Chapter 7 The Regime Governing Interstate Assistance to the Use of Force – Quo Vadis?

Developing his theory of just war, Hugo Grotius argued that,

> "It is the duty of those who stand apart from a war to do nothing which may strengthen the side whose cause is unjust, or which may hinder the movements of him who is carrying on a just war; and in a doubtful case, to act alike to both sides."[1]

This early statement may no longer adequately reflect the *lex lata*. Yet, it certainly proves that non-assistance to a State violating the prohibition to use force is an idea deeply rooted in the system governing the resort to force, and closely connected to the very essence of the idea of outlawing war.

The account of international practice that this book sought to make accessible affirms this connection. The present work has clearly shown that there is a general agreement on the existence of rules governing interstate assistance to the use of force. While this result is an unsurprising one, it does not say much. Over time, assistance has been, and will continue to be, subjected to various standards and interpretations. Again, given the antagonistic interests that States pursue, and the multidimensional political, economic, and ethical dilemmas (non)-assisting States face when confronted with a use of force, this is not a surprising finding.

The current regulatory framework that emerges from international practice affirms that the assessment of assistance is in a constant state of flux. What amounts to prohibited 'assistance' can only be determined on a case-by-case basis. This may be unsatisfactory in regard to the certainty of law. It may, at times, even leave the impression that interstate assistance to the use of force is an area without clear international regulation. But ultimately, it strikes a delicate balance between realistic pragmatism and wishful thinking.

The individuality of each act of assistance is further implicated in the multilevel regulatory approach on assistance that Helmut Aust has

1 Hugo Grotius, De Jure Belli ac Pacis (1625) III c. 17 cited after Quincy Wright, 'The Future of Neutrality', 12 *IntlConc* (1928-1929) 361.

described for assistance in general as a 'network of rules'. With respect to assistance to a use of force, this network is more comprehensive than previously suggested in scholarly analyses, by some States' assertions, and, more generally, by the trend towards the uniformization of complicity regimes.

Last but not least, the diverse and ultimately imprecise regulatory regime may also be a consequence of States' reluctance to engage in a comprehensive dialogue on the topic, which appears to be no coincidence. Interstate assistance to other States' use of force is a topic which States assert rather than discuss among each other. The discourse is more intranational than international. Moreover, States' legal positions often remain non-transparent and imprecise, deeply buried in the UN archives, receiving only scant attention. It is hard to avoid the impression that States enjoy and maintain the ambiguity surrounding the 'obvious and generally accepted' legal rules governing interstate assistance. One may even wonder whether States' approach is not a way to prevent regulatory regimes from gaining too much influence. This approach again may coincide with the politically sensitive dimensions of the topic, albeit the exact reasons must remain speculative. Unlike for other areas of the *ius contra bellum*, States do not even discuss whether to discuss the topic.

This book does not argue that the legal system governing interstate assistance to a use of force is effective or well-balanced. From various perspectives, politically or militarily, many aspects may be validly criticized.[2] But this book also does not want to purport the contrary. Instead, it offers an attempt to sharpen our picture of the *lex lata* as currently applied and elucidated throughout international practice through the legal lens.

As such, it expressly invites further research on an under-discussed topic. The present analysis has focused on the question under what circumstances and how 'interstate assistance to a use of force' is prohibited. As such, this book can be no more than a facet among further nuanced analyses of surrounding questions.

First and foremost, the present analysis of conflict practice, albeit extensive, necessarily remains incomplete. Interstate assistance is an inherent feature of almost any use of force and, hence, any State's position would deserve to be looked at. The range of conceivable (scenarios of) contributions has no boundaries, with each bearing the potential of justifying a

2 E.g. for a passionate political argument against sanctions and non-assistance: Ray Rounds, 'The Case Against Arms Embargos, Even For Saudi Arabia', *War on the Rocks* (16 April 2019).

different classification. In this respect, it may also be interesting to further assess the impact of respective national restrictions on interstate cooperation shaping international regulations. In a similar vein, the consistency of States' positions over time warrants more attention. Second, interstate assistance connects with other legal questions that require in-depth scrutiny. For example, the rise and role of due diligence obligations in view of interstate assistance deserve further investigation.[3] Not only may those rules close gaps within the regulatory regime, but they may also be of decisive importance for the application of the rules concerning interstate assistance. Implications of the non-assistance rule also warrant an in-depth treatment of their own. More attention may also be paid to the legitimacy of self-defense against interstate assistance, in particular in juxtaposition with one of the most controversial topics of recent times, self-defense against non-State actors. Likewise, the relationship between the non-assisting State and the State using force invites additional scrutiny. How do the respective non-assistance rules relate to other rules of international law – ranging from treaty-commitments to provide assistance or to generally cooperate over rules prohibiting economic force? Last but not least, it would be intriguing to situate the *ius contra bellum* regime on interstate assistance in the bigger picture, both dogmatically and comparatively, especially in contrast with rules applying to interstate assistance across different contexts, most notably the *ius in bello* and international criminal law.[4]

With a depressing frequency, military interventions prompt scholars to ask whether Thomas Franck was or has been proven right in asking about the death of Article 2(4).[5] The question of whether the *ius contra bellum* has eroded is particularly salient in cases not only where States remained silent towards a violation of the prohibition to use force, but where many of them were involved. It is precisely these cases where the question of interstate assistance has received momentary attention. The discourse on the Iraq

3 In particular, in view of the prohibition of "indirect participation and non-intervention" category that Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', 60(1) *GYIL* (2018) has argued for.

4 For such a comparative approach to international rules on complicity, see e.g. Miles Jackson, *Complicity in International Law* (2015).

5 Thomas M. Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States', 64(5) *AJIL* (1970); Christian Henderson, *The Use of Force and International Law* (2018); Clauß Kreß, 'On the Principle of Non-Use of Force in Current International Law', *Just Security* (30 September 2019).

War 2003 is only the most prominent example.[6] The Russian war against Ukraine is yet another topical reminder. At the same time, these cases serve as a reminder of the risk of how rules of non-assistance could affect the core of the *ius contra bellum*. If they are too strict, and hence not enforced, this could undermine the *ius contra bellum* itself. Yet, to the very extent that non-compliance with the assistance regime is a risk for the *ius contra bellum*, it may also be an effective means to shield rules from erosion. It is inherent to assistance that it provides both opportunities and constraints. It is no coincidence that the few discussions relating to interstate assistance are a common thread in attempts to strengthen, to enforce, or to enhance the effectiveness of the principle of non-use of force. This potential justifies extending the focus of legal analysis to States behind those using force, beyond the current common dedication of no more than a footnote in analyses of the *ius contra bellum*. This is all the more true as it cannot be expected that interstate assistance will diminish in its relevance for States to use force, be it through traditional or modern means.

The principle of non-assistance to a use of force has substantially driven the recognition of a general rule of complicity that has only relatively recently been ennobled by the ICJ as customary international law. Since then, questions of complicity have received increasing scrutiny, not least in view of recent challenges within the realm of the *ius contra bellum* such as drone or cyber warfare that bring the relevance of assistance to mind. It can be hoped that this momentum sparks a more detailed engagement with the specific rules applicable to interstate assistance to the use of force, too. Whether rules will be concretized or change, remains to be seen. But already a transparent discourse on those rules may reinforce the *ius contra bellum*, and ultimately serve international security and peace.

6 Here again Olivier Corten's analysis is exemplary. In his recent book the chapter on assistance that was included in the French version, is missing, Olivier Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (2010); Olivier Corten, *Le Droit Contre la Guerre. L'Interdiction du Recours à la Force en Droit International Contemporain* (2008).