

## THE DIFFICULTIES WITH ENSURING

B.	The ICRC's Approach is Defensible Because of Its Sensitivity to Military Necessity, as Well as Its Moral and Practical Appeal.....	205
C.	Hathaway's Approach Deters from the Benefits of the ICRC's Approach.....	208..
V.	A CONTEXTUAL APPROACH CORRESPONDS TO THE PHILOSOPHY BEHIND THE LAW OF WAR IN GENERAL.....	211
VI.	CONCLUSION .....	212..

## 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. 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. Providing arms or funding does not constitute "control." 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.



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

Hathaway's approach, although thoughtful, is problematic to the extent that it requires that a State train its ~~State~~ partner to then raise an affirmative defense. This is impractical because some circumstances are exigent and cannot require that a State train a ~~State~~ actor. Moreover, her approach risks detracting from Common Article 1's ~~open~~ nature, because it substitutes the ICRC's emphasis on context with a ~~bright~~ 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-Slvv Same Sl2 (a) 10 2 6 (i) 22 (v) 5 ad (St)-2.6 (es )10 2415174 3.7In15174 3.7.478 1.174 T15



atrocities.<sup>19</sup> The Contras targeted civilians and engaged in torture, rape, and kidnapping.<sup>20</sup> They also conducted assaults on civilian facilities like farms

and health centers.<sup>21</sup> Today, one of the most significant examples of State-sponsored terrorism is the

politician Hevrin Khalaf<sup>60</sup> Human Rights Watch reported that members of the Turkish-backed Syrian National Army conducted extrajudicial killings, unlawfully occupied civilian properties, and engaged in looting.

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<sup>82</sup>. Nevertheless, the Wagner Group maintains close ties to the Russian government<sup>83</sup>. Both the contractor and the Main Intelligence Directorate, the official Russian military intelligence organ, keep bases in Russia



State actor that it keeps the group in a position of complete dependence.<sup>44</sup> 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.<sup>45</sup> Under the “complete control” test, the group must have no real autonomy from the supporting State.<sup>46</sup>

Professor Milanovi<sup>47</sup> and Prof. (ndv2 (us)-2.489 (o)10.779 (r)86.558 [(S)1.558 (t)44.52 (e)9.3



Yugoslavia established this rule *Prosecutor v. Tadi*.<sup>64</sup> However, unlike Nicaragua, *Tadi* was an international criminal trial. The prosecutor charged an individual, Dusko Tadi, with torture, inhuman treatment, and murder in relation to his participation in the Bosnian War.



[Conventions] in all circumstances<sup>78</sup>” As Professors Michael N. Schmitt, Sean Watts, and Frits Kalshoven argue, the provision may simply serve as an aspirational statement or a truism<sup>79</sup>. They explain the provision merely reiterates that States have obligations to ensure their own armed forces and



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.”<sup>97</sup> She writes that the provision would have States take “affirmative steps to ensure [that] their State partners complied with relevant law.”<sup>98</sup> 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.<sup>99</sup> However, Hathaway sees a problem with the diligence standard. A State that took steps to secure its non-State partner’s compliance with the Geneva



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

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

#### 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 .6 ( I76 Td [(da-)10.67B.

short time frame. This was glaringly apparent given that ISIS captured twenty-one Kurdish villages within twentyfour hours during the period leading up to the invasion.<sup>123</sup> 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

http://www.iael.org/4-2.6 (nri)-4.6 (s-4.6 (ua)9.2-10.2.6 (ni)-4.6 (od)10.9(n)10.8 ( ))10.6 (lua)9.2 4-2.

different possible measures,<sup>125</sup> so long as those means are lawful<sup>126</sup> and adequate<sup>127</sup> 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 State partner.<sup>128</sup>

This approach focuses less on the State's actions, and more on whether it exercised due diligence under the given circumstances.<sup>129</sup> The extent of that due diligence depends on the circumstances of each individual case.<sup>130</sup> Relevant considerations in assessing the extent of 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.<sup>131</sup>

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 provides both a practical and moral appeal.

The ICRC considers itself both a "monitor" and a "catalyst" of international humanitarian law.<sup>132</sup> 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.

humanitarian law.<sup>133</sup> For example, the ICRC pushed for the expansion of international humanitarian law to the civil war context.<sup>134</sup> 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.<sup>135</sup> The organization also advocated for legal protections for civilians.<sup>136</sup> Before 1949, the Geneva Conventions mainly focused on combatants.<sup>137</sup> Today, humanitarian law often e.3 2 (t) [C 160 6.96 343.2 6214(n )0.5 52 Tm (137)Tj EMC.96 343.2 6214(5vl (137)f9.



tactical decisions. This is more practical than a planning 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 engendering overly broad deference or unrealistic pronouncements.

The ICRC's broad, diligent 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 by ppa b-2.6 (i) is 74 .6 (i) 1 t(e)-1.7 aye 9.957 repi

against claims of not preventing workplace harassment, training could

foreseeability that violations would occur regardless of any training.<sup>157</sup> The ICRC's emphasis on "reasonableness" and circumstance indicates that some situations call for measures other than training.<sup>158</sup> For example, a

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.

