

## HOLDING STATES RESPONSIBLE FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN PROXY WARFARE: THE CONCEPT OF STATE COMPLICITY IN ACTS OF NON-STATE ARMED GROUPS

Kilian Roithmaier\* 

*Proxy warfare in the form of state support to non-state armed groups is a recurrent feature of armed conflicts. While states have long recognized the strategic advantages of this form of indirect conflict intervention, several studies have linked proxy warfare to a protraction of conflicts and an increased probability of violations of international humanitarian law. However, instances of states being held responsible for facilitating such violations by non-state armed groups have remained rare. This article contends that this responsibility gap is caused by the requirement of state control over acts of non-state armed groups under the current state responsibility framework. It argues that in view of the collusive nature of proxy warfare, the concept of state complicity in wrongful acts is best suited to close the identified responsibility gap. Amidst different normative propositions, the article concludes that complicity should be incorporated into Common Article 1 of the Geneva Conventions as part of the external dimension of the duty ‘to ensure respect’ for international humanitarian law. According to this approach, states would be under a continual obligation to neither encourage nor aid or assist as well as to prevent and stop violations of international humanitarian law by proxy non-state armed groups.*

**Keywords:** proxy warfare; belligerent support relationships; indirect conflict intervention; complicity; state responsibility; non-state armed

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\* PhD Candidate, Department of Transboundary Legal Studies, University of Groningen, Netherlands. k.t.roithmaier@rug.nl. A draft version of this article was presented at the Society of Legal Scholars (SLS) PhD Workshop *Responding to Complex Relationships in International Law*. The author would like to thank Dr. Alexander Gilder for convening the workshop and Dr. Asaf Lubin for his invaluable feedback. He would also like to thank the two anonymous reviewers who helped to improve the article significantly.

groups; international humanitarian law; law of armed conflict; armed conflict; ARSIWA

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### I. INTRODUCTION

States have long recognized the strategic advantages of proxy warfare as a form of indirect conflict intervention.<sup>1</sup> A predominant manifestation thereof is the provision of support by states to non-state armed groups (NSAGs), i.e., groups with a military chain of command and the ability to use armed force, without being part of a state's military structure.<sup>2</sup> Establishing such support relationships enables states to influence armed conflicts overseas while

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<sup>1</sup> Seyom Brown, 'Purposes and pitfalls of war by proxy: A systemic analysis' (2016) 27(2) *Small Wars & Insurgencies* 243, 244-245; Andreas Krieg, 'Externalizing the burden of war: the Obama Doctrine and US foreign policy in the Middle East' (2016) 92(1) *International Affairs* 97, 100; Geraint Hughes, *My Enemy's Enemy: Proxy Warfare in International Politics* (Sussex Academic Press 2012) 6.

<sup>2</sup> In this vein Gerard Mc Hugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (United Nations Office for the Coordination of Humanitarian Affairs 2006) 6, 14-16.

avoiding direct inter-state confrontations as well as the material, financial, and political costs associated with direct military interventions.<sup>3</sup>

However, state support to belligerent parties, NSAGs in particular, has also been linked to a protraction of conflicts and an increased probability of violations of international humanitarian law (IHL).<sup>4</sup> For example, before launching its full-scale invasion against Ukraine in February 2022, the Russian Federation had provided weaponry and other equipment, funds, and assistance to separatist NSAGs in Eastern Ukraine,<sup>5</sup> resulting in an eight-

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<sup>3</sup> Andrew Mumford, 'Proxy Warfare and the Future of Conflict' (2013) 158(2) *The RUSI Journal* 41; James Pattison, 'The Ethics of Arming Rebels' (2015) 29(4) *Ethics & International Affairs* 455, 455-456; Groh L Tyrone, *Proxy War: The Least Bad Option* (Stanford University Press 2019) 31; Daniel L Byman, 'Why engage in proxy war? A state's perspective' (*Brookings*, 21 May 2018) <<https://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/>> accessed 27 October 2020;

<sup>4</sup> Matthew Moore, 'Selling to Both Sides: The Effects of Major Conventional Weapons Transfers on Civil War Severity and Duration' (2012) 38(3) *International Interactions* 325; Bethany Lacina, 'Explaining the Severity of Civil Wars' (2016) 50(2) *Journal of Conflict Resolution* 276, 286-287; Patrick M Regan, 'Third-party Interventions and the Duration of Intrastate Conflicts' (2016) 46(1) *Journal of Conflict Resolution* 55; Hughes (n 1) 50-51; Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press 2007) 209; David E Cunningham, 'Blocking resolution: How external states can prolong civil wars' (2010) 47(2) *Journal of Peace Research* 115; Lerna K Yanik, 'Guns and Human Rights: Major Powers, Global Arms Transfers, and Human Rights Violations' (2006) 28(2) *Human Rights Quarterly* 357, 359 with further references.

<sup>5</sup> Vanessa Meier and others, 'UCDP External Support Dataset (ESD)1975-2017' (*Uppsala Conflict Data Program*, 2022) <<https://ucdp.uu.se/downloads/>> accessed 27 October 2022; International Crisis Group, 'Rebels without a Cause: Russia's Proxies in Eastern Ukraine' (2019) *Europe Report No 254* <<https://icg-prod.s3.amazonaws.com/254-rebels-without-a-cause%20%281%29.pdf>> accessed 25 October 2022, 5; International Crisis Group, 'Russia and the Separatists in Eastern Ukraine' (2016) *Crisis Group Europe and Central Asia Briefing No 79* <<https://icg-prod.s3.amazonaws.com/b79-russia-and-the-separatists-in-eastern-ukraine.pdf>> accessed 2 December 2022.

year-long conflict with more than 14,000 casualties, many of them civilians.<sup>6</sup> In 2014, Malaysia Airlines Flight 17 was brought down with a Russian-delivered Buk surface-to-air missile, killing all 298 civilian passengers on board.<sup>7</sup> However, Russia has denied any legal responsibility for the downing of MH17 and other law of armed conflict violations in Eastern Ukraine and efforts to invoke its responsibility has, thus far, remained unsuccessful.<sup>8</sup> As this case illustrates, holding states responsible for proxy warfare oftentimes remains futile, challenging the adequacy of the current state responsibility framework as codified in the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA).<sup>9</sup>

Against this background, this article attempts to answer the following question: Do the current rules of state responsibility result in a responsibility gap in instances of proxy warfare and – if so – how could such gap be closed? To provide an answer, Section 2 offers a description of proxy warfare with reference to relevant literature. Section 3 contends that the current state responsibility framework creates a responsibility gap in instances of proxy warfare, and that this gap requires a normative response. Finally, Section 4

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<sup>6</sup> International Crisis Group, 'Conflict in Ukraine's Donbas: A Visual Explainer' (*International Crisis Group*, 29 June 2021) <<https://www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer>> accessed 27 October 2022.

<sup>7</sup> Dutch Safety Board, 'Crash van Malaysia Airlines vlucht MH17 (Hrabove, Oekraïne, 17 juli 2014)' (*Onderzoeksraad voor Veiligheid*, October 2015) <<https://www.onderzoeksraad.nl/nl/page/3546/mh17-crash-17-juli-2014>> accessed 2 December 2022.

<sup>8</sup> For ongoing efforts, see *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Pending) <<https://www.icj-cij.org/en/case/166>> accessed 5 December 2022; Government of the Netherlands, 'The Netherlands and Australia Submit Complaint against Russia to the International Civil Aviation Organization' (*Rijksoverheid*, 14 March 2022) <<https://www.government.nl/latest/news/2022/03/14/netherlands-and-australia-submit-complaint-against-russia-to-icao>> accessed 2 December 2022.

<sup>9</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) II Yearbook of the International Law Commission 31. For this, see also Oona A. Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95(3) *Texas Law Review* 539, 542–543.

argues that the concept of state complicity in wrongful acts is best suited to close the identified responsibility gap and that it should be incorporated into Common Article 1 of the Geneva Conventions as a regime-specific, primary rule of IHL.

## II. PROXY WARFARE: A COMPLEX BELLIGERENT SUPPORT RELATIONSHIP BETWEEN STATES AND NON-STATE ARMED GROUPS

No generally accepted definition of the term ‘proxy warfare’ exists in either legal or other scholarship.<sup>10</sup> For the purpose of this article, ‘proxy warfare’ refers to a type of indirect conflict intervention by which states – for the main purpose of attaining their own foreign policy objectives<sup>11</sup> – enhance the capabilities of NSAGs to engage in sustained military operations through the provision of goods (e.g., weaponry and other military equipment), financial assets, and/or resources and services (e.g., provision of intelligence or training).<sup>12</sup> This article focuses on state support to NSAGs specifically as this kind of belligerent support relationship poses particular challenges for the invocation of state responsibility.

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<sup>10</sup> Vladimir Rauta, ‘Proxy Warfare and the Future of Conflict: Take Two’ (2020) 165(2) *The RUSI Journal* 1, 40; ICRC, *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Cost of War* (International Committee of the Red Cross 2021) 14; Candace Rondeaux and David Sterman, ‘Twenty-First Century Proxy Warfare: Confronting Strategic Innovation in a Multipolar World Since the 2011 NATO Intervention’ (*New America*, 20 February 2019) <[https://d1y8sb8igg2f8e.cloudfront.net/documents/Twenty-First\\_Century\\_Proxy\\_Warfare\\_Final.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/Twenty-First_Century_Proxy_Warfare_Final.pdf)> accessed 26 February 2021, 18.

<sup>11</sup> Eli Berman and David A Lake (eds), *Proxy Wars: Suppressing Violence Through Local Agents* (Cornell University Press 2019) 1 ff.

<sup>12</sup> Mumford, ‘Proxy Warfare and the Future of Conflict’ (n 3) 40; Andrew Mumford, *Proxy Warfare* (Polity Press 2013) 61–69; Hughes (n 1) 4, 12; Rondeaux and Sterman (n 10) 26; Brendan Sozer, ‘Development of Proxy Relationships: A Case Study of the Lebanese Civil War’ (2016) 27(4) *Small Wars & Insurgencies* 636, 643. Similarly, Geraint Hughes, ‘Ukraine: Europe’s New Proxy War?’ (2014) I(II) *Fletcher Security Review* 105, 106; ICRC (n 10) 46–47.

Hence, in first instance, proxy warfare needs to be distinguished from direct state interventions, i.e., the employment of a state's own military personnel in combat capacity,<sup>13</sup> as well as situations in which a third state becomes party to an armed conflict *ratione personae* due to its support being an integral part of specific military operations.<sup>14</sup> Proxy warfare should further be distinguished from collective military engagements, such as coalitions, in which different parties 'work together with each making significant contributions'<sup>15</sup> and in which the 'precise functioning and modalities [of the engagement] are negotiated on a case-by-case basis'<sup>16</sup> in a 'direct, cooperative strategic [manner]'.<sup>17</sup> Instead, proxy warfare lacks formalized arrangements, comprehensive strategic cooperation, and conventional lines of command.<sup>18</sup> While the provision of support may enable states to

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<sup>13</sup> Anthony Pfaff, 'Proxy War Ethics' (2017) 9(1) *Journal of National Security Law & Policy* 305, 310–311; Vladimir Rauta, 'Proxy War' – A Reconceptualisation' (2021) 23 *Civil Wars* 1, 15; Yelena Biberman, *Gambling with Violence: State Outsourcing of War in Pakistan and India* (Oxford University Press 2019) 16; Cecily G Brewer, 'Peril by Proxy: Negotiating Conflicts in East Africa' (2011) 16 (1) *International Negotiation* 137, 137–138, 141–142; Jennifer L De Maio, 'Plausible Deniability: Proxy Wars in Africa' (2014) I(II) *Fletcher Security Review* 34, 35; Andrew Mumford, 'The New Era of the Proliferated Proxy War' (*The Strategy Bridge*, 16 November 2017) <<https://thestrategybridge.org/the-bridge/2017/11/16/the-new-era-of-the-proliferated-proxy-war>> accessed 26 February 2021.

<sup>14</sup> For this, see, e.g., Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict' (2015) 97(900) *International Review of the Red Cross* 1227.

<sup>15</sup> Byman (n 3). See also Pfaff (n 13) 310.

<sup>16</sup> Berenice Boutin, 'The Interplay of International Obligations Connected to the Conduct of Others: Toward a Framework of Mutual Compliance Among States Engaged in Partnered Warfare' (2020) 96 *International Law Studies* 529, 532.

<sup>17</sup> Vladimir Rauta, 'Conceptualising the Regular-Irregular Engagement: The Strategic Value of Proxies and Auxiliaries in "Wars Amongst the People"' in David Brown and others (eds), *War Amongst the People: Critical Assessments* (Sandhurst Military Academy 2019) 107–108. See further Rauta, 'Proxy War' – A Reconceptualisation' (n 13) 15; Yelena Biberman, *Gambling with Violence: State Outsourcing of War in Pakistan and India* (Oxford University Press 2019) 20–21.

<sup>18</sup> Rauta, 'Conceptualising the Regular-Irregular Engagement' (n 17) 101. See also Rauta, 'Proxy War' – A Reconceptualisation' (n 13) 16; Hughes (n 1) 12.

informally exercise a certain degree of influence over NSAGs, in most instances of proxy warfare this would not amount to operational military authority and command over the conduct of hostilities.<sup>19</sup>

### III. PROXY WARFARE'S RESPONSIBILITY GAP: THE NEED FOR A NORMATIVE RESPONSE

This understanding of proxy warfare reveals the complex relationship between supporting states and proxy NSAGs that manifests itself in the absence of operative authority of the former over the conduct of hostilities. Indeed, existing literature suggests that many NSAGs continue to operate independently even when receiving comprehensive support from states.<sup>20</sup> It is this aspect of proxy warfare in particular that challenges the invocation of state responsibility under the ARSIWA.

According to Article 2 ARSIWA, an internationally wrongful act not only requires the breach of an international obligation, but also that such breach is attributable to a state under the customary rules of attribution.<sup>21</sup> While a detailed inquiry into the rules of attribution lies outside the scope of this

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<sup>19</sup> Mumford, 'Proxy Warfare and the Future of Conflict' (n 3) 40; Mumford, *Proxy Warfare* (n 12) 78; Rondeaux and Sterman (n 10) 17; Vladimir Rauta, 'Proxy Agents, Auxiliary Forces, and Sovereign Defection: Assessing the Outcomes of Using Non-State Actors in Civil Conflicts' (2016) 16(1) *Southeast European and Black Sea Studies* 91, 93; Biberman (n 17) 21-22. See also Rondeaux and Sterman (n 10) 17. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*) para 109.

<sup>20</sup> See, e.g., Idean Salehyan, 'The Delegation of War to Rebel Organizations' (2010) 54(3) *Journal of Conflict Resolution* 493; Bulbul Khaitan, 'Alternative to the Existing Rule of Attribution for Use of Force by Non-State Actors in an Armed Conflict' (2021) 26(1) *Journal of Conflict and Security Law* 41; Kai M Thaler, 'Delegation, Sponsorship, and Autonomy: An Integrated Framework for Understanding Armed Group-State Relationships' (2022) 7(1) *Journal of Global Security Studies* 1.

<sup>21</sup> ARSIWA, Arts 1, 2. See also Hathaway and others (n 9) 545; Kubo Mačák, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) 21(3) *Journal of Conflict & Security Law* 405, 406.

article, it suffices to conclude that the particularly relevant Articles 4 ('organs of a state')<sup>22</sup> and 8 ('instructions, direction, or control of a state')<sup>23</sup> require institutional or factual authority or control of a state over third entities, i.e., a relationship of subordination between a principal and an agent.<sup>24</sup> Although the required degree of subordination and control – 'complete dependence' (Article 4)<sup>25</sup> and 'effective'<sup>26</sup> or 'overall'<sup>27</sup> control (Article 8) – remain context-specific, the absence of military command and authority of states over proxy NSAGs renders attribution of acts in proxy relationships highly unlikely. This is because these standards would require (1) the complete absence of an NSAG's operational autonomy due to a state's comprehensive authority (complete dependence),<sup>28</sup> (2) a state's 'control [over specific] military or paramilitary operations [of an NSAG] in the course of which the alleged violations were committed' (effective control),<sup>29</sup> or (3) a state's 'participation in the planning and supervision of military operations [of an NSAG]' (overall control),<sup>30</sup> all of which go 'beyond the mere financing and equipping of [an NSAG]'.<sup>31</sup> While states may occasionally acquire effective control over particular military operations or temporary overall control, in particular in long-term support relationships, most instances of proxy

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<sup>22</sup> For the constitutive requirements of *de jure* or *de facto* State organs under Article 4 ARSIWA, see ILC (n 9) Art 4, paras 1, 5-9; *Nicaragua* (n 19) para 109; *Case Concerning Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Bosnian Genocide*), paras 386-389, 391-393.

<sup>23</sup> Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28(2) *European Journal of International Law* 563, 579-580; Mačák (n 21) 427.

<sup>24</sup> ICRC (n 10) 8, 21 ff. Similarly, Lanovoy (n 23) 579; Hathaway and others (n 9) 542-543.

<sup>25</sup> As pronounced in *Nicaragua* (n 19) para 109; *Bosnian Genocide* (n 22) paras 391-393.

<sup>26</sup> As pronounced in *Nicaragua* (n 19) para 115.

<sup>27</sup> As pronounced in *Prosecutor v Tadić* (Appeals Judgment) ICTY-94-1-A (15 July 1999) (*Tadić*) paras 131, 137.

<sup>28</sup> *Nicaragua* (n 19) paras 109-114.

<sup>29</sup> *Ibid* para 115.

<sup>30</sup> *Tadić* (n 27) paras 145.

<sup>31</sup> *Ibid* para 137. See also Lanovoy (n 23) 576.



warfare entail horizontal, collusive interactions rather than principal-agent relationships.<sup>32</sup> For that reason, even systematic and comprehensive support to NSAGs would regularly not meet the requirements for attribution and, hence, invocation of state responsibility.<sup>33</sup> This, as *Hathaway and others* conclude, ‘has led to a critical accountability gap’, regularly allowing states to evade legal responsibility when facilitating IHL violations by NSAGs.<sup>34</sup>

However, whether this responsibility gap requires a normative response is not straightforward. This is because at least in the realm of *jus in bello*,<sup>35</sup> NSAGs have direct international obligations under Common Article 3 of the Geneva Conventions,<sup>36</sup> Additional Protocol II to the Geneva Conventions,<sup>37</sup> and customary IHL, which are largely identical to those of states.<sup>38</sup> As such, NSAGs can be held internationally responsible for violations of IHL independently of a supporting state.

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<sup>32</sup> Khaitan (n 20) 55–56.

<sup>33</sup> ABA Center for Human Rights, ‘The Legal Framework Regulating Proxy Warfare’ (*American Bar Association*, 1 December 2019) <[https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-proxy-warfare-report-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf)> accessed 3 August 2021, 2; Hathaway and others (n 9) 563.

<sup>34</sup> Hathaway and others (n 9) 542. See also Jean d’Aspremont and others, ‘Sharing Responsibility Between Non-State Actors and States in International Law: Introduction’ (2015) 62(1) *Netherlands International Law Review* 49, 54–55; Lanovoy (n 23) 584.

<sup>35</sup> For the accountability gap in the *jus ad bellum*, see Khaitan (n 20); Ilias Plakoefalos, ‘The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy’ (2017) 28(2) *European Journal of International Law* 587, 588.

<sup>36</sup> E.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31.

<sup>37</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

<sup>38</sup> Customary IHL in particular has widely converged the rules binding upon States and NSAGs. For this, see, e.g., Veronika Bílková, ‘Armed Opposition Groups and Shared Responsibility’ (2015) 62(1) *Netherlands International Law Review* 69, 76; Miles Jackson, *Complicity in International Law* (Oxford University Press 2015) 176.

However, it appears inadequate to rely solely on the responsibility of NSAGs in instances of proxy warfare for three reasons. Firstly, as *Fortin and Kleffner* point out, there currently exist no legal rules ‘on the content and implementation of [NSAGs’] responsibility, nor are there judicial or arbitral fora which can adjudicate [their] international responsibility’.<sup>39</sup> Similarly, obligations to provide reparations for violations of IHL under Chapter II ARSIWA and customary IHL Rule 150 are deemed to apply solely to states.<sup>40</sup> Hence, while NSAGs may be legally responsible for violations of IHL, invoking their responsibility oftentimes remains elusive in practice. Secondly, as *Hathaway and others* point out, the identified responsibility gap allows states to ‘escape responsibility for violations of the laws of armed conflict if they act through non-[S]tate partners’.<sup>41</sup> This in turn provides ‘perverse incentives’ for states to rely on non-state proxies as a form of indirect conflict intervention,<sup>42</sup> which not only runs against the foundational rules of non-use of force and non-intervention but also carries the inherent risk of conflict escalation and protraction. Thirdly, from a normative point of view, relying solely on the responsibility of NSAGs challenges the coherence of the state responsibility framework. Whenever third states provide support to belligerent parties, they may facilitate IHL violations by the latter.<sup>43</sup> In the inter-state context such states would be internationally responsible by virtue of Article 16 ARSIWA which provides that a ‘state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so’. This

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<sup>39</sup> Katharine Fortin and Jann Kleffner, ‘Responsibility of Organized Armed Groups Controlling Territory: Attributing Conduct to ISIS’ in Rogier Bartels and others (eds) *Military Operations and the Notion of Control Under International Law: Liber Amicorum Terry D. Gill* (Asser Press/Springer 2021) 314. See also d’Aspremont and others (n 34) 55.

<sup>40</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (International Committee of the Red Cross/Cambridge University Press 2005) Rule 150.

<sup>41</sup> Hathaway and others (n 9) 543.

<sup>42</sup> *Ibid* 562.

<sup>43</sup> Jackson (n 38) 132.

rule is deemed applicable solely in the inter-state context as it requires a primary internationally wrongful act, which non-state actors can generally not commit as they lack international legal personality.<sup>44</sup> However, as demonstrated above, NSAGs have direct international obligations under IHL similar to those of states. Hence, not applying the principle of Article 16 ARSIWA to support relationships between states and NSAGs results in a significant incoherence:<sup>45</sup> while states can be held responsible for facilitating law of armed conflict violations by other states, they will not incur responsibility for facilitating such violations by proxy NSAGs despite the latter being bound by the same primary rules of IHL.

In view of these arguments, there exists a need for a normative response that closes proxy warfare's responsibility gap and remedies identified inconsistencies.

#### **IV. CLOSING THE RESPONSIBILITY GAP: THE CONCEPT OF STATE COMPLICITY IN VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW BY NON-STATE ARMED GROUPS**

In view of the horizontal and collusive nature of proxy warfare, such normative response must provide a framework that accommodates the contributory role of supporting states in proxy relationships. This is most accurately accounted for by the concept of state complicity because it entails an important difference to the general conception of state responsibility under Article 2 ARSIWA:<sup>46</sup> Instead of a state's *direct* responsibility for *perpetrating* an internationally wrongful act, complicity establishes a state's

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<sup>44</sup> Olivier de Frouville, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 275-277; Khaitan (n 20) 42-43; Jackson (n 38) 128.

<sup>45</sup> Similarly, de Frouville (n 44) 277; d'Aspremont and others (n 34) 65.

<sup>46</sup> Cf. Lanovoy (n 23); Jackson (n 38) ch 8; Daniele Amoroso, 'Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law' (2011) 24(4) *Leiden Journal of International Law* 989.

*ancillary* or *derivative* responsibility for *facilitating and supporting* another entity's wrongful act.<sup>47</sup> Originally a concept found in (inter)national criminal law,<sup>48</sup> it has been incorporated into the state responsibility framework by virtue of Article 16 ARSIWA, a provision equated with the prohibition of complicity in wrongful acts in both the case law of the ICJ as well as legal scholarship.<sup>49</sup> Because Article 16 is not as such applicable to acts of NSAGs, several propositions have been put forward on how to apply the concept of complicity to relationships between states and NSAGs.

Firstly, as *Lanovoy* propounds, complicity could be construed as a specific secondary norm of attribution. This would entail that 'the conduct of a non-[S]tate actor is attributable to [a S]tate because of that [S]tate's knowing and causal aid or assistance facilitating that conduct'.<sup>50</sup> *Lanovoy* and *Jackson* identify this approach<sup>51</sup> in the case law of the European Court of Human Rights – invoking states' responsibility for acts of non-state occupational forces that '[survive solely] by virtue of [those states'] military, economic, financial and political support'<sup>52</sup> – as well as the Inter-American Court of Human Rights – invoking states' responsibility due to their 'acquiescence'

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<sup>47</sup> Kimberley Trapp, *State Responsibility for International Terrorism* (Oxford University Press 2011) 45; Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016) Chatham House Research Paper <<https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>> accessed 5 December 2022, para 15; James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 396; Jackson (n 38) 11.

<sup>48</sup> See, e.g., Jackson (n 38) 10-11 and ch 2 more generally.

<sup>49</sup> See, e.g., *Bosnian Genocide* (n 22) para 419; Crawford (n 47) 330; Helmut P Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) ch 5; Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5(4) *Journal of International Criminal Justice* 875, 881; Bernhard Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue Belge de Droit International* 371, 373 (referring to an earlier draft ARSIWA).

<sup>50</sup> *Lanovoy* (n 23) 584.

<sup>51</sup> *Ibid* 582-583; Jackson (n 38) 190-194.

<sup>52</sup> *Ilaşcu and Others v Moldova and Russia* App No 48787/99 (ECtHR, 8 July 2004) para 390 reaffirming its findings in *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001).

and ‘involvement’ in NSAGs’ wrongful acts as well as their general ‘cooperation’ with these groups.<sup>53</sup> However, employing complicity as rule of attribution risks fragmenting the otherwise unified state responsibility regime because inter-state complicity as laid down in Article 16 ARSIWA constitutes an independent rule of derivative liability. While it may be interpreted as primary or secondary norm,<sup>54</sup> it clearly does not entail a rule of attribution. Hence, construing complicity as rule of attribution solely in regard to relationships between states and NSAGs appears to disarrange the internal coherence of the rules of state responsibility, resulting in two different forms of responsibility – primary or derivative – for the same act depending on the primary actor.

Alternatively, it is conceivable to invoke complicity as an independent rule of responsibility and, hence, to apply Article 16 ARSIWA directly to acts of NSAGs. This approach was suggested by Austria when opposing a European Union decision to allow arms transfers to Syrian NSAGs,<sup>55</sup> as well as by the United Nations Human Rights Committee in a recent General Comment asserting that states ‘have obligations under [Article 16 ARSIWA] not to aid or assist activities undertaken by other states *and non-state actors* that violate the right to life’.<sup>56</sup> However, because Article 16 ARSIWA as a rule of derivative responsibility presupposes the breach of an international obligation, it can only apply to instances in which the primary actor has such obligations directly under international law. For NSAG, this only the case

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<sup>53</sup> *19 Merchants v Colombia* Series C No 109 (IACtHR, 5 July 2004) paras 124, 135, 141; *Ituango Massacres v Colombia* Series C No 148 (IACtHR, 1 July 2006) paras 132–135; *Rochela Massacre v Colombia* Series C No Series 163 (IACtHR, 11 May 2007) para 78.

<sup>54</sup> See ILC (n 9) Art 16, para 7.

<sup>55</sup> Austrian Ministry of Foreign Affairs, ‘SYRIA: Austrian Position on Arms Embargo’ (*Financial Times*, 13 May 2021) <<https://im.ft-static.com/content/images/1721c482-bcbc-11e2-b344-00144feab7de.pdf>> accessed 25 October 2021, 3.

<sup>56</sup> UN Human Rights Committee, ‘General comment No. 36: Article 6: right to life’ (3 September 2019) UN Doc CCPR/C/GC/36, para 63 (emphasis added).

under IHL.<sup>57</sup> It follows that a direct application of Article 16 to NSAGs would – under current international law – be confined to IHL violations and, hence, incorporate a regime-specific rule into a generally applicable norm. However, as *Plakokefalos* rightly cautions: ‘The rules on state responsibility are general and residual in their application [and it] is very difficult to address the inadequacies of the primary rules by tweaking the rules of state responsibility.’<sup>58</sup> Indeed, it appears favorable to incorporate complicity through a regime-specific, primary rule instead, which could account more adequately for the particularities and needs of the respective regime.

Hence, the most adequate response to proxy warfare’s responsibility gap appears to incorporate the concept of state complicity into primary rules of IHL. In that regard, several authors have suggested invoking a broad interpretation of Common Article 1 of the Geneva Conventions, imposing on states external negative<sup>59</sup> as well as positive obligations<sup>60</sup> ‘to ensure respect’ for IHL by other states *as well as* private entities.<sup>61</sup> While the exact scopes of these obligations remain debated, they would incorporate a complicity-type rule of responsibility into the law of armed conflict directly, a breach of which would entail an independent internationally wrongful act of a supporting state resulting in an obligation to provide reparation (Articles 31, 34–39 ARSIWA). As will be shown in the remainder of this section, such

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<sup>57</sup> For a discussion of human rights obligations of NSAGs, see, e.g., Jean-Marie Henckaerts and Cornelius Wiesener, ‘Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice’ in Ezequiel Heffes, Marcos D. Kotlik, and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors Debates, Law and Practice* (Springer 2020).

<sup>58</sup> *Plakokefalos* (n 35) 588.

<sup>59</sup> See also *Nicaragua* (n 19) para 220.

<sup>60</sup> See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 136, para 158.

<sup>61</sup> Hathaway and others (n 9) 565; Hannah Tonkin, ‘Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies’ (2009) 22(4) *Leiden Journal of International Law* 779; ABA Center for Human Rights (n 33) 26–30.

<sup>61</sup> See also *Nicaragua* (n 19) para 220.

approach would provide for a regime-specific rule imposing comprehensive obligations on states for the entirety of their support relationship with NSAGs while overcoming the limitations and drawbacks of the aforementioned approaches.

The negative external dimension of Common Article 1 – accepted by the International Court of Justice, the International Committee of the Red Cross, and the vast majority of legal scholars<sup>62</sup> – obliges states to refrain from encouraging and aiding or assisting IHL violations by others, including NSAGs. This obligation, hence, applies before and up to the moment support is provided to NSAGs. If states know, i.e., it is likely and foreseeable,<sup>63</sup> that their support would facilitate IHL violations, Common Article 1 would require them to refrain from providing such support.<sup>64</sup>

Under the positive external obligation of Common Article 1 – if accepted<sup>65</sup> – states would be required to adopt all reasonable measures to stop ongoing and prevent foreseeable IHL violations by others, again including NSAGs.

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<sup>62</sup> Ibid; Jean-Marie Henckaerts, ‘Article 1: Respect for the Convention’ in International Committee of the Red Cross (ed), *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (International Committee of the Red Cross/Cambridge University Press 2020), paras 197-206; Henckaerts and Doswald-Beck (n 40) Rule 144; Michael N. Schmitt and Sean Watts, ‘Common Article 1 and the Duty to “Ensure Respect”’ (2020) 96 *International Law Studies* 674, 694; Marten Zwanenburg, ‘The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation’ (2021) 97 *International Law Studies* 621; Helmut P Aust, ‘Complicity in Violations of International Humanitarian Law’ in Heike Krieger (ed) *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015); Knut Dörmann and Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations’ (2015) 96(895-896) *International Review of the Red Cross* 707.

<sup>63</sup> *Nicaragua* (n 19) para 256. On the ‘fault element’ of Common Article 1, see also Marko Milanović, ‘Intelligence Sharing in Multinational Military Operations and Complicity under International Law’ (2021) 97 *International Law Studies* 1269, 1324-1328.

<sup>64</sup> See Henckaerts (n 62) paras 192-195.

<sup>65</sup> For a recent holistic interpretation of Common Article 1, see Zwanenburg (n 62).

Hence, this obligation would apply primarily after support has been provided to NSAGs. While supporting states remain in principle free to choose the measures they deem adequate to ensure respect for IHL,<sup>66</sup> the gravity of the potential wrongful acts (IHL violations) as well their proximity to proxy NSAGs and their status as potential facilitator would require them to adopt particularly robust measures,<sup>67</sup> such as investigating and prosecuting alleged violations and halting or terminating support relationship altogether.<sup>68</sup>

## V. CONCLUSION

This article engaged with proxy warfare in the form of belligerent support relationships between states and NSAGs. It identified that this form of indirect conflict intervention results in a critical responsibility gap that is caused by the requirement of the current rules of state responsibility of state control over acts of NSAGs. It argued that this situation requires a normative response and contended that the concept of state complicity in wrongful acts is best suited to close the identified responsibility gap because it most accurately accounts for the collusive nature of proxy warfare. Amidst three normative propositions, the article suggested to incorporate the concept of complicity into Common Article 1 of the Geneva Conventions as a regime-specific, primary rule of IHL. Under the external negative as well as positive dimension of Common Article 1, states would be under an obligation to neither encourage nor aid or assist and to prevent and stop violations of IHL for the entire duration of their support relationships with NSAGs.

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<sup>66</sup> Henckaerts (n 62) paras 197-198.

<sup>67</sup> Ibid paras 199-200; *Bosnian Genocide* (n 22) para 430.

<sup>68</sup> See also Hathaway and others (n 9) 588-589.