

Taking Responsibility and Tying Hands: The Case for Limiting U.S. Relationships with Armed Groups Abroad

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Abstract: The United States regularly criticizes and clashes with rivals over their relationships with armed groups, like Russia backing Ukrainian rebels and Iran supporting militias in Iraq, but has its own long history of relationships with armed groups. There have recently been calls to increase U.S. reliance on armed group partners like rebel groups or militias to distribute the burden of great power competition with Russia and China. Relationships with armed groups are risky, however, and changes in international law around the crime of aggression and duty to ensure respect for humanitarian law have increased states' liability for armed group partners. The U.S. should instead restrain itself from relying on armed groups and take greater responsibility for its armed group ties and wartime actions, a policy change that could help constrain violence against civilians, bolster the U.S.'s reputation abroad, and set an example for allies. Framing U.S. self-restraint as responding to international law could also provide a vital boost to the international justice system and 'rules-based' order if commitments are upheld.

INTRODUCTION

In February 2021, the Biden administration ordered its first known airstrikes since taking office, bombing targets in eastern Syria allegedly used for smuggling weapons into Iraq.¹ Department of Defense spokesman John Kirby explicitly described the targets as being “used by a number of Iranian-backed militant groups.”² While less directly confrontational than the Trump administration's assassination of Iranian Revolutionary Guard commander Qassem Soleimani and a militia commander in Iraq in 2019, the Syria strike was reportedly less about the targeted militias and more about signaling U.S. resolve to their Iranian backers.³ In June 2021, the pattern

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¹ Alex Ward, *Biden launched airstrikes against Iran-backed militias in Syria to “send a message”*, VOX (2021), <https://www.vox.com/2021/2/25/22302197/biden-syria-iran-airstrike-military>.

² Department of Defense, *U.S. Conducts Defensive Precision Strike*, U.S. DEPARTMENT OF DEFENSE (2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2516518/us-conducts-defensive-precision-strike/>.

³ Ward, *supra* note 2; Luca Ferro, *Killing Qasem Soleimani: International Lawyers Divided and Conquered*, 53 CASE WEST. RESERVE J. INT. LAW 163–196 (2021).

continued, as U.S. drones attacked alleged weapons stores of “Iran-backed militia groups” along the Iraq-Syria border, attacks the Iraqi government decried as violating their national sovereignty and international law.⁴ The United States has designated Iran as a ‘state sponsor of terrorism’ since 1984, and consistently criticizes Iran’s ties to prominent militant groups like Hezbollah, Hamas, the Taliban, the Houthis in Yemen, and al Qaeda, along with militias around the Middle East, relationships used to justify this year’s airstrikes.⁵

U.S. condemnation of Iranian armed group ties or Russian support for rebels in eastern Ukraine often rings hollow, however, given the U.S.’s own history of outsourcing violence to rebels, militias, and other armed groups. The colonial settlement of the Americas and post-independence U.S. expansions depended on relationships with settler militias and alliances with certain Indigenous nations.⁶ This behavior continued, from the Bay of Pigs invasion and Cold War insurgencies in countries like Angola and Nicaragua to more recent U.S. relationships with rebel coalitions and militias in Afghanistan, Iraq, Libya, and Syria.⁷ Following the withdrawal of U.S. ground forces from Afghanistan and the Taliban’s reassertion of control, there were calls by newly-minted Afghan resistance leaders and by members of Congress to back anti-Taliban fighters, and

⁴ Louisa Loveluck, John Hudson & Alex Horton, *U.S. forces come under fire in Syria hours after airstrikes target Iran-backed militias*, WASHINGTON POST, June 28, 2021, https://www.washingtonpost.com/world/middle_east/iraq-condemns-us-militia-airstrikes/2021/06/28/c5f44b58-d80e-11eb-8c87-ad6f27918c78_story.html.

⁵ Asfandiyar Mir & Colin P. Clarke, *Making Sense of Iran and al-Qaeda’s Relationship*, LAWFARE, March 21, 2021, <https://www.lawfareblog.com/making-sense-iran-and-al-qaedas-relationship>; Ashley Lane, *Iran’s Islamist Proxies in the Middle East*, WILSON CENTER (2021), <https://www.wilsoncenter.org/article/irans-islamist-proxies>; Fatemeh Aman, *Iran-Taliban growing ties: What’s different this time?*, ATLANTIC COUNCIL (2021), <https://www.atlanticcouncil.org/blogs/iransource/iran-taliban-growing-ties-whats-different-this-time/>; Ofira Seliktar, *Iran’s Geopolitics and Revolutionary Export: The Promises and Limits of the Proxy Empire*, 65 ORBIS 152–171 (2021).

⁶ JOHN GRENIER, *THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER, 1607–1814* (2005).

⁷ Erica Gaston, *Practical Challenges and Hybrid Hypocrisy: Legal and Policy Dilemmas with the Hybrid Moniker*, WAR ON THE ROCKS, January 25, 2021, <https://warontherocks.com/2021/01/practical-challenges-and-hybrid-hypocrisy-legal-and-policy-dilemmas-with-the-hybrid-moniker/>.

Ahmad Massoud's 'National Resistance Front' set up a lobbying shop in Washington, D.C.⁸ With Russia threatening to invade Ukraine in late 2021 and invading in early 2022, U.S. officials began planning for the possibility of supporting insurgents in the event Russia toppled the Ukrainian government.⁹

These calls for renewing U.S. military, financial, and political aid to rebel groups clash with the Biden administration's expressed goals of reestablishing U.S. leadership and improving the U.S.'s reputation on the global stage, as well as strengthening a "rules-based international order" in the face of a rising China, resurgent Russia, and increasingly assertive Iran and Turkey.¹⁰ As many commentators have argued, to be an effective global leader, the United States must clean up its own act domestically in addressing issues of racism, political polarization and threats of violence, and voting restrictions and efforts to undermine elections.¹¹ Tackling human rights and democratic legitimacy issues at home and taking bold action to reinvent and revitalize the U.S.'s role in the world are mutually aligned goals, however, and should be pursued at the same time.¹²

⁸ Ahmad Massoud, *Opinion: The mujahideen resistance to the Taliban begins now. But we need help.*, WASHINGTON POST, August 18, 2021, <https://www.washingtonpost.com/opinions/2021/08/18/mujahideen-resistance-taliban-ahmad-massoud/>; Jack Detsch, Robbie Gramer & Amy Mackinnon, 'Charlie Wilson's Playbook': Lawmaker Pushes Biden to Back Anti-Taliban Resistance, FOREIGN POLICY, August 25, 2021, <https://foreignpolicy.com/2021/08/25/charlie-wilson-playbook-biden-anti-taliban-resistance/>; Lachlan Markay, *Afghan resistance ups its U.S. lobbying*, AXIOS, October 28, 2021, <https://www.axios.com/afghan-resistance-lobbying-0af8ad09-e44a-4015-bed9-b8c97fbc546.html>.

⁹ David Ignatius, *The Biden administration weighs backing Ukraine insurgents if Russia invades*, WASHINGTON POST, December 19, 2021, <https://www.washingtonpost.com/opinions/2021/12/19/biden-ukraine-insurgents-russia/>; Jack Detsch & Robbie Gramer, *Biden Administration Debates Legality of Arming Ukrainian Resistance*, FOREIGN POLICY, February 24, 2022, <https://foreignpolicy.com/2022/02/24/biden-legal-ukraine-russia-resistance/>.

¹⁰ Kai Thaler, *Afghan Insurgents Are a Dead End*, FOREIGN POLICY, November 23, 2021, <https://foreignpolicy.com/2021/11/23/afghanistan-taliban-national-resistance-front/>.

¹¹ Kelebogile Zvobgo, *Foreign Policy Begins at Home*, FOREIGN POLICY, January 15, 2021, <https://foreignpolicy.com/2021/01/15/human-rights-foreign-policy-domestic/>; Emma Ashford, *America Can't Promote Democracy Abroad. It Can't Even Protect It at Home.*, FOREIGN POLICY, January 7, 2021, <https://foreignpolicy.com/2021/01/07/america-cant-promote-protect-democracy-abroad/>.

¹² William J. Burns, *The United States Needs a New Foreign Policy*, THE ATLANTIC, 2020, <https://www.theatlantic.com/ideas/archive/2020/07/united-states-needs-new-foreign-policy/614110/>; Sarah H. Cleveland, *A Human Rights Agenda for the Biden Administration*, 115 AJIL UNBOUND 57–62 (2021).

Given the U.S.'s checkered history of covert interventions and other actions contravening international laws and norms,¹³ one of the best ways for the U.S. to show actual fidelity to playing by the rules internationally is by making a costly commitment and tying its hands when it comes to relationships with armed groups. Taking responsibility for the actions of U.S.-backed armed groups today can demonstrate the credibility of U.S. commitments to human rights and show accountability to conflict-affected populations. The activation of the International Criminal Court's jurisdiction over the crime of aggression in 2018 and new International Committee of the Red Cross commentaries on the Geneva Conventions both increase state liability for armed group partners' actions; active support for these legal shifts would offer an opportunity for the U.S. to show leadership among major powers and help establish and enforce new norms of state responsibility for armed group partners. Restricting relationships with armed groups could also constrain temptations to intervene in conflicts where U.S. national interests are not clearly at stake and where there is little trust in local armed groups to protect civilians or de-escalate situations with rivals.

Taking options off the table is a tough sell when it comes to security policy, but reducing U.S. reliance on armed group intermediaries and accepting responsibility for relationships with armed groups is a risk worth taking: for humanitarian reasons, to help restore the U.S.'s reputation abroad, and to set an example for allies. It is also a choice broadly embraced by the public and foreign policy elites, who prefer alliances with states, rather than armed groups.¹⁴ Solidifying this strategic

¹³ E.g. MICHAEL POZNANSKY, *IN THE SHADOW OF INTERNATIONAL LAW: SECRECY AND REGIME CHANGE IN THE POSTWAR WORLD* (2020); LINDSEY A. O'ROURKE, *COVERT REGIME CHANGE* (2021).

¹⁴ Sara Plana, "*Proxies*" and the Public: *Testing the Statist Bias in Public Support for Military Aid* (2020), <https://dx.doi.org/10.2139/ssrn.3708305>; SIBEL OKTAY ET AL., *Treaty Allies Matter for US Foreign Policy Experts*

shift by embracing international law can provide stronger standing to pressure adversaries and allies alike about aggression and human rights abuses abroad, while also bolstering international law and international order at a time when they are threatened or eroding.¹⁵

I. UNDERSTANDING STATE-ARMED GROUP RELATIONSHIPS

The United States and other countries engage with armed groups to pursue different goals, and with varying levels of cooperation and influence over armed group behavior. There is a long history of states outsourcing coercive actions to actors ranging from pirates and mercenaries before the 19th Century, to rebel organizations, warlords, militias, and private military companies today.¹⁶ States also sponsor armed groups for reasons not directly related to national security, like ideological or identity affinity. In other instances, armed groups remain autonomous, independent of state influence or support, or equals to weak states in power and capabilities and engaging in relationships on their own terms. This article focuses on the United States, but the arguments and lessons about the perils of state-armed group relations apply to other major powers and U.S. allies. The United Kingdom and other North Atlantic Treaty Organization (NATO) allies, for instance, collaborated in Afghanistan with violent warlords and local militias who hastily rebranded themselves as security contractors, while France backed Libyan rebels who committed atrocities

— *but They Are Not Indispensable* (2021), <https://www.thechicagocouncil.org/research/public-opinion-survey/treaty-allies-matter-us-foreign-policy-experts-they-are-not>.

¹⁵ Ian Clark et al., *Crisis in the laws of war? Beyond compliance and effectiveness*, 24 EUR. J. INT. RELAT. 319–343 (2018); Rebecca Friedman Lissner & Mira Rapp-Hooper, *The Day after Trump: American Strategy for a New International Order*, 41 WASH. Q. 7–25 (2018); Michael Barnett, *The End of a Liberal International Order That Never Existed*, THE GLOBAL (2019), <https://theglobal.blog/2019/04/16/the-end-of-a-liberal-international-order-that-never-existed/>; Eric A. Posner & Jack Landman Goldsmith, *The Limits of International Law Fifteen Years Later*, 22 CHIC. J. INT. LAW 110–127 (2021).

¹⁶ IRREGULAR ARMED FORCES AND THEIR ROLE IN POLITICS AND STATE FORMATION, (Diane E. Davis & Anthony W. Pereira eds., 2003); Alex Marshall, *From civil war to proxy war: past history and current dilemmas*, 27 SMALL WARS INSUR. 183–195 (2016).

during the war to overthrow Muammar Gaddafi and French forces have organized and allied with militias in Chad and Mali.¹⁷

To understand the implications of a particular relationship and how much a state is enabling or could constrain an armed group—as well as what diplomatic, legal, and policy levers are available to address armed group behavior or state support—we must unpack state-armed group relationships along three key dimensions.¹⁸ First, the level of state investment in armed groups with material and diplomatic resources or territorial safe havens, and how much armed groups depend on this state support. Second, are armed groups pursuing states’ core strategic interests alongside or in addition to their own goals, or are they only loosely aligned with state aims? Third, what is the power balance between states and armed groups in their areas of operations?

Armed groups adopt forms, goals, and tactics intersecting categories used by analysts and shift over time, making it often unproductive to draw clean lines between, for instance, rebel groups, terrorist organizations, and criminal organizations, or, given the increasingly blurry lines between war and peace, to restrict typologies to wartime relationships.¹⁹ State relationships with

¹⁷ Graham Cronogue, *Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors*, 23 DUKE J. COMP. INT. LAW 365–388 (2013); Elke Krahnmann, *NATO contracting in Afghanistan: The problem of principal-agent networks*, 92 INT. AFF. 1401–1426 (2016); Michael Shurkin, *France’s War in the Sahel and the Evolution of Counterinsurgency Doctrine*, 4 TEX. NATL. SECUR. REV. 35–60 (2020).

¹⁸ Kai M. Thaler, *Delegation, Sponsorship, and Autonomy: An Integrated Framework for Understanding Armed Group–State Relationships*, 7 J. GLOB. SECUR. STUD. in press (2022).

¹⁹ REVISITING THE STATE MONOPOLY ON THE LEGITIMATE USE OF FORCE, (Alyson Bailes, Ulrich Schneckener, & Herbert Wulf eds., 2007), <https://www.dcaf.ch/revisiting-state-monopoly-legitimate-use-force> (last visited Aug 11, 2021); Dani Belo & David Carment, *Gray-zone Conflict Management: Theory, Evidence, and Challenges*, 2 J. EUR. MIDDLE EAST. AFR. AFF. 21–41 (2020); Sabine Otto, Adam Scharpf & Anita R. Gohdes, *Capturing group alignments: Introducing the Government and Armed Actors Relations Dataset (GAARD)*, 7 RES. POLIT. 1–8 (2020); PAUL STANILAND, *ORDERING VIOLENCE: EXPLAINING ARMED GROUP-STATE RELATIONS FROM CONFLICT TO COOPERATION* (2021).

any armed sort of armed group, however, can be divided into three types: delegation, sponsorship, and autonomy.²⁰

In a delegation relationship, a state either devolves coercive authority to an armed group or strengthens armed group capabilities for it to advance the state's core security goals, like preserving territorial integrity and domestic political control, or countering threats from external rivals. States may delegate to armed groups projecting force in the domestic periphery or attacking foreign states or rebel rivals abroad. Delegation can be useful to states to reduce material and reputational costs, to take advantage of armed group skills, or as a tool for domestic or interstate bargaining, but delegation relationships entail armed groups undertaking tasks that states would do or would like to still pursue themselves absent the armed group's collaboration.²¹

In domestic settings, governments often rely on armed groups to control or defend remote and contested areas where they are unable or unwilling to project force, like Uganda organizing militias in the country's north to defend against the Lord's Resistance Army or police collaborating with favored criminal organizations to keep neighborhoods out of gang control in Brazil.²² Delegation is a popular choice for invading or occupying forces without local knowledge or legitimacy, like the U.S. in Iraq, which relied on local militias in the Sunni Awakening to retake Al-Anbar province from al Qaeda in Iraq.²³ States may also delegate across borders to attack rival

²⁰ Thaler, *supra* note 19.

²¹ Daniel Byman & Sarah E. Kreps, *Agents of Destruction? Applying Principal-Agent Analysis to State-Sponsored Terrorism*, 11 INT. STUD. PERSPECT. 1–18 (2010); Navin A. Bapat, *Understanding State Sponsorship of Militant Groups*, 42 BR. J. POLIT. SCI. 1–29 (2012); IDEAN SALEHYAN, REBELS WITHOUT BORDERS (2009).

²² Enrique Desmond Arias, *The Impacts of Differential Armed Dominance of Politics in Rio de Janeiro, Brazil*, 48 STUD. COMP. INT. DEV. 263–284 (2013); Adam Branch, *Neither Peace nor Justice: Political Violence and the Peasantry in Northern Uganda, 1986-1998*, 8 AFR. STUD. Q. 1–31 (2005).

²³ Govinda Clayton & Andrew Thomson, *The Enemy of My Enemy is My Friend ... The Dynamics of Self-Defense Forces in Irregular War: The Case of the Sons of Iraq*, 37 STUD. CONFL. TERROR. 920–935 (2014); Henning Tamm,

states or foreign-based insurgents, like Algeria’s longstanding supplying and sheltering of Polisario Front rebels fighting Morocco for Western Sahara’s autonomy, or the Reagan Administration helping organize and supporting Contra forces to destabilize Nicaragua’s leftist Sandinista government in the 1980s, when there was not Congressional or public will for direct intervention.²⁴

In sponsorship relationships, a state sees armed group aims not as tied to its core security interests, but as compatible with broader national interests, usually due to ideological, ethnic, or other affinities. For this reason, sponsorship tends to take place abroad in countries beyond a state’s immediate neighborhood—like North Korea’s support for leftist guerrilla movements around the globe during the Cold War, or Libya arming and training of Basque separatists ETA in Spain and the Irish Republican Army in Northern Ireland.²⁵ The U.S. sponsored right-wing rebels widely during the Cold War, from exiled Kuomintang fighters in Myanmar continuing the fight against China’s victorious Communists in the 1950s, to the formerly Chinese-sponsored UNITA in Angola in the 1980s and 1990s,²⁶ situations and tasks to which the U.S. would not have been willing to commit its own forces.

The Invader’s Dilemma: Enlisting Rebel Groups, in *THE GOVERNOR’S DILEMMA* 119–136 (Kenneth W. Abbott et al. eds., 2020).

²⁴ ROBERT PASTOR, NOT CONDEMNED TO REPETITION: THE UNITED STATES AND NICARAGUA (2nd ed. 2002); AFP, “Foreign manoeuvres” in *W.Sahara destabilising Algeria: PM*, FRANCE 24, December 12, 2020, <https://www.france24.com/en/live-news/20201212-foreign-manoevres-in-w-sahara-destabilising-algeria-pm>.

²⁵ Mark Devenport, *Gaddafi death, the Eta ceasefire and Northern Ireland*, BBC NEWS, October 21, 2011, <https://www.bbc.com/news/uk-northern-ireland-15403982>; BENJAMIN R. YOUNG, GUNS, GUERRILLAS, AND THE GREAT LEADER: NORTH KOREA AND THE THIRD WORLD (2021).

²⁶ William Minter, *The US and the War in Angola*, REV. AFR. POLIT. ECON. 135–144 (1991); Patrick Winn, *They were CIA-backed Chinese rebels. Now you’re invited to their once-secret hideaway.*, THE WORLD, August 28, 2019, <https://www.pri.org/stories/2019-08-28/they-were-cia-backed-chinese-rebels-now-you-re-invited-their-once-secret-0>.

An autonomy relationship involves an armed group that has independence in its strategic decision-making and can survive without state support. An autonomous armed group chooses whether to engage in non-conflictual relationships with states or to fight or ignore them. Autonomous groups have a level of approximate power symmetry or advantage in relation to states with which they interact, such that they do not depend upon them for operational survival and could not be suppressed easily in their base areas if the state turned its forces against them. This is, in part, why autonomous groups persist in areas of state weakness or collapse.

An example would be the relationship between al Qaeda and the Taliban government in Afghanistan from 1996-2001. The Taliban sought to take advantage of al Qaeda's financial and military resources to help consolidate control throughout Afghanistan. Al Qaeda supported the Taliban in exchange for a territorial base, but maintained its strategic and operational autonomy.²⁷ Al Qaeda frequently acted against Taliban interests, but could not be held to account. Despite U.S. demands that the Taliban turn over al Qaeda leadership after the September 11 attacks, it is unclear the Taliban could have if they wanted to,²⁸ due to the power symmetry in the relationship and incomplete Taliban control over Afghan territory. From the U.S. perspective, however, the Taliban government was liable for the actions of its armed group partner.

II. WHO IS LIABLE FOR ARMED GROUP ACTIONS?

Though armed groups control and affect areas populated by millions of people around the globe, international law was designed with states and interstate relations in mind. As a result,

²⁷ DANIEL BYMAN, *DEADLY CONNECTIONS: STATES THAT SPONSOR TERRORISM* (2005); Amin Saikal, *The Role of sub-national actors in Afghanistan*, in *VIOLENT NON-STATE ACTORS IN CONTEMPORARY WORLD POLITICS* 239–256 (Klejda Mulaj ed., 2010).

²⁸ ALEX VAN LINSCHOTEN & FELIX KUEHN, *AN ENEMY WE CREATED: THE MYTH OF THE TALIBAN-AL QAEDA MERGER IN AFGHANISTAN* (2012).

armed groups' murky legal status has historically offered a loophole for their state backers to escape accountability for violating state sovereignty or violence against civilians, even as legal enforcement has expanded to indict and try armed group leaders themselves.²⁹

Domestically, states find delegation relationships useful because armed groups operate extralegally and can undertake technically illegal, but state-condoned, coercive actions. In some cases, state-armed group connections are opaque and there is a degree of plausible deniability when addressing domestic audiences, like the Assad regime's early use of local armed gangs to attack protesters in pre-civil war Syria.³⁰ In most contexts, however, domestic audiences know armed groups act on behalf of and with endorsement from the state, but repression by state security forces would have higher reputational costs internationally. So we have seen counterinsurgency delegated to militias like the Janjaweed in Darfur, or assassinations of ex-rebels and activists carried out by paramilitaries in Colombia.³¹

Delegating to armed groups to pressure external rivals is legally useful, since sovereignty (in theory) precludes states from invading each other's territory except in self-defense, and supporting an armed group offers potential plausible deniability if a state can keep ties secret. Yet even when such ties are clear or 'implausibly deniable,'³² the international community has rarely

²⁹ NOAH WEISBORD, *THE CRIME OF AGGRESSION: THE QUEST FOR JUSTICE IN AN AGE OF DRONES, CYBERATTACKS, INSURGENTS, AND AUTOCRATS* (2019); Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 *TEX. LAW REV.* 539–590 (2017).

³⁰ Reinoud Leenders & Antonio Giustozzi, *Outsourcing state violence: The National Defence Force, "stateness" and regime resilience in the Syrian war*, 24 *MEDITERR. POLIT.* 157–180 (2019).

³¹ Cronogue, *supra* note 18; Andrés Gaudín, *Colombian Elections Marred by Paramilitary Violence*, NOTISUR, March 23, 2018, <https://digitalrepository.unm.edu/notisur/14591>.

³² Rory Cormac & Richard J. Aldrich, *Grey is the new black: Covert action and implausible deniability*, 94 *INT. AFF.* 477–494 (2018).

legally punished state support for external armed groups. Powerful states escape accountability, while weaker states face financial or military consequences, but not legal action.

Recent advances in international legal standards and scholarship have created possibilities to close this gap. Under current international law, armed groups themselves continue to exist in a grey area. In 1977, the United Nations expanded the Geneva Conventions to cover armed groups fighting wars of national liberation against a colonial power, but armed groups fighting in other capacities or for other goals were still considered illegal.³³ Increasingly, customary law has held armed group leaders subject to international criminal law on war crimes, crimes against humanity, genocide, piracy, and terrorism, which has restrained some armed group leaders in their decision making.³⁴ It is now generally accepted that armed groups have an obligation to comply with international law, though only individuals, rather than entire organizations, can face legal claims.³⁵ In two notable examples, the International Criminal Court (ICC) brought cases against Congolese rebel leader Bosco Ntaganda and leaders in the Lord's Resistance Army, including Dominic Ongwen who was convicted in February 2021 of war crimes and crimes against humanity.³⁶ However, while prosecuting individual armed group leaders or members for illegal actions under domestic or international law may be useful for personal accountability, it ignores armed groups' collective nature and, crucially, does not address state support.³⁷

³³ M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. LAW CRIMINOL. 711–810 (2008).

³⁴ HYERAN JO, *COMPLIANT REBELS: REBEL GROUPS AND INTERNATIONAL LAW IN WORLD POLITICS* (2015).

³⁵ Ezequiel Heffes & Brian E. Frenkel, *The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules*, 8 GOETTINGEN J. INT. LAW 39–72 (2017).

³⁶ ICC, *Dominic Ongwen declared guilty of war crimes and crimes against humanity committed in Uganda*, INTERNATIONAL CRIMINAL COURT (2021), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1564>.

³⁷ Neal A. Pollard, *Globalization's Bastards: Illegitimate Non-State Actors in International Law*, 11 LOW INTENSITY CONFL. LAW ENFORC. 210–238 (2002).

In cases where a state delegates, using an armed group to pursue state aims, the armed group's actions could be considered 'adopted conduct' of the state.³⁸ This would make the state legally responsible for the group's behavior. Yet legal standards for attributing responsibility have historically set high bars of state officials exercising direct operational control over armed groups, even for private military companies they contract.³⁹ This has begun to change, however, and customary law has evolved towards a standard of 'overall control.'

The International Court of Justice (ICJ) in its 1986 ruling in *Military and Paramilitary Activities in and against Nicaragua* found clear evidence that the United States had financed, organized, and supplied the Contra rebel forces fighting against Nicaragua's revolutionary Sandinista government by providing equipment, arms, training, and intelligence. U.S. intelligence agents even aided in operational planning and target selection. Despite this, the court ultimately ruled that, to be liable, a state must have "effective control" over specific operations in which an armed group committed crimes.⁴⁰ The ICJ's judges may have ruled narrowly in the *Nicaragua* case due to questions about the Court's legitimacy and U.S. non-cooperation in the case (and subsequent refusal to pay reparations awarded for sabotage by U.S. operatives). The court, however, upheld the effective control standard in its later *Bosnian Genocide* ruling.⁴¹

³⁸ Jan Arno Hessbruegge, *Human rights violations arising from conduct of non-state actors*, 11 BUFFALO HUM. RIGHTS LAW REV. 21–88 (2005).

³⁹ Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHIC. J. INT. LAW 83–95 (2003); HANNAH TONKIN, *STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT* (2011).

⁴⁰ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 14 (1986).

⁴¹ Hathaway et al., *supra* note 30.

The effective control standard was later challenged, though, and state responsibility broadened by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and then the Special Court for Sierra Leone (SCSL). In *Prosecutor v. Dusko Tadić*, the ICTY Appeals Chamber held that the standard for state liability need not be effective control over specific operations, but can be “overall control” resulting from “organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”⁴² This standard was applied to hold Federal Republic of Yugoslavia state officials responsible for atrocities committed by allied Serb armed groups in Bosnia-Herzegovina. The ICTY has since reaffirmed the overall control standard,⁴³ and it was then upheld by the SCSL in its case against former Liberian President Charles Taylor. The SCSL convicted Taylor in 2012 of “aiding and abetting” atrocities committed by Revolutionary United Front rebels in Sierra Leone, with whom there was a delegation relationship—though the SCSL also found Taylor liable for effective control of specific operations.⁴⁴

Two changes in the drafting and interpretation of international law may further solidify state actors’ liability for conduct by armed groups with whom they are in delegation or sponsorship relationships—changes that would gain greater international legitimacy if the U.S. endorsed and abided by them. The first major shift was the 2010 Kampala Amendments to the Rome Statute governing the ICC, which now codify the crime of aggression,⁴⁵ an advance in international law

⁴² ICTY, *Prosecutor v. Duško Tadić - Judgment* (1999), <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

⁴³ Hathaway et al., *supra* note 30.

⁴⁴ Kai Ambos & Ousman Njikam, *Charles Taylor’s Criminal Responsibility*, 11 J. INT. CRIM. JUSTICE 789–812 (2013).

⁴⁵ United Nations, *Adoption of Amendments on the Crime of Aggression* (2010), [https://asp.icc-cpi.int/en_menus/asp/crime of aggression/pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/crime%20of%20aggression/pages/default.aspx).

long sought by jurists, scholars, and activists.⁴⁶ The crime of aggression not only includes direct state attacks undertaken aggressively, rather than in self-defense, but also prohibits “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State,” holding state leaders liable for actions delegated to armed groups.⁴⁷ Since 2018, the ICC has been empowered to enforce these amendments, though there remain debates about the extent of jurisdiction over states parties to the Rome Statute that have not ratified the Kampala Amendments.⁴⁸

The crime of aggression amendments focus on violations of sovereignty, seeking to punish governments for breaching the borders and rights of other states, and for unjustified killings in that process.⁴⁹ Specific state obligations to protect people under international humanitarian law, though, may also be expanding. The International Committee of the Red Cross’s new 2016 commentaries on the Geneva Conventions, specifically around Common Article 1, suggest states have not only have a duty not to encourage armed group partners to violate humanitarian laws, but also a duty to ‘ensure respect’ for the Geneva Conventions by their own forces and by armed groups.⁵⁰ Ensuring respect would mean actively seeking to restrain armed groups with which states are in delegation or sponsorship relationships. This standard would hold states accountable not only to populations in conflict zones, but to the international community as a whole, even if an

⁴⁶ M Cherif Bassiouni, *The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization*, 58 HARV. INT. LAW J. 87–89 (2017); Claus Kreß, *On the Activation of ICC Jurisdiction over the Crime of Aggression*, 16 J. INT. CRIM. JUSTICE 1–17 (2018); WEISBORD, *supra* note 30.

⁴⁷ WEISBORD, *supra* note 30 at 111–113.

⁴⁸ Dapo Akande & Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, 29 EUR. J. INT. LAW 939–959 (2018); Kreß, *supra* note 47; Andreas Zimmermann, *A victory for International rule of law? Or: All’s Well that Ends Well?: The 2017 ASP decision to Amend the Kampala Amendment on the Crime of Aggression*, 16 J. INT. CRIM. JUSTICE 19–29 (2018).

⁴⁹ Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE LAW J. 1242–1318 (2017).

⁵⁰ Hathaway et al., *supra* note 30.

armed group-state relationship does not meet effective or overall control standards for attribution.⁵¹ For example, selling arms to a sponsored armed group when a state knows they will likely be used to commit human rights violations would breach the state's duty to ensure respect, incurring in armed group relationships the same responsibility many activists and politicians argue the U.S. bears for selling Saudi Arabia and the United Arab Emirates weapons used to bombard civilians in Yemen.⁵²

Charles Taylor's conviction established accountability for former heads of state (former Yugoslavian/Serbian leader Slobodan Milosević died during his ICTY trial before a verdict), and a current case and investigation will be further key tests for state leaders' accountability for crimes committed by armed groups in delegation relationships. Sudan's transitional government in 2020 pledged to turn over former President Omar al-Bashir and other officials to the ICC for prosecution for crimes against humanity in Darfur, including those committed by the Janjaweed militias that the ICC prosecutor's office deemed "allied" with government forces.⁵³ The prosecutor's office is also investigating the case of the anti-Rohingya ethnic cleansing campaign in Myanmar, in which state security forces allegedly cooperated with communal and religious armed groups.

⁵¹ *Id.*

⁵² Robert Malley & Stephen Pomper, *Accomplice to Carnage: How America Enables War in Yemen*, 100 FOREIGN AFF. 73–88 (2021); HRW, *US: Suspend Saudi Arms Sales*, HUMAN RIGHTS WATCH (2016), <https://www.hrw.org/news/2016/11/29/us-suspend-saudi-arms-sales>; Ben Hubbard & Shuaib Almosawa, *Biden Ends Military Aid for Saudi War in Yemen. Ending the War Is Harder.*, THE NEW YORK TIMES, February 5, 2021, <https://www.nytimes.com/2021/02/05/world/middleeast/yemen-saudi-biden.html>.

⁵³ ICC, *Case Information Sheet: The Prosecutor v. Omar Hassan Ahmad Al Bashir* (2021), <https://www.icc-cpi.int/CaseInformationSheets/AlBashirEng.pdf>.

III. PERILOUS PARTNERSHIPS

As the Taliban discovered, their initial invitation to al Qaeda to set up shop in Afghanistan had benefits in consolidating power, but also costs: it led to the U.S. toppling the Taliban. It took a two-decade war for the Taliban to regain control of Afghanistan, and while there are divides in the organization and remaining Taliban ties to al Qaeda, Taliban leaders at least publicly say they will not return Afghanistan to a base for international terrorism, in keeping with the general shift among jihadists towards a domestic and regional focus.⁵⁴

In relationships between states and relatively powerful autonomous armed groups, there is limited scope for states to sanction or punish armed groups for behavior they disapprove of. Yet even in delegation and sponsorship relationships, where states have greater power, armed groups always have agency and pursue their own interests, creating risks and potential pitfalls even for powerful states like the U.S. There are similar risks in alliances with other states, but interstate relations also offer greater transparency than relationships with armed groups and hold more levers diplomatically and economically to persuade or compel desired behavior.⁵⁵

Armed group partners might disobey targeting instructions or commit counterproductive, resentment-provoking violence, which can anger civilian populations or other states. U.S. reliance on militia groups to help control rural Afghanistan bred backlash when groups like the Khost

⁵⁴ Claire Parker, *What is ISIS-K? Here's what the Taliban takeover means for al-Qaeda and the Islamic State's Afghanistan affiliate.*, WASHINGTON POST, August 26, 2021, <https://www.washingtonpost.com/world/2021/08/23/taliban-isis-alqaeda-faq/>; Hassan Hassan, *What the Global War on Terror Really Accomplished*, NEWLINES MAGAZINE, 2021, <https://newlinesmag.com/argument/what-the-global-war-on-terror-really-accomplished/> (last visited Sep 25, 2021).

⁵⁵ E.g. MARINA E. HENKE, *CONSTRUCTING ALLIED COOPERATION: DIPLOMACY, PAYMENTS, AND POWER IN MULTILATERAL MILITARY COALITIONS* (2019); Barbara Elias & Alex Weisiger, *Influence through Absence in U.S. Counterinsurgency Interventions? Coercing Local Allies through Threats to Withdraw*, 22 CIV. WARS 512–542 (2020).

Protection Force committed atrocities against local populations, helping build support for the Taliban's return.⁵⁶ The execution of thirteen Turkish workers in northern Iraq in February 2021, allegedly by the Kurdistan Worker's Party (PKK), increased U.S.-Turkish tensions, since Turkey saw the U.S. as tacitly supporting the PKK due to U.S. sponsorship of Kurdish rebels in Syria.⁵⁷ Where multiple armed groups are being trained or supported by different military branches or government agencies, there is a risk of confusion among the public and armed group partners themselves about who they are fighting alongside or possibly competing against for territorial control and resources, with the U.S. military and Central Intelligence Agency backing different rebels and militias in Syria.⁵⁸ Armed groups might also take advantage of state resources to develop their own power bases and then strike out on their own or even switch sides, like when Kashmiri militant groups flipped against Pakistan and worked with Indian security forces.⁵⁹

When delegating to an armed group to achieve foreign policy goals, states generally want to be confident that they can exert significant control over the group. If a state relies on an armed group to target a rival and then loses influence over the group, the state has lost a bargaining chip: it can no longer credibly commit to reducing armed group attacks on the rival state, even if the state cuts back support.⁶⁰ For example, the Mozambican rebel group Renamo was initially formed

⁵⁶ Toon Dirx, *The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan*, 19 CIV. WARS 377–401 (2017); Emran Feroz, *Atrocities Pile Up for CIA-Backed Afghan Paramilitary Forces*, FOREIGN POLICY, November 16, 2020, <https://foreignpolicy.com/2020/11/16/afghanistan-khost-protection-forces-cia-us-pullout-taliban/>; Anand Gopal, *The Other Afghan Women*, THE NEW YORKER, 2021, <https://www.newyorker.com/magazine/2021/09/13/the-other-afghan-women>.

⁵⁷ Simon Lewis & Tuvan Gumrukcu, *U.S. reassures Turkey over executions after Erdogan calls response "a joke,"* REUTERS, February 15, 2021, <https://www.reuters.com/article/uk-turkey-iraq-security-idUSKBN2AFOXV>.

⁵⁸ Sam Heller, *Are CIA-backed Syrian Rebels Really Fighting Pentagon-backed Syrian Rebels?*, WAR ON THE ROCKS, March 28, 2016, <https://warontherocks.com/2016/03/are-cia-backed-syrian-rebels-really-fighting-pentagon-backed-syrian-rebels/>.

⁵⁹ Milos Popovic, *Fragile Proxies: Explaining Rebel Defection Against Their State Sponsors*, 29 TERROR. POLIT. VIOLENCE 922–942 (2017).

⁶⁰ Bapat, *supra* note 22; SALEHYAN, *supra* note 22.

by the Rhodesian intelligence agency and then entered into a delegation relationship with South Africa after Zimbabwe shifted to majority rule. Over time, however, Renamo developed its own domestic constituency and legitimacy in Mozambique by playing on popular grievances. By the late 1980s, Renamo was increasingly independent of South African influence and could no longer reliably be used as a negotiating tool by South Africa's apartheid government.⁶¹

A worse scenario for states, though, is when an armed group abandons a cooperative relationship and attacks its erstwhile patron.⁶² Pakistan offers prime examples. Domestically, Pakistan empowered radical Islamist leaders in the Federally Administered Tribal Areas who developed militia groups the government thought would help control remote areas, but which then threatened the stability of the country as a whole.⁶³ In addition to relationships with rebel agents in Jammu and Kashmir sometimes backfiring,⁶⁴ Pakistani attempts to destabilize and balance against Afghanistan have had similarly negative effects. The *mujahideen* who Pakistan supported in the 1980s Afghan war evolved into the Taliban and al Qaeda—actors who have contributed to regional instability, increased violence within Pakistan, and threatened the Pakistani government. This issue afflicts powerful states, too: the U.S. likewise regretted its support for the Afghan mujahideen in the long run, as Osama bin Laden formed al Qaeda and turned against his former sponsor.⁶⁵

⁶¹ Jessica Schafer, *Guerrillas and Violence in the War in Mozambique: De-Socialization or Re-Socialization?*, 100 AFR. AFF. 215–237 (2001); Carrie Manning, *Constructing Opposition in Mozambique: Renamo As Political Party*, 24 J. SOUTH. AFR. STUD. 161–189 (1998); ROBERT DAVIES, SOUTH AFRICAN STRATEGY TOWARDS MOZAMBIQUE IN THE POST-NKOMATI PERIOD : A CRITICAL ANALYSIS OF EFFECTS AND IMPLICATIONS (1985).

⁶² Paul Staniland, *Armed Groups and Militarized Elections*, 59 INT. STUD. Q. 694–705 (2015); Popovic, *supra* note 60.

⁶³ YELENA BIBERMAN, GAMBLING WITH VIOLENCE: STATE OUTSOURCING OF WAR IN PAKISTAN AND INDIA (2019); KIMBERLY MARTEN, WARLORDS: STRONG-ARM BROKERS IN WEAK STATES (2012).

⁶⁴ Milos Popovic, *The Perils of Weak Organization: Explaining Loyalty and Defection of Militant Organizations Toward Pakistan*, 38 STUD. CONFL. TERROR. 919–937 (2015); Byman and Kreps, *supra* note 22.

⁶⁵ Saikal, *supra* note 28; STEVE COLL, GHOST WARS (2005).

Blowback from state-armed group relationships can also occur when delegation or sponsorship leads a rival to directly escalate conflict with the state. Where a state or armed group knows or suspects it was attacked by a group supported by a rival state, it may retaliate against the rival state, regardless of attempts to deflect or deny responsibility. States may respond through escalating economic sanctions and diplomatic conflict, as the United States did over Libyan links to the 1985 Rome and Vienna airport attacks. Or states may take military action, like when the U.S. unleashed airstrikes on Libya after the 1986 Berlin bombing⁶⁶ or launched cruise missiles at Sudan and Afghanistan following al Qaeda's 1998 embassy bombings in Kenya and Tanzania. More recently, U.S.-Russia tensions escalated after Wagner Group mercenaries, with ties to the Russian government, were involved in a 2018 attack on U.S. forces in Syria.⁶⁷

Restricting U.S. relationships with armed groups abroad would reduce these practical risks of relationships backfiring, but also the potential legal risks presented by the Kampala Amendments and new ICRC commentaries. Alongside the potential security policy benefits, citing international law as an additional justification for U.S. self-restraint from relationships with armed groups would send a signal of U.S. willingness to hold itself to new international legal standards, despite past reluctance and resistance.

⁶⁶ Arms Control Association, *Chronology of Libya's Disarmament and Relations with the United States*, ARMS CONTROL ASSOCIATION FACT SHEETS & BRIEFS (2018), <https://www.armscontrol.org/factsheets/LibyaChronology>.

⁶⁷ Neil Hauer, *Russia's Mercenary Debacle in Syria*, FOREIGN AFFAIRS, February 26, 2018, <https://www.foreignaffairs.com/articles/syria/2018-02-26/russias-mercenary-debacle-syria>; Thomas Gibbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, THE NEW YORK TIMES, May 24, 2018, <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html>; Kimberly Marten, *Russia's use of semi-state security forces: the case of the Wagner Group*, 35 POST-SOV. AFF. 181–204 (2019).

IV. REVERSING U.S. RESISTANCE TO INTERNATIONAL LEGAL ACCOUNTABILITY?

The crime of aggression entering into force and shifts in international humanitarian law move us closer to a world of accountability for states using delegation or sponsorship relationships with armed groups to attack rivals or ‘enemy’ civilians, or to control territory. Yet they also come at a time when the legitimacy of international humanitarian law and the laws of war are threatened and challenged by powerful actors’ open defiance, allegations of anti-African bias, the ICJ’s state-centric nature, and bungled ICC prosecutions.⁶⁸ Increased U.S. support for international law and compliance with it would greatly shore up the international legal system.

Although keen to criticize China and Russia for violations of international laws and ‘rules-based order,’ the U.S. has been reluctant to accept international jurisdiction over its own behavior—Nicaragua is still waiting for reparations payments ordered by the ICJ—and has a complicated and often adversarial history with the ICC.⁶⁹ The U.S. refused to ratify the Rome Statute establishing the ICC, has rejected ICC authority to investigate U.S. officials and security personnel, and was skeptical of the Kampala Amendments,⁷⁰ but it has also supported ICC investigations and cases against rebel leaders, former Libyan leader Muammar Gaddafi, and ex-Sudanese leader Omar al-Bashir.

⁶⁸ Hathaway et al., *supra* note 30; OUMAR BA, STATES OF JUSTICE: THE POLITICS OF THE INTERNATIONAL CRIMINAL COURT (2020); Clark et al., *supra* note 16.

⁶⁹ Diane Desierto, *Reopening Proceedings for Reparations and Abuse of Process at the International Court of Justice*, EJIL: TALK! (2017), <https://www.ejiltalk.org/reopening-proceedings-for-reparations-and-abuse-of-process-at-the-international-court-of-justice/>; Kyle Rapp & Kelebogile Zvobgo, *Biden reversed Trump’s sanctions on International Criminal Court officials. What happens now?*, WASHINGTON POST, April 5, 2021, <https://www.washingtonpost.com/politics/2021/04/05/biden-reversed-trumps-sanctions-international-criminal-court-officials-what-happens-now/>; HRW, *Q&A: The International Criminal Court and the United States*, HUMAN RIGHTS WATCH (2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>.

⁷⁰ See e.g. Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT. LAW 257–295 (2015).

The lowest point in U.S.-ICC relations came in 2020, when the Trump administration followed through on threats and issued an executive order effectively criminalizing the ICC’s investigation of behavior by U.S. military forces and intelligence agents in Afghanistan, barring ICC staff from the U.S. and threatening to seize their assets.⁷¹ Later, the Trump administration sanctioned outgoing ICC Prosecutor Fatou Bensouda and top prosecutorial official Phakiso Mochochoko.⁷²

President Biden revoked Trump’s anti-ICC executive order and sanctions in April 2021,⁷³ yet his administration remains wary of the ICC. Biden’s State Department rejected the initial February 2021 ruling that the ICC had jurisdiction to investigate potential crimes committed in the Israeli-occupied Palestinian Territories, since Israel is not a state party to the Rome Statute and the U.S. refuses to recognize Palestinian sovereignty. The administration likewise criticized the Palestine investigation when it was officially announced in March 2021.⁷⁴ Even in his statement withdrawing sanctions on Bensouda and Mochochoko, Secretary of State Antony Blinken took pains to emphasize that the administration still “disagree[d] strongly” with the Afghanistan and Palestine investigations—before proclaiming how much the US supported the rule of law and justice for victims of atrocities.⁷⁵

⁷¹ John Bolton, *Bolton’s Remarks on the International Criminal Court*, JUST SECURITY (2018), <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/>; HRW, *US Sets Sanctions Against International Criminal Court*, HUMAN RIGHTS WATCH (2020), <https://www.hrw.org/news/2020/06/11/us-sets-sanctions-against-international-criminal-court>.

⁷² BBC, *International Criminal Court officials sanctioned by US*, BBC NEWS, September 2, 2020, <https://www.bbc.com/news/world-us-canada-54003527>.

⁷³ Pranshu Verma & Marlise Simons, *Reversing Trump, Biden Repeals Sanctions on Human Rights Prosecutor*, THE NEW YORK TIMES, April 2, 2021, <https://www.nytimes.com/2021/04/02/us/politics/biden-international-criminal-court-sanctions.html>.

⁷⁴ Sari Bashi, *Biden Can’t Claim ‘Moral Leadership’ While Sanctioning the ICC*, FOREIGN POLICY, March 3, 2021, <https://foreignpolicy.com/2021/03/03/biden-cant-claim-moral-leadership-while-sanctioning-the-icc/>.

⁷⁵ Antony Blinken, *Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court*, UNITED STATES DEPARTMENT OF STATE (2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

The Biden administration will face continuing choices about how to respond to the ICC under new chief prosecutor Karim Khan and as the Afghanistan and Palestine investigations continue. Given the potential liability of some administration officials and U.S. military and intelligence personnel for war crimes or torture in Afghanistan and possibly Iraq, as well as limited Congressional interest in subjecting the U.S. to accountability in The Hague, it seems highly unlikely the administration will seek to ratify the Rome Statute and have the U.S. finally join the ICC. After the Trump administration's aggressive stance, even simply allowing ICC investigations to proceed without interference would improve relations with the Court. Accepting and cooperating with the Afghanistan investigation, though, would send a powerful global signal that the United States is willing to subject itself to international law, as well, rather than only holding others accountable.

The ICC is also a court of last resort, designed only to prosecute cases when domestic courts are unable or unwilling to do so. The prosecutor's office in December 2020 closed its inquiry into abuses by British forces in Iraq because it deemed that investigations had not been blocked or abandoned by the United Kingdom government.⁷⁶ The U.S. could take that as a cue and conduct its own new investigations of anyone flagged by ICC prosecutors as likely committing crimes in Afghanistan, rather than treating international investigations as threats. It can be difficult to punish armed group partners for atrocities, let alone track their actions, but the U.S. has robust, well-resourced mechanisms—internally in the military, through Congressional oversight, and with extensive media and non-governmental organization scrutiny—to monitor, investigate, and

⁷⁶ Owen Bowcott, *ICC abandons inquiry into alleged British war crimes in Iraq*, THE GUARDIAN, December 9, 2020, <http://www.theguardian.com/uk-news/2020/dec/09/icc-abandons-inquiry-into-alleged-british-war-crimes-in-iraq>.

administer justice for violence against civilians committed by the U.S. military.⁷⁷ U.S. forces have been uneven and inconsistent in holding their own accountable, but public investigations in 2021 and 2022 and Secretary of Defense Lloyd Austin himself have increased pressure to investigate and prevent civilian killings by U.S. forces, especially as U.S. special forces and drone strike programs have come under increasing scrutiny.⁷⁸

Russia withdrew from the Rome Statute in 2016 over the ICC prosecutor's preliminary findings on Russian aggression in Crimea and Eastern Ukraine.⁷⁹ China faces allegations from independent international law experts of genocide against Uyghurs in Xinjiang.⁸⁰ There is an opportunity to demonstrate President Biden's desired moral leadership in foreign policy⁸¹ and for the U.S. to make a significant reputational gain by embracing international law more broadly.

⁷⁷ MICHAEL J. MCNERNEY ET AL., U.S. DEPARTMENT OF DEFENSE CIVILIAN CASUALTY POLICIES AND PROCEDURES: AN INDEPENDENT ASSESSMENT (2021); Michael McNerney & Gabrielle Tarini, *Why the U.S. Military Has Been Undercounting Civilian Dead*, FOREIGN POLICY, February 3, 2022, <https://foreignpolicy.com/2022/02/03/military-dead-civilians-war/>.

⁷⁸ Adela Sullivan, *U.S. plans to make condolence payments to families of Afghans killed in mistaken drone strike*, WASHINGTON POST, October 16, 2021, <https://www.washingtonpost.com/world/2021/10/16/pentagon-payment-afghanistan-drone/>; Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, NEW YORK TIMES, November 13, 2021, <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html>; Azmat Khan, *The Human Toll of America's Air Wars*, NEW YORK TIMES, December 19, 2021, <https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html>; Patrick J. Keenan, *Drones and Civilians: Emerging Evidence of the Terrorizing Effects of the U.S. Drone Programs*, 20 ST. CLARA J. INT. LAW 1–47 (2021); LLOYD AUSTIN, *Improving Civilian Harm Mitigation and Response* (2022), <https://www.defense.gov/News/Releases/Release/Article/2914764/departament-of-defense-releases-memorandum-on-improving-civilian-harm-mitigation/>.

⁷⁹ Robbie Gramer, *Why Russia Just Withdrew from the ICC*, FOREIGN POLICY, November 16, 2016, <https://foreignpolicy.com/2016/11/16/why-russia-just-withdrew-from-icc-putin-treaty-ukraine-law/>.

⁸⁰ Newlines Institute, *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*, NEWLINES INSTITUTE (2021), <https://newlinesinstitute.org/uyghurs/the-uyghur-genocide-an-examination-of-chinas-breaches-of-the-1948-genocide-convention/>.

⁸¹ Joseph Biden, *Remarks by President Biden on America's Place in the World*, THE WHITE HOUSE (2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-america-place-in-the-world/>.

Beyond the ICC, given the recent Rome Statute amendments and commentaries on the Geneva Conventions, the U.S. could accept responsibility for the actions of armed groups it delegates to or sponsors abroad. This would mean doing more to constrain human rights violations, compensating victims (which can, alongside legal accountability, reduce enmity towards U.S. forces)⁸² and punishing abusers, and rejecting the Trump administration's precedent of pardoning Blackwater security contractors convicted of war crimes.⁸³ It would also mean being honest about the use of U.S. power and resources and the types of relationships the U.S. engages in with armed groups—rather than cloaking military relationships and strategic aims in ambiguity and jargon like hybrid warfare and grey zone conflicts,⁸⁴ while criticizing rivals for the same things the U.S. does.

CONCLUSION

Opting for self-restraint goes against much current strategic thinking about U.S. relationships with armed groups and shifting the costs of war to state and non-state allies.⁸⁵ With Russia delegating its territorial aspirations and border anxieties to rebels in eastern Ukraine before a direct invasion and as concern grows about potential direct or proxy conflicts with China, there have been some calls for the United States to increase its reliance on armed groups to distribute the burden of great power competition and counterterrorism.⁸⁶ Military officers and policy

⁸² Emily Gilbert, *The gift of war: Cash, counterinsurgency, and 'collateral damage'*, 46 SECUR. DIALOGUE 403–421 (2015); Daniel Silverman, *Too Late to Apologize? Collateral Damage, Post-Harm Compensation, and Insurgent Violence in Iraq*, 74 INT. ORGAN. 853–871 (2020).

⁸³ Reuters, *Trump pardon of Blackwater Iraq contractors violates international law - UN*, REUTERS, December 30, 2020, <https://www.reuters.com/article/us-iraq-blackwater-un-idUSKBN294108>.

⁸⁴ Donald Stoker & Craig Whiteside, *Blurred Lines: Gray-Zone Conflict and Hybrid War—Two Failures of American Strategic Thinking*, 73 NAV. WAR COLL. REV. 12–48 (2020); Frank Hoffman, *On Not-So-New Warfare: Political Warfare vs Hybrid Threats*, WAR ON THE ROCKS, July 28, 2014, <https://warontherocks.com/2014/07/on-not-so-new-warfare-political-warfare-vs-hybrid-threats/>.

⁸⁵ Andreas Krieg, *Externalizing the burden of war: the Obama Doctrine and US foreign policy in the Middle East*, 92 INT. AFF. 97–113 (2016); Matthew Levitt, *Rethinking U.S. Efforts on Counterterrorism: Toward a Sustainable Plan Two Decades After 9/11*, 12 J. NATL. SECUR. LAW POLICY forthcoming (2021).

⁸⁶ David Matsaberidze, *Russia vs. EU/US through Georgia and Ukraine*, 14 CONNECTIONS 77–86 (2015); Dominic Tierney, *The Future of Sino-U.S. Proxy War*, 4 TEX. NATL. SECUR. REV. 50–73 (2021); Frank Hoffman & Andrew

professionals have even discussed reviving U.S. support for maritime privateers to attack Chinese merchant vessels and port facilities.⁸⁷

The U.S. has relied on delegation to militias in Afghanistan and Iraq and sponsorship of Syrian rebel groups in recent years, along with private military contractors. With U.S. forces stretched thin after two decades of ‘forever war’ in Afghanistan and Iraq, increasing direct competition with Russia and China would likely entail higher degrees of support for armed groups, protracted conflicts, and, importantly, higher risks of escalation. For example, delegation and some sponsorship relationships involve a heavy presence of state forces in a training or supervisory role, increasing the chances of confrontations, like the 2018 Wagner Group attack on U.S. forces in Syria,⁸⁸ that could easily escalate to larger crises.

Following Russia’s full-scale invasion of Ukraine in February 2022, moving beyond previous areas of influence in eastern Ukraine, debates emerged with the Biden administration about arming Ukrainian insurgents in the event that Russia topples to Ukrainian government or occupies major portions of the country, with worries that doing so could lead to direct conflict with Russia.⁸⁹ This is a case in which Russia has violated international law by invading Ukraine without

Orner, *The Return of Great-Power Proxy Wars*, WAR ON THE ROCKS, September 2, 2021, <https://warontherocks.com/2021/09/the-return-of-great-power-proxy-wars/>; Liz Randall, *Remarks as Prepared for Delivery by Assistant to the President for Homeland Security, Dr. Liz Sherwood-Randall on the Future of the U.S. Counterterrorism Mission: Aligning Strategy, Policy, and Resources*, THE WHITE HOUSE (2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-assistant-to-the-president-for-homeland-security-dr-liz-sherwood-randall-on-the-future-of-the-u-s-counterterrorism-mission-aligning-strategy-policy-and-resources/>; Ignatius, *supra* note 10.

⁸⁷ Brandon Schwartz, *U.S. Privateering Is Legal*, 146 PROC. US NAV. INST. 1406 (2020); Mark Cancian & Brandon Schwartz, *Unleash the Privateers!*, 146 PROC. US NAV. INST. 1406 (2020); Christopher Booth & Walker Mills, *Unfurl the Banner! Privateers and Commerce Raiding of China’s Merchant Fleet in Developing Markets*, WAR ON THE ROCKS, February 18, 2021, <https://warontherocks.com/2021/02/unfurl-the-banner-privateers-and-commerce-raiding-of-chinas-merchant-fleet-in-developing-markets/>.

⁸⁸ Gibbons-Neff, *supra* note 68.

⁸⁹ Detsch and Gramer, *supra* note 10.

just cause, violating the United Nations Charter and Rome Statute (which has applied to violence in Ukraine since 2013) and committing the crime of aggression, and has violated international humanitarian law by committing indiscriminate violence using weapons including cluster munitions and attacking protected civilian sites like hospitals.⁹⁰ Ukraine's legitimate, democratically-elected and internationally-recognized government has requested military and humanitarian aid before and since the beginning of the invasion, offering a strong basis for continued support to Ukrainian insurgents if the government falls, though scholars and strategists continue to debate the wisdom of arming an insurgency or the prospects for insurgent success against the Russian military.⁹¹ In this case, there would be a strong justification for arming Ukrainian insurgents, though the U.S. would need to be careful about where its weapons and aid were going and how insurgents were treating captured Russian fighters or suspected local collaborators, ensuring respect for international humanitarian law by recipients of U.S. support, especially given the presence in the Ukrainian National Guard and volunteer forces of right-wing extremists.⁹²

⁹⁰ Amnesty International, *Russia commits indiscriminate attacks during the invasion of Ukraine*, AMNESTY INTERNATIONAL, February 25, 2022, <https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/>; Hurst Hannum, *International law says Putin's war against Ukraine is illegal. Does that matter?*, THE CONVERSATION, February 25, 2022, <http://theconversation.com/international-law-says-putins-war-against-ukraine-is-illegal-does-that-matter-177438>; HRW, *Ukraine: Russian Cluster Munition Hits Hospital*, HUMAN RIGHTS WATCH, February 25, 2022, <https://www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital>.

⁹¹ Eliot A. Cohen, *Arm the Ukrainians Now*, THE ATLANTIC, February 23, 2022, <https://www.theatlantic.com/ideas/archive/2022/02/putin-russia-invasion-ukraine-war/621182/>; Douglas London, *The Coming Ukrainian Insurgency*, FOREIGN AFFAIRS, February 25, 2022, <https://www.foreignaffairs.com/articles/ukraine/2022-02-25/coming-ukrainian-insurgency>; Brian S. Petit, *Can Ukrainian Resistance Foil a Russian Victory?*, WAR ON THE ROCKS, February 18, 2022, <https://warontherocks.com/2022/02/can-ukrainian-resistance-foil-a-russian-victory/>; Barry R. Posen, *Ukraine: Unleashing the Rhetorical Dogs of War*, JUST SECURITY, February 15, 2022, <https://www.justsecurity.org/80230/ukraine-unleashing-the-rhetorical-dogs-of-war/>.

⁹² Andreas Umland, *Irregular Militias and Radical Nationalism in Post-Euromaidan Ukraine: The Prehistory and Emergence of the "Azov" Battalion in 2014*, 31 TERROR. POLIT. VIOLENCE 105–131 (2019); Tim Hume, *How a Far-Right Battalion Became a Part of Ukraine's National Guard*, VICE, February 16, 2022, <https://www.vice.com/en/article/3ab7dw/azov-battalion-ukraine-far-right>.

If the U.S. accepts liability for the behavior of armed groups with whom it partners, it will need to become more selective, only engaging in delegation or sponsorship relationships with groups it feels certain it can trust or ensure compliance from, and only in situations where relying on or supporting the armed group is the last, best option.⁹³ It is hard to end relationships with armed groups once they have begun, even when dealing with unreliable or abusive actors like certain Afghan militias who took U.S. arms, money, and grants of local authority and then undermined security and U.S. aims.⁹⁴ Setting a higher bar for which armed groups the U.S. is willing to cooperate with could make it easier to avoid such counterproductive relationships in the future.

If the U.S. feels legally compelled to ensure a degree of command and control over armed group partners or to be able to effectively monitor and sanction them, this would require more on-the-ground forces to manage the relationship. This increased risk to U.S. personnel, and many U.S. soldiers and Marines reluctance to focus on advisory relationships,⁹⁵ could make the government less willing to get involved in conflicts with limited clear connection to protecting American lives and the country itself. This is in line with a broader realist and conservative strategy of restraint in terms of limiting interventions abroad and focusing only on conflicts in which U.S. core interests are at stake.⁹⁶ Surveys among both the general public and foreign policy experts also reveal

⁹³ James Pattison, *The Ethics of Arming Rebels*, 29 ETHICS INT. AFF. 455–471 (2015).

⁹⁴ Niklas Karlén, *Turning off the Taps: The Termination of State Sponsorship*, 31 TERROR. POLIT. VIOLENCE 733–758 (2019); Dirkx, *supra* note 57; Daniel L. Byman, *Why engage in proxy war? A state's perspective*, BROOKINGS ORDER FROM CHAOS (2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/>.

⁹⁵ Kyle Atwell & Paul Bailey, *Wanna Fight? Pushing Partners Aside in Afghanistan*, WAR ON THE ROCKS, October 11, 2021, <https://warontherocks.com/2021/10/we-wanted-to-fight-incentivizing-advising-over-fighting-in-afghanistan-and-beyond/>.

⁹⁶ BARRY R. POSEN, *RESTRAINT: A NEW FOUNDATION FOR U.S. GRAND STRATEGY* (2014).

preferences for alliances with states over those with non-state actors and greater trust in state partners,⁹⁷ so pulling back from relationships with armed groups should be broadly popular.

Anchoring the strategic shift in international law and accountability, not only self-interest, can inject more actual liberalism into the beleaguered ‘liberal international order,’⁹⁸ while also aligning with progressive priorities of limiting intervention and adventurism abroad and respecting human rights globally,⁹⁹ regardless of whether or not actors are U.S. allies. U.S. financial and military power remain undeniable,¹⁰⁰ but as the Biden administration is well aware, credibility and global leadership must be earned.¹⁰¹ To have a rules-based order, the powerful must follow the rules, too.

⁹⁷ Plana, *supra* note 15; OKTAY ET AL., *supra* note 15.

⁹⁸ Barnett, *supra* note 16; Daniel Deudney & G. John Ikenberry, *Misplaced Restraint: The Quincy Coalition Versus Liberal Internationalism*, 63 SURVIVAL 7–32 (2021); Friedman Lissner and Rapp-Hooper, *supra* note 16.

⁹⁹ Van Jackson (ed.), *Policy Roundtable: The Future of Progressive Foreign Policy*, TEXAS NATIONAL SECURITY REVIEW, December 4, 2018, <https://tnsr.org/roundtable/policy-roundtable-the-future-of-progressive-foreign-policy/>.

¹⁰⁰ Michael Beckley, *Rogue Superpower: Why This Could Be an Illiberal American Century*, 99 FOREIGN AFF. 73–86 (2021).

¹⁰¹ Biden, *supra* note 82.