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Brief

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Fighting Together: Legal Challenges Arising from Misconduct by Partners

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DANISH DEFENCE

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Abstract

This research brief examines the legal challenges that may arise for countries like Denmark in relation to the misconduct by partners in international military operations. The two most relevant scenarios involve mistreatment of persons in custody and excessive use of lethal force in policing and targeting situations in breach of the law of armed conflict (LOAC) and international human rights law (IHRL). The brief considers the general rules of state responsibility, in particular, the rule on state complicity and the relevant substantive rules under the LOAC and IHRL as well as the Arms Trade Treaty and the UN Human Rights Due Diligence Policy. It concludes that states have to abstain from any form of assistance once they become aware of the commission of IHRL and LOAC violations by their partners. Under certain circumstances they even have to actively and continuously assess the risk of such misconduct occurring and take mitigating measures. Denmark and other nations are thus advised to make such risk assessments a standard procedure for any form of military cooperation they may engage in.

Training of Iraqi security forces, 2017. © Søren Egebæk

1. Introduction

There is a long history of military cooperation between states. What has changed, however, is the legal landscape surrounding such forms of cooperation; this is true both for the variety of actors it may involve and the density of international regulation. Partners are often other troop-contributing states or the international organisation in command as well as local actors, including host state forces and non-state armed groups, e.g. the pro-Kurdish forces in Syria.

In addition to the specific terms of the mandate and the underlying principles of the UN Charter, there are two legal regimes that govern the conduct of military and other security forces across the war-peace spectrum: the law of armed conflict (LOAC) and international human rights law (IHRL). The exact application of these regimes and their interaction remain matters of debate. Yet, the most vexing question is what happens when it is not a state's own forces, but those of a partner that run afoul the standards laid down by the LOAC and IHRL.

This research brief seeks to map and disentangle the relevant rules and legal regimes under which responsibility may arise for states due to abuse committed by their partners in military operations abroad.[1] In doing so, it considers two possible scenarios: The first involves torture and ill-treatment of persons in the custody of partners, clearly outlawed under both regimes; the second concerns unlawful use of force (including long-range targeting) in violation of the applicable LOAC and IHRL rules. As the case may be, such violations can arise in shared detention facilities, following transfers of detainees to partners or on-base training, or during mentoring or joint operations in the field. There are also situations where assisting states are physically removed from the actual scene, e.g. when they provide air-to-air refuelling and air support, or when they engage in intelligence sharing, arms delivery or other forms of assistance (e.g. financial, logistical).

2. General Rules of State Responsibility: Attribution and State Complicity

According to the general rules of international law, states are primarily responsible for their own acts and omissions. It is, therefore, important to consider whether possible abuse by a state can also be attributed to other states participating in the same operation. For a case of attribution to arise, the soldiers perpetrating the alleged violations must usually act under the direction and control of the other state.[2] In view of the loose command-and-control ar-

1) The focus here is on the responsibility of states under international law. This brief will thus not cover domestic law and will only very briefly consider international criminal liability. For an excellent discussion on the LOAC aspect: Cordula Droege and David Tuck, 'Fighting together and international humanitarian law: Ensuring respect for the law and assessing responsibility for violations', ICRC Blog, 17 October 2017, goo.gl/uP9fyz.

2) ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (hereinafter: ARSIWA with Commentaries), UN Doc. A/56/83, 3 August 2001, Art. 6, para. 3 ('the organ must also act in conjunction with the machinery of that State and *under its exclusive direction and control*, rather than on instructions from the sending State', emphasis added); see also: Berenice Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control', 18 Melbourne Journal of International Law (2017), 154-79.

rangements found in most international military operations, this standard will only rarely be met. The picture is, however, more complex when the partner is a non-state armed group, for which attribution may be based on more relaxed control standards.[3]

Responsibility may also arise when the partner's misconduct is not directly attributable, but where a state assists another state in the commission of a wrongful act. For such a case of *state complicity* to arise, the military or logistical support given must make a significant contribution to the wrongful act, though it does not have to be essential.[4] What is more, the assistance must be provided 'with a view to facilitating the commission of that act'.[5] This additional intent requirement can be explained with the chilling effect that a simple requirement based on knowledge alone would have on cooperation among states.[6] The requirement appears to be met at least when the assisting state knows with certainty that its assistance contributes to the misconduct in question.[7] For being considered complicit in the violations of another state, the assisting state must be bound by the same (or corresponding) obligations: While differences continue to exist, states are bound by largely the same rules under the LOAC and IHRL regarding treatment of persons as well as targeting and the use of force.[8] Importantly, however, both regimes do not have to apply to the assisting state's acts for a case of state complicity to arise.

3. Substantive Rules: IHRL, the LOAC and Beyond

In addition to the general rules on state responsibility, the substantive rules under the LOAC and IHRL provide for far-reaching obligations against any form of abuse by partners.

International Human Rights Law

For states like Denmark, it is the European Convention on Human Rights (ECHR) that constitutes the most relevant human rights treaty, not least because of its highly effective European Court of Human Rights. The ECHR provides for negative obligations, i.e. to refrain from any arbitrary interference with a right, and positive obligations, i.e. to protect such rights from abuse

3) Anders Henriksen, *International Law* (OUP 2017), pp. 134-36 (discussing the different control standards required). See also: ECtHR, *Ilaşcu v. Moldova and Russia*, Judgment, 8 July 2004, Application no. 48787/99, paras. 392-94 (considering crucial 'military, economic, financial and political support' and 'decisive influence' sufficient for attributing the non-state actor's actions to the assisting state).

4) ARSIWA with Commentaries, *supra* note 2, Art. 16, para. 5.

5) Ibid., para. 3.

6) Helmut Aust, *Complicity and the Law of State Responsibility* (CUP 2011), pp. 237-38; Crawford, *State Responsibility – The General Part* (CUP 2013), p. 408. Such considerations have, however, no place in relation to non-state actors like armed groups; i.e. complicity for assistance in unlawful acts by such groups is therefore not subject to an intent requirement: Ryan Goodman and Vladyslav Lanovoy, 'State Responsibility for Assisting Armed Groups: A Legal Risk Analysis', 22 December 2016, www.justsecurity.org/35790.

7) E.g.: Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism', Chatham House Report, November 2016, p. 22; Ryan Goodman and Miles Jackson, 'State Responsibility for Assistance to Foreign Forces', 31 August 2016, www.justsecurity.org/32628.

8) The same is arguably the case for non-state armed groups or international organisations, even though this issue remains complex.

by third parties.[9] While this ensures a comprehensive framework of protection at home, the picture is more complex when states act abroad, such as in international military operations. The extraterritorial application of human rights treaties remains particularly challenging due to the so-called jurisdiction clauses that the ECHR and most others contain.[10]

By and large, a state is only expected to ensure the rights of persons abroad that find themselves in the physical custody of or in an area controlled by that state.[11] Where this is the case, the state has to take all necessary measures to protect them from possible abuse by others, including their partners. To be precise, Danish soldiers acting abroad may not transfer detainees to the host state authorities or to other contingents, if there is a real risk of torture or inhumane treatment (i.e. non-refoulement principle).[12] Yet, premised on the exercise of exclusive control, the ECHR cannot be applied so easily to international military operations, where states often share control over an area or facility with other states,[13] or where it is difficult to determine the exact time and circumstances under which a person is held in the custody of a state.[14] This means that many situations of abuse by partners fall outside the scope of the ECHR and other human rights treaties, because the states in question exercise no control at all and provide only very remote forms of assistance, e.g. intelligence sharing, arms delivery or logistical assistance.[15]

9) The ECHR corresponds largely to its universal counterpart: the International Covenant on Civil and Political Rights (ICCPR).

10) Art. 1 ECHR and Art. 2 ICCPR. Note that the Convention against Torture (1985) does not explicitly prohibit torture or inhumane and degrading treatment (the ban itself would rather come from the ECHR or the ICCPR), but only defines both terms, while providing for a number of measures to prevent and punish such acts. In particular, the duty to prevent torture or inhumane and degrading treatment (in Arts. 2 and 16) is limited to 'any territory under its jurisdiction'. By contrast, Art. 1 of the Genocide Convention (1948) requires states to prevent genocide without any specific spatial limitation.

11) ECtHR, *Al-Skeini v. United Kingdom*, Judgement, 7 July 2011, Application no. 55721/07, paras. 133-40.

12) ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Judgement, 2 March 2010, Application no. 61498/08, para. 14 (involving the transfer of detainees – previously held in a British detention facility in Iraq – to Iraqi authorities without prior assurances that they would not face the death penalty or other forms of inhumane treatment).

13) ECmHR, *Hess v. the United Kingdom*, Decision as to the Admissibility, 28 May 1975, Application no. 6231/73, 2 Decisions and Reports of the ECHR (1975), p. 73 (involving a detention facility jointly run by France, the UK, the US and the USSR).

14) Note that an additional, so-called public powers model (*Al-Skeini v. United Kingdom*, *supra* note 11, para. 135) also applies in situations where the high control standards (over territory or persons) are not met due to involvement of different actors (e.g. host state or other partners). Yet, it only covers attributable acts, not omissions. Hence, no positive obligation could possibly arise *vis-à-vis* misconduct by partners.

15) As for customary IHRL, it is highly unlikely that states have accepted more far-reaching positive obligations than under treaty law: Marko Milanović, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy* (OUP 2011), p. 3; David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 (2) EJIL (2005), 171-212, p. 185 ('The duty to respect the right to life is surely one of these [customary] norms. A State's duty to *respect* the right to life (as opposed to its duty to *ensure* that right) follows its agents, wherever they operate', emphasis added).

Law of Armed Conflict

The LOAC provides for similar protective standards as IHRL, albeit more based on status rather than control over territory or persons alone. E.g. occupying powers are obliged 'to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party',[16] including by partners in the field.[17] Likewise, prisoners of war and other detainees may only be transferred to states willing and able to ensure the required treatment.[18] As with IHRL, the real challenge in applying this standard in international military operations is often identification of the detaining power prior to the transfer: Who detained and held the detainee before the transfer took place?

The obligations under the LOAC go much further, though: Common Article 1 of the Geneva Conventions requires states to 'ensure the respect' by *other* states and non-state entities involved in an armed conflict.[19] This includes a *negative* obligation to refrain from encouraging or aiding and assisting in LOAC violations.[20] Beyond any form of assistance, states also have a *positive* obligation to take feasible measures in order to influence the parties to the conflict towards full compliance with the LOAC.[21] These duties do not only apply to those states that are a party to the conflict, but instead to *all* states.[22] As the commentary of the International Committee of the Red Cross (ICRC) makes clear, states are free to choose the measures necessary to prevent violations in case of a 'foreseeable risk' and to stop ongoing violations.[23] Moreover, the fact that a state cooperates closely with a party to the conflict, 'places it in a unique position to influence the behaviour of those forces' towards full compliance with the LOAC.[24]

16) ICJ, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgement, 19 December 2005, para. 178.
17) The brief occupation of Iraq 2003-2004 is the only recent case of a multinational occupation. Which states beyond the US and the UK qualified as occupying powers in Iraq at that time and in which exact area they had to restore and ensure public order and safety are questions that have not been answered conclusively.
18) Art. 12 (2) GC III. The same standard applies to transfers of aliens in the territory of a party to an IAC, Art. 45 (3) GC IV. State practice seems to have extended this underlying non-refoulement principle also to the transfers of other detainees, including in non-international armed conflicts: Cordula Droege, 'Transfers of Detainees – Legal Framework, Non-Refoulement and Contemporary Challenges', 871 International Review of the Red Cross (2008), 669-701; ICRC Commentary GC I (2016), *infra* note 19, Art. 3, paras. 708-16.
19) ICRC, *Commentary on the First Geneva Convention* (CUP 2016), Art. 1, paras. 12.
20) Ibid., paras. 158-63.
21) Ibid., paras. 164-73.
22) Ibid., para. 131. Note that beyond the ordinary requirement of intense fighting a state may also become a party to an ongoing conflict due to the support it provides to one side, without itself being involved in actual fighting: Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 95 IRRC (2013), 561-612, pp. 583-87.
23) ICRC Commentary GC I (2016), *supra* note 19, Art. 1, paras. 164-65.
24) Ibid., para. 167, emphasis added. While the exact scope of Common Article 1 is a matter of controversy, there seems to be wide support that it covers at least situations where a state 'substantially supports the third-party perpetrator'; see e.g.: Monica Hakimi, 'US Responsibility Arising From Russian Violations of the Law of Armed Conflict', 21 September 2016, https://www.justsecurity.org/33075.

Arms Trade Treaty and the UN Human Rights Due Diligence Policy

Adopted in 2013, the Arms Trade Treaty (ATT) provides an additional layer of obligations.[25] It prohibits the transfer of conventional arms, ammunition or parts thereof, if they would be used in the commission of serious LOAC and IHRL violations.[26] To that end, it requires states to *assess* the potential that such arms and items could be used to commit or facilitate serious violations of the LOAC and IHRL. Where such risks exist, states must consider specific mitigating measures, including confidence-building measures or joint programmes. If the risk persists, the transfer may not take place.[27] In sum, the ATT thus covers an important part of the assistance that states may provide to partners in international military operations and beyond.[28]

In March 2013 the UN Secretary-General issued the Human Rights Due Diligence Policy (HRDDP).[29] It is of particular relevance to national troops (e.g. from Denmark) deployed to UN peace operations cooperating closely with host state forces, such as in Mali.[30] Along the same lines as the ATT, the HRDDP requires an assessment of the potential risks in providing support. If there is – despite mitigating measures – a risk of grave violations of the LOAC and IHRL, the support must be withheld.[31]

Comparison

IHRL provides for far-reaching obligations to protect individuals from abuse by others: It does not only prohibit any form of assistance to the perpetrator, but also the failure to prevent and stop such abuse. As shown above, however, these positive obligations do not readily apply to many scenarios in international military operations abroad, due to a lack of jurisdiction. The rule on state complicity is thus of enormous importance with regard to filling these responsibility gaps. In other words, even if a state's IHRL obligations are not directly applicable, that

25) The ATT entered into force in 2014 and so far has 94 state parties, including most OECD countries. The US is only a signatory, while Canada is currently in the process of preparing for accession. For further information: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en.

26) Art. 6 (3) ATT, emphasis added.

27) Art. 7 ATT.

28) As it covers only conventional arms and items, the ATT does not restrict the provision of facilities (e.g. landing strips or ports), intelligence and targeting information or other forms of support that may potentially contribute to the commission of LOAC and IHRL violations by partners.

29) UNSG, 'Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces' (hereinafter: HRDDP), 5 March 2013, A/67/775-S/2013/110. See also: Helmut Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', 20 (1) JCSL (2015), 61-73.

30) Issued by the UN Secretary-General, the HRDDP is not legally binding *stricto sensu*. Yet, in the case of Mali it has been specifically mentioned in the UN SC resolutions providing the mandate for MINUSMA: e.g. S/RES/2364, 29 June 2017, para. 26.

31) Paras. 16-17.

state may nevertheless incur responsibility for contributing significant assistance to the commission of IHRL violations by a partner state in the field.

By contrast, the LOAC provides for a tightly-knit framework that captures the full spectrum of possible scenarios. State complicity is therefore of only little relevance in armed conflict situations. Both the ATT and the HRDDP reflect a significant part of the duty to ensure respect for the LOAC, but they extend this framework, including its risk assessment requirement, to the field of IHRL, even where the latter is not applicable in relation to the transferring or assisting state.

4. Recommendations: Risk Assessment and Mitigation Measures

As outlined above, states generally have to abstain from any form of assistance once they become aware of the commission of IHRL and LOAC violations by their partners. Under certain circumstances they even have to actively and continuously assess the risk of such misconduct occurring[32] based on the partner's previous compliance record, including the failure to hold perpetrators accountable. Denmark and other nations are thus advised to make such risk assessments a standard procedure for any form of military cooperation they may engage in. In particular, risk assessments may help identify particularly problematic partners and detect structural deficiencies on the part of the partner, which can be addressed by tailored mitigation measures, e.g. capacity-building and training.[33] Ideally, instruction of the applicable legal rules under IHRL and the LOAC should be at the core of such measures, including tactical training with weapons. It is noteworthy that training and other activities towards better compliance with international law do not fall under 'support' for the purpose of the above-mentioned HRDDP.[34] In other words, such activities can continue even when other forms of support must be withheld due to the risk of possible violations.

When assisting their partners, states should condition their support to compliant behaviour.[35] E.g. they should only provide weapons, logistical assistance, intelligence on targets or air support, if the partner agrees to comply with the required targeting and use-of-force standards. Likewise, assisting states may decline to participate in joint cordon-and-search operations or to transfer detainees to their partner until reliable assurances have been given regarding the treatment of the detainees. The European Court of Human Rights has drawn up a detailed list for assessing the reliability of diplomatic assurances.[36] Conditionality will only work with

32) Such obligations derive from the duty to ensure respect by others under the LOAC as well as from the ATT and HRDDP. Due to the limited extraterritorial scope of such IHRL, its risk assessment duties only apply to situations involving the exercise of jurisdiction abroad.

33) Brian Finucan, 'Partners and Legal Pitfalls', 92 International Law Studies (2016), 407-31, p. 427; Moynihan (2016), *supra* note 7, pp. 42-43; ICRC Commentary GC I (2016), *supra* note 19, Art. 1, para. 181.

34) HRDDP, para. 9.

35) Finucan (2016), *supra* note 33, pp. 427-29; ICRC Commentary GC I (2016), *supra* note 19, Art. 1, para.181; Moynihan (2016), *supra* note 7, pp. 41-42.

36) ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Judgement, Application no. 8139/09, 17 January 2012, para. 189.

effective monitoring.[37] This can take the form of visits by the ICRC or other humanitarian organisations, e.g. where the post-transfer treatment of detainees is in doubt. Monitoring may also involve personnel of the assisting state itself, either on an *ad-hoc* basis or as embedded units for a longer period of time.

To ensure better compliance, states can also take a more leading role on the ground, e.g. in the form of joint planning of operations.[38] Yet, where such enhanced presence involves a significant degree of command authority over the partner, there is an increased risk of attribution, whereby the assisting state would be held directly responsible for any violations by its partner.[39] Hence, states have to consider carefully whether it is better to get more involved or to withdraw from the operation and cease all forms of assistance. In such cases, states should focus on securing evidence for possible future investigations, either by themselves or other actors.

5. Outlook

As outlined above, states have far-reaching obligations to *protect* and *not to assist* in relation to misconduct by their partners, deriving from the LOAC and IHRL itself. This framework is significantly complemented by the ATT and the HRDDP as well as the general rule on state complicity, provided that the required intent requirement is met. Yet, these obligations do not necessarily translate into an effective system of accountability for victims that exposes states to legal action for breaches of their obligations. Indeed, even where avenues for legal proceedings are available (e.g. before the International Court of Justice), interested states may refrain from using them for merely political reasons. It is thus far more likely that cases are initiated by victims or activists before domestic courts of the relevant states. The success of such claims depends largely on the way the domestic legal system treats liability claims against the state, especially when they are based on non-incorporated treaty provisions or customary law.

The most effective accountability mechanisms for possible victims are provided by human rights treaties such as the ECHR, which come with their own courts or quasi-judicial bodies and allow for individual complaints. Where applicable, IHRL includes far-reaching duties to protect without the need to clarify whether the perpetrator of the abuse violated international law or was even bound by it. Yet, many situations are not covered: Where the state in question is spatially removed from the abuse itself, its assistance or mere inaction will, at least for now, not trigger its positive IHRL obligations.[40] Nevertheless, state officials should be particularly careful, as they may incur individual criminal liability for aiding and abetting in international

37) Finucan (2016), *supra* note 33, p. 429; Moynihan (2016), *supra* note 7, pp. 43-44.
38) ICRC Commentary GC I (2016), *supra* note 19, Art. 1, para.181.
39) Finucan (2016), *supra* note 33, p. 430.
40) This is why Miles Jackson called for a broadening of the concept of jurisdiction to include also cases of state complicity not otherwise covered: Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', 27 (3) EJIL (2016), 817-30. It is, however, unlikely that the ECtHR will heed this call in the near future. Indeed, one would expect that the Court should first address the responsibility of states for their own IHRL violations abroad by extending at least the negative obligations to all forms of extraterritorial conduct.

crimes.[41] To be precise, there is no need for sharing the purpose under international criminal law: Knowledge that the support will facilitate the commission of war crimes, crimes against humanity or even genocide will usually suffice.[42] Most importantly, immunity generally enjoyed by state officials does not necessarily shield them from prosecution for these international core crimes.[43]

Beyond questions of accountability, there is a need for further research in view of increasingly remote forms of aid and assistance that states may provide to their military partners, including through drone technology, exchange of intelligence and cyber operations. Yet, new technologies may also play an important role in operationalising risk assessments and mitigation actions. Indeed, they may be used for documenting possible abuse by partners and for recording relevant communication with them. What is more, enhanced surveillance technology is particularly useful for monitoring purposes. Ultimately, where interventions with the partner fail to stop the abuse or to hold the perpetrators accountable, digital documentation may be passed on as evidence for possible investigations and prosecutions in international fora.

41) Ryan Goodman, 'The Law of Aiding and Abetting (Alleged) War Crimes', 1 September 2016, www.justsecurity.org/32656. More generally: Miles Jackson, *Complicity in International Law* (OUP 2015), pp. 69-85; Marina Aksenova, *Complicity in International Criminal Law* (Hart 2016), pp. 103-11.

42) Hence, under customary law, 'aiding and abetting' is broader than Art. 25 (3) of the ICC Statute ('for the purpose of facilitating the commission of such a crime'). But 'aiding or abetting' requires a 'substantial effect' on the commission of the crime, which is a slightly higher threshold than under the rule of state complicity: Beth Van Schaack and Alex Whiting, 'Understanding Complicity: When the US Makes a "Substantial Contribution" to War Crimes Committed by Foreign Partners', 26 January 2017, www.justsecurity.org/36748.

43) Personal immunity continues to apply to heads of state, heads of governments and foreign ministers, shielding them from any possible prosecution abroad, regardless of the severity of the crimes.