

THE DIFFICULTIES WITH ENSURING RESPONSIBILITY: A CRITIQUE OF OONA HATHAWAY’S INTERPRETATION OF COMMON ARTICLE 1

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I. INTRODUCTION.

An astute observer of contemporary affairs will note the increased prevalence of proxy wars. In a proxy war, States support paramilitary and rebel groups that have no affiliation to any State government. International law often considers these groups “non-State actors.” Although States support non-State actors for a variety of reasons, a serious problem emerges when States support groups that commit violations of international humanitarian law; no State will face accountability. Legally, a State cannot be responsible for the breaches of a group unless the group’s acts are attributable to it.¹ The law of State responsibility will attribute the wrongful acts of a group to a State only if the State exercised control over the group.² Providing arms or funding does not constitute “control.”³ However, in recent years the International Committee of the Red Cross (“ICRC”) has interpreted Common Article 1 of the Geneva Conventions as requiring that States “ensure respect” for the Conventions.⁴ This means that a State may not encourage or aid in a group’s commission of grave breaches.⁵ Additionally, the ICRC⁶ and some progressive scholars⁷ believe that the

1. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 26 (2001) [hereinafter Draft Articles].

2. *Id.*

3. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 115 (June 27) (explaining that training, supplying, and financing the Nicaraguan *contras* was insufficient for attribution); see also *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 131 (Int’l. Crim. Trib. for the Former Yugoslavia July 15, 1999) (explaining that financing and equipping an armed group is insufficient for attribution).

4. INT’L COMM. OF THE RED CROSS, COMMENT. OF 2016, art. 1, ¶ 121 (2d ed. 2016) [hereinafter COMMENTARY OF 2016], <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>.

5. *Id.* ¶ 158.

6. *Id.* ¶ 164.

7. See Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539 (2017); see also Fateh Azzam, *The Duty*

rule requires that States take reasonable measures in preventing and suppressing their non-State partners' breaches.

The proposed negative obligations ("the duties to refrain from aiding or encouraging") of Common Article 1 do not garner as much controversy as the proposed positive obligations to prevent and suppress grave breaches. Some international law scholars have pushed back against imputing positive obligations to the provision.⁸ Arguably, such an interpretation would impose a significant burden on the extent that States could coordinate with potential allies.⁹ Furthermore, positive obligations might place States in a legally risky position. The more a State acts in furtherance of preventing or suppressing a non-State actor's grave breaches, the more likely a factfinder might see that the State has controlled the non-State actor's operations to the point where it should be responsible for all the group's conduct.¹⁰ Suppressing humanitarian law violations could become an exercise of control leading to liability under the existing rules of State responsibility.¹¹

Professor Oona Hathaway, a leading international law scholar, offers a safe harbor solution to this issue. Hathaway acknowledges that preventing a non-State actor's humanitarian law violations may make a State appear as if it exercised control over the non-State actor and its operations to the point where the State has become vicariously responsible for all of the group's conduct.¹² She also considers that under the rules of State responsibility, a hands-off approach by the State would free it of responsibility for the non-State actor's conduct.¹³ In response, she argues that if a State assists the non-State actor in complying with international humanitarian law, it should have an affirmative defense.¹⁴ The State should be able to use the training as a defense against claims that it exercised so much control as to face liability for all of the non-State actor's illegal acts.¹⁵ In her article, she proposes several measures that States can take to comply with Common

of Third States to Implement and Enforce International Humanitarian Law, 66 NORDIC J. INT'L L. 55 (1997); see also Hannah Tonkin, *Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies*, 22 LEIDEN J. OF INT'L L. 779 (2009).

8. See Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to "Ensure Respect,"* 96 INT'L L. STUD. 674 (2020); see also Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit*, in REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 665 (2007).

9. Schmitt & Watts, *supra* note 8, at 687.

10. See Hathaway et al., *supra* note 7, at 578.

11. See *id.*

12. *Id.*

13. See *id.* at 562-63.

14. *Id.* at 579.

15. *Id.*

Article 1, and subsequently avoid liability.¹⁶ Most centrally, she suggests that States can avoid the risk of vicarious liability if they conduct international humanitarian law training.¹⁷

Hathaway's approach, although thoughtful, is problematic to the extent that it requires that a State train its non-State partner to then raise an affirmative defense. This is impractical because some circumstances are exigent and cannot require that a State train a non-State actor. Moreover, her approach risks detracting from Common Article 1's open-ended nature, because it substitutes the ICRC's emphasis on context with a bright-line training requirement. Ultimately, it may be wiser to defer to the ICRC's contextual/ case-by-case interpretation of the provision, which calls for a fact-specific analysis and which more closely aligns with the law of war in general.

This article will develop why the ICRC has offered a better approach than Professor Hathaway. Part Two will discuss several examples of State support for non-State-actors in armed conflicts, as well as review the existing laws regarding State attribution, Common Article 1, and Oona Hathaway's interpretation of that provision. Part Three will discuss the problems with Hathaway's approach as it applies to an exigent circumstance such as the invasion of Rojava. Part Four will discuss the ICRC's emphasis on context, and how Hathaway's approach detracts from it. Part Five will discuss how the ICRC's contextual approach comports with the law of war in general. This article will conclude that Common Article 1 should not impose a bright-line training requirement but should consider a lack of training as one of several factors which determine a State's fault in respect to supporting a non-State armed group.

II. BACKGROUND.

Recent history and current affairs indicate that States often support non-State armed groups for the purpose of furthering their own geopolitical interests. While the Geneva Conventions set out the basic rules of humanitarian law, the law of State responsibility sets a high bar for holding States responsible when they support non-State actors that commit atrocities in war. Under the law of State responsibility, a State cannot be responsible for a non-State actor's crime unless it exercised "control" over the group or the group's operations in which the crime occurred. The law's narrow construction of "control" creates an accountability gap which does not hold States responsible when they support non-State actors.

16. *Id.* at 585-89.

17. *Id.* at 586.

However, the International Committee of the Red Cross and some scholars have sought to limit this evasion of liability. They interpret Common Article 1, a provision within all four of the Geneva Conventions, as imposing a more stringent standard on States than the law of State responsibility. Common Article 1 provides that States “undertake to respect and ensure respect for the [Geneva Conventions] in all circumstances.” According to the ICRC’s interpretation of the provision, States may not encourage or assist other parties in breaching the Conventions and must do everything reasonably within their power to ensure that other parties comply with the Conventions.

Recognizing that Common Article 1 could hold States accountable for supporting problematic non-State actors, Professor Oona Hathaway identifies a problem which could disincentivize States from embracing the provision’s power. States might worry that they must take actions in compliance with Common Article 1 which would make them appear as if they exercised “control” over the operations of their non-State partners. Under the law of State responsibility, this degree of “control” may trigger liability for a non-State partner’s conduct which occurs in lieu of a State’s efforts to comply with Common Article 1.

In response to this problem, Hathaway suggests that States should have an affirmative defense. If a State took actions in furtherance of securing its non-State partner’s compliance with the Geneva Conventions per Common Article 1, it should then have an affirmative defense against allegations that it exercised “control” over the group such that it is liable for the group’s ultra vires actions.

Moreover, she recommends that training should be a requirement for complying with Common Article 1.

A. *Examples of State Support for Non-State Actors.*

The Cold War provides many examples of States giving support to non-State actors, including the United States’ support for the Nicaraguan *Contras* and Iran’s support for Hezbollah. Between the years 1979 and 1990, the United States provided funding, training, and material support to the Nicaraguan *Contras*, a rebel group that attempted to overthrow the socialist Sandinista government.¹⁸ This support garnered criticism in its day, as information came to light of the *Contras*’ record of committing

18. Brown Univ., *The Counterrevolutionaries (“The Contras”)*, UNDERSTANDING THE IRAN-CONTRA AFFAIRS, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/n-contras.php (last visited Dec. 14, 2021).

atrocities.¹⁹ The *Contras* targeted civilians and engaged in torture, rape, and kidnapping.²⁰ They also conducted assaults on civilian facilities like farms and health centers.²¹ Today, one of the most significant examples of State support is Iran's support for Hezbollah, a radical Shiite group. Hezbollah is now one of the largest violent non-State actors in the world.²² Iran's support for Hezbollah began in the early 1980s during the Lebanese Civil War.²³ In 1983, Hezbollah bombed the U.S. barracks in Beirut.²⁴ The group has continued to conduct terrorist activities, including assassinations, kidnappings, and bombings.²⁵ In recent years, Iran has continued to send weapons, funding, and fuel to Hezbollah.²⁶

The practice of supporting non-State actors ensues today. The Syrian Civil War is a conflict in which non-State actors receive assistance from various countries and engage in much of the fighting. Turkey provides support to several groups, such as the Free Syrian Army²⁷ and Ahrar al-Sharqiya.²⁸ These groups fight in opposition to Syrian president Bashar-al-Assad's regime.²⁹ Both groups received attention for committing atrocities. In October 2019, members of Ahrar-al-Sharqiya murdered Kurdish

19. Larry Rohter, *Nicaragua Rebels Accused of Abuses*, N.Y. TIMES, (Mar. 7, 1985), at A1.

20. *Id.*

21. REED BRODY, *CONTRA TERROR IN NICARAGUA: REPORT OF A FACT-FINDING MISSION: SEPTEMBER 1984-JANUARY 1985* 10 (1st ed. 1985).

22. See Christopher P. Dallas-Feeney, *Violent Non-State Actors in the Middle East: Origins and Goals*, E-INT'L RELS. (May 28, 2019), <https://www.e-ir.info/2019/05/28/violent-non-state-actors-in-the-middle-east-origins-and-goals> (describing Hezbollah as one of several non-State groups capable of competing with Western-style military forces).

23. Matthew Levitt, *Hezbollah's Regional Activities in Support of Iran's Proxy Networks*, MEI@75 (July 26, 2021), <https://mei.edu/publications/hezbollahs-regional-activities-support-irans-proxy-networks>.

24. The Editors of Encyclopedia Britannica, *1983 Beirut Barracks Bombings*, BRITANNICA (Oct. 15, 2008), <https://www.britannica.com/event/1983-Beirut-barracks-bombings>.

25. See Levitt, *supra* note 23 (describing these activities throughout).

26. David Kenner, *Why Israel Fears Iran's Presence in Syria*, THE ATLANTIC (July. 22, 2018), <https://www.theatlantic.com/international/archive/2018/07/hezbollah-iran-new-weapons-israel/565796/>; see also Joyce Karam, *Iran Pays Hezbollah \$700 Million a Year, US Official Says*, THE NATIONAL NEWS (June. 6, 2018), <https://www.thenationalnews.com/world/the-americas/iran-pays-hezbollah-700-million-a-year-us-official-says-1.737347>.

27. See Ibrahim Hamza Mese & Hamoon Khelghat Doost, *Syrian Non-State Actors and the Turkish National Security*, INT'L POLICY DIGEST (May 24, 2021), <https://intpolicydigest.org/the-platform/syrian-non-state-actors-and-the-turkish-national-security/>.

28. *Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies*, AMNESTY INT'L (Oct. 18, 2019, 12:01 AM), <https://www.amnesty.org/en/latest/press-release/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>.

29. *Id.*

politician Hevrin Khalaf.³⁰ Human Rights Watch reported that members of the Turkish-backed Syrian National Army conducted extrajudicial killings, unlawfully occupied civilian properties, and engaged in looting.³¹

Also notable is the emergence of a Moscow-based private military contractor, the Wagner Group. Private military contractors do not enjoy legal status in Russia.³² Nevertheless, the Wagner Group maintains close ties to the Russian government.³³ Both the contractor and the Main Intelligence Directorate, the official Russian military intelligence organ, keep bases in the Russian town of Molkino,³⁴ Vladimir Putin enjoys a close relationship with the company's financier, Yevgeny Prigozhin.³⁵ Yet, despite facts suggesting this close relationship to the government, some analysts prefer to regard the Wagner Group as a non-State actor.³⁶ The group's legally ambiguous relationship with the Russian government should trouble consciences, given the group's activities in Libya³⁷ and the Central African Republic.³⁸

States see several advantages in supporting non-State actors. For one, the practice allows States to refrain from sending their own armed forces to fight in conflicts.³⁹ Additionally, these groups have a familiarity with local

30. *Hevrin Khalaf: Death of a Peacemaker*, BBC (Jan. 13, 2020), <https://www.bbc.com/news/av/world-middle-east-51068522>.

31. *Syria: Civilians Abused in "Safe Zones,"* HUMAN RIGHTS WATCH (Nov. 27, 2019, 12:00 AM), <https://www.hrw.org/news/2019/11/27/syria-civilians-abused-safe-zones#>.

32. Niklas Eklund & Jorgen. Elfving, *Russia Private Military Companies-Redwater?*, JAMESTOWN FOUND. (Mar. 22, 2017, 9:05 PM), <https://jamestown.org/program/russian-private-military-companies-redwater/>.

33. *Band of Brothers: The Wagner Group and the Russian State*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 21, 2020), <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>.

34. *Id.*

35. *Id.*

36. Fredrik Hellem, *Wagner in Africa: Russia's Non-State Actor' Part I*, GREY DYNAMICS (Apr. 15, 2021), <https://www.greydynamics.com/wagner-in-africa-russias-non-state-actor-part-i/>; Maxim Trudolyubov, *Vladimir Putin's Parallel State*, THE WILSON CTR. (Feb. 21, 2018), <https://www.wilsoncenter.org/blog-post/vladimir-putins-parallel-state>.

37. Ilya Barabanov & Nader Ibrahim, *Wagner: Scale of Russian Mercenary Mission in Libya Exposed*, BBC NEWS (Aug. 11, 2021), <https://www.bbc.com/news/world-africa-58009514>; *UN Accuses Russia's Wagner Group of Possible War Crimes in Libya*, DAILY SABAH (Oct. 4, 2021, 3:01 PM), <https://www.dailysabah.com/world/mid-east/un-accuses-russias-wagner-group-of-possible-war-crimes-in-libya>.

38. Neil Munshi & Max Seddon, *Russian Mercenaries Leave Trail of Destruction in the Central African Republic*, FIN. TIMES. (Oct. 21, 2021), <https://www.ft.com/content/020de965-429e-4fb9-9eed-f7e4370514b3>.

39. Daniel L. Byman, *Why Engage in Proxy War? A State's Perspective*, BROOKINGS (May 21, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/>.

conditions and cultural norms.⁴⁰ Nevertheless, these strategic advantages should not outweigh the serious consequences inherent in supporting corrupt, abusive, non-State actors. States are largely able to invest in non-State armed groups, including ones with malicious motives or interests, to further their own political interests. Because no effective legal mechanisms exist, States can continue investing in these groups without facing consequences or scrutiny when international humanitarian law violations occur.

B. The Law at Present Sets a High Bar for Attributing the Grave Breaches of a Non-State Actor to a Supporting State.

Existing law sets a high bar for attributing the grave breaches of a non-State actor to a supporting State. The standards for attribution derive largely from the law of State responsibility. The International Law Committee of the United Nations composed the Draft Articles of State Responsibility, which received the approval of the UN General Assembly.⁴¹ Under the Draft Articles, a State is responsible for the wrongful conduct of a group if the State either controlled the group as a whole or controlled the group's specific operations.⁴² Most of the present controversy regarding State responsibility for non-State actors' conduct revolves around the interpretation of the term "control." Three different interpretations of "control" exist at present. These interpretations consist of the International Court of Justice's ("ICJ") "complete control" and "effective control" standards, and the International Criminal Tribunal of Yugoslavia's ("ICTY") "overall control" standard. The tests have different uses, yet all of them exist for the purpose of attributing the actions of a non-State group to a State.

1. The ICJ's "complete control" test.

The International Court of Justice established two approaches to assessing "control" in the *Paramilitary Activities in and Against Nicaragua* case. The first approach is what Professor Marko Milanović describes as the "complete control" test.⁴³ Under this test, a State is responsible for the acts of a non-State actor when the State exercises so much control over the non-

40. *Id.*

41. Draft Articles, *supra* note 1, at 1.

42. *Id.* at 47.

43. Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT'L L. 553, 576 (2006).

State actor that it keeps the group in a position of complete dependency.⁴⁴ As a result of this complete dependence, a factfinder could find that the non-State actor functioned as a *de facto* organ of the State.⁴⁵ Under the “complete control” test, the group must have no real autonomy from the supporting State.⁴⁶

Professor Milanović⁴⁷ and Professor Stefan Talmon⁴⁸ wrote about the various factors that the ICJ in *Nicaragua* considered when determining whether the United States exercised “complete control” over the Nicaraguan *Contras*. Factors included: (1) whether the United States created the group,⁴⁹ (2) whether the group was completely dependent on the United States,⁵⁰ (3) whether this complete dependence extended to all fields of the group’s activity,⁵¹ (4) whether the United States actually exercised control over the group and did not merely retain the power to do so,⁵² (5) and whether the United States selected, installed, or paid the group’s political leaders.⁵³ The ICJ found that the United States did not exercise “complete control” over the *Contras*.⁵⁴

Of all the “control tests,” the “complete control” test is perhaps the most difficult to establish. Moreover, it may not reflect the typical relationship between a non-State actor and a State, given that many non-State groups retain at least some considerable degree of autonomy in their operations. Nevertheless, the test indicates that one way of finding a State responsible for the acts of a non-State actor is to find that the group was a *de facto* organ of the State. Where a non-State actor is a *de facto* organ of the State, the “complete control” test attributes the entirety of the group’s conduct to the State.

44. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 110 (June 27).

45. Milanović, *supra* note 43, at 577.

46. *Id.*

47. *Id.*

48. Stefan Talmon, *The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT’L AND COMPAR. L. Q. 493, 498 (2009).

49. Milanović, *supra* note 43, at 577.

50. *Id.*

51. Talmon, *supra* note 48, at 498.

52. *Id.*

53. Milanović, *supra* note 43, at 577.

54. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 109 (June 27).

2. The ICJ's "effective control" test

In addition to the "complete control test," the International Court of Justice established the "effective control" standard in the *Nicaragua* case.⁵⁵ The International Law Committee endorsed this test in its commentaries to the Draft Articles of State Responsibility.⁵⁶ Unlike the "complete control" test, which establishes a State's responsibility for the entirety of a group's conduct, the "effective control" test focuses on whether the State should face liability for *specific operations* by the group.⁵⁷ This test looks for a finding that the State controlled a group's operation to such a degree that the group conducted the operation on the State's behalf.

Under the "effective control" standard, a State will not face responsibility for a group's wrongful acts unless the State exercised effective control over the specific operation in which the violations occurred.⁵⁸ Moreover, the State will only be responsible for those wrongful acts that were integral to the operation.⁵⁹ Actions that a group takes beyond the scope of the supporting State's authorization will not be attributable to the State if the actions were peripheral or incidental to the operation.⁶⁰

The "effective control" test sets a very exacting standard. Under the "effective control" test, a State cannot incur liability by generally providing arms, information, finances, or any form of material support to a non-State actor.⁶¹ As Professor Talmon explained, a complainant must demonstrate that the State helped plan the operation, choose the operation's targets, gave instructions to participants, and provided operational support for the mission.⁶² Moreover, he explained that the complainant must show that the State was involved in the operation from its beginning until its end.⁶³ Although the "effective control" test sets a lower burden of proof than that for the "complete control" test, it nevertheless creates such a strict standard that it fails to hold States accountable in most instances.

3. The ICTY's "overall control" test.

The "overall control" test stands as a counterpart to the "effective control" standard. The International Criminal Tribunal for the former

55. *Id.* ¶ 115.

56. Draft Articles, *supra* note 1, ¶ 4.

57. Milanović, *supra* note 43, at 577.

58. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 115.

59. Draft Articles, *supra* note 1, ¶ 3.

60. *Id.* ¶ 8.

61. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 115.

62. Talmon, *supra* note 48, at 503.

63. *Id.*

Yugoslavia established this rule in *Prosecutor v. Tadić*.⁶⁴ However, unlike *Nicaragua*, *Tadić* was an international criminal trial. The prosecutor charged an individual, Dusko Tadić, with torture, inhuman treatment, and murder in relation to his participation in the Bosnian War.⁶⁵ To demonstrate that international humanitarian law applied to the case, the prosecutor had to show that Tadić participated in an international armed conflict.⁶⁶ This meant that the prosecutor had to draw a link between the Federal Republic of Yugoslavia and the Bosnian Serb Army, to which the former provided support and to which Tadić belonged. The Appeals Chamber did not apply the ICJ's "effective control" test,⁶⁷ asserting that the "effective control" test applied to situations in which private individuals acted on behalf of a State.⁶⁸ The Chamber explained that a different standard should apply where the State supported a hierarchically organized group.⁶⁹ The Chamber was satisfied that the Federal Republic of Yugoslavia exercised "overall control" over the Bosnian Serb Army.⁷⁰ Under this "overall control" standard, a group's actions are attributable to a State if the State coordinated or helped in the general planning of the group's military activities, as well as provided equipment and finances to it.⁷¹

This test sets a less stringent standard than the "complete control" test because it does not require that the non-State actor act in "complete dependence" to the supporting State. Moreover, the "overall control" test is less stringent than the "effective control" standard because it does not require that the State have controlled, or instructed, the specific operation in which the breaches occurred. Nevertheless, the ICJ disapproves of the "overall control" rule outside of its use in international criminal settings.⁷² Many in the international community view the "overall control" test as applying to international criminal cases for the purpose of establishing whether the defendant participated in an international armed conflict.⁷³

64. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 120 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

65. *Id.* ¶¶ 4.1-11.55.

66. *Id.* ¶¶ 83-87.

67. *Id.* ¶ 115.

68. *Id.* ¶ 118.

69. *Id.* ¶ 120.

70. *Id.* ¶ 162.

71. *Id.* ¶ 131.

72. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgement, 2007 I.C.J. 43, ¶ 403 (Feb. 26).

73. See Haris Jamil, *Classification of Armed Conflict: An Analysis of Effective Control and Overall Control Tests*, ISIL Y.B. INT'L. HUM. AND REFUGEE L., 2016-2017, at 185 (discussing the "overall control" standard's viability as a form of classifying an armed conflict); Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18

Ultimately, its purpose is to find that humanitarian law applies to the acts of a criminal defendant, which is a different inquiry than whether a State is responsible for the acts of its agent.

4. The accountability gap.

Scholars continue to evaluate the merits of the “control” tests, particularly the “effective control” and “overall control” tests. On one hand, the “effective control” standard sets a very high bar for complainants to meet. It presents difficult, if not impossible, evidentiary burdens, given the covert nature of State/non-State actor relationships.⁷⁴

On the other hand, the “overall control” test sets a much lower bar. Cassese Antonio wrote that the “overall control” standard might better reflect the realities of relationships between States and non-State actors.⁷⁵ Moreover, he noted that the rule would account for the evidentiary difficulties that the “effective control” standard poses.⁷⁶ Arguably, however, this rule should not apply outside of the international criminal context because it could inhibit cooperation that may prove beneficial.⁷⁷ In some instances, providing aid to a non-State actor might further a proper humanitarian purpose, but a lower threshold for liability would dissuade States from doing so.

It may well be that times call for a re-evaluation of the “control” tests. Such a task presents difficulties. At present, however, the predominant standards set a high bar for complainants. As a result, an accountability gap exists for States that support problematic non-State actors. States have an incentive to support these groups because they do not have to worry about the narrow “control” tests. However, some in the international community believe that Common Article 1 of the Geneva Conventions effectively addresses this accountability gap.

C. Common Article 1 Bridges the Accountability Gap.

Common Article 1 of the Geneva Conventions states that “the High Contracting Parties undertake to respect and to ensure respect for the

EUR. J. INT’L. L. 649 (2007) (recognizing the “overall control” standard’s present status as merely a way to classify an armed conflict).

74. See Hathaway et al., *supra* note 7, at 552; see Cassese, *supra* note 73, at 666.

75. Cassese, *supra* note 73, at 666.

76. *Id.*

77. See Hathaway et al., *supra* note 7, at 561-62.

[Conventions] in all circumstances.”⁷⁸ As Professors Michael N. Schmitt, Sean Watts, and Frits Kalshoven argue, the provision may simply serve as an aspirational statement or a truism.⁷⁹ They explain the provision merely reiterates that States have obligations to ensure their own armed forces and populations respect the Geneva Conventions.⁸⁰ However, the ICRC and some progressive scholars argue that Common Article 1 has incurred a more expansive interpretation over the years.⁸¹ Under this more expansive reading of Common Article 1, a State must ensure that *other* States and non-State actors respect the Conventions.⁸² Even if a State is not involved in a conflict, it must keep other parties accountable to international humanitarian law.⁸³

Professors Schmitt, Watts, and Kalshoven find that this progressive interpretation lacks corroborating support. They argue that the Drafters did not intend such a broad reach for the provision.⁸⁴ Moreover, they argue that an insufficient amount of State practice supports this expansive reading.⁸⁵ For the purpose of this note, I will not determine which camp has the better argument. Like Professor Oona Hathaway, I will presume that Common Article 1 requires States to ensure that other States and non-State actors respect the Geneva Conventions.

States have both negative and positive obligations under this modern interpretation of Common Article 1.⁸⁶ Under its negative obligations, a State may not encourage, aid, or assist parties to a conflict in committing

78. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the 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; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; 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; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3.

79. Schmitt & Watts, *supra* note 8, at 676-77; Kalshoven, *supra* note 8, at 669.

80. Schmitt & Watts, *supra* note 8, at 681; Kalshoven, *supra* note 8, at 692.

81. COMMENTARY OF 2016, *supra* note 4, ¶ 173; Marten Zwanenburg, *The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation*, 97 INT’L L. STUD. SERIES. US NAVAL WAR COL. 622-24 (2021); Hathaway et al., *supra* note 7, at 565-78; Knut Dormann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT’L REV. RED CROSS 707-11 (2014).

82. COMMENTARY OF 2016, *supra* note 4, ¶ 153.

83. *Id.*

84. Schmitt & Watts, *supra* note 8, at 680-84; Kalshoven, *supra* note 8, at 702.

85. Schmitt & Watts, *supra* note 8, at 689-92; Kalshoven, *supra* note 8, at 719-27.

86. COMMENTARY OF 2016, *supra* note 4, ¶ 154.

breaches of the Geneva Conventions.⁸⁷ The ICJ established this in *Nicaragua*—the same case in which it devised the “effective control” standard.⁸⁸ In that case, the ICJ held that the United States violated Common Article 1, because it provided a training manual to the *Contras* which endorsed extrajudicial killings of government officials and suggested shooting civilians trying to leave towns.⁸⁹ The ICJ concluded that the United States had encouraged breaches of the Conventions.⁹⁰ To date, this remains one of the clearest applications of Common Article 1 by any tribunal. However, it only illustrates how the provision’s negative obligations function.

Under Common Article 1’s positive obligations, a State must do everything reasonably within its power to prevent or suppress another group or State’s grave breaches.⁹¹ The ICRC gives flexibility to States in determining how they discharge these obligations.⁹² However, there is a lack of case law and authority which elucidates on how these obligations function. Instead of requiring definitive measures, the ICRC argues that a State’s positive obligations depend on the context of a given situation.⁹³ The nature of a State’s obligations depends on the extent and nature of its relation to the other State or non-State group. A State fulfills its obligations when it takes all *possible and lawful* steps to ensure that its non-State partners and other States respect the Conventions.⁹⁴

Professor Oona Hathaway advocates for a progressive interpretation of Common Article 1. In her article “Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors,” Hathaway writes that Common Article 1 resolves the accountability gap for States that support non-State actors.⁹⁵ Common Article 1 would not hold a State accountable for a non-State actor’s wrongful acts but would hold it responsible for not doing everything within its power to ensure that the group did not commit grave breaches.⁹⁶

87. *Id.* ¶ 158.

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

89. *Id.* ¶¶ 255-56.

90. *Id.*

91. COMMENTARY OF 2016, *supra* note 4, ¶ 164.

92. *See id.* ¶¶ 165, 180 (suggesting that States have a choice in choose which measures to take, depending on the circumstances).

93. *See id.* ¶ 165 (suggesting that the nature of a State’s due diligence depends on the circumstances).

94. *Id.* ¶¶ 165, 174.

95. Hathaway et al., *supra* note 7, at 574-78.

96. *Id.* at 576.

Hathaway believes that Common Article 1 would require that “States... make respect of international law a major focus in their interactions with non-State actors in armed conflicts.”⁹⁷ She writes that the provision would have States take “affirmative steps to ensure [that] their non-State partners complied with relevant law.”⁹⁸ She suggests that a State’s failure in properly instructing and training a non-State partner in its international law obligations should be a violation of Common Article 1.⁹⁹ However, Hathaway sees a problem with the due-diligence standard. A State that took steps to secure its non-State partner’s compliance with the Geneva Conventions might risk appearing as if it had exercised “control” over the group or its operations.¹⁰⁰ Thus, if the non-State partner subsequently violated the Geneva Conventions in lieu of the State’s preventative efforts, the State may nevertheless face liability under the “control” tests.¹⁰¹

Hathaway writes that this tension between Common Article 1’s obligations and the law of State responsibility’s attribution doctrine dissuades States from embracing the contemporary reading of Common Article 1.¹⁰² States would not embrace an interpretation of the provision which would place them in a legally precarious situation. She attempts to resolve this problem with a safe-harbor approach. Hathaway’s approach consists of the following: a State which trains a non-State partner in humanitarian law may use the training as an affirmative defense against charges that it exercised “control” over the non-State actor or its operations.¹⁰³ Of course, a State would be responsible for violations that it instructed a non-State partner to commit.¹⁰⁴ However, the State would have this affirmative defense at its disposal against claims that it was responsible for the group’s conduct under the law of State responsibility.

Hathaway’s approach is flawed to the extent that it prescribes international humanitarian law training as a requirement for States to avoid legal responsibility. Some circumstances might present exigencies which make international humanitarian law training practical. Additionally, a bright line training requirement would detract from the ICRC’s emphasis on context. This emphasis on context is important, given the political, social, and strategic realities that come into play in any given situation.

97. *Id.* at 577.

98. *Id.*

99. *Id.*

100. *Id.* at 578.

101. *Id.*

102. *Id.*

103. *Id.* at 579.

104. *Id.* at 580.

III. HATHAWAY'S APPROACH DOES NOT ACCOUNT FOR EXIGENT CIRCUMSTANCES.

Some circumstances may be too exigent to require a State to conduct international humanitarian law training. The Siege of Kobani provides such an example and highlights the difficulty with Oona Hathaway's approach. A State providing support in this situation should have different obligations than the training requirement Hathaway provides.

A. *Background on the Siege of Kobani.*

In September 2014, the militant Sunni group ISIS launched an offensive on the region and town of Kobani, which lies along the Turkish-Syrian border.¹⁰⁵ ISIS sought to capture Kobani as a means of controlling a span of territory touching the Turkish border.¹⁰⁶ Kobani is home to a large Kurdish population.¹⁰⁷ Kurds are a minority in Syria who push for self-governance and autonomy in the region.¹⁰⁸ ISIS views the Syrian Kurdish political project as inherently un-Islamic¹⁰⁹ because of the Kurds' ideological commitment to secularism,¹¹⁰ women's rights,¹¹¹ and religious tolerance.¹¹² The ISIS invasion presented an existential threat to the city's inhabitants. They knew that ISIS captured many Kurdish villages beforehand and that the group did not spare civilians from beheadings, executions by stoning, and other atrocities.¹¹³ 400,000 refugees crossed or

105. Rebecca Grant, *The Siege of Kobani*, AIR FORCE MAG. (Aug. 29, 2018), <https://www.airforcemag.com/article/the-siege-of-kobani/>.

106. Zach Beauchamp, *ISIS is About to Take a City Called Kobane: Will it Draft Turkey Into War?*, VOX (Oct. 7, 2014), <https://www.vox.com/2014/10/6/6918763/kobane-isis-where-is-kobane-turkey>.

107. *Who are the Kurds?*, BBC NEWS (Oct. 15, 2019), <https://www.bbc.com/news/world-middle-east-29702440>.

108. *Id.*

109. Derek H. Flood, *The Battle for Kobani Comes to the Fore*, 7 CTC SENTINEL 5, 5-6 (2014), <https://ctc.usma.edu/the-battle-for-kobani-comes-to-the-fore/>.

110. See Si Sheppard, *What the Syrian Kurds Have Wrought*, THE ATLANTIC (Oct. 25, 2016), <https://www.theatlantic.com/international/archive/2016/10/kurds-rojava-syria-isis-iraq-assad/505037/> (quoting the Kurdish Rojava administration's foreign minister as stating "We want a federation in Syria [not based] in religion").

111. *Id.*

112. *Kurds*, MINORITY RTS. GROUP INT'L, <https://minorityrights.org/minorities/kurds-5/> (Mar. 2018) (describing the Kurdish Rojava administration as introducing "positive practices" for respecting the rights of religious minorities).

113. Tom Perry & Laila Bassam, *Kurds Issue Call to Arms as Islamic State Gains in Syria*, REUTERS (Sept. 18, 2014, 12:30 AM), <https://www.reuters.com/article/us-syria-crisis-drones/kurds-issue-call-to-arms-as-islamic-state-gains-in-syria-idUSKBN0HD00820140918>.

attempted to cross into Turkey, fleeing the massacres which ensued in their home territory.¹¹⁴

ISIS outmatched the Kurdish People's Defense Units (YPG),¹¹⁵ convincing some in the international community that an ISIS takeover was imminent.¹¹⁶ ISIS possessed numerous tanks and armed vehicles at its disposal.¹¹⁷ The YPG lacked heavy weapons which could meet these challenges.¹¹⁸ President Obama decided against sending ground troops, instead deciding to provide other forms of support.¹¹⁹ The U.S. Air Force dropped supplies and provided aerial support to YPG soldiers on the ground.¹²⁰ The YPG assisted in coordinating the aerial bombardments.¹²¹ This assistance proved crucial for the Kurdish resistance, as it ultimately managed to expel ISIS from the city by the following year.¹²²

B. Oona Hathaway's Common Article 1 as Applied to the Kobani Invasion.

Oona Hathaway's approach to Common Article 1 would be unrealistic in a situation like Kobani. If Common Article 1 resembled Hathaway's interpretation and required that the United States train the YPG in international humanitarian law, surely it would have thwarted an effective resistance.

Any kind of meaningful humanitarian law training requires more than a day because it involves building relationships and confronting cultural differences. The situation in Kobani involved an imminent existential threat which required that the Kurdish resistance prepares for combat within a

114. Scott Bobb, *Kobani Fighting Sends 400,000 Refugees to Turkey*, VOA NEWS (Oct. 19, 2014, 9:05 AM), <https://www.voanews.com/a/kobani-fighting-sends-four-hundred-thousand-refugees-to-turkey/2488705.html>.

115. See Flood, *supra* note 109, at 5.

116. Grant, *supra* note 105 (quoting National Security Advisor Tony Blinken stating, "[I]t is going to be difficult just through airpower to prevent ISIS from potentially taking over the town"); *Turkish President Says Kobani About to Fall to "IS"*, DEUTSCHE WELLE (Oct. 7, 2014) (quoting Turkish President Tayyip Erdogan stating "Kobani is about to fall"), <https://www.dw.com/en/turkish-president-says-kobani-about-to-fall-to-is/a-17981034>.

117. Flood, *supra* note 109, at 5.

118. *Id.*

119. David Jackson, *Obama Team: Success Against Islamic State in Kobani*, USA TODAY (Feb. 3, 2015, 9:57 AM), <https://www.usatoday.com/story/theoval/2015/02/03/obama-islamic-state-kobani-iraq-syria/22788287/>.

120. Grant, *supra* note 105.

121. Jamie Dettmer, *In Kobani, Kurd Fighters Help Coordinate Airstrikes on IS Targets*, VOICE OF AM. (Oct. 15, 2014, 2:05 PM), <https://www.voanews.com/a/kobani-islamic-state-fighting-airstrikes-kurdish-fighters/2484354.html>.

122. Grant, *supra* note 105.

short time frame. This was glaringly apparent given that ISIS captured twenty-one Kurdish villages within twenty-four hours during the period leading up to the invasion.¹²³ Ultimately, Hathaway's training requirement would have been unrealistic in a situation like this.

In a situation like Kobani, the supporting State's obligations may involve actions different from providing courses in international humanitarian law training. For example, the circumstances around such a siege could require that the State ensure that the group does not misuse intelligence information for unlawful purposes. The circumstances may require that the State provide weapons that comply with the Geneva Conventions. Such obligations would reflect the factual circumstances of the situation. Ultimately, this scenario highlights the importance of interpreting the positive due diligence requirement as factually specific. Hathaway's affirmative defense would incentivize States to conduct training when, as a measure, it would not address the necessities at hand.

IV. AN AFFIRMATIVE DEFENSE DETRACTS FROM THE ICRC'S EMPHASIS ON CONTEXT.

Oona Hathaway's interpretation of Common Article 1 also devalues the ICRC's emphasis on context. In imputing positive obligations to Common Article 1, the ICRC focuses on the context surrounding the State's engagement with the non-State actor. It does not recognize specific forms of conduct as always appropriate regardless of the circumstances. This position is defensible, given the ICRC's political credibility in the international community. Moreover, this position is both practical and moral. Hathaway's approach detracts from this emphasis on context because it threatens to impose a bright-line training requirement which will likely be superficial or ineffective.

A. *The ICRC's Approach to Common Article 1's Positive Obligations Focuses on Context.*

The ICRC's modern interpretation of Common Article 1 is open-ended and emphasizes context. In its 2016 commentaries, the ICRC explained that States "must do everything reasonably in their power" to prevent or end their non-State partners' violations of the Geneva Conventions.¹²⁴ The ICRC refrained from requiring that States take specific measures in all circumstances. Rather, it explained that States may choose between

123. Perry & Bassam, *supra* note 113.

124. COMMENTARY OF 2016, *supra* note 4, ¶ 118.

different possible measures,¹²⁵ so long as those means are lawful¹²⁶ and adequate¹²⁷ for preventing or ending their partners' grave breaches. The ICRC has set out a standard of means, not of result; thus, the State will not face liability if it did everything reasonably within its power to prevent or suppress the grave breaches of its non-State partner.¹²⁸

This approach focuses less on the State's actions, and more on whether it exercised due diligence under the given circumstances.¹²⁹ The extent of that due diligence depends on the circumstances of each individual case.¹³⁰ Relevant considerations in assessing the extent of a State's due diligence include the means reasonably available to the State, the gravity of the potential breach, the degree of influence that the State holds over the group responsible for the breach, and the foreseeability that breaches will occur.¹³¹

Because the ICRC's approach looks to the reasonableness of the State's conduct according to the circumstances, it emphasizes contextual analysis over imposing bright lines. This approach tasks a tribunal or political body with evaluating States' conduct on a case-by-case basis.

B. The ICRC's Approach is Defensible Because of Its Sensitivity to Military Necessity, as Well as Its Moral and Practical Appeal.

The ICRC's approach is defensible, given its place in the international community. The organization functions as a supervisory authority of international humanitarian law, but it must balance this role against its sensitivity to military necessity. The ICRC's approach to Common Article 1 reflects this need for military necessity. Moreover, its approach carries both a practical and moral appeal.

The ICRC considers itself both a "monitor" and a "catalyst" of international humanitarian law.¹³² The organization performs its supervisory role by monitoring conditions in various conflicts and making "practical proposals" for revisions and adaptations of international

125. *Id.* ¶ 165.

126. *Id.* ¶ 174.

127. *Id.* ¶ 165.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, INT'L COMM. OF THE RED CROSS (Dec. 31, 1998), <https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm>.

humanitarian law.¹³³ For example, the ICRC pushed for the expansion of international humanitarian law to the civil war context.¹³⁴ Due in part to its influence, it is now a reality that international tribunals will try individuals who allegedly committed war crimes in civil wars.¹³⁵ The organization also advocated for legal protections for civilians.¹³⁶ Before 1949, the Geneva Conventions mainly focused on combatants.¹³⁷ Today, humanitarian law often emphasizes a distinction between combatants and civilians.¹³⁸ Over the years, the ICRC has observed changes in warfare and has often functioned as a major agent for establishing legal paradigms.

The international community also regards the ICRC as a supervising authority in international humanitarian law. The organization conducts field reporting and appeals to belligerents to change their practices.¹³⁹ Working with the ICRC can lend credibility to a government or faction.¹⁴⁰ The organization published a two-volume compendium of what it regards as customary international humanitarian law.¹⁴¹ As some scholars have noted, the organization has a lot of political capital.¹⁴² This political capital allows it to advocate for the development of international humanitarian law.

133. *Id.*

134. David P. Forsythe, *The ICRC: A Unique Humanitarian Protagonist*, 89 INT'L REV. OF THE RED CROSS 63, 66 (2007).

135. *Id.*

136. *Id.* at 69.

137. *See id.* at 69 n.15.

138. Protocol 1, *supra* note 78, art. 48.

139. *See* Forsythe, *supra* note 134, at 70-71 (discussing the ICRC's work to limit the uses of poison gas and land mines); David P. Forsythe, *Human Rights and the International Committee of the Red Cross*, 12 HUM. RTS. Q. 265, 275 (1990) (describing the ICRC's advocacy to end torture and mistreatment in Iran, French Algeria, Uruguay, and Gre); *see also* INT'L COMM. OF THE RED CROSS, *Special File: The Intifadah- An Act of Self Defence: D- The World Reaction to and Assessment of Israeli Measures: 6*, 4 PAL. Y.B. INT'L. L. 129, 130 (1987-1988) (describing the ICRC's efforts to improve tensions and harsh conditions in an Israeli detention center).

140. *See* FIONA TERRY, *CONDEMNED TO REPEAT?: THE PARADOX OF HUMANITARIAN ACTION 45* (2002) (discussing the ICRC's position in lending credibility to the apartheid government in South Africa).

141. INT'L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); INT'L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 2: PRACTICE PART 1* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); INT'L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 2: PRACTICE PART 2* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

142. Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 227 (2006).

However, the organization must spend this capital wisely to maintain itself as a supervisory authority.¹⁴³

To maintain its supervisory authority, the ICRC must respect States' demand for military necessity.¹⁴⁴ In writing its commentaries and advocating for the creation of certain laws, the organization must take caution not to lose the trust of others.¹⁴⁵ States will not agree to laws that keep them from engaging in the battlefield. This is where the ICRC encounters trouble regarding Common Article 1. The United States¹⁴⁶ has taken a skeptical stance toward Common Article 1's positive obligations. The criticism that some of its representatives have made is that the broad provision would place an ever-increasing amount of legal responsibility on States.¹⁴⁷

Arguably, the ICRC's broad interpretation of Common Article 1 is politically sensitive enough to quell this concern. Because it focuses on "reasonableness" and context, the ICRC sets out a rule that gives States discretion to make choices about how to cooperate with non-State actors.¹⁴⁸ The rule merely asserts that the extent of a State's legal responsibilities should depend on the nature of its relationship with the group that it supports.¹⁴⁹ Although it does not give absolute deference to States, the ICRC's approach respects the need for States to make their own decisions regarding how to support non-State actors. Thus, it balances humanitarian concerns with respect for military necessity.

Moreover, the ICRC's contextual approach is practical. States need the discretion to make strategic decisions that take into consideration all the exigencies and nuances of the moment. No two situations are alike. The ICRC's emphasis on "reasonableness" gives States freedom to evaluate the extent to which they will engage with non-State groups, and then allows them to choose¹⁵⁰ which measures to take to ensure respect for the Conventions. In other words, it allows States to make thoughtful and

143. *Id.*

144. *The International Committee of the Red Cross (ICRC): Its Mission and Work* (Adopted by the Assembly of the ICRC on June 17, 2008), 91 INT'L. REV. OF THE RED CROSS 399 (2008).

145. *Id.* at 404.

146. Brian J. Egan, Remarks on *International Law, Legal Diplomacy, and the Counter-ISIL Campaign*, AM. SOC'Y OF INT'L L. (Apr. 1, 2016), <https://2009-2017.state.gov/s/l/releases/remarks/255493.htm>; Quinta Jurecic, *Defense Department General Counsel Remarks at IDF Conference*, LAWFARE (May 28, 2019, 8:30 AM), <https://www.lawfareblog.com/defense-department-general-counsel-remarks-idf-conference>.

147. Jurecic, *supra* note 146.

148. COMMENTARY OF 2016, *supra* note 4, ¶ 165 (indicating that a State's obligations depend on the circumstances, including the means reasonably available to it).

149. *Id.*

150. See COMMENTARY OF 2016, *supra* note 4, ¶ 165.

tactical decisions. This is more practical than a training requirement, which has the potential of burdening States' logistical capacities and disrupting their ability to make effective plans.

Lastly, the ICRC's approach is moral. At the heart of Common Article 1's legal obligations are a recognition that a State which supports a non-State actor has at least some influence over how the group wages war. A State with such influence cannot abandon its commitment to the Geneva Conventions merely because it only indirectly invests in a conflict. Yet, the broad nature of the rule also recognizes that these relationships are fraught with nuances. These relationships do not always lend themselves to easy value judgments. The ICRC's approach allows for appreciations of ambiguities and discrepancies, instead of enabling overtly broad deference or unrealistic pronouncements.

The ICRC's broad, due-diligence approach is open-ended enough for States to take charge of their own strategic planning and policy choices. States can have their discretion, so long as they also uphold the Geneva Conventions. As discussed below, Hathaway's approach devalues these merits by constructing a more rigid rule.

C. Hathaway's Approach Deters from the Benefits of the ICRC's Approach.

An affirmative defense approach departs from the emphasis on context which underlies the ICRC's approach. To the extent that an affirmative defense encourages training above other means of "ensuring respect," this may be insufficient where States employ training in bad faith or as a superficial way of preventing humanitarian law violations. Instead of an affirmative defense approach, the ICRC's approach may provide for a better analysis: a factfinder should consider several factors when assessing whether a State took adequate measures in supporting a non-State actor, whether through training or some other means.

Hathaway's affirmative defense incentivizes States to train their non-State partners in international humanitarian law. Given that Common Article 1's mandate is broad, training is a clear course of action that a State may undertake as a way of complying with the article's obligations. Moreover, it provides a defense against allegations of "control" under the law of State responsibility. Much like in the employment law context, where employers utilize training in part as a way of protecting themselves

against claims of not preventing workplace harassment,¹⁵¹ training could become a standard protocol for States under Hathaway's approach.

Encouraging training could constitute a valid policy outcome: in many armed conflicts, non-State actors have little to no familiarity with international humanitarian law.¹⁵² A lack of familiarity with the law contributes to an environment in which violations will likely occur.¹⁵³ In many situations, training may serve as a perfectly legitimate preventative measure.

However, the problem with Hathaway's approach is that States may use training as a way of ensuring against liability even when violations will foreseeably occur regardless of the training. States could conduct training in bad faith. The *Nicaragua v. United States* case provides such an example. In that case, the United States argued that its training manual, which encouraged extrajudicial killings and the targeting of civilians, was an effort in moderating the *Contras*' behavior.¹⁵⁴

Moreover, even in instances where a State is not acting in bad faith, training may at times be a superficial way of "ensuring respect" for the Geneva Conventions. Mechanisms of moral disengagement may undermine the efficacy of training.¹⁵⁵ For example, a group may feel animus towards their enemy or believe that the ends of victory justify the use of illegals means.¹⁵⁶ Under Hathaway's affirmative defense approach, States may "phone in" training even if it is insufficient as a way of preventing violations. This is troublesome; the law should not exculpate the State for conducting training if the circumstances called for other actions.

For this reason, the ICRC's contextual approach should stand. Under the ICRC's approach, training may or may not be adequate after a factfinder takes into consideration the circumstances, the means available to the State, the State's degree of influence over its partner, and the

151. See *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1181 (9th Cir. 2003) (finding that a research university viably established a "reasonable care" affirmative defense precluding employer liability in part because it provided periodic sexual harassment training to employees).

152. Ezequiel Heffes & Jonathan Somer, *Inviting Non-State Armed Groups to the Table*, at 5, CTR. FOR THE STUDY OF ARMED GRPS. (2020).

153. Annyssa Bellal & Stuart Casey-Maslen, *Rules of Engagement: Protecting Civilians Through Dialogue with Armed Non-State Actors*, at 6, GENEVA ACAD. OF INT'L HUMANITARIAN L. AND HUM. RTS. (2011).

154. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 120 (June 27).

155. See Daniel Muñoz-Rojas & Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding & Preventing IHL Violations*, 86 INT'L REV. OF THE RED CROSS 189, 194-98 (2004).

156. *Id.* at 197-98.

foreseeability that violations would occur regardless of any training.¹⁵⁷ The ICRC's emphasis on "reasonableness" and circumstance indicates that some situations call for measures other than training.¹⁵⁸ For example, a situation may require that the State forego certain tactics or operational plans with its non-State partner. Perhaps in some situations, a State may not provide any assistance at all, or cease providing it where violations have already occurred. The contextual approach, although not as clear-cut as Hathaway's affirmative defense, does not easily lend itself to abuse or half-heartedness on the part of States. Moreover, it demands a more nuanced analysis, as opposed to a bright-line outlook which focuses on whether the State trained its partner or not. This is important given that the "effective control" test already lends itself to a rigid analysis. An approach which considers circumstance better resolves the flaws of an already strict attribution framework.

Nevertheless, the due diligence standard should require that a State conduct training when it engages in a long-term and involved relationship with its non-State partner, or where both parties engage in a joint operation.¹⁵⁹ In a joint operation, both parties share time and objectives. Moreover, the State that has joint control over the operation can directly supervise and control the conduct of subordinates, including those belonging to the non-State group. In this scenario, the State should assume some degree of command responsibility. Alternatively, training is proper where the State established a form of academy for non-State actors. Such a scenario naturally calls for training that meaningfully implements international humanitarian law.

Hathaway's proposal for an affirmative defense may not be optimal to resolve the accountability gap if it merely results in an analysis which focuses on whether the State trained its partner in international humanitarian law. States may overly rely on training as a way of complying with Common Article 1 and defending itself against allegations of "control" under the law of State responsibility, even if training is inadequate as a measure for preventing violations. Under the ICRC's approach, States may consider a variety of possible measures and factfinders may assess the circumstances of a given situation when determining States' fault. This is favorable because it better resolves the problem of a rigid accountability framework under the "control" tests.

157. See COMMENTARY OF 2016, *supra* note 4, ¶ 165.

158. See *id.* ¶ 165 (indicating that States "remain...free to choose between different possible measures...").

159. See *id.* ¶ 167.

V. A CONTEXTUAL APPROACH CORRESPONDS TO THE PHILOSOPHY
BEHIND THE LAW OF WAR IN GENERAL.

It is not surprising that the ICRC took a contextual approach in interpreting Common Article 1. The law of war, including the doctrine of command responsibility, often accounts for context.

For example, under Article 14 of Additional Protocol I, an occupying power must ensure that the medical needs of the civilian population in an occupied territory are satisfied.¹⁶⁰ The occupying power generally cannot requisition civilian medical units, equipment, or services.¹⁶¹ However, Article 14 makes an exception for requisition when the occupying power needs the resources for the adequate and immediate medical treatment of its wounded or sick soldiers.¹⁶² Article 14 permits such a requisition so long as the necessity exists,¹⁶³ and if the occupying power takes measures to ensure that the civilian population's medical needs will continue to be satisfied.¹⁶⁴

Article 12 of Additional Protocol I states that civilian hospitals may not be the object of an attack.¹⁶⁵ However, Article 13 states that this protection ceases once combatants use the hospital to commit acts harmful to the enemy.¹⁶⁶ Again, the existence of legal protections depends on the context in which the belligerent uses the hospital.

Even the doctrine of command responsibility, which shares certain theoretical underpinnings to Common Article 1, accounts for context. Apart from directly ordering the commission of wrongful acts,¹⁶⁷ the superior is also responsible for failing to take all reasonable and necessary measures within his power to prevent or repress breaches of international humanitarian law.¹⁶⁸ This focus on reasonableness mirrors Common Article 1's due diligence standard and focuses on the context of the situation at hand.

These examples help to justify the ICRC's approach to Common Article 1. The law of war frequently focuses on the context of a given scenario when determining what is appropriate, rather than imposing bright lines in difficult situations. Although the law outright forbids some forms of

160. Protocol 1, *supra* note 78, art. 14 ¶ 1.

161. *Id.* ¶ 2.

162. *Id.* ¶ 3(a).

163. *Id.* ¶ 3(b).

164. *Id.* ¶ 3(c).

165. *Id.* art. 12.

166. *Id.* art. 13.

167. Rome Statute of the International Criminal Court, art. 25, July 7, 2002, 2187 U.N.T.S. 105.

168. *Id.* art. 28.

conduct, there are other scenarios where the obligations bear on what happens in the moment. The ICRC's approach to Common Article 1 operates in a similar manner, because it focuses less on the specific conduct but rather looks to the circumstances and the nature of the normative obligations at issue.

VI. CONCLUSION.

Common Article 1 could hold States accountable when their dealings with non-State actors do not respect or ensure respect for the Geneva Conventions. However, it would be a mistake to construe Common Article 1 as containing a strict training requirement. It is unrealistic to expect international humanitarian law training in certain emergencies. Moreover, such a requirement would make it difficult for tribunals to make nuanced assessments which take into consideration context and military necessity. Instead, training should be merely one factor for tribunals and human rights bodies when they assess a State's fault. For this reason, tribunals should defer to the ICRC's contextual due-diligence approach.