

## **EMERGING VOICES IN INTERNATIONAL HUMANITARIAN LAW, POLICY AND ACTION**

### **Closer to Home: How National Implementation Affects State Conduct in Partnered Operations**

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#### **Abstract**

Domestic law, case-law and policies play a decisive, yet underestimated role in ensuring that partnered operations are carried out in compliance with international law. Research on the legal framework of partnered operations has so far focused on clarifying existing and emerging obligations at the international level. Lesser attention has been devoted to understanding whether and how domestic legal systems integrate international law into national decision-making which governs the planning, execution and assessment of partnered operations. This article tries to fill the gap by focusing on the practice of selected States (the United States, the United Kingdom, Denmark, Germany, and Italy), chosen for their recent or current involvement in partnered operations. By using the ICRC's "support relationships" framework and based on a comparative analysis of practice, the study seeks evaluate the effectiveness of national laws, case-law and policies according to their ability to prevent or mitigate the risk of humanitarian consequences posed by partnered warfare.

#### **Keywords**

Partnered operations; national implementation; humanitarian consequences; support relationships.

## I. Introduction

Partnered operations pose a distinctive humanitarian problem. Insofar as they increase the military might of parties to armed conflict, they also increase the exposure to danger of all those not taking part in the hostilities. Such a risk might seem no different from that entailed by any conflict involving powerful actors. However, circumstances which are peculiar to partnered operations can aggravate the humanitarian consequences of war.

Firstly, in strategic decision-making, the possibility of pooling resources, technology and intelligence represents an incentive for military engagement, because it enhances the chances of military success while reducing battlefield exposure.<sup>1</sup> A similar incentive operates with forms of remote support to warring parties, which permits involvement in distant battlefields without incurring the economic and political costs of expensive military commitments opposed by reluctant domestic constituencies. The air, financial and logistical support provided by the US-led coalition to local forces against ISIS in Syria and Iraq, as well as the training provided by US troops to Ugandan forces to fight Al-Shabaab, are two examples of the increasing resort to techniques of remote warfare.<sup>2</sup> Both these incentives, i.e., the possibility of joining forces and the advantages of remote support, by multiplying the number of parties to the conflict and the interests at stake, can fuel enmities and contribute to stalling negotiations, eventually prolonging hostilities.<sup>3</sup> Although external support to one party may hasten the end of the conflict, empirical studies show that when both sides receive military assistance by third-party States competing for influence, hostilities are prolonged.<sup>4</sup>

Secondly, at the operational level, military partnerships may foster the proliferation of armed groups and weapons, especially in the case of remote support. This is what happened, for example, in the initial phase of the conflict in Syria, where the decision of some opposition groups to engage

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<sup>1</sup> This has been empirically demonstrated by Daniel S. Morey, “Military Coalitions and the Outcome of Interstate Wars”, *Foreign Policy Analysis*, Vol. 12, No. 4, 2016.

<sup>2</sup> On this see Jolle Demmers and Lauren Gould, “The Remote Warfare Paradox: Democracies, Risk Aversion and Military Engagement”, in Alasdair McKay, Abigail Watson and Megan Karlshøj-Pedersen (eds), *Remote Warfare: Interdisciplinary Perspectives*, E-International Relations, Bristol, 2021.

<sup>3</sup> David E. Cunningham, “Blocking resolution: How external states can prolong civil wars”, *Journal of Peace Research*, Vol. 47, No. 2, 2010.

<sup>4</sup> The leading study on this topic was published by Aysegul Aydin and Patrick M. Regan, “Networks of third-party interveners and civil war duration”, *European Journal of International Relations*, Vol. 18, No. 3, 2012.

in a violent uprising was arguably influenced by the anticipated support of external actors.<sup>5</sup> While the proliferation of armed actors makes humanitarian dialogue more complex, the proliferation of weapons increases the scale of violence both during and after conflict.<sup>6</sup>

Thirdly, on the battlefield, interoperability is more difficult to achieve when the number of partners grows, as their operating procedures and military cultures may diverge. Poor interoperability, *inter alia*, raises the likelihood of targeting mistakes and may hinder the accomplishment of missions.<sup>7</sup> Beyond technical issues, aspects related to communication between coalition forces and political will are believed to be the cause of interoperability failures in Afghanistan and Iraq.<sup>8</sup> Taken together, all these circumstances compound the humanitarian situation of civilians and others not fighting.<sup>9</sup>

In addition to all that, partnered operations present a specific legal challenge, which can in turn bring humanitarian consequences. The higher the number of partners and the more intricate the allocation of tasks, the harder it is to assess State and individual responsibility for violations of the applicable law.<sup>10</sup> This may lead to a number of negative outcomes, ranging from a feeling of diffused responsibility which facilitates misconduct to actual accountability gaps. Even more worryingly, it may induce a preference for opaque arrangements by partners interested in blurring the consequences of their actions. Since these humanitarian and legal challenges are clearly intertwined, they have recently made the object of a common response: prominent studies, including the “Support Relationships in Armed Conflict” initiative (SRI) launched by the International Committee of the

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<sup>5</sup> On the proliferation of armed groups as an effect of external support, see Jaime A. Jackson, Belgin San-Akca and Zeev Maoz, “International support networks and the calculus of uprising”, *Journal of Peace Research*, Vol 57, Issue 5, 2020.

<sup>6</sup> Matthew Moore, “Selling to Both Sides: The Effects of Major Conventional Weapons Transfers on Civil War Severity and Duration”, *International Interactions*, Vol. 38, No. 3, 2012, pp. 332 ff.

<sup>7</sup> Bastian Giegerich and Stéfanie von Hlatky, “Experiences May Vary: NATO and Cultural Interoperability in Afghanistan”, *Armed Forces & Society*, Vol. 46, No. 3, 2020.

<sup>8</sup> Christopher G. Pernin *et al.*, *Targeted Interoperability. A New Imperative for Multinational Operations*, RAND Corporation, Santa Monica, Calif., 2019, pp. 109-118.

<sup>9</sup> For an exhaustive account of humanitarian challenges posed by partnered warfare, see Cordula Droege and David Tuck, “Fighting together: Obligations and opportunities in partnered warfare”, *ICRC Law and Policy blog*, 28 March 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/03/28/fighting-together-obligations-opportunities-partnered-warfare/>. See also C. Droege and D. Tuck, “Fighting together and IHL: Setting the legal framework”, *ICRC Law and Policy blog*, 12 October 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2/>; as well as C. Droege and D. Tuck, “Fighting together and IHL: Ensuring respect for the law and assessing responsibility for violations”, *ICRC Law and Policy blog*, 17 October 2017, available at <https://blogs.icrc.org/law-and-policy/2017/10/17/fighting-together-international-humanitarian-law-ensuring-respect-law-assessing-responsibility-violations-2-2/>.

<sup>10</sup> See Brian Finucane, “Partners and Legal Pitfalls”, *International Law Studies*, Vol. 92, 2016, pp. 414-424.

Red Cross (ICRC),<sup>11</sup> propose to leverage military partnerships to improve partners' compliance with the law applicable in armed conflict.

While most of the research in this field has focused on the influence that States may have on partners' behaviour, less attention has been paid to the measures that States adopt to ensure *their own* conduct complies with international law when engaging in partnered warfare. The ICRC's study on "support relationships" partly fills this gap. It identifies ten areas in which practical measures can be adopted by actors in support relationships, with a view to maximizing compliance with international humanitarian law (IHL) and reducing negative humanitarian consequences. Among these practical measures, a key role is played by those intended to build "internal readiness" to engage in support relationships and "internal oversight" to ensure accountability for own forces. Both internal readiness and internal oversight depend on the adequacy of the supporting party's *own* legal and policy framework. The ICRC's study, thus, acknowledges the significance of domestic laws and policies as well as of case-law for improving IHL compliance in support relationships.<sup>12</sup> But how can the effectiveness of national legal and policy frameworks be evaluated?

This paper argues that the effectiveness of domestic law, case-law and policies in maximizing compliance with the law applicable to partnered operations hinges greatly on the way domestic and international law interact, i.e., on the mechanisms used by States to implement international norms into their national legal systems. The following sections, therefore, map relevant practice in the national implementation of international law in this field, with the aim of assessing, based on a comparative analysis of different models, the benefits and shortcomings of distinct implementation mechanisms in addressing the humanitarian challenges raised by partnered warfare. In doing so, and in consideration of available national practice, the survey refers to "partnered operations" as an umbrella concept that largely overlaps with that of support relationships.

After providing a definition of partnered operations, Section II introduces the research by outlining the international legal framework considered in the analysis. Section III and its sub-sections constitute the core of the inquiry: they review the national law, case-law, and policies of selected States, namely the United States, the United Kingdom, Denmark, Germany, and Italy, chosen for their current or recent involvement in partnered operations and for the availability of relevant sources. Section IV proposes to use the ICRC's SRI framework to evaluate the effectiveness of implementation measures, based on their ability to prevent or mitigate the risk of humanitarian consequences posed by partnered warfare. It submits that national laws and policies are the most

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<sup>11</sup> ICRC, *Allies, partners and proxies: Managing support relationships in armed conflict to reduce the human cost of war*, Geneva, March 2021.

<sup>12</sup> *Ibid.*, pp. 85-86 (on the legal and policy framework for internal readiness) and pp. 115-116 (on the role of judicial authorities in internal oversight).

effective implementation mechanisms for mitigating the humanitarian costs of partnered operations, whereas domestic case-law does not provide a reliable basis for guiding State conduct. Section V concludes.

## **II. Setting the scene: the international legal framework of partnered operations and mechanisms for its national implementation**

In recent years, legal and political scholars have used a variety of expressions such as “military assistance”<sup>13</sup>, “remote warfare”,<sup>14</sup> “proxy wars”<sup>15</sup> and “surrogate warfare”,<sup>16</sup> with slightly differing meanings but one element in common: the involvement of a multiplicity of actors with different roles in a military operation. As mentioned in the introduction, the ICRC has lately introduced the notion of “support relationships”.<sup>17</sup> This study refers to “partnered operations” as an umbrella concept which, while largely overlapping with the notion of support relationships, better reflects existing practice in the national implementation of international norms in this field.

Partnered operations considered in this paper include all instances where States contribute to a partner’s military operation. The definition is general enough to include arrangements as diverse as joint combat operations, troop contribution and embedding, training, advice and assistance (including in force generation), detainee transfer, provision of weapons and equipment, intelligence sharing, logistical support, and financing.<sup>18</sup> Yet, it incorporates one condition that delimits its scope: contribution must be *to a military operation*. This excludes military cooperation which is not directed at realizing one (or a series of) specific military operation (e.g., routine arms transfer, military exercises) as well as cooperation taking place outside of armed conflict (e.g., security sector assistance in law enforcement). Partnered operations thus defined include both partnerships between States and between States and non-State actors (NSA, i.e., armed groups and private military companies). Moreover, the definition does not require that all members of a partnered operations be

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<sup>13</sup> See for example the two issues devoted to “military assistance on request” published by the *Journal on the Use of Force and International Law* in 2020, vol. 7(1) and 7(2).

<sup>14</sup> As in Ohlin JD (ed), *Research Handbook on Remote Warfare* (Cheltenham: Edward Elgar Publishing 2017).

<sup>15</sup> The American Bar Association published a number of articles and blogposts as part of its Proxy Warfare Project <[https://www.americanbar.org/groups/human\\_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/](https://www.americanbar.org/groups/human_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/)>.

<sup>16</sup> Andreas Krieg and Jean-Marc Rickli, *Surrogate Warfare: The Transformation of War in the Twenty-First Century*, Georgetown University Press, Washington, DC, 2019.

<sup>17</sup> ICRC, above note 11.

<sup>18</sup> Financing is the lower end of the definition, being the most remote form of support. It is considered here because it can give rise to responsibility for aid or assistance if the conditions set out in Art. 16 ARSIWA are met. See ILC, “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, *UNYBILC*, Vol. II, No. 2, p. 66 and below in this section.

parties to the conflict: remote contribution may take place without meeting the thresholds of armed conflict under IHL, but in this case at least the recipient of assistance must be a party.<sup>19</sup> Finally, *jus ad bellum* considerations should not impinge on the qualification of an operation as a “partnered operation”: for example, peacekeeping missions as well as collective self-defence operations may both come under the purview of our definition, provided all other conditions are met.

The definition proposed is therefore very similar in scope, although narrower than the notion of “support relationships” adopted by the ICRC. The latter focuses on support which “increases the capacity of a party to conduct armed conflict” and includes, in addition to partnered military operations, also political support, arms transfers (including outside of operations) and other forms of support such as institutional capacity building.<sup>20</sup> The present paper, instead, zooms in on State conduct which contributes to a partner’s military operation in order to reflect a relative homogeneity in national practice in this area, leaving aside forms of political support and institutional capacity building that partly escape the complex legal framework of partnered operations.

Although not a recent phenomenon, partnered warfare has never been as common as it is today. The ICRC has observed that “as the number of actors and conflicts has grown, it has become the norm for actors to work towards their strategic objectives in partnership with other actors”.<sup>21</sup> This makes it all the more important to understand the international legal framework applicable to partnered operations and to identify which implementation mechanisms are used by national institutions to comply with it.

In international law, partnered operations as defined in this paper are governed by a “network of rules on complicity” which reflect the complexity and variety of the phenomenon.<sup>22</sup> These include both primary norms laying down “obligations connected to the conduct of others” and secondary rules on State responsibility deriving from “collaborative conduct”.<sup>23</sup> The most relevant and far-

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<sup>19</sup> A support-based approach to determine when the contribution to multinational forces entails the application of IHL is proposed in Tristan Ferraro, “The applicability and application of international humanitarian law to multinational forces”, *International Review of the Red Cross*, Vol. 95, Nos 891/892, 2013.

<sup>20</sup> ICRC, above note 11, p. 14.

<sup>21</sup> *Ibid.*, p. 18.

<sup>22</sup> Helmut Philipp Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, Cambridge, 2011, chapter 8.

<sup>23</sup> A study of partnered operations in the light of “international obligations connected to the conduct of others” has been first proposed by Berenice Boutin, “The Interplay of International Obligations Connected to the Conduct of Others: Toward a Framework of Mutual Compliance Among States Engaged in Partnered Warfare”, *International Law Studies*, Vol. 96, 2020. For a comprehensive analysis of the legal framework of partnered operations, see by the same author “Responsibility in Connection with the Conduct of Military Partners”, *The Military Law and the Law of War Review*, Vol. 56, No. 1, 2017.

reaching primary norm is the obligation to “ensure respect” for IHL, set out in Common Article 1 to the Geneva Conventions and customary law.<sup>24</sup> Although it applies to States in their relations with all parties to a conflict, the duty to ensure respect “is particularly strong in the case of a partner in a joint operation”, who is in a position to effectively influence the behaviour of others.<sup>25</sup> Such a duty is composed of a negative obligation to refrain from encouraging or assisting violations<sup>26</sup> and a positive obligation to take proactive steps in order to bring the parties to a conflict to an attitude of respect for IHL.<sup>27</sup> It may be worth reminding that Common Article 1 applies also to cooperation between States and non-State armed groups.<sup>28</sup> Primary norms applicable to partnered operations are to be found also in international human rights law (IHRL). First, the customary principle of *non-refoulement* acts as a limitation on the transfer of detainees between partners, including when it takes place within the territory of one State.<sup>29</sup> Second, according to the Human Rights Committee States have a duty “not to aid or assist activities undertaken by other States and non-State actors that violate the right to life”.<sup>30</sup> It can be added that the Arms Trade Treaty (ATT) prohibits the transfer of conventional arms when a State Party has knowledge, at the time of authorization, that they would be used in the commission of international crimes, or when there is an overriding risk that the arms could be employed to commit serious violations of IHL and IHRL.<sup>31</sup> These norms also apply to weapon transfers in the context of partnered operations. Finally, although the present survey focuses on the law applicable in armed conflict, it may be useful to mention that, under *jus ad bellum*, the definition of aggression includes two forms of partnered operations which violate the prohibition on the use of force: placing territory at the disposal of another State for perpetrating an act of aggression; sending non-State armed forces which carry out acts of aggression against another State.<sup>32</sup>

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<sup>24</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 1; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>, Rule 139.

<sup>25</sup> ICRC, *Commentary on the First Geneva Convention*, Geneva, 2016, para. 167.

<sup>26</sup> *Ibid.*, para. 158. According to the ICRC’s commentary, this obligation can require States to opt out of a multinational operation if there is an expectation that it would violate the Geneva Conventions, see para. 161.

<sup>27</sup> *Ibid.*, para. 164.

<sup>28</sup> *Ibid.*, para. 125. A recent study on the obligation to “ensure respect” has been published by Eve Massingham and Annabel McConnachie, *Ensuring Respect for International Humanitarian Law*, Routledge, London, 2021.

<sup>29</sup> Cordula Droegge, “Transfers of detainees: legal framework, non-refoulement and contemporary challenges”, *International Review of the Red Cross*, Vol. 90, No. 669, p 683.

<sup>30</sup> UN Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)*, CCPR/C/GC/36, 3 September 2019, para. 63.

<sup>31</sup> The Arms Trade Treaty, 3013 UNTS, 2 April 2013 (entered into force 24 December 2014), Arts 6(3) and 7.

<sup>32</sup> See UNGA Res. 3314 (XXIX), annex, 14 December 1974, “Definition of Aggression”, Arts 3(f) and 3(g).

Primary norms are complemented by a series of secondary rules that provide for State responsibility arising from the conduct of another State or NSA.<sup>33</sup> They are of immediate relevance to partnered operations and can be identified by reference to the International Law Commission's (ILC) Draft Articles on the Responsibility of States (ARSIWA).<sup>34</sup> In particular, Articles 16 and 17 introduce two forms of "derived" responsibility, respectively for "aid or assistance to" and for "direction and control over" the commission of a wrongful act by another State. Under Article 41(2), no State shall "render aid or assistance" to another State in maintaining a situation created by a serious breach of a peremptory norm. Finally, under Article 8, which is the only norm of the ARSIWA applicable to partnerships between States and NSAs, the conduct of a group of persons "directed or controlled" by a State shall be considered an act of that State.

States have grown progressively more aware of the above-mentioned legal framework and of the risk of incurring responsibility for the wrongful conduct of their partners. This has prompted national legislatures, judiciaries and governments to act to ensure that relevant international norms are properly implemented in domestic legal systems.

### **III. Existing practice in national implementation**

With a view to accounting for the variety of mechanisms available to States, this section examines, in turn, domestic legislation setting conditions for participation in partnered operations (A), national case-law relying on international norms to settle domestic disputes (B), and official State policies adopted to orient the conduct of national institutions (C). It does not provide a comprehensive examination, but rather focuses on the practice of selected States, chosen according to two criteria: their current or recent involvement in partnered operations relevant to our investigation; the publicity of national implementation measures.<sup>35</sup> Both information on States' involvement in partnered operations and publicity of national measures (especially in the case of policies) ultimately hinge on a crucial condition: the transparency of State conduct in a field that, if anything, stands out precisely for the frequent resort to elision and secrecy.

The following sub-sections bring into focus the national law, case-law and policies of the United States, the United Kingdom, Denmark, Germany, and Italy, carrying out, wherever possible,

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<sup>33</sup> To confirm the topicality of the subject, three monographs have been published recently on complicity in international law, see Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, Hart Publishing, Oxford and Portland, 2016; Miles Jackson, *Complicity in International Law*, Oxford University Press, Oxford, 2015; and H.P. Aust, above note 22.

<sup>34</sup> ILC, above note 18.

<sup>35</sup> A factor further limiting the outcome of the investigation was of course the accessibility of sources in a language known to the author.

a comparative analysis between different models. The comparison will consider, in particular, the scope of military engagements covered and the international legal framework that each national measure seeks to implement. Norms of IHL, IHRL and State responsibility (as formulated in the ARSIWA) will be considered. Conversely, the analysis will not take into consideration implementation and monitoring mechanisms provided by international sources, since they fall outside the scope of the research.

### A. Domestic legislation providing conditions for participation in partnered operations

At the legislative level, States' attitudes towards compliance with international law in partnered operations can be exemplified by three cases. The first is the adoption of specific legislation making assistance in military operations contingent on the recipient's respect for fundamental international norms. The second is the explicit inclusion of partnered operations among military commitments that national law subordinates to compliance with international law. The third is to leave the matter unaddressed.

The first case is exemplified by what is likely the best-known piece of domestic legislation on human rights compliance in military assistance: the United States (U.S.) Leahy Law. Since U.S. foreign military assistance comes from two sources, the Department of State (DoS) budget and the Department of Defence (DoD) budget, the Leahy Law consists of two statutory provisions. One was permanently incorporated into the U.S. Foreign Assistance Act in 2008;<sup>36</sup> the other is enclosed in the annual funding legislation of the DoD.<sup>37</sup> The version amended in the Foreign Assistance Act reads as follows:

(a) IN GENERAL – No assistance shall be furnished under this Act or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.

(b) EXCEPTION – The prohibition in subsection (a) shall not apply if the Secretary determines [...] that the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice.

[...]

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<sup>36</sup> U.S. Public Law 87–195, Section 620M (22 U.S. Code §2378d). Before 2008, the amendment had been included in all annual Foreign Operations Appropriations Acts since 1998.

<sup>37</sup> 10 U.S. Code §362.

Two crucial aspects explain the significance of the Leahy Law: (i) it applies at unit level; (ii) withholding of assistance is triggered by one single instance of gross violation of human rights (GVHR). These choices make it a (potentially) effective tool not only to avoid complicity in human rights violations, but also to influence partners and coax them into fighting impunity by addressing specific cases of human rights violations. Accordingly, the Leahy Law requires the Secretary of State to assist recipient governments in bringing those responsible to justice<sup>38</sup> and, if measures are taken, it allows assistance to be reinstated. Yet, two clarifications are needed to appreciate the real potential of the Leahy Law. As to the first aspect and on the positive side, the focus on individual units does not hinder consideration of the overall human rights situation in the recipient State, as another section of the Foreign Assistance Act prohibits assistance to “any country the government of which engages in a consistent pattern” of GVHRs.<sup>39</sup> However, a severe limitation concerning the second aspect restricts the scope of application of the law. Indeed, the U.S. Government considers GVHRs to include conduct such as torture, extrajudicial killing, enforced disappearance, rape under colour of law, and other flagrant denial of the right to life, liberty, or the security of person. This list is not exhaustive and other types of incidents can be examined.<sup>40</sup> As made explicit in the DoS implementation guidance,<sup>41</sup> the law applies equally when the same violations are committed in the context of an armed conflict. Yet, and decisively, the DoS and DoD do not consider civilian harm occurred during the conduct of hostilities in a conflict as a GVHRs.<sup>42</sup> This is a striking restraint, which curtails the potential of the Leahy Law to effectively implement international norms applicable to partnered operations and makes it necessary to assess the role of national policies in complementing it.<sup>43</sup>

Turning to enforcement, the Leahy Law seems to receive extensive application<sup>44</sup> and is implemented through an elaborate procedure known as “Leahy vetting”, which is based on both

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<sup>38</sup> 22 U.S. Code §2378d (c).

<sup>39</sup> Foreign Assistance Act, U.S. Public Law 87–195, Section 502B; however, and crucially, the U.S. Government never enforced this provision.

<sup>40</sup> See U.S. Department of State, “About the Leahy Law”, 20 January 2021, pp. 12-13 <<https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/>>.

<sup>41</sup> *Ibid.*, p. 20.

<sup>42</sup> See Daniel R. Mahanty, “The ‘Leahy Law’ Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain”, *Just Security*, 27 June 2017, available at: <<https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/>>.

<sup>43</sup> See below sub-section C.

<sup>44</sup> Between 2011 and 2013, the U.S. Government subjected 530,000 foreign units to Leahy vetting, see Congressional Record Vol. 160, No. 109 (Senate – July 14, 2014), pp. S4452-S4453.

government's information and independent reporting by non-governmental organizations.<sup>45</sup> However, questions have been raised about the effectiveness of Leahy vetting, as since its enactment the U.S. has not discontinued assistance to armed and security forces whose human rights record is notoriously poor.<sup>46</sup> This might be explained in part by differences in the DoD version of the Leahy Law, which is more permissive with respect to action needed for the recipient to regain assistance ("corrective steps" are sufficient) and provides an option for the Secretary of Defence to waive the prohibition if "required by extraordinary circumstances". Most importantly, it has been disclosed that the DoS itself adopted in the past a restrictive interpretation of the provision, limiting the types of assistance falling under the purview of the Law to training.<sup>47</sup> This does no longer appear to be the case, after it was clarified that the provision applies to "all forms of assistance, including training, equipment and other activities."<sup>48</sup>

Conversely, doubts raised on the application of the Leahy Law in case of assistance provided to armed groups remained unanswered. When in September 2014 the U.S. Congress passed legislation authorizing the DoD to "provide assistance [...] to appropriately vetted elements of the Syrian opposition",<sup>49</sup> no definite assurance was given on its submission to Leahy vetting.<sup>50</sup> Given the DoD's understanding of the term "security force", the Leahy Law has been often interpreted as applying only to State partners, although non-State recipients of assistance are subject to a "Leahy-like" process.<sup>51</sup> Indeed, in the case of assistance to the vetted Syrian opposition, it was the authorizing provision itself that set the minimum requirements for vetting, thus assuming that the Leahy process would not be routinely applied.<sup>52</sup>

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<sup>45</sup> Nina M. Serafino et al, "Leahy Law" *Human Rights Provisions and Security Assistance: Issue Overview*, Congressional Research Service Report R43361, 29 January 2014.

<sup>46</sup> Nathanael T. Miller, "Leahy Law: Congressional Failure, Executive Overreach, and the Consequences", *Cornell International Law Journal*, Vol. 45, No. 3.

<sup>47</sup> Daniel R. Mahanty, above note 42.

<sup>48</sup> U.S. Department of State, Introduction to Leahy vetting policy, version 2.1 <[https://www.state.gov/wp-content/uploads/2020/06/PP410\\_INVEST\\_v2.1.pdf](https://www.state.gov/wp-content/uploads/2020/06/PP410_INVEST_v2.1.pdf)>.

<sup>49</sup> National Defense Authorization Act for Fiscal Year 2015, U.S. Public Law 113-291, Section 1209.

<sup>50</sup> Sarah Margon, "Is Credible Vetting of the Syrian Opposition for Human Rights Abuses Possible?", *Just Security*, 24 September 2014, available at: <https://www.justsecurity.org/15506/guest-post-credible-vetting-syrian-opposition-humanitarian-abuses-possible/>.

<sup>51</sup> Erica L. Gaston, *Regulating irregular actors: can due diligence checks mitigate the risks of working with non-state and substate forces?*, Working paper 608, Centre for the Study of Armed Groups, ODI, London, May 2021.

<sup>52</sup> "The term 'appropriately vetted' means [...] at a minimum: (A) assessments of such elements, groups, and individuals for associations with terrorist groups [...]; and (B) a commitment from such elements, groups, and individuals to promoting the respect for human rights and the rule of law", U.S. Public Law 113-291, Section 1209.

An alternative to legislation listing precise criteria for the authorization of military assistance is the adoption of general clauses making participation in partnered operations conditional on compliance with international law. One example is the Italian Law 145/2016, which allows participation in international missions “provided it takes place in accordance with [...] general international law, international human rights law, international humanitarian law and international criminal law.”<sup>53</sup> The enforcement of this condition is guaranteed by a mechanism of double parliamentary oversight. First, after the Government decides on the participation of the Italian Armed Forces in an international mission, the Italian Parliament is called upon to pass a law that authorizes or denies authorization for the mission. The legal basis for the mission is one of the elements that the Parliament must take into account when deciding on the authorization.<sup>54</sup> Second, all international missions of the Italian Armed Forces are reviewed once a year in a special session of Parliament, which is required to confirm the authorization.<sup>55</sup>

Again, some clarifications are useful to correctly define the scope of application of the norm and appreciate its effectiveness. “International missions” as defined by Italian Law 145/2016 include a fairly diverse type of military commitments outside situations of “declared war”. They range from missions established under the auspices of an international organization, such as the UN and the European Union, to the sending of troops and assets abroad in the context of defence alliances.<sup>56</sup> Nonetheless, there is debate as to whether the law applies to the deployment of special forces as part of intelligence operations abroad, which is governed by a separate provision.<sup>57</sup> In addition, the law refers to participation in “exceptional humanitarian interventions”, but leaves the notion undefined: in this case, compliance with international law becomes a rather flexible condition, whose application depends on the definition of humanitarian intervention and the interpretation of the international legal framework on the use of force.<sup>58</sup>

A third possibility is that national legislation remains silent on the participation of armed forces in partnered operations. This may be particularly the case in common law systems, where statutory law does not exercise the same function as in civil law systems and where case-law and policies play a more prominent role. For example, in the United Kingdom (UK) the War Powers

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<sup>53</sup> Legge 21 luglio 2016 n. 145, Art. 1.

<sup>54</sup> *Ibid.*, art. 2(2).

<sup>55</sup> *Ibid.*, art.3(1).

<sup>56</sup> *Ibid.*, art. 1.

<sup>57</sup> Decreto-legge 30 ottobre 2015 n. 174, convertito con modificazioni dalla L. 11 dicembre 2015 n. 198, Art. 7bis. On this issue, see Natalino Ronzitti, “La Legge Italiana sulle Missioni Internazionali”, *Rivista di Diritto Internazionale*, vol. 2017/2.

<sup>58</sup> Luca Buscema, “Le Operazioni Umanitarie e di Peacekeeping ed il Valore Costituzionale della Pace alla Luce della L. N. 145/2016”, *Rivista AIC*, Vol. 2/2018, pp. 17-21

Convention requires the Government to seek parliamentary approval before deploying troops abroad. Yet the convention, which has only developed in the last few years, does not define which types of military engagements are subject to approval, and its scope has been interpreted as limited to offensive operations.<sup>59</sup> Consequently, it fails to capture precisely those sorts of military commitments which contribute to a partner's operation without being *per se* offensive in nature, such as the provision of training and logistical assistance<sup>60</sup> and the use of drones in intelligence, surveillance, and reconnaissance missions.<sup>61</sup> Moreover, two kinds of operations which usually involve offensive tasks are *a priori* considered to have a blanket exemption from parliamentary oversight: the deployment of Special Forces<sup>62</sup> and the embedding of troops in the armed forces of another State.<sup>63</sup>

Before moving on, it shall be remarked that the three pieces of legislation reviewed in this section are different in terms of scope of engagements covered and of reference legal framework. Under both perspectives, the U.S. Leahy Law seems to present a limited reach: its application is confined to military assistance to States, leaving out all instances of direct operational engagement, as well as (likely) any form of assistance to non-State actors. Moreover, violations considered for withholding assistance are only those amounting to GVHRs, to the exclusion of violations of IHL of the conduct of hostilities. At the other end of the spectrum, the Italian Law 145/2016 adopts a broader approach, as it applies to participation in any type of international mission (with narrow exceptions), ranging from direct operational engagement of Italian troops to the mere sending of assets.<sup>64</sup> In this case, the reference legal framework includes all relevant sources (general international law, IHRL, IHL, international criminal law). Finally, the material scope and reference framework of the UK Powers Convention is more difficult to define, given its nature as an unwritten source. As it stands, the convention seems to be applicable to situations that are complementary to those addressed by the Leahy Law, since it covers only offensive engagements. Unfortunately, no legal parameter for parliamentary approval is explicitly defined, leaving it to each session of Parliament to independently assess to standards of legality of offensive missions.

## B. National case-law on armed forces' contribution to partnered operations

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<sup>59</sup> Claire Mills, *Parliamentary approval for military action*, Briefing Paper BP 7166, 8 May 2018, p. 36.

<sup>60</sup> *Ibid.*

<sup>61</sup> Emily Knowles E and Abigail Watson, *Lawful but awful? Legal and political challenges of remote warfare and working with partners*, Oxford Research Group, May 2018, p. 18.

<sup>62</sup> James Strong, "The war powers of the British parliament: What has been established and what remains unclear?", *The British Journal of Politics and International Relations*, Vol. 20, No. 1, 2018, p. 27.

<sup>63</sup> Secretary of State for Defence Michael Fallon, Written Statement, 18 April 2016, UIN HCWS678.

<sup>64</sup> N. Ronzitti, above note 57, p. 478.

Regardless of the existence of implementing legislation, disputes may be brought before domestic courts over the involvement of national institutions in partnered operations and their compliance with national and international norms. When this happens, depending on the specificities of the national legal system and the prior adoption of (general or specific) implementing legislation, national courts may be in a position to either apply international law directly or refer to international norms in their reasoning. In the field of partnered operations, this has occurred multiple times. Some examples are provided below.

German courts have dealt with partnered operations in at least two cases. In June 2005, the German Federal Administrative Court granted the appeal filed by a Major of the Armed Forces, who had disobeyed superior orders by refusing to work on military software.<sup>65</sup> He motivated his refusal with concerns that his actions might contribute to Germany's participation in attacks on Iraq, which he personally believed to be unlawful under international law. In deciding the case, the Court had to examine the plaintiff's objection of conscience in the light of international norms applicable to Germany's assistance to UK and U.S. forces. Assistance included "overflight rights for military aircraft" and "permission for the sending of troops and the transport of weapons and military supplies to the war zone from German soil".<sup>66</sup> The Court relied extensively on international law, *inter alia* Article 16 ARSIWA and Article 3(f) of the Definition of Aggression,<sup>67</sup> and concluded that "grave concerns in international law exist about the conduct of the federal government".<sup>68</sup> In the judgment, as observed by one author, the Court referred to the ILC rule on complicity even though primary norms on the use of force would have been sufficient to reach a decision.<sup>69</sup>

The opposite occurred in a recent case in which three German courts ruled on Germany's involvement in U.S. drone operations. The complaint was filed by Yemeni citizens who claimed that their right to life was unlawfully threatened by U.S. drone strikes relayed through the U.S. airbase in Ramstein (Germany).<sup>70</sup> After the Administrative Court of Cologne had dismissed the claim on the merits,<sup>71</sup> in March 2019 the Higher Administrative Court for North Rhine-Westphalia overruled the

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<sup>65</sup> German Federal Administrative Court, *Attorney of the Federal Armed Forces v. N (a Major of the Federal Armed Forces)*, Case No. 2 WD 12.04, Judgment, 21 June 2005.

<sup>66</sup> *Ibid.*, para. 4.1.4.1.4.

<sup>67</sup> UNGA Res. 3314 (XXIX), above note 32.

<sup>68</sup> German Federal Administrative Court, above note 65, para. 4.1.4.1.4.

<sup>69</sup> V. Lanovoy, above note 33, p. 183.

<sup>70</sup> The claimants were supported by the ECCHR. For additional information on the case see ECCHR, "Ramstein at court: Germany's role in US drone strikes in Yemen", available at: <https://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/>.

<sup>71</sup> Administrative Court of Cologne, *Jaber v. Federal Government of Germany*, Case No. 3 K 5625/14, Judgment, 27 May 2015.

decision by applying a stricter legal standard.<sup>72</sup> It first held that whether Germany had a duty to protect the right to life of foreigners abroad<sup>73</sup> was a question to be solved by reference to applicable international law.<sup>74</sup> On that basis, it found that the German government had two positive obligations, which it had inadequately fulfilled: a duty to investigate whether U.S. drone strikes in Yemen were conducted in accordance with international law (to the extent they involved the use of German territory); a duty, if necessary, to take the measures it deemed appropriate to work towards compliance with international norms.<sup>75</sup> Interestingly, this time the Court expressly ruled out that Article 16 ARSIWA had any relevance to the case and relied exclusively on IHL primary norms to determine the scope of international obligations binding Germany.<sup>76</sup> Eventually, in November 2020 the Federal Administrative Court overturned the ruling and restored the first-instance judgment.<sup>77</sup> Lowering again the standard demanded by primary norms, the federal court concluded that diplomatic effort made by the German government and legal guarantees given by the U.S. administration sufficed to ensure the compliance of drone operations with international law.<sup>78</sup> The overruling was possible precisely because both courts ignored the possibility of State responsibility for complicity. Comparison between the two cases thus suggests that a comprehensive assessment of primary and secondary norms applicable to each case, albeit redundant, could help domestic courts to correctly identify the issues at stake and avoid accountability gaps.

An extreme alternative is the decision of the Danish High Court (Eastern Division) in the *Operation Green Desert* case, issued in June 2018.<sup>79</sup> The dispute concerned a joint military operation conducted by British, Danish and Iraqi forces in southern Iraq in 2004, during which 37 Iraqi nationals were arrested, detained and ill-treated at the hands of Iraqi military and security forces. No Danish troops had taken part in the apprehension, detention and abuse of the plaintiffs, nor had they exercised

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<sup>72</sup> Higher Administrative Court for North Rhine-Westphalia, *Jaber v. Federal Government of Germany*, Case No. 4 A 1361/15, Judgment, 19 March 2019.

<sup>73</sup> As recognized by the Basic Law, see Grundgesetz, Art. 2(2).

<sup>74</sup> Higher Administrative Court for North Rhine-Westphalia, above note 72, para. III.2.a.

<sup>75</sup> *Ibid.*, incipit.

<sup>76</sup> *Ibid.*, para. III.1.a.aa.2.

<sup>77</sup> German Federal Administrative Court, *Jaber v. Federal Government of Germany*, Case No. 6 C 7.19, Judgment, 25 November 2020. The plaintiff submitted a constitutional complaint, which is currently pending before the Federal Constitutional Court.

<sup>78</sup> For a comment on this decision, see Karoline Dołgowski, “One step forward – three steps back: why the hellfire from Ramstein may continue after all”, *Voelkerrechtsblog*, 1 December 2020, available at: <https://voelkerrechtsblog.org/one-step-forward-three-steps-back-why-the-hellfire-from-ramstein-may-continue-after-all/>.

<sup>79</sup> High Court of Eastern Denmark, *X. v. Ministry of Defence*, Case No. B-3448-14, Judgment, 15 June 2018. The appeal is currently pending before the Danish Supreme Court.

control or command over the Iraqi forces; thus, the violations of Article 3 European Convention on Human Rights (ECHR) suffered by the plaintiffs could not be attributed to Denmark. Nevertheless, the Court affirmed Denmark's responsibility because the Ministry of Defence and the Armed Forces *should have known*, when they decided to join the operation, that there was "a real risk that persons detained during the operation would be subject to inhuman treatment in Iraqi custody".<sup>80</sup> The decision stands in stark opposition to those of the German courts, not only for the very far-reaching stance on responsibility,<sup>81</sup> but especially because the Danish High Court, although referring to Article 3 ECHR, decided the issue under domestic tort law purely, ignoring the international legal framework applicable to the operation.<sup>82</sup>

Finally, it should be remarked (unsurprisingly) that not only lawmakers but also courts have tried sometimes to avoid dealing with government determinations regarding involvement in partnered operations. Avoidance strategies traditionally rely on the political nature of governments' foreign policy decisions and are reflected in the "act of State" or "political question" doctrine. In the *Noor Khan* case for example, the Court of Appeal of England and Wales rejected the claimant's complaint concerning the killing of his father in a U.S. drone strike in Pakistan, which had been allegedly planned on the basis on "locational intelligence" provided by British officers.<sup>83</sup> Before UK courts, the claimant had sought a declaration that British citizens in similar cases would not be entitled to the international law defence of combatant immunity. The Court of Appeal declared the issue non-justiciable, upholding the government's objection that any findings on the matters "would necessarily entail a condemnation of the activities of the United States",<sup>84</sup> precluded by the "foreign act of State" doctrine. Three years later however, the UK Supreme Court took the exact opposite stance in the *Belhaj and another* and *Rahmatullah (No 1)* joined cases.<sup>85</sup> In both lawsuits, the claimants alleged that UK forces were complicit in their unlawful detention, torture and mistreatments at the hands of foreign authorities, to whom they had been transferred. Mr Belhaj and Mrs Boudchar were victim of

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<sup>80</sup> *Ibid.*, pp. 810-811.

<sup>81</sup> Which brought the Danish MoD to immediately voice its disappointment, see Thomas Obel Hansen and Fiona Nelson, "Liability of an Assisting Army for Detainee Abuse by Local Forces: The Danish High Court Judgment in Green Desert", *EJIL: Talk!*, 24 January 2019, available at: <https://www.ejiltalk.org/liability-of-an-assisting-army-for-detainee-abuse-by-local-forces-the-danish-high-court-judgment-in-green-desert/>.

<sup>82</sup> Peter Vedel Kessing, "Liability in Joint Military Operations—The Green Desert Case", *Journal of Conflict and Security Law*, Vol. 25, No. 2.

<sup>83</sup> Court of Appeal of England and Wales (Civil Division), *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs*, Citation No. [2014] EWCA Civ 24, Judgment, 20 January 2014.

<sup>84</sup> *Ibid.*, para. 8.

<sup>85</sup> UK Supreme Court, *Belhaj and another v Straw and others; Rahmatullah (No 1) v Ministry of Defence*, Citation No. [2017] UKSC 3, Judgment, 17 January 2017.

an extraordinary rendition to Libya “arranged, assisted and encouraged” by UK officers; Mr Rahmatullah was captured by British forces in Iraq and transferred to U.S. custody, remaining in detention without charges for ten years.<sup>86</sup> The Supreme Court ruled that no strand of the foreign act of State doctrine applied to the cases. Most importantly, it found that, even if engaged, the doctrine would be subject to a public policy exception for violations of peremptory norms of international law.<sup>87</sup> Interestingly, the Court did not revert the *Noor Khan* judgment: it confirmed that the foreign act of State doctrine had been correctly applied in that case.<sup>88</sup> Yet, as one author pointed out, what was missing in *Noor Khan* was precisely a thorough examination of the circumstances justifying the public policy exception.<sup>89</sup>

Compared to the very diverse types of engagements covered by the national laws reviewed in the previous sub-section, the case-law examined here stands out for consistently referring to remote forms of assistance, ranging from logistical support to detainees’ transfer, to a general contribution to a partner’s mission. On the contrary, the legal framework considered by national courts is very diverse. Courts in the same country seem to come to opposite conclusions as regards both the applicable international norms and the legal standards of review. German courts have alternatively used secondary rules on responsibility and primary norms of IHL; even when agreeing on the applicable law, courts at different stages of the proceedings have applied different standards of review. In addition, courts in different countries disagreed on the general reference framework, resorting alternatively to IHL, IHRL and State responsibility norms. This wide range of options and, perhaps even more so, the reversals of lower court decisions by higher courts show a degree of uncertainty about the applicable legal framework, which may be motivated by the relatively new definition of a clear legal framework for partnered operations.

### C. State policies guiding the conduct of national institutions in partnered operations

State policies are not commonly included in the analysis of national measures adopted by States to comply with international obligations. The reasons for this are, first, that policies are not binding; second, where specific implementation obligations exist, they can only be fulfilled by enacting domestic legislation. This, however, does not rule out a role for State policies in ensuring that national institutions respect applicable international norms. Hence, this last sub-section considers

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<sup>86</sup> *Ibid.*, paras 4 and 6.

<sup>87</sup> *Ibid.*, para. 168.

<sup>88</sup> *Ibid.*, para. 93.

<sup>89</sup> Shaheed Fatima, “Noor Khan: A missed opportunity?”, *Just Security*, 30 January 2014, available at: <https://www.justsecurity.org/6530/noor-khan-missed-opportunity/>

administrative acts which, having been officially adopted by the executive branch, provide a reliable expectation of compliant behavior. Consideration of State policies is not unusual in the practice of international institutions<sup>90</sup> and will prove useful to complete the overview of national implementation models.

One country that stands out in developing policy guidance for its armed and security forces engaged in partnered operations is the United Kingdom. This may be partly motivated by the prominent role of policy and executive documents in common law systems. Two documents are relevant to our inquiry. Their history is instructive, as both had been in operation for some time before being released to the public domain in response to growing demands for transparency about foreign assistance programs. The first document is the “Overseas Security and Justice Assistance (OSJA) Guidance”,<sup>91</sup> which was published in 2011 following allegations that the UK had been providing assistance to authoritarian regimes in the Middle East and North Africa before the outbreak of the Arab Spring.<sup>92</sup> The OSJA Guidance, lastly updated in 2017, has a broad scope of application, as it concerns all kinds of justice and security sector assistance provided by the UK to other States. It also covers assistance to foreign armed and security forces in the framework of armed conflict and applies to both capacity building and “case specific assistance” (thus falling within the scope of our survey). A second document with a narrower focus had been available since 2010: the “Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees” (updated in 2019 and renamed “Principles”).<sup>93</sup> It was published following a lawsuit by the legal charity Reprieve, filed after reports of British involvement in the U.S. rendition program.<sup>94</sup> Both documents serve a dual goal. On the one hand, they seek to avoid complicity in the wrongful conduct of a partner: in particular, to ensure that assistance is consistent with international human rights obligations and that IHRL and

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<sup>90</sup> A relevant example is the updated ICRC’s IHL implementation guidance, which takes into account ‘administrative and practical measures’, including the creation of relevant institutions, processes and procedures, see ICRC, *Bringing IHL home. Guidelines on the national implementation of international humanitarian law*, Geneva, May 2021, pp. 15-24.

<sup>91</sup> HM Government, *Overseas Security and Justice Assistance Guidance* (OSJA Guidance), London, 26 January 2019.

<sup>92</sup> Hannah Wright, *Overseas security and justice assistance: an assessment of human rights guidance*, Saferworld, London, February 2012; Maya Foa, “The British Government is covering up its assistance to torturers and killers worldwide”, *OpenDemocracy*, 25 November 2016, available at: <<https://www.opendemocracy.net/en/openjustice/uk-remains-licit-in-horrific-human-rights-abuses-abroad-due-to-shoddy-policy-document/>>.

<sup>93</sup> HM Government, *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees* (Principles), London, 24 September 2019.

<sup>94</sup> BBC, “UK urged to reveal ‘torture’ file”, 28 July 2009, available at: <[http://news.bbc.co.uk/2/hi/uk\\_news/8170594.stm](http://news.bbc.co.uk/2/hi/uk_news/8170594.stm)>.

IHL risks are mitigated;<sup>95</sup> to prevent participating in, soliciting, encouraging or condoning unlawful killing, torture or cruel, inhuman or degrading treatment, and extraordinary rendition.<sup>96</sup> Secondly, they aim at influencing partners, by strengthening compliance with IHRL and IHL<sup>97</sup> and promoting human rights in countries with which the UK deals.<sup>98</sup> Unfortunately, despite such a positive general stance, the assessment and approval mechanism designed into both documents is obviously limited in scope: since these are policy (i.e., non-legally binding) documents, even when there is a serious risk to contribute to IHL or IHRL violations, they do not block assistance but only require that decision-making is referred to senior personnel or ministers, who can ultimately give authorization.<sup>99</sup> This certainly hampers the ability of both documents to strengthen compliance and casts serious doubt on the possible use of policies as a means to relax legal limitations. To further nuance the assessment of policy initiatives in the field of partnered operations, it should be added that to date the UK government has refused disclosing its “Guidance to Intelligence Officers and Service Personnel applicable to the passing of intelligence relating to individuals who are at risk of targeted lethal strikes”. Requests made under both the Freedom of Information Act<sup>100</sup> and parliamentary oversight<sup>101</sup> have so far been unsuccessful.

Another country which has undertaken to clarify its policies on involvement in partnered operations is the United States. Like the UK, U.S. policy is also fragmented across multiple documents, but unlike the UK, in the case of the U.S. national policies do not compensate for the absence of national legislation, rather they complement it. Again, the centrality of policy documents, even on matters of armed conflict, should come as no surprise, given the role of policies in common law systems. This holds true both when national legislation remains silent on issues that are left to the appreciation of the courts and the regulation of the executive; and when the law regulates a matter only selectively. Indeed, one reason for resorting to policymaking is that the scope of the U.S. Leahy Law is limited to military assistance which may foster gross violations of human rights: it leaves out both instances of direct operational engagement and assistance which results in violations of IHL of the conduct of hostilities.<sup>102</sup> These instances are thus addressed in national policies. At least two

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<sup>95</sup> OSJA Guidance, above note 91, p. 4.

<sup>96</sup> Principles, above note 93, pp. 3-4.

<sup>97</sup> It is the aims of the “Assessment and Approvals Process” under the OSJA Guidance, above note 91, p. 9.

<sup>98</sup> Principles, above note 93, p. 4.

<sup>99</sup> Ruth Blakeley and Sam Raphael, “Accountability, denial and the future-proofing of British torture”, *International Affairs*, Vol. 96, No. 3, pp. 704-707.

<sup>100</sup> Information Commissioner’s Office, Decision No. FS50599866, 26 May 2016.

<sup>101</sup> All Party Parliamentary Group on Drones, Exchange of letters between Tom Watson MP and David Davis MP, and the Foreign and Commonwealth Office, 19 November 2014.

<sup>102</sup> See above sub-section A.

initiatives deserve to be mentioned. Since 2016, the U.S. administration has released an unclassified portion of its “Report on the Legal and Policy Frameworks for the United States’ Use of Military Force”, whose complete version is submitted to Congress every year.<sup>103</sup> The document includes a section on “Working with Others in an Armed Conflict”,<sup>104</sup> covering activities such as “training, provision of materiel, intelligence sharing, *and operational support*” (emphasis added). It explicitly acknowledges that the U.S. partners with non-State actors, if this furthers U.S. interests. It states that the administration can take measures, “including diplomatic assurances, vetting, training, and monitoring” to ensure that the recipient of intelligence respects human rights and the law of armed conflict, but then it recalls the Leahy Law only by reference to partner *countries*. In any case, the framework reiterates the commitment to “promoting compliance by U.S. partners with the law of armed conflict”, in line with Common Article 1. Indeed, although the United States rejects an “expansive interpretation” of Common Article 1, it accepts that the obligation to “ensure respect” entails a commitment to verify partners’ compliance with the law of armed conflict when assessing the lawfulness of military assistance and joint operations.<sup>105</sup> A second example is provided by the “Policy on Pre- and Post-Strike Measures to Address Civilian Casualties”, adopted by the U.S. administration in December 2016. The policy comprises a commitment to “engage with foreign partners to share and learn best practices for reducing the likelihood of and responding to civilian casualties, including through appropriate training and assistance”.<sup>106</sup> Successive “Reports on Civilian Casualties in Connection with United States Military Operations” have also accounted for the measure of U.S. reliance on local partners for offensive operations in several theatres.<sup>107</sup>

It seems possible also in this case to draw a few conclusions from the comparison of the two documents. On the one hand, when compared in terms of the scope of engagements covered, the UK and U.S. policy documents appear to be complementary, in that the former concern remote support that does not involve direct operational engagements, while the latter apply precisely to operational support. On the other hand, and unlike both the law and case-law reviewed in previous sub-sections,

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<sup>103</sup> United States President, *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, Washington, DC, December 2016.

<sup>104</sup> *Ibid.*, pp. 12-14.

<sup>105</sup> See Brian Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations”, *International Law Studies*, Vol. 92, 2016 p. 245. As explained by Egan, the U.S. denies instead that Common Article 1 legally requires to take steps to ensure respect for IHL by all State and non-State parties to a conflict, including non-partners.

<sup>106</sup> United States President, *United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force*, Executive Order 13732, 1 July 2016, Section 2(b)(iii).

<sup>107</sup> See for example United States Department of Defense, *Annual Report on Civilian Casualties in Connection with United States Military Operations in 2020*, April 2021.

policy documents examined here are notable for their reference to both IHL and IHRL as sources of international legal standards.

#### **IV. Leveraging national implementation to address the humanitarian challenges of partnered operations**

As shown in the previous section, the international law of partnered operations is implemented in national legal systems through a variety of mechanisms, which can be combined to address separate aspects of military partnerships. The national practice examined above also suggests that different implementation mechanisms – law, case-law and policies – have been used for distinct purposes, leading to varying results. This leaves room for an evaluation of their effectiveness, provided it is done according to one among several aims that States may pursue through national implementation. An assessment in general terms would instead be impractical for two reasons. First, there is insufficient data to assess how formal implementation translates into actual compliance, mainly for lack of transparency on State conduct in this field.<sup>108</sup> Second, the choice between legislative, judicial or policy measures (or no specific measure) will ultimately depend on the peculiarities of each national legal system. By way of example, judicial implementation of international law generally represents a positive development, but its effectiveness in incorporating international norms differs, depending on the different role that international law plays in common law and civil law systems; not to mention the possibility that national judiciaries are influenced, to varying degrees, by political considerations. Similarly, officially adopted policies, although not binding, can be so deeply embedded in the daily practices of political and military decision-makers that they alone guarantee fully compliant behaviour. More radically, where international law is routinely incorporated in domestic legal systems and national institutions consistently comply with it and operationalize it, specific implementation measures may be unnecessary. For these reasons, the paper refrains from indicating one universal model, based on the conviction that there is no one-size-fits-all solution.

A concern highlighted at the outset of this investigation is that partnered operations raise a peculiar humanitarian problem, insofar as they may exacerbate the suffering and exposure to danger of civilians and others not fighting. One option is thus to evaluate the effectiveness of implementation measures according to their potential to prevent or mitigate the risk of humanitarian consequences posed by partnered operations. This can be done by adopting the framework of analysis proposed by

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<sup>108</sup> Elision and secrecy cover not only the existence of partnered operations, but also the impact of implementation measures where they exist. For a call to more transparency on the impact of the Leahy Law for example, see Michael J. McNerney *et al.*, *Improving Implementation of the Department of Defense Leahy Law*, RAND Corporation, Santa Monica, Calif., 2017, pp. 52-54.

the ICRC in its recent study on how to manage support relationships in armed conflict to reduce the human costs of war (SRI framework).<sup>109</sup> The difference in scope between the two notions of “partnered operations” and “support relationships”, as explained in Section II, should not be an obstacle: since the former is entirely contained in the latter, all instances of partnered operations considered in the examination of national practice do amount at the same time to support relationships as defined by the ICRC, and the SRI framework is equally relevant to them. It should be additionally mentioned that the purpose of the SRI framework is to appraise practical measures that actors in support relationships can take to maximise compliance with IHL, whereas the legal framework considered in this paper is broader, including also national measures implementing IHRL norms and the secondary norms of State responsibility. Even this should not be an impediment to using the ICRC’s study as a framework for assessing the effectiveness of implementation measures: as a matter of fact, all legal and policy measures reviewed above seek to prevent or mitigate the humanitarian consequences of partnered operations, thereby serving the ultimate purpose of the SRI framework.

Bearing that in mind, the ICRC's study divides practical measures into ten functional groups arranged into three stages: preparation, implementation and transition. The framework, therefore, is particularly helpful for our analysis because it reflects the “operations process” adopted by many armed forces and defence alliances.<sup>110</sup> Observations made here can thus be easily integrated into the planning, execution and assessment of military operations by State forces. When reviewed in the light of the ICRC’s SRI framework, national law, case-law and policies each play a distinctive role in maximising compliance with the law applicable in armed conflict. Nevertheless, they intervene at different stages of partnered operations and have a different prospective impact on their humanitarian consequences.

Law and policies are relevant for the preparation phase: they affect what the SRI framework identifies as an actor’s “internal readiness” to engage in a partnered operation, as they set the rules under which the operation will be conducted. Consequently, they are crucial for two reasons: first, they represent minimum standards and thresholds against which States decide whether to engage in a partnered operation; second, they are the benchmarks according to which the operation will be planned. Hence, they have a greater potential to prevent and mitigate the risk of humanitarian consequences entailed by the operation. This consideration should, however, be nuanced in the light of some features revealed by the analysis of national legislation in Section III. Interestingly, both the

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<sup>109</sup> ICRC, above note 11, chapters 5 and 6.

<sup>110</sup> NATO doctrine considers the three stages of “preparation”, “execution” and “operations assessment”, see NATO, *Allied Joint Doctrine for the Conduct of Operations*, NATO standard AJP-3, February 2019. The U.S. Army’s operations process distinguishes “planning”, “preparation” and “execution”, with “assessment” continuously ongoing, see U.S. Army, *The Operations Process*, Army Doctrine Publication No. 5-0, 31 July 2019.

U.S. Leahy Law and the Italian Law 145/2016 include vaguely worded provisions, relying on constructive ambiguity. The Leahy Law lacks definitions for “assistance” and “security force of a foreign country”: these shortcomings have been used in the past to limit its scope of application to training and are used today to exclude assistance to non-State armed groups from Leahy vetting.<sup>111</sup> The Italian Law 145/2016 is noncommittal on its application to special forces operations and makes an unclear reference to “exceptional humanitarian interventions”, leaving the notion undefined. A comparison of these two statutes, therefore, shows that neither specialized legislation nor all-embracing clauses are exempt from loopholes, and both might be circumvented through selective interpretation. The same may be true, to an even greater extent, for national policies. As the British example shows, policies provide governments with a flexible tool to ensure compliance with international norms while avoiding binding commitments. In common law systems, they are a standard means of replacing or complementing deficient national legislation. They can also be helpful in achieving legal interoperability. Yet, for precisely the same reasons, governments may use policies as a means of relaxing applicable legal standards, which end up being balanced by foreign policy considerations.

National case-law performs an equally crucial but distinct function. It can come into play either when national implementing legislation has been breached, to restore proper implementation, or when national legislation has not been adopted at all, to replace it and sanction non-compliant institutions by direct reference to international norms. It intervenes at the implementation stage of the adopted framework, aiming to ensure “internal oversight” of government decisions and armed forces’ conduct in partnered operations. As pointed out in the ICRC’s study, internal oversight “is particularly important when it comes to actors or operations that are intentionally excluded from normal reporting procedures for security reasons, such as missions conducted by special forces or intelligence services”.<sup>112</sup> In this way, the judiciary may be instrumental in closing interpretive loopholes intentionally left in national laws and policies. For this reason, case-law has emerged in recent years as a promising development, marked by the increase in strategic litigations.<sup>113</sup> Yet, judicial decisions may have less impact on the humanitarian challenges of partnered operations, for three reasons. First, as said, they relate to the implementation phase, not the planning stage. They are essential to redress the plight of victims, not to avoid their suffering in the first place. Of course, their findings may be integrated into lessons learned and help planning future operations. However, and second, practice

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<sup>111</sup> For both these interpretive issues, see the discussion on the Leahy Law, above section III.A.

<sup>112</sup> ICRC, above note 11, p. 115.

<sup>113</sup> See, for example, the freedom of information litigation filed by the European Center for Constitutional and Human Rights over Italy’s involvement in the U.S. drone program, available at: <https://www.ecchr.eu/en/case/sicily-air-base-freedom-of-information-litigation-on-italys-involvement-in-us-drone-program/?L=2>.

reviewed in this paper indicates that decisions on matters of military partnerships have been easily reversed, as is typical of a field which is still developing. Finally, it should be noted that frequent judicial reversals result in a condition of unpredictable State responsibility. While this does not call into question the contribution of national judiciaries to the implementation of international law, taken together these observations do explain why national authorities may consider domestic case-law as a less reliable basis for planning partnered operations.

## **V. Conclusions**

In his keynote speech at the 110<sup>th</sup> Annual Meeting of the American Society of International Law, Brian Egan, then Legal Adviser to the U.S. Department of State, recognized that one of the reasons why the United States complies with the law of armed conflict is that “it is essential to building and maintaining our international coalition”.<sup>114</sup> When assessing the international legal framework of partnered operations, indeed, it should not be forgotten that States have recently paid attention to national implementation not only to avoid responsibility, but also because the capacity of coalitions to respect the law of armed conflict supports their legitimacy, strengthens the ties between partners, and ultimately increases their chances of success. These non-legal reasons contribute to explaining why compliance with international law in partnered warfare is gaining prominence and further prove the relevance of the topic this paper sought to address.

By reviewing the national law, case-law and policies of selected States involved in partnered operations and chosen for the accessibility of relevant sources, the research explored the role that national implementation mechanisms can play to prevent or mitigate the risk of humanitarian consequences inherent in partnered operations. It refrained from indicating a universal model for national implementation, mindful of the limitations proper to every mechanism, of the significant differences between national legal systems, and, above all, of the lack of sufficient data to assess how formal implementation translates into actual compliance. Yet, the survey of relevant practice suggests at least that a strategy to alleviate the risk of humanitarian consequences in partnered operations should take into consideration the different effectiveness of law, case-law and policies, i.e., the different impact they bear on distinct phases of partnered operations. If this is done, a general call for national implementation of international law in this field does not appear to be sufficient. Conversely, engagement with States should privilege advocacy for national implementation laws and policies as highly effective mechanisms to guide the planning and preparation of partnered operations. This seems even more relevant when one considers that most of the effort made so far towards fostering compliance with international law have been directed at initiating strategic litigations, often with little

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<sup>114</sup> B. Egan, above note 105, p. 236.

result. While this may be linked to a certain degree of uncertainty in the applicable legal standards, typical of a field that is still consolidating its premises, national legislation remains the preferred option for trying to prevent or mitigate the humanitarian consequences of partnered operations.