



Center for Global Legal Challenges

YALE LAW SCHOOL

STATE RESPONSIBILITY FOR NON-STATE ACTORS THAT DETAIN IN THE COURSE OF A NIAC

A Report of the Center for Global Legal Challenges¹

December 7, 2015

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EXECUTIVE SUMMARY

This white paper addresses three questions that arise when a non-state actor that is receiving assistance from a state actor in a non-international armed conflict engages in detention activities: (1) Under international law, when does a non-state actor have the authority to detain individuals captured in the course of a non-international armed conflict? (2) When does a state providing assistance to a non-state actor become responsible under international law for the non-state actor's actions? (3) Assuming such responsibility exists, what actions must the state take if it believes the non-state actor may engage in human rights abuses or violations of the law of armed conflict?

In response to the first question, neither the Geneva Conventions nor customary international humanitarian law provides a legal basis for non-state actors to detain captured individuals in non-international armed conflicts. However, international humanitarian law also does not expressly prohibit non-state actors from detaining individuals. Instead, it regulates the conditions of detention. If non-state actors comply with Common Article 3 of the Geneva Conventions and relevant provisions of the Second Additional Protocol, detention by armed groups in non-international armed conflict does not violate an explicit provision of international humanitarian law. As long as detention is not arbitrary, internment by non-state actors is also unlikely to constitute the war crime of unlawful confinement.

In response to the second question, under agency-based theories of the state responsibility doctrine, actions of non-state actors may be directly attributed to the state if (1) the state exercises either strict or overall control over the non-state actor such that the group operates as a *de jure* or *de facto* state organ or (2) the state exercises effective control over a specific operation undertaken by the non-state actor. Additionally, to the extent Common Article 1 requires states to ensure that all parties to an armed conflict respect the Geneva Conventions, it may create an alternative and additional source of state liability for the actions of non-state actors.

Finally, in response to the third question, this white paper recommends a series of ex ante and ex post measures states can adopt when engaging with a non-state actor. These include, vetting, training, acquiring written agreements, providing punishment frameworks, and ceasing support when actors commit violations of IHL. Since existing jurisprudence does not contemplate mitigation of state responsibility for the conduct of non-state actors, it is difficult to assess to what extent any of the proposed measures would limit the state's liability. Nevertheless, states adopting these recommendations will both make violations less likely and be more likely to discharge their duties under international humanitarian and human rights law. By taking ex ante measures designed to prevent violations and creating ex post incentives for non-state partners to comply with IHL norms, states reduce the risk armed groups will engage in detention practices that violate international law.

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INTRODUCTION

Consider the following scenario: A state provides training and funding to a non-state group that is engaged in a non-international armed conflict in other state's territory. That non-state actor group then takes detainees. Does the non-state actor have the authority, under international law, to detain? When does the state providing assistance to the non-state actor become responsible under international law for the non-state actor's actions? And, assuming such responsibility exists, what actions must the state take to mitigate responsibility if it believes the non-state actor may engage in human rights abuses or violations of the law of armed conflict?

Part I of this paper addresses the first question—does the non-state actor have the authority, under international law, to detain? As a practical matter, armed opposition groups “do take prisoners—this is a reality that IHL foresees and does not prohibit (but does not expressly allow either).”² As Part I explains, although the Geneva Conventions and the Second Additional Protocol regulate the conduct of parties that detain in NIACs, neither provides a legal basis for non-state actors (or states) to detain. In particular situations, a variety of sources of law—domestic law, a U.N. Security Council resolution, or an *ad hoc* bilateral agreement—may fill this lacuna by authorizing the parties in a NIAC to engage in security internment.³ In practice however, these instruments have rarely granted non-state actors a direct legal basis to detain.⁴ In the absence of a source of law that supplies the legal grounds for detention in NIACs, international law provides no clear resolution as to the legality of the underlying act by the non-state actor. While customary IHL prohibits arbitrary confinement,⁵ whether arbitrary

² Deborah Casalin, *Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups*, 93 INT'L REV. RED CROSS 743, 744 (2011).

³ IHL treaty law does not provide a legal basis for detention by either non-state actors or states in NIAC. International human rights law does not provide a legal basis either, and enacting legislation by the territorial state likely requires derogation from human rights obligations. While domestic law can provide a legal basis for detention in a NIAC, domestic laws must explicitly stipulate the grounds and procedures that govern detention of individuals in a NIAC. It is unclear whether domestic law can provide a legal basis for a state's armed forces to detain outside of their territory. Although a U.N. Security Council resolution can provide a legal basis for detention in NIACs, experts disagree as to the level of specificity required in the wording of the resolution to give this effect. Experts also disagree over whether a bilateral agreement or Status of Forces Agreement can create a legal basis for detention in NIACs. Experts nevertheless agree that the law of self-defense and National Standard Operating Procedures do not provide a viable legal basis for detention in NIACs. See CHATHAM HOUSE & ICRC, EXPERT MEETING ON PROCEDURAL SAFEGUARDS FOR SECURITY DETENTION IN NON-INTERNATIONAL ARMED CONFLICT, 91 INT'L REV. RED CROSS 859, 862-71 (2009) [hereinafter *Procedural Safeguards*].

⁴ Domestic law and U.N. Security Council resolutions have never included a direct legal basis for non-state actors to intern. *Id.* at 870. The only other viable option for non-state actors to acquire a legal basis to detain is by special agreement with the state, although examples of this in practice are rare. See, e.g., Memorandum of Understanding, Yugoslavia-Croatia, Nov. 27, 1991 in 3 SASSÖLI, BOUVIER & QUINTIN, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW at *2 (2011), <https://www.icrc.org/eng/assets/files/publications/icrc-0739-part-ii-vol-ii.pdf#page=111> [hereinafter *Yugoslavia-Croatia Memorandum of Understanding*].

⁵ 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 344 (2005) (Rule 99 prohibits arbitrary deprivations of liberty).

confinement is a war crime in a NIAC is not explicitly settled in international humanitarian or criminal law.⁶

While all states outlaw detention by non-state actors in domestic law, prohibiting the act of detaining under international law regardless of the reasons for detention makes little sense. Doing so would eliminate incentives for non-state actors to comply with prohibitions against hostage-taking, illegal killing, crimes against humanity, and the inhumane treatment of detainees.⁷ As a result, commentators and state practice suggest that as long as detention by non-state actors in NIACs is not arbitrary, the act of detaining adversaries and civilians that pose an imperative security threat does not violate international law or amount to a war crime.⁸

This paper then turns to the second question in Parts II and III: When does the state providing assistance to the non-state actor become responsible under international law for the non-state actor's actions? As Part II explains, if a non-state actor has violated international law in the course of detaining individuals, Articles 4 and 8 of the Draft Articles on State Responsibility (the Draft Articles) provide the legal standards for attributing the actions of non-state actors to a state. Article 4 attributes responsibility for the conduct of non-state actors that are imputed to a state as *de jure* or *de facto* state organs. Article 8 attributes responsibility for violations committed by non-state actors during an operation that is imputed to a state. In addition, courts have applied three different standards of control to ascertain whether a state is responsible for the conduct of a non-state actor. Like Article 4, if the state exercises "strict control" or "overall control" over a non-state actor, courts impute the group and all of its conduct to the state. Under both standards, the state is held responsible for all the conduct of non-state groups, including *ultra vires* acts. Like Article 8, if the state exercises effective control over a particular operation, the state is liable for the conduct of non-state actors during the course of that operation. Under this standard, *ultra vires* acts that are integral to the operation attributed to the state may also give rise to state responsibility. All of these standards set the attribution threshold very high.

Part III explores a second potential source of state liability for IHL violations committed by non-state actors in the context of an armed conflict: Common Article 1 of the Geneva Conventions. Under Common Article 1, states have duties both "to respect" and "ensure respect" for the Geneva Conventions. Unlike the Draft Articles, Common Article 1 does not attribute the conduct of non-state actors to states; instead, the state is held responsible for its own conduct vis-

⁶ ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 28 n.63 (2013) ("The crime [of unlawful confinement] is not listed in the ICC Statute's provisions on war crimes in non-international armed conflict. Nevertheless, the war crime provisions of the Statute of the International Criminal Tribunal for Rwanda (1994) (ICTR Statute) (Article 4) and the Statute of the Special Court for Sierra Leone (2000) (SCSL Statute) (article 3) define war crimes in non-international armed conflict as *including but not limited to* violations of common article 3 of the Geneva Conventions. Finally, there is some State practice that indicates that unlawful confinement may be a war crime in NIAC under customary international law (see for example the national legislation of Burundi, Colombia, Georgia, Nicaragua and Niger referred to in [2 HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 2329-37]; to be noted that all these countries are or have been confronted with non-international armed conflicts and their practice is thus particularly relevant.").

⁷ See Casalin, *supra* note 2, at 744.

⁸ See *infra* notes 66-70. Although this position aligns with the customary prohibition against arbitrary confinement, as a practical matter, what this means for non-state actors remains unclear. To interpret the rule against arbitrary confinement "in the same way when applied to armed opposition groups as when applied to states would realistically make it impossible for armed opposition groups to comply with the requirements." Casalin, *supra* note 2, at 744.

à-vis non-state actors. Duties to ensure respect require that states “not encourage” armed groups to violate their own IHL obligations. Therefore, if it is “likely or foreseeable” that a non-state actor will violate IHL, a state will breach its Common Article 1 duties by providing support to the non-state actor. Some positive third state obligations likely also exist to end other state’s ongoing Geneva Convention violations; these obligations may also apply to non-state actors.

Although Common Article 1 duties remain under-specified, Part IV identifies measures states can take to ensure its non-state partners comply with detention-related IHL regulations. This paper recommends a series of ex ante and ex post measures states can adopt when engaging with a non-state actor. These include, vetting, training, acquiring written agreements, providing punishment frameworks, and ceasing support when actors commit violations of IHL. States adopting these recommendations will both make violations less likely and be more likely to discharge their duties under international humanitarian and human rights law. By taking ex ante measures designed to prevent violations and creating ex post incentives for non-state partners to comply with IHL norms, states reduce the risk armed groups will engage in detention practices that violate international law.

I. THE LEGAL RULES GOVERNING DETENTION BY NON-STATE ACTORS

With the growing participation of non-state actors in armed conflicts around the world, academic literature has begun to address the legal and procedural bases for detention by non-state actors in NIACs.⁹ Since neither the Geneva Conventions nor customary international law provides any express legal basis for non-state actors to detain, most commentators have focused on the legality of internment in the absence of an alternate source of authority to do so. Few have addressed the material framework that governs the conduct of non-state actors that detain in NIAC, in part because relevant provisions in the Geneva Conventions (namely Common Article 3 and Articles 4-6 of the Second Additional Protocol) provide little concrete guidance.¹⁰ Of the rules regulating the conduct of non-state actors that detain in a NIAC, some include the “proviso that certain protections need only be implemented within the limits of the capabilities of the detaining authority . . . [This proviso] is . . . intended to take into account that NIACs will always include non-state parties with varying degrees of organization and resources.”¹¹ Thus, assessing the legality of a non-state group’s internment of individuals in NIAC requires determining (a) whether IHL provides non-state actors with a legal basis to detain in NIAC; (b) whether there is a procedural basis for detention in NIAC in the absence of express authority to detain; and (c) whether, once non-state actors detain, the material conditions of detention satisfy the scant regulatory standards.

Depending on the provisions at stake, the question of whether a non-state actor has met its IHL obligations may involve assessing the group’s internal capacity to implement these

⁹ See, e.g., Ramin Mahnad, *Beyond Process: The Material Framework for Detention and the Particularities of Non-International Armed Conflict*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW (Terry D. Gill ed., 2013).

¹⁰ See *id.* at 33, 34-36, 45.

¹¹ *Id.* at 46 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 5(2), June 8, 1977, 1125 U.N.T.S. 609) [hereinafter Second Additional Protocol].

norms.¹² Since non-state actors often lack government-style legislative and administrative functions, it may not be realistic to expect the same level of compliance from non-state actors as from states.¹³ The rules regulating the conduct of hostilities in NIAC can be divided into four categories:

- (1) Procedural Rights.¹⁴
- (2) Rules that govern the treatment of detainees in the narrow sense.¹⁵ For example Common Article 3, and Article 4(2) of the Second Additional Protocol,¹⁶ which mandate humane treatment and impose corollary prohibitions designed to protect the physical and mental integrity of detainees.¹⁷ These fundamental protections must be equally respected as a minimum by both states and non-state actors.
- (3) Rules that govern the material conditions of confinement.¹⁸ For example, Articles 5 and 6 of the Second Additional Protocol,¹⁹ which require detaining authorities ensure the physical and psychological needs of detainees are met.²⁰
- (4) Fair trial rights, contemplated in Common Article 3 and Article 6 of the Second Additional Protocol.²¹

¹² See LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 72 (2002) (arguing Article 6 of the Second Additional Protocol may in some cases exceed the capabilities of armed opposition groups); Casalin, *supra* note 2 (arguing that the customary IHL prohibition on arbitrary detention as applied to states cannot be applied the same way to armed opposition groups); Knut Dörmann, *Detention in Non-International Armed Conflicts*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 347, 349 (Kenneth Watkin & Andrew J. Norris eds., 2012) (arguing that the “respective legal obligations for parties to a NIAC must be determined on a case-by-case basis”); *Internment in Armed Conflict: Basic Rules and Challenges*, ICRC (Nov. 2014), available at <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges> (arguing that the “legal framework governing internment in NIAC should be determined on a case-by-case basis, i.e. taking into account the relevant legal obligations in each context”) [hereinafter ICRC 2014 Opinion Paper].

¹³ Casalin, *supra* note 2, at 743-45; Dörmann, *supra* 12, at 349.

¹⁴ See *infra* Part I.B; since there are few procedural rights explicitly outlined in IHL provisions relevant to NIACs, most of the procedural rights contemplated by scholars are derived from alternate sources of customary law. See, e.g., Dörmann, *supra* 12, at 353-58; Casalin, *supra* note 2, at 745-49 (referring to the customary prohibition on arbitrary confinement and state practice.)

¹⁵ Dörmann, *supra* 12, at 350.

¹⁶ See *infra* Part I.C.

¹⁷ See Dörmann, *supra* 12, at 350.

¹⁸ Dörmann, *supra* 12, at 351.

¹⁹ See *infra* Part I.C.

²⁰ These are distinct from provisions that govern treatment of detainees in the narrow sense. Provisions that fall under this category ensure detaining authorities provide adequate food, accommodation, health, hygiene, and access to contact with the outside world. These provisions are more likely to apply on a sliding scale, within the limits of a non-state group’s capabilities. In fact the text of Article 5(2) of the Second Additional Protocol explicitly provides that provisions shall be implemented within the limits of the capabilities of the non-state actors. Second Additional Protocol, *supra* note 11, art. 5(2); see also *infra* note 99.

²¹ See *infra* Part I.C. Although Common Article 3 does not stipulate a detailed list of judicial guarantees, it is unclear what standards might apply to non-state actors whose degree of internal capacity—and ability to implement more sophisticated procedures—will vary. Knutt Dörmann argues Article 75(4) of the First Additional Protocol—which was drafted based on an equivalent provision in the ICCPR—applies to detention in NIAC as a matter of customary international law. Dörmann, *supra* 12, at 352-53; see also *infra* note 71.

The lack of clarity as to the precise content of IHL provisions that regulate detention in NIAC, especially vis-à-vis non-state actors, leaves the scope of these standards largely unspecified. This paper does not attempt to give content to those standards beyond what the Geneva Conventions stipulate. Instead, it outlines the sparse requirements in Common Article 3 and the Second Additional Protocol, acknowledging that the exact scope of those obligations remains unclear.²² In so doing, this paper also identifies conduct that clearly departs from customary international norms that regulate non-state actor detention in a NIAC. Such conduct could also give rise to state responsibility under the Draft Articles and Common Article 1.

A. DETENTION BY NON-STATE ACTORS IN NIAC IS NOT *PER SE* ILLEGAL

IHL treaties and customary international law do not expressly authorize any entity—states or non-state actors—to detain individuals in a NIAC. In fact, IHL in NIACs “is utterly silent on the question of who can be interned, for what reasons, for how long and in accordance with which procedures.”²³ In contrast, the Geneva Conventions provide the legal and procedural basis to intern adversaries in the course of hostilities. Rules that regulate international armed conflict give soldiers combatant privilege—the right to participate directly in hostilities, which entails the use lethal force against the opposing party.²⁴ The Third Geneva Convention also expressly gives the parties in an international armed conflict the right to subject prisoners of war to security internment for the duration of hostilities to neutralize the threat. In exchange, POWs are exempt from prosecution for lawful uses of force in the context of an armed conflict.²⁵

The *travaux* of Common Article 3 and the Second Additional Protocol reveal that states took care to avoid giving non-state actors the power to detain.²⁶ This is no accident.²⁷ Unlike the law of international armed conflicts, states have refused to establish a legal basis for detention in NIACs for the same reasons states refuse to give non-state actors combatant or prisoner of war status. States resist expanding the scope of IHL protections in NIAC because states rarely consider rebels and insurgents anything other than ordinary criminals.²⁸ While Common

²² See, e.g., *infra* note 99 (observing that the schema of application for the Second Additional Protocol can be misleading).

²³ DEBUF, *supra* note 6, at 451.

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol].

²⁵ Geneva Convention Relative to the Treatment of Prisoners of War, art. 21, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

²⁶ Gabor Rona, *Is There a Way Out of the Non-International Conflict Detention Dilemma?*, 91 INT’L L. STUD. 32, 33 (2015) (citing II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, at 322, 465 (Federal Political Department Berne, 1951); II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, at 44, 49-50, 76-77 (Federal Political Department Berne, 1951)); see also DEBUF, *supra* note 6, at 451-59 (relying on the drafting history to assert that prisoner of war and combatant status was a major obstacle in the drafting process of the Geneva Conventions and the Second Additional Protocol); Jonathan Horowitz, *Guest Post: IHL Doesn’t Regulate NIAC Internment—A Drafting History Perspective*, OPINIO JURIS (Feb. 9, 2015, 10:55AM), <http://opiniojuris.org/2015/02/09/guest-post-ihl-doesnt-regulate-niac-internment-drafting-history-perspective/>.

²⁷ *Supra* note 26.

²⁸ *Id.*

Article 3 and certain Second Additional Protocol provisions regulate the conduct and conditions of detention in NIACs, they do not provide express authority for parties in NIACs to detain.

The absence of any explicit source of detention authority in NIAC has left jurists and commentators scrambling. Although none of these gap-filling measures has garnered wide-ranging consensus, most commentators agree that states and non-state actors that detain in NIAC without a direct source of authority do not *per se* violate any rule of IHL.²⁹ The practical implications of this issue, especially for non-state actors, are not fully established.³⁰ Nevertheless, state practice and the works of an increasing number of legal scholars and military experts support the conclusion that—as long as it is not arbitrary—detention by non-state actors does “not violate NIAC-IHL or amount to the war crime of unlawful confinement.”³¹ Such conduct may however incur criminal liability under domestic law.³²

To address the complicated legal status of non-state actor detention, it is helpful to consider the law that governs non-territorial states that detain in a NIAC. In *Mohammed v. Ministry of Defense*, a British court recently held that IHL does not provide states with an express or implicit authority to detain in the course of a transnational NIAC.³³ The court’s judgment elicited an active debate among scholars about where states derive the authority to detain in NIACs and whether such authority can be inferred from IHL.³⁴ Although commentators disagree about what the absence of an express authorization (or prohibition) to detain means for states, most agree IHL does not bar parties engaged in a NIAC from detaining.³⁵ This debate also has implications for non-state actors’ lack of detention authority in NIAC. Commentators that

²⁹ *Id.* at 479.

³⁰ The rapidly evolving nature of armed conflict, and the growth of non-state armed groups as well as transnational NIACs have amplified existing gaps in NIAC-IHL norms. When states ratified the Second Additional Protocol, NIACs largely took place within the territory of the state party to the conflict. *Id.* at 459. As purely internal disturbances, contracting states did not have to rely on international law, and therefore did not consider the absence of detailed provisions regulating the conduct of belligerents—or even establishing a legal basis for detention—in NIAC-IHL problematic. Instead, states and commentators considered that the domestic law of the territorial state could regulate hostilities. Even if IHL did not expressly outlaw much non-state actor conduct, territorial states could proscribe and penalize such conduct in their domestic criminal law. Today the underlying presumption that NIACs will arise in the context of a purely internal conflict no longer applies, and many of the gaps states and commentators anticipated would be subsumed in the domestic law of the territorial state have no equivalent cure in the context of a transnational NIAC. Since the domestic law of the territorial state does not bind or regulate extraterritorial states or non-state actors engaged in hostilities in a third country, it is less clear what law can fill the normative gaps that regulate detention in NIAC. Since IHL is utterly silent on who can be interned, for what reasons, for how long, and according to what procedures, the principle of equality between belligerents can only do so much to bridge the gap between states and their non-state actor adversaries in contemporary NIACs. Nevertheless, ascertaining the content of IHL norms applicable to states in NIAC can also help assess the legality of non-state actor detention in NIACs.

³¹ DEBUF, *supra* note 6, at 479; *see also* Procedural Safeguards, *supra* note 3, at 870-71.

³² *Supra* note 31.

³³ *Mohammed v Ministry of Defense* [2014] EWHC 1369 (QB) (*aff’d* *Mohammed v. Secretary of State for Defense; Rahmatullah and Ors v MoD and FCO* [2015] EWCA Civ 843) (appeal taken from Eng.) (holding that IHL does not authorize detention in NIAC, but that other sources of law can provide the legal basis for detention in NIAC).

³⁴ *See infra* notes 40, 41.

³⁵ *Id.*

have addressed the question of whether non-state actors can detain without an explicit legal basis to do so have relied on the principle of equality of belligerents to bridge the gap.³⁶

As Kubo Mačák observes, the silence of IHL allows for three possible interpretations: (1) a prohibition to engage in detention; (2) normative neutrality toward detention; or (3) permission to detain.³⁷ Since most commentators reject the notion that IHL's silence amounts to a *per se* prohibition,³⁸ much of the scholarly debate discusses whether IHL is neutral or permits detention in NIACs.³⁹ Commentators in the neutrality camp acknowledge that other sources of authority can fill the gap.⁴⁰ Examples of alternate sources of detention authority

³⁶ Kubo Mačák, *No Legal Basis under IHL for Detention in Non-International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defense*, EJIL: TALK! (May 5, 2014), <http://www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/> (citing COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1345 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987)) for the proposition that the Second Additional Protocol and Common Article 3 are “based on the principle of equality of the parties to the conflict. This is true particularly for [Second Additional Protocol] provisions concerning the treatment of detainees, as demonstrated by the drafters’ comments after these provisions were adopted in Committee I during the 1974-77 diplomatic conference”). Mačák argues that “in line with the underlying principle of equality, States realise that their non-State adversaries will inevitably resort to detention and internment . . . rather than unrealistically insist that it lacks power to detain.” *Id.*; see also DEBUF, *supra* note 6, at 478-84; Procedural Safeguards, *supra* note 3, at 870-71 (“As a party to an armed conflict a non-State armed group also has inherent authorization to intern This is a direct consequence of the principle of equality of rights and obligations of the parties under IHL and has to be the starting point of the discussion.”).

³⁷ Mačák, *supra* note 36.

³⁸ DEBUF, *supra* note 6, at 479 (“Does the absence of a legal basis to intern in NIAC-IHL mean that members of non-state parties to NIAC who intern members of the armed forces of an adverse State party to the conflict (or persons who pose a threat to their security or military operations) violate IHL and commit a war crime? It does not Where a party to the conflict, regardless of whether it is a State or a non-State party, has recourse to security internment, it does not *per se* violate any rules of international humanitarian law.”); Ryan Goodman, *Authorization vs. Regulation of Detention: What Serdar Mohammed v. MoD Got Right and Wrong*, JUST SECURITY (Feb. 5, 2015, 8:15AM), <https://www.justsecurity.org/19755/authorization-vs-regulation-detention-serdar-mohammed-v-mod-wrong/#/> (“IHL does not authorize (nor does it prohibit) detention in NIAC.”); Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/> (“IHL does not restrict states with regard to detention in NIACs anymore than it does restrict their ability to detain in IACs. States are not prohibited from detaining in NIACs, and, in that sense, are therefore permitted by IHL to detain. IHL simply does not itself provide a legal basis to do so. That legal basis must be found elsewhere.”); Mačák, *supra* note 36 (“It has never been suggested that acts conducted during armed conflict that lack express authorisation in the law are (eo ipso) prohibited. For instance, there is no express authorisation to kill combatants even in IACs, yet it is not seriously suggested that this would result in its illegality.”).

³⁹ See *infra* notes 40, 41.

⁴⁰ See generally *Mohammed v Ministry of Defense* [2014] EWHC 1369 (QB) (*aff’d* *Mohammed v. Secretary of State for Defense*; *Rahmatullah and Ors v MoD and FCO* [2015] EWCA Civ 843) (appeal taken from Eng.) (holding that IHL does not authorize detention in NIAC); DEBUF, *supra* note 6, at 449-98 (arguing that IHL, customary international law, and international human rights law do not provide the legal basis for non-state actors to detain in NIAC); Marko Milanovic, *High Court Rules that the UK Lacks IHL Detention Authority in Afghanistan*, EJIL: TALK! (May 3, 2014), <http://www.ejiltalk.org/high-court-rules-that-the-uk-lacks-ihl-detention-authority-in-afghanistan/> (asserting that detention authority in NIACs only exists on the basis of domestic law); Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014) <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>; Lawrence Hill-Cawthorne & Dapo Akande, *Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari*, EJIL: TALK! (June 2, 2014),

include domestic law, customary IHL, Security Council resolutions, or special agreements between the belligerent parties. Commentators on the other side of the debate argue that states implicitly derive their power to detain from IHL provisions that regulate the conduct of parties to a NIAC once they detain.⁴¹ They conclude that IHL gives states the power to detain. Given that *Mohammed* involved the state's right (rather than a non-state actor's right) to detain in NIAC, much of the commentary on that opinion has not expressly addressed the question of whether non-state actors can detain without an explicit legal basis to do so.⁴²

The apparent intent of the states parties to the Geneva Conventions and the Second Additional Protocol aligns with the more cautious view that IHL does not provide a direct legal basis for detention in NIAC.⁴³ Drafters carefully avoided granting *any* detention authority, wary

<http://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari/> (arguing that the legal basis to detain in NIAC does not come from IHL, but rather arises from municipal law and other international law such as Security Council resolutions); Jonathan Horowitz, *Does IHL Need Human Rights Law? The Curious Case of NIAC Detention*, JUST SECURITY (May 5, 2014 9:21AM), <https://www.justsecurity.org/10134/guest-post-ihl-human-rights-law-curious-case-niac-detention-serdar-mohammed/> (arguing that the court's decision in *Mohammed* articulated a "historically-grounded, compelling view on the relationship between [international human rights law] and IHL in NIAC"); Horowitz, *IHL Doesn't Regulate NIAC Internment*, *supra* note 26 (concluding that in light of the drafting history of Common Article 3 and the Second Additional Protocol that "1) IHL was not crafted to provide regulations (neither on the grounds nor procedures) for NIAC internment and 2) IHL does not have a structure that permits IAC internment regulations to apply to NIAC"); Ryan Goodman, *Authorization vs. Regulation of Detention: What Serdar Mohammed v. MoD Got Right and Wrong*, JUST SECURITY (Feb. 5, 2015, 8:15AM), <https://www.justsecurity.org/19755/authorization-vs-regulation-detention-serdar-mohammed-v-mod-wrong/>; *see also* Ryan Goodman, *Authorization versus Regulation of Detention in Non-International Armed Conflicts*, 91 INT'L L. STUD. 155, 157 (2015) (agreeing with the trial court in *Mohammed* that IHL does not provide a source of legal authority for detention in NIAC, but rejecting the proposition IHL has nothing to say about the grounds for which states may detain particular individuals in NIAC); Kevin Jon Heller, *What Exactly is the ICRC's Position on Detention in NIAC?*, OPINIO JURIS (Feb. 6, 2015, 10:55AM), <http://opiniojuris.org/2015/02/06/exactly-icrcs-position-detention-niac/> (arguing IHL does not provide authority to detain in NIAC and that the standard governing detention in NIAC is that deprivations of liberty must be non-arbitrary, but disagreeing with Goodman that the source of the standard is not IHL, but rather international human rights law).

⁴¹ Mačák, *supra* note 36 (noting that even experts have acknowledged that under the principle of equality of belligerents state's inherent authority to intern in NIAC belongs to any party to a NIAC, including non-state actors); *id.* (citing the *travaux* of the 1974-77 diplomatic conference convened to draft the Additional Protocols to assert that the principle of equality of belligerents "was *both* lauded by supporters of strict equality of NIAC law like France (CDDH/I/SR.40, para. 34) and (begrudgingly) acknowledged by its detractors including Syria and Iraq (CDDH/I/SR.40, paras. 4 and 29, respectively)"); Aurel Sari, *Sorry Sir, We're All Non-State Actors Now: A Reply to Hill Cawthorne and Akande on the Authority to Kill and Detain in NIAC*, EJIL: TALK! (May 9, 2014), <http://www.ejiltalk.org/sorry-sir-were-all-non-state-actors-now-a-reply-to-hill-cawthorne-and-akande-on-the-authority-to-kill-and-detain-in-niac/> (arguing that military necessity—which together with the principle of humanity, is a foundational principle of IHL—is a permissive principle that allows parties to a NIAC to target and detain opposition forces); Sean Aughey & Aurel Sari, *IHL Does Authorise Detention in NIAC: What the Sceptics Get Wrong*, EJIL: TALK! (Feb. 11, 2015), <http://www.ejiltalk.org/ihl-does-authorise-detention-in-niac-what-the-sceptics-get-wrong/> (arguing that the authority for status-based detention in NIAC is implicit in IHL and founded in customary international law); *see also* Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT'L STUD. 60, 66 (2015) (arguing that status-based targeting authority in NIAC implies a corresponding authority to detain, and that such authority—found in IHL and customary international law—prevails over conflicting human rights obligations).

⁴² However, some did argue that the implicit authority to detain extends to non-state actors in NIAC. *See infra* note 49.

⁴³ The drafters wanted to avoid giving insurgents prisoner of war and combatant status, and thus detention authority so as not to give non-state actors legitimacy. *See supra* note 26; DEBUF, *supra* note 6, at 477 (arguing that the

of norms that enhance the position of rebel groups taking arms up against the territorial state.⁴⁴ States generally subscribed to the view that the conduct of belligerents in NIAC pertained to the internal affairs of the state and therefore should be regulated by the domestic law of the territorial state. Under this view, the territorial state does not concede any authority to the non-state actor, and retains the power to detain rebels for security reasons and prosecute them under domestic law.⁴⁵ This position ultimately gives the territorial state the flexibility to outlaw (or sanction) non-state actor detention under domestic law without constraining itself.

This more narrow interpretation of NIAC-IHL does not preclude other sources of law from providing non-state actors with detention authority.⁴⁶ However, it does not explain why non-state actors that detain without an alternate source of detention authority would avoid violating IHL or, potentially, committing a war crime.

Commentators on the other side of the debate argue that IHL (Common Article 3 and the Second Additional Protocol provisions that regulate detention in NIAC) implicitly authorizes all parties to detain.⁴⁷ These scholars contend that IHL provisions in NIACs that address detention conditions also effectively authorize security internment.⁴⁸ The most extreme version of this argument is that the contracting parties—since they did not expressly limit the scope of detention-related regulations in Common Article 3 and the Second Additional Protocol to exclude non-state actors—must have contemplated and accepted the reality that non-state actors would inevitably engage in detention. Proponents of this view believe NIAC-IHL provides states with an implicit authority to detain under the principle of equality of belligerents; they therefore argue that non-state actors engaged in a NIAC have a similar inherent or implied power to detain.⁴⁹ In fact, the ICRC’s Commentary on the Additional Protocols states:

current framework of IHL—which leave non-state actors with not formal means of acquiring detention authority—continues to be one of the less publicly expressed reasons that states refuse to expand the applicability of the Geneva Conventions to NIACs); *id.* 480 n.1563 (noting that it is doubtful whether the States Party ever intended to create an inherent right to detain in NIAC); *see also* Horowitz, *Guest Post: IHL Doesn’t Regulate NIAC Internment—A Drafting History Perspective*, *supra* note 39.

⁴⁴ DEBUF, *supra* note 6, at 457; *see also* Horowitz, *IHL Doesn’t Regulate NIAC Internment*, *supra* note 39.

⁴⁵ *Mohammed*, [2014] EWHC 1369, at ¶ 245 (noting that if IHL granted a state the legal basis to detain in NIAC, this “would have meant authorising detention by dissident and rebel groups” and that “would be anathema to most states”); *see also* Horowitz, *IHL Doesn’t Regulate NIAC Internment*, *supra* note 39.

⁴⁶ For example, if the territorial state consents by special agreement with rebel groups. *See, e.g.*, Yugoslavia-Croatia Memorandum of Understanding, *supra* note 4, at *2. However, as a practical matter, non-state actors are rarely in a position to obtain formal authorization to detain. *See* Procedural Safeguards, *supra* note 3, at 870 (noting domestic law and U.N. Security Council have never given a non-state actor authority to detain).

⁴⁷ *See supra* note 41. A group of experts convened by Chatham House and the ICRC has also adopted this position, and “quite easily” agreed that although there is no *right* to detain in NIAC, IHL contains an “inherent power to intern” that belongs to “any party to a NIAC.” Procedural Safeguards, *supra* note 3, at 863-64; *id.* 870-71; Aughey & Sari, *Targeting and Detaining*, *supra* note 41, at 66 (arguing status-based targeting authority in NIAC implies a corresponding authority to detain, and that such authority—found in IHL and customary international law—prevails over conflicting human rights obligations).

⁴⁸ *See supra* note 41.

⁴⁹ Procedural Safeguards, *supra* note 3, at 870-71 (arguing that, under the principle of equality of belligerents, as a party to a conflict armed non-state groups also have an inherent right to intern); *see also* Ezequiel Heffes, *Detentions by Armed Opposition Groups in Non-International Armed Conflict: Towards a New Characterization of International Humanitarian Law*, 20 J. CONFLICT SECURITY L. 229 (2015); DEBUF, *supra* note 6, at 480 n.1563 (agreeing that, if *arguendo*, there was an inherent right to intern in customary IHL, “it would be a right for all parties

Protocol II and common Article 3 are based on the principle of the equality of the parties to the conflict . . . All the rules are based on the existence of two or more parties confronting each other. These rules grant *the same rights and impose the same duties on both the established government and the insurgent party*, and all such rights and duties have a purely humanitarian character.⁵⁰

Other provisions in the Geneva Conventions and Additional Protocols—including those that provide status-based targeting authority and prohibit summary executions and military missions that aim to kill every member of an armed opposition group—also suggest parties to an armed conflict have an inherent right to detain.⁵¹ These arguments cite examples of state practice and the overall structure of IHL, which is permissive and balances principles of military necessity with humane treatment.⁵²

Experts that attended a 2008 ICRC and Chatham House conference on security internment in NIAC concluded that non-state actors have an “inherent ‘qualified right to intern’ under IHL, [but] it *remains unclear how this right could be translated into an actual legal basis to intern.*”⁵³ The conference report also maintains that on the basis of the IHL principle of equality of rights and obligations of the parties, a non-state actor “cannot be penalized for interning persons as long as the internment is otherwise in accordance with IHL.”⁵⁴ Nevertheless, in the absence of an express legal basis to detain, the question of how non-state actors can exercise their inherent right to intern remains unanswered.⁵⁵ More recently, the ICRC has taken the position a step further by arguing that, because customary and treaty IHL contain an inherent power to intern, “it may in this respect be said to provide a legal basis for internment in NIAC.”⁵⁶

Despite the lack of consensus regarding what the absence of express authority to detain actually means, most commentators agree that silence does not mean detention without direct authority *per se* violates IHL.⁵⁷ Even former ICRC legal advisor Els Debuf—who maintains that

to the conflict, in full conformity with the principle of equality of arms.”); Mačák, *supra* note 36 (acknowledging that the absence of any express legal authority to detain in NIAC under IHL, but arguing that under the principle of equality “States realize their non-State adversaries will inevitably resort to detention and internment”); ICRC 2014 Opinion Paper, *supra* note 12; *but see* DEBUF, *supra* note 6, at 478 (arguing instead that the absence of a legal basis for detention by non-state actors in NIACs does not violate the principle of belligerents because IHL does not provide a direct legal basis for any of the parties to a NIAC, states and non-state actors alike, to intern. Both will have to seek formal detention authority elsewhere. Debuf maintains this position, even though as practical matter, states may obtain the legal authority to detain in domestic law—and thus comply with international and domestic legal obligations—while non-state actors have no recourse to such authority).

⁵⁰ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 36, at 1344; *see also* Mačák, *supra* note 36.

⁵¹ ZEGVELD, *supra* note 12, at 65-67 (noting U.N. bodies and the Inter-American Commission have recognized non-state actors right to detain as long as deprivations of liberty are not arbitrary).

⁵² Aughey & Sari, *supra* note 41.

⁵³ Procedural Safeguards, *supra* note 3, at 870-71.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ ICRC 2014 Opinion Paper, *supra* note 12.

⁵⁷ Mačák, *supra* note 36 (“It has never been suggested that acts conducted during armed conflict that lack express authorisation in the law are (eo ipso) prohibited. For instance, there is no express authorisation to kill combatants even in IACs, yet it is not seriously suggested that this would result in its illegality.”); DEBUF, *supra* note 6, at 479 (“Does the absence of a legal basis to intern in NIAC-IHL mean that members of non-state parties to NIAC who intern members of the armed forces of an adverse State party to the conflict (or persons who pose a threat to their

non-state actors have no legal capacity to procure formal authority to detain in NIAC⁵⁸ and that unauthorized detention in NIAC is unlawful⁵⁹—concludes that non-state actors that detain without express authority do not necessarily breach IHL or commit a war crime.⁶⁰

There is ultimately no clear answer about where non-state actors derive the legal basis to detain; commentators acknowledge that non-state actors are also not formally in a position to obtain authorization from states or other international bodies.⁶¹ In the absence of an express legal basis, courts and commentators have emphasized the importance of the material and procedural framework that governs detention by non-state actors as a way to assess the underlying legality of the act.⁶²

In the context of the internal armed conflict in Colombia, the Inter-American Commission concluded that detentions by non-state actors would not constitute a violation of IHL “so long as detainees do not become hostages and are not mistreated.”⁶³ The Commission reasoned that IHL does not prohibit the capture of combatants; it simply treats such captures as deprivations of liberty that often occur in the context of an armed conflict. Once belligerents have captured adversaries, IHL imposes obligations on captors to treat detainees “humanely, with respect and dignity. Violence to the life, health and physical or mental well-being of the captives is expressly and absolutely prohibited.”⁶⁴

In sum, “[a]lthough it is queried ‘how a non-State actor can exercise the inherent right to intern,’ it is submitted that it is not so much about a right to intern as it is about the need to regulate the existing practice of parties to non-international armed conflicts.”⁶⁵

B. AS LONG AS DETENTION IS NOT ARBITRARY, NON-STATE ACTORS DO NOT VIOLATE IHL OR COMMIT A WAR CRIME

State practice, U.N. bodies, the ICRC, the Inter-American Commission, and other commentators acknowledge that detention by non-state parties in NIACs is lawful *as long as deprivations of liberty are not arbitrary*.⁶⁶ The ICRC study on customary international

security or military operations) violate IHL and commit a war crime? It does not . . . Where a party to the conflict, regardless of whether it is a State or a non-State party, has recourse to security internment, it does not *per se* violate any rules of international humanitarian law.”).

⁵⁸ DEBUF, *supra* note 6, at 477.

⁵⁹ *Id.* 465.

⁶⁰ *Id.* 477-80.

⁶¹ DEBUF, *supra* note 6, at 477; *see also* Procedural Safeguards, *supra* note 3, at 870 (noting domestic law and U.N. Security Council have never given a non-state actor authority to detain).

⁶² *See infra* Part I.B.

⁶³ Third Report on the Human Rights Situation in Colombia, Inter-Am. Comm’n. H.R., OEA/Ser.L/V/II.102, Doc. 9 rev. 1, Ch. IV, ¶¶ 121, 131-32. (1999) [hereinafter Third Report on Colombia].

⁶⁴ *Id.* ¶ 132 (reiterating that IHL does not prevent the state from prosecuting and penalizing non-state actors under domestic law); *see also* Procedural Safeguards, *supra* note 3, at 870-71 (the ICRC has also maintained non-state actors may be penalized under domestic law for detaining in NIAC, even if they do not violate IHL by doing so.)

⁶⁵ SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 303 (2012) (citations omitted).

⁶⁶ I HENCKAERTS & DOSWALD-BECK, *supra* note 5, 344-352 (surveying state practice on the prohibition of arbitrary detention. Rule 99 lists extensive examples of state practice and attempts to give content to legitimate grounds for

humanitarian law maintains that arbitrary detention is incompatible with humane treatment requirements of Common Article 3 and the Second Additional Protocol.⁶⁷ This practice suggests that detention by non-state actors—even in the absence of express authority to detain—is permissible under IHL as long as internment satisfies certain procedural and material conditions. The challenge lies in determining what the material and procedural framework requires.⁶⁸ IHL treaty provisions that regulate non-state actors that detain are limited to Common Article 3 and Articles 4-6 of the Second Additional Protocol (when it applies).⁶⁹ Due to the paucity of these provisions, customary IHL rules play a more prominent role in NIAC than in international armed conflicts.⁷⁰

Under the international law of armed conflict, internment is not arbitrary if parties detain when it is “absolutely necessary” within their territory or for “imperative reasons of security” in occupied territory.⁷¹ The ICRC has made the policy choice to rely on “imperative reasons of security” as the “minimum legal standard that should inform internment decisions in all situations of violence”⁷² including NIACs. Due to the lack of standards that regulate the procedural grounds for detention in NIAC, the ICRC derives the standard from “what is accepted in IAC and is deemed appropriate in NIAC.”⁷³ At least one commentator has emphasized that the ICRC’s policy choice highlights the exceptional nature of internment and imposes a standard that is already in wide use.⁷⁴ In practice, most states and commentators agree that non-state actors in NIACs do not breach international law if they detain individuals who pose a legitimate security threat.⁷⁵ Under this standard, when the circumstances justifying detention cease to exist, detainees must be released,⁷⁶ and a review process must take place.⁷⁷

detention and the procedural requirements of detention in NIAC); THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS: PRINCIPLES AND GUIDELINES, art. 4, cmt. 4.1 (2012), <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf> (recognizing that arbitrary confinement is generally unlawful. The Copenhagen Process represents a standard-setting effort by states, IGOs and NGOs that met periodically between 2007 and 2012. Participants released a list of principles and guidelines related to the handling of detainees in international military operations) [hereinafter, Copenhagen Principles and Guidelines]; Third Report on Colombia, *supra* note 63, at ¶¶ 121-22, 131-32; *see also* Procedural Safeguards, *supra* note 3, at 870-71 (maintaining that even without a legal basis for detention, under IHL, non-state actors cannot be penalized for engaging in security internment as long as detention “is otherwise in accordance with IHL.”); DEBUF, *supra* note 6, at 479.

⁶⁷ 1 HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 344 (further noting that the prohibition against arbitrary confinement is a customary IHL norm that applies in international and non-international armed conflict).

⁶⁸ Dörmann, *supra* 12, at 348.

⁶⁹ Even when Articles 4-6 of the Second Additional Protocol apply to non-state actors that detain in NIAC, many of the contemplated protections only apply to non-state actors that have the organization and internal capacity to implement them. Mahnad, *supra* note 9, at 46.

⁷⁰ Dörmann, *supra* 12, at 348.

⁷¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, 78 Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁷² Dörmann, *supra* 12, at 356 (noting the policy choice is well-suited to transnational NIACs; *see also* ICRC 2014 Opinion Paper, *supra* note 12, at 8-9 (noting that imperative reasons of security is the appropriate minimum standard that “should inform internment decisions in all situations of violence, including NIAC” and adopting the standard because it emphasizes the exceptional nature of detention).

⁷³ Dörmann, *supra* 12, at 356

⁷⁴ *Id.*

⁷⁵ *See e.g.* Third Report on Colombia, *supra* note 63, at ¶ 122 (noting that IHL prohibits the detention or internment

Scholars have sought to give additional content to these requirements.⁷⁸ Although there is no clearly articulated, comprehensive list of detention-related procedural requirements in NIACs, one argues that the principle of legality requires a regulation “emanating from the appropriate authority, [stipulating] the grounds and procedures in accordance with which such persons can be interned.”⁷⁹ Such regulations must provide “a sufficiently accessible and precise way to allow those concerned to foresee the possibility of their internment,” and offer “adequate safeguards to prevent both arbitrary deprivation of liberty and abuse in captivity.”⁸⁰

Similarly, scholar Sandesh Sivakumaran has argued that state legislation could govern detention by state armed forces, “while legislation of the non-state group may suffice for the purposes of non-state group detention.”⁸¹ This assumes a non-state group will be sufficiently organized to have a political organ capable of articulating the procedural basis of detention in a clear and detailed manner.⁸² Former ICRC legal adviser Debuf also argues that detention is not arbitrary “where the absence of domestic legislation is not a matter of unwillingness but of legal incapacity, and is the only element lacking in the organization of internment operations by a non-state party to a [NIAC].”⁸³ Hence, even applying this robust interpretation of the legal

of civilians except where necessary for imperative reasons of security); see DEBUF, *supra* note 6, at 479, 484-85; Procedural Safeguards, *supra* note 3, at 870-71. Goodman, *Authorization versus Regulation of Detention in Non-International Armed Conflicts*, *supra* note 40, at 162-63 (arguing that state practice provides evidence the law of armed conflicts permits detention of security threats in NIAC); Horowitz, *Does IHL Need Human Rights Law?*, *supra* note 40;

⁷⁶ Copenhagen Principles and Guidelines, *supra* note 66, at art. 4. The Commentary emphasizes that “an important component of lawfulness detentions must not be arbitrary.” *Id.* art. 4, cmt. 4.4; see also DEBUF, *supra* note 6, at 484 (elaborating non-state actors do not violate international law if the group “interns members of the armed forces of an adverse party to the conflict or other persons who poses a direct threat to its security and military operations where and for as long as their internment is absolutely necessary to prevent them from returning to hostilities or stop posing such a threat”); see also SIVAKUMARAN, *supra* note 65, at 302.

⁷⁷ SIVAKUMARAN, *supra* note 65, at 302 (noting that this was the standard implemented in the Yugoslavia-Croatia Memorandum of Understanding, *supra* note 4, at *2). Perhaps the most significant—and challenging—procedural safeguard advocated by some scholars is access to an independent and impartial mechanism to review the legality of detention orders. See e.g. SIVAKUMARAN, *supra* note 65, at 303 (arguing that the review requirement would impose an additional layer of institutional capacity on any non-state group that detains in NIAC. The precise character of the review mechanism is less important, although he argues for court-like review. Fundamentally review must be independent and impartial in nature).

⁷⁸ Since the standard is arbitrary confinement, there is a significant body of human rights law that gives content to these standards. See e.g. DEBUF, *supra* note 6, at 484 n.1579 (observing the principle of legality has been interpreted by various human rights bodies); see also *id.* n.1580 (noting that “the legal basis will of course only be lawful if the other criteria for a valid legal basis for deprivation of liberty are also met Our argument here bears similarity with those made by Sivakumaran with regard to the establishment of courts by non-State parties to armed conflict, see [Sandesh Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice*, 7 J. INT’L CRIM. JUST. 489 (2009)]; see also *supra* note 77. Admittedly, the standards that some scholars have argued apply in NIAC, while flexible enough to apply on a “case-by-case” basis, nevertheless set the standard very high. This begs the question whether imposing such high standards is desirable or feasible when the non-state group lacks the internal capacity to implement sophisticated procedural safeguards.

⁷⁹ DEBUF, *supra* note 6, at 484.

⁸⁰ *Id.*

⁸¹ SIVAKUMARAN, *supra* note 65, at 303 (citing examples of armed groups that have enacted rules on offences, arrest, and trial).

⁸² See DEBUF, *supra* note 6, at 484 n.1583 (observing that “If the non-State party has a clearly identified legislative organ, or political representation, the adoption of such regulations or orders should emanate from those organs (or at least be subject to its scrutiny) rather than from its military branch”).

⁸³ DEBUF, *supra* note 6, at 484-85.

framework, as long as the risk of arbitrariness is sufficiently reduced by adequate safeguards, “internment by a non-State party in order to prevent persons from engaging in hostilities against it should not be deemed violative.”⁸⁴

C. NON-STATE ACTORS MUST COMPLY WITH COMMON ARTICLE 3, CUSTOMARY INTERNATIONAL LAW, AND (POSSIBLY) THE SECOND ADDITIONAL PROTOCOL

Common Article 3 and customary international law regulate all non-state actors that participate in NIACs;⁸⁵ to the extent the territorial state has ratified the Second Additional Protocol, IHL treaty provisions that supplement the humane treatment obligations of Common Article 3 also apply.⁸⁶ Therefore, if the Protocol’s higher threshold of application has been met,⁸⁷ Articles 4(2), 5, and 6 regulate the conduct of non-state actors that detain on the territory of the ratifying state.⁸⁸ To the extent these provisions overlap with Common Article 3 and other customary IHL obligations, they may also apply as a matter of customary international law regardless of whether the territorial state has ratified the Second Additional Protocol.⁸⁹

⁸⁴ *Id.*

⁸⁵ Because every state has ratified the Geneva Conventions, Common Article 3 always binds non-state armed groups. Common Article 3 is generally considered customary international law. Dörmann, *supra* 12, at 348 (citing 1 HENCKAERTS & DOSWALD-BECK, *supra* note 5, at xxx, xlv-xlv); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 54, ¶ 218 (June 27) (holding that Common Article 3 reflects “elementary considerations of humanity” constituting a “minimum yardstick” applicable to all armed conflicts).

⁸⁶ Even though non-state actors are not parties to the Geneva Conventions, commentators accept that ratification of relevant IHL norms by the territorial state where the non-state actor operates is “a sufficient legal basis for the obligations of armed opposition groups.” ZEGVELD, *supra* note 12, at 17; *see also* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 *supra* note 36, at 1345. Because every state has ratified the Geneva Conventions, Common Article 3 binds all armed non-state groups participating in a NIAC.

⁸⁷ The Second Additional Protocol introduces a higher threshold of application than Common Article 3. Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. RED CROSS 47, 57 (2011) (“In addition to the existence of an armed conflict between the insurgency and the government taking place in the territory of a High Contracting Party, there are three cumulative material conditions under Article 1, paragraph 1: the organized armed group(s) must be under responsible command; they must exercise such control over a part of the national territory as to enable them to carry out sustained and concerted military operations, and the territorial control must be such as to enable them to be able to implement the Protocol. Where these cumulative criteria for application of Second Additional Protocol are objectively met, the Protocol becomes ‘immediately and automatically applicable’, irrespective of the views of the parties to that conflict.”).

⁸⁸ Second Additional Protocol, *supra* note 11, at arts. 4(2), 5, 6.

⁸⁹ The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has held, “Many provisions of [the Second Additional Protocol] can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.” Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *see also id.*, ¶ 98; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, ¶ 30 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 2, 1999) (“While both Protocols [I and II] have not yet achieved the near universal participation enjoyed by the Geneva Conventions, it is not controversial that major parts of both Protocols reflect customary law.”); ZEGVELD, *supra* note 12, at 20-22; *see also* Dörmann, *supra* 12, at 532-53 (arguing that judicial guarantees in Article 6(5) of the Second Additional Protocol that supplement Common Article 3 may also apply to parties that detain in NIAC as a matter of customary international law. “While Common

Unlike states, non-state actors are not bound by human rights treaties,⁹⁰ and in many cases “cannot perform the government-like functions on which the implementation of human rights norms depends.”⁹¹ Similar concerns about non-state actors’ relative lack of legislative, judicial, and bureaucratic capacity explain why non-state actors are often held to a different standard than states under IHL.⁹² Commentators have recognized that to apply IHL norms that regulate detention in the same way for states as for non-state actors “would realistically make it impossible for armed opposition groups to comply with the requirements.”⁹³ Territorial states may nevertheless significantly constrain the conduct of non-state actors through domestic law.⁹⁴

1. Common Article 3

Since Common Article 3 is binding on non-state actors engaged in NIAC as a matter of customary international law, it provides a source of authority that constrains the conduct of the non-state actor and prescribes the minimum standard of treatment for detainees. Common Article 3 mandates humane treatment of all persons who are no longer taking active part in hostilities, including interned detainees, without adverse distinction.⁹⁵ It goes on to expressly prohibit certain conduct with respect to persons no longer taking active part in the hostilities, including:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a

Article 3 to the Geneva Conventions does not provide a list of judicial guarantees [even though it contemplates fair trial rights], it is now generally accepted that Article 75(4) of Additional Protocol I to the Geneva Conventions—which was drafted based on the corresponding provisions of the International Covenant on Civil and Political Rights (ICCPR)—reflects customary law applicable in all types of armed conflict [citing 1 HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 5, Rule 100 at 352]. Article 75(4), in fact, encapsulates all of Article 6(5) of Additional Protocol II, which supplements Common Article 3 in NIAC.”).

⁹⁰ However, the extent to which non-state actors might be bound by human rights principles is an evolving debate. See DEBUF, *supra* note 6, at 481 (“In our view, non-State entities have, in general no direct legal obligations under international human rights treaties”); Zegveld, *supra* note 12, at 9, 38 (asserting that it is unclear whether non-state groups are bound by human rights law. As a practical matter Zegveld observes that “According to the wording, multilateral human rights treaties impose obligations only on states); *id.* at 152 (noting further that international bodies should be very cautious about holding non-state groups accountable for violations of human rights norms because these norms “presume the existence of a government, or at least, an entity exercising governmental function); *but see* Andrew Clapham *Human Rights Obligations of Non-State Actors in Conflict Situations* 88 Int’l Rev. Red Cross 491 (2006); Phillip Alston as U.N. Special Rapporteur on Extra-Judicial Killing also acknowledged that increasingly non-state actors are subject to the expectations of the international community, which demands conformity with human rights principles. Special Rapporteur on Extrajudicial Killing, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Addendum, Mission to Sri Lanka* ¶ 25, 27 E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (Mr. Phillip Alston).

⁹¹ Dörmann, *supra* note 12, at 349.

⁹² *Supra* note 12.

⁹³ Casalin, *supra* note 2, at 744; *see also* Dörmann, *supra* 12, at 352 (noting that IHL treaty provisions governing the material conditions of detention apply to non-state actors to the extent these groups have the internal capacity to do so); *supra* note 12.

⁹⁴ Although violations of domestic law do not give rise to international liability under the doctrine of state responsibility. *See infra* Part II.

⁹⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁹⁶

Common Article 3 also provides that the wounded and sick (including those in detention) must be cared for.⁹⁷

2. Second Additional Protocol

The Second Additional Protocol applies to a subset of NIACs: those that take place between a High Contracting Party and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”⁹⁸ In such cases, the Second Additional Protocol supplements Common Article 3’s protections. Assuming the non-state group meets the Second Additional Protocol’s threshold requirements, and the territorial state has ratified the Protocol, the following provisions are likely applicable to detention practices⁹⁹:

- Article 4(2) adds to Common Article 3’s list of prohibited acts. It specifically outlaws slavery, the slave trade, corporal punishment, pillage, rape, enforced prostitution, indecent assault, and acts of terrorism.¹⁰⁰
- Unlike Common Article 3, Article 5(1) addresses the material conditions of detention. It mandates that the non-state actor provide food and water to and safeguard the health of detainees to the same extent as it does the local noncombatant population.¹⁰¹ Article 5(1) also stipulates that detainees must be free to exercise their religion while in custody and expressly secures the rights of wounded and sick detainees to receive medical care on the basis of their particular needs without adverse distinction.¹⁰²
- Article 5(2) includes rules governing the separation of men and women in custody, the placement of the latter under the supervision of female guards, access to and ability to send correspondence, and medical examinations.¹⁰³ The Second Additional Protocol imposes these more advanced requirements based on the particular capabilities of the non-state group to implement them.¹⁰⁴

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Second Additional Protocol, *supra* note 11, art. 1(1).

⁹⁹ Scholar Sandesh Sivakumaran observes that some Second Additional Protocol norms on the treatment of detainees must be respected “at a minimum,” while others must be respected “within the[] capabilities of the detaining entity” (citing Second Additional Protocol, *supra* note 11, arts. 5(1) & 5(2) respectively). He further observes however that, “the schema set out by the Protocol is somewhat misleading, as although certain provisions are listed as to be respected at a minimum, their actual content will vary depending on the situation at hand. Similarly, certain provisions that are listed as being dependent on the capacity of the detaining entity do not turn on notions of capacity at all.” SIVAKUMARAN, *supra* note 65, at 293.

¹⁰⁰ *Id.* art. 4(2).

¹⁰¹ *Id.* art. 5(1).

¹⁰² *Id.*

¹⁰³ *Id.* art. 5(2) (stating that persons “responsible for the internment or detention of the persons referred to in paragraph 1 shall also, *within the limits of their capabilities*, respect the following provisions”) (emphasis added).

¹⁰⁴ *Id.* (stating that persons “responsible for the internment or detention of the persons referred to in paragraph 1

- Articles 5(1) and 5(2) contain provisions that mandate that the non-state actor protect detainees from the dangers of armed conflict to the same extent as it does the local noncombatant population.¹⁰⁵
- Article 6 applies to the prosecution and punishment of criminal offences related to the armed conflict.¹⁰⁶ Under the circumstances, it is fair to ask whether the procedures contemplated in Article 6 apply to non-state actors that exhibit a limited degree of internal organization. If the non-state actor exhibits a limited chain of command and degree of internal organization, Article 6 likely exceeds the group's capabilities.¹⁰⁷
- The analysis of the U.N. Mission for El Salvador on non-state actor compliance with Article 6 requirements is particularly enlightening as to the scope of obligation under this particular provision. Ultimately, "to the extent armed opposition groups are unable to comply with the relevant norms, they must leave prosecutions to the governmental authorities."¹⁰⁸

Even though scholars generally reject the notion that IHL prohibits detention by non-state actors in a NIAC,¹⁰⁹ the international legal consequences for armed groups that detain without formal authority remains unclear. Although the normative gap creates some flexibility to consider a non-state group's internal capacity to implement detention-related norms, it also complicates the process of assessing future liability. The problem is particularly acute given that the procedural requirements non-state actors must meet to avoid detaining people arbitrarily are, as yet, not clear.¹¹⁰

shall also, *within the limits of their capabilities*, respect the following provisions") (emphasis added).

¹⁰⁵ See *id.* arts. 5(1), 5(2).

¹⁰⁶ *Id.* art. 6.

¹⁰⁷ Non-state "groups may not always be able to set up a system of courts. Lack of stable territorial presence and lack of facilities in which to house prisoners may be one explanation for a policy by armed opposition groups of executing all captured persons. In any event, any proceedings instituted by armed groups will necessarily be ad hoc. [The United Nations Mission to el Salvador] ONUSAL acknowledged that it would be very difficult for the insurgent forces in an armed conflict to try accused persons before a court meeting the requirements of Protocol II. Nevertheless, ONUSAL observed that 'it has been considered that any responsible and organized entity can and must observe the principles established in Article 6 of Protocol II, which make up the right to an impartial trial.' ONUSAL stated that these principles would continue to enjoy their validity and mandatory character, even if the dissident forces did not have a judicial administration similar to that of the state. When FMLN's penal system did not contain the norms required, ONUSAL observed, it should be modified. Moreover, if the group's penal system continued to be inadequate, ONUSAL suggested that it should apply the law of the Salvadorian Government in the zones under its control. Furthermore, ONUSAL maintained that when the person charged with the offence was a member of the governmental armed forces, FMLN would be obliged to liberate the person and notify the governmental authorities about the violations committed. The ICRC stated that even in response to serious violations of international humanitarian law, the rebels should have recourse to the national system of administration of justice." ZEGVELD, *supra* note 12, at 72-73.

¹⁰⁸ *Id.* at 73.

¹⁰⁹ *Supra* note 57.

¹¹⁰ At least two scholars have argued that legislative and judicial organs may be necessary to ensure detainees have meaningful access to review. See *supra* notes 77-84. These types of mechanisms in non-state groups reveal a high level of internal organization. As Part II discusses in more detail, a non-state group's level of organization is an important factor in the analysis for determining the appropriate standard of attribution. At least one court has suggested that highly organized military groups may be attributed to the state as *de facto* organs under a relatively lower standard of attribution. See *infra* Part II. The level of internal organization also has implications to a state's Common Article 1 responsibilities vis-à-vis non-state actors. See *infra* III.

II. RESPONSIBILITY THROUGH ATTRIBUTION

A. THE DRAFT ARTICLES

The Draft Articles are the most authoritative statement on state responsibility in international law.¹¹¹ Under the Draft Articles, a non-state actor's action is attributable to a state if the state has sufficient connections with the actor (Article 4) or with the operation during which the act takes place (Article 8). In *Bosnian Genocide*, the International Court of Justice (ICJ) declared that both articles reflect customary international law.¹¹²

Article 4 of the Draft Articles provides:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds 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.¹¹³

The International Law Commission (ILC) clarifies that “a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.”¹¹⁴ Therefore, absent evidence that the non-state actor is a *de jure* organ of the state, the question under Article 4 boils down to whether the non-state actor is a *de facto* organ of the state.

Article 8 of the Draft Articles provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.¹¹⁵

The ILC notes that “the three terms ‘instructions’, ‘direction’ and ‘control’ are disjunctive; it is sufficient to establish any one of them.”¹¹⁶ Therefore, absent express

¹¹¹ The Draft Articles “are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility.” JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 43 (2013).

¹¹² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶¶ 385 (Article 4), 398 (Article 8) (Feb. 26).

¹¹³ U.N. Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 4, *in* Rep. of the Int’l Law Comm’n, U.N. GAOR, 53d Sess., Supp. No. 10, A/56/20 (2001) [hereinafter Draft Articles].

¹¹⁴ *Id.* art. 4 cmt. 11.

¹¹⁵ *Id.* art. 8.

¹¹⁶ *Id.* art. 8 cmt. 7.

instructions or direction from the state to the non-state actor to commit the act, the question boils down to whether the state exercised a sufficient degree of “control” over the act.

The focus of the inquiries under Article 4 and Article 8 is different. Under Article 4, the question is the level of control the state exercises over the *actor* that undertakes the act, whereas under Article 8, it is the level of control the state exercises over the *operation* during which the act occurs.

B. THE RELATIONSHIP BETWEEN THE STANDARDS OF CONTROL AND THE DRAFT ARTICLES

The ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY) have created a combined total of three standards for evaluating the level of control required to attribute an act of a non-state actor to a state under the Draft Articles. According to the ICJ, an act of a non-state actor is attributable to a state if the state exercises “effective control” over the operation during which the act occurred.¹¹⁷ Under the “effective control” standard, private conduct that is merely supported, financed, planned, or otherwise carried out on behalf of the state is not attributable unless the state also exercises a high-level of control “in respect of *each operation* in which the alleged violations occurred.”¹¹⁸ According to the ICTY, however, in cases where the non-state actor is an organized military group, the state only needs to exercise “overall control” over the *actor* for the act to be attributable to the state.¹¹⁹ As long as the non-state actor is organized, evidence that the state financed and equipped a “military organization,” and participated in the general planning of the group’s operations, is sufficient to establish state responsibility, even if the state did not issue specific instructions.¹²⁰ Finally, the ICJ’s “strict control” standard establishes that all of the acts of a non-state actor are attributable to a state if that non-state actor is in a relationship of “complete dependence” on the state.¹²¹ The “strict

¹¹⁷ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27) (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”).

¹¹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 400 (Feb 26) (emphasis added). Admittedly, it is difficult to ascertain the exact content of the effective control standard—thus far no court or tribunal has found sufficient evidence of effective control to trigger state responsibility.

¹¹⁹ Prosecutor v. Tadić, Case No. IT-94-I-A, Appeals Chamber, Judgment, ¶ 131 (Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999), (“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group . . .”).

¹²⁰ *Id.* ¶ 145 (“In the case at issue, given that the Bosnian Serb armed forces constituted a ‘military organization,’ the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.”).

¹²¹ *Bosnian Genocide*, 2007 I.C.J. 43, ¶ 391 (asking “whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such *strict control* by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility.”) In *Nicaragua*, 1986 I.C.J. 14, ¶ 110, the court uses the phrase “complete dependence” to refer to the same control standard.

control” standard is the most stringent (the most difficult for establishing attribution), followed by the “effective control” and then the “overall control” standards.

Traditionally, commentators present the ICJ’s “effective control” and the ICTY’s “overall control” standards as alternatives.¹²² This is largely because the ICJ and the ICTY each explicitly rejected the other court’s approach after characterizing the tests as standards of attribution under Article 8. In *Tadić*, the ICTY criticized the ICJ’s “effective control” standard and proposed the “overall control” standard to replace it in cases where the non-state actor is an organized group. This approach makes some intuitive sense: different standards of attribution for organized versus unorganized non-state actors would help avoid a regime of state attribution that allows states to evade responsibility by engaging paramilitary units to do their dirty work.¹²³ However, responding in *Bosnian Genocide* to the ICTY’s appraisal, the ICJ criticized the ICTY’s “overall control” standard and reaffirmed the “effective control” standard it had first established in *Nicaragua* (notwithstanding the non-state actor’s level of organization).¹²⁴ Since the ICJ is the principal U.N. judicial organ, commentators generally consider the “effective control” standard more authoritative.¹²⁵ Nevertheless, many commentators have argued that the “overall control” standard is better for public policy,¹²⁶ especially in light of the rise of terrorist groups,¹²⁷ private military and security companies (PMSCs),¹²⁸ and organized armed groups

¹²² See, e.g., CRAWFORD, *supra* note 111, at 156; Christian J. Tams, *Law-making in Complex Processes: The World Court and the Modern Law of State Responsibility*, in SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 287, 301 (Christine Chinkin & Freya Baetens eds., 2015).

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

¹²⁴ While the ICJ acknowledged that “overall control” may well be the appropriate standard for determining whether or not an armed conflict is international or not, the Court rejected its application in the context of state responsibility doctrine. *Bosnian Genocide*, 2007 I.C.J. 43, ¶¶ 403-07.

¹²⁵ See CRAWFORD, *supra* note 111, at 156; EVGENI MOYAKINE, *THE PRIVATIZED ART OF WAR: PRIVATE MILITARY AND SECURITY COMPANIES AND STATE RESPONSIBILITY FOR THEIR UNLAWFUL CONDUCT IN CONFLICT AREAS* 269 (2015); Tams, *supra* note 122, at 301.

¹²⁶ A principal reason is that the ICTY Appeals Chamber in *Tadić*, unlike the ICJ in *Nicaragua*, actually examined state practice and jurisprudence in establishing the “overall control” standard. MOYAKINE, *supra* note 125, at 269-70; Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649, 653-57 (2007); Amanda Tarzwell, *In Search of Accountability: Attributing the Conduct of Private Security Contractors to the United States Under the Doctrine of State Responsibility*, 11 OR. REV. INT’L L. 179, 201 (2009).

¹²⁷ See KIMBERLEY N. TRAPP, *STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM* 44 (2011); Cassese, *supra* note 126, at 666; Alison Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT’L L. 41, 120 (2004); Scott M. Malzahn, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT’L & COMP. L. REV. 83, 101 (2002); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 20 (2002) (criticizing the effective control test on this basis). For more commentators making similar remarks, see TRAPP, *supra*, at 42 n.111.

¹²⁸ MOYAKINE, *supra* note 125, at 275; Tarzwell, *supra* note 126, at 204; Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT’L L. 239, 271, 289 (2009).

operating on behalf of states.¹²⁹ Others reconcile the two standards by arguing that they are both valid, but they apply in different circumstances.¹³⁰

This white paper argues that the “effective control” and “overall control” standards are not mutually exclusive. Instead, they are best understood as two independent standards, the former addressing attribution under Article 4 and the latter under Article 8. As a handful of commentators have suggested, the “overall control” standard is best understood in terms of the legal theory of attribution underlying the ICJ’s “strict control” standard under Article 4, rather than under Article 8.¹³¹ This understanding of the relationship between the overall control standard and the Draft Articles makes the best sense of current state responsibility doctrine.¹³² Accordingly, the following sections present the standards for attributing an actor to a state under Article 4 (strict control, overall control), and for attributing an operation to a state under Article 8 (effective control). Each section also discusses the extent to which an *ultra vires* act by the non-state actor may be attributed to the state.

C. RESPONSIBILITY UNDER ARTICLE 4: ATTRIBUTING THE ACTOR TO THE STATE

Under Article 4 of the Draft Articles, if a non-state actor is a *de facto* organ of the state, then all of the acts of the non-state actor may be attributed to the state. The ICJ has adopted the “strict control” standard to determine whether a non-state actor is a *de facto* state organ, whereas the ICTY has followed the less stringent “overall control” standard.

¹²⁹ MOYAKINE, *supra* note 125, at 274; Cassese, *supra* note 126, at 655, 657-58.

¹³⁰ Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment, ¶ 17 (Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999) (separate opinion of Judge Shahabuddeen, J.) (Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 405 (Feb. 26); Draft Articles, *supra* note 113, at 48; HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 118 (2011); Kirsten Schmalenbach, *International Responsibility for Humanitarian Law Violations by Armed Groups*, in INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM THE AFRICAN GREAT LAKES REGION 470, 480-81 (Heike Krieger ed., 2015).

¹³¹ Elena Laura Álvarez Ortega, *The Attribution of International Responsibility to a State for Conduct of Private Individuals Within the Territory of Another State*, REVISTA PARA EL ANÁLISIS DEL DERECHO 1, 22-23, 25 (2015); Claus Kress, *L’Organe de Facto en Droit International Public, Réflexions sur l’Imputation à l’Etat de l’Acte d’un Particulier à la Lumière des Développements Récents*, 105 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 93, 131 (2001); Marko Milanović, *State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken*, 22 LEIDEN J. INT’L L. 307, 312-14, 316, 318-19 (2009); Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT’L & COMP. L.Q. 493, 506-07 (2009).

¹³² The Draft Articles Commentary discusses overall control as a standard of attribution under Article 8. Draft Articles, *supra* note 113, art. 8 cmt. 5. Nevertheless, a close reading of *Tadić* reveals that the overall control standard assesses whether the conduct of the non-state actor can be attributed to the state by virtue of the control it exercises over the group (Article 4), rather than the specific operation (Article 8). In *Tadić*, because the Appeals Chamber found the non-state armed group to be a *de facto* state organ, it classified the conflict as an international armed conflict (effectively between two states) rather than a non-international armed conflict (between a state and a non-state group). Like standards of attribution under Article 4, once the conduct of the state in this case met the overall control threshold, all of the conduct of the non-state actor could be attributed to it, regardless of whether the state had exercised a high level of control over particular operations. In this sense, the overall control inquiry asks whether the armed group in question can be attributed to the state, and with it, all of the non-state actor’s conduct.

1. The ICJ's "Strict Control" Standard

The ICJ articulated the "strict control" standard in both *Nicaragua*¹³³ and *Bosnian Genocide*¹³⁴ as a test for whether a non-state actor constitutes a *de facto* organ of a state. As the Court stated in *Bosnian Genocide*:

The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons—or groups of persons—who, while they do not have the legal status of State organs, in fact act under such *strict control* by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act.¹³⁵

And as the Court held in *Nicaragua*, the three requirements for "strict control" are¹³⁶:

- The actor must be completely dependent on the state;¹³⁷
- The state must make use of "the potential for control inherent in that dependence";¹³⁸ and
- The state must exercise a high degree of control over the actor "in all fields."¹³⁹

In both cases, the strict control threshold was not met. In *Nicaragua*, although the Court found that the *contra* force had "been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States," it still did not find strict control.¹⁴⁰ And in *Bosnian Genocide*, even though the Court found that the Bosnian Serb Army of the Republic Srpska (VRS) could not have conducted its crucial or most significant military activities without the support of the Federal Republic of Yugoslavia (FRY), it also still did not find strict control.¹⁴¹

This is not to say, however, that a finding of strict control is impossible. Arguably, the ICJ would have found strict control in the *Blake v. Guatemala* case before the Inter-American Court of Human Rights, even if the state had not created the non-state actor by decree. In that case, the court found that Guatemala had created a group of non-state actors, the Civil Defense Committees, by statute, appropriated state funds for their operations, controlled and supervised their activities, supported them with members of Guatemala's armed forces, and served as their

¹³³ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 109-10 (June 27). The Court did not use the phrase "strict control" in *Nicaragua*.

¹³⁴ *Bosnian Genocide*, 2007 I.C.J. 43, ¶ 391.

¹³⁵ *Id.* (emphasis added).

¹³⁶ The ICJ did not expressly list these three requirements, but commentators have generally summarized the "strict control" test to include these three standards. See Chiragov and Others v. Armenia, App. No. 13216/05, Eur. Ct. H.R., Grand Chamber, Judgment, Concurring Opinion of Judge Motoc, p. 82 (June 16, 2015); Talmon, *supra* note 131, at 498.

¹³⁷ *Nicaragua*, 1986 I.C.J. 14, ¶ 110.

¹³⁸ *Id.*

¹³⁹ *Id.* ¶ 109.

¹⁴⁰ *Id.* ¶ 111.

¹⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 394 (Feb. 26).

nearly exclusive source of financial and material support.¹⁴² The Court noted that the “subordination to the armed forces was not merely statutory, but *de facto* as well.”¹⁴³ Based on evidence of a close “institutional relationship” between the Civil Defense Committees and the Guatemalan army, the Court concluded that the non-state actors “should be deemed to be agents of the state.”¹⁴⁴ Under these circumstances, the Court effectively found that the non-state actors constituted a *de facto* as well as a *de jure* organ of Guatemala. The reasoning suggests that even if Guatemala had not decreed the non-state group into existence, the complicity between the non-state group and the army might have been sufficient to establish state responsibility. Ultimately, the Civil Defense Committees would not have existed, let alone operated without the institutional support of the Guatemalan army. In this sense, the “institutional relationship” between the state and the non-state actor approaches the level of “complete dependence” the ICJ requires under the “strict control” standard.

2. The ICTY’s “Overall Control” Standard

The ICTY Appeals Chamber articulated the “overall control” standard in *Prosecutor v. Tadić* to determine whether the conflict in the former Yugoslavia could be classified as an international armed conflict.¹⁴⁵ In dicta, the Appeals Chamber held that the overall control standard also could be used to ascertain whether the actions of non-state actors are attributable to the state under state responsibility doctrine. According to the Appeals Chamber, if the non-state actor is “an organised group” and the state exercises “overall control” over it, then the non-state actor qualifies as a *de facto* organ of the state,¹⁴⁶ and all of the non-state actor’s acts are therefore attributable to the state.¹⁴⁷ As the Appeals Chamber explained: “If [an organized group] is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State.*”¹⁴⁸

In *Tadić*, the Appeals Chamber was faced with a question similar to the one before the ICJ in *Bosnian Genocide*: whether the acts of the VRS were attributable to the FRY.¹⁴⁹ As a threshold matter, the Appeals Chamber first found that the VRS was “an organised group” because it had: (i) a structure; (ii) a chain of command; (iii) a set of rules; and (iv) outward

¹⁴² *Blake v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶¶ 68-78 (Jan. 24, 1998). Note that instead of using the language of “organs,” the Court used the language of “agents.” *Id.* ¶ 68.

¹⁴³ *Id.* ¶ 70.

¹⁴⁴ *Id.* ¶¶ 76, 78.

¹⁴⁵ The point of the inquiry was to ascertain whether to apply the laws of international or non-international armed conflict to the conduct of the accused. Goodman, *Authorization versus Regulation of Detention in Non-International Armed Conflicts*, *supra* note 40, at 162 (noting that since *Tadić* “[p]rosecutors in the Hague have fought mightily for the rules of *international* armed conflict rather than NIAC to apply to the behavior of defendants, because the former body of rules imposes a greater set of prohibitions”). Under overall control, once Yugoslavia satisfied the attribution threshold, the ICTY held individual members of non-state armed groups to the higher standards of conduct that IHL prescribes in international armed conflicts. It is unclear whether a similar logic would be persuasive in the context of adjudicating state responsibility under the Draft Articles. Nevertheless, once the overall control threshold is reached, ICTY precedent suggests international armed conflict rules might apply.

¹⁴⁶ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, ¶ 146 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

¹⁴⁷ *Id.* ¶ 120.

¹⁴⁸ *Id.* ¶ 122.

¹⁴⁹ *Id.* ¶ 147.

symbols of authority.¹⁵⁰ In particular, the ICTY emphasized that the overall control standard applies when “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.”¹⁵¹

Once it established that the non-state actor in question was sufficiently organized, the Appeals Chamber asked whether the FRY exercised “overall control” over the VRS. The overall control standard, it explained, has two key requirements:

- The state must finance, train, equip, or provide other operational support;¹⁵² and
- The state must participate in the general direction, coordination and supervision of the activities and operations of the organized military group.¹⁵³

The Appeals Chamber further emphasized that, unlike effective control, overall control does not require specific instructions from the state to the non-state actor.¹⁵⁴

In concluding that the FRY did exercise “overall control” over the VRS, the Appeals Chamber was particularly swayed by evidence of continuity of command structures and shared logistical organization, strategy, and tactics.¹⁵⁵ The Appeals Chamber found the following factors particularly indicative of overall control under the circumstances:

- The FRY controlled the political and military objectives and operations of the VRS.¹⁵⁶
- The FRY and the VRS had shared military objectives.¹⁵⁷
- The FRY financed and equipped the VRS. The assistance was “crucial” to the pursuit of the VRS’s activities, such that they “were almost completely dependent on the supplies of the [FRY] to carry out offensive operations.”¹⁵⁸
- There was clear evidence of a direct chain of military command from the VRS to the FRY.¹⁵⁹
- The FRY transferred officers to the VRS and continued paying their salaries.¹⁶⁰

Finally, the Appeals Chamber recognized that although the question of overall control depends primarily on the group’s level of organization, the amount of evidence required to

¹⁵⁰ *Id.* ¶¶ 120-45.

¹⁵¹ *Id.*

¹⁵² *Id.* ¶ 156.

¹⁵³ *Id.*

¹⁵⁴ *Id.* ¶ 131; *see also id.* ¶ 156 (“[I]nternational law does not require that the particular acts . . . should be subject to specific instruction or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as *de facto* organs of that State.”).

¹⁵⁵ *Id.* ¶ 154.

¹⁵⁶ *Id.* ¶¶ 150-51.

¹⁵⁷ *Id.* ¶ 153.

¹⁵⁸ *Id.* ¶ 155.

¹⁵⁹ *Id.* ¶ 152.

¹⁶⁰ *Id.* ¶ 150.

satisfy the test might vary based on factual considerations relevant to the controlling state. In cases where the controlling authority is a non-territorial state and the armed units perform their operations on the territory of a third state, “more extensive and compelling evidence” of overall control is required.¹⁶¹ Similarly, more extensive evidence of overall control is likely required if the armed clashes occur on the territory of a controlling state that is in a “general situation . . . of turmoil, civil strife and weakened State authority.”¹⁶² In *Tadić*, on the other hand, it was easier to satisfy the overall control threshold because the FRY was an adjacent state with “territorial ambitions on the State where the conflict [was] taking place, and the controlling State . . . attempt[ed] to achieve its territorial enlargement through the armed forces which it control[ed].”¹⁶³

PMSCs are examples of non-state actors that would likely meet the “overall control” standard. As a preliminary matter, PMSCs are usually highly organized. The state often recruits, hires, trains, finances, and equips its PMSCs to either protect civilians or engage in warfare. In addition, the military objectives of the PMSCs become assimilated into the state’s objectives, even though the state does not always direct every single PMSC operation. As a result, under the ICTY standard a hiring state likely has “overall control” over its PMSCs.

3. *Ultra Vires* Acts

There is little question that a state is responsible for an *ultra vires* act committed by its *de facto* organ. Article 7 of the Draft Articles provides: “The conduct of an organ of a State . . . shall be considered an act of the State under international law . . . even if [the organ] exceeds its authority or contravenes instructions.”¹⁶⁴ The ILC Commentary points to an abundance of state practice and judicial decisions supporting this notion.¹⁶⁵ Moreover, both the ICJ and the Appeals Chamber of the ICTY¹⁶⁶ have come to a similar conclusion.

D. RESPONSIBILITY UNDER ARTICLE 8: ATTRIBUTING THE OPERATION TO THE STATE

1. The ICJ’s “Effective Control” Standard

The “effective control” standard has been applied in cases where the non-state actor is not a *de jure* or *de facto* organ of the state—and thus does not meet the “strict control” or “overall control” standard—but where the state’s control over a particular operation by a non-state actor is sufficient to trigger state responsibility for acts taken by the non-state actor in the course of

¹⁶¹ *Id.* ¶ 138.

¹⁶² *Id.* ¶ 139.

¹⁶³ *Id.* ¶ 140. Here, the Appeals Chamber was also motivated to find the VRS was a *de facto* state organ of the FRY under a more flexible standard so that the court could apply international humanitarian law norms to the conflict. Classifying the conflict as an international armed conflict (as opposed to a non-international armed conflict) allowed the ICTY to apply the more robust protections available to belligerents in an international armed conflict.

¹⁶⁴ Draft Articles, *supra* note 113, art. 7.

¹⁶⁵ *Id.* art. 7, cmts. 1-8.

¹⁶⁶ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, ¶ 121 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

that operation. The ICJ articulated the “effective control” standard in *Nicaragua* in 1986¹⁶⁷ and *Bosnian Genocide* in 2007,¹⁶⁸ and the ILC effectively adopted the standard in the Draft Articles Commentary in 2001.¹⁶⁹ As the ICJ first held in *Nicaragua* and later restated in *Bosnian Genocide*:

For the conduct to give rise to legal responsibility of the [state], it would in principle have to be proved that that state had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.¹⁷⁰

It is important to note that the scope of the state’s responsibility under effective control is narrower than in cases that meet the overall control test—it applies only to acts carried out during a particular operation, not to all the acts of a given non-state actor. Indeed, both the ICJ and the ILC have emphasized that the focus of the effective control inquiry is the *operation*.¹⁷¹ If a state exercises effective control over the specific operation during which the act was committed, the act is attributable to the state. As the ICJ clarified in *Bosnian Genocide*:

It must . . . be shown that . . . “effective control” was 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.¹⁷²

The ICJ’s analysis of the facts of *Bosnian Genocide* and *Nicaragua* provides limited guidance as to the content and application of the standard. In *Bosnian Genocide*, the ICJ had to determine whether the genocide in Srebrenica committed by the VRS was attributable to the FRY. The Court found that the following factors were insufficient to constitute “effective control”:

- FRY armed, equipped, and financed the VRS;¹⁷³ and
- FRY was aware of VRS’s intended attack on Srebrenica.¹⁷⁴

¹⁶⁷ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27).

¹⁶⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 400 (Feb. 26).

¹⁶⁹ Draft Articles, *supra* note 113, art. 8, cmts. 3-5.

¹⁷⁰ *Bosnian Genocide*, 2007 I.C.J. 43, ¶ 399 (quoting *Nicaragua*, 1986 I.C.J. 14, ¶ 115) (emphasis added).

¹⁷¹ *Nicaragua*, 1986 I.C.J. 14, ¶ 115 (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary *operations* in the course of which the alleged violations were committed.” (emphasis added)); *Bosnian Genocide*, 2007 I.C.J. 43, ¶ 400 (“It must . . . be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each *operation* in which the alleged violations occurred” (emphasis added)); Draft Articles Commentary, *supra* note 113, art. 8, cmt. 3 (“Such conduct will be attributable to the State only if it directed or controlled the *specific operation* and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an *operation* and which escaped from the State’s direction or control.” (emphasis added)).

¹⁷² *Bosnian Genocide*, 2007 I.C.J. 43, ¶ 400 (emphasis added).

¹⁷³ *Id.* ¶¶ 239-41.

¹⁷⁴ *Id.* ¶ 411.

In *Nicaragua*, the ICJ had to determine whether violations of human rights law and humanitarian law committed by the *contras* in Nicaragua were attributable to the United States.¹⁷⁵ The ICJ found the following factors insufficient for a finding of “effective control”:

- The United States financed, organized, trained, supplied, equipped, and armed the *contras*, and also provided them with reconnaissance aircraft, intelligence, and surveillance.¹⁷⁶
- The United States participated in the planning of “the whole of [the *contras*]’ operation.”¹⁷⁷ In particular, the United States decided and planned, or at least closely collaborated in the deciding and planning of, a number of military and paramilitary operations by the *contras*,¹⁷⁸ devised and directed specific strategies and tactics on when to seize and hold territory.¹⁷⁹ In addition, the United States selected some of the *contras*’ military and paramilitary targets and provided operational support.¹⁸⁰
- The United States prepared and distributed a manual suggesting that the *contras* shoot civilians attempting to leave a town, neutralize local judges and officials, hire professional criminals to carry out “jobs,” and provoke violence at mass demonstrations to create “martyrs.”¹⁸¹ In other words, the United States “encouraged” the commission of unlawful acts.¹⁸²

Because the ICJ did not find effective control in either *Nicaragua* or *Bosnian Genocide*, it is unclear exactly what set of facts would constitute “effective control.” However, it is clear that the ICJ sets a high threshold. Hypothetically, a state’s use of a non-state actor to carry out a highly planned targeted killing would constitute an exercise of effective control over a non-state actor.¹⁸³ Per *Nicaragua*, the state’s involvement would have to go beyond financial and material support, target selection, and provision of intelligence to coordinating specifics of the operation, (potentially including, for instance, time and manner of death). The same set of facts would trigger a finding of overall control at the ICTY were the non-state actor in question also found to be an organized group.

2. *Ultra Vires* Acts

The ICJ’s “effective control” standard appears to contemplate state responsibility for an *ultra vires* act by a non-state actor in limited circumstances. In both *Nicaragua* and *Bosnian*

¹⁷⁵ *Nicaragua*, 1986 I.C.J. 14, ¶ 254 (“In effect, Nicaragua is accusing the *contras* of violations both of the law of human rights and humanitarian law, and is attributing responsibility for these acts to the United States.”).

¹⁷⁶ *Id.* ¶¶ 100-01, 108, 115.

¹⁷⁷ *Id.* ¶ 115.

¹⁷⁸ *Id.* ¶ 106.

¹⁷⁹ *Id.* ¶ 104. It is not clear whether the alleged violations of human rights and humanitarian law occurred in the course of these operations.

¹⁸⁰ *Id.* ¶¶ 112, 115.

¹⁸¹ *Id.* ¶¶ 118-19, 122.

¹⁸² *Id.* ¶ 292(9).

¹⁸³ A similar analysis might apply in a case involving an unorganized group of individuals carrying out specific operations on behalf of a state. If the non-state actor does not meet the *Tadić* threshold of organization, non-state actors must meet effective or strict control for state attribution to obtain.

Genocide, the ICJ held that the state needs to have “effective control” over the *operation* during which the violations occur in order to trigger a finding of attribution under this standard—mentioning nothing about control over the acts (or violations) themselves.¹⁸⁴ The choice to focus the inquiry on control over the operation, rather than the act, suggests that a state could be held responsible for *ultra vires* acts that take place in the course of an operation over which that state exercises effective control.

The ILC, which generally accepts the ICJ’s “effective control” standard, limits liability for *ultra vires* acts during operations over which a state exercises “effective control” to those that are “an integral part” of the operation. It does not extend responsibility to *ultra vires* acts that are only “incidentally or peripherally” associated with an operation:

Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.¹⁸⁵

Indeed, some language in *Bosnian Genocide* and *Nicaragua* suggests that a state by definition does not have “effective control” over an *ultra vires* act.¹⁸⁶ In other words, to attribute an act of a non-state actor to a state under the “effective control” standard, the state must have instructed or directed the specific act that constitutes the violation in question.¹⁸⁷ The Appeals Chamber of the ICTY in *Tadić* appears to have interpreted *Nicaragua* and *Bosnian Genocide* in this manner.¹⁸⁸

¹⁸⁴ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27) (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 400 (Feb. 26).

¹⁸⁵ Draft Articles, *supra* note 113, art. 8, cmt. 3.

¹⁸⁶ *Bosnian Genocide*, 2007 I.C.J. 43, ¶ 400 (“It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred . . .”). One could interpret the “or” in this sentence as an explanatory word. *Nicaragua*, 1986 I.C.J. 14, ¶ 115 (“All the forms of United States participation [and control] mentioned above . . . would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.”). One could interpret this sentence to mean that “direction” and “enforcement” are necessary to find the state responsible.

¹⁸⁷ This depends on how one defines “operation.” If the term “operation” is narrowly construed to mean that each act that makes up an operation must be directed by the state (*Tadić*’s reading), then the state cannot be held responsible for acts that were not expressly instructed by the state. However if “operation” is construed so that several acts are steps in one operation, then it is possible to be responsible for an *ultra vires* act under the ILC reading as long as the act in question is integral to the operation ordered by the state.

¹⁸⁸ Prosecutor v. Tadić, Case No. IT-94-I-A, Appeals Chamber, Judgment, ¶ 106 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“This [effective control] test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the contras.”).

III. COMMON ARTICLE 1: RESPONSIBILITY THROUGH AN OBLIGATION TO ENSURE RESPECT

In addition to attribution of responsibility for acts of non-state actors under the Draft Articles, a state may also be responsible for the consequences of a non-state actor's acts under Common Article 1 of the Geneva Conventions. Common Article 1 provides: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."¹⁸⁹

A state's obligations under Common Article 1 are both broader and narrower than its obligations under the Draft Articles. They are broader because states' duties to "ensure respect" for the rules set forth in the Geneva Conventions are distinct from—and arguably more extensive than—duties "to respect" the Conventions.¹⁹⁰ The obligations are narrower in that they only pertain to violations of parties' duties under international humanitarian law (IHL), whereas the Draft Articles address state responsibility for any "internationally wrongful act." It is widely accepted that compliance with IHL is the responsibility of parties to any international or non-international armed conflict and that Common Article 1 is customary international law.¹⁹¹

Duties "to respect" IHL apply directly to states and their organs.¹⁹² The relevant inquiry for determining whether a state is responsible for a non-state actor's violations of "to respect" duties of Common Article 1 thus concerns the degree to which actors or acts can be seen as attributable to the state. The tests for state responsibility codified in the Draft Articles and articulated in the jurisprudence of the ICJ and ICTY thus also applies to liability for non-state actor violations of "to respect" duties under Common Article 1. This kind of responsibility, as detailed in Part II, sets a relatively high bar for a finding of attribution.¹⁹³

Common Article 1 duties to "ensure respect," however, expand state responsibility beyond the potential for direct attribution of the non-state actor's unlawful conduct. At minimum, the duty to ensure respect also creates an obligation for the state not to assist or "encourage" others (whether states or non-state actors) to violate their obligations under the Geneva Conventions.¹⁹⁴ The ICJ has largely characterized this obligation as a duty to avoid taking actions that might assist in IHL violations.¹⁹⁵ In *Nicaragua*, the ICJ cited Common Article 1 to find the United States liable for publishing a CIA manual on psychological warfare.¹⁹⁶ In this

¹⁸⁹ See Geneva Convention I, *supra* note 95, art. 1; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention III, *supra* note 25, art. 1; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; see also First Additional Protocol, *supra* note 24, art. 1.

¹⁹⁰ For overview and discussion, see Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67 (2000); Birgit Kessler, *The Duty to 'Ensure Respect' under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts*, 44 GERMAN Y.B. INT'L L. 498 (2001).

¹⁹¹ See 1 HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 509-513.

¹⁹² See CRAWFORD, *supra* note 111.

¹⁹³ *Id.* at 12.

¹⁹⁴ For the clearest statement, see *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 220 (June 27).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

regard, the duty to ensure respect also creates a state obligation not to assist other states or non-state actors in violating their own obligations under the Geneva Conventions.¹⁹⁷

In addition to duties “not to encourage” violations of IHL, the ICJ has indicated that Common Article 1 creates some positive obligations to prevent or halt violations of IHL by third states.¹⁹⁸ The issue is whether, and to what extent, Common Article 1 places an affirmative duty on states to ensure that other states (and potentially non-state actors) comply with the Conventions.¹⁹⁹ If such third state obligations do exist, a state may be found in breach of its Common Article 1 duties when it fails to exercise “due diligence” to prevent violations of IHL; liability may exist here even when a state has no immediate or direct ties to the actors committing the violations. While the scope of third state obligations under Common Article 1 remains ambiguous, it seems increasingly likely that international tribunals and other legal bodies will recognize such obligations. Additionally, the International Committee of the Red Cross (ICRC) is expected to publish a new set of commentaries on the Geneva Conventions within the year that will emphasize these positive obligations of third states to “ensure respect” of the Conventions by other states.²⁰⁰

The “not to encourage” standard applies most directly to a state’s conduct towards non-state actors with whom it has some form of direct relationship or ongoing ties. The positive obligations articulated in the *Wall* Advisory Opinion, however, may also extend to the conduct of non-state actors that a state has not engaged; positive third state obligations may require states to take at least some minimal action to prevent and halt any non-state actor’s violations of IHL.

Despite a lack of clarity as to the full scope of Common Article 1’s application, states have additional obligations under Common Article 1 with regard to non-state actors that extend beyond the state’s potential liability under the Draft Articles. Even where a state is not responsible for a non-state actor’s actions under the Draft Articles and the three control tests, it may still be found to have violated its Common Article 1 duties. The rest of this section provides additional details about (1) the ICJ’s “not to encourage” standard from *Nicaragua* and (2) the additional third state obligations stated by the ICJ in its *Wall* Advisory Opinion and advocated by the ICRC.

¹⁹⁷ *Id.* ¶ 255. For a discussion of the duty to ensure respect for Common Article 3 of the Geneva Conventions—and the notion that non-state actors have more expansive human rights obligations—see Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 493 (2006).

¹⁹⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9).

¹⁹⁹ For a discussion, see Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, INT’L REV. RED CROSS 1, 5-6 (2015).

²⁰⁰ For the most directly relevant and significant contributions to the literature on “to ensure respect” duties, see Fateh Azzam, *The Duty of Third States to Implement and Enforce International Humanitarian Law*, 66 NORDIC J. INT’L L. 55 (1997); Boisson de Chazournes & Condorelli, *supra* note 190; Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble*, 21 EUR. J. INT’L L. 125 (2010); Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. INT’L HUMANITARIAN L. 3 (1999).

A. THE ICJ'S "NOT TO ENCOURAGE" STANDARD

In *Nicaragua*, the ICJ interpreted Common Article 1 as an obligation "not to encourage" violations of the Conventions:

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances" The United States is thus under an obligation *not to encourage* persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions²⁰¹

The ICJ held that the United States had violated this obligation by publishing and distributing a manual on psychological operations that encouraged the commission of IHL violations.²⁰² In its application of this principle, the ICJ noted that it evaluated whether the "encouragement" in question pertained only to violations of Common Article 3 of the Geneva Conventions,²⁰³ which creates obligations for both non-state actors and state parties to armed conflict. With regard to the handbook, the ICJ found that the United States encouraged the extra-judicial killing of non-combatants in violation of Common Article 3.²⁰⁴ The ICJ thus explicitly distinguished duties under Common Article 1 not to "incite" or "encourage" violations of Common Article 3 from state responsibility for the actions of the paramilitary groups.²⁰⁵

The ruling also indicates that the standard for responsibility for violating the Common Article 1 duty to "ensure respect" is much less stringent than that of state responsibility for attribution of a non-state actor's acts. The language of this section of the opinion talks about state "encouragement" rather than state control.²⁰⁶ The ICJ also found that the United States knew of allegations that the *contras* were violating IHL and held that knowledge of these allegations was sufficient to show the foreseeability of future IHL violations by the non-state actor.²⁰⁷ Significantly, the ICJ found state liability even though the CIA framed the manual as an attempt

²⁰¹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 220 (June 27) (emphasis added).

²⁰² *Id.* ¶ 256.

²⁰³ *Id.* ¶¶ 255-256.

²⁰⁴ *Id.* ¶ 256.

²⁰⁵ *Id.* ¶ 255 ("The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement.").

²⁰⁶ *Id.* ¶ 255 ("It is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable."); *id.* ¶ 256

²⁰⁷ *Id.* ¶ 256 ("When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to "moderate" such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.").

to moderate the IHL violations of the *contras*. Nevertheless, the ICJ did not stipulate that states have affirmative obligations under Common Article 1.²⁰⁸

In its compendium on the “rules of customary international humanitarian law,” the ICRC has argued extensively that state practice supports the ICJ’s ruling in *Nicaragua*. According to Rule 144 of the compendium, “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.”²⁰⁹ In commentaries on this rule, the ICRC argues that years of state practice also support a customary international law obligation not “to encourage” violations of IHL. While *Nicaragua* remains the clearest and most compelling articulation of this standard, the ICRC and other scholars make a strong case that state practice, ICTY cases, U.N. resolutions, and U.N. committee reports support its judgment.²¹⁰

To summarize, state encouragement of a non-state actor’s actions may be unlawful and trigger state liability when it is “likely or foreseeable” that the non-state actor will commit the suggested violations. Even providing advice geared towards moderating non-state actor’s violations of IHL could render a state responsible for a violation of Common Article 1.²¹¹

B. POSITIVE “THIRD STATE” OBLIGATIONS UNDER COMMON ARTICLE 1

In its *Wall* Advisory Opinion, the ICJ adopted a reading of Common Article 1 that suggests it also imposes some positive third state obligations.²¹² Unlike duties “not to encourage” that are owed to specific actors, third state obligations are *erga omnes* obligations owed to the international community as a whole.²¹³ Such obligations typically have been construed as a general grant of authority for third states to act to ameliorate grave breaches of the Conventions

²⁰⁸ *Id.* ¶¶ 255-56.

²⁰⁹ 1 HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 509 (Rule 144 of customary international humanitarian law).

²¹⁰ *Id.* at 509-12 (“The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in its judgments . . . that the norms of international humanitarian law were norms *erga omnes* and therefore all States had a ‘legal interest’ in their observance and consequently a legal entitlement to demand their respect. State practice shows an overwhelming use of (i) diplomatic protest and (ii) collective measures through which States exert their influence, to the degree possible, to try and stop violations of international humanitarian law.”). For additional support that Common Article 1 and customary international law require states not to encourage other states and non-state actors to violate IHL, see Azzam, *supra* note 200; Boisson de Chazournes & Condorelli, *supra* note 190; Kessler, *supra* note 190.

²¹¹ It remains unclear whether states that make a good faith effort to encourage non-state actors to abide by IHL will still be held to violate their Common Article 1 duties. In *Nicaragua* the ICJ found the US liable for violating Common Article 1 because of a CIA manual that the US claimed was intended to discourage the *contras* from violating IHL. The ICJ took the manual’s recommendations geared towards “mitigating” the violations of the *contras* as evidence that US knew future violations were “likely or foreseeable.” The ICJ, however, also found that the manual included additional recommendations that encouraged violations of IHL. *Nicaragua*, 1986 I.C.J. 14, ¶¶ 255-56. It remains unclear whether future courts will find good faith instructions intended to mitigate non-state actors IHL violations sufficient to violate Common Article 1 duties absent additional “encouragements” to violate IHL.

²¹² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Wall* Advisory Opinion, 2004 I.C.J. 131, ¶¶ 156-60. (July 9).

²¹³ Dörmann & Serralvo, *supra* note 199, at 2-3.

or other *jus cogens* violations (including breaches of the 1949 Genocide Convention²¹⁴).²¹⁵ The ICJ interpreted Common Article 1 to imply that “every state party” to the Fourth Geneva Convention had an obligation to “ensure that the requirements” of the Convention are upheld: “[E]very State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”²¹⁶

In its application of this principle, the ICJ held that “all the States parties to the Geneva Convention . . . are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”²¹⁷ The ICJ thus explicitly found that Common Article 1 imposed third state obligations on all High Contracting Parties to halt Israeli’s violation of the Fourth Convention. Given that many state parties do not have direct ties to Israeli’s military action in Palestine, the ICJ opinion implies that this duty exists regardless of whether at state had provided support to Israel or “encouraged” its violations.

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

I simply do not know whether the scope given by the Court to [Common Article 1] in the present Opinion is correct as a statement of positive law. . . . *I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.*²¹⁸

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

Given the available ICJ case law on Common Article 1, it will likely be interpreted to impose some minimal positive third state obligations. It may be that the finding in *Nicaragua* indicates only the “floor” or minimal conditions that would suffice to establish a violation of the Common Article 1 duties “to ensure respect.” Furthermore, the *Wall* Advisory Opinion indicates that third states might even be liable for their failure to take preventative action against foreseeable IHL violations by other states.²¹⁹

Building on this case law, the ICRC legal staff has recently argued that duties “to ensure respect” should include “positive” third state obligations to prevent and halt other states’ violations of the Conventions.²²⁰ However, none of the ICRC legal staff’s commentaries thus far has offered precise details regarding how states might fulfill their Common Article 1 obligations under this standard. They suggest only that states are required to take “all possible steps, as well as any lawful means at their disposal” to “ensure” all other states respect the Geneva

²¹⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 161-62 (Feb. 26).

²¹⁵ See CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 117-57 (2010).

²¹⁶ *Wall* Advisory Opinion, 2004 I.C.J. 131, ¶ 158.

²¹⁷ *Id.* ¶ 159.

²¹⁸ *Id.* ¶ 50 (separate opinion by Koijmans, J.) (emphasis added).

²¹⁹ See *infra* notes 98-103.

²²⁰ Dörmann & Serralvo, *supra* note 199, at 1-3.

Conventions.²²¹ Accordingly, the ICRC legal staff argues for a “due diligence” standard for determining whether states have discharged positive third state obligations.²²² This standard would impose obligations on the conduct of states, but does not require them to attain specific outcomes.²²³ States would not be held responsible for failures to prevent other states from violating the Conventions as long as they can show that they “made every effort” to prevent the violation.²²⁴ ICRC legal commentators have been clear, however, that general prohibition on the use of force of Article 2(4) of the U.N. Charter provides the upper limit on actions states may take to discharge their Common Article 1 obligations.²²⁵ Third state obligations under Common Article 1 could not be used as a means to justify unilateral humanitarian interventions.

Additionally, the ICRC legal staff characterizes “third state” duties as context dependent obligations, which increase in scope according to states’ engagement with one another.²²⁶ Accordingly, significant ties (whether diplomatic, geographic, social, or economic) between states increase the due diligence responsibility that arises vis-à-vis other states under the Common Article 1 obligation to ensure respect for the Conventions.²²⁷ It is unclear, however, if obligations based on “context” are derived merely from the third-party state’s capacity for influence in a given situation. On this reading, a state might incur greater Common Article 1 obligations in any given conflict simply by virtue of its pervasive worldwide military, economic, and diplomatic influence.²²⁸ In alternative construction, a state might be required to take voluntary steps to engage another state or non-state actor in order to comply with its Common Article 1 due diligence obligations. At the very least, direct support for another state’s involvement in an armed conflict would increase a third state’s responsibility under Common Article 1. Beyond direct support for a state’s engagement in an armed conflict, it remains unclear how exactly close relations between states would translate to increased Common Article 1 state responsibility.

There has not, however, been significant discussion as to whether this kind of third state obligation would also create positive obligations regarding the conduct of non-state actors. If these duties do apply to the conduct of other states, they also likely apply to non-state actors.²²⁹

²²¹ *Id.* at 18.

²²² *Id.* at 16-19.

²²³ *Id.* at 18-19.

²²⁴ See Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT’L L. 47-48 (1992).

²²⁵ Dörmann & Serralvo, *supra* note 199, at 19-20. (“CA 1 should not be used to justify a so-called “*droit d’ingérence humanitaire*”. In principle, permitted measures must be limited to “protest, criticism, retorsions or even non-military reprisals”. Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter. The rules on the resort to armed force (*jus ad bellum*) govern the legality of any use of force, even if it is meant to end serious violations of IHL. The content of CA 1 is not part of *jus ad bellum* and thus cannot serve as a legal basis for the use of force.”). For an extended, and speculative discussion of possible options a state may take to discharge “to ensure” Common Article 1 duties, see Umesh Palwankar, *Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law*, 33 INT’L REV. RED CROSS 1, 9-25 (1993).

²²⁶ Dörmann & Serralvo, *supra* note 199, at 18, 19 (citing *Bosnian Genocide*, 2007 I.C.J. 43, ¶ 430).

²²⁷ *Id.* at 18.

²²⁸ See *id.* at 19.

²²⁹ For the idea that third state obligations apply to states and non-state parties alike see Dieter Fleck, *International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law* 11 J. CONFLICT & SECURITY L. 179, 182 (2006) (“[The obligation to ensure respect] extends to

Common Article 1 itself offers no obvious basis for distinguishing between the two. Notably, the European Court of Human Rights and the Inter-American Court of Human Rights have interpreted their respective conventions, which contain similar duty to “ensure” language, to impose affirmative “due diligence” obligations on State Parties for the conduct of non-state actors.²³⁰ Commentators have similarly argued that there are “due diligence” obligations under Common Article 1,²³¹ in particular with regard to the use of private military contractors by states.²³² Additionally, other scholars have suggested affirmative due diligence obligations extend to the context of U.S. support for paramilitary groups in Syria.²³³

IV. RECOMMENDATIONS

This Part makes recommendations about how state responsibility doctrine might guide state practices of engaging non-state actors. If an act is attributable to a state either under Article 4 (control over the *de facto* state organ) or Article 8 (control over the act), then a state will be held responsible.²³⁴ However, even when the acts of a non-state actor do not prove attributable to a state under Article 4 or Article 8, Common Article 1 may still impose state responsibility on a state for the non-state actor’s conduct.²³⁵ Where a state already has engaged with a non-state actor at a level that triggers attribution under the Draft Articles, the following recommendations may help prevent IHL violations. These actions should also help a state discharge its duties under Common Article 1 to ensure that non-state actors respect the Geneva Conventions. Admittedly, there is a tension that underlies these recommendations: Under the overall control test, the more involved a state is in guiding the actions of a non-state actor (including by offering specific training or instructions on how to carry out operations consistent with IHL), the more likely it is to cross the attribution threshold. Yet this must be balanced against the concern that a state’s failure to follow the suggested recommendations (or similar actions) when it engages with a non-

acts of third states, not directly involved in an armed conflict, in their relations to state and non-state parties to the conflict.”); see also Hannah Tonkin, *Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies*, 22 LEIDEN J. INT’L L. 779, 783 (2009).

²³⁰ *Keenan v. United Kingdom*, App. No. 27229/95, ¶ 89 (Eur. Ct. H.R. Apr. 3, 2001); *Alonso Eugénio da Silva v. Brasil*, Case 11.598, Inter-Am. Comm’n H.R., Report No. 9/00, OEA/Ser.L/V/II.106, doc. 3 rev., ¶ 33 (1999).

²³¹ Dörmann & Serralvo, *supra* note 199, at 1-3.

²³² TONKIN, *supra* note 130, at 136 (“If the host state does not take adequate measures to control a PMSC and the company violates IHL in state territory, the state could incur international responsibility for its failure to ensure respect for IHL. Although no court to date has found a state responsible under Common Article 1 merely on the basis of such inaction, the above analysis has shown that this pathway to responsibility is certainly possible in principle.”).

²³³ Nathalie Weizmann, *What Happens If American-trained Rebels Commit War Crimes*, JUST SECURITY (Aug. 18, 2015), <https://www.justsecurity.org/25469/responsible-american-trained-rebels-commit-war-crimes/>.

²³⁴ Indeed, Article 7 of the Draft Articles expressly provides that “The conduct of an organ of a State . . . shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions.*” Draft Articles, *supra* note 113, art. 7 (emphasis added).

²³⁵ The standard for determining what “preventative measures” a state may take, however, may differ depending on whether one applies the ICJ’s “not to encourage” standard or the “due diligence standard.” What standard applies may be determined by the scope of engagement with the non-state actor. According to the recent ICRC legal staff’s interpretation of Common Article 1, the closer ties a state has with a non-state actor the more likely they will incur additional obligations regarding their conduct. See Dörmann & Serralvo, *supra* note 199, 18-20.

state actor may violate its Common Article 1 duties. Moreover, the best way for a state to avoid responsibility for IHL violations is to prevent the violations from happening in the first place.

After considering what the due diligence obligations under Common Article 1 might entail, this Part suggests ex-ante (vetting, training, and written agreements) and ex-post actions (punishment frameworks, cessation of support) that a state may perform to exercise due diligence in its relationships with non-state actors.

A. COMMON ARTICLE 1 DUE DILIGENCE OBLIGATIONS

Under Common Article 1, states are required to take proactive measures to ensure IHL will not be violated whenever they engage non-state actors. These measures apply both to non-state actors that detain, and broadly to the conduct of non-state actors engaged in armed conflict. Taking such measures not only helps fulfill Common Article 1 duties, but also furthers the state's own interests, as they help assure that the non-state actors with whom the state works do not commit violations of international law. Therefore, even if a non-state actor's actions are held attributable to a state (under Articles 4 and 8 of the Draft Articles), states should still take proactive measures.

The literature on Common Article 1 does not provide a clear list of what measures a state can take with regard to non-state actors generally.²³⁶ The literature on state responsibility for PMSCs, however, is more developed. Indeed, many commentators have elaborated on what positive obligations states have under international law with respect to PMSCs.²³⁷ One strand of negotiations among states culminated in the Montreux Document of 2008,²³⁸ which the United

²³⁶ Writings by ICRC legal staff have suggested, however, that under Common Article 1 third state obligations are not obligations "of result." Accordingly, the ICRC argues that due diligence imposes obligations on the conduct of states, but does not require them to attain specific outcomes. States will not be held responsible for failures to prevent other states from violating the Conventions as long as they can show that they "made every effort" to prevent the violation. Dörmann & Serralvo, *supra* note 199, at 18-19. ("[T]he obligation of result is an obligation to 'succeed', while the obligation of diligent conduct is an obligation to 'make every effort.' . . . [T]hird States can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law. This does not turn the duty to ensure respect into a vacuous norm, since States are under the obligation, depending on the influence they may exert, to take all possible steps, as well as any lawful means at their disposal, to safeguard respect for IHL rules by all other States. If they fail to do so, they might incur international responsibility.").

²³⁷ See, e.g., LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 579 (2013); MOYAKINE, *supra* note 125, at 303-92; Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 223-25 (Simon Chesterman & Chia Lehnardt eds., 2007); *Expert Meeting on Private Military Security Contractors: Status and State Responsibility for Their Actions*, U. CENT. FOR INT'L HUMANITARIAN L. 34-35 34 (2005), http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privées.pdf.

²³⁸ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations and Private Military and Security Companies During Armed Conflict, Annex to the letter dated October 2, 2008 from the Permanent Rep. of Switzerland to the United Nations addressed to the Secretary General, U.N. Doc A/63/467 (Sept. 17, 2008) [hereinafter Montreux Document].

States and fifty-two other states have expressly supported.²³⁹ The most relevant part of the Montreux Document provides:

Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:

- a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;
- b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
- c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.²⁴⁰

Scholar Hannah Tonkin has also suggested that Common Article 1 should provide the source of state responsibility for the conduct of PMSCs.²⁴¹ Tonkin argues that a state's due diligence obligations towards the conduct of PMSCs will vary with context.²⁴² In her analysis three factors are relevant for determining a state's due diligence requirements: the level of control a state exercises over the non-state actor, the risk the non-state actor will violate IHL, and the states actual or constructive knowledge of this risk.²⁴³ Arguably, a state dealing with a non-state actor will need to take additional measures to insure compliance with IHL when any one of these factors is present to a significant degree.

On the basis of the Montreux Document, commentary on PMSCs, and NGO reports on non-state actors, this paper sets forth some actions that a state should (and perhaps must) take with respect to a non-state actor in order to discharge its duties to "ensure respect" under Common Article 1, divided into *ex ante* and *ex post* policies. This is not an exhaustive list of duties states incur for their engagement with non-state actors under Common Article 1; states are potentially liable for encouraging non-state actors to violate any of their IHL obligations.

All of the recommended policies should be established and made clear to the relevant actors in advance.²⁴⁴ Some scholars have argued that the knowledge factor for assessing due

²³⁹ Participating States of the Montreux Document, SWISS FED. DEP'T OF FOREIGN AFF. (Sept. 11, 2015), <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>. Although many States have expressed their support for the Montreux Document, as one commentator notes, "it may be observed that there is no broad compliance of States with the Montreux Document." MOYAKINE, *supra* note 125, at 387. Nevertheless, it serves as a good model for developing best practices for engaging with non-state actors.

²⁴⁰ Montreux Document, *supra* note 238, at 11.

²⁴¹ Tonkin, *supra* note 229.

²⁴² *Id.* at 794-95.

²⁴³ *Id.* at 794 ("Just as the measures necessary to discharge the due diligence obligation may vary between states, so too may the measures required of a particular state vary with the circumstances. Three factors are particularly pertinent to this assessment: first, the level of influence or control that the hiring state in fact exercises over the PMSC in question; second, the risk that the company's activities will give rise to a violation of IHL; and third, the state's actual or constructive knowledge of that risk.").

²⁴⁴ See Olivier Bangerter, *The ICRC and Non-State Armed Groups*, in EXPLORING CRITERIA AND CONDITIONS FOR ENGAGING ARMED NON-STATE ACTORS TO RESPECT HUMANITARIAN LAW AND HUMAN RIGHTS LAW, Geneva Call,

diligence requirements under Common Article 1 is more exacting than that under the Draft Articles.²⁴⁵ In exercising due diligence, states may be held responsible not only if they were “aware” of the risk of a non-state actor’s violation of IHL, but also if they “ought to have been aware” of the likelihood of such violations.²⁴⁶ In light of this consideration, the non-state actor’s acceptance and understanding of these policies should be a condition precedent to engagement.

B. EX ANTE RECOMMENDATIONS

1. Vetting

The state should vet any non-state actor with which it plans to work, along with its members. Depending on the context, this process may require national or international records from the host state, possibly including criminal records and civil complaints alleging human rights violations;²⁴⁷ psychological testing;²⁴⁸ mental health checks;²⁴⁹ and information collection on the ground, from social media, and from other public sources to the greatest extent practicable. If the non-state actor has a history of violating international law, such that a violation in the future is reasonably foreseeable,²⁵⁰ the state should refrain from working with it.

2. Training

Given that non-state actors often commit international law violations in part because they are unaware of them,²⁵¹ a state should train the non-state actor in applicable IHL and

74, 81 (2007).

²⁴⁵ See Dörmann & Serralvo, *supra* note 199, at 28; Tonkin, *supra* note 229, at 794-95.

²⁴⁶ Tonkin, *supra* note 229, at 796 (“The third key consideration is whether the hiring state was aware, or ought to have been aware, of the enhanced risk of violation by the PMSC. Although the law of state responsibility contains no general requirement of fault, obligations of prevention frequently require some degree of knowledge or constructive knowledge on the part of the state in order to establish breach. For example, in assessing responsibility for a failure to protect life, the European Court of Human Rights employs a test of ‘foreseeability of the event’: the state is responsible if the authorities knew or ought to have known of the risk to life and failed to take measures which, judged reasonably, might have prevented the occurrence of the fatal event. In similar vein, in the Genocide case the ICJ held that the obligation to prevent and punish genocide applies wherever a state is aware, or should normally be aware, of a serious risk that genocide will occur.”).

²⁴⁷ Cf. Anne-Marie Buzatu, *European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs through International Legal Instruments*, THE GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES 42-43 (Sept. 30, 2008) (suggesting such vetting for PMSCs).

²⁴⁸ DynCorp (a PMSC) and the French Foreign Legion engage in psychological testing as part of their vetting processes. *Id.* at 43.

²⁴⁹ Cf. *First Armed Guard ISO Vetting Scheduled for March*, InterManager (Dec. 11, 2012), <http://www.intermanager.org/2012/12/first-armed-guard-iso-vetting-scheduled-for-march/> (noting that mental health checks are part of vetting maritime PMSCs).

²⁵⁰ For evidence of the “foreseeability of the event” standard used to determine state responsibility for failure to fulfill “to ensure respect” duties under the European Convention on Human Rights, see *Keenan v. United Kingdom*, App. No. 27229/95, ¶ 89 (Eur. Ct. H.R. Apr. 3, 2001); *Kiliç v. Turkey*, App. No. 22492/93, ¶¶ 65–68 (Eur. Ct. H.R. Mar. 28, 2000).

²⁵¹ INTERNATIONAL COMMITTEE OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS 12 (2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf [hereinafter ICRC Report]; *Rules of Engagement: Protecting Civilians Through Dialogue With Armed Non-State Actors*, GENEVA ACAD. OF INT’L HUMANITARIAN L.

international human rights law.²⁵² The Geneva Conventions require, moreover, that states disseminate the texts of the Conventions to relevant belligerents.²⁵³

In terms of implementation, NGOs have emphasized the following best practices: (1) providing training that is not overly academic or theoretical, but rather, relevant to the given context²⁵⁴; (2) focusing on particular norms rather than all norms generally (although there is disagreement on NGOs on this issue)²⁵⁵; (3) conducting training at the highest levels of command²⁵⁶; (4) engaging former members of the non-state actor in developing the training²⁵⁷; (5) engaging local populations in developing the training²⁵⁸; and (6) emphasizing the legitimacy benefits of abiding by IHL.²⁵⁹

3. Written Agreements

The state should have the non-state actor sign written agreements that they will respect their international legal obligations. This recommendation addresses the fact that non-state actors often assert that they are not bound by IHL or international human rights law because they are not (and in most cases cannot be) parties to the relevant treaties.²⁶⁰ Having non-state actors sign written agreements provides another means to hold them legally accountable.

NGOs have noted that these agreements can take different forms: (1) special agreements between parties to a conflict,²⁶¹ (2) unilateral declarations that are made generally or to an NGO,²⁶² and (3) codes of non-state actor conduct that incorporate IHL and international human

& HUM. RTS. 6 (2011), <http://www.geneva-academy.ch/docs/publications/Policy%20studies/Rules%20of%20Engagement.pdf> [hereinafter ADH Report].

²⁵² See Tonkin, *supra* note 229, at 797-98 (“The hiring state should also take steps to ensure that PMSC personnel are adequately trained and instructed in IHL. The obligation to ensure respect for IHL is commonly taken to include an obligation to ensure that national troops are trained and instructed in accordance with IHL standards. This would also require that a state ensure the training and instruction of any PMSCs it hires to perform military and security activities in armed conflict or occupation.”).

²⁵³ Geneva Convention I, *supra* note 95, art. 47; Geneva Convention II, *supra* note 189, art. 48; Geneva Convention III, *supra* note 189, art. 127; Geneva Convention IV, *supra* note 189, art. 144; *see also* First Additional Protocol, *supra* note 24, art. 83 (affirming these provisions and obligations). These provisions should be interpreted to impose the requirement for states to disseminate the texts of the Geneva Conventions to non-state actors they are supporting. *See* MOYAKINE, *supra* note 125, at 314 (2015); TONKIN, *supra* note 130, at 198; Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT’L L. 989, 993 (2008).

²⁵⁴ ICRC Report, *supra* note 251, at 13.

²⁵⁵ ADH Report, *supra* note 251, at 26.

²⁵⁶ *Id.* at 19; Bangerter, *supra* note 244, at 82.

²⁵⁷ ADH Report, *supra* note 251, at 35.

²⁵⁸ GENEVA CALL, ENGAGING WITH ARMED NON-STATE ACTORS IN THE BROADER MIDDLE EAST ON THE PROTECTION OF CIVILIANS 13 (2012), http://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/11/20120331_engaging_with_armed_non-state_actors.pdf [hereinafter Geneva Call Report].

²⁵⁹ ADH Report, *supra* note 251, at 23 (noting that most non-state actors desire to be recognized as legitimate, including among local populations); Olivier Bangerter, *Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not*, 93 INT’L REV. RED CROSS 353, 358 (2011), <https://www.icrc.org/eng/assets/files/review/2011/irrc-882-bangerter.pdf> (“Self-image is one of the most powerful generators of respect for IHL.”).

²⁶⁰ ICRC Report, *supra* note 251, at 11; ADH Report, *supra* note 251, at 6-7 & n.13.

²⁶¹ Bangerter, *supra* note 244, at 82; ADH Report, *supra* note 251, at 34; ICRC Report, *supra* note 251, at 16-18.

²⁶² Bangerter, *supra* note 244, at 82-83; ADH Report, *supra* note 251, at 34; ICRC Report, *supra* note 251, at 19-21.

rights law.²⁶³ These agreements may also be analogized to contracts undertaken between states and PMSCs. When hiring PMSCs, scholars have suggested that exercising due diligence requires including contract provisions that stipulate PMSC personnel will follow IHL.²⁶⁴

C. EX POST RECOMMENDATIONS

1. Punishment Framework

The state should ensure that the non-state actor has an adequate punishment framework in place to deal with individuals who violate IHL or IHRL.²⁶⁵ A similar concept is found in diplomatic protection law: The ILC has noted that, in that context, the due diligence obligation does not require successfully preventing a private actor from taking an action, but it does require taking “adequate protective measures” to prevent the action and punishing the private actor if the action is taken.²⁶⁶

Many questions arise regarding what would constitute an “adequate” punishment framework. Although answering such questions in detail goes beyond the scope of this paper, the punishment framework should, at a minimum, include (1) oversight and monitoring²⁶⁷; (2) investigation of alleged violations²⁶⁸; (3) prosecution of alleged violators²⁶⁹; and (4) punishment of convicted violators. This recommendation is a response to the concern that non-state actors often feel unconstrained by the law since they are already acting unlawfully by taking up arms against a state.

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

As an example, Geneva Call has used this strategy, encouraging non-state actors to sign Deeds of Commitment renouncing the use of land mines and other tactics that violate IHL. Geneva Call Report, *supra* note 258, at 10.

²⁶³ ICRC Report, *supra* note 251, at 22-23.

²⁶⁴ See Tonkin, *supra* note 229, at 798 (“Another requirement of Common Article 1 is the inclusion of clear and appropriate rules of IHL in the contract of employment. Indeed, this represents the most direct way of imposing conditions on PMSC employees. Such contractual clauses should be accompanied by adequate procedures for supervising contractors in the field.”).

²⁶⁵ Cf. MOYAKINE, *supra* note 125, at 360 (suggesting that, in the context of PMSCs, States should be required to have a punishment framework).

²⁶⁶ International Law Commission, *Report of the International Law Commission on the Work of Its Twenty-Seventh Session, 5 May – 25 July 1975*, GAOR, 30th Sess., Supp. No. 10 (1975), in 2 Y.B. INT’L L. COMM., U.N. Doc. A/10010/Rev.1, p. 71, ¶ 4; see MOYAKINE, *supra* note 125, at 324 (“Thus the duty to punish might be understood as a broad international obligation to legislate, investigate, prosecute, punish, and provide redress appears to be quite clear.”).

²⁶⁷ See *id.* (stipulating such a requirement for PMSCs).

²⁶⁸ *Id.* at 361 (same).

²⁶⁹ In the context of Common Article 1 obligations for PMSCs, Tonkin suggests that this may also entail extradition. See Tonkin, *supra* note 229, at 799 (“[I]f the violation constitutes a criminal offence over which the hiring state has jurisdiction, the state should take steps to arrest and prosecute or extradite the perpetrator.”).

accountability for non-state actor conduct may be essential for a state to exercise due diligence under Common Article 1.²⁷⁰

2. Cessation of Support

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

A single violation would not necessarily require a cessation of support. If the primary obligations owed by the state are due diligence obligations, Article 14(3) of the Draft Articles arguably comes into play. Article 14(3) provides: “The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”²⁷¹ The state might decide that it is appropriate to give the non-state actor an opportunity to respond to the violation to prevent it from recurring.

V. CONCLUSION

If a non-state actor in a NIAC unlawfully detains individuals, then a state that engages the non-state actor may incur responsibility for that detention. IHL neither explicitly authorizes nor prohibits detention by non-state actors in NIACs; IHL does, however, regulate non-state actors that detain. As a result, non-state actors will likely only be held responsible for breaching IHL when detention is arbitrary, or fails to meet the substantive guarantees of humane treatment and the material and procedural requirements mandated by Common Article 3 and the Second Additional Protocol of the Geneva Conventions. In general, states may incur legal liability for the unlawful actions of their non-state partners under either state responsibility doctrine or Common Article 1 of the Geneva Conventions.

Under state responsibility doctrine there are at least two independently sufficient tests that attribute the conduct of non-state actors to states. Both tests set high thresholds of attribution—courts have rarely held states responsible for the conduct of non-state actors. First, Article 4 of the Draft Articles asks if the non-state actor can be attributed to the state as a *de facto* organ. If the non-state actor functions as a *de facto* organ all of its conduct, including *ultra vires* acts, can be imputed to the state. International courts have applied different tests (“strict control” and “overall control”) to determine if a non-state group operates as a *de facto* organ of the state. Second, Article 8 asks whether the conduct of non-state actors during a particular operation can be attributed to the state. The ICJ has held that if the state exercises effective

²⁷⁰ The ICJ considered punishment a requirement of international obligations in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶ 439 (Feb. 26).

²⁷¹ *Id.* at 325-26 (“The positive measures to be taken by States may include the duty to intervene when a violation of international law is likely to occur and to regulate the activities of private actors in order to prevent breaches of international humanitarian law and human rights law.”).

control over the operation the state may be liable for the wrongful conduct of the non-state actor during the operation's course. Under effective control, the state is also potentially liable for *ultra vires* actions as long as the wrongful act proves integral to the operation.

Under Common Article 1 states have duties both “to respect” and to “ensure respect” for the Geneva Conventions. Duties to ensure respect require that states “not encourage” non-state actors to violate the group's own (Common Article 3) obligations. The ICJ has held that if it is “likely or foreseeable” that a non-state actor will violate Common Article 3, a state will violate its Common Article 1 duties by providing support to the non-state actor. The ICJ has additionally indicated that some positive third state obligations exist under Common Article 1 to end other states' ongoing Geneva Convention violations; these obligations may also apply to non-state actors. It remains unclear what actions a state must take to discharge its positive obligations under Common Article 1. The ICRC legal staff, writing on their own behalf, have suggested that states may discharge their Common Article 1 obligations by exercising “due diligence” in their interactions with third state actors. It remains unclear exactly how Common Article 1 duties relate to state responsibility doctrine; it may be that states that adequately perform their Common Article 1 duties are more likely to meet the threshold for attribution under state responsibility doctrine. This area of law, however, will likely require additional development and scrutiny, especially in light of the imminent publication of new ICRC commentaries.

In view of these potential sources of state responsibility, we recommend a set of ex ante and ex post actions states can undertake when engaging with a non-state actor in order to mitigate the likelihood of being held responsible for violations of a non-state actor. These include, vetting, training, acquiring written agreements, providing punishment frameworks, and ceasing support when actors commit violations of IHL. Given available case law, it is difficult to isolate definitively the factors sufficient to trigger liability for non-state actors. Nevertheless, states adopting these recommendations will be more likely to discharge their duties under international humanitarian and human rights law. These recommendations apply to non-state actors that detain, but have broader applications to situations involving the conduct of non-state actors more generally. Given the prevalence of state engagement with non-state actors, this body of law will likely be further developed as more cases come before international courts and tribunals.