an internationally wrongful act'.<sup>274</sup> This latter wording indicates the ILC's intent that attribution should arise only if the state controls the particular acts that potentially violate international law.<sup>275</sup> Certain arbitral tribunals<sup>276</sup> and legal scholars<sup>277</sup> also interpret the ICJ's judgment in this way. Cassese, for instance, concluded that the ICJ intended effective control to mean either the ordering of such actions by the state or 'forcefully making the rebels carry out those specific operations'.<sup>278</sup> Or as Hessbruegge observed, the state's responsibility is engaged only if it 'micromanages the conduct of the individual agents'.<sup>279</sup>

This strict interpretation of the test is further supported by the ICJ's judgment in *Bosnian Genocide*.<sup>280</sup> Here, the Court rejected the Applicant's contention that the state's exercise of effective control

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<sup>270</sup> Crawford's First Report on State Responsibility (n 15) 43 para 213.

<sup>271</sup> *ibid.*

<sup>272</sup> ILC YB 1998 vol I (n 23) 289 para 79.

<sup>273</sup> ARSIWA (n 1) art 8 commentary para 3.

<sup>274</sup> *ibid* commentary para 7.

<sup>275</sup> See ILC YB 1998 vol I (n 23) 289 para 79.

<sup>276</sup> See eg *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (2008) ICSID Case No ARB/04/13 [173] <[www.italaw.com/sites/default/files/case-documents/ita0440.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0440.pdf)> accessed 24 October 2021; *Gavrilović* (n 234) [829]; *Marfin Investment Group Holdings SA, Alexandros Bakatselos and Others v Republic of Cyprus* (2018) ICSID Case No ARB/13/27 [679] <[www.italaw.com/sites/default/files/case-documents/italaw10149.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw10149.pdf)> accessed 24 October 2021.

<sup>277</sup> See eg Kaufman (n 52) 2619; Eatwell (n 174) s 2.3; Tsagourias and Farrell (n 68) 954.

<sup>278</sup> Cassese (n 7) 653. See also *Tadić Appeals Chamber* (n 8) [114].

<sup>279</sup> Jan Arno Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *New York U J Intl L Politics* 265, 273. See also Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Human Rights L Rev* 21, 53-55.

<sup>280</sup> *Bosnian Genocide* (n 5) [401].

should be assessed ‘in relation to the whole body of operations carried out by the direct perpetrators of the genocide’, confirming instead that when a breach consists of a number of separate acts, the state must exercise control over all constituent elements of the violation.<sup>281</sup> In the ICJ’s view, the state must have ‘been the cause of the commission of acts in breach of its international obligations’.<sup>282</sup>

In military parlance, this detailed level of oversight bears a greater resemblance to tactical, than operational, control.<sup>283</sup> Therefore, for the ICJ and the ILC, conduct is attributable to a state only if its officials exert tactical control over the specific acts at issue at the time of their commission. In practice, this seems to mean that state officials must be aware of, and actively enforce or condone, the NSA’s acts in potential violation of international law.<sup>284</sup>

To illustrate, consider the attacks on Bunagana and surrounding towns conducted by M23 fighters in July 2012, during which a UN peacekeeper was killed.<sup>285</sup> If members of the Rwandan armed forces exerted tactical control over the M23 fighters throughout those attacks, the NSAs’ conduct, including their potentially unlawful use of force against the UN peacekeeper, is attributable to the state.<sup>286</sup> But if Rwandan armed forces’ involvement was limited to a broader level of oversight over the fighters’ use of force, or they did not exert tactical control over the particular attack during which the peacekeeper was killed, the effective control threshold may not be met. That is the case even if Rwandan officers played a significant role in the planning of the operation, they knew that the rebels might act in a manner that violated IHL, and they had the authority to intervene and stop such violations but failed to do so.

On this interpretation, therefore, the effective control test resembles the ILC’s original conception of attribution, which required the state to instigate the acts in potential violation of international law.<sup>287</sup> But the ARSIWA commentary appears to allow a small degree of flexibility in this respect.

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<sup>281</sup> *ibid* [401]. See also Talmon (n 7) 503.

<sup>282</sup> *Bosnian Genocide* (n 5) [397].

<sup>283</sup> Military doctrine distinguishes three levels of command and control, which range from the general to the specific: strategic, operational, and tactical. NATO defines tactical control as ‘the detailed and, usually, local direction and control of movements or manoeuvres necessary to accomplish missions or tasks assigned...’ See NATO, ‘Allied Joint Doctrine for the Conduct of Operations’ (n 77) 1.39–1.41.

<sup>284</sup> Kress (n 24) 141.

<sup>285</sup> Group of Experts’ Final Report (n 105) 10.

<sup>286</sup> Depending on the circumstances, the killing of the peacekeeper may have violated the IHL principle of distinction. See ICRC Customary IHL Study (n 5) r 1.

<sup>287</sup> ILC YB 1974 vol II (n 10) 284-5 (commentary to draft art 8 para 8). See also s 5.2.1.

When an NSA acts under a state's effective control, 'the condition for attribution will still be met even if particular instructions may have been ignored'.<sup>288</sup> Moreover, the ICJ acknowledged that attribution may be appropriate if the relevant conduct is committed only 'in part' under the state's effective control.<sup>289</sup> Thus, if a state exerts tactical control over an operation, the NSA's actions during that operation may still be attributable to the state if members of the NSA fail to comply with certain commands, or if the state's officials do not control every aspect of the NSA's conduct. It seems that this would only be the case, however, if the instruction that is ignored, or the aspect of the NSA's behaviour that falls outside the state's control, is peripheral to the violation or relates to a relatively insignificant aspect of the relevant conduct.

Imagine, for instance, that state officials exercise tactical control over a militia's operation against fighters located in a village and during that operation, the NSA targets civilians. If members of the militia ignore certain subsidiary commands, such as regarding the timing of the attack or the equipment they should use, the NSA's conduct in violation of IHL is attributable to the state. In this scenario, the relevant acts are still conducted under the state's control and, presumably, endorsed by state officials. But if the militia contravenes a more significant direction, for example that it should target only fighters, the NSA's action in doing so is likely to be considered *ultra vires* and not attributable to the state.<sup>290</sup>

In these examples, the effective control test would most likely be satisfied if the state's officials are physically present with the NSA and act in a command role at the time of the attacks. That does not mean, however, that physical presence is a prerequisite of effective control. With the advent of new technologies, it is possible that state organs might maintain regular contact with an NSA's fighters and thereby exert control over their behaviour from afar. If, by using communications or surveillance equipment, a state effectively controls an NSA's conduct, that conduct should be attributable to the state irrespective of manner by which the state exerts its control or the precise location of its personnel at the relevant time.<sup>291</sup>

The potential for a state to control an operation from afar raises questions regarding the nature of that control. If the state's organs are remotely located, the only way in which they can effectively

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<sup>288</sup> ARSIWA (n 1) art 8 commentary para 8.

<sup>289</sup> *Bosnian Genocide* (n 5) [401].

<sup>290</sup> Kress (n 24) 136.

<sup>291</sup> Renz (n 54) 145.

influence the NSA's behaviour might be by issuing verbal or written commands. More nuanced methods of guidance may, however, be available if state officials are co-located with the NSA. For example, they might demonstrate or gesture the way in which they intend the NSA to behave, or exact punishment on an individual who does not follow an agreed course of action.

Effective control may thus be exercised by way of continuing state guidance, supervision, or oversight over an NSA's activities. But because this assessment relates to the specific operation in which the potential violations occur, it cannot be assumed that just because the state exerts control over one operation, it also exercises the same degree of control over another. Instead, the state's exercise of control is a question of fact, to be assessed on a case-by-case basis. A more general assessment may be possible, however, in some circumstances. For example, if a state exercises a detailed level of control over all the operations conducted by a PMSC by virtue of its contractual relationship with the entity, it might be possible to conclude that the state's effective control extends to all the NSA's operations.<sup>292</sup>

#### *5.4.3.3 Distinguishing between instructions and effective control*

It is apparent from the preceding analysis that effective control necessarily involves some form of guidance or instruction by the state to the NSA regarding how the NSA should act. The ICJ's judgment in the *Bosnian Genocide* case supports this conclusion,<sup>293</sup> as does the ARSIWA commentary.<sup>294</sup> But that does not mean that the attribution standards based upon state instructions and effective control are the same. A distinction remains between the two rules of attribution that manifests most clearly in temporal terms. While effective control necessitates the state's influence over the NSA's execution of the acts in potential violation of international law, a state's instructions to commit a particular act might be issued at a much earlier point in time. An NSA acting on a state's

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<sup>292</sup> Michael N Schmitt and Liis Vihul, 'Proxy Wars in Cyberspace: The Evolving International Law of Attribution' (2014) *Fletcher Security Rev* 54, 63; American Bar Association's Center for Human Rights & Rule of Law Initiative, 'The Legal Framework Regulating Proxy Warfare' (December 2019) 16 <[www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-proxy-warfare-report-2019.pdf](http://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf)> accessed 23 December 2020. Note that the PMSC's conduct might alternatively be attributable to the state based on the rule reflected in art 5. See ARSIWA (n 1) art 5; Ch 5.

<sup>293</sup> *Bosnian Genocide* (n 5) [413]. See also Hathaway and others (n 215) 552 fn 46.

<sup>294</sup> ARSIWA (n 1) art 8 commentary para 8. See also Cassese (n 7) 663; Kaufman (n 52) 2642-45.

instructions therefore has greater freedom of choice regarding the means and methods it chooses to adopt in performing the operation concerned.<sup>295</sup>

The duration of the state's relationship with the NSA may also differ. Thus, instructions might be issued on a one-off basis, with no continuing relationship between the parties. Effective control, however, endures over a longer period in the form of a subordinate relationship between the entity and the state.<sup>296</sup> That relationship must entail at least some degree of dependence by the NSA on the state, which enables the state to control the NSA's activities. In contrast, attribution based on state instructions may arise without such dependence; all that is required is some form of authority on the part of the state at the time the instructions are issued, leading the entity to act upon those commands.<sup>297</sup>

A further difference between the two grounds of attribution relates to the specificity of the directives issued. As discussed in Section 5.3, ambiguous instructions may lead to attribution if the entity's subsequent acts in potential violation of international law fall within their scope. In contrast, because effective control arises during a continuing relationship between the entity and the state, it may be that numerous commands, orders, or looser guidance or instructions are issued by the state during that relationship. These, taken together, may suffice for a conclusion to be reached that the state exercises effective control over the entity at the relevant time. It is not necessary for any individual command, considered independently, to define the acts that the state expects the entity to perform.

#### ***5.4.4 The exercise of effective control in contemporary conflict***

A review of the relationships arising between states and NSAs in contemporary conflict highlights the stringency of the effective control test. For a state's responsibility to be engaged on this basis, evidence is required that the state exerted tactical control over the NSA's conduct in violation of international law. Regarding Rwanda's support to the rebel group M23, for example, factors that might point towards an exercise of effective control include the harmonisation of communications equipment between the state and the rebels and the presence of Rwandan commanders during

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<sup>295</sup> Eatwell (n 174) s 2.3.4.

<sup>296</sup> Kress (n 24) 125.

<sup>297</sup> *ibid* 127.

M23's operations.<sup>298</sup> From facts such as these, it might be possible to infer that Rwandan state organs 'directed or enforced' M23's conduct in breach of IHL.<sup>299</sup>

In many conflicts, however, drawing such an inference might not be possible. Consider, for instance, Hezbollah's role in the Syrian hostilities. The NSA became involved in the conflict at Iran's instigation and acted alongside Syrian troops.<sup>300</sup> Reporting indicates, however, that the group did not operate under the effective control of either state.<sup>301</sup> Although the IRGC and the Syrian authorities reportedly coordinated the NSA's wider operations, Hezbollah fighters exercised a high degree of autonomy at the tactical level, to the extent that they even commanded Syrian government forces.<sup>302</sup> Assuming this was the case in all Hezbollah's operations in Syria, it means that neither Syria nor Iran bears responsibility for the NSA's acts in violation of IHL, such as its conduct in preventing the provision of food and water to civilians in towns under siege.<sup>303</sup>

Hezbollah's level of autonomy also impacts the potential attribution of other Shi'a militias' conduct to Syria or Iran. While reporting indicates that IRGC officers commanded some militia groups at the tactical level, they did not do so consistently<sup>304</sup> and this role was also performed by Hezbollah fighters, particularly regarding the Arabic-speaking militias.<sup>305</sup> When considering specific IHL

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<sup>298</sup> Group of Experts' Final Report (n 105) 8-10.

<sup>299</sup> *Nicaragua* (n 8) [115].

<sup>300</sup> See Ch 2 s 2.1.2.

<sup>301</sup> Nadav Pollak, 'The Transformation of Hezbollah by its Involvement in Syria' (*Washington Institute*, 4 August 2016) 5 <[www.washingtoninstitute.org/policy-analysis/transformation-hezbollah-its-involvement-syria](http://www.washingtoninstitute.org/policy-analysis/transformation-hezbollah-its-involvement-syria)> accessed 28 March 2021.

<sup>302</sup> Nicholas Blanford, 'The Battle for Qusayr: How the Syrian Regime and Hizb Allah Tipped the Balance' (*CTC Sentinel*, August 2013) 19-20 <<https://ctc.usma.edu/wp-content/uploads/2013/08/CTCSentinel-Vol6Iss86.pdf>> accessed 9 February 2021; Samia Nakhoul, 'Special Report: Hezbollah Gambles All in Syria' (*Reuters*, 26 September 2013)

<[www.reuters.com/article/us-syria-hezbollah-special-report/special-report-hezbollah-gambles-all-in-syria-idUSBRE98P0AI20130926](http://www.reuters.com/article/us-syria-hezbollah-special-report/special-report-hezbollah-gambles-all-in-syria-idUSBRE98P0AI20130926)> accessed 27 August 2019; Isabel Nassief, 'The Campaign for Homs and Aleppo: The Assad Regime's Strategy in 2013' (*Institute for the Study of War*, January 2014) 17, 25

<[www.understandingwar.org/sites/default/files/Nassief-BattleforHomsAleppo-web.pdf](http://www.understandingwar.org/sites/default/files/Nassief-BattleforHomsAleppo-web.pdf)> accessed 9 February 2021;

Ali Alfoneh, 'Tehran's Shia Foreign Legions' (*Carnegie Endowment for International Peace*, 30 January 2018)

<<https://carnegieendowment.org/2018/01/30/tehran-s-shia-foreign-legions-pub-75387>> accessed 12 February 2021;

Pollak (n 301) 3.

<sup>303</sup> UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 Aug 2013) UN Doc A/HRC/24/46 Annex III paras 6 and 11.

<sup>304</sup> Paul Bucala and Frederick W Kagan, 'Iran's Evolving Way of War: How the IRGC Fights in Syria' (*Critical Threats*, March 2016) <[www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans\\_Evolving\\_Way\\_of\\_War\\_IRGC\\_in\\_Syria\\_FINAL-1.pdf](http://www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans_Evolving_Way_of_War_IRGC_in_Syria_FINAL-1.pdf)> accessed 28 March 2021.

<sup>305</sup> Ben Hubbard, 'Iran Out to Remake Mideast with Arab Enforcer: Hezbollah' (*The New York Times*, 27 August 2017)

<[www.nytimes.com/2017/08/27/world/middleeast/hezbollah-iran-syria-israel-lebanon.html?rref=collection%2Fsectioncollection%2Fworld&action=click&contentCollection=world](http://www.nytimes.com/2017/08/27/world/middleeast/hezbollah-iran-syria-israel-lebanon.html?rref=collection%2Fsectioncollection%2Fworld&action=click&contentCollection=world)> accessed 22

February 2018. See also Ariane M Tabatabai, Jeffrey Martini and Becca Wasser, 'The Iran Threat Network: Four Models of Iran's Nonstate Client Partnerships' (*RAND*, 2021) 19 <[www.rand.org/pubs/research\\_reports/RR4231.html](http://www.rand.org/pubs/research_reports/RR4231.html)> accessed 19 July 2021.



violations involving Shi'a militia groups, therefore,<sup>306</sup> it may be far from clear that Iranian or Syrian state organs exercised effective control over their conduct at the relevant time.<sup>307</sup>

A similar conclusion is likely regarding the numerous abuses committed by Syrian militias during Turkey's operations to take control of territory held by the SDF in northeast Syria.<sup>308</sup> Despite Turkey's reported 'control over all strategic decision-making' and its oversight over the militias' broader operations,<sup>309</sup> its level of authority over fighters' actions in violation in IHL appears insufficient to satisfy the effective control threshold. Reporting indicates, for instance, that the militias' discipline was so poor that Turkish officials were incapable of preventing fighters from looting civilian properties.<sup>310</sup> As such, these and other acts by the militias that potentially violate Turkey's IHL obligations are unlikely to be attributable to the state.<sup>311</sup>

The position is more nuanced in the context of Russia's involvement in the conflict in eastern Ukraine. Notwithstanding the rebels' clear subordination to Russia, the effective control test requires evidence of Russian influence over the specific rebel acts that potentially violate international law. It is only if Russian military officers or other officials exercised a detailed level of oversight over the rebels' actions when shelling residential areas during the Debaltseve offensive,<sup>312</sup> for instance, that such conduct is attributable to the state pursuant to its exercise of effective control. Russian state organs must, effectively, have directed the rebels to conduct the battle by pursuing that specific tactic. But if Russian officers' involvement was confined to a strategic or operational level of control, for example by giving orders to take control of the town but without stipulating or supervising the way this should be done, the effective control threshold is not met, and the indiscriminate attacks are not attributable to the state.

Ukraine might experience difficulties in proving Russia's exercise of effective control, even if Russian officers were in command of rebel forces during the battle for Debaltseve. Often, evidence

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<sup>306</sup> See Ch 2 s 2.1.2.3.

<sup>307</sup> Jack Watling, 'Iran's Objectives and Capabilities: Deterrence and Subversion' (*RUSI Occasional Paper*, February 2019) 35 <<https://rusi.org/explore-our-research/publications/occasional-papers/irans-objectives-and-capabilities-deterrence-and-subversion>> accessed 22 October 2021.

<sup>308</sup> See Ch 2 s 2.1.4.

<sup>309</sup> Chulov (n 80).

<sup>310</sup> Tsurkov (n 79). See also UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (9 August 2018) UN Doc A/HRC/39/65 7 para 28.

<sup>311</sup> Note that alternatively, such acts could be deemed *ultra vires*. See Eatwell (n 174) s 2.4.2.

<sup>312</sup> Amnesty International, 'Ukraine: Horror of Civilian Bloodshed in Indiscriminate Attacks' (n 96); Mariner (n 96); UNHRC, 'Report on the human rights situation in Ukraine 16 February 2015 to 15 May 2015' (n 96) 18 para 83.

that state officials sanctioned the specific conduct that violates the state's international legal obligations is simply not available. Such difficulties are further compounded in the cyber domain.<sup>313</sup> Thus, if some of the hostile cyber operations directed against Ukraine in connection with the conflict were conducted by NSAs,<sup>314</sup> the same evidential standards must be satisfied for their activities to be attributed to a state based on effective control. In the event that factual attribution is possible, meaning that Ukraine is able and willing to identify the cyber operators responsible for a harmful operation, demonstrating the requisite links between those individuals and a state to establish legal attribution may prove challenging.<sup>315</sup>

Even in conventional operations, the covert nature of states' interactions with NSAs compounds the evidential difficulties posed to injured states.<sup>316</sup> Reporting indicates, for example, that the irregular forces, individuals, or groups that act in support of US special forces' counter-terrorism operations could be acting under the United States' effective control.<sup>317</sup> But given the classification of such activities, the evidence to prove that this is the case might simply not be available.

#### ***5.4.5 The sufficiency of the effective control test***

The burden of proving that a state exercised effective control over an NSA's conduct in potential violation of international law falls to the injured state, to a standard of 'reasonable certainty'.<sup>318</sup> But

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<sup>313</sup> See eg Peter Margulies, 'Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility' (2013) 14 Melbourne J Intl L 496; Thomas Rid and Ben Buchanan, 'Attributing Cyber Attacks' (2015) 38 J Strategic Studies 4; William Banks, 'State Responsibility and Attribution of Cyber Intrusions after Tallinn 2.0' (2017) 95 Texas L Rev 1487; Luke Chircop, 'A Due Diligence Standard of Attribution in Cyberspace' (2018) 67 Intl and Comparative L Quarterly 643, 645-48; Mačák, 'Decoding Article 8' (n 7); Tsagourias and Farrell (n 68); Tomohiro Mikanagi, 'Application of the Due Diligence Principle to Cyber Operations' (2021) 97 Intl L Studies 1019, 1023-30; William Banks, 'Cyber Attribution and State Responsibility' (2021) 97 Intl L Studies 1039.

<sup>314</sup> See Ch 2 s 2.2.3.

<sup>315</sup> This has led some legal commentators to argue that a looser attribution standard should apply in the cyber domain. See eg Margulies (n 313) 512-19; Shackelford and Andres (n 156) 987-91; Chircop (n 313); Rebecca Crotoof, 'International Cybertorts: Expanding State Accountability in Cyberspace' (2018) 103 Cornell L Rev 565; Tsagourias and Farrell (n 68) 961-65.

<sup>316</sup> Becker (n 235) 71. See also Dieter Fleck, 'Individual and State Responsibility for Intelligence Gathering' (2007) 28 Michigan J Intl L 687, 696.

<sup>317</sup> Wesley Morgan, 'Behind the Secret US War in Africa' (*Politico*, 2 July 2018) <[www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005](http://www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005)> accessed 29 September 2020; Daniel R Mahanty and Elias Youssef, 'Exception(s) to the Rule(s): Civilian Harm, Oversight, and Accountability in the Shadow Wars' (*Center for Civilians in Conflict*, November 2020) 13-14 <[www.stimson.org/wp-content/uploads/2020/11/CIVIC\\_US\\_Report\\_ETR-FINAL1.pdf](http://www.stimson.org/wp-content/uploads/2020/11/CIVIC_US_Report_ETR-FINAL1.pdf)> accessed 2 October 2021. For analysis regarding US Special Forces' control over partners for the purposes of command responsibility, see Gregory Raymond Bart, 'Special Operations Forces and Responsibility for Surrogates' War Crimes' (2014) 5 Harvard National Security J 513, 522-24.

<sup>318</sup> ARSIWA (n 1) commentary to Ch V para 8; *ibid* chapeau to Ch II para 9. See also Schmitt and Vihul (n 292) 65-66.

even if a state closely supervises an NSA's conduct in breach of international law, that state might evade responsibility in the absence of 'clear evidence'<sup>319</sup> or 'adequate direct proof'<sup>320</sup> that it exercised the requisite control over the acts concerned. As noted by commentators, this reality creates a 'normative safe zone' in which states can freely operate.<sup>321</sup> Moreover, it provides an incentive for states to use NSAs to commit acts that they could not legally perform directly, via their own organs.<sup>322</sup>

The ICJ thus formulated a rule of attribution that is of little practical relevance. This outcome may derive, at least in part, from the political pressures to which the Court was subject at the time of the *Nicaragua* judgment.<sup>323</sup> But due to the stringency of the test, no court or tribunal, to date, has found sufficient evidence of effective control to trigger state responsibility. As Kalshoven remarked, 'one wonders how a State could ever achieve the required high level of control over a body of men operating in another country without actually incorporating it in its armed forces'.<sup>324</sup>

The ICTY Appeals Chamber highlighted the effective control test's lack of consonance with the aims of the law of state responsibility.<sup>325</sup> This body of law should enhance the enforcement of, and compliance with, states' international legal obligations and thereby hold states to account for the conduct of NSAs that act on their behalf. But the effective control test, as interpreted by the ICJ and the ILC, is too inflexible to achieve that aim.

It is not surprising, therefore, that the ICTY's overall control test was welcomed by some jurists<sup>326</sup> and commentators<sup>327</sup> as offering a less rigid standard of attribution. The Netherlands similarly

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<sup>319</sup> *Nicaragua* (n 8) [109].

<sup>320</sup> *ibid* [111]. See also *Nicaragua* (n 8) Separate Opinion of Judge Ago [16]; *Bosnian Genocide* (n 5) [209]. Note, however, that the ECtHR has taken a more flexible approach to evidence in this context, drawing adverse inferences and reversing the burden of proof. See *Carter v Russia* (n 53) [166]-[169].

<sup>321</sup> Schmitt and Vihul (n 292) 71. See also Cassese (n 7); Vladislav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 *Eur J Intl L* 563, 578.

<sup>322</sup> Christenson (n 32) 337; Becker (n 235) 71-72; Graham Cronogue, 'Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors' (2013) 23 *Duke J Comparative and Intl L* 365, 384; Hathaway and others (n 215) 562-65.

<sup>323</sup> Francis A Boyle, 'Determining US Responsibility for Contra Operations under International Law' (1987) 81 *American J Intl L* 86, 86; Michael N Schmitt, 'Counter-Terrorism and the Use of Force in International Law' (2003) 79 *Intl L Studies* 7, 60; Hathaway and others (n 215) 549.

<sup>324</sup> Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond' (1991) 40 *Intl and Comparative L Quarterly* 827, 855.

<sup>325</sup> *Tadić Appeals Chamber* (n 8) [117], [123].

<sup>326</sup> *Bosnian Genocide* (n 5) dissenting opinion of Vice-President Al-Khasawneh; *ibid* dissenting opinion of Judge ad hoc Mahiou.

<sup>327</sup> See eg Cassese (n 7); Spinedi (n 7); Trapp (n 156) 40-45; Heinsch (n 156); Jorritsma (n 7).

viewed the ARSIWA commentary's 'inbuilt ambiguity' as to the applicable standard of control in a positive light, as offering flexibility and 'scope for the progressive development of the legal rules on state responsibility'.<sup>328</sup> But the overall control test presents its own difficulties, largely due to its focus on the wider relationship between the NSA and the state.<sup>329</sup> Thus, to meet the law's object and purpose a test is required that sits in the middle ground between effective and overall control. The potential features of such a test are addressed further in Chapter 7.<sup>330</sup>

#### **5.4.6 The meaning of direction**

Direction and control are commonly considered together and the differences between them, if any, are unclear. The ARSIWA commentary obfuscates the position by referring first to direction and control as a single attribution standard,<sup>331</sup> then later indicating that the terms are disjunctive, meaning that it is sufficient to establish either one of them.<sup>332</sup> Article 8's drafting history perhaps explains this anomaly.<sup>333</sup> But despite the ILC's stated intent that there should be no cumulative requirement for the establishment of both direction and control,<sup>334</sup> the commentary does not address direction as an independent rule of attribution. Further confusion arises due to the close relationship between the ordinary meanings of instructions and direction.<sup>335</sup> Both imply the issuing of some form of order by the state to the NSA and have been used interchangeably in the context of state responsibility.<sup>336</sup>

Because the concept of direction is rarely considered alone, minimal guidance is available to determine exactly what this entails. The ICJ indicated only that the state must have 'provided the direction pursuant to which the perpetrators of the wrongful act acted'.<sup>337</sup> Legal commentators suggest that 'as distinct from merely giving instructions, in the case of "direction" it is necessary that the state leads the steps to be taken in the commission of the unlawful conduct; it must show how the operation is to be conducted'.<sup>338</sup> Alternatively, direction is assessed to mean 'guidance over the

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<sup>328</sup> ILC, 'Comments and Observations Received from Governments' (March to June 2001) UN Doc A/CN.4/515 and Add.1-3 49.

<sup>329</sup> See s 5.4.1.2; Ch 7 s 7.2.3.

<sup>330</sup> See Ch 7 s 7.2.3.

<sup>331</sup> ARSIWA (n 1) art 8 commentary para 1.

<sup>332</sup> *ibid* art 8 commentary para 7.

<sup>333</sup> See s 5.2.1.

<sup>334</sup> ILC YB 1998 vol I (n 23) 289 para 79; ILC YB 2000 vol II pt 2 (n 25) 65.

<sup>335</sup> Cassese (n 7) 663.

<sup>336</sup> See eg ILC YB 1998 vol II pt 1, 'Documents of the Fiftieth Session' UN Doc A/CN.4/SER.A/1998/Add.1(Part 1) 40 para 197; *Bosnian Genocide* (n 5) [406].

<sup>337</sup> *Bosnian Genocide* (n 5) [406]. See also Mačák, 'Decoding Article 8' (n 7) 417-18.

<sup>338</sup> Cameron and Chetail (n 7) 209.

entity that commits the wrongful act in the sense of the state taking the lead'.<sup>339</sup> Yet, there is little to distinguish such interpretations from a state's exercise of effective control.

Crawford in his writings reinforces the tendency to consider direction and control together.<sup>340</sup> Nonetheless, in a footnote, he expressed the view that the independent concept of direction 'implies a continuing period of instruction, or a relationship between the state and a non-state entity such that suggestion or innuendo may give rise to responsibility'.<sup>341</sup> This explanation of direction is important because it potentially fills a lacuna that emerges between the predominant interpretations of instructions and effective control. To illustrate, consider an enduring relationship between a state and an NSA in which the state provides the NSA with continuing support and the NSA regularly performs tasks on the state's behalf. In such circumstances, the NSA might act for the state based on its instinctive knowledge of the state's wishes, gained through prior training and guidance, rather than pursuant to instructions regarding each specific task. But if the state does not positively assign a task to the NSA, or exert control over its execution, the respective thresholds for attribution based on state instructions and effective control are unlikely to be satisfied.<sup>342</sup>

A 'less rigorous' interpretation of direction<sup>343</sup> that encompasses a state's 'suggestion or innuendo'<sup>344</sup> to an NSA with which it maintains a continuing association could therefore play an important role in holding states to account. Attribution on this basis would be appropriate, however, only in the context of an enduring relationship. In other circumstances, vague and imprecise forms of guidance by the state are insufficient to lead to attribution.<sup>345</sup> But if a state fosters a hierarchical association with an NSA during which it habitually guides that NSA's conduct, the state should bear responsibility for acts on the part of the NSA that breach its international legal obligations, even in the absence of express instructions to commit those acts or detailed control over their execution.<sup>346</sup>

If this understanding of direction is applied to contemporary conflict, it is potentially pertinent to Iran's dealings with the Shi'a militia groups operating in Syria.<sup>347</sup> While uncertainty surrounds Iranian

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<sup>339</sup> Tsagourias and Farrell (n 68) 954.

<sup>340</sup> Crawford (n 7) 146-156.

<sup>341</sup> Crawford (n 7) 146 fn 28.

<sup>342</sup> See ss 5.3-5.4.

<sup>343</sup> See *Bosnian Genocide* (n 5) Verbatim Record 2006/8 [62] (Pellet).

<sup>344</sup> Crawford (n 7) 146 fn 28.

<sup>345</sup> See s 5.3.1.

<sup>346</sup> Mačák, 'Decoding Article 8' (n 7) 418.

<sup>347</sup> See Ch 2 s 2.1.2.

officials' precise influence over these groups' behaviour,<sup>348</sup> reporting indicates that the IRGC conducted an extensive train, advise, and assist mission in Syria and orchestrated the planning of the militias' operations.<sup>349</sup> It is arguable, therefore, that the militias' conduct in violation of IHL, such as their indiscriminate attacks during the assault on Aleppo,<sup>350</sup> are attributable to Iran based upon the state's direction of the group's activities, even if Iranian officials did not instruct the militias to conduct the attacks in this manner or exercise tactical control over the NSAs' conduct at the relevant time.

It is important to recall, however, that there is no state practice, *opinio juris*, or jurisprudence to support this suggested interpretation. Clear references to direction as a separate basis of attribution are lacking from the jurisprudence of the ICJ and from most legal scholarship. The ILC, in its extensive deliberations on the issue, did not treat direction as a distinct basis of attribution until the Drafting Committee amended Special Rapporteur Crawford's proposed wording for Article 8 to refer to 'direction or control' rather than using the conjunctive 'and'.<sup>351</sup> It seems, therefore, that Crawford's original formulation better represents the underlying customary international law upon which Article 8 is based. Accordingly, until such time as the law may develop, direction refers to the need for the state to direct the manner in which the NSA acts, as an inherent part of its exercise of effective control.

## 5.5 Conclusion

The different grounds of attribution encompassed within Article 8 ARSIWA are frequently conflated. Indistinct lines separate the three concepts and there is a considerable overlap between them. In simple terms, however, the principal distinction between 'instructions' and 'direction or control' is temporal, depending on whether the state influences the NSA's decision to act or the act itself. In addition, direction and control require evidence of a continuing, hierarchical relationship between an NSA and a state, whereas instructions may be issued on an isolated basis. There is no reason, however, why attribution based on state instructions cannot also arise during an ongoing

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<sup>348</sup> See s 5.4.4.

<sup>349</sup> Colin Clarke and Phillip Smyth, 'The Implications of Iran's Expanding Shi'a Foreign Fighter Network' (*CTC Sentinel*, November 2017) <<https://ctc.usma.edu/the-implications-of-irans-expanding-shia-foreign-fighter-network/>> accessed 28 March 2021; Bucala and Kagan (n 304).

<sup>350</sup> See Ch 2 s 2.1.2.

<sup>351</sup> ILC YB 1998 vol I (n 23) 289 para 79; ILC YB 2000 vol II pt 2 (n 25) 65.

relationship between an entity and a state, provided sufficient evidence exists regarding the instructions issued and their nexus to the potential internationally wrongful act.

Considerable debate has arisen regarding the notion of control and how broadly this should be construed. In the context of armed conflict, this concept brings into stark relief the tensions between humanitarian concerns, which call for less stringent rules of attribution, and the principle that states should bear responsibility only for conduct that can be truly categorised as their own. The delicate balance between these competing interests, however, is not achieved by either the ICTY's overall control test or the ICJ's test of effective control. The former is over-inclusive in seeking to satisfy humanitarian concerns while the latter is overly stringent in its requirements and is therefore of little practical relevance.

Although the ICJ's judgment in the *Bosnian Genocide* case provided much-needed clarity, its endorsement of the strict effective control test has the side effect of encouraging states to pursue their national security goals via proxy, in the knowledge that they are unlikely to be held responsible for any harmful conduct that results. This naturally leads to concerns of an accountability gap, which allows states to act via NSAs in a manner that they could not lawfully act via their own organs.<sup>352</sup> When assessing this assertion, it is important to recall that the legal process of attribution is not the only way in which states can be held to account when they act through NSAs. States might, alternatively, bear responsibility for their own organs' conduct in violating primary norms of international law through their interactions with NSAs. Certain primary norms that states might breach in this context are the focus of Chapter 6.

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<sup>352</sup> See eg Cassese (n 7); Hathaway and others (n 215).

## Chapter 6 – Primary Norms of International Law

### 6.1 Introduction

The preceding chapters assess the circumstances in which private conduct performed in the context of an armed conflict is attributable to a state.<sup>1</sup> And in so doing, they reveal an accountability gap: the stringent attribution thresholds allow states to pursue their goals via private individuals or groups without bearing responsibility when those actors act to the detriment of other states.<sup>2</sup> This lacuna not only encourages states to conduct their foreign policy via proxy, but also severely limits the remedies available to states that fall victim to harmful activity by NSAs. If the conduct in question is not attributable to a state, an injured state cannot respond with countermeasures, or seek reparations.<sup>3</sup>

Some commentators argue that the appropriate way to address this issue is to relax the relevant rules of attribution.<sup>4</sup> Others advocate, instead, a reliance on primary norms of international law to hold states directly accountable in respect of the conduct of their own organs.<sup>5</sup> This chapter examines some of the primary norms that states may violate when acting through proxies and considers the extent to which these serve to fill the apparent gap in accountability.

Primary norms of international law are distinct from the secondary rules reflected in the law of state responsibility.<sup>6</sup> Put simply, primary norms regulate state behaviour, while secondary rules determine when conduct in breach of those primary norms is attributable to a state and the consequences of that breach. The primary norms considered in this chapter bind the state itself;

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<sup>1</sup> See Chs 3 to 5.

<sup>2</sup> *ibid.* See also Carston Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *Eur J Intl L* 989; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016) art 2 paras 265-273 (2016 commentary to GC1); Oona A Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 *Texas L Rev* 539.

<sup>3</sup> International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) arts 2, 28-31, 49 (ARSIWA).

<sup>4</sup> See eg Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *Eur J Intl Law* 649; Mark Gibney, 'Genocide and State Responsibility' (2007) 7 *Human Rights L Rev*, 760; Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5 *J Intl Crim Justice* 829; Jörn Griebel and Milan Plücker, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v Serbia' (2008) 21 *Leiden J Intl L* 601; 2016 commentary to GC1 (n 2) art 2, paras 265-273.

<sup>5</sup> James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 *Eur J Intl L* 435, 439-40; James Crawford, *State Responsibility: The General Part* (CUP 2013) 158.

<sup>6</sup> See Ch 1 s 1.2.



therefore, it is the conduct of the state's own organs that violates the norm. For instance, if Russia violated the prohibition on the use of force through its assistance to the rebels operating in eastern Ukraine,<sup>7</sup> the act of providing such assistance is attributable to Russian state organs.<sup>8</sup> Accordingly, this conduct constitutes an internationally wrongful act<sup>9</sup> involving legal consequences.<sup>10</sup> These include an obligation on Russia to make reparation in respect of any injury caused and Ukraine's right to take countermeasures.<sup>11</sup> Russia's violation of a primary norm thus gives rise to an autonomous claim of responsibility, which is independent from any claim arising directly from the rebels' wrongdoing.

In the *Nicaragua*, *Armed Activities*, and *Bosnian Genocide* cases, the ICJ demonstrated a greater willingness to find that the respondent states had violated primary norms of international law than to attribute private conduct to the state.<sup>12</sup> The Court concluded in each case that the evidence was insufficient to lead to attribution.<sup>13</sup> But in *Nicaragua*, the ICJ found that the United States had violated the prohibition on the use of force<sup>14</sup> and the principle of non-intervention<sup>15</sup> and had acted in contravention of its obligation not to encourage violations of IHL.<sup>16</sup> In *Armed Activities*, the court found that Uganda, as the occupying power, had violated its 'obligation of vigilance' to prevent looting and the exploitation of natural resources, including by private individuals.<sup>17</sup> And in *Bosnian Genocide*, the ICJ determined that the Federal Republic of Yugoslavia (FRY) was in breach of its duty to prevent acts of genocide.<sup>18</sup>

The ICJ's jurisprudence thus illustrates the significance of primary norms in holding states to account when they act through NSAs. Certain key primary norms that may regulate states' behaviour towards private actors in armed conflict are the focus of this chapter. These include the prohibition

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<sup>7</sup> See s 6.2.

<sup>8</sup> ARSIWA (n 3) art 4. See also Ch 3 s 3.2.

<sup>9</sup> ARSIWA (n 3) art 2.

<sup>10</sup> *ibid* arts 28-31.

<sup>11</sup> ARSIWA (n 3) arts 28-39.

<sup>12</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*); *Armed Activities on the Territory of the Congo (The Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ 168 (*Armed Activities*); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Bosnian Genocide*).

<sup>13</sup> *ibid*. See also Ch 3 s 3.3; Ch 5 ss 5.3-5.4.

<sup>14</sup> *Nicaragua* (n 12) [227]-[228].

<sup>15</sup> *ibid* [241]-[242].

<sup>16</sup> *ibid* [220], [255].

<sup>17</sup> *Armed Activities* (n 12) [248]-[250]. The ICJ additionally found that Uganda violated the prohibition on the use of force and the principle of non-intervention. See *ibid* [161]-[165].

<sup>18</sup> *Bosnian Genocide* (n 12) [438].

on the use of force, the principle of non-intervention, and the requirement for states to respect and to ensure respect for IHL. In each case, the purpose of the analysis is not to examine the respective primary norms in detail or to reach a conclusion regarding their precise scope, but rather to consider the extent to which these norms fill the accountability gap that emerges due to the stringent attribution thresholds.

## 6.2 The prohibition on the use of force

It is a principle of customary international law that states must not use force, or threaten to use force, against the territorial integrity or political independence of any state.<sup>19</sup> Codified in Article 2(4) of the UN Charter,<sup>20</sup> the principle prohibits not only a state's direct use of force, for example via its armed forces, but also its participation in forcible acts committed by private actors such as armed groups.<sup>21</sup> In such cases, there is no requirement for attribution. Instead, it is the state's own organs' conduct in assisting the NSA that amounts to a use of force attributable to the state.<sup>22</sup>

### 6.2.1 The scope of the norm

The Friendly Relations Declaration, adopted by the UN General Assembly in 1970, illustrates the types of state activity towards an NSA that might constitute a prohibited use of force.<sup>23</sup> In this context, the Declaration stipulates that 'Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State'.<sup>24</sup> Accordingly, Rwanda likely violated the prohibition

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<sup>19</sup> *Nicaragua* (n 12) [187]-[191]; *Armed Activities* (n 12) [162]. Regarding the historical development of the norm, see Christine Gray, *International Law and the Use of Force* (4<sup>th</sup> edn, OUP 2018) 9-26; Oliver Dörr, 'Use of Force, Prohibition of' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2015) paras 4-8; Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 465-473; Russell Buchan and Nicholas Tsagourias, 'The Crisis in Crimea and the Principle of Non-Intervention' (2017) *Intl Community L Rev* 165, 174-176.

<sup>20</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 2(4). The principle is commonly considered to be a *jus cogens* norm. See ARSWIA (n 3) art 26. See also Buchan and Tsagourias (n 19) 176; Dörr (n 19) para 32.

<sup>21</sup> *Nicaragua* (n 12) [228]. See also Tom Ruys, '*Armed Attack*' and *Article 51 of the UN Charter* (CUP 2011) 372-74.

<sup>22</sup> ARSIWA (n 3) art 4. See also Claus Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 574; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Publishing 2006) 176-85.

<sup>23</sup> UNGA, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (24 October 1970) UN Doc A/RES/2625(XXV) (Friendly Relations Declaration). The provisions of the Declaration relating to the prohibition on the use of force are considered to reflect customary international law. See *Armed Activities* (n 12) [162]; *Nicaragua* (n 12) [188] [191].

<sup>24</sup> Friendly Relations Declaration (n 23).

on the use of force through its organs' substantial involvement in the establishment of the armed group M23, even if the attacks the group later conducted against the DRC are not attributable to the state.<sup>25</sup>

The Friendly Relations Declaration additionally provides:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to ... involve a threat or use of force.<sup>26</sup>

The ICJ quoted this section of the Declaration in the *Nicaragua* case to support its conclusion that the United States violated the prohibition on the use of force through its support to the *contras*.<sup>27</sup> When irregular forces or armed bands in receipt of state assistance commit acts that 'involve a threat or use of force', the Court affirmed that the assisting state's conduct in providing such support constitutes an unlawful threat or use of force by that state.<sup>28</sup> It follows that many of the examples of state support to NSAs outlined in Chapter 2 potentially violate the norm. For instance, Russia's conduct in supporting rebels in the Donbas likely constitutes a prohibited use of force due to Moscow's supply of sophisticated military equipment to those NSAs in their fight against Ukraine.<sup>29</sup>

Not all forms of state support, however, lead inevitably to this conclusion. In the *Nicaragua* case, the ICJ concluded that although the arming and training of the *contras* involved the threat or use of force, the mere supply of funds to the group did not.<sup>30</sup> It is similarly questionable whether *de minimis* forms of assistance suffice, such as the provision of a small quantity of weapons that does not materially assist the NSA in its use or threat of force. While some form of causal link must exist between a state's provision of support and the consequent use or threat of force on the part of the NSA,<sup>31</sup> it remains unclear how direct or material this link must be. For instance, must the NSA use

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<sup>25</sup> See Ch 2 s 2.3.

<sup>26</sup> Friendly Relations Declaration (n 23).

<sup>27</sup> *Nicaragua* (n 12) [228]. See also *Armed Activities* (n 12) [161]-[165].

<sup>28</sup> *Nicaragua* (n 12) [205].

<sup>29</sup> See Ch 2 s 2.2.1.

<sup>30</sup> *Nicaragua* (n 12) [228].

<sup>31</sup> Friendly Relations Declaration (n 23).

the weapons the state provided in its use of force against another state?<sup>32</sup> Does a state violate the prohibition on the use of force if an intervening event occurs, or a long period of time passes, between its provision of assistance and the supported actor's use of force?

It is not the purpose of this chapter to answer such questions. But to illustrate their relevance when assessing the norm's importance in narrowing the gap in accountability, consider the assistance provided by the US-led coalition to groups opposing the Assad regime in Syria. As discussed in Chapter 2, the Friends of Syria initiative was largely ineffective, leaving rebel groups with little alternative but to obtain weaponry from other sources.<sup>33</sup> Therefore, opposition forces in receipt of salaries and training from the coalition likely launched attacks against Syria using weapons obtained elsewhere, for example through smuggling.<sup>34</sup> Such circumstances add uncertainty to any determination regarding the coalition members' unlawful use of force.

Alternatively, consider the use of force in Syria by extremist groups such as ISIS, using weapons originally provided by the US-led coalition to the 'moderate' opposition.<sup>35</sup> Here, an intervening event, namely the transfer of the weapons from the vetted rebel group to the extremists, weighs against a conclusion that the United States and its allies violated the norm. But would the same be true if the state concerned did not follow any vetting procedures, or it turned a blind eye to the potential transmission of the weapons to extremist groups?

Questions such as these highlight considerable ambiguities surrounding the nature and extent of the assistance that states provide, and the causal links that must exist, for states' support to NSAs to violate the prohibition on the use of force. Additional uncertainty surrounds the particular conduct by a supported NSA that might lead to a breach of the norm on the part of the assisting state. For instance, does the simple presence of a supported armed group on another state's territory violate the norm, or must the group commit acts of violence against the state?<sup>36</sup> Must an NSA cause or

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<sup>32</sup> See Buchan and Tsagourias (n 19) 178.

<sup>33</sup> See Ch 2 s 2.1.1.

<sup>34</sup> *ibid.* See also Saskia Baas, 'Syria's Armed Opposition: A Spotlight on the Moderates' (*Small Arms Survey*, January 2016) 7 <[www.smallarmssurvey.org/fileadmin/docs/R-SANA/SANA-Dispatch5-Syria-armed-opposition.pdf](http://www.smallarmssurvey.org/fileadmin/docs/R-SANA/SANA-Dispatch5-Syria-armed-opposition.pdf)> accessed 12 December 2017.

<sup>35</sup> Mallory Shelbourne, 'Study Shows US Weapons Given to Syrian Rebels Ended Up in ISIS Hands' (*The Hill*, 14 December 2017) <<https://thehill.com/policy/defense/364917-study-shows-us-weapons-given-to-syrian-rebels-ended-up-in-isis-hands>> accessed 1 March 2020.

<sup>36</sup> See Buchan and Tsagourias (n 19) 179.

threaten physical damage, death, or injury through its conduct, or can operations causing non-kinetic effects also violate the norm?<sup>37</sup>

The latter question is particularly pertinent in the cyber domain. Private cyber operators frequently act with state support and the prohibition on the use of force is relevant in this context as the norm applies ‘to any use of force, regardless of the weapons employed’.<sup>38</sup> Accordingly, if a state provides a hacker group with malware and training to enable it to carry out cyber operations against another state and the NSA conducts an operation that causes physical effects, the state’s actions in providing such support amount to a prohibited use of force.<sup>39</sup> A pertinent example is the Stuxnet virus, given that this caused physical damage to Iranian centrifuges.<sup>40</sup> Had this operation been perpetrated by private individuals with state backing rather than by government officials,<sup>41</sup> the sponsoring state may have violated the prohibition on the use of force through its support to those NSAs.

Uncertainty endures, however, whether a cyber operation that causes only non-kinetic effects could constitute a prohibited use of force.<sup>42</sup> While operations causing purely economic harm will not normally violate the norm,<sup>43</sup> states hold divergent views in their approach to the issue. The

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<sup>37</sup> See Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) r 69 commentary para 8.

<sup>38</sup> *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [39]. See also Jeremy Wright, ‘Cyber and International Law in the 21<sup>st</sup> Century’ (*Speech Delivered at Chatham House, London*, 23 May 2018) <[www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century](http://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century)> accessed 26 June 2018; République Française Ministère des Armées, ‘Droit International Appliqué aux Opérations dans le Cyberspace’ (September 2019) 7; Government of the Netherlands, ‘Letter to Parliament on the International Legal Order in Cyberspace’ (*Appendix: International Law in Cyberspace*, 26 September 2019) 3 <[www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace](http://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace)> accessed 4 April 2020; Paul C Ney Jr, ‘DOD General Counsel Remarks’ (*US Cyber Command Legal Conference*, 2 March 2020) <[www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/](http://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/)> accessed 11 March 2020; Australian Government, ‘Australia’s International Cyber and Critical Tech Engagement Strategy’ (*Annex B: Australia’s Position on how International Law Applies to State Conduct in Cyberspace*, 2021) 97 <[www.internationalcybertech.gov.au/our-work](http://www.internationalcybertech.gov.au/our-work)> accessed 19 August 2021; UK Mission to the UN, ‘Application of International Law to States’ Conduct in Cyberspace: United Kingdom Statement’ (2021) 3 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/990851/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990851/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement.pdf)> accessed 23 November 2021.

<sup>39</sup> Tallinn Manual 2.0 (n 37) r 69 commentary para 4.

<sup>40</sup> *ibid* r 68; *ibid* r 71 commentary para 10. See also Kim Zetter, ‘A Cyberattack has Caused Confirmed Physical Damage for the Second Time Ever’ (*Wired*, 8 January 2015) <[www.wired.com/2015/01/german-steel-mill-hack-destruction/](http://www.wired.com/2015/01/german-steel-mill-hack-destruction/)> accessed 31 July 2021; Andrew Moore, ‘Stuxnet and Article 2(4)’s Prohibition Against the Use of Force: Customary Law and Potential Models’ (2015) 64 *Naval L Rev* 1; Samuli Haataja and Afshin Akhtar-Khavari, ‘Stuxnet and International Law on the Use of Force: an Informational Approach’ (2018) 7 *Cambridge Intl LJ* 99.

<sup>41</sup> Ellen Nakashima and Joby Warrick, ‘Stuxnet Was Work of US and Israeli Experts, Officials Say’ (*The Washington Post*, 2 June 2012) <[www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U\\_story.html](http://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U_story.html)> accessed 23 November 2021.

<sup>42</sup> Tallinn Manual 2.0 (n 37) r 69 commentary paras 8-10.

<sup>43</sup> *ibid* r 69 commentary paras 2-3.

Netherlands' government, for example, was unable to rule out the possibility that 'a cyber operation with a very serious financial or economic impact' might qualify as an unlawful use of force.<sup>44</sup> This debate is of relevance when addressing states' support to NSAs in the cyber domain. For instance, if the harmful cyber operations targeting Ukraine had been launched in peacetime, by private operators acting with Russian assistance, the question would arise whether Russia's conduct in this respect violated the prohibition on the use of force. Given the multiplicity of cyber operations directed against Ukraine and the diversity of their effects,<sup>45</sup> this is a complex issue that requires assessment on a case-by-case basis.<sup>46</sup> While the cyber operations targeting the Ukrainian power network might have violated the norm in view of the severity and invasiveness of the effects caused,<sup>47</sup> the same cannot be said of operations causing less serious or measurable effects.<sup>48</sup>

### **6.2.2 Significance of the norm in closing the accountability gap**

The *Nicaragua* case illustrates the clear relevance of the prohibition on the use of force in regulating states' support to NSAs.<sup>49</sup> In cases where a state exercises insufficient control over an NSA to meet the attribution thresholds, the state may nevertheless bear responsibility for its own organs' breach of the duty to abstain from organising or assisting hostile activities against another state.<sup>50</sup> If a state's provision of support to an NSA violates the prohibition on the use of force, its conduct constitutes

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<sup>44</sup> Government of the Netherlands (n 38) 4. See also République Française Ministère des Armées (n 38) 7.

<sup>45</sup> See Ch 2 s 2.2.3.

<sup>46</sup> Several states have adopted the 'scale and effects' approach articulated in Tallinn Manual 2.0. See Tallinn Manual 2.0 (n 37) r 69 commentary paras 8-10; Harold Hongju Koh, 'International Law in Cyberspace' (*US Cyber Command Inter-Agency Legal Conference, Fort Meade*, 18 September 2012) <<https://2009-2017.state.gov/s/1/releases/remarks/197924.htm>> accessed 13 March 2020; République Française Ministère des Armées (n 38) 7; Government of the Netherlands (n 38) 4; NATO, 'Allied Joint Doctrine for Cyberspace Operations' (*AJP-3.20*, January 2020) 20 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/899678/doctrine\\_nato\\_cyberspace\\_operations\\_ajp\\_3\\_20\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899678/doctrine_nato_cyberspace_operations_ajp_3_20_1_.pdf)> accessed 15 August 2021; Finnish Government, 'International Law and Cyberspace: Finland's National Positions' (15 October 2020) 6 <<https://valtioneuvosto.fi/en/-/finland-published-its-positions-on-public-international-law-in-cyberspace>> accessed 20 August 2021; New Zealand Ministry of Foreign Affairs and Trade, 'The Application of International Law to State Activity in Cyberspace' (1 December 2020) <[www.mfat.govt.nz/en/media-and-resources/the-application-of-international-law-to-state-activity-in-cyberspace/](http://www.mfat.govt.nz/en/media-and-resources/the-application-of-international-law-to-state-activity-in-cyberspace/)> accessed 22 August 2021; Federal Government of Germany, 'On the Application of International Law in Cyberspace' (March 2021) 6 <[www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf](http://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf)> accessed 14 August 2021; Australian Government (n 38) 97.

<sup>47</sup> See Ch 2 s 2.2.3.

<sup>48</sup> Tallinn Manual 2.0 (n 37) r 69 commentary paras 8-10.

<sup>49</sup> *Nicaragua* (n 12) [195], [228].

<sup>50</sup> Friendly Relations Declaration (n 23).

an internationally wrongful act<sup>51</sup> and thereby gives rise to legal consequences including a right to reparations.<sup>52</sup>

The remedies available to an injured state are, however, more limited than if the private conduct at issue is itself attributable to a state. This is particularly apparent in the case of a use of force that rises to the level of an armed attack. When a state is the victim of an armed attack that is attributable to another state, the injured state has the right to respond with necessary and proportionate force in self-defence.<sup>53</sup> But uncertainty surrounds the threshold at which a use of force becomes an armed attack, particularly when a state acts indirectly via NSAs.<sup>54</sup>

To illustrate, consider the conflict in eastern Ukraine. If the rebel forces' conduct amounted to an armed attack that was attributable to Russia, Ukraine had the right to respond with force in self-defence.<sup>55</sup> Ukraine could respond in the same manner if the Kremlin despatched armed rebel groups into its territory and the operation, 'because of its scale and effects, would have been classified as an armed attack ... had it been carried out by regular armed forces'.<sup>56</sup> In addition, Ukraine could respond in self-defence if Russia was 'substantially involved' in the rebel attacks.<sup>57</sup>

The precise meaning of the 'substantial involvement' threshold and how it relates to the control tests applicable to the law of state responsibility remains, however, unclear.<sup>58</sup> According to the ICJ, the mere arming and equipping of an armed group, or the provision of logistical or other support, cannot be equated with an armed attack.<sup>59</sup> Therefore, if the evidence of Russia's involvement in the conflict is more limited, meaning that the armed attack on Ukraine is not attributable to Russia and Moscow's assistance to the rebels does not itself constitute an armed attack, Ukraine has fewer response options. In such circumstances, even if Russia's assistance to the rebels amounts to an

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<sup>51</sup> ARSIWA (n 3) art 2.

<sup>52</sup> *ibid* art 31.

<sup>53</sup> UN Charter (n 20) art 51.

<sup>54</sup> *Nicaragua* (n 12) [195]. See also Tallinn Manual 2.0 (n 37) r 69 commentary paras 6-7; Gray (n 19) 134-157; Ruys (n 21) 139-99.

<sup>55</sup> UN Charter (n 20) art 51. See also Ch 2 s 2.2.

<sup>56</sup> *Nicaragua* (n 12) [195]. See also *ibid* [247].

<sup>57</sup> *Nicaragua* (n 12) [195] [247].

<sup>58</sup> Becker (n 22) 170-71, 177-79; Ruys (n 21) 415; Craig Martin, 'Challenging and Refining the "Unwilling or Unable" Doctrine' (2019) 52 *Vanderbilt J of Transnational L* 1, 44; Marko Milanović, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *Intl L Studies* 295, 333.

<sup>59</sup> *Nicaragua* (n 12) [195], [247]. See also Ruys (n 21) 388-90, 415-19; Gray (n 19) 137-39; Michael N Schmitt and Liis Vihul, 'Proxy Wars in Cyberspace: The Evolving International Law of Attribution' (2014) *Fletcher Security Rev* 54, 67-70.

unlawful use of force, Ukraine cannot respond by using force against Russia in self-defence.<sup>60</sup> Instead, Ukraine must limit its response to retorsion<sup>61</sup> or to non-forcible countermeasures,<sup>62</sup> which must be proportionate to the state's internationally wrongful act.<sup>63</sup>

Restrictions as to remedy therefore limit the significance of the norm in narrowing the accountability gap. It is also notable that the prohibition on the use of force applies solely in the international relations between states. The norm is therefore of no relevance in regulating a state's sponsorship of an NSA that operates solely within its own territorial borders.<sup>64</sup> It follows that Syria did not violate the prohibition on the use of force through its support for the *Shabbiha* or other local paramilitary forces, as these groups operated solely within Syrian territory and did not interfere in the affairs of an external state.<sup>65</sup> Furthermore, states do not violate the norm if they act with the territorial state's consent.<sup>66</sup> Thus, Iran's conduct in arming and equipping Shi'a militia groups in Syria does not constitute an unlawful use of force because those groups act with the agreement of the Syrian regime.<sup>67</sup>

The norm's importance in closing the gap in accountability is further weakened by continuing uncertainty regarding its scope and application.<sup>68</sup> Thus, states that choose to act through NSAs may not be held to account due to a lack of clarity regarding the nature and level of assistance that violates the norm and ambiguity as to the causal connections that must exist between the support provided and the NSA's use of force. The use of new technologies highlights further uncertainties.<sup>69</sup> In the cyber domain, in particular, it remains unclear when precisely an operation exceeds the use of

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<sup>60</sup> *Nicaragua* (n 12) [211]. See also Kimberley Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (OUP 2015); Christian Tams, 'Self-Defence Against Non-State Actors: Making Sense of the "Armed Attack" Requirement' in Mary Ellen O'Connell and others (eds), *Self-Defence Against Non-State Actors* (CUP 2019).

<sup>61</sup> See Thomas Giegerich, 'Retorsion' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of International Law* (OUP 2015).

<sup>62</sup> *Nicaragua* (n 12) [210]. See also ARSIWA (n 3) art 50.

<sup>63</sup> *Nicaragua* (n 12) [249]. See also ARSIWA (n 3) art 51.

<sup>64</sup> Dörr (n 19) para 21; Ruys (n 21) 377.

<sup>65</sup> See Ch 2 s 2.1.2.

<sup>66</sup> ARSIWA (n 3) art 20. See also James Crawford, *State Responsibility: The General Part* (n 5) 317; Gray (n 19) 84-95; Federica I Paddeu, 'Military Assistance on Request and General Reasons Against Force: Consent as a Defence to the Prohibition of Force' (2020) 7 J on the Use of Force and Intl L 227.

<sup>67</sup> UNSC, 'Letter dated 20 April 2016 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council' (22 April 2016) UN Doc S/2016/369. See also Ch 2 s 2.1.2.

<sup>68</sup> Gray (n 19) 76. See also s 6.2.1.

<sup>69</sup> See eg Tallinn Manual 2.0 (n 37) r 69 commentary para 8.



force threshold, meaning that other norms such as the principle of non-intervention gain a heightened importance.

### 6.3 The principle of non-intervention

Under customary international law, states are prohibited from intervening in the internal or external affairs of other states.<sup>70</sup> This principle of non-intervention is a corollary of states' sovereignty, territorial integrity and political independence,<sup>71</sup> and is regularly invoked.<sup>72</sup> Although it applies only in the relations between states, the ICJ concluded in its *Nicaragua* judgment that violations of the rule may be direct or indirect in nature.<sup>73</sup> A state may therefore violate the norm if its organs intervene in the affairs of another state through the activities of an NSA.<sup>74</sup>

In the *Nicaragua* case, the ICJ addressed the principle of non-intervention in the context of the United States' support for the *contras*, defining the norm as 'the right of every sovereign State to conduct its affairs without outside interference'.<sup>75</sup> The Court then set out the conditions that must be met for one state's intrusion into another's territory or affairs to amount to a prohibited intervention. First, the interference must relate to those 'matters in which each State is permitted, by the principle of sovereignty, to decide freely', commonly referred to as the state's *domaine réservé*.<sup>76</sup> Second, an intervention only contravenes international law if it 'uses methods of coercion in regard to such choices, which must remain free ones'.<sup>77</sup>

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<sup>70</sup> See *Nicaragua* (n 12) [202], [205]; *Armed Activities* (n 12) [161]-[162]; *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35. See also Tallinn Manual 2.0 (n 37) 312-327; Philip Kunig, 'Intervention, Prohibition of' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2015); Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22 *Leiden J Intl L* 345; Marcelo Kohen, 'The Principle of Non-Intervention 25 Years after the Nicaragua Judgment' (2012) 25 *Leiden J Intl L* 157; Buchan and Tsagourias (n 19); Harriet Moynihan, 'The Application of International Law to State Cyberattacks: Sovereignty and Non-Intervention' (*Chatham House Research Paper*, December 2019) <[www.chathamhouse.org/publication/application-international-law-state-cyberattacks-sovereignty-and-non-intervention](http://www.chathamhouse.org/publication/application-international-law-state-cyberattacks-sovereignty-and-non-intervention)> accessed 4 December 2019.

<sup>71</sup> *Nicaragua* (n 12) [202]. Regarding the norm's historical development see Mohamed Helal, 'On Coercion in International Law' (2019) 52 *New York U J Intl L and Politics* 1, 49-54, 65; Steven Wheatley, 'Foreign Interference in Elections under the Non-Intervention Principle: We Need to Talk about "Coercion"' (2020) 31 *Duke J Comparative and Intl L* 161, 168-72; William Ossoff, 'Hacking the Domaine Réservé: The Rule of Non-Intervention and Political Interference in Cyberspace' (2021) 62 *Harvard Intl L J*, 295, 298-304.

<sup>72</sup> Jamnejad and Wood (n 70) 345-346.

<sup>73</sup> *Nicaragua* (n 12) [205].

<sup>74</sup> *ibid* [205]; *Armed Activities* (n 12) [164].

<sup>75</sup> *Nicaragua* (n 12) [202].

<sup>76</sup> *ibid* [205].

<sup>77</sup> *ibid* [205]. See also Friendly Relations Declaration (n 23): 'No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.

### 6.3.1 *Interference in the state's domaine réservé*

For one state's interference into the affairs of another to violate the principle of non-intervention, it must have the potential to coerce the latter in respect of its internal or external affairs.<sup>78</sup> The ICJ characterised such matters as including 'the choice of a political, economic, social, and cultural system, and the formulation of foreign policy'.<sup>79</sup> In essence, a state's *domaine réservé* refers to those areas of its domestic and foreign policy that are not regulated by treaties or by customary international law and are therefore regarded as protected from interference by other states.<sup>80</sup>

While in the past states' sovereign affairs were relatively distinct, developments in the relations between states over recent decades have added a degree of ambiguity to the concept of a state's *domaine réservé*. Increased globalisation, together with states' acceptance of human rights obligations, mean that external states and international organisations now have an interest in areas that were once matters of purely domestic concern.<sup>81</sup> Thus, like the notion of governmental authority addressed in Chapter 4,<sup>82</sup> the outer limits of a state's sovereign functions are fluid and vary from state to state.<sup>83</sup>

Consider, for example, the Arms Trade Treaty, in which states parties agreed to restrictions in their conduct of international trade in conventional weapons.<sup>84</sup> Following those states' ratification or accession to the treaty, their activities in this area are no longer an exclusively domestic affair. The scope of states' *domaine réservé* in the cyber domain may similarly contract in future as they agree to additional international regulation in this sphere.<sup>85</sup> In this way, the nature and extent of acceptable

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<sup>78</sup> *Nicaragua* (n 12) [205]; Friendly Relations Declaration (n 23). See also Kunig (n 70) para 3; Tallinn Manual 2.0 (n 37) r 66.

<sup>79</sup> *Nicaragua* (n 12) [205]. See also Friendly Relations Declaration (n 23): 'Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State'. This formulation is also adopted by certain states. See eg Wright (n 38); Ney (n 38); New Zealand Ministry of Foreign Affairs and Trade (n 46); Federal Government of Germany (n 46) 3.

<sup>80</sup> Tallinn Manual 2.0 (n 37) r 66 commentary para 7; Helal (n 71) 4, 65-67. See also Government of the Netherlands (n 38) 3.

<sup>81</sup> Duncan Hollis, 'The Influence of War; The War for Influence' (2015) *Temple Intl & Comp Law J* 31, 40; Kunig (n 70) para 3; Buchan and Tsagourias (n 19) 172.

<sup>82</sup> See Ch 4 s 4.3.1.

<sup>83</sup> Helal (n 71) 66-67.

<sup>84</sup> Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) art 6(3). See also William T Worster, 'The Arms Trade Treaty Regime in International Institutional Law' (2015) 36 *U Pennsylvania J Intl L* 995.

<sup>85</sup> Tallinn Manual 2.0 (n 37) r 66 commentary paras 13-14; Kunig (n 70) para 3; Sean Watts, 'Low-Intensity Cyber Operations and the Principle of Non-Intervention' (2014) 14 *Baltic YB Intl L* 137, 155.

interventions by one state into another may evolve over time, thereby adding further ambiguity to the precise boundaries of a state's *domaine réservé*.<sup>86</sup>

Despite the diminishing and uncertain range of activities that remain sovereign in nature, states' recent pronouncements regarding cyber interventions have illuminated, to some extent, their respective conceptions of the *domaine réservé*.<sup>87</sup> The United Kingdom, for instance, expressed the view that cyber operations would violate the non-intervention principle if they manipulate the electoral system to alter the results of an election, interfere with essential medical services, or intervene in the fundamental operation of Parliament or the stability of the financial system.<sup>88</sup> France, meanwhile, asserted more broadly that a cyber interference may violate the principle if it impacts the state's political, social or cultural system, or its military or economic security.<sup>89</sup> States also, however, acknowledge the lack of international consensus on the issue.<sup>90</sup>

It is particularly difficult to assess whether states violate the norm through their support to NSAs in the cyber domain.<sup>91</sup> While the cyberattacks on the Ukrainian power network may have implicated Ukraine's *domaine réservé* in view of the impact of these operations on the state's ability to manage its critical infrastructure,<sup>92</sup> the same may not be true of the numerous other cyber operations directed against Ukraine.<sup>93</sup> Some such operations affected private individuals or companies within Ukraine and may not have impacted the state's freedom of choice regarding its independent sovereign functions, such as the running of its financial, energy or transport sectors.<sup>94</sup> Thus, had these attacks

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<sup>86</sup> See Hollis (n 81) 40.

<sup>87</sup> See Przemyslaw Roguski, 'Application of International Law to Cyber Operations: A Comparative Analysis of States' Views' (*The Hague Program for Cyber Norms*, March 2020) 7-9 <[www.thehaguecybernorms.nl/research-and-publication-posts/application-of-international-law-to-cyber-operations-a-comparative-analysis-of-states-views](http://www.thehaguecybernorms.nl/research-and-publication-posts/application-of-international-law-to-cyber-operations-a-comparative-analysis-of-states-views)> accessed 26 August 2021.

<sup>88</sup> Wright (n 38); UK Mission to the UN (n 38) 3-4.

<sup>89</sup> République Française Ministère des Armées (n 38) 7. See also Michael N Schmitt, 'Noteworthy Releases of International Cyber Law Positions – Part II: Iran' (*Articles of War*, 27 August 2020) <<https://lieber.westpoint.edu/iran-international-cyber-law-positions/>> accessed 15 August 2021.

<sup>90</sup> See eg Wright (n 38); Ney (n 38).

<sup>91</sup> Jens David Ohlin, 'Did Russian Cyber Interference in the 2016 Election Violate International Law?' (2017) 95 *Texas L Rev* 1579, 1587-88; Nicholas Tsagourias, 'Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace' (*EJIL:Talk!*, 26 August 2019) <[www.ejiltalk.org/electoral-cyber-interference-self-determination-and-the-principle-of-non-intervention-in-cyberspace/](http://www.ejiltalk.org/electoral-cyber-interference-self-determination-and-the-principle-of-non-intervention-in-cyberspace/)> accessed 14 December 2019; Moynihan (n 70) 33-35. For an analysis of states' views regarding the application of the norm in the cyber domain see Ossoff (n 71) 310-23.

<sup>92</sup> Moynihan (n 70) 34-35.

<sup>93</sup> See Ch 2 s 2.2.3.

<sup>94</sup> Moynihan (n 70) 34-35; Tallinn Manual 2.0 (n 37) r 66 commentary para 11.

been launched in peacetime, by private cyber operators acting with Russian support, it is far from clear whether Russia's conduct would have violated the principle of non-intervention.

In contrast with conduct in cyberspace, the state-sponsored activities of anti-government groups operating in the physical domain may more starkly impact a target state's *domaine réservé*, particularly if the NSA impedes the state's sovereign control over territory.<sup>95</sup> Subject to its obligations under IHRL, a state's exercise of territorial control within its borders is a matter falling clearly within its *domaine réservé*.<sup>96</sup> Therefore, given that many of the examples of state support to NSAs detailed in Chapter 2 enabled the groups concerned to gain or maintain control over territory, the respective states' conduct in providing such support plainly implicates the non-intervention principle. The more difficult question is to determine whether the relevant intervention meets the second requirement of the norm, namely whether it was coercive.

### **6.3.2 Coercion**

Coercion is not defined in international law and considerable ambiguity surrounds the particular acts taken by one state against another that meet this threshold.<sup>97</sup> The Friendly Relations Declaration indicates that to be considered coercive, an intervening state's conduct must have the potential to compel a target state to act in an involuntary manner, either by taking positive steps it would not otherwise have taken or by refraining from acting in the manner it had intended.<sup>98</sup> In other words, coercion requires 'an element of pressure or compulsion on the part of the coercing state' that deprives the target of its freedom of choice over the matter at issue.<sup>99</sup>

Consider, for instance, the support that Turkey provided to rebels in Syria in the early stages of the disturbances.<sup>100</sup> This included the supply of weaponry, as well as a safe haven in Turkish territory from which the rebels could plan their operations.<sup>101</sup> The assistance therefore enhanced the rebels'

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<sup>95</sup> *Nicaragua* (n 12) [241].

<sup>96</sup> *ibid* [205].

<sup>97</sup> This ambiguity has been acknowledged by certain states. See eg Government of the Netherlands (n 38) 3; Wright (n 38). See also Helal (n 71) 69-70.

<sup>98</sup> Friendly Relations Declaration (n 23). See also Tallinn Manual 2.0 (n 37) r 66 commentary para 18; Government of the Netherlands (n 38) 3; Federal Government of Germany (n 46) 5.

<sup>99</sup> Moynihan (n 70) 28. See also Tallinn Manual 2.0 (n 37) r 66 commentary paras 18, 21; Buchan and Tsagourias (n 19) 171-172; Helal (n 71) 71-72.

<sup>100</sup> See Ch 2 s 2.1.1.

<sup>101</sup> *ibid*.

ability to fight against the Syrian regime and was coercive in the sense that it forced the government to take steps that it would not otherwise have taken in response.<sup>102</sup>

While coercion is ‘particularly obvious in the case of an intervention which uses force’,<sup>103</sup> non-violent interventions may also be coercive in nature.<sup>104</sup> Difficulties often arise, however, in determining whether this criterion is met.<sup>105</sup> The line between a coercive intervention and a state’s lawful influence over another state’s affairs, such as through diplomacy, persuasion, or the spreading of propaganda, is frequently indistinct.<sup>106</sup> Key is the question whether the state compels its target to act involuntarily, or merely influences it to act.<sup>107</sup> For instance, if Russia tasked NSAs to spread misinformation regarding the Ukrainian government in the context of the Donbas conflict,<sup>108</sup> it is questionable whether that conduct alone would constitute a prohibited intervention due to the need to demonstrate a coercive effect.<sup>109</sup>

Coercion may be particularly difficult to identify when states use proxies to interfere in other states’ affairs in the cyber domain.<sup>110</sup> Some commentators argue that this element of the norm precludes a determination of illegality in the context of cyber operations, meaning that a more nuanced definition of non-intervention is required.<sup>111</sup> Other scholars and states, meanwhile, interpret the

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<sup>102</sup> *Nicaragua* (n 12) [205]; *Armed Activities* (n 12) [164]. See also Michael N Schmitt, ‘Legitimacy versus Legality Redux: Arming the Syrian Rebels’ (2014) 7 J National Security L & Policy 139, 143-45.

<sup>103</sup> *Nicaragua* (n 12) [205].

<sup>104</sup> Friendly Relations Declaration (n 23). See also Tallinn Manual 2.0 (n 37) r 66 commentary para 20; Helal (n 71) 56-60.

<sup>105</sup> For discussion of the norm in the context of electoral interference see Wheatley (n 71); Ohlin (n 1587-1594; Hollis (n 81) 39-41; Tsagourias (n 91); Gary P Corn, ‘Covert Deception, Strategic Fraud, and the Rule of Prohibited Intervention’ (*Hoover Institution*, 2020) <<https://s3.documentcloud.org/documents/7217091/476426508-Covert-Deception-Strategic-Fraud-and.pdf>> accessed 9 August 2021.

<sup>106</sup> Tallinn Manual 2.0 (n 37) r 66 commentary para 21; Helal (n 71) 4, 72-74.

<sup>107</sup> *ibid.* See also Terry D Gill, ‘Non-Intervention in the Cyber Context’ in Katharina Ziolkowski (ed), ‘Peacetime Regime for State Activities in Cyberspace’ (*NATO Cooperative Cyber Defence Centre of Excellence*, 2013) 223 <[www.ilsa.org/Jessup/Jessup16/Batch%202/Peacetime-Regime.pdf](http://www.ilsa.org/Jessup/Jessup16/Batch%202/Peacetime-Regime.pdf)> accessed 30 December 2019.

<sup>108</sup> See eg Simon Shuster, ‘Russians Rewrite History to Slur Ukraine Over War’ (*Time*, 29 October 2014) <<https://time.com/3545855/russia-ukraine-war-history/>> accessed 7 December 2019; Orysia Lutsevych, ‘Agents of the Russian World: Proxy Groups in the Contested Neighbourhood’ (*Chatham House*, April 2016) 35 <[www.chathamhouse.org/sites/default/files/publications/research/2016-04-14-agents-russian-world-lutsevych.pdf](http://www.chathamhouse.org/sites/default/files/publications/research/2016-04-14-agents-russian-world-lutsevych.pdf)> accessed 7 December 2019.

<sup>109</sup> Tallinn Manual 2.0 (n 37) r 66 commentary para 21. See also Tsagourias (n 91); Ossoff (n 71) 319; Gary Corn, ‘Coronavirus Disinformation and the Need for States to Shore Up International Law’ (*Lawfare*, 2 April 2020) <[www.lawfareblog.com/coronavirus-disinformation-and-need-states-shore-international-law](http://www.lawfareblog.com/coronavirus-disinformation-and-need-states-shore-international-law)> accessed 4 April 2020.

<sup>110</sup> Tallinn Manual 2.0 (n 37) r 66 commentary para 17-24; Moynihan (n 70) 27-33; Gill (n 107) 232-238; Watts (n 85) 146-149; Ido Kilovaty, ‘The Elephant in the Room: Coercion’ (2019) 113 AJIL Unbound 87.

<sup>111</sup> Kilovaty (n 110) 87; Thibault Moulin, ‘Reviving the Principle of Non-Intervention in Cyberspace: The Path Forward’ (2020) 25 J Conflict & Security L 423, 439-46; Michael P Fischerkeller, ‘Current International Law is not an Adequate Regime for Cyberspace’ (*Lawfare*, 22 April 2021) <[www.lawfareblog.com/current-international-law-not-adequate-regime-cyberspace](http://www.lawfareblog.com/current-international-law-not-adequate-regime-cyberspace)> accessed 10 August 2021.

coercion requirement more flexibly, to include actions that restrict a state's choice regarding matters falling within its *domaine réservé*.<sup>112</sup> This broader construction, adopted by the government of Australia, encompasses cyber operations that deprive the target state of the ability to exercise control over its sovereign affairs, such as the stability of its financial systems.<sup>113</sup> But for now, the law in this area remains under-developed, leaving considerable room for debate regarding the norm's precise application.

Uncertainty similarly surrounds the level or nature of state support to an NSA that may violate the non-intervention principle. While it is clear from the *Nicaragua* case that indirect methods of intervention suffice,<sup>114</sup> the ICJ's judgment does not clarify whether lesser forms of support than those provided by the United States to the *contras* would satisfy the coercion requirement.<sup>115</sup> For instance, while the provision of weaponry to the Syrian rebels was clearly coercive and amounts to a prohibited intervention in Syria's affairs, it is doubtful whether the same conclusion could be reached had the Obama administration gone no further than providing 'non-lethal' assistance, such as communications or medical equipment.<sup>116</sup> In cases of minimal or ineffective state support, the causal nexus between the state's conduct in assisting an NSA and the coercive effect of the NSA's actions against the target state may be too attenuated to amount to a prohibited intervention.<sup>117</sup>

A further factor that may impact this assessment is the state's intent when providing the relevant support. The ICJ concluded in the *Nicaragua* case that while the *contras* intended to overthrow the Nicaraguan government, it was not necessary to establish whether the United States shared that aim.<sup>118</sup> Instead, to amount to a prohibited intervention, it was sufficient that the United States intended, by its support to the *contras*, to coerce the Nicaraguan government in respect of matters falling within its *domaine réservé*.<sup>119</sup> It is questionable, however, whether a determination of the

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<sup>112</sup> Watts (n 85) 149; Wheatley (n 71) 182-95; Moynihan (n 70) 30-32; Corn, 'Covert Deception' (n 105) 12-13; Roguski (n 87) 7-9.

<sup>113</sup> Australian Government (n 38) 98. See also New Zealand Ministry of Foreign Affairs and Trade (n 46).

<sup>114</sup> *Nicaragua* (n 12) [205].

<sup>115</sup> *ibid* [205], [228].

<sup>116</sup> Mark Hosenball, 'Exclusive: Obama Authorizes Secret US Support for Syrian Rebels' (*Reuters*, 1 August 2012) <[www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801](http://www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801)> accessed 25 November 2019. See also Tom Ruys and Luca Ferro, 'Non-lethal Assistance and the Syrian Conflict: Lessons from the Netherlands' (*Just Security*, 20 July 2020) <[www.justsecurity.org/71286/non-lethal-assistance-and-the-syrian-conflict-lessons-from-the-netherlands/](http://www.justsecurity.org/71286/non-lethal-assistance-and-the-syrian-conflict-lessons-from-the-netherlands/)> accessed 2 August 2021.

<sup>117</sup> Tallinn Manual 2.0 (n 37) r 66 commentary para 24.

<sup>118</sup> *Nicaragua* (n 12) [241].

<sup>119</sup> *ibid* [241]. See also Tallinn Manual 2.0 (n 37) r 66 commentary paras 27-28; Wheatley (n 71) 183.

intervening state's intent is crucial to a finding of unlawful intervention. In *Armed Activities*, the ICJ concluded that Uganda intervened unlawfully in the DRC's sovereign affairs without establishing Uganda's motive for supporting the rebels.<sup>120</sup> Moreover, New Zealand's government expressed the view that a state's intent may be inferred from the effects of its activities.<sup>121</sup> But a lack of clarity in this respect adds further ambiguity to determinations of the norm's application.

### **6.3.3 Significance of the norm in closing the accountability gap**

It is apparent from the ICJ's findings in the *Nicaragua* case that when states assist rebel groups located overseas, their own organs' conduct in supporting the NSA concerned will often violate the principle of non-intervention.<sup>122</sup> The norm does not apply, however, to every instance of state support to NSAs addressed in Chapter 2. The wrongfulness of any intervention is precluded if the intervening state's proxies operate with the territorial state's consent.<sup>123</sup> As such, neither Iran nor Russia violated the norm through their respective dealings with Shi'a militias and PMSCs operating in Syria, as these groups fought in support of the Assad regime with governmental consent.<sup>124</sup>

The effectiveness of the non-intervention principle is further diminished due to considerable ambiguity regarding its scope and application.<sup>125</sup> While interventions involving the use of force ordinarily violate the norm,<sup>126</sup> its application is far less certain in cases where the supported proxy acts through non-violent means. Such issues are particularly apparent when the intervention occurs in the cyber domain or in the information environment.<sup>127</sup> And levels of uncertainty are only compounded when the relevant intervention is carried out indirectly, via an NSA, meaning that questions of causation may also complicate the assessment.<sup>128</sup>

Even if a state clearly violates the norm, an injured state's potential remedy in respect of that breach may fall far short of the remedy available had the actual abuses committed by the NSA been attributable to the state. Any countermeasures taken by an injured state must be 'commensurate with

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<sup>120</sup> *Armed Activities* (n 12) [163].

<sup>121</sup> New Zealand Ministry of Foreign Affairs and Trade (n 46). See also Watts (n 85) 158; Moynihan (n 70) 32.

<sup>122</sup> *Nicaragua* (n 12) [241].

<sup>123</sup> ARSIWA (n 3) art 20. See also Gray (n 19) 84-95.

<sup>124</sup> UNSC, 'Letter dated 20 April 2016' (n 67). See also Ch 2 s 2.1.2.

<sup>125</sup> Gray (n 19) 76; Ossoff (n 71) 304-09.

<sup>126</sup> *Nicaragua* (n 12) [205].

<sup>127</sup> Wright (n 38); Ney (n 38). See also Watts (n 85) 145; Corn, 'Covert Deception' (n 105) 2-3.

<sup>128</sup> See Tallinn Manual 2.0 (n 37) r 66 commentary para 24.

the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.<sup>129</sup> As such, only minimal countermeasures might be open to an injured state in response to a state's assistance to an armed group in violation of the principle of non-intervention. In contrast, if a state bears responsibility for the actual abuses committed by the supported NSA, more serious countermeasures may be proportionate due to the increased gravity of the internationally wrongful act at issue, and the injured state may be entitled to a higher level of reparations.<sup>130</sup>

#### 6.4 Due diligence

Like the principle of non-intervention, states' due diligence obligations derive from the concept of state sovereignty.<sup>131</sup> Due diligence began to operate as a constraint on state behaviour in the 19<sup>th</sup> century, particularly regarding the protection of aliens within a state's territory.<sup>132</sup> Mixed claims commissions and arbitral tribunals dealt with numerous claims by states seeking redress for injuries suffered by their nationals. In the *Youmans* case, for example, the General Claims Commission concluded that Mexico failed to exercise due diligence to protect a US national from the mob that killed him, and also failed to take proper steps to apprehend and punish those responsible for the crime.<sup>133</sup>

Due diligence is thus a standard of conduct that states are expected to meet, and their organs' failure to comply constitutes an internationally wrongful act. As a principle of general international law, the

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<sup>129</sup> ARSIWA (n 3) art 51. See also *ibid* commentary para 6; *Nicaragua* (n 12) [249].

<sup>130</sup> ARSIWA (n 3) arts 34, 51.

<sup>131</sup> *Island of Palmas* case (*Netherlands v USA*) (1928) (1927) 2 RIAA 831, 839 <[http://legal.un.org/riaa/cases/vol\\_II/829-871.pdf](http://legal.un.org/riaa/cases/vol_II/829-871.pdf)> accessed 4 May 19.

<sup>132</sup> See Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German YB Intl L* 9, 22; International Law Association, 'Study Group on Due Diligence in International Law: First Report' (March 2014) 31 (ILA First Report); Antal Berkes, 'The Standard of "Due Diligence" as a Result of Interchange Between the Law of Armed Conflict and General International Law' (2018) 23 *J Conflict and Security L* 433, 437-38; Anne Peters, Heike Krieger and Leonhard Kreuzer, 'Due Diligence: The Risky Risk Management Tool in International Law' (2020) 9 *Cambridge Intl L J* 121, 122-23.

<sup>133</sup> *Thomas H Youmans (USA) v United Mexican States* (1927) 4 RIAA 110 <[http://legal.un.org/riaa/cases/vol\\_IV/110-117.pdf](http://legal.un.org/riaa/cases/vol_IV/110-117.pdf)> accessed 4 May 19. Other relevant cases include *Alabama Claims Arbitration (USA v Great Britain)* (1872) 29 RIAA 125 <[http://legal.un.org/riaa/cases/vol\\_XXIX/125-134.pdf](http://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf)> accessed 4 May 19; *Sambiaggio* case, 10 RIAA 499 (1903) <[http://legal.un.org/riaa/cases/vol\\_X/499-525.pdf](http://legal.un.org/riaa/cases/vol_X/499-525.pdf)> accessed 22 November 2018; *Laura M B Janes et al (USA) v United Mexican States* (1925) 4 RIAA 82 <[http://legal.un.org/riaa/cases/vol\\_IV/82-98.pdf](http://legal.un.org/riaa/cases/vol_IV/82-98.pdf)> accessed 4 May 19; *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 615 <[http://legal.un.org/riaa/cases/vol\\_II/615-742.pdf](http://legal.un.org/riaa/cases/vol_II/615-742.pdf)> accessed 5 May 2019; *SS Lotus (France v Turkey)* (1927) PCIJ Rep Series A No 10 <[http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm)> accessed 4 May 2019; *JJ Boyd (USA) v United Mexican States* (1928) 4 RIAA 380 <[http://legal.un.org/riaa/cases/vol\\_IV/380-381.pdf](http://legal.un.org/riaa/cases/vol_IV/380-381.pdf)> accessed 4 May 2019; *William E Chapman (USA) v United Mexican States* (1930) 4 RIAA 632 <[http://legal.un.org/riaa/cases/vol\\_IV/632-640.pdf](http://legal.un.org/riaa/cases/vol_IV/632-640.pdf)> accessed 4 May 19.



norm is best articulated by the ICJ in its *Corfu Channel* judgment: ‘it is every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’.<sup>134</sup> More specific due diligence obligations arise within distinct areas of international law,<sup>135</sup> including IHRL<sup>136</sup> and IHL.<sup>137</sup> This section assesses the utility of the general principle in regulating states’ behaviour towards NSAs but in so doing, draws upon jurisprudence relating to more specific due diligence obligations such as the ICJ’s observations regarding the duty to prevent genocide.<sup>138</sup>

#### **6.4.1 The scope of the duty**

The precise content of states’ due diligence obligations varies according to the specific area of law that is invoked.<sup>139</sup> In general terms, however, states breach the principle of due diligence and thereby commit an internationally wrongful act if their organs fail to take appropriate measures to ensure that their territory is not used to violate other states’ rights.<sup>140</sup> The principle thus imposes a positive duty on states to take reasonable steps to stop harmful activities within their territory from occurring.<sup>141</sup> For instance, if a state knows that an armed group is using its territory to mount attacks against another state but tolerates such behaviour and takes no steps to stop the group’s activities, that omission may violate the state’s due diligence obligations.

Duties of due diligence extend beyond a state’s own territory to apply extra-territorially in cases of occupation.<sup>142</sup> In *Armed Activities*, for example, the ICJ found that Uganda had not complied with its obligations as an occupying power to take appropriate measures to prevent the looting, plundering and exploitation of natural resources.<sup>143</sup> The principle may therefore apply when a hiring state sends a PMSC to work in an area under its occupation, as the United States did following the 2003

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<sup>134</sup> *Corfu Channel* (n 70) 22. See also UN Secretary-General, ‘Survey of International Law in Relation to the Work of Codification of the International Law Commission’ (1 February 1949) UN Doc A/CN.4/1/Rev.1 para 57; International Law Association, ‘Study Group on Due Diligence in International Law: Second Report’ (July 2016) 5 (ILA Second Report).

<sup>135</sup> See generally ILA First Report (n 132).

<sup>136</sup> See s 6.5.

<sup>137</sup> See s 6.6. See also Katherine Del Mar, ‘The Requirement of “Belonging” under International Humanitarian Law’ (2010) 21 Eur J Intl L 105, 121.

<sup>138</sup> *Bosnian Genocide* (n 12) [429]-[438].

<sup>139</sup> ILA First Report (n 132); ILA Second Report (n 134) 4.

<sup>140</sup> ILA Second Report (n 134) 6; Sarah Heathcote, ‘State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility’ in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2013) 295-99.

<sup>141</sup> Pisillo-Mazzeschi (n 132) 22-26; Tallinn Manual 2.0 (n 37) r 7.

<sup>142</sup> Berkes (n 132) 446-47.

<sup>143</sup> *Armed Activities* (n 12) [248]-[249].

invasion of Iraq. If the PMSC acts to the detriment of other states, the hiring state may bear responsibility for its own organs' failure to properly regulate the relevant PMSC activity.<sup>144</sup>

To breach the norm, the state's omission must relate to conduct that is 'contrary to the rights' of other states.<sup>145</sup> While, in general, only states violate international law, the principle is also relevant to non-state activity.<sup>146</sup> In this context, the due diligence obligation applies when an NSA engages in conduct that would, if conducted by the territorial state, breach an obligation the state owes the target.<sup>147</sup> Thus, because the attacks that M23 launched in the DRC would have amounted to an unlawful use of force if conducted directly by Rwanda's armed forces,<sup>148</sup> Rwanda bore due diligence obligations in respect of M23's activities on its territory relating to such attacks.<sup>149</sup> It is less certain, however, that the principle would apply to a failure by Russia to stop NSAs from using its territory to disseminate misinformation regarding the Ukrainian government<sup>150</sup> because such activity would not clearly violate international law if conducted directly by Russian state organs.<sup>151</sup>

The latter example additionally raises questions regarding the level of harm that the non-state activity must cause before due diligence obligations arise. By analogy with international environmental law, the experts involved in drafting Tallinn Manual 2.0 concluded that the non-state conduct must cause 'serious adverse consequences' for the target state.<sup>152</sup> Applying this threshold in practice, however, presents difficulties. While private conduct that simply causes minor disruption or inconvenience to a state will not engage the principle, the precise threshold at which the

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<sup>144</sup> Nigel D White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 Criminal Justice Ethics 233, 245. See also University Centre for International Humanitarian Law, 'Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions' (29-30 August 2005) 34-46 <[www.ucihl.org/communication/Private\\_Military\\_Companies\\_report.pdf](http://www.ucihl.org/communication/Private_Military_Companies_report.pdf)> accessed 9 December 2020; Hannah Tonkin, 'Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies' (2009) 22 Leiden J Intl L 779, 794.

<sup>145</sup> *Corfu Channel* (n 70) [22]. See also Tallinn Manual 2.0 (n 37) r 6 commentary para 15; Heathcote (n 140) 299.

<sup>146</sup> Tallinn Manual 2.0 (n 37) r 6 commentary para 21, citing *Trail Smelter case (USA, Canada)* (1941) 3 RIAA 1905, 1963 <[http://legal.un.org/riaa/cases/vol\\_III/1905-1982.pdf](http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf)> accessed 6 May 2019; Berkes (n 132) 339-40.

<sup>147</sup> Tallinn Manual 2.0 (n 37) r 6 commentary para 22.; Russell Buchan, 'Cyberspace, Non-State Actors and the Obligation to Prevent Transboundary Harm' (2016) 21 J Conflict Security L 429, 433.

<sup>148</sup> See s 6.2; Ch 3 s 3.3.

<sup>149</sup> See Tallinn Manual 2.0 (n 37) r 6 commentary para 23.

<sup>150</sup> See Shuster (n 108); Lutsevych (n 108).

<sup>151</sup> Tallinn Manual 2.0 (n 37) r 6 commentary para 27; Tsagourias (n 91).

<sup>152</sup> Tallinn Manual 2.0 (n 37) r 6 commentary paras 25-26. See also Government of the Netherlands (n 38) 5.

consequences for the target state are sufficiently serious to implicate a territorial state's due diligence obligations remains unsettled.<sup>153</sup>

Due diligence obligations are particularly pertinent, but also contested, in the cyber domain.<sup>154</sup> Certain states accept that they are under a duty to take feasible steps to ensure that cyber infrastructure situated within their territory, or under their governmental control, is not used to the detriment of other states.<sup>155</sup> But others assert that they are under no such obligation.<sup>156</sup> Even if consensus can be reached on the issue, considerable doubt persists as to what exactly that obligation entails.<sup>157</sup>

One key area of ambiguity concerns the steps that states are required to take to fulfil their due diligence obligations. For instance, must states undertake investigations into suspected activity or simply respond to harmful non-state conduct once it has occurred?<sup>158</sup> The state's level of knowledge is thus an important factor to address. While constructive knowledge is sufficient for the duty to arise,<sup>159</sup> most scholars agree that there is no positive duty on states to monitor all private activity

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<sup>153</sup> See Tallinn Manual 2.0 (n 37) r 6 commentary paras 25-27; Robert P Barnidge, 'The Due Diligence Principle under International Law' (2006) 8 Intl Community L Rev 81, 101-102; Buchan (n 147) 449-451; Scott Shackelford, Scott Russell and Andreas Kuehn, 'Unpacking the International Law on Cybersecurity Due Diligence: Lessons from the Public and Private Sectors' (2016) 17 Chicago J Intl L 1, 11.

<sup>154</sup> See eg Tomohiro Mikanagi, 'Application of the Due Diligence Principle to Cyber Operations' (2021) 97 Intl L Studies 1019.

<sup>155</sup> Republic of Estonia, 'President of the Republic at the Opening of CyCon 2019' (29 May 2019) <<https://president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/>> accessed 15 August 2021; Government of the Netherlands (n 38) 4-5; République Française Ministère des Armées (n 38) 10; Finnish Government (n 46) 4-5; Australian Government (n 38) 99; Federal Government of Germany (n 46) 3; Ministry of Foreign Affairs of Japan, 'Basic Position of the Government of Japan on International Law Applicable to Cyber Operations' (28 May 2021) 5-6 <[www.mofa.go.jp/files/100200935.pdf](http://www.mofa.go.jp/files/100200935.pdf)> accessed 14 August 2021.

<sup>156</sup> The UN Group of Governmental Experts treated due diligence as a non-binding norm of responsible state behaviour. See UNGA, 'Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (24 June 2013) UN Doc A/68/98 para 23; UNGA, 'Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (22 July 2015) UN Doc A/70/174 paras 13(c), 28(e); 'Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security' (28 May 2021) 6-7 <<https://front.un-arm.org/wp-content/uploads/2021/06/final-report-2019-2021-gge-1-advance-copy.pdf>> accessed 14 August 2021. See also UK Mission to the UN (n 38) 4-5; Roy Schöndorf, 'Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations' (2021) 97 Intl L Studies 395, 403-04; Eric Talbot Jensen and Sean Watts, 'Cyber Due Diligence' (2021) 73 Oklahoma L Rev 645, 683-702.

<sup>157</sup> Mikanagi (n 154) 1031-32.

<sup>158</sup> Moynihan (n 70) 25.

<sup>159</sup> *Corfu Channel* (n 70) 18-22; *Bosnian Genocide* (n 12) [432]; European Court of Human Rights (ECtHR) *Osman v United Kingdom* (28 October 1998) App No 23452/94 [116]. See also Tallinn Manual 2.0 (n 37) r 6 commentary paras 37-39; Barnidge (n 153) 104-105; Buchan (n 147) 440-442; Shackelford, Russell and Kuehn (n 153) 10; Tonkin (n 144) 795; Karine Bannelier-Christakis, 'Cyber Diligence: A Low-Intensity Due Diligence Principle for Low-Intensity Cyber

taking place in territory under their control.<sup>160</sup> So if it is correct that ISIS fighters were able to freely cross Turkey's southern border into Syria,<sup>161</sup> Ankara was only under a duty to take steps to stop this harmful activity if state officials knew or should have known of its occurrence.

Duties of due diligence are, by their nature, flexible and may vary in accordance with factors such as the degree of predictability of the harm, the importance of the interest to be protected, and the state's ability to regulate non-state conduct within its territory.<sup>162</sup> In *Armed Activities*, for example, the ICJ found that Zaire had not violated its due diligence obligations by failing to prevent NSAs located within its borders from using armed force against Uganda due to the government's inability to exercise control over that part of its territory.<sup>163</sup> Accordingly, while Syria was subject to equal due diligence duties throughout its territory during the early stages of the conflict, its obligations subsequently weakened in areas falling under rebel control.<sup>164</sup>

The due diligence obligations of failed or weak states are often minimal as they lack the territorial control, the capacity, and the resources to address the threats posed by NSAs.<sup>165</sup> But if states do have an ability to act, the level of obligation may increase in line with the foreseeability of the harm and the gravity of the threat posed.<sup>166</sup> In the *Bosnian Genocide* case, the ICJ found that the FRY knew that the Bosnian Serbs embraced a 'deep-seated hatred' of the Muslims and it was 'clear that there

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Operations' (2015) 14 *Baltic YB Intl L* 23, 28-31; Kimberly N Trapp, *State Responsibility for International Terrorism* (OUP 2011) 66-70; Becker (n 22) 133-36.

<sup>160</sup> Tallinn Manual 2.0 (n 37) r 6 commentary para 42; *ibid* r 7 commentary paras 7-13. See also Government of the Netherlands (n 38) 4 fn 11; Republic of Estonia (n 155).

<sup>161</sup> Tyler Durden, 'ISIS Secrets Spilled in Rare On-Camera Interviews: "We Just Walked into Syria"' (*Zero Hedge*, 19 November 2019) <[www.zerohedge.com/geopolitical/secrets-spilled-rare-camera-isis-interviews-we-just-walked-syria](http://www.zerohedge.com/geopolitical/secrets-spilled-rare-camera-isis-interviews-we-just-walked-syria)> accessed 20 November 2019.

<sup>162</sup> ILA First Report (n 132) 2-3, citing *Alabama Claims Arbitration* (n 153), *Chapman* (n 153) *Boyd* (n 153). See also ILA Second Report (n 134) 13-20; Pisillo-Mazzeschi (n 132) 44-45; Geiß (n 251) 435; Tonkin (n 144) 794; Timo Koivurova, 'Due Diligence' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2015) para 19; Michael N Schmitt, 'In Defense of Due Diligence in Cyberspace' (2015) *The Yale L J Forum* 68, 74; Trapp, *State Responsibility for International Terrorism* (n 159) 70-75; Becker (n 22) 140-46; Berkes (n 132) 448-49.

<sup>163</sup> *Armed Activities* (n 12) [301]. See also *Sambiaggio* (n 133) 513.

<sup>164</sup> See Ch 2 s 2.1.

<sup>165</sup> Kimberley Trapp, 'Shared Responsibility and Non-State Terrorist Actors' (2015) 62 *Netherlands Intl L Rev* 141, 153-154. See also ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' (23 April to 1 June and 2 July to 10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 155, art 3 commentary para 17 (Articles on Prevention of Transboundary Harm).

<sup>166</sup> See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) (2011) Seabed Disputes Chamber of the International Tribunal for the Law of the Sea [117]; Articles on Prevention of Transboundary Harm (n 165) art 3 commentary para 11. See also Shackelford, Russell and Kuehn (n 153) 21.

was a serious risk of genocide in Srebrenica'.<sup>167</sup> As such, the FRY should have prioritised the threat and taken enhanced measures to mitigate against it.<sup>168</sup> In a similar manner, Iraq's obligation to regulate the activities of Iranian-backed Shi'a militia groups operating within its borders becomes more onerous when its organs know, or should know, of imminent attacks these groups are planning against the US-led coalition.<sup>169</sup> Such conduct on the part of the militias violates the coalition states' rights to act in support of the Iraqi government, free from unlawful uses of force.<sup>170</sup> But if the action required to stop the attacks imposes an unreasonable burden on Iraq, the state's failure to act would not breach its due diligence obligations.<sup>171</sup>

The due diligence principle thus allows for a graduated response by states, in proportion to the seriousness of the harm posed and their capacity to respond.<sup>172</sup> International law does not prescribe specific actions that states must take to comply with the principle.<sup>173</sup> Instead, the standard is one of reasonableness, requiring states to take such steps as are feasible in the circumstances.<sup>174</sup> Iraq therefore remains free to address the threat posed by Shi'a militia groups operating within its borders in the manner it sees fit. Its potential violation of the due diligence principle depends not on whether it succeeds in stopping militia groups from conducting attacks against the US-led coalition, but rather whether the steps it takes are reasonable in all the circumstances.<sup>175</sup> The obligation the due diligence principle imposes on states is therefore one of conduct, not of result.<sup>176</sup>

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<sup>167</sup> *Bosnian Genocide* (n 12) [438]

<sup>168</sup> *ibid* [438]. See also Schmitt 'In Defense of Due Diligence in Cyberspace' (n 162) 75; Tonkin (n 144) 794.

<sup>169</sup> See eg Lionel Beehner, 'Iraq's Militia Groups' (*Council on Foreign Relations*, 26 October 2006) <[www.cfr.org/background/iraqs-militia-groups](http://www.cfr.org/background/iraqs-militia-groups)> accessed 16 May 2019; Kirk H Sowell, 'The Rise of Iraq's Militia State' (*Carnegie Endowment for International Peace*, 23 April 2015) <<http://carnegieendowment.org/sada/?fa=59888>> accessed 28 November 2017.

<sup>170</sup> Crispin Smith, 'Iraq's Legal Responsibility for Militia Attacks on US Forces: Paths Forward' (*Just Security*, 10 March 2021) <[www.justsecurity.org/75232/iraqs-legal-responsibility-for-militia-attacks-on-u-s-forces-paths-forward/](http://www.justsecurity.org/75232/iraqs-legal-responsibility-for-militia-attacks-on-u-s-forces-paths-forward/)> accessed 23 November 2021.

<sup>171</sup> Schmitt 'In Defense of Due Diligence in Cyberspace' (n 162) 74-75.

<sup>172</sup> Geiß (n 251) 433. See also *Alabama Claims Arbitration* (n 153) 129.

<sup>173</sup> Tallinn Manual 2.0 (n 37) r 7 commentary para 6, 16; Buchan (n 147) 437.

<sup>174</sup> *Osman* (n 159) [116]. See also ILA Second Report (n 134) 2, 8-9; Buchan (n 147) 443-447.

<sup>175</sup> *Nicaragua* (n 12) [157]; Koivurova (n 162) para 40; Pisillo-Mazzeschi (n 132) 36; Tallinn Manual 2.0 (n 37) r 7. For further discussion regarding the steps states must take to comply with their due diligence obligations, see eg Barnidge (n 153) 112-115; Buchan (n 147) 435; White (n 144) 243-245; Pisillo-Mazzeschi (n 132) 26-30.

<sup>176</sup> *Bosnian Genocide* (n 12) [430]; Koivurova (n 162) para 2; Buchan (n 147) 434-435. But see also Peters, Krieger and Kreuzer (n 132) 130.

#### 6.4.2 *Significance of the norm in closing the accountability gap*

The principle of due diligence is of clear relevance in regulating states' behaviour towards NSAs, offering a more nuanced method of holding states to account. Unlike the binary 'all or nothing' approach that results from the process of attribution, the reasonableness of the measures a state takes to comply with its due diligence duties may vary according to factors such as the foreseeability and severity of the harm and the state's capacity to control the risk.<sup>177</sup> Importantly in this context, states' duties of due diligence may also increase according to their ability to influence the actor concerned.<sup>178</sup> In the *Bosnian Genocide* case, the ICJ determined that the FRY was in a position of influence over the Bosnian Serbs and its failure to exert that influence to prevent the genocide in neighbouring Bosnia engaged the state's international responsibility.<sup>179</sup> By analogy, therefore, Turkey bears an enhanced duty to regulate the activities of armed groups operating in areas it controls in northern Syria that could violate the rights of other states in view of its capacity to influence those NSAs' behaviour.<sup>180</sup>

Duties of due diligence are particularly relevant in cases where attribution is problematic, such as in the cyber domain.<sup>181</sup> From an evidential perspective, it may be easier for an injured state to demonstrate that a state's organs failed to take feasible steps to prevent private actors from misusing the state's cyber infrastructure than it is to prove attribution.<sup>182</sup> For instance, if Russian state organs were aware, or should have known, that private cyber operators were planning to launch the attacks against the Ukrainian power network from Russian cyber infrastructure but did not take feasible steps to stop those attacks, Moscow likely violated its due diligence obligations.<sup>183</sup> If, however, those attacks were launched from cyber infrastructure situated outside Russia's territory and beyond the scope of its governmental control, the due diligence principle would not apply.

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<sup>177</sup> Monika Hakimi, 'State Bystander Responsibility' (2010) 21 *Euro J Intl L* 341, 373-374; Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for their Involvement in Serious International Wrongdoing?' (2017) 60 *German YB Intl L* 667.

<sup>178</sup> *Bosnian Genocide* (n 12) [430]. See also Ministry of Foreign Affairs of Japan (n 155) 5-6; Mikanagi (n 154) 1032-36.

<sup>179</sup> *Bosnian Genocide* (n 12) [434]. For a critique of the ICJ's conclusions in this respect, see eg Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 *Eur J Intl L* 695, 699-701.

<sup>180</sup> See Ch 2 s 2.1.4.

<sup>181</sup> Ministry of Foreign Affairs of Japan (n 155) 6. See also Buchan (n 147) 431; Eric Talbot Jensen and Sean Watts, 'A Cyber Duty of Due Diligence: Gentle Civilizer or Crude Destabilizer?' (2017) 95 *Texas L Rev* 1555, 1558; Peters, Krieger and Kreuzer (n 132) 130-31.

<sup>182</sup> Mikanagi (n 154) 1035-36.

<sup>183</sup> Tallinn Manual 2.0 (n 37) r 7.

In this way, the due diligence principle is territorial in focus, imposing obligations on states only in respect of activities that occur on territory or infrastructure they control. Consequently, the principle is of limited utility in regulating Russia's dealings with NSAs operating outside its borders, such as the Wagner Group.<sup>184</sup> The norm may be implicated in respect of any training the NSAs receive within Russia, or any attacks they conduct from Russian territory. But the principle has no bearing on much of the support Russia provides to these groups, due to its extraterritorial character.

The due diligence principle is thus limited in its scope and is of minimal relevance, for instance, to Iran's support to Shi'a militia groups operating in Syria due to Iran's lack of territorial control in the areas where the militias operate. Continuing ambiguity regarding the principle's scope and the duties it imposes on states additionally hinders its utility in holding states to account when they act through NSAs.<sup>185</sup> Such uncertainties present considerable evidential difficulties to injured states seeking to prove that a state has failed to meet the standards the principle requires; a problem that is only exacerbated by the abstract and variable nature of the state responses that may be considered feasible in meeting states' due diligence obligations.<sup>186</sup>

Even if a state is found to be in breach of the norm, any reparations awarded may be insignificant when compared to level of harm caused by the NSAs' conduct. If a state's organs fail to act in the manner required by international law and thereby violate the state's due diligence obligations, the state's responsibility relates to its own omission, rather than the harmful act perpetrated by the NSA.<sup>187</sup> This distinction is significant to the quantum of reparations owing to the victim.<sup>188</sup> In *Bosnian Genocide*, despite the ICJ's conclusion that the FRY violated the duty to prevent genocide, the Court determined that it was inappropriate to award financial compensation in respect of that breach because it could not be proven that the genocide would have been averted had the FRY

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<sup>184</sup> See Kimberly Marten, 'Russia's Use of Semi-State Security Forces: the Case of the Wagner Group' (2019) 35 *Post-Soviet Affairs* 181, 182; Ellen Ioanes, 'These are the Countries where Russia's Shadowy Wagner Group Mercenaries Operate' (*Business Insider*, 19 November 2019) <[www.businessinsider.com/russia-wagner-group-mercenaries-where-operate-2018-4?r=US&IR=T](http://www.businessinsider.com/russia-wagner-group-mercenaries-where-operate-2018-4?r=US&IR=T)> accessed 16 April 2020.

<sup>185</sup> Peters, Krieger and Kreuzer (n 132) 122; Roguski, (n 87) 11-12.

<sup>186</sup> Pisillo-Mazzeschi (n 132) 50; Moynihan (n 70) 25; Becker (n 22) 152.

<sup>187</sup> See Tallinn Manual 2.0 (n 37) r 6 commentary para 44; Barbara A Frey, 'Small Arms and Light Weapons: The Tools Used to Violate Human Rights' (*Disarmament Forum: Human Rights, Human Security and Disarmament*, 2004) 37, 42 <[www.peacepalacelibrary.nl/ebooks/files/UNIDIR\\_pdf-art2140.pdf](http://www.peacepalacelibrary.nl/ebooks/files/UNIDIR_pdf-art2140.pdf)> accessed 6 May 2019; Barnidge (n 153) 94-95; Becker (n 22) 169.

<sup>188</sup> See Buchan (n 147) 435; Luke Chircop, 'A Due Diligence Standard of Attribution in Cyberspace' (2018) *International and Comparative L Quarterly* 643, 653-656.

complied with its legal obligations.<sup>189</sup> As such, the Court awarded reparation only in the form of satisfaction,<sup>190</sup> namely a declaration that the FRY failed to comply with its legal obligations.<sup>191</sup> Had the ICJ concluded that the genocide itself was attributable to the FRY, the Court would likely have awarded far more significant reparations.

The nature of a responsible state's breach of international law is also relevant to the countermeasures an injured state may take in response.<sup>192</sup> In the context of a due diligence violation, any countermeasures must relate to the responsible state's failure to properly regulate private activity on its territory and aim at compelling it to take the measures necessary to terminate the harmful private conduct. While in the cyber context it may be proportionate for an injured state to take action that brings an end to the harmful private activity,<sup>193</sup> in more traditional conflict situations this level of response may be excessive in the circumstances and violate the prohibition on forcible countermeasures.<sup>194</sup> The United States' airstrikes on Iraqi territory in response to militia groups' attacks on its bases, for instance, clearly do not qualify as lawful countermeasures to Iraq's failure to take feasible steps to stop such attacks.<sup>195</sup> In practice, therefore, the due diligence principle offers little by way of remedy to pressure territorial states to properly regulate non-state activity within their borders.<sup>196</sup>

## 6.5 International human rights law

In the period following the Second World War, states increasingly entered into human rights treaties, guaranteeing fundamental rights and standards of legal protection to individuals within their jurisdiction.<sup>197</sup> The treaties impose duties to 'respect' human rights, meaning that states must refrain

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<sup>189</sup> *Bosnian Genocide* (n 12) [462]. See also Gattini (n 179) 706-712; Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *Eur J Intl L* 669, 689-92.

<sup>190</sup> See ARSIWA (n 3) art 37.

<sup>191</sup> *Bosnian Genocide* (n 12) [461]-[463]. But cf *Corfu Channel* (n 70) 22-23.

<sup>192</sup> See Jensen and Watts 'A Cyber Duty of Due Diligence' (n 181); Shackelford, Russell and Kuehn (n 153) 17-20.

<sup>193</sup> Schmitt 'In Defense of Due Diligence in Cyberspace' (n 162) 79.

<sup>194</sup> ARSIWA (n 3) art 50. See also Martin (n 58) 44.

<sup>195</sup> Scott R Anderson, 'The Law and Consequences of the Recent Airstrikes in Iraq' (*Lawfare*, 1 January 2020) <[www.lawfareblog.com/law-and-consequences-recent-airstrikes-iraq](http://www.lawfareblog.com/law-and-consequences-recent-airstrikes-iraq)> accessed 1 May 2020.

<sup>196</sup> Jensen and Watts, 'A Cyber Duty of Due Diligence' (n 181) 1574; Chircop (n 188); British Institute of International and Comparative Law 'State Responsibility for Cyber Operations: International Law Issues' (Event Report, 9 October 2014) 5-6 (comments of Nicholas Tsagourias).

<sup>197</sup> Examples include International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (adopted 4 November 1950, entered into force 3 September 1953) (ECHR); American Convention on Human Rights (adopted 22 November 1969, entered into force 27 August 1979) 1144 UNTS 123 (ACHR).



from acting in a manner that interferes with or curtails the enjoyment of human rights.<sup>198</sup> In addition, they include provisions requiring states parties to ‘ensure’ or ‘secure’ human rights to all individuals within their jurisdiction.<sup>199</sup> These impose positive duties on states to protect citizens from interference with their rights by NSAs and to take remedial measures should human rights violations occur.<sup>200</sup>

### **6.5.1 Due diligence obligations in IHRL**

In the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights (IACtHR) explained states’ due diligence obligations as follows:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention [on Human Rights].<sup>201</sup>

The Court clarified that a state must ‘take reasonable steps to prevent human rights violations’ and ‘use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction...’<sup>202</sup> Thus, like the general duty of due diligence outlined in Section 6.4, the standard of behaviour required of states is one of reasonableness in all the circumstances.<sup>203</sup>

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<sup>198</sup> See eg ICCPR (n 197) art 2(1); ECHR (n 197) art 1; ACHR (n 197) art 1(1).

<sup>199</sup> *ibid.* See also ILA Second Report (n 134) 14; Monika Hakimi, ‘Toward a Legal Theory on the Responsibility to Protect’ (2014) 39 *Yale J Intl L* 247, 261; Danwood Mzikenge Chirwa, ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights’ (2004) 5 *Melbourne J Intl L* 1, 11-14.

<sup>200</sup> See eg UN Human Rights Committee (UN HRCttee), ‘General Comment No 31 The Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 8. See also Jan Arno Hessbruegge, ‘Human Rights Violations Arising from Conduct of Non-State Actors’ (2005) 11 *Buffalo Human Rights L Rev* 21, 65-82; Marko Milanović, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 *Human Rights L Rev* 411, 441.

<sup>201</sup> Inter-American Court of Human Rights (IACtHR) *Velásquez Rodríguez v Honduras* (1999) 28 *ILM* 291 [172].

<sup>202</sup> *ibid* [174]. See also *Osman* (n 159) [115]; African Commission on Human and Peoples’ Rights *Social and Economic Rights Action Centre and the Centre for Economic Social Rights v Nigeria* (2001) Communication No 155/96 [59]; UN HRCttee *Delgado Paéz v Colombia* (1985) No 195/1985; UN HRCttee *Santullo v Uruguay* (1977) No 9/1977.

<sup>203</sup> *Velásquez Rodríguez* (n 201) [174]; Chirwa (n 199) 14-18. See also s 6.4.1.

The steps that are feasible for a state to take to discharge its due diligence obligations may vary according to numerous factors including its level of control over the relevant territory<sup>204</sup> and its relationship with the NSA concerned. When a state empowers an NSA to exercise governmental functions on its behalf, for instance, it might be expected to take more extensive steps to ensure that entity's human rights compliance than if it has no association with, or influence over, the NSA.<sup>205</sup> Thus, the Human Rights Committee stressed that the United Kingdom remains responsible for adherence to all its human rights obligations when it outsources core state activities involving the use of force and detention to the private commercial sector.<sup>206</sup>

The same principle applies whenever states delegate public functions to NSAs involved in contemporary conflict, including PMSCs.<sup>207</sup> Irrespective of how the delegation is effectuated, states that empower NSAs to perform governmental tasks<sup>208</sup> bear positive obligations to ensure that the NSA does not violate human rights. Therefore, when the Assad regime delegated law enforcement functions to the *Shabbiba* in the early stages of the Syrian conflict, the state arguably breached its positive duties to ensure that the *Shabbiba* did not violate Syria's obligations to protect life under the International Covenant on Civil and Political Rights.<sup>209</sup>

While Syria's engagement with the *Shabbiba* arose within its territorial borders, states' jurisdiction for the purposes of IHRL can also extend extraterritorially.<sup>210</sup> In simple terms, the greater the level of control that a state exercises over overseas territory, or the people within it, the greater the likelihood that it is bound to fulfil its human rights obligations within that territory, including the duty protect

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<sup>204</sup> See Tatyana Eatwell, 'State Responsibility for Human Rights Violations Committed in the State's Territory by Armed Non-State Actors' (*Geneva Academy*, December 2018) <[www.geneva-academy.ch/joomlatoools-files/docman-files/Academy%20Briefing%202013.pdf](http://www.geneva-academy.ch/joomlatoools-files/docman-files/Academy%20Briefing%202013.pdf)> accessed 1 September 2020.

<sup>205</sup> Adam McBeth, 'Privatising Human Rights: What Happens to the State's Human Rights Duties when Services are Privatised?' (2004) 5 *Melbourne J Intl L* 133; Hessbruegge (n 200) 59-60; Hakimi, 'State Bystander Responsibility' (n 177) 358. See also UN HRCtee *BdB et al v The Netherlands* (1989) No 273/1989 UN Doc A/44/40 286 paras 4.7, 6.5; ECtHR, *Case of Van der Mussele v Belgium* (23 November 1983) App No 8919/80 [29]; ECtHR *Case of Costello-Roberts v United Kingdom* (25 March 1993) App No 13134/87 [27].

<sup>206</sup> UN HRCtee, 'Report to the General Assembly' (3 October 1995) UN Doc A/50/40 74-75 paras 423, 431. See also Hakimi, 'State Bystander Responsibility' (n 177) 358-60.

<sup>207</sup> Hoppe, 'Passing the Buck' (n 2) 994-1005; Carsten Hoppe, 'Positive Human Rights Obligations of the Hiring State in Connection with the Provision of Coercive Services by a Private Military and Security Company' (*Academy of European Law*, 2009) <[https://cadmus.eui.eu/bitstream/handle/1814/12956/AEL\\_2009\\_19.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/12956/AEL_2009_19.pdf?sequence=1&isAllowed=y)> accessed 23 August 2021.

<sup>208</sup> See Ch 4 s 4.3.

<sup>209</sup> ICCPR (n 197) art 6. See also Ch 2 s 2.1.2.

<sup>210</sup> See generally Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

individuals from the harmful activities of NSAs.<sup>211</sup> In the *Ilascu* case, for instance, the ECtHR addressed Russia's responsibility for alleged violations of the claimant's human rights within the Moldovan Republic of Transnistria.<sup>212</sup> In holding Russia responsible for the claimants' ill-treatment at the hands of Transnistrian separatists, the Court concluded that:

[A] State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>213</sup>

The ECtHR made similar findings in respect of Turkey's responsibility for human rights violations involving the local administration in northern Cyprus.<sup>214</sup> Here, the Court found that it was not necessary to determine whether Turkey exercised 'detailed control over the policies and actions of the authorities of the [local administration]' because it was 'obvious from the large number of troops engaged in active duties in northern Cyprus' that 'Turkish forces exercised 'effective overall control over that part of the island'.<sup>215</sup>

The 'effective control' standard in IHRL is much looser than the test of effective control formulated by the ICJ relevant to Article 8 ARSIWA.<sup>216</sup> The former is used, however, for a different purpose, namely, to establish whether a state exercises jurisdiction over territory, meaning that it must fulfil its human rights obligations in the location concerned.<sup>217</sup> Despite this, the ECtHR has an unfortunate

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<sup>211</sup> Hakimi 'Toward a Legal Theory' (n 199) 262; James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP, 2018) 179.

<sup>212</sup> ECtHR *Case of Ilascu and Others v Moldova and Russia* (8 July 2004) App No 48787/99 (*Ilascu*).

<sup>213</sup> *Ilascu* (n 212) [314]. See also *ibid* [382].

<sup>214</sup> See ECtHR *Loizidou v Turkey* (Preliminary Objections) (23 March 1995) App No 15318/89 [62]; ECtHR *Loizidou v Turkey* (Merits) (18 December 1996) App No 15318/89 [52]; ECtHR *Cyprus v Turkey* (Merits) (10 May 2001) App No 25781/94 [77], [81].

<sup>215</sup> *Loizidou v Turkey* (Merits) (n 214) [56]. See also ECtHR *Al-Skeini and Others v United Kingdom* (Merits) (7 July 2011) App No 55721/07 [138]; ECtHR *Ukraine v Russia (re Crimea)* (16 December 2020) App Nos 29048/14 and 38334/18 [303].

<sup>216</sup> Milanović, *Extraterritorial Application of Human Rights Treaties* (n 210) 135-173; Crawford and Keene (n 211) 195. See also Ch 5 s 5.4. A similar test is applied by other human rights bodies. See UN HRCtee, 'General Comment No 31 The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 10; Oona A Hathaway and others, 'Human Rights Abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?' (2011) 43 *Arizona State L J* 1; Takele Soboka Bulto, 'Patching the "Legal Black Hole": The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' (2011) 27 *South African J Human Rights* 249.

<sup>217</sup> Milanović, 'From Compromise to Principle' (n 200) 436-446; Marko Milanović, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in Anne van Aaken and Iulia Motoc (eds), *The European Convention*

tendency to conflate the concepts of jurisdiction and attribution.<sup>218</sup> On one interpretation of its jurisprudence, the Court concluded in each case that the relevant area was subject to the respondent state's jurisdiction and the state violated its positive IHRL obligations.<sup>219</sup> On another, the ECtHR developed new and looser standards of attribution, meaning that a sponsoring state bears responsibility for the human rights violations of an NSA that survives by virtue of its support, or in whose conduct it acquiesces or connives.<sup>220</sup>

### 6.5.2 *A lex specialis attribution standard?*

While ambiguity surrounds the ECtHR's approach to attribution, a *lex specialis* rule has been more explicitly adopted within the Inter-American human rights system. In cases relating to Colombia's involvement in massacres perpetrated by paramilitaries operating within its territory, the IACtHR and Commission found that Colombia had not only breached its positive duties to protect the victims of the massacres, but also that the paramilitaries' conduct was itself attributable to the state based on a looser standard of attribution than the general rules reflected in ARSIWA.<sup>221</sup>

Regarding the Mapiripán massacre, for example, the IACtHR found that the Colombian Army provided logistical support to the paramilitaries, facilitated their entry into Mapiripán, and relocated prior to the massacre, thereby leaving the civilian population unprotected.<sup>222</sup> Colombia accepted

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*on Human Rights and General International Law* (OUP 2018) 103-107; Hakimi, 'State Bystander Responsibility' (n 177) 353-354. For analysis of the issue in the context of the downing of Flight MH17 see Marko Milanović and Sangeeta Shah, 'Ukraine and the Netherlands v Russia (nos 8019/16, 43800/14 and 28525/20): Amicus Curiae Brief on Behalf of the Human Rights Law Centre of the University of Nottingham' (12 February 2021) paras 3-19 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3775402](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775402)> accessed 24 August 2021.

<sup>218</sup> Milanović, 'Special Rules of Attribution' (n 58) 342-85; Remy Jorritsma, 'Unravelling Attribution, Control and Jurisdiction: Some Reflections on the Case Law of the European Court of Human Rights' in Hélène Ruiz R Fabri (ed), *International Law and Litigation* (Nomos 2019) 678-92.

<sup>219</sup> Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (n 210) 41-52; Crawford and Keene (n 211) 196; Helen Keller and Reto Walther, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2019) *Intl J Human Rights* 1, 3; Hakimi 'Toward a Legal Theory' (n 199) 271.

<sup>220</sup> Milanović, 'From Compromise to Principle' (n 200) 436-446; Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *Intl and Comparative L Quarterly* 493, 508-11; Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 *Eur J Intl L* 563, 583; Tatyana Jane Eatwell, 'State Responsibility for the Unlawful Conduct of Armed Groups' (*DPhil thesis, Trinity College University of Cambridge*, 2019) s 4.4.3

<[www.repository.cam.ac.uk/bitstream/handle/1810/302004/Eatwell%20Thesis%20May%202020%20updated%20Electronic%20Final.pdf?sequence=8&isAllowed=y](http://www.repository.cam.ac.uk/bitstream/handle/1810/302004/Eatwell%20Thesis%20May%202020%20updated%20Electronic%20Final.pdf?sequence=8&isAllowed=y)> accessed 22 June 2021; Milanović, 'Special Rules of Attribution' (n 58) 342-85.

<sup>221</sup> Inter-American Commission of Human Rights *Riofrío Massacre v Colombia* (6 April 2001) Report No 62/01; IACtHR *Mapiripán Massacre v Colombia* (15 September 2005) Ser C No 134; IACtHR *Rochela Massacre v Colombia* (11 May 2007) Ser C No 163. See also Jackson (n 179) 190-200; Seibert-Fohr (n 177).

<sup>222</sup> *Mapiripán Massacre* (n 221) [116].

responsibility for the actions of its own organs but distinguished the paramilitaries' conduct, arguing that the attribution thresholds reflected in ARSIWA were not met.<sup>223</sup> The Court, however, expressly rejected this submission, asserting that the American Convention 'constitutes *lex specialis* regarding State responsibility'.<sup>224</sup> Given that 'the massacre could not have been prepared and carried out without the collaboration, acquiescence and tolerance ... of the Armed Forces of the State' the Court found that the paramilitaries' actions, as well as those of the state's organs, were attributable to Columbia.<sup>225</sup>

Although ARSIWA envisages the development of such special rules of international law,<sup>226</sup> the IACtHR's findings in this respect are questionable. First, despite using the language of attribution, the Court's main focus in this and other cases was the conduct of Colombia's state organs, including their failure to properly regulate the paramilitaries' behaviour.<sup>227</sup> Second, as discussed in Chapter 8, it is doubtful whether a state's mere 'collaboration, acquiescence and tolerance' should be sufficient to lead to attribution.<sup>228</sup> And third, the background facts indicate that the Court's formulation of a *lex specialis* rule of attribution was unnecessary in the circumstances. Through legislation issued in 1965, Columbia 'fostered the creation of said "self-defense groups" among the civilian population' to 'assist the state's security forces in counterinsurgency operations.'<sup>229</sup> In other words, Columbia empowered the paramilitaries to perform governmental functions on its behalf, alongside the national army.<sup>230</sup> The better basis on which to attribute the paramilitaries' conduct to the state is therefore the general rule reflected in Article 5 ARSIWA.<sup>231</sup>

### **6.5.3 Significance of IHRL in closing the accountability gap**

Whether or not IHRL includes any *lex specialis* rules of attribution, this body of law has the potential to significantly narrow the gap in accountability. When states engage with NSAs operating within

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<sup>223</sup> *Mapiripán Massacre* (n 221) [97d]-[97e].

<sup>224</sup> *ibid* [107].

<sup>225</sup> *ibid* [120].

<sup>226</sup> ARSIWA (n 3) art 55.

<sup>227</sup> *Mapiripán Massacre* (n 221) [123]; *Riofrio Massacre* (n 221) [52]; *Rochela Massacre* (n 221) [102]; IACtHR *Ituango Massacres v Colombia* (2006) Ser C No 148 [134]. See also Ilias Plakokefalos, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy' (2017) 28 *Eur J Intl L* 587, 592-93; Eatwell, 'State Responsibility for the Unlawful Conduct of Armed Groups' (n 220) s 4.4.3.

<sup>228</sup> See Ch 8 s 8.5.1.

<sup>229</sup> *Mapiripán Massacre* (n 221) [96.1]-[96.2]. See also *Ituango Massacres* (n 227) [125].

<sup>230</sup> But see *Mapiripán Massacre* (n 221) [96.5] indicating that the element of the legislation that authorised private citizens to bear weapons was suspended prior to the massacre.

<sup>231</sup> ARSIWA (n 3) art 5. See also Ch 4.

their own borders or control an area extraterritorially via a local NSA, the state may bear responsibility if its organs fail to diligently ensure that those NSAs respect human rights. In such circumstances, individuals who suffer injury through the NSA's activities can recover reparations from the state without needing to grapple with difficult issues of attribution.<sup>232</sup> Moreover, in contrast with the other norms addressed in this chapter, such a finding may lead an award of compensation for the full harm caused to the claimant, rather than simply reflecting the state's own omission.<sup>233</sup>

IHRL is therefore an important means by which injured states and individuals can seek redress for the harms caused when states act via NSAs in contemporary conflict. Consider, for instance, Moscow's extensive support to the Donetsk and Luhansk rebels in eastern Ukraine.<sup>234</sup> Given Russia's military involvement in the region and the level of influence it exerts through its support to the local administrations, it is arguable that Russia exercises 'effective control' over the Donbas region for the purposes of the European Convention on Human Rights (ECHR).<sup>235</sup> If that is the case, the region falls within Russia's jurisdiction, meaning that the state is subject to human rights obligations in the Donbas including a duty to protect citizens from harmful conduct by rebel forces. Claims are now pending before the ECtHR making exactly this argument, alleging numerous IHRL violations on Russia's part.<sup>236</sup> Similar claims may also be open to victims of Turkish-backed NSAs in northern Syria on the basis that the abuses were committed in areas that Turkey controls via the local militias.<sup>237</sup>

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<sup>232</sup> See generally Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 390-415.

<sup>233</sup> Becker (n 22) 53; Dinah Shelton, *Remedies in International Human Rights Law* (3<sup>rd</sup> edn, OUP 2015) 315-76.

<sup>234</sup> See Ch 2 s 2.2.

<sup>235</sup> *Loizidou v Turkey* (Merits) (n 214); *Cyprus v Turkey* (n 214); ECtHR *Chiragov and Others v Armenia* (16 June 2015) App no 13216/05; *Ilascu* (n 212); *Al-Skeini* (n 215); *Ukraine v Russia (re Crimea)* (n 215).

<sup>236</sup> ECtHR 'Grand Chamber to Examine Four Complaints by Ukraine against Russia over Crimea and Eastern Ukraine' (Press release, 9 May 2018); Marko Milanović, 'Russian Agents Charged with Downing of MH17; MH17 Cases in Strasbourg' (*EJIL:Talk!*, 20 June 2019) <[www.ejiltalk.org/russian-agents-charged-with-downing-of-mh17-mh17-cases-in-strasbourg/](http://www.ejiltalk.org/russian-agents-charged-with-downing-of-mh17-mh17-cases-in-strasbourg/)> accessed 23 August 2021; Vyacheslav Hnatyuk, 'As Ukraine's Conflict Grinds On, Lawyers Take to the Frontline' (*Balkan Insight*, 21 October 2019) <<https://balkaninsight.com/2019/10/21/as-ukraines-conflict-grinds-on-lawyers-take-to-the-frontline/>> accessed 4 May 2020; Isabella Risini and Geir Ulfstein, 'The Netherlands' Inter-State Application Against Russia Six Years after MH17' (*EJIL:Talk!*, 14 August 2020) <[www.ejiltalk.org/the-netherlands-inter-state-application-against-russia-six-years-after-mh-17/](http://www.ejiltalk.org/the-netherlands-inter-state-application-against-russia-six-years-after-mh-17/)> accessed 23 August 2021.

<sup>237</sup> UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (14 August 2020) UN Doc A/HRC/45/31 14 paras 67-68; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 March 2021) UN Doc A/HRC/46/55 24-25 para 94. See also Roger Lu Phillips, 'Turkey Opened the Door to the European Court of Human Rights for Syrian Victims' (*Just Security*, 20 May 2020) <[www.justsecurity.org/70268/turkey-opened-the-door-to-the-european-court-of-human-rights-for-syrian-victims/](http://www.justsecurity.org/70268/turkey-opened-the-door-to-the-european-court-of-human-rights-for-syrian-victims/)> accessed 23 August 2021.

In some circumstances, IHRL's reach can extend beyond a state's exercise of territorial control.<sup>238</sup> In the *Al-Skeini* case, for example, the ECtHR found that the ECHR applied to the UK's operations in Iraq due to the British military's exercise of 'authority and control' over each of the Iraqi claimants rather than the state's control over territory.<sup>239</sup> When jurisdiction arises under this 'personal model', it clearly imposes negative duties on a state not to violate IHRL through the actions of its organs.<sup>240</sup> These include an obligation of *non-refoulement*, not to transfer or deport individuals to a location in which they could face a real risk of inhuman or degrading treatment.<sup>241</sup> If in the course of an SDF detention operation in Syria, therefore, a detainee falls within the authority and control of an assisting state, that state may be under an obligation not to transfer the detainee to the SDF where he or she could face a prolonged period of detention in unlawful conditions.<sup>242</sup> In addition, the state might bear due diligence obligations to protect detainees from violations of their rights by any other actor.<sup>243</sup>

A claimant's prospects of redress in such circumstances depend in part, however, upon the particular human rights treaties to which the relevant state is a party. The European human rights regime is far stronger than those established elsewhere in the world due to its direct impact on state policy and its ability to effectively secure state compliance through rulings of the ECtHR.<sup>244</sup> Accordingly, while cases are proceeding against Russia regarding alleged human rights violations involving NSAs in the Donbas, claimants are unlikely to initiate similar claims against the United States in respect of alleged failures to ensure the SDF's human rights compliance in northeast Syria. The United States maintains that the human rights treaties to which it is a party have no extraterritorial application.<sup>245</sup> Moreover, those treaties do not include an equivalent enforcement mechanism to the ECHR.

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<sup>238</sup> See generally Jorritsma (n 218) 673-77.

<sup>239</sup> *Al-Skeini* (n 215) [149]-[150]. See also *ibid* [136]; Marko Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *Eur J Intl L* 121.

<sup>240</sup> *Al-Skeini* (n 215) [149]-[150]. See also Milanović 'Al-Skeini and Al-Jedda' (n 239) 127-131.

<sup>241</sup> ECtHR *Soering v United Kingdom* (7 July 1989) App No 14038/88 [91]. See also Ch 8 s 8.6.2.

<sup>242</sup> Human Rights Watch, 'Thousands of Foreigners Unlawfully Held in NE Syria' (23 March 2021) <[www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria](http://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria)> accessed 31 March 2021. See also Ch 2 s 2.1.3.

<sup>243</sup> It remains unclear whether states are subject to positive duties under the 'personal model' of jurisdiction. See Milanović, *Extraterritorial Application of Human Rights Treaties* (n 210) 209-221; Milanović 'Al-Skeini and Al-Jedda' (n 239) 132-133.

<sup>244</sup> Jorritsma (n 218) 660.

<sup>245</sup> Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 *Intl L Studies* 20.

Inconsistencies in IHRL's application and enforcement limit its efficacy in regulating states' behaviour towards NSAs. Continued ambiguity regarding states' extraterritorial jurisdiction raises a further hurdle, including differences in approach between the various human rights bodies.<sup>246</sup> In this respect, the ECtHR takes a more restrictive stance than the Human Rights Committee, which advocates for a broader model of extraterritoriality based on a state's capacity to bring human rights violations to an end.<sup>247</sup> But until such time as this more flexible approach gains traction, it can only be said with certainty that states are subject to extraterritorial IHRL obligations when they exercise control over territory or persons.

To illustrate, consider Russia's support to the Wagner Group.<sup>248</sup> Although Moscow bears due diligence obligations in respect of its dealings with the NSA in Russia and possibly in eastern Ukraine, IHRL imposes no such duties when Moscow acts through the same entity in Syria, Libya, or Sudan.<sup>249</sup> IHRL is likewise of little relevance in regulating Iran's use of Shi'a militia groups to further its foreign policy goals in Syria and Iraq, or its support to the Houthis in Yemen. Given states' prevalent support for militia groups operating outside their borders, this represents an important weakness in IHRL's ability to close the gap in accountability. Many commentators therefore rely instead on common Article 1 to the Geneva Conventions as a more inclusive means of regulating states' support to NSAs.

## 6.6 Common Article 1 to the Geneva Conventions

The first article of each of the four 1949 Geneva Conventions provides that 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.<sup>250</sup> In the decades since the adoption of the Geneva Conventions, the precise

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<sup>246</sup> Marko Milanović and Tatiana Papić, 'The Applicability of the ECHR in Contested Territories' (2018) 67 *Intl and Comparative L Quarterly* 779; Helen Duffy, 'Georgia v Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (*Just Security*, 2 February 2021) <[www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/](http://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/)> accessed 24 August 2021.

<sup>247</sup> UN HRCtee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 para 63. See also Ch 8 s 8.6.2.

<sup>248</sup> See Ch 2 ss 2.1.2, 2.2.1.

<sup>249</sup> Marten (n 184) 182; Ioanes (n 184).

<sup>250</sup> Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 art 1 (GC1); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 art 1 (GCII); Geneva Convention III relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 art 1 (GCIII); Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 art 1 (GCIV).



meaning and scope of this provision have been the subject of considerable debate.<sup>251</sup> The ICRC has consistently promoted a broad interpretation of the duty,<sup>252</sup> which is supported in considerable doctrinal literature.<sup>253</sup> Other commentators and states, however, argue for a narrower construction.<sup>254</sup>

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<sup>251</sup> See eg Fateh Azzam, ‘The Duty of Third States to Implement and Enforce International Humanitarian Law’ (1997) 66 *Nordic J Intl L* 55; Frits Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ (1999) *YB of Intl Humanitarian L* 3, 29-30; Laurence Boisson de Chazournes and Luigi Condorelli, ‘Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests’ (2000) 82 *Intl Rev Red Cross* 67; Birgit Kessler, ‘The Duty to Ensure Respect under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts’ (2001) 44 *German YB Intl L* 498; Maya Brehm, ‘The Arms Trade and States’ Duty to Ensure Respect for Humanitarian and Human Rights Law’ (2008) 12 *J Conflict and Security L* 359; Tomasz Zych, ‘The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law’ (2009) 27 *Windsor YB Access to Justice* 251; Tonkin (n 144); Toni Pfanner, ‘Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims’ (2009) 92 *Intl Rev Red Cross* 279; Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21 *Eur J Intl L* 125, 137; Knut Dörmann and Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations’ (2014) 96 *Intl Rev Red Cross* 707; Robert Kolb, ‘Commentaires (Iconoclastes?) sur l’Obligation de Faire Respecter le Droit International Humanitaire selon l’Article 1 Commun des Conventions de Genève de 1949’ (2014) 47 *Revue Belge de Droit Intl* 513; Robin Geiß, ‘Common Article 1 of the Geneva Conventions: Scope and Content of the Obligation to “Ensure Respect” – “Narrow but Deep” or “Wide and “Shallow”?’ in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015); Hathaway and others, ‘Ensuring Responsibility’ (n 2); Verity Robson, ‘The Common Approach to Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions’ (2020) 25 *J Conflict and Security L* 101; Catherine Drummond, ‘Ensuring Respect for IHL by and in Relation to the Conduct of Private Actors’ in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law* (Routledge 2021); Michael N Schmitt and Sean Watts, ‘Common Article 1 and the Duty to “Ensure Respect”’ (2021) 96 *Intl L Studies* 674; Marten Zwanenburg, ‘The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation’ (2021) 97 *Intl L Studies* 621.

<sup>252</sup> See Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) (1952 commentary to GC1) art 1; Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol 2: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at sea* (ICRC 1960) art 1; Jean Pictet (ed), *Commentary on the Geneva Convention of 12 August 1949, Vol 3: Geneva Convention relative to the Treatment of Prisoners of War* (ICRC 1960) art 1; Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol 4: Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) art 1; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) art 1; 2016 commentary to GC1 (n 2) art 1; ICRC, *Commentary on the Second Geneva Convention* (CUP 2017) art 1; ICRC, *Commentary on the Third Geneva Convention* (CUP 2021) art 1 (2021 commentary to GC3). See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), ‘Customary International Humanitarian Law vol I: Rules’ (2005) r 144 <[www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)> accessed 24 October 2017 (ICRC Customary IHL Study).

<sup>253</sup> See eg Azzam (n 251); Boisson de Chazournes and Condorelli (n 251); Brehm (n 251); Tonkin (n 144); Pfanner (n 251); Dörmann and Serralvo (n 251); Geiß (n 251); Théo Boutruche and Marco Sassòli, ‘Expert Opinion on Third States’ Obligations vis-à-vis IHL Violations under International Law, with a Special Focus on Common Article 1 to the 1949 Geneva Conventions’ (*Norwegian Refugee Council*, 8 November 2016) <[www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli---8-nov-2016.pdf](http://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli---8-nov-2016.pdf)> accessed 25 August 2021; Hathaway and others, ‘Ensuring Responsibility’ (n 2); John Hursh, ‘International Humanitarian Law Violations, Legal Responsibility, and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale’ (2020) 7 *J on the Use of Force and Intl L* 122, 147-54.

<sup>254</sup> See eg Kalshoven (n 251); Focarelli (n 251); Zych (n 251); Kolb (n 251); Brian Egan, ‘Keynote Address’ (*American Society of International Law*, April 2016) <[www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil/](http://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil/)> accessed 27 April 2020; John Reid, ‘Ensuring Respect: The Role of State Practice in Interpreting the Geneva Conventions’ (*International Law Association Reporter*, 9 November 2016) <<https://ilareporter.org.au/2016/11/ensuring->

### 6.6.1 *The duty to ‘respect’ IHL*

The first element of common Article 1 (CA1) reaffirms the general principle of *pacta sunt servanda*, emphasising that the Conventions are binding on all states parties and must be performed by them in good faith.<sup>255</sup> This duty to respect reiterates similar provisions within the two Geneva Conventions of 1929.<sup>256</sup> In its 1952 commentary, however, the ICRC highlights the prominent position given to CA1 in the 1949 Conventions as well as the article’s wording, which together serve to strengthen and draw attention to the ‘special character’ of the clause.<sup>257</sup>

The ‘respect’ obligation requires states’ organs, including their armed forces and other persons or groups acting on their behalf, to abide by the provisions of the Conventions.<sup>258</sup> If they fail to do so, and that failure is attributable to the state, the relevant act or omission amounts to an internationally wrongful act entailing the state’s international responsibility. In this respect, therefore, CA1 adds nothing to the existing provisions of international law,<sup>259</sup> a state bears responsibility in respect of IHL violations involving NSAs only if the private conduct at issue is attributable to the state under the rules reflected in ARSIWA.<sup>260</sup> The parallel provisions of customary international law, however, may be of greater import in regulating states’ conduct towards NSAs.

In the *Nicaragua* case, the ICJ found that the United States acted in breach of its duty ‘not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions’.<sup>261</sup> Although the ICJ referred in its judgment to CA1, it based its conclusion regarding the existence of such a duty on ‘the general principles of humanitarian law to which the Conventions merely give specific

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respect-the-role-of-state-practice-in-interpreting-the-geneva-conventions-john-reid/> accessed 25 August 2021; Paul Ney, ‘Remarks by Defense Dept General Counsel Paul C Ney Jr on the Law of War (*Just Security*, 28 May 2019) <[www.justsecurity.org/64313/remarks-by-defense-dept-general-counsel-paul-c-ney-jr-on-the-law-of-war/](http://www.justsecurity.org/64313/remarks-by-defense-dept-general-counsel-paul-c-ney-jr-on-the-law-of-war/)> accessed 25 August 2021; Robson (n 251); Schmitt and Watts (n 251). See also *Turp v Canada (Foreign Affairs)* [2017] FC 84 [21]-[22] <[www.canlii.org/en/ca/fct/doc/2017/2017fc84/2017fc84.html](http://www.canlii.org/en/ca/fct/doc/2017/2017fc84/2017fc84.html)> accessed 22 April 2018; *ibid* Affidavit of Michael N Schmitt (29 June 2016).

<sup>255</sup> 2016 commentary to GC1 (n 2) art 1 para 143, citing Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 26.

<sup>256</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929) art 25; Geneva Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929) art 82.

<sup>257</sup> 1952 commentary to GC1 (n 252) art 1. See also Kalshoven (n 251) 29-30.

<sup>258</sup> 2016 commentary to GC1 (n 2) art 1 para 144.

<sup>259</sup> *ibid* art 1 para 144.

<sup>260</sup> ARSIWA (n 3) arts 4, 5, 8, 9-11. See also Chs 3-5.

<sup>261</sup> *Nicaragua* (n 12) [220]. See also *ibid* [118]-[122], [255]-[256].

expression'.<sup>262</sup> The ICJ's reference to Article 3 of the Conventions indicates that the customary duty not to encourage IHL violations applies to all categories of conflict, including those of a non-international character.<sup>263</sup> It follows that the United States may have breached that duty if, for example, it encouraged the SDF to hold ISIS detainees in conditions that did not meet the minimum standards of humane treatment required by common Article 3.<sup>264</sup>

Ambiguity remains, however, regarding the types of state behaviour that amount to 'encouragement' for the purposes of the customary norm. While this was plain in the *Nicaragua* case in view of the contents of the CIA manual supplied to the *contras*,<sup>265</sup> it remains unclear whether lesser forms of encouragement would suffice, such as a mere suggestion that an NSA might consider a particular course of action. It is equally unclear whether a state's continued provision of arms or funding to an NSA following alleged IHL violations could constitute encouragement for these purposes, particularly given the ICJ's failure to condemn the United States' material support to the *contras* on this basis.<sup>266</sup>

The *Nicaragua* judgment additionally leaves open the question whether the customary duty not to encourage IHL violations is more relevant to the 'respect' element of CA1 or the duty to ensure respect. Although the ICRC refers to the case in the context of the obligation to ensure respect by others,<sup>267</sup> the duty arguably forms part of a state's wider obligation to respect IHL through the conduct of its organs.<sup>268</sup> It is the 'ensure respect' element of CA1, however, that has the greatest potential to regulate state behaviour towards NSAs.

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<sup>262</sup> *Nicaragua* (n 12) [220]. Regarding the customary status of the provision see *ibid* separate opinion of Judge Ago 181, 184 para 6; *ibid* dissenting opinion of Judge Sir Robert Jennings 528, 537. See also Kalshoven (n 251) 55-57; Boisson de Chazournes and Condorelli (n 251) 70; Focarelli (n 251) 169-170.

<sup>263</sup> *Nicaragua* (n 12) [255].

<sup>264</sup> See Ch 2 s 2.1.3.

<sup>265</sup> *Nicaragua* (n 12) [122].

<sup>266</sup> In this context, the ICJ focused on the United States' violation of the prohibition on the use of force and the principle of non-intervention. See ss 6.2, 6.3. See also Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of the *jus contra bellum* and *jus in bello*' (2013) 18 J Conflict and Security L 59, 84-87; Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 Chinese J Intl L 13, 26-31.

<sup>267</sup> 2016 commentary to GC1 (n 2) art 1 para 158.

<sup>268</sup> Robson (n 251) 111-12.

### 6.6.2 *The duty to ‘ensure respect’ for IHL*

The requirement to ‘ensure respect’ first appeared in the 1949 Conventions and is repeated within the first Additional Protocol of 1977 relating to international armed conflicts, as well as Protocol III.<sup>269</sup> In its 1952 commentary to the first Geneva Convention, the ICRC interpreted the duty as meaning that ‘in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention’.<sup>270</sup> The ICRC thereby asserted that the duty includes an external dimension, meaning that states are bound not only to ensure respect for the Conventions by their own organs and by individuals within their jurisdiction, but also to take active steps to bring other states into compliance, even when they are not a party to the conflict at issue.<sup>271</sup>

In its revised 2016 commentary to the first Geneva Convention, the ICRC emphasised both the external dimension of the ‘ensure respect’ provision and its obligatory nature.<sup>272</sup> Many commentators support this interpretation, arguing that the inclusion of the word ‘undertake’ within CA1 imposes an obligation on states to ensure compliance with the Conventions by other states and by NSAs.<sup>273</sup> Tonkin, for instance, asserts that all states that hire PMSCs to work in conflict zones, including those that are not a party to the relevant conflict, are under an obligation to ‘take all reasonable measures within [their] power to prevent and repress PMSC violations of IHL’.<sup>274</sup>

Other scholars, however, consider that CA1’s drafting history excludes such an expansive construction.<sup>275</sup> In his comprehensive review of the background to CA1, Kalshoven points to a lack of substantive discussion regarding the meaning of the article and in particular, the absence of any indication that the authors intended the ‘ensure respect’ element to amount to a binding legal

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<sup>269</sup> GC1 (n 250) art 1; GCII (n 250) art 1; GCIII (n 250) art 1; GCIV (n 250) art 1; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 art 1(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) 2404 UNTS 261 art 1(1).

<sup>270</sup> 1952 commentary to GC1 (n 252) art 1. For a critique of the commentaries, see Kalshoven (n 251) 31-38.

<sup>271</sup> Dörmann and Serralvo (n 251) 715.

<sup>272</sup> 2016 commentary to GC1 (n 2) art 1 para 153.

<sup>273</sup> *ibid* art 1 para 170; Tonkin (n 144) 783; Geiß (n 251) 420; Corten and Koutroulis (n 266) 81-84; Boutruche and Sassòli (n 253) 9-13.

<sup>274</sup> Tonkin (n 144) 788. See also *ibid* 783-784; White (n 144) 245; University Centre for IHL (n 144) 42-46.

<sup>275</sup> Kalshoven (n 251); Focarelli (n 251); Zych (n 251); Affidavit of Michael N Schmitt (n 254); James Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’ (24 January 2012) paras 34-45 <[www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf](http://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf)> accessed 18 May 2020; Schmitt and Watts (n 251) 680-84.

obligation, or to have external effect.<sup>276</sup> Instead, commentators who propound a more restricted interpretation of CA1 consider that states' duty to ensure respect for IHL relates solely to private individuals within their jurisdiction.<sup>277</sup>

Such scholars additionally point to an absence of state practice since the adoption of the Conventions to support a wider construction of the norm.<sup>278</sup> Focarelli, for instance, argues that states' and international bodies' calls for compliance with the Conventions are insufficient to establish a binding obligation, particularly as the UN's appeals in this respect are 'invariably contained in recommendations' rather than binding resolutions.<sup>279</sup> Furthermore, it is notable that states that are not a party to a conflict frequently fail to take any measures to ensure that the belligerent states respect IHL.<sup>280</sup> If states were under an obligation to 'ensure respect' in this manner, every such failure would violate CA1.<sup>281</sup> But in Syria, despite the considerable international condemnation of parties to the conflict regarding their respective IHL violations,<sup>282</sup> there has been no equivalent condemnation of third states, with no involvement in the hostilities, in respect of their failure to ensure that those conflict parties comply with IHL.

The ICRC nevertheless maintains that the 'ensure respect' element of CA1 is obligatory in nature, comprising both a negative duty not to encourage or assist violations of the Conventions and a positive duty to 'take proactive steps to bring violations of the Conventions to an end...'<sup>283</sup> When addressing the negative obligation, the ICRC refers to the prohibition on providing aid or assistance to another state in the commission of an internationally wrongful act reflected in Article 16 ARSIWA.<sup>284</sup> According to the ICRC, a state may breach its obligations under CA1 if it assists

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<sup>276</sup> Kalshoven (n 251). See also Focarelli (n 251) 136, 146-151.

<sup>277</sup> Focarelli (n 251) 137-138; Crawford, 'Israeli Settlements' (n 275) para 39; Robson (n 251) 103-04.

<sup>278</sup> Focarelli (n 251) 138-157; Zych (n 251) 257-268; Kolb (n 251) 516-18; Affidavit of Michael N Schmitt (n 254) para 48-81; Robson (n 251) 104-09; Schmitt and Watts (n 251) 687-700. For opposing views see Azzam (n 251) 64, 71; ICRC Customary IHL Study (n 252) r 144; Kessler (n 251) 504-505, 512-513; Boisson de Chazournes and Condorelli (n 251) 69-70; Geiß (n 251) 424-428; Dörmann and Serralvo (n 251) 716-722; 2016 commentary to GC1 (n 2) art 1 para 156; Boutruche and Sassòli (n 253) 9-13; Zwanenburg (n 251) 639-43.

<sup>279</sup> Focarelli (n 251) 157. See also Zych (n 251) 257-268; Crawford, 'Israeli Settlements' (n 275) paras 34-45.

<sup>280</sup> Affidavit of Michael N Schmitt (n 254) para 52.

<sup>281</sup> *ibid* para 53; Focarelli (n 251) 147; Kolb (n 251) 517; Schmitt and Watts (n 251) 690-92.

<sup>282</sup> See eg French Embassy in London, 'Statement by the Heads of State and Government of France, Germany, Canada, the United States, Italy and the United Kingdom regarding the Situation in Aleppo' (7 December 2016) <<https://uk.ambafrance.org/Countries-condemn-Syrian-regime-s-actions-in-Aleppo>> accessed 29 April 2020; Amnesty International, 'Syria: Damning Evidence of War Crimes and other Violations by Turkish Forces and their Allies' (18 October 2019) <[www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/](http://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/)> accessed 29 April 2020. See also Ch 2 s 2.1.

<sup>283</sup> 2016 commentary to GC1 (n 2) art 1 paras 158, 164.

<sup>284</sup> 2016 commentary to GC1 (n 2) art 1 para 159, citing ARSIWA (n 3) art 16. See also Ch 8 s 8.2.1.

another actor in the knowledge that its support will be used to violate IHL, even if the more stringent requirements of Article 16 are not met.<sup>285</sup>

While the ICRC does not specifically address states' assistance to NSAs in this context, references to armed groups elsewhere in the commentary indicate that in the ICRC's view, CA1 applies equally when states provide support to an armed group that is party to a non-international armed conflict (NIAC).<sup>286</sup> It follows that Iran may have acted in breach of the norm through its support to Shi'a militia groups operating in Syria if it provided such assistance in the knowledge that it would be used, for example, to conduct siege warfare and thereby starve the civilian population.<sup>287</sup>

It is not universally accepted, however, that CA1 applies to NIACs.<sup>288</sup> In contrast with Additional Protocol I to the Geneva Conventions, states parties to Additional Protocol II, which relates specifically to NIACs, agreed to no such obligation.<sup>289</sup> When considering a claim in relation to Canada's supply of armoured vehicles to Saudi Arabia, the Canadian domestic courts concluded that CA1 does not impose any obligation in this context.<sup>290</sup> It is therefore far from clear whether any obligation to 'ensure respect' for the Conventions binds states that are either a party to a NIAC, or provide support to an armed group involved in such a conflict.

Further ambiguity surrounds the scope of any positive duties that CA1 imposes on states.<sup>291</sup> While in the ICRC's view, states must do 'everything reasonably in their power to bring the violations to an end' and 'prevent violations when there is a foreseeable risk that they will be committed',<sup>292</sup> states clearly retain a discretion with regard to the particular steps they may take to fulfil these

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<sup>285</sup> 2016 commentary to GC1 (n 2) art 1 paras 159-60. See also Boutruche and Sassòli (n 253) 20-22.

<sup>286</sup> See 2016 commentary to GC1 (n 2) art 1 paras 120, 125, 159. See also Brehm (n 251) 372; Kessler (n 251) 507-508; Boisson de Chazournes and Condorelli (n 251) 69.

<sup>287</sup> See Ch 2 s 2.1.2.

<sup>288</sup> See eg Affidavit of Michael N Schmitt (n 254) paras 85-93; Schmitt and Watts (n 251) 700-05.

<sup>289</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 art 1 (AP1); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609. See also Affidavit of Michael N Schmitt (n 254) para 89-90.

<sup>290</sup> *Turp v Canada* (n 254) [71], [73]. See also *Turp v Canada (Foreign Affairs)* [2018] FCA 133

<[www.canlii.org/en/ca/fca/doc/2018/2018fca133/2018fca133.html?autocompleteStr=turp%20v%20cana&autocompletePos=3](http://www.canlii.org/en/ca/fca/doc/2018/2018fca133/2018fca133.html?autocompleteStr=turp%20v%20cana&autocompletePos=3)> accessed 22 April 2018.

<sup>291</sup> 2016 commentary to GC1 (n 2) art 1 para 172. See also Focarelli (n 251) 170; Geiß (n 251) 421-422; Zych (n 251) 264; Kessler (n 251) 516.

<sup>292</sup> 2016 commentary to GC1 (n 2) art 1 paras 164-165. See also Geiß (n 251) 429-430; Tonkin (n 144) 791-799; Brehm (n 251) 374-375; Azzam (n 251) 68-69, 73.

obligations.<sup>293</sup> Thus, notwithstanding the efforts of some commentators to suggest certain duties that flow from the provision, such as a requirement on states to provide IHL training to members of armed groups they support,<sup>294</sup> it cannot be said with certainty that any specific obligations result.

Instead, any positive obligations arising from CA1 are subject to a due diligence standard of conduct, meaning that states should take such steps to ensure respect for IHL as are reasonable in the circumstances.<sup>295</sup> Drawing upon the ICJ's judgment in *Bosnian Genocide*,<sup>296</sup> the ICRC observes that when a state maintains a relationship with an NSA, a greater range of measures may be feasible to ensure that NSA's IHL compliance.<sup>297</sup>

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>298</sup>

According to the ICRC, therefore, states with no direct involvement in a conflict, but which nevertheless maintain some form of relationship with one of the parties, bear an enhanced obligation under CA1 to ensure that that party complies with IHL.<sup>299</sup> In contrast with the duty of due diligence outlined in Section 6.4, this obligation is not tied to a state's territorial control. Thus, it is arguable that as the US-led coalition had the ability to influence the rebels fighting the Assad regime in Syria through altering the quantity or type of arms and other forms of support supplied,<sup>300</sup> the coalition's members were under an enhanced duty to take feasible steps to ensure that the rebels observed IHL.<sup>301</sup>

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<sup>293</sup> 2016 commentary to GC1 (n 2) art 1 para 165.

<sup>294</sup> See eg Umesh Palwankar, 'Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law' (1994) 298 Intl Rev Red Cross 11; University Centre for IHL (n 144) 43, 49; Tonkin (n 144) 795-799; 2016 commentary to GC1 (n 2) art 1 paras 180-183; Drummond (n 251) 68-73.

<sup>295</sup> 2016 commentary to GC1 (n 2) art 1 paras 165-166.

<sup>296</sup> *Bosnian Genocide* (n 12) [430]. See also s 6.4.2.

<sup>297</sup> 2016 commentary to GC1 (n 2) art 1 para 166, citing *Bosnian Genocide* (n 12) [430].

<sup>298</sup> 2016 commentary to GC1 (n 2) art 1 para 167.

<sup>299</sup> *ibid* art 1 paras 165-166. See also Drummond (n 251) 66-67.

<sup>300</sup> See Ch 2 s 2.1.1.

<sup>301</sup> See Hathaway and others, 'Ensuring Responsibility' (n 2) 583-589; Dörmann and Serralvo (n 251) 734; Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 Intl Rev Red Cross 401, 413; Brehm (n 251) 375-376.

It is noteworthy, however, that no international court or tribunal to date has found a state responsible for a failure to take positive action to ensure respect for IHL by either a state or NSA. Even in a situation in which the United States exercised considerable influence over the *contras*, the ICJ concluded that the state's obligation did not extend beyond a negative duty not to encourage IHL violations.<sup>302</sup> The Court did not suggest that the United States should exert its influence to prevent such violations, even if these were clearly foreseeable.<sup>303</sup> As such, questions surround not only the scope and extent of any positive obligations that CA1 imposes on states, but also whether the norm gives rise to such duties at all.

### **6.6.3 Significance of the norm in closing the accountability gap**

Notwithstanding the considerable uncertainty that surrounds CA1's scope and application, the norm's relevance to international armed conflicts is not in dispute. In this context, states must take steps 'to ensure that their nationals and others under their control comply with the 1949 Geneva Conventions and Protocols I and III'.<sup>304</sup> If control for these purposes is construed in accordance with IHL rather than the more stringent thresholds applicable to the law of state responsibility,<sup>305</sup> states' CA1 obligations extend to armed groups acting under their responsible command,<sup>306</sup> as well as any NSAs acting under their overall control.<sup>307</sup> Given the international character of the conflict in the Donbas,<sup>308</sup> therefore, and the degree of control that Moscow seemingly exerted over the rebels' conduct,<sup>309</sup> it is arguable that Russia breached its duties under CA1 by failing to ensure the NSAs' compliance with IHL.<sup>310</sup>

Even a narrow construction of CA1 is thus of some significance in regulating states' dealings with NSAs engaged in conflict. But the norm's import in closing the accountability gap would be significantly greater if states accepted the ICRC's approach. For legal scholars who support this

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<sup>302</sup> Zych (n 251) 265-266; Ruys, 'Of Arms, Funding and Non-Lethal Assistance' (n 266) 27.

<sup>303</sup> *ibid.*

<sup>304</sup> Schmitt and Watts (n 251) 679. See also Kalshoven (n 251) 60.

<sup>305</sup> See Ch 3 s 3.3; Ch 5 s 5.4.3.

<sup>306</sup> AP1 (n 289) art 43. See also Ch 3 s 3.4.2.

<sup>307</sup> See Ch 5 s 5.4.3.1.

<sup>308</sup> ICC, 'Report on Preliminary Examination Activities 2016' (*Office of the Prosecutor*, 14 November 2016) 37-38 para 169-70 <[www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](http://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf)> accessed 12 April 2018.

<sup>309</sup> See Ch 2 s 2.2.1; Ch 5 s 5.4.3.1.

<sup>310</sup> See Ch 2 s 2.2.2.



interpretation, CA1 ‘provides a source of state responsibility for the actions of NSAs that cures many of the deficiencies of [the] state attribution doctrine viewed on its own’.<sup>311</sup>

According to this broader reading of the norm, states must take feasible steps to ensure respect for IHL by external actors, including armed groups operating outside their territory.<sup>312</sup> While the ICRC asserts that such positive duties apply to all states, irrespective of their involvement in the conflict, they are particularly pertinent to states with the ability to influence the NSA concerned.<sup>313</sup> In such circumstances, a greater range of measures will be open to the state to ensure the armed group’s IHL compliance, such as the withholding of financial support. If a state hiring a PMSC, for instance, fails to take feasible steps to ensure that the contractors sent to work in an area of hostilities are properly vetted and trained in IHL, the state arguably bears responsibility for that omission even if the PMSC’s conduct is not attributable to it under the law of state responsibility.<sup>314</sup>

The negative aspects of CA1 are equally important in regulating states’ conduct towards NSAs. For example, if the United States aided the SDF to detain ISIS fighters in the knowledge that the detainees would be held in unlawful conditions,<sup>315</sup> it is arguable that the state acted in breach of its CA1 obligation not to assist violations of IHL.<sup>316</sup> But as with states’ positive obligations, it cannot be said with certainty that any such negative duty exists as a matter of *lex lata*.<sup>317</sup> While the ICJ’s jurisprudence confirms that states must not encourage NSAs to violate IHL,<sup>318</sup> doubt remains whether states’ duties in a NIAC extend any further.<sup>319</sup>

Continued ambiguity regarding the obligations that CA1 imposes on states significantly weakens its impact in holding states to account regarding their dealings with NSAs in armed conflict.<sup>320</sup> But even if states endorsed the ICRC’s expansive interpretation of the norm, CA1 would not close the accountability gap entirely. Any reparations awarded in respect of a state’s failure to comply with its

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<sup>311</sup> Hathaway and others, ‘Ensuring Responsibility’ (n 2) 565.

<sup>312</sup> 2016 commentary to GC1 (n 2) art 1 paras 164-173.

<sup>313</sup> *ibid* para 167. See also Hakimi ‘State Bystander Responsibility’ (n 177); Hakimi, ‘Toward a Legal Theory’ (n 199) 259, 265-266; Trapp, *State Responsibility for International Terrorism* (n 159) 154-155.

<sup>314</sup> Tonkin (n 144) 788.

<sup>315</sup> Human Rights Watch, ‘Thousands of Foreigners Unlawfully Held’ (n 242). See also Ch 2 s 2.1.3.

<sup>316</sup> 2016 commentary to GC1 (n 2) art 1 para 158.

<sup>317</sup> Regarding the positive component of the duty, the ICRC now acknowledges this disagreement. See 2021 commentary to GC3 (n 252) art 1 para 202.

<sup>318</sup> *Nicaragua* (n 12) [220].

<sup>319</sup> Schmitt and Watts (n 251) 694, 700-05.

<sup>320</sup> Focarelli (n 251) 170; Kessler (n 251) 156; Ruys, ‘Of Arms, Funding and Non-Lethal Assistance’ (n 266) 29-31.

duty to ensure respect for IHL would reflect only the state's omission, not the actual harm caused by the NSA.<sup>321</sup> Moreover, any countermeasures taken in response to a CA1 violation must be proportionate to the breach and aimed only at compelling the responsible state to comply with its 'ensure respect' obligations.<sup>322</sup> Ultimately, therefore, the norm's utility to states that suffer injury through IHL violations involving NSAs in receipt of state support may, in practice, be minimal.

## 6.7 Conclusion

This chapter demonstrates the importance of primary norms of international law in holding states to account in respect of their dealings with NSAs. Norms such as the due diligence principle and the prohibition on the use of force offer a 'less burdensome' means of engaging a state's responsibility, without the need to cross the high evidential bar set by the stringent attribution thresholds.<sup>323</sup> The fragmented nature of primary norms, however, together with continuing ambiguity regarding their precise scope, reduces their efficacy in holding states to account.

Iran's support to Shi'a militia groups operating in Syria illustrates the limitations of a reliance on primary norms.<sup>324</sup> Thus, Iran did not violate the prohibition on the use of force or the principle of non-intervention through its support to these NSAs, because they fought alongside the Assad regime with governmental consent.<sup>325</sup> Neither the due diligence principle nor IHRL are engaged due to Iran's lack of territorial control over the areas of Syria in which the militias operate.<sup>326</sup> And CA1 is similarly of limited significance in view of the considerable uncertainty regarding its scope and application. In the absence of attribution under the law of state responsibility, therefore, states that suffer injury through international law violations involving such groups are left with little remedy.

Finally, even if primary norms do offer a means of redress, there is a qualitative difference between a state's responsibility for the principal wrongdoing, as committed by an NSA, and its accountability for its organs' contribution to that wrongdoing through the provision of support, or its organs' failure to take feasible steps to prevent the relevant harm. This distinction is apparent in terms of

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<sup>321</sup> See Kolb (n 251) 517; Remy Jorritsma, 'Where General International Law Meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts' (2018) 23 J Conflict and Security L 405, 424.

<sup>322</sup> ARSIWA (n 3) arts 49, 51.

<sup>323</sup> Shackelford, Russell and Kuehn (n 153) 10.

<sup>324</sup> See Ch 2 s 2.1.2.

<sup>325</sup> ARSIWA (n 3) art 20.

<sup>326</sup> These norms may, however, be implicated in respect of Iran's provision of training and other support to Shi'a militia groups from its own territory.

the remedy available to the injured state, and the level of countermeasures that it is entitled to take in response to the breach. It is clear, therefore, that primary norms offer only a partial means of holding states to account and an accountability gap persists. Defining the parameters of that lacuna is the focus of the next chapter.

## Chapter 7 – Defining the Gap in Accountability

It is apparent from the preceding analysis that in conflict situations, states commonly act via private individuals or groups in a manner that they could not lawfully act through their own organs. The predominant interpretation of the attribution standards reflected in ARSIWA severely limits the practical relevance of these rules and places a considerable evidential burden upon injured states.<sup>1</sup> Primary norms, meanwhile, may hold states to account for the conduct of their own organs in relation to the NSA concerned, but their application is context-specific and in some cases, open to debate.<sup>2</sup>

There is, therefore, a clear accountability gap that acts as an incentive to states to achieve their national security and foreign policy goals via NSAs, rather than directly via their own organs.<sup>3</sup> This chapter seeks to define the scope of that lacuna, drawing together the issues highlighted in the preceding analysis. First, Section 7.1 examines the parameters of the accountability gap in contemporary conflict, seeking to identify broad themes that are common to a range of conflicts. Second, Section 7.2 considers the extent to which the accountability gap could be narrowed through a more flexible interpretation of the rules of attribution reflected in Articles 4, 5 and 8 ARSIWA. The chapter concludes that while a loosening of all three attribution standards would be an important development in the law of state responsibility, that alone is insufficient to close the accountability gap and hold states properly to account when they act through NSAs.

### 7.1 The accountability gap in contemporary conflict

When states support NSAs engaged in conflict, they can act with a high degree of confidence that if those NSAs violate the state's international legal obligations, the state will not be held accountable for the breach. This gap in accountability derives, in part, from the strict division between the public and private domains upon which the law of state responsibility rests. The realities of contemporary conflict do not reflect that divide due to the often-blurred lines between the conduct of public and private actors. Moreover, the rules of attribution that delineate the divide set such stringent tests to

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<sup>1</sup> See Chs 3-5.

<sup>2</sup> See Ch 6.

<sup>3</sup> For academic discussion regarding this accountability gap, see eg Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart 2006) 239-82; Monika Hakimi, 'State Bystander Responsibility' (2010) 21 *Eur J Intl L* 341; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) 319-28; Oona A Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 *Texas Law Review* 539.

determine when ostensibly private conduct crosses into the public sphere that states can often evade responsibility in respect of conduct with which they are intimately involved. These factors, together, generate a safe space in which states can promote their foreign policy objectives via proxy without bearing responsibility when those NSAs violate international law. The issue is further compounded by the changing role of NSAs in contemporary conflict and the evolving manner in which states and NSAs interact.

### ***7.1.1 The public private divide***

The law of state responsibility is based upon a clear separation between the individual and the state. Conduct is either public, in which case it is attributable to a state and can constitute an internationally wrongful act, or it is private and cannot lead to state responsibility.<sup>4</sup> The strict division between the public and the private spheres is breached only rarely, when seemingly private conduct is elevated to the public domain. This occurs principally when an NSA acts as an agent of the state, under its instructions, direction, or control, or when the state empowers an NSA to perform governmental functions on its behalf.<sup>5</sup>

A clear delineation between the public and private domains is, however, a fiction.<sup>6</sup> If a bright line can be drawn at all between public and private activity, this varies from state to state.<sup>7</sup> In authoritarian regimes such as China and Iran, for instance, the divide between public and private conduct is often indistinct, with considerable state involvement in ostensibly private activity.<sup>8</sup> Even in liberal democracies, the distinction between the public and private sectors is increasingly blurred due to the prevalence of outsourcing and the involvement of private companies in activities that

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<sup>4</sup> International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) art 2 (ARSIWA).

<sup>5</sup> *ibid* arts 5, 8.

<sup>6</sup> See generally Robert H Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 U Pennsylvania L Rev 1429; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 Eur J Intl L 387; Gurpreet Mahajan, 'Reconsidering the Private-Public Distinction' (2009) 12 Critical Review of Intl Social and Political Philosophy 133; Constantijn van Aartsen, 'The End of the Public-Private Divide' (*Maastricht University*, 14 September 2016) <[www.maastrichtuniversity.nl/blog/2016/09/end-public-private-divide](http://www.maastrichtuniversity.nl/blog/2016/09/end-public-private-divide)> accessed 13 October 2020.

<sup>7</sup> Special Rapporteur Crawford acknowledged this during the ILC's work on state responsibility. See James Crawford, 'First Report on State Responsibility' (1998) UN Doc A/CN.4/490 and Add.1-7 33-34 para 154. See also Chinkin (n 6) 390; Becker (n 3) 273-74.

<sup>8</sup> Xingzhong Yu, 'State Legalism and the Public/Private Divide in Chinese Legal Development' (2014) 15 Theoretical Inquiries in Law 27; Mahrangiz Kar, 'The Invasion of the Private Sphere in Iran' (2003) 70 Social Research 829. See also Mnookin (n 6) 1440.

implicate the public functions of the state.<sup>9</sup> And in states embroiled in conflict, it may often be difficult to distinguish state actors from irregular or non-state groups operating within the same territory.<sup>10</sup>

Chapter 4 examines this issue in the context of Article 5 ARSIWA and the identification of functions that constitute an exercise of elements of governmental authority.<sup>11</sup> Despite the seemingly straightforward guidance in the ARSIWA commentary that these encompass ‘functions of a public character normally exercised by State organs’,<sup>12</sup> the chapter highlights the inherent difficulty in categorising conduct as either public or private.<sup>13</sup> This is particularly apparent in contemporary conflict, where NSAs exert increasing levels of power and autonomy and, in some instances, act in a state-like manner through their control over territory.<sup>14</sup>

Certain primary norms of international law implicitly acknowledge this blurring of the public private divide.<sup>15</sup> The principle of due diligence, for example, holds states to account if they fail to take feasible steps to stop private actors from using their territory to violate the rights of other states.<sup>16</sup> IHRL imposes obligations on states not only to respect individuals’ rights but also to protect them against interference by NSAs.<sup>17</sup> Moreover, human rights bodies have consistently concluded that when a state delegates public functions to a private actor, it is under a duty to ensure that the NSA complies with the state’s IHRL obligations.<sup>18</sup> But the law of state responsibility, as reflected in ARSIWA, ignores this reality. Instead, the rules of attribution impose ‘artificial distinctions’ between the public and private domains and, in so doing, improperly absolve the state for its contributions towards harmful private conduct.<sup>19</sup>

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<sup>9</sup> Becker (n 3) 273-74; Kristen E Eichensehr, ‘Public-Private Cybersecurity’ (2017) 95 Texas L Rev 467, 475.

<sup>10</sup> See eg Tim Eaton, ‘The Libyan Arab Armed Forces: A Hybrid Armed Actor?’ (*War on the Rocks*, 27 January 2021) <<https://warontherocks.com/2021/01/the-libyan-arab-armed-forces-a-hybrid-armed-actor/>> accessed 4 September 2021.

<sup>11</sup> See Ch 4 s 4.3.1.

<sup>12</sup> ARSIWA (n 4) art 5 commentary para 2.

<sup>13</sup> Ch 4 s 4.3.1.

<sup>14</sup> See s 7.1.4.

<sup>15</sup> Chinkin (n 6) 393. See also James Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10 Eur J Intl L 435, 439-40.

<sup>16</sup> See Ch 6 s 6.4.

<sup>17</sup> See Ch 6 s 6.5.

<sup>18</sup> *ibid*; Chinkin (n 6) 393.

<sup>19</sup> Becker (n 3) 272.

When an NSA acts with the benefit of state support but the state's involvement in its activities is insufficient to lead to attribution, the NSA's conduct falls at the intersection of the public private divide. It is not entirely private in nature, in view of the state assistance that enables its commission, but nor is it entirely public given the private character of the actor concerned. In contemporary conflict, activities involving elements of both the public and the private abound. These range from the indiscriminate attacks perpetrated by the Houthis in Yemen using weapons supplied by Iran,<sup>20</sup> to harmful cyber operations conducted by private hackers with the benefit of state support.

In some circumstances, states that assist NSAs will breach primary norms of international law. When providing advanced weaponry to the Houthis, for instance, Iran likely violated the prohibition on the use of force and the principle of non-intervention.<sup>21</sup> But as the analysis in Chapter 6 demonstrates, primary norms provide an incomplete and fragmented means of holding states that choose to act via NSAs to account. For example, an injured state might struggle to prove that Iran violated any primary norms of international law through its support to Shi'a militia groups located in Syria.<sup>22</sup> The issue is further exacerbated by the stringent attribution thresholds examined in Chapters 3 to 5. Thus, it is not only the public private divide that is problematic but also the way in which the rules of attribution delineate that divide.

### **7.1.2 *The delineation of the divide***

The underlying basis of attribution in the three rules reflected in Articles 4, 5 and 8 ARSIWA is the proximity of the relationship between the act in potential violation of international law and the state.<sup>23</sup> While in the case of Articles 4 and 5 this relationship is established principally via the state's domestic law, it is the factual relationship between the state and the NSA that is pertinent to the rule reflected in Article 8. Attribution on this basis, as well as *de facto* state organ status for the purposes of Article 4, is founded upon the existence of a principal-agent relationship, in which the NSA is subordinate to the state and does its bidding.

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<sup>20</sup> See eg UNHRC 'Situation of Human Rights in Yemen, including Violations and Abuses Since September 2014' (9 August 2019) UN Doc A/HRC/42/17 6-7 paras 31-37; Michael Knights, 'The Houthi War Machine: From Guerrilla War to State Capture' (*CTC Sentinel*, September 2018) <<https://ctc.usma.edu/houthi-war-machine-guerrilla-war-state-capture/>> accessed 15 September 2019.

<sup>21</sup> See Ch 6 ss 6.2, 6.3.

<sup>22</sup> See Ch 6 s 6.7.

<sup>23</sup> See Chs 3-5.

The analysis in Chapters 3 to 5 reveals, however, that when applied to examples from contemporary conflict, the rules reflected in Articles 4, 5 and 8 ARSIWA are not fulfilling their intended functions. In other words, they are not attributing private conduct to a state in all circumstances in which it is appropriate to do so. It is not the rules themselves that are problematic but rather the predominant interpretation of those rules, which creates often insurmountable hurdles for injured states seeking to hold states that act through NSAs to account.

#### *7.1.2.1 Attribution based on law*

Attribution pursuant to the rule reflected in Article 4 ARSIWA is determined primarily via the state's own domestic law.<sup>24</sup> If the state's internal law characterises an entity as a state organ, all the entity's conduct performed in that public capacity is attributable to the state.<sup>25</sup> Domestic law is also critical to attribution under the rule reflected in Article 5. According to the ILC, the conduct of an NSA performing delegated public functions is only attributable to the state if the NSA was 'empowered by law' to perform those functions.<sup>26</sup>

There is one key difference in the respective functions of the state's domestic law, however, that is pertinent to the gap in accountability. In the case of Article 4, a state cannot avoid responsibility simply by choosing to act via an NSA that it does not designate as one of its organs. If an NSA, in fact, acts as an organ of state, its conduct is attributable to the state even if it is not categorised as such by the state's internal law.<sup>27</sup> But there is no equivalent provision within Article 5. If an NSA is not 'empowered by law', its conduct is not attributable to the state under the rule reflected in Article 5, even if it is clearly authorised by the state to exercise elements of its governmental authority.<sup>28</sup>

Although an NSA's conduct could still be attributed to the state under the rule reflected in Article 8, this omission is problematic. In certain circumstances, a state's instructions, direction, or control is not the most appropriate basis of attribution. While it is right to focus on the state's influence over an NSA's conduct when that NSA plays its own role in the conflict, and acts in pursuance of its own independent goals, the position is different when the NSA concerned is purely fighting for the state. Turkey's evolving relationship with Syrian militias illustrates the point. Initially, Turkey provided

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<sup>24</sup> ARSIWA (n 4) art 4. See also Ch 3 s 3.2.

<sup>25</sup> See Ch 3 ss 3.2, 3.4.

<sup>26</sup> ARSIWA (n 4) art 5. See also Ch 4 s 4.3.2.

<sup>27</sup> See Ch 3 s 3.3.

<sup>28</sup> See Ch 4 s 4.3.2.



support to these groups in their fight against the Assad regime in the early stages of the Syrian conflict.<sup>29</sup> Later, however, Turkey diverted these groups away from their goal of toppling President Assad and empowered them to fight instead against the Syrian Kurds.<sup>30</sup> Later still, Turkey used these same militias to promote its interests in the conflicts in Libya and Nagorno-Karabakh.<sup>31</sup>

In the latter circumstances, the militias were not acting on their own account; they were acting solely for Turkey. The same is true of the Shi'a militia groups that fought for Iran in the Syrian conflict, such as the Afghan Fatemiyoun.<sup>32</sup> It is also true of the Wagner Group and other Russian PMSCs when they act to promote Moscow's foreign policy objectives overseas.<sup>33</sup> In the Central African Republic, for instance, Russia reportedly signed a military cooperation agreement with the government, the terms of which were fulfilled not by Russia's own armed forces but by PMSCs.<sup>34</sup> In essence, Moscow authorised the PMSCs to satisfy its obligations under the agreement and thereby perform public functions on the state's behalf. It is wholly appropriate, therefore, for the NSAs' conduct to be attributed to the state pursuant to the rule reflected in Article 5 ARSIWA.

The ILC's inclusion of a requirement for 'empowerment by law', however, precludes Article 5's application to circumstances such as this.<sup>35</sup> In response to allegations of war crimes in the Central African Republic,<sup>36</sup> Moscow used the fact that PMSCs are not authorised under Russian domestic

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<sup>29</sup> See Ch 2 s 2.1.1.

<sup>30</sup> See Ch 2 s 2.1.4.

<sup>31</sup> Dror Zeevi, 'Turkey Fuels Nagorno-Karabakh Conflict: Drones, Mercenaries and Dreams of Imperial Resurgence' (*Just Security*, 16 October 2020) <[www.justsecurity.org/72910/turkey-fuels-nagorno-karabakh-conflict-drones-mercenaries-and-dreams-of-imperial-resurgence/](http://www.justsecurity.org/72910/turkey-fuels-nagorno-karabakh-conflict-drones-mercenaries-and-dreams-of-imperial-resurgence/)> accessed 18 October 2020.

<sup>32</sup> Farzin Nadimi, 'Iran's Afghan and Pakistani Proxies: In Syria and Beyond?' (*Washington Institute*, 22 August 2016) <[www.washingtoninstitute.org/policy-analysis/irans-afghan-and-pakistani-proxies-syria-and-beyond](http://www.washingtoninstitute.org/policy-analysis/irans-afghan-and-pakistani-proxies-syria-and-beyond)> accessed 29 March 2021; Ben Farmer and Akhtar Makoi, 'Thirsty for Martyrdom and a Living Wage: Why Thousands of Afghans Signed up to Iran's Shadowy War in Syria' (*The Telegraph*, 26 January 2020) <[www.telegraph.co.uk/news/2020/01/26/thirsty-martyrdom-living-wage-thousands-afghans-signed-irans/](http://www.telegraph.co.uk/news/2020/01/26/thirsty-martyrdom-living-wage-thousands-afghans-signed-irans/)> accessed 15 February 2020; Ariane M Tabatabai, Jeffrey Martini and Becca Wasser, 'The Iran Threat Network: Four Models of Iran's Nonstate Client Partnerships' (*RAND*, 2021) 14-16 <[www.rand.org/pubs/research\\_reports/RR4231.html](http://www.rand.org/pubs/research_reports/RR4231.html)> accessed 19 July 2021.

<sup>33</sup> See Ch 2 ss 2.1.2, 2.2. See also Kimberly Marten, 'Russia's Use of Semi-State Security Forces: The Case of the Wagner Group' (2019) 35 *Post-Soviet Affairs*.

<sup>34</sup> UNHRC, 'Joint Enquiry of the Special Procedures of the Human Rights Council on the Alleged Activities of Russian Private Military and Security Companies in the Central African Republic' (Ref AL RUS 5/2021, 24 March 2021) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26305>> accessed 9 July 2021.

<sup>35</sup> See Ch 4 s 4.3.2.

<sup>36</sup> Declan Walsh, 'Russian Mercenaries are Driving War Crimes in Africa, UN Says' (*The New York Times*, 27 June 2021) <[www.nytimes.com/2021/06/27/world/asia/russia-mercenaries-central-african-republic.html?referringSource=articleShare](http://www.nytimes.com/2021/06/27/world/asia/russia-mercenaries-central-african-republic.html?referringSource=articleShare)> accessed 9 July 2021.

law to bolster its denial of responsibility in connection with the NSAs' activities.<sup>37</sup> Thus, Russia effectively bypasses responsibility for any abuses its PMSCs commit by enabling the groups' participation in the conflict through informal means, falling outside the state's domestic legal regime.<sup>38</sup> If, for example, Wagner Group contractors conducted indiscriminate attacks on civilians during the battle for Debaltseve in eastern Ukraine,<sup>39</sup> the rule reflected in Article 5, as interpreted by the ILC, would not attribute such IHL violations to Russia.

This outcome defeats the object and purpose of the attribution standard and allows states to use their internal law to side-step international responsibility.<sup>40</sup> It would be less problematic if the NSAs' conduct could be attributed to Russia on other grounds, such as pursuant to the state's instructions, direction, or control.<sup>41</sup> Indeed, analysts suggest that the illegal status of PMSCs in Russia is actually a means of control; if contractors are operating unlawfully, they can be threatened with prosecution for illegal behaviour at any time.<sup>42</sup> But when a state effectively outsources the role of its armed forces to an NSA, that NSA's conduct should be attributable to the state irrespective of the state's exercise of control, and irrespective of the means through which the NSA is empowered to act.

#### *7.1.2.2 Attribution based on fact*

Even if evidence of state control over an NSA's conduct is available, this is frequently insufficient to lead to attribution.<sup>43</sup> The analysis in Chapters 3 and 5 demonstrates the rigidity of the tests formulated by the ICJ to determine attribution for the purposes of Articles 4 and 8 ARSIWA, which allow little room for nuance or an assessment of all relevant facts and circumstances.<sup>44</sup> Both tests are so focused on the presence or absence of state control that they ignore pertinent aspects of the broader circumstances, including the wider relationship between the state and the NSA.

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<sup>37</sup> Permanent Mission of the Russian Federation to the United Nations, 'Response to the Joint Enquiry of the Special Procedures of the Human Rights Council on the Alleged Activities of Russian Private Military and Security Companies in the Central African Republic' (28 April 2021) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36281>> accessed 9 July 2021.

<sup>38</sup> See Ch 4 s 4.3.2.

<sup>39</sup> See Ch 2 s 2.2.2.

<sup>40</sup> See Ch 4 s 4.3.2.

<sup>41</sup> ARSIWA (n 4) art 8.

<sup>42</sup> Marten (n 33) 181, 188, 191, 199.

<sup>43</sup> See Ch 3 s 4.3, Ch 5 s 5.4.

<sup>44</sup> *ibid.* See also Becker (n 3) 264.

Considering, first, the rule reflected in Article 4, it is right that *de facto* state organ status should arise only in exceptional circumstances, given that all the conduct of an entity with that status is attributable to the state.<sup>45</sup> An application of the ICJ's complete dependence and control test to situations of contemporary conflict, however, reveals its impracticality.<sup>46</sup> The requirement for both elements of the test to be 'complete' in nature excludes relationships in which the NSA exercises any degree of autonomy or obtains resources from any source other than the state and renders *de facto* state organ status practically meaningless.

The principal issue in the context of Article 8 ARSIWA is the requirement for the state to exercise a detailed level of control over the specific conduct on the part of an NSA that potentially violates international law.<sup>47</sup> Evidence of this high degree of control is lacking in most of the scenarios outlined in Chapter 2.<sup>48</sup> Moreover, the difficulty for injured states in proving such a level of control is exacerbated by the covert nature of states' relationships with NSAs, which are often conducted via their intelligence services or their special forces.<sup>49</sup> This is a particular issue in the cyber domain. While a sophisticated commander might direct such operations with ease, obtaining evidence of the requisite levels of state control to prove attribution poses a potentially insurmountable challenge.<sup>50</sup>

Even in conventional military operations, a requirement for evidence that a state organ 'directed or enforced' the conduct at issue is unrealistic.<sup>51</sup> Acts that potentially violate international law might be committed by members of an NSA without specific orders being issued either by state officials or by the NSA's leadership.<sup>52</sup> If an individual does act pursuant to direction from one of the NSA's commanders, it may be that that order could be countermanded by a state official, who exercises command and control over the operation as a whole.<sup>53</sup> In such circumstances, given the control exercised by the state over the operation in which the conduct in violation of international law is

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<sup>45</sup> See Ch 3.

<sup>46</sup> *ibid* s 3.3.

<sup>47</sup> See Ch 5 s 5.4.

<sup>48</sup> *ibid* s 5.4.4.

<sup>49</sup> Geraint Hughes, *My Enemy's Enemy: Proxy Warfare in International Politics* (Sussex Academic Press 2012) 15-18; Becker (n 3) 71, 241.

<sup>50</sup> Peter Margulies, 'Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility' (2013) 14 *Melbourne Journal of Intl Law* 496, 500; Lanovoy (n 3) 322.

<sup>51</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [115] (*Nicaragua*).

<sup>52</sup> Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 *Harvard Intl L J* 113, 156.

<sup>53</sup> *ibid*.

committed, attribution of the NSA's conduct to the state appears appropriate. The ICJ's stringent effective control threshold, however, would not be met.<sup>54</sup>

The test formulated by the ICJ thus ignores states' authority over NSAs' conduct at all levels other than the exercise of tactical control over the specific acts that violate international law.<sup>55</sup> Consider, for instance, Iran's relationship with Shi'a militia groups operating in Syria. If it is correct that IRGC officers led the militias in combat,<sup>56</sup> it may be that Iran exercised sufficiently detailed control over the militias' conduct in potential violation of IHL for these acts to be attributable to Iran.<sup>57</sup> But reporting indicates that Hezbollah fighters commonly exercised command at the tactical level.<sup>58</sup> If this is accurate, doubts arise whether Iranian officials exerted the requisite quality of control over the militias' activities for their conduct during the hostilities to be attributable to the state. Even if IRGC officers commanded the operation in which the abuses occurred, if they did not exert detailed control over the violations themselves, the effective control threshold might not be met.<sup>59</sup> This outcome leaves victims of IHL violations at the hands of the NSAs with limited means of recourse and fails to reflect the reality of Iran's considerable influence over their behaviour.<sup>60</sup>

### **7.1.3 State support to non-state actors in the absence of control**

The conflict in Syria demonstrates the wide range of relationships between states and NSAs in contemporary conflict.<sup>61</sup> These include more horizontal relationships, in which the state and NSA pursue mutually beneficial partnerships, as well as associations in which a state provides material support to an NSA without also exercising control. Moreover, states' relationships with NSAs are dynamic; the respective degrees of dependence and control may fluctuate as the balance of power between the parties shifts.<sup>62</sup> For instance, while Iran exerted significant influence over Hezbollah in

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<sup>54</sup> See Ch 5 s 5.4.3.

<sup>55</sup> *ibid.*

<sup>56</sup> Paul Bucala and Frederick W Kagan, 'Iran's Evolving Way of War: How the IRGC Fights in Syria' (*Critical Threats*, March 2016) <[www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans\\_Evolving\\_Way\\_of\\_War\\_IRGC\\_in\\_Syria\\_FINAL-1.pdf](http://www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans_Evolving_Way_of_War_IRGC_in_Syria_FINAL-1.pdf)> accessed 28 March 2021.

<sup>57</sup> See Ch 5 s 5.4.3.

<sup>58</sup> Ben Hubbard, 'Iran Out to Remake Mideast with Arab Enforcer: Hezbollah' (*The New York Times*, 27 August 2017) <[www.nytimes.com/2017/08/27/world/middleeast/hezbollah-iran-syria-israel-lebanon.html?rref=collection%2Fsectioncollection%2Fworld&action=click&contentCollection=world](http://www.nytimes.com/2017/08/27/world/middleeast/hezbollah-iran-syria-israel-lebanon.html?rref=collection%2Fsectioncollection%2Fworld&action=click&contentCollection=world)> accessed 22 February 2018.

<sup>59</sup> See Ch 5 s 5.4.3.

<sup>60</sup> See generally Tabatabai, Martini and Wasser (n 32).

<sup>61</sup> See Ch 2 s 2.1.

<sup>62</sup> Diane M Zorri, Houman A Sadri and David C Ellis, 'Iranian Proxy Groups in Iraq, Syria, and Yemen: A Principal-Agent Comparative Analysis' (*Joint Special Operations University Report 20-5*, December 2020) 2-3.

the years following the group's creation, the relationship between the parties became less hierarchical over time as the group developed its own domestic support.<sup>63</sup>

The rules of attribution reflected in ARSIWA were not crafted with highly independent NSAs such as Hezbollah or private cyber operators in mind.<sup>64</sup> Furthermore, ARSIWA fails to even contemplate the myriad ways in which states facilitate NSAs' harmful conduct without also exercising control. To illustrate, consider the United States' support to the SDF in northeast Syria. Here, US forces act in an 'advise and assist' role, meaning that they mentor and train the SDF and provide support to the group in its conduct of military operations against ISIS targets.<sup>65</sup> This might include the provision of intelligence, assistance in planning, and specialist support during the operation itself. Although US forces' involvement in such operations could rise to the level of effective control, particularly if they accompany the SDF on such missions,<sup>66</sup> it is equally possible that the United States provides support that is critical to the operations' success without also exercising tactical control over the SDF's conduct.

In such circumstances, even if the state's military personnel facilitate the detention of ISIS fighters in the knowledge that they will then be held, indefinitely, in inhumane conditions<sup>67</sup> or transferred to Iraq where they face possible torture,<sup>68</sup> the state can act with confidence that it will not be held to account. ARSIWA does not include any equivalent to Article 16, which regulates states' aid or assistance to other states, in the context of state support to NSAs.<sup>69</sup> And as discussed in Chapter 6, an injured state is likely to experience difficulties in proving that the United States, through its support to the SDF, violated primary norms of international law.

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<sup>63</sup> *ibid.*

<sup>64</sup> Nicholas Tsagourias and Michael Farrell, 'Cyber Attribution: Technical and Legal Approaches and Challenges' (2020) 31 *Eur J Intl L* 941, 961-62.

<sup>65</sup> See Ch 2 s 2.1.3.

<sup>66</sup> See Ch 5 s 5.4.3. For discussion of state control in the context of command responsibility see Gregory Raymond Bart, 'Special Operations Forces and Responsibility for Surrogates' War Crimes' (2014) 5 *Harvard National Security J* 513, 522-24.

<sup>67</sup> See Ch 2 s 2.1.3.

<sup>68</sup> Raya Jalabi and Alissa de Carbonnel, 'Exclusive: Islamic State Suspects Sent by US from Syria to Iraq' (*Reuters*, 29 May 2019) <[www.reuters.com/article/us-mideast-crisis-islamicstate-transfers/exclusive-islamic-state-suspects-sent-by-u-s-from-syria-to-iraq-idUSKCN1SZ0R1](http://www.reuters.com/article/us-mideast-crisis-islamicstate-transfers/exclusive-islamic-state-suspects-sent-by-u-s-from-syria-to-iraq-idUSKCN1SZ0R1)> accessed 3 October 2020; Belkis Wille, 'ISIS Suspect Transfers to Iraq Replete with Risks' (*Human Rights Watch*, 1 November 2019) <[www.hrw.org/news/2019/11/01/isis-suspect-transfers-iraq-replete-risks](http://www.hrw.org/news/2019/11/01/isis-suspect-transfers-iraq-replete-risks)> accessed 4 October 2020.

<sup>69</sup> ARSIWA (n 4) art 16. See also Ch 8 s 8.2.

The failure of international law to properly address states' responsibility for the support they provide to NSAs is particularly apparent when viewed in light of the individual criminal responsibility of states' leaders for conduct performed in their official capacity.<sup>70</sup> Charles Taylor, for instance, was convicted by the Special Court for Sierra Leone of aiding and abetting a number of offences committed by an NSA when he was President of Liberia, including war crimes and other serious IHL violations.<sup>71</sup> The Court additionally found that Taylor had planned various attacks alongside the NSA's commander.<sup>72</sup> These findings were not contingent, however, on Taylor's exercise of control. In fact, the court specifically rejected a prosecution argument that Taylor exerted effective command and control over the NSA.<sup>73</sup>

This case raises clear parallels with scenarios in which a state exercises insufficient control over an NSA for attribution to arise, but its organs nevertheless facilitate the NSA's commission of international wrongs. In such circumstances, there is little doubt that state officials' actions in assisting the NSA are attributable to the state, unless they were acting in a personal capacity at the relevant time.<sup>74</sup> But while those actions might lead to the officials' individual criminal responsibility, they will not result in state responsibility absent a high degree of state control or the breach of a primary norm. This outcome is anomalous and fails to properly reflect the official nature of the assistance provided.<sup>75</sup> Although there are clear differences between the scope and the focus of international criminal law and the law of state responsibility,<sup>76</sup> it is unsatisfactory for a state official to bear personal responsibility for aiding and abetting an NSA's harmful conduct if those same actions, performed on behalf of the state, do not result in state responsibility. Thus, international

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<sup>70</sup> Regarding the intersection between international criminal law and the law of state responsibility, see André Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *Intl and Comparative Law Quarterly* 615; Alexandra Boivin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' (2005) 87 *Intl Rev of the Red Cross* 467, 481-84.

<sup>71</sup> *Prosecutor v Charles Taylor* (Trial Chamber Judgment) SCSL-03-01-T (18 May 2012); *Prosecutor v Charles Taylor* (Appeals Judgment) SCSL-03-01-A (26 September 2013). See also Nina H B Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108 *American J Intl L* 722, 734-37, 741-42.

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.* See also Beth Van Schaack, 'The Charles Taylor Appeal and the Scope of Accomplice Liability' (*Just Security*, 22 October 2013) <[www.justsecurity.org/2167/charles-taylor-appeal-scope-accomplice-liability/](http://www.justsecurity.org/2167/charles-taylor-appeal-scope-accomplice-liability/)> accessed 1 June 2020.

<sup>74</sup> ARSIWA (n 4) art 4. See also Jørgensen (n 71) 736-37; Ch 3 s 3.4.

<sup>75</sup> André Nollkaemper, 'The Charles Taylor Judgment: Disconnecting the Responsibilities of Presidents and States' (*Shares Project*, 1 October 2013) <[www.sharesproject.nl/the-charles-taylor-judgment-disconnecting-the-responsibilities-of-presidents-and-states/](http://www.sharesproject.nl/the-charles-taylor-judgment-disconnecting-the-responsibilities-of-presidents-and-states/)> accessed 8 October 2020; Kimberley Trapp, *State Responsibility for International Terrorism* (OUP 2011) 230-63.

<sup>76</sup> See Jørgensen (n 71) 735; Paola Gaeta, 'On What Conditions Can a State be Held Responsible for Genocide?' (2007) 18 *Eur J Intl L* 631, 635-37.

criminal law highlights a clear gap in the law of state responsibility, particularly regarding the law's failure to address forms of state support to NSAs that fall short of control.

#### **7.1.4 *The evolving role of non-state actors in contemporary conflict***

The effects of this lacuna are particularly apparent in contemporary conflict due to the proliferation of NSAs and their increasing power and autonomy.<sup>77</sup> It is an anachronism to consider the state as the only powerful actor operating in the international sphere. Today, NSAs frequently act with considerable sophistication and independence and their associations with states may be more akin to horizontal partnerships than hierarchical affiliations. As such, a high degree of state control is often lacking from states' contemporary relationships with NSAs, meaning that the prospects of attribution are slim.

Hezbollah provides a stark example. The group participated in the Syrian conflict at Iran's instigation, commanding Shi'a militia groups and devising the battlefield tactics for military campaigns such as the assault on Aleppo.<sup>78</sup> Iran's relationship with Hezbollah thus demonstrates states' capacity to participate indirectly in contemporary conflict through powerful, autonomous entities, while bearing little risk of responsibility when those NSAs violate international law. Tehran has replicated this model across the Middle East, from the Badr Brigades in Iraq to militia groups in Bahrain.<sup>79</sup> And although few NSAs exhibit equivalent levels of autonomy to Hezbollah, many act with a degree of independence that precludes the application of the stringent control thresholds reflected in ARSIWA.<sup>80</sup>

Other NSAs, such as the Kurdish-led administration linked to the SDF in northeast Syria, act in a state-like manner through their exercise of authority over territory and local populations.<sup>81</sup> NSAs'

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<sup>77</sup> See Ch 1 s 1.1.1.

<sup>78</sup> See Ch 2 s 2.1.2. See also Marisa Sullivan, 'Middle East Security Report 19: Hezbollah in Syria' (*Institute for the Study of War*, April 2014) 4 <[www.understandingwar.org/sites/default/files/Hezbollah\\_Sullivan\\_FINAL.pdf](http://www.understandingwar.org/sites/default/files/Hezbollah_Sullivan_FINAL.pdf)> accessed 27 February 2018; Maria Abi-Habib, 'Syria's Civil War Produces a Clear Winner: Hezbollah' (*The Wall Street Journal*, 3 April 2017) <[www.wsj.com/articles/syrias-civil-war-produces-a-clear-winner-hezbollah-1491173790](http://www.wsj.com/articles/syrias-civil-war-produces-a-clear-winner-hezbollah-1491173790)> accessed 27 February 2018.

<sup>79</sup> Borzou Daragahi, 'Badr Brigade: Among the Most Consequential Outcomes of the Iran-Iraq War' (*Atlantic Council*, 16 August 2018) <[www.atlanticcouncil.org/blogs/iransource/badr-brigade-among-most-consequential-outcomes-of-the-iran-iraq-war-2/](http://www.atlanticcouncil.org/blogs/iransource/badr-brigade-among-most-consequential-outcomes-of-the-iran-iraq-war-2/)> accessed 27 September 2020; Norman Roule, 'What a New Terrorist Designation Says About Iranian Action in Bahrain' (*Just Security*, 21 September 2018) <[www.justsecurity.org/60818/terrorist-designation-iranian-action-bahrain/](http://www.justsecurity.org/60818/terrorist-designation-iranian-action-bahrain/)> accessed 27 September 2020. See also Tabatabai, Martini and Wasser (n 32).

<sup>80</sup> See Ch 3 s 3.3; Ch 5 s 5.4.

<sup>81</sup> See Ch 2 s 2.1.3.

exercise of territorial control, however, is frequently contingent on external state support. When US forces withdrew from some of their bases in Syria following the Turkish incursion in October 2019, therefore, the administration linked to the SDF had little choice but to respond by ceding control over a proportion of its territory.<sup>82</sup> The Donetsk and Luhansk People's Republics in eastern Ukraine similarly rely for their continued survival on significant assistance from neighbouring Russia.<sup>83</sup> Moscow reportedly installs the administrations' leadership, runs their military and financial affairs, and represents the region in conflict resolution negotiations.<sup>84</sup>

Yet, despite the key role states play in bolstering *de facto* administrations, states are rarely held to account when those NSAs violate international law. Reporting from the Donbas indicates, for instance, that arbitrary detentions involving torture are prevalent in the areas controlled by the local administrations.<sup>85</sup> But often, such conduct is not attributable to a state due to insufficient state control over the NSA's day-to-day activities.<sup>86</sup> And although human rights bodies have concluded that areas governed by a local administration may fall within a supporting state's jurisdiction for the purposes of IHRL, differences between the various human rights regimes and their respective enforcement mechanisms lessen IHRL's impact in holding state sponsors to account.<sup>87</sup> Individuals living under the authority of a local administration may therefore be left with little meaningful remedy when an NSA in control of territory violates their rights.<sup>88</sup>

A further feature of contemporary conflict that amplifies the impact of the accountability gap is states' increasing propensity to use NSAs to engage in combat on their behalf. This development is

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<sup>82</sup> International Crisis Group, 'Steadying the New Status Quo in Syria's North East' (27 November 2019) <[www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/b72-steadying-new-status-quo-syrias-north-east](http://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/b72-steadying-new-status-quo-syrias-north-east)> accessed 1 October 2020; Abdullah Al-Ghadhawi, 'Kurds Left with Few Choices After US Withdrawal' (*Chatham House*, November 2019) <<https://syria.chathamhouse.org/research/kurds-left-with-few-choices-after-us-withdrawal>> accessed 26 May 2020; Matthew Ayton, 'Amid US Uncertainty in Syria, Kurdish YPG Eyes Bolstering Ties with Russia' (*Atlantic Council*, 23 March 2020) <[www.atlanticcouncil.org/blogs/menasource/amid-us-uncertainty-in-syria-kurdish-ypg-eyes-bolstering-ties-with-russia/](http://www.atlanticcouncil.org/blogs/menasource/amid-us-uncertainty-in-syria-kurdish-ypg-eyes-bolstering-ties-with-russia/)> accessed 30 August 2020.

<sup>83</sup> See Ch 2 s 2.2.

<sup>84</sup> Thomas De Waal, 'Uncertain Ground: Engaging with Europe's *de facto* States and Breakaway Territories' (*Carnegie Europe*, 3 December 2018) 61, 64 <<https://carnegieeurope.eu/2018/12/03/uncertain-ground-engaging-with-europe-s-de-facto-states-and-breakaway-territories-pub-77823>> accessed 30 August 2020.

<sup>85</sup> *ibid* 64.

<sup>86</sup> See Ch 5 s 5.4.

<sup>87</sup> See Ch 6 s 6.5.

<sup>88</sup> See generally Tatyana Eatwell, 'State Responsibility for Human Rights Violations Committed in the State's Territory by Armed Non-State Actors' (*Geneva Academy*, December 2018) <[www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202013.pdf](http://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202013.pdf)> accessed 1 September 2020; ICRC, 'The Legal Regime Protecting Persons Living in Territory under the Control of Non-State Armed Groups' (*Armed Groups and International Law*, 19 May 2020) <<https://armedgroups-internationallaw.org/2020/05/19/the-legal-regime-protecting-persons-living-in-territory-under-the-control-of-non-state-armed-groups/>> accessed 1 September 2020.



evident in the United States' prolific use of military contractors since the end of the Cold War,<sup>89</sup> and in Russia's employment of the Wagner Group to promote its interests across the world.<sup>90</sup> But the United States and Russia are not alone in using NSAs in this manner. China employs fishing fleets, of ambiguous status, to protect its interests in the South China Sea.<sup>91</sup> Iran extends its sphere of influence through Hezbollah and other Shi'a militia groups, which act to fulfil Tehran's strategic goals in Syria and the wider Middle East.<sup>92</sup> And Turkey employs militias to promote its foreign policy goals not only in northern Syria but also in Libya and Nagorno-Karabakh.<sup>93</sup>

The conflict in Libya typifies the trend.<sup>94</sup> While the Government of National Accord was reinforced by Syrian militias supported by Turkey, the Libyan National Army on the other side of the hostilities was bolstered by a diverse coalition of forces. This included Syrian militias backed by Russia, a contingent from the Wagner Group, PMSCs based in the United Arab Emirates, and militias from Chad and Sudan.<sup>95</sup> In each case, however, it is questionable whether the respective states empowered the NSAs to act in accordance with their domestic laws.<sup>96</sup> It is also doubtful whether the states exercised a high degree of control over their proxies' conduct, particularly given the prevalence of IHL violations committed by parties to the conflict.<sup>97</sup> States' use of NSAs in this manner, therefore,

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<sup>89</sup> Sean McFate, 'Mercenaries and War: Understanding Private Armies Today' (*National Defense University*, December 2019) 18-23 <<https://apps.dtic.mil/sti/pdfs/AD1115550.pdf>> accessed 23 July 2021.

<sup>90</sup> See Ch 2 ss 2.1.2, 2.2. See also Kimberly Marten, 'Where's Wagner? The All-New Exploits of Russia's "Private" Military Company' (*Ponars Eurasia*, 15 September 2020) <[www.ponarseurasia.org/where-s-wagner-the-all-new-exploits-of-russia-s-private-military-company/](http://www.ponarseurasia.org/where-s-wagner-the-all-new-exploits-of-russia-s-private-military-company/)> accessed 31 March 2021.

<sup>91</sup> Chuin-Wei Yap, 'China's Fishing Fleet, the World's Largest, Drives Beijing's Global Ambitions' (*The Wall Street Journal*, 21 April 2021) <[www.wsj.com/articles/chinas-fishing-fleet-the-worlds-largest-drives-beijings-global-ambitions-11619015507](http://www.wsj.com/articles/chinas-fishing-fleet-the-worlds-largest-drives-beijings-global-ambitions-11619015507)> accessed 12 July 2021.

<sup>92</sup> Tabatabai, Martini and Wasser (n 32).

<sup>93</sup> Zeevi (n 31); Anchal Vohra, 'It's Syrian vs Syrian in Libya' (*Foreign Policy*, 5 May 2020) <<https://foreignpolicy.com/2020/05/05/libya-civil-conflict-syrian-mercenaries-turkey-russia-gna-haftar/>> accessed 11 July 2021.

<sup>94</sup> See generally Javier Martín, 'Libya: The First Totally Privatized War in Modern History' (*International Institute for Nonviolent Action*, 2020) <[www.ohchr.org/Documents/issues/Mercenaries/WG/OtherStakeholders/shockmonitor\\_submission.pdf](http://www.ohchr.org/Documents/issues/Mercenaries/WG/OtherStakeholders/shockmonitor_submission.pdf)> accessed 4 September 2021.

<sup>95</sup> UNSC, 'Final Report of the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011)' (8 March 2021) UN Doc S/2021/229 7-8 paras 16-23, 30-33 paras 86-100; Nathan Vest and Colin P Clarke, 'Is the Conflict in Libya a Preview of the Future of Warfare?' (*Defense One*, 2 June 2020) <[www.defenseone.com/ideas/2020/06/conflict-libya-preview-future-warfare/165807/](http://www.defenseone.com/ideas/2020/06/conflict-libya-preview-future-warfare/165807/)> accessed 11 July 2021; Vohra (n 93); Martín (n 94); Alia Brahimi, 'Libya has a Mercenaries Problem. It's Time for the International Community to Step Up' (*Atlantic Council*, 21 May 2021) <[www.atlanticcouncil.org/blogs/menasource/libya-has-a-mercenaries-problem-its-time-for-the-international-community-to-step-up/](http://www.atlanticcouncil.org/blogs/menasource/libya-has-a-mercenaries-problem-its-time-for-the-international-community-to-step-up/)> accessed 11 July 2021.

<sup>96</sup> See Ch 4 s 4.3.2.

<sup>97</sup> Human Rights Watch, 'Libya: Apparent War Crimes in Tripoli' (16 June 2020) <[www.hrw.org/news/2020/06/16/libya-apparent-war-crimes-tripoli](http://www.hrw.org/news/2020/06/16/libya-apparent-war-crimes-tripoli)> accessed 4 September 2021; Samy Magdy, 'US Military: Russian Mercenaries Planted Land Mines in Libya' (*The Washington Post*, 15 July 2020) <[https://www.washingtonpost.com/world/middle\\_east/us-military-russian-mercenaries-planted-land-mines-in-](https://www.washingtonpost.com/world/middle_east/us-military-russian-mercenaries-planted-land-mines-in-)

underlines the need for the rules of attribution to operate effectively, to ensure that when NSAs clearly act on a state's behalf, their conduct in potential violation of international law is attributable to that state.

## 7.2 Addressing the accountability gap through a relaxation of the attribution standards

The preceding analysis highlights not only the existence of an accountability gap when states act through NSAs but also the importance of the attribution thresholds in defining the parameters of that lacuna. If the law of state responsibility allowed for the attribution of private conduct to the state in a broader range of circumstances, this would naturally lead to a narrowing of the gap in accountability. It is therefore pertinent to assess whether a relaxation of the rules of attribution would better meet the law's object and purpose.

A review of each of the attribution standards reflected in Articles 4, 5 and 8 ARSIWA reveals that a more relaxed interpretation of all three rules would be of benefit. A loosening of just one threshold, such as the effective control test for the purposes of Article 8, would assist in closing the accountability gap only in the specific circumstances that that particular rule of attribution is designed to address, namely when an NSA acts on a state's behalf as its agent.<sup>98</sup> It would not address a situation in which a state delegates public functions to an NSA, when the exercise of control is not relevant to the issue of attribution,<sup>99</sup> or when an NSA is integrated into a state's apparatus to such an extent that all its conduct should be attributed to the state.<sup>100</sup> Although their respective spheres of application overlap, the rules reflected in Articles 4, 5 and 8 serve different functions. Therefore, they each need to operate effectively in light of the realities of states' contemporary interactions with NSAs.

### 7.2.1 *De facto state organs*

Establishing that an entity has the status of a *de jure* organ of state is relatively uncontroversial.<sup>101</sup> More problematic, however, are determinations of *de facto* state organ status. This classification is

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libya/2020/07/15/1e0f65ba-c69b-11ea-a825-8722004e4150\_story.html> accessed 4 September 2021; Ilya Barabanov and Nader Ibrahim, 'Wagner: Scale of Russian Mercenary Mission in Libya Exposed' (*BBC News*, 11 August 2021) <[www.bbc.co.uk/news/world-africa-58009514](http://www.bbc.co.uk/news/world-africa-58009514)> accessed 4 September 2021.

<sup>98</sup> See ARSIWA (n 4) art 8; Ch 5.

<sup>99</sup> ARSIWA (n 4) art 5; Ch 4.

<sup>100</sup> ARSIWA (n 4) art 4; Ch 3 s 3.3.

<sup>101</sup> See Ch 3 s 3.2.

designed to prevent a state from evading responsibility by acting via a person or entity that is not designated as a state organ by its internal law.<sup>102</sup> It is, however, of limited practical relevance due to the stringency and inflexibility of the test formulated by the ICJ to determine its application.<sup>103</sup>

The relationship between Rwanda and M23 aptly demonstrates the issue.<sup>104</sup> Although the militia group acted as an effective arm of the state, in a similar manner to Rwanda's own armed forces, it is doubtful that the group qualifies as a *de facto* state organ because the 'complete dependence' element of the ICJ's test appears not to be met.<sup>105</sup> M23 was not financially dependent on Rwanda and received significant assistance from alternate sources, including the government of Uganda.<sup>106</sup>

Even if the available evidence points towards an NSA's complete dependence on one state, that alone is insufficient to lead to attribution. The state must additionally exercise a high degree of control over all the entity's areas of activity.<sup>107</sup> If an NSA demonstrates a consistent degree of autonomy or indiscipline, as the *Shabbiba* did when acting for the Assad regime in the early stages of the Syrian conflict,<sup>108</sup> the ICJ's test is unlikely to be satisfied.

The 'complete dependence and control' test thus deprives *de facto* state organ status of practical effect. If this cannot be met in respect of M23 or the *Shabbiba*, it is questionable whether any relationship between a state and an NSA could be sufficiently close to satisfy both elements of the test.<sup>109</sup> The cumulative requirements of the entity's complete dependence on the state plus the state's exercise of a high degree of control over the entire scope of the entity's activities excludes militias such as M23 from qualifying as *de facto* state organs, without permitting an examination of their wider relationship with the state to assess whether it parallels that of a *de jure* organ. This outcome

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<sup>102</sup> ARSIWA (n 4) art 4, commentary para 11. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [392] (*Bosnian Genocide*).

<sup>103</sup> See Ch 4 s 4.3. See also *Nicaragua* (n 51) [109]-[111]; *Bosnian Genocide* (n 102) [392]-[394].

<sup>104</sup> See Ch 2 s 2.3; Ch 3 s 3.3.

<sup>105</sup> *Nicaragua* (n 51) [109]-[111]; *Bosnian Genocide* (n 102) [392]. See also Ch 3 s 3.3.

<sup>106</sup> See Ch 2 s 2.3. The involvement of both states in the NSA's activities raises issues of shared responsibility. See ARSIWA (n 4) art 47. See also Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 288-95; André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan J Intl L* 359; Lanovoy (n 3) 147-61; André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 *Eur J Intl L* 15.

<sup>107</sup> *Nicaragua* (n 51) [110]; *Bosnian Genocide* (n 102) [393]-[394].

<sup>108</sup> See Ch 2 s 2.1.2.

<sup>109</sup> Jörn Griebel and Milan Plücker, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v Serbia*' (2008) 21 *Leiden J Intl L* 601, 613. But see also Marko Milanović, 'State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücker' (2009) 22 *Leiden J Intl L* 307, 317-8.

appears inconsistent with the ILC's aim in broadening the scope of Article 4 to encompass those entities that act, in truth, as part of the machinery of government.<sup>110</sup>

To meet that aim, a more flexible test is required that assesses the reality of the overall relationship between the state and the NSA without requiring the extant levels of dependence and control to be 'complete' in nature. While an NSA's level of dependence on the state and the state's degree of control over the entity's wider activities are both highly relevant considerations when making this assessment, they should not predominate over other pertinent factors. Instead, all the features of the relationship between the state and the NSA should be considered, including the factual circumstances identified by the ICJ as indications of *de facto* state organ status.<sup>111</sup> In addition to the respective levels of dependence and control, these might include:

1. State involvement in the NSA's creation;<sup>112</sup>
2. Shared goals or ideology between the state and the NSA;
3. The public character of the functions performed by the NSA;<sup>113</sup>
4. State involvement in all fields of the NSA's activities;<sup>114</sup>
5. State involvement in devising the NSA's overall strategy;<sup>115</sup>
6. State organs acting alongside or in concert with the NSA;
7. The state's selection of the NSA's political or military leaders;<sup>116</sup>
8. State involvement in the planning of the NSA's operations and the selection of its targets;<sup>117</sup>
9. State involvement in the NSA's recruitment practices;
10. The state's payment of salaries to leaders and/or members of the NSA.

Consideration of a range of factors such as these, tailored to the situation at issue, would allow a less rigid and fairer assessment of the true relationship between a state and an NSA. A similar

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<sup>110</sup> See ARSIWA (n 4) art 4 commentary para 11.

<sup>111</sup> See Ch 3 s 3.3.1.

<sup>112</sup> *Nicaragua* (n 51) [93]-[94]. See also *Armed Activities on the Territory of the Congo (The Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ 168 [158]-[160].

<sup>113</sup> *Emilio Agustín Maffezini v The Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction) (25 January 2000) [75]-[89] <[www.italaw.com/sites/default/files/case-documents/ita0479.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf)> accessed 26 September 2021; *Flemingo Duty Free Shop Private Limited v The Republic of Poland* (Arbitral Award) (12 August 2016) [418]-[435] <[www.italaw.com/sites/default/files/case-documents/italaw7709\\_3.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf)> accessed 26 September 2021.

<sup>114</sup> *Nicaragua* (n 51) [109].

<sup>115</sup> *ibid* [110]; *Bosnian Genocide* (n 102) [394].

<sup>116</sup> *Nicaragua* (n 51) [112].

<sup>117</sup> *ibid* [112].

approach has been followed by certain arbitral tribunals, which found entities to qualify as *de facto* state organs without requiring evidence of complete dependence and control.<sup>118</sup> When applied to Iran's relationship with Hezbollah, for example, the shared ideology between the state and the NSA is a factor of particular importance. This leads Hezbollah to consistently act in furtherance of Iranian interests without a need for the state to exercise a high degree of control over its activities. The group's intimate relationship with one particular organ of the Iranian state, the IRGC, is also of relevance.<sup>119</sup> A further indication of Hezbollah's place within the wider architecture of the Iranian state is the group's significance to Tehran's overall concept of defence and deterrence.<sup>120</sup> These elements, however, must be weighed against factors that point away from Hezbollah's status as a *de facto* state organ. These include the considerable autonomy the group demonstrates when conducting military operations,<sup>121</sup> the support it receives from Syria,<sup>122</sup> and the important domestic role it plays within Lebanon.<sup>123</sup>

Given that attribution pursuant to Article 4 ARSIWA means that all the NSA's conduct is attributable to the state irrespective of the degree of state involvement in the activity concerned, a conclusion that Hezbollah qualifies as a *de facto* state organ of Iran appears inappropriate. As the ICJ noted, *de facto* state organ status is 'exceptional' in nature.<sup>124</sup> Thus, the status should arise only when a particularly close relationship exists between the state and the NSA that extends to all the NSA's fields of activity.<sup>125</sup>

But to achieve its object and purpose and to prevent states from using their internal laws to evade responsibility, this status must apply more broadly than the 'complete dependence and control' test allows. A more flexible interpretation of the rule of attribution might, for example, lead to a

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<sup>118</sup> *Maffezini* (n 113) [75]-[89]; *Flemingo Duty Free Shop* (n 113) [418]-[435].

<sup>119</sup> Hubbard (n 58).

<sup>120</sup> Ariane Tabatabai, 'The Fruits of Iran's Victory in Syria' (*Lanfare*, 15 April 2018) <[www.lawfareblog.com/fruits-irans-victory-syria](http://www.lawfareblog.com/fruits-irans-victory-syria)> accessed 27 August 2019; Jack Watling, 'Iran's Objectives and Capabilities: Deterrence and Subversion' (*RUSI Occasional Paper*, February 2019) 16-17 <[https://rusi.org/sites/default/files/20190219\\_op\\_irans\\_objectives\\_and\\_capabilities\\_web.pdf](https://rusi.org/sites/default/files/20190219_op_irans_objectives_and_capabilities_web.pdf)> accessed 23 August 2019; Tabatabai, Martini and Wasser (n 32).

<sup>121</sup> Sullivan (n 78).

<sup>122</sup> Mohanad Hage Ali, 'Power Points Defining the Syria-Hezbollah Relationship' (*Carnegie Middle East Center*, 29 March 2019) <<https://carnegie-mec.org/2019/03/29/power-points-defining-syria-hezbollah-relationship-pub-78730>> accessed 27 August 2019.

<sup>123</sup> Counter Extremism Project, 'Hezbollah's Influence in Lebanon' (April 2018) <[www.counterextremism.com/sites/default/files/Hezbollah%20Influence%20in%20Lebanon\\_043018.pdf](http://www.counterextremism.com/sites/default/files/Hezbollah%20Influence%20in%20Lebanon_043018.pdf)> accessed 27 August 2019.

<sup>124</sup> *Bosnian Genocide* (n 102) [393].

<sup>125</sup> *Nicaragua* (n 51) [109].

conclusion that despite the Assad regime's lack of strict control over the *Shabbiha's* harmful activities, when the relationship is viewed as a whole, the group nevertheless qualifies as a *de facto* organ of Syria.<sup>126</sup> Such an approach would better meet the object and purpose of the attribution standard reflected in Article 4 and act as a disincentive to states to act via proxy in a manner that they cannot lawfully act via their *de jure* state organs.

### **7.2.2 *Persons or entities exercising elements of governmental authority***

The purpose of Article 5 ARSIWA is to attribute to a state the wrongful conduct of NSAs that the state empowers to perform governmental functions on its behalf.<sup>127</sup> As such, the rule of attribution should hold states to account in respect of international law violations involving private individuals or groups to whom the state has delegated functions that are traditionally performed by the state's own organs.<sup>128</sup> Chapter 4's analysis of the attribution standard reveals, however, that this objective is not always met. While difficulties arise in determining the particular functions that may be characterised as 'governmental' in nature,<sup>129</sup> the principal obstacle to attribution on this basis in contemporary conflict is the requirement that the entity must be empowered by the state's internal law to perform the delegated function.<sup>130</sup>

Section 7.1.2 highlights the impact of this requirement when considering Russia's use of the Wagner Group to perform combat functions on its behalf, or Turkey's employment of Syrian militias to exert its influence in northern Syria, Libya, and Nagorno-Karabakh. These examples demonstrate states' willingness to delegate governmental functions to private entities via means that are often covert and may not accord with the state's domestic law. The rule of attribution reflected in Article 5 would better meet its object and purpose, therefore, if it required only that the state empowers an NSA to exercise elements of its governmental authority without any need to prove that such empowerment was effectuated by law.<sup>131</sup> This would enable all forms of state authorisation to be considered when assessing the issue of attribution.

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<sup>126</sup> See Ch 3 s 3.3.2.

<sup>127</sup> ARSIWA (n 4) art 5. See also Ch 4.

<sup>128</sup> ILC YB 1998 vol I, 'Summary Records of the Meetings of the Fiftieth Session' UN Doc A/CN.4/SER.A/1998 228 (comments of Special Rapporteur James Crawford).

<sup>129</sup> See Ch 4 s 4.3.1.

<sup>130</sup> *ibid* s 4.3.2.

<sup>131</sup> *ibid*.

This loosening of the ‘empowerment’ criterion would not affect the remaining two requirements of the rule. Thus, attribution on this basis would arise only in respect of conduct on the part of an NSA that can be classified as governmental in nature, and only if the NSA is acting in that public capacity at the time it commits the act in potential breach of international law.<sup>132</sup> Moreover, some form of positive action on the part of the state would still be necessary in order to ‘empower’ the NSA to perform the relevant function; a mere failure to prevent the exercise of such powers would not suffice.<sup>133</sup> As such, the attribution standard would remain distinct from the rule reflected in Article 9 ARSIWA, which relates to an NSA’s performance of governmental functions in the absence or default of the official authorities.<sup>134</sup>

The key question, therefore, is to determine the types of state behaviour that should be sufficient to ‘empower’ an NSA to perform governmental functions on its behalf in the absence of authorisation under the state’s domestic law. A clear link between the state and the NSA should be required but the rule should not be too prescriptive in this respect, to allow consideration of all the relevant facts and circumstances. Evidence of the following may be of relevance:

1. State involvement in the entity’s creation;
2. Connections between state organs and the NSA’s leadership;
3. The NSA acting alongside or in concert with state organs;
4. Instructions or orders from state organs to the NSA to perform the relevant function;
5. The issuance of guidance or direction by state organs in relation to the manner in which the NSA should perform the function;
6. Payments by the state to the NSA;
7. The state’s provision of assistance, equipment, or training to the NSA that enables its performance of the function.

If such factors were relevant to the issue of empowerment, as suggested, an additional question that would be key to this assessment is who the NSA is acting for at the relevant time.<sup>135</sup> If the NSA is acting in pursuit of its own goals in the conflict, the criteria for attribution under the rule reflected

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<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*

<sup>134</sup> ARSIWA (n 4) art 9.

<sup>135</sup> In the Bosnian Genocide case, for instance, the ICJ concluded that the Bosnian Serbs were acting for the Republika Srpska, not on behalf of the FRY. See *Bosnian Genocide* (n 102) [388].

in Article 5 would not be met. Thus, when Turkey first assisted the rebels fighting the Assad regime in Syria, Article 5 was not an appropriate basis on which to attribute the NSAs' conduct to the state.<sup>136</sup> At that time, the rebels were acting on their own account with Turkey's assistance; they were not exercising elements of Turkey's governmental authority. But if an NSA is clearly performing public functions for a state and would not be conducting the operations concerned without that state's authorisation, attribution pursuant to Article 5 may be apt. When the rebels in Syria switched focus at Turkey's behest to fight against the Kurds, and later to participate in the conflicts in Libya and Nagorno-Karabakh, they were performing combat functions on Turkey's behalf.<sup>137</sup> In such circumstances, the rule reflected in Article 5 should attribute their conduct when performing those functions to the state, including their acts in potential violation of international law.<sup>138</sup>

Interpreted in this more relaxed manner, the rule of attribution reflected in Article 5 potentially captures other harmful conduct by NSAs in conflict situations. For example, the fact that Syria reportedly armed the *Shabbiha* and used the group to crush the protests in Syria alongside state security forces<sup>139</sup> might demonstrate that the Assad regime authorised the NSA to perform law enforcement functions on its behalf. The close association between the Wagner Group and the Russian military intelligence service, the GRU, together with the role the PMSC plays in support of Moscow's strategic aims in conflicts across the globe<sup>140</sup> might point towards Russia's empowerment of the group to act as an unofficial combat arm of the state. But Iran's provision of weapons to the Houthis appears insufficient to constitute empowerment. Reporting indicates that the Houthis' objectives and actions are not influenced by Iran and would continue unchanged in the absence of Iranian support.<sup>141</sup> Thus, rather than exercising elements of Iranian governmental authority, the Houthis are acting on their own account, with assistance from Tehran.<sup>142</sup>

As these examples illustrate, a broader construction of the empowerment requirement would entail fact-based assessments to determine the rule's application. The facts surrounding the NSA's activities

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<sup>136</sup> See Ch 2 s 2.1.1.

<sup>137</sup> Elizabeth Tsurokov, 'Who Are Turkey's Proxy Fighters in Syria?' (*NYR Daily*, 27 November 2019) <[www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/](http://www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/)> accessed 16 June 2020; Zeevi (n 31).

<sup>138</sup> See Ch 2 s 2.1.4.

<sup>139</sup> See Ch 2 s 2.1.2; Ch 4 s 4.3.2.

<sup>140</sup> See Ch 2 ss 2.1.2, 2.2. See also Mike Giglio, 'Inside the Shadow War Fought by Russian Mercenaries' (*Buzzfeed*, 17 April 2019) <<https://www.buzzfeednews.com/article/mikegiglio/inside-wagner-mercenaries-russia-ukraine-syria-prighozhin>> accessed 9 August 2019; Kimberly Marten, 'Semi-State Security Actors and Russian Aggression' (*Lawfare*, 8 July 2018) <[www.lawfareblog.com/semi-state-security-actors-and-russian-aggression](http://www.lawfareblog.com/semi-state-security-actors-and-russian-aggression)> accessed 9 August 2019.

<sup>141</sup> Watling (n 120) 24-25; Knights (n 20); Tabatabai, Martini and Wasser (n 32) 13-14.

<sup>142</sup> *ibid.*



would similarly be relevant when assessing the extent of the NSA's conduct that should be attributed to the state. In the case of Hezbollah, for instance, the rule would only attribute the group's actions in potential breach of international law to Iran when the NSA is performing extraterritorial combat functions on Tehran's behalf; not when it is acting in any other capacity, such as in its political role in Lebanon.<sup>143</sup> Hezbollah's actions in Syria might meet this test given that the group first became involved in the conflict at Iran's behest, it coordinates its actions closely with the IRGC, and operates with the benefit of considerable Iranian support.<sup>144</sup>

Some of the factors that might be relevant to the issue of empowerment, if interpreted more broadly, could also lead to attribution on other grounds. State officials' instructions to an NSA, for instance, are equally pertinent when considering attribution under the rule expressed in Article 8.<sup>145</sup> This does not negate, however, the importance of the attribution standard reflected in Article 5. First, when a state empowers a private entity to perform public functions on its behalf, all the NSA's conduct in that capacity is attributable to the state, even if it is *ultra vires*.<sup>146</sup> In contrast, Article 8 does not attribute to a state conduct performed outside the scope of the state's instructions, direction, or control.<sup>147</sup> Second, if the criteria for attribution under Article 5 are met, there is no requirement to prove that the state exerted any degree of control over the NSA's conduct. A more flexible interpretation of the 'empowerment' criterion could, accordingly, play a critical role in narrowing the gap in accountability. Moreover, it could act as an incentive to states to ensure that the NSAs they authorise to perform public functions on their behalf comply with international law.

### **7.2.3 Instructions, direction, or control**

In contrast to Article 5 ARSIWA, the rule reflected in Article 8 attributes any form of conduct to a state, regardless of its public or private character. Although the rule applies if an NSA acts under a state's instructions, direction, or control, it is the concept of control that has received the most

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<sup>143</sup> See Ch 4 s 4.3.3.

<sup>144</sup> See Ch 2 s 2.1.2. See also Samia Nakhoul, 'Special Report: Hezbollah Gambles All in Syria' (*Reuters*, 26 September 2013) <[www.reuters.com/article/us-syria-hezbollah-special-report/special-report-hezbollah-gambles-all-in-syria-idUSBRE98P0AI20130926](http://www.reuters.com/article/us-syria-hezbollah-special-report/special-report-hezbollah-gambles-all-in-syria-idUSBRE98P0AI20130926)> accessed 27 August 2019; Paul Bucala and Frederick W Kagan, Iran's Evolving Way of War: How the IRGC Fights in Syria' (*Critical Threats*, March 2016) 22 <[www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans\\_Evolving\\_Way\\_of\\_War\\_IRGC\\_in\\_Syria\\_FINAL-1.pdf](http://www.criticalthreats.org/wp-content/uploads/2016/07/imce-imagesIrans_Evolving_Way_of_War_IRGC_in_Syria_FINAL-1.pdf)> accessed 27 August 2019.

<sup>145</sup> See Ch 5 s 5.3.

<sup>146</sup> ARSIWA (n 4) art 7; Ch 4 s 4.3.3.

<sup>147</sup> ARSIWA (n 4) art 7.

attention from international courts and tribunals, and from academic scholars.<sup>148</sup> It is, moreover, the strict interpretation of this control threshold that is most relevant to the emergence of a gap in accountability.

The stringency of the effective control test formulated by the ICJ has led many commentators, as well as the ICRC, to argue that the looser standard of overall control should apply for the purposes of attribution, as well as conflict classification.<sup>149</sup> The overall control test focuses on the entire relationship between the entity and the state, rather than the state's control over the particular operation in which the alleged international law violation occurs.<sup>150</sup> If the test applies to determine attribution and a state exercises overall control over an entity's wider operations, all the NSA's conduct in potential violation of international law is attributable to the state, with the exception of any acts that are *ultra vires*.<sup>151</sup> But while the application of this test would narrow the gap in accountability by broadening the range of private conduct that is attributable to a state, there is some merit to the concerns expressed by the ICJ in the *Bosnian Genocide* case.<sup>152</sup> The use of the overall control test as a rule of attribution potentially stretches the links that must exist between the state and the NSA too far.<sup>153</sup>

Consider, for example, the United States' support for the SDF in the fight against ISIS.<sup>154</sup> Given that the two-prong overall control test may be met if a state equips and finances an NSA and also plays a role in the planning of its military activity,<sup>155</sup> it is possible that the United States' relationship with the SDF reaches the threshold of overall control.<sup>156</sup> If that is the case, and the overall control test applies for the purposes of attribution, all the SDF's conduct falling within the scope of the United States' control is attributable to the state. This means that the United States could bear responsibility for the SDF's conduct in recruiting children for military service even if it had no knowledge of, or

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<sup>148</sup> See Ch 5 s 5.4.

<sup>149</sup> *ibid*.

<sup>150</sup> *ibid* s 5.4.3.1.

<sup>151</sup> For discussion of *ultra vires* acts in the context of art 8 ARSIWA, see Ch 5 ss 5.3.1.2, 5.4.3.2.

<sup>152</sup> *Bosnian Genocide* (n 102) [406]. See also Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 60; Marko Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights L Rev 411, 440.

<sup>153</sup> *ibid*.

<sup>154</sup> See Ch 2 s 2.1.3.

<sup>155</sup> *Prosecutor v Tadić* (Appeals Chamber Judgment) ICTY IT-94-1-A (1999) [131], [137] (*Tadić* Appeals Chamber). See also Ch 5 s 5.4.3.1.

<sup>156</sup> See Ch 2 s 2.1.3; Congressional Research Service, 'Armed Conflict in Syria: Overview and US Response' (updated 12 February 2020) 32-39 <<https://fas.org/sgp/crs/mideast/RL33487.pdf>> accessed 1 June 2020.

involvement in, the NSA's recruitment practices.<sup>157</sup> Although such conduct could be considered *ultra vires*, falling outside the scope of the state's control, this conclusion is by no means certain given the close links between the SDF's wider operations and its recruitment of personnel.<sup>158</sup>

The attribution of conduct in such circumstances, in the absence of any clear connection between the NSA's actions in potential breach of international law and those of the supporting state, overly expands the scope of the attribution standard reflected in Article 8 and potentially holds states to account in respect of acts that cannot properly be characterised as their own.<sup>159</sup> In some circumstances, however, the overall test may equally be under-inclusive, in that it fails to attribute conduct to a state that is performed under that state's control. For instance, a state might maintain links with an NSA that do not rise to the level of overall control and make use of that group on an ad hoc basis to perform specific operations on its behalf. If the state exercises control over the group during an operation in which international law violations occur, the rule reflected in Article 8 should attribute the group's conduct to the state. But if the overall control standard applies for the purpose of determining attribution, and this test is not met in respect of the wider relationship between the state and the NSA, attribution will not arise.<sup>160</sup>

Consider, in this respect, Rwanda's involvement in the conflict in eastern DRC.<sup>161</sup> In the course of the hostilities, Rwanda maintained connections with various NSAs and, on occasion, tasked these with specific missions, such as targeted killings.<sup>162</sup> Given Rwanda's diverse relationships with these groups, it may be that when considered as a whole, the state's involvement in their activities did not rise to the level of overall control. For instance, such groups might have obtained finance and equipment from sources other than the state, and Rwanda might not have assisted in 'the general planning of [the groups'] military activity'<sup>163</sup> but only in the planning of specific operations.

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<sup>157</sup> *ibid.* See also UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (1 February 2018) UN Doc A/HRC/37/72 10 para 42.

<sup>158</sup> ARSIWA (n 4) art 7; art 8 commentary para 8. See also Ch 5 s 5.4.3.2.

<sup>159</sup> Akande (n 152) 60.

<sup>160</sup> Ryan Goodman, 'Legal Limits on Military Assistance to Proxy Forces: Pathway for State and Official Responsibility' (*Just Security*, 14 May 2018) <[www.justsecurity.org/56272/legal-limits-military-assistance-proxy-forces-pathways-state-official-responsibility/](http://www.justsecurity.org/56272/legal-limits-military-assistance-proxy-forces-pathways-state-official-responsibility/)> accessed 8 September 2019.

<sup>161</sup> See Ch 2 s 2.3.

<sup>162</sup> UNSC, 'Letter dated 26 June 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council: Annex' (27 June 2012) UN Doc S/2012/348/Add.1 17-23 (Group of Experts' Interim Report).

<sup>163</sup> *Tadić* Appeals Chamber (n 155) [131].

Thus, Rwanda might not have exercised overall control over the wider activities of the group Nduma Defence of Congo at the time state officials entrusted the commander of that group with the task of killing the leader of a rival militia.<sup>164</sup> In that situation, if the overall control standard applies for the purposes of attribution, the killing would be attributable to Rwanda only if sufficient evidence is available to indicate that Rwanda instructed the commander to complete this task.<sup>165</sup> In the absence of evidence of state instructions, however, Rwanda would avoid responsibility, even if it exercised a detailed level of oversight over the operation in which the killing occurred.

Determining the appropriate control standard for the purposes of Article 8 ARSIWA thus presents a paradox. The application of the effective control threshold leads to an accountability gap due to its very stringent nature and the ensuing evidential difficulties posed to an injured state.<sup>166</sup> Yet, the use of the overall control test creates its own problems. On the one hand, this is over-inclusive and might lead to state responsibility in respect of conduct over which the state had a minimal level of influence or oversight.<sup>167</sup> But on the other, the overall control test might fail to hold states to account for conduct over which they exercise a detailed level of control.<sup>168</sup>

The difficulties with the overall control standard derive from the test's emphasis on the wider relationship between the state and the NSA. While this focus is appropriate when determining *de facto* state organ status due to the very close links that must exist between an entity and the state in all the NSA's fields of activity, it is not well suited to the rule of attribution reflected in Article 8.<sup>169</sup> The aim of this rule is to attribute to a state the conduct of persons or groups that, in fact, act on the state's behalf at the time the acts in potential violation of international law are committed. This is a question that can be answered most effectively by examining the state's exercise of control over the operation in which the violation occurs rather than the state's overall relationship with the NSA.<sup>170</sup>

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<sup>164</sup> Group of Experts' Interim Report (n 162) 18 para 36.

<sup>165</sup> See Ch 5 s 5.3.

<sup>166</sup> See Ch 5 s 5.4.3.

<sup>167</sup> *Bosnian Genocide* (n 102) [406]; Akande (n 152) 60.

<sup>168</sup> Goodman (n 160).

<sup>169</sup> The links between a state and an NSA must be far stronger to establish *de facto* state organ status than overall control. See Ch 3 s 3.3; Ch 5 s 5.4.3.1.

<sup>170</sup> See Stefan Talmon 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 Intl and Comparative L Quarterly 493, 501-03; Marko Milanović, 'State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücker' (2009) 22 Leiden J Intl L 307, 316; Djemila Carron, 'When is a Conflict International? Time for New Control Tests in IHL' (2016) 98 Intl Rev Red Cross 1019, 1025.

Nevertheless, the effective control standard formulated by the ICJ does not satisfy the rule's object and purpose. Although this test rightly applies to the operation in which the alleged breach of a state's international legal obligation arises, the requirement for evidence of detailed state control over the NSA's conduct in violation of international law is overly stringent and impractical.<sup>171</sup> Instead, if a state is in a position of authority over an NSA such that it is able to control the constituent acts performed in the course of an operation, or to order their cessation, this should be sufficient to attribute the NSA's conduct to the state.<sup>172</sup>

The position is analogous to the control exercised by commanders over their troops. Commanders have the power and authority to order their subordinates to act, or not to act, in a particular way but will not normally exert that control over every constituent element of an operation. By virtue of the principle of command responsibility, however, commanders may be criminally responsible if their troops violate IHL in the course of an operation.<sup>173</sup> Such responsibility arises not only in respect of acts performed under the commander's specific orders, but also pursuant to acts of which the commander was aware, or should have been aware, and did not take appropriate measures to prevent.<sup>174</sup> In a similar manner, a state should bear responsibility for an NSA's conduct if the relevant act was performed in the course of an operation over which the state had the capacity to exert its control and the state's organs knew or should have known of the potential legal violation.

This more flexible interpretation of the control threshold would hold states more effectively to account when they act through NSAs. Consider, for instance, the alleged torture of detainees by militia groups in northern Syria.<sup>175</sup> According to the UN Commission of Inquiry, Turkish forces and officers were regularly present in detention facilities where ill-treatment of detainees was rampant

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<sup>171</sup> See Ch 5 ss 5.4.3-5.4.5.

<sup>172</sup> Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) r 17 commentary para 6. See also Talmon (n 170) 503.

<sup>173</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 art 87; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 28(a); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), 'Customary International Humanitarian Law vol I: Rules' (2005) r 153 <[www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)> accessed 24 October 2017 (ICRC Customary IHL Study). See also Jenny S Martinez, 'Understanding *Mens Rea* in Command Responsibility: From *Yamashita* to *Blaškić* and Beyond' (2007) 5 J Intl Crim Justice 638; Geoffrey S Corn, 'Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command' (2015) 96 Intl Rev Red Cross 901; Elies van Sliedregt, 'Command Responsibility and Cyberattacks' (2016) 21 J Conflict and Security L 505.

<sup>174</sup> Rome Statute (n 173) art 28(a); ICRC Customary IHL Study (n 173) r 153.

<sup>175</sup> See Ch 2 s 2.1.4.

and Turkish officials attended some interrogation sessions when torture took place.<sup>176</sup> If this reporting is correct it appears that Turkey had the capacity to stop the mistreatment, not only due to its officials' presence at the facilities but also because of the militias' dependence on the state for salaries and training,<sup>177</sup> which offered Turkey considerable leverage over their behaviour. The militias' acts of mistreatment should therefore be attributable to Turkey, even if the state's organs did not 'direct or enforce' the actual abuses perpetrated by the NSAs.<sup>178</sup>

The more remote the state organs' involvement in the relevant violation, however, the less appropriate attribution becomes. The rule reflected in Article 8 should attribute an NSA's conduct to a state only if the state exerts its authority over the operation concerned, meaning that its officials know or should know of the NSA's harmful conduct during that operation, and they have the capacity to exercise control over the NSA's behaviour at the time the relevant abuses occur. To illustrate, imagine that the SDF mistreats an ISIS detainee during a detention operation that is supported by the United States. On the predominant interpretation of effective control, the SDF's conduct in mistreating the detainee is only attributable to the United States if US forces are in command of the SDF, and they actively enforce or condone the mistreatment.<sup>179</sup> Attribution may additionally be appropriate if the state's armed forces are aware, or should be aware, of the abuse and they have the requisite authority over the NSA's conduct of the operation to intervene to stop its occurrence. Such a scenario would normally arise if the state's armed forces are physically present during the operation. However, if communications or surveillance technologies allow state officials to exercise control over the NSA's conduct remotely, any acts committed in violation of international law should similarly be attributed to the state.

Likewise, in the cyber domain, if a state's involvement in, or authority over, an operation is such that the NSA would act or cease to act on the state's command, Article 8 should attribute to the state any private conduct during the operation that violates the state's international legal obligations.<sup>180</sup> This approach accords with the *opinio juris* of Germany, according to which attribution is appropriate even if the state does not have a detailed insight into or influence over all particulars of the relevant

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<sup>176</sup> UN OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 March 2021) UN Doc A/HRC/46/55 15 para 45.

<sup>177</sup> Tsurkov (n 137).

<sup>178</sup> See *Nicaragua* (n 51) [115]; Ch 5 s 5.4.3.

<sup>179</sup> See Ch 5 s 5.4.3.2.

<sup>180</sup> Tallinn Manual 2.0 (n 172) r 17 commentary para 6.

cyber operation.<sup>181</sup> In this regard, an observation made by the ICTY in the context of command responsibility is pertinent: ‘the power to give orders and have them executed can serve as an indicium of effective control’.<sup>182</sup>

There is a fine line, however, between situations in which it is appropriate to attribute private conduct to a state and circumstances when it is not. It will be a question of fact in each case which side of that line any violations involving an NSA should fall. When a state’s involvement in an operation involving potential breaches of international law is more peripheral – for instance, if it is limited to the provision of intelligence or malware – attribution would be a step too far.<sup>183</sup> It is questionable, in such circumstances, whether the acts at issue can properly be characterised as the state’s own conduct, performed on its behalf.<sup>184</sup> But consideration of a state’s capacity to ensure an NSA’s compliance with international law would allow the full facts and circumstances to be considered when addressing the issue of attribution.

The effective control test formulated by the ICJ focuses solely on the state’s level of control over the specific private conduct at issue, to the exclusion of other factors that may be pertinent to an assessment of the state’s responsibility. But if attribution arises further to a state’s ability to determine the course of a particular operation, many other facts are of potential relevance. These include:

1. The nature and duration of the relationship between the entity and the state;
2. The financial or other support the state provides to the NSA;
3. The importance of such support to the NSA in the continued performance of its activities;
4. State organs’ involvement in the planning of the operation concerned;
5. State organs’ exercise of strategic, operational, or tactical control over that operation;
6. The content and timing of any instructions or guidance issued by the state;
7. The NSA’s involvement in any previous violations of international law;
8. State organs’ knowledge of the particular violation(s) at issue.

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<sup>181</sup> Federal Government of Germany, ‘On the Application of International Law in Cyberspace’ (March 2021) 11 <[www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf](http://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf)> accessed 14 August 2021.

<sup>182</sup> *Prosecutor v Hadžihasanović and Kubura* (Appeals Chamber Judgment) ICTY IT-01-47-A (2008) [199].

<sup>183</sup> See Ch 8 s 8.5.1.

<sup>184</sup> See *Bosnian Genocide* (n 102) [406].

An assessment of a state's capacity to exercise control in relation to a particular operation would thus allow a wider focus than just the circumstances of the operation itself. This would permit an examination of the broad relationship between the state and the NSA to the extent that it is pertinent to the state's ability to exert control over the operation concerned. A broader interpretation of effective control should therefore hold states more effectively to account when they act through NSAs, without going so far as to attribute private conduct to states that cannot properly be characterised as their own.

### **7.3 Conclusion**

International law has not kept pace with states' changing use of proxies or the evolving nature of the NSAs themselves. In contemporary conflict, NSAs proliferate, and their conduct frequently straddles the public private divide upon which the law of state responsibility is founded. This is due, in part, to the fact that modern-day associations between states and NSAs do not fit neatly within the hierarchical model envisaged by the law of state responsibility that is reflected in ARSIWA. The rules of attribution are difficult to apply, and their strict interpretation means that they are of little practical relevance in holding states to account for the often-significant role they play in the harmful conduct perpetrated by NSAs.

A more relaxed interpretation of the attribution standards reflected in Articles 4, 5 and 8 ARSIWA would undoubtedly assist in addressing this concern. A move away from the stringent, inflexible, rules formulated by the ICJ and the ILC would allow the full circumstances to be considered when assessing the issue of attribution and thereby hold states more effectively to account. But even with these changes, an accountability gap would remain.

Under the law of state responsibility, as interpreted by the ILC, a state may facilitate an NSA's conduct in breach of the state's international legal obligations without engaging its international responsibility. Even if a state's support is critical to an NSA's conduct in potential violation of international law, ARSIWA includes no mechanism through which the state can be held to account for its own contribution towards that wrong. This situation is unsatisfactory and encourages irresponsible state behaviour and a lack of respect for the international legal order. Chapter 8 therefore continues the analysis by examining potential ways in which states could be held to



account in respect of their support to NSAs in situations where the rules of attribution do not apply.

## Chapter 8 – State Responsibility for Assistance to Non-State Actors

### 8.1 Introduction

Earlier chapters demonstrate international law's limitations in effectively regulating states' support to NSAs in contemporary conflict. The 'all or nothing' approach resulting from attribution fails to account for the myriad ways in which states contribute towards abuses perpetrated by NSAs or the autonomy with which many NSAs act. Although primary norms of international law regulate certain forms of state support to NSAs in conflict situations these are fragmented and incomplete, meaning that gaps in accountability remain.

The law of state responsibility, as reflected in ARSIWA, fails to provide any mechanism to address harmful conduct involving both states and NSAs in the absence of state control. But the search for control engendered through the application of Articles 4 and 8 ARSIWA is often futile, raising insurmountable evidential hurdles for injured states.<sup>1</sup> The principal evidence available is frequently the state support itself, namely the financial, technical, or other assistance that states choose to provide to NSAs to further their own interests in the relevant conflict.<sup>2</sup>

This chapter offers an alternative framework of responsibility, arguing that states should be held to account when they assist NSAs in the commission of acts that would be internationally wrongful if perpetrated directly by the state. In so doing, the chapter relies on existing norms of international law to illuminate both the ways in which states already bear responsibility in respect of their participation in other actors' wrongs and the manner in which the law may develop in future. While a complete regime of responsibility should additionally hold NSAs directly to account for their own wrongful conduct, such developments are beyond the scope of this thesis.<sup>3</sup>

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<sup>1</sup> See Chs 3, 5.

<sup>2</sup> See Ch 2.

<sup>3</sup> For further discussion regarding NSAs' direct responsibility for their conduct, see eg Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 Buffalo Human Rights L Rev 21, 25-46; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 Intl and Comparative L Quarterly 369; Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 Intl Rev Red Cross 491; Jan K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 Intl Rev Red Cross 443; Andrea Bianchi, 'The Fight for Inclusion: Non-State Actors and International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 42-46; International Law Association, 'Non-State Actors' (*Washington Conference Report*, 2014); Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann

When referring to states' contributions towards other actors' wrongs, many commentators refer to states' 'complicity' in the principal wrong.<sup>4</sup> Although this term originates in criminal law, its use in this chapter is not intended in that context. Instead, the chapter uses a range of terms to refer to states' support to other actors in the commission of a wrong, including 'aid or assistance' as employed in ARSIWA<sup>5</sup> or each of these terms on a singular basis.

The chapter begins by examining the current regime of state responsibility for complicity. The ILC included two articles within ARSIWA that address states' assistance to other states: a general rule reflected in Article 16 and a more specific rule reflected in Article 41(2), relating to violations of peremptory norms of international law. These provisions are the focus of Section 8.2.

The remainder of the chapter is divided into four parts. Section 8.3 considers the potential application of Articles 16 and 41(2) to states' assistance to NSAs, focusing on the constituent elements of these rules. Section 8.4 then examines whether customary international law is evolving to incorporate a complicity rule regulating states' assistance to NSAs, before Section 8.5 evaluates the place of such a rule within the secondary law of international responsibility. Finally, Section 8.6 addresses the complicity provisions within certain primary norms of international law relevant to contemporary conflict. The chapter thereby constructs a vision for the development of international law in a manner that would properly regulate states' assistance to NSAs and thereby close, or at least substantially narrow, the accountability gap identified in Chapter 7.

## **8.2. The current regime of state responsibility for complicity**

Traditionally, international law focuses on the bilateral relationships between states.<sup>6</sup> This emphasis on states' respective rights and obligations does not readily allow for the responsibility of a third

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(eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill 2015); Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP 2017).

<sup>4</sup> See eg John Cerone, 'Re-examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 ILSA J Intl and Comparative L 525; Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011); Miles Jackson, *Complicity in International Law* (OUP 2015); Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016); Robert Lawless, 'A State of Complicity: How Russia's Persistent Public Denial of Syrian Battlefield Atrocities Violates International Law' (2018) 9 Harvard National Security J 180.

<sup>5</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) arts 16, 41(2) (ARSIWA).

<sup>6</sup> Roberto Ago, 'Le délit international' (1939) 68 (II) Recueil des Cours 419, 523. See also Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 5-6; Aust (n 4) 12-15.

state in respect of its contribution towards the commission of an internationally wrongful act.<sup>7</sup> Thus, in contrast with the manner in which international criminal law punishes individuals' complicity in a crime, the law of state responsibility historically failed to address states' conduct in facilitating international wrongs.<sup>8</sup> Developments in the law, however, including the adoption of the UN Charter, have seen a move away from strict bilateralism towards a greater focus on the public or community interest, thereby allowing for a broadening of responsibility to reflect states' contributions towards others' wrongful conduct.<sup>9</sup>

This move is reflected in certain norms of treaty and customary international law that prohibit states' complicity in specific wrongs such as genocide, torture, aggression, and the use of particular munitions.<sup>10</sup> It is also evident in ARSIWA, particularly through the adoption of Article 16 relating to states' assistance to other states in the commission of an internationally wrongful act.<sup>11</sup> ARSIWA additionally provides for an aggravated regime of responsibility in respect of states' assistance in maintaining a situation created by a serious breach of peremptory norms.<sup>12</sup> This section outlines each of these provisions, before examining the rationale behind the rules' state-centric focus.

### **8.2.1 Article 16 ARSIWA**

Article 16 ARSIWA represents an important step forward in holding states to account in respect of their contributions towards international wrongs.<sup>13</sup> It draws upon prior state practice condemning

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<sup>7</sup> *ibid.* See also Jackson, *Complicity in International Law* (n 4) 125.

<sup>8</sup> Jackson, *Complicity in International Law* (n 4) 6, 127.

<sup>9</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 2(5). See also Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 229; Pierre-Marie Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' (2002) 13 *Eur J Intl L* 1053, 1054-58; Aust (n 4) 23-47.

<sup>10</sup> See eg Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art III(e) (Genocide Convention); UNGA Res 3314 (XXIX) (Declaration on Aggression) (14 December 1974) UN Doc A/RES/3314 arts 3(f), 3(g); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 4(1); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 241, art 1(1)(c). See also ARSIWA (n 5) art 16 commentary para 2.

<sup>11</sup> ARSIWA (n 5) art 16. See also ILC YB 1999 vol I, 'Summary Records of the Meetings of the Fifty-First Session' UN Doc A/CN.4/SER.A/1999 78 para 40 (comments of Mr Simma); James Crawford, *State Responsibility: The General Part* (CUP 2013) 49.

<sup>12</sup> ARSIWA (n 5) art 41(2).

<sup>13</sup> Bernhard Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue Belge de Droit International* 370; Vaughan Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 *Japanese J Intl L* 1, 12-13; Jackson, *Complicity in International Law* (n 4) 135.

others' participation in such activities<sup>14</sup> and, subject to certain conditions,<sup>15</sup> prohibits states from providing aid or assistance towards the commission of any internationally wrongful act on the part of the recipient state. The article provides:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.<sup>16</sup>

In its commentary, the ILC affirms that 'the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act'.<sup>17</sup> Thus, the assisting state is not responsible for the principal wrong committed by the beneficiary state but rather for its own act of assistance, which constitutes an independent internationally wrongful act.<sup>18</sup> For instance, if Article 16's constituent elements are met in respect of the United States' support to the Saudi-led coalition in Yemen,<sup>19</sup> the United States bears responsibility not for the indiscriminate attacks conducted by the coalition but rather for its own contribution towards those attacks, which included the provision of munitions, intelligence, and mid-air refuelling.

This distinction has led to debate as to whether Article 16 is truly a secondary rule of state responsibility.<sup>20</sup> Some scholars highlight Article 16's primary nature on the basis that it defines

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<sup>14</sup> ARSIWA (n 5) art 16 commentary paras 7-8. For a detailed review of the state practice supporting art 16 see Aust (n 4) 97-191. Like the ICJ in the *Bosnian Genocide* case, Aust concludes that art 16 is a norm of customary international law. See *ibid* 191; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [420] (*Bosnian Genocide*). However, art 16 was originally viewed by some as falling within the 'progressive development' of the law. See ILC YB 1978 vol II pt 2, 'Report of the ILC on its thirtieth session' UN Doc A/CN.4/SER.A/1978/Add.1(Part 2) 103 para 16; Crawford (n 11) 401, 408.

<sup>15</sup> ARSIWA (n 5) art 16 commentary para 3.

<sup>16</sup> *ibid* art 16.

<sup>17</sup> *ibid* art 16 commentary para 1.

<sup>18</sup> *ibid* art 16 commentary paras 1, 9. See also ILC YB 1978 vol II pt 2 (n 14) 103-4 commentary to draft art 27 para 16; Graefrath (n 13) 371; Crawford (n 11) 399; Lanovoy, *Complicity and its Limits* (n 4) 4-5.

<sup>19</sup> See generally Oona A Hathaway and others, 'Yemen: Is the US Breaking the Law?' (2019) 10 *Harvard National Security J* 1, 63-67; John Hursh, 'International Humanitarian Law Violations, Legal Responsibility, and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale' (2020) 7 *J on the Use of Force and Intl L* 122.

<sup>20</sup> ARSIWA (n 5) general commentary to Ch IV para 7. See also Graefrath (n 13) 372; Aust (n 4) 51-2; Jackson, *Complicity in International Law* (n 4) 148-150; Lanovoy, *Complicity and its Limits* (n 4) 11; Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (*Chatham House*, November 2016) 7

acceptable state behaviour in relation to other primary rules.<sup>21</sup> The norm, however, is also hybrid in character, because ‘the wrongfulness of the assisting state’s conduct is derived from the wrongfulness of the conduct of the state that it is assisting’.<sup>22</sup> If the assisted state’s conduct does not amount to an internationally wrongful act, the act of assistance is itself lawful. Therefore, the article is also akin to a secondary rule in that responsibility arises further to a breach of a primary norm by the assisted state.<sup>23</sup>

Although Article 16 is broad in scope, in that it regulates one state’s assistance to another in violating any primary norm to which both states are subject,<sup>24</sup> its impact is limited through the objective and subjective elements governing its application. The former refers to the specific support that the state provides while the latter relates to the assisting state’s knowledge or intent when providing the relevant support. Before examining these elements in the context of states’ support to NSAs,<sup>25</sup> it is pertinent to assess their meaning for the purposes of the rule reflected in Article 16.

#### 8.2.1.1 *The objective element*

Consideration of the objective element entails two enquiries: first, whether any limit is placed on the type of aid that falls within Article 16’s scope; and second, the degree to which the assistance provided must contribute towards the ensuing wrong. The answer to the first query is straightforward; Article 16 regulates any form of assistance, including military or other aid, that one

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<[www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf](http://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf)> accessed 11 May 2020.

<sup>21</sup> ILC YB 1978 vol I, ‘Summary Records of the Thirtieth Session’ UN Doc A/CN.4/SER.A/1978 236 para 32 (comments of Mr Quentin-Baxter); James Crawford, ‘Second Report on State Responsibility’ (1999) UN Doc A/CN.4/498/Add.1 47 para 166, 51 para 187 (Crawford’s Second Report on State Responsibility); ILC YB 1999 vol I (n 11) 79 para 41 (comments of Mr Simma); Aust (n 4) 50-51; Andre Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 Michigan J Intl L 359, 409; Jackson, *Complicity in International Law* (n 4) 149-150; Ilias Plakokefalos, ‘The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy’ (2017) Eur J Intl L 587, 589.

<sup>22</sup> Moynihan, ‘Challenges in Armed Conflict and Counterterrorism’ (n 20) 7. See also Crawford’s Second Report on State Responsibility (n 21) 47 para 167, 51 para 188; ARSIWA (n 5) general commentary to Ch IV para 7; Aust (n 4) 92, 188, 417; Lanovoy, *Complicity and its Limits* (n 4) 11.

<sup>23</sup> Crawford’s Second Report on State Responsibility (n 21) 47 para 167.

<sup>24</sup> ARSIWA (n 5) art 16(2); *ibid* commentary para 6. For further discussion regarding the ‘double obligation’ element of art 16, see Crawford (n 11) 409-10; Aust (n 4) 249-68; Jackson, *Complicity in International Law* (n 4) 162-67; Lanovoy, *Complicity and its Limits* (n 4) 103-06, 240-58; Moynihan, ‘Challenges in Armed Conflict and Counterterrorism’ (n 20) 10.

<sup>25</sup> See s 8.3.

state may provide to another.<sup>26</sup> Regarding the second, one ILC member articulated the position as follows:

[P]articipation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.<sup>27</sup>

To amount to aid or assistance, therefore, one state's support to another must fall below the threshold of joint participation in an unlawful act but amount to more than a *de minimis* level of support that makes no real causative contribution to the act.<sup>28</sup> Inconsistency within the ARSIWA commentary, however, leads to a lack of clarity regarding the particular nexus that must exist between the state's assistance and the wrong.<sup>29</sup> The commentary provides first that the assistance must be 'clearly linked to the subsequent wrongful conduct' and contribute 'significantly' towards it,<sup>30</sup> but later states that 'the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered'.<sup>31</sup>

While former Special Rapporteur Crawford resolves this discrepancy in favour of the stricter threshold,<sup>32</sup> considerable ambiguity remains.<sup>33</sup> For instance, if Article 16 applied to states' support to NSAs, would the nexus between the financial and other assistance Turkey provided to militias in

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<sup>26</sup> Aust (n 4) 198-200; Crawford (n 11) 402; Jackson, *Complicity in International Law* (n 4) 153; Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 8.

<sup>27</sup> ILC YB 1978 vol I (n 21) 239 para 11 (comments of Mr Ushakov).

<sup>28</sup> Crawford (n 11) 402; Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) r 18 commentary para 5. Regarding joint responsibility for the same internationally wrongful act see ARSIWA (n 5) art 47.

<sup>29</sup> Crawford (n 11) 402-03.

<sup>30</sup> ARSIWA (n 5) art 16 commentary para 5.

<sup>31</sup> *ibid* para 10.

<sup>32</sup> Crawford (n 11) 403 citing ILC, 'Draft Articles on the Responsibility of International Organisations with Commentaries' (2011) in ILC YB 2011 vol II pt 2, 'Report of the ILC on its Sixty-Third Session' UN Doc A/CN.4/SER.A/2011/Add.1(Part 2) art 14 commentary para 4 (ARIO). This stricter threshold is also supported by the *opinio juris* of the United States. See The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (December 2016) 14 <[www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](http://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf)> accessed 27 November 2021. See also Jackson, *Complicity in International Law* (n 4) 158; Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 8-9.

<sup>33</sup> See eg US Department of State, 'Draft Articles on State Responsibility: Comments of the Government of the United States of America' (1 March 2001) 10-11.

northern Syria and the abuses they committed against civilians be sufficient to engage the state's responsibility?<sup>34</sup> This issue is addressed further in Section 8.3.1, but is particularly pertinent given that aid or assistance for the purposes of Article 16 does not encompass states' incitement or inducement to commit an act.<sup>35</sup> Thus, the mere fact that Turkey instigated the militias' operations in northern Syria would be insufficient to lead to state responsibility under an NSA-analogue to the rule.

The notion of aid or assistance additionally excludes omissions; in the words of the ICJ, 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrator...'<sup>36</sup> Some commentators question this conclusion, pointing to certain culpable omissions that may assist in the commission of a wrong.<sup>37</sup> For instance, if it is correct that Turkish forces were present in detention facilities run by Syrian militias when detainees were tortured,<sup>38</sup> the failure of those forces to intervene to stop such behaviour could be viewed as assistance, without which the abuse could not have taken place, due to the considerable leverage Ankara exerted over the militias' conduct.<sup>39</sup> But based on the ICJ's jurisprudence, such an omission would not meet the requirements of Article 16.

#### 8.2.1.2 *The subjective element*

There is a similar lack of clarity in the wording of Article 16 and its commentary regarding the subjective element of the norm, namely the requisite knowledge or intent on the part of the assisting state.<sup>40</sup> While Article 16 itself stipulates a requirement only for 'knowledge of the

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<sup>34</sup> See Ch 2 s 2.1.4.

<sup>35</sup> ARSIWA (n 5) general commentary to Ch IV para 9. See also ILC YB 1978 vol II pt 2 (n 14) 100-01 (commentary to art 27 paras 5-7); Roberto Ago, 'Seventh Report on State Responsibility – the Internationally Wrongful Act of the State, Source of International Responsibility' (1978) UN Doc A/CN.4/307 and Add.1 and 2 54-56 paras 62-64; Aust (n 4) 221; Crawford (n 11) 403; Miles Jackson, 'State Instigation in International Law: A General Principle Transposed' (2019) 30 Eur J Intl L 391, 395-96.

<sup>36</sup> *Bosnian Genocide* (n 14) [432].

<sup>37</sup> Franck Latty, 'Actions and Omissions' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 359; Aust (n 4) 225-30; Jackson, *Complicity in International Law* (n 4) 156-57; Lanovoy, *Complicity and its Limits* (n 4) 96-97. But see also Crawford (n 11) 403-05; Richard Mackenzie-Gray Scott, 'State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups' (2019) 24 J Conflict and Security L 373, 386-87.

<sup>38</sup> UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 March 2021) UN Doc A/HRC/46/55 15 para 45.

<sup>39</sup> See Ch 2 s 2.1.4.

<sup>40</sup> See generally Georg Nolte and Helmut Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 Intl and Comparative L Q 1, 13-15; Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 286; Aust (n 4) 230-49; Crawford (n 11) 405-08; Jackson, *Complicity in International Law* (n 4) 159-62; Lanovoy, *Complicity and its Limits* (n 4) 99-101, 218-40; Harriet Moynihan, 'Aiding and Assisting: The



circumstances of the internationally wrongful act’,<sup>41</sup> the commentary states that ‘the aid or assistance must be given with a view to facilitating the commission of that act...’<sup>42</sup> thereby indicating an additional requirement for intent.

Given that this is mentioned only in the commentary and not in Article 16’s text, debate has arisen whether evidence of a state’s intent is a true prerequisite of responsibility.<sup>43</sup> States largely endorsed the requirement for intent when commenting on the draft article<sup>44</sup> and from a policy perspective, it encourages international cooperation by ensuring that an assisting state’s responsibility arises only in cases where it is clearly implicated in an unlawful act.<sup>45</sup> But many scholars criticise this interpretation of Article 16 as overly restrictive, allowing states to avoid responsibility when their assistance is manifestly facilitating internationally wrongful acts.<sup>46</sup>

If it is accepted that proof of intent is required, further questions arise regarding the nature of that intent. Must a state intend its military or other assistance to facilitate the specific internationally wrongful act that the recipient commits, or is it sufficient for the state to know that its support will likely lead to this outcome?<sup>47</sup> For instance, if Article 16 applied to the United States’ support to the SDF in Syria, is evidence required that US officials intended to facilitate the detention of ISIS fighters in sub-standard detention facilities, with little prospect of trial or release, or is the state’s responsibility engaged if US officials knew that this was likely to transpire but nevertheless

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Mental Element under Article 16 of the International Law Commission’s Articles on State Responsibility’ (2018) 67 Intl and Comparative L Quarterly 455; Marko Milanović, ‘Intelligence Sharing in Multinational Military Operations and Complicity under International Law’ (2021) 97 Intl L Studies 1269.

<sup>41</sup> ARSIWA (n 5) art 16(a). See also *ibid* art 16 commentary para 4.

<sup>42</sup> *ibid* commentary para 3. See also *ibid* commentary para 5.

<sup>43</sup> Georgio Gaja, ‘Interpreting Articles Adopted by the International Law Commission’ (2015) 85 Brit YB Intl L 10, 19-20; Moynihan, ‘The Mental Element under Article 16’ (n 40);

<sup>44</sup> See Aust (n 4) 237-38; Lanovoy, *Complicity and its Limits* (n 4) 222-23; Mackenzie-Gray Scott (n 37) 390-91. See also US Department of State (n 33) 10; The White House (n 32) 14.

<sup>45</sup> Ago’s Seventh Report on State Responsibility (n 35) 58 para 72; Nolte and Aust (n 40) 12, 16; Aust (n 4) 238-41; Jackson, *Complicity in International Law* (n 4) 144.

<sup>46</sup> For a summary of such views see Aust (n 4) 236-37. See also Graefrath (n 13) 375-77; Kate Nahapetian, ‘Confronting State Complicity in International Law’ (2002) 7 UCLA J Intl L and Foreign Affairs 99, 105-11; Alexandra Boivin, ‘Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons’ (2005) 87 Intl Rev of the Red Cross 467, 471-72.

<sup>47</sup> In the *Bosnian Genocide* case, the ICJ opined that the assisting state must know of the specific intent of the principal perpetrator but did not indicate whether it must share that intent. See *Bosnian Genocide* (n 14) [421]. See also Olivier Corten, ‘La “Complicité” dans le Droit de la Responsabilité Internationale: un Concept Inutile?’ (2011) 57 Annuaire Français de Droit Intl 57, 73-75; Moynihan, ‘The Mental Element under Article 16’ (n 40) 467-69; Milanović, ‘Intelligence Sharing’ (n 40) 1278-304; Mackenzie-Gray Scott (n 37) 395-96.

continued to assist?<sup>48</sup> Such questions are explored in Section 8.3.2 in relation to the appropriate mental element that should apply in the context of a state's assistance to NSAs.

### **8.2.2 Article 41(2) ARSIWA**

Article 16 is not the only provision within ARSIWA that addresses one state's assistance to another in the commission of an internationally wrongful act. Article 41(2) additionally prohibits states from aiding others in relation to serious breaches of peremptory norms of international law, or *jus cogens*.<sup>49</sup> This provides that 'No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'.<sup>50</sup>

Article 40 ARSIWA specifies that Article 41's provisions apply to 'a serious breach by a State of an obligation arising under a peremptory norm of general international law'.<sup>51</sup> The commentary defines peremptory norms in accordance with the 1969 Vienna Convention on the Law of Treaties, meaning a norm 'from which no derogation is permitted...'<sup>52</sup> to include the prohibitions of aggression, genocide and torture, and certain rules of IHL.<sup>53</sup> But not only must the obligation breached be peremptory in character, the breach itself must also be 'serious'.<sup>54</sup> This latter criterion refers to violations involving 'a gross or systematic failure by the responsible State to fulfil the obligation'.<sup>55</sup> As such, the prohibition on aid or assistance within Article 41 does not apply to all violations of peremptory norms but only to those of 'a certain order of magnitude'.<sup>56</sup> Some less

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<sup>48</sup> See Ch 2 s 2.1.3.

<sup>49</sup> ARSIWA (n 5) art 41(2). See also Nina HB Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010); Aust (n 4) 319-75; Crawford (n 11) 378-89; Lanovoy, *Complicity and its Limits* (n 4) 106-20. Regarding the background to the provision see eg Marina Spinedi, 'International Crimes of State: The Legislative History' in Joseph HH Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 1989); Simma (n 9) 301-18; Eric Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 Eur J Intl L 1147.

<sup>50</sup> ARSIWA (n 5) art 41(2). This provision is echoed in the ILC's later work on peremptory norms. See ILC, 'Peremptory Norms of General International Law (*jus cogens*): Text of Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading' (29 May 2019) UN Doc A/CN.4/L.936 4 (draft conclusion 19).

<sup>51</sup> ARSIWA (n 5) art 40(1).

<sup>52</sup> *ibid* art 40 commentary para 2, citing Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53. See also ILC Report on Peremptory Norms (n 50) 1 (draft conclusion 2).

<sup>53</sup> ARSIWA (n 5) art 40 commentary paras 4-5. See also Simma (n 9) 286-93.

<sup>54</sup> ARSIWA (n 5) art 40 commentary para 1.

<sup>55</sup> *ibid* art 40(2). See also *ibid* art 40 commentary paras 7-8.

<sup>56</sup> *ibid* commentary para 7. For a critique of this distinction, see United States Department of State (n 33) 7-8.

serious IHL violations, such as low-level mistreatment of detainees, might therefore be excluded from the scope of the provision.<sup>57</sup>

Article 41 also includes an obligation of non-recognition.<sup>58</sup> This imposes a general duty on states not to take steps that would imply recognition of the situation brought about by the serious breach of a peremptory norm.<sup>59</sup> It could apply, for example, to states considering entering into a treaty with Russia in which Moscow purports to act on behalf of Crimea.<sup>60</sup> The assistance element of Article 41(2) has ‘a separate scope of application’<sup>61</sup> and assumes a close factual link between the support rendered and a specific wrongful act.<sup>62</sup> While the provision should be viewed alongside Article 16, it ‘extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach...’<sup>63</sup>

Article 41(2) thus addresses conduct ‘after the fact’,<sup>64</sup> including assistance that facilitates a continuing wrongful act such as an unlawful occupation.<sup>65</sup> This might encompass, for example, a state’s provision of information to another state that the latter employs during the systematic torture of detainees.<sup>66</sup> Where, conversely, the wrong in question is not of a continuing character, such as an isolated indiscriminate attack, the assistance prohibition in Article 41(2) is of minimal import.<sup>67</sup> This

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<sup>57</sup> See Jørgensen ‘The Obligation of Non-Assistance’ (n 49) 692; Lanovoy, *Complicity and its Limits* (n 4) 112-14. But see also Crawford (n 11) 381.

<sup>58</sup> ARSIWA (n 5) art 41(2). See also Aust (n 4) 326-37; James Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’ (24 January 2012) paras 46-51, 79-92 <[www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf](http://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf)> accessed 18 May 2020.

<sup>59</sup> Aust (n 4) 335.

<sup>60</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [121]-[124]. See also ARSIWA (n 5) art 41 commentary para 8; Aust (n 4) 332-34. Regarding the legal consequences of Russia’s annexation of Crimea, see Enrico Milano, ‘The Non-Recognition of Russia’s Annexation of Crimea: Three Different Legal Approaches and one Unanswered Question’ (2014) 1 *Questions of Intl L* 35; Robin Geiß, ‘Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind’ (2015) 91 *Intl L Studies* 425, 448-49.

<sup>61</sup> ARSIWA (n 5) art 41 commentary para 12.

<sup>62</sup> Aust (n 4) 333-37. Boivin, however, suggests that the required nexus between the assistance and the ensuing violation is looser in respect of art 41(2) than art 16. See Boivin (n 46) 473, 493.

<sup>63</sup> ARSIWA (n 5) art 41 commentary para 11.

<sup>64</sup> *ibid.*

<sup>65</sup> For further examples of continuing wrongful acts see ARSIWA art 14 commentary para 3. See also Crawford, ‘Israeli Settlements Opinion’ (n 58) para 138.

<sup>66</sup> See eg UK House of Lords/ House of Commons Joint Committee on Human Rights, ‘Allegations of UK Complicity in Torture’ (*Twenty-third Report of Session 2008-09, HL Paper 152, HC 230*, 4 August 2009) paras 24-26 <<https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf>> accessed 14 May 2020.

<sup>67</sup> Jørgensen ‘The Obligation of Non-Assistance’ (n 49) 692; Aust (n 4) 339.

provision imposes no enhanced duty on states in their cooperation with others prior to the commission of a serious breach.<sup>68</sup>

In one important respect, however, the aggravated regime of responsibility reflected in Article 41 is broader than the general prohibition expressed in Article 16. Where the breach of a peremptory norm is at issue, there is no requirement to show that the assisting state had knowledge of the circumstances of the wrong or intended to assist in maintaining the situation it created.<sup>69</sup> In the ILC's view, 'it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State'.<sup>70</sup> Whether or not that is true in every case, the more relaxed mental element underlines the importance of *jus cogens* rules and the higher degree of vigilance demanded of states when duties generated by such rules are at stake.<sup>71</sup> Nonetheless, the ILC recognised that the legal regime relating to serious breaches is in 'a state of development'.<sup>72</sup> It is far from certain, therefore, that Articles 40 and 41 ARSIWA are reflective of customary international law.<sup>73</sup>

### **8.2.3 The state-centric focus of Articles 16 and 41**

Like Article 16, Article 41(2) ARSIWA regulates states' conduct only when they assist the wrongs of other states; it does not apply to states' contributions towards abuses involving NSAs.<sup>74</sup> In its early deliberations regarding 'indirect' forms of responsibility, the ILC discounted complicity in the conduct of NSAs as a potential foundation of responsibility on the basis that 'those persons cannot be regarded as separate subjects of international law'.<sup>75</sup> While all states have international legal personality, which bestows a public character on their conduct, states bear responsibility in respect of private conduct only if this is so closely linked to the state that attribution is appropriate, thereby

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<sup>68</sup> Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 23.

<sup>69</sup> ARSIWA (n 5) art 41 commentary para 11.

<sup>70</sup> *ibid.*

<sup>71</sup> ILC, 'Report on Peremptory Norms' (n 50) 1 (draft conclusion 3). See also Nolte and Aust (n 40) 17; Aust (n 4) 342.

<sup>72</sup> ARSIWA (n 5) art 41 commentary para 14.

<sup>73</sup> See eg United States Department of State (n 33) 7-8; Aust (n 4) 343-52; Helmut Philipp Aust, 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission' in Dire Tladi (ed), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (Brill Nijhoff 2021).

<sup>74</sup> ARSIWA (n 5) arts 16, 40.

<sup>75</sup> ILC YB 1975 vol II, 'Documents of the Twenty-Seventh Session Including the Report of the Commission to the General Assembly' UN Doc A/CN.4/SER.A/1975/Add.1 73 (commentary to draft art 11 para 11). See also Roberto Ago, 'Fourth Report on State Responsibility – the Internationally Wrongful Act of the State, Source of International Responsibility' (1972) UN Doc A/CN.4/264 and Add.1 100 para 72; Roberto Ago, 'Eighth Report on State Responsibility – the Internationally Wrongful Act of the State, Source of International Responsibility' (1979) UN Doc A/CN.4/318 and Add.1-4 4-5 para 3; Crawford (n 11) 79.

recasting the conduct in question as state action.<sup>76</sup> In the absence of attribution, the conduct remains private and cannot amount to an internationally wrongful act.<sup>77</sup> Therefore, as responsibility under Articles 16 and 41 is derivative in nature, in that it arises from the principal internationally wrongful act that the state's assistance facilitates, when the assisted conduct is private in nature there is no primary wrong for the state to be complicit in.<sup>78</sup>

The ILC's failure to address states' assistance to NSAs within ARSIWA thus results from the position of states as the primary subjects of international law.<sup>79</sup> As one of the constituent elements of an internationally wrongful act is its attribution to a state,<sup>80</sup> the derivative responsibility of an assisting state can arise only if the principal wrong is attributable to a state under one of the rules of attribution reflected in ARSIWA. To illustrate, consider the abuses against civilians perpetrated by the rebel group M23 in the DRC.<sup>81</sup> If these are attributable to Rwanda further to the state's exercise of effective control over the operations in which they occurred,<sup>82</sup> Uganda may bear responsibility for its contribution towards such abuses due to the considerable logistical and other assistance it provided to M23.<sup>83</sup> But if those abuses are not attributable to Rwanda or to another state, there is no internationally wrongful act for Uganda to assist. Therefore, Uganda's responsibility is not engaged.<sup>84</sup>

The state-centric focus of ARSIWA's complicity provisions is evident throughout the ILC's deliberations on the issue.<sup>85</sup> Although Special Rapporteur Ago initially used the language of complicity in the context of NSAs when discussing the potential attribution of private conduct to the state,<sup>86</sup> the ILC did not specifically address states' contributions towards private wrongs as a

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<sup>76</sup> Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 Chicago J Intl L 83, 90.

<sup>77</sup> ARSIWA (n 5) art 2.

<sup>78</sup> *ibid* art 16 commentary para 11. See also Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 276; Jackson, *Complicity in International Law* (n 4) 5, 176.

<sup>79</sup> Jackson, *Complicity in International Law* (n 4) 5, 127-28; Mackenzie-Gray Scott (n 37) 374-76.

<sup>80</sup> ARSIWA (n 5) art 2.

<sup>81</sup> See Ch 2 s 2.3.3.

<sup>82</sup> See Ch 5 s 5.4.4.

<sup>83</sup> See Ch 2 s 2.3.2.

<sup>84</sup> Crawford's Second Report on State Responsibility (n 21) 49 para 175; ARSIWA (n 5) general commentary para 4c.

<sup>85</sup> See eg ILC YB 1975 vol I 'Summary Records of the Twenty-Seventh Session' UN Doc A/CN.4/SER.A/1975 44 para 13 (comments of Mr Ustor); *ibid* 45 para 28 (comments of Mr Reuter); *ibid* 47 para 4 (comments of Mr Ushakov); *ibid* 48 paras 9-10 (comments of Mr Bedjaoui); *ibid* 58 para 19 (comments of Mr Bilge); Ago's Seventh report on State Responsibility (n 35) 52 para 51; *ibid* 57-60 paras 70-77; Crawford's Second Report on State Responsibility (n 21) 45-46 para 161.

<sup>86</sup> Ago's Fourth Report on State Responsibility (n 75) 96-97 para 64; ILC YB 1975 vol II (n 75) 80 (commentary to draft art 11 para 32). See also Eduardo Savarese, 'Issues of Attribution to States of Private Acts: Between the Concept of De Facto Organs and Complicity' (2005) 15 Italian YB Intl L 111, 112-16.

potential basis of responsibility at any time during ARSIWA's long period of development.<sup>87</sup> As well as deriving from NSAs' lack of legal personality and their consequent inability to commit an internationally wrongful act, this may also be due in part to the novelty of the rule reflected in Article 16 and the view by some that responsibility for complicity, even in respect of the wrongs of other states, formed part of the progressive development of the law.<sup>88</sup>

### **8.3 Articles 16 and 41(2) as a model to regulate states' assistance to non-state actors**

Although the ILC's rationale for restricting ARSIWA's scope in this manner may have been justifiable in 2001, the analysis in Chapter 7 demonstrates that it is no longer valid today. The complicity provisions within the law of state responsibility should apply equally to states' assistance to NSAs. It is questionable, however, whether Articles 16 and 41(2) ARSIWA serve as an effective model for the regulation of state's support to NSAs. Analysis of the issue requires an assessment of the objective and subjective elements of these provisions to determine whether they are sufficiently broad to capture the types of state conduct towards NSAs that cause harm in contemporary conflict.

#### ***8.3.1 The objective element***

The objective element of a complicity rule such as Article 16 concerns the actual assistance that is provided to the recipient. This element may be further divided into two sub-components; the nature of the assistance that may violate the rule and the requisite link between that assistance and any subsequent wrong.

##### *8.3.1.1 The nature of the assistance*

Article 16 ARSIWA regulates any form of assistance that one state provides to another.<sup>89</sup> This broad remit should be replicated in any complicity rule relating to NSAs. Thus, whether a state's support takes the form of material aid such as weapons, or the provision of training, intelligence, or the use

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<sup>87</sup> Special Rapporteur Crawford merely alluded to this when referring to the similarities between the draft articles relating to one state's implication in the conduct of another and the rules of attribution. See Crawford's Second Report on State Responsibility (n 21) 47 para 167.

<sup>88</sup> Crawford (n 11) 401, 408.

<sup>89</sup> Aust (n 4) 198-200; Crawford (n 11) 402; Jackson, *Complicity in International Law* (n 4) 153-54; Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 8.

of territory, it should fall within the rule's scope.<sup>90</sup> If the ambit of such a rule were more limited, for example by excluding the provision of financial aid, this would create a lacuna that states could too easily exploit to avoid responsibility.<sup>91</sup>

Notwithstanding the ICJ's assertion that only positive action can amount to complicity,<sup>92</sup> a state's culpable omissions could facilitate wrongful conduct on the part of an NSA.<sup>93</sup> Consider, for example, the attacks against the US-led coalition perpetrated by Iranian-backed Shi'a militia groups in Iraq.<sup>94</sup> While the Iraqi government might breach its due diligence obligations if it fails to take feasible steps to stop such attacks,<sup>95</sup> it might also assist in their commission if, for instance, it receives details of an impending attack but fails to communicate these to the coalition or send its own security forces to address the threat. The more culpable nature of the latter omission by state officials should be reflected in its responsibility for complicity rather than its mere failure to exercise due diligence.<sup>96</sup>

As well as encompassing culpable omissions, the relevant complicity rules should regulate states' instigation or inducement of NSAs' abuses.<sup>97</sup> Such conduct falls within the scope of certain primary norms, such as the duty to respect and ensure respect for IHL<sup>98</sup> but falls outside Article 16 ARSIWA.<sup>99</sup> The ILC justified this exclusion due to the sovereign equality of states; a state should bear responsibility for its own decisions, even if these are taken upon the advice of another.<sup>100</sup> But in the context of state support to NSAs the same logic does not apply. However powerful an NSA may be, it is not on an equal footing with a state from an international law perspective and thus a state's incitement of wrongful conduct should lead to responsibility.

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<sup>90</sup> *ibid.*

<sup>91</sup> Aust (n 4) 199.

<sup>92</sup> *Bosnian Genocide* (n 14) [432].

<sup>93</sup> Jackson, *Complicity in International Law* (n 4) 157.

<sup>94</sup> See eg Lionel Beehner, 'Iraq's Militia Groups' (*Council on Foreign Relations*, 26 October 2006) <[www.cfr.org/background/iraqs-militia-groups](http://www.cfr.org/background/iraqs-militia-groups)> accessed 16 May 2019.

<sup>95</sup> See Ch 6 s 6.4.

<sup>96</sup> Jackson, *Complicity in International Law* (n 4) 157. Note, however, that some Shi'a militias are integrated into Iraq's security forces, meaning that their attacks are attributable to the state. See Ch 3 s 3.2.1.

<sup>97</sup> See generally Jackson, 'State Instigation in International Law' (n 35).

<sup>98</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [220] (*Nicaragua*). See also Jackson, *Complicity in International Law* (n 4) 209-10; Ch 6 ss 6.2, 6.3, 6.6.

<sup>99</sup> ARSIWA (n 5) general commentary to Ch IV para 9.

<sup>100</sup> ILC YB 1978 vol II pt 2 (n 14) 100 (commentary to draft art 27 para 6). See also Graefrath (n 13) 373; Nolte and Aust (n 40) 13; Jackson, 'State Instigation in International Law' (n 35) 409-10.

To illustrate, consider the position if a state encourages patriotic hackers to conduct harmful cyber operations against another state.<sup>101</sup> Although the threshold for attribution is unlikely to be met,<sup>102</sup> if the state's actions had a causal influence on the hackers' behaviour, the state should bear responsibility for its own conduct in instigating the harmful operations. Proving such influence and its nexus to any subsequent wrongs may, however, prove challenging.<sup>103</sup>

### *8.3.1.2 The required nexus between the assistance and the NSA's wrong*

To justify the imposition of responsibility on an assisting state, it is necessary to establish 'a culpable or causative link' between the assistance provided and the recipient's wrong.<sup>104</sup> This must be sufficiently close to ensure that states are held to account only in respect of wrongful conduct that they genuinely facilitate but not so stringent as to limit the efficacy of the rule. While the nexus may be proximate and direct in some cases, as with Iran's supply of drones to the Houthis that were used to conduct indiscriminate attacks on Saudi Arabia,<sup>105</sup> in other situations it may be more attenuated.

Consider, for instance, Turkey's support to militias engaged in the conflict in northern Syria.<sup>106</sup> Turkey's assistance to such groups was wide-ranging and reportedly included the provision of training and the payment of fighters' salaries.<sup>107</sup> With the aid of such support, the militias fought on Turkey's behalf in various operations in Syria, including its 2018 campaign to take control of Afrin.<sup>108</sup> In the course of that operation, the militias engaged in numerous abuses against the civilian population, including the seizure, looting and destruction of property.<sup>109</sup> But although the state's

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<sup>101</sup> Regarding patriotic hackers' actions against Estonia in 2007, see Eneken Tikk, Kadri Kaska and Liis Vihul, 'International Cyber Incidents: Legal Considerations' (*NATO Cooperative Cyber Defence Centre of Excellence*, 2010) 31-2 <<https://ccdcoe.org/publications/books/legalconsiderations.pdf>> accessed 24 October 2017.

<sup>102</sup> See Ch 5 s 5.3.1.

<sup>103</sup> Jackson, 'State Instigation in International Law' (n 35) 411-12; Lawless (n 4) 214-15.

<sup>104</sup> Nina H B Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108 *American J Intl L* 722, 748.

<sup>105</sup> Los Angeles Times, 'Devices Found in Missiles and Drones Link Iran to Attacks, Reports Say' (19 February 2020) <[www.latimes.com/world-nation/story/2020-02-19/devices-found-in-missiles-yemen-drones-link-iran-to-attacks](http://www.latimes.com/world-nation/story/2020-02-19/devices-found-in-missiles-yemen-drones-link-iran-to-attacks)> accessed 17 June 2020; US Embassy & Consulates in Saudi Arabia, 'Statement by Secretary Michael R Pompeo: Iran-backed Houthi Attacks Against Saudi Arabia' (29 October 2020) <<https://sa.usembassy.gov/iran-backed-houthi-attacks-against-saudi-arabia/>> accessed 25 June 2021.

<sup>106</sup> See Ch 2 s 2.1.4. The ensuing analysis assumes that the militias' conduct is not attributable to Turkey.

<sup>107</sup> Elizabeth Tsurkov, 'Who Are Turkey's Proxy Fighters in Syria?' (*NYR Daily*, 27 November 2019) <[www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/](http://www.nybooks.com/daily/2019/11/27/who-are-turkeys-proxy-fighters-in-syria/)> accessed 16 June 2020. See also Ch 2 s 2.1.4.

<sup>108</sup> *ibid.*

<sup>109</sup> Human Rights Watch, 'Syria: Turkey-Backed Groups Seizing Property' (14 June 2018) <[www.hrw.org/news/2018/06/14/syria-turkey-backed-groups-seizing-property](http://www.hrw.org/news/2018/06/14/syria-turkey-backed-groups-seizing-property)> accessed 16 June 2020. See also Ch 2 s 2.1.4.



assistance undoubtedly enabled the militias' participation in the wider operation, Turkey's support appears not to have made a direct contribution towards the violations themselves.

To determine Turkey's potential responsibility under an NSA-analogue to Article 16, the ARSIWA commentary provides limited assistance. This is due to its internal inconsistency<sup>110</sup> as well as its failure to indicate how the requisite link between the state's aid and the wrong should be established.<sup>111</sup> For instance, is it sufficient that the state's support put the recipient in a position whereby it was able to commit the abuses at issue, or must the assistance contribute directly to the recipient's wrong?

The decision of the European Commission of Human Rights in *Tugar v Italy* is instructive in this respect.<sup>112</sup> Tugar was injured in 1993 by an anti-personnel mine that had been supplied by Italy to Iraq in the early 1980s.<sup>113</sup> He complained that Italy had failed to protect his right to life either by allowing the supply of a weapon that was likely to be used indiscriminately or by failing to enact an effective arms transfer licensing system.<sup>114</sup> The Commission rejected his claim, concluding that:

the applicant's injury can not [*sic*] be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered.<sup>115</sup>

Although this decision raises difficulties for injured parties seeking to hold states to account,<sup>116</sup> it appears to be justified on the facts. The adverse consequences of Italy's failure to regulate arms transfers to Iraq were simply 'too remote' to engage Italy's responsibility.<sup>117</sup> An opposite conclusion would potentially engage a state's responsibility whenever it supplies weapons or other forms of

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<sup>110</sup> ARSIWA (n 5) art 16 commentary paras 5, 10. See Crawford (n 11) 403; s 8.2.1.1.

<sup>111</sup> See David D Caron, 'The Basis of Responsibility: Attribution and Other Transsubstantive Rules' in Richard B Lillich and Daniel Barstow Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational 1998) 153.

<sup>112</sup> European Commission of Human Rights *Tugar v Italy* (18 October 1995) App No 22869/93.

<sup>113</sup> *ibid.*

<sup>114</sup> *Tugar v Italy* (n 112).

<sup>115</sup> *ibid.*

<sup>116</sup> See Boivin (n 46) 480; Lanovoy, *Complicity and its Limits* (n 4) 173-74.

<sup>117</sup> *Tugar v Italy* (n 112).

assistance to a state or NSA, however distant the ultimate wrong may be from the state's act of assistance.

Remoteness is therefore a key factor to consider in any complicity rule relating to states' support to NSAs. If the state's assistance is distanced from the NSA's conduct through the passage of time or the occurrence of intervening events, this decreases the likelihood of a sufficiently strong connection between the NSA's conduct and the state's provision of aid.<sup>118</sup> Consider, for instance, a state's delivery of training to an NSA whose members subsequently commit abuses against civilians in violation of IHL.<sup>119</sup> To determine whether the training is sufficiently closely linked to those abuses to engage the state's responsibility, a number of questions are relevant. Were the abuses committed by the same individuals who received the training? Did the training involve skills, such as marksmanship, that the NSA employed when committing the abuses? How much time passed between the delivery of the training and the commission of the violations?

Answers to questions such as these should help to ascertain the proximity of the links between the training and the NSA's harmful conduct. But in other situations, different questions may be pertinent. For instance, in the case of patriotic hackers acting pursuant to a state's encouragement, causal links are key; it is necessary to determine the extent to which the state's behaviour caused the hackers to conduct the harmful cyber operations.<sup>120</sup> But in practice this may be difficult to ascertain, particularly in the absence of clear evidence regarding the effects of the state's encouragement on the hackers. It may be more appropriate, in such circumstances, to hold the state to account for failing to exercise due diligence to stop the relevant conduct.<sup>121</sup> However, if the state takes positive steps to encourage the hackers' activities, for instance by offering some form of incentive to act, it might be possible to draw causal inferences from the surrounding circumstances.<sup>122</sup>

Such inferences could potentially be drawn if it is assessed that the state's actions made the NSA's wrongful behaviour more likely in the circumstances.<sup>123</sup> Conversely, if the NSA would have acted in

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<sup>118</sup> The ICTY reached a similar conclusion regarding aiding and abetting liability in international criminal law. See eg *Prosecutor v Perišić* (Appeals Chamber Judgment) ICTY IT-04-81-A (2013) [40]. See also Moynihan 'Challenges in Armed Conflict and Counterterrorism' (n 20) 9-10.

<sup>119</sup> See eg Ben Rawlence, 'Trained in Terror' (*The Guardian*, 30 July 2008) <[www.theguardian.com/commentisfree/2008/jul/30/kenya.terrorism](http://www.theguardian.com/commentisfree/2008/jul/30/kenya.terrorism)> accessed 26 June 2021.

<sup>120</sup> Jackson, 'State Instigation in International Law' (n 35) 411-12.

<sup>121</sup> See Ch 6 s 6.4.

<sup>122</sup> Jackson, 'State Instigation in International Law' (n 35) 411-12.

<sup>123</sup> The ICJ referred in this context to 'encouragement, which was likely to be effective...' See *Nicaragua* (n 98) [256].

the same way without the state's encouragement, the nexus requirement relevant to the proposed complicity rule should not be satisfied.<sup>124</sup>

Similar considerations may apply when evaluating a state's material support to an NSA, including when that assistance does not relate directly to the violations at issue but puts the NSA into a position whereby it is able to commit the relevant harms. If the support changes the situation for the principal actor, making it easier for the NSA to commit the wrongful act, this should be taken into account when assessing the state's potential responsibility for complicity.<sup>125</sup> Thus, the Danish High Court found a clear causal link between Danish forces' assistance towards an Iraqi detention operation, which consisted of establishing an outer cordon around the village where the detainees were located, and the subsequent mistreatment of those detainees by the Iraqi police.<sup>126</sup>

A comparable analysis can be made regarding Turkey's assistance to the Syrian militias. Although the money and equipment Turkey provided may not have directly facilitated the militias' conduct in seizing, looting, and destroying Kurdish property in Afrin,<sup>127</sup> Turkey's support was critical to their ability to perpetrate such abuses. Through its provision of assistance, Turkey empowered the militias to enter the territory concerned and made it materially easier for them to violate international law.<sup>128</sup> As such, the nexus requirement should be satisfied.

In some cases, however, the impact of a state's assistance on an NSA's conduct may be less apparent. While it should not be necessary to prove 'but for' causation in every case, the state's support must facilitate the NSA's wrongful behaviour. To illustrate, consider the position if the United States shares intelligence with the SDF relating to ISIS activity in Syria and the SDF subsequently relies on that intelligence when conducting a detention operation during which it mistreats detainees. If the US intelligence enabled the operation, for instance by providing the SDF with the detainees'

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<sup>124</sup> Beth Van Schaack and Alex Whiting, 'Understanding Complicity: When the US Makes a "Substantial Contribution" to War Crimes Committed by Foreign Partners' (*Just Security*, 26 January 2017) <[www.justsecurity.org/36748/understanding-complicity-substantial-contribution-war-crimes-committed-foreign-partners/](http://www.justsecurity.org/36748/understanding-complicity-substantial-contribution-war-crimes-committed-foreign-partners/)> accessed 24 June 2021.

<sup>125</sup> Aust (n 4) 215; Lawless (n 4) 216.

<sup>126</sup> Note that this decision was based on Danish tort law. See Thomas Obel Hansen and Fiona Nelson, 'Liability of an Assisting Army for Detainee Abuse by Local Forces: The Danish High Court Judgment in Green Desert' (*EJIL:Talk!*, 24 January 2019) <[www.ejiltalk.org/liability-of-an-assisting-army-for-detainee-abuse-by-local-forces-the-danish-high-court-judgment-in-green-desert/](http://www.ejiltalk.org/liability-of-an-assisting-army-for-detainee-abuse-by-local-forces-the-danish-high-court-judgment-in-green-desert/)> accessed 18 June 2020; Peter Vedel Kessing, 'Liability in Joint Military Operations – The *Green Desert* Case' (2020) 25 *J Conflict and Security L* 343, 348-49, 358.

<sup>127</sup> Tsurkov (n 107); Human Rights Watch (n 109).

<sup>128</sup> See ILC YB 1978 vol II pt 2 (n 14) 104 (commentary to draft art 27 para 17); Aust (n 4) 215; Lawless (n 4) 216.

location, the nexus requirement should be satisfied. But if the intelligence was more general in nature, the US assistance might have made only a minor contribution towards the detentions. In such circumstances, questions arise regarding the scale of the support provided and whether this is sufficient to engage the state's responsibility.

When addressing such questions, a first issue to consider is whether the intelligence was the only support that the state contributed towards the detention operation. If the state also provided other assistance, the various forms of aid should be assessed cumulatively to evaluate their joint contribution towards the NSA's wrong.<sup>129</sup> Second, it is important to examine the impact of the state's support on the NSA's ability to act. To return to the example involving the SDF, if the US assistance made it easier for the group to plan or conduct the detention operation the nexus requirement should be satisfied, even if the contribution was not 'significant'.<sup>130</sup> Subject to a *de minimis* threshold, to exclude aid that assists only in a remote, indirect, or minimal way,<sup>131</sup> this approach would allow the extent of the state's contribution towards the NSA's wrong to be reflected in the level of any reparations awarded, rather than in the determination of responsibility.<sup>132</sup> Moreover, it should encourage states to more carefully consider the purposes for which their aid might be used prior to providing support to an NSA.

### **8.3.2 The subjective element**

The subjective or mental element of Article 16 ARSIWA is strict; an assisting state bears responsibility only if it provides the relevant aid 'with a view to facilitating the commission' of the principal internationally wrongful act on the part of the recipient state.<sup>133</sup> While this approach accords with the views of a majority of states,<sup>134</sup> it clearly limits Article 16's scope of application.<sup>135</sup> As Crawford opined regarding states' obligations in respect of Israeli settlements in the occupied Palestinian territories, 'it is not sufficient that the US supplies Israel with bulldozers which are

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<sup>129</sup> André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 *Eur J Intl L* 15, 41.

<sup>130</sup> See ARSIWA (n 5) art 16 commentary para 5.

<sup>131</sup> Lowe (n 13) 5.

<sup>132</sup> Mark Gibney, Katarina Tomaševski and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harvard Human Rights J* 267, 295; Lanovoy, *Complicity and its Limits* (n 4) 174, 175. See also Nollkaemper and others (n 129) 53-62.

<sup>133</sup> ARSIWA (n 5) art 16 commentary para 3. See also s 8.2.1.2.

<sup>134</sup> See Aust (n 4) 237-38; Lanovoy, *Complicity and its Limits* (n 4) 222-23.

<sup>135</sup> Graefrath (n 13) 375.

subsequently utilised in the unlawful destruction of private property during construction of the Wall – the US must know and intend that those bulldozers are to be used in such a way’.<sup>136</sup>

To assess the suitability of a similar intent requirement within a complicity rule relating to NSAs, consider once again Turkey’s assistance to militia groups in northern Syria. Turkey’s intent when providing such support could relate to the groups’ violation of IHL obligations to which they are directly bound due to their status as a party to the NIAC.<sup>137</sup> In other words, the complicity rule could require Turkey to know and intend that its aid will facilitate the militias’ breach of their own IHL obligations, such as those arising under common Article 3 to the Geneva Conventions.<sup>138</sup> But uncertainty abounds regarding the precise obligations that bind NSAs and in some circumstances, it might not be clear whether IHL applies to the conflict at issue or to the recipient of the assistance.<sup>139</sup> Alternatively, therefore, Turkey’s intent could relate to conduct on the part of the militias that would breach Turkey’s own international legal obligations, if it were attributable to the state. Such alternatives are discussed further in Section 8.5.

In either case, a literal interpretation of the intent requirement would place a heavy burden on an injured state wishing to invoke Turkey’s responsibility. States’ motivations for assisting NSAs are wide-ranging and normally relate primarily to the advancement of their own interests rather than a desire to cause harm to others.<sup>140</sup> In Turkey’s case, it appears that the state’s support to the militias was motivated by the promotion of its strategic goals in northern Syria, namely to stem the flow of refugees and to combat the Kurdish terrorist group, the PKK.<sup>141</sup> Even if elements of the Turkish

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<sup>136</sup> Crawford, ‘Israeli Settlements Opinion’ (n 58) para 77.

<sup>137</sup> See s 8.5.2.1.

<sup>138</sup> Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 art 3 (GC1); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 art 3 (GCII); Geneva Convention III relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 art 3 (GCIII); Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 art 3 (GCIV).

<sup>139</sup> See s 8.5.2.2.

<sup>140</sup> Gibney, Tomaševski and Vedsted-Hansen (n 132) 294; Nahapetian (n 46) 126-27; Boivin (n 46) 471-72; Lanovoy, *Complicity and its Limits* (n 4) 101-02. See also ICRC, ‘Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War’ (March 2021) 23 <[www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce](http://www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce)> accessed 14 April 2021.

<sup>141</sup> See Ch 2 s 2.1.4.

government did intend the militias to harm Kurdish civilians, proving so in the absence of public statements to this effect would be ‘uncertain and elusive’.<sup>142</sup>

It is possible, however, to view the intent requirement more leniently. A state’s intent could be inferred from its wider conduct if state officials clearly know of the risk of abuses but nevertheless provide the relevant assistance.<sup>143</sup> This approach finds some support in the *Corfu Channel* case, in which the ICJ inferred knowledge of mine-laying in its territorial waters to the Albanian government due to the surrounding circumstances, including Albania’s surveillance over the channel.<sup>144</sup> Thus, an injured state that is ‘unable to furnish direct proof of facts giving rise to responsibility ... should be allowed a more liberal recourse to inferences of fact and circumstantial evidence’.<sup>145</sup>

Inferences of a state’s intent could be drawn from a range of factors, including the existence of shared goals between the state and the NSA, indications of knowledge on the part of state officials, or the previous conduct of the NSA concerned.<sup>146</sup> If such an approach is applied to Turkey’s support to Syrian militias, it may be inferred that at least in relation to its later operations, Turkey intended to facilitate the militias’ abuses. In view of the numerous atrocities the militias committed against civilians during the operation to gain control of Afrin,<sup>147</sup> Turkey must have known that they would act in a similar manner during its subsequent operations in October 2019.<sup>148</sup> And, as Lowe opined, ‘... as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts.’<sup>149</sup>

This looser reading of the intent requirement brings a greater range of state assistance within the scope of Article 16, as well as any NSA-analogue to the rule. It also brings the mental element for

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<sup>142</sup> ILC YB 1998 vol II, ‘Documents of the Fiftieth Session’ UN Doc A/CN.4/SER.A/1998/Add.1, 101 (comments of Denmark on behalf of the Nordic countries).

<sup>143</sup> Corten (n 47) 73-74; Crawford (n 11) 408; Jackson, *Complicity in International Law* (n 4) 159-60; Lanovoy, *Complicity and its Limits* (n 4) 228; Moynihan, ‘The Mental Element under Article 16’ (n 40) 467-70; Lawless (n 4) 217-18; Mackenzie-Gray Scott (n 37) 401; Milanović, ‘Intelligence Sharing’ (n 40) 1308-16.

<sup>144</sup> *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 18-22. See also Milanović, ‘Intelligence Sharing’ (n 40) 1317.

<sup>145</sup> *Corfu Channel* (n 144) 18.

<sup>146</sup> Lanovoy, *Complicity and its Limits* (n 4) 238-39; Boivin (n 46) 471; Moynihan, ‘Challenges in Armed Conflict and Counterterrorism’ (n 20) 16.

<sup>147</sup> Human Rights Watch (n 109). See also UNHRC, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (9 August 2018) UN Doc A/HRC/39/65 6-7 paras 26-31.

<sup>148</sup> UNHRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (28 January 2020) UN Doc A/HRC/43/57 9 para 39, 11 para 54.

<sup>149</sup> Lowe (n 13) 8. See also Milanović, ‘Intelligence Sharing’ (n 40) 1313-15.

the purposes of state responsibility better into line with international criminal law.<sup>150</sup> For an aider and abettor to bear criminal responsibility, he must ‘take the conscious decision to act in the knowledge that he thereby supports the commission of the crime’.<sup>151</sup> Officials can be criminally responsible, therefore, in the absence of any intent to facilitate the principal wrong.<sup>152</sup> But given the penal consequences for individuals, it makes little sense for the required mental element for a state’s complicity to be more stringent than that required for criminal responsibility.<sup>153</sup> Thus, if a state official supplies arms to an NSA in the knowledge that they will be used to target civilians, it would be anomalous if this led to the official’s criminal responsibility without also giving rise to the responsibility of the state.<sup>154</sup>

States’ interactions with NSAs regarding the transfer of weapons or other material aid are regulated by complicity rules within other bodies of international law, which include no intent requirement. Consider, for instance, the duty to respect and ensure respect for IHL.<sup>155</sup> While the precise scope and effects of this provision remain subject to considerable debate,<sup>156</sup> the negative aspect of the duty, requiring states not to assist other states or NSAs to violate the Conventions is less contentious.<sup>157</sup> Regarding the mental element of the norm, the ICRC asserts that states should refrain from transferring weapons to another state or an NSA ‘if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions’.<sup>158</sup>

The ICJ formulated a similar test when addressing the duty not to encourage IHL violations. According to the Court, ‘it is material to consider whether that encouragement was offered to

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<sup>150</sup> See generally Jackson, *Complicity in International Law* (n 4) 75-80.

<sup>151</sup> *Prosecutor v Kunarac, Kovac and Vukovic* (Trial Chamber Judgment) ICTY IT-96-23-T & IT-96-23/1-T (2001). See also *Prosecutor v Blaškić* (Appeals Chamber Judgment) ICTY IT-95-14-A (2004) [49]; *Prosecutor v Orić* (Appeals Chamber Judgment) ICTY IT-03-68-A (2008).

<sup>152</sup> But see Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 25(3)(c).

<sup>153</sup> Miles Jackson, ‘Aiding and Assisting: The Relationship with International Criminal Law?’ (*Just Security*, 15 November 2016) <[www.justsecurity.org/34441/chatham-houses-paper-aiding-assisting-international-criminal-law/](http://www.justsecurity.org/34441/chatham-houses-paper-aiding-assisting-international-criminal-law/)> accessed 24 June 2021.

<sup>154</sup> Ryan Goodman, ‘Legal Limits on Military Assistance to Proxy Forces: Pathway for State and Official Responsibility’ (*Just Security*, 14 May 2018) <[www.justsecurity.org/56272/legal-limits-military-assistance-proxy-forces-pathways-state-official-responsibility/](http://www.justsecurity.org/56272/legal-limits-military-assistance-proxy-forces-pathways-state-official-responsibility/)> accessed 8 September 2019.

<sup>155</sup> GC1 (n 138) art 1; GCII (n 138) art 1; GCIII (n 138) art 1; GCIV (n 138) art 1.

<sup>156</sup> See Ch 6 s 6.6.

<sup>157</sup> Milanović, ‘Intelligence Sharing’ (n 40) 1324-26.

<sup>158</sup> ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016) art 1 para 162 (2016 commentary to GC1). An equivalent standard is favoured by the Independent Commission of Inquiry tasked with examining the Syrian conflict. See UNHRC, ‘Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic, 21 July 2016-28 February 2017’ (10 March 2017) UN Doc A/HRC/34/CRP.3 22 para 102.

persons in circumstances where the commission of such acts was likely or foreseeable'.<sup>159</sup> The ICJ went on to conclude that because the state officials responsible for the manual containing the encouragement were aware at least of 'allegations' of IHL violations by the *contras*, the United States had breached its international legal obligations.<sup>160</sup>

These standards are more relaxed than the mental element relevant to Article 16 and therefore capture a wider range of state assistance. In addition, they effectively impose a positive duty on states to assess the risk that their assistance will be used in a manner that violates IHL. Yet, the two tests are not identical. While according to the ICRC there must be an 'expectation' that the NSA will use the state's assistance to violate IHL, the ICJ requires only that such violations are 'likely or foreseeable' based on 'allegations' rather than 'facts or knowledge of past patterns'.<sup>161</sup> The ICRC's test therefore establishes a higher threshold, requiring a greater degree of certainty that violations will occur.

To engage a state's responsibility, the ICRC sets the better standard. A state might receive unsubstantiated allegations of IHL violations on the part of an NSA, making it foreseeable that its assistance will facilitate further such breaches, without any real expectation that these will occur. For instance, the state might conclude that the allegations are not credible, or that the training it provides to the NSA means that future violations are not likely. To hold the state to account in such circumstances, in the absence of a clear risk that its assistance will facilitate future breaches, would extend the scope of state responsibility too far. But if the risk is real rather than theoretical, based on facts or knowledge rather than mere allegations, the state should take steps to mitigate that risk or, if that is not possible, desist from providing support.

When regulating states' assistance to NSAs in contemporary conflict, a 'clear risk' standard is plainly preferable to a requirement for intent.<sup>162</sup> This would deter states from turning a blind eye to the

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<sup>159</sup> *Nicaragua* (n 98) [256]. Note, however, that the ICJ did not apply the same test with respect to the United States' material assistance to the *contras*. See Tatyana Jane Eatwell, 'State Responsibility for the Unlawful Conduct of Armed Groups' (DPhil thesis, Trinity College University of Cambridge 2019) s 4.3.3 <[www.repository.cam.ac.uk/bitstream/handle/1810/302004/Eatwell%20Thesis%20May%202020%20updated%20Electronic%20Final.pdf?sequence=8&isAllowed=y](http://www.repository.cam.ac.uk/bitstream/handle/1810/302004/Eatwell%20Thesis%20May%202020%20updated%20Electronic%20Final.pdf?sequence=8&isAllowed=y)> accessed 22 June 2021; Milanović, 'Intelligence Sharing' (n 40) 1328.

<sup>160</sup> *Nicaragua* (n 98) [256]. See also Nahapetian (n 46) 117-18.

<sup>161</sup> Vedel Kessing (n 126) 352.

<sup>162</sup> This standard is similar to that adopted by human rights bodies in relation to the principle of *non-refoulement*. See Samuel Shepson, 'Jurisdiction in Complicity Cases: Rendition and *Refoulement* in Domestic and International Courts' (2015) 53 *Columbia J Transnational L* 701, 713, 727. It also echoes the stance taken in the EU Common Position on Arms Exports. See Council of the European Union, 'Council Common Position Defining Common Rules Governing



likely risks involved in their provision of assistance but would not go so far as to hold states to account for assisting abuses they could not have contemplated at the time of providing their support.<sup>163</sup> The fact that some states already carry out such risk assessments pursuant to domestic law or policy suggests, moreover, that this requirement should not impose too onerous a burden on states.<sup>164</sup>

Nonetheless, it is questionable whether a mental element of this nature is appropriate within an NSA-analogue to Article 16. To assess the level of risk its support will entail, a state must enquire into the NSA's past and present behaviour to determine the likelihood that the NSA will use the state's assistance in a manner that violates international law.<sup>165</sup> A positive obligation of this type is better imposed through primary norms of international law rather than via the secondary rules of state responsibility; a matter that is addressed in Section 8.6.

Article 16's generality raises further questions regarding the suitability of a standard based on risk.<sup>166</sup> The provision has 'a vast field of potential application' covering all kinds of internationally wrongful acts, including breaches of bilateral arrangements or treaty obligations outside the context of an armed conflict.<sup>167</sup> This broad focus is a key reason behind the narrow interpretation of Article 16's constituent elements, including the requirement for intent.<sup>168</sup> It is therefore pertinent to examine

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Control of Exports of Military Technology and Equipment' (2008/944/CFSP, 8 December 2008) art 2(2)(c) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>> accessed 29 May 2020; R (*Campaign Against the Arms Trade*) v Secretary of State for International Trade [2019] EWCA Civ 1020. A similar standard is also applied by the UK government as a matter of domestic policy. See eg UK Government, 'Overseas Security and Justice Assistance (OSJA): Human Rights Guidance' (2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/583304/OSJA\\_Guidance\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583304/OSJA_Guidance_2017.pdf)> accessed 7 January 2021 (UK OSJA); UK Government, 'The Principles Relating to the Detention and Interviewing of Detainees Overseas and the Passing and Receipt of Intelligence Relating to Detainees' (July 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/818306/20190718\\_The\\_Principles\\_relating\\_to\\_the\\_detention\\_and\\_interviewing\\_of\\_detainees\\_overseas.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818306/20190718_The_Principles_relating_to_the_detention_and_interviewing_of_detainees_overseas.pdf)> accessed 11 January 2021 (UK Principles).

<sup>163</sup> Jackson, *Complicity in International Law* (n 4) 162.

<sup>164</sup> US Department of State, 'About the Leahy Law' (20 January 2021) <[www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/](http://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/)> accessed 10 June 2021 (Leahy Law); UK OSJA (n 162); UK Principles (n 162). UN entities additionally conduct risk assessments before supporting non-UN security forces. See UN, 'Human Rights Due Diligence Policy on United Nations Support to Non-UN Security Forces' (2015) <<https://unsdg.un.org/sites/default/files/Inter-Agency-HRDDP-Guidance-Note-2015.pdf>> accessed 20 June 2021; Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2014) 20 J Conflict and Security L 61.

<sup>165</sup> Eatwell (n 159) s 4.3.4; Milanović, 'Intelligence Sharing' (n 40) 1318.

<sup>166</sup> Vladyslav Lanovoy, 'The Guiding Principles on Shared Responsibility in International Law: Too Much or Too Little?' (2020) 31 Eur J Intl L 1235, 1244-45.

<sup>167</sup> Aust (n 4) 239. See also Nolte and Aust (n 40) 16-17.

<sup>168</sup> Nolte and Aust (n 40) 16-17.

whether an NSA-analogue to Article 41(2) would better regulate states' assistance to NSAs in armed conflict, given that this has a much narrower focus and includes no requirement for intent or knowledge on the part of the assisting state.

### **8.3.3 A non-state actor equivalent to Article 41(2)**

In contrast with the very wide remit of Article 16, Articles 40 and 41 ARSIWA focus solely on peremptory norms of international law, or *jus cogens*, and the enhanced principles of responsibility that apply in this context.<sup>169</sup> These norms operate beyond the reciprocal obligations of states to promote elemental considerations of humanity<sup>170</sup> and are highly relevant to situations of armed conflict. A review of international law violations involving NSAs in contemporary conflict reveals that these typically involve breaches of fundamental rules of IHL, such as those relating to civilians or persons *hors de combat*.<sup>171</sup> Such rules are a category of *jus cogens*<sup>172</sup> and also express obligations *erga omnes*, owed by states towards the international community as a whole.<sup>173</sup>

International law should, as a minimum, hold states to account in respect of their assistance to NSAs in the violation of peremptory norms. It makes little sense, for example, for a state to be prohibited from complicity in torture if the acts in question are conducted by another state but not if they are perpetrated by an NSA.<sup>174</sup> Article 41(2), however, is overly narrow in its scope to provide an effective model for the regulation of states' assistance to NSAs in contemporary conflict.

This provision addresses only conduct 'after the fact',<sup>175</sup> including assistance that facilitates the continuation of an ongoing wrongful act. An NSA analogue to the rule could, therefore, address Russia's assistance to the local administrations in the Donbas in maintaining their *de facto* control

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<sup>169</sup> See s 8.2.2.

<sup>170</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [157]; ILC, 'Report on Peremptory Norms' (n 50) 1 (draft conclusion 3). See also Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 *Eur J Intl L* 387; Kenneth Keith, 'Bilateralism and Community in Treaty Law and Practice – of Warriors, Workers, and (Hook-)Worms' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 758.

<sup>171</sup> See Ch 2.

<sup>172</sup> ARSIWA (n 5) art 40 commentary para 5.

<sup>173</sup> Marco Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations *Erga Omnes* and *Erga Omnes Partes*' (2018) 23 *J of Conflict and Security L* 383. Regarding the relationship between peremptory norms and *erga omnes* obligations see ARSIWA (n 5) general commentary to Ch III para 7; Simma (n 9) 300-01; ILC, 'Report on Peremptory Norms' (n 50) 4 (draft conclusion 17).

<sup>174</sup> See generally Fortin (n 3) 217-26; Manfred Nowak, 'Can Private Actors Torture?' (2021) *J Intl Crim Justice* 1.

<sup>175</sup> ARSIWA (n 5) art 41 commentary para 11.

over Ukrainian sovereign territory.<sup>176</sup> But Article 41(2) is of little relevance when the wrong in question is not of a continuing character, such as a short-lived attack directed against civilians.<sup>177</sup> Given the need to regulate states' assistance to NSAs not only in maintaining a situation created through the violation of a peremptory norm but also in facilitating the commission of the initial breach, the effective regulation of states' support to NSAs requires a rule that is broader in its temporal scope than Article 41(2). Alternatively, an NSA equivalent to Article 41(2) would need to be supplemented by additional primary or secondary rules that apply in a broader range of circumstances.

An additional drawback to reliance on an NSA-analogue to Article 41(2) is the continuing uncertainty regarding the specific norms that qualify as *jus cogens*.<sup>178</sup> While this categorisation clearly encompasses certain obligations such as the prohibitions on genocide and torture,<sup>179</sup> the status of other norms is less clear. Thus, the ICJ opined that 'a great many rules' of IHL are so fundamental that they 'constitute intransgressible principles of international customary law'<sup>180</sup> but did not specify which provisions have attained this status. Consider, for instance, the alleged IHL violations involving Shi'a militia groups in Syria.<sup>181</sup> While the NSAs' alleged indiscriminate attacks against civilian infrastructure likely violated a peremptory norm, namely the principle of distinction, it is less clear whether the same is true of the militias' practice of forced conscription. Similar uncertainty surrounds the status of other NSA conduct, such as the SDF's prolonged detention of ISIS fighters without any prospect of prosecution or release.<sup>182</sup>

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<sup>176</sup> See Ch 2 s 2.2.

<sup>177</sup> Jørgensen 'The Obligation of Non-Assistance' (n 49) 692; Aust (n 4) 339.

<sup>178</sup> ARSIWA (n 5) art 40 commentary paras 3, 6; ILC, 'Report on Peremptory Norms' (n 50) 1-3 (draft conclusions 4-9). See also Rafael Nieto-Navia, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law' in Lal Chand Vohrar and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Brill Nijhoff 2003).

<sup>179</sup> ARSIWA (n 5) art 40 commentary para 5.

<sup>180</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [79]. See also ARSIWA (n 5) art 40 commentary para 5.

<sup>181</sup> See Ch 2 s 2.1.2.3.

<sup>182</sup> See Ch 2 s 2.1.3. The ILC does not categorise the prohibition on arbitrary detention as a peremptory norm. See ARSIWA (n 5) art 40 commentary paras 3-5. However, certain UN bodies and courts have done so. See UNGA, 'Report of the Working Group on Arbitrary Detention' (24 December 2012) UN Doc A/HRC/22/44 16-24 paras 37-75; *Belhaj and another v Straw and others, Rabmatullah (No 1) v Ministry of Defence and another* [2017] UKSC 3 [271].

### **8.3.4 Interim conclusions**

The application of Articles 16 and 41(2) to states' assistance to NSAs would undoubtedly be a step forward in enhancing the accountability of states that choose to act through NSAs in conflict situations. There are, however, clear limitations to these provisions' effectiveness in regulating state behaviour. First, considerable ambiguity remains regarding the precise circumstances to which the rules apply. Second, in the context of Article 16, the ILC's interpretation of the provision's constituent elements is overly stringent when considering states' complicity in NSAs' conduct.

An analysis of these provisions in the context of states' assistance to NSAs additionally raises questions whether the general international law of state responsibility is the best means through which to regulate states' dealings with NSAs in contemporary conflict. This issue can be explored further through an examination of state practice in this area, as well as the jurisprudence of the ICJ.

## **8.4 The development of customary international law**

### **8.4.1 State practice and governmental statements**

In the context of the use of force in contemporary conflict, states have been vocal in condemning other states for their support to NSAs. Syria and Iran, for instance, both condemned the United States for the assistance it offered to Syrian rebels in 2013.<sup>183</sup> Israel denounced Iran, Syria and Lebanon for their support to Hezbollah, which enabled the group to conduct attacks on Israeli territory.<sup>184</sup> And in UN Security Council discussions, states criticised Russia for equipping, arming and training the rebels in eastern Ukraine.<sup>185</sup> Often, however, the precise grounds on which states condemn others' actions, and whether their condemnation is on a legal, moral, or political basis, remains ambiguous.

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<sup>183</sup> Julian Borger, 'Syria and Iran Condemn US for Offering Support to Anti-Assad Rebels' (*The Guardian*, 2 March 2013) <[www.theguardian.com/world/2013/mar/02/syria-iran-us-assad-rebels](http://www.theguardian.com/world/2013/mar/02/syria-iran-us-assad-rebels)> accessed 27 May 2020. See also UNSC '8645<sup>th</sup> Meeting: The Situation in the Middle East' (24 October 2019) UN Doc S/PV.8645 24.

<sup>184</sup> UNGA, 'Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council' (12 July 2006) UN Doc A/60/937-S/2006/515.

<sup>185</sup> See eg UNSC, '7576<sup>th</sup> Meeting: Letter Dated 28 February from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council (S/2014/136)' (11 December 2015) UN Doc S/PV.7576 19, 23; UNSC, '7683<sup>rd</sup> Meeting: Letter Dated 28 February from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council (S/2014/136)' (28 April 2016) UN Doc S/PV.7683 8, 11, 14.

Numerous UN Security Council Resolutions (UNSCR) similarly denounce states' support of armed groups as constituting a threat to international peace and security. For instance, in UNSCR 2078, the Security Council expressed 'deep concern' at reports indicating that external support continued to be provided to M23 and reiterated its demand that 'any and all outside support to the M23 cease immediately'.<sup>186</sup> Many other examples exist, relating to a range of conflicts involving NSAs.<sup>187</sup>

The international community has been particularly vocal in denouncing states' conduct in harbouring NSAs responsible for terrorism in the aftermath of 9/11. Thus, the UN Security Council condemned the Taliban regime for allowing Afghanistan to be used as a base for terrorist training and activities<sup>188</sup> and expressly prohibited states 'from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists'.<sup>189</sup> In a letter to the Security Council, the United States highlighted that the terrorist attacks were 'made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [Al-Qaeda] as a base of operation',<sup>190</sup> while NATO denounced the Taliban's role in providing protection to those responsible for the attacks.<sup>191</sup>

There is, however, a dearth of state practice or governmental pronouncements on the issue of states' assistance to NSAs outside the context of terrorism and the use of force. While state practice clearly supports the position articulated in the Friendly Relations Declaration that states must 'refrain from ... assisting or participating in acts of civil strife or terrorist acts in another State ... [involving] a threat or use of force',<sup>192</sup> it remains unclear whether states are in favour of a broader

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<sup>186</sup> UNSC Res 2078 (28 November 2012) UN Doc S/RES/2078 para 8. See also Ch 2 s 2.3.

<sup>187</sup> See eg UNSC Res 864 (15 September 1993) UN Doc S/RES/864 (Angola) para 19; UNSC Res 1304 (16 June 2000) UN Doc S/RES/1304 (DRC) para 10; UNSC Res 1343 (7 March 2001) UN Doc S/RES/1343 para 2; UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484 para 7; UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556 paras 6-8; UNSC Res 1907 (23 December 2009) UN Doc S/RES/1907 para 16. See also Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 419-510; Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 108-18.

<sup>188</sup> UNSC Res 1378 (14 November 2001) UN Doc S/RES/1378; UNSC Res 1390 (28 January 2002) UN Doc S/RES/1390.

<sup>189</sup> UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 2a. See also UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170 para 10; UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199 paras 24-27; UNSC Res 2370 (2 August 2017) UN Doc S/RES/2370 para 1.

<sup>190</sup> UNSC, 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (7 October 2001) UN Doc S/2001/946.

<sup>191</sup> NATO, 'Statement by NATO Secretary General, Lord Robertson' (2 October 2001) <[www.nato.int/docu/speech/2001/s011002a.htm](http://www.nato.int/docu/speech/2001/s011002a.htm)> accessed 28 May 2020.

<sup>192</sup> UNGA, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (24 October 1970) UN Doc A/RES/2625(XXV). See also Ch 6 s 6.2.

prohibition on assistance that facilitates other harmful conduct by NSAs. For instance, while many of the denouncements referred to above relate to situations in which NSAs acted in breach of IHL, it is not apparent that states' condemnations related to the facilitation of such abuses rather than the broader use of force.<sup>193</sup>

To date, Austria is alone in expressly articulating its position in this context. When the UK and France succeeded in lifting the EU arms embargo imposed in 2011 relating to the Syrian conflict, Austria expressed concern not only that the supply of arms to the Syrian opposition would breach the principle of non-intervention and the prohibition on the use of force, but also that 'Member States supplying arms to the Syrian opposition would incur State responsibility for aiding and assisting in the commission of internationally wrongful acts'.<sup>194</sup> In so doing, Austria invoked Article 16 ARSIWA by analogy, asserting that 'Should supplied arms be used by armed opposition groups in Syria in the commission of internationally wrongful acts, the States who had supplied these arms and had knowledge of these acts would incur State responsibility for their aid and assistance in the commission of such acts'.<sup>195</sup>

While this approach has not been explicitly echoed by other states, some support for it, particularly in the context of military assistance to NSAs, may be gleaned from states' adoption of the Arms Trade Treaty.<sup>196</sup> Article 6(3) prohibits states parties from transferring conventional arms to any entity, including NSAs, if the state has:

knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.<sup>197</sup>

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<sup>193</sup> See fns 183-192. See also Mackenzie-Gray Scott (n 37) 377-78.

<sup>194</sup> Julian Borger, 'The Austrian Position on Arms Embargo in Syria – Official Document' (*The Guardian*, 15 May 2013) <[www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf](http://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf)> accessed 28 May 2020. See also Gray (n 187) 114.

<sup>195</sup> *ibid.* See also Mackenzie-Gray Scott (n 37) 378-80.

<sup>196</sup> Arms Trade Treaty (adopted 2 April 2013 as GA Res 67/234B, entered into force 24 December 2014). See also Jørgensen, 'State Responsibility for Aiding or Assisting' (n 104). For further examples of state practice that arguably supports Austria's approach see Mackenzie-Gray Scott (n 37) 380-81.

<sup>197</sup> Arms Trade Treaty (n 196) art 6(3).

The treaty's ratification by 110 states supports the proposition that all states are subject to an obligation not to transfer arms to NSAs in the knowledge that they will be used in the commission of serious international law violations.<sup>198</sup> This position is strengthened as additional states, such as China, accede to the treaty.<sup>199</sup> While the decision of the world's two largest arms exporters, Russia and the United States,<sup>200</sup> not to join the treaty points away from the provision's customary status,<sup>201</sup> it is notable that the United States has introduced domestic legislation that prohibits funding to foreign military units where there is credible information implicating those units in the commission of gross violations of human rights.<sup>202</sup>

Many states conduct similar risk assessments before providing arms or other assistance to external actors, either pursuant to their obligations under the Arms Trade Treaty or under regional or domestic provisions.<sup>203</sup> The EU Common Position on Arms Exports, for instance, requires member

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<sup>198</sup> For details of states parties see <<https://thearmstradetreaty.org/>> accessed 17 June 2021. Regarding the role of multilateral treaties in the emergence of customary international law, see RR Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-1966) 41 Brit YB Intl L 275; ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' in ILC YB 2018 vol II, 'Report of the ILC on its Seventieth Session' UN Doc A/73/10 121, 143-46 (Conclusion 11).

<sup>199</sup> Michelle Nichols, 'China Slams US as it Joins Global Arms Trade Treaty at UN' (*Reuters*, 7 July 2020) <[www.reuters.com/article/us-china-usa-arms-idUSKBN24730S](http://www.reuters.com/article/us-china-usa-arms-idUSKBN24730S)> accessed 17 June 2021. See also Anna Stavrianakis and He Yun, 'China and the Arms Trade Treaty: Prospects and Challenges' (*Saferworld*, May 2014) <[www.saferworld.org.uk/resources/publications/811-china-and-the-arms-trade-treaty-prospects-and-challenges](http://www.saferworld.org.uk/resources/publications/811-china-and-the-arms-trade-treaty-prospects-and-challenges)> accessed 30 May 2020.

<sup>200</sup> Chiara Vercellone, 'Who Were the Largest Major Arms Exporters in the Last 5 Years?' (*Defense News*, 9 March 2020) <[www.defensenews.com/2020/03/09/who-were-the-largest-major-arms-exporters-in-the-last-5-years/](http://www.defensenews.com/2020/03/09/who-were-the-largest-major-arms-exporters-in-the-last-5-years/)> accessed 29 May 2020.

<sup>201</sup> The United States 'un-signed' the Arms Trade Treaty in April 2019, while Russia did not sign. For details of all states parties see <<https://thearmstradetreaty.org/>> accessed 29 May 2020. See also Rachel Stohl, 'Trump Unsigns the Arms Trade Treaty: How did we get here?' (*War on the Rocks*, 3 May 2019) <<https://warontherocks.com/2019/05/trump-unsigned-the-arms-trade-treaty-how-did-we-get-here/>> accessed 22 June 2021. As 'specially affected' states, the practice of these states is particularly important when considering the emergence of customary international law. See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 1969 [73]-[74]; Michael Wood, 'The Evolution and Identification of the Customary International Law of Armed Conflict' (2018) 51 *Vanderbilt J Transnational L* 713, 733-34.

<sup>202</sup> Leahy Law (n 164). The United States applies similar provisions as a matter of policy when assisting NSAs. See Daniel Byman, 'Event: US Security Assistance and Human Rights' (*Brookings Institution*, 12 December 2016) 25-26 <[www.brookings.edu/wp-content/uploads/2016/12/20161212\\_security\\_human\\_rights\\_transcript.pdf](http://www.brookings.edu/wp-content/uploads/2016/12/20161212_security_human_rights_transcript.pdf)> accessed 20 June 2021; Erica L Gaston, 'Regulating Irregular Actors: Can Due Diligence Checks Mitigate the Risks of Working with Non-State and Substate Forces?' (*Global Public Policy Institute*, May 2021) <<https://odi.org/en/publications/regulating-irregular-actors-can-due-diligence-checks-mitigate-the-risks-of-working-with-non-state-and-substate-forces/>> accessed 20 June 2021. The US Defense Appropriation Act for fiscal year 2021 additionally introduced a human rights-related condition to the provision of funding for 'irregular forces, groups, or individuals' that support special forces' counter-terrorism operations under the state's 127e programme. See Legal Information Institute, '10 US Code s 127e – Support of Special Operations to Combat Terrorism' <[www.law.cornell.edu/uscode/text/10/127e](http://www.law.cornell.edu/uscode/text/10/127e)> accessed 29 September 2020; National Defense Authorization Act for Fiscal Year 2021 (HR 6395, 3 January 2020) s 1051(2) <[www.govtrack.us/congress/bills/116/hr6395/text](http://www.govtrack.us/congress/bills/116/hr6395/text)> accessed 20 June 2021.

<sup>203</sup> Arms Trade Treaty (n 196) art 7. See also UK OSJA (n 162); UK Principles (n 162).

states to ‘deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of [IHL]’.<sup>204</sup> This position, moreover, has been adopted by certain non-EU arms exporters including Canada, Georgia, and Norway.<sup>205</sup>

The developing consensus on this issue arguably points towards an emerging customary international law obligation on states to investigate, before providing arms to an external NSA, the risk that the recipient will use or divert the arms for unlawful purposes.<sup>206</sup> It cannot be said with any certainty, however, that this represents ‘a general practice that is accepted as law’,<sup>207</sup> undertaken with a sense of legal obligation.<sup>208</sup> For instance, the United States’ policy of vetting NSAs in Syria appears to have been driven more by political considerations than by any sense of legal obligation.<sup>209</sup>

Moreover, the preceding analysis reveals that international law’s development towards the regulation of states’ assistance to NSAs is predominantly linked to obligations arising under primary norms of international law such as the prohibition on the use of force. It is difficult, therefore, to conclude that there is an emerging general norm within the secondary law of state responsibility that regulates states’ assistance to NSAs in a manner analogous to Article 16. Further guidance in this respect can, however, be gleaned from the ICJ in its interpretation of complicity in genocide.<sup>210</sup>

#### ***8.4.2 The ICJ’s interpretation of complicity in genocide***

Certain primary norms contain specific complicity provisions that regulate not only states’ assistance to other states but also their support to NSAs. Thus, states parties to the Convention on the Prohibition of Anti-Personnel Mines, for example, are prohibited from assisting, encouraging, or inducing ‘anyone’ to engage in activity prohibited by the Convention, including NSAs.<sup>211</sup> Complicity

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<sup>204</sup> Council Common Position (n 162).

<sup>205</sup> Council of the European Union, ‘Twentieth Annual Report According to Article 8(2) of Council Common Position 2008/044/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment’ (2018/C453/01) 1 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XG1214\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XG1214(01)&from=EN)> accessed 29 May 2020.

<sup>206</sup> Jørgensen ‘State Responsibility for Aiding or Assisting’ (n 104) 729; Tom Ruys, ‘Of Arms, Funding and “Non-Lethal Assistance” – Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) 13 Chinese J Intl L 13, 29-30.

<sup>207</sup> ILC, ‘Identification of Customary International Law’ (n 198) 124-26 (Conclusion 2).

<sup>208</sup> *ibid* 138-40 (Conclusion 9).

<sup>209</sup> Christopher M Blanchard and Amy Belasco, ‘Train and Equip Program for Syria: Authorities, Funding and Issues for Congress’ (*Congressional Research Service*, 9 June 2015) <<https://fas.org/sgp/crs/natsec/R43727.pdf>> accessed 27 March 2021. See also Eatwell (n 159) s 4.3.4; Gaston (n 202) 7-9.

<sup>210</sup> See ILC, ‘Identification of Customary International Law’ (n 198) 149-50 (Conclusion 13).

<sup>211</sup> Convention on Anti-Personnel Mines (n 10) art 1(1)(c). See also Lanovoy, *Complicity and its Limits* (n 4) 187-89.



is similarly prohibited within the Genocide Convention.<sup>212</sup> This instrument relates primarily to the domestic criminalisation of genocide, requiring all states parties to ‘confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish’.<sup>213</sup> The only reference within the Convention to state responsibility for genocide appears in the compromissory clause granting jurisdiction to the ICJ.<sup>214</sup> Nevertheless, the ICJ in the *Bosnian Genocide* case determined that the Convention not only imposes an obligation on states to prevent and to punish genocide, but also a duty not to commit genocide directly, or to be complicit in genocide committed by another actor.<sup>215</sup>

The ICJ’s basis for reaching this conclusion was teleological.<sup>216</sup> The Court concluded that it would be ‘paradoxical’ for states to be subject to a duty to prevent genocide but not also be forbidden from conducting such acts through their own organs.<sup>217</sup> Moreover, it would not be in keeping with the object and purpose of the Convention to deny that responsibility could arise through acts other than the commission of genocide itself, including complicity.<sup>218</sup>

Importantly, the ICJ made no distinction between a state’s complicity in genocide committed by another state and that perpetrated by an NSA. In *Bosnian Genocide*, the issue arose in respect of the considerable assistance that the Federal Republic of Yugoslavia (FRY) provided to the Republika Srpska relating to the genocide at Srebrenica.<sup>219</sup> When addressing the meaning of the term ‘complicity’ within the Genocide Convention, the ICJ concluded that this ‘includes the provision of means to enable or facilitate the commission of the crime’<sup>220</sup> and referred specifically to Article 16 ARSIWA.<sup>221</sup> The Court noted that although ‘complicity’ is not a notion that exists in the current

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<sup>212</sup> Genocide Convention (n 10) art III.

<sup>213</sup> Genocide Convention (n 10) art I. See also Nina Jørgensen, ‘State Responsibility and the 1948 Genocide Convention’ in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 275, 286.

<sup>214</sup> Genocide Convention (n 10) art IX. See also Jørgensen, ‘State Responsibility and the 1948 Genocide Convention’ (n 213) 275-78.

<sup>215</sup> *Bosnian Genocide* (n 14) [162]-[169], [418]-[424]. Regarding the parties’ submissions on this issue see Jørgensen, ‘State Responsibility and the 1948 Genocide Convention’ (n 213) 279-84.

<sup>216</sup> Jackson, *Complicity in International Law* (n 4) 203-06.

<sup>217</sup> *Bosnian Genocide* (n 14) [166].

<sup>218</sup> *ibid* [167]. For a critique of the ICJ’s conclusions, see Paola Gaeta, ‘On What Conditions Can a State be Held Responsible for Genocide?’ (2007) 18 *Euro J Intl L* 631; Antonio Cassese, ‘On the Use of Criminal Law Notions in Determining State Responsibility for Genocide’ (2007) 5 *J Intl Crim Justice* 875. See also *Bosnian Genocide* (n 14) Joint Declaration of Judges Shi and Koroma [4]; *ibid* Separate Opinion of Judge Owada [38]-[56]; *ibid* Separate Opinion of Judge Tomka [40]-[45].

<sup>219</sup> For further background information regarding the case see Ch 3 s 3.2-3.3; Ch 5 s 5.4.1.

<sup>220</sup> *Bosnian Genocide* (n 14) [419].

<sup>221</sup> *ibid* [420].

terminology of the law of state responsibility, it is similar to the category of ‘aid or assistance’ referred to in Article 16.<sup>222</sup> Thus, to ascertain the FRY’s potential responsibility, the ICJ determined that it had to:

examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished ‘aid or assistance’ in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.<sup>223</sup>

In this way, the ICJ applied Article 16 by analogy when addressing the FRY’s responsibility for complicity in genocide perpetrated by an NSA. While the ICJ ultimately concluded that the FRY was not so complicit,<sup>224</sup> the ICJ’s invocation of Article 16 in this context ‘suggests that the concept of aid or assistance embodied in Article 16 is experiencing a separate and broader development in customary international law’.<sup>225</sup> Thus, just as Article 58 of the draft Articles on the Responsibility of International Organisations (ARIO) provides for a state’s responsibility to be engaged when it assists an international organisation (IO) to violate international law,<sup>226</sup> courts might apply the same principle by analogy when states facilitate violations involving NSAs.

## **8.5 Regulating states’ assistance to non-state actors via the law of state responsibility**

Legal scholars have pointed to the ICJ’s ruling in the *Bosnian Genocide* case as an important foundation for the expansion of the law of state responsibility to encompass states’ assistance to NSAs.<sup>227</sup> Scholars disagree, however, whether the judgment points towards the development of complicity as a distinct basis of attribution, or as a non-imputational rule.<sup>228</sup> This section addresses these potential grounds of responsibility in turn, concluding that the better approach is to hold states to account for their own contribution towards an NSA’s wrongs rather than the wrongful

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<sup>222</sup> *ibid* [419].

<sup>223</sup> *ibid* [420].

<sup>224</sup> *ibid* [421]-[424]. For a critique of the ICJ’s approach, see Marko Milanović, ‘State Responsibility for Genocide: A Follow-Up’ (2007) 18 *Eur J Intl L* 669, 680-84; Jackson, *Complicity in International Law* (n 4) 212-13.

<sup>225</sup> Jørgensen ‘State Responsibility for Aiding or Assisting’ (n 104) 730.

<sup>226</sup> ARIO (n 32) art 58.

<sup>227</sup> Alain Pellet, ‘Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues’ in Péter Kovács (ed), *International Law – A Quiet Strength: Miscellanea in Memoriam Géza Herczegh* (Pázmány Press 2011) 126; Jackson, *Complicity in International Law* (n 4) 201-216; Jørgensen ‘State Responsibility for Aiding or Assisting’ (n 104) 730; Lanovoy, *Complicity and its Limits* (n 4) 319-329.

<sup>228</sup> See eg Jackson, *Complicity in International Law* (n 4) 213; Lanovoy, *Complicity and its Limits* (n 4) 320.

conduct itself. Given that conclusion, the section then examines the difficulties that arise in formulating a complicity provision in the absence of an underlying internationally wrongful act.

### **8.5.1 Attribution of the non-state actor's conduct to the complicit state**

The argument that states' complicity in NSAs' conduct should lead to the attribution of private conduct to the state has been made most forcefully in the context of terrorism, following the attacks of 9/11.<sup>229</sup> International support for the US military action against the Taliban in Afghanistan was overwhelming, despite the fact that the nexus between Al Qaeda and the Taliban clearly fell below the attribution thresholds formulated by the ICJ in the *Nicaragua* case.<sup>230</sup> The legal basis for the United States' self-defence response was therefore debated extensively by legal scholars, with some concluding that a more lenient attribution standard has developed.<sup>231</sup> According to this argument, private conduct is attributable to a state in cases where it merely assists an NSA or provides it with a sanctuary from which to conduct attacks; there is no need for evidence of state control.<sup>232</sup>

A similar development is evident in IHRL. As discussed in Chapter 6, in a number of cases relating to atrocities perpetrated by NSAs, human rights bodies have concluded that private conduct was attributable to the territorial state on the sole basis that it collaborated with, acquiesced in, and tolerated the NSAs' actions.<sup>233</sup> While this and the legal developments relating to international terrorism can be explained as *lex specialis* rules of attribution<sup>234</sup> applicable only to instances of state support to NSAs in these particular contexts, some commentators argue that they indicate the emergence of 'a new secondary norm, according to which private wrongs are to be imputed to a state if the latter knowingly facilitated (or otherwise cooperated in) their commission'.<sup>235</sup>

There is minimal support for such an approach outside the contexts of terrorism and IHRL.<sup>236</sup> It does, however, have potential benefits. First, it holds a complicit state to account in the same manner

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<sup>229</sup> See Jackson, *Complicity in International Law* (n 4) 179-189.

<sup>230</sup> Ruys, *Armed Attack' and Article 51* (n 187) 440. See also *ibid* 419-510; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart 2006) 211-18.

<sup>231</sup> See Becker (n 230) 219-37; Ruys, *Armed Attack' and Article 51* (n 187) 489-93.

<sup>232</sup> See eg Christian J Tams, 'The Use of Force Against Terrorists' (2009) 20 *Eur J Intl L* 359, 384-87.

<sup>233</sup> See Ch 6 s 6.5.2. See also Jackson, *Complicity in International Law* (n 4) 190-99.

<sup>234</sup> ARSIWA (n 5) art 55. See also *Bosnian Genocide* (n 14) [401].

<sup>235</sup> Daniele Amoroso, 'Moving Towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law' (2011) 24 *Leiden J Intl L* 989, 990. See also Lanovoy, *Complicity and its Limits* (n 4) 306-29.

<sup>236</sup> But see International Commission of Inquiry on Darfur, 'Report to the United Nations Secretary-General' (25 January 2005) UN Doc S/2005/60 37 para 125. See also Becker (n 230) 319-20.

as if it had committed the unlawful act via its own organs, thereby elevating the condemnatory element of the law and giving rise to reparations for the injured state.<sup>237</sup> Second, such a rule of attribution could have a strong deterrent effect in discouraging states from providing assistance to NSAs.<sup>238</sup> And third, this approach avoids the difficulties that arise when formulating an NSA-analogue to Article 16, which stem from NSAs' lack of legal personality in international law.<sup>239</sup>

Conversely, however, such an approach brings to the fore the valid concerns expressed by the ICJ in the *Bosnian Genocide* case regarding the excessive expansion of the notion of attribution.<sup>240</sup> Under the attribution regime reflected in ARSIWA, 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.<sup>241</sup> Accordingly, a state should bear responsibility only for conduct that can fairly be characterised as its own.<sup>242</sup> Although the ICJ's construction of the relevant attribution standards is, in certain respects, overly narrow,<sup>243</sup> this assessment does not justify an extension of the circumstances giving rise to attribution to include complicity. There is a qualitative difference between a state supplying an NSA with weapons that the NSA uses to kill civilians and the state's officials or agents engaging in such conduct directly.<sup>244</sup>

Consider, for instance, the support the US-led coalition provided to the SDF in Syria relating to the detention of ISIS fighters.<sup>245</sup> Reporting indicates that the United States assisted and enabled the SDF's detention operations and funded security improvements to detention facilities.<sup>246</sup> In so doing, US officials likely knew that the detainees would be held in very poor and overcrowded conditions.<sup>247</sup>

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<sup>237</sup> Amoroso (n 235) 992; Jackson, *Complicity in International Law* (n 4) 19.

<sup>238</sup> Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Rejoinder to Ilias Plakokefalos' (2017) 28 *Eur J Intl L* 595, 596.

<sup>239</sup> See s 8.5.2.

<sup>240</sup> *Bosnian Genocide* (n 14) [406]. See also Becker (n 230) 236-37.

<sup>241</sup> *Bosnian Genocide* (n 14) [406].

<sup>242</sup> Marko Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights L Rev* 411, 440; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmschurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 60; Nollkaemper and Jacobs (n 21) 385-86; Jean d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 *Netherlands Intl L Rev* 49, 54-55; Jackson, *Complicity in International Law* (n 4) 188.

<sup>243</sup> See Chs 3-5, 7.

<sup>244</sup> Gibney, Tomaševski and Vedsted-Hansen (n 132) 287.

<sup>245</sup> William Rosenau and Zack Gold, "'The Cheapest Insurance in the World?'" The United States and Proxy Warfare' (*CNA*, July 2019) 36 <[www.cna.org/CNA\\_files/PDF/DRM-2019-U-020227-1Rev.pdf](http://www.cna.org/CNA_files/PDF/DRM-2019-U-020227-1Rev.pdf)> accessed 31 August 2020. See also Ch 2 s 2.1.3.

<sup>246</sup> *ibid*; Eric Schmitt, 'ISIS Prisoners Threaten US Mission in Northeastern Syria' (*The New York Times*, 25 May 2020) <[www.nytimes.com/2020/05/25/world/middleeast/isis-prisoners-syria.html](http://www.nytimes.com/2020/05/25/world/middleeast/isis-prisoners-syria.html)> accessed 31 August 2020.

<sup>247</sup> Human Rights Watch 'Northeast Syria: Boys, Men Held in Inhumane Conditions' (8 October 2019) <[www.hrw.org/news/2019/10/08/northeast-syria-boys-men-held-inhumane-conditions](http://www.hrw.org/news/2019/10/08/northeast-syria-boys-men-held-inhumane-conditions)> accessed 28 April 2020.

It is possible, therefore, that the constituent elements of a rule of attribution based on complicity would be satisfied: the United States' aid facilitated the detention of ISIS fighters and state officials were fully aware at the time they authorised the relevant assistance that the detainees would be held in inhumane conditions. But it is highly questionable, in such circumstances, whether the United States should bear responsibility for the SDF's breach of its humane treatment obligations under IHL.<sup>248</sup> This would be disproportionate to the state's involvement in the wrong, particularly given the steps taken to improve the detention facilities and to train the SDF to act in accordance with international law.<sup>249</sup> It is, moreover, an outcome that states, as the principal creators of international law, are unlikely to accept.

### ***8.5.2 A non-state actor equivalent to Article 16***

A better approach, therefore, is to hold complicit states to account for their own contributions towards an NSA's wrong. This would allow a differentiation between different degrees of state complicity, meaning that the consequences of responsibility can vary according to the level of the state's culpability and its involvement in the harm.<sup>250</sup> Such an approach mirrors that taken by the ILC in Article 16 ARSIWA; the assisting state is responsible only to the extent that its own conduct causes or contributes to the wrong.<sup>251</sup>

Given this conclusion, the question arises whether the law of state responsibility should simply build upon the foundations laid by the ICJ in the *Bosnian Genocide* case to include an NSA equivalent to Article 16. This could take the form of an interpretive extension of the customary norm that underlies Article 16, so that the rule applies equally to states' assistance to NSAs. Alternatively, it could constitute a new rule of international law that is separate from the norm reflected in Article 16.

International law's development in either manner would clearly be desirable as a matter of legal policy. However, it is not straightforward. As discussed in Section 8.2.1, a state's responsibility under the rule expressed in Article 16 derives from its assistance in the commission of another state's internationally wrongful act. But because NSAs are not subjects of international law in the same

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<sup>248</sup> GC1 (n 138) art 3; GCII (n 138) art 3; GCIII (n 138) art 3; GCIV (n 138) art 3.

<sup>249</sup> Schmitt (n 246).

<sup>250</sup> Gibney, Tomaševski and Vedsted-Hansen (n 132) 295; Becker (n 230) 271.

<sup>251</sup> ARSIWA (n 5) art 16 commentary paras 1, 9.

manner as states, their wrongful conduct does not constitute an internationally wrongful act, therefore there is no international wrong for the state to be complicit in.<sup>252</sup>

Nevertheless, in certain contexts, international law does impose obligations directly on NSAs. This is particularly pertinent in contemporary conflict. Thus, armed groups are directly bound by IHL not only on an individual basis through their criminal responsibility<sup>253</sup> but also under common Article 3<sup>254</sup> and Additional Protocol II<sup>255</sup> to the Geneva Conventions. Legal scholars additionally argue that certain NSAs are subject to IHRL obligations.<sup>256</sup> These developments, therefore, raise the prospect that the law of state responsibility could regulate a state's participation in the international wrongdoing of an NSA.<sup>257</sup> If a state and an NSA are bound by the same norm of international law, why should the state not be deemed complicit in its breach?<sup>258</sup>

#### *8.5.2.1 Responsibility arising from state complicity in an NSA's legal violations*

Common Article 3 to the Geneva Conventions (CA3) provides the clearest example of international legal obligations imposed directly on NSAs.<sup>259</sup> This provision sets out minimum standards with which all parties to a NIAC must comply, including an obligation of humane treatment towards persons taking no active part in the hostilities and a duty to care for the wounded and sick.<sup>260</sup> If the non-state party to a NIAC acts in breach of CA3, its conduct violates IHL. Therefore, if substantiated, the allegations that rebels in eastern Ukraine tortured and executed Ukrainian soldiers

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<sup>252</sup> ARSIWA (n 5) art 2. See also Amoroso (n 235) 994.

<sup>253</sup> See ARSIWA (n 5) art 58.

<sup>254</sup> GC1 (n 138) art 3; GCII (n 138) art 3; GCIII (n 138) art 3; GCIV (n 138) art 3. See also ICRC, *Commentary on the First Geneva Convention* (CUP 2016) (ICRC 2016 Commentary to GC1) art 3 paras 505-08.

<sup>255</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

<sup>256</sup> See eg Clapham, 'Human Rights Obligations of Non-State Actors' (n 3); Bianchi (n 3) 42-46; Fortin (n 3).

<sup>257</sup> de Frouville (n 78) 277; Jackson, *Complicity in International Law* (n 4) 214-16.

<sup>258</sup> de Frouville (n 78) 277.

<sup>259</sup> While the basis on which NSAs are subject to IHL obligations remains subject to debate, there is nevertheless a consensus that all parties to a NIAC are bound by such rules. See Clapham, 'Human Rights Obligations of Non-State Actors' (n 3) 497-500; Kleffner (n 3); Sivakumaran (n 3).

<sup>260</sup> GC1 (n 138) art 3; GCII (n 138) art 3; GCIII (n 138) art 3; GCIV (n 138) art 3.

clearly breached the groups' international legal obligations.<sup>261</sup> As such, Russia's facilitation of those abuses could engage the state's responsibility under an NSA-analogue to Article 16.<sup>262</sup>

Armed groups that are party to a NIAC are also bound by certain norms of IHL relating to the conduct of hostilities. In its study of customary IHL, the ICRC found that key rules, such as the principle of distinction and the prohibition on indiscriminate attacks, apply equally to all parties to a NIAC.<sup>263</sup> Accordingly, if it is correct that Shi'a militia groups conducted indiscriminate attacks during their involvement in the Syrian conflict,<sup>264</sup> these constitute IHL violations on the part of the militias in which Iran, through its provision of assistance to such groups, may have been complicit.

The application of IHRL to NSAs involved in contemporary conflict is less clear.<sup>265</sup> Commentators increasingly argue that international law imposes at least some human rights obligations on NSAs, particularly if they exercise territorial control.<sup>266</sup> For example, a group of four special rapporteurs referred in 2006 to Hezbollah's obligation to respect and promote human rights on the basis that the group 'remains subject to the demands of the international community, first expressed in the Universal Declaration of Human Rights'.<sup>267</sup> If the law develops to impose clear IHRL obligations on NSAs, a state's complicity in an NSA's violation of these duties might similarly lead to state responsibility under an NSA equivalent to Article 16.

#### *8.5.2.2 Difficulties with this approach*

There are, however, two key difficulties with this approach. The first is the derivative nature of Article 16 and its application only to a state's assistance 'in the commission of an internationally

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<sup>261</sup> See eg UNHRC, 'Report on the human rights situation in Ukraine' (1 December 2014 to 15 February 2015) 8-9 <[www.un.org.ua/images/stories/9thOHCHRreportUkraine\\_1.pdf](http://www.un.org.ua/images/stories/9thOHCHRreportUkraine_1.pdf)> accessed 21 August 2019. See also Ch 2 s 2.2.2.

<sup>262</sup> Russia's responsibility in such circumstances would be subject to the relevant subjective and objective elements of the complicity standard being met. See s 8.3.

<sup>263</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds), 'Customary International Humanitarian Law vol I: Rules' (2005) rr 1, 7, 11 <[www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)> accessed 24 October 2017 (ICRC Customary IHL Study). See also *ibid* r 139.

<sup>264</sup> See Ch 2 s 2.1.2.3.

<sup>265</sup> Clapham, 'Human Rights Obligations of Non-State Actors' (n 3) 503-08.

<sup>266</sup> *ibid*; Fortin (n 3) 152-73; Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups' (n 3).

<sup>267</sup> UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari: Mission to Lebanon and Israel' (2 October 2006) UN Doc A/HRC/2/7 7 para 19.

wrongful act'.<sup>268</sup> As noted above,<sup>269</sup> ARSIWA's foundational articles specifically link an internationally wrongful act to a state, meaning that when referring to an NSA's conduct there is no internationally wrongful act for a state to be complicit in.<sup>270</sup> Second, even if the law of international responsibility develops so as to recognise armed groups' legal violations as internationally wrongful acts, these represent only a fraction of the wrongs perpetrated by NSAs in contemporary conflict. States assist a wide variety of NSAs to act in a manner that potentially violates IHL, including in scenarios when the relevant IHL obligation does not directly bind the NSA concerned.<sup>271</sup>

For example, in the context of an armed conflict, a state might train a group of individuals who are not party to the conflict to perform acts of sabotage against a common adversary. If those acts constitute attacks<sup>272</sup> and they are conducted in an indiscriminate manner, the NSA's conduct might breach the assisting state's IHL obligations.<sup>273</sup> But if the NSA is not a party to the conflict, it is not bound directly by IHL therefore there is no primary wrong for the state to be complicit in. The position would only be different if the individual members of the group violate international criminal law and the law develops so as to recognise those violations as internationally wrongful acts.

Even regarding armed opposition groups, ambiguity can prevail as to whether IHL applies to their conduct. It might not be clear, for instance, whether the intensity threshold for IHL's application has been reached,<sup>274</sup> particularly as governments often prefer to portray internal hostilities as a fight against criminals or terrorists.<sup>275</sup> Alternatively, the NSA in receipt of the state's assistance might be insufficiently organised to become a party to a NIAC. In this situation, although the individual members of the NSA might be bound by international criminal law, the group itself would bear no obligations under IHL.<sup>276</sup>

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<sup>268</sup> ARSIWA (n 5) art 16.

<sup>269</sup> See s 8.2.3.

<sup>270</sup> ARSIWA (n 5) arts 1, 2.

<sup>271</sup> See d'Aspremont and others (n 242) 53.

<sup>272</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 art 49(1).

<sup>273</sup> See ICRC Customary IHL Study (n 263) rr 11, 12.

<sup>274</sup> See *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1 (2 October 1995) [70]. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 155-211; ICRC 2016 Commentary to GC1 (n 254) art 3 paras 422-37.

<sup>275</sup> Clapham, 'Human Rights Obligations of Non-State Actors' (n 3) 493, 496. The Ukrainian government, for example, referred to the deployment of its forces to the east of the country as an 'anti-terror' operation. See BBC News, 'Ukraine Says Donetsk "Anti-Terror Operation" Under Way' (16 April 2014) <[www.bbc.com/news/world-europe-27035196](http://www.bbc.com/news/world-europe-27035196)> accessed 5 June 2020.

<sup>276</sup> ICRC 2016 Commentary to GC1 (n 254) art 3 paras 429-30.



That could be the case in respect of Turkey's support to the various militia groups responsible for the significant abuses against civilians during its incursion into northern Syria in October 2019.<sup>277</sup> Reporting indicates that the militias in receipt of Turkish support consisted of disparate armed groups, including some extremist units and others recruited as 'hired hands'.<sup>278</sup> Accordingly, it is far from certain that the militias possessed the requisite level of hierarchy and discipline to qualify as an organised armed group that was bound by IHL.<sup>279</sup>

Similar concerns arise regarding states' assistance to NSAs participating in internal disturbances that do not (yet) rise to the level of an armed conflict, such as Syria's support to the *Shabbiba*.<sup>280</sup> In such circumstances, the hostilities are governed not by IHL but by IHRL and the state's domestic law. Although commentators increasingly maintain that NSAs bear IHRL obligations, the law in this area remains underdeveloped.<sup>281</sup> It is distinctly unsatisfactory, however, simply to wait until a consensus is reached that NSAs are bound by IHRL before states are held accountable for their facilitation of conduct on the part of NSAs that states could not lawfully perform themselves.

A more effective rule, therefore, would be one that does not rely on the commission of an underlying international wrong by an NSA but holds states to account for their facilitation of conduct in breach of their own international legal obligations. Such a rule would better meet the object and purpose of the law of state responsibility and mean that a state truly 'cannot do by another what it cannot do by itself'.<sup>282</sup> The ICJ's judgment in *Bosnian Genocide* provides some support for this approach, given that the Court referred to Article 16 by analogy in the context of the FRY's potential complicity in the international crime of genocide, committed by the NSA's members, rather than the breach of an obligation that was binding on the NSA itself.<sup>283</sup>

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<sup>277</sup> See Ch 2 s 2.1.4.

<sup>278</sup> Tsurkov (n 107); Martin Chulov, 'Syria: Videos of Turkey-Backed Militias Show "Potential War Crimes"' (*The Guardian*, 26 October 2019) <[www.theguardian.com/world/2019/oct/26/syria-turkey-arab-videos-torture-kurdish-bodies-militia](http://www.theguardian.com/world/2019/oct/26/syria-turkey-arab-videos-torture-kurdish-bodies-militia)> accessed 5 June 2020.

<sup>279</sup> ICRC 2016 Commentary to GC1 (n 254) art 3 para 429. See also Annyssa Bellal, 'ICRC Commentary of Common Article 3: Some Questions Relating to Organized Armed Groups and the Applicability of IHL' (*EJIL:Talk!*, 5 October 2017) <[www.ejiltalk.org/icrc-commentary-of-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl/](http://www.ejiltalk.org/icrc-commentary-of-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl/)> accessed 5 June 2020.

<sup>280</sup> See Ch 2 s 2.1.2.

<sup>281</sup> See eg Clapham, 'Human Rights Obligations of Non-State Actors' (n 3); Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups' (n 3); Fortin (n 3).

<sup>282</sup> ARSIWA (n 5) art 16 commentary para 6.

<sup>283</sup> *Bosnian Genocide* (n 14) [171]-[174]. See also Eatwell (n 159) ss 5.6-5.7.

Further support derives from general international law. The approach is arguably a natural extension of the notions of interdependence and solidarity that underlie the UN Charter and the Declaration on Friendly Relations.<sup>284</sup> It is bolstered, moreover, by scholars' interpretations of the principle of due diligence.<sup>285</sup> Thus, to breach this principle, a state's omission must relate to conduct that is 'contrary to the rights' of other states.<sup>286</sup> But although NSAs cannot normally violate other states' rights due to their lack of international legal personality, the principle is nonetheless deemed to apply when an NSA engages in conduct that would, if conducted by the territorial state, breach an obligation that state owes the target.<sup>287</sup>

If a state bears international responsibility when, through its omissions, it fails to exercise due diligence to stop an NSA's harmful conduct, common sense dictates that it should equally bear responsibility when it actively assists an NSA to behave in that manner. There is, accordingly, merit in examining whether the law of international responsibility could include a rule relating to state complicity in NSAs' conduct that does not derive from an internationally wrongful act in the terms conceived in Articles 1 and 2 ARSIWA.

### ***8.5.3 Complicity in the absence of an underlying internationally wrongful act***

In the early stages of the ILC's deliberations, Special Rapporteur Ago suggested a broader foundational article that did not necessarily attach international responsibility to the state that had committed the wrong in question.<sup>288</sup> Ago recognised that in some special cases, states' responsibility might be engaged in relation to the acts of others.<sup>289</sup> He proposed, therefore, that Article 1 should 'provide, in general, that every internationally wrongful act gives rise to international responsibility, without specifying that this responsibility necessarily attaches to the State which commits the wrongful act'.<sup>290</sup> The ILC ultimately rejected Ago's proposal due to the 'exceptional' nature of the

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<sup>284</sup> UN Charter (n 9); Friendly Relations Declaration (n 192).

<sup>285</sup> See Ch 6 s 6.4.

<sup>286</sup> *Corfu Channel* (n 144) [22]. See also Tallinn Manual 2.0 (n 28) r 6 commentary para 15.

<sup>287</sup> Tallinn Manual 2.0 (n 28) r 6 commentary para 22. See also Ch 6 s 6.4.

<sup>288</sup> Roberto Ago, 'Second Report on State Responsibility – The Origin of International Responsibility' (1970) UN Doc A/CN.4/233 186-87 para 29.

<sup>289</sup> *ibid.*

<sup>290</sup> *ibid.* Ago proposed that Article 1 should read, 'Every internationally wrongful act by a State gives rise to international responsibility'. See *ibid* 187 para 30.

cases it was designed to address.<sup>291</sup> Article 1 ARIO, however, bears some resemblance to Ago's original suggested wording.<sup>292</sup>

Adopted in 2011, ARIO reflects the recognition of IOs as additional subjects of international law.<sup>293</sup> ARIO departs from the strict inter-state notion of responsibility for complicity, providing not only for the responsibility of an IO that aids or assists a state or another IO in the commission of an internationally wrongful act,<sup>294</sup> but also for a state's responsibility when it assists an IO.<sup>295</sup> While Special Rapporteur Ago raised this basis of responsibility as an 'intellectually conceivable' possibility in 1979, he dismissed it on the grounds that 'there are no known cases in which this has actually happened and such cases are unlikely to occur in the future'.<sup>296</sup> These provisions of ARIO, therefore, represent the progressive development of the law of international responsibility.<sup>297</sup>

ARIO's foundational article is broader in scope than Article 1 ARSIWA, providing that the articles apply to 'the international responsibility of an international organization for an internationally wrongful act'.<sup>298</sup> This formulation allows an IO to bear responsibility not only for its own wrongful conduct but also for its contribution towards other actors' wrongs, such as its influence over the wrongful act of a state.<sup>299</sup> Thus, if an IO authorises member states to commit an act that would be internationally wrongful if committed directly by the IO and a state acts on that authorisation, the IO's responsibility is engaged.<sup>300</sup> Of note, in such circumstances, there is no requirement that the act in question is internationally wrongful for the state concerned.<sup>301</sup>

The ARIO commentary refers in this context to an observation made by the Austrian delegation during the debate in the Sixth Committee: 'an international organization should not be allowed to

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<sup>291</sup> Roberto Ago, 'Third Report on State Responsibility – The Internationally Wrongful Act of the State, Source of International Responsibility' (1971) UN Doc A/CN.4/246 and Add.1-3 213 para 47. See also Nataša Nedeski and André Nollkaemper, 'Responsibility of International Organisations "in Connection with Acts of States"' (2012) 9 Intl Organizations L Rev 33, 41-42; Nollkaemper and Jacobs (n 21) 381-82.

<sup>292</sup> ARIO (n 32) art 1(1).

<sup>293</sup> *ibid* art 2 commentary paras 7-10.

<sup>294</sup> *ibid* art 14. See generally Nedeski and Nollkaemper (n 291).

<sup>295</sup> ARIO (n 32) art 58.

<sup>296</sup> Ago's Eighth Report on State Responsibility (n 75) 5 para 3.

<sup>297</sup> ARIO (n 32) general commentary para 5.

<sup>298</sup> *ibid* art 1(1).

<sup>299</sup> *ibid* art 1 commentary para 4. See also Giorgio Gaja, 'Eighth Report on Responsibility of International Organisations' (2011) UN Doc A/CN.4/640 11 para 27; Nedeski and Nollkaemper (n 291) 42-43; Nollkaemper and Jacobs (n 21) 383.

<sup>300</sup> ARIO (n 32) art 17(2).

<sup>301</sup> *ibid* art 17(3).

escape responsibility by “outsourcing” its actors’.<sup>302</sup> In other words, an IO should not be permitted to take advantage of the separate legal personality of its members to avoid compliance with an international obligation.<sup>303</sup> While NSAs do not possess legal personality in the same manner as states or IOs, a clear analogy can be drawn to situations in which states facilitate NSAs’ commission of acts that those states could not lawfully commit via their own organs. The detention of ISIS fighters in northern Syria is a case in point. None of the states within the US-led coalition could lawfully detain those fighters in the poor conditions, without any fair trial guarantees, in which they are held by the SDF.<sup>304</sup>

Had a member of the anti-ISIS coalition caused an IO, rather than an NSA, to detain individuals in a manner that breached the state’s international legal obligations, ARIO provides for that state’s international responsibility to be engaged. Thus, according to Article 61, a state member of an IO incurs responsibility if it circumvents an international obligation to which it is subject by causing the IO to act in breach of that obligation, even if the act in question is not internationally wrongful for the IO.<sup>305</sup> Again, this provision is designed to address situations when a state avails itself of an IO’s separate legal personality to circumvent its own international obligations.<sup>306</sup> And notwithstanding NSAs’ lack of equivalent legal personality, there is no clear basis in law or policy why a state should not bear responsibility if achieves the same aim via an NSA.

The scope and content of this extended basis of responsibility relating to IOs remains underdeveloped.<sup>307</sup> Nonetheless, it serves as a potential model for the evolution of the law of state responsibility to hold states accountable in connection with NSAs’ harmful conduct. To mirror Article 61 ARIO, a state should incur responsibility if it circumvents an international obligation to

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<sup>302</sup> *ibid* art 17 commentary para 1 citing Official Records of the UNGA, Fifty-ninth Session, Sixth Committee, 22<sup>nd</sup> meeting (A/C.6/59/SR.22) para 24.

<sup>303</sup> ARIO (n 32) art 17 commentary para 4.

<sup>304</sup> See Ch 2 s 2.1.3. These conditions, together with the absence of any judicial guarantees, would likely violate states’ customary IHL obligations to treat detainees humanely and to afford them a fair trial. See ICRC Customary IHL Study (n 263) rr 87, 100. They would also violate states’ extraterritorial IHRL obligations. See eg ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 arts 9, 14. See also Silvia Borelli, ‘Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”’ (2005) 87 *Intl Rev Red Cross* 39; Dan E Stigall, ‘The Syrian Detention Conundrum: International and Comparative Legal Complexities’ (2020) 11 *Harvard Nat Security J* 54.

<sup>305</sup> ARIO (n 32) art 61.

<sup>306</sup> *ibid* art 61 commentary para 1.

<sup>307</sup> Pierre Klein, ‘The Attribution of Acts to International Organisations’ in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 306-07; Nedeski and Nollkaemper (n 291) 41-51; Nollkaemper and Jacobs (n 21) 383, 395.

which it is subject by causing an NSA to commit an act that, if committed by the state, would have constituted a breach of the obligation.<sup>308</sup> And this provision should apply whether or not the act in question is internationally wrongful for the NSA.<sup>309</sup>

A general rule of this nature is desirable as a matter of legal policy to underline the principle of *pacta sunt servanda*<sup>310</sup> and the importance of the legal obligations between states. Such a rule, moreover, would enhance states' broader compliance with international law by promoting both the stability of international relations and the integrity of treaty commitments.<sup>311</sup> If states cannot directly violate their international legal obligations, they should not be able to do so indirectly, via an NSA.

A provision modelled on Article 61 ARIO is, however, too narrow in scope to fully regulate states' dealings with NSAs engaged in armed conflict. This applies only if the act of the IO is 'caused by' the state,<sup>312</sup> thereby indicating a requirement for a direct causal relationship between the act of the state and the subsequent conduct of the IO. As discussed in Section 8.3.1, a rule regulating states' assistance to NSAs would be more effective if it encompassed not only assistance that causes the NSA's conduct but also aid that puts the NSA into a position whereby it is able to commit the relevant harms.

In other respects, however, Article 61 is overly broad. Like Article 16 ARSIWA, this applies to a state's conduct in causing or assisting a breach of any of its international legal obligations.<sup>313</sup> This is unnecessary when the focus is solely on regulating states' relations with NSAs in situations of armed conflict. Such a far-reaching rule fails to acknowledge the diverse contexts in which states engage with NSAs<sup>314</sup> or the varying importance of different international norms.<sup>315</sup>

#### **8.5.4 Interim conclusions**

The preceding analysis reveals that a simple extension of Article 16 ARSIWA to apply to states' assistance to NSAs is not a complete nor a straightforward solution to resolving the accountability

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<sup>308</sup> See ARIO (n 32) art 61(1).

<sup>309</sup> *ibid* art 61(2).

<sup>310</sup> See Vienna Convention on the Law of Treaties (n 52) art 26.

<sup>311</sup> Jackson, *Complicity in International Law* (n 4) 167.

<sup>312</sup> ARIO (n 32) art 61 commentary para 7.

<sup>313</sup> Nolte and Aust (n 40) 16-17; Aust (n 4) 239.

<sup>314</sup> See Nollkaemper and Jacobs (n 21) 421.

<sup>315</sup> Graefrath (n 13) 377; Jørgensen 'State Responsibility for Aiding or Assisting' (n 104) 730.

gap identified in earlier chapters. First, Section 8.3 demonstrates the difficulties arising from Article 16's constituent elements, which are so narrowly drawn as to present often insurmountable hurdles for injured states. Second, the ILC formulated the provision as a derivative form of responsibility that stems from a principal internationally wrongful act; a form of conduct that, according to ARSIWA, an NSA cannot commit.<sup>316</sup>

ARIO's provisions relating to the responsibility of IOs in connection with the acts of states, and vice versa, demonstrate the potential for a state's responsibility to be engaged in respect of its contribution towards an NSA's conduct, even if that conduct is not internationally wrongful for the NSA. This would negate the need for an underlying internationally wrongful act. However, a provision that simply mirrors Article 61 ARIO is not ideally suited to regulate states' assistance to NSAs in contemporary conflict due to its generality of application and its requirement for a direct causal relationship between the state's conduct and the NSA's wrong.<sup>317</sup> This potentially excludes many forms of state assistance that facilitate an NSA's harmful conduct from the rule's scope.

It is notable, moreover, that a rule that engages a state's 'direct responsibility' independently of a breach on the part of the assisted actor is effectively a primary norm of international law.<sup>318</sup> This raises questions whether such a rule should even form part of the general international law of state responsibility.<sup>319</sup> Given that primary norms already regulate states' conduct towards NSAs in armed conflict,<sup>320</sup> it is pertinent to consider whether the accountability gap is better addressed through a strengthening of these rules, rather than via the secondary rules of state responsibility.

## **8.6 Regulating states' assistance to non-state actors via primary norms**

Regulating states' dealings with NSAs via primary norms has certain advantages over reliance on a general complicity rule within the law of state responsibility.<sup>321</sup> First, primary norms are tailored to the context at issue. Rather than seeking to regulate complicity in a very broad range of circumstances, primary norms are narrower in focus, targeting specific state behaviour such as the

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<sup>316</sup> ARSIWA (n 5) art 2.

<sup>317</sup> See s 8.5.3.

<sup>318</sup> Jean d'Aspremont, 'The Articles on the Responsibility of International Organisations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 Intl Organizations L Rev 15, 24-25; Nedeski and Nollkaemper (n 291) 43-44; Shepson (n 162) 713-14, 727; Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 29.

<sup>319</sup> See Ch 1 s 1.2.1.

<sup>320</sup> See Ch 6.

<sup>321</sup> Jinks (n 76) 84; Plakokefalos (n 21) 588, 593.

use of force, or specific factual scenarios such as states' obligations during armed conflict. Second, in view of this specificity, alongside the importance of the interests that the relevant primary norms protect, their constituent elements can be more narrowly drawn and therefore more effective in regulating state behaviour.<sup>322</sup> It is the very generality of Article 16 ARSIWA that necessitates its stringent intent requirement and the close links between the state's assistance and the principal wrong.<sup>323</sup> Addressing states' support to NSAs via primary norms circumvents the need for an injured state to grapple with these requirements and allows a reliance on rules designed to meet the circumstances at hand.<sup>324</sup>

This section focuses on two of the primary norms addressed in Chapter 6, namely the duty to respect and ensure respect for IHL and the obligations on states arising under IHRL. In each case, the section examines the scope of the primary obligations imposed on states and whether these can be interpreted in a manner that heightens states' accountability in respect of the support they provide to NSAs.

### ***8.6.1 The duty to respect and ensure respect for IHL***

The analysis in Chapter 6 highlights the continuing debate among legal scholars in relation to CA1, particularly regarding the scope of the duty to ensure respect for IHL.<sup>325</sup> While a universal acceptance of the ICRC's broad construction of the norm would negate the need for any re-interpretation, the assertion that all states are bound by an obligation not only to ensure respect for IHL by their own organs and populations but also to bring other states and NSAs into compliance is not supported by the norm's drafting history or by subsequent state practice.<sup>326</sup> The focus of this section, therefore, is a more limited interpretation of CA1 and its customary equivalent. It addresses, first, the negative duties on states not to assist the commission of conduct in violation of IHL before turning to consider the issue of positive obligations.

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<sup>322</sup> Nolte and Aust (n 40) 16-17; André Nollkaemper, 'Complicity in International Law: Some Lessons from the US Rendition Program' in *Proceedings of the Annual Meeting (American Society of International Law) Vol 109, Adapting to a Rapidly Changing World* (CUP 2015) 180; Milanović 'Intelligence Sharing' (n 40) 1332-33.

<sup>323</sup> *ibid.* See also ILC YB 1999 vol I (n 11) 79 para 41 (comments of Mr Simma).

<sup>324</sup> Corten (n 47) 60, 72-83. See also Shaheed Fatima, 'Accountability for States' Assisting Other States' Wrongful Acts: The Superior Effectiveness of Human Rights Norms' (*Just Security*, 16 November 2016)

<[www.justsecurity.org/34479/accountability-states-assisting-states-wrongful-acts-superior-effectiveness-human-rights-norms/](http://www.justsecurity.org/34479/accountability-states-assisting-states-wrongful-acts-superior-effectiveness-human-rights-norms/)> accessed 24 June 2021.

<sup>325</sup> See Ch 6 s 6.6.

<sup>326</sup> *ibid.*

### 8.6.1.1 Negative aspects of the duty

While the application of CA1 to NIACs remains contested, it is clear from the ICJ's judgment in the *Nicaragua* case that the parallel provisions of customary international law impose obligations on states not to encourage NSAs engaged in a NIAC to act in violation of the provisions of CA3.<sup>327</sup> In this respect, therefore, the customary duty to respect and ensure respect for IHL is broader than Article 16 ARSIWA.<sup>328</sup> Not only does this encompass responsibility for a state's incitement of violations, which is excluded from the scope of Article 16,<sup>329</sup> it also applies to states' dealings with NSAs.<sup>330</sup>

The ICRC interprets this aspect of the *Nicaragua* judgment as giving rise to an obligation on states not to contribute towards IHL violations by other parties to a conflict.<sup>331</sup> A slightly wider interpretation of the ICJ's judgment is, however, possible. Thus, the ICJ did not refer specifically to the conflict parties in its judgment, but rather to 'persons or groups engaged in the conflict in Nicaragua'.<sup>332</sup> As armed groups are the only NSAs that may be a party to a NIAC,<sup>333</sup> the ICJ's reference to 'persons' as well as groups suggests that the customary duty not to instigate IHL violations prohibits states from encouraging any NSA to act in a manner that would violate the state's own IHL obligations, whether or not that NSA is a party to the conflict.<sup>334</sup> This interpretation, moreover, accords with the object and purpose of the norm.<sup>335</sup> To paraphrase the ICRC, 'It would be contradictory if common Article 1 obliged the High Contracting Parties to "respect and ensure respect" by their own armed forces while allowing them to contribute to violations by [other actors engaged in] a conflict'.<sup>336</sup>

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<sup>327</sup> *Nicaragua* (n 98) [220], [255]. See also ICRC Customary IHL Study (n 263) r 144.

<sup>328</sup> See 2016 commentary to GC1 (n 254) art 1 para 160.

<sup>329</sup> ARSIWA (n 5) general commentary to Ch IV para 9.

<sup>330</sup> *Nicaragua* (n 98) [220], [255].

<sup>331</sup> 2016 commentary to GC1 (n 254) art 1 para 158.

<sup>332</sup> *Nicaragua* (n 98) [220], [255].

<sup>333</sup> 2016 commentary to GC1 (n 254) art 3 para 505-08.

<sup>334</sup> Catherine Drummond, 'Ensuring Respect for IHL by and in Relation to the Conduct of Private Actors' in Eve Massingham and Annabel McConnachie (eds), *Ensuring Respect for International Humanitarian Law* (Routledge 2021) 66.

<sup>335</sup> Matthias Herdegen, 'Interpretation in International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2015) paras 14-15.

<sup>336</sup> The ICRC's commentary reads, 'It would be contradictory if common Article 1 obliged the High Contracting Parties to "respect and ensure respect" by their own armed forces while allowing them to contribute to violations by *other Parties to a conflict*' (emphasis added). See 2016 commentary to GC1 (n 254) art 1 para 158.



It would be equally anomalous if the duty on states not to encourage NSAs to act in violation of IHL did not also extend to states' facilitation of such abuses through the provision of assistance.<sup>337</sup> While the ICRC characterises this obligation as falling within the negative duties imposed on states within the 'ensure respect' element of the norm,<sup>338</sup> it arguably forms part of states' duty to respect IHL through the conduct of their organs and agents. As such, the rule should clearly apply to NIACs as a natural extension of the customary duty identified by the ICJ in *Nicaragua*.<sup>339</sup> Thus, the duty to respect IHL necessarily implies a corresponding obligation on states not to knowingly facilitate or encourage IHL violations on the part of other actors, including NSAs. Iran, for instance, should not be able to lawfully support Shi'a militia groups operating in Syria in the knowledge that its assistance will be used in a manner that violates the state's obligations under IHL.<sup>340</sup>

The duty not to encourage IHL violations is particularly relevant when states, through their provision of assistance to NSAs, gain an enhanced ability to influence their conduct.<sup>341</sup> Russia, for instance, exerted a considerable degree of influence over the conduct of rebel fighters in the Donbas due to the rebels' dependence on Moscow for military support and equipment.<sup>342</sup> The ICRC recognised the significance of such relationships between states and NSAs in its 2016 commentary to CA1.<sup>343</sup> Similarly, the ICJ acknowledged the importance of the FRY's capacity to influence the conduct of the Republika Srpska in the *Bosnian Genocide* case, finding that the state's failure to exert that influence in preventing the genocide in neighbouring Bosnia engaged the state's international responsibility.<sup>344</sup>

Such relationships of influence are key to enhancing NSAs' compliance with norms of international law. If a state develops or sustains a relationship with an NSA engaged in armed conflict, thus

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<sup>337</sup> *ibid*; Olivier Corten and Vaïos Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of the *jus contra bellum* and *jus in bello*' (2013) 18 J Conflict and Security L 59, 84-85; Helmut Philipp Aust, 'Complicity in Violations of International Humanitarian Law' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015) 456-58.

<sup>338</sup> 2016 commentary to GC1 (n 254) art 1 paras 158-63.

<sup>339</sup> *Nicaragua* (n 98) [220], [255].

<sup>340</sup> See Ch 2 s 2.1.2. For analysis of this duty in the context of states' assistance to NSAs in Libya and Syria see Corten and Koutroulis (n 337) 85-91; Ruys, 'Of Arms, Funding and Non-Lethal Assistance' (n 206) 26-31.

<sup>341</sup> See ICRC Customary IHL Study (n 263) r 144.

<sup>342</sup> International Crisis Group, 'Russia and the Separatists in Eastern Ukraine' (*Europe and Central Asia Briefing* 79, 5 February 2016) 6 <<https://d2071andvip0wj.cloudfront.net/b79-russia-and-the-separatists-in-eastern-ukraine.pdf>> accessed 14 February 2018. See also Ch 2 s 2.2.

<sup>343</sup> 2016 commentary to GC1 (n 254) art 1 paras 165-167. See also ICRC, 'Allies, Partners and Proxies' (n 140).

<sup>344</sup> *Bosnian Genocide* (n 14) [434]. For a critique of the ICJ's conclusions, see *ibid* Declaration of Judge Skotnikov 379; Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 Eur J Intl L 695, 699-701.

furthering its own interests in the hostilities, the state's obligation to 'respect and ensure respect' for IHL should extend not only to its own armed forces, its population, and to other individuals or groups acting on its behalf, but also to any NSAs it supports.<sup>345</sup> While this interpretation may not have been contemplated by the parties to the Geneva Conventions at the time these were agreed,<sup>346</sup> an updated construction of the norm is required to ensure its effective operation in light of states' extensive use of proxies.<sup>347</sup> Accordingly, states should be bound to ensure respect for IHL on the part of any NSAs engaged in conflict that they assist, whether or not the recipient NSA is a party to the conflict. And in cases where such a supportive relationship exists, giving rise to an ability on the part of the state to influence the NSA's behaviour, the state should be subject to positive as well as negative obligations.<sup>348</sup>

#### *8.6.1.2 Positive aspects of the duty*

As outlined in Chapter 6, legal scholars hold divergent views regarding the meaning of the 'ensure respect' element of CA1.<sup>349</sup> Drawing upon the ICJ's judgment in the *Bosnian Genocide* case, however, there may be a sensible middle ground between the opposing positions. While the ICRC's assertion that states are subject to a duty to ensure the IHL compliance of all conflict parties is overly broad and somewhat unrealistic,<sup>350</sup> the same is not true if the duty is restricted to situations where a relationship of influence exists between a state and an NSA. Thus, as the United States' representative stated before the UN Security Council following reports of abuses during Turkey's October 2019 incursion into northern Syria, 'Turkey is responsible for ensuring that its forces *and any Turkish-supported entities* act in accordance with the law of armed conflict'.<sup>351</sup>

In common with many instances of state support to NSAs, Turkey provided assistance to militias based outside its borders, in neighbouring Syria.<sup>352</sup> To ensure the effectiveness of the 'ensure respect' obligation, therefore, the positive duties of due diligence it imposes should not depend upon a

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<sup>345</sup> Corten and Koutroulis (n 337) 86-87.

<sup>346</sup> See Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) YB of Intl Humanitarian L 3.

<sup>347</sup> Herdegen (n 335) para 30.

<sup>348</sup> *Wall Advisory Opinion* (n 170) [158]-[159]. See also Oona A Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 Texas L Rev 539, 569-74.

<sup>349</sup> See Ch 6 s 6.6.

<sup>350</sup> See 2016 commentary to GC1 (n 254) art 1 para 153. See also Ch 6 s 6.6.

<sup>351</sup> UNSC, '8645<sup>th</sup> Meeting' (24 October 2019) UN Doc S/PV.8645 10 (emphasis added).

<sup>352</sup> See Ch 2 s 2.1.4.

territorial link between the state and the NSA.<sup>353</sup> Instead, to follow the ICJ's judgment in the *Bosnian Genocide* case, the state's 'capacity to influence effectively' is key.<sup>354</sup> The ICJ highlighted a range of factors that might be considered when determining whether a state has the ability to influence another actor, including 'the geographical distance of the State concerned from the scene of the events, and ... the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events'.<sup>355</sup>

Taking such factors into account, Iran clearly has the capacity to influence the conduct of Hezbollah and the other Shi'a militia groups operating in Syria.<sup>356</sup> In fact, a similar ability is apparent in all the relationships outlined in Chapter 2. When a state assists an NSA, this typically generates a degree of dependence by the NSA on the state that the state can leverage to exert its influence over the NSA's conduct. Therefore, when a state chooses to assist an NSA engaged in conflict, in addition to its negative duty not to knowingly facilitate IHL abuses, the state should be subject to a positive duty to ensure that the NSA does not use that assistance in a manner that violates international law.<sup>357</sup> Or as the ICRC put it, states 'must exert their influence, to the degree possible, to stop violations of [IHL]'.<sup>358</sup>

The extent of that duty might differ, however, according to the strength of the state's relationship with the NSA concerned. As the ICJ acknowledged, a state's capacity to influence 'varies greatly from one State to another'.<sup>359</sup> Thus, when a state has a particularly strong relationship with an NSA, the steps it is expected to take might be greater than if its capacity to influence the NSA's conduct is relatively weak.<sup>360</sup> In Libya, for instance, Turkey exerted a greater degree of influence over the Syrian militias fighting in the conflict than over local Libyan militia groups due to its longstanding

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<sup>353</sup> The general principle of due diligence requires such a territorial link. See Ch 6 s 6.4.

<sup>354</sup> *Bosnian Genocide* (n 14) [430]. See also Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 96 *Intl Rev Red Cross* 707, 724-75; ICRC, 'Allies, Partners and Proxies' (n 140) 24-25, 53.

<sup>355</sup> *Bosnian Genocide* (n 14) [430].

<sup>356</sup> See Ch 2 s 2.1.2. See also Matthew Levitt and Bernard Gwertzman, 'The Hezbollah Connection in Syria and Iran' (*Council on Foreign Relations*, 15 February 2013) <[www.cfr.org/interview/hezbollah-connection-syria-and-iran](http://www.cfr.org/interview/hezbollah-connection-syria-and-iran)> accessed 25 April 2018.

<sup>357</sup> Monika Hakimi, 'State Bystander Responsibility' (2010) 21 *Euro J Intl L* 341, 362-67.

<sup>358</sup> ICRC Customary IHL Study (n 263) r 144.

<sup>359</sup> *Bosnian Genocide* (n 14) [430]. See also Hakimi 'State Bystander Responsibility' (n 357) 364; Monika Hakimi, 'Toward a Legal Theory on the Responsibility to Protect' (2014) 39 *Yale J Intl L* 247, 259; Hathaway and others, 'Ensuring Responsibility' (n 348) 573-74.

<sup>360</sup> Hathaway and others, 'Ensuring Responsibility' (n 348) 573-74.

relationship with the former and their considerable dependence on the state.<sup>361</sup> As such, Turkey should bear an enhanced duty to ensure such groups' IHL compliance, particularly in light of the previous abuses they committed in Syria, which put Turkey on notice of the militias' propensity to act in a manner that violates IHL.<sup>362</sup>

Further factors of relevance to a state's positive obligations are the severity of the IHL violation and the means available to the state.<sup>363</sup> These elements, as well as the state's ability to influence the NSA, impact the steps that might be feasible for the state to take to ensure the NSA's respect for IHL. Consider, for instance, the United States' support to the SDF relating to the detention of ISIS fighters.<sup>364</sup> If the state gains awareness that members of the SDF are mistreating detainees, this interpretation of CA1 would require the state to exercise due diligence to ensure that its assistance is not used in a manner that breaches IHL and to bring any violations to an end.<sup>365</sup> Feasible steps to fulfil this obligation might include investigating the allegations, monitoring the SDF's conduct to ensure that the mistreatment is not repeated, and requiring the SDF guard force to undertake training in detainee handling.<sup>366</sup>

In addition, as discussed in Section 8.3.2, the proper regulation of states' assistance to NSAs should require states to assess the risks relating to their proposed support before providing any material or other aid to NSAs engaged in conflict. A requirement for all states to adopt such measures would be a welcome development *lex ferenda* to enhance the effective regulation of states' relations with NSAs.

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<sup>361</sup> Tom Allinson and Abderrahmane Ammar, 'Libya: Are Turkey's Syrian Mercenaries a New Threat?' (*Deutsche Welle*, 11 February 2020) <[www.dw.com/en/libya-are-turkeys-syrian-mercenaries-a-new-threat/a-52329943](http://www.dw.com/en/libya-are-turkeys-syrian-mercenaries-a-new-threat/a-52329943)> accessed 17 February 2020.

<sup>362</sup> See s 8.3.2.

<sup>363</sup> 2016 Commentary to GC1 (n 254) art 1 para 165.

<sup>364</sup> See Ch 2 s 2.1.3.

<sup>365</sup> Jonathan Horowitz, 'Kurdish-Held Detainees in Syria Are Not in a "Legal Gray Area"' (*Just Security*, 13 April 2018) <[www.justsecurity.org/54866/kurdish-held-detainees-syria-legal-gray-area/](http://www.justsecurity.org/54866/kurdish-held-detainees-syria-legal-gray-area/)> accessed 3 June 2020.

<sup>366</sup> For further examples of positive steps states could take to ensure their partners' international law compliance see Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 37-44; ICRC, 'Allies, Partners and Proxies' (n 140); American Bar Association's Center for Human Rights & Rule of Law Initiative, 'The Legal Framework Regulating Proxy Warfare' (December 2019) 29, 37-39 <[www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-proxy-warfare-report-2019.pdf](http://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf)> accessed 23 December 2020; Brian Finucane, 'Partners and Legal Pitfalls' (2016) 92 *Intl L Studies* 407, 425-30.

## 8.6.2 *International human rights law*

IHRL similarly imposes positive duties of due diligence on states in respect of their relations with NSAs.<sup>367</sup> As the analysis in Chapter 6 highlights, such duties are particularly relevant when states provide extraterritorial support to a local administration, as Russia does in eastern Ukraine, or when states support NSAs operating within their own borders or in territory under their control.<sup>368</sup>

In the latter context, Chapter 6 addresses the potential development of a *lex specialis* standard of attribution within IHRL.<sup>369</sup> But the attribution of an NSA's conduct to a state based solely on the state's complicity in the harm is undesirable.<sup>370</sup> As discussed in Section 8.5.1, states should, as a matter of principle, bear responsibility only for conduct that can be properly categorised as their own. Attribution to a state in circumstances where it has merely facilitated wrongful conduct 'is to adopt an anachronistic world-view that assumes that States are the only real actors on the world stage'.<sup>371</sup> Moreover, as Milanović observes, 'there is an inherent value in having general, coherent secondary rules of attribution which apply irrespective of the primary rules that are being applied', in order to enhance the systemic character of international law and reduce its fragmentation.<sup>372</sup>

Instead of either attributing private conduct to a state or holding states to account only in respect of their failure to exercise due diligence, there should be a middle ground whereby states are properly held accountable for their contributions towards NSAs' wrongs. This could be achieved through human rights bodies interpreting the respective treaties as imposing a negative obligation on states parties not to facilitate IHRL violations on the part of other actors.<sup>373</sup> Thus, the obligation on parties to the ECHR to 'secure to everyone within their jurisdiction the rights and freedoms' defined therein<sup>374</sup> should be interpreted as not only prohibiting states from infringing such rights directly

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<sup>367</sup> See Ch 6 s 6.5.

<sup>368</sup> *ibid.*

<sup>369</sup> See Ch 6 s 6.5.2.

<sup>370</sup> Jackson, *Complicity in International Law* (n 4) 197-98.

<sup>371</sup> Becker (n 230) 261.

<sup>372</sup> Marko Milanović, 'Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum' (*EJIL:Talk!*, 21 February 2010) <[www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/](http://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/)> accessed 12 June 2020. See also Jackson, *Complicity in International Law* (n 4) 197.

<sup>373</sup> Jackson, *Complicity in International Law* (n 4) 198.

<sup>374</sup> ECHR (adopted 4 November 1950, entered into force 3 September 1953) art 1. See also ICCPR (n 304) art 2(1); American Convention on Human Rights (adopted 22 November 1969, entered into force 27 August 1979) 1144 UNTS 123 art 1(1).

through the actions of their organs, but also from violating Convention rights indirectly through the facilitation of such breaches by NSAs.<sup>375</sup>

Given the frequency with which states act through NSAs, such an interpretation promotes human rights treaties' effective implementation<sup>376</sup> and in the case of the ECHR, it accords with the Convention's status as a 'living instrument' that 'must be interpreted in the light of present-day conditions'.<sup>377</sup> Such an interpretation is, moreover, consistent with the manner in which human rights bodies have construed other IHRL norms. A useful precedent in this context is the development of the principle of *non-refoulement*, which imposes a negative obligation on states not to transfer or deport individuals to a location in which they could face a real risk of inhuman or degrading treatment.<sup>378</sup> In *Soering v United Kingdom*, the European Court found that the ECHR imposes this duty<sup>379</sup> notwithstanding the wording of Article 3 ECHR, which merely provides 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.<sup>380</sup>

In reaching this conclusion, the ECtHR noted that 'It would hardly be compatible with the underlying values of the Convention ... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture'.<sup>381</sup> Accordingly, although extradition in such circumstances is not explicitly prohibited in the text of Article 3 ECHR, 'it would plainly be contrary to the spirit and intent of the Article' if this were to take place.<sup>382</sup> A similar prohibition has been read into Article 7 of the ICCPR.<sup>383</sup>

The development of the principle of *non-refoulement* demonstrates how human rights bodies have interpreted the obligation not to torture individuals or subject them to cruel, inhuman or degrading treatment as imposing a negative duty on states not to deport or extradite individuals when this will

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<sup>375</sup> Jackson, *Complicity in International Law* (n 4) 198.

<sup>376</sup> Herdegen (n 335) para 30.

<sup>377</sup> ECtHR *Tyrer v United Kingdom* (25 April 1978) App No 5856/72 [31]; ECtHR *Loizidou v Turkey* (Preliminary Objections) (23 March 1995) Case No 40/1993/435/514 [71]. See also Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 Eur J Intl L 817, 825.

<sup>378</sup> Jackson, *Complicity in International Law* (n 4) 198-99; Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 27-28.

<sup>379</sup> ECtHR *Case of Soering v United Kingdom* (7 July 1989) App No 14038/88 [91].

<sup>380</sup> ECHR (n 374) art 3.

<sup>381</sup> *Soering* (n 379) [88].

<sup>382</sup> *ibid.*

<sup>383</sup> UN HRCtee, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (10 March 1992) para 9. See also Convention Against Torture (n 10) art 3(1).

give rise to a real risk of such treatment.<sup>384</sup> The principle, moreover, can be viewed as a prohibition of one state's assistance to another in the commission of a particular type of international law violation, namely torture or inhumane treatment.<sup>385</sup> It is paradoxical, however, that a state's obligation not to deport or expel a person to a country where that person risks being tortured does not extend to an obligation not to facilitate torture.<sup>386</sup> Thus, the effective implementation of IHRL requires that the obligation to respect, protect, and fulfil human rights should be interpreted as incorporating a duty on states not to assist the commission of human rights violations by other actors, including by NSAs.<sup>387</sup>

Consider, for instance, the arms and other assistance the Assad regime provided to the *Shabbiha* in the early stages of the Syrian conflict, which enabled the group to crush anti-government demonstrations.<sup>388</sup> Under existing interpretations of IHRL, Syria might be held to account in respect of its organs' failure to protect civilians from the *Shabbiha's* abuses in accordance with its positive duties under the ICCPR.<sup>389</sup> There is, however, a significant difference in terms of culpability between a state's failure to protect civilians from harm and its provision of assistance to a militia in the knowledge that the group will use that support to kill and injure protesters.<sup>390</sup> An interpretation of IHRL in the manner outlined above would allow human rights bodies to properly reflect that difference in its decisions and in the reparations awarded.<sup>391</sup>

Such an interpretation, however, would only apply where the victims of the NSA's conduct fall within the state's jurisdiction.<sup>392</sup> A significant limitation of IHRL as a means of regulating states' assistance to NSAs is thus its territorial reach.<sup>393</sup> But there are indications that human rights bodies' approach to the issue of extraterritorial jurisdiction may be changing. Traditionally, jurisdiction is established either when the victim is located in an area under the state's control, or when that

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<sup>384</sup> Jackson, *Complicity in International Law* (n 4) 199. But see Hakimi, 'State Bystander Responsibility' (n 357) 366, arguing that the principle of *non-refoulement* falls within states' positive obligations to protect.

<sup>385</sup> Aust (n 4) 224-25; Moynihan, 'Challenges in Armed Conflict and Counterterrorism' (n 20) 27-28.

<sup>386</sup> Gibney, Tomaševski and Vedsted-Hansen (n 132) 268; Jackson, 'Freeing Soering' (n 377) 823-25.

<sup>387</sup> Jackson, *Complicity in International Law* (n 4) 199; Milanović 'Intelligence Sharing' (n 40) 1338-48.

<sup>388</sup> UNHRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (23 November 2011) UN Doc A/HRC/S-17/2/Add.1 6 para 20. See also Ch 2 s 2.1.2.

<sup>389</sup> ICCPR (n 304) art 2(1). See also Ch 6 s 6.5.

<sup>390</sup> Jackson, *Complicity in International Law* (n 4) 197.

<sup>391</sup> Milanović, 'Intelligence Sharing' (n 40) 1348.

<sup>392</sup> See Ch 6 s 6.5.

<sup>393</sup> Milanović, 'Intelligence Sharing' (n 40) 1350-56.

individual is under the authority or control of a state official.<sup>394</sup> In General Comment No. 36, however, the Human Rights Committee advocated for a broader model of extraterritoriality whereby state parties to the ICCPR are under an obligation to respect and ensure the right to life of all persons ‘over whose enjoyment of the right to life it exercises power or effective control’.<sup>395</sup> This functional approach focuses not on states’ exercise of control over persons or territory but rather on their capacity to fulfil their negative and positive human rights obligations.<sup>396</sup>

A UN Special Rapporteur relied on this approach when reporting on the position of foreign terrorist fighters and their families in northern Syria.<sup>397</sup> Finding that the conditions in the detention camps run by the SDF amount to torture and inhuman and degrading treatment, the Rapporteur asserted that a number of states ‘may exercise de facto or constructive jurisdiction over the conditions of their nationals held in camps specifically because they have the practical ability to bring the detention and attendant violations to an end through repatriation...’<sup>398</sup> Thus, since states have the capacity to bring human rights violations relating to their nationals in the camps to an end, it is argued that states are under a positive obligation to do so.

If adopted more widely, this theory of extraterritoriality might capture many instances of states’ assistance to NSAs located outside their territory. Potentially, it could require states to conform to IHRL standards wherever in the world they operate, whenever they may reasonably do so.<sup>399</sup> The precise obligations to which states are subject would vary, however, according to their activities in the territory concerned.<sup>400</sup> If the state acts in that location primarily through NSAs, its capacity to influence those NSAs might, once again, impact the duties to which it is subject.<sup>401</sup> For instance,

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<sup>394</sup> UN HRCtee, ‘General Comment No 31 The Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 10. See also Ch 6 s 6.5.

<sup>395</sup> UN HRCtee, ‘General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life’ (30 October 2018) para 63. See also Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 *Law and Ethics of Human Rights* 47; Basak Çali, ‘Has “Control Over Rights Doctrine” for Extraterritorial Jurisdiction Come of Age? Karlsruhe Too, Has Spoken, Now it’s Strasbourg’s Turn’ (*EJIL:Talk!*, 21 July 2020) <[www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/](http://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/)> accessed 2 July 2021.

<sup>396</sup> Shany (n 395).

<sup>397</sup> UNGA, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Fionnuala Ní Aoláin’ (3 September 2020) UN Doc A/75/337 19-21 paras 37-41.

<sup>398</sup> *ibid* 19 para 38; See also Helen Duffy, ‘Communications No 79/2019 and 109/2019 LH et al v France and 77/2019 FB et al v France’ (*Leiden Children’s Rights Observatory*, March 2021) <[www.childrensrighsobservatory.nl/case-notes/casenote2021-3](http://www.childrensrighsobservatory.nl/case-notes/casenote2021-3)> accessed 24 August 2021.

<sup>399</sup> Shany (n 395) 57.

<sup>400</sup> *ibid*.

<sup>401</sup> *Bosnian Genocide* (n 14) [430]. See also s 8.5.1.



because of its relationship with the SDF, the United States could be subject to an enhanced duty to respect and protect the human rights of individuals in SDF detention.<sup>402</sup> But as at the date of writing, it remains uncertain both whether this approach will be followed by other human rights bodies such as the ECtHR or what the full impact could be on states' dealings with NSAs.

## 8.7 Conclusion

International law developed historically to address the horizontal relations between states and remains ill-adapted today to adequately deal with states' contributions towards the wrongs of other actors.<sup>403</sup> The issue is particularly acute when considering states' dealings with NSAs, which are not treated as subjects of international law. But given the reality of states' prevalent assistance to NSAs in contemporary conflict, it is inappropriate to limit state responsibility to the rare situations when an NSA's conduct is attributable to a state. International law should properly hold states to account when they facilitate wrongful conduct on the part of NSAs and thereby close the accountability gap that emerges between the application of the stringent attribution standards and the responsibility that arises under nebulous primary norms of international law.

That aim could be achieved, in part, through extending the current complicity provisions in ARSIWA to encompass states' assistance to NSAs. While the ICJ's judgment in the *Bosnian Genocide* case provides a clear foundation for this development, a review of state practice and governmental statements reveals that states' assistance to NSAs is predominantly denounced in the context of primary norms of international law such as the prohibition on the use of force. Moreover, it is primary norms rather than the secondary rules of state responsibility that can most effectively regulate states' behaviour by, for example, requiring states to assess the risks associated with the assistance they provide.<sup>404</sup> IHRL is particularly important in this respect, given its dedicated enforcement mechanisms that allow individuals who have been harmed by an NSA's conduct to invoke the international responsibility of complicit states.<sup>405</sup>

Primary norms of international law are therefore key to the regulation of states' support to NSAs. Both IHRL and the duty to respect and ensure respect for IHL should be interpreted to impose a

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<sup>402</sup> Shany (n 395) 69-70.

<sup>403</sup> Nollkaemper and Jacobs (n 21) 436.

<sup>404</sup> See s 8.3.2.

<sup>405</sup> Milanović 'Intelligence Sharing' (n 40) 1339.

negative duty on states not to assist NSAs to violate norms to which the state, itself, is bound. But holding states to account after they have facilitated abuses by an NSA tackles only part of the problem.<sup>406</sup> Thus, these norms should additionally require states that choose to act through NSAs to take positive steps to prevent abuses, such as by conditioning their aid on the NSA's compliance with IHL.

To the extent that Articles 16 and 41(2) ARSIWA apply to situations that are not addressed by primary norms, they should regulate states' aid or assistance to NSAs. It is immaterial whether the existing norms that underlie those provisions are extended to encompass states' aid or assistance to NSAs or whether new rules develop to this effect. In either case, the desired outcome would be achieved, namely, ensuring that states' support to NSAs is subject to an equivalent degree of regulation as their assistance to other states. Like Articles 16 and 41(2), these provisions should operate not as rules of attribution but should hold states to account for their own contributions towards an NSA's wrongs. In this way, they would strike a balance between the need to regulate states' assistance to NSAs in contemporary conflict and the reality that NSAs are often powerful actors in their own right that frequently act with considerable autonomy on the world stage.

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<sup>406</sup> Boivin (n 46) 496.

## Chapter 9 – Conclusion

States have used proxies to pursue their national security and foreign policy goals for centuries and the practice continues unabated today. This study has focused on three contemporary conflicts in which states' support to NSAs is particularly apparent.<sup>1</sup> But examples abound across the globe, ranging from Libya,<sup>2</sup> to Yemen,<sup>3</sup> to Chad.<sup>4</sup> The reality is that states frequently choose to engage in conflict via NSAs and in so doing, they often avoid responsibility for acts that would be deemed unlawful if committed directly, via their own organs of state.

This final chapter draws together the various strands of argument raised in the preceding analysis to accentuate the study's central thesis: there is a gap in accountability regarding states' use of proxies that international law must evolve to address. It first appraises the parameters of the problem before exploring the future of proxy warfare, to highlight why this issue will only become more pressing in the years to come. Thereafter, the chapter reviews the changes required to narrow the accountability gap and considers how the law could evolve, given the fragmented international order and states' reluctance to agree to further regulation regarding their dealings with NSAs.

### 9.1 International law's deficiency in addressing the challenges posed by non-state actors

International law is founded upon the supremacy of states. But as the contemporary conflicts outlined in Chapter 2 clearly demonstrate, states are not the only actors of importance in situations of armed conflict, or on the wider world stage. NSAs are gaining in power, authority, and levels of autonomy. In conflict situations, they frequently challenge states for control over their territories and populations. And while it is true that NSAs often benefit from the support of one or more states, it cannot be assumed that the state is always the dominant party in such relationships.

The law of state responsibility, as reflected in ARSIWA, fails to reflect this reality. After half a decade of work by the ILC, the draft articles were adopted at a time when the power of NSAs was

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<sup>1</sup> See Ch 2.

<sup>2</sup> Alia Brahimi, 'Libya has a Mercenaries Problem. It's Time for the International Community to Step Up' (*Atlantic Council*, 21 May 2021) <[www.atlanticcouncil.org/blogs/menasource/libya-has-a-mercenaries-problem-its-time-for-the-international-community-to-step-up/](http://www.atlanticcouncil.org/blogs/menasource/libya-has-a-mercenaries-problem-its-time-for-the-international-community-to-step-up/)> accessed 11 July 2021.

<sup>3</sup> Michael Knights, 'The Houthi War Machine: From Guerrilla War to State Capture' (*CTC Sentinel*, September 2018) <<https://ctc.usma.edu/houthi-war-machine-guerrilla-war-state-capture/>> accessed 15 September 2019.

<sup>4</sup> Samer al-Atrush and Jane Flanagan, 'Chad Rebels Trained by Russia March on Heart of Africa' (*The Times*, 23 April 2021) <[www.thetimes.co.uk/article/chad-rebels-trained-by-russia-march-on-heart-of-africa-n8gzkgk0q](http://www.thetimes.co.uk/article/chad-rebels-trained-by-russia-march-on-heart-of-africa-n8gzkgk0q)> accessed 24 May 2021.

plain for all to see, shortly after the tragedy of 9/11. At that time, the primacy of states was already in decline.<sup>5</sup> Yet, the articles are state-centric in their focus. They create a strict public private divide and fail to account for the myriad ways in which states might contribute towards NSAs' wrongs.<sup>6</sup>

This is evident in ARSIWA's failure to include any provision to account for states' complicity in the harmful conduct of NSAs.<sup>7</sup> It is equally apparent in the predominant interpretation of the rules of attribution. These either allow the state to determine the status of the entity concerned via its own domestic law or they require evidence of an agency relationship, in which the NSA is subordinate to the state and does its bidding.<sup>8</sup> But as the preceding analysis demonstrates, states frequently empower entities to act via informal means that do not obviously accord with their internal laws.<sup>9</sup> And the relationships between states and NSAs often do not feature the requisite degree or quality of control to satisfy the stringent attribution thresholds.<sup>10</sup>

Of the many contemporary conflict scenarios arising in the case studies outlined in Chapter 2, the relevant NSA's conduct would likely be attributable to its state sponsor in only a small proportion of cases.<sup>11</sup> Frequently, the available evidence relates to the support the state provides to the NSA rather than its exercise of control, meaning that injured states are faced with often-insurmountable evidential hurdles. Thus, the delicate balance that must be struck by the rules of attribution when delineating the public private divide is off kilter.<sup>12</sup> Put differently, the rules fail to attribute private conduct to a state in all the circumstances in which it is appropriate to do so. This means that despite perhaps significant state involvement in the harmful conduct at issue, it remains private in character and cannot engage the responsibility of the state.

Primary norms have an important role to play in holding states to account for their own conduct when engaging with NSAs.<sup>13</sup> But the analysis in Chapter 6 reveals that these do not apply consistently to all instances of state support to NSAs in situations of conflict. Their importance in closing the accountability gap is diminished further due to continued ambiguity regarding their

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<sup>5</sup> Vaughan Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 *Japanese J Intl L* 1, 2.

<sup>6</sup> See Ch 7.

<sup>7</sup> See Ch 8.

<sup>8</sup> See Ch 7 s 7.1.2.

<sup>9</sup> See Ch 4 s 4.4; Ch 7 s 7.1.2.

<sup>10</sup> See Ch 3; Ch 5.

<sup>11</sup> See Chs 3-5.

<sup>12</sup> See Ch 7 s 7.1.2.

<sup>13</sup> See Ch 6.

scope, as well as the more limited means of redress that an injured state might be able to recover following their breach.<sup>14</sup> Thus, an accountability gap persists, which acts as an incentive to states to promote their foreign policy and national security goals via proxy, rather than acting directly via their own organs of state.

## 9.2 The future of proxy warfare

The factors that encourage states to act via proxy today are only likely to augment in the future. NSAs are becoming increasingly dominant in the territories in which they operate, filling power vacuums and acting in a state-like manner following governmental collapse or withdrawal.<sup>15</sup> In the years to come, powerful NSAs will continue to undermine the authority of weaker governments, thereby challenging states' monopoly on the use of force.<sup>16</sup> This reality will lead external states to intervene to exert whatever influence they can over the NSAs concerned.<sup>17</sup>

Even in the absence of territorial control, the relative power of NSAs is likely to augment as they gain access to new technologies.<sup>18</sup> In some cases, NSAs may be able to obtain these directly from commercial providers.<sup>19</sup> But just as Iran supplies the Houthis with advanced weaponry for use in targeting Saudi Arabia,<sup>20</sup> NSAs are likely to receive the most sophisticated equipment from state donors.<sup>21</sup> Drone technology, for instance, will be used for advantage not only by states but also by

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<sup>14</sup> *ibid.*

<sup>15</sup> Shane R Reeves and Ronald T P Alcalá, 'Five Legal Takeaways from the Syrian War' (*Harvard Nat Sec J Online*, 30 September 2019) 4-6 <[https://harvardnsj.org/wp-content/uploads/sites/13/2020/04/Reeves-Alcala\\_Five-Legal-Takeaways-from-the-Syrian-War\\_FINAL.pdf](https://harvardnsj.org/wp-content/uploads/sites/13/2020/04/Reeves-Alcala_Five-Legal-Takeaways-from-the-Syrian-War_FINAL.pdf)> accessed 24 December 2020.

<sup>16</sup> Andreas Krieg and Jean-Marc Rickli, 'Surrogate Warfare: The Art of War in the 21<sup>st</sup> Century?' (2018) 18 *Defence Studies* 113, 119-21.

<sup>17</sup> Eric Robinson, 'The Missing, Irregular Half of Great Power Competition' (*Modern War Institute*, 8 September 2020) <<https://mwi.usma.edu/the-missing-irregular-half-of-great-power-competition/>> accessed 11 July 2021.

<sup>18</sup> US Department of Defense, 'Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge' (undated but released January 2018) 3 <<https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>> accessed 10 July 2021; Reeves and Alcalá (n 15) 6-8.

<sup>19</sup> Linda Schlegel, 'Interview: Rising Drone Capabilities of Non-state Actors' (*Global Risk Insights*, 17 April 2018) <<https://globalriskinsights.com/2018/04/interview-risk-non-state-actor-drone-capabilities/>> accessed 11 July 2021.

<sup>20</sup> Los Angeles Times, 'Devices Found in Missiles and Drones Link Iran to Attacks, Reports Say' (19 February 2020) <[www.latimes.com/world-nation/story/2020-02-19/devices-found-in-missiles-yemen-drones-link-iran-to-attacks](http://www.latimes.com/world-nation/story/2020-02-19/devices-found-in-missiles-yemen-drones-link-iran-to-attacks)> accessed 17 June 2020; US Embassy & Consulates in Saudi Arabia, 'Statement by Secretary Michael R Pompeo: Iran-backed Houthi Attacks Against Saudi Arabia' (29 October 2020) <<https://sa.usembassy.gov/iran-backed-houthi-attacks-against-saudi-arabia/>> accessed 25 June 2021.

<sup>21</sup> Itamar Lifshitz and Ayal Meents, 'The Paradox of Precision: Nonstate Actors and Precision-Guided Weapons' (*War on the Rocks*, 17 November 2020) <<https://warontherocks.com/2020/11/the-paradox-of-precision-nonstate-actors-and-precision-guided-weapons/>> accessed 7 November 2021.

their proxies in battlefields across the world.<sup>22</sup> States will share intelligence, including satellite imagery, with NSAs.<sup>23</sup> And in the future, states might additionally distribute more innovative technology to their proxies such as robotic and autonomous systems.

NSAs' use of new technologies is likely to increase the difficulties faced by injured states in grappling with the issue of attribution. If an indiscriminate attack is launched via munitions released from a drone swarm, for example, it might be particularly challenging for the injured state to identify the actor responsible for the harm. Attribution is equally problematic in the cyber domain, where states will continue to operate via NSAs to disrupt and degrade their adversaries' capabilities.<sup>24</sup>

States such as Russia have already demonstrated the utility of cyber and influence campaigns in undermining adversaries while maintaining plausible deniability.<sup>25</sup> And the perceived benefits of using proxies outlined in Chapter 1<sup>26</sup> may become yet more pressing in the coming era of great-power competition.<sup>27</sup> As the rivalry between Russia, China and the United States grows, so does the appeal of proxy warfare as a means by which the powers and their allies can compete while avoiding direct confrontation.<sup>28</sup> Irregular methods of operating are therefore likely to feature heavily in future, with the great powers relying frequently on hackers, PMSCs, and other NSAs to achieve their goals.<sup>29</sup>

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<sup>22</sup> James Marson and Brett Forrest, 'Armed Low-Cost Drones, Made by Turkey, Reshape Battlefields and Geopolitics' (*The Wall Street Journal*, 3 June 2021) <[www.wsj.com/articles/armed-low-cost-drones-made-by-turkey-reshape-battlefields-and-geopolitics-11622727370](http://www.wsj.com/articles/armed-low-cost-drones-made-by-turkey-reshape-battlefields-and-geopolitics-11622727370)> accessed 11 July 2021; Jane Arraf and Eric Schmitt, 'Iran's Proxies in Iraq Threaten US with More Sophisticated Weapons' (*The New York Times*, 4 June 2021) <[www.nytimes.com/2021/06/04/world/middleeast/iran-drones-iraq.html](http://www.nytimes.com/2021/06/04/world/middleeast/iran-drones-iraq.html)> accessed 11 July 2021; Al Jazeera, 'Indian Air Force Base in Kashmir Hit by Explosions' (27 June 2021) <[www.aljazeera.com/news/2021/6/27/india-probes-suspected-use-of-drones-in-blast-at-jammu-air-base](http://www.aljazeera.com/news/2021/6/27/india-probes-suspected-use-of-drones-in-blast-at-jammu-air-base)> accessed 11 July 2021.

<sup>23</sup> Joby Warrick, 'Russia is Preparing to Supply Iran with an Advanced Satellite System that will Boost Tehran's Ability to Surveil Military Targets, Officials Say' (*The Washington Post*, 10 June 2021) <[www.washingtonpost.com/national-security/iran-russia-satellite/2021/06/10/d28978f0-c9ab-11eb-81b1-34796c7393af\\_story.html](http://www.washingtonpost.com/national-security/iran-russia-satellite/2021/06/10/d28978f0-c9ab-11eb-81b1-34796c7393af_story.html)> accessed 11 July 2021.

<sup>24</sup> Noëlle van der Waag-Cowling, 'Stepping into the Breach: Military Responses to Global Cyber Insecurity' (*ICRC*, 17 June 2021) <<https://blogs.icrc.org/law-and-policy/2021/06/17/military-cyber-insecurity/>> accessed 11 July 2021.

<sup>25</sup> Bilyana Lilly and Joe Cheravitch, 'The Past, Present, and Future of Russia's Cyber Strategy and Forces' (*NATO CCDCOE*, 2020) <[https://ccdcoe.org/uploads/2020/05/CyCon\\_2020\\_8\\_Lilly\\_Cheravitch.pdf](https://ccdcoe.org/uploads/2020/05/CyCon_2020_8_Lilly_Cheravitch.pdf)> accessed 12 July 2021. See also Ch 2 s 2.2.3.

<sup>26</sup> See Ch 1 s 1.1.1.

<sup>27</sup> Ronald O'Rourke, 'Renewed Great Power Competition: Implications for Defense – Issues for Congress' (*Congressional Research Service*, 8 July 2021) 1 <<https://fas.org/sgp/crs/natsec/R43838.pdf>> accessed 10 July 2021.

<sup>28</sup> C Anthony Pfaff and Patrick Granfield, 'How (Not) to Fight Proxy Wars' (*The National Interest*, 27 March 2018) <<https://nationalinterest.org/feature/how-not-fight-proxy-wars-25102>> accessed 21 December 2020.

<sup>29</sup> Robinson (n 17); Seth G Jones, 'The Future of Competition: US Adversaries and the Growth of Irregular Warfare' (*Center for Strategic & International Studies*, 4 February 2021) <[www.csis.org/analysis/future-competition-us-adversaries-and-growth-irregular-warfare](http://www.csis.org/analysis/future-competition-us-adversaries-and-growth-irregular-warfare)> accessed 11 July 2021; Dominic Tierney, 'The Future of Sino-US Proxy War' (*Texas*

Finally, just as NSAs will continue to play a key role in the hostilities of the future, so will they continue to act in a manner that potentially violates international law.<sup>30</sup> The alleged atrocities perpetrated by members of the Wagner Group in Syria, Libya, and the Central African Republic illustrate the point.<sup>31</sup> Conflicts involving NSAs frequently entail the widespread use of violence directed against civilians, exerted both for political and for criminal ends.<sup>32</sup> It is therefore imperative that when states facilitate those abuses, international law effectively holds them to account.

### 9.3 Addressing the gap in accountability

The preceding analysis illustrates the prevalence, both today and in the future, of states' harmful interactions with NSAs. The damaging effects of those interactions are experienced most directly by the civilians and persons *hors de combat* that fall victim to abuses on the part of states' proxies. But harms are caused equally to the wider international legal order. States that seek to evade their international obligations by operating through NSAs deprive those obligations of substance and ultimately weaken the entire framework of international law. To address such concerns, the required developments to the law are threefold: a more relaxed interpretation of the rules of attribution; a complicity rule that holds states to account when they facilitate harmful conduct on the part of NSAs; and a strengthening of relevant primary norms of international law.

#### 9.3.1 *A more relaxed interpretation of the rules of attribution*

The law of state responsibility would more effectively hold states to account when they act through NSAs if a greater range of private conduct could be attributed to a state and thereby engage the state's responsibility. In many situations arising in contemporary conflict, evidence of state involvement in the NSA's conduct that is sufficient to satisfy the relevant rules of attribution is

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*National Security Review*, March 2021) <<https://tnsr.org/2021/03/the-future-of-sino-u-s-proxy-war/>> accessed 13 July 2021.

<sup>30</sup> See Ch 1 s 1.1.2.

<sup>31</sup> Amy MacKinnon, 'New Report Exposes Brutal Methods of Russia's Wagner Group' (*Foreign Policy*, 11 June 2020) <<https://foreignpolicy.com/2020/06/11/russia-wagner-group-methods-bouta-killing-report/>> accessed 31 March 2021; Samy Magdy, 'US Military: Russian Mercenaries Planted Land Mines in Libya' (*The Washington Post*, 15 July 2020) <[www.washingtonpost.com/world/middle\\_east/us-military-russian-mercenaries-planted-land-mines-in-libya/2020/07/15/1e0f65ba-c69b-11ea-a825-8722004e4150\\_story.html](http://www.washingtonpost.com/world/middle_east/us-military-russian-mercenaries-planted-land-mines-in-libya/2020/07/15/1e0f65ba-c69b-11ea-a825-8722004e4150_story.html)> accessed 13 July 2021; Declan Walsh, 'Russian Mercenaries are Driving War Crimes in Africa, UN Says' (*The New York Times*, 27 June 2021) <[www.nytimes.com/2021/06/27/world/asia/russia-mercenaries-central-african-republic.html?referringSource=articleShare](http://www.nytimes.com/2021/06/27/world/asia/russia-mercenaries-central-african-republic.html?referringSource=articleShare)> accessed 9 July 2021.

<sup>32</sup> See Ch 1 s 1.1.2.

simply not available. This issue must be remedied in respect of all three rules examined in this study; lowering the attribution threshold relevant to just one of those rules would be of limited effect.

Although they can overlap, each of the attribution standards reflected in Articles 4, 5 and 8 ARSIWA has its own sphere of application. *De facto* state organ status relevant to Article 4 applies only to those entities that, in fact, act as organs of the state in everything they do.<sup>33</sup> If the test is satisfied, all the entity's conduct performed in that capacity is attributable to the state, including *ultra vires* acts.<sup>34</sup> Article 8, in contrast, looks to the state's level of influence over the particular conduct on the part of the NSA that potentially violates international law.<sup>35</sup> This narrow focus is then replicated in the effects of attribution. If the requirements of the rule are met, it is only the specific acts that were performed under the state's instructions, direction, or control that are attributable to the state. Any unauthorised conduct remains private in character and does not engage the state's responsibility.

Article 5, meanwhile, looks not for state control but rather for a delegation of public functions.<sup>36</sup> The rationale behind the rule is that when states choose to outsource governmental tasks to a private entity, they should bear responsibility for the entity's conduct when performing those functions even in the absence of state control, and even if the NSA acts in a manner that is *ultra vires*. But if the NSA performs other functions, either on its own account or for a private client, it is only the NSA's conduct in its public capacity that is attributable to the state.<sup>37</sup>

The three rules of attribution, therefore, are distinct in their respective focus and effects. And this distinction is important when considering the purpose of the rules, the interplay between them, and the tests that apply to determine their application. When assessing the rules in the round, one can agree with Milanović's observation that they are 'broadly speaking, good enough'.<sup>38</sup> In other words, they fulfil the task they are designed to perform, namely, to connect human conduct to the state for the purpose of determining that state's international responsibility. Moreover, there are no other circumstances, outside the rules reflected in ARSIWA, in which attribution is obviously

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<sup>33</sup> See Ch 3 s 3.3.

<sup>34</sup> See Ch 3 s 3.4.

<sup>35</sup> See Ch 5.

<sup>36</sup> See Ch 4.

<sup>37</sup> *ibid.*

<sup>38</sup> Marko Milanović, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *Intl L Studies* 295, 386.



appropriate.<sup>39</sup> There is no requirement, therefore, for a *lex specialis* standard of attribution that applies in conflict situations.<sup>40</sup>

It is apparent from the analysis in Chapters 3 to 5, however, that in the context of contemporary conflict, the rules reflected in Articles 4, 5 and 8 ARSIWA do not attribute private conduct to a state in all circumstances in which it is appropriate to do so. It is not the rules themselves that are problematic, but rather their predominant interpretation. In the case of Articles 4 and 8, it is the stringency of the respective control thresholds that presents the greatest difficulties. The tests formulated by the ICJ are so strict as to make the rules practically unworkable.<sup>41</sup> Chapter 7, therefore, proposes a more relaxed interpretation of the applicable control tests that would bring a greater range of private conduct within their scope.<sup>42</sup>

A less stringent interpretation of the test to determine *de facto* state organ status, for instance, would allow all pertinent features of the relationship between a state and an NSA to be considered, rather than focusing solely on the respective levels of dependence and control.<sup>43</sup> This approach should lead to attribution in cases where an NSA acts, in truth, as an organ of state, as the *Shabbiba* militia seemingly did in the early stages of the Syrian conflict.<sup>44</sup> A broader interpretation of effective control for the purposes of Article 8, meanwhile, would reduce the evidential burden on injured states by no longer requiring proof that the state directed or enforced the specific acts on the part of the NSA that violate international law.<sup>45</sup> Instead, evidence that the state was in a position of authority over the NSA, such that the NSA would act on its orders during the operation in which the violation was committed should suffice.

This loosening of the applicable control thresholds would be an important step forward in narrowing the gap in accountability. State control, however, is not always the most suitable basis of attribution. That is particularly the case when the NSA concerned is fighting purely for its state sponsor, rather than in pursuit of its own goals. The Syrian militias fighting for Turkey in the

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<sup>39</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in ILC YB 2001 vol II pt 2, 'Report of the ILC on the Work of its Fifty-third Session' UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) arts 9, 10, 11.

<sup>40</sup> See generally Milanović, 'Special Rules of Attribution' (n 38).

<sup>41</sup> See Ch 3 s 3.3.2; Ch 5 s 5.4.5.

<sup>42</sup> See Ch 7 ss 7.2.1, 7.2.3.

<sup>43</sup> See Ch 3 s 3.3; Ch 7 s 7.2.1.

<sup>44</sup> See Ch 2 s 2.1.2; Ch 3 s 3.3.2.

<sup>45</sup> See Ch 5 s 5.4; s 7 s 7.2.3.

conflicts in Libya and Nagorno-Karabakh provide a clear example.<sup>46</sup> Alternatively, consider the activities of the Wagner Group in promoting Moscow's interests across the globe,<sup>47</sup> or the Shi'a militias acting for Iran in Syria.<sup>48</sup> In all such cases, the respective states empowered the NSAs to perform combat functions on their behalf, yet they did not obviously do so in a manner that complied with their domestic laws. Thus, on the ILC's interpretation of the rule reflected in Article 5 ARSIWA, their conduct is not attributable to the state.

Chapter 7 argues that the rule expressed in Article 5 would better meet its object and purpose if evidence to satisfy the 'empowerment' criterion could be furnished through an assessment of the facts surrounding the state's relationship with the NSA rather than solely via the state's internal law.<sup>49</sup> Given states' increased propensity to outsource combat functions to PMSCs and militia groups, this would be a significant development in the law. It would not only lead to state responsibility in a wider range of circumstances but would also disrupt the perverse incentive that the rules of attribution currently promote for states to empower NSAs to act on their behalf but then distance themselves from those NSAs' activities so as not to exercise control.<sup>50</sup> While highly objectionable, this practice offers states the advantage both of plausible deniability and a minimised risk of attribution under the rule reflected in Article 8.

This more relaxed interpretation of the rule expressed in Article 5 might make state officials think twice before outsourcing combat functions to an undisciplined NSA. But if they decide, nevertheless, to proceed, the increased risk of state responsibility might encourage states to regulate those NSAs' activities more diligently. A state's exercise of control is often the most effective means

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<sup>46</sup> Dror Zeevi, 'Turkey Fuels Nagorno-Karabakh Conflict: Drones, Mercenaries and Dreams of Imperial Resurgence' (*Just Security*, 16 October 2020) <[www.justsecurity.org/72910/turkey-fuels-nagorno-karabakh-conflict-drones-mercenaries-and-dreams-of-imperial-resurgence/](http://www.justsecurity.org/72910/turkey-fuels-nagorno-karabakh-conflict-drones-mercenaries-and-dreams-of-imperial-resurgence/)> accessed 18 October 2020.

<sup>47</sup> Kimberley Marten, 'Russia's Use of Semi-State Security Forces: The Case of the Wagner Group' (2019) 35 *Post-Soviet Affairs* 181.

<sup>48</sup> Michael Knights, 'Iran's Foreign Legion: The Role of Iraqi Shiite Militias in Syria' (*The Washington Institute*, 27 June 2013) <[www.washingtoninstitute.org/policy-analysis/view/irans-foreign-legion-the-role-of-iraqi-shiite-militias-in-syria](http://www.washingtoninstitute.org/policy-analysis/view/irans-foreign-legion-the-role-of-iraqi-shiite-militias-in-syria)> accessed 27 June 2018.

<sup>49</sup> See Ch 7 s 7.2.2.

<sup>50</sup> Mark Gibney, Katarina Tomaševski and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harvard Human Rights J* 267, 286-87; Oona A Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 *Texas L Rev* 539.

by which to ensure that an NSA acts with discipline and in accordance with international law.<sup>51</sup> It is therefore a form of behaviour that the law should incentivise, not discourage.

### ***9.3.2 State responsibility for aid or assistance to non-state actors***

Attribution is appropriate only when the conduct at issue is clearly performed on behalf of a state.<sup>52</sup> But as the case studies in Chapter 2 illustrate, states' relationships with NSAs vary considerably and in many instances, states facilitate abuses on the part of NSAs in circumstances where their involvement in those acts is insufficient to justify legal attribution. This scenario may arise more frequently in future as the relative power and autonomy of NSAs continues to increase.

As outlined in Chapter 8, the ILC overlooked such forms of state complicity in NSAs' conduct in its work on state responsibility.<sup>53</sup> ARSIWA draws a strict line between public and private activity, by-passing entirely the possibility that states might contribute towards the wrongs perpetrated by actors other than states.<sup>54</sup> But the law did not cease its development with ARSIWA's adoption in 2001. Its continued evolution is demonstrated by the ILC's work on the responsibility of international organisations, which includes more extensive complicity provisions.<sup>55</sup> This is also apparent from the ICJ's judgment in *Bosnian Genocide* in which the Court applied Article 16 ARSIWA by analogy to a state's support to an NSA,<sup>56</sup> an approach that may be followed by other courts and tribunals in future.

Although it is not yet possible to conclude with certainty that ARSIWA's complicity provisions apply to states' aid or assistance to NSAs as a matter of *lex lata*,<sup>57</sup> they should apply to such circumstances *lex ferenda*. Notwithstanding NSAs' lack of legal personality, it makes little sense for the law to prohibit states from assisting other states to violate international law but to allow them to provide equivalent assistance to NSAs. That is particularly the case given the power and autonomy exercised by many NSAs and their growing propensity to act in a state-like manner. It does not matter

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<sup>51</sup> Erica L Gaston, 'Regulating Irregular Actors: Can Due Diligence Checks Mitigate the Risks of Working with Non-State and Substate Forces?' (*Global Public Policy Institute*, May 2021) 56 <<https://odi.org/en/publications/regulating-irregular-actors-can-due-diligence-checks-mitigate-the-risks-of-working-with-non-state-and-substate-forces/>> accessed 20 June 2021

<sup>52</sup> See Ch 8 s 8.5.1.

<sup>53</sup> See Ch 8 s 8.2.

<sup>54</sup> See Ch 7 s 7.1.1.

<sup>55</sup> See Ch 8 s 8.5.3.

<sup>56</sup> See Ch 8 s 8.4.2.

<sup>57</sup> See Ch 8 s 8.4.1.

whether an entirely new norm develops to address states' aid or assistance to NSAs or whether the norms that underlie Articles 16 and 41(2) ARSIWA evolve to the same effect. Either development is equally desirable in order that the law of state responsibility properly addresses states' contributions towards the harms perpetrated NSAs.

The effectiveness of any complicity provision is highly dependent, however, on the objective and subjective elements that govern its application.<sup>58</sup> These must be flexible enough to capture the offending state conduct but not so lax as to overly limit states' freedom of action and deter beneficial forms of state cooperation with NSAs, such as the United States' support to the SDF that facilitated the defeat of ISIS.<sup>59</sup> The disadvantage of a general complicity rule, modelled on Article 16 ARSIWA, is that the balance tips too far in favour of enabling states' assistance to NSAs; it is the very generality of this provision that leads to the strict interpretation of its constituent elements.<sup>60</sup> But in the context of states' support to NSAs engaged in conflict, the importance of the protected norms to the international community necessitates a more demanding complicity rule that holds states to account for a broader range of assistance to NSAs.<sup>61</sup> This, therefore, is better imposed by primary norms of international law.

### ***9.2.3 The role of primary norms***

Chapter 6 highlights the key role played by primary norms in regulating states' associations with NSAs in contemporary conflict. These norms are wide-ranging and include the prohibition on the use of force and the principle of due diligence, which imposes positive duties on states to take feasible steps to suppress wrongdoing by NSAs operating on territory under their control.<sup>62</sup> Importantly, primary norms hold states to account for their own organs' conduct in relation to the NSA concerned, meaning that they regulate states' behaviour towards NSAs without any requirement for injured states to cross the high evidential bar set by the strict attribution thresholds.

When considering states' facilitation of harmful conduct on the part of NSAs, one clear advantage of the complicity provisions within primary norms is their specific focus, tailored to particular types

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<sup>58</sup> See Ch 8 s 8.3.

<sup>59</sup> Domitilla Sagramoso, 'Who "Defeated" ISIS? An Analysis of US and Russian Contributions' (*Russia Matters*, 6 May 2020) <<https://russiamatters.org/analysis/who-defeated-isis-analysis-us-and-russian-contributions>> accessed 4 June 2020.

<sup>60</sup> See Ch 8 ss 8.2-8.3.

<sup>61</sup> *ibid* s 8.3.

<sup>62</sup> See Ch 6.

of state behaviour. In contrast with the generality of Article 16, this specificity allows the constituent elements of the relevant provisions to be more narrowly drawn and therefore more effective in regulating state behaviour.<sup>63</sup> For instance, according to the ICRC, the duty to respect and ensure respect for IHL requires states to refrain from transferring weapons to an NSA if the state expects, based on the NSA's past behaviour, that such weapons would be used to violate IHL.<sup>64</sup> This is a lower mental standard than the requirement for intent within Article 16.<sup>65</sup> Primary norms can additionally require states to take positive steps to ensure their proxies' compliance with international law;<sup>66</sup> a type of obligation that the secondary law of state responsibility simply cannot impose.

There are drawbacks, however, to a complete reliance on primary norms in this context. As the analysis in Chapter 6 demonstrates, their application is highly fragmented and context-dependant. The effectiveness of IHRL, for instance, is hindered by the limited circumstances in which this body of law applies to states' activities outside their own territorial borders.<sup>67</sup> Moreover, many relevant norms are ambiguous in their scope. A prime example is the duty to respect and ensure respect for IHL, in relation to which the ICRC, legal commentators, and states take vastly differing positions.<sup>68</sup>

Primary norms' efficacy in filling the accountability gap identified in Chapter 7 would increase with added certainty as to their meaning and scope. Their utility in this context would also augment if certain norms were interpreted in a manner that heightens states' accountability in respect of their assistance to NSAs. As noted in Chapter 8, relationships of influence between states and NSAs are key to enhancing NSAs' compliance with international law.<sup>69</sup> Thus, when states develop or sustain relationships with NSAs engaged in conflict, and thereby gain the capacity to influence their behaviour, states should be subject to both negative and positive duties to ensure that those NSAs comply with international law.

Regarding the duty to respect and ensure respect for IHL, for instance, states engaging in support relationships with NSAs should be subject not only to negative obligations not to assist those NSAs

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<sup>63</sup> See Ch 8 s 8.6.

<sup>64</sup> ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016) art 1 para 162.

<sup>65</sup> See Ch 8 s 8.3.2.

<sup>66</sup> See Ch 8 s 8.6.1.2.

<sup>67</sup> See Ch 6 s 6.5.

<sup>68</sup> See Ch 6 s 6.6.

<sup>69</sup> See Ch 8 s 8.6.

to violate IHL but also positive duties of due diligence to ensure that the NSAs act in compliance with the law.<sup>70</sup> On this interpretation of CA1, even if the conduct of the Syrian militias acting on Ankara's behalf is not attributable to Turkey, the state would bear international responsibility for its own assistance towards the militias' harmful conduct as well as its failure to exercise due diligence to ensure the NSAs' IHL compliance.<sup>71</sup> Such a development would build upon the ICJ's judgment in *Bosnian Genocide* and represent one further step forward in the quest to hold states properly to account when they facilitate harms on the part of NSAs.

#### 9.4 The future development of the law

The conclusions outlined above raise questions regarding how international law should evolve in the manner suggested and where responsibility should lie for implementing such proposals. Clearly, international law is made by states, and it must develop in a manner that is generally acceptable to governments across the globe. It appears unlikely, however, that states would agree to any expansion in the scope of their international responsibility, particularly given the current fragmented international order in which geopolitical tensions abound.

It is still conceivable that the law of state responsibility could be agreed in the form of a Convention.<sup>72</sup> ARSIWA's future status has remained on the agenda of the UN General Assembly since 2001. But despite a growing number of states now advocating in favour of a treaty on state responsibility,<sup>73</sup> the current status quo, involving periodic reconsideration of the issue, appears entrenched.<sup>74</sup> In any event, the likelihood of such a Convention relaxing the rules of attribution or providing for state complicity in the conduct of NSAs appears slim. States, as the gatekeepers of the international system, have little incentive to either expand the remit of their own responsibility or to agree to any changes that would afford NSAs international legal personality or otherwise elevate their status.<sup>75</sup>

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<sup>70</sup> See Ch 8 s 8.6.1.

<sup>71</sup> See Ch 2 s 2.1.4; Ch 8 s 8.6.1.

<sup>72</sup> Federica L Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' (2018) 21 Max Planck YB UN L 83; Arman Sarvarian, 'The Ossified Debate on a UN Convention on State Responsibility' (2021) 70 Intl & Comparative L Q 769.

<sup>73</sup> Paddeu (n 72).

<sup>74</sup> *ibid*; Sarvarian (n 72).

<sup>75</sup> Jan Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martius Nijhoff 2003) 365.

In the absence of any treaty on state responsibility, this body of law can nevertheless develop through state practice and expressions of *opinio juris*.<sup>76</sup> Although some states exploit the law's deficiencies when acting through NSAs, states also suffer harm when malign actors push the boundaries of international law through their use of proxies. If states that perceive such harms call out other states out for their behaviour, it could prompt additional states to follow suit. This can raise the reputational costs to states that choose to act through NSAs. Moreover, if states make clear that they consider the behaviour at issue to be internationally wrongful and properly articulate the basis for their assertions, such *opinio juris* might make an important contribution towards the development of international law.

States, additionally, could seek to reach agreement regarding certain particularly harmful practices relating to NSAs engaged in armed conflict. For instance, as noted in Section 9.2, states already supply sophisticated technologies to their proxies including drones and precision-guided munitions. Weapons such as these can cause egregious harm to civilian populations if used by NSAs in a manner that violates IHL.<sup>77</sup> To address this threat, the international community could seek to implement an arms control regime that prohibits the transfer of sophisticated weaponry, manufacturing capabilities, and know-how to NSAs.<sup>78</sup> While such a development would address only a small part of the problem, it would nevertheless be a step in the right direction towards an acknowledgement, on the part of states, of the harms that their assistance to NSAs engaged in conflict can cause.

The judgments of international courts and tribunals can also be influential in shaping the law, as the ICJ's key jurisprudence on the issue of state responsibility demonstrates. However, cases raising issues of state responsibility for private conduct in armed conflict are rarely litigated and when they are, aspects of the ICJ's judgments form part of the problem rather than providing a solution. The Court's strict interpretation of effective control relevant to Article 8 ARSIWA is a case in point.<sup>79</sup> While the judgments of other international courts and tribunals are less authoritative on matters of state responsibility and do not apply directly to situations of armed conflict, the more relaxed approach these bodies sometimes take on the issue of attribution perhaps provides some cause for

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<sup>76</sup> ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' in ILC YB 2018 vol II, 'Report of the ILC on its Seventieth Session' UN Doc A/73/10 119-120.

<sup>77</sup> Lifshitz and Meents (n 21).

<sup>78</sup> *ibid.*

<sup>79</sup> See Ch 5 s 5.4.3.

optimism. Arbitral tribunals, for instance, have found entities to qualify as *de facto* state organs for the purposes of Article 4 ARSIWA based on less stringent criteria than the ICJ's strict test of complete dependence and control.<sup>80</sup> And the ECtHR has taken a more flexible approach to evidence when considering attribution under the rule reflected in Article 8, drawing adverse inferences and reversing the burden of proof.<sup>81</sup>

Any developments to the law via the judgments of international courts and tribunals will, however, take time. In the shorter term, a more effective means to regulate state behaviour in connection with NSAs may be via soft law, meaning non-binding instruments such as principles, or codes of conduct.<sup>82</sup> A pertinent example is the Montreux Document, which articulates good practice for states relating to their use of PMSCs during armed conflict.<sup>83</sup> The ICRC promotes a similar approach in its work on support relationships, encouraging states with the capacity to influence those engaged in conflict to enhance the protection of civilians.<sup>84</sup>

The use of non-binding norms to reach consensus is particularly evident in the cyber domain. Here, the UN Group of Governmental Experts agreed to eleven voluntary, non-binding norms of responsible state behaviour, including an acknowledgement that 'States must not use proxies to commit internationally wrongful acts using [information and communication technologies]...'<sup>85</sup> Although it is likely that states intended this statement to extend no further than the rules of

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<sup>80</sup> *Emilio Agustín Maffezini v The Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction) (25 January 2000) [75]-[89] <[www.italaw.com/sites/default/files/case-documents/ita0479.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf)> accessed 26 September 2021; *Flemingo Duty Free Shop Private Limited v The Republic of Poland* (Arbitral Award) (12 August 2016) [418]-[435] <[www.italaw.com/sites/default/files/case-documents/italaw7709\\_3.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf)> accessed 26 September 2021.

<sup>81</sup> ECtHR, *Carter v Russia* (21 September 2021) App No 20914/07 [162]-[169].

<sup>82</sup> Kumaravadivel Guruparan and Jennifer Zerk, 'Influence of Soft Law Grows in International Governance' (*Chatham House*, 17 June 2021) <[www.chathamhouse.org/2021/06/influence-soft-law-grows-international-governance](http://www.chathamhouse.org/2021/06/influence-soft-law-grows-international-governance)> accessed 16 July 2021.

<sup>83</sup> UNGA, 'The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict' (17 September 2008) UN Doc A/63/467-S/2008/636.

<sup>84</sup> ICRC, 'Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War' (March 2021) 23 <[www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce](http://www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce)> accessed 14 April 2021.

<sup>85</sup> UNGA, 'Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security' (14 July 2021) UN Doc A/76/135 18 para 71(g). See also UNGA, 'Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security' (10 March 2021) UN Doc A/AC.290/2021/CRP.2; Michael N Schmitt, 'The Sixth United Nations GGE and International Law in Cyberspace' (*Just Security*, 10 June 2021) <[www.justsecurity.org/76864/the-sixth-united-nations-gge-and-international-law-in-cyberspace/](http://www.justsecurity.org/76864/the-sixth-united-nations-gge-and-international-law-in-cyberspace/)> accessed 14 August 2021; Dan Efrony, 'The UN Cyber Groups, GGE and OEWG – A Consensus is Optimal, but Time is of the Essence' (*Just Security*, 16 July 2021) <[www.justsecurity.org/77480/the-un-cyber-groups-gge-and-oewg-a-consensus-is-optimal-but-time-is-of-the-essence/](http://www.justsecurity.org/77480/the-un-cyber-groups-gge-and-oewg-a-consensus-is-optimal-but-time-is-of-the-essence/)> accessed 6 November 2021.



attribution reflected in ARSIWA,<sup>86</sup> it could be interpreted more broadly to encompass states' use of proxies in circumstances where the stringent attribution thresholds would not be satisfied.

The Oxford Process on International Law Protections in Cyberspace similarly takes a consensus approach, although the statements in this context are agreed by international legal scholars rather than states, and seek to articulate protections that apply under existing international law.<sup>87</sup> The statement relating to foreign electoral interference, for instance, asserts that states must not conduct, authorise, endorse, or render assistance to cyber operations that they know will likely have adverse consequences for electoral processes in other states.<sup>88</sup> While not related directly to conflict, statements such as this can add important clarity regarding the acceptable bounds within which states may lawfully engage with NSAs in the cyber domain and thereby aid in the development of the law.

States' adoption of domestic laws and policies can also build consensus regarding acceptable state behaviour when dealing with NSAs in conflict situations. As noted in Chapter 8, some states are required by domestic law or policy to carry out risk assessments prior to engaging with NSAs, or to conduct vetting of their potential partners.<sup>89</sup> The greater the number of states that implement such policies, the stronger the culture of compliance will be, thereby aiding the development of norms regarding responsible state behaviour.

Finally, it is important to address the development of primary norms of international law, which evolve independently of the secondary norms of state responsibility. These play a critical role in regulating state behaviour towards NSAs in armed conflict and may develop at a faster pace. The various human rights bodies, for instance, interpret IHRL on a regular basis and may, in future, consolidate the emerging complicity rule outlined in Chapter 8.<sup>90</sup> Understandings of IHL, meanwhile, are shaped not only by states and international courts and tribunals, but also through the work of the ICRC and the community of IHL scholars.<sup>91</sup> As is evident from the debate regarding

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<sup>86</sup> Schmitt, 'The Sixth United Nations GGE' (n 85).

<sup>87</sup> Oxford Institute for Ethics, Law and Armed Conflict, 'The Oxford Process on International Law Protections in Cyberspace' <[www.elac.ox.ac.uk/the-oxford-process](http://www.elac.ox.ac.uk/the-oxford-process)> accessed 6 November 2021.

<sup>88</sup> Oxford Institute for Ethics, Law and Armed Conflict, 'The Oxford Statement on International Law Protections Against Foreign Election Interference Through Digital Means' paras 2-3 <[www.elac.ox.ac.uk/the-oxford-statement-on-international-law-protections-against-foreign-electoral-interference-through#](http://www.elac.ox.ac.uk/the-oxford-statement-on-international-law-protections-against-foreign-electoral-interference-through#/)> accessed 6 November 2021.

<sup>89</sup> See Ch 8 s 8.4.1.

<sup>90</sup> See Ch 8 s 8.6.2.

<sup>91</sup> Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) 71 *Current Legal Problems* 119.

the duty to respect and ensure respect for IHL,<sup>92</sup> the latter's views can hold considerable sway in determining the proper construction of IHL norms. Thus, the interpretation of CA1 may continue to evolve in a manner that enhances humanitarian protections and thereby play a greater role in future in regulating states' conduct towards NSAs in armed conflict.

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<sup>92</sup> See Ch 6 s 6.6.

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