

## Partnered Operations and the Positive Duties of Co-Parties

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### Abstract

A key issue in partnered operations is the extent to which partners have obligations under international law as regards each other's conduct. For partnered operations in situations of armed conflict, this issue has generated a rich and vivid debate on the existence of a duty to ensure respect for international humanitarian law (IHL) by one's partners, and in particular, whether this duty would require taking *positive* action. Rather than weighing in on the general question of whether *all* States bear such duties, this article sheds light on one aspect that this debate has tended to overlook. The article specifically looks at the situation in which multiple parties are engaged in the same armed conflict alongside one another against a common adversary—here labelled 'co-parties'. It investigates which positive obligations these parties have as regards each other's conduct. The central argument is that co-parties in an armed conflict have multiple complementary sets of duties to take positive steps vis-à-vis the conduct of their fellow co-parties. The resulting network of duties reflects the central role of the parties to the conflict to ensure that armed conflicts are carried out in accordance with the protective purposes of IHL. Built into the established structure of the legal framework regulating armed conflict, the account of the duties of co-parties presents a more refined conception to the allocation of obligations under IHL in cooperation settings, which, if implemented, may contribute to addressing the protection challenges raised by partnered operations.

### 1. Introduction

In their fight against the Houthi rebels in Yemen, the Saudi-led coalition could for some time count on a wide range of military support from Western States, and the most extensive support probably came from the US. In addition to assisting with the air-to-air refuelling of fighter jets, and the provision of relevant targeting intelligence,<sup>1</sup> members of the US Air Force were embedded with the 'Coalition

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<sup>1</sup> C Daugirdas and J Mortenson, 'United States Strikes Houthi-Controlled Facilities in Yemen, Reaffirms Limited Support for Saudi-Led Coalition Notwithstanding Growing Concerns About Civilian Casualties' (2017) 111 *AJIL* 523.

Command Center' in Riyadh to help the coalition coordinate its military operations.<sup>2</sup> As the massive international humanitarian law (IHL) violations by the Saudi-led coalition became increasingly apparent,<sup>3</sup> questions about the US' legal obligations in relation to the conduct of its partners in Yemen arose.<sup>4</sup> Likewise, following Russia's military intervention alongside Syrian government forces, Russia was publicly criticised for not taking steps to prevent Syria from using prohibited types of weapons, and from deliberately targeting civilians.<sup>5</sup> Similar questions also existed for the members of the multinational coalition which took action against the 'Islamic State in Iraq and the Levant' (ISIL) as part of Operation Inherent Resolve (OIR).<sup>6</sup>

These, and other similar examples, illustrate a key issue that frequently surfaces in partnered operations, namely the extent to which partners have obligations under international law concerning, not only their own conduct, but also the conduct of their partners. For partnered operations in situations of armed conflict, this issue has generated a rich and vivid debate about the existence, as well as the scope of one's duty to ensure respect for IHL by one's partners. Particular controversy revolves around the question as to whether partners must not only *negatively* refrain from aiding, assisting, and encouraging each other in violating IHL, but whether partners must also take *positive* action to ensure respect for IHL by one another.

Rather than address the general question as to whether *all* States bear such duties, this article specifically enquires into what positive obligations multiple parties have vis-à-vis each other's conduct while involved in the same armed conflict against a common adversary.

Before exploring this issue, two clarifications are necessary. The first pertains to a matter of terminology. This article refers to parties on the same side of an

<sup>2</sup> US Congress, 'Joint Resolution: To direct the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress' (SJ Res 7) (3 January 2019); see also US, 'Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen' 25 March 2015 <<https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>> accessed 15 August 2021.

<sup>3</sup> J Galbraith, 'Congress Signals Concern Over U.S. Role in Aiding Saudi Arabia's Activities in Yemen' (2019) 113 *AJIL* 159, 160.

<sup>4</sup> O Hathaway and others, 'Yemen: Is the U.S. Breaking the Law?' (2019) 10 *HarvNSJ* 1 67–71; J Hursh, 'International Humanitarian Law Violations, Legal Responsibility, and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale' (2020) 7 *JUOFIL* 122, 147–54.

<sup>5</sup> J Borger, 'Russia may Share Criminal Responsibility for Assad's use of Barrel Bombs, UK Says' *The Guardian* (30 September 2015) <[www.theguardian.com/world/2015/sep/30/russia-syria-barrel-bombing-international-law-uk](http://www.theguardian.com/world/2015/sep/30/russia-syria-barrel-bombing-international-law-uk)> accessed 25 November 2020 (quoting the UK Foreign Secretary as considering Russia to bear an obligation to '[a] least stop [violations of international humanitarian law] from happening'.).

<sup>6</sup> See also below Section 3.A.(i).

armed conflict as ‘co-parties’, rather than as ‘co-belligerents’.<sup>7</sup> This is because the term ‘co-parties’ better aligns with the general terminology of contemporary IHL, which has to a large extent—though not entirely—replaced the notions of ‘war’ and ‘belligerents’ with ‘armed conflict’ and ‘parties to the conflict’.<sup>8</sup> Moreover, the term ‘co-parties’ avoids connotations associated with any particular historical or contemporary understanding of the meaning and implications of ‘co-belligerency’.<sup>9</sup> ‘Party’ or ‘co-party’ to the conflict is used here in contradistinction to ‘third State’, which in this article denotes a State that is not a party to the respective armed conflict.<sup>10</sup>

The second clarification concerns the scope of the article. Its argument covers international armed conflicts (IACs) as well as non-international armed conflicts (NIACs). Although the argument in principle applies to all types of collective entities that can be parties to these armed conflicts, be they States, non-State armed groups, or international organisations, the main focus is on the States. Accordingly, this article does not specify potential differences in the shape of the positive duties of co-parties other than States. This article also does not address the legal criteria for identifying *how* States, armed groups, or international organisations become (co-)parties to an armed conflict.<sup>11</sup> This

<sup>7</sup> See M Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 531 (‘[A] “cobelligerent” is a fully fledged belligerent fighting in association with one or more belligerent powers.’)

<sup>8</sup> See generally A Clapham, *War* (OUP 2021) 30–34, 234. For a synonymous use of the terms ‘belligerent’ and ‘party to an armed conflict’ see T Gill, ‘Belligerents’ in D Džuić and N Pons (eds), *The Companion to International Humanitarian Law* (Brill 2018) 211.

<sup>9</sup> R Ingber, ‘Co-belligerency’ 42 *YJIL* 67.

<sup>10</sup> On the possibility of international organisations as addressees of IHL where they are not parties to the conflict see below n 117 and the accompanying text. On different possible conceptions of the notion of third parties in international law see generally C Chinkin, *Third Parties in International Law* (Clarendon Press 1993) 7 ff.

<sup>11</sup> See generally eg T Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’ (2013) 95 *IRRC* 561, 583–95; T Ferraro, ‘The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict’ (2015) 97 *IRRC* 1227, 1230–33; N Lubell, ‘Fragmented Wars: Multi-Territorial Military Operations against Armed Groups’ in W Williams and C Ford (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (OUP 2019) 22–26; R Bartels, ‘When Do Terrorist Organisations Qualify as “Parties to an Armed Conflict” under International Humanitarian Law?’ (2017) 56 *MLLWR* 451; R Van Steenberghe, ‘Les interventions militaires étrangères récentes contre le terrorisme international. Seconde partie: droit applicable (jus in bello)’ (2017) 63 *AFDI* 37, 44–57; R Van Steenberghe and P Lesaffre, ‘The ICRC’s “support-based approach”: A Suitable but Incomplete Theory’ (2019) 59 *QIL*, *Zoom-in* 5; T Gill, ‘Some thoughts on the ICRC Support Based Approach’ (2019) 59 *QIL*, *Zoom-in* 45; B Maganza, ‘Which Role for Hybrid Entities Involved in Multi-parties NIACs? Applying the ICRC’s Support-based Approach to the Armed Conflict in Mali’ (2019) 59 *QIL* 25; N Verlinden, ‘“Are we at war?” State Support to Parties to Armed Conflict: Consequences under *jus in bello*, *jus ad bellum* and Neutrality Law’ (PhD, KU Leuven 2019) 103–73.

identification, on its own terms, can raise complex legal challenges, particularly in cooperation settings—just consider the controversies about whether the involvement of the US alongside the Saudi-led coalition indeed made the US a co-party to the conflict with the Houthi rebels.<sup>12</sup> These issues are beyond the scope of this article. Instead, the premise is that there can be situations in which multiple cooperating States, armed groups, or international organisations qualify as parties on the same side of one and the same armed conflict.

The central argument of the article is that co-parties have duties to take positive steps vis-à-vis the conduct of their fellow co-parties in an armed conflict. These duties stem from multiple legal bases. On the one hand, there are obligations addressed to the parties in the realms of the conduct of hostilities<sup>13</sup> and the protection of individuals,<sup>14</sup> which encompass positive duties regarding fellow co-parties. On the other hand, the general obligation to ensure respect for IHL requires that co-parties take measures to ensure that their fellow co-parties also respect IHL. These different sets of duties of co-parties complement each other to form a robust network of positive duties vis-à-vis fellow co-parties. The network reflects that the parties to the conflict have the central role to ensure that armed conflicts are carried out in accordance with the protective purposes of IHL.

This article argues that a better understanding of the positive duties among co-parties is crucial for IHL to effectively fulfil its protective purposes in cooperative settings that characterise partnered operations. At a general level, accounting for the duties of co-parties presents a more refined conception of the allocation of obligations under the legal framework that regulates armed conflict. This conception is particularly relevant to partnered operations, as it may help mitigate

<sup>12</sup> Hathaway and others (n 4) 59 (‘[I]t is possible that such support is sufficient to involve the U.S. in the NIAC between those states and the Houthis.’); contra Hursh (n 4) 141. For the ambiguity of the US itself on this point see W Strobel and J Landay, ‘Exclusive: As Saudis Bombed Yemen, U.S. Worried about Legal Blowback’ *Reuters* (10 October 2016) <[www.reuters.com/article/us-usa-saudi-yemen-idUSKCN12A0BQ](http://www.reuters.com/article/us-usa-saudi-yemen-idUSKCN12A0BQ)> accessed 3 October 2021 (‘U.S. government lawyers ultimately did not reach a conclusion on whether U.S. support for the campaign would make the United States a “co-belligerent” in the war under international law (...).’); S Oakford, ‘One American’s Failed Quest to Protect Civilians in Yemen’ *The Atlantic* (17 August 2018) <<https://perma.cc/PM9Q-6H3V>> accessed 3 October 2021 (‘In an email, the Pentagon spokesperson Rebecca Rebarich wrote that the United States “is not a party to the Yemeni civil war and is not investigating strikes conducted by the Saudi-led coalition.”’).

<sup>13</sup> Eg the obligation to take precautions in military operations (art 57(1) API; J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law*, vol I (CUP 2005) r 15 (hereinafter ICRC CIHL Study)), see below Section 3.A.(i).

<sup>14</sup> Eg the obligations to search for, collect, and care for wounded, sick, shipwrecked, missing, or dead individuals (art 15 GCI, 18 GCII, 16 GCIV, 33 API; ICRC CIHL Study rr 109, 112–14, 116–17); see below Section 3.A.(ii).

the risk of diffuse responsibilities in cooperative settings.<sup>15</sup> At the same time, the account traces how party status translates into positive obligations that must be fulfilled by cooperation. In that sense, this article suggests a way in which the international legal regulation of partnered operations may harness the potential protection benefits of cooperation in armed conflicts.<sup>16</sup>

To make its argument, the article proceeds as follows. Section 2 situates the argument within the context of the broader debate on the scope of the duty to ensure respect by others, while explaining how the persisting controversies can best be understood in light of the distinct respective legal positions of parties to an armed conflict and third States. This sets the scene for the central claim of the article, which is advanced in Sections 3 and 4. Section 3 argues that different sets of obligations of co-parties contain a positive duty dimension vis-à-vis fellow co-parties. It shows how these duties complement each other. Section 4 demonstrates the implications of the resulting network of duties and their contribution to a more refined understanding of the allocation of duties in partnered operations. Section 5 concludes this article.

## 2. Setting the scene: accounting for controversies over the duty to ensure respect for IHL by others

The starting point for the argument is the debate on the duty to ensure respect for IHL by others under Common Article 1 (CA1) and customary international law.<sup>17</sup> This ‘external’ element of the duty to ensure respect could comprise duties in two dimensions. First, States are under a *negative* duty not to aid, assist, or encourage violations of IHL by the parties to the conflict.<sup>18</sup>

<sup>15</sup> On this risk see generally eg ICRC, ‘Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War’ (April 2021) 21.

<sup>16</sup> On such benefits see generally *ibid* 24–28.

<sup>17</sup> ICRC CIHL Study r 144.

<sup>18</sup> See eg *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14 [220], [255]; ICRC (ed), *Commentary on the Third Geneva Convention* (CUP 2020) [191]–[192]; R Geiß, ‘The Obligation to Respect and to Ensure Respect for the Conventions’ in A Clapham, P Gaeta, and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 130; T Ruys, ‘Of Arms, Funding and “Non-lethal Assistance”—Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) 13 *CJIL* 13, 51; H Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 389; H Aust, ‘Complicity in Violations of International Humanitarian Law’ in H Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015) 458; M Milanovic, ‘Intelligence Sharing in Multinational Military Operations and Complicity under International Law’ (2021) 97 *ILS* 1269, 1326; though see M Schmitt and S Watts, ‘Common Article 1 and the Duty to “Ensure Respect”’ (2020) 96 *ILS* 674 (rejecting an external element of the duty to ensure respect altogether); V Robson, ‘The Common Approach to Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions’ (2020) 25 *JCSL* 101, 103 (considering the negative external duty dimension as a mere corollary of the obligation to perform the Geneva Conventions in good faith).

Secondly, there could be a *positive* external duty that demands affirmative measures to prevent or terminate IHL violations.

The positive aspect of the duty to ensure respect by others is controversial. In its updated Commentaries to the Geneva Conventions, the International Committee of the Red Cross (ICRC) takes a firm position in favour of such positive duties.<sup>19</sup> This position enjoys considerable support in some parts of the scholarship<sup>20</sup> and is affirmed by some instances of international practice.<sup>21</sup> Other parts of the scholarship, however, continue to reject such duties<sup>22</sup> and they also confront persisting resistance from a number of States. At the latest International Conference of the Red Cross and Red Crescent Movement in late 2019, some States were reportedly strongly opposed to the ICRC's views on this point.<sup>23</sup> In 2016, the then Legal Adviser to the US Department of State stated that the US 'do[es] not share this expansive interpretation of Common Article 1'.<sup>24</sup> The US

<sup>19</sup> ICRC (ed), *GCIII Commentary* (n 18) [197].

<sup>20</sup> See eg L Condorelli and L Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances"' in C Swinarski (ed), *Etudes et essais sur le droit Humanitaire et sur les Principes de la Croix-Rouge en l'honneur de Jean Pictet* (Martinus Nijhoff 1984) 24; B Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 *GYIL* 498, 505; K Dörmann and J Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 96 *IRRC* 707, 722; Geiß (n 18) 123; A Breslin, 'A Reflection on the Legal Obligation for Third States to ensure Respect for IHL' (2017) 22 *JCSL* 5, 6; E Massingham and A McConnachie, 'Common Article 1: An Introduction' in E Massingham and A McConnachie (eds), *Ensuring Respect for International Humanitarian Law* (Routledge 2020) 2.

<sup>21</sup> See eg EU Council, 'User's Guide to Council Common Position 2008/944/CFSP' 16 September 2019 (12189/19) [2.13]; *Wall* (Advisory Opinion) Written Statement League of Arab States (January 2004) [1.18].

<sup>22</sup> See eg F Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 *YIHL* 3, 54; C Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble' (2010) 21 *EJIL* 125, 128–29; Robson (n 18) 103; Schmitt and Watts (n 18) 679; R Kolb, 'Commentaires Iconoclastes sur l'Obligation de Faire Respecter le Droit International Humanitaire Selon l'Article 1 Commun des Conventions de Geneve de 1949' (2013) 46 *RBDI* 513, 518–19.

<sup>23</sup> H Aly, 'Negotiations at Red Cross Conference Shrouded in Global Politics' (The New Humanitarian, 13 December 2019) <[www.thenewhumanitarian.org/news/2019/12/13/Red-Cross-IHL-conference-global-politics](http://www.thenewhumanitarian.org/news/2019/12/13/Red-Cross-IHL-conference-global-politics)> accessed 18 November 2020. This—apparently successful—resistance is reflected in the language of the resolution addressing this issue, which only refers to States' 'obligation to respect IHL', bereft of even referring to 'ensuring respect' at all ('Resolution—Bringing IHL home' (ICRC Conference 2019) 33IC/19/R1 Preamble).

<sup>24</sup> B Egan, 'Keynote Address' (2016) 110 *ASIL Proceedings* 300, 307 (apparently confining this criticism to *positive* external duties while accepting *negative* external duties: '[a]s a matter of international law, we would look to the law of State responsibility and our partners' compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners.').

Department of Defense reiterated this view in 2019<sup>25</sup> and Australia joined the US in criticising the ICRC's view on positive external duties by Australia.<sup>26</sup> The Danish Military Manual includes a section on CA1, which rather conspicuously, refers only to *internal* positive duties.<sup>27</sup> In the *Turp* case, the Canadian government went even further by arguing, inter alia, that CA1 was not at all applicable to States with no involvement in the conflict, and that the provision would not prescribe specific measures be taken.<sup>28</sup> The Federal Court endorsed these views.<sup>29</sup> Moreover, some of the practice that explicitly supports an external dimension of the duty to ensure respect is explicitly limited to negative duties,<sup>30</sup> or it does simply not specify whether the external dimension would comprise positive obligations.<sup>31</sup> Similarly, in the *Wall* Advisory Opinion, the ICJ found that 'all the States parties to [GCIV] are under an obligation . . . to ensure compliance by Israel with international humanitarian law',<sup>32</sup> leaving an open question as to whether this

<sup>25</sup> 'Remarks by Department of Defense General Counsel' 28 May 2019 <[www.justsecurity.org/64313/remarks-by-defense-dept-general-counsel-paul-c-ney-jr-on-the-law-of-war/](http://www.justsecurity.org/64313/remarks-by-defense-dept-general-counsel-paul-c-ney-jr-on-the-law-of-war/)> accessed 25 November 2020 ('The United States has been very clear that . . . we do not agree with this legal interpretation.').

<sup>26</sup> J Reid, 'Ensuring Respect: the Role of State Practice in Interpreting the Geneva Conventions' (ILA Reporter, 2016) <<http://ilareporter.org.au/2016/11/ensuring-respect-the-role-of-state-practice-in-interpreting-the-geneva-conventions-john-reid/>> accessed 18 November 2020. Reid was then Head of the Office of International Law at the Commonwealth Attorney-General's Department.

<sup>27</sup> Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations 2016* (English Version 2019) 641–42 (hereinafter *Danish Manual*) ('Furthermore, the Geneva Conventions and Additional Protocol I contain a Common Article 1, which requires the States Parties to respect and ensure respect for these conventions in all circumstances. This involves, among other things, an implementation obligation and an obligation to ensure that the conventions are actually observed by one's own forces.').

<sup>28</sup> *Daniel Turp v Canada* (Minister of Foreign Affairs) [2017] FC 84 [21] (also denying the applicability of CA1 to NIACs).

<sup>29</sup> *ibid* [72]. See already *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FCR 791 33.

<sup>30</sup> The Netherlands, *Parliamentary Questions (Appendix) 1177 (2015-2016)* 18 January 2016 <<https://zoek.officielebekendmakingen.nl/ah-tk-20152016-1177.html>> accessed 10 October 2021 (quoting the Minister of Defence stating in parliament that, with a view to the Netherlands' IHL obligations, knowledge that a partner uses shared information to commit IHL violations might entail a decision to refrain from sharing); J Charpentier, 'Pratique Française de Droit International' (1977) 23 AFDI 1012, 1017 (reporting that France reminded Algeria of its obligation not to assist IHL violations by others).

<sup>31</sup> For detailed reviews see A Frutig, *Die Pflicht von Drittstaaten zur Durchsetzung des humanitären Völkerrechts nach Artikel 1 der Genfer Konventionen von 1949: Auf dem schmalen Grat zwischen Recht und Moral* (Helbing Lichtenhahn 2009) 88–119; Dörmann and Serralvo (n 20) 716–22.

<sup>32</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [159].

duty would entail taking positive measures or only negatively prescribe not to assist IHL violations.<sup>33</sup>

A key reason that may explain why positive duties to ensure respect by others face particular opposition is that imposing such duties on *all* States is perceived to create tensions with the overall structure of the allocation of obligations in armed conflict. This structure is based on a critical distinction between two sets of duty bearers—the parties to an armed conflict and third States.<sup>34</sup>

The international legal framework regulating armed conflict ascribes the parties with the primary role to ensure that armed conflicts are carried out in accordance with its protective purposes, a role that the UN Security Council, for example, tirelessly emphasises.<sup>35</sup> Accordingly, a specific set of obligations is imposed on the parties, both under the law relating to the means and methods of warfare and the law relating to the protection of individuals.<sup>36</sup> In addition, the Security Council frequently addresses parties to an armed conflict and imposes obligations which at times extend beyond their IHL treaty or customary obligations.<sup>37</sup>

By contrast, under international law third States are generally required to stay detached from conflicts.<sup>38</sup> The posture of detachment has traditionally been embodied in the law of neutrality with its duties to abstain from assisting the parties<sup>39</sup> and to prevent them from using neutral territory for purposes of a conflict.<sup>40</sup> Although the law of neutrality now plays a less prominent role, it arguably still applies to IACs<sup>41</sup>

<sup>33</sup> This can be contrasted with the *Armed Activities* case, where the Court clearly found that positive obligations to ensure respect for IHL by others flowed from art 43 of the Hague Regulations, albeit for the occupying power itself, rather than for all third States under CA1 (*Armed Activities (DRC v Uganda)* (Merits) [2005] ICJ Rep 168 [178]–[179]).

<sup>34</sup> This article is only concerned with obligations borne by collective entities and does not deal with obligations addressed at individuals.

<sup>35</sup> See eg UNSC Res 2475 (20 June 2019) UN Doc S/RES/2475, Preamble.

<sup>36</sup> See in more detail below Section 3.

<sup>37</sup> UNSC Res 2532 (1 July 2020) UN Doc S/RES/2532 [1]–[2] (adopted in the course of the COVID-19 pandemic); UNSC Res 2540 (28 August 2020) UN Doc S/RES/2540 [9] (Somalia); UNSC Res 2459 (15 March 2019) UN Doc S/RES/2459 [1] (South Sudan); UNSC Res 2439 (30 October 2018) UN Doc S/RES/2439 [6].

<sup>38</sup> Some obligations are nonetheless addressed to parties and third States alike, for example the duty to allow and facilitate humanitarian relief in IACs (art 72(2), (5) API). Treaty provisions do not address whether third States have obligations in situations of NIACs to allow and facilitate humanitarian assistance and the customary rule as formulated by the ICRC CIHL Study is also addressed only toward the parties to the conflict (see ICRC CIHL Study r 55).

<sup>39</sup> art 6 HC XIII.

<sup>40</sup> arts 2–5 HC V; art 5 HC XIII; art 42 Hague Air Rules.

<sup>41</sup> To NIACs, neutrality law can be applied on a discretionary basis if a third State recognises the non-State party's belligerency, see R McLaughlin, *Recognition of Belligerency and the Law of Armed Conflict* (OUP 2020) 225–40 (concluding that State practice since 1949 suggests that this may still be possible). The view that the principle of non-intervention in conflicts qualifying as 'civil wars' equally prohibits third States to assist *either* party remains controversial (in favour see Institut de Droit International, 'The Principle of Non-Intervention in Civil Wars – Resolution' (14 August 1975) art 2(1);



today,<sup>42</sup> and it co-exists with the UN Charter system of collective security.<sup>43</sup> In any event, the underlying notion of abstention required of third States with respect to an armed conflict has subtly informed the structures of contemporary international law. For example, this can be seen, albeit in a nuanced fashion, in complicity rules, which prohibit from contributing to violations of international law, including in armed conflicts.<sup>44</sup>

This posture of abstention aligns seamlessly with construing the duty to ensure respect by others in terms of *negative*, complicity-type duties not to aid, assist or encourage IHL violations by parties. Conversely, demanding that third States take *positive* steps to ensure respect for IHL by the parties would mean a significant rupture with the general detachment required of third States.<sup>45</sup> These frictions can arguably explain the unease that such propositions continue to face in scholarship, as well as the reluctance and even rejection by certain States.

The point of this article is not to take a stance on whether *third States* have such positive external obligations. Instead, the article takes the unsettled state of the debate and the underlying structural tensions as a point of departure for

for discussion see eg C Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (Hart 2020) 92–96; E de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 76–83; Ruys (n 18) 40–45; Z Vermeer, ‘Intervention by Invitation and the Alleged Prohibition of Military Assistance to Governments in Civil Wars’ (DPhil, University of Oxford 2018); C Nowak, *Das Interventionsverbot im Bürgerkrieg: Darstellung eines Wandels durch die Bürgerkriege in Libyen, Syrien, Irak, Jemen und Ukraine seit 2011* (Peter Lang 2018) 165–76).

<sup>42</sup> See eg recent pronouncements of States considering the law of neutrality applicable to cyberspace (France, ‘Ministère des Armées: Droit International Appliqué aux Opérations dans le Cyberspace’ 10 September 2019 <[www.defense.gouv.fr/content/download/565895/9750877/file/Droit+internat+applique+aux+operations+Cyber+espace.pdf](http://www.defense.gouv.fr/content/download/565895/9750877/file/Droit+internat+applique+aux+operations+Cyber+espace.pdf)> accessed 4 October 2020 17; the Netherlands, ‘Letter of the Minister of Foreign Affairs to Parliament’ 5 July 2019 (Kamerstuk 33 694 Nr 47) <<https://zoek.officielebekendmakingen.nl/kst-33694-47.html>> accessed 4 October 2020; Italy, ‘Italian Position Paper on “International Law and Cyberspace” November 2021 <[www.esteri.it/mae/resource/doc/2021/11/italian\\_position\\_paper\\_on\\_international\\_law\\_and\\_cyberspace.pdf](http://www.esteri.it/mae/resource/doc/2021/11/italian_position_paper_on_international_law_and_cyberspace.pdf)> accessed 3 November 2021 14; see also Danish Manual 60; US Department of Defense, Law of War Manual (June 2015, updated December 2016) 1019–20 (hereinafter US Manual); see also ILC, Draft Articles on the Effects of Armed Conflicts on Treaties Art 17; ILC Committee on the Use of Force, ‘Final Report on the Meaning of Armed Conflict in International Law’ (2010) 1, 4, 33.

<sup>43</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [89]; *Namibia* (Advisory Opinion) [1971] ICJ Rep 16 Sep Op Ammoun [13]–[16]; H Kelsen, ‘Théorie du Droit International’ (1953) 84 *RCADI* 1, 59–60; for a concise analysis of the extent to which neutrality law continues to apply in different possible scenarios of action taken by UN Security Council, see J Upcher, *Neutrality in Contemporary International Law* (OUP 2020) 129–41.

<sup>44</sup> See ARS 16, 41; ARIO 14, 41(2), as well as the broader ‘network’ of specific complicity rules in sub-fields of international law (Aust, *Complicity* (n 18) 376 ff).

<sup>45</sup> While the law of neutrality also imposes positive duties on neutrals to prevent the parties from using neutral territory (see arts 2–5 HC V, 5–6 HC XIII), these are solely aimed at safeguarding the neutral’s detachment from the conflict.

arguing that the *parties* to a conflict do have obligations to take positive measures regarding the conduct of others, namely vis-à-vis their fellow co-parties in the same armed conflict. Indeed, as will be seen in the next section, the duties of co-parties rest on firmer legal ground and reach more widely than they would for third States.

### **3. Legal bases for different sets of positive duties of co-parties vis-à-vis their partners' conduct in armed conflict**

Two sets of obligations provide the legal bases for the duties of co-parties in relation to conduct by their fellow co-parties. First, duties to take positive steps vis-à-vis the conduct of co-parties flow from specific obligations addressed to the parties to the conflict in the realms of the conduct of hostilities and the protection of individuals. Secondly, such duties can be derived from the general obligation to respect and ensure respect for IHL in its specific application to parties vis-à-vis their fellow co-parties. The two sets of duties differ in their scope and content and thus complement each other to form a web of obligations to take positive steps vis-à-vis the conduct of one's partners. This network of obligations defines the relationship between co-parties as structurally apart from that of third States towards the parties.

#### ***A. Duties with respect to fellow co-parties flowing from specific party obligations***

There are obligations addressed to the parties to armed conflicts which, in their application to co-parties in multi-party conflict settings, can be understood to entail positive duties with respect to the conduct of one's fellow co-parties. This is the case both as regards the conduct of hostilities and the protection of individuals in situations of armed conflict.

##### **(i) Conduct of hostilities: precautions vis-à-vis fellow co-parties**

As regards the conduct of hostilities, the general duty to take precautions may serve as a central illustration of a duty that requires parties to take positive measures vis-à-vis the conduct of their fellow co-parties. The obligation requires that '[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects'.<sup>46</sup>

At the outset, the room for construing the duty to take 'constant care' is provided by the broad scope of the duty. First, the notion of 'military operations' is wider than that of 'attacks', which Article 49(1) API defines as 'acts of violence against the adversary, whether in offence or in defence'. Military

<sup>46</sup> art 57(1) API; ICRC CIHL Study r 15; see also *ibid* r 44, 2nd clause (on precautions in military operations concerning the environment).

operations have been understood to cover a considerably wider range of activities,<sup>47</sup> including non-violent activities preparing<sup>48</sup> or supporting attacks.<sup>49</sup> The obligation would therefore also apply to co-parties who do not carry out attacks themselves,<sup>50</sup> but who, for example, provide air-to-air refuelling or logistical support (such as transporting troops to front-lines) as part of military operations coordinated among multiple partners. Secondly, the scope of the requirement to take ‘constant care’ is understood to be broad and covers all stages and aspects of a military operation, from its planning to the execution process.<sup>51</sup> The rule has thus been referred to as a ‘principle of precaution’<sup>52</sup> that should ‘animate all strategic, operational, and tactical decision-making’,<sup>53</sup> so as to best serve its purpose and effectively operationalise the protection of civilians.<sup>54</sup>

<sup>47</sup> M Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 415 (hereinafter Tallinn Manual 2.0); M Bothe, KJ Partsch and W Solf, *New Rules for Victims of Armed Conflicts - Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (reprint edn, Martinus Nijhoff 2013) 344.

<sup>48</sup> See eg art 44(3) API (‘military operation preparatory to an attack’).

<sup>49</sup> Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016) 2 (referring to the notion of hostilities—which is generally considered synonymous to ‘military operations’—including, among others, intelligence gathering or various types of logistical support); Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 680 (considering the notion of ‘military operation’ in the context of the general duty to take precautions in military operations under art 57(1) API to include ‘any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat’); similarly Bothe, Partsch and Solf (n 47) 408 (‘“Military operations” as used in Protocol I involve both *fire* and *movement*.’, emphasis in original); ILA Study Group, ‘The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare’ (2017) 93 *ILS* 322, 380; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) [5.32] (‘would include the movement or deployment of armed forces’).

<sup>50</sup> J-F Quéguiner, ‘Precautions under the Law Governing the Conduct of Hostilities’ (2006) 88 *IRRC* 793, 797.

<sup>51</sup> Tallinn Manual 2.0 477; ILA (n 49) 381; G Corn, ‘War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure’ (2015) 42 *PepperdineLR* 419, 430–42.

<sup>52</sup> ICRC CIHL Study r 15; G Corn, ‘The Invaluable Civilian Risk Mitigation Contribution of Recognizing the Value of Precautionary Measures’ in R Geiß and H Krieger (eds), *The ‘Legal Pluriverse’ Surrounding Multinational Military Operations* (OUP 2019) 225; M Sassoli and A Quintin, ‘Active and Passive Precautions in Air and Missile Warfare’ (2014) 44 *IsrYHR* 69, 75; A Cohen and Y Shany, ‘Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts’ (2012) 14(2011) *YIHL* 37, 46.

<sup>53</sup> G Corn, ‘Precautions to Minimize Civilian Harm are a Fundamental Principle of the Law of War’ (*JustSecurity*, 8 July 2015) <[www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war](http://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war)> accessed 23 July 2021.

<sup>54</sup> A Haque, *Law and Morality at War* (OUP 2017) 154–55; A Cohen and D Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (OUP 2021) 177–78; Corn (n 51) 424; Corn (n 52) 225.

Against this background, it can be reasonably argued that the requirement to take ‘constant care’ also applies to the interactions between multiple co-parties in the conduct of military operations. Accordingly, where contributions by multiple co-parties are intertwined in coordinated military operations, the obligation of each to take all feasible precautions to spare civilians can be understood as encompassing steps to ensure that civilians are spared by the military operations as a whole, including the contributions made by one’s fellow co-parties.

Just like other precautions, measures vis-à-vis one’s co-parties must only be taken when it is feasible for the respective party. The obligation prescribes conduct rather than a result,<sup>55</sup> and is set out in terms of a due diligence standard.<sup>56</sup> ‘Feasible’ is generally understood to mean precautions which are ‘practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations’,<sup>57</sup> while the US takes a narrower view and considers that only those practicable precautions would have to be taken that are also ‘reasonable’.<sup>58</sup> To establish which steps a co-party can feasibly take vis-à-vis its fellow co-parties, an important factor will be the degree of coordination and the extent to which the position of the respective co-party permits the exercise of influence on how its partners carry out their contributions to military operations.

In practical terms, precautionary measures among co-parties could, for example, consist of assisting partners at the stage of planning or executing military operations by setting up and carrying out appropriate processes for the selection and verification of targets that anticipate sufficient precautions to spare civilians. This could happen through consultation with fellow co-parties on the precautionary measures they take, as well as in providing expertise and

<sup>55</sup> On the distinction see generally J Combacau, ‘Obligations de résultat et obligations de comportement : Quelques questions et pas de réponse’ in D Bardonnnet (ed), *Mélanges offerts à Paul Reuter : le droit international, unité et diversité* (Pedone 1981); R Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 35 *GYIL* 9, 30, 46–49.

<sup>56</sup> G Venturini, ‘Les obligations de diligence dans le droit international humanitaire’ in S Cassella (ed), *Le standard de due diligence et la responsabilité internationale* (Pedone 2018) 137; M Longobardo, ‘Due Diligence in International Humanitarian Law’ in H Krieger, A Peters and L Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 188–89.

<sup>57</sup> United Kingdom, Statement on Ratification of AP I (28 January 1998) 2020 UNTS 75, 76; Germany, Statement on Ratification of AP I (14 February 1991) 1607 UNTS 526, 529; for similarly worded statements by other States see J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law*, vol II (CUP 2005) 360–61; see also art 3(4) CCW Protocol II; art 1(5) CCW Protocol III; art 3(10) Amended CCW Protocol II; *Galić* (Trial Judgment) IT-98-29-T (5 December 2003) [58] n 105 (with reference to further practice); Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare* (CUP 2013) 26.

<sup>58</sup> US, ‘Comments on ICRC Memorandum on the Applicability of International Humanitarian Law in the Gulf Region’ (11 January 1991) in S Cummins and D Stewart (eds), *Digest of United States Practice in International Law 1991-1999* (ILI 2005) 2057, 2063; DoD General Counsel Remarks (28 May 2019); US Manual 194.

technological means, and by sharing intelligence to enable appropriate target selection and verification processes, or cooperating in gathering such intelligence.

To illustrate, consider the measures taken by the Netherlands in relation to its contribution to the multi-State coalition against ISIL (as part of OIR). The Dutch contribution included not only airstrikes, but also providing intelligence on potential targets for coalition operations.<sup>59</sup> A report to the House of Representatives by an independent review committee into the contributions of the Dutch intelligence and security services in identifying targets examined the precautionary procedural framework of the intelligence provision. The report found that:

[f]or the purpose of providing these reports, the MIVD [Dutch Intelligence and Security Services] has established and presented a specific procedure to the Dutch Minister of Defence, who has approved it. This procedure provides for additional safeguards, such as a mandatory prior review by the legal department of the MIVD as well as additional reports. In the context of this procedure, the MIVD reviews whether the data to be provided pertains to a legitimate military objective ... as defined in international humanitarian law.<sup>60</sup>

The report also accounts for ‘considerations concerning potential collateral damage’ and notes that, more generally,

the MIVD keeps itself apprised of the actions of the military coalition in general and the targeting process at the headquarters of the military coalition in particular. For example, the MIVD asks for feedback from the Dutch representatives at the headquarters on the targeting process of the military coalition.<sup>61</sup>

The measures taken, as regards the Dutch intelligence contribution, effectively operate as precautions to prevent or limit potential harm to civilians from the coordinated military operations of the coalition.

The importance of cooperation in gathering and sharing intelligence among co-parties relevant to precautionary processes has recently been illustrated by a case that also concerns the Dutch contribution to OIR. In relation to civilian casualties resulting from Dutch airstrikes in Hawija in 2015, an interrogation of the Dutch Minister of Defence in the House of Representatives in 2020 revealed that the Dutch ‘Red Card Holder’, representing the Netherlands at

<sup>59</sup> The Netherlands Review Committee on the Intelligence and Security Services, ‘Review Report: On contributions of the MIVD to targeting’ 3 August 2016 (CTIVD no 50) <<https://english.ctivd.nl/investigations/review-report-50/documents/reports/2017/02/23/index>> accessed 10 October 2021 29.

<sup>60</sup> *ibid* 29.

<sup>61</sup> *ibid* 30.

the joint operations centre, had not been aware of US intelligence that indicated risks of civilian casualties from the airstrikes.<sup>62</sup> In response to this, the Dutch government reportedly instructed its Red Card Holder to proactively request such information from partners.<sup>63</sup>

In the aftermath of a military operation, the cooperated collection of information can also be crucial, namely to conducting investigations into potential harm to civilians.<sup>64</sup> It has been suggested that ‘monitoring the effects of military actions through investigation of possible violations arguably constitutes a “feasible precaution” against disproportionate harm’.<sup>65</sup> The duty of a party to an armed conflict to take precautions may thus comprise a duty to investigate where feasible.<sup>66</sup> The duty to take precautions regarding the conduct of fellow co-parties would therefore also entail a duty to investigate potential IHL violations of other co-parties. Such a duty could be meaningful, particularly if one’s co-party is not itself in a position, without support from its co-parties, to investigate all civilian casualties occurring as a consequence of its military operations, as the Netherlands made clear in relation to its operations as part of OIR.<sup>67</sup>

In addition to ‘active’ precautions, positive steps regarding conduct by fellow co-parties may also be required as part of the obligation to take ‘passive’ precautions against the effects of attacks (by the adverse side) on civilians.<sup>68</sup> Accordingly, each co-party would, for example, not only have to remove civilians under its control from the vicinity of military objects<sup>69</sup> and avoid locating military objectives near civilians,<sup>70</sup> but should also take steps toward its fellow co-parties to ensure that they take those same passive precautions, to the extent that such steps are feasible. This could be particularly relevant for co-parties

<sup>62</sup> The Netherlands, Parliamentary Debate Nr 71 item 7 (2019-20) 14 May 2020 <<https://zoek.officielebekendmakingen.nl/h-tk-20192020-71-7.html>> accessed 11 November 2021.

<sup>63</sup> L Treffers, ‘Dutch Defence Minister Announces Fresh Transparency moves’ (*Airwars*, 7 July 2020) <<https://airwars.org/news-and-investigations/minister-announces-fresh-transparency-moves/>> accessed 27 September 2021 (referring to a letter to members of parliament dated 29 June 2020).

<sup>64</sup> Cohen and Zlotogorski (n 54) 214.

<sup>65</sup> N Lubell, J Pejic, and C Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (ICRC and Geneva Academy 2019) 15, 20.

<sup>66</sup> Cohen and Shany (n 52) 46–47; M Lattimer, ‘The Duty in International Law to Investigate Civilian Deaths in Armed Conflict’ in M Lattimer and P Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart 2018) 42.

<sup>67</sup> The Netherlands, Parliamentary Debate 14 May 2020 (n 62) (‘The Netherlands on its own does not have sufficient capacity and capabilities to gather intelligence . . . to be able to deal with such a conflict on its own. We can only do these things as part of a coalition.’ (translated with DeepL); see also Treffers (n 63).

<sup>68</sup> art 58 API; ICRC CIHL Study rr 22–24.

<sup>69</sup> art 58(a) API; ICRC CIHL Study r 23.

<sup>70</sup> art 58(b) API; ICRC CIHL Study r 24.

operating extraterritorially, for example, alongside another State fighting armed groups on its territory.

Understanding passive precautions in these terms when applied to co-parties is consistent with the reference in Article 58 API to individuals ‘under their [i.e., the parties’] control’, which does not preclude that each party also has duties towards individuals under the control of its co-parties. More generally, this approach is in line with the broad and flexible scope of the obligation to take precautions against the effects of military operations, as well as with the purpose of ensuring the effective operational protection of civilians. The rationale is the same as the one applied to the obligation to take active precautions. If multiple co-parties cooperate to enhance their operational capabilities, they must also cooperate in the deployment of their defensive capabilities to fulfil their duties as defending parties. The fact that the respective civilians are under the control of a fellow co-party (rather than one’s own control) will determine what measures are feasible. Feasible measures could include assisting the respective co-party with removing civilians from the military objectives, identifying military objectives located near civilians and alerting co-parties to them, or providing expertise to another co-party on where military objectives may be located.

In summary, the duties of parties to take precautions vis-à-vis the conduct of their fellow co-parties aptly illustrate how obligations addressed to the parties to an armed conflict translate into positive external duties for co-parties.

## (ii) Protection of individuals

Positive duties towards fellow co-parties also flow from obligations addressed to the parties in the realm of protecting individuals affected by armed conflict. This is illustrated by the obligations to search for, collect, protect, and care for the wounded, sick, and shipwrecked, to search for the dead, and to prevent them from being despoiled, and to search for missing persons.<sup>71</sup> These obligations can be understood as encompassing the duties of a party to take steps so that its fellow co-parties (also) search for, collect, care for (etc) the protected individuals in compliance with their own obligations in that respect. The argument for this account proceeds as follows.

At the outset, it is important to note that these obligations are activated irrespective of the specific activities that a co-party engages in. Unlike, for example, obligations incumbent on detaining powers (which only apply to a State conducting detention operations),<sup>72</sup> the obligations to search for, collect, and care for wounded, sick, shipwrecked, missing, or dead individuals are addressed to all parties to the conflict. There are no textual or contextual indications or

<sup>71</sup> arts 15 GCI, 18 GCII, 16 GCIV, 33 API; ICRC CIHL Study rr 109, 112–14, 116–17.

<sup>72</sup> Even in multi-party settings, there will—as a matter of international law—always only be one detaining power with respect to each detained individual, see ICRC (ed), *GCIII Commentary* (n 18) [1519]–[1523].

reasons stemming from the object and purpose of these obligations<sup>73</sup> that would confine them to those parties that have inflicted the casualties, or more generally, have used means or methods of warfare that have affected the respective individuals in such a way that they now require protection. The treaty provisions only speak of the ‘parties’. Since other provisions are explicitly limited to parties engaging in certain conduct (such as those addressed to detaining powers), a systematic interpretation does not suggest that such limitations should simply be implicitly assumed. This is also in line with the object and purpose of these provisions. The purpose is to protect individuals because of their present condition,<sup>74</sup> rather than to regulate specific acts by the parties that inflict casualties or to attach consequences to such acts. This protective purpose would be undermined if it was necessary, in every instance, to determine who exactly brought about the individual’s condition. In practice, that will often not be possible. In its updated Commentaries on the Geneva Conventions, the ICRC therefore rightly notes that these obligations

apply equally to the Party to the conflict that inflicted the casualties (*and its allies to the extent that they are also Parties to the conflict*) and to the Party to the conflict to which the casualties belong<sup>75</sup>

and that

[i]n situations in which multinational or coalition forces are engaged as Parties to a conflict, it may also mean that a Party that has not participated in a particular engagement nevertheless needs to assist in search,

<sup>73</sup> See art 31(1) VCLT. The methods of interpretation relied on here are only directly applicable to ascertain the meaning of the obligations under treaty law. Yet, the underlying considerations are also relevant to identifying the scope of the customary international law obligations—or indeed to the interpretation of the customary rules. In any event, there are no indications that the scope of the treaty-based obligations would differ from the customary-based obligations in a way that would matter for the purposes of the argument made in this article. On the methodological issues surrounding the interpretation of customary international law, see generally O Chasapis Tassinis, ‘Customary International Law: Interpretation from Beginning to End’ (2020) 31 *EJIL* 235; P Merkouris, ‘Interpreting the Customary Rules on Interpretation’ (2017) 19 *ICLR* 126; P Merkouris, ‘Interpreting Customary International Law: You’ll Never Walk Alone’ in P Merkouris, J Kammerhofer, and N Arajärvi (eds), *The Theory and Philosophy of Customary International Law and its Interpretation* (CUP forthcoming 2022); D Alland, ‘L’interprétation du droit international public’ (2013) 362 *RCADI* 51, 82–88; A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 498–510; A Bleckmann, ‘Zur Feststellung und Auslegung von Völkergewohnheitsrecht’ (1977) 37 *ZaöRV* 504.

<sup>74</sup> See eg art 9(1) API (‘This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked . . .’).

<sup>75</sup> ICRC (ed), *Commentary on the Second Geneva Convention* (CUP 2017) [1632] (emphasis added).



collection and evacuation activities if it is present in the area of an engagement.<sup>76</sup>

Accordingly, *all* (co-)parties bear these obligations vis-à-vis *all* protected individuals. This includes situations where several co-parties coordinate their operations, for example by dividing up different operational tasks or geographical zones of operation. In such cases, working with one's co-parties can be an important—and sometimes even a necessary—way to ensure the protection of individuals who are, for example, located in areas where one's co-parties operate. This arguably means that obligations to take 'all possible measures'<sup>77</sup> towards protected individuals affected by the conflict entail a duty to take positive steps, if possible, to ensure that fellow co-parties also protect individuals and thus comply with their own protection obligations.

Just as the obligation to take precautions vis-à-vis the conduct of fellow co-parties, the obligations discussed in this section are obligations of conduct and subject to due diligence standards.<sup>78</sup> Only those steps must be taken which are 'possible' in light of the circumstances.<sup>79</sup> In practical terms, this could mean assisting fellow co-parties with the search, identification, or treatment of individuals, for example by providing the necessary expertise, personnel, facilities, and material resources or by cooperating in the collection and sharing of information that may, for instance, facilitate the identification of individuals.<sup>80</sup>

To sum up, the notion that it is the primary role of the parties to ensure the protection of individuals in armed conflict can be said to be specified for the situation of co-parties by the positive external dimension of party obligations to protect individuals who are affected by armed conflicts.

### ***B. General duty to ensure respect for IHL by fellow co-parties***

In addition to the duties to take certain positive steps vis-à-vis one's co-parties as part of party obligations in the realms of the conduct of hostilities and the protection of individuals, co-parties also bear a general duty to take positive steps to ensure the respect for IHL by their fellow co-parties.

To buttress this proposition, it is helpful to recall the resistance observed at the beginning of this article with respect to positive duties to ensure compliance by others under CA1 and customary international law. Section 2 of this article

<sup>76</sup> ICRC (ed), *Commentary on the First Geneva Convention* (CUP 2016) [1490].

<sup>77</sup> art 15 GCI; art 18 GCII; ICRC CIHL Study rr 109–13.

<sup>78</sup> ICRC (ed), *GCI Commentary* (n 75) [1485]; ICRC CIHL Study 402; Longobardo (n 56) 190.

<sup>79</sup> ICRC (ed), *GCI Commentary* (n 75) [1485]. Some relevant provisions even point to specific circumstances that may play a role in this respect, eg art 16 GCIV ('[a]s far as military considerations allow').

<sup>80</sup> See also eg ICRC, 'Allies' (n 15) 63, 67, 107–09.

has suggested that this resistance can be accounted for by the tensions between such duties and the posture of abstention which is otherwise required of third States in armed conflicts. The point here is not whether these tensions are actually insurmountable or whether there are good reasons to simply adjust the posture required of third States by embracing positive external compliance duties. Rather, the point is that the concern associated with this departure from a detached posture can only be raised for third States vis-à-vis the parties to a conflict, but not as regards parties vis-à-vis their fellow co-parties. And indeed, as section 4 will demonstrate, there are some illustrations from international practice that may indicate that this account of the general duty to ensure respect as it applies to co-parties faces less opposition than positive external duties for third States.

Accordingly, there is a stronger case for arguing that co-parties have a general duty to take positive steps to ensure compliance by their fellow co-parties, regardless of whether those same duties are also accepted for third States. This is because the respective posture of (co-)parties and third States in armed conflict differ structurally, as noted at the outset of this piece. Construing the general duty to ensure respect for IHL as entailing positive duties vis-à-vis fellow co-parties coheres with the overall primary role of the parties to ensure that armed conflicts are conducted in accordance with IHL. Such an account of the general duty to ensure respect fits neatly into the framework of duty bearers under IHL, which, as section 3.A of this article has demonstrated, already imposes positive duties on parties with respect to both the conduct of hostilities and the protection of individuals, arguably with implications for the duties of co-parties vis-à-vis one another. These systematic considerations inform an interpretation of the terms of CA1 ‘in their context’,<sup>81</sup> as well as an account of the customary law obligation to ensure respect consistent with the legal framework of the regulation of armed conflict as a whole.<sup>82</sup>

In practical terms, positive measures to ensure respect for IHL by fellow co-parties under CA1 may range from diplomatic dialogue or protest and legal assistance, to ‘conditioning joint operations on a coalition partner’s compliance with its obligations’.<sup>83</sup> In choosing and implementing these measures, co-parties must exercise due diligence.<sup>84</sup> What and how much action is required will thus depend on the prevailing circumstances, including the factual capacity to influence one’s partners.<sup>85</sup> In general, co-parties may have greater discretion under the broad, general duty to ensure respect than they have under the more specific positive party duties discussed in the previous section. However, the position of parties within the regulatory scheme of IHL suggests that more can be expected of co-parties under CA1 than of third parties.

<sup>81</sup> art 31(1) VCLT.

<sup>82</sup> See n 73 on the methodological questions in determining the scope of customary rules.

<sup>83</sup> ICRC (ed), *GCIII Commentary* (n 18) [214].

<sup>84</sup> Geiß (n 18) 123; Longobardo (n 56) 185–86.

<sup>85</sup> Longobardo (n 56) 186; ICRC (ed), *GCIII Commentary* (n 18) [198].

In conclusion, there are thus different legal bases for the obligations of co-parties to take positive measures vis-à-vis their fellow co-parties. This raises the question of how these different sets of obligations relate to each other, to which this article now turns.

### **C. The complementary relationship between the different sets of duties**

The different sets of obligations of co-parties vis-à-vis their fellow co-parties are complementary to each other. Figuratively speaking, the duties that co-parties have in this respect as part of their party obligations may be imagined as ‘narrow [in their scope of application] but deep [in their content],’ whereas the duty flowing from the general obligation to ensure respect would be ‘wide [in its scope of application] but shallow [in its content].’<sup>86</sup>

For activities where there are no specific duties imposed on parties that can be construed as encompassing duties vis-à-vis one’s co-parties, the general duty to ensure respect would be relevant. Thus, to the extent that the positive duties of parties with an external dimension among co-parties remain sectorial rather than comprehensive, they leave gaps for the operation of the general duty to ensure compliance with IHL by one’s co-parties.

Conversely, for activities that are regulated by specific positive duties vis-à-vis fellow co-parties, these duties are not rendered redundant by the existence of a general obligation to ensure respect by one’s co-parties. This is because these duties have a different content than the general obligation to ensure respect. In addition to being somewhat more specific—with the advantages of greater clarity and legal certainty as to their contours—these obligations may reach wider and ask more from the co-parties bearing them.

For example, when certain positive measures vis-à-vis one’s co-party can feasibly be taken to ensure that civilians are spared, the obligation to take *all* feasible precautions would entail that all of these measures must be taken.<sup>87</sup>

<sup>86</sup> For the use of this model to contrast competing visions of CA1 see R Geiß, ‘Common Article 1 of the Geneva Conventions Scope and content of the obligation to ‘ensure respect’ – ‘narrow but deep’ or ‘wide and shallow?’ in H Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015) 441 (drawing on its use in the context of the responsibility to protect by the UN Secretary-General, Report of the Secretary-General on Implementing the Responsibility to Protect (12 January 2009) UN Doc A/63/677 [10(c)]).

<sup>87</sup> W Boothby, *The Law of Targeting* (OUP 2012) 130–31 (‘[A]ll practicable measures must be taken to comply with the listed requirements and . . . action which could be taken but is not is as much indicative of a breach of the provision as action that is directly contrary to any of the precautions.’); Corn (n 53) (‘In fact, Article 57 imposes an obligation to take precautions unless doing so is not feasible. . . . Article 57 appears to establish a presumption that precautionary measures will be implemented, qualified by a feasibility limitation.’); see also Haque (n 54) 155; though note N Neuman, ‘A Precautionary Pale: The Theory and Practice of Precautions in Attack’ (2018) 48 *IsrYBHR* 19, 27 (emphasising the flexible nature of the duty to take precautions).

The same would be true of duties to protect individuals by taking ‘all possible measures’.<sup>88</sup> Such party obligations may be more demanding than the general duty to ensure respect, which might leave a co-party with greater discretion as to how it ensures respect. Indeed, although both the activity-specific and the general obligation must be fulfilled by exercising due diligence, what is considered sufficiently diligent conduct may vary in meeting different obligations.<sup>89</sup> More generally, understanding obligations specifically addressed to the parties as wider-reaching than the general duty of all States to ensure respect for IHL is consistent with the overall structure of the legal system of IHL and the central position the parties have—notably as duty-bearers—within that regulatory framework.

Moreover, the activity-specific party duties include, but may also go beyond a requirement that co-parties ensure that their fellow co-parties respect their own party obligations under IHL. Since all co-parties are bound by the underlying obligations—for example, to take precautions or to take care of protected individuals—the requirement to take positive steps vis-à-vis one’s fellow co-party is directed structurally at inducing or facilitating a behaviour by that co-party to which that co-party itself has a duty. In other words, an element of ensuring respect is inherent to these duties. Yet, unlike the general duty to ensure respect, duties to take positive steps flowing from party obligations do not end there. They are not confined to positive action that would be required to prevent a co-party from violating its own party obligations, not if further action is ‘feasible’ or ‘possible’.

To illustrate this point, imagine a scenario in which co-party A has more limited technological capabilities at its disposal than co-party B and diligently uses these means in the best feasible way to implement precautionary measures. Nonetheless, if co-party B can feasibly share its enhanced technological capabilities with co-party A so that co-party A can take more effective precautions, for example, by drawing on more reliable intelligence or by using more precise weapons, co-party B would arguably have an obligation to assist co-party A as part of its obligation to take precautions in military operations.<sup>90</sup> The wider underlying point is that the positive obligations of co-parties depend on what co-party B itself, rather than on what its fellow co-party A can do. And this is also relevant if co-party A fails to diligently use its own, more limited, capabilities. Case in point, recall the example of Russia’s intervention alongside Syria in the armed conflict with Syrian opposition forces, or the US’ support to the Saudi-led

<sup>88</sup> See nn 77–79.

<sup>89</sup> Longobardo (n 56) 195.

<sup>90</sup> On the relevance of the technological means available to a State for establishing the feasibility of precautions see Sassòli and Quintin (n 52) 84–85; K Trapp, ‘Great Resources Mean Great Responsibility: A Framework of Analysis for Assessing Compliance with API Obligations in the Information Age’ in D Saxon, *International Humanitarian Law and the Changing Technology of War* (Martinus Nijhoff Publishers 2013) 156, 164–65.

coalition in their armed conflict with the Houthis<sup>91</sup> (assuming for the sake of the argument that the involvement the US had in that conflict sufficed to render it a party to the conflict).<sup>92</sup> What precautions Russia and the US would have to take vis-à-vis Syria and the Saudi-led coalition, respectively, would depend on Russia and the US' own technological means (for example regarding the collection of targeting intelligence), regardless of whether Syria or Saudi Arabia could otherwise be expected to deploy those same means.

In light of the complementary character of the different sets of positive duties of co-parties vis-à-vis their fellow co-parties, the next section considers the rationale underpinning them and the wider implications that flow from them.

#### **4. A Network of mutual positive duties vis-à-vis fellow co-parties: rationale and ramifications for the allocation of obligations in partnered operations**

The different sets of obligations explored in Section 3 of this article form a robust network of positive obligations among co-parties vis-à-vis each other's conduct. While that network tends to be overlooked, it offers crucial nuance to the debate on positive external duties to ensure respect for IHL by others. Indeed, the different sets of duties among co-parties avoid central concerns that have been associated with positive external duties to the extent that these are only relevant as regards duties imposed on third States. These duties do not involve a departure from the established postures required of parties and third States as distinct duty bearers within the overall structure of the allocation of obligations in armed conflicts.<sup>93</sup>

Accordingly, they are also less vulnerable to the normative criticism of over-extension levelled against the duty to respect and ensure respect for IHL.<sup>94</sup> Moreover, the advantage of legal certainty gained by emphasising negative duties, which are somewhat more 'clear-cut',<sup>95</sup> is more relevant to conceptualising the legal position of third States than that of co-parties. The positive duties of co-parties also do not run the risk of providing incentives for increased third-party involvement,<sup>96</sup> which may complicate and in certain circumstances

<sup>91</sup> On these conflicts see already nn 1–5.

<sup>92</sup> n 12.

<sup>93</sup> See already above Section 3.A.(ii).

<sup>94</sup> Robson (n 18) 114; Schmitt and Watts (n 18) 706; R Goodman, 'Two U.S. Positions on the Duty to Ensure Respect for the Geneva Conventions' (*JustSecurity*, 26 September 2016) <[www.justsecurity.org/33166/u-s-positions-duty-ensure-respect-geneva-conventions/](http://www.justsecurity.org/33166/u-s-positions-duty-ensure-respect-geneva-conventions/)> accessed 10 October 2021.

<sup>95</sup> H Krieger, 'Rights and Obligations of Third Parties in Armed Conflicts' in E Benvenisti and G Nolte (eds), *Community Interests across International Law* (OUP 2018) 456.

<sup>96</sup> *ibid* 467.

prolong armed conflicts.<sup>97</sup> More generally, the perceived benefits that have traditionally been associated with the posture of abstention required of third States would not be affected, particularly the function of preventing armed conflicts from expanding and escalating.<sup>98</sup> At the same time, an account of the duties of co-parties as advanced here yields normative benefits. It translates to multi-party settings the protective purposes underlying the duties addressing the parties, and spells out the meaning of these duties in such settings.

These considerations suggest that there is considerably less ground for contesting the duties of co-parties vis-à-vis their fellow co-parties. This is also illustrated by instances in recent international practice, which can plausibly be read as indications that the account of the duties of co-parties may indeed face less opposition. For example, the US State Department only objected to the view that CA1 imposed positive duties on the US ‘vis-à-vis *not only our partners*, but all States and non-State actors engaged in armed conflict’,<sup>99</sup> leaving room for the possibility that such obligations might exist with respect to ‘partners’.<sup>100</sup> Although this could theoretically include instances where the US acts in partnership with others while remaining a third State to conflicts, it should be noted that the statement was made against the background of the current practice in the US-led campaign against ISIL—a conflict to which the US undoubtedly was a party—and other ‘coalitions and partnerships’ in ‘current U.S. military operations’.<sup>101</sup> Implicitly, a limitation to duties vis-à-vis fellow co-parties may therefore have been the underlying idea.

A statement at the Security Council by the US Mission to the UN in October 2019 points in a similar direction. Concerning the Turkish offensive in northeast Syria, the statement noted that:

Turkey must protect civilians in northeast Syria. We also expect Turkey to abide by its commitments to prevent ISIS from regaining a foothold in Syria, and to ensure the secure, humane detention of ISIS fighters. We remain deeply troubled by reports that Turkish Supported Opposition forces deliberately targeted civilians. If verified, these actions may constitute war crimes, and we urge our Turkish partners to immediately

<sup>97</sup> See eg A Aydin and P Regan, ‘Networks of Third-Party Interveners and Civil War Duration’ (2011) 18 EJIR 573, 586–87; D Cunningham, *Barriers to Peace in Civil War* (CUP 2011) 126–29; D Balch-Lindsay and A Enterline, ‘Killing Time: The World Politics of Civil War Duration, 1820–1992’ (2000) 44 *ISQ* 615, 632–33; P Regan, ‘Conditions of Successful Third-Party Intervention in Intrastate Conflicts’ (1996) 40 *JCR* 336, 346–47.

<sup>98</sup> Chinkin (n 10) 300; M Bothe, ‘The Law of Neutrality’ in D Fleck (ed), *Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 550.

<sup>99</sup> Egan (n 24) 306–07, emphasis added.

<sup>100</sup> See also O Hathaway and Z Manfredi, ‘The State Department Adviser Signals a Middle Road on Common Article 1’ (*JustSecurity*, 12 April 2016) <[www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/](http://www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/)> accessed 18 November 2020.

<sup>101</sup> Egan (n 24) 306.

investigate these incidents and hold accountable any individuals or entities involved. Turkey is responsible for ensuring its forces and any Turkish-supported entities act in accordance with the law of armed conflict.<sup>102</sup>

The reference that Turkey must ensure that its partners comply with the law of armed conflict was made with respect to a conflict in which it is plausible that Turkey and the non-State armed groups supported by Turkey were co-parties,<sup>103</sup> and it was made in the context of a statement that emphasised aspects of Turkey's obligations as a party, including notably the protection of civilians.

Similarly, other instances of practice seem to suggest that positive external duties may be accepted in instances of co-party status. For example, the then UK Foreign Secretary reportedly considered Russia to be legally required to prevent the Syrian regime from certain violations of IHL following Russia's intervention as a (co-)party to the conflict alongside the regime.<sup>104</sup> At the same time, as a practical matter, recent litigation on arms exports in relation to the conflict in Yemen has revealed that the UK government seems to determine its approach, and duties, regarding IHL violations by others depending on whether or not the UK considers itself a party to that conflict. The government stressed that:

neither the MOD [Ministry of Defence] nor the FCO [Foreign and Commonwealth Office] reaches a conclusion as to whether or not an IHL violation has taken place in relation to each and every incident that comes to its attention. This would simply not be possible in conflicts to which the UK is not a party, as is the case in Yemen.<sup>105</sup>

<sup>102</sup> M Barkin, 'Remarks at a UN Security Council Briefing on the Humanitarian Situation in Syria' (24 October 2019) <<https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-humanitarian-situation-in-syria-21/>> accessed 28 November 2020.

<sup>103</sup> For some factual background on Turkey's operations see C Gall and P Kingsley, 'Turkish Forces Escalate Campaign in Syria Against Kurdish-Led Militia' *New York Times* (11 October 2019) A11 <<https://www.nytimes.com/2019/10/10/world/middleeast/syria-turkey-offensive.html>> accessed 25 January 2022.

<sup>104</sup> Borger (n 5) ('The airstrikes, said Hammond, changed Russia's legal position as a party to the conflict. "Now the Russians ... have a shared responsibility. They may arguably have a legal exposure to this barrel bombing activity. Barrel bombing ... breaches international humanitarian law. ... At least stop that from happening. Use your leverage."').

<sup>105</sup> *The Queen (on the application of Campaign against Arms Trade) and the Secretary of State for International Trade and Amnesty International, Human Rights Watch UK and Oxfam International intervening* [2019] EWCA Civ 1020 [83] (quoting a ministerial statement on this point).

These concerns have been acknowledged by the High Court, which found that there would be inherent difficulties for a non-party to a conflict to reach a reliable view on breaches of International Humanitarian Law by another sovereign state.<sup>106</sup>

As a final illustration, the UN has explicitly embraced its duty to take positive steps to ensure respect by its co-parties in situations in which the UN considers itself a party to an armed conflict by virtue of the involvement of Peace Operations under UN aegis in the conflict:

where the non-UN security forces are party to an armed conflict and the UN becomes a party to that conflict, too—something that may occur precisely because the UN is providing support to those forces ... international humanitarian law, as reflected in common article 1 of the Geneva Conventions, requires that the Organization take such action as is within its power to try to make sure that the non-UN security forces conduct their operations in a manner that respects their obligations under international humanitarian law.<sup>107</sup>

It cannot be said that international practice has established an ‘agreement’<sup>108</sup> in the sense of a ‘common understanding’ between the High Contracting Parties<sup>109</sup> to the effect that the relevant IHL treaty obligations encompass positive duties vis-à-vis fellow co-parties.<sup>110</sup> The instances reviewed here also do not in and of themselves reflect a general practice accepted as law so that specific rules of customary international law, to this effect, could be said to have emerged.<sup>111</sup> Nonetheless, the instances may be taken into account as a supplementary means of interpreting the general duty to ensure respect and of the duties addressed to parties in the realms of the conduct of hostilities and the protection of individuals.<sup>112</sup> They may also be considered in establishing the

<sup>106</sup> *The Queen (on the application of Campaign against Arms Trade) and The Secretary of State for International Trade and Amnesty Int’l, Human Rights Watch UK and Oxfam Int’l intervening* [2017] EWHC 1726 (QB) [181].

<sup>107</sup> Statement at the ILC by the Under-Secretary-General for Legal Affairs and Legal Counsel (23 May 2013) <[http://legal.un.org/ola/media/info\\_from\\_lc/ILC%20Legal%20Counsel%20statementrev3may20.pdf](http://legal.un.org/ola/media/info_from_lc/ILC%20Legal%20Counsel%20statementrev3may20.pdf)> accessed 1 May 2021 20.

<sup>108</sup> art 31(3)(b) VCLT.

<sup>109</sup> It should be noted that the US is not a contracting party to API and the UN is not a contracting party to any IHL treaty.

<sup>110</sup> ILC, ‘Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries’ (2018) UN Doc A/73/10 30 [9]; see also already ILC Report (1966) II YILC 221–22 [15].

<sup>111</sup> art 38(1)(b) ICJ Statute.

<sup>112</sup> art 32 VCLT; ILC Draft conclusions subsequent agreements and subsequent practice, conclusion 2(4); see also G Nolte, ‘Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties’ (2013) UN Doc A/CN.4/660 73 [107]; O Dörr, ‘Article 32’ in O Dörr and K Schmalenbach (eds),



scope of customary international law obligations in this respect.<sup>113</sup> In particular, statements from States that otherwise object to positive external duties under IHL suggest that the push-back against such duties in international practice may actually be confined to duties for third States.<sup>114</sup>

Crucially, moreover, even under an expansive approach to the positive external duties of third States, which does not share the concerns of sceptics, the account of the duties of co-parties developed in this article would nonetheless remain relevant. This is because the network of duties among co-parties as discerned here would in several ways still set co-parties as structurally apart from the potential positive external duties of third States.

First, the positive duties of co-parties vis-à-vis their fellow co-parties would be more wide-reaching than the potential positive duties of third States vis-à-vis the parties. As Section 3 of this article has argued, the duties addressed to the parties regarding the conduct of hostilities and the protection of individuals impose more concrete and stringent requirements than the general duty to ensure respect for third States. In addition, it may even be that the general duty to ensure respect by others under CA1 and customary international law would be more demanding in what it requires from co-parties than for third States.

Secondly, the duties of co-parties would also be borne by parties other than States, namely non-State armed groups and international organisations. If non-State armed groups are co-parties to an armed conflict, they bear party obligations encompassing duties vis-à-vis their fellow co-parties in the realms of the conduct of hostilities and the protection of individuals under CA3, APII (where applicable), and customary international law.<sup>115</sup> As parties to NIACs, armed groups also could arguably bear such positive external duties as part of the general obligation to ensure respect for IHL as a matter of customary international law.<sup>116</sup> In contrast—unlike States—non-State armed groups are not addressees of IHL (and thus also not bound by the general duty to ensure respect) when they do not qualify as parties to an armed conflict. For international organisations, in turn, it has still not been settled as to whether they bear a duty to ensure respect for IHL if they, for example, mandate or coordinate a multinational military operation without qualifying as parties to the conflict.<sup>117</sup> Conversely, when they are (co-)parties to an armed conflict, there appears to be no reason why they should not bear the obligations of co-

*Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 627.

<sup>113</sup> For the methodological issues in this respect see n 73.

<sup>114</sup> This is also true of positions such as that of the Canadian government, which entirely rejects the applicability to third States of the general duty to respect and ensure respect for IHL, see n 28.

<sup>115</sup> Eg ICRC CIHL Study rr 15, 109, 112–14, 116–17.

<sup>116</sup> *ibid* r 139.

<sup>117</sup> In favour ICRC (ed), *GCIII Commentary* (n 18) [175]; against Geiß (n 18) 116–17.

parties identified in this article as a matter of customary international law with respect to their fellow co-parties.<sup>118</sup>

For all these reasons, the network of positive duties among co-parties set out in this article is significant. If this network of obligations is better understood and implemented, it may prove to be an important step to ensure that the protective purposes of IHL are effectively fulfilled, specifically in situations of cooperation between multiple parties that may arise in partnered operations. In this respect, it is worth recalling that all co-parties bear these duties, and therefore they mutually reinforce one another between the cooperating parties. For example, if co-party A can feasibly assist co-party B in taking precautions or caring for protected individuals, co-party A has a positive duty to provide this assistance, and co-party B has a corresponding duty to seek such assistance from co-party A as part of their own obligation to take positive steps vis-à-vis their co-parties. In other words, co-parties are under a mutual duty to cooperate in the fulfilment of their party obligations.

## 5. Conclusion

From the perspective of protecting human beings affected by an armed conflict, partnered operations entail the risk that capabilities to inflict harm are amplified while responsibility is diffused among partners.<sup>119</sup> Conversely, cooperation may enhance capacities to achieve greater standards of protection.<sup>120</sup> This article has shown one way in which the international legal regulation of partnered operations accounts for the risks and makes use of the potential benefits of cooperation in terms of protection. When multiple partners are parties on the same side of an armed conflict, they bear complementary sets of mutual duties to take positive steps vis-à-vis each other's conduct in the conflict. The account of the duties of co-parties presented here clarifies the allocation of obligations in partnered operations, it can thus contribute to mitigating the risks that responsibility is diffused. Engrained into the established structure of the international legal regulation of armed conflict, the network of positive obligations to ensure the protection of individuals in cooperation with fellow co-parties also exploits potential protection benefits in partnered operations.

<sup>118</sup> For the UN's own view to this effect see already n 107.

<sup>119</sup> See n 15.

<sup>120</sup> See n 16.