

## ARTICLE

A State of Complicity:  
How Russia's Persistent and Public Denial of Syrian Battlefield Atrocities  
Violates International Law

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### Abstract

Do Russian officials violate international law when they publicly deny the atrocities committed by the Syrian armed forces? This Article argues that Russia's persistent denial of the Syrian government's violations of the law of armed conflict implicitly encourages Syria to continue its human rights abuses on the battlefield with a sense of impunity, thus rendering Russia complicit in the Syrian government's wrongdoing. To reach this conclusion, this Article develops a theory of State complicity by examining two legal provisions: first, Article 16 of the Draft Articles of State Responsibility, which prohibits states from aiding or assisting other states to commit violations of international law; and, second, Rule 144 of the ICRC's 2005 study of customary international law, which prohibits states from encouraging other states to violate the law of armed conflict. This Article determines that Rule 144, rather than Article 16, is the proper state complicity rule for analyzing Russia's pattern of denying Syria's unlawful battlefield acts. This Article then applies Rule 144 to conclude that Russia's persistent, deliberate, and bad faith denial of Syrian wrongdoing violates Rule 144 and justifies Russia's legal responsibility as an accomplice in the Syrian government's atrocities. This Article then discusses the impact of Russia's complicity on the United States' national security interests in Syria, as well as the potential legal consequences of Russian complicity and the prospects for holding Russia accountable under international law. Although legal obstacles exist to enforcement, this Article argues that the United States and others nevertheless must insist that Russia cease its harmful practice of denying Syrian violations and hold Russia accountable for its part in bringing about the humanitarian abuses committed by the Syrian government.

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*Good friends, sweet friends, let me not stir you up  
To such a sudden flood of mutiny*

- Mark Antony, *Julius Caesar*<sup>1</sup>

### Introduction

Do Russian officials violate international law when they publicly deny the Syrian government's unlawful battlefield acts? Consider, for example, the chemical weapon attack in Syria on April 4, 2017, resulting in the death of dozens of civilians.<sup>2</sup> The ensuing investigation revealed compelling, if not conclusive, evidence that Syrian armed forces conducted the strike and that, in doing so, they violated the law of armed conflict (LOAC).<sup>3</sup> However, Russia dismissed the evidence and strenuously denied Syria's involvement in the unlawful strike.

Russia's denial of Syria's involvement in the April 4th chemical weapon attack was not an isolated occurrence. Rather, it fit a pattern of behavior that has become familiar at least since Russia's 2015 military intervention in the Syrian Civil War: first, Syrian armed forces engage in military action that results in numerous civilian deaths; second, states and other prominent members of the international community, citing overwhelming evidence, claim Syria violated the LOAC and call for Syria to be held legally accountable; and third, the Russian government, coming to Syria's defense, asserts the inaccuracy or complete falsity of the factual basis underlying the allegations of Syrian wrongdoing.

This Article argues that Russia's pattern of publicly denying Syrian battlefield wrongdoing violates international law.<sup>4</sup> Specifically, Russian officials'

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<sup>1</sup> WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2. In the aftermath of Caesar's death at the hands of Brutus and Cassius, Mark Antony delivers a speech to the plebeians at Caesar's funeral. Despite expressly claiming no intent to incite or encourage misconduct, Antony's speech effectively stirs the plebeians to violence. This Article argues that Russian officials' persistent, bad faith denial of Syrian battlefield wrongdoing functions similarly to Antony's words to the plebeians. It effectively facilitates the Syrian government's battlefield misconduct by implicitly encouraging Syria to continue its widespread and systematic violations with a sense of impunity. Thus, just like Antony with respect to the plebeians, Russia may justifiably be deemed complicit in the Syrian government's atrocities.

<sup>2</sup> Anne Barnard & Michael R. Gordon, *Worst Chemical Attack in Years in Syria; U.S. Blames Assad*, N.Y. TIMES (Apr. 4, 2017), <https://nyti.ms/2oxSW25>.

<sup>3</sup> The terms law of armed conflict (LOAC) and international humanitarian law (IHL) are essentially equivalent. Each refers to "the body of treaty-based and customary international law aimed at protecting the individual in time of international or non-international armed conflict." GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 24 (2016). This Article prefers the term LOAC instead of the term IHL, but uses both depending on context and source.

<sup>4</sup> This Article is narrowly focused on one aspect of Russian conduct in Syria, namely its denial of the factual bases underlying Syrian LOAC violations. Accordingly, the many other allegations of Russian violations of international law in general and the LOAC specifically are beyond the scope of this Article. See, e.g., Julian Borger & Kareem Shaheen, *Russia Accused of War Crimes in Syria at U.N. Security Council Session*, GUARDIAN (Sept. 26, 2016),

persistent, deliberate, and bad faith denial of the Syrian government's atrocities emboldens Syria by providing political and legal cover against the objections of other states and international organizations, and thus implicitly encourages Syria to continue violating international law with a sense of impunity. The encouraging effect of Russia's pattern of denial renders it complicit in Syria's human rights abuses on the battlefield.

Russia's conduct has profoundly impacted the United States' national security interests insofar as it has contributed to increased instability in the region, exacerbated Syria's humanitarian crisis, and further instigated extremist groups that are threats to the United States' national security. Therefore, the United States has a direct interest in asserting the unlawfulness of Russia's behavior and invoking available legal and political means to prevent it from occurring again.

In support of this Article's assertion of Russian complicity in Syrian battlefield misconduct, Part I describes Russia's political and military involvement in the Syrian armed conflict and examines three examples of Russia engaging in the denial of Syrian violations of the LOAC. Part II identifies a basis in international law for a theory of state complicity, specifically Rule 144 from the 2005 study of the International Committee of the Red Cross (ICRC) of customary international humanitarian law (IHL). Part III applies Rule 144's state complicity prohibition to Russia's conduct to show how Russia is complicit in Syrian wrongdoing based on Russia's practice of denying the factual assertions underlying allegations of Syrian LOAC violations. Part IV examines how Russia's complicity impacts the United States' strategic interests in Syria, as well as the options the United States and other states have for holding Russia accountable. Part V concludes that the United States and others must insist that Russia cease its practice of denial and hold Russia accountable for its violations of international law.

## I. Background

This Part presents an overview of the widespread LOAC violations that have occurred in the Syrian armed conflict, as well as the circumstances of Russia's military intervention in the conflict. It then identifies three of the more prominent examples of Russian officials' denial of widely-corroborated factual accounts that support the allegations of LOAC violations by the Syrian armed forces.

### A. *Unlawful Battlefield Conduct in the Syrian Armed Conflict*

The current armed conflict in Syria<sup>5</sup> arose out of a political uprising that began in 2011.<sup>6</sup> Initially, the conflict was between the government of Syrian

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<https://www.theguardian.com/world/2016/sep/25/russia-accused-war-crimes-syria-un-security-council-aleppo> [<http://perma.cc/FDP7-LXX2>].

<sup>5</sup> Regarding the legal determination of the existence of an armed conflict in Syria, see *infra* note 137.

<sup>6</sup> See *Syria: The Story of the Conflict*, BBC (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868> [<http://perma.cc/8YUD-XYBJ>].

President Bashar al-Assad and multiple anti-regime rebel groups. However, since the commencement of hostilities, the battlefield has grown more complex and chaotic, today consisting of a broad array of armed groups participating in various ways in the conflict. Presently, the various groups involved in the conflict include the armed forces of Russia, Iran, the United States, Turkey, Jordan, and other western and Gulf Arab states, as well as non-state groups such as Hezbollah, other Shia Muslim militias, and extremist groups such as the Islamic State and the al-Nusra Front.<sup>7</sup>

Early in the conflict, citing “continued grave and systematic human rights violations by the Syrian authorities,”<sup>8</sup> the United Nations Human Rights Council established the Independent International Commission of Inquiry (CoI) on the Syrian Arab Republic, whose mandate was to investigate all alleged violations of international human rights law in Syria since March 2011.<sup>9</sup> The CoI produced numerous reports documenting the vast array of alleged human rights and LOAC violations in Syria, including four reports published since Russia’s intervention, beginning in September 2015.<sup>10</sup> The allegations documented by the CoI include routine attacks against medical care facilities, schools, and other civilian public spaces;<sup>11</sup> unlawful killings, hostage-taking, torture, and sexual violence;<sup>12</sup> the use of prohibited weapons;<sup>13</sup> attacks against civilian infrastructure and humanitarian relief personnel and objects; and arbitrary arrest, detention, and enforced

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<sup>7</sup> The lines of allegiance between and among these various groups are at times difficult to draw. Further complicating the situation is the fact that certain groups, particularly the United States and its coalition partners, make a distinction between the Syrian Civil War and the separate international military campaign, occurring in Syria and elsewhere, against the Islamic State. For a general overview, see *Syria War: A Brief Guide to Who’s Fighting Whom*, BBC (Apr. 7, 2017), <http://www.bbc.com/news/world-middle-east-39528673> [<http://perma.cc/DF83-FH2Y>].

<sup>8</sup> Human Rights Council Res. S-17/1, U.N. Doc A/HRC/S-17/2, at 3 (Aug. 22, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/170/97/PDF/G1117097.pdf?OpenElement>.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Human Rights Council, Conf. Room Paper of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016–28 February 2017, U.N. Doc. A/HRC/34/CRP.3 (2017), <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx> [<http://perma.cc/7K35-6ZC5>] [hereinafter HRC CRP.3]; Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/34/64 (2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/026/63/PDF/G1702663.pdf?OpenElement> [hereinafter HRC Report 34/64]; Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/33/55 (2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/178/60/PDF/G1617860.pdf?OpenElement> [hereinafter HRC Report 33/55]; Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/31/68 (2016), <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/ListReports.aspx> [<http://perma.cc/GZE3-APCZ>] [hereinafter HRC Report 31/68].

<sup>11</sup> HRC Report 31/68, *supra* note 10, at 10–12.

<sup>12</sup> HRC Report 33/55, *supra* note 10, at 12–17.

<sup>13</sup> HRC Report 34/64, *supra* note 10, at 11–13.

disappearance.<sup>14</sup> These allegations were directed against many of the various groups participating in the conflict, including the Syrian government.

Allegations of unlawful battlefield conduct in Syria are not limited to the CoI reports. States and international human rights organizations have accused numerous participants in the conflict of international law violations, including the Syrian government, armed opposition groups operating in Syria, and other states, such as the United States<sup>15</sup> and Russia.<sup>16</sup>

#### B. *Russia's Military Intervention in Syria*

Russia, an ally of Syria for decades,<sup>17</sup> has been a strong supporter of Mr. Assad's government since the beginning of the Syrian conflict in 2011. Until late 2015, Russia's support for Syria included military aid such as arms sales<sup>18</sup> and political and diplomatic support.<sup>19</sup> Notwithstanding the support of Russia and other regional allies, by mid-2015 the Syrian government had suffered a series of military setbacks resulting in the reduction of its control to roughly one fifth of the country's territory.<sup>20</sup> Facing these losses in addition to a military manpower shortage, Mr. Assad formally requested military assistance from Russia in the form of personnel and equipment in July 2015.<sup>21</sup>

In August and September 2015, Russia responded to Mr. Assad's request by deploying combat troops and other military support personnel, warplanes, tanks,

<sup>14</sup> HRC CRP.3, *supra* note 10, at 6–11, 16–17.

<sup>15</sup> See, e.g., HUMAN RIGHTS WATCH, ATTACK ON THE OMAR IBN AL-KHATAB MOSQUE: US AUTHORITIES' FAILURE TO TAKE ADEQUATE PRECAUTIONS 1 (2017), [https://www.hrw.org/sites/default/files/report\\_pdf/syria0417\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/syria0417_web.pdf) [<http://perma.cc/2MZM-3V2J>].

<sup>16</sup> See, e.g., Peter Yeung, *Russia Committing War Crimes by Deliberately Bombing Civilians and Aid Workers, Says Amnesty International*, INDEPENDENT (Feb. 21, 2016), <http://www.independent.co.uk/news/world/middle-east/russia-civilians-war-crimes-amnesty-international-a6887096.html> [<http://perma.cc/732N-DMWA>].

<sup>17</sup> See Ann M. Simmons, *Russia Has Been Assad's Greatest Ally – As It Was to His Father Before Him*, L.A. TIMES (Apr. 6, 2017), <http://www.latimes.com/world/middleeast/la-fg-syria-russia-20170406-story.html>.

<sup>18</sup> See Gabriela Baczynska & Darya Korsunskaya, *Syria Gets Russian Arms Under Deals Signed Since Conflict Began: Assad*, REUTERS (Mar. 30, 2015), <https://www.reuters.com/article/us-syria-crisis-russia-arms-idUSKBN0MQ0RK20150330> [<http://perma.cc/T7UE-Q3WL>]; Richard Galpin, *Russian Arms Shipments Bolster Syria's Embattled Assad*, BBC (Jan. 30, 2012), <http://www.bbc.com/news/world-middle-east-16797818> [<http://perma.cc/JQA6-DT8C>].

<sup>19</sup> See Vladimir V. Putin, *A Plea for Caution from Russia*, N.Y. TIMES (Sept. 11, 2013), <https://nyti.ms/2k1nXph>.

<sup>20</sup> See Kareem Shaheen, *String of Losses in Syria Leaves Assad Regime Increasingly Precarious*, GUARDIAN (June 11, 2015), <https://www.theguardian.com/world/2015/jun/11/syria-losses-east-assad-regime-precarius> [<http://perma.cc/6GY6-U4DK>].

<sup>21</sup> See Bill Chappell, *Russia Begins Airstrikes in Syria after Assad's Request*, NAT'L PUB. RADIO (Sept. 30, 2015), <http://www.npr.org/sections/thetwo-way/2015/09/30/444679327/russia-begins-conducting-airstrikes-in-syria-at-assads-request>; see also Shaheen, *supra* note 20.

and artillery to Syria, as well as warships to the eastern Mediterranean Sea.<sup>22</sup> This significant movement of personnel and equipment culminated in the initiation of a Russian air campaign that started on September 30, 2015.<sup>23</sup> Throughout the remainder of 2015 and continuing through the present day, the Russian military has conducted airstrikes against Syrian territory held by various armed groups that oppose Mr. Assad's government, including moderate anti-regime groups as well as extremist groups such as the Islamic State.<sup>24</sup> As of late 2017, Russian troops and military equipment remain active in Syrian territory,<sup>25</sup> although force reductions are expected in light of the ejection of ISIS from most of its urban strongholds.<sup>26</sup>

### C. *Russian Officials' Denial of Allegations of Syrian LOAC Violations*

An examination of the circumstances surrounding the LOAC violations committed by the Syrian armed forces reveals a pattern of behavior. First, the Syrian military engages in battlefield conduct, the result of which is substantial death, injury, or other adverse consequences to a large number of civilian persons, or substantial damage to civilian objects or structures, such as schools, hospitals, residences, or other designated public areas. Second, states and other prominent members of the international community, marshalling overwhelming evidence of unlawful conduct by the Syrian armed forces, denounce the action and call for Mr. Assad's government to be held legally accountable for its violations of international law. Third, the Russian government, coming to Syria's defense, vigorously declares inaccurate, unreliable, or completely false the circumstances giving rise to the allegedly unlawful Syrian acts. This Section examines three examples of this pattern of behavior in practice.

#### 1. Khan Sheikhou Chemical Weapon Attack

Perhaps the most notorious example of the pattern of behavior previously described is the alleged chemical weapon attack by Syria on April 4, 2017.<sup>27</sup> According to the allegations, at about 6:45 a.m., Syrian warplanes conducted an

<sup>22</sup> See Ian Bremmer, *These 5 Facts Explain Bashar Assad's Hold in Syria*, TIME (Sept. 22, 2015), <http://time.com/4039940/these-5-facts-explain-bashar-assads-hold-in-syria> [<http://perma.cc/G7EK-5PLT>].

<sup>23</sup> See Chappell, *supra* note 21.

<sup>24</sup> See Barbara Starr & Ryan Browne, *Russia Bombed Location in Syria Near Where U.S. Troops Were Present*, CNN (Sept. 18, 2017), <http://www.cnn.com/2017/09/18/politics/russia-us-syria-bomb-deir-ezzor/index.html> [<http://perma.cc/UVV8-8EGH>].

<sup>25</sup> See Anne Barnard & Margaret Coker, *ISIS, Squeezed on Two Sides, Loses Syrian City and Border Crossing*, N.Y. TIMES (Nov. 3, 2017), <https://nyti.ms/2iYHNpM>.

<sup>26</sup> See Emma Burrows & James Masters, *Putin Orders Withdrawal of Russian Troops in Visit to Syrian Base*, CNN (Dec. 11, 2017), <http://www.cnn.com/2017/12/11/middleeast/putin-russia-syria-withdrawal/index.html> [[perma.cc/K579-M8A9](http://perma.cc/K579-M8A9)].

<sup>27</sup> See *Death by Chemicals: The Syrian Government's Widespread and Systematic Use of Chemical Weapons*, HUMAN RIGHTS WATCH (May 1, 2017), <https://www.hrw.org/report/2017/05/01/death-chemicals/syrian-governments-widespread-and-systematic-use-chemical-weapons> [<http://perma.cc/L92Z-8DZQ>] [hereinafter *Death by Chemicals*] (attributing the attack to the Syrian armed forces after detailing a rigorous investigation of the allegations).

airstrike against the town of Khan Sheikhoun, located in the rebel-controlled and fiercely contested northwestern governorate of Idlib.<sup>28</sup> The bombs dropped during the airstrike, likely KhAB-250 aerial bombs produced by the former Soviet Union, are said to have contained chemical weapons, specifically the deadly nerve agent sarin.<sup>29</sup> The attack resulted in the deaths of at least ninety-two people, thirty of whom were children, and the injury of hundreds more.<sup>30</sup>

The evidence collected by non-governmental fact-finders powerfully supports the conclusion that chemical weapons were used in the April 4th attack and that the attack was conducted by the Syrian armed forces.<sup>31</sup> Moreover, there is a lengthy history concerning allegations of chemical weapon use by the Syrian government dating back to at least 2014.<sup>32</sup> Even limiting a survey of such allegations to the attacks that occurred after December 2016, there have been at least four separate instances of alleged use of chemical weapons by the Syrian government.<sup>33</sup>

The international community responded swiftly and severely to the attack. States and non-governmental organizations strongly condemned the use of chemical weapons by the Syrian armed forces and called for Mr. Assad's government to be held accountable.<sup>34</sup> The Russian and Syrian governments answered with characteristic defiance. Mr. Assad called the factual allegations a "fabrication," asserting that his government did not possess chemical weapons, and even if it did, it would not use them, and "[had] never used [its] chemical arsenal in [its] history."<sup>35</sup> Russia likewise aggressively denied the allegations that Syria had used chemical weapons. Russian officials argued that the Syrian warplanes

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See id.* This evidence includes documentary evidence such as satellite imagery, photos, and videos, information about aircraft movements, and the statements of 32 witnesses who were present in Syria at the time of the alleged attack, all of which supports the conclusion that Syria had not only the means and resources to engage such an attack, but also the motive to do so. *See* John Irish, *French Intelligence Says Assad Forces Carried Out Sarin Attack*, REUTERS (Apr. 26, 2017) <http://www.reuters.com/article/us-mideast-crisis-syria-intelligence-idUSKBN17SORY> [<http://perma.cc/H3YL-PQ9X>]; *Syria: UN Security Council Must Take Decisive Action after Idleb Chemical Attack*, AMNESTY INT'L (Apr. 5, 2017), <https://www.amnesty.org/en/press-releases/2017/04/syria-un-security-council-must-take-decisive-action-after-idleb-chemical-attack> [<http://perma.cc/BR5W-AEB4>].

<sup>32</sup> *See* Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/27/60, at 19 (2014), <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx> [<http://perma.cc/54SU-JL5W>].

<sup>33</sup> *See* *Death by Chemicals*, *supra* note 27.

<sup>34</sup> *See, e.g.,* Julie Hirschfeld Davis, *U.S. Imposes Sanctions on Syrian Government Workers After Sarin Attack*, N.Y. TIMES (Apr. 24, 2017), <https://nyti.ms/2peaYGq>; *Death by Chemicals*, *supra* note 27; Arthur Beesley & James Politi, *EU and NATO Welcome U.S. Strike on Syria*, FIN. TIMES (Apr. 7, 2017), <https://www.ft.com/content/e2a854fd-9796-347e-8009-d2846b3f50ea>.

<sup>35</sup> Laura Smith-Spark, *Assad Claims Syria Chemical Attack Was 'Fabrication', in Face of Evidence*, CNN (Apr. 13, 2017), <http://www.cnn.com/2017/04/13/middleeast/syria-bashar-assad-interview/index.html> [<http://perma.cc/4K25-B8EJ>].

conducted a lawful strike on April 4th using permissible, conventional weapons against a proper military target.<sup>36</sup> They acknowledged the possibility that at least some of the civilian deaths that occurred during the strike were the result of exposure to chemical weapons.<sup>37</sup> However, Russian officials asserted that the source of the chemical weapons was a weapons production facility or depot controlled by rebel opposition forces.<sup>38</sup> No evidence was found supporting these claims.<sup>39</sup>

Aside from the lack of factual support for Russian officials' assertions, there are other problems with their claims. First, there appears to be substantial evidence directly refuting the claims made by Russian and Syrian officials.<sup>40</sup> Russia, on the other hand, acknowledged that chemical weapons were involved but maintained that the rebel groups were solely responsible.<sup>41</sup> The inconsistency of the explanations offered by the Syrian and Russian governments suggests that Russian officials may have offered their factual accounts in bad faith and knew that the Syrian government was in fact responsible for the chemical weapons attack.

## 2. Airstrike Against School in Idlib Governorate

The history of the conflict in Syria is replete with examples of allegations of LOAC violations by the Syrian air force in the form of airstrikes against civilians and civilian objects. The international responses to such alleged violations, as well as Syrian and Russian answers to the allegations, conform to the previously outlined pattern of behavior.

As one example, on October 26, 2016, warplanes engaged in an airstrike against a residential area in the Idlib governorate, which is the location of the main Syrian opposition stronghold and has been a regular target for airstrikes by Syrian and Russian warplanes in recent years.<sup>42</sup> The attack struck a school complex, resulting in the deaths of twenty-two children and six teachers.<sup>43</sup> International groups quickly asserted the likelihood that the strikes were conducted by Syrian or pro-regime warplanes, denounced the attack as unlawful, and called for justice and accountability.<sup>44</sup> The responses of Russian and Syrian government officials were

<sup>36</sup> See *Death by Chemicals*, *supra* note 27.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Malachy Browne, Natalie Reneau & Mark Scheffler, *How Syria and Russia Spun a Chemical Strike*, N.Y. TIMES (Apr. 26, 2017), <https://nyti.ms/2q4rtTC>; see also Malachy Browne, *The Times Uses Forensic Mapping to Verify a Syrian Chemical Attack*, N.Y. TIMES (May 1, 2017), <https://nyti.ms/2pp4jsD>.

<sup>41</sup> See *Death by Chemicals*, *supra* note 27.

<sup>42</sup> Ammar Abdullah, *Airstrikes Near Syrian School in Rebel Area Kill up to 22, Mostly Kids*, CBS NEWS (Oct. 26, 2016), <http://www.cbsnews.com/news/airstrikes-near-syrian-school-rebel-area-kill-up-to-22-mostly-kids> [<http://perma.cc/VY95-ZMVH>].

<sup>43</sup> UNICEF, *School bombing may be deadliest of Syria war*, CBS NEWS (Oct. 27, 2016), <http://www.cbsnews.com/news/unicef-says-idlib-syria-school-attack-killed-22-children-6-teachers-may-be-deadliest-of-war> [<http://perma.cc/Q8HH-5CV6>].

<sup>44</sup> *Id.*

similar to each other but, as was the case in the alleged April 4th chemical weapon attack, disjointed in important respects. Syrian officials blamed rebels for any civilian deaths that occurred, claiming the following day that two children had died due to missiles fired by opposition fighters located at another school.<sup>45</sup> However, Russia called the allegations a “sham,” apparently arguing that there had been no airstrike against the school at all.<sup>46</sup>

### 3. Attack Against United Nations Humanitarian Aid Convoy

Another prominent example of Russian denial in the face of compelling evidence of LOAC violations by the Syrian military is the well-documented strike against a United Nations humanitarian aid convoy.

On September 20, 2016, after receiving permission from the Syrian government to distribute humanitarian aid to beleaguered areas throughout the country, the United Nations deployed an aid convoy to an area of eastern Aleppo that at the time was controlled by opposition groups.<sup>47</sup> The convoy was struck by warplanes in Urum al-Kubra, a town southwest of the city of Aleppo and located in rebel-controlled territory, after leaving a government-controlled area of Aleppo.<sup>48</sup> The airstrike, which also struck a warehouse and health clinic operated by the Red Crescent, lasted for over three hours.<sup>49</sup> Witness accounts include those of rescue workers who saw the strikes coming from helicopters and land missiles.<sup>50</sup> There were no apparent military targets in the vicinity of the strike. Syrian and Russian warplanes were the only air forces known to be active in the area of the attack.<sup>51</sup>

In the wake of the attack, the United Nations immediately suspended its aid convoy program in Syria, and the International Committee of the Red Cross rebuked the attack as a “flagrant violation of international humanitarian law.”<sup>52</sup> Syrian officials denied any involvement in the attack.<sup>53</sup> For its part, Russia not only

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<sup>45</sup> Sarah El Deeb, *U.N. Says School Attack in Syria May Be Potential War Crime*, AP NEWS (Oct. 27, 2016), <https://www.apnews.com/689180f6b8774f6582657db982b49dda> [http://perma.cc/B5R6-9GXD].

<sup>46</sup> *See id.*

<sup>47</sup> Stephanie Nebehay & Tom Miles, *U.N. Suspends Aid Convoys in Syria After Hit, ICRC Warns on Impact*, REUTERS (Sept. 20, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-aid-idUSKCN11Q0W1> [http://perma.cc/SYB3-WQ2P].

<sup>48</sup> *Syria: Investigate Attack on U.N. Aid Convoy*, HUMAN RIGHTS WATCH (Sept. 20, 2016), <https://www.hrw.org/news/2016/09/20/syria-investigate-attack-un-aid-convoy> [http://perma.cc/M54K-NL48].

<sup>49</sup> *Id.*

<sup>50</sup> *The Latest: U.S. Holds Russia Responsible for Aid Convoy Hit*, AP NEWS (Sept. 20, 2016), [https://apnews.com/8b6713ebfcf641e88c35e839ffffdc88/latest-un-suspends-syria-convoys-after-aid-trucks-hit?utm\\_campaign=SocialFlow&utm\\_source=Twitter&utm\\_medium=AP](https://apnews.com/8b6713ebfcf641e88c35e839ffffdc88/latest-un-suspends-syria-convoys-after-aid-trucks-hit?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP) [http://perma.cc/SQ9H-NCJB].

<sup>51</sup> *Syria: Investigate Attack on U.N. Aid Convoy*, *supra* note 48.

<sup>52</sup> Nebehay & Miles, *supra* note 47.

<sup>53</sup> *Syrian Army Says It Did Not Hit Aid Convoy Near Aleppo: SANA*, REUTERS (Sept. 20, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-army/syrian-army-says-it-did-not-hit-aid-convoy-near-aleppo-sana-idUSKCN11Q1JT> [http://perma.cc/9YSM-KKPG].

denied that any Syrian or Russian forces were involved, but also insisted there was no strike against the convoy at all. According to the Russian Defense Ministry, the Russian military had “carefully studied the video recordings of the so-called activists from the scene and found no signs that any munitions hit the convoy.”<sup>54</sup> To the contrary, the Ministry spokesman asserted that “everything showed on the video is the direct consequence of the cargo catching fire, and this began in a strange way simultaneously with militants carrying out a massive offensive in Aleppo.”<sup>55</sup>

## II. The Basis for a Theory of State Complicity in International Law

Part II identifies the relevant concepts and provisions of international law, including the international law of state responsibility and the concept of state complicity. It then examines two rules of state complicity: Article 16 of the Draft Articles on State Responsibility, and Rule 144 of the 2005 ICRC study of customary IHL. This analysis concludes that Rule 144, rather than Article 16, is the state complicity rule that should be applied in the ensuing analysis of Russia’s practice of publicly denying alleged Syrian LOAC violations.

### A. *The International Responsibility of States for Violations of the LOAC*

The international law of state responsibility controls the analysis of whether Russia is complicit in Syria’s LOAC violations.<sup>56</sup> An analysis of the law of state responsibility begins with the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles), adopted by the International Law Commission (ILC) in 2001.<sup>57</sup> Upon their adoption by the ILC, the United Nations General Assembly formally acknowledged the Draft Articles and presented them to the attention of all states.<sup>58</sup> After their acknowledgment by the General Assembly, the Draft Articles did not subsequently become the subject of state convention,<sup>59</sup> and thus constitute a “subsidiary means for the determination of rules of law.”<sup>60</sup> Nevertheless, they are highly influential. Many aspects of the Draft

<sup>54</sup> *The Latest: U.S. Holds Russia Responsible for Aid Convoy Hit*, *supra* note 50.

<sup>55</sup> *Id.*

<sup>56</sup> A separate topic, which is outside the scope of this Article, is the potential liability of individual Russian government officials, which would be analyzed under the legal regime of international criminal law.

<sup>57</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int’l Law Comm’n on Its Fifty-Third Sess., U.N. Doc. A/56/10, at 25 (2001), [http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a\\_56\\_10.pdf&lang=EXP](http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_56_10.pdf&lang=EXP) [hereinafter Draft Articles]. The full text and commentaries of the Draft Articles may also be found in print in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002).

<sup>58</sup> G.A. Res. 56/83, ¶ 3–4 (Dec. 12, 2001).

<sup>59</sup> See JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 42–44 (2013).

<sup>60</sup> See Statute of the Int’l Court of Justice, art. 38(1)(d), <http://www.icj-cij.org/en/statute> [<http://perma.cc/46J8-LKSW>]. International law derives from four sources: customary international law, treaties (or state conventional law), general principles of law, and “judicial decisions and the teachings of the most highly qualified publicists of the various nations.” *Id.*, art. 38(1). Customary international law consists of the general practices that are accepted as international law. *Id.* Others

Articles have been identified as customary international law, or at least recognized as authoritative statements of the international law of state responsibility.<sup>61</sup>

The central premise of the law of state responsibility is set forth in Article 1 of the Draft Articles,<sup>62</sup> which asserts that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”<sup>63</sup> The conditions required to establish that a state has committed an internationally wrongful act are set forth in Article 2: (1) a particular act or omission must be attributable to the state under international law; and (2) that act or omission must constitute a breach of an international obligation of the state.<sup>64</sup>

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have described it as “the generalization of the practice of States.” *Fisheries (U.K. v. Nor.)*, Judgment, 1951 I.C.J. Rep. 116, 191 (Dec. 18) (separate opinion of Read, J.); *see also* JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24–27 (8th ed. 2012) (identifying the three elements of custom: duration and consistency of practice; generality of practice; and *opinio juris sive necessitatis*, or acceptance of the practice as law). Treaty law, also known as conventional international law, refers to the law agreed upon by states and reduced to convention or treaty. *Id.* at 30–34. It is “constituted by agreement as having the force of special law” between the states which are party to the convention in question. *Conventional law*, BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>61</sup> *See* Kaj Hobér, *State Responsibility and Attribution*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 549, 553 (Peter Muchlinski et al. eds., 2008) (“[T]here is a general consensus the [Draft Articles] accurately reflect customary international law on state responsibility.”); *see also* *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 401 (Feb. 26) (asserting that the “rules for attributing alleged internationally wrongful conduct to a State” as reflected in the Draft Articles, constitute customary international law). However, “[a]lthough the [Draft Articles] have been generally welcomed and widely invoked, they have not escaped criticism.” CRAWFORD, *supra* note 59, at 85. Most commentators acknowledge that a gap exists between the Draft Articles and the international law of state responsibility as understood and practiced by states. *Id.* at 85–90. The extent of that gap in general is beyond the scope of this Article. However, it will be necessary to determine the extent to which the complicity rule in Article 16 of the Draft Articles accurately reflects the law of state responsibility, insofar as Article 16’s complicity rule constitutes a secondary rule of state responsibility. This determination occurs in Section II(B)(2) *infra*.

<sup>62</sup> References in this Article to particular provisions of the Draft Articles will omit the word “draft.” For example, Draft Article 1 is simply referred to as Article 1.

<sup>63</sup> Draft Articles, *supra* note 57, art. 1.

<sup>64</sup> *Id.*, art. 2. With regard to the attribution element of Article 2, examples include the rules of the Draft Articles imputing to a state: the conduct of an organ of that state, *id.*, art. 4; the conduct of persons exercising the governmental authority of that state, *id.*, art. 5; and the conduct of private persons or groups acting on the instructions of, or under the direction or control of, that state, *id.*, art. 8. Regarding the breach element, the “essence of an internationally wrongful act lies in the non-conformity of the state’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation.” *Id.*, comment. to pt. 1, ch. III, ¶ (3). It is worth noting that the fundamental principle asserted in Article 1 that each state is responsible for its own internationally wrongful acts does not preclude the possibility that another state may also be responsible for the same wrongful conduct. *See id.*, comment. to art. 1, ¶ (6). For example, the same wrongful conduct may simultaneously be attributable to multiple states. *See generally id.*, pt. 1, ch. II; *see also id.*, art. 19. Additionally, a state may appropriately bear international responsibility in connection with a wrongful act attributable to another state. *See generally id.*, pt. 1, ch. IV.

The Draft Articles constitute a statement of *general* international law.<sup>65</sup> This Article will assume generally that the Draft Articles are operative in the context of the LOAC.<sup>66</sup> However, a complete account of the applicable law for the purpose of this Article’s analysis requires a look beyond the general law to relevant special law regimes, specifically the LOAC. There are two reasons for this. First, the rules contained in the Draft Articles are secondary in nature and, as such, purport to state only the “general conditions under international law for [a] State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.”<sup>67</sup> The Draft Articles claim not to contain the substantive obligations of states under international law.<sup>68</sup> For the substantive content of states’ international obligations, one must look to primary rules contained in relevant special international law regimes.<sup>69</sup> Second, and relatedly, the Draft Articles are superseded when, and to the extent that, a relevant special law regime, such as the LOAC, provides an applicable secondary rule of state responsibility.<sup>70</sup>

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<sup>65</sup> The concept of the general law, or *lex generalis*, is perhaps best understood by reference to its counterpart: special law, or *lex specialis*. While general law is broadly applicable, usually unconfined by particular subject matter, special law is embodied in what are sometimes called “self-contained regimes of law” or simply “special law regimes.” A special rule may function in two ways: (1) an application of the general rule in a particular circumstance or (2) an exception to the general rule. See Int’l Law Comm’n, Rep. on the Work of Its Fifty-Fifth Session, U.N. Doc. A/58/10, ch. X (2003), [http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc\\_2003\\_v2\\_p2.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_2003_v2_p2.pdf&lang=EF) SRAC.

<sup>66</sup> See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1: RULES, at 530–36 (2007).

<sup>67</sup> Draft Articles, *supra* note 57, General Commentary, ¶ (1).

<sup>68</sup> As secondary rules, the Draft Articles claim not to “define the content of the international obligations” of states, the breach of which entails responsibility. *Id.*; see also *id.*, comment. to pt. 1, ch. III, ¶ (2); Int’l Law Comm’n Rep. on the Work of Its Twenty-Second Session, U.N. Doc. A/CN.4/237, ¶ 66(c) (1970), [http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a\\_cn4\\_237.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_cn4_237.pdf&lang=EF) (“[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect . . . comes [properly] within the sphere [of the international law of state responsibility].”).

<sup>69</sup> For example, states’ substantive obligations in the context of armed conflict are found not in the Draft Articles’ secondary rules of state responsibility but in the LOAC. The distinction made by the Draft Articles between primary and secondary rules has been criticized as impractical and artificial. See CRAWFORD, *supra* note 59, at 64–65. Many commentators acknowledge at least some artificiality in the distinction, but argue that it was necessary for completion of the project. See, e.g., VLADYSLAV LANOVOY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY 73–74 (2016). Indeed, as will be seen, the desired dichotomy between the Draft Articles’ secondary rules and the primary rules of international law breaks down to a great extent with regard to the legal concept of complicity. See Draft Articles, *supra* note 57, art. 16 and comment.; see also *infra* note 101.

<sup>70</sup> Draft Articles, *supra* note 57, art. 55 (“[The Draft Articles] do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law.”). For example, the LOAC appears to contain a special rule of state responsibility that operates to the exclusion of the general rules of attribution articulated in the Draft Articles.

In light of these principles, analysis of Russian complicity in Syrian LOAC violations requires a determination of the extent to which the general international law of state responsibility, as articulated by the Draft Articles, provides a rule that utilizes state complicity as a basis for international responsibility. Should a state-complicity rule be identified in the general law of state responsibility, the next step is examining the LOAC to determine whether that special law regime provides its own complicity rule. If the LOAC also provides a state complicity rule, then the inquiry becomes which of the two rules to apply in the ensuing analysis of Russian complicity based on its denial of Syrian battlefield wrongdoing.

However, addressing these issues first requires an examination of the concept of legal complicity, and the adoption of a framework for analyzing the complicity rules found in the general international law and the LOAC.

## B. *The Legal Basis for a Theory of State Complicity in LOAC Violations*

### 1. Legal Complicity: Concept and Framework

Complicity is defined generally as “[a]ssociation or participation in a criminal act.”<sup>71</sup> An accomplice is, once again quite generally, one “who is in any

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Under the Draft Articles, “[t]he conduct of an organ of a State . . . shall be considered an act of the State under international law if the organ . . . acts *in that capacity*, even if it exceeds its authority or contravenes instruction.” *Id.*, art. 7 (emphasis added). Thus, were the Draft Articles the controlling authority, it appears that a state would be responsible only for the conduct of members of its armed forces acting in their official capacity. Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT’L REV. RED CROSS 401, 405 (2002). Under this approach, a state is not responsible for the conduct of its armed forces members acting as private persons, such as when they commit criminal offenses during leave in an occupied territory. *Id.* However, under the LOAC, parties to an armed conflict “shall be responsible for all acts by persons forming part of [their respective] armed forces.” *Id.* (citing Laws and Customs of War on Land (Hague Convention IV) art. 3, Oct. 18, 1907, 36 Stat. 2277, U.N.T.S. 539 [hereinafter Hague IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict art. 91, Jun. 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Additional Protocol I]). This example of Article 55 in operation does not impact this Article’s analysis because it is assumed that the battlefield misconduct in question was committed by members of the Syrian armed forces acting under orders in their official capacities.

<sup>71</sup> *Complicity*, BLACK’S LAW DICTIONARY, *supra* note 60; see MODEL PENAL CODE § 2.06 (AM. LAW INST., Proposed Official Draft 1962); Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Due to the fact that early development of the theory of complicity occurred in the context of domestic criminal law, the language surrounding complicity is often phrased in terms of criminal law. Notwithstanding the unique phraseology of criminal law, domestic and international criminal law cases and scholarship concerning complicity have been useful to those who have sought a better understanding of complicity’s role in international law. See, e.g., MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* 10–55 (2015). The International Court of Justice (ICJ) has supported the notion that the criminal law of complicity properly informs analysis of state complicity. See *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 114, ¶ 167 (“It is true that the concepts used in [the Genocide Convention], and particularly that of ‘complicity,’ refer to well-known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanction against individuals. It would however not be in keeping with the object and purpose of the [Genocide] Convention to

way involved with another in the commission of a crime.”<sup>72</sup> The term “principal” is used to describe the primary wrongful actor, in whose misconduct the accomplice is said to have participated. As a theory of legal liability or responsibility,<sup>73</sup> complicity’s function is to establish the circumstances under which the accomplice may be held legally responsible for his participation in the principal’s wrongful conduct.<sup>74</sup> Legal responsibility under a theory of complicity is derivative in nature.<sup>75</sup> Thus, the potential legal responsibility of the accomplice necessarily depends on the occurrence of some separate wrongful act committed by the principal.<sup>76</sup>

Any particular rule prohibiting complicity may be divided into its objective element (in criminal law, the *actus reus* element) and subjective element (the *mens rea* element). The objective element refers to the action of the accomplice, that is, the specific aid or assistance the accomplice affords to the principal and on which legal responsibility is based.<sup>77</sup> The objective element of complicity may be further divided into two sub-components. First, it must be determined whether and to what

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deny that the international responsibility of a State—even though quite different in nature from criminal responsibility—can be engaged . . . through the actions of [State] organs or persons or groups whose acts are attributable to them.”)

<sup>72</sup> *Accomplice*, BLACK’S LAW DICTIONARY, *supra* note 60; *see also* *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 222, ¶ 432.

<sup>73</sup> Some commentators draw a conceptual distinction between “liability” and “responsibility” in the international law of state responsibility. *See, e.g.*, Michel Montjoie, *The Concept of Liability in the Absence of an Internationally Wrongful Act*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 503 (James Crawford, Alain Pellet & Simon Olleson eds., 2010). The distinction is not important for purposes of this Article, which will use the term “responsibility.”

<sup>74</sup> *See* K.J.M. SMITH, *A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY* 1–2 (1991); *see also* *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 222, ¶ 432; MODEL PENAL CODE, *supra* note 71, § 2.06; JACKSON, *supra* note 71, at 10.

<sup>75</sup> Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 433 (2007–08); *see also* MODEL PENAL CODE, *supra* note 71, § 2.06(2).

<sup>76</sup> Robert Weisberg, *Reappraising Complicity*, 4 BUFFALO CRIM. L. REV. 217, 224 (2000); *see also* SMITH, *supra* note 74, at 94 (“Simplistically, if no crime is committed there is no criminality from which another’s complicity can be derived.”). This characteristic of complicity distinguishes it from theories of inchoate responsibility such as conspiracy, attempt, and solicitation, each of which may occur without a principal offense. Weisberg, *supra* note 75, at 224. Complicity must also be distinguished from the concept of vicarious liability, which involves imposing legal responsibility “on one party for the wrongs of another solely because of the relationship between the parties,” regardless of whether the former engaged in any action that contributed in any way to the latter’s wrongful conduct. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 337 (1985).

<sup>77</sup> The terms “aid” and “assistance” are used generally in this Article to describe the conduct prohibited under the objective element of any particular complicity rule. In practice, the many regimes of domestic and international criminal law use a broad array of terminology to describe the kinds of conduct prohibited under their respective complicity rules. A non-comprehensive sample of the terms used include aid, abet, counsel, command, induce, procure, advise, persuade, solicit, facilitate, incite, assist, encourage, and instigate. Some authors proclaim the usefulness of a conceptual distinction between assistance that is active and assistance that is influential in nature when examining the kinds of conduct falling within a prohibition against complicity. *See, e.g.*, Kadish, *supra* note 76, at 342–44. This distinction will be important in this Article’s later comparison between the complicity rule in Article 16 and that of Rule 144. *See infra* Section II(B)(4).

extent the complicity rule places limitations on the kinds of aid or assistance that fall within its scope.<sup>78</sup> Second, it must be resolved whether the complicity rule establishes a minimum threshold for the degree to which an accomplice's aid or assistance must contribute to the principal's wrongful conduct, and, if so, where the threshold lies.<sup>79</sup> Thus, legal responsibility under a particular complicity rule may only arise when the accomplice's conduct is of a kind falling within the rule's conduct component and which meets the rule's contribution threshold.

The subjective element of complicity refers to the mental state the accomplice is required to possess when furnishing aid or assistance to the principal.<sup>80</sup> In the determination of the mental state requirement of any particular complicity rule, the debate is generally between, on the one hand, a strict requirement that the accomplice by his aid or assistance intended to facilitate the commission of the principal's wrongful act and, on the other hand, a less strict requirement that the accomplice knew or was aware of the fact that the principal would use the accomplice's aid or assistance to engage in the wrongful act.<sup>81</sup>

This general theory of complicity provides a framework for determining how the general international law of state responsibility, as set forth in the Draft Articles, articulates a rule of state complicity.

## 2. Article 16: A Complicity Rule within the Draft Articles

Article 16, entitled "Aid or assistance in the commission of an internationally wrongful act," reads as follows:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

<sup>78</sup> See JACKSON, *supra* note 71, at 31–42; see also Dressler, *supra* note 75, at 431 (listing possible kinds of aid or assistance that may fall within the scope a particular complicity rule); see generally SMITH, *supra* note 74, at 20–54. This sub-component of the objective element of complicity will be referred to throughout this Article as the "conduct component."

<sup>79</sup> See JACKSON, *supra* note 71, at 32, 42–46; see also Weisberg, *supra* note 76, at 222 (noting the "causation question" implicit in the notion of complicity "raises so many questions of degree"); see generally SMITH, *supra* note 74, at 55–93. This sub-component of the objective element of complicity will be referred to throughout this Article as the "contribution threshold."

<sup>80</sup> See Dressler, *supra* note 75, at 431–32; Weisberg, *supra* note 76, at 231–32; see generally SMITH, *supra* note 74, at 141–234. In this Article, the subjective element of complicity will be referred to as the "mental state requirement."

<sup>81</sup> See SMITH, *supra* note 74, at 141–43; see also *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at ¶ 421. This debate is often shorthand as the debate between an "intent" or "purpose" requirement and a "knowledge" requirement. In theory, however, the debate may be extended to include the possibility of legal responsibility for complicity based on aid or assistance provided recklessly, negligently, or even faultlessly (i.e., strict liability). See JACKSON, *supra* note 71, at 52–54; SMITH, *supra* note 74, at 142.

(b) the act would be internationally wrongful if committed by that State.<sup>82</sup>

The rule articulated in Article 16 constitutes a rule of complicity,<sup>83</sup> and the previously established conceptual framework is applicable to Article 16.<sup>84</sup> Accordingly, its rule may be divided into its objective (or action) element and its subjective (or mental state) element.

The objective element of Article 16 consists of one state's aiding or assisting another state in the commission of the latter's internationally wrongful act. Article 16's objective element may be further divided into its conduct component<sup>85</sup> and its contribution threshold.<sup>86</sup> First, under the conduct component, it must be determined whether Article 16's complicity rule places any limitations on the kinds of state conduct that may constitute "aid or assistance." The text of the rule clearly does not impose any such limitations. Likewise, in the commentary to

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<sup>82</sup> Draft Articles, *supra* note 57, art. 16. Article 16 contains what is referred to as an "opposability" requirement. See LANOVOY, *supra* note 69, at 103–06. This requirement, located in paragraph (b) of the rule, conditions the international wrongfulness of the assisting state's aid or assistance on a determination that the principal state's internationally wrongful act would also be internationally wrongful if committed by the assisting state. See Draft Articles, *supra* note 57, art. 16. The justification for or virtue of such a requirement is beyond the scope of this Article. Furthermore, the opposability requirement is unlikely to be relevant to this Article's analysis due to the near universal applicability of the core rules and principles of the LOAC through customary international law and widely adopted state conventions.

<sup>83</sup> See Helmut Philipp Aust, *Complicity in Violations of International Humanitarian Law*, in *INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM THE AFRICAN GREAT LAKES REGION* 442, 448–49 (Heike Krieger ed., 2015); Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT'L. REV. RED CROSS 467, 470 (2005) (noting that Article 16 was the "first attempt to codify 'complicity' in connection with the law regulating inter-State relations"). The debate whether to include a rule of state complicity within the Draft Articles was particularly intense. "In contrast to the majority of domestic legal systems, international law was relatively slow to recognize" that one state's contribution to another state's breach of its international obligation "should be subject to legal consequences." LANOVOY, *supra* note 69, at 23; see JACKSON, *supra* note 71, at 125 (noting the historical relative underdevelopment within the law of state responsibility of a theory of state complicity). Commentators explain this notably slow development in the legal regime by highlighting the traditional view of international law as a system of bilateral obligations between states, "defined [principally] by correlative rights and obligations owed by subjects to each other." *Id.* The role of third states, and thus a state complicity rule, is difficult to account for within such a system. *Id.* Notwithstanding the relatively slow development of an explicit prohibition against third states' aid or assistance in the law of state responsibility, the notions underlying the theory of complicity were "not entirely unknown in the earlier stages of development of international law." LANOVOY, *supra* note 69, at 23. For example, one finds early signals of the conceptual underpinnings of complicity in the area of international law known as the law of neutrality. *Id.* at 23–32.

<sup>84</sup> This conceptual framework is established *supra* in notes 77–81 and accompanying text.

<sup>85</sup> See *supra* note 78 and accompanying text.

<sup>86</sup> See *supra* note 79 and accompanying text. In the context of state complicity, other authors have referred to this component of complicity's objective element as the "nexus" requirement. See, e.g., LANOVOY, *supra* note 69, at 95. This is due to its function of evaluating the strength of the nexus between the assisting state's aid or assistance and the principal state's internationally wrongful act. See *id.*

the rule, the drafters do not appear to impose any limits on the kinds of aid or assistance falling within the ambit of the rule,<sup>87</sup> although it does appear that the rule excludes non-active behavior of influence, such as advice, encouragement, and incitement.<sup>88</sup>

Second, under the contribution threshold, it must be determined whether the principal state's internationally wrongful act is sufficiently linked to the assisting state's aid or assistance, in order to impose state responsibility under Article 16. In other words, though the text of Article 16 does not set forth such a standard, does Article 16's rule contain an implicit minimum threshold for the degree to which the assisting state's aid or assistance must contribute to the commission of the principal state's unlawful conduct? And if such a threshold exists, where does it lie? The ILC

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<sup>87</sup> See Draft Articles, *supra* note 57, comment. to art. 16. As a demonstration of the breadth of this aspect of the rule, the commentary includes the following conduct as potentially falling within the ambit of Article 16: providing an essential facility, financing the principal state's wrongful activity, furnishing the means for closure of an international waterway, aiding in the abduction of individuals on foreign soil, and contributing to the destruction of a third country national's property. Draft Articles, *supra* note 57, comment. to art. 16, ¶ (1). Most commentators agree that the rule does not place limitations on the *form* of the conduct that may constitute "aid or assistance," see e.g., CRAWFORD, *supra* note 59, at 402, and thus read Article 16 broadly in this regard, see JACKSON, *supra* note 71, at 154; Vaughan Lowe, *Responsibility for the Conduct of Other States*, 101 JAPANESE J. INT'L L. 1, 5 (2002); Stefan Talmon, *A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq*, in THE IRAQ WAR AND INTERNATIONAL LAW 185, 218 (Phil Shiner & Andrew Williams eds., 2008) ("The ILC has made it clear that no particular kind of aid or assistance is necessary in order for responsibility [under Article 16] to arise.").

<sup>88</sup> See Draft Articles, *supra* note 57, comment. to ch. IV, ¶ (9) ("The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support . . ."); Int'l Law Comm'n, Second Report on State Responsibility by James Crawford, Special Rapporteur, U.N. Doc. A/Cn.4/498, ¶¶ 170, 182 (1999) [hereinafter Crawford Report] (distinguishing between "advice, encouragement [and] incitement," which are excluded from within the scope of the rule, and "cases of actual assistance," which are included). The exclusion of behavior of influence from within the scope of Article 16 has been justified in several ways, including based on (1) the lack of authority under customary international law warranting their inclusion within a state complicity rule, see *id.*, ¶¶ 170, 213 n.400; (2) the unique nature of states as autonomous, sovereign entities that are entitled to conduct their affairs free from the influence of third states, see Int'l Law Comm'n, Seventh Report on State Responsibility by Roberto Ago, Special Rapporteur, U.N. Doc. A/CN.4/307, ¶¶ 62–63 (1978) ("[T]he mere fact that a State has been incited by another State to act in a certain way cannot affect the characterization of its actions or the determination of their legal consequence. The decision of a sovereign State to adopt a certain course of conduct is certainly its own decision, even if it has received suggestions and advice from another State, which it was at liberty not to follow."); and (3) the generally remote contributory value of behavior of influence and thus its failure to meet the contributory threshold required by Article 16's complicity rule, see JACKSON, *supra* note 71, at 154–55 (arguing for inclusion of incitement within the scope of Article 16, but acknowledging that "other elements of the complicity rule," such as the contribution threshold, could effectively exclude "more marginal" forms of assistance such as behavior of influence). It is the exclusion of these behaviors of influence from Article 16's scope that led to the ILC drafters' decision not to refer to Article 16 expressly as a *complicity* prohibition, choosing instead to use the terms *aid or assistance*. See LANOVOY, *supra* note 69, at 77 (citing Int'l Law Comm'n, Rep. on the Work of Its Thirtieth Session, U.N. Doc. A/33/10, at 99 (1978)). In making this decision regarding terminology, the drafters wished to emphasize that Article 16 was "not intended to prohibit certain acts that are commonly considered complicity in domestic law, namely moral aid and incitement." *Id.*

drafters provide some guidance, stating in the commentary that Article 16 contains “no requirement that the aid or assistance [was] essential to the [principal state’s] performance of the internationally wrongful act; it is sufficient if [the aid or assistance] contributed significantly to that act.”<sup>89</sup> Put differently, Article 16 requires that the assisting state’s aid or assistance renders it materially easier for the principal state to commit the internationally wrongful act.<sup>90</sup>

Moving from complicity’s objective element to its subjective element, Article 16 must be evaluated in terms of its mental state requirement.<sup>91</sup> Specifically, it must be determined what mental state the assisting state must possess when providing aid or assistance to the principal state. The mental state requirement of Article 16 appears in paragraph (a) of the article, which provides that the assisting state must provide the aid or assistance “with knowledge of the circumstances of the [principal state’s] internationally wrongful act.”<sup>92</sup> Thus, at first glance, in the debate between a strict “intent” mental state requirement and a less strict “knowledge” requirement, the text of Article 16 falls on the side of requiring only knowledge on the part of the assisting state. However, according to the ILC drafters’ commentary, responsibility under Article 16 requires that the assisting state provided the aid or assistance “with a view to facilitating the commission of an internationally wrongful act” by the principal state.<sup>93</sup> Furthermore, the drafters assert that the assisting state is not responsible under Article 16 “unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.”<sup>94</sup> This language in the drafters’ commentary “suggests a more stringent fault requirement” of intent, rather than one of mere knowledge.<sup>95</sup> This ambiguity concerning Article 16’s mental state requirement has not been authoritatively resolved.<sup>96</sup>

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<sup>89</sup> Draft Articles, *supra* note 57, comment. to art. 16, ¶ (5).

<sup>90</sup> See Crawford Report, *supra* note 88, ¶ 182. However, the commentary to Article 16 adds confusion by noting that, in some cases falling within the ambit of Article 16’s prohibition, the “assistance may have been only an incidental factor in the commission of the primary [wrongful] act,” Draft Articles, *supra* note 57, comment. to art. 16, ¶ (10), thus implying a relatively low threshold. The majority of commentators deem this comment misleading or erroneous and favor a threshold of “significant contribution” or “material facilitation.” See, e.g., CRAWFORD, *supra* note 59, at 402–03; JACKSON, *supra* note 71, at 158.

<sup>91</sup> See *supra* notes 80–81 and accompanying text.

<sup>92</sup> Draft Articles, *supra* note 57, art. 16.

<sup>93</sup> *Id.*, comment. to art. 16, ¶ (1). However, to further confuse matters, the drafters provide, as an example of “a view to facilitating the commission” of the principal state’s unlawful act, one state’s voluntary assistance to another state in “carrying out conduct which violates the international obligations of the latter, . . . by knowingly providing an essential facility or financing the activity in question.” *Id.* (emphasis added). This comment implies a lower standard of knowledge rather than intent.

<sup>94</sup> *Id.* ¶ (5).

<sup>95</sup> JACKSON, *supra* note 71, at 159.

<sup>96</sup> For those notable commentators favoring a requirement of “intent” or “purpose,” see HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 249 (2011); CRAWFORD, *supra* note 59, at 408; Georg Nolte & Helmut Philipp Aust, *Equivocal Helpers—Complicit States, Mixed Messages and International Law*, 58 INT’L COMP. L.Q. 1, 14–15 (2009). For those advocating a less strict “knowledge” requirement, see JACKSON, *supra* note 71, at 161; Lowe, *supra* note 87, at 8;

Having established Article 16 as articulating a complicity rule, as well as the general parameters of that rule, the next issue is the authoritative status of the rule reflected in Article 16. In other words, does Article 16's rule reflect customary international law?<sup>97</sup> While "complicity was still part of progressive development of international law" in 1978 when the ILC first proposed the precursor to Article 16,<sup>98</sup> many commentators assert that the rule presently has achieved customary law status.<sup>99</sup> Although there is widespread support for this assertion as a general matter, significant disagreement exists regarding the precise parameters of both the objective and subjective elements of Article 16.<sup>100</sup>

As previously discussed, under Article 55 of the Draft Articles, a state complicity rule contained in the special law regime of the LOAC would operate to the exclusion of Article 16, to the extent that it provides an applicable secondary rule of state responsibility.<sup>101</sup> Accordingly, the inquiry must examine the special

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John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. OF INT'L L. 77, 109–17 (1987).

<sup>97</sup> Recall that since their adoption by the ILC, the Draft Articles have not subsequently become codified in state convention. *See supra* note 59 and accompanying text. Thus, their status as an authoritative statement of international law depends on either the extent to which the Draft Articles' rules have been articulated in separate, binding state conventional law or, alternatively, the extent to which they have come to embody customary international law since their adoption by the ILC. Respecting state conventional law, a number of rules appear in various multilateral instruments that may constitute prohibitions against complicity. *See, e.g.*, G.A. Res. 3314 (XXIX), arts. 1 & 3(f), annex, (Dec. 14, 1974) (defining the term "aggression" and then including within its definition "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State"). Indeed, the drafters' commentary to Article 16 refers directly to specific primary rules that prohibit states from participating in the wrongful acts of other states. Draft Articles, *supra* note 57, comment. to art. 16, ¶ (2). However, just as it is unclear "how the general rule [contained in Article 16] is founded on these primary rules," JACKSON, *supra* note 71, at 153; *see also* Nolte & Aust, *supra* note 96, at 8, it is equally uncertain whether any primary rule or group of primary rules can be seen as codification of Article 16's general rule. Indeed, most of the relevant primary rules were codified before the ILC adopted the Draft Articles in 2001. Thus, the inquiry concerning Article 16's authoritative status must focus on whether and to what extent its rule constitutes customary international law.

<sup>98</sup> LANOVOY, *supra* note 69, at 77.

<sup>99</sup> *See, e.g.*, JACKSON, *supra* note 71, at 153; AUST, *supra* note 96, at 191. Significantly, in 2007 the ICJ declared that Article 16 reflects a rule of customary international law. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at ¶ 420.

<sup>100</sup> *See supra* notes 89–90 and 92–96 and accompanying text.

<sup>101</sup> *See* Draft Articles, *supra* note 57, art. 55; *see also supra* note 69 and accompanying text. Before transitioning to the LOAC, it is worthwhile to return briefly to the distinction between primary and secondary rules of international law. *See supra* notes 67–69 and accompanying text. Recall that the Draft Articles purport only to codify secondary rules of state responsibility. Consequently, the drafters intended that the articles avoid defining the content of states obligations under international law, which would be left to the primary rules contained in customary international law and state conventional law. However, Article 16 appears to cross the line between primary obligations and secondary rules of responsibility. Indeed, Article 16's invocation of the international responsibility of states that provide aid or assistance to other states appears to "define the content of [an] international obligation [of states], the breach of which gives rise to responsibility." *See* Draft Articles, *supra* note 57, General Commentary, ¶ (1). Thus, by all appearances, Article 16 functions as a primary rule of international law rather than a secondary rule of state responsibility. JACKSON, *supra* note 71, at 149–50. For this reason, some have criticized the decision to include Article 16

law regime of the LOAC to determine whether the latter provides for a state complicity rule.

### 3. Rule 144: A Complicity Rule within the LOAC

There is no rule within customary or conventional LOAC expressly prohibiting state complicity.<sup>102</sup> However, in its 2005 study of customary IHL (ICRC Study), the ICRC identified a rule from which such a prohibition may arise. Rule 144 of the ICRC Study (Rule 144) holds that “[s]tates may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.”<sup>103</sup> A complicity rule may be deduced from Rule 144’s prohibition of one state’s encouragement of another state to violate the LOAC.

To understand how Rule 144’s encouragement prohibition operates as a state complicity rule, the previously discussed framework may be applied by dividing Rule 144 into its objective and subjective elements.<sup>104</sup> The objective element of Rule 144’s encouragement prohibition may be further divided into its conduct component<sup>105</sup> and contribution threshold.<sup>106</sup> As discussed above, the conduct component ascertains the kinds of aid or assistance that fall within the

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within the Draft Articles. *See, e.g.*, Int’l Law Comm’n, Summary Record of the 1518th Meeting, U.N. Doc. A/CN.4/SER.A/1978 (1978) (noting the criticism of one ILC member that a precursor to Article 16, “more than any article the Commission had adopted, seemed to leap the barrier between secondary and primary rules” of international law). Others have made more nuanced arguments about Article 16’s place within the primary/secondary rule dichotomy, for example arguing that it straddles the line between primary and secondary rules rather than leaps over it and that, even if the secondary nature of Article 16 is suspect, the rule may nonetheless justifiably be included within a body of secondary rules of state responsibility in furtherance of the notion of the international rule of law. *See* AUST, *supra* note 96, at 6. This revelation that Article 16 operates as a primary rule rather than a secondary rule of state responsibility has conceptual (but not practical) repercussions. Article 55 asserts that the Draft Articles are inapplicable only to the extent that the rules in special law regimes govern “the conditions for the existence of an internationally wrongful act.” Draft Articles, *supra* note 57, art. 55. A complicity rule gleaned from the LOAC would operate just like Article 16: as a primary rule defining the content of states’ international obligations and not as a secondary rule which sets forth the conditions for the existence of an internationally wrongful act. Thus, a complicity rule contained in the LOAC would not fall within the scope of Article 55, and consequently would not render Article 16 inapplicable to the analysis at hand. This conclusion does not render irrelevant the secondary legal regime of the law of state responsibility. Rather, it simply indicates that, in analyzing a potentially complicit state’s international responsibility, the operable secondary rules of state responsibility are Article 2, which establishes the two conditions necessary to designate any particular state act as an internationally wrongful act, and Article 1, which mandates international responsibility for states’ internationally wrongful acts. *See supra* notes 62–64 and accompanying text.

<sup>102</sup> LANOVOY, *supra* note 69, at 205; AUST, *supra* note 96, at 385.

<sup>103</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 509. The ICRC Study’s conclusions about the content of customary LOAC are much debated and quite controversial. The extent to which states and other commentators agree with the ICRC Study’s conclusions generally is discussed subsequently. *See infra* note 119.

<sup>104</sup> *See supra* notes 77–81 and accompanying text.

<sup>105</sup> *See supra* note 78 and accompanying text.

<sup>106</sup> *See supra* note 79 and accompanying text.

complicity rule's scope. On this point, there is an important difference between Article 16 and Rule 144. Whereas Article 16's complicity rule is limited to active measures of aid or assistance and therefore excludes what may be deemed behavior of influence (such as advice, encouragement, and incitement),<sup>107</sup> Rule 144 is expressly directed at an assisting state's behavior of influence—its encouragement of the principal state's unlawful conduct.<sup>108</sup>

In addition to Rule 144's conduct component is its contribution threshold, which determines the extent to which the assisting state's aid or assistance must contribute to the principal state's unlawful conduct to fall within Rule 144's ambit. Neither the text of Rule 144 nor its accompanying commentary establishes, or even discusses, the concept of a contribution threshold.<sup>109</sup> Thus, at first glance one may conclude that either Rule 144's complicity prohibition does not contain a contribution threshold or, alternatively, that it does, but is subject to unanchored speculation.<sup>110</sup> However, neither conclusion is justified. Consideration of the available options for Rule 144's contribution threshold is illustrative. Three general options exist.

Under the first option, Rule 144 does not have a contribution threshold or, alternatively, its threshold is relatively low and thus captures nearly all encouragement that contributes, however slightly, to the principal state's commission of the LOAC violation in question. This option is an unwise, and therefore unlikely, reading of Rule 144.<sup>111</sup> The rule would risk becoming too wide

<sup>107</sup> See *supra* notes 87–88 and accompanying text.

<sup>108</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 509.

<sup>109</sup> *Id.* at 509–13.

<sup>110</sup> A third possibility is that Rule 144's prohibition against encouragement simply does not constitute a complicity rule. This possibility is unlikely. First, this Section's ensuing discussion will set forth the options for Rule 144's contribution threshold, as well as come to a conclusion as to why one of the options is most appropriate. In doing so, Rule 144's potential utility as a state complicity prohibition will be revitalized. Second, while the text of Rule 144 and the scholarship analyzing it do not address the rule's contribution threshold, the scholarship addressing Rule 144 *does* analyze the rule as a potential basis for a state complicity rule within the LOAC. See, e.g., LANOVOY, *supra* note 69, at 206–07. Furthermore, the scholarship addressing Common Article 1 of the 1949 Geneva Conventions, which is one of the principal authorities cited by the ICRC Study as justification for Rule 144's status as a rule of customary LOAC, see *infra* note 120, refers to it as a potential basis for a state complicity rule within the LOAC. See Aust, *supra* note 83, at 454–60. The lack of discussion within scholarship regarding the nature of a contribution threshold in either Rule 144 or Common Article 1 is not surprising given the tendency of commentators to conflate what this Article refers to as the conduct component with the contribution threshold. See, e.g., *id.* at 454–58 (arguing that the embodiment of a prohibition against encouraging LOAC violations within Common Article 1, and the absence of such a prohibition under Article 16, suggests that state responsibility under Common Article 1 “commence[s] at a lower *threshold* than is the case with [Article 16]”) (emphasis added); LANOVOY, *supra* note 69, at 207 n.227 (citing Aust's argument). *But see* JACKSON, *supra* note 71, at 153 (warning against conflating what this Article refers to as the conduct component with the contribution threshold of complicity).

<sup>111</sup> See Draft Articles, *supra* note 57, comment. to art. 16, ¶ (5) (asserting that the aid or assistance must *actually* facilitate the commission of the principal state's wrongful conduct, which limits state complicity to “those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct”); LANOVOY, *supra* note 69, at 95; Lowe, *supra* note 87, at 5 (“[A]id that assists in a remote and indirect or a minimal way is clearly not a sufficient basis for responsibility. There

in scope.<sup>112</sup> For example, an overly inclusive rule would negatively impact states' willingness to cooperate with other states. States might fear that any show of support for another state might satisfy the low contribution threshold and thus result in allegations that the supporting state was complicit in the latter's wrongful acts. Accordingly, the absence of a contribution threshold in Rule 144's complicity prohibition, or a relatively low one, would neither be appropriate from a legal policy standpoint nor be likely to garner support among states.

Under the second option, Rule 144's contribution threshold is relatively high and would therefore require that the assisting state's encouragement contribute robustly to the principal state's commission of the wrongful conduct in question. Like the first option, this option is also problematic. A relatively high contribution threshold risks imposing a requirement that the contributory value of the assisting state's encouragement be an essential aspect, or, even more extremely, a but-for cause, of the principal state's wrongful conduct. In other words, too high of a threshold may effectively require that the principal state's wrongful conduct would not have occurred without the assisting state's encouragement.<sup>113</sup> Such a high bar is unsupportable when viewed within the greater international law context.<sup>114</sup>

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is, accordingly, a *de minimis* threshold." (citation omitted)). The authorities cited in this note, as well as notes 112 and 113 *infra*, address Article 16's contribution threshold and thus are referenced here by way of analogy.

<sup>112</sup> See Lowe, *supra* note 87, at 5 ("Common sense demands a *de minimis* threshold. If it were otherwise, because practically every friendly contact with a foreign State might be said to lend at least moral support for its actions, the category of unlawful aid and assistance would become impossibly wide."); see also JACKSON, *supra* note 71, at 158.

<sup>113</sup> See Draft Articles, *supra* note 57, comment. to art. 16, ¶ (5) ("There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful conduct; it is sufficient if it contributed significantly to that act."); see also AUST, *supra* note 96, at 212–13.

<sup>114</sup> The conceptual difficulty of imposing too high of a contribution threshold becomes apparent after considering the relationship between complicity and joint responsibility. The relationship between these two theories of state responsibility is summarized by Aust: in a scenario in which the aiding or assisting state is providing an ever-increasing level of assistance, at some point "[the] State [has] contributed to such an extent to the wrongful act of [the receiving] State that it is no longer sufficient to attribute to it the role of a complicit State. Rather, a joint commission of the wrongful act has to be assumed." AUST, *supra* note 96, at 219–20. The Draft Articles provide for situations of joint responsibility. Under Article 47, "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act." Draft Articles, *supra* note 57, art. 47, comment. to art. 47, ¶ (1) ("Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act . . . [and] states the general principle that in such case each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act."); see generally Christine Chinkin, *The Continuing Occupation?: Issues of Joint and Several Liability and Effective Control*, in THE IRAQ WAR AND INTERNATIONAL LAW, *supra* note 87, at 161; Christian Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 73, at 281. The line between two states' joint commission of a wrongful act, on the one hand, and an assisting state's aid or assistance to a principal state's commission of a wrongful act, on the other, may be indistinct. Dominicé, *supra* note 113, at 283 (noting the potentially blurry line between, on the one hand, derivative responsibility such as complicity and,

The third option for Rule 144's contribution threshold lies between the first two options. This option would require that the assisting state's encouragement significantly contributed to the principal state's LOAC violation. In other words, the assisting state's encouragement must make it materially easier for the principal state to commit the internationally wrongful act.<sup>115</sup> This option would avoid the overbreadth concerns associated with too low of a threshold, as well as the under-inclusiveness and conceptual difficulties associated with too high of a threshold. Thus, when applying Rule 144, the ideal approach is to adopt a threshold that requires a significant contribution by the assisting state's encouragement to the principal state's wrongful act.<sup>116</sup>

Respecting the subjective element of Rule 144's complicity prohibition, the pertinent inquiry is the mental state the assisting state must possess when providing aid or assistance to the principal state. As was the case regarding its contribution threshold, neither the text of Rule 144 nor the rule's accompanying commentary offers guidance in resolving this question. However, scholars have suggested that Rule 144's encouragement prohibition requires only that the assisting state knew or was aware that the principal state would use its assistance to commit the wrongful conduct in question.<sup>117</sup> Though compelling, this reading is not widely accepted as customary international law and is therefore not dispositive.

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on the other, joint responsibility based on co-authorship or joint action). Furthermore, the line may be quite fine, thus highly dependent upon particular factual circumstances. *See id.* (providing an example in which a state merely providing military assistance to another state becomes a co-author of the latter's wrongful conduct once the precise character of the assistance may be said to amount to actual participation in the act); IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 191 (1983) ("Thus the supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment, and personnel for the specific purpose of assisting an aggressor, would constitute a joint responsibility.").

<sup>115</sup> *See* Crawford Report, *supra* note 88, ¶ 182.

<sup>116</sup> Concededly, a "significant contribution" threshold, while having the virtue of being a middle way between two more extreme possible thresholds, remains vague in application. Section III(C), *infra*, will address this vagueness and attempt to obtain some clarity by applying it to Russia's denial of Syrian LOAC violations.

<sup>117</sup> *See* Sassòli, *supra* note 70, at 413; Quigley, *supra* note 96, at 90; Aust, *supra* note 83, at 458; LANOVOY, *supra* note 69, at 207. Some have even argued for a negligence standard holding that an assisting state may be held responsible when it *should have known* that its assistance would be used by the principal state to commit the internationally wrongful act. Antonio Coco & Jean-Baptist Maillart, *The Conflict with Islamic State: A Critical Review of International Legal Issues*, in THE WAR REPORT: ARMED CONFLICT IN 2014, at 388, 418 (Annyssa Bellal ed., 2015). The rationale for a potentially lower standard of knowledge in Rule 144 and Common Article 1 (rather than a strict requirement of intent) is that "a specific obligation to ensure respect [under Common Article 1, which is the basis for the encouragement prohibition,] is more demanding and onerous than the general obligation [under Article 16 of the Draft Articles] to abstain from aiding or assisting in the commission of internationally wrongful acts." Robin Geiß, *The Obligation to Respect and to Ensure Respect for the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 111, 131 (Andrew Clapham et al. eds., 2015); *see also* Sassòli, *supra* note 70, at 413. This scholarship addresses Rule 144, as well as Common Article 1 of the 1949 Geneva Conventions, which is one of the principal authorities (if not *the* principal authority) cited by the ICRC Study justifying Rule 144's status as a rule of customary LOAC. *See infra* note 120 and accompanying text.

Accordingly, there remains some doubt as to the nature of Rule 144's mental state requirement. Due to this uncertainty, this analysis adopts the stricter approach and assumes that Rule 144's mental state requirement is one of intent. That is, for responsibility to exist under Rule 144, the assisting state must provide encouragement with the intent to facilitate the principal state's commission of an internationally wrongful act.<sup>118</sup>

Rule 144's status as an accurate statement of customary international law is subject to debate.<sup>119</sup> Two significant issues underlie this debate. First, the legal basis on which the ICRC Study rested its conclusion that Rule 144 constitutes customary international law, particularly Common Article 1 of the 1949 Geneva Conventions, is itself the subject of much debate and criticism.<sup>120</sup> Second, it is

<sup>118</sup> The adoption of the stricter approach requiring proof of intent may be less consequential than it first appears. Application of the intent requirement permits certain inferences of an accomplice's intent based on the accomplice's knowledge and the reasonably foreseeable consequences of his actions. The permissibility of these inferences reduces the practical difference between a strict intent requirement and a knowledge requirement. These permissible inferences of intent are discussed *infra* in Section III(D).

<sup>119</sup> In general, significant criticism has been directed toward the ICRC Study. *See generally*, John B. Bellinger, III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007); Yoram Dinstein, *The ICRC Customary International Law Study*, 82 INT'L L. STUD. 99 (2006); Timothy L. H. McCormack, *An Australian Perspective on the ICRC Customary International Humanitarian Law Study*, 82 INT'L L. STUD. 81 (2006); Malcolm MacLaren & Felix Schwendimann, *An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law*, 6 GERMAN L. J. 1217, 1234–38 (2005). Most of the general criticism of the study calls into question the methodology adopted by the ICRC for assessing state practice and discerning *opinio juris*. *See* Bellinger & Haynes, *supra* note 118, at 444–48; Dinstein, *supra* note 118, at 101–05; McCormack, *supra* note 118, at 88–95. This is not to say that the study is wholly without support. *See* Dinstein, *supra* note 118, at 105. It is widely regarded as an important, if controversial, contribution to the field of the LOAC.

<sup>120</sup> Common Article 1 of the 1949 Geneva Conventions stipulates that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The rule contained in Common Article 1 may be separated into its “respect” element and its “ensure respect” element. The “respect” element reaffirms the general principle of the law of treaties that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA art. 1, ¶ 165 (2d ed. 2017), <https://ihl-databases.icrc.org/ihl/full/GCII-commentary> [hereinafter ICRC COMMENTARY] (citing Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331). Much more controversial is the “ensure respect” element of Common Article 1. The “ensure respect” element has been interpreted in two ways. Under the narrow interpretation, states merely “have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions.” *Id.* ¶ 142. Under the broader interpretation, in addition to ensuring respect by their

essential to distinguish between Rule 144's complicity prohibition—the duty of states not to encourage violations of the LOAC—and its provision asserting a positive duty of states to “exert their influence, to the degree possible, to stop violations of international humanitarian law” by other states and non-state actors. These two purported obligations are best thought of as distinct provisions: the latter as a positive duty requiring states to take action; the former as a negative duty of states not to engage in certain conduct.<sup>121</sup> Rule 144's assertion of a positive duty of

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own organs and individuals within their own jurisdictions, states also have undertaken “to ensure respect for the Conventions by other States and non-State Parties.” *Id.* This broader conception of the “ensure respect” element includes both a negative duty not to “encourage, . . . aid or assist in violations of the Conventions by Parties to the conflict,” as well as a positive obligation to “do everything reasonably in their power to prevent and bring such violations to an end.” *Id.* ¶ 176.

It is crucial to acknowledge the parallel structures of these two rules: on the one hand, the distinction in Rule 144 between its negative duty not to “encourage violations” of the LOAC by other states and non-state actors and its positive duty to exert influence to stop other states' and non-state actors' LOAC violations, HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 509; and, on the other hand, the distinction in Common Article 1's (broadly interpreted) “ensure respect” obligation between its negative duty not to encourage, aid, or assist in other states' and non-state actors' violations of the Geneva Conventions and its positive duty to “prevent and bring such violations to an end.” ICRC COMMENTARY, *supra* note 119, art. 1, ¶ 176. Indeed, the authors of the ICRC customary law study, in the commentary to Rule 144, liberally refer to Common Article 1 and its commentary. HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 509–13. Furthermore, those who have studied the concept of state complicity within the context of armed conflict have identified Common Article 1 as the basis for a complicity prohibition. *See* Aust, *supra* note 83, at 454–60; Boivin, *supra* note 83, at 475–79. In light of the connections between Common Article 1 and Rule 144, this Article consults the scholarship and criticism directed toward Common Article 1 in addition to that directed at Rule 144. *See* Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707, 728 (2014); *see also* THÉO BOUTRUCHE & MARCO SASSÒLI, EXPERT OPINION ON THIRD STATES' OBLIGATIONS VIS-À-VIS IHL VIOLATIONS UNDER INTERNATIONAL LAW, WITH A SPECIAL FOCUS ON COMMON ARTICLE 1 OF THE 1949 GENEVA CONVENTIONS 21 (Nov. 8, 2016), <https://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli--8-nov-2016.pdf> [<http://perma.cc/T684-FKHX>] (drawing a connection between Common Article 1's negative duty not to encourage, aid, or assist in violations of the LOAC and the same rule as reflected in Rule 144 of the ICRC Study). The scholarship analyzing the meaning, scope, and drafting history of Common Article 1 is extremely rich. *See generally* Fateh Azzam, *The Duty of Third States to Implement and Enforce International Humanitarian Law*, 66 NORDIC J. INT'L L. 55 (1997); Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67 (2000); Maya Brehm, *The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law*, 12 J. CONFLICT & SEC. L. 359 (2008); Dörmann & Serralvo, *supra*; Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUR. J. INT'L L. 125 (2010); Fritz Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. INT'L HUMANITARIAN L. 3 (1999); Birgit Kessler, *The Duty to 'Ensure Respect' Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts*, 44 GERMAN Y.B. INT'L L. 498 (2001); Tomasz Zych, *The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law*, 27 WINDSOR Y.B. ACCESS JUST. 251 (2009).

<sup>121</sup> *See* HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 509, 511; Kalshoven, *supra* note 120, at 56–57 (distinguishing between the obligation not to encourage LOAC violations, which “amounts to little more than a confirmation of [a] well-established principle,” and the obligation to influence other states not to violate the LOAC or to stop violating the LOAC, which “might be termed ‘humanitarian intervention’”).

states to exert their influence to stop other states' LOAC violations has been the subject of strenuous debate and has received significant criticism.<sup>122</sup> In contrast, Rule 144's negative duty not to encourage LOAC violations has received much less opposition and may justifiably be offered as an accurate representation of customary international law.<sup>123</sup> Moreover, and importantly for this analysis, Rule 144's negative duty not to encourage LOAC violations applies to states not only in the context of an international armed conflict, but also in non-international armed conflicts.<sup>124</sup> This distinction is important, since the conflict in Syria has been characterized as a non-international armed conflict.<sup>125</sup> Thus, Rule 144 may appropriately be applied to the Russian practice of denying the factual bases for allegations of Syrian LOAC violations.

#### 4. Adopting Rule 144 Rather Than Article 16 to Analyze Russian Complicity

Two state complicity rules have been identified: Article 16, contained in the Draft Articles and deriving from the general international law of state responsibility; and the duty of states not to encourage LOAC violations, identified by the ICRC Study as a rule of customary international law within the special law regime of the LOAC. The question becomes which of these two rules to apply in analyzing Russia's potential complicity in LOAC violations committed by the

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<sup>122</sup> Thorough explorations of this debate and criticism can be found in the authorities cited in note 120 *supra*, which address both Rule 144's positive duty as well as Common Article 1's analogous obligation to exert influence.

<sup>123</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 220 (June 27) (considering the "ensure respect" obligation of Common Article 1, which is liberally referred to by the authors of the ICRC Study in justifying the customary law basis of Rule 144, to imply the existence of a negative duty upon states not to encourage violations of the LOAC); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 159 (July 9) (asserting a negative duty upon all states "not to render aid or assistance" to another state's unlawful conduct); see also Kalshoven, *supra* note 120, at 56–57 (referring to the obligation not to encourage LOAC violations as a "well-established principle").

<sup>124</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 509 (citing as authority Common Article 1's "ensure respect" duty). Reference to Common Article 1 once again is helpful. See *supra* note 120. Recall that Common Article 1 requires states to respect and ensure respect for *the present Convention in all circumstances*. Article 3 common to all four 1949 Geneva Conventions, obviously forming part of "the present Convention," provides limitations that bind the parties to a non-international armed conflict. Geneva Convention I, *supra* note 120, art. 3; Geneva Convention II, *supra* note 120, art. 3; Geneva Convention III, *supra* note 120, art. 3; Geneva Convention IV, *supra* note 120, art. 3. Thus, Common Article 1's "ensure respect" duty applies to any non-international armed conflict "to the extent that [it is] covered by [C]ommon Article 3." Boisson de Chazournes & Condorelli, *supra* note 120, at 68–69; Focarelli, *supra* note 120, at 126 n.4. Furthermore, the ICJ has found that the "respect" and "ensure respect" obligations derive not only "from the [Geneva] Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression." *Nicar. v. U.S.*, 1986 I.C.J., ¶ 220. Thus, the obligations expressed in Common Article 1 exist beyond that provision and apply at all times in all circumstances, including in a non-international armed conflict. *But see supra* notes 120–124 and accompanying text (discussing the various interpretations of the "respect" and "ensure respect" obligations and the varying levels of controversy associated with each interpretation).

<sup>125</sup> See *infra* note 137.

Syrian armed forces. In order to answer this question, recall the principle set forth in Article 55, which states that the Draft Articles “do not apply where and to the extent that the conditions for the existence of an internationally wrongful act . . . are governed by special rules of international law.”<sup>126</sup> It may be argued that Rule 144 constitutes a rule of state complicity contained in the special law regime of the LOAC.<sup>127</sup> As such, Rule 144 would operate to the exclusion of Article 16.<sup>128</sup>

Additionally, recall that Article 16 is limited in its scope to active measures of aid and assistance, thereby excluding behaviors of influence such as advice, encouragement, and incitement. In contrast, Rule 144 expressly prohibits states from engaging in such behavior, namely the encouragement of other states to violate the LOAC. This distinction is significant when considering the nature of the Russia’s behavior: the allegedly systematic and bad faith denial of the factual bases underlying the allegations of LOAC violations by the Syrian government. It is unlikely that such behavior constitutes an active measure of assistance.<sup>129</sup> Thus, it appears that the Russian practice of denial falls outside the scope of Article 16’s conduct component, rendering Article 16 inapplicable to this analysis. For these reasons, this Article adopts Rule 144, rather than Article 16, as the applicable state complicity rule to determine whether Russia is complicit in Syrian LOAC violations by virtue of its practice of denial.<sup>130</sup>

### III. An Analysis of Russian Complicity in Syrian Law of Armed Conflict Violations

This Part, after establishing the underlying Syrian battlefield misconduct, applies Rule 144 to Russia’s practice of denying Syrian wrongdoing. The analysis determines that Russian denial of Syrian LOAC violations meets the requirements of Rule 144: that it constitutes encouragement (Section III(B)); that it sufficiently contributes to Syria’s continued wrongdoing (Section III(C)); and that Russia has

<sup>126</sup> Draft Articles, *supra* note 57, art. 55; *see also supra* notes 65–70 and accompanying text.

<sup>127</sup> *See AUST, supra* note 96, at 388–89 (referring to Common Article 1 of the Geneva Conventions, which constitutes one of the principal bases for the ICRC Study’s conclusion that Rule 144 constitutes customary LOAC, as a *lex specialis* rule of state complicity).

<sup>128</sup> However, recall the discussion *supra* in note 101 expressing skepticism about labeling state complicity rules, including Article 16 and Rule 144, as secondary rules of state responsibility after noting that such rules appear to operate more like primary rules of international law.

<sup>129</sup> Compare the types of measures of assistance identified in the commentary to Article 16 as falling within the scope of the rule, all of which may uncontroversially be characterized as “active” in nature: providing an essential facility, financing the principal state’s wrongful activity, furnishing the means for closure of an international waterway, aiding in the abduction of individuals on foreign soil, and contributing to the destruction of a third country national’s property. *See* Draft Articles, *supra* note 57, comment. to art. 16, ¶ (1).

<sup>130</sup> Although Article 16 will not be applied in this Article’s ensuing analysis of Russian denial of Syrian LOAC violations, Section III(B)(2)’s exploration of Article 16 was still useful. First, examining Rule 144 alongside Article 16 served to highlight the distinctions between the two rules. Second, the examination of Rule 144 relied on scholarship and commentary pertaining to Article 16, thus necessitating an examination of the latter. Third, even though Article 16’s complicity rule will not be applied in the ensuing analysis, aspects of Article 16, including scholarship and commentary addressed toward it, will be useful to the analysis.

demonstrated intent to facilitate the Syrian government's further wrongdoing (Section III(D)). Thus, Russia has violated Rule 144 and is complicit in the Syrian government's atrocities.

A. *The Principal State's Internationally Wrongful Acts: Syrian LOAC Violations*

While an assisting state's international responsibility is distinct from that of the principal state under the theory of complicity, the two are fundamentally related:<sup>131</sup> the assisting state's responsibility is derivative of the principal state's unlawful conduct.<sup>132</sup> Thus, the complicit state's responsibility is necessarily dependent on the separate wrongful act by the principal state.<sup>133</sup> Accordingly, a legal analysis of Russia's potential complicity in Syrian LOAC violations necessitates a determination of whether the conduct of the Syrian armed forces was, in fact, wrongful under international law.<sup>134</sup>

As discussed previously, the Draft Articles provide rules to determine whether the conduct of a state constitutes an internationally wrongful act.<sup>135</sup> Under those rules, the conduct in question must be attributable to the state.<sup>136</sup> Furthermore, the conduct must constitute a breach of a state's international obligation.<sup>137</sup>

<sup>131</sup> See Draft Articles, *supra* note 57, comment. to art. 16, ¶ 1 (“Under Article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the [principal] State.”).

<sup>132</sup> See *supra* notes 75–76 and accompanying text.

<sup>133</sup> See Draft Articles, *supra* note 57, comment. to art. 16, ¶ 5; see also JACKSON, *supra* note 71, at 55; Talmon, *A Plurality of Responsible Actors*, *supra* note 87, at 220 (“The determination of the responsibility of the [alleged accomplice] under Article 16 . . . for aiding or assisting the [principal] logically requires the prior determination of the commission of an internationally wrongful act by the [latter].”)

<sup>134</sup> See Draft Articles, *supra* note 57, art. 16 (predicating the assisting state's international responsibility on the condition that it aided or assisted “another State in the commission of an *internationally wrongful act*” (emphasis added)).

<sup>135</sup> See *supra* notes 62–64 and accompanying text.

<sup>136</sup> See Draft Articles, *supra* note 57, art. 2. Any battlefield misconduct committed by members of the Syrian armed forces may be attributed to the Syrian state. See Hague IV, *supra* note 70, art. 3 (“[States] shall be responsible for all acts committed by persons forming part of [their respective] armed forces.”); Additional Protocol I, *supra* note 70, art. 91 (restating the attribution rule of Hague IV, art. 3); see also Draft Articles, *supra* note 57, art. 4 (“The conduct of any State organ shall be considered an act of that State under international law . . . .”); *id.*, comment. to art. 4, ¶ 1 (including within the definition of “State organ” “all individuals or collective entities which make up the organization of the State and act on its behalf”).

<sup>137</sup> See Draft Articles, *supra* note 57, art. 2. The breach element of Article 2 has two components: first, an identification of the relevant Syrian obligations under the LOAC; second, a determination of whether Syria breached its international obligations under the LOAC in the course of the armed conflict. Respecting Syria's LOAC obligations, the applicability of the LOAC, and thus the operability of any obligation thereunder, is contingent upon the existence of an armed conflict. See Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“International humanitarian law *applies from the initiation of such armed conflicts* and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.” (emphasis added)); see also SOLIS, *supra* note 3, at 24–25, 180. An armed conflict “exists whenever there is a resort to armed force between States or

Allegations that Syria has breached its LOAC obligations have arisen continuously since the beginning of the armed conflict, and have continued unabated since Russia's 2015 military intervention in the conflict.<sup>138</sup> A small sample of these allegations were discussed previously.<sup>139</sup> This analysis will proceed under the assumption that the Syrian armed forces have continually engaged in unlawful battlefield conduct.<sup>140</sup> This assumption allows this Article to proceed with the principal analysis, namely whether Russia was complicit in Syria's LOAC violations.

### B. *The Conduct Component: Russian Denial as Implicit Encouragement*

As previously established, the objective element of any particular complicity prohibition may be divided into two sub-components.<sup>141</sup> The first sub-component, referred to in this Article as the conduct component, consists of a determination of the kinds of aid or assistance that fall within the complicity rule in question.<sup>142</sup> Rule 144 is clear about the kinds of aid or assistance falling within

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protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Tadić*, IT-94-1-I, Decision on Defence Motion, ¶ 70; *see also* Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 168–73 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) (discussing considerations relevant to the determination of the existence of an armed conflict). A non-international armed conflict (NIAC) has been ongoing in Syria since February 2012. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50, at 47 (2012), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf) [<http://perma.cc/JX2T-UGWX>]. Thus, the applicable LOAC includes Common Article 3 of the Geneva Conventions. *See, e.g.*, Geneva Convention I, *supra* note 120, art. 3. Syria’s international obligations also include customary international law relevant to NIACs, specifically the law of targeting. *See, e.g.*, Brian Egan, Legal Advisor, U.S. Dep’t of St., Address at the Annual Meeting of the American Society of International Law, Washington, DC: International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations (Apr. 1, 2016), *reprinted in* 92 INT’L L. STUDIES 235, 242–43 (2016) (identifying rules considered by the U.S. government to represent customary international law in the context of a NIAC); HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 3, 25, 27, 51, 105; Geneva Convention I, *supra* note 120, art. 19; *see generally* SOLIS, *supra* note 3, at 268–310. Furthermore, with respect to the alleged chemical weapons attack on April 4, 2017, *see supra* Section I(C)(1), Syria is bound by the Chemical Weapons Convention, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 1, Apr. 29, 1997, 1974 U.N.T.S. 45, to which it has been a party since 2013. Org. for the Prohibition of Chemical Weapons, Status of Participation in the Chemical Weapons Convention as of 17 October 2015, Doc. S/1315/2015, at 6 (2015), <https://www.opcw.org/about-opcw/member-states/status-of-participation> [<http://perma.cc/79GN-PAA9>].

<sup>138</sup> For a detailed look at the breath and nature of the Syrian government’s LOAC violations, see the reports generated by the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 10.

<sup>139</sup> *See supra* Part I.

<sup>140</sup> *See Syria 2016/2017*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/syria/report-syria> [<http://perma.cc/23DS-3GNL>] (last visited Oct. 12, 2017).

<sup>141</sup> *See supra* notes 78–79 and accompanying text.

<sup>142</sup> *See supra* note 78 and accompanying text. The second sub-component of the objective element is the contribution threshold, which will be addressed in Section III(C) *infra*.

its purview: states may not *encourage* violations of the LOAC by other states.<sup>143</sup> Thus, the question posed here is whether Russia's practice of denying the factual bases underlying allegations of Syrian LOAC violations constitutes encouragement under Rule 144.<sup>144</sup>

To encourage is to instigate, incite to action, embolden, or help.<sup>145</sup> Encouragement as a form of aid or assistance is of relatively low intensity.<sup>146</sup> However, there are limits to what kinds of conduct fall within an encouragement prohibition. For example, encouragement would not include mere presence without a particular act or force by the accomplice.<sup>147</sup> Rather, "actual encouragement, in one form or another, of the principal is the minimum requirement for complicity in any offense."<sup>148</sup> The accomplice's encouragement may, but need not, be explicit (for example, "You should do this" or "You must do that").<sup>149</sup> It may be suggested or implied "by expressions, gestures or actions intended to signify approval."<sup>150</sup> This last point is important: although it is clear that Russian denial of Syrian LOAC violations is not explicit encouragement, it may nevertheless constitute implied encouragement. Indeed, given Russia's resounding, repeated, and public denial, it is quite reasonable to conclude that Russia has effectively encouraged the Syrian government to continue violating the LOAC on the battlefield with a sense of impunity.<sup>151</sup>

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<sup>143</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 66, at 509.

<sup>144</sup> Rule 144 does not require merely that the assisting state's behavior constitutes *encouragement*, but that the behavior *encourages the assisted state in violating the LOAC*. However, for purposes of this Section, the question will be limited to the former. The latter requires an analysis of the connection between the assisting state's encouragement and the principal state's unlawful conduct that is best addressed by Rule 144's contribution threshold. *See infra* Section III(C).

<sup>145</sup> *Encourage*, BLACK'S LAW DICTIONARY, *supra* note 60; *see also* Prosecutor v. Semanza, Case No. ICTR-97-20, Judgment and Sentence, ¶ 381 (May 15, 2003) (equating instigating, urging, encouraging, and prompting as forms of participation in a criminal act); *id.* ¶ 384 (equating abetting, encouraging, advising, and instigating as forms of participation in a criminal act). Depending on context, these definitional terms often vary according to level of intensity. For example, encouragement may be a less intense behavior than incitement or instigation.

<sup>146</sup> *See* SMITH, *supra* note 74, at 35–39.

<sup>147</sup> *Id.* at 35. "[S]imple presence and likely encouragement" is insufficient. *See id.* Even presence at the scene of the crime, "ready to intervene if necessary but without indicating this to others," is insufficient. *Id.* at 35–36. International criminal law cases provide further support. *See, e.g., Semanza*, ICTR-97-20, Judgment and Sentence, ¶ 385 ("[The accomplice's] encouragement or support may consist of physical acts, verbal statements, or, in some cases, mere presence *as an 'approving spectator.'*" (emphasis added)).

<sup>148</sup> SMITH, *supra* note 74, at 36; *see Semanza*, ICTR-97-20, Judgment and Sentence, ¶ 385.

<sup>149</sup> *See Semanza*, ICTR-97-20, Judgment and Sentence, ¶ 386 ("The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement.")

<sup>150</sup> SMITH, *supra* note 74, at 37 (citation omitted). The accomplice's intent behind the encouragement is clearly important, but the analysis of intent is a separate element of complicity. *See infra* Section IV(D).

<sup>151</sup> There is authority in the international law of state responsibility for drawing on the terminology of criminal law regimes. *See supra* note 71. The ICJ has supported the notion that the criminal law of complicity properly informs analysis of state complicity. *See Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 75, ¶ 167 ("It is true that the concepts used in [the Genocide Convention],

While Russia's denial has reasonably operated as a form of implied encouragement (and thus is within the purview of Rule 144's conduct component), whether its encouragement renders it complicit as a matter of international law is a more difficult determination. Therefore, Russia's conduct must be analyzed under Rule 144's contribution threshold.

C. *The Contribution Threshold: Russian Denial as a Significant Contribution to Syrian LOAC Violations*

Has Russia's denial sufficiently contributed to Syria's continued violations of the LOAC? The key to answering this question is Rule 144's contribution threshold. As previously discussed, a contribution threshold refers to the minimum contribution or assistance that an assisting state must provide to the principal state's unlawful conduct in order to be held complicit under international law.<sup>152</sup> The standard under Rule 144 is whether the assisting state's encouragement *significantly contributed* to the principal state's misconduct.<sup>153</sup> In other words, the encouragement must have made it materially easier for the principal state to engage in the misconduct. Thus, Russia's conduct must be viewed under that standard.

As an initial matter, there is a crucial temporal element to the concept of a contribution threshold, because under the theory of complicity the assisting state's encouragement necessarily precedes the principal state's unlawful conduct.<sup>154</sup> Thus, the argument that Russia's denial of the factual basis for a LOAC violation renders Russia complicit in that particular violation is untenable.<sup>155</sup> Rather,

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and particularly that of 'complicity,' refer to well-known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanction against individuals. It would however not be in keeping with the object and purpose of the [Genocide] Convention to deny that the international responsibility of a State—even though quite different in nature from criminal responsibility—can be engaged” through “the actions of [States] organs or persons or groups whose acts are attributable to them.”); *id.* at 217, ¶421 (analogizing between, on the one hand, the Genocide Convention's criminal law prohibition against complicity in genocide and, on the other hand, the prohibition against one state's aiding or assisting another state's international law violation under Article 16 of the Draft Articles). Furthermore, in its Nicaragua judgment, the ICJ analyzes the state complicity rule prohibiting the encouragement of others' violations of international law. *See* *Nicar. v. U.S.*, 1986 I.C.J. at 129–30, ¶¶ 255–56. The Court appeared to define the word encouragement in the same manner as it is defined in criminal law. *Compare id.* at 108, ¶ 228 (finding *encouragement* in the United States' distribution of a manual advising, recommending, and providing training for certain measures designed to achieve the Nicaraguan insurgents' mission) *with Semanza*, ICTR-97-20, Judgment and Sentence, ¶¶ 381, 384 (equating the terms encouraging, advising, instigating urging, and prompting as forms of participation in a criminal act).

<sup>152</sup> *See supra* note 79 and accompanying text.

<sup>153</sup> *See supra* notes 109–116 and accompanying text.

<sup>154</sup> *See* John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHIL. 127, 128 (2007).

<sup>155</sup> While it cannot be argued that Russian denial renders it complicit in Syrian LOAC violations to which said acts of denial pertain, it does not follow that Russia bears no risk of state responsibility for those Syrian LOAC violations. The Draft Articles acknowledge that “there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred.” Draft Articles, *supra* note 57, comment. to pt. 1, ch. IV, ¶ (9). However, there are two important qualifications to this general rule. The first qualification, quite clearly inapplicable to Russian denial of Syrian battlefield misconduct, is the notion that “in some circumstances assistance given by one State to another after the latter has

complicity's temporal feature necessitates, first, the identification of particular instances of Russian denial and, second, an inquiry into whether and to what extent those instances of denial contributed to subsequent LOAC violations by the Syrian armed forces. For present purposes, the particular acts of Russian denial at issue here occurred in September and October 2016 and April 2017.<sup>156</sup> In the months following each act of Russian denial, there was a substantial number of allegations of unlawful battlefield conduct by the Syrian armed forces.<sup>157</sup> The crucial determination thus becomes the nature of the link between Russia's acts of denial and the subsequent LOAC violations. One could argue that the connection is merely

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committed an internationally wrongful act may amount to the adoption of that act by the former State." *Id.*; see also *id.*, art. 11. The second qualification is the concept of states' "special obligations in putting an end to an unlawful situation" arising in the case of "serious breaches of obligations under peremptory norms of general international law." *Id.*, comment. to pt. 1, ch. IV, ¶ (9). Article 41 sets forth states' obligation to cooperate to bring such serious breaches to an end through lawful means. *Id.*, art. 41(1). Article 40 defines a *serious* breach of "an obligation arising under a peremptory norm of general international law" as a breach of such an obligation that "involves a gross or systematic failure by the responsible State to fulfil the obligation." *Id.*, art. 40(7). Furthermore, Article 41 prohibits states from recognizing as lawful "a situation created by" a serious breach of an obligation under peremptory norms as well as from rendering "aid or assistance in maintaining that situation." *Id.*, art. 41(2). Questions remain as to whether and to what extent Russia (or any other state, for that matter) may be said to have breached an obligation under Article 41 in connection with alleged LOAC violations committed by the Syrian armed forces. Those questions include the extent to which Articles 40 and 41 constitute customary international law, see Advisory Opinion, 2004 I.C.J. at 136, ¶¶ 157–59; Nina HB Jørgensen, *The Obligation of Non-Assistance to the Responsible State*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 73, 687, 690–91 (arguing that Articles 40 and 41 constitute "a mix of codification and progressive development of the law," and thus are likely "to require further development within the specific framework established by the" Draft Articles), as well as whether and to what extent the rules contained within the LOAC constitute peremptory norms of general international law, see Vienna Convention on the Law of Treaties, *supra* note 120, art. 53 (defining a peremptory norm of international law as one that is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 79 (July 8) ("[A] great many rules of humanitarian law applicable in armed conflict . . . constitute *intransgressible* principles of international customary law . . ." (emphasis added)); Draft Articles, *supra* note 57, comment. to art. 40, ¶ (5) ("[T]he basic rules of international humanitarian law applicable in armed conflict" constitute peremptory norms of international law); CRAWFORD, *supra* note 59, at 378–80; Sassòli, *supra* note 70, at 420. Nonetheless, it appears that a case could be made that Russian denial implicates obligations under Articles 40 and 41, or at least that Russian denial provides a compelling basis for analysis under those articles.

<sup>156</sup> The particular acts of denial by Russia include those in connection with the alleged Syrian airstrikes against a United Nations humanitarian aid convoy in the vicinity of Aleppo and a school complex in Idlib governorate on September 20, 2016 and October 26, 2016, respectively, as well as the alleged Syrian chemical weapons attack against Khan Sheikhoun on April 4, 2017. See *supra* Part I(C).

<sup>157</sup> For the time period subsequent to the UN aid convoy attack and the Idlib school attack, see HRC Report 34/64, *supra* note 10. For the time period subsequent to the Idlib chemical weapons attack, see Gardiner Harris et al., *Syrian Crematory Is Hiding Mass Killings of Prisoners*, *U.S. Says*, N.Y. TIMES (May 15, 2017), <https://nyti.ms/2ripTNx>; Madison Park & Steve Brusk, *White House: Syria Could be Preparing Another Chemical Weapons Attack*, CNN (Jun. 27, 2017), <http://www.cnn.com/2017/06/26/politics/syria-chemical-weapons-white-house-warning/index.html> [<http://perma.cc/5LZP-2A7B>].

correlative, in which case Rule 144's contribution threshold is not satisfied. The alternative is that Russia's denials in fact contributed to Syria's subsequent unlawful acts. If so, then the relevant inquiry is whether Russia satisfied Rule 144's contribution threshold.

Despite numerous instances of Russian denial and alleged Syrian LOAC violations, at first glance it may appear difficult to attribute a contributory relationship between specific instances of Russian denial and particular subsequent Syrian unlawful acts.<sup>158</sup> Moreover, this issue is exacerbated by the inherent challenge of trying to evaluate the contributory value of *encouragement*.<sup>159</sup> However, care must be taken not to interpret the contribution threshold too strictly. While it might seem necessary as a matter of principle to draw precise lines between particular instances of Russian denial and specific, subsequent Syrian LOAC violations, this degree of clarity is not specifically required under Rule 144. Here, a distinction between complicity in the context of criminal law regimes and that of the law of state responsibility is instructive. In criminal law regimes, there are unique interests involved that call for a high level of precision before imposing legal liability or responsibility, including general interests of fairness and justice, recognition of the serious consequences of imposing criminal liability, and moral concerns.<sup>160</sup> These interests are arguably absent or, more likely, implicated differently in the context of the law of state responsibility.<sup>161</sup> As an example, in domestic criminal law regimes, the relatively high level of precision required regarding the connection between the accomplice's act of assistance and the principal's particular criminal act is informed by the perceived severe potential consequences of imposing legal responsibility, including incarceration, monetary penalties, and official permanent status as a criminal offender. In contrast, in the context of the international law of state responsibility, where states as opposed to individuals are the subjects of potential sanction, these considerations are greatly minimized, if not absent. The significant differences between criminal law regimes

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<sup>158</sup> Evaluating the contributory value of the acts or behavior of the accomplice to subsequent unlawful conduct by the principal is often analyzed in terms of causation. Indeed, the scholarship of complicity fixates on the role of causation. See generally Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L. J. 91 (1985); Gardner, *supra* note 154; Kadish, *supra* note 76; SMITH, *supra* note 74, at 55–93. Its role as a theoretical lynchpin of complicity is both debated and vexing. For present purposes, it is important to reiterate that the strictest form of causation—but-for causation—is not required under Rule 144's contribution threshold. See *supra* notes 89 and 111–114 and accompanying text.

<sup>159</sup> See JACKSON, *supra* note 71, at 42–45 (acknowledging the difficulty of analyzing the contribution threshold in cases of encouragement and suggesting as a resolution to the problem a presumption of contribution unless the principal wrongdoer can rebut it by evidence that the encouragement played no role in the principal's decision).

<sup>160</sup> SMITH, *supra* note 74, at 64–73 (identifying several legal and moral considerations implicated in the decision of how to account for the link between the accomplice's and principal's actions, including the roles of chance and freedom of choice, the moral bases for imposing legal responsibility, and the aims and justifications of criminal responsibility).

<sup>161</sup> The implication of those interests in the international law of state responsibility depends on the view taken of the nature of certain fundamental considerations, including the nature of the wrongful conduct, the nature of the harm caused by the wrongful conduct, and the nature and proper role of fault in legal responsibility. See CRAWFORD, *supra* note 59, at 51, 54–62.

and the international law of state responsibility may therefore permit a more flexible approach to the connection between the assisting state's encouragement and the principal state's unlawful act, in this case Russia's denial and Syria's ensuing LOAC violations.<sup>162</sup>

Russia's unique strength and demonstrated resolve militate in favor of finding that its public denials significantly contribute to Syria's LOAC violations. Russia is undoubtedly a major international power. Many consider its overall military strength to surpass that of all states except for the United States.<sup>163</sup> Moreover, Russia's perceived military strength has likely increased, given Russia's recent willingness to deploy its ground and air forces regionally, including in Georgia,<sup>164</sup> the Ukraine,<sup>165</sup> and Syria. Furthermore, Russia is one of the five permanent members of the United Nations Security Council, where it holds permanent veto power over any action proposed by the Security Council. Russia has exercised its veto power to protect the Syrian government despite overwhelming international support to investigate its alleged violations and to hold those committing human rights violations responsible.<sup>166</sup> From the Syrian

<sup>162</sup> It might be argued that this analysis is inconsistent with the previously made analogies between complicity in criminal law regimes and state complicity. See *supra* notes 71, 145–151, and accompanying text. The earlier criminal law analogies were useful to explore the nature of complicity and its elements, as well as to develop a framework for comparing various complicity rules and applying Rule 144 to the issue at hand. The present distinction made between the interests of these different legal regimes is equally useful to explaining why the application of the law of state responsibility may permit more flexibility than criminal law.

<sup>163</sup> See Tom O'Connor, *What Russia's Military Looks Like Compared to the U.S.*, NEWSWEEK (Apr. 7, 2017), <http://www.newsweek.com/us-russian-military-action-syria-most-powerful-army-580656> [https://perma.cc/7TAX-DKCK]; *2017 Report of Russia Military Strength*, GLOBAL FIRE POWER, [http://www.globalfirepower.com/country-military-strength-detail.asp?country\\_id=russia](http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=russia) [https://perma.cc/E4BZ-FLGF] (last visited Jul. 26, 2017).

<sup>164</sup> See *2008 Georgia Russia Conflict Fast Facts*, CNN (Mar. 26, 2017), <http://www.cnn.com/2014/03/13/world/europe/2008-georgia-russia-conflict/index.html> [https://perma.cc/YY6Z-EGVN].

<sup>165</sup> Nick Thompson, *Ukraine: Everything You Need to Know about How We Got Here*, CNN (Feb. 3, 2017), <http://www.cnn.com/2015/02/10/europe/ukraine-war-how-we-got-here/index.html> [https://perma.cc/WN54-6L6A].

<sup>166</sup> For examples of Russian exercise of its veto power regarding Syria, see Press Release, Security Council, Security Council Fails to Adopt Resolution Condemning Chemical Weapons Use in Syria, Following Veto by Russian Federation, U.N. Press Release SC/12791 (Apr. 12, 2017), <https://www.un.org/press/en/2017/sc12791.doc.htm> [https://perma.cc/F6YT-P9PG]; *Russia, China Block Syria from Facing International Criminal Court*, CNN (May 23, 2014), <http://www.cnn.com/2014/05/22/world/syria-un/index.html> [https://perma.cc/9ACG-C75U]; Colum Lynch, *Russia, China Veto Third Security Council Syria Resolution*, FOREIGN POL'Y (Jul. 19, 2012), <http://foreignpolicy.com/2012/07/19/russia-china-veto-third-security-council-syria-resolution> [https://perma.cc/5HAA-KHLC]. Although Syria is a signatory to the Rome Statute, it has not ratified it and therefore is not a state party to it. See Rome Statute, *supra* note 71, art. 125; *The State Parties to the Rome Statute*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [https://perma.cc/R33H-29AG] (last visited Dec. 17, 2017). As such, the International Criminal Court (ICC) does not have jurisdiction over the Syrian government's alleged war crimes unless the case is referred to the ICC by the Security Council pursuant to Chapter VII of the U.N. Charter. See Rome Statute, *supra* note 71, arts. 12, 13. By exercising its Security Council veto power over attempted referrals to the ICC, Russia shields individual Syrian actors from the possibility of

government's perspective, Russia's strength and support are all the more consequential due to the Syrian government's isolation from the international community and the bleak military situation it faced in mid-2015.<sup>167</sup> Before Russia intervened militarily in September 2015, the regime's effective control over Syrian territory had reached an alarming low.<sup>168</sup> Once Russia intervened, the Syrian government achieved dramatic territorial and tactical gains against its rebel opponents.<sup>169</sup> Ultimately, Russia's international clout reveals the significance its pattern of denial has had on Syria's willingness to continually violate the LOAC. Russia has emboldened the Syrian government by providing legal and political cover in the face of condemnation from other states, as well as leading Assad to believe that he may continue to engage in battlefield misconduct with impunity.<sup>170</sup> In sum, Russia's continual denial of Syrian wrongdoing has made it materially easier for the Syrian government to continue committing battlefield atrocities.

D. *The Mental State Requirement: Russian Intent to Facilitate the Commission of Syrian LOAC Violations*

Rule 144's subjective element requires that the assisting state *intended* to facilitate the principal state's internationally wrongful act when it provided encouragement.<sup>171</sup> Accordingly, the central question is whether Russia, when engaging in the denial of Syrian LOAC violations, intended to facilitate further battlefield wrongdoing by the Syrian government.

There are practical challenges in any legal context to establishing an individual's mental state at a particular time during a particular course of

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investigation and prosecution for war crimes and other international law violations. This functional immunity emboldens Syrian individuals and cloaks them with a sense of impunity for continued unlawful conduct.

<sup>167</sup> Krishnadev Calamur, *Who Are Syria's Friends and Why Are They Supporting Assad?*, NAT'L PUB. RADIO (Aug. 28, 2013), <http://www.npr.org/sections/parallels/2013/08/28/216385513/who-are-syrias-friends-and-why-are-they-supporting-assad>.

<sup>168</sup> See *supra* note 20 and accompanying text.

<sup>169</sup> See Tom Perry & Laila Bassam, *Syrian Government Drives Rebels from Swath of Aleppo*, REUTERS (Nov. 28, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-aleppo-idUSKBN13N0H4> [<https://perma.cc/LU34-JKGM>]; Ben Hubbard, *Turning Point in Syria as Assad Regains All of Aleppo*, N.Y. TIMES (Dec. 22, 2016), <https://nyti.ms/2jEcI94>.

<sup>170</sup> See Matthew Weaver et al., *Putin Stands by Assad as Firm Evidence of Chemical Attack Mounts*, GUARDIAN (Apr. 6, 2017), <https://www.theguardian.com/world/2017/apr/06/postmortems-confirm-syria-chemical-attack-turkey-says> [<https://perma.cc/KC5C-XDPK>] (citing statements made by states in the wake of the April 2017 chemical weapon attack implying that Russian denial and use of its Security Council veto power may embolden Syria by not imposing consequences for its international law violations); Steve Coll, *While Trump Tweets, Assad and Putin Advance in Syria*, NEW YORKER (June, 6, 2017), <https://www.newyorker.com/news/daily-comment/while-trump-tweets-assad-and-putin-advance-in-syria> [<https://perma.cc/E55D-E62A>] (implying that Russian support of Syria, particularly by denying its war crimes, emboldens Syria, making it more likely to continue its unlawful conduct and less likely to participate in a political settlement of the war).

<sup>171</sup> See *supra* notes 117–118 and accompanying text. This Article's assumption of a strict mental state requirement of intent is perhaps unnecessary. There is support for the notion that Rule 144 only requires that the assisting state *knew* that its assistance would be used by the principal state to commit an internationally wrongful act. See *supra* note 117 and accompanying text.

conduct.<sup>172</sup> Legal regimes address these challenges by permitting certain inferences, including a rebuttable inference of intent from the individual's conduct or from the individual's knowledge at the time of the conduct in question.<sup>173</sup> Put another way, legal regimes recognize that an individual's intent is naturally informed by the notion of foreseeability: actors may justifiably be said to intend the foreseeable consequences of their actions.<sup>174</sup> Closely related to the concept of foreseeability are the notions of provision of aid or assistance in a reckless manner,

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<sup>172</sup> See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 3.1.3 (2000) (suggesting the difficulty of thinking about criminal intent abstractly apart from its manifestation in criminal conduct); JACKSON, *supra* note 71, at 76 (suggesting the same in the context of international criminal law); Weisberg, *supra* note 76, at 240–47 (noting the difficulties American courts have had in construing and applying an intent requirement in the context of complicity in domestic criminal law regimes). Even the Draft Articles, which purport to reflect a regime of objective responsibility largely free from any general requirement of subjective fault, see CRAWFORD, *supra* note 59, at 60–62, do not avoid the problems associated with intent, particularly in the context of Article 16's state complicity rule. See Vladyslav Lanovoy, *Complicity in an Internationally Wrongful Act*, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART* 134, 152 (André Nollkaemper & Ilias Plakokefalos eds., 2014) (“In most cases, it is difficult, if not impossible, to establish that a state did not only know that its assistance would be used for a violation of an international obligation of another state, but that it had been providing assistance for that purpose.”)

These challenges in establishing an actor's intent are heightened with respect to the law of state responsibility, in which the actor is not an individual person but a state government comprised of numerous persons who do not always act in congruity or with the same motivations or purposes. See *State Responsibility: Comments and Observations Received by Governments*, U.N. Doc. A/CN.4/488, in [1998] 2 Y.B. Int'l L. Comm'n 81, 101, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (pt. 1) (“[P]roof of wrongful intent or negligence is always very difficult. In particular, when this subjective element has to be attributed to the individual or group of individuals who acted or failed to act on behalf of a State, its research becomes uncertain and elusive.”); David Enoch, *Intending, Foreseeing, and the State*, 13 *LEGAL THEORY* 69, 86 (2007). International law acknowledges that “states have no wills except the wills of the individual human beings who direct their affairs.” J. L. BRIERLY, *THE LAW OF NATIONS* 55 (6th ed. 1963). Thus, establishing state intent is an exercise in attribution: the intent of individuals or groups of individuals must be ascertained and then the determination must be made that those individuals' or groups' conduct is attributable to the state. See Draft Articles, *supra* note 57, art. 2.

<sup>173</sup> See R.A. DUFF, *INTENTION, AGENCY, AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 72–73 (1990) (setting forth a concept of intent that reaches beyond the narrowest conception of the term to include the knowledge and belief of the actor); JACKSON, *supra* note 71, at 47 (“We are responsible not only for consequences we act in order to bring about but also for those we know will occur in the ordinary course of events.”); A. P. SIMESTER ET AL., *SIMESTER AND SULLIVAN'S CRIMINAL LAW: THEORY AND DOCTRINE* 140–45 (6th ed. 2016) (discussing support for permissibility of an inference of intent where an actor engages in conduct with knowledge of virtually certain effects or side-effects); Weisberg, *supra* note 76, at 238 (citing the 1980 official commentary to the draft Model Penal Code for the proposition that “often, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motive”).

<sup>174</sup> See Kadish, *supra* note 76, at 351; *cf.* Gozales v. Duenas-Alvarez, 549 U.S. 183, 190–91 (2007) (“[M]any States and the Federal Government apply some form or variation” of the doctrine that “an aider and abettor is criminally responsible not only for the crime he intends, but also for any crime that ‘naturally and probably’ results from his intended crime” or “permit jury inferences of intent” based on the natural and probable consequences of the aider or assister's conduct); *id.* at App. C (citing cases from several states that adopted the “natural and probable consequences” doctrine for purposes of proving intent).

or with willful ignorance of the principal's wrongful aims.<sup>175</sup> Under a theory of recklessness, the question is whether the assisting party is legally responsible when it knew of a substantial risk that the principal would engage in unlawful conduct.<sup>176</sup> Under a theory of willful ignorance, it is suggested that the assisting party, knowing of a high or near-certain risk that the principal will engage in unlawful conduct, may not avoid responsibility by deliberately failing to confirm or deny the principal's ultimate aim.<sup>177</sup> There is significant support for the application of these concepts in the context of state complicity.<sup>178</sup>

Given the applicability of these inferences, by continually denying Syrian unlawful battlefield acts, Russian officials intend to facilitate further LOAC violations by the Syrian armed forces. To begin with, the Syrian government's continuous battlefield misconduct benefits Russian officials. If the Syrian government is defeated by rebel opponents, it would be catastrophic for Russia's political and strategic interests, both in the Middle East and at large.<sup>179</sup> Given

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<sup>175</sup> The permissibility of these inferences risk the conflation of complicity with the separate legal theory of due diligence. Several commentators have compared and contrasted the concepts of complicity and due diligence. See, e.g., Sarah Heathcote, *State Omissions and Due Diligence Aspects of Fault, Damage, and Contribution to Injury in the Law of State Responsibility*, in THE ICJ AND THE EVOLUTION OF INTERNATIONAL LAW: THE ENDURING IMPACT OF THE CORFU CHANNEL 295 (Karine Bannelier et al. eds., 2012); Olivier Corten & Pierre Klein, *The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case*, in THE ICJ AND THE EVOLUTION OF INTERNATIONAL LAW, *supra* note 174, at 315; JACKSON, *supra* note 71, at 129–32, 155–57.

<sup>176</sup> See SMITH, *supra* note 74, at 160–71.

<sup>177</sup> See SIMESTER ET AL., *supra* note 173, at 577–78.

<sup>178</sup> Regarding the inference of intent from conduct or knowledge, see Ago, *supra* note 88, at 58, ¶ 72 (“The very idea of ‘complicity’ in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, *knowledge of the specific purpose* for which the State receiving certain supplies intends to use them.” (emphasis added)); CRAWFORD, *supra* note 59, at 408; JACKSON, *supra* note 71, at 159; Lowe, *supra* note 87, at 8; AUST, *supra* note 96, at 242–43; LANOVOY, *supra* note 69, at 102, 237; Bernhard Graefrath, *Complicity in the Law of International Responsibility*, 29 BELGIAN REV. INT’L L. 370, 374–77 (1996). Regarding the inference of intent from the foreseeability of the principal's wrongful acts, see Lowe, *supra* note 87, at 8 (“[A]s a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts. The fact that the unlawful conduct is foreseen, or foreseeable, as a sufficiently probable consequence of the assistance must surely suffice.”). Regarding reckless assistance and willfully ignorant assistance, see Nolte & Aust, *supra* note 96, at 15 (“The requirement of wrongful intent should not allow States to deny their responsibility for complicity in situations where internationally wrongful acts are manifestly being committed. When State A regularly exports military material to State B and it is *obvious* that State B is systematically violating human rights when repressing its ethnic minorities with the help of this material, State A should not be allowed to hide behind the position that it did not wish to support the commission of such wrongful acts.”).

<sup>179</sup> Russia's interests include maintaining consistency with past support for the Syrian government, see Neil MacFarquhar, *Russia Answers U.S. Criticism over Military Aid to Syria*, N.Y. TIMES (Sept. 7, 2015), <https://nyti.ms/2F62Xbe>; supporting the fight against extremism and terrorism, see *id.*; embarrassing the U.S. government, see *id.*; demonstrating that the U.S. government is soft on terrorism, see *id.*; strengthening Mr. Assad's foundering government, which is Russia's preferred government given the extent of the historical ties between it and the Assad regime, thus providing Russia with leverage in a future political settlement to the Syrian conflict, see *id.*; deflecting international attention away from Russia's activities in the Ukraine and the Crimean Peninsula, see

Syria's depleted and desperate state in mid-2015,<sup>180</sup> Russian officials likely perceived that drastic measures were in order to turn the tide of the armed conflict in favor of the Syrian government. The Syrian government's systematic engagement in unlawful battlefield acts such as directly targeting civilians and fighters who were *hors de combat*, as well as chemical weapons attacks, had the desired effect of defeating rebel groups and increasing the government's territorial gains.<sup>181</sup> Russian officials know that one consequence of a large number of LOAC violations by the Syrian armed forces is fierce condemnation by other states in the international community. In response to this condemnation, Russian officials have instead provided the legal and political cover necessary to keep the international community at bay by persistently denying the regime's human rights atrocities and violations under international law. Thus, that Syria's international law violations are in Russia's strategic interest supports finding that Russia intends to facilitate Syria's continued violations through its persistent denial of the Syrian government's violations under international law.

While the inference of Russian intent to facilitate Syria's LOAC violations is strong, it is important to evaluate opposing arguments. First, one might argue that Russia's assessment of the incidents detailed above is correct and that allegations against the Syrian government are mistaken. However, this opinion is most likely without merit. While individual reports of Syrian battlefield misconduct might occasionally contain inaccuracies, it is hard to imagine that the reports of the Syrian government's LOAC violations are entirely erroneous. This possibility seems farfetched when considering the ubiquitous nature of the reports, the level of detail and corroboration within individual reports, and the diversity of sources from which reports originate.<sup>182</sup> Second, in the event Russia's denials are largely baseless,

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Neil MacFarquhar, *Russia Defends the Presence of Its Military Advisers in Syria*, N.Y. TIMES (Sept. 9, 2015), <https://nyti.ms/2G9c38l>; enhancing Russia's ability to project military power in the Middle East, see Eric Schmitt & Michael R. Gordon, *Russian Moves in Syria Widen Role in Mideast*, N.Y. TIMES (Sept. 14, 2015), <https://nyti.ms/2G6748y>; and undercutting U.S. influence in the middle east, see Michael R. Gordon, *U.S. Begins Military Talks with Russia on Syria*, N.Y. TIMES (Sept. 18, 2015), <https://nyti.ms/2F40GNN>.

<sup>180</sup> See Greg Botelho & Khushbu Shah, *ISIS Is 'Everywhere' in Syria's Ancient City of Palmyra*, CNN (May 22, 2015), <http://www.cnn.com/2015/05/21/middleeast/isis-syria-iraq> [<https://perma.cc/DJJ8-LQ5T>].

<sup>181</sup> See George Russell, *Ignoring U.N., Russia and Assad Continue Syrian Chemical Weapons and Bombing Attacks Labeled as War Crimes*, FOX NEWS (Mar. 6, 2017), <http://www.foxnews.com/world/2017/03/06/ignoring-un-russia-and-assad-continue-syrian-chemical-weapons-and-bombing-attacks-labeled-war-crimes.html> ("The experts also agree that the ugly tactics are working. [Assad's regime and allied militia] are slowly gaining ground in the countryside, while the air forces focus increasing punishment on civilian 'infrastructures'—hospitals and schools—in an effort to drive desperate civilian populations out of opposition strongholds.").

<sup>182</sup> Importantly, this conclusion assumes the general reliability of the predominantly Western institutions reporting such allegations. This assumption highlights one of the fundamental challenges to the normative analysis of a systematic, or at least persistent, practice of denial and, accordingly, perhaps one of the potential powerful advantages of adoption of such a practice. One party's denial, if successful, tends to shift focus from the immediate factual dispute to evaluating the credibility of the opposing institutions that offer factual claims. In other words, such a policy, if effective, undermines the shared premises of the parties to the dispute, as well as those parties

another argument is that these denials are nonetheless made in good faith. However, this argument is similarly problematic. While some inaccuracy in the reports of Syrian LOAC violations is inevitable, Russia's conduct reflects wholesale disregard of credible allegations of Syrian misconduct made by credible journalists and humanitarian organizations. Russia's complete defiance of these corroborated factual accounts of Syrian atrocities more likely suggests bad faith.

That Russian officials are acting in bad faith supports finding that in continuing to deny Syrian misconduct they intend to facilitate further violations of international law by the Syrian armed forces.<sup>183</sup> A determination of bad faith implies that Russian officials know that allegations of Syrian LOAC violations are largely accurate. Consequently, Russian officials cannot claim to be engaging in persistent denial for the purpose of truth seeking or defending the Syrian government against what it perceived as Western bias or bullying. Some may argue that Russia's persistent denial does not necessarily demonstrate its intent to facilitate Syria's continued unlawful conduct. However, upon consideration of the previous discussion of intent, this argument is unavailing. For example, an assisting state may be said to intend the probable or foreseeable consequences of its actions. Given Russia's unique standing in the international community and its special role as Syria's ally,<sup>184</sup> it is foreseeable that the Syrian government perceives Russia's persistent denial as implicit approval of past violations, as political and legal protection against condemnation from other states, and as implicit encouragement to continue to engage in wrongdoing with a sense of impunity. The foreseeability of Syria's perception of Russian denial increases after considering the widespread, apparently deliberate, and systematic nature of Syrian wrongdoing.<sup>185</sup> Syria has continually demonstrated a willingness to violate any battlefield rule in the name of tactical gains. Even if the Syrian government interprets Russian denial not as Russia's implicit approval of its wrongful acts, but instead merely as a willingness by Russian officials to turn a blind eye to its misconduct, Russia is still not out of the woods. This is because Russia, aware of the truth of the allegations against Syria and knowing that Syria would continue to violate the law, may not remain willfully

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outside the dispute, thus making it more difficult for the parties to focus on advocating for a particular conclusion to the original dispute. These consequences could be perceived as advantageous to the party which adopted the practice of denial. Scholarship of the implications of the perceived increased use of practices of denial has begun. *See generally* Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57 (2017).

<sup>183</sup> Some argue that the key to understanding the subjective element of complicity is the concept of the obligation of good faith. *See, e.g.*, LANOVOY, *supra* note 69, at 234 ("The basic explanation [for a need for a mental state requirement in the theory of state complicity] lies in the general obligation of good faith.").

<sup>184</sup> Russia's unique position with respect to the international community is explored more fully *supra* in notes 163–170 and accompanying text.

<sup>185</sup> *Cf.* Lanovoy, *supra* note 172, at 154 ("Several actions taken with regard to the participation of different states in the conflict in Syria in 2013 may suggest that the *intention* requirement is immaterial, particularly where the pattern of violations is widespread and systematic.").

blind of the consequences of its actions. Rather, it may be said to intend to facilitate Syria's continued violations of the LOAC.

#### IV. Russian Complicity's Impact on U.S. National Security Interests and Russia Accountability

After years of avoiding direct involvement in the Syrian armed conflict, in September 2014 the United States' began a military intervention in Syria.<sup>186</sup> The intervention, consisting of airstrikes and sea-based missile strikes, targeted the Islamic State, an extremist group that had increasingly posed a security threat to both the United States and the international community.<sup>187</sup> The United States made clear that its military intervention was not, at that time, directed at the Syrian government or its armed forces.<sup>188</sup>

Russia's repeated denial of Syrian LOAC violations has significantly impacted the United States' national security interests in Syria. First, Russia's conduct reveals that its strategic interests in Syria are counter to those of the United States. As previously established, Russia's interests are furthered by the tactical gains Syria accrues by routinely violating the LOAC.<sup>189</sup> Thus, from a strategic standpoint, Russia views the atrocities resulting from Syria's continued battlefield misconduct as at least an acceptable cost to the achievement of its broader strategic goals. In contrast, the United States' strategic interests lie in the eradication of the Islamic State from Syrian territory.<sup>190</sup> Russia's encouragement of the Syrian government's international law violations is detrimental to this interest insofar as those violations perpetuate the conflict between the government and the Islamic

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<sup>186</sup> See Craig Whitlock, *U.S. Begins Airstrikes Against Islamic State in Syria*, WASH. POST (Sept. 23, 2014), [https://www.washingtonpost.com/world/national-security/us-begins-airstrikes-against-islamic-state-in-syria/2014/09/22/8b677e26-42b3-11e4-b437-1a7368204804\\_story.html?utm\\_term=.7d99e33c069d](https://www.washingtonpost.com/world/national-security/us-begins-airstrikes-against-islamic-state-in-syria/2014/09/22/8b677e26-42b3-11e4-b437-1a7368204804_story.html?utm_term=.7d99e33c069d) [<https://perma.cc/7R8E-TWQV>].

<sup>187</sup> The purpose of the United States' military action was not to attack the Syrian government or its armed forces or facilities. See *id.* Nonetheless, Syria alleged that the United States' military action violated its sovereignty and international law. See Ian Black & Dan Roberts, *ISIS Air Strikes: Obama's Plan Condemned by Syria, Russia and Iran*, GUARDIAN (Sept. 12, 2014), <https://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan> [<https://perma.cc/9YDN-EV99>]. The United States invoked collective self-defense under Article 51 of the U.N. Charter as the basis for its military action in Syria. United States Representative to the U.N., Letter from Samantha Power, U.S. Permanent Representative to the United Nations, to Ban Ki-moon, Secretary-General of the United Nations (Sept. 23, 2014), reprinted in Marty Lederman, *The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group*, JUST SEC. (Sept. 23, 2014), <https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group> [<https://perma.cc/MX2U-V4PE>].

<sup>188</sup> See Greg Myre, *What Is the U.S. Goal in Syria?*, NAT'L PUB. RADIO (Apr. 8, 2017), <http://www.npr.org/sections/parallels/2017/04/08/523016523/what-is-the-u-s-goal-in-syria>. But see *infra* note 196 and accompanying text.

<sup>189</sup> See *supra* notes 179, 181 and accompanying text.

<sup>190</sup> See Sergey Aleksashenko, *A Three-sided Disaster: The American, Russian, and Iranian Strategic Triangle in Syria*, BROOKINGS: ORDER FROM CHAOS BLOG (Oct. 16, 2015), <https://www.brookings.edu/blog/order-from-chaos/2015/10/16/a-three-sided-disaster-the-american-russian-and-iranian-strategic-triangle-in-syria> [<https://perma.cc/8SR2-BECC>].

State (and other extremist groups) by providing fuel for Islamic State propaganda and recruitment.<sup>191</sup>

Second, Russia's conduct likely contributed to the United States becoming more involved in the Syrian armed conflict, contrary to its strategic interests.<sup>192</sup> As discussed, the purpose of the United States' intervention in Syria was to address the threat posed by the Islamic State.<sup>193</sup> However, Syria's repeated and egregious violations of the LOAC placed pressure on the United States to strike the Syrian government directly.<sup>194</sup> The United States relented to this pressure in April 2017. In response to the Syrian government's chemical weapon attack against insurgents within its territory,<sup>195</sup> the United States engaged in a Tomahawk missile strike against a Syrian airbase.<sup>196</sup> Russia's conduct, to the extent that its encouragement contributed to the Syrian government's decision to engage in the April 4th chemical weapon attack, played a part in leading the United States to take these further measures against the Syrian government.

Given the fact that Russia's conduct is counter to the United States national security interests, the United States must seek to hold Russia accountable for its violations of Rule 144's complicity prohibition. What are the means available to hold Russia accountable? The Draft Articles provide three general consequences of a state's international responsibility.<sup>197</sup> First, they hold that "the legal consequences of an internationally wrongful act under [Part 2 of the Draft Articles] do not affect the continued duty of the responsible state to perform the obligation breached."<sup>198</sup> Second, the internationally responsible state is obligated to cease the internationally wrongful act, "if it is continuing, [and] to offer appropriate assurances and

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<sup>191</sup> Lizzie Dearden, *ISIS Claims Propaganda 'More Powerful than Atomic Bomb' as Group Forms Strategy for Survival*, INDEPENDENT (Feb. 14, 2017), <http://www.independent.co.uk/news/world/middle-east/isis-propaganda-atomic-bomb-survival-strategy-iraq-syria-islamic-state-icsr-report-amaq-rumiyah-al-a7579511.html> [https://perma.cc/3GJR-JZ7R].

<sup>192</sup> See John J. Mearsheimer, *America Unhinged*, NAT'L INT., Jan.–Feb. 2014, at 9–11 (arguing that interfering militarily in Syria has "significant costs" for the United States, and thus that the United States should "adopt a hands-off policy" toward it).

<sup>193</sup> See Aleksashenko, *supra* note 190.

<sup>194</sup> See Madeline Conway, *Timeline: U.S. Approach to the Syrian Civil War*, POLITICO (Apr. 7, 2017), <http://www.politico.com/story/2017/04/timeline-united-states-response-syria-civil-war-237011> [https://perma.cc/35R9-5DX4].

<sup>195</sup> *Id.*

<sup>196</sup> See Michael R. Gordon et al., *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://nyti.ms/2oO4J9K> (noting that Trump Administration stated April 6, 2017 missile strike was in response to Syrian use of chemical weapons).

<sup>197</sup> See AUST, *supra* note 96, at 271. In addition to these three general consequences, the Draft Articles assert the irrelevance of a responsible state's internal (domestic) law as a justification for failing to comply with the consequences of responsibility, *see* Draft Articles, *supra* note 57, art. 32, and hold that the provisions of the Draft Articles dealing with the consequences of international responsibility are "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State," *id.*, art. 33(2). *See also* AUST, *supra* note 96, at 271.

<sup>198</sup> Draft Articles, *supra* note 57, art. 29.

guarantees of non-repetition, if circumstances so require.”<sup>199</sup> Third, the responsible state is obligated to “make full reparation for the injury caused by the internationally wrongful act.”<sup>200</sup> Potential reparations include restitution,<sup>201</sup> compensation,<sup>202</sup> and satisfaction.<sup>203</sup>

Several challenges exist to the implementation of these consequences,<sup>204</sup> two of which are particularly salient. First, while Russia’s obligations of continued performance and its responsibility to cease the internationally wrongful act and provide assurances of non-repetition are relatively straightforward, questions arise in connection with its obligation to “make full reparation for the injury caused” by its breach of Rule 144.<sup>205</sup> In the case of complicity, at least two states have contributed to the injury, thus raising questions of causation which are unaddressed by the Draft Articles.<sup>206</sup> Second, the question arises as to who may invoke Russia’s international responsibility. The general rule under the Draft Articles is that states are “injured” and therefore may invoke the responsibility of another state “if the obligation breached is owed to . . . that State individually.”<sup>207</sup> However, exceptions exist allowing other non-injured states to invoke responsibility in the event that the obligation “is established for the protection of a collective interest of the group” or “is owed to the international community as a whole.”<sup>208</sup> The extent to which states’ duties and entitlements under the LOAC constitute common interests of the international community has been the subject of debate.<sup>209</sup>

In addition to challenges concerning implementation of the consequences of state complicity under the Draft Articles, uncertainties exist as to how allegations of state complicity may be resolved within existing international dispute settlement systems.<sup>210</sup> Given the derivative nature of complicity, the establishment of the

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<sup>199</sup> *Id.*, art. 30.

<sup>200</sup> *Id.*, art. 31.

<sup>201</sup> *See id.*, art. 35.

<sup>202</sup> *See id.*, art. 36.

<sup>203</sup> *See id.*, art. 37.

<sup>204</sup> A full examination of these consequences is beyond the scope of this Article. For a thorough discussion of the consequences of international responsibility in the context of complicity, see LANOVOY, *supra* note 69, at 254–302; see also AUST, *supra* note 96, at 269–318. For a comprehensive treatment of the consequences of international responsibility in general, see CRAWFORD, *supra* note 59, at 459–711.

<sup>205</sup> *See* Draft Articles, *supra* note 57, art. 31.

<sup>206</sup> For a treatment of this issue, see AUST, *supra* note 96, at 274–86; see also LANOVOY, *supra* note 69, at 269–81.

<sup>207</sup> Draft Articles, *supra* note 57, art. 42. If the obligation breached is owed to a group of states or to the international community as a whole, then a state may invoke responsibility as an injured state if the breach “specially affects that State.” *Id.* It has been argued in the context of the LOAC that this definition of “injured” state includes “only the adverse party in an international armed conflict, the state on the territory of which a violation of international humanitarian law has occurred or the national State of the victims.” Sassòli, *supra* note 70, at 423.

<sup>208</sup> Draft Articles, *supra* note 57, art. 48.

<sup>209</sup> *See* Focarelli, *supra* note 120, at 167–70.

<sup>210</sup> *See* AUST, *supra* note 96, at 296 (“Holding States responsible before international courts and tribunals is a different issue from the question whether a State is responsible for the commission of an internationally wrongful act.”).

assisting state's international responsibility necessitates a determination of the principal state's internationally wrongful act to which the assisting state contributed.<sup>211</sup> In judicial fora, in which jurisdiction is based on consent, in most cases the court in question may not have jurisdiction over all of the relevant state parties.<sup>212</sup> These considerations could present hurdles to the United States' and others' attempts to hold Russia accountable through formal international dispute resolution proceedings.

While these challenges are significant, it should be kept in mind that resorting to formal international dispute settlement systems is fairly uncommon.<sup>213</sup> Thus, it is unlikely that allegations of state complicity against Russia will come before a formal judicial proceeding. It is much more likely that the United States and others may attempt to hold Russia accountable for its complicity outside formal resolution systems. To that end, states may resort to "certain extrajudicial self-help measures under international law."<sup>214</sup> These include retorsion, which consists of "retaliation against another state in a manner that does not interfere with the target state's rights under international law."<sup>215</sup> Another example is the countermeasure, which "involve[s] non-compliance by one state with an international obligation owed towards another state, adopted in response to a prior breach of international law by that other state and aimed at inducing it to comply with its obligations of cessation and reparation."<sup>216</sup>

One advantage to the United States and others resorting to informal self-help measures rather than formal dispute resolution systems is that the informality of self-help measures may relieve pressure on those making such allegations. For example, in informal processes states do not have to meet the technical burdens involved in formal international dispute settlements to prove, in this case, Russian officials' intent to facilitate Syrian misconduct. On the other hand, states are at a

<sup>211</sup> *Id.*; see also *supra* notes 73–76, 131–134 and accompanying text.

<sup>212</sup> For example, under the so-called Monetary Gold principle (also called the "indispensable third party" principle), the International Court of Justice "has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, 'it would have to rule, as a prerequisite, on the lawfulness' of the conduct of another State, in the latter's absence and without its consent." Draft Articles, *supra* note 57, comment. to art. 16, ¶ (11) (quoting East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. Rep. 90, 105 ¶ 35 (June 30)); see also Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., & U.S.), Preliminary Questions, 1954 I.C.J. Rep. 19, 32 (June 15); LANOVOY, *supra* note 69, at 300 (addressing the difficulty of resolving state complicity allegations "in a predominantly bilateral and consensualist system of international dispute settlement").

<sup>213</sup> See LANOVOY, *supra* note 69, at 300. ("It is true that due to, *inter alia*, political and diplomatic interests, evidentiary issues and the structural deficiencies of the current framework for dispute settlement in international law, States will rarely consider bringing a case against the complicit wrongdoer before international courts and tribunals.").

<sup>214</sup> CRAWFORD, *supra* note 59, at 675.

<sup>215</sup> *Id.* at 676; see also Draft Articles, *supra* note 57, comment. to pt. 3, ch. II, ¶ (3) (defining retorsion as "unfriendly conduct which is not inconsistent with any international obligation of the state engaging in it even though it may be a response to an internationally wrongful act").

<sup>216</sup> CRAWFORD, *supra* note 59, at 685. See generally Draft Articles, *supra* note 57, pt. 3, ch. 2. A full discussion of these extrajudicial self-help measures is beyond the scope of this Article. For a detailed examination, see CRAWFORD, *supra* note 59, at 675–711. For a treatment of these self-help measures in the context of state complicity, see LANOVOY, *supra* note 69, at 293–300.

greater risk of allowing the informal nature of extrajudicial self-help to result in reckless assertions about complicity that could have undesirable consequences, such as the escalation of international disputes.<sup>217</sup> Thus, states would benefit from ensuring a strong legal foundation exists as to the nature of the state's complicity, including its basis in international law and its elements, before asserting international responsibility.<sup>218</sup>

How do these considerations impact the United States' interest in ensuring that Russia is held accountable for its complicity in Syrian wrongdoing? The difficulty of this question is exacerbated by the complex relationship between the United States and Russia. The Russian conduct in question is only one example of how its interests conflict with those of the United States.<sup>219</sup> Furthermore, it must be conceded that, for the reasons previously discussed, resort to formal international dispute settlement systems is unlikely. Thus, in seeking to hold Russia accountable, the United States will likely have to rely on political, diplomatic, and other self-help measures. Perhaps the first step is for the United States to publicly recognize the issue. The United States could publicly assert that Russia is violating international law by repeatedly denying Syria's LOAC violations, and that therefore Russia is complicit in Syria's atrocities. Alternatively, the United States could make an assertion less couched in legal terminology. For example, it could assert that Russia's repeated denials obstruct the goal of bringing the Syrian conflict to a resolution. Any public statement would need to account for the complicated relationship between the United States and Russia, as well as the potential consequences of such an assertion of Russian responsibility under international law. Nonetheless, given the unlawfulness of Russia's repeated denials, as well as the serious repercussions it has on U.S. national security interests in Syria, it is essential for the United States to address the issue, prevent its recurrence, and hold Russia accountable for its part in the atrocities that have occurred in Syria.

## V. Conclusion

This Article argues that Russia, by virtue of its officials' repeated, bad faith denial of Syrian battlefield misconduct, is complicit in the Syrian government's continued violations of the LOAC. Assad's regime perceives Russia's persistent

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<sup>217</sup> See CRAWFORD, *supra* note 59, at 698.

<sup>218</sup> Since Russia's 2015 military intervention in Syria, some allegations that Russia is complicit in Syrian international law violations appear to have been made either with disregard for, or misunderstanding of, the legal requirements of state complicity. See, e.g., Michael Edison Hayden, *Schiff Says Russia Is Absolutely 'Complicit' in Syrian Chemical Attack*, ABC NEWS (Apr. 9, 2017), <http://abcnews.go.com/Politics/schiff-russia-absolutely-complicit-syrian-chemical-attack/story?id=46677669> [<https://perma.cc/N5A5-R7X4>].

<sup>219</sup> See, e.g., Off. of Dir. of Nat'l Intel., Intelligence Community Assessment: Assessing Russian Activities and Intentions in Recent U.S. Elections (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf) [<https://perma.cc/ZTD8-YACC>] (concerning allegations of Russia's improper involvement in the 2016 U.S. presidential election); Matthew Pennington, *As War in Afghanistan Drags on, Russia Resurrects Interest*, U.S. NEWS & WORLD REP. (Mar. 30, 2017), <https://www.usnews.com/news/politics/articles/2017-03-30/amid-us-afghanistan-uncertainty-russia-resurrects-interest> (concerning Russia's recent assertion of interests in the conflict in Afghanistan).

denial of its violations of international law as implicit approval of the Syrian government's actions, as legal and political cover against other states' attempts to hold it accountable, and as implicit encouragement to continue violating international law. Finally, evidence of Russia's intent is that the Assad regime's efforts to regain lost power and territory are in furtherance of Russia's regional and global interests.

While challenges exist to establishing Russian complicity in Syria's LOAC violations, the United States and others must nevertheless insist that Russia cease its harmful practice of denial and hold Russia accountable for its violations under international law. Russia's status as an accomplice rather than a principal wrongdoer in no way diminishes the seriousness of its conduct. Just like principle bad actors, "[a]ccomplices themselves bring wrongdoing into the world."<sup>220</sup> Russia has enabled the persistence of the Syrian government's human rights abuses. It must be made to account for the role it has played in these atrocities.

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<sup>220</sup> Gardner, *supra* note 154, at 141.