

## Chapter 1 Interstate Assistance to the Use of Force – The Framework of the Book

“We must be the great arsenal of democracy”,<sup>1</sup> Franklin D Roosevelt announced on December 29, 1940, at a time when National Socialist Germany had occupied much of Europe and the United Kingdom was increasingly under pressure from the Germans. Winston Churchill proclaimed: “Give us the tools, and we will finish the job.”<sup>2</sup> Soon thereafter, what had been a figurative slogan became reality. The US launched the Lend-Lease program. It still kept clear of the actual fighting. But it was supplying substantial military aid to allied States fighting National Socialist Germany. It literally became the ‘*arsenal*’ of States defending democracy against National Socialist Germany. Josef Stalin later noted at a dinner in Tehran “[w]ithout American production, the United Nations could never have won the war.”<sup>3</sup> 46 years later, in 1986, the United States conducted airstrikes against Libya in an operation that has been described as the “longest and most demanding combat mission” in US military history.<sup>4</sup> The reason: European and regional States had denied their support, neither allowing American aircraft overflight nor refueling. In 2019, a German court determined that American drone strikes in Yemen are only made possible due to the use of a relay station based in Ramstein, Germany.<sup>5</sup> Recently, the involvement of third States in the Ukraine conflict defines the ongoing war.

Interstate assistance to use of force matters. These four examples are no exception. In fact, it is rare for States to use force in their international relations without assistance from another State. In view of a use of force, States cooperate. States provide each other with security assistance, long before they resort to force, by training soldiers, exporting arms, or joining

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- 1 Franklin Delano Roosevelt, 'Fireside Chat on National Security. White House, Washington, D.C. December 29, 1940' in Samuel Irving Rosenman (ed), *The Public Papers and Addresses of Franklin D. Roosevelt* (1941) 643.
  - 2 Winston S Churchill, 'Give us the Tools and We Will Finish the Job: A Broadcast Address February 9, 1941' in Charles Eade (ed), *The Unrelenting Struggle: War Speeches*, vol II (1942).
  - 3 'One War Won', *Time Magazine* (13 December 1943) <http://content.time.com/time/subscriber/article/0,33009,791211,00.html>.
  - 4 Walter J Boyne, 'El Dorado Canyon', 82(3) *Airforce Magazine* (March 1999).
  - 5 OVG für das Land Nordrhein-Westfalen, 4 A 1361/15, judgment (19 March 2019), juris.

military alliances. States aid and assist each other in concrete cases. States conduct their military operations on a joint and coalition basis. Some States engage in hostilities. Most other contributing States will be involved to a different extent, by providing military bases and essential facilities, permitting transit or overflight, refueling strikes, sharing intelligence and reconnaissance information or providing advice. Other States will merely continue 'normal' trade relations with the State using force, thereby delivering war-essential resources or maintaining the State's economy necessary to shoulder the use of force. All of this is a truism, which is widely treated as such.

The present book is dedicated to this truism. It seeks answers in international practice to the question of whether, and if so, under which circumstances, a State's assistance short of force to another State that uses force runs afoul of international legal norms, in particular the specific rules of the *ius contra bellum* under the United Nations Charter. What are the rules applying to a State that decides to literally be an "arsenal" for other States? What legal framework applies to more remote acts of assistance like granting overflight rights or continuing trade relations?

In times of a post-Westphalian order, where non-State actors increasingly dominate also questions of *ius contra bellum*, cyber wars are looming, and artificial intelligence is entering the stage, it may appear anachronistic to dedicate a book to interstate assistance. It is not. Interstate assistance has been and continues to be decisive for almost any use of force in the international relations of States (I). In fact, it is submitted that the regulation of interstate assistance to a use of force may play an important role in enhancing the effectiveness of the cornerstone of international law: the prohibition to use force.

This chapter demarcates the framework of the analysis. After defining the factual scope of the analysis, i.e. 'interstate assistance to a use of force' (II.A), the normative regime to be analyzed will be defined (II.B). Then, the research question and the ensuing analysis will be further outlined (III).

I. The importance and relevance to assess interstate assistance to a use of force

Whenever States use force in their international relations – whether they defend themselves against an armed attack, fight terrorism, rescue nationals abroad, act upon the authorization of the Security Council, seek to prevent a genocide, or intervene upon the invitation of a contested government in a civil war situation – interstate assistance is a common defining feature with significant impact.<sup>6</sup> But, most assisting States rarely directly participate in the hostilities. Instead, their contributions commonly remain short of armed force.

In the sovereignty-centered world order, interstate assistance naturally is an essential component of any global military operation. To use force, States (must) rely on assistance. Only a few States in specific operations can realize the old ideal of self-sufficient troops. States resorting to armed force are widely dependent on territorial assistance, even if it is just transit rights. Also, they may hardly handle the logistics of war alone. Many if not most States depend on external supplies for their defense. In fact, only disputes between neighboring States seem to allow a use of force in international relations without the involvement of another State. But even in those cases, it will be the exception. Eventually when hostilities become protracted, international support and supplies become a decisive factor in sustaining the war efforts. In other words, an observation from 1938 remains valid today: “[I]n war no Power is completely indifferent to foreign supplies of war materials [...]”<sup>7</sup>

Even when States have the capacity to act on their own, States cooperate as a matter of policy. For example, as Graham observed, “[e]ven the United States anticipates that, notwithstanding its unique ability to raise, prepare, deploy, sustain, and recover forces of sufficient capability, capacity, and size to ‘go it alone’, all future operations will be conducted in coalition.”<sup>8</sup> Canada stated in the context of the Iraq War in 2003: “For decades, we have

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6 Similarly, Berenice Boutin, 'Responsibility in Connection with the Conduct of Military Partners', 56(1) *MLLWR* (2017-2018) 64.

7 Royal Institute of International Affairs, *International Sanctions: A Report by a Group of Members of the Royal Institute of International Affairs* (1938) 27.

8 Andrew Graham, 'Military Coalitions in War' in Yves Boyer and Julian Lindley-French (eds), *The Oxford Handbook of War* (2012) 320. The USA has never fought a major war alone, see Patricia A Weitsman, *Waging War: Alliances, Coalitions, and Institutions of Interstate Violence* (2014) 14. Similar observations were made also a

always had exchanges with our allies to wage battles together. You never go to war alone; it is a joint effort.<sup>9</sup> This is also reflected in the increasing trend to resort to force in ‘coalitions of the willing’.<sup>10</sup> Besides the military necessity of assistance, States using force prefer to share the burden of a military operation – both economically and politically.

Assisting States also have manifold reasons to provide assistance. Assisting States may seek to benefit from partnering with the State using force.<sup>11</sup> By providing assistance, they may actively advance strategic priorities and policies, while at the same time remaining true to political, constitutional, or historical constraints that prevent direct engagement in hostilities.<sup>12</sup> Other times, interstate assistance may be attractive as a powerful tool to influence military conflicts and still conceal one’s involvement and avoid hitting the headlines. Put differently, assistance can be an effective alternative to directly using force.<sup>13</sup>

It thus seems fair to observe that, by its nature, interstate assistance is a universal phenomenon in military operations. All States, whether superpowers or micro-States, can, want to, and do provide assistance.

Given the prevalence of interstate assistance, it is hardly surprising that assistance often has a significant impact on the use of force.

Assistance may enable a specific use of force. For example, without regional States allowing the use of their territory as a launch base, most recent

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century ago. For example, Thomas H Holland, 'The Mineral Sanction as a Contribution to International Security', 15(5) *IntlAff* (1936) 742.

9 HC Deb (Canada) 18 March 2003, Hansard vol 138 no 72, 1435 (McCallum, Minister of National Defence).

10 Exemplary on the wide literature discussing coalitions of the willing: Alejandro Rodiles, *Coalitions of the Willing and International Law: The Interplay between Formality and Informality* (2018); Matteo Tondini, 'Coalitions of the Willing' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017), 701.

11 Assisting States, in particular small powers, often receive substantial political, economic or military advantages from providing assistance. For more details see Graham, *Military Coalitions in War*, 319.

12 For example, economically powerful States like Germany or Japan who are reluctant to directly use force in light of their historic DNA and constitutional limitations thus may live up to international expectations.

13 For example, States engage in proxy wars or apply a “policy of leading from behind”. This strategy has been particularly recognized in the context of assistance to non-State actors, Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71(2) *AJIL* (1977) 237; Ian Brownlie, *International Law and the Use of Force by States* (1963) 369.

military operations in the ‘war against terror’ could not have taken place. The same may be true for the continuous provision of armaments and logistical services, as illustrated in the example of the Saudi-led intervention in Yemen, which heavily depends on Anglo-American supplies.<sup>14</sup> Moreover, States launch military operations against targets that are solely defined by assisting foreign intelligence.<sup>15</sup> As much as the provision of assistance, the decision to refrain from assistance may shape the specific operation. For example, the Turkish denial to allow the use of its territory in the Iraq War 2003 necessitated the largest paratrooper operation since World War II.

The effect of interstate assistance may be significant enough to turn the tides. The American decision in 1940 to become the “arsenal of democracy” in support of the United Kingdom is perhaps the most prominent example.<sup>16</sup> Moreover, the provision of assistance may undermine international efforts to starve out war.<sup>17</sup>

But even if the impact and scope of assistance do not match such cases, interstate assistance plays a critical role in, and may materially affect, the success of military operations. For example, even assistance of smaller scope, such as unburdening another State’s military or supporting them economically, facilitates the use of force. Whenever States share the military or financial burdens, this may render the use of force at least more profitable and ensure operational endurance.<sup>18</sup> Even joining a military coalition

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14 There are reports arguing that if the Anglo-American assistance ceased, the Saudi-led military operation would have to stop within a week, David Wearing, ‘Britain could stop the war in Yemen in days. But it won’t’, *Guardian* (3 April 2019), <https://www.theguardian.com/commentisfree/2019/apr/03/britain-war-in-yemen>. In 1951, the Collective Action Committee explained the effectiveness of arms embargoes as “most countries must rely on imports for many types of armaments, since there are few countries which are major producers of arms.” Collective Measures Committee, A/1891 (1951), para 81.

15 ‘Israel bombardiert mutmaßliche Chemiewaffen-Fabrik in Syrien’, *SZ* (7 September 2017), <http://www.sueddeutsche.de/politik/krieg-in-syrien-israel-bombardiert-mutmassliche-chemiewaffen-fabrik-in-syrien-1.3656607>.

16 Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954) 404 (Discourse 23).

17 Cf e.g. Quincy Wright, ‘Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War’, 24 *PROCASIL* (1930) 91 in view of US supplies to belligerents contravening League efforts.

18 E.g. Collective Measures Committee, A/1891 (1951), para 50.

merely by name, and thus lending political support, is often considered a decisive factor in States' decision to resort to force.<sup>19</sup>

The prevalence and relevance of interstate assistance in itself would justify the assessment of the legal framework applicable to this common thread in States' military operations. The identification and clarification of the framework that international law provides for contributions to the use of force may offer meaningful guidance to States in a highly politicized area of international relations. But this is all the more true, as rules governing interstate assistance have another essential function: By their nature, they affect the relationship of 'third' States to the conduct of another actor. As Vaughan Lowe succinctly explained, legal rules on interstate assistance "make [...] it possible – indeed, make [...] it] necessary – greater sensitivity to the repercussions of each State's actions upon the wider community."<sup>20</sup> It is well accepted that rules governing interstate assistance may contribute to promoting respect for the rule of law.<sup>21</sup>

The regulation of interstate assistance to the use of force may hence constitute an essential puzzle piece in the endeavor to strengthen the effectiveness of what has been called the 'cornerstone' of international law, the prohibition to use force.<sup>22</sup>

One may wonder if the answer to the applicable legal framework governing interstate assistance is not obvious. Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARS), now accepted as customary international law, stipulates the general conditions when an assisting State is internationally responsible.<sup>23</sup> Indeed, the present work recognizes the relevance of Article 16 ARS. In its current form, it

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19 See e.g. the American efforts to secure a coalition to intervene in Iraq in 2003. Similarly, States intervening in Libya in 2011 attached great importance to have Arab States on board.

20 Vaughan Lowe, 'Responsibility for the Conduct of Other States', 101(1) *JIntl&Dipl* (2002) 14.

21 Georg Nolte, Helmut Aust, 'Equivocal Helpers - Complicit States, Mixed Messages, and International Law', 58(1) *ICLQ* (2009) 12; Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011) 50-96; Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 134.

22 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Rep 2005, 168, [*Armed Activities*] 223 para 148.

23 A/RES/56/83 (12 December 2001), Annex, as corrected by A/56/49 (Vol. I)/Corr.4 (6 June 2007).

adequately reflects customary international law. As such, it is part of what Helmut Aust has identified as a “network of rules on complicity”.<sup>24</sup>

That said, crucially, this book proposes that Article 16 ARS does not represent the entire picture of the applicable legal framework for interstate assistance to the use of force. Subject to this book’s analysis, six observations imply that Article 16 ARS leaves room for such a regime and affirm the need for further scrutiny.

First, Article 16 ARS has been accepted as customary international law only relatively recently. The ILC had introduced the idea of a general rule of complicity on the universal level only in the 1970s. Since then, the provision has faced scepticism as to whether it reflects *lex lata*.<sup>25</sup> Even with respect to the ILC’s final version, critical voices have remained, questioning whether Article 16 ARS merely constitutes progressive development.<sup>26</sup> In any event, it was only in 2001 that the ILC adopted the Articles on State Responsibility, including Article 16 ARS, which the UNGA took note of. In 2007, the ICJ, in passing, acknowledged the norm as customary international law.<sup>27</sup> Whenever one is to accept as exact date of birth of Article 16 ARS, it is

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24 Aust, *Complicity*, Chapter 8.

25 Seventh Report on State Responsibility by Mr Roberto Ago, A/CN.4/307, ILCYB 1978 vol I(1) [Seventh Report Ago], 59 para 74: “well established in international law” but “in any event, [...] progressive development”. James Crawford, *State Responsibility: The General Part* (2013) 400-401, 408 “(at least initially) a measure of progressive development”. See for the debate in literature: Aust, *Complicity*, 98-99 n 5-7. For a cautious conclusion after an extensive survey of practice see Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (2007) 239, 165-239. In any event, since Aust’s analysis in 2011, it seems universally accepted that Article 16 ARS reflects customary international law, just see Miles Jackson, *Complicity in International Law* (2015) 153; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016) 164; Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House Research Paper, Chatham House, 2016) 24; Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (2020) 94.

26 E.g. Germany: A/C.6/33/SR.42 para 58 (9 November 1978); A/CN.4/488, 75-76 (25 March 1998). On State reactions see Aust, *Complicity*, 169-174, 182-183; Jackson, *Complicity*, 150-151; Pacholska, *Complicity*, 93-94.

27 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Rep 2007, 43, 217 para 420.

arguably later than 1978.<sup>28</sup> Interstate assistance to the use of force, however, was already a common phenomenon in the early days of the Charter. Was interstate assistance unregulated at that time?

The ILC's work, and (the development of) Article 16 ARS itself suggest the contrary. In fact, Article 16 ARS was derived from State practice reflecting *specific* rules governing assistance. Rules concerning assistance to the use of force, although not analyzed in detail, featured most prominently. What were and are those rules?

A second observation renders these questions even more acute: There are various other specific rules on assistance recognized and applied in other areas of international law.<sup>29</sup> For example, Common Article 1 Geneva Conventions prohibits aid and assistance.<sup>30</sup> Treaties guaranteeing international human rights are interpreted to also protect against acts of assistance.<sup>31</sup>

Third, and closely related to the two previous observations, Article 16 ARS is, by its nature, a *general* rule of international law. Pulling several strands together, Article 16 ARS applies across the field of international law. Despite some recent trends to the contrary, it was not meant to create uniformity.<sup>32</sup> It does not exclude the diversity of primary, specific rules governing assistance.<sup>33</sup> The rules upon which Article 16 ARS was based continue to exist and be of relevance, not least to contribute to clarifying the scope of Article 16 ARS.

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28 See also Jean d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents', 58(2) *ICLQ* (2009) 432; Aust, *Complicity*, 6; Lanovoy, *Complicity*, 22; Pacholska, *Complicity*, 79-81.

29 Just see Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', 60(1) *GYIL* (2018); Boutin, *MLLWR* (2017-2018) 64-70.

30 See e.g. Jean-Marie Henckaerts, 'Respect for the Convention' in International Committee of the Red Cross (ed), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016) 50-51.

31 For an overview see Seibert-Fohr, *GYIL* (2018); Suzanne Egan, *Extraordinary Rendition and Human Rights: Examining State Accountability and Complicity* (2019) Chapter 4.

32 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 13.

33 ILC ARS Commentary Article 16, 66, para 2, where the ILC acknowledges that "various specific substantive rules exist". In general Article 55 ARS. Similarly Pacholska, *Complicity*, 89. On the importance of diversity John Cerone, 'Re-Examining International Responsibility: Inter-State Complicity in the Context of Human Rights Violations', 14(2) *ILSAJIntl&CompL* (2008) 533-534.



Fourth, the ILC has conceptualized Article 16 narrowly in an attempt not to undermine cooperation between States, which is generally considered beneficial.<sup>34</sup> The precise equilibrium between desirable cooperation and protection of third States' rights may remain debated, as ongoing controversies on the precise conditions of Article 16 ARS vividly show. But it is beyond doubt that Article 16 ARS has been tailored to be applicable to any type of assistance and any violation of international law. Proposals to limit the rule to serious breaches of international law did not prevail.<sup>35</sup> Moreover, the conditions of Article 16 ARS were essentially driven by considerations seeking to ensure the inclusion in the ARS despite the fact that the ARS must not "define a rule and the content of the obligation it imposes."<sup>36</sup> This background has determined any discussion on the preconditions of Article 16 ARS. Accordingly, as a general rule, Article 16 ARS applies equally to assistance to the use of force, an act of genocide and a breach of a bilateral treaty. This again leaves room to wonder if Article 16 ARS adequately takes into account the risk of expansion, extension, and escalation of an international armed conflict inherent to interstate assistance, and the special normative value of the prohibition to use force.

Fifth, with respect to interstate assistance to the use of force, Article 16 ARS does not detail the consequences and the nature of the violated norm. Can a State exercise self-defense against an assisting State? How to handle situations of a conflict of obligations when Article 16 ARS applies, but States likewise have a duty to provide assistance? Does Article 103 UNC apply? Does the widely accepted *ius cogens* nature of the prohibition to use force also extend to rules of non-assistance, trumping conflicting duties to assist?

Sixth, Article 16 ARS prompts questions about the many nuances in international practice with respect to assistance. For example, it has difficulties explaining why States provide individual and elaborate justifications for their own assistance to the use of force when they claim that the assisted use of force already complies with international law. Why is some assistance considered an act of aggression itself, as most famously indicated

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34 Nolte, Aust, *ICLQ* (2009) 12.

35 On these John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57(1) *BYIL* (1987) 104-105.

36 ILC ARS Commentary, General Commentary, 31, para 1-2; Chapter IV, 65 para 7; Second Report on State Responsibility, by Mr James Crawford, A/CN.4/498 and Add.1-4, ILCYB 1999, 3-97 [Second Report Crawford], 47 para 166-167.

for example by Article 3(f) Aggression Definition,<sup>37</sup> and not ‘complicity in aggression’?

Accordingly, an analysis of interstate assistance to the use of force must go beyond Article 16 ARS and general international law. This book hence addresses one of the pillars upon which Article 16 ARS was built, and which complements or maybe supersedes Article 16 ARS: the *ius contra bellum* regime on interstate assistance to a use of force.

Recent academic discussions on the *ius contra bellum* almost exclusively focus on the State using force itself and the intricate questions of whether it acts in accordance with international law or not. The positions of third States towards another State’s use of force are almost exclusively scrutinized through that lens, asking to what extent their reaction may inform the legality of the use of force. The wide range of other States’ contributions *short of force* is hardly appreciated on its own.<sup>38</sup> Usually, it is no more than a vague and unspecific side note to the statements of facts.

Since the adoption of Article 16 ARS, as Vaughan Lowe has prophesied,<sup>39</sup> scholars’ attention in *ius contra bellum* discussions has increasingly broadened to also include the responsibility of assisting States. Notably, however, specific *ius contra bellum* rules on assistance are widely ignored. With respect to assistance to the use of force, the considerations are most commonly limited to the rules of general international law, primarily Article

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37 A/RES/29/3314 (14 December 1974), Annex. Article 3(f) reads: “Any of the following acts [...] shall [...] qualify as an act of aggression [...] (f) The 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”.

38 For a notable, but rare exception in the context of the Iraq war 2003: Olivier Corten, ‘Les Arguments Avancés par la Belgique pour Justifier son Soutien aux Etats-Unis dans le Cadre de la Guerre contre l’Irak’, 38(1-2) *RBDI* (2005); Olivier Corten, ‘Quels droits et quels devoirs pour les Etats tiers?’ in Karine Bannelier, Théodore Christakis and Pierre Klein (eds), *L’intervention en Irak et le droit international* (2004). See also Stefan Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’ in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (2008) 217-220; Nolte, Aust, *ICLQ* (2009); Claus Kress, ‘The German Chief Federal Prosecutor’s Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq’, 2(1) *JICJ* (2004).

39 Lowe, *JIntl&Dipl* (2002) 13.

16 ARS,<sup>40</sup> even when claiming to (also) analyze primary rules of international law governing assistance to the use of force.<sup>41</sup>

Paradoxically, nonetheless, the existence of a specific legal framework governing assistance to the use of force – beyond the express recognition in the Charter of a right to assist a lawful use of force – seems widely accepted and virtually uncontested.

The International Law Commission indirectly recognized this framework when holding that “[t]he obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force.”<sup>42</sup> As another example, Harriet Moynihan, in her analysis on complicity, noted that “international law on the use of force contains some rules relevant to aiding and assisting.”<sup>43</sup> On a similar assumption, but without further explanations, 300 scholars signing an appeal of international lawyers concerning the recourse to force against Iraq in 2003 declared that “[a]ll forms of participation in such a war on the part of the United States, including all forms of assistance to the United States by third states or a regional organization, also consti-

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40 See e.g. BVerwG 2 WD 12/04, BVerwGE 127, 302-374, ILDC 483 (DE 2005), judgment (21 June 2005). Michael Bothe, 'Der Irak-Krieg und das völkerrechtliche Gewaltverbot', 41(3) *AVR* (2003) 266; Michael J Strauss, 'Foreign bases in host states as a form of invited military assistance: legal implications', 8(1) *JUFIL* (2021) 11; Oliver Dörr, 'Use of Force, Prohibition of' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, September 2015) para 60; Luca Ferro, 'Western Gunrunners, (Middle-) Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?', 24(3) *JCSL* (2019) 521; John Hursh, 'International humanitarian law violations, legal responsibility, and US military support to the Saudi coalition in Yemen: a cautionary tale', 7(1) *JUFIL* (2020) 127, 141-142; Oona A Hathaway and others, 'Yemen: Is the US Breaking the Law?', 10(1) *HarvNatSecJ* (2019) 54; Boutin, *MLLWR* (2017-2018) 63-70; Tondini, *Coalitions*, 715-716, who expressly excludes the analysis of primary rules applicable to coalitions, 707.

41 Ferro, *JCSL* (2019) 510; Hursh, *JUFIL* (2020); Hathaway and others, *HarvNatSecJ* (2019); Boutin, *MLLWR* (2017-2018) 63; See also Frederik Naert, 'European Union Common Security and Defence Policy Operations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017) 686; André Nollkaemper, Ilias Plakokefalos, *The Practice of Shared Responsibility in International Law* (2017) sets out to analyse primary rules (A Framework of Analysis, 5). The specific primary rules of the *ius contra bellum* are not comprehensively addressed, however.

42 ILC ARS Commentary, Article 16, 67, para 9. See also examples in Seventh Report Ago, 58 para 71.

43 Moynihan, *Aiding and Assisting*, 28 para 93.

tute a violation of the prohibition of the use of force.”<sup>44</sup> Miles Jackson even claimed that “one of the clearest manifestations of a prohibition on state complicity arises in respect of the wrong of aggression”.<sup>45</sup>

Somewhat surprisingly, the assessments of the rules governing *interstate* assistance to a use of force rarely go beyond such assertions.<sup>46</sup> Not only is the exact legal origin of the rule indistinct (is it a breach of the prohibition to use force itself or rather a separate rule, or could it be both?); the scope, content and consequences of these rules are hardly subject to discussions.

There are only a few exceptions. Jackson claims that “there is not, however, a general rule prohibiting complicity in aggression.” Instead, he claims that “practice establishes the prohibition of a specific kind of complicity”: Article 3(f) Aggression Definition that addresses territorial assistance only.<sup>47</sup> He acknowledges, however, “some indication of the existence of a wider rule in that context”<sup>48</sup>, i.e. a “specific obligation on states prohibiting the knowing provision of military aid to an aggressor.”<sup>49</sup> Olivier Corten, who provides arguably the most comprehensive analysis,<sup>50</sup> disagrees. He concludes that there are various primary and specific rules governing assistance. *Inter alia*, he derives a general obligation of non-assistance to an act of aggression from practice. Helmut Aust, as well as later Vladyslav

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44 'Appel de juristes de droit international concernant le recours a la force contre l'Irak', 36(1) *RBDI* (2003) 273 para 6.

45 Jackson, *Complicity*, 135. See for early positions of just war theorists: Aust, *Complicity*, 16-18 on Grotius and Vattel. See also Stuart Casey-Maslen and others, *The Arms Trade Treaty: A Commentary* (1st edn, 2016) 200 para 6.67 “Such action will be a clear and serious violation of its obligations under an international agreement: the UN Charter.”; Antonio Coco, 'I divieti di trasferimento ai sensi degli articoli 6 e 7 del Trattato sul commercio delle armi', 96(4) *RivDirInt* (2013) 1238.

46 It is different for assistance provided to non-State actors.

47 Similarly, when discussing “primary prohibitions of complicity” Felder, *Beihilfe*, 142-145.

48 Jackson, *Complicity*, 136.

49 Ibid 146. See also Elihu Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law. Survey and Comment. VI. January 1-June 30, 1958', 7(3) *ICLQ* (1958) 551 not excluding such an obligation with respect to arms supplies.

50 Corten, *Etats Tiers*; Corten, *RBDI* (2005); Olivier Corten, 'La complicité dans le droit de la responsabilité internationale: un concept inutile?', 58 *AFDI* (2012) 61-63. See in particular Olivier Corten, *Le Droit Contre la Guerre. L'Interdiction du Recours à la Force en Droit International Contemporain* (2008) 265-291. An interesting (but somehow characteristic for the topic) aspect is that he omits the Chapter in the English version.

Lanovoy in a similar manner, provide an “exploratory” “overview”<sup>51</sup> and a “brief summary”<sup>52</sup> respectively of the specific primary rules applicable to interstate assistance to a use of force. Both identify Article 3(f) Aggression Definition, Article 2(5) UNC and the law of neutrality, as well as general due diligence obligations, as relevant, but they do not mention a general *ius contra bellum* prohibition to participate.<sup>53</sup> Lanovoy further considers whether forms of assistance other than the placing of the territory are prohibited under the Definition of Aggression; his analysis focuses only on assistance to non-State actors, however.<sup>54</sup> Moreover, he claims, yet without any substantiation, that “complicity in the threat or use of force amounts to the threat or use of force in and of itself.”<sup>55</sup> Based on the fragmentary overview, Lanovoy asserts “that the norms operating in the context of the prohibition of the use of force are well equipped to respond, on their own, to instances of complicity.”<sup>56</sup> Last but not least, some scholars (essentially uncritically) apply the regime governing assistance to non-State armed groups to the interstate context.<sup>57</sup>

There is no systematic and comprehensive analysis of interstate assistance to the use of force under the specific *ius contra bellum* regime of the UN Charter. The little analysis of interstate assistance may partly be grounded in the fact that the *ius contra bellum* rules governing assistance sit somewhat uncomfortably between two beliefs: While no one seems to seriously challenge that assistance to a use of force in violation of the UN

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51 Aust, *Complicity*, 379. Aust adds the caveat that “treatment is exploratory in the sense that the norms and concepts we are discussing in this chapter could very well warrant in-depth treatments of their own.” See also *ibid* 35. “The difficulties in interpreting Article 2(4) and (5) of the Charter with respect to their meaning for potentially complicit States show that, in the absence of clear and consistent Security Council findings on the requisite obligations, much remains unclear as to what is required of these States.”

52 Lanovoy, *Complicity*, 204.

53 Aust, *Complicity*, 380-385, 34 for an attempt to regulate this through “good faith”; Lanovoy, *Complicity*, 194-204. See also Alexander AD Brown, 'To complicity... and beyond! Passive assistance and positive obligations in international law', 27 *HagueYIL* (2016) 140; Pacholska, *Complicity*, 90-91.

54 Lanovoy, *Complicity*, 195-196.

55 *Ibid* 204.

56 *Ibid*.

57 See e.g. *Ibid* 195-196; Hathaway and others, *HarvNatSecJ* (2019) 61-62; Robert Chesney, 'U.S. Support for the Saudi Air Campaign in Yemen: Legal Issues', *Lawfare* (15 April 2015). But see Ferro, *JCSL* (2019) 511.

Charter is impermissible<sup>58</sup>, the impression seems to prevail that such a rule is hardly applied in practice. For example, Ian Brownlie commented, referencing the Suez Crisis:

“The form of assistance and the degree of knowledge of the intended purpose may be such that joint responsibility in delict may arise, in principle at least; in practice, claims for reparation have been made with reference to damage directly caused by the individual state.”<sup>59</sup>

In a similar but more general vein, Vaughan Lowe observed:

“There have, it is true, been instances where assistance given by one State to another, which other State has committed an unlawful act, has led to the assisting State being identified as carrying responsibility under international law. The ILC Commentary cites as one instance Iran’s protest in 1984 at the provision of financial and military aid by the United Kingdom to Iraq, during the Iran-Iraq war. [...]. Other examples cited by the Commission, such as the provision of German and British airfields for use by the United States as bases for raids on Lebanon and Libya, are less equivocally located within the principle of complicity. Even so, such instances of the attribution of legal, and not just political responsibility to assisting States have not been common.”<sup>60</sup>

In fact, it does not require a detailed scrutiny of international practice to notice that *interstate assistance* to the use of force under the *ius contra bellum* regime does not feature prominently, mirroring its absence in scholarly debate. Not only does the UN Charter not contain an express provision on interstate assistance to a use of force. This is particularly true for abstract practice that is well-accepted to interpret the *ius contra bellum* and its corollaries. The Friendly Relations Declaration does not mention interstate assistance in express terms. The Aggression Definition only refers to territorial assistance. Moreover, assistance in conflict practice at first sight

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58 The belief that was expressed with respect to the League of Nations seems to subsist: “The insertion of a special clause [stating that a State that ventures an attack in violation of the League must not be afforded assistance] is useless, since it cannot be presumed that a Power which agrees to become party to a treaty of security would be disloyal to any of its co-signatories.” Committee on Arbitration and Security, Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) C.536.M.163.1928.IX, 31, LNOJSpecSuppl (64) 1928, 490-527.

59 Brownlie, *Use of Force*, 369-370.

60 Lowe, *JIntl&Dipl* (2002) 13.

gives the impression that political preferences play a crucial role. States' low profile on *interstate* assistance is particularly striking in contrast to the widely discussed *ius contra bellum* rules governing assistance to non-State actor violence.<sup>61</sup>

It is against this background that the present book sets out to shed light on crucial and decisive, but rarely discussed contributions to the use of force, and on the specific *ius contra bellum* regime, as established through international practice, governing interstate assistance to a use of force.

## II. The factual and legal scope of the analysis

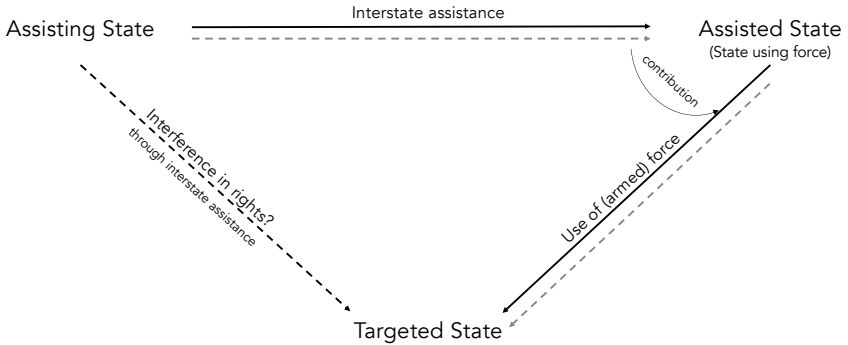
This book is concerned with a triangular relationship between, first, a State that provides assistance (in the following 'assisting State'),<sup>62</sup> second, a State that receives assistance and uses force ('assisted State'), and third, a State that is targeted by the assisted State's use of force ('targeted State').<sup>63</sup>

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61 See on this in detail Claus Krefß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995).

62 On the difficulties with the terminology of 'third States', see Paolo Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 1224-1225.

63 There are many different variants, and complicating factors (for example who attacked first and who responded, or what the surrounding circumstances were). Those need not concern at this stage, however. The general structure will always remain the same. For example, if the 'targeted State' defends itself by force against the attacking 'assisted State', and thereby receives assistance, the same constellation arises. Only the perspective changes. To assess the assistance to the 'targeted State', the 'targeted State' now defending itself will be an 'assisted State' using force, the attacking 'assisted State' will be a 'targeted State'. These tags merely have a descriptive function, irrespective of any legal implications.



This book seeks to answer the question to what extent the assisting State may bear legal responsibility for its contribution to the use of force of the assisted State against the targeted State. Primarily, it seeks to determine the extent to which the assisting State intrudes through the connection by ‘interstate assistance’ to the assisted State’s use of force into the targeted State’s right to be free from external force. In other words, this book addresses the legal framework (B) governing interstate assistance to another State’s use of force (A).

The term ‘interstate assistance’ is used in this context to describe the *factual* phenomenon of contributing to a use of force that is subject to examination. As such, it establishes the factual scope for the present analysis. References to ‘interstate assistance’, ‘assisting State’, ‘targeted State’ or ‘assisted State’ are not used as legal terms. In particular, it does not imply a legal classification of ‘interstate assistance’, such as whether it is prohibited under international law, or the legal effects it may have.

#### A. Definition of ‘interstate assistance to the use of force’

This book concerns ‘interstate assistance to the use of force.’ For the present purpose, this describes any State conduct, consisting of an action or an inaction, short of armed force that is capable of contributing to another State’s use of force in international relations. This definition establishes the *factual scope* of the analysis as follows:



1) Action and inaction capable of contributing

The involvement of a State in another State's use of force takes place on a wide spectrum. Categorization proves difficult. Each contribution will be idiosyncratic, not least as it is hardly only a single isolated type of contribution. To account for the broad range of assistance, this study does not limit itself to specific types of assistance or conducts. Instead, in parallel with Article 2 ARS, a conduct can encompass both actions and inactions.

The analysis primarily focuses on positive actions. In particular, operational support, active strategic or tactical logistical support, and financial support for military operations that are outsourced by the State using force lies at the core interest. Typologically, this embraces the provision of resources, facilities, and services. Examples include granting permission to use or pass through a State's territory, airspace, and waters, or supplying of resources, like war material in the narrower sense<sup>64</sup>, as well as war material in the broader sense, i.e. anything that may be of support and use for a military operation.<sup>65</sup> Moreover, it comprises the provision of services ranging from intelligence sharing,<sup>66</sup> reconnaissance and planning over training and communication lines to logistics,<sup>67</sup> organizational support, combat service support,<sup>68</sup> and the provision of (military) advisors.

In addition, general cooperation, economically, politically, or diplomatically, when one of the States uses force is also of interest. Maintaining general trade relations can be 'interstate assistance' just as political support and encouragement, through joining a coalition by name or through endorsing military operations. To use Vaughan Lowe's words: "practically every friendly contact with a foreign State might be said to lend at least moral support".<sup>69</sup>

Also under scrutiny are contributions that take the more subtle and passive form of inaction and omission.<sup>70</sup> This is particularly prevalent when the assisting State has the capacity to influence its contribution to the use of

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64 This includes for example arms, ammunition, troops placed at the full disposal, as well as non-lethal war material like body armor, non-armored vehicles.

65 This includes any equipment, oil, petrol, means of transport such as vehicles, planes, ships, but could even cover food, or clothing.

66 *The Oxford Essential Dictionary of the U.S. Military* (2002), combat intelligence.

67 This includes the transport of personnel and war material, the furnishing of services such as refueling or repairing, and disposition of facilities.

68 *Dictionary of the U.S. Military*, combat service support.

69 Lowe, *JIntl&Dipl* (2002) 5.

70 On the difference between omission and inaction Brown, *HagueYIL* (2016) 136.

force, most notably in cases involving territorial contributions. Accordingly, the book also discusses situations where a State may not permit the use of its territory, but its conduct in relation to the use of force is limited to tolerating, acquiescing or simply not preventing the use of its territory. In other words, for the present purpose any scenario where a State's territory is implicated in another use of force is treated as interstate assistance in factual terms. Similar situations may arise when the assisting State has not authorized or encouraged the export of weapons or actively sent its nationals as 'volunteers', but has remained inactive in relation to such conduct by other (private) actors.

Whether or not a particular conduct qualifies as 'interstate assistance' within the scope of the analysis is determined without regard to specific characteristics of assistance, such as intent or knowledge of the assisting State regarding its action or contribution to the use of force. While these features may be important for the legal classification, they do not affect the factual scope.

The qualification "*capable of contributing*" to the use of force denotes that in this book 'interstate assistance' refers to the *act of giving* assistance, rather than the assistance itself.

As such, it is not decisive to determine the specific effects of the assisting conduct, as long as it is capable of somehow contributing to the use of force. For example, it is not necessary that the respective conduct 'facilitates' the use of force to fall within the factual confines of the analysis. Nor is it necessary to assess whether the act of assistance was actually used by the assisted State or had any specific effect on the assisted State's use of force. For example, if a State allows another State to use its air corridor for military operations but the State using force eventually does not utilize the air corridor, it would still fall within the scope of the analysis.

Unlike for example with respect to the specific implementation of the use of force (which falls under the *ius in bello* regime), virtually any act of assistance is *capable of contributing* to a State's *decision* to resort to force (that is governed by the *ius contra bellum*).<sup>71</sup> Also, for assistance to qualify as 'interstate assistance', it is not necessary for the assistance and the assisted use of force to coincide in time. Contributions made long *before* the operation involving the use of force takes place qualify as 'interstate

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71 Cf for example not any conduct is capable of assisting a conduct in violation of international humanitarian law. As Pacholska, *Complicity*, 156-157 shows States consider "non-lethal" support not to be capable of contributing to such violations.

assistance' in factual terms, too.<sup>72</sup> For example, a delivery of tanks in 1995 that are used for a military invasion in 2018 constitutes 'assistance' in factual terms.

Not part of the analysis is assistance that has been provided only *after* the use of force has been terminated. This does not necessarily exclude assistance provided after the hostilities themselves. It only excludes assistance after the termination of the use of force in legal terms.<sup>73</sup> This crucially depends on the characteristics of the assisted use of force and the legal definition of a use of force.<sup>74</sup> Conduct in relation to a *continuing* use of force, such as the presence of armed forces in another State without its consent, will always be capable of contributing to the use of force. Careful assessment is required for assistance to a use of force that is not of a continuing character, such as air strikes where no troops remain on the territory of the targeted State. Such operations are typically terminated by the end of each outing. Long-lasting air operations, like for example in Yemen against the Houthi rebels or in Syria fighting ISIS, involve repeated, similar but dogmatically separate conduct (each of which is subject to the prohibition to use force).<sup>75</sup>

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72 This can be described as 'preparatory assistance' or 'cooperation'. It is true that any assistance is by nature preparatory as the assisted act lies in the future. The term 'preparatory assistance' describes assistance that is not provided with view to a concrete use of force. As such, it is *potential* assistance that has not yet a direct link to a prospective use of force. Typically, it will be temporally remote from a use of force. Such cooperation may include e.g. general arms delivery, the provision of loans, training of troops, certain form of logistics (e.g. transport of equipment or troops to the border), the provision of military bases, but also general forms of cooperation, trade or funds that may (also) be used for military purposes.

73 Similarly Jackson, *Complicity*, 11.

74 To illustrate: If the Aggression Definition recognizes as per Article 3(c) that the blockade of ports constitutes an act of aggression, this also broadens the scope what is considered an operation involving the use of force. By definition, the use of force is thereby no longer an instantaneous act, but has a continuing character. As long as the blockade is upheld, a use of force is taking place. It is only terminated once the blockade is over. See generally ILC ARS Commentary, Article 14, 59 para 1.

75 States also report these operations also as factually separate uses of force, even though in the legal sense they provide only one justification applicable to similar conduct. However, legally, they may be treated as a unity for some specific aspects, see for example the ICJ when determining the existence of an armed attack according to "scale and effects" of the attack (*Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [Nicaragua], 103 para 195). Also, the proportionality limit is based on the scale of the attack – which

Whether assistance is capable of contributing to a use of force depends on *when* a use of force is terminated. While it is more prevalent for non-continuing uses of force, the question arises in case of continuing uses, too.

It should be noted that even when the use of force has terminated, the same conduct may be still interstate assistance, as it may be capable of assisting a(nother) use of force. In practice, this is a fine line. For example, in case the assistance after the use of force was promised beforehand, it may be considered assistance to that use of force. Moreover, in case of an ongoing military operation with repeated similar uses of force, assistance after a specific use of force may contribute to the subsequent use. However, this does not mean that the assistance after the use of force was directly capable of assisting that use of force. Dogmatically, in the first case, the relevant act of assistance is the *promise* of assistance made before the use of force, not the conduct after its termination. In the second case, the relevant act of assistance (servicing) supports not the initial use of force, but the subsequent uses, which are dogmatically distinct.

Lastly, assistance provided *to uphold the effects of a use of force*, such as maintaining a situation created by the use of force, is not covered in this analysis. This excludes assistance provided to uphold occupation or annexation for the present discussions.<sup>76</sup>

## 2) 'Inter-State' assistance

The present analysis concerns *interstate* assistance. This defines the scope in a two ways.

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necessarily combines the military strikes as a whole, and does not consider them individually.

76 This exclusion is however without prejudice to the question whether such situations are a continuing use of force, or consequence of a use of force. For the former reading: Article 3(a) Aggression Definition; ILC ARS Commentary, Article 14, 60 para 3; Arab States during the discussions on the definition of Aggression; Ahmed M Rifaat, *International Aggression. A Study of the Legal Concept: Its Development and Definition in International Law* (1979) 270-271. For the latter view: Western States during discussions on the Aggression Definition; Thomas Bruha, 'The General Assembly's Definition of the Act of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (2017) 161. *Armed Activities*, Separate Opinion Judge Kooijmans 320-322 para 55-64. On the debate in detail see most recently Tom Ruys, Felipe Rodriguez Silvestre, 'Military Action to Recover Occupied Land: Lawful Self-defense or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited', 97 *IntLLStud* (2021) in particular 686-692.

First, the study exclusively considers assistance provided *to States*. This focus excludes from the scope of the present analysis State assistance provided to non-State actors, such as insurgents and rebels operating against another government or terrorist organizations, whose conduct is not attributable to a State. Likewise, assistance provided to international organizations is not part of the present study. However, State cooperation with and within international organizations is relevant, as long as the assistance is provided by one State to another State.

It is not necessary, however, that the assisting conduct is directed at the assisted State directly. Assistance to other actors can also qualify as interstate assistance if it eventually benefits the assisted State. For example, if one State transports weapons provided by another State to the assisted State using force, it would be considered interstate assistance to the assisted State.<sup>77</sup>

Second, only assistance provided *by a State* is of interest.<sup>78</sup> This means that the assisting conduct must be attributable to a State. The general rules on attribution determine the relevant act of assistance that is then measured against the relevant norms.<sup>79</sup>

In most cases, State organs, attributable to the assisting State under Article 4 ARS, will make the relevant contribution to the use of force. For example, aerial refueling would typically be provided by the assisting State's army. Accordingly, the decisive act of assistance constitutes the provision of refueling *itself*.

It is more complex when the contribution to the use of force comes from a third actor, most commonly private persons.<sup>80</sup> Various scenarios are conceivable. For example, private military companies assist another State

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77 See also the scenario of the assisting State providing weapons to a third actor that passes them on to the assisted State. The pertinent act of assistance to the assisted State could for example be a failure to prevent the passing on.

78 Assistance by international organizations falls outside the study, e.g. UN Peacekeeping forces assisting in a use of force, e.g. S/2020/806 (19 August 2020) (UNFIL to Hezbollah). For further examples, Boutin, *MLLWR* (2017-2018) 64.

79 Cf Article 2 ARS.

80 Note that it could technically also come from another State or an international organization. E.g. a micro-State may have asked another State to provide assistance to a use of force. This situation again is distinct from the situation in which a State assists another State in its own act of assistance. The gifting of military material remains the contribution to a use of force attributable to the *donor State*, irrespective of the fact that it is delivered by the transporting State.

using force;<sup>81</sup> or nationals from the assisting State volunteer to assist, by manpower or by supplying armaments. If the private actor's assistance is attributable to the assisting States under the general rules of attribution of conduct,<sup>82</sup> their contribution would be the relevant act of interstate assistance. If not, the assisting State cannot be held responsible for the contribution of the private actor itself. But crucially, even in such cases, there still can be relevant interstate assistance: i.e. the assisting State's own implication in the third actor's assistance. To illustrate: a private actor under the jurisdiction of the assisting State sells arms; the assisting State's organs authorize, tolerate, or merely fail to prevent such sale. Such State conduct may not justify attributing the arms sale to the assisting State. Still, its authorization, toleration, or its failure to prevent might be considered 'interstate assistance', as it also contributes – albeit more remotely – to the use of force, and can be attributed to the assisting State under Article 4 ARS.<sup>83</sup>

Moreover, Article 6 ARS deserves specific mention at this stage, as its application may crucially define the relevant act of assistance. It acknowledges a common phenomenon of interstate military cooperation: An assisting State 'lends' an organ to the assisted State, such as providing headquarters staff, armed forces, or embedding personnel in the assisted State's army.<sup>84</sup>

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81 Chia Lehnardt, *Private Militärfirmen und völkerrechtliche Verantwortlichkeit. Eine Untersuchung aus humanitär-völkerrechtlicher und menschenrechtlicher Perspektive* (2011) 20-36. See on the conditions for attribution in that respect: Charlotte Beaucillon, Julian Fernandez, Hélène Raspail, 'State Responsibility for Conduct of Private Military Companies Violating *Ius ad Bellum*' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011) 403-407; Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (2011) 80-122; Lindsay Cameron, Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (2013) 136-223; Astrid Epiney, Andrea Egbuna-Joss, 'Zur Völkerrechtlichen Verantwortlichkeit im Zusammenhang mit dem Verhalten Privater Sicherheitsfirmen', 17(2) *SwissRevIntl&EurL* (2007).

82 In particular, Articles 4, 5 and 8 ARS. Not at least as it depends on the specific circumstances, a full analysis of these general questions would go beyond the present scope.

83 For a structural similar conception see ECtHR, *Bosphorus v Ireland*, Grand Chamber, 30 June 2005, Appl No 45036/ 98, para 149 et seq.

84 This is also referred to as Third Country Deployments. Note that this provision only applies to the provision of "organs", ILC ARS Commentary, Article II, 44, para 5. It does concern the sending/not preventing of private entities, or 'volunteers', or foreign fighters. For the pertinent act of assistance, it does not matter, however, as their conduct would normally not be attributable to the assisting State anyways. The act

According to Article 6 ARS, the conduct of a lent organ placed at the disposal of the assisted State by the assisting State shall be considered an act of the assisted State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.<sup>85</sup>

Accordingly, if the requirements of Article 6 ARS *are not* met, the conduct of the lent organ remains attributable to the assisting State by virtue of Article 4 ARS, and the assisting State's responsibility depends solely on its organ's *own* conduct. The relevant act of assistance in this case would be the conduct of the lent organ.<sup>86</sup>

If the requirements of Article 6 ARS *are* met, the conduct of the seconded organ is no longer attributable to the assisting State, but to the assisted State alone.<sup>87</sup> No responsibility may hence arise from the lent organ's specific

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of assistance can hence be always no more than the sending/not preventing. See for examples Third Report of the Special Rapporteur Mr Roberto Ago, A/CN.4/246 and Add.1-3 in ILCYB, 1971, vol II(1), 267 para 200.

- 85 According to the ILC, this requires that the organ must act "with consent, under the authority and for the purposes of the receiving State." In essence, the organ therefore must "act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State." On the sending of "armed forces to assist another State" the ILC specifies that it is not covered "where the forces in question remain under the authority of the sending State." ILC ARS Commentary, Article 6, 44, para 2, 3. The application of Article 6 ARS hence depends on the specific command and control structure and the role of the assigned organ. For an overview see Tondini, *Coalitions*. See also Pacholska, *Complicity*, 222-226.
- 86 As a consequence, the assisting State remains responsible for any breach of the norms that the conduct of the lent organ violates. Hence, the conduct itself (irrespective of the fact that it also may constitute assistance) may violate the prohibition to (directly) use force. For example, consider a State's lent organ flying combat missions in the realm of an international mission (e.g. Australian and British embedded soldiers in the US air force in Syria): The lent organ's conduct would have to be assessed against the prohibition to (directly) use of force. In addition, the conduct may be also considered an act of assistance to another State's use of force; this falls however outside the scope of the present analysis as the assistance would involve armed force. In a scenario that the lent organ was analyzing intelligence data without being involved in targeting decision, it is crucial for determining the assisting State's responsibility however whether the lent organ's conduct constituted assistance prohibited under international law (*ius contra bellum* obligations or general international law). Furthermore note that attribution of the conduct of the lent organ to the assisted State is not excluded, e.g. by virtue of Article 8 ARS.
- 87 ILC ARS Commentary, Article 6, 44 para 1. Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 71, 83 et seq.

conduct for the assisting State.<sup>88</sup> In this case only the placement of the organ at the disposal of the assisted State or the non-revocation of the placement may be a relevant – but again more remote – act of assistance, that can give rise to the responsibility of the assisting State.<sup>89</sup>

### 3) Assistance ‘short of armed force’

It has already become clear that ‘interstate assistance’ can take various forms. For the present purposes, assistance that involves armed force by the assisting State directed against the targeted State – even though technically sharing the characteristics of ‘interstate assistance’ – is not within the scope of the analysis.<sup>90</sup> Accordingly, excluded from the present scope is any conduct widely described as ‘active engagement in hostilities’, ‘fire support’<sup>91</sup> or the use of force in concert. Examples of such excluded situations include the British air strikes in support of the American-led operation against ISIS in Syria and air strikes conducted by one State in support of another State’s ground troops.<sup>92</sup> Importantly, it is an exclusion in *factual*, not legal terms. It does not mean that ‘assistance short of armed force’ may not qualify as a use of force in *legal* terms.<sup>93</sup>

Four points on this exclusion merit further clarification.

First, the caveat does not mean to exclude from the analysis any assistance provided by a State’s armed forces. To the contrary, in most cases, it will be the military that serves as the assisting State’s internal

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88 In that sense already Seventh Report on State Responsibility by Mr Roberto Ago, A/CN.4/307, ILCYB 1978 vol I(1) [Seventh Report Ago], 53 para 56.

89 There have been voices however arguing that Article 6 ARS excludes not only attribution, but any responsibility. See for further references, but critical towards such a conclusion Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011) 223-224. Likewise against an exclusion of responsibility Stefan Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq’ in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (2008) 218.

90 With a similar distinction: Harvard Law School, ‘Draft Conventions, with Comments, Prepared by the Research in International Law of the Harvard Law School, III, Rights and Duties of States in Case of Aggression’, 33 Supplement *AJIL* (1939) 879-880 distinguishing between co-defending (with armed force) and supporting State (without armed force).

91 *Dictionary of the U.S. Military*, combat support.

92 Boutin, *MLLWR* (2017-2018) 64.

93 This is also true for the case that by virtue of interstate assistance a conduct of armed force is attributed to the assisting State. See on details Chapter 6, I.



organ responsible for providing such assistance. The identity of the entity providing the assistance is of limited relevance in drawing the line.

Second, engaging with armed force should not be equated with the unfortunate and imprecise distinction between lethal and non-lethal support for two reasons.<sup>94</sup> Lethal assistance often also relates to support that may have lethal effects if used, rather than being inherently lethal itself. Lethal support hence does not necessarily entail assistance by armed force. Moreover, situations that are considered armed force in factual terms may also be non-lethal.<sup>95</sup>

Third, only armed force attributable to the assisting State is excluded from the scope. Accordingly, situations where a military organ of the assisting State is engaged in hostilities but is not attributable to the assisting State constitute 'interstate assistance' to be assessed here.<sup>96</sup>

Fourth, the exclusion of assistance by armed force from the analysis does not mean that it may not fall under the legal framework governing interstate assistance. In fact, there is good reason to believe that the same framework would apply *a fortiori*. Instead, the exclusion is based on the following reasons: First, 'assistance by armed force' is directed against the targeted State, and thus not dependent on the assisted State. Second, such conduct is already subject to the legal framework governing the direct use of force. Third, in international practice 'assistance by force' is usually not discussed as 'assistance', i.e. for its *contribution* to a thereby assisted use of force, but for its nature in and of itself.<sup>97</sup> These three features imply that

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94 E.g. Michael N Schmitt, Andru E Wall, 'The International Law of Unconventional Statecraft', 5(2) *HarvNatSecJ* (2014) 363 who classifies military training that may constitute an unlawful use of force as lethal.

95 For instance, Russia's occupation of the Crimea took place without a shot being fired, Claus Krefß, Christian J Tams, 'Wider die normative Kraft des Faktischen. Die Krim-Krise aus völkerrechtlicher Sicht', 3(Mai/Juni) *IP* (2014). The entire operation was hence *stricto sensu* non-lethal. The same is true for a blockade by armed force, which not necessarily may be lethal. A State acting in such a manner in support of another State would however still fall outside the scope of the present analysis. See on non-lethal weapons generally: David P Fidler, 'The International Legal Implications of Non-Lethal Weapons', 21(1) *MichJIntL* (1999); Elisabeth Hoffberger, 'Non-Lethal Weapons: The Principle of Proportionality in Armed Conflict and the Right to Health in Law Enforcement', 38(2) *ZbPravFakSveucRij* (2017); Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', 13(1) *CJIL* (2014).

96 Cf Article 6 ARS.

97 This is reflected in the States' reaction: States comment on the act in and of itself, rather than specifically address in legal terms the fact that the use of force also

in most cases it is not considered necessary to focus on the contribution aspect of such armed force, and its legal framework.<sup>98</sup> It is also for this reason that the analysis of such conduct is (strategically) less fruitful for determining the legal framework of interstate assistance.

On that note, the present analysis will not focus on assisting States that contribute concurrently through armed force *and* assistance short of force to a specific conflict. This excludes in particular contributions of lead-nations in coalitions. They exercise command and control or coordinate and organize military operations within a coalition, thereby essentially contributing to the use of force by other participating States.<sup>99</sup>

#### 4) Assistance to 'another State's use of force'

The assisted use of force, for the present purposes, is defined along the lines of the prohibition to use force. It embraces any use of armed force that would in *factual terms* fall under the prohibition of the use of force.<sup>100</sup> This also requires that the use of force occurs in States' international relations.

Accordingly, this defines the scope of the analysis as follows:

On the basis of the factual description of force it is not presupposed that assisted use of force must necessarily violate the prohibition to use force. The assistance regime for lawful use of force is also within the scope.

The book primarily addresses situations where a use of force has actually occurred. It concerns assistance *to a use* of force, rather than conduct that creates the potential to use force but never materializes. This does not limit the analysis to situations where States provide assistance *during* a use of force, excluding assistance provided *before* a use of force.

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contributes to another State's use of force. Moreover, the assisting States' position does usually not allow to distinguish whether it is the act itself or the contribution to another State's use of force that the assisting State seeks to justify.

98 However, it may merit consideration in light of questions whether particular thresholds are met, i.e. when the assisted use of force met the threshold for self-defense, but the assistance by armed force did not.

99 For example, Saudi-Arabia by leading a coalition to fight against the Houthi rebels in Yemen is also facilitating the use of force of other coalition members.

100 See for a detailed discussion Claus Krefß, 'The State Conduct Element' in Claus Krefß and Stefan Barriga (eds), *The Crime of Aggression. A Commentary* (2017) 422-453; Olivier Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (2010) 50 et seq; Albrecht Randelzhofer, Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012).

Not part of the analysis is assistance provided to a government using force on its own territory in what has been called “civil war situation”. In such cases, the assisted State is not using force in international relations in terms of Article 2(4) UNC, but against non-State actors within its own territorial confines. Assistance to a government engaged in such hostilities is hence beyond the scope of this book.<sup>101</sup> However, the analysis extends to cases of assistance to a State that uses armed force within another State upon invitation, even if the use of force is directed against non-State actors in the inviting State. In other words, assistance to a ‘military intervention by invitation’ is within the confines of the present analysis.<sup>102</sup> While the legal classification of consensual use of force as falling outside the prohibition or as an exception to the prohibition is debatable,<sup>103</sup> for the purposes of this analysis, it is sufficient that force is used in international relations as a matter of fact.

Crucially, this book is dedicated to assistance to the use of force attributable to another *State*. The prominent regulation of assistance to non-State actors engaged in violent activities will hence only be touched upon to the extent that it sheds light on interstate assistance. Similarly, assistance provided to an international organization engaged in a use of force, e.g. in case of robust UN peace keeping is beyond the scope of this book.<sup>104</sup> This does not exclude however the use of force authorized by the Security Council under Chapter VII or VIII. Similarly, it does not exclude force that is used under the auspices and framework of an international organization, i.e. NATO, the EU, the ECOWAS or the African Union, as long as the

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101 Discussion in this respect usually focus on assistance by armed force, see Erika De Wet, *Military Assistance on Request and the Use of Force* (2020) 15-16. There is however also a debate on the permissibility of assistance *short of armed force*, cf e.g. Institut de Droit International, ‘Resolution on the Principle of Non-intervention in Civil Wars’ (Rapporteur: D Schindler, Wiesbaden Session, 1975), [www.idi-iil.org/a\\_pp/uploads/2017/06/1975\\_wies\\_03\\_en.pdf](http://www.idi-iil.org/a_pp/uploads/2017/06/1975_wies_03_en.pdf), Article 2; Christian Henderson, ‘The Provision of Arms and Non-Lethal Assistance to Governmental and Opposition Forces’, 36(2) *UNSWLJ* (2013).

102 Situations are also referred to as “direct military assistance”. For further details on the situations covered thereby see De Wet, *Military Assistance on Request*, 15-16.

103 Federica I Paddeu, ‘Military assistance on request and general reasons against force: consent as a defence to the prohibition of force’, 7(2) *JUFIL* (2020).

104 On questions of attribution and peacekeeping see Paulina Starski, ‘Zurechnungsfragen bei multinationalen militärischen Einsätzen’ in Graf Sebastian von Kielmannsegg, Heike Krieger and Stefan Sohm (eds), *Multinationalität und Integration im militärischen Bereich: Eine rechtliche Perspektive* (2018); Pacholska, *Complicity*, 209-248.

assisted use of force remains attributable to individual States, too.<sup>105</sup> Last but not least, the book covers assistance provided within the framework of an *ad hoc* international coalitions, or coalitions of the willing, which involve a cooperation between individual States and are not considered international organizations.<sup>106</sup>

B. The normative focus: universal prohibition(s) to contribute to a use of force

Not all cases of interstate assistance, as defined above, will also be prohibited under international law. This book seeks to flesh out the applicable legal framework, and to determine under what circumstances and how 'interstate assistance to a use of force' is prohibited.

This book pertains to the factual phenomenon of 'interstate assistance'. The analysis concerns rules that govern assistance as defined above in factual terms. Therefore, it is not solely confined to analyzing 'complicity' or 'aid and assistance' in legal terms.<sup>107</sup> Instead, this book is dedicated to exploring State responsibility for 'interstate assistance to the use of force' under the *ius contra bellum*.

A State is responsible for its own internationally wrongful conduct, i.e. a conduct attributable to it which is in breach of an international obliga-

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105 On relevant questions of attribution, for the NATO see David Nauta, *The International Responsibility of NATO and its Personnel during Military Operations* (2017) 155-167; Marten Zwanenburg, 'North Atlantic Treaty Organization-Led Operations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017). For the EU: Naert, *EU Operations*. for AU: Ademola Abass, 'African Union Operations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017) 621 et seq.

106 Cf for the definition of international organization: Article 2(a) DARIO, A/66/10 (2011) para 87. Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2014) para 3-II; Angelo Jr Golia, Anne Peters, *The Concept of International Organization* (MPIL Research Paper Series, Max Planck Institute for Comparative Public Law and International Law, vol 27, 2020) 15. See also Tondini, *Coalitions*, 705, 713, 718.

107 For such a perspective Felder, *Beihilfe*; Aust, *Complicity*; Jackson, *Complicity*; Lanovoy, *Complicity*. Also Article 16 ARS only concerns complicity, and does not deal with co-perpetration for example, ILC ARS Commentary, Article 16, 66, para 1. See on the terminology: Pacholska, *Complicity*, 82-88.

tion of that State.<sup>108</sup> This is referred to as the principle of independent responsibility.<sup>109</sup> Based on this assumption, the responsibility of the assisting State for an act of assistance under the *ius contra bellum* may be conceptualized in several ways at a theoretical level.

The act of assistance may serve as vehicle for *attribution* of the assisted conduct to the assisting State. Consequently, the assisted conduct would be considered a conduct of the assisting State in legal terms. The assisting State's responsibility would then depend on a breach of an international obligation of the assisting State that prohibits the assisted use of force as its own conduct.

If assistance does not lead to attribution, the assisted use of force remains a distinct act. In this case, the act of assistance would be the relevant own conduct of the assisting State that might lead to responsibility. This conduct may also breach the *ius contra bellum*. Theoretically, the wrong may be defined in different ways. The act of assistance itself could be prohibited under international law generally and the *ius contra bellum* specifically, regardless of whether it contributes to a use of force.<sup>110</sup> As such, the *creation of a risk* of contributing to a (lawful or unlawful) use of force would be prohibited. Alternatively, the act of assistance could be prohibited *due to its implication in or contribution* to the assisted State's use of force. This would presuppose that the assisted use of force has taken place. Different variants are conceivable. Already the mere implication or contribution through the act of assistance to another actor's use of force could be prohibited. This may be described as *ancillary* responsibility. To paraphrase James Crawford, the assisting State would bear responsibility for "independently wrongful conduct involving another State."<sup>111</sup> Also, it could be the connec-

108 Article 2 ARS; ILC ARS Commentary, Chapter IV, 64, para 1.

109 Ibid; See also André Nollkaemper, Dov Jacobs, 'Shared Responsibility in International Law: a Conceptual Framework', 34(2) *MichJIntLL* (2013) 381-382; James D Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 98. International law does not recognize vicarious responsibility, according to which the assisting State would bear responsibility *for the assisted use of force*, not for its own conduct. Lowe, *JIntl&Dipl* (2002) 11.

110 Seventh Report Ago 52, para 52.

111 Second Report Crawford, 46, para 161 (d), who illustrates such a situation with the case of *Soering v United Kingdom*, ECtHR, 7 July 1989, Appl No 14038/88. The UK was responsible for taking action which has as direct consequence the exposure of Jens Soering to inhumane treatment through being subjected to the death row in the USA. Note that responsibility was not already established for putting him *at risk*

tion of an act of assistance to an *unlawful* use of force that is proscribed. Accordingly, responsibility would be *ancillary and derivative*, in the sense that the wrongfulness of assistance depends on and hence is derived from the wrongfulness of the assisted use of force.<sup>112</sup>

Given the broad range of conduct that qualifies as ‘interstate assistance to a use of force’, a variety of rules may apply. Not all applicable rules are however the subject matter of this book. It focuses solely on universal prohibitions of a contribution to a use of force that gives rise to responsibility under the *ius contra bellum*. This focus shapes the study in several respects.

Accordingly, the following analysis only deals with the decision to provide interstate assistance to a use of force *as such*, regardless of *how* the use of force is carried out. In particular, rules governing assistance to violations of international humanitarian law,<sup>113</sup> most prominently Article 1 Common Article Geneva Conventions,<sup>114</sup> or to violations of international

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of inhumane treatment. The violation would have required the extradition (para 111). Also, it did not matter to the Court that the thereby assisted conduct would have been not wrongful for the USA. It sufficed that the conduct would have been wrongful for the UK under the European Convention of Human Rights. Moreover, it was not required that the eventually assisted conduct by the USA took place. See in detail Miles Jackson, ‘Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction’, 27(3) *EJIL* (2016) 822-825.

- 112 The ILC ARS Commentary, Chapter IV, 64 para 5, views this as exception to the principle of independent responsibility, as the “the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of [assisted State].” Still the fact remains that the assisting State is responsible for its own conduct. It is the assisting State’s own role that may be considered wrongful. See also Nollkaemper, Jacobs, *MichJIntlL* (2013) 388.
- 113 On the difference between *ius contra bellum* and *ius in bello*: Alexander Orakhelashvili, ‘Overlap and Convergence: the Interaction between Jus ad Bellum and Jus in Bello’, 12(2) *JCSL* (2007); Christopher Greenwood, ‘The Relationship between Jus ad Bellum and Jus in Bello’, 9(4) *RevIntlStud* (1983).
- 114 See on this: Helmut Philipp Aust, ‘Complicity in Violations of International Humanitarian Law’ in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015); Robin Geiß, ‘Common Article 1 of the Geneva Conventions: Scope and Content of the Obligation to ‘Ensure Respect’ – ‘Narrow but Deep’ or ‘Wide and Shallow?’ in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015); Jean-Marie Henckaerts, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016); Verity Robson, ‘The Common Approach to Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions’, 25(1) *JCSL* (2020).

human rights law,<sup>115</sup> are not addressed. Also, prohibitions of assistance to the use of specific weapons are not subject to analysis here.<sup>116</sup>

Likewise, the analysis does not cover rules that regulate the details of *how* interstate assistance is provided.<sup>117</sup> Regional or bilateral (treaty) rules are not independently assessed but are considered through the lens of determining the scope of universal rules. Moreover, this book does not address the law of neutrality, which may coexist alongside rules governing interstate assistance to the use of force.<sup>118</sup>

The analysis concentrates on whether the *contribution* to a use of force constitutes a breach of international law. Most instances of ‘interstate assistance’ will involve conduct that is otherwise permissible. But even when the assisting conduct is already unlawful for other reasons,<sup>119</sup> its contribution to a use of force may add an additional wrong, constituting an additional breach of a norm of international law.<sup>120</sup> Therefore, the present

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- 115 Under the ECHR, e.g. ECtHR, *El Masri v Macedonia*, Grand Chamber, 13 December 2012, Appl No 39630/09; *Al-Nashiri v Poland*, 24 July 2014, Appl No 28761/11; *Nasr and Ghali v Italy*, 23 February 2016, Appl No 44883/09. On this Seibert-Fohr, *GYIL* (2018).
- 116 E.g. Article I(1)(d) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 3 September 1992, entered into force on 29 April 1997, 1975 UNTS 45; Article 1 (e) Treaty on the Prohibition of Nuclear Weapons of 7 July 2017, entered into force on 22 January 2021, I 56487; Article 1 (1) (c), (a) Convention on Cluster Munitions, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions of 30 May 2008, entered into force on 1 August 2010, 2688 UNTS 39; Article 1 (1) (c), (a) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Land Mines and on Their Destruction of 18 September 1997, entered into force on 1 March 1999, 2056 UNTS 211.
- 117 E.g. status of forces agreements.
- 118 Bothe, *AVR* (2003) 267-268; Aust, *Complicity*, 282; Lanovoy, *Complicity*, 31. For details James Upcher, *Neutrality in Contemporary International Law* (2020).
- 119 For example, when the act of assistance takes place on the territory of the targeted State (e.g. refueling warplanes, rescuing soldiers, gathering intelligence), the assisting conduct on its own already violates the territorial sovereignty of the targeted State. The same may be true for assistance that is primarily an action directed against another State. For example, in case interstate assistance consisted of a use of force to support a use of force of the assisted State, it would violate the prohibition to use of force, irrespective of the contribution to the assisted State’s use of force. The same may be true if the assisting State imposes sanctions against a State to support the assisted State using force. The act of assistance may also be in violation of treaty commitments, or rights not belonging to the targeted State, e.g. violations of international human rights law (gathering and sharing of intelligence).
- 120 Seventh Report Ago, 54 para 60, 58 para 72.

assessment does not consider whether the assisting conduct itself violated international law. Instead, the focus is solely on the specific contributory aspect of the conduct, and when it may (additionally) render the assisting conduct unlawful.

Excluded from the scope of this book are also rules that establish the legal framework for the *preparation* of a potential use of force. While such rules likewise impact the provision of interstate assistance and pursue the same goal of limiting State contribution to a use of force, they do not depend on an actual use of force. A State would not bear responsibility *because of* its contribution to a use of force. Obligations of disarmament as well as obligations requiring arms control fall hence outside the scope of analysis. They prohibit and regulate specific types of interstate cooperation, such as the transfer or assistance, encouragement or incitement in acquiring of nuclear weapons.<sup>121</sup> They prevent assistance, but they do not regulate assistance in legal terms. They are not contingent on the end-use of the weapons.<sup>122</sup> The wrong they outlaw is not a contribution to a use of force but creating the opportunity for and risk of a use of force, irrespective whether or not it materializes.<sup>123</sup> For similar reasons, what are known as 'no harm rule' and due diligence obligations, which pertain to blameworthy State negligence,<sup>124</sup> are not the focus of the analysis although these rules may also impact and prohibit interstate assistance.

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121 Article I Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, entered into force on 5 March 1970, 729 UNTS 161. See also Article III Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972, entered into force on 26 March 1975, 1015 UNTS 163; Article 1 (1) (b) Convention on Cluster Munitions, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions; Article 1 (1) (b) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Land Mines and on Their Destruction. See also prohibitions of certain weapons by virtue of principles of international humanitarian law, e.g. because they are incapable of distinguishing between combatants and civilians, or because they cause superfluous injuries, Alexandra Boivin, 'Complicity and Beyond. International Law and the Transfer of Small Arms and Light Weapons', 87(859) *IRRC* (2005) 469.

122 Boivin, *IRRC* (2005) 469.

123 Adrian Loets, 'Arms Control' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013); Bakhtiyar Tuzmukhamedov, 'Disarmament' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2011).

124 Anne Peters, Heike Krieger, Leonhard Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates' in Anne



In addition, several legal regimes governing assistance by States are not subject of the present book, based on the factual definition of 'interstate assistance'<sup>125</sup>: rules regulating assistance to governments using force in 'civil war' situations,<sup>126</sup> rules governing assistance after the fact, most prominently Article 41(2) ARS,<sup>127</sup> as well as rules relating to State support of non-State armed groups, as most famously addressed in the Nicaragua-formula, are not addressed.<sup>128</sup> The prohibition of war propaganda<sup>129</sup> likewise falls outside the scope. It primarily concerns the incitement of a population, and hence individuals.<sup>130</sup> Moreover, even if it also applied to the encouragement of other States, it would denote a form of interstate assistance, but would not be dependent on an actual use of force. It hence is not a prohibition of contributing to a use of force, but rather a prohibition of planning and preparing a use of force.

This book focuses on rules that establish the responsibility of States under international law. As such, it does not address the extent of which interstate assistance may be considered an act of aggression<sup>131</sup> or the conditions under which an individual may be considered to aid and abet an act of aggression, both of which can lead to international criminal liabil-

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Peters, Heike Krieger and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (2020) 4. See also on this Seibert-Fohr, *GYIL* (2018) 36.

125 See above A.I.-4.

126 See note 101.

127 See also Jackson, *Complicity*, 11; Helmut Aust, 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission' in Dire Tladi (ed), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (2021) 251-252. For similar reasons the rule of non-recognition will not be part of the analysis. On the relationship to rules on complicity see Aust, *Complicity*, 326 et seq.

128 *Nicaragua*, 103 para 195.

129 Friendly Relations Declaration; A/RES/110 (II) (3 November 1947), para 1; see also A/RES/277 (II) (13 May 1949); A/RES/381 (V) (17 November 1950); A/RES/819 (IX) (11 December 1954); Article 20(1) ICCPR.

130 See in detail Michael G Kearney, *The Prohibition of Propaganda for War in International Law* (2007). It also constitutes an obligation to regulate, e.g. Article 20(1) ICCPR. Whether it directly applies to individuals, has been controversial, see e.g. A/8018 (1970) para 225 (UK), para 257 (USA). See also Corten, *Law against War*, 110 arguing that war propaganda can also amount to a threat to the peace or a threat in terms of Article 2(4) UNC.

131 Article 3bis ICC-Statute.

ity.<sup>132</sup> Likewise, domestic rules shaping the decision to provide interstate assistance are also not part of the analysis.<sup>133</sup>

Last but not least, the analysis will only address *prohibitions*. Not of interest here is hence whether there is a duty to provide assistance,<sup>134</sup> a right to defend oneself against the assisting State,<sup>135</sup> or the circumstances under which an assisting State may become party to an armed conflict, triggering the applicability of international humanitarian law.<sup>136</sup>

### III. The outline of the book

The book takes a positivist approach to determine the legal framework governing interstate assistance to a use of force. International practice will be at the heart of the analysis.

The book proceeds in six main chapters. Following this introductory chapter, the book will examine, in four steps, the circumstances under which 'interstate assistance to a use of force' contravenes international and universal prohibitions due to its contribution to the use of force.

Chapter two looks at the origins of the current *ius contra bellum* regime. It sketches the role of prohibitions on interstate assistance in the development of the general prohibition to use force and the system of collective security. The focus here will lie here on the abstract legal framework rather than its implementation.

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132 Article 25 III (c) ICC-Statute. Moynihan, *Aiding and Assisting*, 5; Jackson, *Complicity*; Marina Aksenova, *Complicity in International Criminal Law* (2016).

133 E.g. for the relevant provisions under German Basic Law see e.g. BVerfGE 112, 1; 131, 316-346, para 86, Helmut Aust, 'Artikel 25' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz Kommentar*, vol 1 (7th edn, 2021) para 38-42; Matthias Herdegen, 'Artikel 25' in Theodor Maunz and Günter Dürig (eds), *Grundgesetz Kommentar* (2016) para 723-76. On the US war power resolution Oona Hathaway and others, 'The Yemen Crisis and the Law: The Saudi-Led Campaign and U.S. Involvement', *Just Security* (18 February 2018).

134 Note however that the other side of the coin of a duty to provide assistance to a State using force is a prohibition to assist the other State. Non-assistance is the minimal form of required assistance. To the extent that such duties may allow insights on a prohibition of assistance, they will also hence be part of the analysis.

135 ILC ARS Commentary, Article 21, 75 para 5; See also the controversial discussion on self-defense against non-State actors, Krefß, *Gewaltverbot und Selbstverteidigung*.

136 See on this e.g. Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict', 97(900) *IRRC* (2015).

The third chapter turns to the current state of the *ius contra bellum*. It will examine in a first step of interpretation the bare regulations of interstate assistance in the United Nations Charter. As will become clear, besides establishing a powerful means to regulate assistance through the Security Council, the UN Charter leaves a legal limbo on (primary) prohibitions of interstate assistance.

In light of this, chapter four forms the core of the analysis. It will address in a second step how the framework provided by the United Nations Charter has been filled with life in international practice. Accordingly, the chapter briefly sets out the methodological approach, and scrutinizes abstract pronouncements on the law, treaty and conflict practice as well as international case law and UN practice. Chapter five summarizes the findings on the regulatory framework governing interstate assistance, as elucidated by international practice.

The sixth chapter is dedicated to the role of general rules of international law in connection with interstate assistance to the use of force. Besides the role of rules of attribution of conduct, the ILC's general rules on responsibility in connection with the act of another State and due diligence obligations are assessed in view of the *ius contra bellum* regime. The seventh chapter concludes.

