Chapter 6 General Rules of International Law and Interstate Assistance

After having determined the scope of substantive international obligations under the *ius contra bellum*, the present chapter turns to general rules of international law relevant to interstate assistance.[1] Three sets of rules are addressed here: rules of attribution of conduct (I), rules leading to international responsibility in connection with the act of another State (II) and due diligence norms (III). These rules may complement the specific *ius contra bellum* rules governing assistance.

I. Assistance and the attribution of conduct

Conceptually, the rules on the attribution of conduct could lead to responsibility of an assisting State based on its assistance.[2] The attribution of conduct is a normative operation.[3] It determines when an act or omission is regarded as the conduct of a State.[4] The ILC spells out various "circum-

1 The notion 'general rule' is used irrespective of the debate on primary (substantive) or secondary nature of rules. Here, the rules under scrutiny are *general* in the sense that they apply universally and are not limited to a specific field of international law.

2 The following questions are to be distinguished from the question to what extent the *assisted* State may be responsible for the assisting State's assistance, which will not be addressed here. This would be for example the scenario in which the assisted State is in charge of an international coalition, in which some States provide assistance short of force. For example, Article 6 ARS opens the door to responsibility of the assisted State for the assisting State's organ's conduct. In this respect the command structure of a coalition is particularly relevant. On the different command structures in coalitions see Matteo Tondini, 'Coalitions of the Willing' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017).

3 ILC ARS Commentary, ILCYB 2001 vol II Part Two, Article 2, 35 para 6, Article 3, 39 para 4; Luigi Condorelli, Claus Kreß, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (2010) 225-228.

4 ILC ARS Commentary, Article 3, 38 para 1. See Berenice Boutin, 'Responsibility in Connection with the Conduct of Military Partners', 56(1) *MLLWR* (2017-2018) 59.

stances" determined by international law under which specific conduct is attributable to a State.[5]

If the act of assistance qualified as such a 'circumstance', the *assisted* use of force could be attributed to the assisting State. This would have some far-reaching consequences. The assisting State would bear responsibility not *in relation* to the assisted use of force. It would be fully responsible *for* the assisted use of force *itself*. The assisting State would thus be responsible for a breach of the prohibition of the use of force – not for assisting a use of force, not for indirect use of force, but for *directly using* force. The assisted use of force would be considered the assisting State's own conduct, with all its consequences. Preconditions for circumstances excluding the wrongfulness must be established for the assisting State itself. The content of responsibility would be defined accordingly. Specific rules governing *ultra vires* acts apply.[6] And attribution of conduct may open the door to self-defense against the assisting State.[7] Accordingly, attribution of conduct opens an additional avenue to extensive international responsibility for the assisted use of force. This avenue is superior: in case of attribution of conduct no question of complicity arises.[8] The *fact* of providing assistance would render the question obsolete as to whether the provision of assistance constituted assistance in *legal terms* that is prohibited under international law.

This pathway towards responsibility of the assisting State for *ius contra bellum* violations is a narrow one, however. For the purpose of international responsibility,[9] Articles 4 to 11 ARS generally define when conduct

5 ILC ARS Commentary, 31 para 3b, 32, 38 para 1, 39 para 7, 8, Article 2, 38 para 4.

6 If attribution was based on structural integration in the State organization, Arts 4-6 ARS, the strict regime of Article 7 ARS applied. See also Vaughan Lowe, 'Responsibility for the Conduct of Other States', 101(1) *JIntl&Dipl* (2002) 9. If Article 8 ARS applied, an act going beyond the scope of the authorization would be still attributed if it was *incidental* to the mission, ARS Commentary, Article 8, 48 para 8. Note that there is no requirement of knowledge.

7 Benjamin K Nussberger, 'Language as Door-Opener for Violence? How a New "Attribution-Narrative" May Lead to Armed Confrontation between Iran, and the US and Saudi-Arabia', *Opinio Juris* (7 June 2019).

8 *Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [*Nicaragua*], 64 para 114; *Bosnia Genocide*, 217 para 419.

9 ILC ARS Commentary, Article 2, 35, para 5; Jörn Griebel, Milan Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia', 21(3) *LJIL* (2008) 602-603; Paulina Starski, 'Accountability and Multinational Military Operations' in Robin Geiß and Heike Krieger (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (2020) 303; Berenice

is attributable to a State. In the absence of *lex specialis,* these rules are exclusive.[10]

In practice, as seen, providing assistance in and of itself is generally not viewed as sufficient to lead to attribution. Assisting States consider the use of force by the assisted State as their *own conduct* only in exceptional circumstances. Instead, they generally draw a clear line between their own act of assistance and the assisted act. Both States' responsibility and defense arguments are not grounded in attribution of the assisted use of force. When providing justifications, States justify their own assisting conduct, not the assisted use of force. Third States, when protesting against assistance, have the same focus. Responsibility of assisting States is typically not established for the use of force by the assisted State, but for the assisting State's *own* conduct related to the use of force by the assisted State.

This practice reflects and underlines the general conceptualization of the rules of attribution of conduct: already by design, assistance *per se* is not sufficient to justify attribution under the recognized general rules (A) or by virtue of a concept of co-perpetration (B). Also, this practice affirms

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Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control', 18(2) *MelbJIL* (2017) 165. These rules do not necessarily correspond with (special and broader) rules allocating a conduct to a State for questions of jurisdiction (for the ECHR see e.g. ECtHR, *Catan and others v Moldova and Russia*, Grand Chamber, 19 October 2012, Appl No 43370/04, 8252/05, 18454/06, para 115. Remy Jorritsma, 'Unravelling Attribution, Control and Jurisdiction: Some Reflections on the Case Law of the European Court of Human Rights' in Hélène Ruiz Fabri (ed), *International Law and Litigation: A Look into Procedure* (2019)), qualifications of armed conflicts (e.g. *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 [*Bosnia Genocide*], 210 para 405), or justifications to resort to self-defense (This question arises for example in the context of self-defense against non-State actors, Erika de Wet, 'The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution', 32(1) *LJIL* (2019) 103 who claims that the threshold for an indirect armed attack is more flexible than the customary standard for attribution of conduct; James Crawford, *State Responsibility: The General Part* (2013) 158 who argues that there may be specific primary rules that lead to direct attribution, independent from the general rules of attribution. There are however also voices arguing that developments in this respect have led to a change of the general rules of attribution of conduct.). For those questions, attribution of conduct may be a sufficient, but not a necessary prerequisite. See on this also Marko Milanovic, 'Special Rules of Attribution of Conduct In International Law', 96 *IntlLStud* (2020).

10 ILC ARS Commentary, 39 para 9.

structural concerns against special *ius contra bellum* attribution rules for interstate assistance (C).

A. Assistance and Articles 4, 8, 11 ARS

Irrespective of whether all rules of attribution of conduct apply in the interstate context,[11] assistance *per se* is generally not a circumstance triggering their application. It may only be a relevant factor in determining such circumstances. This is in particular true for Articles 4, 8, and 11 ARS that one might consider being triggered by assistance.

Through 'mere' assistance, States do not establish a 'joint organ' that would justify attribution of the assisted use of force under Article 4 ARS.[12] In case of a joint organ, any conduct of the organ would be attributed to each State to which the organ belonged.[13] Legally, the assisted and the assisting State would hence conduct the assisted use of force concurrently.

11 Two relevant questions go hand in hand: first, whether the fact that the assisted use of force is conducted by another State's organ, and thus is attributable to another State, stands against the attribution of conduct to the assisting State; second, whether in view of Articles 16-18 ARS the rules on attribution of conduct are conceptualized exclusively for the relationship between States and private actors. For a detailed discussion Messineo, *Attribution of Conduct*, 62. The ILC generally holds that "under Chapter II the same conduct may be attributable to several States at the same time", ILC ARS Commentary, Part Two, 33-34 Article 1 para 6. See also ILC ARS Commentary, Article 6, 44, para 3, Article 47, 124 para 3, and Article 7, 45-46 para 3, Chapter IV, 64 para 5; Seventh Report Ago, 54 para 58. The fact that in practice assistance does not lead to attribution does not necessarily imply that the standards are not considered applicable to the interstate context. In fact, States rather seem to view them applicable, but do not consider assistance to meet the threshold required, see e.g. BT Drs 19/14983 (11 November 2019), Question 31.

12 ILC ARS Commentary, Article 47, 124 para 1; Seventh Report Ago, 54 para 58; Talmon, *Plurality of Responsible Actors*, 198 explaining that common and joint organ may be used interchangeably. That a joint organ may exist seems widely accepted, although it received only little scrutiny in its details. For reference to the ILC debates and the literature: Erik Kok, 'Indirect Responsibility in the Contemporary Law of State Responsibility' (Doctorate, University of Amsterdam 2018) 163-615; Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (2010) 283; Crawford, *State Responsibility*, 340. Critical on this Kok, *Indirect Responsibility* 159.

13 Commentary Draft Article 27, ILCYB 1978 II(2), 99 para 2; ILC ARS Commentary, 64 para 2; Talmon, *Plurality of Responsible Actors*, 199; Messineo, *Attribution of Conduct*, 72; Crawford, *State Responsibility*, 340; Kolb, *State Responsibility*, 217.

Yet, one should be careful not to easily infer from the mere fact of providing assistance or joining an international coalition the clear and unequivocal will of a State necessary for the creation of a joint organ.[14] Assisting States usually shy away from a formalized structure that is widespread practice to establish a joint organ.[15] Being part of a coalition is often not much more than "political rhetoric".[16] As such, without further circumstances, the assisting State cannot be considered to *ex ante* adopt and acknowledge the conduct of the foreign State organ.[17]

Assistance *per se* does not suffice to establish control of the assisting State over the assisted use of force that would lead to attribution under Article 8 ARS. This is true irrespective of whether one requires 'effective' or 'overall' control.[18] It is also true in cases in which assistance was specifically directed to a particular use of force,[19] or was a necessary (or enabling) condition for the assisted State to conduct the specific operation. In fact, it is even true for assistance that qualified as "indirect use of force". Assistance as such may establish 'general structural control' or 'a high degree of dependency'. Assistance may be an important factor to determine whether there is control. But by its nature, assistance itself does not exclude the assisted actor's discretion for executing the operation. It does not sufficiently prove that the assisting actor necessarily acts under the assisting State's authority. Only to the extent that an assisting State is substantially, systematically, and not sporadically involved in the command and control structure, and thus directs or enforces the perpetration of the use of force, the door to

14 Cf Kok, *Indirect Responsibility* 161.

15 Cf Messineo, *Attribution of Conduct*, 71-72; Kok, *Indirect Responsibility* 158 who argues that if it is an organ of one State only, there is a strong presumption that it acts only on that State's behalf. See also 160 et seq for a detailed analysis of State practice.

16 Recall e.g. the discussion in the Iraq war in 2003 (in particular, States providing assistance to the Coalition Provisional Authority regulating the occupation in Iraq following the Iraq war, Talmon, *Plurality of Responsible Actors*, 217) or the fight against ISIS. See also Aust, *Complicity*, 220.

17 Talmon, *Plurality of Responsible Actors*, 203-204; Kok, *Indirect Responsibility* 161.

18 On the debate see: ILC ARS Commentary, Article 8, 48 para 5; *Nicaragua*, 64, para 115; *Bosnia Genocide*, 208-210 para 400-407; Appeals Chamber, ICTY, *Prosecutor vs Duško Tadić*, IT 94 I A, (15 July 1999) para 118-120.

19 See also Lanovoy, *EJIL* (2017) 578, 579; Fry, *Attribution of Responsibility*, 117; *Bosnia Genocide*, 217 para 420.

attribution under Article 8 ARS may open.[20] Influence through assistance, even if preponderant or decisive, does not suffice.

Finally, assistance itself does not lead to attribution under Article 11 ARS. Article 11 ARS requires for attribution a “clear and unequivocal” adoption and acknowledgment of conduct.[21] Therefore, assistance to the respective conduct is not a precondition.[22] Still, adoption and acknowledgment typically goes hand in hand with assistance.[23] Hence, the ILC specifically sought to distinguish the case of assistance in its commentary to Article 11 ARS. It noted that “[t]he separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.”[24] The “mere support or endorsement” or approval in “some general sense” is to be distinguished from adoption and acknowledgement.[25] Article 11 ARS rather requires the assisting State’s intention to “accept responsibility”.[26] The State must “identif[y] the conduct in question and mak[e] it its own.”[27] It is hence not excluded that assistance implies adoption. But ultimately this remains a question of interpretation for the specific case. It may not be accepted lightly, however. State practice of ‘mere assistance’ described above reflects this general conceptualization, in particular as it allows for different appraisal in cases of involvement in conduct of certain duration, like an occupation.[28]

B. Joint conduct: attribution of conduct by virtue of co-perpetration?

In the scenarios discussed here, the assisted State performs the use of force in its entirety alone. The assisting State’s contribution falls short of force. It hence does not commit a *direct* use of force itself. But the assisting State often not only provides essential assistance but also acts upon a joint plan. Inspired by international criminal law and domestic law, one might be tempted to view the assisted use of force as a ‘joint operation’. In light

20 Neither for the ICJ (*Nicaragua*, 64 para 115; *Bosnia Genocide*, 208, para 400, 214 para 412) nor for the ICTY (*Tadić*, para 151, 152, 156) assistance was sufficient. Similarly Epiney, *de facto-Organ*; Cassese, *EJIL* (2007) 661.
21 ILC ARS Commentary, Article 11, 53-54, para 8, 9. Epiney, *de facto-Organ*.
22 Kolb, *State Responsibility*, 92; Condorelli, Kreß, *Rules of Attribution*, 231.
23 See also ILC ARS Commentary, Chapter IV, 65 para 9.
24 ILC ARS Commentary, Article 11, 53 para 6.
25 Ibid 53 para 6.
26 Ibid.
27 Ibid.
28 Talmon, *Plurality of Responsible Actors*; Epiney, *de facto-Organ*.

of joint contributions and a joint plan, the act of assistance might be considered to lead to attribution of *conduct*.

1) Joint conduct as attribution of conduct?

The ILC's Articles on State Responsibility do not embrace an article dedicated to 'joint conduct'.[29]

It is true that the concept has its place in international law, nonetheless. Even the ILC seems to acknowledge the existence of the concept.[30] In its commentaries to Article 16 ARS, the ILC explained that the requirement that the assisted act must be an internationally wrongful act *by the assisted State* "distinguishes the situation of aid or assistance from that of co-perpetrator or co-participant in an internationally wrongful act."[31] In its commentary to Article 19 ARS, the ILC held that

> "[A]rticle 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. *If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II* [concerning the attribution of conduct]."[32]

29 This was criticized in the debate on the ARS. The Special Rapporteur responded that it was included, yet adequately covered in Chapter II. See Report of the International Law Commission on the work of its fifty-first session, 3 May - 23 July 1999, A/54/10, ILCYB 1999 vol II(2), 71 para 260, 266.

30 See also in literature e.g. Ian Brownlie, *System of the Law of Nations: State Responsibility Part 1* (1st edn, 1983) 189-192; John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57(1) *BYIL* (1987) 80; Bernhard Graefrath, 'Complicity in the Law of International Responsibility', 29(2) *RBDI* (1996) 373; John E Noyes, Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13(2) *YaleJIntlL* (1988) 242; Lowe, *JIntl&Dipl* (2002) 10-11; Aust, *Complicity*, 219-221.

31 ILC ARS Commentary, Article 16, 66, para 1.

32 Ibid Article 19, 71 para 4, emphasis added.

And in its commentary to Article 47 ARS, the ILC stated:

> "Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might *combine in carrying out together an internationally wrongful act* in circumstances *where they may be regarded as acting jointly in respect of the entire operation.*"[33]

Accordingly, for the ILC, the concept of 'joint conduct' describes the situation where the conduct *is already attributable* to two or more States. Two or more States "commit the act" or "combine in carrying out together the act".

To the extent that the conduct attributable to two or more States constitutes an element of the respective unlawful act it is then classified as a joint conduct.[34] This qualification becomes relevant for the legal consequences in case of a plurality of responsible States.[35] According to Article 47 ARS, "where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."

But the fact that States commit a joint action does not lead to the attribution of the other State's conduct.[36] The ILC remains committed to the

33 Ibid Article 47, 124 para 1, emphasis added.

34 Crawford, *State Responsibility*, 335.

35 Dual attribution is only one of several possible cases leading to joint responsibility. Other scenarios that may lead to a plurality of responsible States: 'the conduct committed by a joint organ'. It also includes however independent conduct: 'the conduct of several States separately causing aspects of the same harm or injury', 'independent wrongful conduct', 'assistance to the wrongful conduct', direction, compulsion or coercion'. All these scenarios are distinct from a 'joint conduct'. Noyes, Smith, *YaleJIntlL* (1988) 228-229; Crawford, *State Responsibility*, 325, 334. Second Report Crawford, 45-46 para 161.

36 See in detail, yet on the basis of responsibility more generally Kok, *Indirect Responsibility* 191-215. See also Kolb, *State Responsibility*, 216; Graefrath, *RBDI* (1996) 373 who holds that co-perpetration in an internationally wrongful act "of course entails separate responsibility for each of these States" committing a joint action, emphasis added; Quigley, *BYIL* (1987) 80; Aust, *Complicity*, 220 arguing that it is "individual responsibility according to Article 1 ASR"; Lowe, *JIntl&Dipl* (2002) 10-11 stating that a State acting jointly with the principal actor State is engaged itself in the wrongful conduct in question; Fry, *Attribution of Responsibility*, 99; Tom Dannenbaum, 'Public Power and Preventive Responsibility' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (2015) 199; 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) 144; Pacholska, *Complicity*, 238. It is a

principle of independent responsibility.[37] Accordingly, "the responsibility of each participating State will be determined individually, on the basis of its own conduct, and by reference to its own international obligations."[38]

This conclusion was not uncontested. For example, Yugoslavia argued in the hearings concerning the Legality of the Use of Force Cases:

> "The North Atlantic Council directs the war against Yugoslavia as a joint enterprise. It constantly says so. It would be a legal and political anomaly of the first order if the actions of the command structure were not *attributable jointly and severally to the member States*. This joint and several responsibility is justified both in legal principle and by the conduct of the member States."[39]

It should be noted, however, that Yugoslavia made this argument in light of an international organization leading the operation.[40] Moreover, Yugoslavia emphasized the fact that coalition States, like the UK, apologized for the behavior, "although there had been no suggestion that British planes had fired missiles".[41] The Yugoslav argument on attribution may hence be well understood to be grounded in an 'adoption and acknowledgment' of the conduct or the establishment of a joint organ.[42] In any event, an argument of attribution by virtue of joint conduct was by no means accepted. Canada and Germany were most explicit in rejecting such a theory. Canada stated that "[a]ccusations based on an assumed but unstated theory of "guilt by association", or liability erga omnes for occurrences beyond the control of the accused, should simply be disregarded."[43] Germany stressed that "each

mischaracterization when Kok, *Indirect Responsibility* 191 summarizes these views to be attributing the conduct to all States that participate in the venture.

37 ILC ARS Commentary, Article 47, 124 para 3. Crawford, *State Responsibility*, 333-336. See also Second Report Crawford, 47 para 164: "It seems that situations (a)–(d) and (i) [situation (a) refers to "joint conduct"] do not raise any particular problems for the purposes of part one of the draft articles, although they may raise issues under part two as to the extent of reparation which each State is to bear."

38 ILC ARS Commentary, Article 47, 125 para 8.

39 *Legality of the Use of Force Case*, Verbatim Record, Yugoslavia (Ian Brownlie), 12 May 1999, CR 99/25, 16, emphasis added.

40 For the controversy whether the conduct of the NATO is attributable to all States: Starski, *Zurechnungsfragen*, 22.

41 *Legality of the Use of Force Case*, Verbatim Record, 12 May 1999, CR 99/25, 16.

42 The Yugoslav memorial suggests this as well: *Legality of the Use of Force*, Memorial of the Federal Republic of Yugoslavia (5 May 2000), 291-300, 327-328.

43 *Legality of the Use of Force*, Preliminary Objections of Canada (5 July 2000), 47, para 167-198.

of the respondents must be treated according to its own record."[44] On procedural grounds, the ICJ did not decide the case. The Court noted, however, that this finding did not alter the fact that States "remain in all cases responsible for acts attributable to them that violate the rights of other States."[45] It thus left open whether or not it viewed the military operation in Yugoslavia as a joint enterprise and whether or not it may lead to attribution of conduct.

2) Assistance as 'joint conduct'?

In any event, by providing assistance, the assisting State would arguably not be considered to commit a joint act.[46] A joint conduct would require that the act of assistance amounted to an element of the assisted act, i.e. the use of force. The exact definitional boundaries of what constitutes a use of force are unclear. Still, there seems to be remarkable consensus that acts of mere assistance – even if provided as part of a joint coalition and a joint plan – are not an element of a use of force. In practice, they are widely considered distinct from the assisted use of force. In Tom Dannenbaum's words, it is collaborative but independent action.[47]

When authors seek to illustrate the plurality of responsible States by 'joint conduct', they frequently refer to joint military operations.[48] For example, James Crawford refers to a "joint military attack by a coalition of states against another state in violation of the prohibition on the use of force in Article 2(4) of the UN Charter."[49] He cites the use of force

44 *Legality of the Use of Force*, Preliminary Objections of the Federal Republic of Germany (5 July 2000), 45, para 3.45.
45 *Legality of the Use of Force (Serbia and Montenegro v Germany)*, Preliminary Objections Judgment, ICJ Rep 2004, 720, 764, para 114.
46 Likewise Aust, *Complicity*, 289.
47 Dannenbaum, *Public Power*, 195.
48 See already Seventh Report Ago, 54 para 59.
49 Crawford, *State Responsibility*, 333-334. Note that Crawford assumes for his examples that the 'military attack' by the States is *one and the same* conduct. Technically, Article 2(4) however only prohibits the "use of force". This does not require a full operation, as occurred in the examples. Instead, a specific act of using force suffices to meet the threshold of a use of force. A use of force (e.g. an airstrike) is typically only a single act that cannot be divided up. Consequently, the conduct itself can only be committed/performed by one actor (soldier/army). A 'military attack' by several States as referred to by Crawford consists hence typically of several uses of force, which are legally distinct however, and which (each and every one) legally requires a

by ten NATO members in Yugoslavia, as well as the UK's involvement in the Iraq war in 2003.[50] In both situations, the pertinent conduct 'use of force' was already attributable to each State under the general rules of attribution. Each State directly used force, and hence each State violated Article 2(4) UNC itself and independently. This is in particular relevant as with respect to the Iraq war 2003, Crawford stops short of qualifying the involvement of other States (like Ireland) as co-authorship. Instead, he characterizes it as aid and assistance in terms of Article 16 ARS.[51] He gives no reasons for doing so. But arguably, he viewed the Irish assistance as amounting to an element of the wrongful act, i.e. the use of force. Christian Dominicé argues along similar lines. He claims that even a State that provides military assistance to another State may become a co-author in the internationally wrongful act. His argument is based on the same implicit assumption that the *operation as a whole* is the relevant conduct, i.e. use of force. He requires, however, that the "character of the assistance provided amounts to true participation in the act."[52] Only then does the contribution constitute an element of the unlawful act. For Helmut Aust, membership in a coalition itself and "rather insignificant" contributions do not suffice to qualify for a collective enterprise. Instead, he accepts a joint commission of a wrongful act either in the case that the conduct is attributable to the State, or independently (through its own conduct), yet jointly violates the same primary norm ("individual responsibility").[53] Ian

justification (cf *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Rep 2005, 168 [*Armed Activities*] 216 para 117) – unless the act by one *actor* is *attributable* to several *States*. There are hence several internationally wrongful acts, in violation of Article 2(4) UNC. All contributing States are hence committing the same conduct, violating the same norm. Legally speaking, they are not engaged in the identical *conduct*, although they are engaged in the same *operation*. States are only engaged in the same and identical conduct if the conduct is attributable to all States. With respect to the legal consequences for an *ius contra bellum* violation and for the application of Article 47 ARS, it may be justified to consider the operation as a whole as the pertinent conduct. Similarly, note that for the qualification as a joint 'armed attack' or 'occupation', this may consist of several uses of force, which can consequently also be committed/performed by more than one actor. Also, it depends on the nature of the use of force. It may be different for e.g. a blockade in contrast to an air strike.

50 Crawford, *State Responsibility,* 333-334 n 55 and 59.

51 Crawford, *State Responsibility*, 333-334 n 59.

52 Dominicé, *Multiple States*, 283.

53 Aust, *Complicity*, 219-221. Note that Aust, unlike Crawford or Dominicé, views the relevant conduct only the specific use of force, not the entire operation. Similarly

Brownlie draws a similar line. For him, "[t]he supply of weapons, military aircraft, radar equipment and so forth would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility."[54] Furthermore, he sees "joint responsibility" if two States "acting in concert" unlawfully invade and occupy a State. He submits that any conduct is "*at least as a presumption*" attributable to both States.[55]

While there seems to be rather broad agreement that mere assistance is *not* an element of a use of force, there is no clear-cut positive definition. In addition to determining the required extent of involvement[56] and the required connection (coalition? parallel operations?), it will be key how to define the conduct of "use of force". Is it only the specific and single strike that is relevant, is it the specific operation or is it the entire military campaign that represents the use of force? In practice, these questions are not settled. But one may ask if not to the extent that the provision of assistance attributable to the assisting State qualifies as *indirect* use of force, and to the extent that the assisting State is hence responsible for a breach of the prohibition of the use of force, allows for a classification of assistance as joint conduct.

C. Special attribution grounds in *ius contra bellum?*

In the realm of the *ius contra bellum,* repeatedly authors have identified a trend toward broadening the general criteria of attribution.[57] For example, some have claimed that a failure to exercise due diligence in prevention al-

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Fry, *Attribution of Responsibility*, 99 stating that "by participating in the common enterprise, a state [...] is already involved in the wrongful conduct, and responsibility in such situations may be direct rather than attributed.".

54 Brownlie, *State Responsibility*, 191. For the latter contribution it is unclear if Brownlie refers to the placement at the disposal of the combat units etc, which would lead to exclusive attribution of their conduct to the assisted State, or to a use of force in support of another State, which remains attributable to the assisting State.

55 Ibid 192.

56 E.g. would the (limited) Arab airstrikes to fight against ISIS in Syria be enough to speak of "joint conduct"?

57 See for a discussion Milanovic, *IntlLStud* (2020).

lows for the attribution of conduct.[58] Recently, some viewed a trend toward an additional ground of attribution in cases of 'complicity' with non-State actors using force.[59]

It can remain open to debate whether the existence of such a test would risk "undermining the coherence in the secondary rules of attribution" as Miles Jackson fears.[60] In light of the fact that the ILC expressly recognizes in Article 16 ARS a norm leading to responsibility in connection with the act of another State rather than to attribution of conduct, and States have accepted this alternative concept to deal with this problem, one may doubt that such a ground for attribution of conduct has emerged under general international law for the inter-State context. So far, this debate has not reached the inter-state dimension. In practice, the acts are treated as distinct; the assisted use of force is generally not attributed to the assisting State. That scholars and States alike are reluctant to apply the rules of attribution of *conduct* to interstate assistance, and carefully avoid the far-reaching consequences of attribution of *conduct,* may have various reasons. Most notably, the perceived 'accountability gap'[61] in case of support to non-State actors may not be conceived as pressing for States. Unlike assisted non-State actors, the assisted States may be held accountable for the use of force under international law. Also, there is a legitimate target of self-defense without necessarily implicating a third State's territorial integrity.

58 Cf in particular with respect to the use of force committed by non-State actors, there are many voices claiming that assistance to the non-State actors allows for attribution. See e.g. on this Christian J Tams, 'The Use of Force against Terrorists', 20(2) *EJIL* (2009); Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor. Birth of the "Unable or Unwilling" Standard?', 75 *ZaöRV* (2015); Palchetti, *De Facto Organs of a State* para 12; Dannenbaum, *Public Power*, 208. Note, this approach is distinct from the question whether assistance itself qualifies as "use of force" (or "armed attack") under the primary rules of *ius contra bellum*. For this see de Wet, *LJIL* (2019); Sarah SK Heathcote, 'State Omissions and Due Diligence' in Karine Bannelier, Sarah SK Heathcote and Théodore Christakis (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (2012) 306-307 n 62. But see Lanovoy, *EJIL* (2017) 573 noting that "outside judicial scrutiny, the role of attribution for the purposes of jus ad bellum may have diminished over time".

59 Lanovoy, *EJIL* (2017). Critical Miles Jackson, *Complicity in International Law* (2015) 176 et seq.

60 Jackson, *Complicity*, 197.

61 See for discussions about the inadequacy of the rules on non-State actors e.g. Lanovoy, *EJIL* (2017); Crawford, *State Responsibility*, 156 et seq.

II. Assistance leading to 'international responsibility' in connection with the act of another State

The ILC recognizes three cases under general international law in which "it is appropriate that one State should assume responsibility for the internationally wrongful act of another."[62] According to the ILC, a State that 'aids and assists' (A), 'directs and controls' or 'coerces' another State to commit an internationally wrongful act (B) bears international responsibility.[63] Under what circumstances may an act of assistance to the use of force lead to international responsibility?

A. Article 16 ARS – "aid and assistance"

The most prominent norm of general international law governing the contribution to another State's conduct, is Article 16 ARS. It reads:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State."

The norm is widely seen as central in governing assistance to the use of force. It is based on State practice relating to assistance in a use of force.[64] It is the primary reference point for commentators when assessing the permissibility of assistance to a use of force, which is increasingly, but not widely shared by States.[65] This has not always been the case. The general rule has not always been accepted to reflect *lex lata*.[66] In any event, with the recognition of the norm as customary international law by the ICJ in

62 ILC ARS Commentary, Chapter IV, 64, para 5.

63 Articles 16-18 ARS. This is often referred to "attribution of responsibility". For a detailed discussion see Fry, *Attribution of Responsibility*.

64 Recall in particular the ILC references to financial and military aid (UK to Iraq against Iran 1984), the permission to use its territory to carry out an armed attack (Germany to US in Lebanon 1958, UK to US in Libya 1986). ILC ARS Commentary, Article 16, 66 para 7, 8. See further details Chapter 4, II.A.5.

65 See e.g. US Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operation" on 5 December 2016.

66 See Chapter 1, I. notes 25-26.

2007, its customary status is no longer seriously contested.[67] This has been rightly celebrated as an important response to an increasingly globalized world moving from bilateralism to community interest. As such, it is little surprising that the provision is gaining increasing prominence in States' discourse, too.

There is no doubt that Article 16 ARS applies to interstate assistance to a use of force.

Article 16 ARS imposes a narrow regime for responsibility for acts of assistance (2). The essence of the responsibility remains not without ambiguity, prompting the question of what violation the assisting State is responsible for (1). Against this background, an assessment of the relationship between Article 16 ARS and other specific rules governing assistance as identified in Chapter 4 shall follow (3), which will contextualize its increasing prominence in the discourse on assistance to the use of force.

1) The legal result of assistance: "internationally responsible"

Unlike in a case of attribution of *conduct*, Article 16 ARS does not have the effect that the assisted conduct is considered as an act of the assisting State. There remain two separate acts. Instead, Article 16 ARS holds that the assisting State, through its implication in another State's wrongful conduct, is "internationally responsible".

According to the ILC, this responsibility of the assisting State is not original. It is derivative.[68] The wrong does not originate in the act of assistance itself, but in the assisted act in which the assisting State is implicated by giving assistance.[69] In fact, the act of assistance taken in isolation is

67 *Bosnia Genocide*, 217 para 420. See also Claus Kress, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2(1) *JICJ* (2004) 251-252 who stated already in 2004 that Article 16 "can be safely regarded as reflecting customary international law".

68 ILC ARS Commentary, Chapter IV, 65 para 8 "rules of derived responsibility", Article 16, 66 para 2. See for a discussion of different terminology Boutin, *MLLWR* (2017-2018) 61.

69 ILC ARS Commentary, Article 19, 71 para 4. Second Report Crawford, 47 para 167 "attribute the wrongfulness of State A's conduct to State B, which is implicated in that conduct because of assistance given [...]." Ibid 46 para 161: "the reason why State A's conduct is wrongful is its relationship to the wrongful conduct of State B." See also Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2013) 46-47.

(usually) not unlawful. It is through, and because of, the connection with the wrongful act that the assisting State bears responsibility.[70] This does not mean that Article 16 ARS establishes vicarious responsibility.[71] The act of assistance and the assisted act may both result in the same injury.[72] But the assisting State is not responsible *for* the assisted act and the violation of international law committed by the assisted State itself.[73] The assisting State is "only responsible to the extent that *its own conduct has caused or contributed* to the internationally wrongful act."[74] Lowe summarized succinctly: "Responsibility under Article 16, then, arises *when* another State commits a wrongful act, but arises *from* the conduct of the assisting State alone."[75]

The ILC's approach raises questions about the legal characterization of acts of assistance that fall under Article 16 ARS. The ILC notes the result: the assisting State is "internationally responsible". It specifies the relevant act attributable to the assisting State that leads to responsibility: the contribution to the assisted act. But the ILC remains silent on the last piece necessary to establish international responsibility: for the violation of what international obligation is the assisting State responsible? Put in concrete terms, is assistance to a use of force characterized as use of force itself? That

70 Second Report Crawford, 46 para 161.

71 Lowe, *JIntl&Dipl* (2002) 11.

72 ILC ARS Commentary, Article 16 67, para 10. On the problem apportioning the shares of responsibility see Aust, *Complicity*, 274-276.

73 ILC ARS Commentary, Article 16, 67, para 10, Article 17, 68, para 1. Ibid Chapter IV, 64 para 5 may counter this impression. It holds that Chapter IV defines "exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another." This should not be taken out of the context, however. Before, the ILC holds that Chapter IV describes cases "where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, *or at any rate primarily lies*, in a breach of the international obligations of the former." Emphasis added. This insertion arguably covers the case of assistance. It indicates that Chapter IV, despite the ILC's claim, does not just entail an allocation of responsibility. See also Fry, *Attribution of Responsibility*, 104 who doubts that the provision of aid and assistance is a proper case for attribution of responsibility.

74 ILC ARS Commentary, Article 16, 66 para 1, emphasis added. See also, 67 para 10. See also Article 16: "responsible for doing so", i.e. aid and assistance, which stands in contrast to Articles 17 and 18 which states "responsible for that act".

75 Lowe, *JIntl&Dipl* (2002) 5, emphasis original. For the similar conclusion Fry, *Attribution of Responsibility*, 116.

this is more than a theoretical exercise Special Rapporteur Roberto Ago identified already in 1978. The legal consequences may "vary appreciably".[76]

This question would be answered – as it was for Articles 17 and 18, or as it was claimed for Chapter IV in general – if the assisting State bore responsibility *for the assisted act itself.* It would still remain the *conduct* exclusively by another actor. But by virtue of providing assistance, responsibility would be allocated to the assisting State, too. The assisting State would then bear responsibility for a violation of the prohibition to use of force – like the assisted State. Technically, the assisting State would be responsible for an act in violation of an international obligation without having committed an own conduct in violation of that (or possibly any) international obligation.[77] In that case, the act of assistance would be (merely) a cause justifying the allocation of responsibility.

But this is not, according to the ILC, what Article 16 ARS orders. Despite positioning Article 16 ARS in Chapter IV, the ILC holds the assisting State responsible only *for its own conduct,* i.e. its contribution to the wrongful assisted act and not for the assisted act itself.[78]

Draft Article 27, adopted on the first reading and originating from Ago's proposal, stipulated that "aid and assistance [...] itself constitutes an internationally wrongful act."[79] Ago held in his report that unless it is specifically provided for in an express provision, assistance does not "partake of the

76 Seventh Report Ago, 60 para 75. Several questions may depend on the content of the obligation and the characterization of the offence. What is the legal nature and status of the norm prohibiting assistance? Does it partake (the *ius cogens*) status of the assisted primary norm? Does Article 103 UNC apply? What about special consequences attached to the primary norm, like the reporting obligation pursuant to Article 51 UNC or the right to respond to a violation in self-defense? The question of distribution of responsibility is not necessarily related to this question, as it may also arise when two different norms are violated.

77 See also Fry, *Attribution of Responsibility*, 103-104, 105; Boutin, *MLLWR* (2017-2018) 59. Unlike possibly for Article 17 ARS, no rule allowing for attribution of conduct may be applicable. See on the question whether Article 17 ARS amounts to derived or direct responsibility, i.e. responsibility for a violation of the international obligation by the assisted State or for a violation of the international obligation by the assisting State itself by virtue of attribution of conduct, Fry, *Attribution of Responsibility*, 118-119.

78 See also Fry, *Attribution of Responsibility*, 116-117; Lowe, *JIntl&Dipl* (2002) 4.

79 Report of the International Law Commission on the work of its Thirtieth session, 8 May – 28 July 1978, A/33/10, ILCYB 1978 vol II(2), 80.

nature" of the assisted act.[80] For him, assistance and the assisted act were not equivalent. Ago warned that "it is necessary to guard against the danger of finally diminishing the gravity of a particularly serious internationally wrongful act by unduly enlarging the era in which the existence of such acts is recognized."[81] In concrete terms, for Ago, the provision of arms did not qualify as aggression itself. Assistance remained a distinct act, "which is characterized differently and does not necessarily have the same legal consequences."[82] Ago appeared to believe that assistance violated a distinct general rule of customary international law prohibiting aid and assistance to an internationally wrongful conduct.[83] The assisting State would be responsible for a breach of Article 16 ARS.

The final version of Article 16 ARS gives reason to doubt that the ILC followed Ago's conceptualization. The ILC sought to discourage the impression that Article 16 ARS constitutes a distinct international obligation which gives rise to an assisting State's responsibility. Instead, it implies an alternative reading. It is *a violation of the respective primary obligation* for which the assisting State bears responsibility by virtue of its contribution, in addition to the assisted State. The legal consequences and characteristics

80 See also Seventh Report Ago, 54 para 60. Ago referred to Article 3(f) Aggression Definition and stated: "it seems inadmissible to generalize the idea of such equivalence and to extend it beyond cases in which it is specifically provide for in an express provision."

81 Seventh Report Ago, 60 para 75.

82 See also ibid 54 para 60.

83 Ibid 54 para 60. Special rapporteur Crawford seemed to understand Ago in a similar manner, when he criticized Draft Article 27 for defining "a rule and the content of the obligation it imposes." Second Report Crawford, 47 para 166. An interpretation similar to Ago's position seem to adopt: Jackson, *Complicity*, 149 ("Article 16 is the specified international obligation of the state"); Dominicé, *Multiple States*, 285 ("aid or assistance referred to constitutes an internationally wrongful act distinct to that committed by the State beneficiary of the aid. The aid or assistance must be clearly connected to the unlawful act, in the sense that it must constitute a contribution to the commission of the act, but it constitutes in itself the breach of an autonomous rule"); Lanovoy, *Complicity in an Wrongful Act*, 139 ("general rule not to aid or assist in the wrongful act of another state"). In general, this is the view of those who consider Article 16 ARS a primary norm prescribing the substantive conduct of a specific obligation, rather than a secondary obligation. See e.g. Boutin, *MLLWR* (2017-2018) 62-63. But the primary nature of Article 16 ARS does not necessarily define which norm the State breaches and hence for which violation of law the State bears responsibility. Arguably, Article 16 ARS renders a specific conduct wrongful, irrespective of how exactly it functions. The debate on the primary or secondary character of Article 16 only partly answers the question discussed here.

of the primary obligation hence also apply to the assisting State. Article 16 ARS hence would extend the primary prohibition of specific conduct to also prohibit assistance to that conduct.[84] The assisting State would hence also violate Article 2(4) UNC. Several aspects nourish this impression.

The examples by which the ILC illustrates Article 16 are all phrased as violations of the primary rule themself. For example, with respect to assistance relating to the use of force, the ILC holds that the act of assistance breaches "the obligation not to use force" itself.[85] This conceptualization may also explain why the ILC did not distinguish when drawing on examples of 'indirect use of force' and 'participation'.[86]

More fundamentally, the ILC's assertion that the provision establishes derivative responsibility (by way of exception to the principle of independent responsibility[87]) and responsibility for one's own conduct implies such a reading. Special Rapporteur Crawford corroborated this impression when he drew an analogy to "the problems of attribution, dealt with in chapter II. In certain circumstances, it may be justified to attribute the *wrongfulness* of State A's conduct to State B [...]."[88] This may also explain why Ago's concern was not expressly reconsidered.

The opposability requirement that Ago and the ILC had not included in the first draft may further point in this direction.[89] The ILC introduced the requirement that the assisted act would be internationally wrongful if

84 This question is independent from the controversial question whether Article 16 ARS constitutes a primary or secondary norm. In fact, such an interpretation of Article 16 ARS may still be considered primary in nature, as it defines the scope of international obligations.

85 ILC ARS Commentary, Article 16, 66-67 para 8, 9: "*The obligation not to use force* may also be breached by an assisting State". The 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*." Emphasis added. See also para 2 where it refers to Article 3(f) Aggression Definition and the Friendly Relations Declaration.

86 The examples the ILC cited in the commentary are marked by distinguishable features, in light of the above: the UK assistance to US operations in Libya 1986 might qualify as indirect use of force; the German assistance to US operations in Lebanon 1958 would arguably qualify as participation; Article 3(f) Aggression Definition or the Friendly Relations Declaration referred to indirect use of force, rather than mere assistance. ILC ARS Commentary, Article 16, 66, para 8.

87 ILC ARS Commentary, Chapter IV, 64-65, para 5, 8.

88 Second Report Crawford, 47 para 167, emphasis added. ILC ARS Commentary, Chapter IV, 65 para 7. See also ibid 64, para 5 that spoke of "assum[ing] responsibility for the internationally wrongful act of another [State]".

89 See also Jackson, *Complicity*, 165; Fry, *Attribution of Responsibility*, 113-114.

committed by the assisting State itself, *inter alia,* to justify and mitigate Article 16 ARS' extension into the realm of primary rules.[90] It used the argument that the assisting State was bound to the same obligation to argue that it did not impose a new substantive primary obligation.[91] Instead, Article 16 ARS was seen – analogous to domestic legal orders – as a "general part" to more specific primary rules.[92] This reading is enhanced by the fact that Special Rapporteur Crawford thought the opposability requirement of such importance and necessity that without it he saw a case for the deletion of the provision "on the ground that it states a primary rule."[93] Arguably, the opposability requirement would not make such a *structural*[94] difference on that question, if the assisting State did not bear responsibility for the violation of the primary norm, but of a separate norm.

While there is accordingly good reason to believe that the ILC thought the assisting State to be responsible for a breach of the primary obligation, i.e. here the prohibition to use force itself, the exact conceptualization remains unclear. Again, conceptually two alternatives are conceivable under the ILC's premises. Either the assisting State is considered to violate its *own* obligation not to use force. This would mean that Article 16 ARS extended the scope of the respective primary norm to also prohibit assistance to the prohibited wrong.[95] Alternatively, Article 16 ARS "attributes" or allocates

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90 Second Report Crawford, 51 para 187-188. For the debate on whether Article 16 is a primary or secondary rule see: Pacholska, *Complicity*, 51-52, 85; Jackson, *Complicity*, 148-149.

91 The ILC acknowledged that it nonetheless "blur[red] the distinction" "between the primary or substantive obligations of States and its secondary obligations of responsibility." It saw it however justified. ILC ARS Commentary, Chapter IV, 65 para 7.

92 See also Second Report Crawford, 47 para 167; ILC ARS Commentary, Chapter IV, 65 para 7.

93 Second Report Crawford, 51 para 187-188. The opposability requirement is not conclusive, however. The ILC did not acknowledge that the assisting State would breach the *same* obligation. The opposability requirement sought primarily to ensure compliance with the *pacta tertiis* rule. One could understand the opposability requirement hence also primarily as limitation to responsibility. It merely excluded responsibility for assistance to an act that would not be wrongful for the assisting State itself.

94 Of course, in any event, it always makes a difference in that it limits responsibility for assistance. It limits responsibility according to the principle "a State cannot do by another what it cannot do by itself".

95 This interpretation would square best with the ILC's assumption that the assisting State is only responsible "to the extent that its own conduct has caused or contributed to the internationally wrongful act" and the nature of assistance. Crawford's qualification of Article 16 ARS as being part of the "general part" points in this direction. ILC

to the assisting State *a share* of the assisted State's responsibility for the act violating the prohibition to use force, to the extent its own conduct has caused or contributed to the internationally wrongful act.[96] The 'attribution' would be justifiable as the assisting State is bound to the same rule.

Article 16 ARS leaves room for argument for both Ago's and Crawford's conceptualizations. Each has benefits and difficulties. Ago's approach has the benefit of allowing for a nuanced approach. But while it is clear in a negative sense, i.e., in defining the nature and character an act of assistance does *not* have, it leaves the exact consequences undetermined. The ILC's conceptualization of Article 16 ARS, classifying assistance as a breach of the same rule the assisted State violates, seems to provide answers to such questions. The ILC suggests that consequences may be adjusted according to the assisting State's contribution.[97] But as a general rule, it equates the treatment of the assisting State with a State violating the primary norm, blurring the line between perpetration and participation.

ARS Commentary, Chapter IV, 64 para 5 that states that the wrongfulness "in any rate primarily lies in the breach of the international obligations of the" assisted State also indicates that the assistance itself also entails an own wrong. This interpretation challenges however the assumption that it is an exception to the principle of independent responsibility. The extension would instead ensure that the principle of independent responsibility would be guaranteed. One could argue, however, that there would still be "attribution" and "derivative responsibility" that justified its placement in Chapter IV as it depended also on the wrong of the assisted act.

96 Such an interpretation would square best with the systematic placement in Chapter IV that seeks to define "exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another", as an exception to the principle of independent responsibility, ILC ARS Commentary, Chapter IV, 64 para 5. Arguably, however, it has trouble explaining why the ILC holds the assisting State to be responsible for its "own act". The act of assistance then would only be the cause for the attribution of assistance, and arguably the limitation of the share of responsibility. Critical on a conceptual level Fry, *Attribution of Responsibility*, 117, 133, 107 as the normative operation of attribution of responsibility required as theoretical basis an element of control, which assistance does not entail.

97 For example, it holds that the assisting State "should only be held to indemnify the victim for […] those [consequences] which […] flow from its own conduct." ILC ARS Commentary, Article 16, 67 para 10. See also Ibid Article 17, 68 para 1. See for the difficulties to determine the exact content of the assisting State's responsibility, Aust, *Complicity*, 269-296; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016) 261-284; Boutin, *MLLWR* (2017-2018) 81-85.

2) Preconditions for prohibited assistance under Article 16 ARS

Article 16 ARS does not positively define what *is* (prohibited) assistance. Instead, it takes a negative approach. Acknowledging that almost any act may qualify as aid or assistance to another act,[98] the ILC sets out to define what *does not* qualify as assistance. Article 16 ARS “limits” the scope of responsibility for assistance under international law in several manners:[99]

First, only assistance to an internationally wrongful act may lead to international responsibility. Second, the ILC requires an objective *de minimis* threshold. Third, it requires that the assisting State is “aware of the circumstances making the [assisted] conduct [...] internationally wrongful.” There is controversy regarding the existence of a fourth requirement of ‘intention’. Fifth, “the assisted act must be such that it would have been wrongful had it been committed by the assisting State itself.”

a) The requirement of an unlawful assisted act

Article 16 ARS is accessory in nature. The assisted act by another actor must take place and be internationally wrongful. Two consequences are worth highlighting.

First, the assisting State benefits from the fact that the wrongfulness of the assisted State’s conduct may be precluded. It is hence irrelevant that the assisted act would be unlawful for the assisting State, if the assisted act ultimately is in accordance with international law. For example, even though the assisting State may be expressly exempted from an authorization (by the Security Council or the targeted State) to resort to force against the targeted State, as long as the assisted State remains within the boundaries of the authorization, the assisting State may not be internationally responsible according to Article 16 ARS.

Second, as long as the international wrongfulness is not established, States may provide assistance without bearing responsibility. It is neither necessary for the assisting State to claim that the assisted act is lawful. Nor

98 Second Report Crawford, 50 para 180 note 349.

99 ILC ARS Commentary, Article 16, 66, para 3. These limitations are grounded in *international law*. Domestic concepts with respect to assistance were considered to be of limited relevance. See in detail Aust, *Complicity*, 193-194; Harriet Moynihan, 'Aiding and Assisting: the Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility', 67(2) *ICLQ* (2018) 467.

does it need to make an effort to justify the assisted act. It suffices that at the time of providing assistance, the assisted act is not unlawful.

Consequently, the assisting State may benefit from a legal gray area that has not been authoritatively decided.[100] This is also the reason why the assisting State would not act self-contradictory, if it did not claim the assisted act to be in accordance with international law, but only not to violate international law.

This does not constitute a challenge to the binary code of international law, according to which either a conduct is lawful or unlawful.[101] It reflects the lack of authoritative determinations in international law, leaving the determination in the first place to the assisting State itself.

A more complex question is whether the assisting State bears the risk that the legally ambiguous act is authoritatively determined later as *ex ante* unlawful. With respect to the use of force, this question might arguably arise in case that the Security Council authoritatively determines the lawfulness of a use of force through a binding resolution.

Nolte and *Aust* suggest that the assisting State does not bear the risk.[102] They explain this conclusion with the fact that factual and normative uncertainty often go hand in hand, and by drawing a parallel to the factual uncertainty underlying instigation that was excluded from Article 16 ARS. Their argument is motivated by not wanting to discourage beneficial forms of international co-operation.

To the extent that there is no factual uncertainty, however, i.e. a situation in which the assisting State has positive knowledge about all circumstances that may render the assisted act unlawful,[103] this conclusion is not a necessary one, however. With good reason, legal and factual uncertainty may be

100 Georg Nolte, Helmut Aust, 'Equivocal Helpers - Complicit States, Mixed Messages, and International Law', 58(1) *ICLQ* (2009) 12-13, 18.

101 Ibid 6.

102 Ibid 12-13.

103 In case of factual uncertainty, States do not meet the required threshold of knowledge. In the Ilisu Damn case, Nolte and Aust use as an example, the legal uncertainty resulted in factual uncertainty. Legally, it was unclear what conduct was required. The assisting States did not only not know what conduct sufficed to meet the standards, but also did they not know what measures were taken. Ibid 12. In any event, even in case where there is only uncertainty about what conduct sufficed, the assisting State would not have knowledge about the circumstances making the conduct unlawful. The legal uncertainty may impact the necessary knowledge. With respect to the use of force, this should not be accepted lightly. The law has however less subtleties that may impact the knowledge about the relevant facts.

treated differently. A State can be expected to know the law. Moreover, it seems that the risk is not specifically connected to the situation of assistance. Instead, the risk is inherent in a State being subjected to an authoritative determination of the law. Finally, it would not necessarily be unjust to impose a deterring effect on usually beneficial state cooperation. The assisting State is free to take the risk. To the extent the risk realizes, the assisting State is not unjustly burdened. It contributed to an unlawful act. The deterring effect is likewise not unjust, as it is confined to the contribution to an unlawful act.

b) The objective condition: 'aid and assistance in the commission of an internationally wrongful act'

The ILC does not positively circumscribe conduct that may amount to "aid and assistance".[104] The examples in its commentaries serve merely as illustrations. Likewise, the ILC does not exclude any specific nature or form of assistance from the scope of Article 16 ARS.[105] In particular, the ILC also refrains from taking a position on the debate whether or not an omission can qualify as "aid and assistance."[106]

104 The ILC does not distinguish between aid and assistance. It merely uses it as a more neutral terminology in to avoid the notion of "complicity" which was conceived to be tainted by criminal law.

105 Jackson, *Complicity*, 153. See also Lanovoy, *Complicity*, 94-95; Lanovoy, *Complicity in an Wrongful Act*, 143.

106 Limiting complicity to 'commissions': *Bosnia Genocide* 222 para 432 which held that "complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators". The ICJ thereby distinguishes 'participation' and 'due diligence violations' by the (blurry) line between acts and omissions; Kolb, *State Responsibility*, 218. Ago also argued that the failure of a territorial State to take preventive or repressive measures was not a form of complicity. Seventh Report Ago, 53, para 57. This is understood as supporting the thesis that complicity may not embrace omissions. It may be doubted, however, that Ago's proposal was as radical. Rather, he believed that in this situation the "link was not sufficient to make one of the acts appear as participation in the other." He hence concluded that "[t]he failure, *as such*, can certainly not be defined as a form of complicity." He also stated "participation [...] cannot be found in the fact, *or rather the sole fact,* that a State failed to take preventive or repressive measures." Emphasis added. More plausible is hence to understand Ago to view this question as a question of degree. Viewing omissions also covered: Eckart Klein, 'Beihilfe zum Völkerrechtsdelikt' in Ingo von Münch (ed), *Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (1981) 428-429; Lowe, *JIntl&Dipl* (2002) 4; Andreas Felder, *Die*

There seems to be one exception, however. For the ILC, incitement in and of itself does not qualify as “concrete support” as required for Article 16.[107] This again is no exclusion in absolute terms.[108] As the Special Rapporteurs Ago and Crawford set out that State practice suggests that mere advice and suggestions are not enough to have an impact on the wrongful act.[109] It remains uncertain if the assisted sovereign State is guided by the incitement. Accordingly, the ILC notes that incitement “is *generally not considered as sufficient* to give rise to responsibility”.[110]

With this, the ILC seems to already apply a general nexus requirement for a conduct to qualify as ‘assistance in the commission of another act.’ In its commentaries, this is later concretized. Assistance must have “caused or contributed to the commission of the internationally wrongful act”.[111] The assistance must be “clearly linked to the subsequent wrongful conduct”.[112] Not necessary is however that the assistance is “essential for the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”[113] The ILC hence does not require a ‘but for’ causality.[114] What is needed is some form of causative connection

Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit (2007) 254-255; Nolte, Aust, *ICLQ* (2009) 10 note 43; Aust, *Complicity*, 225-230; Jackson, *Complicity*, 155-157; Alexander AD Brown, 'To complicity… and beyond! Passive assistance and positive obligations in international law', 27 *HagueYIL* (2016); Lanovoy, *Complicity*, 96-97; Pacholska, *Complicity*, 97, 187-188.

107 ILC ARS Commentary, Chapter IV, 65 para 9. Arguably, this also embraces a prior assertion that a planned conduct is lawful. In Article 41(2) ARS, the ILC distinguishes between the “recognition as lawful” and “aid and assistance,” indicating that the conducts are distinguishable. The ILC makes the distinction for assistance *after the fact*. A prior assertion that a planned conduct is lawful seems to be however the equivalent to a ‘recognition as lawful’ after the fact. For different views on the relationship between assistance (after the fact) and non-recognition see Aust, *Complicity*, 334-337.

108 Similarly, Jackson, *Complicity*, 154-155.

109 Seventh Report Ago, 54 para 62, 63; Second Report Crawford, 47 para 164, 50 para 182.

110 ILC ARS Commentary, Chapter IV, 65 para 9, emphasis added. Nolte, Aust, *ICLQ* (2009) 13 base this on the “factual uncertainty” whether the instigated State will act.

111 ILC ARS Commentary, Article 16, 66 para 1.

112 Ibid para 5.

113 Ibid.

114 Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House Research Paper, Chatham House, 2016) 8 para 21; Aust, *Complicity*, 212 note 86 and 215 doubting that such a standard is viable for a responsibility for complicity in general; Felder, *Beihilfe*, 249. It may be different for indemnification, Pacholska, *Complicity*, 243-245.

to the assisted use of force,[115] or, as Helmut Aust argues, "aid or assistance must have made a difference."[116]

Accordingly, the ILC stipulates a *de minimis* threshold for Article 16 ARS, limiting the scope of aid and assistance in that it must actually facilitate the use of force. In practice, the ILC does not understand this as a high hurdle.[117] Article 16 ARS also embraces assistance that "may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered."[118] Moreover, the ILC holds that "cases where that internationally wrongful act would clearly have occurred in any event" are covered, too.[119]

This suggests that the ILC seeks to exclude only manifestly futile contributions that inherently may not impact the internationally wrongful act.[120] Manifestly minimal and remote contributions likewise may fall outside the scope. Yet, this should be accepted only if assistance has as little impact as instigation, symbolic and political endorsement, or the continuation of trade relations unrelated to a specific act are considered to have.[121] It is true that thus incidental relationships that may arise from virtually every State interaction could fall under Article 16 ARS.[122] Yet, a broad nexus element allows for necessary flexibility. There is little convincing reason to exclude assistance with an objectively remote or incidental connection to the assisted act that may normally be no more than general State cooperation if provided deliberately and with positive knowledge to support an unlawful act.[123] The subjective element sufficiently protects (good faith in) general

115 Moynihan, *Aiding and Assisting*, 8 para 21.
116 Aust, *Complicity*, 217.
117 See also ibid 279 "the general importance of causality in the first category may be questioned".
118 ILC ARS Commentary, Article 16, 67 para 10.
119 Ibid 66 para 1.
120 In this direction also Lanovoy, *Complicity*, 95-99.
121 See for example also Moynihan, *Aiding and Assisting*, 10 para 27 who points out that the nexus requirement in Article 16 ARS is flexible. In case that the assisting State contributes only incidentally, but the subjective element is present, this may be proof that the nexus requirement is also fulfilled. The elements may influence each other.
122 But see Jackson, *Complicity*, 158 arguing for a threshold of "significant contribution" without further specifying the meaning. See also the debate within the ILC on the required "material facilitation" that suggests that some *de minimis* threshold should exist, Second Report Crawford, 50.
123 See also Moynihan, *Aiding and Assisting*, 10 para 27 in view of the example of freeing up another State's capacity.

state cooperation. Moreover, the assisting State will not be overly burdened, as the content of responsibility is defined by its (little) contribution.

On the other side of the spectrum, "aid and assistance" in terms of Article 16 ARS is distinguished from co-perpetration in an internationally wrongful act. The ILC requires that the assisted act must remain an act by another State.[124] The assisted act must neither be an act of the assisting State (either through attribution of conduct or a violation of the primary norm by the assisting State itself), nor must the assisting State bear responsibility for the assisted act. Accordingly, the pertinent act of assistance must at least not lead to attribution of conduct[125] or meet the test of Articles 17 and 18 ARS.[126]

As a consequence, a strong nexus between the assistance and the assisted internationally wrongful act does not generally oppose a qualification as "aid and assistance" in terms of Article 16 ARS.[127] For example, according to the ILC, Article 16 ARS covers the case "where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred", too. Likewise, the qualification as an indirect use of force appears not oppose the qualification also as assistance under Article 16 ARS.[128] The examples given by the ILC affirm this conclusion. Without attention to the nuanced characterization of the respective assistance, the ILC qualifies the territorial assistance provided by Germany or the UK to the US operations in Lebanon and Libya in 1958 and 1986 respectively as a breach of the "obligation not to use force".[129] Similarly, it uses Article

124 ILC ARS Commentary, Article 16, 66 para 1. The ILC uses the wording "by the latter". This is unfortunately imprecise, as attribution may not be exclusive. In case of co-perpetration it may remain the conduct of the assisted State, nonetheless. The conduct can be conduct of the assisted State *and* of the assisting State. It should be hence understood as 'by the latter *only*.'

125 See above. Note that there is wide agreement that contributions short of force do not qualify as 'joint conduct.' See also Lanovoy, *Complicity*, 149 note 304; Lanovoy, *Complicity in an Wrongful Act*, 144. He does not explain however when and how an "essential contribution" leads to attribution.

126 See also Lanovoy, *Complicity*, 138-160; Aust, *Complicity*, 119-224. See also Felder, *Beihilfe*, 251-252.

127 The strong nexus is relevant for the content of responsibility. The injury suffered can be concurrently attribute to the assisting and the assisted State. Consequently, the assisting State may bear responsibility that is practically not distinguishable from the assisted State's responsibility. Both States are responsible for all consequences. ILC ARS Commentary, Article 16, 67 para 10.

128 See also ILC ARS Commentary, Article 16, 65 para 2 note 273.

129 Ibid 66 para 7.

3(f) Aggression Definition and the first principle of the Friendly Relations Declaration as examples, both being cases of an indirect use of force.[130]

On a general note, the requirement of "aid and assistance" hence serves as no more than a preselection. Article 16 ARS thus reflects the diversity in practice: potentially any conduct may qualify as assistance as long as it makes a contribution to the internationally wrongful act.

c) The subjective prerequisites: Article 16 (a) ARS

In view of the limited objective restrictions to Article 16 ARS, the subjective element stands at the center of the ILC's conception of aid and assistance. For the ILC, the subjective element is the essential screw to adjust the responsibility, and to ensure that the "very broad concept of 'facilitation' [does not] sweep into the net of responsibility a very wide range of States."[131]

(1) Knowledge of the circumstances of the internationally wrongful act

Article 16 ARS requires knowledge of the circumstances of the internationally wrongful use of force. The commentary specifies that this entails awareness "of the circumstances making the conduct [i.e., the use of force] of the assisted State internationally wrongful."[132] "If the assisting State is unaware of the circumstances in which its assistance is intended to be used by the other State, it does not bear responsibility."[133]

Knowledge must be hence specific and embrace the essential elements of the conduct as defined by the violated international obligation. In the context of the *ius contra bellum*, this requires the assisting State's awareness of (1) the assisted State resorting to force in its international relations. This includes at least the targeted State or actor as well as the basic features of a concretized operation. The assisting State must (2) know about the circumstances that render the use of force unlawful. For example, it must know that the assisted use of force cannot be based on a justification; that the assisted use of force does not respond to an armed attack; the assisted

130 Ibid 66 para 2 note 273.
131 Lowe, *JIntl&Dipl* (2002) 11.
132 ILC ARS Commentary, Article 16, 66 para 3.
133 Ibid para 4.

use of force will be of such an extent that renders it disproportionate; or that the assisted use of force is not necessary; that there is no authorization or invitation. Unlike what would be required in case of violations of international humanitarian law, it is however not necessary that the assisting State has specific knowledge about all specifics of how the operation is conducted, e.g., whether civilians are targeted.[134] It suffices that the assisting State knows about the essential wrong.

The requirement of knowledge about the circumstances making the conduct unlawful has several implications.

First, it means that if the State provides assistance to a specific use of force that may be conducted in several manners, both in violation of or in accordance with international law, the assisting State will only be responsible under Article 16 ARS in connection with an unlawful act, if the assisting State has *knowledge about the relevant circumstances* making the conduct unlawful.[135] It does not mean, however, that the assisting State must have determined the *unlawfulness* of the act. It suffices that the assisting State is aware of the pertinent circumstances. In the context of the use of force, this situation is particularly relevant if the assisting State knows that the assisted State will use force (knowledge about the 'if' of the operation), but not about the exact implementation of the operation (the 'how'). If the operation itself was in accordance with international law, subject to the condition that it was exercised proportionately, the assisting State would not bear responsibility if it did not have knowledge about the circumstances rendering the use of force disproportionate, or in other words, if it assumed circumstances rendering the use of force proportionate. However, unlike for the IHL violations, knowledge about the "how" is, in most circumstances, not relevant – as it primarily relates to the proportionality requirement. For the unlawfulness for other reasons, no such knowledge is needed.

Moreover, the assisting State will be responsible only in connection with the assisted conduct it has knowledge about. Even if the assisting State knows about the assisted State using force, it is not responsible for any violation of the *ius contra bellum*. Lowe's illustration captures this well.[136]

134 This specificity renders the application of Article 16 ARS particularly difficult in the context of violations of international humanitarian law.

135 It is hence not sufficient if the assisting State does merely not positively know about the lawfulness of the act.

136 Lowe, *JIntl&Dipl* (2002) 12.

An assisting State that allows armed forces of an assisted State to take off from its territory is only responsible for the actions if it knows about the specific conduct. If the assisting State only knew about plans to overfly the territory, it would not be responsible for a contribution to air strikes that the armed forces may have engaged in. If it knew about the plan of a limited use of force, it would not be responsible for having contributed to an occupation that the armed forces may eventually have established.[137]

Last but not least, the requirement raises the bar for responsibility for *ultra vires* acts. Unless the assisting State has specific knowledge, it will not be responsible.[138]

On that basis, it is crucial to understand *when* a State has knowledge.

The ILC adopted a stringent approach. Failed attempts to define knowledge as "constructive knowledge" (should have known)[139] point towards a narrow understanding.[140] Consequently, even if there were due diligence obligations to assess a situation,[141] the failure to comply with these obligations would not lead as such that the assisting State has (or more precisely can be treated to have) "knowledge" as required by the ILC. They remain separate obligations. This again does not exclude, however, that the assisting State in the course of discharging any due diligence obligation acquires knowledge about relevant circumstances.

137 It is true that both qualified as "use of force" according to Article 2(4) UNC. This allows for the argument that the assisting State that knows about an unlawful limited use of force knows all relevant circumstances rendering the conduct wrongful, also when the assisted State occupies the territory instead of using limited force. The occupation is arguably only an *aggravation* of the wrongful limited use of force that the assisting State knows about. It could be argued that the occupation is only about the "specifics" of the unlawful use of force. It is submitted here however that the assisting State would not know about the essential wrong. But the distinction has to be drawn for each individual case.

138 Lowe, *JIntl&Dipl* (2002) 9-10. This is a decisive difference to the rules on attribution of conduct, based on structural grounds, see above note 6.

139 See e.g. the Netherlands proposed hold an assisting State responsible "where it knows or should have known the circumstances of the internationally wrongful act." ILCYB 2001 vol II(1), 52. This has been rejected. ILC, Summary Record of the 2681st Meeting (29 May 2001), ILCYB 2001 vol I, 90, 95, para 50.

140 See also *Bosnia Genocide*, 218 para 421; Talmon, *Plurality of Responsible Actors*, 219 for a due diligence standard *de lege ferenda*; Lowe, *JIntl&Dipl* (2002) 10 indicating that such due diligence standard might develop. But this question is controversially debated: Aust, *Complicity*, 236 with further references; Lanovoy, *Complicity*, 100; Jackson, *Complicity*, 159-162; Moynihan, *ICLQ* (2018) 460-461.

141 Such obligations are the necessary counterpart of a constructive knowledge standard, Pacholska, *Complicity*, 199-200.

As regards the standards knowledge must meet, the ILC did not positively define 'knowledge' or 'awareness'. Several authors understood it however to require "actual or near-certainty" regarding the circumstances of the internationally wrongful act.[142] In interpreting "knowledge," it should be taken into account that it is impossible to have actual or near-certainty about the circumstances making unlawful conduct that lies in the future. At the point in time of the provision of assistance, there are only plans and intentions, which are executed later. On that basis, it is conceived to be overly restrictive to confine knowledge to actual knowledge of what has been previously planned. Knowledge embraces also foreseeable consequences, i.e. particular consequences that will occur in the ordinary course of events.[143]

Ultimately, it comes down to a question of proof and evidence. From what may the assisting State's positive knowledge be inferred? For example, to what extent may the assisted State's previous record of compliance with the *ius contra bellum* be taken into account? To what extent does awareness about a general policy entailing threats to use military force against a specific actor that would violate international law allow for the conclusion of knowledge about a use of force?[144] Can one infer from the fact that the assisted act originated from the assisting State's territory that it had knowledge?[145] As Moynihan aptly notes, "in the process of inferring whether a State had knowledge, the distinction between the different levels of knowledge […] becomes a fine one."[146]

As a general rule, one should be cautious to draw such inferences, in order not to introduce a lower level of knowledge through the backdoor. Knowledge requires *specificity*. *General* knowledge does not suffice. Where to draw the line, i.e., when knowledge is sufficiently specific, is a question of evidence and proof to be assessed in the individual case, which requires balancing many features. The lapse of time may be one of them.

142 Moynihan, *ICLQ* (2018) 460-461, 471; Moynihan, *Aiding and Assisting*, 13; Jackson, *Complicity*, 161.

143 Lowe, *JIntl&Dipl* (2002) 8; Lanovoy, *Complicity*, 100, 221-227; Moynihan, *Aiding and Assisting*, 16 para 52.

144 For example, Turkey's position on "Kurdish terrorists" in neighboring countries is internationally well-known, as is its readiness to use force against those "terrorists" on a (shaky) international basis.

145 On this question *Corfu Channel Case (United Kingdom, Albania)*, merits, ICJ Rep 1949, 4 [*Corfu Channel*], 18.

146 Moynihan, *Aiding and Assisting*, 16 para 53, see also 54. See also *Corfu Channel*, 18 indicating that the specific situation may influence the burden of proof.

If assistance and the assisted act do not stand in immediate temporal connection, as for example in case of a general security cooperation entailing the delivery of armament, the assisting State will only be responsible for a use of force taking place some years later, if it was positively aware of that specific operation. Likewise, one should be reluctant to infer knowledge from the mere location where the act takes place, although it may affect the standard of proof.[147] Similarly, the assisting State's behavior and the legal environment can be taken into account.[148] To the extent States have close military cooperation, however, it is more likely that a State has knowledge. For example, structural exchange on a military level, or the deployment of liaison officers to a specific military operation, may strongly indicate that a State has knowledge.

(2) Intention to facilitate?

In its commentaries to Article 16 ARS, the ILC suggests that there is an additional condition: the intent to facilitate.[149] The Article itself remains however silent on such a criterion.[150] The ILC's deliberate ambiguity[151]

147 The ICJ held in the *Corfu Channel* Case, 18, that "it cannot be concluded from the mere fact of control exercised by a State over its territory and waters that the State necessarily knew or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew or should have known, the authors." See also Heathcote, *State Omissions and Due Diligence*, 300; Aust, *Complicity*, 246-247.

148 See on willful blindness of the assisting State Moynihan, *ICLQ* (2018) 461-462; Jackson, *Complicity*, 54, 162. See also Aust, *Complicity*, 246-249.

149 "[W]ith a view to facilitating the commission of an internationally wrongful act", para 1; "intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct", para 5; "deliberately participates", para 7. Likewise, the Special rapporteurs required intent: Seventh Report Ago, 58 para 72, 60, para 75; Second Report Crawford, 49 para 175: "specific intent to assist".

150 This is in particular noteworthy as an earlier draft required "assistance *for the commission of an internationally wrongful act*." Article 27, Report of the International Law Commission on the work of its Thirtieth session, 8 May – 28 July 1978, A/33/10, ILCYB 1978 vol II(2), 80.

151 Throughout the preparatory works, it was repeatedly stressed that not only the commentaries, but the Articles should expressly entail such a criterion. Comments of the US Government in the 50th session of the ILC, A/CN.4/488 (22 October 1997). Second Report Crawford, 50, para 180 suggested that it was not enough to mention it in the commentary. On the other hand, several ILC members were opposed to such a criterion. Aust, *Complicity*, 232-235.

as well as the division among States on this issue[152] has promoted fierce academic discussions regarding whether it is required, and if so, what this means and how it relates to knowledge. This is not the place to revisit a debate that others have addressed extensively.[153] For the present context, it suffices to note that according to the ILC's approach such a requirement would apply to any kind of support. Under Article 16 ARS, assistance hence would always stand under the impression of potentially additional limiting criterion that awaits authoritative settlement.

(3) Knowledge at what point in time?

The assisting State must have knowledge at the time of the provision of assistance by the assisting State.[154] Generally, later acquired knowledge about the circumstances making the assisted conduct unlawful does not render an act of assistance unlawful. This also means that for continuing or repeated similar assistance to continuing or repeated similar conduct, the assisting State is required to constantly assess the factual background and, where indicated, adjust its contribution. The longer a breach is lasting, the more likely an assisting State has acquired knowledge about the relevant factual circumstances. This again highlights the crucial importance to precisely define the assisting State's act of assistance. This is in particular decisive where the direct contribution to the use of force is not attributable to the assisting State, but where the assisting State is only implicated in a third actor's contribution.

d) The opposability requirement: Article 16 (b) ARS

Responsibility under Article 16 ARS is further limited by the requirement that the assisted act has to be internationally wrongful had it been commit-

152 Pacholska, *Complicity*, 105, 107.

153 For a detailed overview of the arguments see Aust, *Complicity*, 236-237. Requiring intent: ibid 377; Moynihan, *ICLQ* (2018) 466; Lowe, *JIntl&Dipl* (2002) 6-7. Critical of the requirement: Lanovoy, *Complicity*, 101-103, 227-240; Jackson, *Complicity*, 160-161; André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law', 31(1) *EJIL* (2020) 43 para 6.

154 Moynihan, *Aiding and Assisting*, 17 para 55-57.

ted by the assisting State itself.[155] In light of the *pacta tertiis* rule, the ILC particularly sought to exclude responsibility for assistance to violations by the assisted State of treaty obligations to which the assisting State has not subscribed. At the same time, the precondition entails a policy decision: according to the ILC, assistance to a wrongful act of the assisted State that would not be wrongful also for the assisting State is not considered illegal.[156]

The universal prohibition to use force is not only stipulated in the almost universally ratified UN Charter. It also reflects customary international law. As States are universally bound by the same rules, the condition will hence not widely serve as a limiting criterion in the realm of the *ius contra bellum*.

Still, the condition might be relevant in the present context: it may preclude responsibility in cases in which the *assisting* State has a right to use force against the targeted State that the *assisted* State does not have. Notably, this would be relevant for a potential right of self-defense, an authorization, or a (treaty-based, indefinite) invitation that the assisting State *may*, but the assisted State *may not,* rely upon. The assisting State would assist in an unlawful use of force by the assisted State against the targeted State. But the assisting State could have lawfully used force itself against the targeted State. The assisted act would not be an internationally wrongful act if committed by the assisting State itself.[157] The assisting State would hence not bear responsibility under Article 16 ARS.

The ILC is not without ambiguity regarding whether such a consequence was intended. The text of Article 16 ARS requires in a general manner that the act would be "internationally wrongful if committed by that State". Here, it arguably would not be. This literal interpretation also corresponds with the general idea behind the opposability requirement: "a State can-

155 The ILC seems to view it as a necessary condition, ILC ARS Commentary, Chapter IV, 65 para 8 "cannot be allowed to undermine the principle", Second Report Crawford, 50 para 183. But see for critique on the criterion: Jackson, *Complicity*, 166-167; Lanovoy, *Complicity*, 240-257; Lanovoy, *Complicity in an Wrongful Act*, 159-161; Pacholska, *Complicity*, 111.

156 Recall that the ILC's decision has been taken in view of the debate on the primary or secondary nature of Article 16 ARS, see also note 91.

157 Article 2 ARS, that defines an internationally wrongful act, requires i.a. a "breach of an international obligation of that State". It hence depends on what constitutes a "breach", and its relationship with circumstances precluding the wrongfulness. If a recognized right to use force (that precludes the wrongfulness) is understood to exclude a breach, there would be no internationally wrongful act.

not do by another what it cannot do by itself."[158] In the commentary, however, the ILC describes the limitation of responsibility to assistance "in the breach of obligations by which the aiding or assisting State is itself bound."[159] In view of the goal to preserve the *pacta tertiis rule*, this could be interpreted more narrowly, to only exclude cases in which the assisting State is not bound by the obligation violated by the assisted State. Not at least, it remains a contribution to an unlawful act.

e) A different threshold for assistance to serious breaches of peremptory norms?

Article 41(2) ARS stipulates that no State shall "render aid or assistance in maintaining [a] situation" created by a serious breach of an obligation arising under a peremptory norm. Article 41 ARS does neither require knowledge or intent, nor does it stipulate the opposability requirement. As the prohibition to use force is widely considered an *ius cogens* norm[160], this might allow for the argument that under general international law the conditions, in particular the subjective element, may be relaxed for assistance to the use of force.[161]

Even leaving the controversy on the *lex lata* status of Article 41(2) ARS aside,[162] such an argument should be met with reservation.

In particular, one should be careful to understand the ILC to have substantially loosened or even given up the subjective element. First, the ILC

158 ILC ARS Commentary, Article 16, 66, para 6.

159 Ibid. Focusing also on this aspect of the rule Aust, *Complicity*, 252-266.

160 Fourth Report of the Special Rapporteur (Dire Tladi) on Peremptory Norms of General International Law (Jus Cogens), A/Cn.4/ 727 (2019), para 60, 62-68; James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', 32(2) *MichJIntlL* (2011); Oliver Corten, Vaios Koutroulis, 'The Jus Cogens Status of the Prohibition on the Use of Force. What Is Its Scope and Why Does It Matter?' in Dire Tladi (ed), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (2021).

161 See for a discussion Aust, *Complicity*, 340-342; Moynihan, *ICLQ* (2018) 470-471; Pacholska, *Complicity*, 118-128.

162 Accepting it only "as a matter of logical construction" Aust, *Complicity*, 343-344. But see more recently Pacholska, *Complicity*, 116-118; 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) 251-253.

underlined that Article 41(2) ARS "is to be read in connection with Article 16" ARS. As such, it re-emphasized that "the concept of aid or assistance [...] presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". It did not find it necessary "to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State."[163] The ILC hence did not abandon the subjective preconditions for responsibility. It facilitated proof, as it suggests that knowledge may be presumed.[164]

Moreover, in any event, Article 41(2) has a narrow scope of application. It does not cover *any* assistance to a use of force. The attenuated conditions are qualified (and justified[165]) in a threefold manner. First, the assisted use of force must be in violation of a peremptory norm. Second, the pertinent use of force would need to amount to a gross or systematic failure to comply with the obligation not to use force.[166] Third, and most importantly, Article 41(2) ARS concerns assistance "after the fact". Article 41(2) ARS governs assistance to *maintain a situation* created by a serious breach of peremptory norms. While the ILC sees this to also embrace assistance to a continuing breach of international law,[167] and thus introduces some conceptual unclarities, the ILC makes it clear that Article 41(2) ARS does not introduce a special complicity regime for assistance to any breach of a peremptory norm. Instead, Article 41(2), as a general rule, concerns

163 ILC ARS Commentary, Article 41, 115 para 11.

164 But see Aust, *Complicity*, 422 for an argument that a higher degree of vigilance may be justified, and that stricter standards may develop. See also Pacholska, *Complicity*, 126, 252 claiming that for some limited forms of *ius cogens* violations such stricter subjective standards (constructive knowledge) have developed already.

165 Aust, *Complicity*, 342, 347.

166 Cf Article 41(2) is limited to serious breaches. A breach is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation. For critique as this implies that there can be non-gross or non-systematic breaches of peremptory norms, see Aust, *Complicity,* 326.

167 ILC ARS Commentary, Article 41, 115, para 11 where the ILC suggests that "[...] it applies whether or not the breach itself is a continuing one." See on this Aust, *Complicity,* 338; Lanovoy, *Complicity*, 115; Benjamin K Nussberger, 'Magdalena Pacholska, Complicity and the Law of International Organizations. Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations (Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA, 2020) 288 pp', 58(1) *MLLWR* (2020) 123.

assistance *after the commission of the wrongful act*.[168] This limits the application of Article 41(2) ARS to cases of the use of force considerably. In fact, it may only lead to a dual application for a use of force that has a continuing character, like an unlawful occupation or the stationing of armed forces in another State without its consent.[169] Here, assistance may facilitate an ongoing violation *and* the maintenance of a situation created by a breach of the prohibition to use force at the same time. Only in these cases do both Articles 16 and 41(2) apply.[170] In fact, throughout the ILC's work, assistance to the commission of a wrongful act is kept distinct from assistance after the fact.[171]

In particular, the ILC did not suggest that attenuated conditions apply to violations of the *ius contra bellum*. It frequently referred to examples of assistance to (notably non-continuous) use of force in justifying and illustrating the general conditions of Article 16 ARS.

Furthermore, the attenuated subjective condition is linked to the limitation of Article 41(2) ARS to assistance after the fact, and its longer duration, and the concomitant identifiability.[172]

Last but not least, the character of Article 41(2) ARS is based on a notion of interdependence and solidarity in reaction to serious breaches of peremptory norms. It was not concerned with classical assistance. Instead,

168 ILC ARS Commentary, Article 41, 115 para 11; Moynihan, *Aiding and Assisting*, 23 para 82. But see for some authors that read the ILC's statement in the commentary to mean that Article 41(2) applied to breaches of non-continuing nature, hence to assistance to the commission of an act, too. Pacholska, *Complicity*, 133. Such an understanding does not consider however that the ILC thereby only pointed to the extension of the complicity regime compared to Article 16. One cannot necessarily conclude however that the ILC thought Article 41(2) to also apply to situations of Article 16 ARS.

169 ARS Commentary, Article 16, 115 para 11. "It extends beyond the commission of the serious breach itself to the maintenance of the situation created by the breach, and it applies whether or not the breach itself is a continuing one." See also Aust, *Complicity*, 339 who likewise suggests that Article 41(2) ARS may apply to wrongful acts of continuing character. For the examples which the ILC views as having a continuing character, cf ILC ARS Commentary, Article 14 para 6.

170 See also Nina H B Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in Crawford James, Pellet Alain and Olleson Simon (eds), *The Law of International Responsibility* (2010) 692; Aust, *Complicity*, 338-339.

171 Cf e.g. ILC ARS Commentary, Chapter IV, 65, para 9.

172 ILC ARS Commentary, Article 41, 115 para 11. See also Nolte, Aust, *ICLQ* (2009) 17; Aust, *Complicity*, 342.

it was linked to the idea of enforcement – hence also the focus on assistance *after the fact*.[173]

All this indicates that the ILC does not assume special conditions taking into account the fact that assistance was provided to a breach of the peremptory prohibition to use force.

3) Relationship to specific rules governing assistance

Article 16 ARS is a *general* rule. It applies in case of any internationally wrongful act. The rule on aid and assistance hence greatly impacts any area of interstate cooperation.[174] It was drafted with the awareness of the reality of a globalized world and vast State cooperation.[175] The narrow framing of Article 16 reflects the will not to overly discourage generally beneficial and desirable cooperation.

The general conceptualization of rules governing assistance may be inherent to a certain logic.[176] Nonetheless, neither of the requirements in its specific form is a necessary theoretical precondition for responsibility for assistance in the commission of an internationally wrongful act. The framing of the key limiting criteria of knowledge and opposability is ultimately also guided by a policy to fairly allocate risk.[177] This is not to say that the conditions may not be wise, pragmatic, or realistic, not at least to ensure acceptance and effective compliance among States. The ILC may be right in that – for this general rule – there is no persuasive legal or moral argument to loosen the criteria.

But crucially, other factors could play a role. Vaughan Lowe, for example, noted that "it may be different if the materials supplied are inherently dangerous, or designed specifically and uniquely for some unlawful purpose."[178] The ILC acknowledged this, too, when it pointed to the diversity

173 Jørgensen, *Non-Assistance*, 690.
174 Nolte, Aust, *ICLQ* (2009).
175 ILC ARS Commentary, Chapter IV, 65 para 8.
176 See e.g. Seventh Report Ago, 58 para 73. Also Aust, *Complicity*, 239.
177 The ILC appears to acknowledge this in its commentaries. Cf ILC ARS Commentary, Chapter IV, 65 para 8. "For example, a State providing financial or other aid to another State *should* not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful." Emphasis added. See also para 9 with respect to "incitement".
178 Lowe, *JIntl&Dipl* (2002) 6.

of specific substantive rules prohibiting assistance in the commission of certain wrongful acts, which it did not view to stand against a general rule, however.[179]

As is well known, the provision was not designed solely as progressive development of international law. The ILC viewed these conditions to be grounded in State practice.[180] It engaged in deductive reasoning.[181] Accordingly, Article 16 ARS in its genesis has been strongly influenced by State practice and specific rules on assistance.

In more recent practice, this has turned around. The general standards accepted in Article 16 ARS inform the interpretation and understanding of more specific rules.[182] This is not surprising as specific and general rules are interdependent and mutually inform each other's interpretation and scope.

This does not mean however that the general nature and origin of Article 16 ARS should be forgotten. It is not the gold standard to regulate assistance. Specific rules are not merely supplementing the general rule of Article 16 ARS.[183] Article 16 ARS is supplementing the specific rules. And Article 16 ARS is not supplanting the specific rules.

The fact that this is not just a theoretical chicken-egg problem is particularly apparent when recalling that the idea of Article 16 ARS was introduced only in the 1970s, and accepted as *lex lata* (leaving aside when a rule of customary international law begins to exist) only in the 2000s with the adoption of the ARS and the ICJ's recognition in the Genocide case. But assistance was subject to regulation even before that.

Moreover, specific rules may have different, more demanding standards.[184] In particular, they might also impose stricter regulatory regimes on assistance. Also, legal consequences attached to assistance may differ. Assistance to a wrongful act may not always be treated as equivalent

179 ILC ARS Commentary, Article 16, 66, para 2.

180 E.g. Seventh Report Ago, 58 para 73. But see with respect to the opposability requirement: Aust, *Complicity*, 251.

181 Jackson, *Complicity*, 135-136 describes it as a "move from the specific to the general – from a prohibition on a specific form of complicity in a specific wrong to a broad prohibition on complicity in any international wrong". See also 152-153.

182 For this see e.g. the Genocide Case, in which the ICJ relied on Article 16 ARS to inform its analysis of the meaning of "complicity" in the Genocide Convention. *Bosnia Genocide*, 217 para 420.

183 But see for this Aust, *Complicity*, 379.

184 Nolte, Aust, *ICLQ* (2009) 17; Aust, *Complicity*, 376 et seq for an overview; Moynihan, *Aiding and Assisting*, para 96-101. Indirectly also ILC, ARS Commentary, Article 16 para 2.

to the wrongful act. On that note one should be cautious to hastily apply the general standard, burying the many more specific standards in oblivion.

Obviously, this does not exclude the possibility that specific rules may be (re)-informed, and that this leads to a generalization of a fragmented regime governing interstate assistance. It is unproblematic if main interpreters of international law, particularly States, follow such an approach of putting (only) Article 16 ARS at the center of the legal regime governing assistance. This would be the normal process of interpretation and evolution of an international law in a constant flux. It may not have been the ILC's objective. But this process is inherent to any written "codification" capturing a rule in flux that can benefit from the ILC's authority.[185] In fact, for some States, the ILC's high hurdles to responsibility might be preferable to the existing obligations in the specific areas of international law. As such, it would be little surprising that those States welcome and actively advocate for the ILC's authoritative rule governing assistance.

It is of more concern, however, if external assessors, who are not directly involved in the formation of international law, grant Article 16 ARS a place of such prominence in their analysis that the nuances in the regime governing international law are not reproduced comprehensively.[186] Article 16 ARS does not, and does not claim to, embody the full picture of the regulatory regime on interstate assistance. Likewise, it is problematic, if references to Article 16 ARS replace efforts to determine the exact scope of potentially differing specific rules of international law.[187]

Helmut Aust's observation is accurate that Article 16 ARS is part of a network of rules governing assistance.[188] Despite the increasing prominence of Article 16 ARS in debates, other, yet mostly non-codified, norms generally

185 See also Jackson, *Complicity*, 152.

186 For a similar concern with respect to due diligence obligations Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 35 *GYIL* (1992) 21-22. But now Article 16 ARS is typically referred to describe the regime on assistance to a use of force, e.g. Oliver Dörr, 'Use of Force, Prohibition of' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, September 2015) 31.

187 Cf the ICJ in the *Bosnia Genocide* case did not subscribe to such an approach, as it assimilated Article 16 ARS and the prohibition of complicity in genocide only on the assumption that it saw "no reason to make any distinction of substance". Still, the mere *assertion* that there were no differences nourishes the impression in an unfortunate manner that the assimilation is a general rule. See also Nussberger, *MLLWR* (2020) 122.

188 Aust, *Complicity*, 379.

governing assistance for a particular field of international law may and do coexist.[189]

One may be tempted to argue that now the relationship between the general and specific rules governing assistance is less pressing for assistance relating to the use of force. It is true that assistance to the use of force has played an important role in shaping the (high) requirements on assistance.[190] The ILC relied extensively on the practice relating to the use of force. The ILC's debates were dominated by examples relating to the use of force. So were the commentaries. The ILC even felt compelled to state that the rule on assistance was "not limited to the prohibition on the use of force."[191] One could get the impression that the ILC has stipulated a rule that in particular applies to assistance to the use of force.

On that note, it is little surprising that the analysis has shown that (the current) Article 16 ARS, in many facets, coincides with the specific rules governing assistance to a use of force without UN involvement. To this extent, the *ius contra bellum* rules are *leges speciales* that allow for a more nuanced qualification of assistance. Most notably, the *ius contra bellum* regime draws a clear line between the (preconditions of the) prohibition to use force and to participate in a use of force that Article 16 ARS at times blurs. The rules remain distinct, both theoretically and practically. Content-wise, now widely parallel paths may diverge again, and already do so, as, for example, the more flexible approach of the prohibition of participation (e.g. with respect to the subjective element) indicates. The rules then complement each other.

B. Assistance as 'direction and control' or 'coercion'

A State may bear international responsibility if it 'directs and controls' another State in the commission of an internationally wrongful act or if it 'coerces' another State to do so.[192] In both situations, the directing and

189 See also Lanovoy, *Complicity*, 204 arguing that Article 16 ARS is "residual in that context". Stressing this in the debates on the ARS, e.g. Germany, A/C.6/54/SR.23 para 3 (1999).
190 Recall Chapter 4, II.A.5.
191 ILC ARS Commentary, 67 para 9.
192 Article 17 and 18 ARS.

controlling or coercing State bears responsibility *for* the directed or coerced act.[193]

An act of assistance will however usually not lead to such an attribution of responsibility on those grounds. The ILC conceptually distinguishes the conduct falling under both provisions from conduct that qualifies as assistance in terms of Article 16 ARS.[194] This is also reflected in the prerequisites of Articles 17 and 18 ARS.

Article 17 ARS requires the respective State to control and direct the pertinent act in its entirety. "The term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind."[195] Additionally in regard to direct and control over the specific act, the commentary suggests that the application of Article 17 ARS is grounded in relationships of structural dependency, like suzerainty, protectorates, colonial relationships or occupation, not in State cooperation, such as in international coalitions, in particular if confined to assistance.[196]

While coercion under Article 18 ARS is not limited to unlawful coercion,[197] it requires "[n]othing less than conduct which forces the will of the coerced State", "giving it no effective choice but to comply with the wishes of the coercing State". [198] Not sufficient is however "that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct."[199]

Accordingly, the act of providing assistance on its own, without further qualification, does typically not meet the threshold of these articles. The fact that these articles do not cover assistance is also reflected in State practice. Not only are they seldom applied in practice. But also assistance

193 ILC ARS Commentary, Article 17, 68 para 1, Article 18, 69 para 1. But see also Fry, *Attribution of Responsibility*, 118-119 for the question whether at least Article 17 ARS provides direct or derivative responsibility.

194 ILC ARS Commentary, Article 17, 68 para 1.

195 Ibid 69, para 7.

196 Ibid 68, para 4. This background has been more express in the previous draft Article 28, Eight Report on State Responsibility by Roberto Ago, A/CN.4/318 and Add.1 to 4 ILCYB vol II(1), 4-26, 26 para 47.

197 ILC ARS Commentary, Article 18, 70, para 3.

198 Ibid 69, para 2.

199 Ibid.

as such is not considered meeting the thresholds. To the contrary, if States refer to these concepts, assisting States are rather viewed to be subject of direction and control or coercion, rather than exercising direction and control or coercion through assistance.[200] While this of course is not conclusive, it captures well the spin with which these norms are relevant in the context of assistance.

III. Assistance and due diligence obligations

The identification of specific due diligence obligations has not been part of the normative focus of this book.[201] Still, two types of due diligence obligations may be relevant for interstate assistance: first, international obligations requiring a (procedural) due diligence assessment prior to an act of assistance (A); second, international norms that oblige States to exercise due diligence in order to prevent another State's conduct (B). Accordingly, for the sake of completeness brief remarks on their conceptual place are in order.

200 See for example S/PV.4726 Resumption 1, 35 (Iraq), emphasis added: "As I listened to a number of voices of those who are misled or who have misled others, which declared that *they have joined the camp of war and aggression, in opposition to the United Nations and its Charter*, I am fully aware that they have spoken not because their people wanted them to do so, but because of reasons that are well known to everyone. The warnings that the United States has made to many other Member States have reached us and everyone else present here. *I believe that the United States used a carrot-and-stick policy in order to intimidate or entice smaller States to make them do its bidding. I understand that some other States whose military bases are now being occupied by hundreds of thousands of American soldiers have also been coerced and have no other choice but to obey the orders of the United States.*"

201 As Anne Peters, Heike Krieger, Leonhard Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates' in Anne Peters, Heike Krieger and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (2020) 2 explain due diligence describes a modality attached to a duty of care. Crucially, the question whether there exists a due diligence obligation, and whether there is a general understanding of due diligence as a standard must be kept apart. To what extent international law recognizes due diligence duties with respect to interstate assistance to a use of force is not focus of the analysis.

A. Due diligence obligations informing non-assistance provisions

First, international law recognizes (procedural) obligations requiring a State to exercise due diligence prior to an act of assistance.[202] Such obligations are primarily obligations of conduct. They may also seek to limit the likelihood of contributing to a specific (unlawful) conduct by another State.[203] But they do not go as far as to require the prevention of another State's conduct. In the present context, for example assisting States could be (and in particular under specific treaties are) under the independent obligation to conduct a risk assessment before providing assistance, or to make inquiries about the planned use of the assistance, whether or not assistance is ultimately provided or the use of force actually takes place.[204]

By their nature, such obligations remain distinct from prohibitions of a contribution to the unlawful use of force. They relate to different acts, the former to diligence prior to assistance, the latter to the provision of assistance itself. They describe different wrongs, the former not to have exercised due diligence, the latter to have contributed to a use of force. Accordingly, in general, the mere failure to exercise due diligence does not lead to responsibility for the assisting contribution to an act. This does not exclude that both kinds of obligations may be connected.[205] For example, the assistance norm may embrace a due diligence standard on its own,

202 Obligations of a similar nature under national law may be relevant, too.

203 Such due diligence obligations may exist also irrespective of the risk of contributing to another unlawful act, e.g. in order to comply with the State's other (national) obligations.

204 It must be a *duty* to take such measures. A *right* to do so (e.g. conditionality, consultation or monitoring mechanisms), as for example recognized in agreements to provide weapons or as recognized in some SOFA agreements, is not sufficient. Likewise, such treaty practice does not necessarily suggest that States act upon a legal obligation to take such measures, cf Neil McDonald, 'The Role of Due Diligence in International Law', 68(4) *ICLQ* (2019) 1049. In practice, such measures are widely taken, but it cannot be established beyond doubt that such measures are generally required under international law. Likewise reluctant on the existence of a *general* due diligence obligation before providing assistance: Jackson, *Complicity*, 162; Moynihan, *Aiding and Assisting*, para 49; Moynihan, *ICLQ* (2018) 462-463; Quigley, *BYIL* (1987) 119.

205 See for example in detail Pacholska, *Complicity*, 168-206; Talmon, *Plurality of Responsible Actors*, 219 arguing that such standards may develop *de lege ferenda*; Nolte, Aust, *ICLQ* (2009) 15.

and thus incorporate the failure to comply with the former as one of its conditions.[206]

But irrespective of such a structural connection, rules of assistance must be understood within the system of international law as a whole. International rules interact. In any event, (specific) due diligence obligations of the assisting State, if adequately discharged, may factually impact and inform the application of norms regulating assistance. For example, an obligation to make inquiries may result in knowledge of the assisting State that meets the threshold required by an assistance norm. On the other hand, (mere) "compliance with due diligence [does] not automatically award protection against legal liability" for assistance, if the respective prerequisites are met nonetheless.[207]

B. Due diligence obligations requiring non-assistance

A second type of due diligence obligations may have a more direct impact on the provision of assistance. There may be due diligence obligations that prohibit an act of assistance. States may be under the obligation to exercise due diligence in order to prevent conduct or harm from materializing.[208] These norms are widely described as obligations of prevention or "no harm rules".[209]

Such obligations to exercise due diligence to prevent another actor's act or harm may, *a fortiori,* also oblige States not to negligently contribute to another State's act, below the threshold of participation or perpetration.[210] Crucially, even then, such obligations are characterized by a due diligence

206 E.g. by allowing for constructive knowledge to establish responsibility. What a State *should* have known may then be informed by the respective due diligence standard entailed in a procedural due diligence obligation.

207 Sabine Michalowski, 'Due Diligence and Complicity: A Relationship in Need of Clarification' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) 236-237.

208 McDonald, *ICLQ* (2019) 1044 note 13; Heathcote, *State Omissions and Due Diligence*, 309.

209 Crawford, *State Responsibility*, 227; Pacholska, *Complicity*. Note that conceptually, such norms could also exist without a due diligence requirement.

210 Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', 60(1) *GYIL* (2018); Astrid Epiney, 'Nachbarrechtliche Pflichten im Internationalen Wasserrecht und Implikationen von Drittstaaten', 39(1) *AVR* (2001) 38.

requirement. They are not obligations of result but of conduct.[211] In case the assisting State has deployed its best effort, but contributes to the use of force nonetheless, it does not bear responsibility.[212]

Structurally, such obligations resemble rules governing assistance that render a State a 'participant' in a use of force.[213] In fact, a non-assistance obligation that incorporates due diligence standards is conceptually hardly distinguishable from a duty of prevention.[214] This is particularly evident to the extent that an omission, i.e., failure to prevent, may qualify as 'assistance in legal terms'.[215] In both cases, the assisting State's responsibility is grounded in its own conduct, i.e., the omission.[216] The added value of a qualification under a non-assistance norm may accordingly be put into question.[217] Following the general requirements for responsibility for omission, an omission may only lead to responsibility if there was a duty to take action that was not discharged.[218] For an omission to (also) qualify as participation, it will be already unlawful for a violation of an obligation to prevent under international law.

And still, generally, separate norms not only exist, but were treated throughout the evolution of the rules as distinct.[219]

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211 Heathcote, *State Omissions and Due Diligence*, 308-309.

212 Crawford, *State Responsibility*, 227.

213 Pacholska, *Complicity*, 181-182; Dannenbaum, *Public Power*, 208.

214 Both rules establish ancillary (and derivative) responsibility in the sense that it depends on the occurrence of a (wrongful) conduct by another State. Crawford, *State Responsibility*, 227; Pacholska, *Complicity*, 182.

215 See for the discussion above II.A.2.b.

216 A violation of such norms likewise does not lead to vicarious responsibility, i.e. responsibility for the not prevented act itself. On the terminology see Starski, *ZaöRV* (2015) 446. But also see the discussions with respect to non-State actors whether a preventive failure may lead to an attribution of an attack, e.g. Dannenbaum, *Public Power*, 203 note 60, 208. See above on special attribution grounds.

217 Olivier Corten, Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case' in Karine Bannelier, Sarah SK Heathcote and Théodore Christakis (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (2012).

218 Aust, *Complicity*, 228 note 169.

219 Heathcote, *State Omissions and Due Diligence*, 305; Jackson, *Complicity*, 131. This is also true for Article 16 ARS that the ILC distinguished from no harm rules: e.g. Seventh Report Ago, 53 para 57; Second Report Crawford, 46 para 161 (d) and (e). This was also the case for the concretization of the regime governing assistance to a use of force. See e.g. in the Friendly Relations Declaration, or the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Use of Force in International Relations. In both resolutions, a no harm rule was discussed,

This may find its reasons in the difference in the nature of the norms. Both are necessarily ancillary in nature, and dependent on the other State's conduct to actually take place.[220] But both describe a different international wrong. The wrong for a classic assistance norm derives from the relationship of the act of assistance to the *wrongful* conduct of the assisted act.[221] Crucial is that the relevant act contributes to an internationally wrongful conduct. For a duty of prevention, the wrong lies, however, not *necessarily* in the contribution to a violation of international law. In fact, this allows even for the case that, as far as the assisting State is concerned, the assisted act in question is internationally lawful.[222] The assisted conduct may be considered as a "question of fact."[223] Although both norms impact a contribution to a wrong, the wrong of the duty to prevent is hence grounded in the failure to prevent on the occasion of another actor's unlawful act and in the failure to discharge a duty to take due diligence, not the contributory connection to an unlawful act.[224]

While the precise content of due diligence duties "varies from one instrument to another",[225] generally this is then also conceptually reflected in the different origin, scope, and perception of the norms. The principle underlying an obligation of due diligence and a prohibition of participation does not necessarily run in parallel. Instead, both norms will have

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but treated distinct from a non-assistance norm. Similarly for the law of neutrality, e.g. James Upcher, *Neutrality in Contemporary International Law* (2020) Chapter 3.

220 Dannenbaum, *Public Power*, 208; Lanovoy, *Complicity*, 216. This distinguishes such due diligence norms from those sketched in section III.A.

221 Jackson, *Complicity*, 132; Aust, *Complicity*, 418.

222 Second Report Crawford, 46 para 161 note 315.

223 Ibid. Note that this is optional. Whether this is in fact the case depends on the specific norm in question. It may also be that there is an obligation to prevent a conduct of the assisted State that would be lawful for the assisted State, but wrongful if committed by the assisting State itself (e.g. the Soering case).

224 See also Seventh Report Ago, 52, para 52 note 99, 53 para 57, 58 para 72. Jackson, *Complicity*, 132. See also ILC ARS Commentary, Article 16, 66 para 2 "substantive specific rules exist [...] requiring third States to prevent or repress [wrongful] acts. Such provisions do not rely on any general principle of derived responsibility [...]." ILC ARS Commentary, Chapter IV, 64 para 4 "original not derived from the wrongfulness of the conduct of any other State." In this direction also describing the responsibility as indirect, but not derivative Pacholska, *Complicity*, 182; Jackson, *Complicity*, 5-6; Dannenbaum, *Public Power*, 207-208; Robert Kolb, 'Reflections on Due Diligence Duties and Cyberspace', 58 *GYIL* (2015) 119.

225 *Bosnia Genocide*, 220 para 429; Pacholska, *Complicity*, 178-179.

different legal origins.[226] The preconditions and scope of both rules will differ considerably.[227] Instead of duplicating or excluding each other, they complement each other.[228] In view of the different wrong, non-assistance obligations usually impose a higher threshold for responsibility than a no harm rule that are confined to due diligence measures.[229] Moreover, *de lege lata* the former are more general and comprehensive than the latter, whose scope is often limited to the prevention of a specific conduct.

It is true that the practical difference may be limited once a failure to prevent is established. Under both norms, the assisting States may be considered to contribute to and be responsible for the same damage.[230] But the different labels attached to the 'act of assistance' should not be underrated. A violation of a non-assistance norm reflects a more serious form of involvement and a more reprehensible wrong. Irrespective of whether 'fair labeling' may be legally required in the realm of international responsibility of States,[231] this may have – beyond the (political) signaling effect[232] – decisive legal implications as regards the consequences of the breach (e.g.,

226 Ago has aptly put it: "By such failure, the State in question breaches an international obligation incumbent on it, which is quite different from the obligation breached on its territory by the organ of the foreign State. [… It] are two different internationally wrongful acts […]. Seventh Report Ago, 53 para 57. See also Dominicé, *Multiple States*, 281-282. The no harm rule may derive e.g. from bilateral treaties, general customary law (territorial sovereignty), or the law of neutrality.

227 For a comparison see Pacholska, *Complicity*, 182-188; Lanovoy, *Complicity in an Wrongful Act*, 210-218.

228 Cf for Article 16 ARS, ARS Commentary, Article 16, 66 para 2. Aust, *Complicity*, 381-382.

229 See on general due diligence requirements: Due diligence obligations are best effort obligations. A State is only required to take *reasonable* measures. It is neither required to take impossible measures to prevent, nor to take measures that exceed the capabilities of a State. Moreover, the reasonableness is to be assessed by balancing the nature, scale and scope of the (potential) harm to both States. Michael N Schmitt, 'In Defense of Due Diligence in Cyberspace', 125 *YaleLJF* (2015-2016) 74-76; Kolb, *GYIL* (2015) 117; Heathcote, *State Omissions and Due Diligence*.

230 Seventh Report Ago, 53 para 57; Second Report Crawford, 47 para 164. See also ILC ARS Commentary, Article 47, 125 para 8.

231 Critical for example Pacholska, *Complicity*, 195.

232 Most vividly illustrated by the Genocide Case, where the ICJ rejected responsibility for complicity in genocide, but found responsibility for the failure to prevent genocide. Lanovoy, *Complicity*, 214.

justifying a response in self-defense)[233], the content of responsibility, claims of recourse in case of joint responsibility, or evidentiary questions.[234]

This is not the place to engage with the boundaries of no harm rules applicable to interstate assistance to another State's use of force. Doing full justice to such an assessment would exceed the scope of the present, already extensive analysis. Suffice it to note at this point that several due diligence rules may apply. In particular, in relation to the use of an assisting State's territory, as a corollary to State sovereignty, States are bound by the "obligation to protect within their territory the rights of other States".[235] It is less clear if a similar obligation of prevention exists outside the accepted basis of territorial sovereignty, e.g., for the mere (influential) fact of contributing to another State's use of force,[236] or even more broadly, a general obligation to

233 See also Aust, *Complicity*, 229.

234 See Jackson, *Complicity*; Lanovoy, *Complicity*, 212-217. On questions of proof see *Corfu Channel*, 16-18; Quincy Wright, 'The Corfu Channel Case', 43(3) *AJIL* (1949) 492-493.

235 *Island of Palmas Case (Netherlands v USA)*, 4 April 1928, 2 UNRIAA, 839. See also *Corfu Channel*: "obligation not to allow knowingly territory to be used for acts contrary to rights of other States." *Armed Activities*, Declaration Judge Tomka, 351-353, para 1-6. It has been observed that these due diligence obligations are primarily crafted and applied in judicial practice with respect to conduct by non-State actors, not States, Pacholska, *Complicity*, 183-186. But conceptually, there are no reasons not to apply the rule in the inter-State context. State likewise did not voice such doubts, but instead repeatedly argued for a positive obligation for the interstate context. For example, the USSR in the drafting of 1987-Resolution stipulated that "measures of a domestic nature must be taken which would preclude the possibility of conditions being created that would facilitate the conduct of activities that contradict the principle of the non-use of force in international relations." Report, A/34/41 (1979) para 119, 46. The ILC appears not to exclude the application of such rules in the interstate context either: ILC ARS Commentary, ARS Article 16, 66 para 2: "Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States, or *even requiring third States to prevent or repress such acts.*" In view of cyber operations, States apply the no harm rule also in case of conduct (that may amount to use of force, also) that is attributable to a State. See most recently, Germany, Position paper on application of international law in cyberspace, (March 2021) https://www.auswaertiges-amt.de/blob/2446304/2ae17233b62966a4b7f16d50ca3c6802/on-the-application-of-international-law-in-cyberspace-data.pdf, 3. It remains unclear why, as e.g. Pacholska 186 argues, this practice should be specific to the nature of cyber activities. In favor of the application to interstate assistance also Olivier Corten, *Le Droit Contre la Guerre. L'Interdiction du Recours à la Force en Droit International Contemporain* (2008) 269; Aust, *Complicity*, 381.

236 There is debate whether the duty may exist also on a non-territorial basis, Pacholska, *Complicity*, 175-176; Lanovoy, *Complicity*, 215. Critical with respect to the exist-

ensure compliance with the prohibition to use force.[237] In any event, there are various specific due diligence obligations in relation to specific kinds of assistance relevant for a use of force, most notably the transfer of arms.[238]

To the extent rules are discussed in international practice, such no harm rules are described as the "lowest-set net of international responsibility"[239] in the broader context of involvement of several States in the commission of an internationally wrongful act. Accordingly, some contributions to a use of force are unlawful on two distinct grounds. Other contributions may be prohibited that are not covered by the assessed regulatory framework on interstate assistance.

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ence of a *general* duty of due diligence in view of in relation to activities of other actors Jackson, *Complicity*, 131, 162; McDonald, *ICLQ* (2019) 1044. It remains to be seen if such a rule develops. As seen, whereas it is common practice that States exercise due diligence prior to assisting, it remains unclear if this practice finds its origin in the belief of an obligation to do so. See also ibid 1049-1054. Conceptually, the creation of substantial risks through providing military relevant assistance, could be a legitimate link justifying such a norm.

237 A similar obligation has been recognized in Common Article 1 Geneva Conventions in view of international humanitarian law. On this in detail e.g. Eve Massingham, Annabel McConnachie, *Ensuring Respect for International Humanitarian Law* (2020). In the realm of the *ius contra bellum*, an assessment of such an obligation would have to take into account the fact that the special role of the Security Council protecting international peace and security.

238 E.g. the supply of weapons is subject to due diligence obligations, e.g. under the EU law, Lanovoy, *Complicity*, 229 note 328.

239 E.g. Pacholska, *Complicity*, 189. See also Aust, *Complicity*, 381-382.