

**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 eastern 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 practically 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 United States 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 international reputation, 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

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eastern Syria allegedly used for smuggling weapons into Iraq.<sup>1</sup> Department of Defense (DOD) spokesman John Kirby explicitly described the targets as being “used by a number of Iranian-backed militant groups.”<sup>2</sup> While less directly confrontational than the Trump administration’s assassination of Iranian Revolutionary Guard commander Qassem Soleimani in Iraq in 2020,<sup>3</sup> the strike in Syria was reportedly less about the targeted militias and more about signaling U.S. resolve to their Iranian backers.<sup>4</sup> In June 2021, the pattern continued, as U.S. drones attacked alleged weapons stores of “Iran-backed militia groups” along the Iraq-Syria border—attacks that the Iraqi government decried as violating their national sovereignty and international law.<sup>5</sup> 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.<sup>6</sup> The United

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<sup>1</sup> Alex Ward, *Biden launched airstrikes against Iran-backed militias in Syria to “send a message”*, VOX (Feb. 26, 2021), <https://www.vox.com/2021/2/25/22302197/biden-syria-iran-airstrike-military>.

<sup>2</sup> *U.S. Conducts Defensive Precision Strike*, U.S. DEPT OF DEF. (Feb. 25, 2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2516518/us-conducts-defensive-precision-strike/>.

<sup>3</sup> Luca Ferro, *Killing Qasem Soleimani: International Lawyers Divided and Conquered*, 53 CASE W. RESERVE J. INT’L L. 163, 166–83 (2021).

<sup>4</sup> Ward, *supra* note 1.

<sup>5</sup> Louisa Loveluck et al., *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](https://www.washingtonpost.com/world/middle_east/iraq-condemns-us-militia-airstrikes/2021/06/28/c5f44b58-d80e-11eb-8c87-ad6f27918c78_story.html).

<sup>6</sup> Ofira Seliktar, *Iran’s Geopolitics and Revolutionary Export: The Promises and Limits of the Proxy Empire*, ORBIS, Winter 2021, at 152, 155–65; shley Lane, *Iran’s Islamist Proxies in the Middle East*, WILSON CTR. (May 20, 2021), <https://www.wilsoncenter.org/article/irans-islamist-proxies>; Asfandyar Mir & Colin P. Clarke, *Making Sense of Iran and al-Qaeda’s Relationship*, LAWFARE (Mar. 21, 2021), <https://www.lawfareblog.com/making-sense-iran-and-al-qaedas-relationship>; Fatemeh Aman, *Iran-Taliban growing ties: What’s different this time?*, ATLANTIC COUNCIL (Feb. 16, 2021), <https://www.atlanticcouncil.org/blogs/iransource/iran-taliban-growing-ties-whats-different-this-time/>.

States used these relationships to justify the 2021 airstrikes.<sup>7</sup>

U.S. condemnation of Iranian armed group ties or Russian support for rebels in eastern Ukraine often rings hollow, however, given the its own history of outsourcing violence to rebels, militias, and other armed groups. Early colonial governments and post-independence U.S. expansions depended on relationships with informal settler militias and alliances with certain Indigenous nations.<sup>8</sup> 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.<sup>9</sup> Following the withdrawal of U.S. ground forces from Afghanistan and the Taliban's reassertion of control, there have been calls by newly-minted Afghan resistance leaders and by members of Congress to back anti-Taliban fighters, and Ahmad Massoud's "National Resistance Front" set up a lobbying shop in Washington, D.C.<sup>10</sup> 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 that Russia toppled the Ukrainian government.<sup>11</sup>

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<sup>7</sup> *U.S. Conducts Defensive Precision Strike*, *supra* note 2; Ward, *supra* note 1.

<sup>8</sup> See, e.g., JOHN GRENIER, *THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER*, 32–43, 170–72 (2005).

<sup>9</sup> Erica Gaston, *Practical Challenges and Hybrid Hypocrisy: Legal and Policy Dilemmas with the Hybrid Moniker*, *WAR ON ROCKS* (Jan. 25, 2021), <https://warontherocks.com/2021/01/practical-challenges-and-hybrid-hypocrisy-legal-and-policy-dilemmas-with-the-hybrid-moniker/>.

<sup>10</sup> Ahmad Massoud, *The mujahideen resistance to the Taliban begins now. But we need help.*, *WASHINGTON POST* (Aug. 18, 2021), <https://www.washingtonpost.com/opinions/2021/08/18/mujahideen-resistance-taliban-ahmad-massoud/>; Jack Detsch et al., *'Charlie Wilson's Playbook': Lawmaker Pushes Biden to Back Anti-Taliban Resistance*, *FOREIGN POLY* (Aug. 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* (Oct. 27, 2021), <https://www.axios.com/afghan-resistance-lobbying-0af8ad09-e44a-4015-bed9-b8c97fbc546.html>

<sup>11</sup> David Ignatius, *The Biden administration weighs backing Ukraine insurgents if Russia invades*, *WASHINGTON POST* (Dec. 19, 2021),

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 global reputation, as well as strengthening a "rules-based international order" in the face of a rising China, resurgent Russia, and increasingly assertive Iran and Turkey.<sup>12</sup> To be an effective global leader, the United States must clean up its own act domestically with regard to issues of racism, political polarization, threats of violence, and voting restrictions.<sup>13</sup> Tackling human rights and democratic legitimacy issues at home and taking bold action to reinvent and revitalize the United States' role in the world are mutually aligned goals, however, and can be pursued at the same time.<sup>14</sup>

Given the United States' checkered history of covert interventions and other actions contravening international law,<sup>15</sup> one of the best ways for the United States to show actual fidelity to playing by the rules 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

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<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 POL'Y (Feb. 24, 2022), <https://foreignpolicy.com/2022/02/24/biden-legal-ukraine-russia-resistance/>.

<sup>12</sup> Kai Thaler, *Afghan Insurgents Are a Dead End*, FOREIGN POL'Y (Nov. 23, 2021), <https://foreignpolicy.com/2021/11/23/afghanistan-taliban-national-resistance-front/>.

<sup>13</sup> Kelebogile Zvobgo, *Foreign Policy Begins at Home*, FOREIGN POL'Y (Jan. 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 POL'Y (Jan. 7, 2021), <https://foreignpolicy.com/2021/01/07/america-cant-promote-protect-democracy-abroad/>.

<sup>14</sup> William J. Burns, *The United States Needs a New Foreign Policy*, ATLANTIC (July 14, 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, 2021, at 57.

<sup>15</sup> See generally MICHAEL POZNANSKY, IN THE SHADOW OF INTERNATIONAL LAW: SECRECY AND REGIME CHANGE IN THE POSTWAR WORLD (2020); LINDSEY A. O'ROURKE, COVERT REGIME CHANGE: AMERICA'S SECRET COLD WAR (2021).

rights and international law, and would show accountability to conflict-affected populations. The activation of the International Criminal Court's (ICC) jurisdiction over the crime of aggression in 2018 and new International Committee of the Red Cross's (ICRC) commentaries on the Geneva Conventions both provide a chance to increase state liability for armed group partners' actions. Even if the United States remains wary of subjecting itself to international legal jurisdiction, active support for these legal shifts and proactive compliance with them would offer an opportunity for U.S. leadership among major powers and could help establish and enforce new norms of responsibility for armed group partners. Restricting relationships with armed groups could also constrain temptations to intervene in conflicts 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 are risks worth taking: for humanitarian reasons, to help restore the United States' 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.<sup>16</sup> Solidifying this strategic 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 when they are threatened or eroding.<sup>17</sup>

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<sup>16</sup> On public opinion, see Sara Plana, *'Proxies' and the Public: Testing the Statist Bias in Public Support for Military Aid* (MIT Political Sci. Dep't Research, Paper No. 2020-9), <https://dx.doi.org/10.2139/ssrn.3708305>. On foreign policy elites' view, see Sibel Oktay et al., *Treaty Allies Matter for US Foreign Policy Experts — but They Are Not Indispensable*, CHICAGO COUNCIL ON GLOBAL AFF. (Aug. 3, 2021), <https://www.thechicagocouncil.org/research/public-opinion-survey/treaty-allies-matter-us-foreign-policy-experts-they-are-not>.

<sup>17</sup> On the struggles of the international legal regime, see, e.g., Ian Clark et al.,

## 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 20th century, to rebel organizations, warlords, militias, and private military companies today.<sup>18</sup> States also sponsor armed groups for reasons not directly related to national security, such as ideological or identity affinity. In other instances, armed groups remain autonomous: independent of state influence or support, or equal 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 about the perils of state-armed group relations and their legal implications also 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; France backed Libyan rebels who committed atrocities during the war to overthrow Muammar Gaddafi, and has organized and allied with militias in Chad and

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*Crisis in the laws of war? Beyond compliance and effectiveness*, 24 EUR. J. INT'L REL. 319 (2018); Eric A. Posner & Jack L. Goldsmith, *The Limits of International Law Fifteen Years Later*, 22 CHI. J. INT'L L. 110 (2021). On the state of international order, see, e.g., Rebecca Friedman Lissner & Mira Rapp-Hooper, *The Day after Trump: American Strategy for a New International Order*, 41 WASH. Q., no. 1, 2018, at 7; Michael Barnett, *The End of a Liberal International Order That Never Existed*, GLOBAL (Apr. 16, 2019), <https://theglobal.blog/2019/04/16/the-end-of-a-liberal-international-order-that-never-existed/>.

<sup>18</sup> See generally 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 & INSURGENCIES 183 (2016); see also Waseem Ahmad Qureshi, *The Ethics of Asymmetric Warfare*, 4 CARDOZO INT'L & COMP. L. REV. 233, 234–36 (2020).

Mali.<sup>19</sup>

Armed groups adopt forms, goals, and tactics intersecting categories used by analysts, and they shift over time. This makes 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.<sup>20</sup> State relationships with any sort of armed group, however, can be divided into three types: delegation, sponsorship, and autonomy.<sup>21</sup>

In a delegation relationship, a state either devolves coercive authority to an armed group or strengthens an armed group's capabilities for it to advance the state's core security goals, such as preserving territorial integrity, maintaining domestic political control, or countering threats from external rivals.<sup>22</sup> States may delegate to armed groups that project force in the domestic periphery, though this Article concentrates on delegation across national borders.<sup>23</sup>

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<sup>19</sup> 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'L L. 365, 376–83 (2013); Elke Krahmman, *NATO contracting in Afghanistan: the problem of principal-agent networks*, 92 INT'L AFF. 1401, 1404–12 (2016); Michael Shurkin, *France's War in the Sahel and the Evolution of Counterinsurgency Doctrine*, TEX. NAT'L SEC. REV., Winter 2020, at 35, 54–56.

<sup>20</sup> REVISITING THE STATE MONOPOLY ON THE LEGITIMATE USE OF FORCE (Alyson Bailes et al. eds., 2007), <https://www.dcaf.ch/revisiting-state-monopoly-legitimate-use-force>; Sabine Otto et al., *Capturing group alignments: Introducing the Government and Armed Actors Relations Dataset (GAARD)*, RES. & POL., October 2020, at 1, 1–3; PAUL STANILAND, ORDERING VIOLENCE: EXPLAINING ARMED GROUP-STATE RELATIONS FROM CONFLICT TO COOPERATION (2021); Kai M. Thaler, *Delegation, Sponsorship, and Autonomy: An Integrated Framework for Understanding Armed Group-State Relationships*, 7 J. GLOBAL SEC. STUD. ogab026, 3–6 (2022).

<sup>21</sup> Thaler, *supra* note 20, at 5–13.

<sup>22</sup> *Id.* at 5–10; DANIEL BYMAN ET AL., TRENDS IN OUTSIDE SUPPORT FOR INSURGENT MOVEMENTS 9–40 (2001).

<sup>23</sup> 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, such as Uganda organizing militias in the country's north or police collaborating with criminal organizations to keep neighborhoods out of gang control in Brazil. *See, e.g.*, Enrique Desmond Arias, *The Impacts of Differential Armed*

Delegation can be useful for states to reduce material and reputational costs, to take advantage of an armed group's skills, or as a tool for domestic or interstate bargaining. Still, in delegation relationships, armed groups undertake tasks that states would pursue themselves absent the armed group's collaboration.<sup>24</sup>

Delegation is a popular choice for invading or occupying forces without local knowledge or legitimacy. For example, the United States relied on local militias in the Sunni Awakening to retake Al-Anbar province from al Qaeda in Iraq.<sup>25</sup> States may also delegate across borders to attack rival states or foreign-based insurgents. For instance, the Reagan Administration helped organize and supported Contra forces to destabilize Nicaragua's leftist Sandinista government in the 1980s, when there was not congressional or public will for direct intervention.<sup>26</sup> Another example is Algeria's longstanding supplying and sheltering of Polisario Front rebels fighting against Morocco for Western Sahara's

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*Dominance of Politics in Rio de Janeiro, Brazil*, 48 *STUD. COMP. INT'L DEV.* 263 (2013) (discussing Uganda); Adam Branch, *Neither Peace nor Justice: Political Violence and the Peasantry in Northern Uganda, 1986-1998*, *AFR. STUD. Q.*, Spring 2005, at 1 (discussing Brazil).

States also find domestic delegation relationships useful for technically illegal, but state-condoned, coercive actions. In some cases, state-armed group connections are opaque and there is a degree of plausible deniability, like the Assad regime's use of local armed gangs to attack protesters in pre-civil war Syria. See Reinoud Leenders & Antonio Giustozzi, *Outsourcing state violence: The National Defence Force, 'stateness' and regime resilience in the Syrian war*, 24 *MEDITERRANEAN. POL.* 157, 163–65 (2019).

<sup>24</sup> See generally Daniel Byman & Sarah E. Kreps, *Agents of Destruction? Applying Principal-Agent Analysis to State-Sponsored Terrorism*, 11 *INT'L STUD. PERSP.* 1 (2010); Navin A. Bapat, *Understanding State Sponsorship of Militant Groups*, 42 *BRIT. J. POL. SCI.* 1 (2012); IDEAN SALEHYAN, *REBELS WITHOUT BORDERS: TRANSNATIONAL INSURGENCIES IN WORLD POLITICS* (2009).

<sup>25</sup> 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. CONFLICTS & TERRORISM* 920, 924–31 (2014); Henning Tamm, *The Invader's Dilemma: Enlisting Rebel Groups*, in *THE GOVERNOR'S DILEMMA: INDIRECT GOVERNANCE BEYOND PRINCIPALS AND AGENTS* 119, 106–08 (Kenneth W. Abbott et al. eds., 2020).

<sup>26</sup> See generally ROBERT PASTOR, *NOT CONDEMNED TO REPETITION: THE UNITED STATES AND NICARAGUA* (2d ed. 2002).



autonomy.<sup>27</sup>

In sponsorship relationships, a state sees an armed group's aims not as tied to its core security interests, but as compatible with broader national interests, usually due to ideological, ethnic, or other affinities.<sup>28</sup> For this reason, sponsorship tends to take place in countries beyond a state's immediate neighborhood. Examples include North Korea's support for leftist guerrilla movements around the globe during the Cold War, and Libya's arming and training of Basque separatists Euskadi Ta Askatasuna (ETA) in Spain and the Irish Republican Army in Northern Ireland.<sup>29</sup> The United States sponsored right-wing rebels widely during the Cold War, from exiled Kuomintang fighters in Myanmar who continued the fight against China's victorious communists in the 1950s,<sup>30</sup> to the formerly Chinese-sponsored National Union for the Total Independence of Angola (UNITA) in the 1980s and 1990s<sup>31</sup>—situations and tasks to which the United States was unwilling to commit its own forces.

An autonomy relationship involves an armed group that has independence in its decision-making and can survive without state support.<sup>32</sup> An autonomous armed group chooses whether to fight states, ignore them, or to engage in non-conflictual relationships with them. Autonomous groups have an approximate power symmetry or advantage relative to

<sup>27</sup> 'Foreign manoeuvres' in *W.Sahara destabilising Algeria: PM*, FRANCE 24 (Dec. 12, 2020), <https://www.france24.com/en/live-news/20201212-foreign-manoevres-in-w-sahara-destabilising-algeria-pm>.

<sup>28</sup> Thaler, *supra* note 20, at 10–11; see also DANIEL BYMAN, *DEADLY CONNECTIONS: STATES THAT SPONSOR TERRORISM* (2005).

<sup>29</sup> On Libya, see Mark Devenport, *Gaddafi death, the Eta ceasefire and Northern Ireland*, BBC (Oct. 21, 2011), <https://www.bbc.com/news/uk-northern-ireland-15403982>. On North Korea, see generally BENJAMIN R. YOUNG, *GUNS, GUERRILLAS, AND THE GREAT LEADER: NORTH KOREA AND THE THIRD WORLD* (2021).

<sup>30</sup> Patrick Winn, *They were CIA-backed Chinese rebels. Now you're invited to their once-secret hideaway.*, WORLD (Aug. 28, 2019), <https://www.pri.org/stories/2019-08-28/they-were-cia-backed-chinese-rebels-now-you-re-invited-their-once-secret-0>.

<sup>31</sup> See, e.g., William Minter, *The US and the War in Angola*, 18 REV. AFR. POL. ECON. 135 (1991).

<sup>32</sup> Thaler, *supra* note 20, at 11–13.

states in their areas of operations, such that they do not depend upon states for operational survival and could not be suppressed easily by the state in their base areas. This is, in part, why autonomous groups persist in areas of state weakness or collapse. The United States is most likely to work with autonomous groups through intelligence agencies and Special Operations Forces.<sup>33</sup> When there is a degree of U.S. cooperation with and material or intelligence support for an autonomous group, as with the Northern Alliance in Afghanistan up through 2001, legal obligations and liabilities can still apply to U.S. actors.<sup>34</sup>

An example of an autonomy relationship opposed by the United States would be the relationship between al Qaeda and the Taliban government in Afghanistan from 1996 to 2001. The Taliban used 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.<sup>35</sup> 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's leadership after the September 11 attacks, it is unclear the Taliban could have done so if they wanted to,<sup>36</sup> due to the power symmetry in the relationship and the Taliban's incomplete control over Afghan territory. From the U.S. perspective, however, the Taliban government was liable for the actions of its armed

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<sup>33</sup> See Loch K. Johnson, *Intelligence Analysis and Planning for Paramilitary Operations*, 5 J. NAT'L SEC. L. & POL'Y 481 (2012); Richard M. Pious, *White House Decisionmaking Involving Paramilitary Forces*, 5 J. NAT'L SEC. L. & POL'Y 465, 467–74 (2012).

<sup>34</sup> Ahmed S. Younis, *Imputing War Crimes in the War on Terrorism: The U.S., Northern Alliance, and 'Container Crimes'*, 9 WASH. & LEE RACE & ETHNIC ANC. L. J. 109, 117–23 (2003).

<sup>35</sup> BYMAN, *supra* note 28, at 200–10; *see also* Amin Saikal, *The Role of sub-national actors in Afghanistan*, in VIOLENT NON-STATE ACTORS IN CONTEMPORARY WORLD POLITICS 239 (Klejda Mulaj ed., 2010).

<sup>36</sup> BYMAN, *supra* note 28, at 209–15; *see also* ALEX STRICK VAN LINSCHOTEN & FELIX KUEHN, AN ENEMY WE CREATED: THE MYTH OF THE TALIBAN-AL QAEDA MERGER IN AFGHANISTAN (2012).

group partner.

## II. WHO IS LIABLE FOR ARMED GROUP ACTIONS UNDER INTERNATIONAL LAW?

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, armed groups' murky legal status has historically offered a loophole for their state backers to escape accountability for violating another state's sovereignty or committing violence against civilians, even as legal enforcement has expanded to indict and try armed group leaders themselves.<sup>37</sup>

Delegating to armed groups to pressure external rivals is legally useful, since under the United Nations Charter sovereignty precludes states from invading each other's territory except in self-defense,<sup>38</sup> and supporting an armed group offers potential plausible deniability if a state can keep the ties secret. Yet even when such ties are clear or "implausibly deniable,"<sup>39</sup> the international community has rarely legally punished state support for external armed groups. Powerful states have tended to escape accountability outside of diplomatic condemnations, while weaker states face financial or military consequences, but not legal action. For instance, Russia faced few consequences for its long support for South Ossetian rebels, which culminated in direct intervention and war against the Georgian government in 2008, and increased integration of South Ossetia into

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<sup>37</sup> See generally 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. L. REV. 539 (2017).

<sup>38</sup> U.N. Charter art. 2(4).

<sup>39</sup> Rory Cormac & Richard J. Aldrich, *Grey is the new black: covert action and implausible deniability*, 94 INT'L AFF. 477, 478 (2018).

Russia.<sup>40</sup> African leaders and officials who have supported rebels and militias in the Democratic Republic of the Congo have faced some threats of sanctions, but little legal pressure.<sup>41</sup>

Recent advances in international legal standards and scholarship have created possibilities to close this gap, moving armed groups and their relations with states out firmly into the realm of international law, leading to some successful prosecutions. In 1977, the Geneva Conventions were expanded to cover armed groups fighting wars of national liberation against colonial powers as part of international conflicts,<sup>42</sup> while “other dissident armed groups” who control territory in non-international conflicts were also held to have obligations to abide by international humanitarian law.<sup>43</sup> Increasingly, international tribunals and national courts with universal jurisdictions have 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.<sup>44</sup> It is now generally accepted that armed groups have obligations to comply with international law, though only individuals, rather than entire organizations, can face legal claims.<sup>45</sup> Prosecuting individual

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<sup>40</sup> See generally Adam Sorenson, *South Ossetia and Russia: The Treaty, the Takeover, the Future*, 42 N.C.J. INT'L L. 223 (2016).

<sup>41</sup> PHILIPPE LE BILLON, *WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES* 163–70 (2012).

<sup>42</sup> 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, ¶ 4, June 8, 1977, 1125 U.N.T.S. 3.

<sup>43</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, ¶ 1, June 8, 1977, 1125 U.N.T.S. 609. On the evolution of international humanitarian law norms, see generally M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008).

<sup>44</sup> See, e.g., HYERAN JO, *COMPLIANT REBELS: REBEL GROUPS AND INTERNATIONAL LAW IN WORLD POLITICS* 41–50 (2015).

<sup>45</sup> Ezequiel Heffes & Brian E. Frenkel, *The International Responsibility of Non-*

armed group leaders or members may be useful for personal accountability, but it ignores armed groups' collective nature and, crucially, does not address the problem of state support.<sup>46</sup>

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 if there is evidence that the state's leaders considered the armed group to be acting on their behalf and approved of actions it took that violated international law.<sup>47</sup> Yet legal standards for attributing responsibility both to states and individual state officials have historically set high bars of state officials exercising direct operational control over armed groups, even for private military companies they contract with.<sup>48</sup>

The International Court of Justice (ICJ) in its 1986 *Nicaragua* ruling found clear evidence that the United States had financed, organized, and supplied the Contra rebel forces, which fought 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.<sup>49</sup> Despite this,

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*State Armed Groups: In Search of the Applicable Rules*, 8 GOETTINGEN J. INT'L L. 39, 46–55 (2017). In two notable examples, the ICC prosecutor brought cases against Congolese rebel leader Bosco Ntaganda and Lord's Resistance Army leaders including Dominic Ongwen for war crimes and crimes against humanity. See *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment (July 8, 2019); *Prosecutor v. Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment (Feb. 4, 2021).

<sup>46</sup> Neal A. Pollard, *Globalization's Bastards: Illegitimate Non-State Actors in International Law*, 11 LOW INTENSITY CONFLICT & L. ENFORCEMENT 210, 227–29 (2002).

<sup>47</sup> Int'l Law Comm'n, Rep. on the Work on Its Fifty-Third Session, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), at 52–54 (2001). For an application of the standard of adopted conduct to human rights violations by non-state actors with ties to states, see Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 50–53 (2005).

<sup>48</sup> See generally Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83 (2003); HANNAH TONKIN, *STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT* (2011); see also Hessbruegge, *supra* note 47, at 50–55.

<sup>49</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 50–55 (June 27).

the court ultimately ruled that, to be liable, a state must have “effective control” over specific operations in which an armed group committed crimes.<sup>50</sup> 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.<sup>51</sup> The ICJ, however, upheld the effective control standard in its later *Bosnian Genocide* ruling.<sup>52</sup>

Customary law has since evolved, however, towards a standard of “overall control.” The International Criminal Tribunal for the Former Yugoslavia (ICTY) and then the Special Court for Sierra Leone (SCSL) have challenged the effective control standard and broadened the notion of state responsibility. In *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.”<sup>53</sup> The ICTY applied this standard to hold Federal Republic of Yugoslavia officials responsible for atrocities committed by their allied Serb armed groups in Bosnia-Herzegovina. It has since reaffirmed the overall control standard.<sup>54</sup> This standard was then upheld by the SCSL in its case against former Liberian President Charles Taylor, who was convicted in 2012 of “aiding and abetting” atrocities committed by Revolutionary United Front rebels in Sierra Leone, with whom Taylor had a delegation

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<sup>50</sup> *Id.*

<sup>51</sup> The United States subsequently refused to pay reparations awarded for sabotage by U.S. operatives. Hathaway et al., *supra* note 37, at 548–50.

<sup>52</sup> Application of Convention on the Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 208–09, 400–01 (Feb. 26). For discussion of the effective control standard in this case, see Hathaway et al., *supra* note 37, at 550–52.

<sup>53</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgement, ¶ 137 (ICTY July 15, 1999).

<sup>54</sup> Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Judgment, ¶ 26 (ICTY Feb. 20, 2001); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, ¶ 134 (ICTY Mar. 24, 2000).

relationship—though the SCSL also found Taylor liable for effective control of specific operations.<sup>55</sup>

Charles Taylor’s conviction established accountability for former heads of state (former Yugoslavian/Serbian leader Slobodan Milošević died during his ICTY trial before a verdict),<sup>56</sup> and a current proceeding will further test 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 of crimes against humanity in Darfur, including those committed by the Janjaweed militias that the ICC prosecutor’s office deemed “allied” with the government forces.<sup>57</sup> An October 2021 military coup that returned al-Bashir’s allies to power, however, may prevent his extradition any time soon.<sup>58</sup> The prosecutor’s office is also investigating the case of the anti-Rohingya ethnic cleansing campaign in Myanmar, in which the state security forces who are currently in power, with the support of the now-deposed civilian leaders, allegedly cooperated with communal and religious armed groups.<sup>59</sup>

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<sup>55</sup> Prosecutor v. Taylor, SCSL-03-01-T, Judgment, ¶ 6994 (May 18, 2012). For a detailed discussion of the case, see Kai Ambos & Ousman Njikam, *Charles Taylor’s Criminal Responsibility*, 11 J. INT’L CRIM. JUST. 789 (2013).

<sup>56</sup> Prosecutor v. Milošević, Case No. IT-02-54 (ICTY). On the Milošević case and its implications, see, e.g., Scott Grosscup, *The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor’s Justice*, 32 DENVER J. INT’L L. & POL’Y 355 (2004); Hiram Abtahi & Grant Dawson, *The anatomy of the Milošević trial (2001–2006)*, 1 J. INT’L HUMANITARIAN ACTION, 2016, at 4.

<sup>57</sup> *Case Information Sheet: The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC (July 2021), <https://www.icc-cpi.int/CaseInformationSheets/AlBashirEng.pdf>.

<sup>58</sup> Emma DiNapoli & Mohammed Hassan, *Why the ICC’s First Trial on Darfur is About More Than Securing Justice*, JUST SEC. (Apr. 4, 2022), <https://www.justsecurity.org/80920/why-the-iccs-first-trial-on-darfur-is-about-more-than-securing-justice/>.

<sup>59</sup> Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation (Nov. 14, 2019). In February 2021, military leaders seized power in Myanmar once again in a coup d’état, and they have resisted subsequent calls for accountability for violence against the Rohingya, now recognized by the United States as a case of genocide. See Lara Jakes, *Myanmar’s*

Two changes in the making 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 United States endorsed and abided by them. The first major shift was the 2010 Kampala Amendments to the Rome Statute, which now codify the crime of aggression,<sup>60</sup> an advance in international law long sought by jurists, scholars, and activists.<sup>61</sup> The crime of aggression not only includes direct state attacks undertaken aggressively, rather than in self-defense; it also prohibits “[t]he sending by or on behalf of a [s]tate of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another [s]tate,” thereby holding state leaders liable for actions delegated to armed groups.<sup>62</sup> Since 2018, the ICC has been empowered to enforce these amendments. However, debates remain about the extent of jurisdiction over states parties to the Rome Statute that have not ratified the Kampala Amendments, and currently the ICC cannot try individuals from non-party states for the crime of aggression.<sup>63</sup>

This limitation, for instance, means that even though Ukraine has now recognized the ICC's jurisdiction over

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*Military Committed Genocide Against Rohingya, U.S. Says*, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/us/politics/myanmar-genocide-biden.html>.

<sup>60</sup> International Criminal Court RC/Res. 6, The Crime of Aggression (June 11, 2010) [hereinafter Kampala Amendments].

<sup>61</sup> See generally M. Cherif Bassiouni, *The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization*, 58 HARV. INT'L L.J. ONLINE 87 (2017); Claus Kreß, *On the Activation of ICC Jurisdiction over the Crime of Aggression*, 16 J. INT'L CRIM. JUST. 1 (2018); WEISBORD, *supra* note 37.

<sup>62</sup> Kampala Amendments, *supra* note 60, Article 8 bis, ¶ 2.

<sup>63</sup> Dapo Akande & Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, 29 EUR. J. INT'L L. 939, 940–43 (2018); Kreß, *supra* note 61, at 7–13. For a critical view of the Kampala Amendments' practical limits, see, e.g., 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'L CRIM. JUST. 19 (2018).



crimes committed within its territory, because neither Russia nor Ukraine is signatory to the Rome Statute (and as such have not ratified the Kampala Amendments), the ICC cannot prosecute Russian leaders for the crime of aggression for Russia's 2022 invasion of Ukraine, let alone for stoking an insurgency and intervening in Eastern Ukraine since 2014.<sup>64</sup> This is why some legal scholars and practitioners have argued for the government of Ukraine to work with the UN General Assembly to, through a treaty, create a special international tribunal for the crime of aggression in the Russian war on Ukraine.<sup>65</sup>

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.<sup>66</sup> Specific state obligations to protect people under international humanitarian law may also be expanding. The ICRC's 2016 commentaries on the Geneva Conventions, specifically around Common Article 1, suggest that states have not only a duty not to encourage armed group partners to violate humanitarian laws, but also a duty to "ensure respect" for the Geneva Conventions by the armed groups.<sup>67</sup> This standard is not binding and has not yet been applied by international courts, but it offers a potential avenue for accountability in the future if judges accept the

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<sup>64</sup> Ellen Ioanes, *Here's what the ICC can actually do about Putin's war crimes*, VOX (Apr. 9, 2022), <https://www.vox.com/23017838/international-criminal-court-icc-putin-war-crimes>.

<sup>65</sup> Alexander Komarov & Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SEC. (Apr. 11, 2022), <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>; James A. Goldston, *Model Indictment for the Crime of Aggression Committed against Ukraine*, JUST SEC. (May 9, 2022), <https://www.justsecurity.org/81411/osji-model-indictment-for-the-crime-of-aggression-committed-against-ukraine/>.

<sup>66</sup> See generally Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L.J. 1242 (2017).

<sup>67</sup> Jean-Marie Henckaerts, *Article 1: Respect for the Convention*, in COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 35, ¶ 154 (2d ed. 2016)

ICRC's interpretation.<sup>68</sup>

Ensuring respect would mean actively seeking to restrain armed groups with which states are in delegation or sponsorship relationships—where states are providing support to armed groups and have some leverage and influence over their behavior.<sup>69</sup> This standard would hold states accountable even if an armed group-state relationship does not meet effective or overall control standards for attribution.<sup>70</sup> The positive obligation to ensure respect is “particularly strong in the case of a partner in a joint operation,” over whom a state is likely to have significant influence and leverage.<sup>71</sup>

For example, selling weapons to a sponsored armed group when a state knows that they will likely be used to commit violations of international humanitarian law would breach the state's duty to ensure respect. Many activists and politicians argue that the United States bears such a responsibility for selling its state partners Saudi Arabia and the United Arab Emirates weapons used to bombard civilians in Yemen.<sup>72</sup> While states might object that they can never truly control other actors and that violations of the Geneva Conventions may take place regardless of how they have approached a relationship, there are obligations to ensure

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<sup>68</sup> Hathaway et al., *supra* note 37, at 574–78.

<sup>69</sup> Thaler, *supra* note 20, at 5–11.

<sup>70</sup> Henckaerts, *supra* note 67, ¶¶ 125, 150–70.

<sup>71</sup> *Id.* ¶ 167.

<sup>72</sup> See, e.g., Robert Malley & Stephen Pomper, *Accomplice to Carnage: How America Enables War in Yemen*, FOREIGN AFF., March/April 2021, at 73; *US: Suspend Saudi Arms Sales*, HUM. RTS. WATCH (Nov. 29, 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.*, N.Y. TIMES (Feb. 5, 2021), <https://www.nytimes.com/2021/02/05/world/middleeast/yemen-saudi-biden.html>.

Such weapon sales violate the duty to ensure respect, as the ICRC's 2016 commentaries state: “An illustration of a negative obligation can be made in the context of arms transfers. Common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.” See Henckaerts, *supra* note 67, ¶ 162.

respect both from the beginning of a partnership and after violations have occurred. The ICRC outlines a range of actions states may take to try to ensure respect for international humanitarian law from state or armed group partners, including diplomatic pressure, placing IHL-related conditions of joint activities or arms transfers, and referring illegal actions to international and domestic investigative and judicial bodies.<sup>73</sup> All of these options require states to prioritize compliance with international humanitarian law at all times in a relationship.

### III. PERILOUS PARTNERSHIPS

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, armed groups always have agency and pursue their own interests, creating risks and potential pitfalls even for powerful states like the United States. Alliances with other states hold similar risks, but interstate relations also offer greater transparency than relationships with armed groups and contain more diplomatic and economic levers to persuade or compel desired behavior.<sup>74</sup>

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 Protection Force committed atrocities against local

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<sup>73</sup> Henckaerts, *supra* note 67, ¶ 181.

<sup>74</sup> See, e.g., MARINA E. HENKE, CONSTRUCTING ALLIED COOPERATION: DIPLOMACY, PAYMENTS, AND POWER IN MULTILATERAL MILITARY COALITIONS 22–29 (2019); Barbara Elias & Alex Weisiger, *Influence through Absence in U.S. Counterinsurgency Interventions? Coercing Local Allies through Threats to Withdraw*, 22 CIV. WARS 512, 514 (2020).

populations, increasing support for the Taliban's return.<sup>75</sup> 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 United States as tacitly supporting the PKK due to U.S. sponsorship of Kurdish rebels in Syria.<sup>76</sup> 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 competing against for territorial control and resources. An example of such risk is the U.S. military and Central Intelligence Agency (CIA)'s backing of different rebels and militias in Syria.<sup>77</sup> 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—for instance, when Kashmiri militant groups flipped against Pakistan and worked with Indian security forces.<sup>78</sup>

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

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<sup>75</sup> Toon Dirckx, *The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan*, 19 CIV. WARS 377, 388–93 (2017); Emran Feroz, *Atrocities Pile Up for CIA-Backed Afghan Paramilitary Forces*, FOREIGN POL'Y (Nov. 16, 2020), <https://foreignpolicy.com/2020/11/16/afghanistan-khost-protection-forces-cia-us-pullout-taliban/>; Anand Gopal, *The Other Afghan Women*, NEW YORKER (Sept. 6, 2021), <https://www.newyorker.com/magazine/2021/09/13/the-other-afghan-women>.

<sup>76</sup> Simon Lewis & Tuvan Gumrukcu, *U.S. reassures Turkey over executions after Erdogan calls response 'a joke'*, REUTERS (Feb. 15, 2021), <https://www.reuters.com/article/uk-turkey-iraq-security-idUSKBN2AF0XV>.

<sup>77</sup> Sam Heller, *Are CIA-backed Syrian Rebels Really Fighting Pentagon-backed Syrian Rebels?*, WAR ON ROCKS (Mar. 28, 2016), <https://warontherocks.com/2016/03/are-cia-backed-syrian-rebels-really-fighting-pentagon-backed-syrian-rebels/>.

<sup>78</sup> Milos Popovic, *The Perils of Weak Organization: Explaining Loyalty and Defection of Militant Organizations Toward Pakistan*, 38 STUD. CONFLICTS & TERRORISM 919, 924–29 (2015).

longer credibly commit to reducing armed group attacks on the rival state.<sup>79</sup> For example, the Mozambican rebel group Renamo was initially formed 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.<sup>80</sup>

A worse scenario for states is when an armed group abandons a cooperative relationship and attacks its erstwhile patron.<sup>81</sup> Pakistan offers prime examples. Domestically in the Federally Administered Tribal Areas, Pakistan empowered radical Islamist leaders who developed militia groups that the government thought would help control remote areas, but which then threatened the stability of the country as a whole.<sup>82</sup> Relationships with rebel agents in Jammu and Kashmir have sometimes backfired,<sup>83</sup> and Pakistani attempts to destabilize and balance against Afghanistan have had similarly negative effects. The mujahideen whom 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 United States likewise regretted its

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<sup>79</sup> Bapat, *supra* note 24, at 16.

<sup>80</sup> See generally Carrie Manning, *Constructing Opposition in Mozambique: Renamo as Political Party*, 24 J.S. AFR. STUD. 161 (1998); ROBERT H. DAVIES, *SOUTH AFRICAN STRATEGY TOWARDS MOZAMBIQUE IN THE POST-NKOMATI PERIOD: A CRITICAL ANALYSIS OF EFFECTS AND IMPLICATIONS* (1985).

<sup>81</sup> See generally Milos Popovic, *Fragile Proxies: Explaining Rebel Defection Against Their State Sponsors*, 29 TERRORISM & POL. VIOLENCE 922 (2017).

<sup>82</sup> YELENA BIBERMAN, *GAMBLING WITH VIOLENCE: STATE OUTSOURCING OF WAR IN PAKISTAN AND INDIA* 97–111 (2019); KIMBERLY MARTEN, *WARLORDS: STRONG-ARM BROKERS IN WEAK STATES* 31–63 (2012).

<sup>83</sup> Popovic, *supra* note 78; Byman & Kreps, *supra* note 24, at 9.

support for the Afghan mujahideen in the long run, as Osama bin Laden formed al Qaeda and turned against his former sponsor.<sup>84</sup>

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 conflicts, as the United States did over Libyan links to the 1985 Rome and Vienna airport attacks.<sup>85</sup> Alternatively, states may take military action, like when the United States unleashed airstrikes on Libya after the 1986 Berlin bombing<sup>86</sup> or launched cruise missiles at Sudan and Afghanistan following al Qaeda's 1998 embassy bombings in Kenya and Tanzania.<sup>87</sup> More recently, U.S.-Russian tensions escalated after Wagner Group mercenaries, with ties to the Russian government, were involved in a 2018 attack on U.S. forces in Syria.<sup>88</sup>

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<sup>84</sup> See generally Saikal, *supra* note 35; STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001 (2005).

<sup>85</sup> *Chronology of Libya's Disarmament and Relations with the United States*, ARMS CONTROL ASS'N (2018), <https://www.armscontrol.org/factsheets/LibyaChronology> (last reviewed Mar. 2021).

<sup>86</sup> *Id.*

<sup>87</sup> See generally Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067 (2000); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999).

<sup>88</sup> Neil Hauer, *Russia's Mercenary Debacle in Syria: Is the Kremlin Losing Control?*, FOREIGN AFF. (Feb. 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*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html>.

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

There are, therefore, strong practical reasons for restricting U.S. relationships with armed groups abroad. Alongside the potential security policy benefits, following international law and citing it as an additional justification for U.S. self-restraint would send a signal of U.S. willingness to hold itself to emerging international legal standards, despite past resistance. The crime of aggression entering into force and shifts in international humanitarian law move us closer to a world of accountability for states delegating to or sponsoring armed groups. Yet they also come at a time when the legitimacy of the laws of war is threatened and challenged by powerful actors' open defiance, allegations of anti-African bias at the ICC, persistence of the ICJ's state-centric nature, and bungled ICC prosecutions.<sup>89</sup> 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 United States has been reluctant to accept international courts' jurisdiction over its own behavior—Nicaragua is still waiting for reparations payments ordered by the ICJ.<sup>90</sup> In particular, the United States has a complicated and often adversarial history with the ICC.<sup>91</sup> The United States refused to ratify the

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<sup>89</sup> On interconnected crises of legitimacy, compliance, and effectiveness in the IHL regime, *see generally* Clark et al., *supra* note 17. On potential problems with current ICJ jurisprudence, *see* Hathaway et al., *supra* note 37, at 552–554. On the ICC cases and relations with African states, *see generally* OUMAR BA, *STATES OF JUSTICE: THE POLITICS OF THE INTERNATIONAL CRIMINAL COURT* (2020).

<sup>90</sup> Diane Desierto, *Reopening Proceedings for Reparations and Abuse of Process at the International Court of Justice*, EJIL: TALK! (Aug. 16, 2017), <https://www.ejiltalk.org/reopening-proceedings-for-reparations-and-abuse-of-process-at-the-international-court-of-justice/>.

<sup>91</sup> *See, e.g.*, Kyle Rapp & Kelebogile Zvobgo, *Biden reversed Trump's sanctions on International Criminal Court officials. What happens now?*, WASHINGTON POST (Apr. 5, 2021), <https://www.washingtonpost.com/politics/2021/04/05/biden-reversed->

Rome Statute, rejected ICC authority to investigate U.S. officials and security personnel, and was skeptical of the Kampala Amendments;<sup>92</sup> nevertheless, it has also supported ICC investigations and cases against rebel leaders, former Libyan leader Muammar Gaddafi, and ex-Sudanese leader Omar al-Bashir.

The lowest point in U.S.-ICC relations came in 2020, when the Trump administration issued an executive order that effectively criminalized the ICC's investigation of conduct by U.S. military forces and intelligence agents in Afghanistan, barred the ICC's staff from U.S. territory, and threatened to seize their assets.<sup>93</sup> Later, the Trump administration sanctioned the ICC chief prosecutor Fatou Bensouda and top prosecutorial official Phakiso Mochochoko.<sup>94</sup>

President Biden revoked President Trump's anti-ICC executive order and sanctions in April 2021,<sup>95</sup> yet the Biden administration remains wary of the ICC. President Biden's Department of State (DOS) rejected the ICC's initial February 2021 ruling that the court had jurisdiction to investigate potential crimes committed in the Israeli-occupied Palestinian Territories, since the United States

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trumps-sanctions-international-criminal-court-officials-what-happens-now/; Q&A: *The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>; Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html>.

<sup>92</sup> See generally Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257 (2015).

<sup>93</sup> *US Sets Sanctions Against International Criminal Court*, HUM. RTS. WATCH (June 11, 2020), <https://www.hrw.org/news/2020/06/11/us-sets-sanctions-against-international-criminal-court>.

<sup>94</sup> *International Criminal Court officials sanctioned by US*, BBC (Sept. 2, 2020), <https://www.bbc.com/news/world-us-canada-54003527>.

<sup>95</sup> Pranshu Verma & Marlise Simons, *Reversing Trump, Biden Repeals Sanctions on Human Rights Prosecutor*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2021/04/02/us/politics/biden-international-criminal-court-sanctions.html>.



refuses to recognize Palestinian sovereignty and Israel is not a state party to the Rome Statute.<sup>96</sup> The Biden administration likewise criticized the Palestine investigation when the ICC officially announced it in March 2021.<sup>97</sup> Even in his statement withdrawing sanctions on Bensouda and Mochochoko, Secretary of State Antony Blinken emphasized that the administration still “disagree[d] strongly” with the Afghanistan and Palestine investigations—before proclaiming how much the United States supported the rule of law and justice for victims of atrocities.<sup>98</sup>

The Biden administration faces continuing choices about how to respond to the ICC under the new chief prosecutor, Karim Khan, and as the Afghanistan and Palestine investigations continue. Given the potential liability of some Biden administration officials and U.S. military and intelligence personnel for war crimes or torture in Afghanistan and possibly Iraq, and with limited congressional interest in subjecting the United States to accountability in The Hague, it seems highly unlikely that the administration will seek to ratify the Rome Statute to have the United States finally join the ICC and accept the court’s authority to prosecute U.S. officials and security force members. After the Trump administration’s aggressive stance, however, even simply allowing ICC investigations to proceed without interference would improve relations with

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<sup>96</sup> Ned Price, *Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation*, U.S. DEP’T OF ST. (Feb. 5, 2021), <https://www.state.gov/opposing-international-criminal-court-attempts-to-affirm-territorial-jurisdiction-over-the-palestinian-situation/>.

<sup>97</sup> Antony J. Blinken, *The United States Opposes the ICC Investigation into the Palestinian Situation*, U.S. DEP’T OF ST. (Mar. 3, 2021), <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>; see also Sari Bashi, *Biden Can’t Claim ‘Moral Leadership’ While Sanctioning the ICC*, FOREIGN POL’Y (Mar. 3, 2021), <https://foreignpolicy.com/2021/03/03/biden-cant-claim-moral-leadership-while-sanctioning-the-icc/>.

<sup>98</sup> Antony J. Blinken, *Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court*, U.S. DEP’T OF ST. (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

the court. Cooperating with the Afghanistan investigation, though, and explicitly acknowledging U.S. responsibilities under the Kampala Amendments could send a powerful global signal that the United States is willing to subject itself to international law, rather than only holding others accountable.

The United States need not be a member of the ICC or accept its jurisdiction to take seriously and act upon its investigatory findings. The ICC is a court of last resort, designed only to prosecute cases when domestic courts are unable or unwilling to do so. To illustrate, the prosecutor's office in December 2020 closed its inquiry into abuses by British forces in Iraq because it deemed that the United Kingdom government had not blocked or abandoned investigations into the allegations.<sup>99</sup> The United States could take that as a cue and conduct its own new investigations of anyone flagged by ICC prosecutors as likely having committed crimes in Afghanistan, rather than treating international investigations as threats.

Accepting U.S. responsibility for the actions of armed groups it delegates to or sponsors abroad would mean doing more to constrain human rights violations, punishing abusers, and compensating victims. While U.S. forces have been uneven and inconsistent in self-monitoring and holding their own accountable (and the CIA often rejects oversight and accountability),<sup>100</sup> U.S. military forces themselves are

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<sup>99</sup> Owen Bowcott, *ICC abandons inquiry into alleged British war crimes in Iraq*, GUARDIAN (Dec. 9, 2020), <http://www.theguardian.com/uk-news/2020/dec/09/icc-abandons-inquiry-into-alleged-british-war-crimes-in-iraq>.

<sup>100</sup> See generally MICHAEL J. MCNERNEY ET AL., U.S. DEPARTMENT OF DEFENSE CIVILIAN CASUALTY POLICIES AND PROCEDURES: AN INDEPENDENT ASSESSMENT (2021), available at [https://www.rand.org/pubs/research\\_reports/RRA418-1.html](https://www.rand.org/pubs/research_reports/RRA418-1.html); *Exception(s) to the Rule(s): Civilian Harm, Oversight, and Accountability in the Shadow Wars*, CTR. FOR CIVILIANS IN CONFLICT (Nov. 19, 2020), [https://civiliansinconflict.org/wp-content/uploads/2020/11/CIVIC\\_US\\_Report\\_Drones\\_Final.pdf](https://civiliansinconflict.org/wp-content/uploads/2020/11/CIVIC_US_Report_Drones_Final.pdf); Katherine Hawkins, *Torture and the CIA's Unaccountability Boards*, JUST SEC. (Feb. 5, 2015), <https://www.justsecurity.org/19724/torture-cias-unaccountability-boards/>.

bound at all times by the Uniform Code of Military Justice<sup>101</sup> and are required to report known violations of it.<sup>102</sup> These obligations remain during counterinsurgency operations with foreign state or armed group forces.<sup>103</sup> The “Leahy Laws” also restrict the DOS and Department of Defense (DOD) from training or equipping units of foreign security forces that have been credibly implicated in “gross violations of human rights” including torture, extrajudicial killings, forced disappearances, and rape.<sup>104</sup> However, “the [DOS] and DOD do not generally consider civilian harm incurred during the conduct of hostilities in a conflict as a gross violation of human rights, even if and when credible third parties have determined that the laws of armed conflict may have been violated,”<sup>105</sup> and the CIA remains conspicuously not subject to the Leahy Laws.<sup>106</sup>

There should be consistent and thorough follow-through in ensuring that not only state allies, but also armed group partners are obeying international legal standards. To that end, the United States should cease or reduce assistance and cooperation when it is clear that an armed group partner is unable or unwilling to restrain its forces and hold them accountable for abuses, and should turn over evidence of

<sup>101</sup> Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–946 (2020).

<sup>102</sup> 10 U.S.C. § 931c.

<sup>103</sup> U.S. service members are obligated to report any “possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during any operation in the range of military operations that would constitute a violation of the law of war if it occurred during an armed conflict.” DEPT OF ARMY, FM 3-24/MCWP 3-33.5, INSURGENCIES AND COUNTERING INSURGENCIES, § 13, ¶ 45 (2014).

<sup>104</sup> Foreign Assistance Act of 1961 § 620M, 22 U.S.C. § 2378d (2020); 10 U.S.C. § 362 (2020).

<sup>105</sup> Daniel Mahanty, *The “Leahy Law” Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SEC. (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/>.

<sup>106</sup> Sarah Margon, *The CIA’s grotesque secret: How it’s partnering with human rights abusers -- and sparking blowback*, SALON (Aug. 18, 2015), [https://www.salon.com/2015/08/18/the\\_cias\\_grotesque\\_secret\\_how\\_its\\_partnering\\_with\\_human\\_rights\\_abusers\\_and\\_sparking\\_blowback/](https://www.salon.com/2015/08/18/the_cias_grotesque_secret_how_its_partnering_with_human_rights_abusers_and_sparking_blowback/).

human rights violations to international investigators. In addition, compensating victims of abuses by armed group partners could, alongside legal accountability, reduce enmity towards U.S. forces and the U.S. government,<sup>107</sup> and would reflect an acknowledgment of U.S. obligations towards those directly affected by its security policies abroad. Accepting responsibility would also mean being honest about the use of U.S. power and resources and the types of relationships the United States engages in with armed groups—rather than cloaking military relationships and strategic aims in ambiguity and jargon like hybrid warfare and grey zone conflicts,<sup>108</sup> while criticizing rivals for similar things the United States has done.<sup>109</sup>

Russia withdrew from the Rome Statute in 2016 over the ICC prosecutor's preliminary findings on Russian aggression in Crimea and Eastern Ukraine.<sup>110</sup> China faces allegations from independent international law experts of genocide against Uyghurs in Xinjiang.<sup>111</sup> There is an opportunity available to demonstrate President Biden's desired moral

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<sup>107</sup> Daniel Silverman, *Too Late to Apologize? Collateral Damage, Post-Harm Compensation, and Insurgent Violence in Iraq*, 74 INT'L ORG. 853, 854–55 (2020).

<sup>108</sup> See generally Donald Stoker & Craig Whiteside, *Blurred Lines: Gray-Zone Conflict and Hybrid War—Two Failures of American Strategic Thinking*, 73 NAVAL WAR C. REV. 12 (2020); Frank Hoffman, *On Not-So-New Warfare: Political Warfare vs Hybrid Threats*, WAR ON ROCKS (July 28, 2014), <https://warontherocks.com/2014/07/on-not-so-new-warfare-political-warfare-vs-hybrid-threats/>.

<sup>109</sup> Overt, rather than covert, support for armed groups can also help restrain armed group violence against civilians by increasing public scrutiny and the armed group's awareness of it. See generally Arthur Stein, *Committed sponsors: external support overtness and civilian targeting in civil wars*, 28 EUR. J. INT'L REL. 386 (2022).

<sup>110</sup> Robbie Gramer, *Why Russia Just Withdrew from the ICC*, FOREIGN POL'Y (Nov. 16, 2016), <https://foreignpolicy.com/2016/11/16/why-russia-just-withdrew-from-icc-putin-treaty-ukraine-law/>.

<sup>111</sup> *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*, NEWLINES INST. (Mar. 8, 2021), <https://newlinesinstitute.org/uyghurs/the-uyghur-genocide-an-examination-of-chinas-breaches-of-the-1948-genocide-convention/>.

leadership in foreign policy,<sup>112</sup> and for the United States to make a significant reputational gain by embracing international law more broadly and working to respect it in practice, whether or not U.S. leaders ever accept ICC membership and jurisdiction.<sup>113</sup>

## 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.<sup>114</sup> With Russia delegating its territorial aspirations and border anxieties to rebels in eastern Ukraine before a direct invasion<sup>115</sup> and as concern grows about potential direct or proxy conflicts with China,<sup>116</sup> 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.<sup>117</sup> Military officers and policy professionals

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<sup>112</sup> *Remarks by President Biden on America's Place in the World*, WHITE HOUSE (Feb. 4, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/>.

<sup>113</sup> U.S. hypocrisy on matters of international law and human rights damages the country's reputation and can undermine its credibility in criticizing abuses by other states and non-state actors. See generally Daryl Glaser, *Does Hypocrisy Matter? The Case of US Foreign Policy*, 32 REV. INT'L STUD. 251, 261–67 (2006); Douglas A. Johnson et al., *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America*, FOREIGN AFF., September/October 2016, at 121.

<sup>114</sup> See Andreas Krieg, *Externalizing the burden of war: the Obama Doctrine and US foreign policy in the Middle East*, 92 INT'L AFF. 97 (2016); Matthew Levitt, *Rethinking U.S. Efforts on Counterterrorism: Toward a Sustainable Plan Two Decades After 9/11*, 12 J. NAT'L SEC. L. & POL'Y 247, 257–65 (2022).

<sup>115</sup> Andrew S. Bowen, *Coercive diplomacy and the Donbas: Explaining Russian strategy in Eastern Ukraine*, 42 J. STRATEGIC STUD. 312, 321–31 (2019).

<sup>116</sup> Dominic Tierney, *The Future of Sino-U.S. Proxy War*, TEX. NAT'L SEC. REV., Spring 2021, at 49.

<sup>117</sup> Frank Hoffman & Andrew Orner, *The Return of Great-Power Proxy Wars*, WAR ON ROCKS (Sept. 2, 2021), <https://warontherocks.com/2021/09/the-return-of-great-power-proxy-wars/>; *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*, WHITE HOUSE (Sept. 9, 2021), [https://www.whitehouse.gov/briefing-room/speeches-](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/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/)

have even discussed reviving U.S. support for maritime privateers to attack Chinese merchant vessels and port facilities.<sup>118</sup>

The United States 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, which may generate 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, thus increasing the chances of confrontations that could easily escalate to larger crises.

Following Russia’s full-scale invasion of Ukraine in February 2022, debates emerged within the Biden administration about arming Ukrainian insurgents in the event that Russia toppled the Ukrainian government or occupied major portions of the country, with worries that doing so could lead to direct conflict with Russia.<sup>119</sup> This is a case in which Russia has violated the United Nations Charter and Rome Statute (which has applied to violence in Ukraine since 2013) by invading Ukraine without just cause and

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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/.

<sup>118</sup> Brandon Schwartz, *U.S. Privateering Is Legal*, PROC., <https://www.usni.org/magazines/proceedings/2020/april/us-privateering-legal> (last visited July 5, 2020); Mark Cancian & Brandon Schwartz, *Unleash the Privateers!*, PROC., <https://www.usni.org/magazines/proceedings/2020/april/unleash-privateers> (last visited July 5, 2020); Christopher Booth & Walker Mills, *Unfurl the Banner! Privateers and Commerce Raiding of China’s Merchant Fleet in Developing Markets*, WAR ON ROCKS (Feb. 18, 2021), <https://warontherocks.com/2021/02/unfurl-the-banner-privateers-and-commerce-raiding-of-chinas-merchant-fleet-in-developing-markets/>.

<sup>119</sup> Detsch & Gramer, *supra* note 11.

committing the crime of aggression,<sup>120</sup> and has violated international humanitarian law by committing indiscriminate violence using weapons including cluster munitions, attacking protected civilian sites like hospitals, and massacring civilians.<sup>121</sup> Ukraine's legitimate, democratically-elected and internationally-recognized government 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 fell.<sup>122</sup> In this case, there would be a strong justification for arming Ukrainian insurgents. Just as it must try to do in supplying the sitting Ukrainian government,<sup>123</sup> to ensure respect for international humanitarian law the United States would need to be careful about where its weapons and aid were going and how insurgents were

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<sup>120</sup> Hurst Hannum, *International law says Putin's war against Ukraine is illegal. Does that matter?*, CONVERSATION (Feb. 25, 2022), <http://theconversation.com/international-law-says-putins-war-against-ukraine-is-illegal-does-that-matter-177438>.

<sup>121</sup> See, e.g., *Russia commits indiscriminate attacks during the invasion of Ukraine*, AMNESTY INT'L (Feb. 25, 2022), <https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/>; *Ukraine: Russian Cluster Munition Hits Hospital*, HUM. RTS. WATCH (Feb. 25, 2022), <https://www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital>; AMNESTY INTERNATIONAL, *Ukraine: "He's not coming back". War crimes in Northwest areas of Kyiv Oblast*, AMNESTY INT'L (May 6, 2022), <https://www.amnesty.org/en/documents/eur50/5561/2022/en/>.

<sup>122</sup> A similar argument could be made that supporting insurgents in Myanmar is justified and legal, given that the military toppled the elected government in a coup d'état and has since been engaging in widespread human rights violations, in addition to its prior genocide against the Rohingya Muslim minority. See generally Andrew Ong, *Ethnic Armed Organisations in Post-Coup Myanmar: New Conversations Needed*, ISEAS YUSOF ISHAK INST. (June 11, 2021), [https://www.iseas.edu.sg/wp-content/uploads/2021/05/ISEAS\\_Perspective\\_2021\\_79.pdf](https://www.iseas.edu.sg/wp-content/uploads/2021/05/ISEAS_Perspective_2021_79.pdf); Kaitlyn Robinson, *To Support Democracy in Myanmar, Engage with Ethnic Armed Organizations*, WAR ON ROCKS (Jan. 19, 2022), <https://warontherocks.com/2022/01/to-support-democracy-in-myanmar-engage-with-ethnic-armed-organizations/>.

<sup>123</sup> Katie Bo Lillis et al., *What happens to weapons sent to Ukraine? The US doesn't really know*, CNN (Apr. 19, 2022), <https://www.cnn.com/2022/04/19/politics/us-weapons-ukraine-intelligence/index.html>.

treating captured Russian fighters or suspected local collaborators, especially given the presence in the Ukrainian National Guard and volunteer forces of right-wing extremists.<sup>124</sup>

Russian atrocities in Ukraine and a desire to seek accountability for them have even led some U.S. policymakers to reconsider the U.S. relationship with the ICC and objections to the court's jurisdiction over citizens of states not party to the Rome Statute—while still trying to avoid ICC jurisdiction over U.S. officials and security personnel.<sup>125</sup> Regardless of its stance on the ICC, if the United States accepts liability for the behavior of armed group 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, in situations where relying on or supporting the armed group is the last, best option.<sup>126</sup> It is difficult 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 regional security and U.S. aims.<sup>127</sup> Setting a

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<sup>124</sup> See generally Andreas Umland, *Irregular Militias and Radical Nationalism in Post-Euromaidan Ukraine: The Prehistory and Emergence of the "Azov" Battalion in 2014*, 31 *TERRORISM & POL. VIOLENCE* 105 (2019); Tim Hume, *How a Far-Right Battalion Became a Part of Ukraine's National Guard*, *VICE* (Feb. 16, 2022), <https://www.vice.com/en/article/3ab7dw/azov-battalion-ukraine-far-right>.

<sup>125</sup> Christopher J. Dodd & John B. Bellinger III, *How the U.S. can support a war crimes investigation into Russia*, *WASHINGTON POST* (Apr. 5, 2022), <https://www.washingtonpost.com/opinions/2022/04/05/us-international-criminal-court-russia-war-crimes-putin-ukraine/>; see also Savage, *supra* note 91. Politicians presenting U.S. support for the ICC and assistance to it as an important step for protecting human rights could even help sway more Americans towards supporting joining the ICC. See Keleboglu Zvobgo, *Human Rights versus National Interests: Shifting US Public Attitudes on the International Criminal Court*, 63 *INT'L STUD. Q.* 1065, 1076–77 (2019).

<sup>126</sup> James Pattison, *The Ethics of Arming Rebels*, 29 *ETHICS & INT'L AFF.* 455, 462–64 (2015).

<sup>127</sup> See generally Niklas Karlén, *Turning off the Taps: The Termination of State Sponsorship*, 31 *TERRORISM & POL. VIOLENCE* 733 (2019). On Afghanistan, see Dirks, *supra* note 75, at 388–93.



higher bar for which armed groups the United States is willing to cooperate with could make it easier to avoid such counterproductive relationships in the future.

If the United States feels legally compelled to effectively monitor and sanction armed group partners, this would require more on-the-ground forces to manage the relationship. This increased burden to U.S. personnel, and many U.S. soldiers' and marines' reluctance to focus on advisory relationships,<sup>128</sup> 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.<sup>129</sup> Surveys among both the general public and foreign policy experts also reveal preferences for alliances with states over those with non-state actors and greater trust in state partners,<sup>130</sup> 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,"<sup>131</sup> while also aligning with progressive priorities of limiting intervention abroad and respecting human rights globally,<sup>132</sup> whether or not actors are U.S. allies. U.S. financial and military power remain undeniable,<sup>133</sup> but as the Biden administration is well

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<sup>128</sup> Kyle Atwell & Paul Bailey, *Wanna Fight? Pushing Partners Aside in Afghanistan*, WAR ON ROCKS (Oct. 11, 2021), <https://warontherocks.com/2021/10/wanted-to-fight-incentivizing-advising-over-fighting-in-afghanistan-and-beyond/>.

<sup>129</sup> See generally BARRY R. POSEN, *RESTRAINT: A NEW FOUNDATION FOR U.S. GRAND STRATEGY* (2014).

<sup>130</sup> Plana, *supra* note 16; Oktay et al., *supra* note 16.

<sup>131</sup> See, e.g., Barnett, *supra* note 17; Friedman Lissner and Rapp-Hooper, *supra* note 17.

<sup>132</sup> See, e.g., *Policy Roundtable: The Future of Progressive Foreign Policy*, TEX. NAT'L SEC. REV. (Dec. 4, 2018), <https://tnsr.org/roundtable/policy-roundtable-the-future-of-progressive-foreign-policy/>.

<sup>133</sup> See generally Michael Beckley, *Rogue Superpower: Why This Could Be an Illiberal American Century*, FOREIGN AFF., November/December 2020, at 73.

aware, credibility and global leadership must be earned.<sup>134</sup> To have a rules-based order, the powerful must follow the rules, too.

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<sup>134</sup> *Remarks by President Biden on America's Place in the World, supra* note 112.