Kölner Schriften zum Friedenssicherungsrecht 23

Benjamin K. Nußberger

# Interstate Assistance to the Use of Force

Nomos

INSTITUTE FOR INTERNATIONAL PEACE AND SECURITY LAW

Kölner Schriften zum Friedenssicherungsrecht

Cologne Studies on International Peace und Security Law

Études colognaises sur le droit de la paix et de la sécurité internationales

Herausgegeben von/Edited by/Éditées par

Prof. Dr. Dr. h.c. Dr. h.c. Claus Kreß LL.M. (Cambridge)

Band/ Volume 23

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The open access publication of this title was made possible by the umbrella initiative „Hochschule.digital Niedersachsen“ of the German state of Lower Saxony.

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

a.t.: Köln, Univ., Diss., 2022

ISBN 978-3-7560-0648-9 (Print)
978-3-7489-3982-5 (ePDF)

**British Library Cataloguing-in-Publication Data**
A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-0648-9 (Print)
978-3-7489-3982-5 (ePDF)

**Library of Congress Cataloging-in-Publication Data**
Nußberger, Benjamin K.
Interstate Assistance to the Use of Force
Benjamin K. Nußberger
884 pp.
Includes bibliographic references.

ISBN 978-3-7560-0648-9 (Print)
978-3-7489-3982-5 (ePDF)

1st Edition 2023



Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-0648-9 (Print)
ISBN 978-3-7489-3982-5 (ePDF)
DOI https://doi.org/10.5771/9783748939825

Onlineversion
Nomos eLibrary

*To Felicitas and Ferdinand in hope for a peaceful life*

# Preface

It was a brief letter that ultimately led to this book: Germany's report to the Security Council about its contributions to fighting ISIS in Syria. The masterful ambiguity of the letter intrigued me to explore the legal grey area in which interstate assistance often operates. The manuscript essentially developed during my time at the Institute for International Peace and Security Law at University of Cologne and at the University of Oxford. I defended it as doctoral dissertation at the Faculty of Law of the University of Cologne in November 2022. The present book is a revised and updated version of my dissertation. It takes into account State practice and literature up to March 2023, including practice relating to the ongoing war triggered by the Russian aggression against Ukraine.

A book on assistance, how could it be different, could not have been finished without the support of many. Hence, first and foremost, I would like to extend my sincere gratitude to Professor Claus Kreß, who exemplifies why in Germany a doctoral supervisor is called "Doktorvater" (doctoral father). Claus has been a "Doktorvater" to me in a literal meaning, caring about my academic and personal well-being. I would also like to thank Professor Stefan Hobe as the second examiner of my thesis for reviewing my work so swiftly.

I am grateful for having been able to think, research, and write in extraordinarily stimulating and supportive environments. I would like to especially thank Professor Catherine Redgwell, Professor Dapo Akande, Professor Miles Jackson, and Professor Antonios Tzanakopoulos for their hospitality and for fully integrating me into the vibrant and inspiring PIL group during my two-year academic stay in Oxford. Also, I owe thanks to the Bodleian law library staff, who guided me through the thicket of the archives of United Nations Official Papers. Similarly, I am particularly grateful to have been a fortunate member of the Institute of International Peace and Security Law in Cologne. The institute has always been my academic family and home base. On that note, I wish to thank all my (academic) companions and friends who accompanied me on this journey, emotionally or intellectually. Treading this path together has decisively shaped the book. Each and every conversation about assistance helped me to better understand my questions, my thoughts, and eventually my book

project. Paula Fischer, Josef Weinzierl, and my brother Malte Nußberger, who were the first to take on my full manuscript, deserve special mention here.

I am grateful to the German Academic Scholarship Foundation that generously supported my doctoral studies and my research stay in Oxford; to the German Academic Exchange Service (DAAD) for also supporting my academic visit to Oxford; and to the Institute for International Peace and Security Law as well as the Niedersachsen Consortium for generously funding the publication and enabling me to share my book with all, open access.

Last but not least, I would also like to say 'thank you' to my family – especially Angelika and Stephan, my parents, whose contributions by their very nature could not but be described inadequately, yet in any case have been at any time pivotal. Finally, a great and heartfelt '*merci infiniment*' to my wife, Anne-Marie, who personifies loving, boundless, patient, assuring, and enabling assistance that cannot be properly put into words but certainly makes her an 'accomplice' in whatever I do.

Berlin, March 2023

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# Selected Abbreviations

| | |
|---|---|
| 1987-Declaration | United Nations General Assembly Resolution 42/22 of 18 November 1987, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Use of Force in International Relations |
| Aggression Definition | United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, Definition of Aggression |
| alt | alternative |
| AP | Associated Press |
| Appl No | Application Number |
| ARIO | Articles on the Responsibility of International Organizations, in Yearbook of the International Law Commission, 2011, vol. II, Part Two, as it appears in the annex to General Assembly resolution 66/100 of 27 February 2012 |
| ARS | Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol II (Part Two), as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. |
| ASEAN | Association of Southeast Asian Nations |
| ATT | Arms Trade Treaty, adopted by United Nations General Assembly Resolution 67/234B of 2 April 2013, entered into force 24 December 2014, 3013 UNTS I52373 |
| AU | African Union |
| BT Drs | Bundestagsdrucksache |
| BVerfG | Bundesverfassungsgericht |
| BVerfGE | Entscheidungen des Bundesverfassungsgerichts |
| BVerwG | Bundesverwaltungsgericht |
| BVerwGE | Entscheidungen des Bundesverwaltungsgerichts |
| CADSP | Solemn Declaration on a Common African Defense and Security Policy (27-28 February 2004) |
| Daesh | Islamic State of Iraq and the Levant |
| Deb | Debate |
| DeptStBull | Department of State Bulletin |

| | |
|---|---|
| DW | Deutsche Welle |
| ECHR | European Convention of Human Rights |
| ECOWAS | Economic Community of West African States |
| ECtHR | European Court of Human Rights |
| ed | Editor |
| edn | edition |
| eds | Editors |
| EU | European Union |
| FAZ | Frankfurter Allgemeine Zeitung |
| Friendly Relations Declaration | United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations |
| FT | Financial Times |
| GCC | Gulf Cooperation Council |
| HC | House of Commons |
| HL | House of Lords |
| i.a. | inter alia |
| IBTimes | International Business Times |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 |
| ICG | International Crisis Group |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICTY | International Criminal Tribunal of the Yugoslavia |
| IHL | International Humanitarian Law |
| ILC | International Law Commission |
| ILC ARS Commentary | Responsibility of States for Internationally Wrongful Acts, General Commentary, as it appears in Yearbook of the International Law Commission, 2001 vol II Part Two as corrected, pages 31-143 |
| ILCYB | Yearbook of the International Law Commission |
| ILDC | International Law in Domestic Courts |

| | |
|---|---|
| ILM | International Legal Materials |
| IRNA | Islamic Republic News Agency |
| ISIL | Islamic State of Iraq and the Levant |
| ISIS | Islamic State of Iraq and the Levant |
| KUNA | Kuwait News Agency |
| LNTS | League of Nations Treaty Series |
| LoN | League of Nations |
| LoNC | Covenant of the League of Nations |
| NAM | Non-Aligned Movement |
| NATO | North Atlantic Treaty Organization |
| No | Number |
| NYT | New York Times |
| OAS | Organization of American States |
| OSCE | Organization for Security and Co-Operation in Europe |
| OIC | Organisation of Islamic Cooperation |
| OVG | Oberverwaltungsgericht |
| para | paragraph |
| RFERL | Radio Free Europe Radio Liberty |
| SIPRI | Stockholm International Peace Research Institute |
| SOFA | Status of Force Agreement |
| SZ | Süddeutsche Zeitung |
| TIAS | Treaties and Other International Acts Series |
| UN | United Nations |
| UNC | Charter of the United Nations |
| UNCIO | Documents of the United Nations Conference on International Organization |
| UNGA | United Nations General Assembly |
| UNRIAA | Reports of International Arbitration Awards |
| UNSC | United Nations Security Council |
| UNSG | United Nations Secretary General |
| UNTS | United Nations Treaty Series |
| UNYB | Yearbook of the United Nations |
| UST | United States Treaties and Other International Agreements |

| | |
|---|---|
| VCLT | Vienna Convention on the Law of Treaties, done on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331 |
| VG | Verwaltungsgericht |
| vol | volume |
| WaPo | Washington Post |
| WSJ | Wall Street Journal |

Symbols without specific designation are United Nations documents. For the abbreviations used, see the Dag Hammarskjöld United Nations Library guide on 'UN Document Symbols' available at: https://research.un.org/en/docs/symbols.

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

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

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

1 Franklin Delano Roosevelt, 'Fireside Chat on National Security. White House, Washington, D.C. December 29, 1940' in Samuel Irving Rosenman (ed), *The Public Papers and Addresses of Franklin D. Roosevelt* (1941) 643.

2 Winston S Churchill, 'Give us the Tools and We Will Finish the Job: A Broadcast Address February 9, 1941' in Charles Eade (ed), *The Unrelenting Struggle: War Speeches*, vol II (1942).

3 'One War Won', *Time Magazine* (13 December 1943) http://content.time.com/time/subscriber/article/0,33009,791211,00.html.

4 Walter J Boyne, 'El Dorado Canyon', 82(3) *Airforce Magazine* (March 1999).

5 OVG für das Land Nordrhein-Westfalen, 4 A 1361/15, judgment (19 March 2019), juris.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

adequately reflects customary international law. As such, it is part of what Helmut Aust has identified as a "network of rules on complicity".[24]

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

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

24 Aust, *Complicity*, Chapter 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

for example by Article 3(f) Aggression Definition,[37] and not 'complicity in aggression'?

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

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

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

37 A/RES/29/3314 (14 December 1974), Annex. Article 3(f) reads: "Any of the following acts [...] shall [...] qualify as an act of aggression [...] (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State".

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

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

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

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

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

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

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

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

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

tute a violation of the prohibition of the use of force."[44] Miles Jackson even claimed that "one of the clearest manifestations of a prohibition on state complicity arises in respect of the wrong of aggression".[45]

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

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

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

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

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

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

48 Jackson, *Complicity*, 136.

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

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

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

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

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

52 Lanovoy, *Complicity*, 204.

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

54 Lanovoy, *Complicity*, 195-196.

55 Ibid 204.

56 Ibid.

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

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

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

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

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

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

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

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

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

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

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

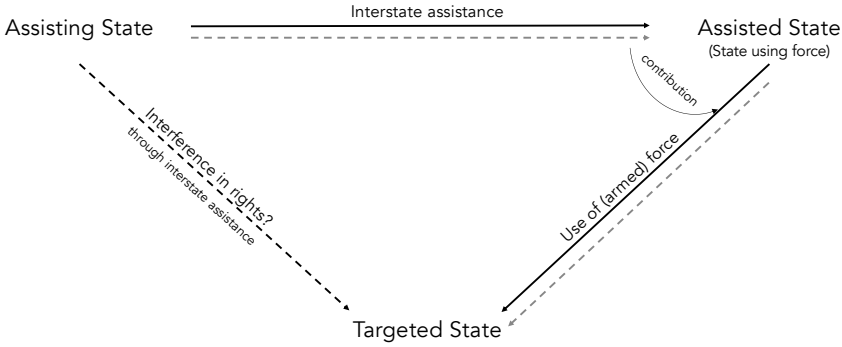
## II. The factual and legal scope of the analysis

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

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

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

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




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

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

## A. Definition of 'interstate assistance to the use of force'

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

1) Action and inaction capable of contributing

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

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

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

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

64 This includes for example arms, ammunition, troops placed at the full disposal, as well as non-lethal war material like body armor, non-armored vehicles.
65 This includes any equipment, oil, petrol, means of transport such as vehicles, planes, ships, but could even cover food, or clothing.
66 *The Oxford Essential Dictionary of the U.S. Military* (2002), combat intelligence.
67 This includes the transport of personnel and war material, the furnishing of services such as refueling or repairing, and disposition of facilities.
68 *Dictionary of the U.S. Military*, combat service support.
69 Lowe, *JIntl&Dipl* (2002) 5.
70 On the difference between omission and inaction Brown, *HagueYIL* (2016) 136.

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

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

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

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

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

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

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

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

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

73 Similarly Jackson, *Complicity*, 11.

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

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

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

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

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

### 2) 'Inter-State' assistance

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

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

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

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

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

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

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

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

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

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

79 Cf Article 2 ARS.

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

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

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

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

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

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

84 This is also referred to as Third Country Deployments. Note that this provision only applies to the provision of "organs", ILC ARS Commentary, Article 11, 44, para 5. It does concern the sending/not preventing of private entities, or 'volunteers', or foreign fighters. For the pertinent act of assistance, it does not matter, however, as their conduct would normally not be attributable to the assisting State anyways. The act

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

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

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

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

85 According to the ILC, this requires that the organ must act "with consent, under the authority and for the purposes of the receiving State." In essence, the organ therefore must "act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State." On the sending of "armed forces to assist another State" the ILC specifies that it is not covered "where the forces in question remain under the authority of the sending State." ILC ARS Commentary, Article 6, 44, para 2, 3. The application of Article 6 ARS hence depends on the specific command and control structure and the role of the assigned organ. For an overview see Tondini, *Coalitions*. See also Pacholska, *Complicity*, 222-226.

86 As a consequence, the assisting State remains responsible for any breach of the norms that the conduct of the lent organ violates. Hence, the conduct itself (irrespective of the fact that it also may constitute assistance) may violate the prohibition to (directly) use force. For example, consider a State's lent organ flying combat missions in the realm of an international mission (e.g. Australian and British embedded soldiers in the US air force in Syria): The lent organ's conduct would have to be assessed against the prohibition to (directly) use of force. In addition, the conduct may be also considered an act of assistance to another State's use of force; this falls however outside the scope of the present analysis as the assistance would involve armed force. In a scenario that the lent organ was analyzing intelligence data without being involved in targeting decision, it is crucial for determining the assisting State's responsibility however whether the lent organ's conduct constituted assistance prohibited under international law (*ius contra bellum* obligations or general international law). Furthermore note that attribution of the conduct of the lent organ to the assisted State is not excluded, e.g. by virtue of Article 8 ARS.

87 ILC ARS Commentary, Article 6, 44 para 1. Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 71, 83 et seq.

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

### 3) Assistance 'short of armed force'

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

Four points on this exclusion merit further clarification.

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

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

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

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

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

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

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

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

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

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

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

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

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

96 Cf Article 6 ARS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

106 Cf for the definition of international organization: Article 2(a) DARIO, A/66/10 (2011) para 87. Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2014) para 3-11; Angelo Jr Golia, Anne Peters, *The Concept of International Organization* (MPIL Research Paper Series, Max Planck Institute for Comparative Public Law and International Law, vol 27, 2020) 15. See also Tondini, *Coalitions*, 705, 713, 718.

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

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

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

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

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

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

110 Seventh Report Ago 52, para 52.

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

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

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

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

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

112 The ILC ARS Commentary, Chapter IV, 64 para 5, views this as exception to the principle of independent responsibility, as the "the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of [assisted State]." Still the fact remains that the assisting State is responsible for its own conduct. It is the assisting State's own role that may be considered wrongful. See also Nollkaemper, Jacobs, *MichJIntlL* (2013) 388.

113 On the difference between *ius contra bellum* and *ius in bello*: Alexander Orakhelashvili, 'Overlap and Convergence: the Interaction between Jus ad Bellum and Jus in Bello', 12(2) *JCSL* (2007); Christopher Greenwood, 'The Relationship between Ius ad Bellum and Ius in Bello', 9(4) *RevIntlStud* (1983).

114 See on this: Helmut Philipp Aust, 'Complicity in Violations of International Humanitarian Law' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015); Robin Geiß, 'Common Article 1 of the Geneva Conventions: Scope and Content of the Obligation to 'Ensure Respect' – 'Narrow but Deep' or 'Wide and Shallow'?' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015); Jean-Marie Henckaerts, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016); Verity Robson, 'The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions', 25(1) *JCSL* (2020).

human rights law,[115] are not addressed. Also, prohibitions of assistance to the use of specific weapons are not subject to analysis here.[116]

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

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

115 Under the ECHR, e.g. ECtHR, *El Masri v Macedonia*, Grand Chamber, 13 December 2012, Appl No 39630/09; *Al-Nashiri v Poland*, 24 July 2014, Appl No 28761/11; *Nasr and Ghali v Italy*, 23 February 2016, Appl No 44883/09. On this Seibert-Fohr, *GYIL* (2018).

116 E.g. Article I(1)(d) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 3 September 1992, entered into force on 29 April 1997, 1975 UNTS 45; Article 1 (e) Treaty on the Prohibition of Nuclear Weapons of 7 July 2017, entered into force on 22 January 2021, I 56487; Article 1 (1) (c), (a) Convention on Cluster Munitions, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions of 30 May 2008, entered into force on 1 August 2010, 2688 UNTS 39; Article 1 (1) (c), (a) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Land Mines and on Their Destruction of 18 September 1997, entered into force on 1 March 1999, 2056 UNTS 211.

117 E.g. status of forces agreements.

118 Bothe, *AVR* (2003) 267-268; Aust, *Complicity*, 282; Lanovoy, *Complicity*, 31. For details James Upcher, *Neutrality in Contemporary International Law* (2020).

119 For example, when the act of assistance takes place on the territory of the targeted State (e.g refueling warplanes, rescuing soldiers, gathering intelligence), the assisting conduct on its own already violates the territorial sovereignty of the targeted State. The same may be true for assistance that is primarily an action directed against another State. For example, in case interstate assistance consisted of a use of force to support a use of force of the assisted State, it would violate the prohibition to use of force, irrespective of the contribution to the assisted State's use of force. The same may be true if the assisting State imposes sanctions against a State to support the assisted State using force. The act of assistance may also be in violation of treaty commitments, or rights not belonging to the targeted State, e.g. violations of international human rights law (gathering and sharing of intelligence),

120 Seventh Report Ago, 54 para 60, 58 para 72.

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

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

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

122 Boivin, *IRRC* (2005) 469.

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

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

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

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

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

125 See above A.I.-4.

126 See note 101.

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

128 *Nicaragua*, 103 para 195.

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

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

131 Article 3bis ICC-Statute.

ity.[132] Likewise, domestic rules shaping the decision to provide interstate assistance are also not part of the analysis.[133]

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

## III. The outline of the book

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

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

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

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

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

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

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

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

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

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

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

# Chapter 2 Pre-1945 History of Interstate Assistance – Diversity in Transition

General international law prior to the UN Charter may not, as Roberto Ago has famously concluded, have known a general prohibition of complicity.[1] But that interstate assistance has always been a decisive factor in international relations is beyond controversy. This is in particular true for interstate assistance to other States resorting to armed force. Legal discussions on the permissibility of such assistance may root back to the early beginnings of the Westphalian system. The present chapter addresses the legal responses to this phenomenon in the 20th century. After sketching rules relating to interstate assistance in the *ius ad bellum* (I), the diverse legal regimes on assistance in an emerging *ius contra bellum* are subject of this chapter (II-III).

## I. Assistance and the *ius ad bellum*

That States pursue peace and security in their international relations was not a new development of the 20th century. Albeit war was a frequently used instrument of policy, States always sought to establish peace. As such, war, as well as third States' contributions to war have always been subject to discussion.

Before the early 1900s, States may not have pursued to guarantee and preserve States' *individual* peace. But the international order was oriented towards fostering *international* peace and security.

International law recognized a *ius ad bellum* as part of States' sovereignty. A general prohibition to resort to armed force in international relations was not part of the international regulations of war. On the contrary, war was, as Carl von Clausewitz famously put it, a legitimate "continuation of politics by other means."[2]

1 Roberto Ago, 'Le délit international', 68 *RdC* (1939) 523. Less absolute Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011) 22-23.

2 Carl von Clausewitz, *On War* (2010) 70.

Against this background, war was considered a bilateral issue only among the belligerents, i.e. the State using force and the target State.[3] For third States war was hence a fact, in which they must not have any legal interest.[4] They were not to judge the conflict.[5] For them the belligerent States accordingly possessed an identical legal position.[6] As a result, third States were expected to *prima facie* keep out of the dispute. They were not supposed to interfere in the conflict. It was inherent in the bilateral conception of war that cooperation with belligerents was to be minimized.[7] The extent of cooperation to be constrained was open to debate.[8] Belligerents arguably conceived any external relationship with the enemy State to affect the bilateral dispute.[9] William Hall observed:

> "[D]uring war, privileges tending to strengthen the hands of one or two belligerents help him towards the destruction of his enemy. To grant them is not merely to show less friendship to one than the other; it is to embarrass one by reserving to the other a field of action in which his enemy cannot attack him; it is to assume an attitude with respect to him of at least passive hostility."[10]

3 Quincy Wright, 'The Meaning of the Pact of Paris', 27(1) *AJIL* (1933) 40; Edward Gordon, 'Article 2(4) in Historical Context', 10(2) *YaleJIntlL* (1985) 271.

4 Josef L Kunz, 'The Covenant of the League of Nations and Neutrality', 29 *PROCASIL* (1935) 38; Robert W Tucker, 'The Interpretation of War Under Present International Law', 4(1) *ILQ* (1951) 13.

5 John Fischer Williams, 'The Covenant of the League of Nations and War', 5(1) *CLJ* (1933) 4; Clyde Eagleton, 'Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War', 24 *PROCASIL* (1930) 91.

6 William Edward Hall, *A Treatise on International Law* (2nd edn, 1884) 61.

7 Philip C Jessup and others, *Neutrality, Its History, Economics and Law* (1935) vol 1, xii.

8 See also Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies* (2002) 3.

9 Eagleton illustrated this fact vividly by describing State practice in World War I: "The lists of contraband were expanded until, it was said, only ostrich feathers were omitted! Even lip sticks and nail files, which one associates rather with dainty femininity, than with ruthless war, were denied to Germany, and with good reason, for glycerine could be extracted from the lip stick and used to manufacture high explosives; and the nail files were used by the Germans to file shrapnel cases. Even the baby's milk was stopped, for milk contains fats for explosives, and the cans made good grenades. The United States requisitioned, among other things, for war purposes, school books, cork screws, pencil sharpeners, rat traps and spittoons. I do not see, after that list, how even ostrich feathers can survive in the next war!" Eagleton, *PROCASIL* (1930) 88.

10 William Edward Hall, *A Treatise on International Law* (3rd edn, 1924) 93.

Third States naturally took a more restrained approach, appealing to their sovereign rights that embraced the right to determine the kind and amount of intercourse they will maintain with other States.[11] Third States sought to maintain their freedom of trade.[12] Again, this was a bilateral relationship in which other States were expected not to interfere.

Once war was declared, two bilateral spheres were colliding. On the one hand, cooperation with a declared belligerent would have interfered with a bilateral war. On the other hand, non-cooperation respecting a bilateral armed dispute would have infringed upon the relationship between the third State and the State using force.

Still, in view of the prevailing *ius ad bellum*, any State remained free to get involved in another conflict if it so wished.[13] The belligerents did not have a general right to their dispute remaining bilateral. Neither were third States legally protected from being a target of a use of force seeking to prevent cooperation with a belligerent. In other words, States' choice whether or not to participate in war was not a "matter for international law but for international politics".[14] As a result, assisting States would have been regarded as belligerents.[15]

Hence only when States decided not to take sides for a belligerent but insisted on their sovereign right of cooperation with the belligerents, a compromise was necessary to balance the rights and interests of all involved States, and thus to ensure international peace. This compromise was sought under the law of nations.[16] To determine where to draw the normative line was the main function of the law of neutrality. The law of neutrality did not establish a hard limit. It was not a prohibition to States' freedom to

11 Ibid.

12 Ibid; Jessup and others, *Neutrality*, vol 1, xii; Eagleton, *PROCASIL* (1930) 87.

13 Lassa Oppenheim, *International Law: A treatise* (3rd edn, 1920-1921) 400 cited in Quincy Wright, 'The Future of Neutrality', 12 *IntlConc* (1928-1929) 373.

14 Ibid. Unless States were bound by (bilateral) specific treaties of neutrality. Some States adopted a status of 'permanent' neutrality, committing themselves to remain permanently neutral, Wright, *IntlConc* (1928-1929) 366.

15 "From the legal point of view, it was no difference from sending in ground troops." Oona A Hathaway, Scott J Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017) 87 with an example of US denial of assistance to France.

16 Jessup and others, *Neutrality*, vol 1, xi, Preface to Volume One; ILA, 'The Effect of the Briand-Kellogg Pact of Paris on International Law', 38(1) *ILARCONF* (1934) 13-14: "it meant, rather, that war was invested with a character of extra-legality, and on the basis of the extra-legal fact of war, we built, especially during the nineteenth century, a great superstructure of neutral rights and belligerent rights."

interfere through military force or assistance to force. It fleshed out States' obligations for the situation of third States wishing to and belligerent States wishing third States to stay out of a war. And as such, it also defined when a State was seen as co-belligerent State.

The law of neutrality embodied reciprocal promises that once a State behaved in a certain manner, certain rights would be granted. On the assumption that a State declared itself neutral, States undertook rights and duties that again were obligatory and enforceable. In other words, the law of neutrality protected against contradictory behavior: a State claiming neutrality without behaving accordingly.[17] As such, the law of neutrality sought to establish legal certainty for all States involved and incentivize States to uphold the principle of bilateralism. The belligerents were assured that they were dealing with a friend and not a disguised enemy. At the same time, third – neutral – States were guaranteed that the bilateral war did not overly impede their bilateral relationships with the belligerents, and that they would not be treated as (co)-belligerents.[18] The armed dispute was thus to be regionalized, thereby preventing escalation and the spreading of the conflict, and thus guaranteeing *international* peace.[19]

Throughout history, the delicate compromise embodied in the law of neutrality has not been static. Initially, rights and obligations were defined in bilateral agreements; eventually they were institutionalized.[20] The scope and content of those rights and duties of belligerents and of neutrals likewise experienced considerable variation, corresponding in particular to contemporary power distributions and technological developments.[21] The rules ranged from requirements of 'perfectly' equal and uniform treatment of both belligerents to commitments not to deviate from the 'courant normale' to distinct absolute prohibitions of specific forms of contributions,

17 Hersch Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *TGS* (1934) 184.

18 Chadwick, *Neutrality*, 1, 3.

19 Wilhelm Georg Grewe, *Epochen der Völkerrechtsgeschichte* (1984) 429; Eagleton, *PROCASIL* (1930) 87-88.

20 Grewe, *Völkerrechtsgeschichte*, 629; Stefan Oeter, 'Ursprünge der Neutralität: die Herausbildung des Instituts der Neutralität im Völkerrecht der frühen Neuzeit', 48 *ZaöRV* (1988).

21 For an overview see James Upcher, *Neutrality in Contemporary International Law* (2020) 218; Philip C Jessup, 'The Birth, Death and Reincarnation of Neutrality', 26(4) *AJIL* (1932) 790.

most notably the supply of military materials or transit rights[22] (that would violate the law of neutrality even when provided equally) to rules requiring prevention.[23]

In brief, during the reign of the *ius ad bellum*, the law of neutrality regulated contributions to war. Yet, it was a qualified prohibition, subject to the reservation of States' sovereign freedom to not apply those rules. Just as States remained free to go to war, they were free to provide assistance.

## II. Assistance and the emerging *ius contra bellum*

In the early 20th century, States increasingly turned against the bilateral conception of war. It may have served to protect *international* peace. The system however left States' individual peace to the protection of each State itself. Under the impression of the devastating experience of the First World War, the international legal order set out to afford protection of the political independence and territorial integrity "to great and small States alike."[24] The sovereign right to resort to war and use force in international relations was gradually subject to increasing legal regulation, a *ius contra bellum*.

With the creation of the League of Nations, States undertook procedural limitations of war, and subscribed to a system of collective security. In addition – and for those States not joining the League in the alternative, States *peu à peu* further outlawed war. First, war found its legal limits primarily in bilateral treaties of non-aggression. Multilateral restrictions of war, most notably the Kellogg-Briand Pact, soon followed.

These developments led to a paradigm shift. War was no longer viewed through the lens of bilateralism. To borrow Henry Stimson's description of the legal conception of war in response to the Kellogg-Briand Pact:

22 These prohibitions had not always found acceptance. Initially, to the extent passage across the territory was provided impartially, it was considered permissible, Upcher, *Neutrality*, 253. In Article 4, 2 Hague Convention No. 5 of 1907 States undertook the duty to prevent passage of belligerent troops across the neutral territory. See for a remarkable argument a right of neutrals to practice "unrestricted trade in arms and military supplies": US position in World War I, Wright, *IntlConc* (1928-1929) 396-398. Training of troops remained not expressly regulated, Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954) 389.

23 E.g. on discussions about the prevention of private arm supplies, Stefan Oeter, *Neutralität und Waffenhandel* (1992).

24 Hathaway, Shapiro, *Internationalists*, 105.

> "We no longer draw a circle about them and treat them with the punctilio of the duellist's code. Instead we denounce them as lawbreakers."[25]

Accordingly, wars were no longer seen as equal; and warring parties were no longer necessarily considered equal. The legality of resorting to war became a decisive criterion for distinction. War was no longer considered a matter of fact that third States had to accept. Now, third States had a legal interest in the war. War was deemed a concern to all States that agreed to a certain regulation of war: "No war […] is a happening to which we are legal strangers".[26] In brief, *international* peace now also embraced the *individual* peace and security of all States.[27]

The introduction of prohibitions of war and the inherent change in conceptualizing war also changed the statics for third States in their position towards war. In addition to their commitment not to resort to war themselves, States had a recognized right to react to unlawful war. The extent to which States also undertook obligations limiting their sovereign freedom to provide interstate assistance, by joining a system of collective security such as the League Covenant (A) and by prohibiting the resort to war (B) is the subject of the following section.

## A. Assistance and collective security – the Covenant of the League of Nations

The interwar period was also a time, in which the idea of collective security transitioned from political theory to international legal reality. What implications did this have for assistance to a use of force? The following section examines if the system of collective security, by definition, prohibits assistance to anyone who acts contrary to the agreed-upon principles that trigger the collective security system.[28] After assessing the role of non-assistance in an ideal system of collective security (1), the analysis turns to the specific implementation under the League Covenant (2).

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25 Henry L Stimson, 'The Pact of Paris: Three Years of Development', 11(1) *Foreign Affairs* (1932-1933) iv.

26 Discussion: Morris, The Pact of Paris for the Renunciation of War: Its Meaning and Effect in International Law', 23 *PROCASIL* (1929) 92 (Professor Chamberlain).

27 Gordon, *YaleJIntlL* (1985) 274; Manley O Hudson, 'Discussion: Kunz, The Covenant of the League of Nations and Neutrality', 29 *PROCASIL* (1935) 43-44.

28 An agreed principle protected by a system of collective security may be and is typically the principle of non-use of force, albeit it can be defined more broadly to include any threat against peace and security.

### 1) The idea of collective security and assistance

Collective security is a system aiming to ensure security and peace for all States. It contains rules first on conflict settlement between States and second for the behaviour of third States toward a (threat of) violation of the established rules of conflict settlement. After, describing the basic elements of an ideal concept of a system of collective security (a), this section examines the role of non-assistance within the ideal concept (b). Part (c) reminds of the fact that systems of collective security may vary in practice.

#### a) The ideal concept of a collective security system

Two basic features define a system of collective security. First, States express their understanding of legitimate, fundamental security interests in agreed norms and principles which they then accept as a concern of the community as a whole.[29] Second, as a consequence, any event considered to oppose those common principles is to be met by a collective response, by concentrated force,[30] from all States other than the violator, aiming at restoring the agreed-upon common values and principles.[31]

An ideal system of collective security functions hence as follows: States form a community based on shared principles in the interest of security for all States.[32] To provide effective protection to these principles,[33] States agree to establish a special enforcement mechanism.[34] In other words, they agree on how States will react in response to a violation of the agreed principles.

Any violation of the agreed-upon principle directed against one State is considered a concern and a violation of the rights of all States. Accordingly, the community as a whole may and shall take enforcement measures

29 Alexander Orakhelashvili, *Collective Security* (2011) 6.
30 Ibid 6.
31 Ibid 11; Erika de Wet, Michael Wood, 'Collective Security' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) para 1; Gary Wilson, *The United Nations and Collective Security* (2014) 5; Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, 2017) 328 para 860.
32 Inis L Claude, *Swords into Plowshares: the Problems and Progress of International Organization* (3rd rev edn, 1964) 223.
33 Otto Pick, Julian Critchley, *Collective Security* (1974) 22.
34 Ibid.

(collective measures) to counter the violation of the commonly agreed principles. Whether a violation has occurred will be determined through an established procedure.[35] All member States pledge to defend one another against any violation of the agreed values and principles from among the members of the community itself.[36] Hans Morgenthau succinctly summarized the basic function of the enforcement system:

> "[C]ollective security envisages the enforcement of the rules of international law by all the members of the community of nations, whether or not they have suffered injury in the particular case. The prospective lawbreaker, then, must always expect to face a common front of all nations, automatically taking collective action in defense of international law."[37]

Inis Claude added that collective security "is the proposition that aggressive and unlawful use of force by any nation against any nation will be met by the combined force of all other nations."[38] The system's maxim is hence "all for one"[39] and "all against one."[40] Third States hence agree to take collective measures against the violation.

The specific collective measure to be taken depends on the specific system. Ideally, the enforcement of the agreed principles may work gradually. The community imposes collective measures as deemed necessary to counter the violation of the agreed principles. As a last resort, the violator will be confronted by collective and thus overwhelming military means. The fundamental idea thereby is "creating such an imbalance of power in favour of the upholders of world order that aggression will be prevented

35 As Claude, *Swords into Plowshares*, 228 notes "[c]ollective security [...] assumes the moral clarity of a situation, the assignability of guilt for a threat to or breach of the peace". For a biting criticism see Roland Stromberg, 'The Idea of Collective Security', 17(1) *JHistIdeas* (1956) 255-258.

36 Marc Weller, 'The Use of Force' in Cogan Jacob Katz, Hurd Ian and Johnstone Ian (eds), *The Oxford Handbook of International Organizations* (2016) 627.

37 Hans J Morgenthau, *Politics Among Nations: the Struggle for Power and Peace* (1949) 285.

38 Claude, *Swords into Plowshares*, 224.

39 Robert Kolb, 'The Eternal Problem of Collective Security: From the League of Nations to the United Nations', 26(4) *RefugSurvQ* (2007) 220. See also Morgenthau, *Politics Among Nations*, 398.

40 Charles A Kupchan, Clifford A Kupchan, 'The Promise of Collective Security', 20(1) *IntlSec* (1995) 52; Charles A Kupchan, Clifford A Kupchan, 'Concerts, Collective Security, and the Future of Europe', 16(1) *IntlSec* (1991) 118.

by the certainty of defeat or defeated by the minimal efforts of collective forces."[41] As Kupchan and Kupchan aptly put it, "collective security is, if nothing else, all about balancing and the aggregation of military force against threats to peace."[42] In order to establish security, the system of collective security hence aims to shift (military) power – away from the aggressor, towards the targeted State, and towards upholding the agreed principles and thus security of all. It builds on the idea that stability and security result from selective cooperation.[43] Ideally, the prospect of fighting *alone* against the organized entire international community acts as a deterrent.[44] In the (more realistic) case of a violation occurring nonetheless, the violator's efforts are rendered futile, as they will be confronted by the community as a whole organized to collectively manage the violation.[45]

This idea embodies and is reflected in several interrelated defining features that are also essential requirements for the success of the system of collective security.[46]

The ideal system of collective security strives for universality in membership. All States should be part of the community.[47] This characterizes the ideal concept of collective security in two ways. First, all States are subject to the enforcement system. Universality is crucial to avoid selective security.[48] It ensures that all States as potential violators are included and face the consequences of their actions.[49] Second, and important for the present context, universality of membership is essential for the effectiveness of the enforcement system itself. Universal membership implies that all States, including all major powers, are obliged to be part of the front against

41 Claude, *Swords into Plowshares*, 235.
42 Kupchan, Kupchan, *IntlSec* (1995) 52. See also Kupchan, Kupchan, *IntlSec* (1991) 117.
43 Cf Kupchan, Kupchan, *IntlSec* (1995) 53.
44 Claude, *Swords into Plowshares*, 228. "Collective security may be described as resting upon the proposition that war can be prevented by the deterrent effect of overwhelming power upon states which are too rational to invite certain defeat." Robert Lyle Butterworth, 'Organizing Collective Security: The UN Charter's Chapter VIII in Practice', 28(2) *WP* (1976) 198.
45 Butterworth, *WP* (1976) 198.
46 Claude, *Swords into Plowshares*, 228-238 for a detailed discussion; Wilson, *UN and Collective Security*, 8.
47 Kolb, *RefugSurvQ* (2007) 220.
48 Claude, *Swords into Plowshares*, 243.
49 This is what ibid, 234-235 focuses on.

a violator.[50] Ideally, a violator will be isolated completely. Any loopholes allowing the violator to circumvent the enforcement measures will thus be – ideally – closed. With no States outside the system who are not bound to the common solidarity agreement, no one must assist the violator, and henceforth undermine the strength of collective means and circumvent the power shift towards the community. Universality in this respect is understood as necessary prerequisite to create the required (overwhelming[51]) imbalance and thus to effectively ensure security for all.[52]

Similarly, the principle of impartial application is another essential element of an ideal system of collective security.[53] All States must apply the enforcement mechanism impartially. The design of the mechanism and its trigger is blind to which State is violating security or any other links or friendships among States within the community. Unlike the regimes of alliances and concepts of collective self-defence, the system is not directed against any particular State but operates based on an abstract definition of a violation committed from within the own community and membership.[54] This again is connected to the principle of universality.[55] The system functions on the assumption that flexible alliances of all member States will form against the violator.

Furthermore, systems of collective security are ideally organized within an institutional framework.[56] The entire institutional framework has the primary aim of facilitating and effectively implementing the enforcement of the agreed principles. The institutionalization serves to coordinate and ensure collective measures, to commonly define the norms and procedure

50 For the consequences if the system of collective security does not work in accordance with this essential assumption, see Morgenthau, *Politics Among Nations*, 398-403, in particular 401.

51 At the same time this also limits the costs for enforcement measures. First, the more States participate, the more the burden and costs can be shared among more shoulders. Second, the lesser the risk is that the aggressor receives the external assistance, the lesser are the costs.

52 Claude, *Swords into Plowshares*, 235: "The basic importance of the objective conditions of power diffusion and organizational comprehensiveness lies in the fact that collective security assumes the possibility of creating such an imbalance of power in favour of the upholders of world order that aggression will be prevented by the certainty of defeat or defeated by the minimal efforts of collective forces".

53 Kolb, *RefugSurvQ* (2007) 221.

54 Claude, *Swords into Plowshares*, 233.

55 Kolb, *RefugSurvQ* (2007) 220.

56 Claude, *Swords into Plowshares*, 238; Wilson, *UN and Collective Security*, 9.

of the system of collective security, and thus ultimately to achieve effective enforcement.[57]

Last but not least, collective security *qua definitionem,* in its ideal form, requires compulsory collective action.[58] As Inis Claude puts it:

> "Collective security is a design for providing certainty of collective action to frustrate aggression – for giving to the potential victim the reassuring knowledge, and conveying to the potential law-breaker the deterring conviction, that the resources of the community will be mobilized against any abuse of national power. This ideal permits no *ifs* or *buts*. [...] The theory of collective security is replete with absolutes, of which none is more basic than the requirement of certainty."[59] "Confidence is the quintessential condition of the success of the system."[60] "What is essential, in either case, is that the states upon which the operation of collective security depends should clearly renounce the right to withhold their support from a collective undertaking against whatever aggression may arise." "Collective security envisages ironclad commitments for joint sanctions."[61]

Such automaticity naturally does not have an easy stance with States. It limits State's sovereignty not insignificantly.[62] Moreover, given the collectivization of response against an aggressor, automaticity may be associated with the danger of escalation, turning every small war into a larger one in which all States are obliged to participate.[63] If not deterred, war is no longer localized, but becomes an obligatory matter of concern for the international community as a whole.[64] While the precise form and scope of the measure

57 Wilson, *UN and Collective Security*, 9.

58 Claude, *Swords into Plowshares*, 231, 236; Kolb, *RefugSurvQ* (2007) 220; Kupchan, Kupchan, *IntlSec* (1995) 53 stating that the ideal collective security is a "variant in which states make automatic and legally binding commitments to respond to aggression wherever and whenever it occurs".

59 Claude, *Swords into Plowshares*, 231, emphasis in the original.

60 Ibid 233; Morgenthau, *Politics Among Nations*, 285: "the prospective lawbreaker, then, must always expect to face a common front of all nations, automatically taking collective action in defense of international law".

61 Claude, *Swords into Plowshares*, 243.

62 Stromberg, *JHistIdeas* (1956) 259-260.

63 Ibid 259.

64 For example, Germany and Italy were making this argument Royal Institute of International Affairs, *International Sanctions: A Report by a Group of Members of the Royal Institute of International Affairs* (1938) 143.

may not be predetermined, certainty that collective action will take place is at least an integral part of the theory of an ideal system of collective security. It is essential that the isolation-mechanism does not stop at recognizing the right of not directly injured States to take action by declaring the violation a concern of the international community as a whole. This is described as the indivisibility of peace.[65] The ideal mechanism takes an additional step. States must isolate the violator. Automaticity ensures trust in the application of the isolation mechanism in concrete cases. Without automaticity, the imbalance would depend on States' discretion to exercise their right to take collective measures. Accordingly, the deterrent effect would be weaker. At the same time, automaticity goes hand in hand with the principle of universality. Automatic collective measures only work well if all States participate. Only in this case can States be sure that the measure taken will not be circumvented by others.

### b) The role of non-assistance in a collective security system

Within the ideal system of collective security, (non-) assistance plays a decisive role. A system of collective security includes a presumption of non-assistance to the violator. This does not necessarily follow from the mere fact that States universally agree not to commit a violation, i.e. aggression.[66] The commission of and assistance to an act cannot be easily equated. But this conclusion may be derived from the specific enforcement mechanism according to which a violator is to be fought, not supported.

Enforcement action can take two directions.

On the one hand, the targeted State may be strengthened. Measures may include direct support provided to the targeted State for its defense or actions undertaken together as the community against the aggressor. The community shows solidarity – in whatever form necessary. In this respect, assistance, and in particular military assistance, is granted a decisive role in the system of collective security as it is essentially built upon States' cooper-

65 Wilson, *UN and Collective Security*, 11.

66 It is true that the use force against one State is not only a violation of the rights of the targeted State, but also all other States. A State that assists such a use of force would hence contribute to a violation of its own rights. It may be contradictory. But it does not conclusively answer that such assistance is also prohibited. For the violation of its own rights, the State may thereby decide to waive its rights. There is no duty to exercise the right, and hence no duty not to contradict oneself. See in further detail with respect to the UN Charter specifically, Chapter 3 VI.B.

ation to restore the commonly agreed principles. The positive and active form of participation and assistance in restoring the common principles is thus decisive for the functioning of a collective security system.

On the other hand, the violator may be weakened through measures exerting pressure on it. Those measures may, but need not necessarily, directly relate to the offending action. Weakening the violator can be achieved through positive action, such as subjecting it to military measures. It can however also be achieved through negative action. For example, if the violator is dependent on external supply, cutting ongoing support that was commenced already prior to the violation may be an effective means. This may include exercising pressure through a broad range of measures: economic deprivation – the economic weapon complements the available response means – but it can also be limited to diplomatic and political responses.

Non-assistance to the violator, however, does not always guarantee the imbalance a system of collective security is aiming for. In fact, in most cases not providing any assistance to aggressors does no more than upholding the *status quo*. Still the fact remains that as seen in Chapter 1, assistance, if provided, may be decisive; it may create or at least uphold an imbalance in favor of the violator. Hence, non-assistance to the aggressor is an essential (negative) precondition for any imbalance to work, and henceforth crucial to the ideal system of collective security. In other words, in itself, non-assistance is (in most cases) not a sufficient means to achieve the enforcement of the agreed principles. But, at the same time, without non-assistance the concept of collective security would be put at risk to be ineffective if not futile. The imbalance which shall be created would be thwarted through assistance provided to the violator.

In short, a general prohibition of assistance to the violator has a double function: It may constitute an enforcement measure aimed at weakening the violator. At the same time, non-assistance to the violator is the foundation of ensuring and enabling the basic idea and function of the system of collective security: the isolation of the violator with its offending conduct.

Without a prohibition of assistance, the stakes of effective enforcement action would be set higher. For similar reasons, a collective security system entails features like the aspiration of universality or institutionalization.

This is also why an obligation of non-assistance, the precise scope of which is to be determined,[67] may be considered an integral part of an ideal system.

### c) Families of collective security systems

"There is no one template of a collective security system."[68] Within the basic coordinates sketched out above, a system of collective security may take different forms and designs.[69] Kupchan and Kupchan refer to a "family of collective security organizations ranging from ideal collective security to concerts."[70] Collective security is a concept that provides a framework. Within its boundaries, the parameters may be arranged differently. Ultimately, it is a choice of policy. Alexander Orakhelashvili explains: "The powers, functions, and tasks of collective security institutions are determined through inter-State agreements."[71]

Accordingly, systems of collective security may vary with respect to various aspects:

There can be differences with respect to the trigger, i.e. the situation that defines when the system of collective security comes into operation. For example, the term 'security' may be understood differently. The event triggering the system could be confined to non-compliance with procedures to prevent war, to acts of external aggression or be as broad as to include any threat to international peace and security giving a positive definition to peace.[72] Likewise, systems of collective security may be distinct in the procedure relevant to determine whether the trigger mechanism is met in the present case. Activating the mechanism could require a determination by a central organ, an agreement among all member States, or leave it to each State individually.

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67 Assistance might eventually encompass any interaction between States. Non-assistance might go as far as to require an absolute boycott of the State. Similarly, the temporal scope can differ: a non-assistance obligation can relate to any assistance that facilitates the wrong, and hence also covers preparatory acts of assistance; it can however also be limited to assistance during the war itself.

68 Wilson, *UN and Collective Security*, 9.

69 Ibid 7-8.

70 Kupchan, Kupchan, *IntlSec* (1995) 53.

71 Orakhelashvili, *Collective Security*, 10, 11.

72 Nikolaos K Tsagourias, Nigel D White, *Collective Security: Theory, Law and Practice* (2013) 24.

The community may be universal or limited in membership as well as global or merely regional in scope.[73]

Different design options exist also with respect to the collective response by third States forming the international community. The form and type of the collective response, the procedure according to which the response may be decided and executed, may differ among collective security systems. The means and the intensity of the collective enforcement measures may have a wide range.[74] As such, they can extend from non-forcible means such as economic sanctions to the use of force. The involved actors may vary. The collective measures can be placed in the hand of the members themselves or a centralized organ. The collective response by third States may be compulsory. It may also be organized as flexible response conditional to another decision, or even only as a right that may be exercised discretionary.[75] Similarly, the collective response may be automatic, immediate, pre-determined and pre-defined, or rather designed to be flexible for the specific case and to be determined on a case-by-case basis.

This flexibility in design extends also to regulations of inter-State assistance specifically. To mention only a few options from a broad array of possibilities: States may be obliged to assist the target of aggression or may just be entitled to do so. Similarly, States may have an obligation not to assist a violator. Alternatively, such a regulation may be confined to a right not to provide assistance, freeing States from existing cooperation obligations but leaving it within the discretion of States to continue their support or not. Finally, the scope of the prohibition of assistance to a violator may vary as well. It could be absolute, requiring basically an entire boycott, or it could be limited to assistance specific to the specific act, requiring a subjective element.

To briefly summarize, assistance is a prominent and integral part of systems of collective security. Its specific role depends however on the specific implementation of the entire system. How this system has been realized through the Covenant of the League of Nations will be the subject of the following section.

73 Kupchan, Kupchan, *IntlSec* (1991) 120; de Wet, Wood, *Collectiv Security* para 1.
74 Wilson, *UN and Collective Security*, 8.
75 Kupchan, Kupchan, *IntlSec* (1995) 53.

### 2) Assistance under the Covenant of the League of Nations

The Covenant of the League of Nations did not outlaw war. War remained a legitimate means of international politics. But the resort to war – and only war[76] – was subject to 'certain' procedural limitations, imposing a qualified prohibition to "resort to (or go to) war".[77]

Other States' attitude to war was a dominant question under the Covenant regime that was widely described as a system of collective security.[78] Member States undertook the obligation to provide (territorial) support to the (expressly legal) resort to armed force to protect the Covenant, upon the recommendation of the Council, against a Covenant-breaking State.[79] For other cases of war, the Covenant did not entail a general

76 The obligation did not extend to a "force short of war": Pick, Critchley, *Collective Security*, 25; Weller, *Use of Force*, 626. See discussions whether the moratorium should extend also to warlike preparations: David Hunter Miller, *The Drafting of the Covenant*, vol I (reprint 1969 edn, 1928) 5 para 9.

77 War was prohibited in only five situations: (1) Article 12 I 1 LoNC: war without previous submission of the dispute to judicial settlement or meditation; (2) Article 12 I 2 LoNC: war before the end of a three-month cooling off period; (3) Article 13 IV LoNC: war against a State complying an award or decision; (4) Article 15 VI, X LoNC: war against a State complying with universally adopted report; (5) Article 15 XIII, X LoNC. Walther Schücking, Hans Wehberg, *Die Satzung des Völkerbundes* (2nd edn, 1924) 618; Philip Noel-Baker, *The Geneva Protocol: for the pacific settlement of international disputes* (1925) 27-29; Stone, *Legal Controls of International Conflict*, 175; Robert Kolb, *International Law on the Maintenance of Peace. Jus Contra Bellum* (2018) 46-47, 50-54. Also, States undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." The relationship of this obligation undertaken in Article 10 LoNC with other limitations to war has been controversial. Ian Brownlie, *International Law and the Use of Force by States* (1963) 62-65. Some viewed it as independent qualified prohibition to resort to war, from which they inferred a duty of solidarity (and non-assistance) in such qualified instances of war, e.g. Friedrich Merkel, *Die kollektiven Beistands- und die Nichtangriffspakte* (1938) 35-36. States however remained reluctant towards such an interpretation. On the meaning of 'resort to war': Williams, *CLJ* (1933); Hersch Lauterpacht, '"Resort to War" and the Interpretation of the Covenant during the Manchurian Dispute', 28(1) *AJIL* (1934); Quincy Wright, 'The Test of Aggression in the Italo-Ethiopian War', 30(1) *AJIL* (1936).

78 E.g. John Fischer Williams, 'Sanctions under the Covenant', 17 *BYIL* (1936) 136.

79 In case of the situation described in Article 16 II LoNC, States were not obliged to contribute armed forces. Alfred Verdross, 'Austria's Permanent Neutrality and the United Nations Organization', 50(1) *AJIL* (1956) 65; Noel-Baker, *Geneva Protocol*, 135-136; Schücking, Wehberg, *Völkerbund*, 632; Kolb, *Jus Contra Bellum*, 64. This position was not uncontroversial: Hans Wehberg, *The Outlawry of War: A Series of Lectures Delivered Before the Academy of International Law at The Hague and in*

clause regulating interstate assistance. States remained free to support States engaged in war not prohibited under the Covenant.[80] The situation was more complex with respect to assistance provided to a State committing an act of war in breach of the Covenant.

Under the Covenant, war was no longer a bilateral issue.[81] It was a matter of concern to the whole League.[82] An act of war in disregard of the Covenant was deemed an act of war against all other League Members.[83] Against this background, States had a right but no obligation to support the State targeted by unlawful war.[84] With regard to the Covenant-break-

*the Institut Universitaire de Hautes Études Internationales at Geneva* (1931) 11. But, under Article 16 III LoNC, States i.a. agreed that they will take the necessary steps to afford passage through their territory for forces of any of the Members of the League which are cooperating to protect the Covenant. See also Arnold McNair, 'Collective Security', 17 *BYIL* (1936) 162. But see London Declaration (13 February 1920) for an exception for Switzerland, Robert B Mowat, 'The Position of Switzerland in the League of Nations', 4 *BYIL* (1923).

80 Note however that assisting States may be subject to the Covenant's regulations of resorting to war, to the extent that assistance qualified as 'war'. Advocating for an obligatory neutrality by third States, unless the Covenant procedure is gone through Malbone Watson Graham, 'The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality', 15(5) *CalLRev* (1927) 371.

81 Stone, *Legal Controls of International Conflict*, 168 explains that before this provision was included war was "so little of matter of legal concern of third States that even attempted mediation was liable to be treated as an unfriendly act. Self-help by States was still a part of the international legal order".

82 Article 11 I 1 LoNC.

83 Article 16 I LoNC

84 League of Nations, Reports and Resolutions on the Subject of Article 16 of the Covenant. Memorandum and Collection of Reports, Resolutions and References prepared in Execution of the Council's Resolution of December 8th, 1926, A.14.1927.V, (1927), 17: "All these Members are, in consequence, entitled to commit acts of war against the Covenant-breaking State, or to declare that a state of war exists between them and it; in fact, they may, quite independently of the measures laid down in Article 16, apply, in respect of this State and its nationals, measures as are in conformity with their national law, and which international law allows to be employed against an enemy." States were however not automatically in a state of war with a Covenant-breaking State, Schücking, Wehberg, *Völkerbund*, 621; Miller, *Drafting of the Covenant*, 80, 366-367; Francis P Walters, *A History of the League of Nations* (1960) 53. On the non-existence of a duty to cooperate: e.g. Affairs, *International Sanctions*, 89; Walters, *History LoN*, 382; David Mitrany, *The Problem of International Sanctions* (1925) 16; Hathaway, Shapiro, *Internationalists*, 117-119. See on subsequent discussions to make assistance obligatory: Walters, *History LoN*, 381-382; Jessup and others, *Neutrality*, vol 4, 104-105.

ing State, States were free not to assist it.[85] But the text of the Covenant did not embrace a corresponding duty. It did not generally prohibit to give assistance to wars unlawful under the Covenant.[86] Instead, member States undertook under Article 16 para 1 LoNC that defined the collective response to war in violation of the Covenant:

> "immediately to subject [a State that resorted to war in disregard of the Covenant] to severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."

The 'severance of all trade or financial relations' did not depend on a specific *contribution* of trade or the financial relations to an unlawful war. No specific causality standard or subjective connection was required. Instead, Article 16 LoNC envisaged an automatic and absolute boycott of the treaty-breaking State. US President Woodrow Wilson put the idea underlying Article 16 LoN: "Suppose somebody does not abide by these engagements, then what happens? An absolute isolation, a boycott! The boycott is automatic. There is no 'but' or 'if' about that in the Covenant. [...] It is the

85 Arguably even against an obligation to provide support. Cf also Article 20 LoNC. For example, States were free to deviate from treaty commitments. They were likewise no longer bound to grant to a Covenant-breaking State rights guaranteed by the law of neutrality Payson S Wild, 'Treaty Sanctions', 26(3) *AJIL* (1932) 496; McNair, *BYIL* (1936) 157; Williams, *BYIL* (1936) 146; Resolutions and Recommendations Adopted on the Reports of the Third Committee', 6 *LNOJSpecSuppl* (1921) 25 para 4; Stone, *Legal Controls of International Conflict*, 381. For example, this view was widely shared in the Italian-Ethiopian war: Wright, *AJIL* (1936) 48; Hersch Lauterpacht, 'The Covenant as the Higher Law', 17 *BYIL* (1936).

86 But see Articles 12, 13 IV, 15 VI LoNC whereby States agree not to go to war with a State complying with the Covenant procedure. This obligation has been understood to also impose a "*duty* to remain neutral" towards the Covenant-breaking State. Kunz, *PROCASIL* (1935) 38. Based on the idea that non-neutrality would constitute an act of war against the complying State, States may have undertaken also a certain obligation not to assist to the extent neutrality requires such non-assistance. The scope of the prohibition of assistance would be limited then to non-neutral behavior. On the discussion of scope of 'war' see: Williams, *CLJ* (1933). Italy for example viewed a unilateral denial to deliver oil as an act of war. Following such an interpretation, the unilateral delivery of oil to an aggressor might have been considered prohibited 'assistance'.

most complete boycott ever conceived in a public document."[87] M Augustin Hamon described the idea as the "revival of medieval excommunication."[88]

In view of the broad nature of the measures to be adopted, acts of assistance were prohibited, too. In fact, this was an underlying motivation by States when discussing the response mechanism.[89] To use Arnold McNair's words: the measures were "directed to handicap one of two belligerents in its contest with its adversary and eventually to make it impossible for it to continue the contest."[90] This non-assistance component featured prominently in practice, most notably when States were reluctant to implement the deliberately drastic boycott conceived by the drafters.[91] In view of great exporting countries not joining the League, Article 16 LoNC was interpreted to allow States freedom how to specifically and gradually implement the obligation.[92] The Council was thereby assigned a coordinative role.[93] On that note, measures in implementation of Article 16 LoNC were structurally designed and selected[94] to primarily target the Covenant-breaking State in its military and economic capacities necessary for the unlawful war.[95] Article 16 LoNC hence embraced a prohibition of specific contributions to unlawful war.

87 Affairs, *International Sanctions*, 2. See also Geoffrey L Goodwin, *Britain and the United Nations* (1957) 42; Orakhelashvili, *Collective Security*, 8.

88 Affairs, *International Sanctions*, 2.

89 Williams, *BYIL* (1936) 132. This was also acknowledged in the debates. Even remote contributions to war were prohibited for their contribution to an unlawful war. E.g. delegates stressed that the goal of import embargoes was that "belligerent's capacity to import – and to that extent to carry on a war – was *pro tanto* made more difficult". Severing financial relations was described to "reduce the power of the aggressor to purchase", Affairs, *International Sanctions*, 76, 95. This is further indicated by the fact that all private relations were to be ended. On the adoption of Article 16, the question was asked whether it is "the intention of this article to provide for the suppression of private relations" and the Chairman answered: "Our experience with the blockade has demonstrated the necessity of putting an end to all kinds of relations." Miller, *Drafting of the Covenant*, 264.

90 McNair, *BYIL* (1936) 153.

91 Denna F Fleming, 'The League of Nations and Sanctions', 8 *PROCSPSA* (1935) 21.

92 Noel-Baker, *Geneva Protocol*, 136; Williams, *BYIL* (1936) 142; Affairs, *International Sanctions*, 17; Stone, *Legal Controls of International Conflict*, 180.

93 Williams, *BYIL* (1936) 137-138; Wehberg, *Outlawry of War*, 11.

94 States attempted to identify the areas in which the violator was particularly dependent on foreign assistance, and adopted those measures in the hope that they will lead the violator to end its violation.

95 Schücking, Wehberg, *Völkerbund*, 629-630. France proposed a list of specific acts to be prohibited. While the League instead stressed the need for a case-specific re-

In practice, the determination of whether there had been a breach of the Covenant that triggered the prohibition of assistance was ultimately left to States themselves.[96] But in case they found a breach, they were required to take measures as a matter of legal duty.[97] Moreover, the scope of Article 16 LoNC was limited in several respects. Assistance was only prohibited as a *reaction* to a violation, i.e., once an act of war in violation of the Covenant had actually been committed. Prior preparatory contributions to warring efforts could hence not lead to responsibility under Article 16 LoNC. Furthermore, the cooperation addressed was *economic* in character,[98] which left one to wonder about services, like military logistics, training or communication, or passage through a State's territory.

The rather limited and selective textual basis of Article 16 LoNC did not reflect States' belief that further assistance to a Covenant-breaking State was not generally prohibited. Article 16 LoNC was conceptualized and applied as what was widely referred to as "sanctions",[99] or "economic weapon".[100] In view of the experiences of World War I and the interdependence of increasingly less self-sufficient States, sanctions constituted an alternative means

sponse, both approaches shared the characteristic of prohibiting acts that specifically contribute to the unlawful war. See also on the statistics concerning raw materials, production, exports and imports that the Secretariat had compiled: Walters, *History LoN*, 381.

96 "The Economic Weapons", Resolution adopted on October 4th, 1921, para 4, *LNOJSpecSuppl* (1921). This did not change the bindingness of the obligation, however. Affairs, *International Sanctions*, 193. For an example of an implementation in practice, cf the Italian-Ethiopian dispute, Walters, *History LoN*, 655-656. In the Manchurian dispute, States refrained from finding an unlawful resort to war by Japan. Non-assistance obligations were hence not triggered, Lauterpacht, *AJIL* (1934) 46. See also Stone, *Legal Controls of International Conflict*, 176-177; Williams, *BYIL* (1936) 136, 139. On an interesting comparison with the UNSC, Stone, *Legal Controls of International Conflict*, 178-180.

97 But see by the end of the 1930s, the obligatory nature of Article 16 LoNC was increasingly challenged. E.g. Note by the Secretary General: Questions relating to Article 16 of the Covenant, Report of the 6th Committee to the Assembly on September 30th, 1938, C.444.M.287.1938.VII (30 November 1938), including A.74.1938.VII. See also Tucker, *ILQ* (1951) 18.

98 LoN, Reports and Resolutions on the Subject of Article 16 of the Covenant. Memorandum and Collection of Reports, Resolutions and References prepared in Execution of the Council's Resolution of December 8th, 1926, A.14.1927.V, (1927), 17. Stone, *Legal Controls of International Conflict*, 177: humanitarian action was not prohibited.

99 Williams, *BYIL* (1936) 131; Walters, *History LoN*, 53.

100 "The Economic Weapons", Resolution adopted on October 4th, 1921, *LNOJSpecSuppl* (1921) 24.

short of armed forces.[101] While such sanctions – in pursuit of the goal to end an unlawful war – also aimed to prohibit specific acts that support the Covenant-breaking State, they primarily sought to ensure and enforce compliance with the Covenant. In other words, there may have been an overlap. The Covenant may have implicated specific negative non-assistance to a Covenant-breaking State. But it required positive action that went beyond non-assistance, hence not conclusively regulating non-assistance.[102]

Such a reading of the Covenant is further affirmed in subsequent efforts within the League to construct a more extensive system of security, thereby complementing the Covenant's regime. Assistance afforded to a Covenant-breaking State committing an act of war did not feature prominently in either of them. Instead, the focus lay on obligations guaranteeing States more substantial protection against all aggression towards the State targeted by unlawful use of force.

For example, discussions in 1923 on a draft Treaty of Mutual Assistance would have included a mutual promise of immediate and effective aid in case of aggressive war determined by the Council.[103]

The Geneva Protocol (1924), that despite never entering into force was considered to be widely influential for further developments, followed similar lines. States undertook to "co-operate loyally and effectively in support of the Covenant of the League of Nations, and in resistance to any act of aggression." They also agreed to "come to the assistance" of the State attacked or threatened, though they remained free to define the nature of this assistance.[104] As such, the Protocol sought to further clarify the provisions on mutual assistance and solidarity under the Covenant.[105]

101 Wehberg, *Outlawry of War*, 11 describing it as punishment; Rita Falk Taubenfeld, Howard J Taubenfeld, 'The "Economic Weapon": The League and the United Nations', 58 *PROCASIL* (1964) 188; Stone, *Legal Controls of International Conflict*, 180.

102 See also Helmut Huber, *Die Nichtangriffs- und Neutralitätsverträge* (1936) 13-14; Morgenthau, *Politics Among Nations*, 287-288.

103 The treaty sought to establish greater security for States as breeding grounds for disarmament commitments. It was however ultimately rejected. Wehberg, *Outlawry of War*, 14-17; Walters, *History LoN*, 223-228.

104 Fleming, *PROCSPSA* (1935) 22. Note the agreement that "naturally [aggressor States, even when both are aggressors] will not be entitled to receive the assistance referred to in Article 11, paragraph 3." M Benes, Report of the Third Committee, Security and Reduction of Armaments, C.708 (1924) IX, 360.

105 Brownlie, *Use of Force*, 69-70; Walters, *History LoN*, 268-276, 283; Manley O Hudson, 'The Geneva Protocol', 3(2) *Foreign Affairs* (1924-1925) 232-233.

The Treaty of Locarno (1925) not only required States not to resort to war against each other, but also established a full duty to assist the State targeted by the attack.[106]

Last but not least, the League prepared a Model Collective Treaty of Mutual Assistance.[107] Therein, States would pledge not to attack or invade the territory of another contracting party, not to resort to war against another Contracting Party and to give assistance to the State subjected to such an attack once the Council determined it as a violation.[108]

In none of these treaties was the silence on non-assistance to a treaty-breaking State meant to allow assistance (not falling under sanctions) to such States. To the contrary, they were drafted on the understanding that assistance to a treaty-breaking State was in any event prohibited. The Committee on Arbitration and Security summarized it most succinctly in its introductory note with respect to third States:

> "It is equally clear that the Contracting Parties could not in any case afford any assistance to a third State which ventured to attack one of them in violation of the Covenant of the League of Nations. The insertion of a special clause to this effect is useless, since it cannot be presumed that a Power which agrees to become party to a treaty of security would be disloyal to any of its co-signatories. It would even be dangerous to insert such a clause, for it might well weaken the force of Articles 16 and 17 of the Covenant; the undertaking not to afford assistance to a third aggressor State would not, for States Members of the League of Nations, be an adequate commitment. The Covenant provides, not for negative,

106 Article 2 and 4 Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, done at Locarno, October 16, 1925. At the same time, separate mutual assistance treaties between France Poland and Czechoslovakia were signed, according to which each pledged armed support in case Germany should attack the other. Brownlie, *Use of Force*, 71; Walters, *History LoN*, 285- 292.

107 Committee on Arbitration and Security, Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) C.536.M.163.1928.IX, 32, LNOJSpecSuppl (64) 1928, 490-527. See also Brownlie, *Use of Force*, 67; Walters, *History LoN*, 383-384. See below II.B.1 on the collective and the bilateral treaties of non-aggression that have been drafted in parallel.

108 Article I, III Model Treaty of Mutual Assistance. These model treaties were the climax of long-lasting discussions in the League. For details see Jörg Manfred Mössner, 'Non-Aggression Pacts' in Rudolf Bernhardt (ed), *Max Planck Encyclopedia of Public International Law - Use of Force. War and Neutrality. Peace Treaties (N-Z)* (1982) 34-35.

> but for positive action against any State resorting to war in violation of the engagements subscribed to in Articles 12, 13 and 15."[109]

There was hence a tacit agreement in the abstract that assistance to a State committing an act of war in disregard of the Covenant must not be provided.[110] This obligation was thereby structurally linked to the Covenant's underlying system of collective security, which left the ultimate responsibility for international peace and security to States. The League was not by design a centralized system of collective security. Instead, it established "a system of co-operation between States, which were to retain their sovereignty but to agree to do and not to do certain things in the exercise of their sovereign rights."[111] "The League was not an 'it' but 'they'."[112] The non-assistance obligation derived from the principle "all against one".

In practice, the obligation of non-assistance neither had much impact nor featured prominently besides sanctions. This is not least because sanctions rarely went beyond non-assistance obligations. As an anonymous contemporary author noted in view of sanctions imposed against Italy in the Italo-Ethiopian War:

> "All that is involved is non-intercourse: a refusal to buy, to extend credit, or to sell certain supplies to Italy in view of her violation of accepted law. In other words, the nations merely say to her: "So long as you take such action, we will refuse to be accomplice to it in any way – we will not take your exports, give you our credits, or send you essential war supplies." Sanctions in the real sense would be involved only if force were used, as, for instance, by blockade. This is not at all a play of words; it penetrates deep into the spirit of what is being attempted and gives an answer to the non-resistant pacifists who, by taking no action at all, would, in fact, aid and abet a violation of law."[113]

109 Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) 31.

110 See also Mitrany, *Sanctions*, 35, 55 who described this as a 'minimum demand of a leagued world'; Hudson, *PROCASIL* (1935) 43 referred to a duty to withhold any advantage flowing from the nineteenth century law of neutrality.

111 James L Brierly, 'The Covenant and the Charter', 23 *BYIL* (1946) 84-85.

112 Ibid 85. See also McNair, *BYIL* (1936) 161.

113 Expert on International Affairs, 'Sanctions in the Italo-Ethiopian Conflict', 16 *Intl-Conc* (1935) 543-544. For a similar observation Mitrany, *Sanctions*, 42.

Moreover, the scope of this non-assistance obligation seemed to follow the same principles as sanctions.[114] States' commitment not to assist a treaty-breaking State did not go further than what was decided upon as a sanction. It was likewise applied *in reaction* to, i.e. upon the outbreak of hostilities. It did not establish responsibility for any (previous preparatory) contributions to war, even when provided in full awareness that this may contribute to a prospective unlawful resort to war.[115] Neither was it automatically applied in absolute terms. While no specific subjective or objective conditions like causality or knowledge were required, States' understanding of assistance appeared to be a flexible and realpolitik-driven one. States thereby seem to have factored in the not insubstantial (economic and political) burdens that non-assistance might entail for the non-assisting State, in particular owing to the absence of American commitment to join League efforts. It appeared thus to be decisive whether or not the contribution would have a specific and actual impact on the State that unlawfully resorts to war. For example, in the Italian-Ethiopian War, States continued to provide strategic commodities to Italy, despite the fact that the Italian attack on Ethiopia was denounced as a breach of the Covenant and States imposed sanctions for the first time.[116] As a contemporary author noted, "it

114 Mitrany, *Sanctions*, 35, 42.

115 E.g. States did not constrain their cooperation with Italy when Italian war preparations were hardly deniable. It should not go unnoticed however that during this time Italy denied to prepare an illegal war. Most decisively for Italian war preparations, Italy was not hindered to pass through the Suez Canal. Besides discussions on whether a State had a right to close the canal, Halford L Hoskins, 'Suez Canal Problems', 30(4) *GeogrRev* (1940) 670, it has been discussed however whether a closure of the Canal for Italy constituted a warlike act. It would then not have been obligatory under Article 16 para 1, but fall within Article 16 para 2 LoNC, Williams, *BYIL* (1936) 141, 145; Affairs, *International Sanctions*, 206.

116 Abstract of Report on Italy's Aggressions Adopted by the League of Nations Council, October 7, 1935', 16 *IntlConc* (1935) 527. All States but six followed the Council's report that found Italy to have resorted to war in disregard of Article 12 of the Covenant, Wright, *AJIL* (1936) 47; Stone, *Legal Controls of International Conflict*, 177-178. The League's Coordination Committee that had been established consequently proposed to ban arms trade, financial transactions, to prohibit "importation into the territory of State Members of all goods (other than gold or silver bullion and coin) consigned from Italy or Italian possessions", and "the exportation or re-exportation to Italy and her colonies of a certain number of articles … necessary for the prosecution of war, … [and] mainly exported by States Members of the League." These proposals had been accepted. A further proposal that would have added coal, oil, pig iron and steel, was rejected, however, Cristiano Andrea Ristuccia, 'The 1935 Sanctions against Italy: Would coal and oil have made a difference?', 4(1)

is already a common secret in one or another of the countries claiming to impose all the restrictions recommended, that the trade exchange with Italy was bigger during these restrictions than before their so-called "enforcement"."[117] Ethiopia had repeatedly called for the cessation of such support.[118] The ensuing discussions concerned only States' obligations under Article 16 LoNC as sanctions but did not feature an independent obligation not to provide assistance. States apparently did not feel obliged to cease assistance, as the cessation of petroleum or oil was considered ineffective and only detrimental to States ceasing cooperation as long as non-parties to the Covenant did not commit to join the termination of supplies.[119]

Accordingly, while States appeared to recognize that assistance to war in violation of the Covenant was prohibited, too, it was primarily the sanction regime under the League against which assisting contributions were measured.

## B. Prohibitions of war: also prohibitions of assistance to war?

In the interwar period, States subjected their right to resort to war increasingly to legal constraints. Before a prohibition of war gained traction on the universal level with the conclusion of the Kellogg-Briand Pact in 1928, States were pioneering the idea through bilateral treaties.[120]

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*EurRevEconHist* (2000) 87. Those actions were understood as interpretation of the Article, Williams, *BYIL* (1936) 142.

117 George de Fiedorowicz, 'Historical Survey of the Application of Sanctions', 22 *TGS* (1936) 129.

118 91st Session of the Council Annex 1592 Documentation relating to the Dispute between Ethiopia and Italy', *LNOJ* (1936) 399, 403.

119 Affairs, *International Sanctions*, 67. The Committee of Experts concluded that an oil embargo would have made it more difficult and more expensive for Italy to purchase oil, de Fiedorowicz, *TGS* (1936) 131. For an argument that mineral sanctions would have been an effective and sufficient deterrent: Thomas H Holland, 'The Mineral Sanction As a Contribution to International Security', 15(5) *IntlAff* (1936). See also on the question whether sanctions are only obligatory when applied collectively Williams, *BYIL* (1936) 135.

120 Contemporary scholars agreed that this was a new development in State practice, although the idea was not revolutionary. For example, Chancellor Otto von Bismarck had expressed the wish for such treaties already in the 19th century: "Wie nützlich es für den Frieden sein könnte, wenn sich möglichst viele Großmächte zusagen wollten, sich nicht anzugreifen!", Günther Wasmund, *Die Nichtangriffspakte: zugleich ein Beitrag zu dem Problem des Angriffsbegriffes* (1935) 59-60; Huber, *Nichtangriffsverträge*, 8. It is true that treaties of friendship and treaties of neutrality

Within those treaties, assistance to another State's resort to war also found express regulation. Beyond committing to refrain from resorting to war[121] against their treaty party, States also pledged not to assist a third State attacking their treaty party (1). Multilateral regulations, namely the Kellogg-Briand Pact, may have lacked such textual clarity. Still, questions on interstate assistance featured nonetheless in interpretative exercises (2).

1) (Bilateral) treaties of non-aggression and assistance

The majority of bilateral non-aggression treaties did not stop at prohibiting aggression. In addition, these treaties frequently imposed express obligations on the contracting parties not to support a third State resorting to war against the treaty party.

By broadening the obligations for the treaty parties accordingly, States compensated for the treaty's bilateral nature. Treaties were thus conceptualized to grant more comprehensive protection against not only direct, but also indirect attacks.[122] Through a sophisticated network of bilateral treaties, States sought to build up an extended security zone. A State's treaty partners ideally thereby constituted a buffer rendering attacks by third States in times of limited air power substantially more difficult.

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with comparable commitments limiting the recourse to war were not uncommon, even before the interwar period. e.g. Harvard Law School, 'Draft Conventions, with Comments, Prepared by the Research in International Law of the Harvard Law School, III, Rights and Duties of States in Case of Aggression', 33 Supplement *AJIL* (1939) 858 et seq; Wasmund, *Nichtangriffspakte*, 57-58. Those treaties were not absolute, but allowed for deviation, and were based on the understanding of a sovereign right to resort to war School, *AJIL* (1939) 823; Merkel, *Nichtangriffspakte*, 48; Wasmund, *Nichtangriffspakte*, 60.

121 The term "war" is used in a non-technical manner in this section. The conduct prohibited under the bilateral treaties is defined by a remarkable terminological variance including "aggressive action", "attack", "act of aggression", "recourse to war", "act of violence". Cf also Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (2nd printing edn, 1958) 37-38. On the scope and meaning of the prohibitions itself, Wasmund, *Nichtangriffspakte*; Huber, *Nichtangriffsverträge*; Merkel, *Nichtangriffspakte.*

122 Indirect attack is understood as the provision of assistance to a direct attack. On the original meaning of 'indirect aggression' see Ann Van Wynen Thomas, Aaron J Thomas, *The Concept of Aggression in International Law* (1972) 18. Initially, France coined the term in a broad manner. France understood it as any attack that was not directed against France itself, but still would render France less secure, i.e. for example Germany attacking France's (south)eastern neighbors.

The Soviet Union, which had also been the driving force behind bilateral non-aggression treaties, took this basic idea the furthest.[123] As a counter-system to the League of Nations, and in fear of "imperialistic interference" by the League, the USSR concluded various bilateral non-aggression pacts with neighbouring and geographically key States, until it eventually joined the League in 1934.[124] Thereby, it established a (legal) buffer zone, seeking to protect itself not only against attacks by its treaty parties, but foremost indirectly by members of the League of Nations.[125]

In effect, non-aggression treaties were a political means to achieve a minimal level of security. They complemented or compensated for duties to provide assistance or a full alliance that may not have been viable for some States. In other words, these treaties entailed the most minimal commitment to military assistance: assistance through non-assistance to the enemy.[126]

123 Huber, *Nichtangriffsverträge*, 13; Mössner, *Non-Aggression Pacts*, 36; Wasmund, *Nichtangriffspakte*, 63-64.

124 Treaty of Friendship and Neutrality (USSR, Turkey) (17 December 1925) 157 LNTS 353; Treaty of Berlin (USSR, Germany) (24 April 1926) 53 LNTS 387; Treaty of Neutrality and Non-Aggression (USSR, Afghanistan) (31 August 1926); Non-Aggression pact (USSR, Lithuania) (28 September 1926) 69 LNTS 145; Treaty of Non-Aggression (USSR, Latvia) (5 February 1932) 148 LNTS 113; Treaty of Guarantee and Neutrality (USSR, Persia) (1 October 1927) 112 LNTS 275; Treaty of Non-Aggression and Pacific Settlement of Disputes (USSR, Finland) (21 January 1932) 157 LNTS 393; Treaty of Non-Aggression and Peaceful Settlement of Disputes (USSR, Estonia) (4 May 1932) 131 LNTS 297; Pact of Non-aggression, (USSR, Poland) (25 July 1932) 136 LNTS 41; Pact of Non-Aggression (USSR, France) (29 November 1932) 157 LNTS 411; Treaty of Friendship (USSR, Italy) (2 September 1933) 148 LNTS 319. Three ancillary treaties were also part of its network: Treaty of Friendship and Security (Persia, Turkey) (22 April 1926) 2(15) Bulletin of International News (1926) 1–3; Treaty of Friendship and Security, (Persia, Afghanistan) (27 November 1927) 107 LNTS 433; Treaty of Friendship and Cooperation (Turkey, Afghanistan) (25 May 1928). For details see Huber, *Nichtangriffsverträge*, 19, 21-59; Malbone W Graham, 'The Soviet Security Treaties', 23(2) *AJIL* (1929); Merkel, *Nichtangriffspakte*, 48, 60-62.

125 Initially, the Soviet Union had aimed for an absolute non-assistance provision. Other States denied this request as they were not willing to tolerate an aggressive Russia policy. The USSR consequently settled for more limited option, which was still aligned with its primary interest: security against arbitrary attacks by the League. See e.g. on the negotiations of the Treaty of Berlin, Huber, *Nichtangriffsverträge*, 34.

126 Merkel, *Nichtangriffspakte*, 14, for more details on the background of non-aggression treaties 47; Huber, *Nichtangriffsverträge*, 16; Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) 31.

The specific design of non-assistance obligations, in particular their trigger and scope varied considerably.

Some States committed to an obligation to remain neutral.[127] States undertook this duty throughout the duration of the hostilities, usually limited to the case where a treaty party was attacked despite its peaceful attitude.[128] The commitment to non-assistance was generally understood in line with their rights and duties under the law of neutrality,[129] albeit it was sometimes qualified by specific and absolute non-assistance rules.[130] As such, this implied – as some treaties expressly stressed[131] – that intercourse with the attacking belligerent permissible under the law of neutrality was to be respected.

Other treaties avoided any reference to the law of neutrality, deliberately so.[132] Those treaties required the treaty party not to "lend its support",[133]

127 E.g. Political Agreement (Austria, Czechoslovakia) (16 December 1921) 9 LNTS 9, 247 Article 3; Treaty of Friendship and Neutrality (USSR, Turkey) (17 December 1925), 157 LNTS 353, Article I; Treaty of Neutrality and Mutual Non-Aggression (USSR, Afghanistan) (24 June 1931) 157 LNTS 371, Article 1. For more details see also Wasmund, *Nichtangriffspakte*, 105.

128 E.g. Treaty of Berlin (USSR, Germany) n 124, Article 2; Treaty of Neutrality, Conciliation and Arbitration (Turkey, Hungary) (5 January 1929) 100 LNTS 137, Article 2; Treaty of Friendship, Neutrality, Conciliation and Arbitration (Greece, Turkey) (30 October 1930) 125 LNTS 9, Article 2; Treaty of Non-Aggression and Pacific Settlement of Disputes (USSR, Finland), n 124, Article 2; (USSR, Italy), n 125, Article 2; (USSR, Poland) n 125, Article 2; (USSR, France) n 125, Article 2; (USSR, Persia) n 124; (Persia, Afghanistan), n 125, Article 2. But see the (USSR, Afghanistan), (USSR, Turkey), (Turkey, Persia) n 124 who contained an unlimited obligation of neutrality and non-assistance, even in case of aggressive wars. As Wasmund, *Nichtangriffspakte*, 108 notes those treaties effectively constituted an "indirect duty of assistance to an aggressive treaty party."

129 Treaty of Friendship (Turkey, France) (3 February 1930) 54 LNTS 195, Article I. Some treaties imposed further commitments, e.g. with respect to their nationals. On the content of neutrality: Kentaro Wani, *Neutrality in International Law: From the Sixteenth Century to 1945* (2017) 6, 7.

130 E.g. (USSR, Afghanistan) n 127, Article 3.

131 (Persia, Afghanistan) n 124, Article 2; (USSR, Persia) n 124, Article 2.

132 In order to avoid a debate about the compatibility with the League Covenant, States refrained from using the terminology of "neutrality". Also, not all States were willing to any longer turn a blind eye on aggressive policies by their contracting parties. Promising full neutrality was considered to possibly support an aggressive State. Cf Wasmund, *Nichtangriffspakte*, 106 n 44; Huber, *Nichtangriffsverträge*, 39.

133 (USSR, Lithuania), n 124: "Should one of the Contracting Parties, despite its peaceful attitude, be attacked by one or several third Powers, the other Contracting Party undertakes not to support the said third Power or Powers against the Contracting

or "not to give aid or assistance, either directly or indirectly".[134] As a general rule, these obligations applied during the course of the conflict, and, as some States were eager to stress, left other rights and obligations undertaken prior to the treaty unaffected.[135] The non-assistance obligation applied only to the extent that the use of force was aggressive.[136]

Some treaties again listed specific forms of contributions to a third actor's military activities that were prohibited. Notably, these provisions applied in case of a use of force by any third actor, governments, organisations, or private groups alike.[137]

Some treaties took a different approach to regulating assistance than previous treaties that formulated a prohibition distinct from the prohibition to use force.[138] The increasing number of non-aggression pacts had prompted the question what conduct precisely the treaties prohibited – a question that was to be controversially debated with increased intensity for the years to come.[139] Notably early attempts to defining aggression indicated that the provision of assistance to armed force may suffice.

Most famously, the Politis Definition in the context of the Disarmament Conference 1932-1933 included:

> "Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the

Party attacked." (Italy, Yugoslavia) (25 March 1937) in Merkel, *Nichtangriffspakte*, 63. Treaty of Non-Aggression (Germany, USSR) (23 August 1939).

134 (USSR, Poland) n 124, Article II; (USSR, France) n 124, Article II ("aid and support").

135 (USSR, France) n 124, Article III.

136 This was also the general rule for treaties promising support: They were limited to cases of lawful wars. But not all treaties had such a qualification, e.g. the infamous Treaty of non-aggression between Germany and the USSR from 1939.

137 Treaties either referred to both actors ('Governments'/'third parties' and 'military organisations') or stipulated abstract obligations. E.g. (Lithuania, Russia) n 124, Article IV; (Russia, Latvia), n 124, Article IV; Treaty of Friendship (Turkey, France) (3 February 1930) 54 LNTS 195, Article I; (Austria, Czechoslovakia) n 127, Article 4; (Russia, Afghanistan) n 124, Article 3.

138 Treaties that mentioned assistance in a distinct prohibition did not necessarily exclude this interpretation, as they typically used broad formulations such as "all warlike manifestations as far as possible" or noted that the use of force was prohibited irrespective whether committed separately or in conjunction with other powers. Bengt Broms, *The Definition of Aggression in the United Nations* (1968) 26-27.

139 Brownlie, *Use of Force*, 67.

> request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection."[140]

At its face this provision concerned non-State actor violence, not interstate conflict. But in his report, Politis suggested that this rule reflected a more general principle: a (broadly understood) idea of complicity:

> "The Committee, of course, did not wish to regard as an act of aggression any incursion into the territory of a State by armed bands setting out from the territory of another country. *In such a case, aggression could only be the outcome of complicity by the State in furnishing its support to the armed bands or in failing to take the measures in its power to deprive them of help and protection.* In certain cases (character of frontier districts, scarcity of population, etc.) the State may not be in the position to prevent or put a stop to the activities of these bands. In such a case, it would not be regarded as responsible, provided it had taken the measures which were in its power to put down the activities of the armed bands. In each particular case, it will be necessary to determine in practice what these measures are."[141]

Still, in comparison to assistance to non-State actor violence that was a feature common to several treaties,[142] the rule rarely applied in express terms to interstate assistance. A notable exception was the 1937 Treaty of Non-Aggression between Afghanistan, Iraq, Iran, and Turkey, according to which

140 Draft Act relating to the definition of the aggressor Series of League of Nations Publications, IX, Disarmament, 1935 IX.4, 583 et seq, Conf. D/C.G.108. On the legal status of the definition Claus Kreß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995) 269.

141 LoN, Conference for the Reduction and Limitation of Armaments, Conference Document, vol II, 681.

142 For an overview see Ian Brownlie, 'International Law and the Activities of Armed Bands', 7(4) *ICLQ* (1958) 719-722. E.g. Convention for the Definition of Aggression (3 July 1933), 147 LNTS 67, 148 LNTS 79, 211 (Afghanistan, Estonia, Iran, Latvia, Lithuania, Persia, Poland, Romania, USSR, Turkey, Czechoslovakia, Yugoslavia, Finland); Pact of the Balkan Entente (Greece, Turkey, Romania, Yugoslavia) (9 February 1934) 153 LNTS 153. Note that not all treaties recognized this: e.g. Anti-War Treaty on Non-Aggression and Conciliation (Argentina, Brazil, Chile, Mexico, Uruguay, Paraguay, USA) (10 October 1933), 28(3) AJILSuppl (1934) 79.

> "[t]he following shall be deemed to be acts of aggression: [...] Directly or indirectly aiding or assisting an aggressor [...]. The Following shall not constitute acts of aggression:" [...] Action to assist a State subject to attack, invasion or recourse to war by another of the High Contracting Parties [in violation of the Kellogg-Briand Pact]."[143]

Last but not least, several treaties did not dedicate a specific clause to assistance to unlawful war. Their silence was, however, not a rejection of the obligation but was usually grounded in the fact that obligations under the treaties transcended the minimal commitment to non-assistance. While it remained a fact that some treaties left the issue unregulated,[144] this is not true for all of them. For example, treaties under the auspices of the League discussed above, such as the Geneva Protocol,[145] the Treaty of Locarno[146] or the Model Collective Treaty of Mutual Assistance,[147] all did not mention non-assistance, as they exceeded such an obligation: the requirement of solidarity and mutual assistance, again limited to a case of lawful resort to armed force, was understood to also require non-assistance.[148]

Other treaties of non-aggression that confined themselves to prohibiting aggression were understood in a broader context. For example, some treaties were aligned in terms with the Kellogg-Briand Pact.[149] Others were based on the model (bilateral and multilateral) non-aggression pacts prepared under the auspices of the League of Nations.[150] During the negotiations in the Committee on Arbitration and Security, it was proposed to

143 (8 July 1937) 190 LNTS 21, Article 4.

144 E.g. Peace, Friendship and Arbitration (Dominican Republic, Haiti) (20 February 1929) 105 LNTS 215.

145 Protocol for the Pacific Settlement of Disputes (2 October 1924) 19(1) AJILSuppl (1925) 9-17.

146 Treaty of Mutual Guarantee (Germany, Belgium, France, UK, Italy) (16 October 1925) 54 LNTS 289, Articles 2, 4.

147 Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928).

148 Wasmund, *Nichtangriffspakte*, 62, 107. With respect to a commitment to non-aggression in such treaties: Merkel, *Nichtangriffspakte*, 34, see also for an overview on those treaties.

149 E.g. Pact of Non-Aggression (Germany, Poland) (26 January 1934), https://avalon.law.yale.edu/wwii/blbk01.asp. Huber, *Nichtangriffsverträge*, 45. For the interpretation of the commitments under the Kellogg-Briand Pact, below II.B.2.

150 See Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) for: Resolution adopted by the Assembly on September 26th, 1928, on the Submission and Recommendation of Model Treaties of Non-Aggression and Mutual Assistance, 28; Introductory Note to the Model Collective Treaty of Mutual Assistance and Collective and Bilateral Treaties of Non-Aggression, drawn up by

include an express and absolute prohibition to assist any attacking State. The Committee however rejected the proposal on the view that such a prohibition to support was already included in the non-aggression provision.[151] The bilateral treaties based on this model treaty affirmed this reading. The Pact of Non-Aggression between Greece and Romania from 1928, Greece and Yugoslavia from 1929, Greece and Poland from 1932, Romania and Turkey from 1933, and Turkey and Yugoslavia from 1933 were concluded on this assumption.[152] Moreover, the treaties were designed to be concluded by members of the League,[153] and thus to complement the protection under the Covenant for League members against League members.[154] As such, States were cautious for the treaties not to alter existing solidarity obligations under the League Covenant.[155]

Bilateral treaty commitments to non-assistance to a State engaged in war were not novel.[156] The obligations recognized in the treaties are noteworthy in that they no longer followed the paths of power but were increasingly guided by, and thus an expression of, the emerging *ius contra bellum*.

On a conceptual level, it is interesting to note that it seemed not obvious to States that a commitment to non-aggression automatically and inherently implied a prohibition of assistance. States did not seek to prohibit any reason for conflict, but carefully tailored the scope of their obligations.[157] Hence, they imposed either a distinct rule of non-assistance, or defined assistance as a prohibited act.

The scope and meaning of non-assistance commitments remained to be defined, but some general parameters were established. Non-assistance was also usually required only in case of aggressive wars. Assistance to lawful resort to war remained permissible. In view of the still dominant distinction between war and peace, treaty obligations seemed confined to assistance

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the Committee on Arbitration and Security; Model Collective Treaty of Mutual Assistance and Collective and Bilateral Treaties of Non-Aggression.

151 Huber, *Nichtangriffsverträge*, 75-76.

152 Ibid; Mössner, *Non-Aggression Pacts*, 35; Merkel, *Nichtangriffspakte*, 62.

153 Although it was not excluded that non-members become parties to the treaty. Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) 29 c).

154 There was some discussion whether to extend the treaty to cases of aggression by third States. While this was not meant to be excluded, the issue was deemed too complex. Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) 4, 29, 31.

155 Huber, *Nichtangriffsverträge*, 75-76.

156 Ibid 7-8; Merkel, *Nichtangriffspakte*, 18-19.

157 Similarly Merkel, *Nichtangriffspakte*, 50, 55.

provided once war had occurred, leaving pre-war cooperation (and war preparation) out of the equation.[158] Still, albeit heavily influenced by the law of neutrality, States seemed to adopt a rather comprehensive understanding of assistance. For example, at times obligations extended to State action with respect to non-State actors. Moreover, States widely acknowledged that the certainty of a commitment not to provide assistance to a belligerent party could constitute (minimal) assistance. As such, promises of (full) assistance[159] and non-assistance alike were widely, but not universally,[160] limited to States resorting to non-aggressive war.[161]

### 2) The Kellogg-Briand Pact and assistance

The Kellogg-Briand Pact may not have had the direct impact on international diplomacy that some had hoped for.[162] But setting its shortcomings aside, international actors agreed already in contemporary times that its underlying ideals were revolutionary.[163] The Pact's text was kept simple and plain. Its substantive parts read:

158 Notably, however, treaties frequently included provisions requiring States not to participate in any alliance directed against the treaty party.

159 Merkel, *Nichtangriffspakte*, 16, 33.

160 As seen above, there were notable – in a time of transition unsurprising – exceptions, which however validate the general rule. The treaty of non-aggression concluded between the USSR and Germany in 1939 was probably the most infamous example for these kinds of pacts, Wasmund, *Nichtangriffspakte*, 109. See for example for the discussions on the USSR, Germany, Treaty of Berlin (1926), Huber, *Nichtangriffsverträge*, 33-36, see also 34 for French protest. See also Model Treaty of Mutual Assistance and Bilateral Treaties of Non-Aggression (1928) 31 which explicitly states that any mutual assistance treaties need to be in compliance with the LoNC.

161 Several treaties included even a right to terminate the treaty when a treaty party resorted to aggression.

162 Edwin M Borchard, 'The Multilateral Treaty for the Renunciation of War', 23(1) *AJIL* (1929) 118. Some even questioned the Pact's *legal* character. For the debate see e.g. Roland S Morris, 'The Pact of Paris for the Renunciation of War: Its Meaning and Effect in International Law', 23 *PROCASIL* (1929) 88, 90-91; Wright, *AJIL* (1933) 39, 40-41; Lauterpacht, *TGS* (1934) 188-189.

163 ILA, *ILARCONF* (1934) 12 (Hudson); Lauterpacht, *TGS* (1934) 201; David Jayne Hill, 'The Multilateral Treaty for the Renunciation of War', 22(4) *AJIL* (1928) 826. See for further views Julie M Bunck, Michael R Fowler, 'The Kellogg-Briand Pact: A Reappraisal', 27(2) *TulJIntl&CompL* (2019) 261-266. For a detailed assessment of the Pact see Wehberg, *Outlawry of War*, 80-82; Hathaway, Shapiro, *Internationalists*.

> "Article 1
> The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
> Article 2
> The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."[164]

For the first time, States universally constrained the sovereign right to take recourse to war. However, what is more noteworthy in the present context is what the text of the Pact did not mention. The Pact did not define 'war'. It did not expressly provide for exceptions. It remained silent on consequences of a violation. And last but not least, in striking contrast to the widespread practice of bilateral non-aggression treaties, the Pact made no mention of assistance.[165]

In particular the latter point is remarkable. Prior to the negotiations of the Pact, several proposals of the so-called 'outlawry movement' had promoted a prohibition of war, including non-assistance obligations. Prominently, for example, James Shotwell advocated for a prohibition with teeth, i.e., 'sanctions'.[166] When he eventually yielded to political reality that universal agreement to 'sanctions' as obligations to take measures of constraint in reaction to prohibited war met insurmountable opposition at the time,[167] he still submitted that States could not remain indifferent towards an aggressor. Accordingly, the model treaty he proposed in 1927

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Note that the Pact is still valid; Bosnia and Herzegovina for example has joined as late as 1994.

164 General Treaty for Renunciation of War as an Instrument of National Policy (28 August 1928), 94 LNTS 57.

165 Note that it was accepted that in case of a violation through a resort to war by one party, States were released from their obligations under the treaty to the treaty-breaking State. See e.g. Mr Kellogg, Secretary of State, Identic Note to Fourteen Governments on a Multilateral Treaty Renouncing War as an Instrument of Policy, June 23, 1928, reprinted in Wright, *IntlConc* (1928-1929) 409.

166 See in detail on Professor Shotwell's role in the emergence of the Kellogg-Briand Pact and the outlawry movement in general Hathaway, Shapiro, *Internationalists*.

167 Ibid 118-119, 125-126; Wehberg, *Outlawry of War*, 66.

envisaged a separate provision that required States "not to aid or abet the treaty-breaking power."[168]

Limits to cooperation also played a relevant role for the States involved. When France offered the US to conclude the Pact as a bilateral agreement only, it essentially aimed at a non-assistance commitment.[169] France was well aware that the US would be reluctant to enter a full alliance. The French proposal hence primarily sought a negative commitment from the US not to join forces with a potential enemy.[170] By 'multilateralising' the proposed treaty, the USA sidestepped the diplomatic trap posed by the French.[171]

The Pact's text only shows that neither of these submissions that would have limited assistance short of war found their way into the text of the Pact.[172] The simple wording was deliberate. As US Secretary of State Henry Stimson famously put three years after the Pact's entry into force:

> "The Briand-Kellogg Pact provides for no sanction of force. It does not require any signatory to intervene with measures of force in case the Pact is violated. Instead, it rests upon the sanction of public opinion, which can be made one of the most potent sanctions of the world."[173]

168 James T Shotwell, 'Model Treaty of Permanet Peace', 89(7) *Advocate of Peace through Justice* (1927). This "recognized a moral duty not to help an aggressor". While this included arm supplies by governments, it did not entail a prohibition of private arms shipments to aggressors, Wright, *IntlConc* (1928-1929) 355, also on further attempts to prohibit assistance. For example a resolution introduced by US Senator Burton would have declared it "the policy of the United States to prohibit the exportation of arms, munitions, or implements of war to any country which engages in aggressive warfare against any other country in violation of a treaty, convention, or other agreement to resort to arbitration or other peaceful means for the settlement of international controversies."

169 Hathaway, Shapiro, *Internationalists*, 124.

170 France's diplomatic goal was to gather as many allies against Germany as possible, or at least to isolate Germany. Bunck, Fowler, *TulJIntl&CompL* (2019) 244, 246, 254.

171 Ibid 252. In particular, the US was reluctant to give up its neutrality rights.

172 Likewise, it has not been subject in the immediate exchange among States on the Pact, Wehberg, *Outlawry of War*, 74.

173 Stimson, *Foreign Affairs* (1932-1933) v. For earlier statements see, Harold Josephson, 'Outlawing War: Internationalism and the Pact of Paris', 3(4) *DiplHist* (1979) 380. Other States agreed, André Nicolayévitch Mandelstam, *L'interprétation du pacte Briand-Kellogg par les gouvernements et les parlements des états signataires* (1934) 38, 69-72, 108 (France), 141 (Italy), 146 (Belgium); Tucker, *ILQ* (1951) 21. On the background of the "peace with/without teeth debate" between Shotwell and Levison see Hathaway, Shapiro, *Internationalists*, 124-126.

While hence it is clear that the Pact stopped short of any collective security mechanism, to what extent, if at all, the Pact prohibited assistance to war by means short of war at the outset, silence prevailed.

Remarkably, the absence of an express clause dealing with assistance was *not* widely equated with the understanding that assistance to a resort to war in violation of the Pact remained permissible – quite the contrary.

There was broad agreement that the Pact also prohibited States to support a State taking recourse in contravention to the Pact. The "Budapest Articles of Interpretation" provide the best illustration.[174] In 1934, the International Law Association had taken on the task to thoroughly analyse the "effect of the Briand-Kellogg Pact of Paris on International Law".[175] The Articles that were unanimously adopted stipulated under Article 3 that a "signatory State which aids a violating State thereby itself violates the Pact. "[176]

This interpretation did not remain unopposed. For example, during the ILA's debates, Eduard Reut-Nicolussi took a stance against such an interpretation. He raised the delicate question of the relationship between sanctions and non-assistance obligations, and argued that, in his view, the obligation was "nothing but [a] sanction" which was not part of the Pact of Paris. He maintained that the Pact did not concern the community's reaction against a violator, which should not be confounded with the obligations of the signatories.[177] Reut-Nicolussi further rejected that such a non-assistance obligation under international law could be justified by an "analogy of criminal law [...] saying that if an action is forbidden by criminal law everyone else has to abstain from aiding the criminal. The contents of the Briand-Kellogg Pact are but a renouncement of war."[178]

Such arguments remained isolated, however. Expressly, Jaroslav Zourek took on the task to defend the majority interpretation of the Pact. He viewed it as "une règle constructive implicitement déjà comprise dans le Pacte".[179] For him, the prohibition of war constituted "une norme du droit international penal protégant l'ordre public et l'intérêt général."[180] A State aiding another State in violation of such a norm would carry the same

174 ILA, *ILARCONF* (1934) 66-69.
175 Ibid 3. Not included were the subject of sanctions and the definition of aggression.
176 Ibid 66-69.
177 Ibid 52.
178 Ibid 53.
179 Ibid 54-55.
180 Ibid 54.

responsibility. Assistance was of the same nature as the delict of the main actor.[181] Edmund Withman viewed it as a "necessary implication of the Pact."[182] Others, such as Hersch Lauterpacht, commenting on the Budapest Articles, likewise accepted the non-assistance obligation as a "proper instance of genuine interpretation".[183]

The wide agreement on the existence of such a prohibition should not disguise the fact that the precise content of the prohibition remained vague at best. The British government's position exemplified this well. When asked by the House of Lords to comment on the Budapest Articles in 1935, the government remained reluctant to generally accept the Budapest Articles of Interpretation. In its brief comments, it did not reject the non-assistance obligation as stipulated by Article 3 of the Budapest Articles. The government limited itself to noting that its effect crucially depended on the precise meaning of the word "aids".[184]

The debate on the Pact's impact on the law of neutrality also illustrates the wide range of possible interpretations. Whether the Pact allowed for assistance to the 'victim' State, and whether it prohibited granting a treaty-breaking 'aggressor' State the rights protected under the law of neutrality sparked major controversy. Both would have deviated from the traditional law of neutrality, as was universally agreed.

Some considered the granting of rights under the law of neutrality to the treaty-breaking State to violate the Pact itself (which then would have

181 Ibid 19, 53-55 (Dehn, Hammarskjöld). Tullio Ascarellli stressed the fact that the Kellogg-Briand Pact established a new principle that will lie at the base of a new international legal order. In that light he cautioned against drafting strict rules already at this moment. Wyndham Bewes was unsure how Reut-Nicolussi understood sanctions, and hence disagreed.

182 Ibid 58.

183 Lauterpacht, *TGS* (1934) 182 based his argument on "a rule of interpretation […] that a person who aids a criminal takes part in that crime. This is a rule of juridical logic, although the criminal law finds it convenient to refer specifically to accessories before, during and after the fact." Lauterpacht argues on the (unexplained) assumption that the pact prohibits (also) "taking part" in war. Note that he did not accept however recognition as a form of abetting to fall under the prohibition. Also accepting such an obligation: Wright, *AJIL* (1933) also argued for non-assistance in the context of neutrality. See also Ekkehard Geib, *Das Verhältnis der Völkerbundssatzung zum Kelloggpakt* (1934) 63 n 8 with further references.

184 HL Deb 20 February 1935, Hansard vol 95, col 1045.

*obliged* States not to comply with the law of neutrality).[185] More precisely, some viewed the fulfilment of these traditional rules of neutrality as assistance prohibited under the Pact. Following this line of argumentation, even indiscriminate abstention (that would in effect perpetuate (and encourage the exploitation of) factual power distributions[186]) might be considered prohibited assistance.

Not all were willing to go so far, even when generally accepting that States had the *right* to decline to observe neutrality towards a treaty-breaking State. For example, Quincy Wright submitted that a State giving "privileges *beyond* those permitted by *strict* neutrality" "will be aiding a violation of the Pact."[187] Less certain is his conclusion on granting rights under the law of neutrality, on which he held that "such non-participant *might* himself be conspiring in the use of non-pacific means against such secondary belligerent."[188]

Those who accepted the non-assistance obligation but suggested that the Pact did not affect the rules of neutrality[189] faced related challenges to reconcile those positions. For example, Hersch Lauterpacht believed that "a disregard of the rules of neutrality to the detriment of one belligerent is a sanction". Unlike the non-assistance component, an obligatory disregard of neutrality was not a "necessary complement of a breach".[190] The Pact may have necessitated but did not realize a change in law.[191] Still, he apparently

185 E.g. ILA, *ILARCONF* (1934) 18-19 (C.G. Dehn), 21 (Duncan Campbell Lee), 23 (Thorvald Boye). In this direction also Eagleton, *PROCASIL* (1930) 92 asserting rights as a neutral would be a positive violation of the pact, and spirit of the pact.

186 For example, this was a common critique of American neutrality in view of German, Japanese and Italian aggressions in the 1930s, Quincy Wright, 'The Lend-Lease Bill and International Law', 35(2) *AJIL* (1941) 312.

187 Wright, *AJIL* (1933) 60. See also his qualification later "(and *to some extent* obliged) to deny them to primary belligerents." Emphasis added. See also the Budapest Article themselves, that only held that States *could* but were *not obliged* to refuse those neutral rights, para 4 a, b. During the debates it was discussed whether those provisions should be mandatory. The motion lost however "with a narrow majority", ILA, *ILARCONF* (1934) 57-60.

188 Wright, *AJIL* (1933) 59.

189 Jessup and others, *Neutrality*, vol 4, 117-118, 121-122. For an overview see e.g. Ferdinand Schlüter, 'Kelloggpakt und Neutralitätsrecht', 11 *ZaöRV* (1942) 30.

190 Lauterpacht, *TGS* (1934) 184. Note that Lauterpacht limited his argument against the fact that a State declared itself neutral, but assisted, nonetheless. He accepted that "third States have the right to go, on their part, to war with the aggressor, that is to say, that they are not bound to remain neutral."

191 Ibid 191, 193-194.

did not see an immediate conflict of obligations. To the extent that neutrality required strict impartiality, Lauterpacht assumed neutrality to be compatible with the Pact, and its inherent non-assistance obligation.[192] Such voices appeared to interpret the non-assistance obligation narrowly: to the extent a State's contribution remained impartial in accordance with the law of neutrality, it did not amount to proscribed assistance.[193] Non-assistance would be confined to, but also in any event required to not disadvantage a victim.[194]

State practice in application of the treaty did not lead to certainty either. States might have rejected a duty to impose coercive measures, directly or indirectly. But this did not deny the existence of a prohibition of assistance.[195] Some States imposed strict embargoes (on both belligerent

192 In view of the fact that the Pact at best allowed for a right, but not a duty to provide assistance (see for many: ILA, *ILARCONF* (1934) 56-57), this interpretation does not seem untenable in all cases. To illustrate, consider Wright's (Wright, *AJIL* (1933) 59-60) and Dehn's (ILA, *ILARCONF* (1934) 18-19) examples of a treaty-breaking State's rights under the law of neutrality. To intern ships from a "innocent belligerent who is upholding the Pact" would not necessarily amount to unlawful assistance to the treaty-breaking State. Third States are under no obligation to assist the 'victim'. The victim has no right to pass the territory; preventing the victim State from doing so, could hence not constitute unlawful assistance. Similar reasons apply to allowing the search and visit of its vessels for contraband. The victim State does not have a right (under the Pact) to assistance. Allowing the aggressor State to limit this support hence cannot amount to unlawful assistance. More problematic would be however the treatment of aggressor vessels on its territory, to the extent it goes beyond mere humanitarian operations.

193 In a similar direction also Geib, *Völkerbund*, 63 n 8, 64 with further references who required a duty to remain neutral towards the aggressor, but no obligation to be no longer neutral towards the targeted State.

194 In fact, this position seemed to be taken by many States. Once States determined a State as a treaty-breaker, they did not provide assistance to the State.

195 Whitepaper 12 December 1929 by the United Kingdom, cited in Quincy Wright, 'Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War', 24 *PROCASIL* (1930) 80; Eagleton, *PROCASIL* (1930); Wright, *PROCASIL* (1930). "The effect of these instruments is to deprive nations of the right to employ war as an instrument of national policy and to forbid states which have signed them to give aid and comfort to an offender." See also (Russia, Poland) n 125 "amplifying and complementing" the Pact that stipulated the following rule: "Should one of the Contracting Parties be attacked by a third State or by a group of other States, the other Contracting Party undertakes not to give aid or assistance, either directly or indirectly, to the aggressor State during the whole period of the conflict."

States);[196] others remained neutral.[197] But they remained silent on whether they conceived this behaviour to be obligatory. In any event, to the extent that States had identified a belligerent State as a treaty-breaker, they did not assert the right to support that went beyond cooperation permitted under the law of neutrality. When providing assistance, States were eager to emphasise that this assistance was directed against a treaty-breaking State.[198] Likewise, the mere fact of not assisting a victim was not considered prohibited assistance to the aggressor. It was generally agreed that the Pact did not impose any solidarity obligation to provide assistance to a victim of a treaty-breaking State.

It is further noteworthy that discussions primarily focused on *State* conduct. In line with the predominant view that the law of neutrality regulated

196 E.g. the USA stopped to provide supplies to Italy during the Italy-Ethiopian war. In reaction to Italy's complaint, Foreign Minster Hull held that the US did not violate its commitment to neutrality, as it embargoed both States without discrimination. Moreover, crucially, Hull also explained that the US did not see how a State that violated its obligations under the Paris Pact could demand the continuing supply of war materials under the penalty of being an unfriendly act, in violation of a trade treaty. Cordell Hull, 'Memorandum by the Secretary of State Regarding a Conversation With the Italian Ambassador (Rosso), 22 November 1935' in United States Department of State (ed), *Peace or War. United States Foreign Policy 1931-1941* (1943) 292-301. See also Josephson, *DiplHist* (1979) 386.

197 A resolution proposed by Senator Carper in the US senate that would have prohibited the US to export arms to a treaty-breaking State did not enter into force, Mandelstam, *Pacte Briand-Kellogg*, 95. Also worth mentioning is the Harvard Draft Convention on Rights and Duties of States in Case of Aggression 1939, a *de lege ferenda* project seeking to define rights and duties in case of a determined aggression. States had no duty, but a right to support (without armed force) or defend (with armed force) a victim of aggression, see on the terminology School, *AJIL* (1939) 879-880. But States had to "at least accord to a defending State observance of the duties which a neutral owes to a belligerent". This meant for example that States "may not make State loans to an aggressor or permit an aggressor to outfit warship in [their] ports." States did not owe neutrality to an aggressor, but they were free to treat both the aggressor and the victim impartially (904).

198 E.g. Prior to its entry into World War II, the USA explained its assistance to Great Britain on the grounds that Italy and Germany were aggressors violating the Kellogg-Briand Pact. Quincy Wright, 'The Transfer of Destroyers to Great Britain', 34(4) *AJIL* (1940) 688 with further references; Wright, *AJIL* (1941) 308 et seq. The American assistance was primarily assessed through the lens of the law of neutrality. Throughout this discussion it was assumed however that assistance against a Pact-breaking State was permissible.

primarily State cooperation and not assistance provided by nationals, the permissibility of assistance from private sources remained ambiguous.[199]

Beyond the fact that the denial of assistance to a victim was not equated with prohibited assistance to the treaty-breaking 'aggressor', the meaning of prohibited assistance hence remained vague. The Pact's silence in this respect certainly contributed to the ambiguity. On the other hand, it may also be for this openness of the meaning that the evolving *ius contra bellum* had the opportunity to be widely interpreted to also regulate the permissibility of assistance.

This *ius contra bellum* rule of non-assistance was considered distinct from, and possibly different in scope than the present rules of neutrality, although their ideals still inspired thinking.

On that note, structurally the rule was clear. The rule was considered part of the original prohibition, not a mere consequence of a breach and sanction.[200] Conceptually, the provision of assistance was not considered a prohibited act of "war".[201] It rather depended on the assisted State that resorted to war in contravention of the treaty.[202] The prohibition of assistance did not proscribe the permissibility of assistance to a State engaged in war permissible under the Pact. This question was vigorously debated in view of its compatibility with the law of neutrality.[203] The Pact, however, was not

199 On this question: Edward A Harriman, 'The Legal Effect of the Kellogg-Briand Treaty', 9 *BULRev* (1929) 250-251 who discussed whether the national's government had the right to interfer; Wehberg, *Outlawry of War*, 65.

200 Controversial for non-recognition Lauterpacht, *TGS* (1934) 183; Carl Bilfinger, 'Die Kriegserklärungen der Westmächte und der Kelloggpakt', 10 *ZaöRV* (1940) 16.

201 The reason for this may be found in the fact that the notion of war was widely understood rather narrowly. On that understanding, as 'use of force short of war' remained permissible, the act of providing assistance itself would have also not been considered unlawful. E.g. Harriman, *BULRev* (1929) 247.

202 How to determine who was aggressor was hence the crucial question. For example, in the Budapest Articles the ILA left this question open. An addition by Edward Whitman according to which the prohibition of assistance applied in case a State using force "omits or refuses on demand of any signatory to submit the grounds therefor to the Permanent Court of International Justice, or to any other tribunal to be appointed by it, for final determination" was withdrawn, and adopted as desideratum. ILA, *ILARCONF* (1934) 59, 66.

203 For example, the Budapest Articles: "4. In the event of a violation of the Pact by resort to armed force or war by one signatory State against another, the other State, may, without thereby committing a breach of the Pact or of any rule of international law, do all or any of the following things: [...] (b) Decline to observe towards the State violating the pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent. (c) Supply the State attacked with

viewed as establishing an absolute prohibition of war.[204] The *prohibition* of assistance accordingly did not extend to any assistance, but only to assistance to war in breach of the Pact.[205]

## III. Assistance in a time of transition

With the emergence of an *ius contra bellum,* rules relating to interstate assistance were subject to change, too. States generally seemed to agree that interstate assistance could no longer be left to the sovereign discretion of individual States. The scope of rules was guided by the traditional distinction between war and peace, and thinking of neutrality. It was also the law of neutrality, not a *ius contra bellum* assistance regime that dominated the debates among States and scholars on interstate assistance throughout pre-Charter wars, most notably World War II.[206] But in the shadow of these neutrality debates, States aligned their arguments to also ensure compliance with an assistance regime under the *ius contra bellum*. The prohibition of assistance may not have been prominently featured in allegations of

financial or material assistance, including munitions of war. (d) Assist with armed forces the States attacked." See also Wright, *PROCASIL* (1930); Eagleton, *PROCASIL* (1930). Wright, *PROCASIL* (1930); Wright, *AJIL* (1933). Critical Lauterpacht, *TGS* (1934).

204 War in self-defense remained permissible. E.g. Axel Møller, 'The Briand-Kellogg Pact', 3(1) *NordikTidsskriftIntlRet* (1932) 63-64; Lauterpacht, *TGS* (1934) 198. For an overview of statements by States and an assessment Wright, *AJIL* (1933) 42-43, 43-49. On the relevance of those notes and statements Morris, *PROCASIL* (1929) 90; Borchard, *AJIL* (1929) 117; Philip Marshall Brown, 'The Interpretation of the General Pact for the Renunciation of War', 23(2) *AJIL* (1929) 375; George W Wickersham, 'The Pact of Paris: a Gesture or a Pledge?', 7(3) *Foreign Affairs* (1928-1929) 370 for a more careful view. Similarly, wars in pursuance of international policies e.g. under the League Covenant, were permissible.

205 This may follow *a fortiori* from the fact that States had the right to go to war with the aggressor (following from Preamble, and fact that they are also violated in their own right). For many see e.g. Lauterpacht, *TGS* (1934) 184 States "have the right to go, on their part, to war with the aggressor"; ILA, *ILARCONF* (1934) 57 (Hudson); Bunck, Fowler, *TulJIntl&CompL* (2019) 255.

206 Illustrative in this respect is the debate on substantial American support to States fighting National Socialist Germany previous to the USA's entry into war, most notably the "destroyer deal". Just see Wright, *AJIL* (1940); Wright, *AJIL* (1941); Friedrich Berber, 'Die amerikanische Neutralität im Kriege 1939-1941', 11 *ZaöRV* (1942/1943); Lothar Gruchmann, 'Völkerrecht und Moral. Ein Beitrag zur Problematik der amerikanischen Neutralitätspolitik 1939-1941', 8(4) *VfZ* (1960).

violations of international law. But States also did not claim to lawfully support an aggressor. Instead, in tacit appreciation of the regime, they invoked their own justifications or claimed the lawfulness of the supported armed force.[207]

In the contemporary *lex lata*, the historical rules are particularly interesting in terms of their regulatory approach. Three general approaches can be identified. First, States viewed assistance as a means of *perpetration* of the resort to war, an 'act of aggression' itself. That this was not a necessary interpretation of the prohibition to resort to war is suggested by the second approach of regulation: a distinct and complementary prohibition of assistance, that was either expressly agreed upon or implied in commitments to solidarity. The third approach involved sanctions that addressed assistance as a consequence of non-compliance with the *ius contra bellum*, as most prominently introduced by the idea of collective security. In a time of transition, when the prohibition of armed force itself struggled for universal appreciation and implementation, and regulations were fragmentary, the lines between the three regulatory approaches remained fluid.

The diversity in regulation within the pre-Charter era may not have allowed the drafters of the UN Charter to build on a stable foundation of an elaborate network of rules relating to interstate assistance. But as the following chapters will show, it set the tone for the subsequent development of rules relating to interstate assistance to a use of force.

207 Gruchmann, *VfZ* (1960) 397.

# Chapter 3 The United Nations Charter and Interstate Assistance

The United Nations Charter[1] is the focal point for the rules governing the use of force in international relations. What is its regulatory approach on interstate assistance? How, and to what extent, is interstate assistance prohibited? To determine this, this chapter focuses on the bare regulatory framework of the UN Charter on interstate assistance, as put into place originally in June 1945. At this stage, the interpretation is confined to a textual one as envisaged by Article 31 paras 1-2 VCLT. Accordingly, this chapter addresses only the first part of a "single and combined interpretation operation"[2] necessary to determine the regulatory framework on interstate assistance. The second part, i.e., subsequent practice in the application of the treaty, will remain behind a veil of ignorance for the moment. Practice relating to interstate assistance that may gradually shape, clarify, and develop the Charter's original framework will be the subject of Chapter 4. This step-by-step approach to interpretation seeks to provide a clear view of the very foundation that underlies the manifold international practice filling the Charter with life.[3]

## I. The *ius contra bellum* under the UN Charter and interstate assistance: an overview

In pursuit of its primary goal, "to save succeeding generations from the scourge of war,"[4] and more concretely, "to maintain international peace and security",[5] the UN Charter establishes a comprehensive system that is

1 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

2 Conclusion 2 (5) ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/73/10 (2018), para 51.

3 On the importance of a clear view on the legal framework for the later assessment of subsequent practice in application of the Charter, Claus Kreß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995) 34-40.

4 Preamble UNC.

5 Article 1(1) UNC.

usually referred to as the *ius contra bellum*. Its "cornerstone"[6] is laid down in Article 2(4) UNC:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The UN Charter further defines other fundamental principles and individual obligations,[7] and establishes mechanisms and procedures whereby member States seek to ensure international peace and security.[8] Not all of those will be of interest here. The system will be viewed through the prism of 'interstate assistance to a use of force' as defined in the introductory chapter. On that note, the following provisions, their relevance, and their interaction require scrutiny:

In subsection (II), the UN Security Council's competencies will be revisited, as the Council could address interstate assistance under its powers in Article 41 UNC. Article 2(5) UNC, the scope of which is examined in subsection (III), is the only provision of the Charter that explicitly prohibits "assistance to any state against which the United Nations is taking preventive or enforcement action". Subsection (IV) asks what it means for the general permissibility of interstate assistance that the UN Charter explicitly recognizes a *right* to give assistance in (only) two situations: in case of force used by the Security Council, Article 43 UNC, and force used in self-defense, Article 51 UNC. To what extent solidarity obligations under the Charter may embrace a duty *not* to support the attacking State is subject of subsection (V).

Besides, the Charter makes no further reference to interstate assistance. Notably, the Charter makes no mention of interstate assistance outside the system of collective security. Article 2(4) UNC prohibits the use of force but is silent on assistance to the use of force. Similarly, the principle of non-intervention as derived from Article 2(1) UNC likewise does not address interstate assistance. Sections (VI) and (VII) hence ask whether those provisions may govern interstate assistance, nonetheless. Whether interstate assistance could be subject to an unwritten but inherent rule of

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

7 Article 2(1)-(5) UNC.

8 See in detail Robert Kolb, *International Law on the Maintenance of Peace. Jus Contra Bellum* (2018).

the UN Charter is then addressed in subsection (VIII). Subsection (IX), in concluding, brings the Charter's regulatory approach together.

## II. A prohibition of assistance by a UN sanction – Article 41 UN Charter

The UN Charter is widely accepted as having established a system of collective security.[9] It governs States' reactions to an event triggering its collective security mechanism. By its nature, the collective security mechanism may also touch upon interstate assistance.[10]

Under the Charter, in case of a threat to international peace and security, UN members shall respond collectively. This collective response is placed into the hands of the Security Council. The Security Council has i.a. the authority to impose "measures not involving the use of armed force" (hereafter referred to as 'sanctions').[11] Thereby, as will be shown, the Security Council may address interstate assistance (A) to a use of force (B). This regulatory approach is a politicized, discretionary one (C) that is one piece of the Charter's general regime on interstate assistance (D).

9 High-Level Panel on Threats, Challenges and Change, "A more secure world: our shared responsibility" A/95/565 (2 December 2004); World Summit Outcome, A/RES/60/1 (24 October 2005); *Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [*Nicaragua*] 100, para 188; Vaughan Lowe and others, *The United Nations Security Council and War. The Evolution of Thought and Practice since 1945* (2008) 15; Erika de Wet, Michael Wood, 'Collective Security' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) para 3.

10 See Chapter 2, II.A.

11 Article 41 UNC. On the terminology see Alain Pellet, Alina Miron, 'Sanctions' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013); Antonios Tzanakopoulos, 'State Reactions to Illegal Sanctions' in Paul Eden and Matthew Happold (eds), *Economic Sanctions and International Law*, vol 62 (1 edn, 2016) 67-69; Tom Ruys, 'Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (2017). Note that not all measures that find their basis in Article 41 UNC will be considered sanctions, e.g. the establishment of *ad hoc* tribunals.

## A. Sanctions as non-assistance obligations? The scope and content of sanctions

Sanctions under the Charter are not predetermined. The Security Council imposes them as obligations on member States.[12] The Security Council has wide discretion in defining the scope and content of sanctions. The list of possible "measures not involving the use of armed force" in Article 41 s. 2 UNC is non-exhaustive.[13] Hence, the Security Council can also take more narrowly defined measures than the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." This allows the Security Council to prohibit interstate assistance to the specific conduct triggering UN action by means of sanctions.

Still, Article 41 UNC describes the general playing field of sanctions. It is worth noting what is not mentioned in Article 41 UNC: typical interstate assistance. There is no reference to the provision of arms, logistical support, territorial assistance, or any other form of 'military' contribution. This is all the more remarkable as Article 43 UNC, in contrast, acknowledges the importance of 'military support', mentioning the provision of facilities or permissions for transit expressly. Also, the suspension of "financial relations" is absent from Article 41 UNC. "Financial measures" had been discussed in the founding debates; yet Venezuela's proposal to include them was rejected.[14]

Instead, the examples given in Article 41 s. 2 UNC are fairly remote from the specific conduct triggering Security Council action – in line with its predecessor, Article 16 LoN.[15] This reflects the design of sanctions as a collective enforcement tool, as coercive measures "not involving the use of armed force". More generally, the measures to be imposed by the Security Council are not limited to addressing behavior that has a close causal relationship to the conduct triggering the Security Council's inter-

12 Articles 41 and 25 UNC.

13 This is already indicated by the text "may include". See also Leland M Goodrich, Anne Patricia Simons, Edvard Isak Hambro, *Charter of the United Nations: Commentary and Documents* (3rd rev edn, 1969) 312; Krisch, *Article 41 UNC*, 1311 para 12.

14 III UNCIO, 189–231, 211, Doc 2 G/7 (d)(1); XII UNCIO 508, Doc 881 III/3/46; Kolb, *Jus Contra Bellum*, 146.

15 Royal Institute of International Affairs, *International Sanctions: A Report by a Group of Members of the Royal Institute of International Affairs* (1938) 76; David Hunter Miller, *The Drafting of the Covenant*, vol I (reprint 1969 edn, 1928) 15; Krisch, *Article 41*, 1307 para 1. See also Chapter 2.

vention. Rather measures can extend to *general cooperation* that may (only) indirectly and remotely affect and support the conduct triggering UN action.

In brief, albeit not expressly mentioned, under Article 41 UNC the Security Council is vested with the legal capacity to also regulate assistance. But the measures were primarily designed to go well beyond.[16]

## B. The precondition for sanctions

The Security Council may take action under Chapter VII UNC if it has determined a threat to the peace, breach of the peace or act of aggression.[17] First and foremost, a State's use of force in its international relations may trigger the Security Council's authority to impose sanctions.[18] Sanctions may, therefore, involve obligations on interstate assistance to a use of force. In that respect, two features merit special mention.

First, in contrast to its "predecessor," the LoN, the Security Council is empowered to effectively maintain and restore international peace and security, irrespective of legal responsibilities of the parties.[19] It is hence also not necessary for the Security Council to act upon a violation of international law – although in practice it will do so in many cases. *Any* use of force, even if in accordance with international law,[20] can be subject to sanctions, including non-assistance obligations.

Second, sanctions do not presuppose that a use of force has taken place. The UN Charter allows action already against a *threat* to international peace and security. In particular, sanctions do not require that the triggering conduct meets the conditions of the prohibition of a use or threat of force under Article 2(4) UNC.[21] This situation was originally sought to be covered by the category of a "breach of the peace" that characteristically embraces the materialization of the abstract threat, most prominently active

16 Kolb, *Jus Contra Bellum*, 147.
17 Article 39 UNC.
18 See also the (originally dominant) negative definition of peace, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 138.
19 Niko Krisch, 'Article 39' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol II (3rd edn, 2012) 1278, para 10 with further references. This distinguishes sanctions from law enforcement and legal consequences of a wrongful act, Pellet, Miron, *Sanctions* para 15.
20 Cf also Article 51 s 1 UNC.
21 Krisch, *Article 39 UNC*, para 13.

hostilities.[22] This observation has two consequences: Sanctions are not necessarily confined to assistance once a use of force has occurred and is continuing. Instead, sanctions may already regulate assistance to a single "one-strike" use of force. Moreover, it allows UN enforcement action to address assistance to a use of force in two ways: On the one hand, the Security Council may restrict assistance from one State to a State that is involved in a threat to the peace, breach of the peace, or act of aggression. Thereby, the Security Council has the power to regulate a third and innocent State's relationship with a State responsible for a situation meeting the threshold of Article 39 UNC.[23] The measure is (non-overtly[24]) directed against the State using force but implemented through the assisting State. On the other hand, the provision of assistance in and of itself may also qualify as a threat to the peace, breach of the peace or act of aggression. The Security Council's measure would then be directed directly against the assisting State and the assistance itself.

Accordingly, UN sanctions are a mechanism through which the Security Council may impose non-assistance obligations in the case of, and even in anticipation of, a use of force, irrespective of its wrongfulness.

### C. Non-automatic sanctions: the role of the Security Council

Unlike in the Covenant of the League of Nations, the UN Charter did *not* opt for the drastic solution of automatic and immediate sanctions. The decision on sanctions is concentrated in the Security Council instead, the primary organ responsible for securing international peace and security.

By vesting the Security Council with the power to impose non-assistance obligations, the Charter recognizes two issues: first, the importance of assistance, and the potentially powerful impact of non-assistance; and second, the general idea of non-assistance in its regime of securing international peace and security. As the Security Council operates within the confined framework of the UN Charter, it operationalizes dormant non-assistance principles already embodied in the Charter. This does not mean,

22 Ibid para 40; Johanna Friman, 'Deblurring the concept of a breach of the peace as a component of contemporary international collective security', 6(1) *JUFIL* (2019) 31.

23 Article 50 UNC acknowledges that this may have repercussions on third States and provides for a mitigating procedure.

24 Kolb, *Jus Contra Bellum*, 144 noting that it is not necessary to specifically designate a violator.

however, that the Charter contains obligations, which the Council only *reaffirms*. The very existence of such obligations depends on the Security Council's decision and whether the specific resolution designates a call for non-assistance as mandatory.[25]

There were good reasons for the centrality of the Security Council for non-assistance obligations. In fact, it was a deliberate change of direction from the League Covenant that was discussed in the drafting committees.[26] It was meant to tie the existence of the non-assistance obligation to the political will and assessment of the specific situation of the international community, as represented and reflected in the Security Council. States were well aware that this would necessarily allow for political discretion and leeway.[27] Not every situation that constitutes a threat to or breach of peace or an act of aggression would be subject to sanctions – especially when veto powers are involved in the situation. But the 'politicization' of sanctions and hence of prohibitions of assistance was considered to also have important benefits:[28]

First, the effectiveness of the sanction was meant to be improved through ensuring universal participation.[29] Sanctions can only be effective, if the sanctioned State is isolated and alternatives to circumvent the sanctions are cut off. This requires widespread, if not universal, participation of States. Linking the sanction to agreement in the Security Council sought to ensure universal participation. The Security Council is the organ bearing the primary responsibility for maintaining international peace and security. Its design claims to represent the international community. In case the Security Council, including the veto powers, agreed on a sanction, the sanction is presumed not to remain a dead letter, but – as an adequate reflection of the power-politics – to be acceptable to all and to be implemented.

25 Anne Peters, 'Article 25' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 792, para 8-10. For debates on the limits of the Council's discretion see de Wet, *Chapter VII*, 131 et seq.

26 Bolivia's proposal would have required immediate collective action in case an act of aggression has been investigated, III UNCIO 577-586, 584, Doc 2 G/14 (r); XII UNCIO 502, 505, Doc 881 III/3/46. Bengt Broms, 'The Definition of Aggression', 154 *RdC* (1978) 315.

27 Krisch, *Article 39 UNC*, 1275 para 4-5.

28 See also Gary Wilson, *The United Nations and Collective Security* (2014) 8; Goodrich, Simons, Hambro, *UN Charter Commentary*, 290 et seq.

29 See also Wilson, *UN and Collective Security*, 8. Also in this direction C Lloyd Brown-John, *Multilateral Sanctions in International Law: A Comparative Analysis* (1975) 3.

Second, closely tied to the idea of universality of sanctions, requiring agreement in the Security Council for imposing a sanction reduces the (political and financial) costs and necessary sacrifices of States implementing the sanction. This will again increase the political will to implement. Universality reduces the risk that other States will take advantage of States that comply with the sanction.[30] Strict sanctions may hurt the sanctioning State more than the sanctioned State.[31] Even if it is assumed that the non-assistance was necessary and effective, it may at times bear disproportionately high costs for the assisting State. Universal participation renders possible assistance and cooperation among sanctioning States to absorb the costs and impact for sanctioning States.

Third, loosening up the trigger as well as the consequence and placing it at the discretion of the Security Council introduces more flexibility to achieve the main goal of maintaining or restoring international peace and security.[32] The UN sanction mechanism is reflective of the fact that there is no silver bullet to achieving this aim. Each situation requires case-specific means. Even non-assistance to the violator or violation at times might have no, disproportionate, or even counter-productive effects. In this light, Chapter VII UNC introduced flexibility, specificity and discretion – leaving it to the Security Council to decide on prompt and effective measures and obligations tailored specifically to the specific situation.

Last but not least, all these considerations also acknowledge and reflect the breadth of (potential) assistance, as being capable of potentially facilitating the threat to or breach of peace or act of aggression. Even minor and limited uses of force are costly – both economically and politically.[33] Anything that upholds economic relations, development aid, or even

30 The sanctioning regime is ineffective in achieving its goals, when other States step in and fill the gap the State left that decided to comply. Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954) 180. The sanctioning State runs risk to cut politically or financially important ties with the sanctioned State, without any (proportionate) advantage and compensation.

31 For example, these were main reasons for States not to impose comprehensive sanctions against Italy when invading Abyssinia, George de Fiedorowicz, 'Historical Survey of the Application of Sanctions', 22 *TGS* (1936) 129-130. This argument remains popular today, e.g. Ray Rounds, 'The Case Against Arms Embargos, Even For Saudi Arabia', *War on the Rocks* (16 April 2019). Article 50 UNC acknowledges the potential hardship of sanctions on the sanctioning States.

32 See also Wilson, *UN and Collective Security*, 19.

33 Even limited airstrikes, such as the US firing of 66 Tomahawk cruise missiles on Syria in response to the alleged use of chemical weapons, are (politically and economically)

mere political encouragement, support, or backing can constitute (remote, but decisive) assistance. In a globalized world, any cooperation with a State using force can be seen as (albeit remote) assistance to the violation. The Security Council's decision hence serves as a case-specific filter to specify which State cooperation is particularly dangerous in effect, and which form of State cooperation with the violator in fact constitutes decisive assistance to the violation. Again, its aim is to avoid disproportionate and overly harsh repercussions of general non-assistance obligations and to prevent potentially even worse impacts on international peace and security by cutting ties of cooperation.[34]

By granting the Security Council discretion to determine sanctions, and thereby non-assistance obligations, the UN Charter refrains from making a definitive normative judgment on non-assistance. Instead, it is reluctant to automatically prohibit assistance and leaves it to the specific situation, thereby introducing reasoning motivated by political and effectiveness concerns.

In brief, Chapter VII UNC recognizes that assistance may be problematic. But Chapter VII UNC does not prohibit assistance. Assistance *may* be prohibited – if there is political will that both compensates for concerns about an automatic obligation and tailors the scope of the obligation acceptable to all.

## D. UN sanctions as the exclusive regime governing assistance?

The sanction scheme under Chapter VII UNC allows for a *comprehensive* regulation of assistance – through secondary obligations decided upon by the Security Council. What is its place in the UN Charter's general regime

expensive: Amanda Macias, 'US taxpayers paid millions of dollars for the airstrikes on Syria', *NBC* (16 April 2018), https://www.cnbc.com/2018/04/16/syria-airstrikes-cost-to-us-taxpayers.html.

34 Along those lines warning against the risks of too strict non-assistance obligations Georg Nolte, 'Zusammenarbeit der Staaten bei der Friedenssicherung: Steuerung durch Verantwortlichkeit und Haftung' in Marten Breuer and others (eds), *Im Dienste des Menschen: Recht, Staat und Staatengemeinschaft: Forschungskolloquium anlässlich der Verabschiedung von Eckart Klein* (2009); Georg Nolte, Helmut Aust, 'Equivocal Helpers - Complicit States, Mixed Messages, and International Law', 58(1) *ICLQ* (2009).

on assistance? Does it mean that assistance is only prohibited if and only if the Security Council decides so?[35]

By design, this is not a necessary conclusion from Chapter VII UNC. It does not exclude the existence or development of complementary regulations on assistance under the UN Charter. Article 41 UNC primarily has an 'enabling' function, enriching the Security Council's enforcement arsenal with a politically more agreeable and less intrusive weapon than the resort to armed forces, which proved effective and powerful during both World Wars.[36] Sanctions were an institutionalized response to the fact that, without institutionalization, general rules on war did not prove effective.[37] Sanctions generally regulate the *consequences* of a threat to peace, here the use of force by States. As such, they can also prohibit assistance; but they were not exclusively designed as non-assistance obligations, and as the Charter's definitive response to assistance. The primary function of sanctions is to maintain international peace and security, not to establish responsibility.

Moreover, the UN system for sanctions and its preconditions are tailored to address *any* form of cooperation. For assistance, this means that sanctions may also address remote assistance and impose regulations in the event of a (mere) threat to the peace, irrespective of a violation of international law. This again limits the informative value for the Charter's normative stance on assistance that does not share these characteristics, for example on proximate assistance directly contributing to a use of force that accordingly transcends the purely economic and political relations between States. It cannot be concluded with certainty that the reasons for politicizing the regulation of cooperation apply with similar force here.

Nonetheless, Chapter VII UNC marks the framework within which non-assistance rules may develop. In particular, Article 41 UNC certifies States' reluctance to accept an automatic, legally required absolute economic boycott of a State using force. In a globalized world, such a duty is conceived as

35 Eckart Klein, 'Beihilfe zum Völkerrechtsdelikt' in Ingo von Münch (ed), *Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (1981) 437 seems to take this view, after referring to the UN mechanism by which prohibitions of assistance may be imposed, when he holds that "jede darüber hinausgehende, insbesondere natürlich eine generelle Regelung überfordert das Völkerrecht als eine zwischen den Staaten bestehende Ordnung".

36 Stone, *Legal Controls of International Conflict*, 180.

37 Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 469.

too intrusive, and politically too sensitive to exist without the case-specific political agreement of the international community as represented by the Security Council. Within the UN Charter, a prohibition of assistance will therefore not, although conceptually not excluded, go as far.

UN sanctions are designed as an enforcement part of the UN Charter. As such, they form part of the UN Charter's assistance regime, leaving room conceptually for further rules governing assistance. Still, (the reasons for) the design of the sanction regime may guide international practice. It suggests that in a globalized world, a non-assistance norm will not be unlimited and unqualified.

## III. Article 2(5) UN Charter: non-assistance only if the United Nations takes action?

The only provision in the UN Charter that expressly mentions a prohibition of interstate assistance is Article 2(5) UNC. It reads:

> "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

The first part of Article 2(5) UNC establishes a duty of solidarity. It does not concern the present topic of inquiry. It addresses States' assistance to actions of the United Nations, not solidarity among member States. The second part of Article 2(5) UNC squarely addresses and prohibits *interstate* assistance. The United Nations may take preventive or enforcement action in view of States using force, as seen above. The prohibition may hence apply to assistance to a use of force.

Does this mean that Article 2(5) UNC is a general rule of non-assistance to a (wrongful) use of force? It is submitted that it is not. Article 2(5) UNC applies only in the specific situation where UN enforcement measures are taken (A). In view of its scope (B), this prompts questions about the role of Article 2(5) UNC within the regulatory framework of the Charter. More precisely, does the existence of Article 2(5) UNC in its present scope imply that a general prohibition of assistance is not part of the Charter regime (C)? Or does Article 2(5) UNC, despite its specific scope, represent a generalizable idea of non-assistance to States that may be lawfully targeted even by force (D)?

## A. The trigger: A general prohibition of interstate assistance?

The non-assistance obligation in Article 2(5) UNC applies when the "United Nations is taking preventive or enforcement action" under Chapter VII.[38]

It is not already triggered when the United Nations *is empowered to* take preventive or enforcement action, i.e. when the threshold of Article 39 UNC is met, allowing the Council to take actions. The use of the present progressive "is taking" makes it clear that the United Nations must be *in the course of* taking the enforcement measure. This choice of wording is no coincidence. It reflects the main idea behind the provision: to ensure member States' solidarity with UN actions. By design, it aims at securing the member States' full support for UN enforcement action, that is necessary to ensure its effectiveness and success.[39] It is further reflected in the fact that the second part of Article 2(5) UNC is not a separate principle, but is systematically closely linked to the general duty to assist the UN in *any action* as enshrined in Article 2(5) alt 1 UNC. In fact, the original two separate principles[40] were even merged in Article 2(5) UNC, for they were viewed as two sides of the same coin: effectively facilitating the establishment of international peace and security through the UN.[41] The distinguishing line would also be very thin: non-assistance to the United Nations may be viewed as (minimal) assistance to the targeted State; and *vice versa*, assistance to the target State may be considered as non-sufficient assistance to the United Nations. In addition, Chile's proposal to exclude States outside the region of the conflict from the obligation of assistance points in

38 On the debate whether preventive measures pursuant to Article 40 suffice to trigger the obligation under Article 2(5) see Helmut Aust, 'Article 2(5)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) para 18.

39 Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (2007) 158.

40 The Dumbarton Oaks proposals entailed two different principles: Doc 1 G/1, III UNCIO 1-23, 3. See also the draft VI UNCIO 402-404, Doc 908 I/1/34 (a), 404 principles 5 and 6.

41 Ahmed Mahiou, 'Article 2(5)' in Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies. Commentaire article par article* (3rd edn, 2005) 467; Robert Kolb, *An Introduction to the Law of the United Nations* (2010) 138; Aust, *Article 2(5) UNC*, para 2.

that direction of a unity of those two rules.[42] The second alternative hence "complements",[43] or, more precisely, clarifies[44] that the duty to assist the UN when taking enforcement measures also embraces non-assistance to the violating State. On that basis the non-assistance obligation only applies to actual UN actions taking place, not *potential* UN actions.

This limited field of application of the non-assistance obligation is again indicative of the Charter's generally reluctant approach to (non)-assistance. In fact, the non-assistance obligation again only applies once the Security Council has created legal certainty through a political agreement reflected in an agreed enforcement measure.[45] This regulation is no surprise, however. It aligns with the general conception of the UN Charter that places the Security Council at the center of efforts to maintain international peace and security.

The application of the non-assistance obligation under Article 2(5) UNC depends on UN preventive or enforcement action. Still, by design, it remains an independent obligation, legally distinct from the specific obligations arising from preventive or enforcement action. Both obligations coexist, even if they overlap or are identical in content. This means that the obligation of non-assistance neither replaces nor substitutes a preventive or enforcement action. Nor is the UN's action a *concretization* of the obligation under Article 2(5) UNC for a specific situation.[46]

What, then, is UN preventive or enforcement action that triggers Article 2(5) UNC?

First, Article 2(5) UNC requires action by the "United Nations". For the positive assistance duty laid down in 2(5) alt 1 UNC, it is controversial whether this refers only to the Security Council or also includes other

42 Doc 2, G/7(i), III UNCIO 282-291, 284: Chile proposed to include: "But whenever disputes affect a Continent or region and do not constitute a danger to the general world peace, the states of other Continents or regions shall not be obligated to participate in operations of a military nature decided upon by the Council and the Assembly."

43 Mahiou, *Article 2(5)*, 130-131.

44 Jochen Abr Frowein, 'Article 2(5)' in Bruno Simma and Hermann Mosler (eds), *The Charter of the United Nations. A Commentary*, vol I (1st edn, 1994) 130 para 5; Aust, *Article 2(5) UNC*, para 18.

45 See e.g. Bernhard Graefrath, Edith Oeser, 'Teilnahmeformen bei der völkerrechtlichen Verantwortlichkeit', 29(5) *Staat und Recht* (1980) 448; Aust, *Article 2(5) UNC*, para 29.

46 In a similar direction Aust, *Article 2(5) UNC*, para 18 who states that the "obligation of non-assistance supplements the principal enforcement action the SC has taken".

UN organs.[47] For the non-assistance duty under Article 2(5) Alt 2 UNC, it is accepted that only Security Council action suffices. Only the Council may take enforcement measures, i.e., binding measures under Chapter VII UNC.[48] However, this does not exclude the possibility that the obligation is triggered in cases where "delegated organs of the United Nations", such as regional agencies authorized by the Security Council, exercise the relevant conduct.[49]

Second, the non-assistance obligation presupposes 'preventive and enforcement' action. This excludes recommendations, as otherwise their recommendatory nature would be obverted.[50] Similarly, it is doubtful if the obligation applies "when the Security Council simply finds that an act of aggression or of the unlawful use of force has been taken by a State without deciding upon further action under Chapter VII."[51]

Last but not least, action may be taken in view of a use of force that amounts to a threat to peace, breach of peace or aggression.[52] It is not necessary for the use of force that prompted UN enforcement action to have already taken place. Neither is it essential that the pertinent use of force is contrary to international law.[53]

The non-assistance obligation applies hence to any use of force against which the Security Council lawfully *may, and does* in fact, take measures.

### B. The scope: A prohibition of assistance to conduct obstructing UN action

Article 2(5) alt 2 UNC prohibits "assistance to any State." It does not specify in what *action* the State must not be assisted, in contrast to Article 2(5) alt 1 UNC that refers to "assistance in any action". Instead, the *State itself* must not be supported. At first glance, one could be prompted to read Article 2(5) as a duty to fully isolate the violator against which the UN takes action.

47 Ibid para 6, 24.
48 Ibid para 18, 24. To that extent the second part is viewed a l*ex specialis* to the first part of Article 2(5) UNC, Hans Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems* (1966) 92; Aust, *Article 2(5) UNC*, para 18.
49 Kelsen, *Law of the United Nations*, 91-92. See also Jochen Abr Frowein, Nico Krisch, 'Article 2(5)' in Bruno Simma (ed), *The Charter of the United Nations. A Commentary*, vol I (2nd edn, 2002) 138 para 6 in view of authorization practice.
50 Frowein, *Article 2(5) UNC (1994)*, 130 para 2; Frowein, Krisch, *Article 2(5) UNC (2002)*, 138, para 4-5, 139 para 8-9.
51 Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011) 382.
52 Article 39 UNC.
53 See Article 51 s 1 UNC.

But several indicators suggest a more restrictive understanding of Article 2(5) UNC, according to which it only prohibits assistance to conduct that has a specific connection to the enforcement action.

For one, Article 2(5) UNC prohibits 'assistance', not 'cooperation' in general. This implies that, despite its broad wording, what is considered problematic is the specific relationship to a specific conduct of the State against which the United Nations is taking action. Moreover, a broader interpretation of Article 2(5) UNC would be incompatible with the UN system. Article 2(5) UNC cannot undermine the Security Council's enforcement measures, which are carefully crafted responses to specific cases. This internationally agreed response cannot be thrown out of balance if States were always required to sever all ties with the violator once the Security Council takes an enforcement measure. A broader interpretation might blur the legal separation between the UN enforcement measure and Article 2(5) UNC and disregard the Charter's system of competencies, in particular the primary responsibility of the Security Council for the maintenance of international peace and security.[54]

In view of its purpose to protect and strengthen the UN in its enforcement action, Article 2(5) UNC hence is concerned with *conduct* that assists States in resisting the Security Council's enforcement action.[55] This again allows for two interpretations in practice:

Under a broad interpretation, the non-assistance obligation under Article 2(5) UNC could capture any conduct that runs counter to the *purpose* of the enforcement action. Any assistance to the conduct that prompted the Security Council to take action would be prohibited. For example, assistance that prolonged or facilitated a use of force which the Security Council attempted to end through imposing enforcement measures under

54 For assistance obligations, similar considerations apply. Pursuant to Article 43 UNC, States' obligations to *provide troops* to the Security Council are subject to a specific agreement between the Council and the States. Article 43 UNC also covers the provision of "assistance, facilities, including the right of passage" to a force "exercised or authorized by the Security Council". Article 2(5) UNC cannot introduce obligations to provide support, without undermining Article 43 UNC that only entails an obligation to negotiate. See also Aust, *Article 2(5) UNC*, para 4; Frowein, Krisch, *Article 2(5) UNC (2002)*, para 4. But see Derek W Bowett, George Paterson Barton, *United Nations Forces: A Legal Study of United Nations Practice* (1964) 387, 413 et seq.

55 In a similar direction see Frowein, Krisch, *Article 2(5) UNC (2002)*, 139 para 8 who argue that "no other state may grant assistance to that state in a manner inconsistent with the purpose of the action of the SC"; Felder, *Beihilfe*, 159 adopting the same definition; Aust, *Article 2(5) UNC*, 18.

Chapter VII UNC would be prohibited. Such assistance could be understood to undermine the necessary solidarity of States with the UN; not at least it renders the enforcement action eventually necessary and, in any event, more costly. By this broad interpretation, Article 2(5) UNC would go beyond what was required by the enforcement measure itself. To illustrate: if the Security Council imposes sanctions confined to an arms embargo against a State illegally using force against another State, the obligation under Article 2(5) UNC would go beyond that. Member States would also be prohibited from providing other contributions, e.g., provision of oil that fuels the war efforts, or not to provide assistance that facilitated circumventing the arms embargo, e.g., through providing materials necessary to build arms themselves.

Alternatively, under a narrower interpretation, any assistance provided to the targeted State that obstructs the *specific* enforcement measure *itself* would be prohibited.[56] In effect, Article 2(5) UNC would not go beyond ensuring compliance with the specific UN enforcement action. For example, economic aid that alleviated the consequences of an economic embargo would be outlawed.[57] In a case where the Security Council authorizes a no-fly-zone against a State intervening in another State with ground troops, military assistance to a State that is tailored towards resistance to a no-fly-zone authorized by the Security Council, e.g., through air raid defense, would be prohibited. Assistance that leaves the specific enforcement measure however unaffected, e.g. the delivery of tanks to facilitate the intervention through ground troops, would not fall under the prohibition. As for the duty to assist in enforcement action, it would only require the implementation of the specific enforcement measure imposed. Any assistance that enabled the enforcement measure or rendered it more effective in ending the violation would not be necessary. Accordingly, at a minimum, remaining permanently neutral despite obligations to act, could run counter to the enforcement action.[58] For example, in cases where the Council authorizes a use force, and calls for assistance, there would be *no obligation* to provide assistance under Article 2(5) UNC to the authorized

56 The same is true for the assistance obligation: only specific assistance to the very specific enforcement action.

57 Frowein, Krisch, *Article 2(5) UNC (2002)*, 139.

58 France wanted to include this effect in the text. This proposal was rejected, however, on the understanding that this effect is already covered, as it is "tacitly accepted". Doc 423 I/1/20, VI UNCIO 312; Doc 739, I/1/19(a), VI UNCIO 722.

force in the form of troops, facilities, or overflight rights. States would only be obliged to comply with the specific enforcement measures.

In application of Article 2(5) UNC, it would be a fine line between the two possible interpretations. In most cases, support for the violation usually also obstructs the specific enforcement measure. Assistance typically has an effect on both the violation and the enforcement measure. While it may not be the main purpose of Article 2(5) UNC, in most cases Article 2(5) UNC will hence indirectly outlaw support for the violation.

In any event, Article 2(5) alt 2 UNC establishes a comprehensive prohibition without further conditions. It is not limited to a specific type of assistance. Unlike other prohibitions of assistance, it does not introduce any further limiting criteria. Most notably, there is no mention of any subjective element such as knowledge or intent.[59]

### C. Is Article 2(5) alt 2 UN Charter exclusive?

Article 2(5) alt 2 UNC is the only provision in the UN Charter that expressly stipulates a rule on interstate assistance. If understood broadly, Article 2(5) alt 2 UNC may also prohibit assistance to a use of force that triggered a Security Council response. This might invite to think that the Charter prohibits assistance to the use of force only under the conditions set forth in Article 2(5) UNC.[60]

This conclusion is not justified, however, for two reasons. First, Article 2(5) alt 2 UNC does not prohibit interstate assistance to a use of force, in a general and comprehensive manner. Instead, its main focus is ensuring the effectiveness of UN enforcement action. Second, the regulation of horizontal assistance is no more than a component of the regulation of vertical assistance, i.e., assistance to the United Nations. Non-assistance required by Article 2(5) UNC is part of the enforcement system. It is an *institutional* rule directed at building a strong and effective enforcement

59 But see Bernhard Graefrath, 'Complicity in the Law of International Responsibility', 29(2) *RBDI* (1996) 376 seeking to deduce a presumption of intention "in cases where assistance is given to a State knowing that the international community has taken action against that State because of a serious violation on international law". He hence seems to understand any State violating Article 2(5) UNC to have intention also to facilitate the resistance against the UN.

60 In this direction Aust, *Complicity*, 34: "Article 2(5) provides by implication that the UN Charter does not automatically ban complicity with wrongful acts in an all-encompassing manner."

mechanism, expressly granting the UN a right. It is not however a provision that regulates assistance on a primary level.

Accordingly, Article 2(5) UNC does not aim to establish an exclusive and definitive normative framework for assistance. Rather, it is concerned with the effectiveness of UN (steered) enforcement action. In this respect, the regulation of horizontal assistance is merely a tool. Non-assistance required by Article 2(5) alt 2 UNC is a means to assist the UN. As such, it does not preclude a broader regulatory regime on assistance.

### D. Article 2(5) UN Charter as embodiment of a general idea

Article 2(5) alt 2 UNC itself is a part of the Charter's regulatory regime on interstate assistance. In addition, it embodies a general idea of (minimal) solidarity. Non-assistance as required by Article 2(5) UNC primarily "protects" the Security Council. In doing so, it also has a deliberate impact on the horizontal relationships among States – in fact, protecting the targeted State. Thereby, it reflects a general idea: the idea of non-assistance to a State which may be lawfully subjected to enforcement measures.[61] As seen, this includes non-assistance to a State that resorts to force in a manner threatening international peace and security. On that note, Article 2(5) UNC brings to light in express terms the foundational idea of solidarity that is deeply entrenched in the UN system of collective security: not only by recognizing a right to assistance, but also by expressly stipulating a non-assistance obligation.[62] While Article 2(5) UNC primarily tailors this general idea to the specific implementation of collective security in the UNC, centralized through the Security Council, it certifies the general idea of non-assistance within the Charter. As such, it may serve as a basis for further development through State practice.

One should be careful to assume that the absence of additional preconditions for the non-assistance obligation pursuant to Article 2(5) UNC

61 Aust, *Article 2(5) UNC*, para 1, para 28; Kelsen, *Law of the United Nations*, 94. Both formulate the general idea that a member that has violated the Charter shall be deprived of any assistance. While it is at least for the use of force true that most cases are also a violation of the Charter, this is not precise, if creating a threat to international peace and security is not considered a 'violation' of the Charter. Even a lawfully acting State may be subject to enforcement action.

62 Similarly, the ILC ARS Commentary, Article 16, 66 para 2; Aust, *Article 2(5) UNC*, para 1.

implies that such preconditions are *generally* not necessary. Article 2(5) UNC reflects the unique situation in which the UN has taken binding enforcement measures. Additional requirements obliging States to prevent obstruction thereof might seem unduly restrictive. The comprehensive prohibition of assistance is justified by the bottle neck created by requiring agreement among members representative of the international community in the Security Council.[63]

Furthermore, Article 2(5) UNC provides guidance on the relationship between an obligation to assist (the targeted State), and a prohibition to assist (the State using force). Non-assistance to the violator may be part of an assistance obligation. At the same time, non-assistance to the violator is *only* part of the assistance obligation to the targeted State. Anything that violates the non-assistance obligation also violates the assistance obligation. But not everything that violates the assistance obligation (i.e., no assistance to the victim) also violates the non-assistance obligation (i.e., prohibited assistance to the aggressor). Assistance obligations would otherwise be void and meaningless. The same would be true for the specification of a non-assistance obligation.

## IV. An implicit prohibition of assistance in view of specifically recognized rights to provide assistance?

Originally, as still reflected in the express terms of the Charter, the use of force is permissible only in two situations. Under the Charter, the use of force is monopolized by the Security Council, as per Articles 2(4) and 42 UNC. Unlike measures below the threshold of armed force that were to be taken by member States when called for by the Security Council,[64] the use of force was meant to be exercised through the hands of the Security Council and its military forces only, and not, as was the case with the League of Nations,[65] through member States.[66] Until the Security Council has taken measures necessary to maintain international peace and security, however, the Charter does not impair States' inherent right of individual or collective self-defense if an armed attack occurs against a member State of

63 Aust, *Article 2(5) UNC*, para 29.
64 Article 41 UNC.
65 Article 16(2) LoNC.
66 Article 42 UNC.

the United Nations.[67] In other words, unilateral use of force was exceptionally permissible only in cases of self-defense.

For both cases, the UN Charter addresses assistance by other States.[68] With respect to the use of force by the Security Council, Article 43 UNC describes how States may contribute (A). With respect to a situation of self-defense, the Charter recognizes a right of "collective self-defence" (B). Does the exclusive recognition of those rights imply that assistance is prohibited in all other cases in which the Charter does not expressly recognize rights to assist?

### A. Is assistance permissible only to a use of force through the United Nations?

Article 43 UNC is the only provision in which assistance is expressly mentioned in relation to a use of force. But it does not address *interstate* assistance; it concerns assistance to the Security Council as an organ of the United Nations. It is nonetheless interesting as it pertains to contributions to a use of force considered lawful under the Charter.[69] Pursuant to Article 43 UNC

> "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, *assistance, and facilities, including rights of passage*, necessary for the purpose of maintaining international peace and security."[70]

67 Article 51 UNC.

68 The use of force is permissible under the UN Charter in a third scenario: consensual use of force. The Charter itself is not only silent on such use of force itself, but also on assistance thereto. Hence, *a priori* this excludes any significant inference for specific prohibitions of assistance. Other independent grounds such as a humanitarian intervention, pro-democratic intervention, or rescue missions for nationals abroad are highly controversial. As the Charter does not explicitly regulate assistance to a use of force in those situations, they are not considered here.

69 The UN armed forces have never been established. Instead, the Security Council authorizes use of force of member States. As such, later practice is directly interesting with respect to *interstate* assistance.

70 Emphasis added.

Irrespective how to qualify the placement of military contingents to the Security Council itself, Article 43 UNC expressly mentions several forms of assistance short of force. "Assistance" was primarily meant to relate to direct military assistance, such as the provision of facilities, military bases, intelligence, reconnaissance, passage through territory, or military logistics.[71] The importance of such assistance for an effective military endeavor is illustrated by the express reference to a "right of passage," which the original proposal at the Dumbarton Oaks Conference did not contain.[72] At the San Francisco Conference, France successfully advocated for its insertion,[73] in view of the experiences in World War II, when Scandinavian States refused the right of passage to France and the UK who were seeking to defend Finland against Soviet aggression.[74] The clause was not meant to "exclude the granting of other facilities", but to stress the crucial importance of such assistance to effective military operations.[75]

Assistance pursuant to Article 43 UNC was however not conceptualized as *ad hoc* assistance to specific measures taken by the Security Council in response to a particular situation. Instead, member States were required to provide assistance in the abstract to a standing armed force. States are obliged to assist, yet only if "special agreements" on the details of their contribution can be realized.[76] States hence were only willing to accept a duty *de negotiando et de contrahendo*.[77]

71 Ruth B Russell, *A History of the United Nations Charter: the Role of the United States 1940-1945* (1958) 468. The UK and USA rejected an even more explicit proposal by the USSR as they thought Article 43 UNC already encompass it.

72 Doc 1 G/1, III UNCIO 1-23, 15-16. See also Bowett, Barton, *UN Forces*, 418; Krisch, *Article 43*, para 4. It was also not explicitly included in the United States Department of State, 'United States Tentative Proposals for a General International Organization, July 18, 1944' in E Ralph Perkins and S Everett Gleason (eds), *Foreign Relations of the United States: Diplomatic Papers, 1944, General*, vol I (1966) 661-662 VI D 2, 6. This did not mean however that the importance of that form of assistance was not recognized. In fact, according to the proposal, the Council should be "empowered to call upon member states to grant rights of passage and to furnish facilities, including bases, necessary to the effective action of forces operating under authority of the council. The conditions of the exercise of these rights and of the furnishing of facilities, including bases, should be determined, in advance or at the time of action, by agreement between the executive council and the member states in whose territories these rights and facilities are required."

73 Doc 881 III/3/46, XII UNCIO 509, 510.

74 Bowett, Barton, *UN Forces*, 418.

75 Doc 881 III/3/46, XII UNCIO 509, 510.

76 Krisch, *Article 43 UNC*, 1353 para 6.

77 Ibid para 6; Bowett, Barton, *UN Forces*, 418.

For the present purpose, Article 43 UNC is interesting in three respects: First, it acknowledges the importance of assistance for a successful military operation to maintain or restore international peace and security. Second, it distinguishes between different types of contributions, most notably through armed forces and through "assistance and facilities". Third, it presupposes and thus builds upon a *right* of member States to provide assistance to a use of force in accordance with Article 42 UNC.

An implicit *prohibition* of assistance to unilateral use of force outside the UN framework does not follow from Article 43 UNC, however. The (exclusive) recognition of a right to assist cannot be equated with a prohibition of assistance in any other situation than the one recognized. Also, Article 43 UNC constitutes an essential piece in the UN Charter's monopolization of the use of force. But it does not establish monopolization itself. This rather follows from Articles 2(4), 39, 42, and 51 UNC.[78] The regulation of assistance with respect to monopolized force hence cannot extend the monopolization of force to a monopolization of assistance.

### B. Is assistance permissible in collective self-defense only?

In addition to a use of force through the UN, unilateral use of force in self-defense remains permissible in exceptional circumstances according to the Charter. Article 51 s 1 UNC states:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Article 51 UNC positively recognizes the existence of two rights:[79] first, the right of a State to defend itself (individual self-defense);[80] second, the right of third States to *collectively* defend a State, if requested.[81] It is thus clear

78 See also Hans Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations', 42(4) *AJIL* (1948) 785.

79 It is controversial whether it establishes or merely affirms a right. On the right of collective self-defense, it is further controversial if this right was a novel right, Christine Gray, *International Law and the Use of Force* (3rd edn, 2008) 170; Christian Henderson, *The Use of Force and International Law* (2018) 260

80 The exact circumstances of the right are fiercely contested.

81 Ian Brownlie, *International Law and the Use of Force by States* (1963) 331; Emmanuel Roucounas, 'Present Problems of the Use of Force in International Law', 72 *AIDI*

that States have the right to cooperate in defending a State until the Security Council takes necessary measures.

Aside from the question of circumstances under which defense is permitted,[82] the question of permissible means by which defense may be exercised is even more crucial to the current constellation of third State's assistance.

It is beyond serious doubt that a State defending itself *individually* against an attack may do so by resorting to force.[83] Naturally, the drafters of the Charter had the use of arms in mind.[84] This is also true for the collective defense; other States may use force as well. As Lauterpacht has succinctly put it, "[i]n that sense collective self-defence is no more than rationally conceived individual self-defence."[85]

Lawful self-defense is not however – *a maiore ad minus* – confined to a forceful response. Measures directed against the attacking State that do not involve force (e.g., economic pressure) are likewise encompassed. If they

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(2007) 129 para 110. According to another school of thought, collective self-defense refers to a situation where *each* participating State must have been breached in its own rights or have some substantive rights affected. Cf Derek W Bowett, *Self-Defence in International Law* (1958) 207; Derek W Bowett, 'Collective self-defence under the Charter of the United Nations', 32 *BYIL* (1955-1956) 137-141. Bowett even claimed that each participating State must have an individual right to self-defense. While he seemed to be primarily concerned with a use of force in collective self-defense, he consistently referred to "lending assistance". Especially the concern that the assisting State would have to assess itself whether there was a situation of individual self-defense, sidestepping the UN, and the argument that otherwise it would be a sanction seeking to preserve international peace and security that is left to the Security Council, suggests that Bowett considered any assistance, even short of force, impermissible, at least if directed *against* the targeted State. See on discussion on this view Stanimir A Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) 102; Gray, *Use of Force 2008*, 170. Ultimately, it remains a question of under what circumstances a right to collective self-defense is permissible.

82 As a common denominator it is accepted that, first, means taken are allowed only in situations of defense, and second, that the Security Council measures enjoy primacy and may restrict States' actions. Anything beyond, in particular the exact boundaries are utterly controversial. See on this in detail Olivier Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (2010) 401 et seq; Henderson, *Use of Force*, 208.

83 E.g. James A Delanis, 'Force under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion', 12(4) *VandJTransnatlL* (1979) 107.

84 E.g. VI UNCIO 459, Doc 576 III/4/9, XII UNCIO 679, 680-682. See also on the term "defending", Harvard Law School, 'Draft Conventions, with Comments, Prepared by the Research in International Law of the Harvard Law School, III, Rights and Duties of States in Case of Aggression', 33 Supplement *AJIL* (1939) 879.

85 Lauterpacht, in Oppenheim's International Law, Vol. II, 7th ed. (1952), 155-156.

*prima facie* violated international law, they would be permissible under the circumstances recognized in Article 51 UNC, too.[86]

In a situation of collective self-defense, an act of (permissible) self-defense can be even more remote. The specific act need not be *directly* directed against the attacking State. It can also be geared (only) towards the State that uses force in self-defense. As joint efforts to counter the attack are permissible, it is likewise legitimate to provide assistance short of force to a State that actually uses force. Article 51 UNC hence also recognizes a right to provide assistance to unilateral use of force in self-defense.[87]

But Article 51 UNC does more than recognize the existence of this right. It unconditionally states that "*nothing* in the present Charter *impairs*" this right. In other words, Article 51 UNC serves as an exception to other Charter provisions. It seeks to ensure that self-defense remains exceptionally permissible, notwithstanding other (prohibitory) provisions under the Charter. This extends to assistance short of force.

This negates two implications that might be inferred from Article 51 UNC as being necessary or logical: first, that conduct exceptionally permissible as self-defense under Article 51 UNC, i.e., in particular assistance short of force, would otherwise be unlawful; and second, that such conduct is necessarily prohibited under conditions other than those recognized by Article 51 UNC.[88] Instead, Article 51 UNC operates on the *assumption*

86 Cf also Article 21 ARS, according to which self-defense not only precludes the wrongfulness of a violation of Article 2(4) UNC, but also of other norms. ILC ARS Commentary, Article 21, 74 para 2.

87 The precise conditions have been controversial. It is clear that collective self-defense presupposes consent of the assisted State. The necessary form has been controversially debated over time. Some required pre-existing treaty arrangements, others required the defense to take place within a regional arrangement. On the debate Alexandrov, *Self-Defense*, 101-102; Henderson, *Use of Force*, 256-262. On recent conditions see James A Green, 'The 'additional' criteria for collective self-defence: request but not declaration', 4(1) *JUFIL* (2017).

88 It has even been controversial if self-defense is limited to an armed attack or if other inherent rights exist. See e.g. Bert V A Röling, 'The Ban on the Use of Force and the U.N. Charter' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (1987) 6-7. This debate concerns however the level of *under what circumstances* defense may be exercised. While some read Article 51 UNC to allow self-defense "only" if an armed occurs, others reject that reading. Stephen M Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law', 136 *RdC* (1972) 479. It is not challenged however that Article 51 UNC allows the use of force in only limited circumstances.

that the Charter contains prohibitions that might impair individual and collective self-defense.

With respect to any *defense by force*, the non-impairment clause in Article 51 UNC is necessary. There is 'something' in the Charter that impairs this right of self-defense by force, albeit Article 51 UNC does not name it: Articles 2(4) and 42 UNC. Article 51 UNC primarily carves out an exception to the Security Council's monopoly on the use of force and to the general prohibition of the use of force. Hence, as there are specific prohibitions under the Charter, it is idle to further pursue the question of whether the fact that Article 51 UNC is limited to recognizing a right to use force *only* in self-defense has (also) a prohibitory effect *in itself*.

This question arises, however, in the context of collective self-defense that implicitly entails a right to assistance. In the UN Charter, there are no explicit provisions to which Article 51 UNC might refer and which might impair the recognized right to assistance. An explicit and comprehensive equivalent to Articles 2(4) and 42 UNC for assistance short of force is absent. And still, the fact remains that the Charter recognizes such a right to assist in a specific situation (only).

There is little reason to treat assistance short of force structurally differently from assistance through the use of force. The nature of Article 51 UNC speaks clearly: it presupposes but does not establish a prohibition.

This is especially true since the (positive or negative) recognition of the right to provide assistance short of force was not the main focus of the Charter but rather a side effect of the recognition of assistance through force. The *travaux préparatoires* primarily focused on the use of force. There is little indication that *without* Article 51 UNC, assistance short of force would have been considered unlawful. Even when States indicated that collective self-defense also entailed 'mere' support,[89] it was not suggested that Article 51 UNC constituted a *prohibition*. The primary goal of the addition was to alleviate the concerns of Latin American States that regional defense pacts, such as the 1945 Act of Chapultepec, were compatible with the UN Charter.[90]

89 For example, Colombia when defining collective self-defense used the open wording "giving support", Doc 576 III/4/9, XII UNCIO 679, 687. See also France who referred to a case of "mutual assistance against aggression", ibid 681.

90 Josef L Kunz, 'Individual and Collective Self-Defence in Article 51 of the Charter of the UN', 41(4) *AJIL* (1947) 873, 875; Gray, *Use of Force 2008*, 170; Doc 576 III/4/9, XII UNCIO 679, 680-681 (Colombia). The Act of Chapultepec allowed non-attacked

Last but not least, the *a maiore ad minus* reasoning and logical interpretation used to determine the scope of the *right* cannot be easily applied to determine the scope of such a *prohibition*. One can conclude that a right to take certain measures also embraces a right to take less intrusive means. But one cannot conclude that those less intrusive means would be otherwise prohibited, in particular if the right was established for the specific case of using force in collective defense. In fact, the drafting history leaves little doubt that the specific threshold under which self-defense was permissible was chosen deliberately in view of the use of force, not of assistance short of force.[91]

Collective self-defense under Article 51 UNC recognizes an exceptional right to provide assistance short of force. Its very existence presupposes a prohibition. But it does not establish one. At the same time, Article 51 UNC makes it clear that nothing impairs the right to provide assistance in case an armed attack occurs, even if a prohibition develops under the Charter. The incidental regulation of collective self-defense in Article 51 UNC hence does not make an unambiguous statement on the permissibility of interstate assistance outside the Security Council context. But it indicates a direction; and adumbrates that (at least) some forms of assistance may require justification and may be permissible only if they fall within the realm of the right recognized in Article 51 UNC.

### C. Some observations

The express recognition of both rights – even when viewed together – does not establish a prohibition of assistance in other cases. But it does not oppose such prohibitions either. On the contrary, both provisions are indicators that – even in view of the UN mechanism to regulate assistance under sanctions – the general regulation of assistance in the Charter has not been forgotten. It removes any doubt that, in any event, the Charter does not prohibit assistance to a use of force through the United Nations and assistance to a use of force in self-defense.

States "the use of *armed force* to repel aggression" but also collective measures short of armed force (emphasis added).

91 Henderson, *Use of Force*, 217.

## V. Obligatory solidarity under the UN Charter?

The UN Charter is considered a system of collective security, which, in its ideal form implicates a *general duty* of solidarity.[92] Accordingly, a prohibition of assistance to a State using force might be inferred – as a potential minimal component of solidarity obligations with the targeted State.[93] But the UN Charter does not go that far.

Under the Charter, member States are obliged to offer "mutual assistance" only to States carrying out UN action.[94] It may be controversial to what extent States are actually required to provide military assistance to other States.[95] It further may be doubtful to what extent assistance must be provided directly to the targeted State rather than to those States taking enforcement measures. Irrespective of these controversies regarding the scope of the required solidarity, it in any event presupposes UN action, and as such, does not establish a general prohibition of assistance.[96]

In situations of self-defense, as seen earlier, member States have the *right* to provide assistance to the targeted State. They are however generally *not required* to do so.[97] This was a deliberate decision during the drafting process. For example, New Zealand had proposed to include the following principle in the Charter:

> "All members of the Organization undertake collectively to resist any act of aggression against any member."[98]

In advocating for this, New Zealand primarily argued :

> "If it were left to an ad hoc decision to decide whether or not to take action, even after the Security Council had decided that an act of aggres-

92 Inis L Claude, *Swords into Plowshares: the Problems and Progress of International Organization* (3rd rev edn, 1964) 231, 236; Kelsen, *AJIL* (1948) 783; Robert Kolb, 'The Eternal Problem of Collective Security: From the League of Nations to the United Nations', 26(4) *RefugSurvQ* (2007) 220; Charles A Kupchan, Clifford A Kupchan, 'The Promise of Collective Security', 20(1) *IntlSec* (1995) 53.

93 That this is possible and usually considered part of such a duty shows Article 2(5) UNC.

94 Article 49 UNC. See also Article 2(5) alt 1 UNC.

95 Gregor Novak, August Reinisch, 'Article 49' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol II (3. edn, 2012) para 8-10.

96 See also Kelsen, *AJIL* (1948) 787.

97 Klein, *Beihilfe*, 435; Alexandrov, *Self-Defense*, 102.

98 VI UNCIO 334 (announcement of the proposal), 342 (explanation), 563.

> sion had taken place, the door would be open to evasion, appeasement, weaseling and sacrifice on the part of small nations. This amendment was, he felt, the minimum obligation which would guarantee the success of the Organization in the maintenance of peace and security."[99]

The proposal received some support,[100] but was ultimately rejected as it did not secure the necessary two-thirds majority.[101] In addition to difficulties with the concept of aggression,[102] the UK articulated the reasons most explicitly, especially to the extent that the proposal could be understood to go beyond assistance obligations in case of UN action:

> "[I]t altered the whole basis of the Organization. The amendment imposed an automatic collective obligation to resist aggression, whereas the whole basis of the new Charter was the identification by the Security Council of threats to the peace, followed by action by the member states in accordance with the Security Council's plans and requests."[103]

Regarding assistance in the case of UN action, the UK believed the proposal to be sufficiently covered in the solidarity provisions relating to the enforcement of UN action, in particular Article 2(5) UNC.[104]

## VI. Assistance as a prohibited threat or use of force? – Article 2(4) UN Charter

The principle laid down in Article 2(4) UNC reads:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

99 Doc 810 I/1/30 (6 June 1945), VI UNCIO 342-343.
100 VI UNCIO 343 (Peru). Norway also wanted to expressly apply the principle to cases where the Security Council was unable to act, VI UNCIO 345.
101 VI UNCIO 346, 400, 721.
102 VI UNCIO 721.
103 Doc 866 I/1/30 a (8 June 1945), VI UNCIO 356.
104 Similarly, VI UNCIO 344 (China), VI UNCIO 345 (Australia).

Article 2(4) UNC also establishes an independent prohibition against the threat or use of force.[105] The prohibition is not conditioned by the UN system of collective security.[106]

Unlike other provisions of the Charter, Article 2(4) UNC does not mention "assistance". That the provision of assistance may nonetheless fall under the prohibition is, as a matter of principle, not seriously contested within the international community – most notably in view of State support to non-State actors engaging in forcible activities.[107] However, what is controversial is the concrete scope of the norm – in particular, in view of the elephant in the room when discussing the use of force: a potential right of self-defense. Accordingly, various standards for the necessary degree of assistance have been proposed.

Whether and how assistance generally, and interstate assistance specifically, may be captured under Article 2(4) UNC depends on the conceptualization of and guidance provided by Article 2(4) UNC.[108] Before delving into the analysis of international practice in Chapter 4, it is crucial to determine how Article 2(4) UNC dogmatically allows interstate assistance to qualify as a "threat or use of force." Article 2(4) UNC allows for four avenues. First, the 'act of assistance' in and of itself could constitute *'force*' (A). Second, the commitment to refrain from the use of force could inherently embrace a prohibition to *assist* a use of force by another State (B). Third, through an act of assistance, a State might *'use*' another actor's force (C). Finally, assistance may be considered a *threat* of force, parallel to the dogmatic conceptions for 'use of force', either when assistance itself qualifies as 'threat' or through the contribution of assistance to another actor's threat qualified as 'threat' (D).

105 Ibid; *Nicaragua*, 118 para 227. See Section VIII for the fact that Article 2(4) UNC establishes a *principle* of non-use of force.

106 *Nicaragua*, 100 para 188; Clauß Kreß, 'On the Principle of Non-Use of Force in Current International Law', *Just Security* (30 September 2019).

107 Kreß, *Gewaltverbot und Selbstverteidigung*, 346-354; Henderson, *Use of Force*, 60-62.

108 It is important to note that the interpretation at stake only relates to assistance being prohibited as *use of force*. This *is prima facie* irrespective of related questions whether assistance may trigger self-defense, or whether assistance may be prohibited as another form of intervention under the rule of non-intervention.

## A. An act of assistance to a use of force as 'force'?

In factual terms, the scope of the present analysis is limited to assistance short of armed force.[109] Nonetheless, one may wonder if the act of giving assistance to another use of force may qualify as 'force' in legal terms according to Article 2(4) UNC. If this were proven to be true, by providing assistance, the assisting State would be considered to be using its *own* force – independently, and irrespective of the conduct of an intermediary. This conceptualization is described here as '*direct* use of force'. On the understanding of a clear distinction between assisting and assistance conduct (1), assistance could be considered force for its contribution to another use of force (2), or for creating a risk itself (3). On that note, some terminological clarifications are in order (4).

### 1) Dogmatic distinction between assisting and assisted conduct

The *assisting* and the *assisted* conduct are dogmatically distinct. At all times, they remain two factually separate actions.[110] Accordingly, it must be assessed separately for each conduct, the assisted conduct and the act of assistance, whether it qualifies as an act of 'force'.

In this context, the assisted conduct will always qualify as an act of force, as the present analysis is concerned solely with such scenarios.[111] This however leaves the act of assistance unaffected. The mere fact that the act of assistance later contributes to another actor's conduct that qualifies as force does not change the character of the act of assistance.[112] By its very nature, the act of assistance supports *other* force. It remains a contribution to force, which is, by definition, an independent act and not the assisted act of force.

Even the legal operation of attribution of conduct maintains this principled distinction between the assisted and the assisting act. In cases of attribution, ultimately, the relevant forceful conduct is legally treated as the assisting State's *own* conduct. This might be triggered through the

109 See Chapter 1, II.A.3.

110 Piereluigi Lamberti Zanardi, 'Indirect Military Aggression' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (1986) 113.

111 See Chapter 1 II.A.4. Usually, the assisted State will engage *itself* in an act of '*force*'.

112 Similarly Zanardi, *Indirect Military Aggression*, 113; Maziar Jamnejad, Michael Wood, 'The Principle of Non-intervention', 22(2) *LJIL* (2009) 361.

provision of assistance.[113] But the attribution of conduct is only a legal fiction, which assigns the assisted conduct to the assisting State by virtue of its assisting contributions. Nonetheless, the two acts remain doctrinally distinct. The act of assistance has the legal effect of attributing another conduct to the assisting State. But the act of assistance does not take on the nature of the assisted conduct.

Accordingly, the provision of assistance does not fall under Article 2(4) UNC for the mere fact that it contributes to a use of force. The connection between an act of assistance and armed force *by another actor* does not make the act of assistance, in and of itself, an act of 'force'.

2) The contribution of assistance to a use of force as 'force'?

Following the principle of distinction, only the assisting State's own act of assistance is relevant to determine whether assistance qualifies as 'force' in terms of Article 2(4) UNC. Examples of relevant acts include the provision of territory, sale of weapons, sharing of identified targets, or refueling of aircraft. On that note, it is case-specific whether assistance constitutes an act that qualified as force in terms of Article 2(4) UNC.

For instance, when the means used to provide assistance simultaneously constitute armed 'force', it is clear that assistance qualifies as force. This would be the example of a State providing aerial fire to assist another State's ground troops. Such scenarios are however excluded from the present analysis.[114] The main interest here is not whether the means used for assistance qualify as force, but rather whether the *contribution to* another actor's force may constitute 'force', regardless of the *means used*. At the core of the inquiry is the defining feature of any act of assistance: its (potential) contribution to another actor's force.

The answer to this question depends crucially on the exact meaning of 'force' prohibited by Article 2(4) UNC. It is well accepted that force presupposes coercion. Beyond that, however, there are many controversies. The Charter provides only little guidance, which allowed the debate to develop many different, yet interwoven strands. There is ongoing discussion regard-

113 For a more detailed discussion see Chapter 6.
114 For details see Chapter 1.

ing whether force requires a minimal threshold of intensity.[115] Moreover, beyond the consensus that *armed force* is covered,[116] there has long been dispute as to whether other types, such as economic, political or ideological force, fall within the ambit of Article 2(4) UNC.[117] More recently, the debate has shifted to the extent to which cyber operations amount to 'force'.[118] At the core of these debates is the controversy surrounding the definition of the necessary scale and extent of an act of coercion and, more fundamentally, the precise threshold that an act of coercion must meet to fall under Article 2(4) UNC.

Different views exist on the definition of the necessary threshold. Under any view, there are valid reasons why assistance as a contribution itself may not qualify as 'force' in terms of Article 2(4) UNC. For example, if one subscribes to the view that force in terms of Article 2(4) UNC requires at least *armed* force (which has strong justifications[119]), the inherent risk associated with assistance alone would not suffice. If the focus is on the *means*, then the instrument used, i.e a weapon, would be decisive.[120] A weapon is understood as means that has violent consequences.[121] Again, the mere act of providing assistance (even in the form of weapons or lethal assistance) in itself does not directly harm another actor. The assistance

115 Corten, *Law against War*; Mary Ellen O'Connell, 'The Prohibition on the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law; Jus ad Bellum, Jus in Bello, and Jus Post Bellum* (2013). Critical Tom Ruys, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Uses of Force Excluded from UN Charter Article 2(4)?', 108(2) *AJIL* (2014).

116 Committee on the Use of Force (2010-2018) International Law Association, 'Final Report on Aggression and the Use of Force' (*Sydney Conference*, 2018) 4.

117 Albrecht Randelzhofer, Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 208-210 para 17-22; Delanis, *VandJTransnatlL* (1979); Henderson, *Use of Force*, 54 with further references.

118 Michael N Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework', 37(3) *ColumJTransnatlL* (1998-1999); Russell Buchan, 'Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions?', 17(2) *JCSL* (2012); Marco Roscini, *Cyber Operations and the Use of Force in International Law* (2014).

119 The Charter allows arguments for both sides. In combination with international practice, however, the better arguments speak for a prohibition under Article 2(4) UNC of *armed* force only. For the classical arguments see Randelzhofer, Dörr, *Article 2(4) UNC*, 208-210 para 17-20; Schmitt, *ColumJTransnatlL* (1998-1999) 904-905.

120 Roscini, *Cyber Operations*, 49.

121 Ibid 49, 50.

may be used to do so. But *as such*, it only enables to use weapons, but is not a weapon itself.[122]

One does not necessarily reach different conclusions when applying an *effect*-based understanding of 'force'. It has been submitted that the relevant action must produce physical effects comparable in gravity to armed force.[123] There seems to be agreement that the specific action causing the effect must affect the targeted State.[124] At the same time, the 'effect' criterion raises further questions.[125] What kind of effects are required? This issue has resurfaced recently in the context of cyber operations. Do effects beyond physical damage suffice?[126] Moreover, are indirectly caused destructive effects sufficient?[127] As for assistance, it has no more than the potential effect of contributing to another State's force. It does not itself cause significant physical damage. Still, assistance may eventually lead to force.[128] Accordingly, while an effects-based understanding of force theoretically allows for acts of assistance to be classified as force, it ultimately depends on how the threshold of effects is defined. According to the prevailing understanding that requires physical damage, assistance does not qualify as force.[129]

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122 In this respect the argument by Roscini, ibid 50 is not convincing. He states that the "focus on instrumentality explains why the ICJ qualified arming and training of armed groups as a use of force: although not directly destructive, those activities are strictly related to weapons, as they aim at enabling someone to use them." These means however would not have the "(violent) consequences" which Roscini requires. Those are only achieved by the actor using force.

123 On physical effects: International Law Association, 'Final Report on Aggression and the Use of Force', 25.

124 See for example: ibid 25 "directly cause significant damage". Roscini, *Cyber Operations*, 47-48; Lianne J M Boer, ''Echoes of Times Past': On the Paradoxical Nature of Article 2(4)', 20(1) *JCSL* (2015) 10-12; Henderson, *Use of Force*, 55; Buchan, *JCSL* (2012) 217; Michael N Schmitt, 'Cyber Operations and the Jus Ad Bellum Revisited', 56(3) *VillLRev* (2011-2012) 576-577.

125 See also Kreß, *Non-Use of Force* (2019).

126 Boer, *JCSL* (2015) 14.

127 Indirect in the sense of 'as a consequence of the alternation, deletion, or corruption of data or software, or the loss of functionality of infrastructure'. Cf Roscini, *Cyber Operations*, 48.

128 Cf ibid 48, 50 for such a broad reading of effects.

129 It is true that 'effects' may also include any conduct that contributes to conduct that meets the relevant threshold. Ultimately, when the act of assistance leads to a use of force, it has the effect of physical damage. 'Effects' may hence also be understood to raise questions of causation and directness. It is submitted here however that in view of the above described principle of distinction, only the act of assistance

But it is submitted here that there is an additional, more fundamental reason why a contribution to a use of force cannot qualify as force itself under Article 2(4) UNC – irrespective of the (controversial) threshold. Assistance is only *indirect in nature*. It is not directed against the targeted State, but rather towards the assisted State. It benefits the assisted State, but it does not, in and of itself, target another State. It is not only a more remote intervention compared to some forms of cyber operations that do not directly cause damage. It does not set into action any (let alone irreversible) process against the targeted State. It exclusively depends on the assisted State whether it has any effect on the targeted State. By definition, the assisting State leaves the ultimate decision to the assisted State. It is not different if the assisting State concretizes and directs the act of assistance against a specific target.[130] This becomes particularly clear when the assisted State eventually does not use force. Assistance remains without a direct effect on the targeted State.

3) The risk created by assistance as 'force'?

This leaves only the impact of the act of assistance itself that may qualify as force. Although indirect by definition, the provision of assistance itself may have a significant impact on international relations. In practice, in view of military assistance, States often feel coerced to react. For example, a State's decision to allow another State to establish a military base on its territory impacts its neighboring State, too. This feature is not indirect. It does not depend on another actor. It directly affects other States. As assistance strengthens specific States, it creates a risk for other States; in most cases, for *all* States, as assistance is not tailored against a specific State. Instead,

itself matters as relevant conduct. The act of assistance itself does not result in the physical damage; it is the assisted act, to which the assistance merely contributes.

130 Note that the nature of the assisted actor may be relevant in this respect. This may explain positions like Delanis, *VandJTransnatlL* (1979) 126. But not even for non-State actors that receive support and that (necessarily) sit within another State, assistance always constitutes force. Assistance is only *coercion* against the territorial State if the non-State actor's conduct is directed against the territorial State. It is different when the non-State actor's conduct is directed against a third (non-territorial) State. Assistance could be viewed as intervention against the territorial State as the territorial State is 'coerced' to tolerate an infringement of its exclusive sovereignty. This may qualify as violation of sovereignty, but not as coercion or force.

only the action of the assisted State concretizes and directs the risk against a specific State.

Article 2(4) UNC does not capture such a general risk, however. Article 2(4) UNC is a key feature in the Charter's task to "maintain international peace and security".[131] But, it does not prohibit any threat to international peace and security. It is concerned with the "uncontested core threat of the peace":[132] direct conflict between States. At its core, Article 2(4) UNC requires a specific, precise and identifiable[133] relationship between two or more (legal) persons, namely the State using or threatening 'force' and the State being *targeted* by that force.[134]

Already the wording reflects the basic assumption that force must be directed against another actor. 'Force' is widely defined as "physical strength or power *exerted upon* a person or object".[135] Other elements of Article 2(4) UNC point in a similar direction. The phrase "in international relations" defines the target of force, and excludes force remaining within the internal relations of a State. Put differently, again, there must be an actor outside of those internal relations that is specifically and directly targeted.[136] The clarification "against the territorial integrity or political independence of any state" then specifies the basic assumption in that any State may be such a target.[137]

131 Article 1(1) UNC.

132 Krisch, *Article 39 UNC*, 1279 para 12.

133 Corten, *Law against War*, 93 et seq.

134 See comparable ibid 94.

135 *Oxford English Dictionary* (2018), force 5a, emphasis added.

136 In that direction also Roscini, *Cyber Operations*, 44 who seems to see already here a narrowing down to States.

137 There is some discussion under what circumstances a State is targeted in terms of Article 2(4) UNC. Some argue that this is only the case if force is directed "against the territorial integrity or political independence". This school hence sees only interventions prohibited that touch upon the targeted State's right of territorial integrity and political independence. This view resurfaces in a slightly different guise in view of the use of force in response to non-State terrorist attacks. It is used to argue that targeted and confined operations that are not directed against the territorial State where force is used is not prohibited under Article 2(4) UNC. Again, others hold the view that any force that intervenes in any sovereign rights is covered, e.g. Brownlie, *Use of Force*, 268. See for a brief overview on the debate Henderson, *Use of Force*, 19-21. Irrespective whether these views are convincing, for the present purposes it is interesting to note that these arguments are based on the accepted assumption that Article 2(4) UNC presupposes a conduct that is in some form specifically *directed against* a State.

Article 2(4) UNC's character of prohibiting intervention rather than situational and vague risks is further reflected in the fact that a threat of force was not meant to be prohibited, unless it is sufficiently precise.[138] This interpretation, as Oliver Corten has convincingly shown, is supported by the inter-Charter comparison between the term "threat of force" used in Article 2(4) UNC and the term "threat to international peace and security", employed as a threshold for Security Council action in Article 39 UNC.[139] The latter broadly refers to *situations* threatening international peace and security in general, in order to grant the Security Council broad powers to react to situations, even those which are not in violation of international law and other States' rights generally, or Article 2(4) UNC particularly. In contrast, the former is meant to cover only threats that are directed against a State specifically, i.e. governing a specific relation between two states.[140] Vague and abstract threats are hence not generally prohibited. They do not fall however in a regulatory gap. Their regulation is left to the UN Security Council.

The *travaux préparatoires* solidify this interpretation of the character of Article 2(4) UNC. The provision was included to extend the prohibition of formal war to any use of force.[141] The structural adversarial nature was not meant to be thereby abrogated.

The inherent design of Article 2(4) UNC becomes clear when transferring the situation from the triangular relationship between the targeted, the assisting, and the assisted State to a bilateral relationship between a targeted State and State using force alone. In this case, the assisted State would not receive assistance from a third State but would support itself. The functional equivalent to assistance in this scenario is preparation. It is widely agreed that such military preparation is not considered 'force'. At best, it is discussed under the concept of 'threat of force'. For example (self-)armament is not generally prohibited, and in particular does not constitute 'force'.[142] Although arms buildup and militarization can exert pressure on other States, 'forcing' them into a (voluntary) arms race, they

138 Corten, *Law against War*, 93 et seq.
139 Ibid 94.
140 Ibid 94-95.
141 On this see Kolb, *Jus Contra Bellum*, 62, 329-330; Hans Kelsen, 'The Draft Declaration on Rights and Duties of States', 44(2) *AJIL* (1950) 271.
142 Efforts to include general disarmament obligations in the Charter were not heeded. States left it to the General Assembly, Article 11 UNC. *Nicaragua* 135, para 269; Bakhtiyar Tuzmukhamedov, 'Disarmament' in Rüdiger Wolfrum (ed), *Max Planck*

merely contribute to increasing a State's potential to prospectively use force.[143] The same is true for maneuvers and military training, which are not prohibited as 'force'.[144] To the extent that they are not at the very least directed against a State in particular, they are not considered under Article 2(4) UNC.[145]

To summarize, Article 2(4) UNC does not prohibit assistance as a use of one's *own force*. As such, it does not touch upon the exclusive relationship between an assisting and an assisted State.[146] Interstate assistance does not fall within the affairs of another (potentially targeted) State but remains within a State's sovereign right to conduct its own foreign policy in co-ordination with another State.[147] Article 2(4) UNC does not seek to grant States a right to be free from powerful enemies or enemies with allies. In absence of Security Council action, States are expected to tolerate this.

#### 4) Terminological clarification

In view of the foregoing, this is a moment to pause for terminological clarifications.

With respect to terms, the debate appears to be reminiscent of the Wild West. Assistance under Article 2(4) UNC is most prominently discussed (in relation to assistance to non-State actors) as "indirect force",

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*Encyclopedia of Public International Law* (online edn, 2011) para 5; Randelzhofer, Dörr, *Article 2(4) UNC*, para 73.

143 This is even true for cases in which armament is explicitly targeted against a State, although under specific circumstances it may then be considered a threat of force – force again being however not the armament, but the prospect of using the armament. Increasing armament can be an indicator in determining whether there is a threat.

144 Dale Stephens, Tristan Skousgaard, 'Naval Demonstrations and Manoeuvres' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2009) para 11.

145 See for example the NATO Trident Juncture Maneuvers in Norway in 2018. Russia understood the maneuver to be directed against itself, it to be provocative, sending a signal. And yet, it refrained from seeing them as a violation of international law. NATO states on the other hand emphasized that the maneuver's message is that "NATO is capable of defending, it is capable of deterring any adversary, no particular adversary." NATO, Tridente Juncture 2018 Press Conference, (9 October 2018), https://www.nato.int/cps/en/natohq/opinions_159119.htm.

146 Cf Chapter 1, II, figure 1.

147 *Nicaragua*, 133, para 265.

"indirect aggression" or "indirect use of force". Moreover, these terms are rarely explicitly defined and subject to varying interpretations, at times differing substantially in the scenarios they are considered to capture.[148] The terminological diffusion, as the chapter on international practice will later prove true, not only widely obfuscates the debates, but also creates uncertainty about the lines of (dis)agreement.

The present analysis will not employ the term "indirect force."[149] The term dilutes the problem. It leads to a discussion of how giving assistance can constitute *force*. Thereby, it fails to fully capture the necessary discussion, as it leads to the too narrow question of whether assistance constitutes 'force'. Moreover, it does not adequately reflect the dogmatic conceptualization of the issue. The term "indirect force" may misleadingly suggest that the assisting State (directly) engages in an act of force which however is not directed against the targeted State. It further implies that assistance is considered the assisting State's own force.[150] Thereby, it inadequately represents the fact that in most cases, there is only one conduct that qualifies as 'force': the conduct of the assisted actor. This assisted force is usually direct. In contrast, as seen, assistance to force does not render an assisting act as 'force' itself. The assisting State does not engage in an act of force.

148 For example, for an overview on the early understanding of the term "indirect aggression", see A/2211 (3 October 1952), para 408-440.

149 For authors discussing the question of assistance to a use of force under this terminology: Rolf M Derpa, *Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nichtmilitärischer Gewalt* (1970) 18 with further references; Randelzhofer, Dörr, *Article 2(4) UNC*, 211-213 para 23-28; Roscini, *Cyber Operations*, 48, 50 discusses assistance under the question of "force"; International Law Association, 'Final Report on Aggression and the Use of Force', 4. In this direction also 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) 282-283 classifying assistance as an "element of the unlawful act". Undecided: Erin K Pobjie, ''Use of Force' and Article 2(4) of the UN Charter: The Meaning of a Prohibited 'Use of Force' between States under International Law' (Doctorate, University of Cologne 2019); de Wet, *Chapter VII*, 146, 148. In addition, the term "indirect force" also refers to the threshold debate, i.e. whether "force" embraces also forms of (extreme) coercion other than armed force, e.g. economic, or political coercion. Thomas Bruha, *Die Definition der Aggression: Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974; zugleich ein Beitrag zur Strukturanalyse des Völkerrechts* (1980) 219.

150 If assistance qualified as 'force', the assisting State would be using own force. It would be a "direct use of force."

In this light, unless assistance to the use of force is prohibited as a necessary complement to the prohibition to use force, the key question is whether another actor's force can be *used through providing assistance*.

Accordingly, the present analysis prefers the term "indirect use of force" to describe assistance to force that falls under Article 2(4) UNC. It describes the situation where the assisting State does not commit force through its own organs, but through its involvement in another actor's (direct use of) force, it can be considered to *use* that force, too.[151] The use is indirect in the sense that the *direct force is used through an intermediary, a third party*.[152]

151 Authors using this terminology, too: Hans Wehberg, 'L'interdiction du Recours a La Force. Le Principe et les Problèmes qui se posent', 78 *RdC* (1951) 68-69; Eugène Aroneanu, *La définition de l'agression* (1958) 84; Schwebel, *RdC* (1972) 458; Eduardo Jiménez De Aréchaga, 'International Law in the Past Third of a Century', 159 *RdC* (1978) 93, 115; Tom Ruys, *"Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010) 372; Dapo Akande, 'The Contribution of the International Court of Justice to the Law of the Use of Force', *EJIL:Talk!* (18 November 2011); Abdulqawi A Yusuf, 'The Notion of Armed Attack in the Nicaragua Judgment and Its Influence on Subsequent Case Law', 25(2) *LJIL* (2012); Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 71; Claus Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2016) 574; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, 2019) 720. See also Manfred Lachs, 'The Development and General Trends of International Law in Our Time', 169 *Recueil des Cours de l'Académie de Droit International de la Haye* (1980) 166. States likewise use this terminology most frequently: see e.g.: A/36/41 (1981) para 238. Note that if the direct use of force was *attributable* to the assisting State under the Articles on State responsibility, the assisting State would be engaged in a *direct* use of force. Attribution creates the legal fiction that an attributable conduct is the State's *own* conduct. For more details when this is the case, see Chapter 6.

152 In that sense also: UNSG A/2211 (1952) para 414, 415: "The characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative." Ann Van Wynen Thomas, Aaron J Thomas, *The Concept of Aggression in International Law* (1972) 46-47, 66; Rosalyn Higgins, 'Legal Limits to the Use of Force by Sovereign States United Nations Practice', 37 *BYIL* (1961) 288; Schwebel, *RdC* (1972) 455-456 ("operating through third parties"); Henderson, *Use of Force*, 60 refers to "indirect use of armed force". He describes the problem as "the use of force through *indirect* means whereby as opposed to a state employing is armed forces to carry out a use of force it instead provides the means to others to do so." Unfortunately, however, in his further analysis, Henderson blurs his clear analytic setup, by then attempting to define "a forcible act" (60) or "whether […] support has crossed the threshold between intervention and force". He then attempts to define "force" rather than the "indirect means" which he set out initially. See also Benjamin K Nussberger, 'Christian Henderson, The Use of

It is true that the labels "direct" and "indirect" may be subject to criticism. First, if not clearly defined, they are not without ambiguity. As such it is not a surprise that 'indirect' has been used in practice to describe scenarios other than the use of another actor's force.[153] Second, the distinction between 'direct' and 'indirect' may appear arbitrary, and may not be adequate in some cases of very remote or very proximate involvement.[154]

Nonetheless, the use the terminology is justified. In the present context, 'indirect use' refers to the *means* of committing a use of force through *another* actor, rather than a threshold. In contrast, 'Direct use' refers to the use of one's *own* force. Notably, this terminology is grounded in international practice. When discussing the issue at hand, States predominantly qualify the *action*, rather than *force* itself, as direct or indirect. They refer to the direct/indirect *use* of force rather than to "indirect force".[155] Similarly, the ICJ in the course of discussing the problem does not use the term "indirect force" but rather relates "indirect" to the "use of force."[156]

The term "indirect aggression" likewise is widely used in academia and international practice.[157] It is usually connected not only to Article 39 UNC,

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Force and International Law', *JCSL* (2019). Schmitt, *ColumJTransnatlL* (1998-1999) 909 correctly classifies the problem as an application of an agency theory. But, again, he then sees the Nicaragua jurisprudence as a definition of "force"; Ruys, *Armed Attack*, 371; Corten, *Law against War*, 444 ("possible implication of a State's responsibility in the event of acts perpetrated by private groups").

153 For example, the USSR in 1952 used "indirect aggression" to refer to assistance irrespective of whether armed force was ever used. Thomas, Thomas, *Concept of Aggression*, 69.

154 Cf Ruys, *Armed Attack*, 371.

155 The reference to "directly or indirectly" is common in the resolution practice by the UNGA. Notably, however, this does not describe the form of intervention itself (e.g. "force"), but rather to the act of intervening (e.g. "use"). Similarly, States qualify the "use". Cf for example: Ghana, A/C.6/SR.815 para 33; UNSG A/2211 (1952) para 414, 415: "The characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative"; A/54/368-S/1999/993 (21 September 1999).

156 *Nicaragua*, 109 para 206, 110 para 209; see also para 205 where it refers to direct and indirect form of military action.

157 Using this term: Corten, *Law against War*, 444; Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71(2) *AJIL* (1977) 231, 232, 237-238. But Stone seems to still think about "force", as he states that the requirement of "force" by the assisted actor "has a rather circular ring to it." On the development of the term Thomas, Thomas, *Concept of Aggression*, 46-47. Critical Ruys, *Armed Attack*, 371. Higgins, *BYIL* (1961) 289 classifies aid and assistance not as indirect aggression,

but, more importantly, to a potential right of self-defense. 'Indirect aggression' is also imprecise and ambiguous. But, unlike the term "indirect force", it is not conceptually misleading. "Aggression" is widely understood to include at least[158] "*use* of armed force".[159] As such, the term is not limited to indirect force but embraces also indirect *use* of force. Nonetheless, the term will not be used. References to indirect aggression may, depending on the context, be understood as an affirmation of a prohibition of indirect use of force as well.

### B. A prohibition of assistance as necessary and logical complement to the agreement to refrain from a use force itself?

An act of assistance is no prohibited (one's own) force. Still, States agree to an obligation of non-use of force in their international relations. Does this commitment not to *use* force also embrace a commitment not to *participate* in the prohibited use of force?

Some have advanced such arguments.[160] For example, *Hersch Lauterpacht*, in interpreting the renunciation of war under the Kellogg-Briand Pact, suggested such a reading:

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but aggression proprio suo. For States see e.g. A/2638 (1953) 8 para 72 (Dominican Republic), 73 (Iran).

158 There is substantial debate whether it is even broader. For example, the USSR viewed the mere giving of assistance to non-State actor rebels (even without force) as aggression. Similarly, the OAS Charter distinguishes between an 'armed attack' and 'act of aggression that is not an armed attack' (Article 29). See on the term Henderson, *Use of Force*, 65.

159 Article 1 Aggression Definition.

160 Derpa, *Gewaltverbot*, 20 argued that this is "for reasons of logic, and is justified because of the involvement in and causation of the unlawful result." Second Report Crawford, 51 para 188 held: "For State A deliberately to procure the breach by State B of an obligation by which both States are bound cannot be justified; a State cannot do by another what it cannot do by itself." It should be noted however that this is not the *reason* for accepting a prohibition of assistance, but merely a *precondition*. Crawford, and the ILC, based the prohibition also in State practice. Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016) 23 may also be understood in this direction when he claimed that "complicity is a by-product of the multilateralization of the relations of responsibility, hesitantly stretching beyond the orthodox bilateralist structure of international law". Kelsen, *AJIL* (1950) 271 made an even broader claim. He viewed a non-assistance obligation as "implied in the concept of international law". It is not beyond doubt however that Kelsen viewed the prohibition to use force to also cover assistance to a use of force.

> "The process of interpretation is essentially a simple one. Its object is to discover whether a fact or set of facts falls logically within the rule. Thus a rule of interpretation may tell us that a person who aids a criminal takes part in the crime. This is a rule of juridical logic, although the criminal law finds it convenient to refer specifically to accessories before, during and after the fact. Art. 3 of the Budapest Articles, which lays down that "a signatory State which aids a violating State thereby itself violates the Pact," may therefore be regarded as a proper instance of genuine interpretation."[161]

While Lauterpacht is certainly correct in claiming that it is a "rule of juridical logic" that an accessory takes part in the crime, his ultimate conclusion needs to be taken with a grain of salt, especially when transferring it to other treaty regimes, like the UN Charter. This is because he does not fully elaborate on his thoughts but operates on the unproven assumption that the provision was meant to prohibit *any* taking part in war, i.e. also assistance.[162] It is only on this assumption that Lauterpacht's "rule of juridical logic" comes into play.

This assumption, however, is not based on legal logic. A unitarian understanding of participation cannot simply be presumed. The mere fact that a prohibition outlaws a certain conduct does *not necessarily* mean that *any* form of participation in that prohibited conduct is proscribed as well. It rather requires careful interpretation to determine whether States' consent includes the belief that participation should be prohibited, too.

In general, a prohibition of a certain behavior may be deliberately limited to (the higher threshold of) perpetration, i.e. the direct execution, only. There may be good reasons not to outlaw participation in a specific conduct.[163] Even though a broader prohibition might seem more effective, it would also be more intrusive on interstate cooperation and States' freedom.

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Also thinking in this direction with an argument of "good faith": Aust, *Complicity*, 34.

161 Hersch Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *TGS* (1934) 182. Recall also the debates on the Budapest Articles, Chapter 2, II.B.2.

162 In fact, this is a point that Lauterpacht (ibid 182) noted himself with respect to deducing a renunciation of recourse to force from the renunciation of the right of war.

163 See also A/33/10, ILCYB vol II Part Two, (1978), commentary on Article 27, 103-104 para 16. 'Participation' is not used here as the generic term that captures different forms of involvement (perpetration, complicity, instigation) (for such a use see e.g. German criminal law § 25-28 StGB, Claus Kress, 'The German Chief Federal

A prohibition of participation would have wide-ranging effects on the international legal order, as it would inherently also define how other States must react to the conduct of other States. It cannot be easily accepted that States always agree to such an automatic "enforcement" regime.

In fact, a general distinction between perpetration and participation is consistently reflected in general international and national regulatory practice. Participation, and assistance in particular, is subject to explicit and separate provisions specifically addressing this issue.[164] Typically, it is *not* assumed to always be inherent in a prohibition of a certain conduct. This is in particular true for the regulation of the use of force, as evidenced in the treaty practice leading up to the UN Charter. Multiple predecessors to the prohibition of the use of force, especially in bilateral non-aggression treaties, included additional specific provisions on assistance to the use of force.[165] As will be seen, this distinction is widely upheld in bilateral treaties that codify, repeat, and reaffirm Article 2(4) UNC.[166]

This distinction is also reflected in the Charter itself. The UN Charter acknowledges the relevance of assistance to a use of force. It provides several express rules on assistance and the reactions of third States, all of which are subject to Security Council action. States were well aware of the potential and danger that assistance could be used to circumvent the prohibition, as various attempts to define acts of assistance as force or aggression demonstrate.[167] And yet, despite being in the drafter's mindset, no general rule on assistance is (expressly) reflected in the Charter's text, and Article 2(4) UNC specifically. This omission is even more striking

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Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2(1) *JICJ* (2004) 252 n 26. 'Participation' describes here a specific form of involvement in, i.e. the contribution to another States' act, distinct from perpetration that captures the principal commission of the prohibited conduct.

164 "Participation" is usually regulated explicitly, when it is meant to be proscribed. This is a common feature across the fields of international law. For example, Article III (e) Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, or international criminal law (Article 25 ICC-Statute). In national legal orders, if assistance is outlawed, usually there is an express and separate provision, e.g. § 27 German Penal Code, or § 840 German Civil Code.

165 See Chapter 2 II.B.1.

166 See for details Chapter 4 II.B.

167 The debate concerned in particular non-State actors, but interstate assistance was also repeatedly referred to. See for an overview of the pre-Charter approaches UNSG, 'Question of Defining Aggression' A/2211 (1952).

in light of the neighboring provision of Article 2(5) UNC that squarely addresses assistance.

The Charter's focus on perpetration (i.e. one's own use) seems to reflect the priorities following the experience of World War II. The primary threat to peaceful co-existence of States was identified as the perpetrators of acts of aggression, not the bystanders.[168] The UN Charter aimed to solidify the emerging, yet still fragile principle of non-use of force that had been trampled upon during World War II.[169] States hence primarily focused on the core norm (and the then perceived core threat to international peace and security). This did not mean that the reaction of third States was not deemed crucial. Yet, in light of previous experiences under the League of Nations, States left the regulation primarily to the Security Council.

It is hard to shake the impression of cynicism associated with accepting that a specific conduct is prohibited for oneself but not prohibiting participation in the very same conduct by another actor. This would be even more pronounced in light of the general object and purpose of the UN Charter in general, and Article 2(4) UNC in particular that sought to establish a comprehensive prohibition to use force. Why would States agree to refrain from using force in their international relations but allow support for other States using such force? But first, the historical experiences, the initially neutral and "non-interventionist" character of military assistance, and not least pragmatism may explain such a result. Second, the Charter does not leave assistance unregulated, as the Security Council is empowered to (also) address it. Third, even if it were cynical, cynicism in international law cannot be equated with legal logic.

Given the above, a prohibition of participation, as necessary and automatic complement to the prohibition against the use of force, does neither follow *solely* from the fact that it is an *erga omnes* norm and is widely described to have *ius cogens* character. Helmut Aust has laid this out in detail on a general level.[170] Also, even though the acceptance of complicity

168 Cf also Higgins, *BYIL* (1961) 288.

169 See the debates on its nature in the time after drafting Brownlie, *Use of Force*, 112-116, 127-129.

170 Aust, *Complicity*, 35-49. See also Astrid Epiney, 'Nachbarrechtliche Pflichten im Internationalen Wasserrecht und Implikationen von Drittstaaten', 39(1) *AVR* (2001) 37-38. It does not exclude however that the special character may serve as an additional argument and justification for an extension. For the contrary view: Alexander Orakhelashvili, *Peremptory Norms in International Law* (2008) 578-579. For recent debates on a duty to cooperate to bring to an end and a duty to actively uphold

rules might be described as "byproduct of multilateralization",[171] multilateralization itself is not a sufficient condition. Not every multilateral obligation necessarily also prohibits assistance. The same is true for concepts of "abuse of rights"[172] or "principle of fair labelling".[173] These features may influence the existence of a complicity rule. But ultimately, the basis for a prohibition of assistance lies in States' consent.[174]

Accordingly, a prohibition of participation is not necessarily and automatically part of the prohibition of the use of force pursuant to Article 2(4) UNC. The *prohibition* against the use of force only prohibits the *use* of force. Whether this also includes assistance cannot be assumed but requires careful interpretation.

## C. Assistance as a 'use' of force?

The key question then is what can be considered a 'use' of force.

It is crucial to free oneself from understanding 'use' in purely factual terms. It is an inherently *normative* concept. States are organized entities. But, in factual terms, they cannot 'act' or 'use'.[175] As artificial legal persons, States depend on the conduct of human beings, which is normatively attributed to States.[176] Prohibitions of conduct under international law, which address States, are hence premised on the idea that the prohibited act is attributable to the State. This is governed by general rules of international law. But a prohibition itself may set out what relationship between a responsible State and the actor engaged in an action that is captured by the prohibition suffices to be considered a violation by the respective State.[177]

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norms of *ius cogens*, 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).

171 Lanovoy, *Complicity*, 23.

172 Aust, *Complicity*, 50-96 who does not however see this as the exclusive basis, but rather the normative framework under which international practice is assessed.

173 Miles Jackson, *Complicity in International Law* (2015) 120, 142-144.

174 Also emphasizing this Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (2020) 194-198.

175 ILC ARS Commentary, 35, Article 2, para 5.

176 Ibid, para 6.

177 Similarly Kreß, *Gewaltverbot und Selbstverteidigung*, 238.

With respect to the prohibition against the use of force, there is no doubt that Article 2(4) UNC normatively captures forceful conduct that is considered a State's *own* conduct, i.e. that can be attributed to a State.[178] This is the most common scenario of force used by the State's own army. Here it is referred to as 'direct use' of force.

Does the prohibition against the use of force, as conceptualized under the Charter, also allow to regulate other 'uses' of force, going beyond 'direct use' of force?[179] More specifically, can (certain forms of) assistance to another actor's force, i.e. active hostilities, qualify as 'use' of force?

This question is addressed in two steps: First, does the Charter limit the concept of "use" to a State's 'direct use' or can a "use" of force also be a "use" of another State's conduct amounting to force ('indirect use')? Second, if the Charter is open to 'indirect use', does Article 2(4) UNC provide a (conceptual) framework defining what constitutes "indirect use" prohibited under the Charter?

### 1) No limitation of Article 2(4) UN Charter to 'direct use'

It is beyond question that a State uses force when the relevant person "using force" acts on behalf of the State, meaning that the requirements for attribution of conduct are fulfilled.[180] But even then, force is actually *executed* by another actor (at the outset distinct from the legal person 'State'). As an artificial person, a State itself cannot physically perpetrate any conduct. It requires a normative operation to overcome this hurdle: attribution.[181] From a doctrinal and conceptual perspective, however, even then a State uses force through an 'intermediary'. What is described as "direct use" is technically a specific form, a specific intense degree, of "indirect use".[182]

The critical question, therefore, is whether the prohibition against the use of force is limited to such 'use' that is considered the State's *own* use under international law.

178 What conduct amounts to such use of force again is utterly controversial, as is the question which actors are bound to the prohibition.

179 Recall the argument above that the assistance to a use of force does not render the use of force the conduct of the assisting State itself.

180 See for example: Brownlie, *Use of Force*, 370 "some form of agency".

181 ILC ARS commentary, Article 2 para 6.

182 For a similar conclusion see ILC YB vol II Part Two, (1978), A/33/10, commentary on Article 27, 104 para 16.

The text of Article 2(4) UNC is drafted in an open manner. It does not specify *how* force shall be used. Article 2(4) UNC does not elaborate on, but also does not specifically exclude any modes of participation.[183] Unlike in other areas of international and national law, Article 2(4) UNC does not recognize in explicit terms that a prohibited conduct can also be perpetrated with the involvement of another actor – scenarios that are typically discussed under concepts such as unitarian perpetration, co-perpetration or perpetration by means.[184]

It is true that the Charter only cautiously received pre-Charter trends expressly prohibiting indirect use of force.[185] This allows for speculation about whether indirect use of force was already deemed prohibited at the time of the UN's inception.[186] But, even if indirect use of force was not already prohibited at that time, the Charter did not and does not preclude the possibility of further development through international practice.

Nothing else follows from the (convincing) view that Article 2(4) UNC only covers the use of *armed* force. It does not exclude the possibility of an indirect use of force. The necessary threshold for what qualifies as force is distinct from the captured means by which force that meets this necessary threshold is used.

A limitation of the scope of the prohibition against the use of force to a State's 'direct (own) use' might have the benefit of conceptual and practical clarity. The State using prohibited force would be relatively easy to identify. It would define and confine the responsibility of a State for a use of force unambiguously to cases where the State exercises control over the conduct. Again, the Charter does not exclude such a narrow conceptualization.

183 See also Schwebel, *RdC* (1972) 458.

184 Kai Ambos, 'Article 25' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (1 edn, 2016).

185 Recall Chapter 2.

186 Suggesting that the prohibition against indirect use of force was only later development of the Charter Higgins, *BYIL* (1961) 288-289; Ahmed M Rifaat, *International Aggression. A Study of the Legal Concept: Its Development and Definition in International Law* (1979) 217; Cornelis Arnold Pompe, *Aggressive War: An International Crime* (1953) 93. Also, in this direction Henderson, *Use of Force*, 60. This view has been in particular prominent with respect to a conclusion of self-defense in reaction to indirect use of force. For further references see Christian J Tams, 'Die Linke v. Federal Government and Federal Parliament (Counter Daesh)', 114(3) *AJIL* (2020) 469-470 n 25-27. Clauß Kreß, Benjamin Nußberger, 'The German Constitutional Court on the Right of Self-defense against ISIS in Syria', *Just Security* (16 October 2019).

Yet, such a narrow conceptualization would draw a line that may be conceived overly schematic. It also would run risk to not fully take account of the practical realities of international relations. As such, it would invite for a means to undermine the prohibition to resort to forceful means. States could hide behind other independent actors' force and carefully tailor their involvement to remain below the threshold of attribution of conduct, or, at least, below the threshold of possible proof. Throughout history, a common and popular alternative to direct use of force against a State has been to initiate, assist, and foster force through other actors. In fact, such involvement has consistently been described as one of the most dangerous forms of intervention.[187] Substantial involvement in another actor's force may achieve similar effects as direct use of force, yet in a more concealed and pervasive manner.[188] Considerations like these justify extending the scope of the prohibition against the use of force to cover such indirect uses of force, too, without necessarily devaluing the prohibition.

Such considerations led international scholars, and as will be seen States as well, to a rare show of unanimity. It is fair to conclude that there is wide consensus that Article 2(4) UNC, as a matter of principle, is open to 'indirect use' of force to also qualify as 'use'.[189] This interpretation is in particular widely accepted in the context of a State's involvement in the conduct of non-State actors.

a) 'Indirect use' – 'use' through interstate assistance?

Not every involvement in another actor's use of force can suffice to qualify as 'indirect use'. Otherwise, the prohibition would be limitless. It is

187 For example, as Schwebel, *RdC* (1972) 461 noted with respect to aggression for many States "aggression by indirect means presents a greater danger to national and international security these days than does aggression by direct means".

188 For more reasons see Randelzhofer, Dörr, *Article 2(4) UNC*, 211 para 24.

189 For a similar conclusion after a literature review see Ruys, *Armed Attack*, 372 ("it is widely accepted that 'indirect use of force' is fully covered by the Charter prohibition on the use of force"); Randelzhofer, Dörr, *Article 2(4) UNC*, 211, para 25; Derpa, *Gewaltverbot*, 20. See also Brownlie, *Use of Force*, 361; Thomas, Thomas, *Concept of Aggression*, 66-67; Kreß, *Gewaltverbot und Selbstverteidigung*, 247-248; International Law Association, 'Final Report on Aggression and the Use of Force', 4; Henderson, *Use of Force*, 60-62. It would go too far to speak of consensus, however, with respect to the scope of prohibited 'indirect use of force' and the consequence of self-defense against an indirect use of force.

ultimately a question of *degree*. It comes down to defining the necessary relationship between the other actor's forceful conduct and the relevant State to consider the State's "use" of that actor's conduct.[190] Can *assistance* provided to an intermediary that falls short of attribution qualify as a 'use' under the Charter regime?[191]

The definition of 'use' has only limited informative value. It is defined as "the act of employing something."[192] It only affirms that 'use' allows for different interpretations.

One interpretation of 'use' could require control over the execution of force. This would include only assistance that also leads to attribution of conduct.

Another interpretation within the terminological scope of 'use' would be a more holistic and functional understanding, in line with general concepts of perpetration. Accordingly, 'use' could describe conduct that (decisively) influences and dominates the if and how of the force. The physical commission of the relevant act of force would be only one relevant feature among many. Other criteria could be likewise considered, such as the scope of involvement, the relevance and significance of the contribution, or the subjective position towards the use of force. 'Use' would not necessarily require setting an irreversible process of force into motion; it would not need to focus on the execution of force only. Accordingly, the interpretation of 'use' would not necessarily align with the concept of 'attribution of conduct'.[193]

Both positions find legitimate grounds in the Charter.

190 James Crawford, *State Responsibility: The General Part* (2013) 338.

191 On the preconditions for attribution, see Chapter 6.

192 *Oxford English Dictionary*, use.

193 If an assisting State is considered to 'use' another State's act of force, ultimately, this has the same effect as in case of attribution of conduct: the assisting State violated Article 2(4) UNC. But conceptually, one arrives at the same conclusion via different routes. Attribution of conduct has the effect that the assisted conduct is considered the assisting State's *own* conduct. The act of assistance itself does not violate international law; it only serves as a vehicle for attribution. In case of an indirect use of force below the threshold of attribution of conduct, there remain two separate conducts which are exclusively attributable to two actors. Conceptually, the assisting State is using another State's conduct. It is the assisting State's *own* (assisting) conduct that qualifies as 'use'. Similarly Zanardi, *Indirect Military Aggression*, 113; Marko Milanovic, 'Special Rules of Attribution of Conduct In International Law', 96 *IntlLStud* (2020) 32-35. The ICJ in *Nicaragua* also distinguished between attribution of conduct and indirect use of force. In both cases, both States may be responsible for the violation of Article 2(4) UNC, see also Crawford, *State Responsibility*, 327, 334-335.

At the time of drafting, driven by the experience of World War II, the primary concern of the Charter was States' execution of force themselves. The term 'use of force' was meant to capture any warring activities comprehensively. Indirect means were, albeit discussed, not the primary focus at that time. Also normatively, *perpetration* and *participation* are distinct. The Charter recognizes this as a general rule by distinguishing terminologically, systematically and consistently between the 'use' and perpetration of military force on one side, and 'assistance' to and participation in force on the other side.[194]

However, this distinction is not set in stone.[195] In particular, it does not exclude the possibility that specific forms of participation may nonetheless be considered as a 'use' or perpetration. Throughout the Charter, the significance of assistance is recognized. As *i.a.* the Charter preamble's grand promise of 'saving succeeding generations from the scourge of war', the *travaux préparatoires* and the Charter's very object and purpose to maintain international peace and security imply, the Charter sets out to establish a comprehensive rule of non-use of force. In particular, when indirect means, such as assistance, may have similar substance and effects as the use of direct means, adopting a strict means-based rather than an effect-based interpretation of the term 'use' may run counter the object and purpose of the Charter. Otherwise, assistance to proxies could be a loophole to circumvent Charter obligations. In fact, the Charter was not meant to stand back behind the previous prohibition of "war". The status of war could at that time also be triggered through acts of assistance contrary to the law of neutrality.[196] The decision to refer to "use of force" instead of "war" was meant to broaden the prohibition, and to close the loophole that was left when "only" outlawing war.[197] The legal term of "war" was replaced with a determination of a simple fact.[198]

194 See Article 2(4), (5), 42, 43, 51 UNC.

195 As John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57(1) *BYIL* (1987) 105-106 notes for general international law: "When one asks which acts fall into which category, the difficulty of drawing the line is apparent".

196 For such an argument see e.g. ILCYB 1951, vol I, SR.94, 105 para 79 (Spiropoulos) according to which "if a State gave *military* assistance [in violation of the law of neutrality] to an aggressor, it was considered an aggressor itself."

197 Stuart Ford, 'Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties', 4(1) *Journal of Armed Conflict Law* (1999) 78; Corten, *Law against War*, 51-52.

198 Kolb, *Jus Contra Bellum*, 329.

There is hence little to indicate that Article 2(4) UNC is committed to exclude assistance from its scope.

It is not excluded that assistance may be considered an 'indirect use' of another actor's force even when falling short of attribution standards. But the Charter does not definitively resolve the necessary conditions.

In particular, the Charter does not define the intermediary. Given the generic conceptualization and justification for a broad understanding of indirect use of force, the nature of the intermediary should not matter. Conceptually, there is no reason to limit indirect use of force through assistance to assistance provided *to non-State actors*.[199] This finds further support in the historical parallelism in discussions on indirect use of force related to both assistance to non-State actors and States.[200]

Moreover, the Charter equally allows for a prohibition of indirect use of force that is constructed as establishing mere objective liability as it is open to a prohibition that requires an additional subjective element of the assisting State. In that sense, the Charter is indecisive. It allows arguments for either side, as the vivid debate on the necessary prerequisites for an act to qualify as *direct* use of force illustrates.[201]

At the time of establishing the Charter, the precise scope of the use of force was subject to many controversies that remained unresolved. These controversies are also reflected in the broad wording that was phrased deliberately open to the lower end.[202] The Charter leaves it to international practice to concretize the line between prohibited perpetration of force and participation, and to answer what forms of assistance can be considered a 'use' of force.[203]

199 Likewise e.g. Randelzhofer, Dörr, *Article 2(4) UNC*, 211 para 23; Crawford, *Brownlie's Principles of Public International Law*, 720.

200 See Chapter 2.

201 See for example for debates whether the prohibition against use of force requires a certain gravity, and a subjective element of the State using force Henderson, *Use of Force*, 75-76 with further references.

202 Delanis, *VandJTransnatlL* (1979) 100.

203 This is also reflected in the fact that it was controversial whether the prohibition of force constituted the only prohibition of intervention, or whether a less stringent prohibition (of non-intervention) is recognized. The initial concept of the Charter was not predetermined on this question.

b) Proposals to define 'indirect use of force'

In view of the Charter's openness, it is not surprising that literature offers numerous proposals regarding what constitutes 'indirect use of force'.

It is interesting to note some common characteristics. First, there seems to be wide agreement that an intermediary must actually perform force. Second, most observations concern assistance provided to non-State actors. Only few define general standards also applicable to interstate assistance. Third, not every form of assistance is considered to qualify as 'use' of force; at least, some level of involvement that may be traditionally described as 'perpetration' is required.

Approaches specifying the required threshold are again diverse:[204]

Some propose a case-specific approach. For example the ICJ in the *Nicaragua* case holds that only the provision of weapons or military training, and not the supply of funds, suffices to meet the threshold of a *use* of force.[205] *Kreß* takes an even more nuanced approach.[206]

Others set the threshold high, requiring subjective and objective elements. For example, *Henderson* requires that "the physical coercion does not need to take place either through overt means or directly in one causal step, but it must nevertheless constitute an intentional and material contribution towards others carrying out the direct violence that ensues."[207] In

204 See for a detailed and nuanced survey, also in light of the (dominant) questions of a right to self-defense, Kreß, *Gewaltverbot und Selbstverteidigung*, 143-168.

205 For a detailed analysis see Chapter 4, II.D.5. Many authors adopt the ICJ's position rather uncritically: Henderson, *Use of Force*, 60-62; Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels', 7(1) *JNSLP* (2014) 140-144; Michael N Schmitt, Andru E Wall, 'The International Law of Unconventional Statecraft', 5(2) *HarvNatSecJ* (2014) 361-363; Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', 13(1) *CJIL* (2014) 31-32. Several authors apply it to the interstate context, e.g. Lanovoy, *Complicity*, 195-196; Oona A Hathaway and others, 'Yemen: Is the US Breaking the Law?', 10(1) *HarvNatSecJ* (2019) 61-62; Robert Chesney, 'U.S. Support for the Saudi Air Campaign in Yemen: Legal Issues', *Lawfare* (15 April 2015).

206 Kreß, *Gewaltverbot und Selbstverteidigung* sees a violation of Article 2(4) UNC in cases of sending (313), support of sending (318), toleration as well as both instigation and support (328), but no violation in cases of inability, negligence (288) and support or instigation separately (333). For a detailed summary (346-354).

207 Henderson, *Use of Force*, 61; Christian Henderson, 'The Provision of Arms and Non-Lethal Assistance to Governmental and Opposition Forces', 36(2) *UNSWLJ* (2013) 648, 649.

application he distinguishes between lethal or non-lethal support[208], taking into account in particular the "immediate and direct impact upon the forcible action."[209]

Some do not require subjective preconditions[210] but converge indirect use to standards that would lead to full attribution. For example, *Thomas* and *Thomas* require an almost puppet-like standard.[211] *Zanardi* argues for what amounts to basically a *de facto* organ.[212] Similarly, *Derpa* requires a high standard of conduct "through foreign hands", whose sincerity is however called into question as the failure to prevent the use of sovereign territory also suffices.[213] *Schmitt* also demands an agency relationship, which he seems to accept only for "actively and directly preparing another to apply armed force, but not merely funding the effort".[214]

*Crawford* remains vague. He accepts, without further elaboration, that "state participation in the use of force of another state" can amount to an indirect use of force.[215] In another context, Crawford suggests that state participation must be similar to the UK's involvement in the US operations in the Iraq War 2003 to qualify as "concerted conduct". This suggests that it also required the own use of force (i.e. that the assisting State fulfills an element of the unlawful *act* (i.e. force) *itself*.[216] Crawford qualifies other forms of assistance, such as (Ireland's) allowing a stop-over at an airbase before the invasion (of Iraq in 2003), as "only" aid and assistance but not concerted conduct, and hence, in terms of Article 2(4), no use.[217]

208 He defines unlethal support as "equipment that while not having the primary aim to taking life nonetheless is provided with the aim of assisting the party concerned to prevail in an armed conflict, or at least to possess some (or better) capabilities to defend itself." Henderson, *UNSWLJ* (2013) 649.

209 Ibid 648-650.

210 Dominicé, *Multiple States*, 282-283.

211 Thomas, Thomas, *Concept of Aggression*, 46-47, 66 ("the state in order to commit indirect aggression does not use its own armed forces to encroach upon a foreign territory or peoples, but operates through third parties, armed persons, who act against the other state, apparently but not in reality on their own initiative").

212 Zanardi, *Indirect Military Aggression*, 113 at least for armed attack, but arguably also for a use of force.

213 Derpa, *Gewaltverbot*, 18.

214 Schmitt, *ColumJTransnatlL* (1998-1999) 909.

215 Crawford, *Brownlie's Principles of Public International Law*, 720.

216 This can also be achieved through attribution of conduct, as in the case of UK in Iraq 2003 where US conduct was attributed to the UK on the basis of Article 11 ARS).

217 Crawford, *State Responsibility*, 334.

*Dominincé* requires that the assisting state engages in a contribution that "constitutes an element of the unlawful act", which can also consist of 'merely' providing logistics.[218] *Brownlie*, while acknowledging the problem also on the interstate level, remains unclear – and in fact seems to pursue a narrow reading. He mentions in passing that assistance has been described as "indirect aggression". He also concludes that "joint responsibility in delict" may arise. At the same time, he emphasizes that such claims have not been widely made in practice, noting that "assistance to an aggressor" has been specifically outlawed by some treaties other than the Charter. With respect to Article 2(4) UNC, he then only briefly remarks that "obviously" a violation of Article 2(4) UNC would be present "if aid takes the form of ordering forces to fight as elements in the field under the aggressor's command."[219] In his book on State responsibility, *Brownlie* then suggests two examples:

> "[T]he supply of weapons, military aircraft, radar equipment, and so forth would in certain situations amount to 'aid and 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."[220]

Other authors also identify the problem in the interstate context, but do not clearly position themselves in this respect.[221]

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218 Dominicé, *Multiple States*, 282-283. It should be added that Dominicé seems to define "force" broader as "military operation".

219 Brownlie, *Use of Force*, 370. With respect to support to non-State actors Brownlie requires the rebels to be "effectively supported and controlled". See also in more detail Ian Brownlie, 'International Law and the Activities of Armed Bands', 7(4) *ICLQ* (1958).

220 Cited from Quigley, *BYIL* (1987) 106.

221 Higgins, *BYIL* (1961) 289 ("it would seem that when State A aids State B by furnishing arms, &c., to it in its aggressive use of force against State C, State A is guilty of aggression rather than indirect aggression"). She thereby distinguishes interstate assistance from assistance to rebels, which she describes as "indirect aggression." Randelzhofer, Dörr, *Article 2(4) UNC*, 211 para 23 ("The notion of 'indirect force' […] refers to the participation of one State in the use of force by another State (eg by allowing parts of its own territory to be used for violent acts against a third State), as well as to a State's participation in the use of force by unofficial bands organized in a military manner […]"). Schwebel, *RdC* (1972) 455-456 ("operating through third parties") In the following, he discusses the debate on indirect aggression in the Aggression Definition relating to non-State actors.

### 2) Article 2(4) UN Charter's guidance on assistance

Following from the above, it is clear that Article 2(4) UNC does not cover assistance unconditionally. While the Charter is silent on the specifics, it still provides structural guidance and preconditions within which international practice can flesh out the prohibition against the (indirect) use of force.

#### a) An actual conduct that meets the threshold of use or threat of force

First, providing assistance may only qualify as indirect use of (another) force if the assisted actor actually performs conduct that in factual terms reaches the level triggering the threshold of Article 2(4) UNC.

The prohibition of indirect use of force under Article 2(4) UNC is conceptualized to establish accessory responsibility in the sense that it depends on that conduct taking place. It is not, however, necessarily derivative, in the sense that the wrongfulness of the conduct does not derive solely from the wrongfulness of the assisted conduct under international law.

Without force, assistance cannot amount to a use of force. There would be nothing that could be 'used' through assistance. This precondition, while obvious to some,[222] deserves mention as it reemphasizes the tacit consensus that Article 2(4) UNC presupposes intervention against a specific State. A vague and indefinite risk is not prohibited. Moreover, it reminds of the fact that Article 2(4) UNC establishes a factual prohibition.[223]

Consequently, preparation for force is not prohibited; assistance that may be directed at facilitating force that however never ultimately materializes in practice is nothing more than an attempted (indirect) use of force.

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222 For a similar conclusion see e.g.: Henderson, *Use of Force*, 61; Thomas, Thomas, *Concept of Aggression*, 55 with reference to the Nuremberg Tribunals already, 57 aE; Quincy Wright, 'The Prevention of Aggression', 50(3) *AJIL* (1956) 527; Zanardi, *Indirect Military Aggression*, 112-113 for armed attack, because it otherwise does not occur; Randelzhofer, Dörr, *Article 2(4) UNC*, 213 para 28 arguing that indirect force cannot go further than direct force; Samuel G Kahn, 'Private Armed Groups and World Order', 1 *NYIL* (1970) 40-41. For some this has been obvious: Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', 65(5) *AJIL* (1971) 720.

223 Kolb, *Jus Contra Bellum*, 62, 329-330. A mere declaration of war even without actual hostilities does no longer trigger the prohibition.

The Charter does not require, however, that the assisted force qualifies as unlawful use of force under international law for the *assisted* actor.[224] It suffices that the assisted conduct would be prohibited for the *assisting* State. The responsibility of the assisting State is what needs to be established.

This has direct consequences: The assisting State does not benefit from the lawfulness of the other actor's force.[225] Shared responsibility of the assisted and the assisting State for the same force is possible under Article 2(4) UNC. Last but not least, conceptually, the author of 'force' is irrelevant, to the extent that the assisted actor is capable of engaging in conduct that meets the threshold of force. Hence, actors through whom States can use force can be non-State actors, such as opponent, rebel or terrorist groups, contractors, or "volunteers", within or outside the target State, or States.

b) The necessary degree of involvement

Second, although the Charter leaves open what degree of involvement qualifies as 'use', the fact remains that it generally distinguishes between assistance to force and use of force. This again suggests that not all forms of assistance, especially those expressly defined as such in the Charter, can be considered a *use* of force. Only in exceptional cases may the distinction be overcome.

Moreover, it is worth noting that the Charter, in its original conception, explicitly limits supportive cooperation (remote forms of assistance, such as economic relations) through the Security Council sanction regime alone. More direct forms of assistance are not addressed. Also, the fact that this regulation of assistance is based on specific (political) decisions of a central organ, the Security Council, is a reminder of assistance's ambivalence, and the complex struggle to find a balance between a globalized world and necessary cooperation and prohibiting intervention. It certifies a certain reluctance to automatically prohibit contributions that only remotely assist a use of force.

In this light, for an act to be considered a *use* of force, the Charter requires an active and major role of the assisting State. The involvement and contribution (indirect use) to an actual force must be similar in ex-

224 For example, the assisted actor may be justified under international law to use force, or may not even be bound to the prohibition against use of force.

225 It does not exclude however that the justification of the assisted actor influences the assisting State's justification.

tent, effect and importance to direct use of force itself. Article 2(4) UNC prohibits *perpetration*, not mere *participation*.

## D. Assistance as a 'threat' of force?

Article 2(4) UNC also prohibits the 'threat of force'. If assistance itself does not qualify as 'force', can it be considered as 'threat' of force?

At the outset, it is crucial to note that the UN Charter prohibits only a threat *of force*. As the juxtaposition of threat of force with threat to peace underlines, a specific coercion against a State is prohibited, not the creation of a general risk or dangerous situations.[226]

The UN Charter does not define what conduct may qualify as threat of force. It leaves substantial room for a lively debate that has unfolded regarding to what extent demonstrations of force, militarization or the acquisition of armaments may be considered a threat of force.[227] Often, the discussed behavior is the direct consequence of assistance. Through assistance, a State may be substantially and essentially involved in potentially threatening conduct. For example, the provision of weapons by an assisting State may lead to the militarization of the assisted State. A State may also host a military base used by the assisted State for a military buildup near the border of the targeted State. This prompts the more fundamental question of whether the act of assistance – to the extent that a 'threat' was defined to capture such conduct – may qualify as a threat of force itself?

Once again, it is crucial to recall the defining features of an act of assistance. The act of assistance increases the military potential of the assisted State and potentially the risk of the assisted State using force. But at all times, assistance only makes a contribution. The assisting State may influence to the extent that the assisted use of force cannot take place without assistance, but it does not control whether the assisted use of force will materialize. The assisting State relinquishes control over (the use of) its assistance. As such, the act of assistance is decoupled from the potential future use of force. Moreover, the assistance is directed towards the assisted State, not against the targeted State.

226 Corten, *Law against War*, 94-95.

227 For a detailed assessment Nikolas Stürchler, *The Threat of Force in International Law* (2007).

Regardless of the exact boundaries of a threat of force,[228] the concept inherently requires two essential features that are relevant in the present context: first, the realization of the threat of force must depend on the threatening State's will.[229] A State must have control over the conduct with which it is threatening. It thus cannot threaten with another actor's use of force that it does not control. Second, the pertinent conduct potentially qualifying as a threat must be directed against the targeted State.

As a general rule, this leaves a limited field of application for the prohibition of a threat of force in the context of assistance. First, the prohibition does not seek to address the general risk created by a State's military cooperation with other States. Second, already on a conceptual level, an act of assistance itself may only rarely qualify as a threat, if it is directed against the targeted State and if it indicates the assisting State's own readiness to realize the threat through its own force. Similar to the prohibition of the use of force, the prohibition of the threat of force draws a line between a threat and assistance to a threat, which cannot necessarily be equated.

At the same time, structurally similar to indirect use of force, the UN Charter does not exclude the possibility that an assisting State, through providing assistance to another State's threat, may also be considered threatening. The necessary precondition then is that the assisted actor itself poses a threat. Whether the assistance amounts to a threat will depend on the conduct of the assisted State. Only if the latter qualifies as threat, may the assisting State also be considered to commit a threat.[230]

## VII. Assistance and sovereign equality under Article 2(1) UN Charter

States enjoy sovereign equality.[231] As a corollary to this fundamental right, there is a protective regime of prohibitions and obligations that is widely

228 For different definitions see e.g. Marco Roscini, 'Threats of Armed Force and Contemporary International Law', 54(2) *NILR* (2007) 234; Corten, *Law against War*, 93-94.

229 Cf also Roscini, *NILR* (2007) 235.

230 Imagine a scenario in which the assisting State provides assistance to the assisted State to send a message to and threaten the targeted State, but the assisted State does not indicate at all to use force against the targeted State.

231 Article 2(1) UNC.

referred to under the *principle* of non-intervention.[232] This principle embraces several specific obligations, two of which are of particular interest here.[233] First, States must not intervene in the internal affairs of another State through coercion. Second, States bear the obligation to respect another State's territorial integrity and inviolability. Both rules are interrelated, and often both violated simultaneously.[234] But conceptually, they are distinct rules with separate preconditions.[235] The following addresses whether and under what circumstances the *provision of assistance* to another actor's threat or use of force may be in violation of these rules.[236]

### A. Assistance as unlawful intervention in internal affairs of the target State?

The original conception of the UN Charter did not expressly[237] include a general prohibition of intervention addressed to member States. The general principle of non-intervention "in matters which are essentially within the domestic jurisdiction of any state" stipulated in Article 2(7) UNC only ap-

232 Niki Aloupi, 'The Right to Non-intervention and Non-interference', 4(3) *CJICL* (2015) 572; *Nicaragua*, 106 para 202.

233 Aloupi, *CJICL* (2015) 572; Robert Jennings, Arthur Watts, *Oppenheim's International Law: Volume 1 Peace* (9 edn, 2008) 382, 429. A further corollary of sovereign equality is the responsibility and obligation of States not to allow its territory to be used for acts contrary to rights of other States. See e.g. *Island of Palmas Case (Netherlands v USA)*, 4 April 1928, 2 UNRIAA, 839; *Corfu Channel (United Kingdom v Albania)* (Merits), 1949 ICJ Rep 4 [*Corfu Channel*], 22. As seen this aspect is outside the scope of the analysis' focus. But see on the differences in more detail Chapter 6. See also on the trends relating to due diligence obligations on interstate assistance, Chapter 4.

234 Aloupi, *CJICL* (2015) 573. *Nicaragua*, 111 para 212.

235 See only Aloupi, *CJICL* (2015) 571-572, 575; Russell Buchan, *Cyber Espionage and International Law* (2018) 68.

236 Note that this discussion is different from the question whether military assistance (short of armed force) to a government can constitute an unlawful intervention against the *recipient* State itself. See on this Ruys, *CJIL* (2014) 42-44; Henderson, *UNSWLJ* (2013) 646.

237 Gaetano Arangio-Ruiz, 'Human rights and Non-intervention in the Helsinki Final Act', 157 *RdC* (1977) 267-268; Vaughan Lowe, 'The Principle of Non-Intervention: Use of Force' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst* (1994) 68. *Nicaragua*, 106 para 202: "The principle is not, as such, spelt out in the Charter." It may be also against this background that the ICJ held in para 176 that the principle of non-intervention may be an example for a rule where the Charter and customary international law is not identical. The ICJ refrains from answering where to ground the rule exactly: in customary international law or the Charter.

plies to intervention by the United Nations. For member States intervention was only prohibited through Article 2(4) UNC – in the specific form of a use or threat of force.

It is the common understanding that the express recognition of obligations of non-intervention in Articles 2(4)[238] and (7) UNC[239] does not exclude a general prohibition, however. Instead, they may be seen as specifications, as *leges speciales*, of an unuttered, but implied general principle that may have different facets as well.[240]

By now, a *general* prohibition of intervention applicable also to acts of States has gained general acceptance in the international community. Initial uncertainties and controversies regarding the rule's existence and its legal basis can be safely assumed to be settled.[241] The rule is derived from and well-accepted as a corollary of the recognition of the principle of sovereign equality of States in Article 2(1) UNC[242] that has also acquired the status of customary international law.[243] Accordingly, States are under

238 Aloupi, *CJICL* (2015) 576. This has been however not uncontroversial. For example, in particular Western States claimed that as evidenced by Article 2(4) UNC the Charter regulated and prohibited only "armed force". Helal, *NYUJIntlL&Pol* (2019) 31. For early views see an overview Jackamo III, *VaJIntlL* (1991-1992) 954-956. At the time of drafting, prohibiting force and war was considered the primary purpose, yet it was not meant to be an exclusive regulation, ibid 959.

239 For Article 2(7) see: Nolte, *Article 2(7) UNC*, 284-285 para 7; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950) 770; Lowe, *Non-intervention*, 72-73.

240 Arangio-Ruiz, *RdC* (1977) 267-268; Raymond J Vincent, *Nonintervention and International Order* (1974) 325-326; Jamnejad, Wood, *LJIL* (2009) 349.

241 As Lowe, *Non-intervention*, 68 explains the driving force back then was the rule's recognition in the Charter of the Organizations of American States (Articles 15, 16, 18). Initially, the UNGA resolutions addressing a duty of non-intervention were controversial, and only deemed to be political expressions, Thomas J Jackamo III, 'From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention', 32(4) *VaJIntlL* (1991-1992) 961-963. In any event, with the adoption of the Friendly Relations Declaration, the rule as such gained universal acceptance in the legal sphere – irrespective of the fact that the exact scope of the rule remains elusive in many respects to put it mildly.

242 *Nicaragua*, 106 para 202; Jamnejad, Wood, *LJIL* (2009) 346-347; Aloupi, *CJICL* (2015) 568-569. Sometimes, the principle is also tied to Article 2(4) (e.g. Arangio-Ruiz, *RdC* (1977) 267-268) or Article 2(7) (for such views see Georg Nolte, 'Article 2(7)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 284-285 para 7).

243 *Nicaragua*, 106 para 202, 108-110 para 206-209; Mohamed Helal, 'On Coercion in International Law', 52(1) *NYUJIntlL&Pol* (2019) 29-30; Aloupi, *CJICL* (2015) 570;

the obligation not to *intervene* in another State's internal affairs through coercive means.[244] For assistance to qualify as an unlawful intervention,[245] it would need to bear on the targeted State's internal affairs (a) and be considered a coercive means (b).

1) Can assistance bear on internal affairs of another State?

The rule of non-intervention has a broad scope. It protects a State's independence and autonomy, its internal affairs, i.e. the right to decide freely on a political, economic, social, and cultural system, and a foreign policy.[246] Unlike the infringement of territorial inviolability, it is not inherently necessary for there to be a territorial link. A State's autonomy is again circumscribed and defined by its individual international legal obligations.[247]

Accordingly, in a globalized world virtually any conduct may bear on another State's internal affairs. This is also true for a State's support of another State. The mere fact that assistance creates a risk of *enabling* another actor to potentially use the assistance for force can amount to an interference in the protected sphere.[248] This is true even when the assistance is never or

Jackamo III, *VaJIntlL* (1991-1992) 953; Henderson, *UNSWLJ* (2013) 645. By now it also is affirmed by State practice: Jamnejad, Wood, *LJIL* (2009) 352; Aloupi, *CJICL* (2015) 367. See also Lowe, *Non-intervention*, 68-75 for a discussion of the divergence between abstract and conflict practice.

244 Jamnejad, Wood, *LJIL* (2009) 347; Nolte, *Article 2(7) UNC*, 288 para 19; Helal, *NYUJIntlL&Pol* (2019) 4; *Nicaragua*, 108 para 205, 146 para 292. On the terminology: while the rule is often referred to as "principle" of non-intervention, relevant here is the specific 'obligation' not to intervene that is part of the (arguably) broader principle. See also *Nicaragua*, 106 para 202, 146 para 292, which concludes that the obligation has been violated.

245 "Inference" describes a conduct that bears on the internal affairs *or* territorial integrity/inviolability. "Intervention" is a specific form of interference understood as "coercive interference". See on this already ILCYB 1949, vol I, SR.11, 89 para 83 (Brierly).

246 *Nicaragua*, 108 para 206; Aloupi, *CJICL* (2015) 573.

247 Aloupi, *CJICL* (2015) 573-574; Antonios Tzanakopoulos, 'The Right to be Free from Economic Coercion', 4(3) *CJICL* (2015).

248 This is for example reflected in practice, where States at times adopt a broad conception. For example, A/RES/36/103 (9 December 1981) stipulated: II (i) "The duty of States to refrain from any measure which could lead to the strengthening of existing military blocs or the creation or strengthening of new military alliances, interlocking arrangements, the deployment of interventionist forces or military bases or other military installations conceived in the context of great-Power confrontation".

not yet used against that third State, when there is no territorial connection, such as when the assisted actor is within the territory, or the territorial influence sphere,[249] or when it is not intended to be used against another State.[250]

2) Assistance as coercion?

Not any such *interferences* with a State's *right* to independence and autonomy, and thus any assistance, amounts to a prohibited *intervention*.[251] In other words, the prohibition of intervention does not congruently mirror States' sovereign right to autonomy.[252] Treating the right and the prohibition as identical would unduly restrict other States' sovereignty, and threaten to strangle State interaction substantially.[253] States are hence expected to tolerate some interference with their autonomy. Balancing both spheres, the rule of non-intervention is confined to coercive interfer-

See also II (h) and (n) which also outlaw preparatory acts without requiring action taken against another State, but let suffice the mere designation of that act. It is a distinct question whether such conceptualizations reflect *lex lata*. Resolution 36/103 did not receive unanimous support and was fiercely opposed by most developed States. Lowe, *Non-intervention*, 69.

249 For such arguments see the Monroe or Breshnew doctrine.

250 See e.g. A/RES/36/103 II (1981). Again, this was required to establish coercion, not interference. Accepting an interference is not in contradiction to the conclusion that assistance, as such, can never constitute force. An interference is a necessary, but not a sufficient condition for "force".

251 Helal, *NYUJIntlL&Pol* (2019) 36, 47.

252 See for this for example also the Friendly Relations Declaration. It acknowledges that "Every State has an inalienable right to choose its political, economic, social and cultural systems, without *interference* in any form by another State." The prohibition is limited however to a duty not to *intervene*: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." See also Buchan, *Cyber Espionage*, 63.

253 This has also always been a prominent argument of critics against the very existence of such a rule, as well as its only reluctant acceptance by States. See Jamnejad, Wood, *LJIL* (2009) 348, 352; Arangio-Ruiz, *RdC* (1977) 263; Lowe, *Non-intervention*, 67, see also 78 where he states that "All States seek to influence the conduct of other States. That is what the international system of nation State signifies". Also, for example is seems to be acknowledged that the 1965 Declaration on the Inadmissibility of Intervention in Domestic Affairs and the Protection of Their Independence and Sovereignty was no more than a statement of political intent, Jamnejad, Wood, *LJIL* (2009) 348, 352-353.

ences.[254] The additional criterion of "coercion" operates as filtering-criteria.[255]

There is no authoritative definition of what conduct constitutes coercion.[256] In view of the rule's origin, it is not surprising that there is much room for concretization and uncertainty about its scope.[257]

On that note, this is not the place to seek to fully define what amounts to coercion. Instead, the focus is on how 'assistance' may amount to prohibited coercion. Assistance can be considered prohibited intervention in two ways: as direct (a) and indirect (b) intervention.

a) Assistance as direct intervention

It is not excluded that the provision of assistance to the assisted State, as such, i.e. merely enabling another actor to potentially use force, constitutes prohibited intervention against another State. But there are strong indications already on a conceptual level that it does not. It is suggested that coercion, like force, is limited by its nature to conduct specifically targeting other States. Creating abstract and vague risks by supporting other States would thus not constitute coercion.

The rule's origin points in that direction. The relationship between the prohibition of intervention and Article 2(4) UNC, which is viewed as a specific expression of the rule of non-intervention, indicates that both rules share the same basic characteristics. Both rules differ only in the scope and degree of conduct. The development of the prohibition of intervention as a legal rule was initially only accepted regionally. It gained universal momentum when it became clear that attempts to define means short of

254 Hence, a prohibition with a limited scope, and a narrow understanding of coercion, is a better reading of the apparently conflicting State practice than denying the rule as whole.

255 *Nicaragua*, 108 para 205 Nolte, *Article 2(7) UNC*, 288 para 19. For a discussion on different non-forcible interventions versus interferences, see Jamnejad, Wood, *LJIL* (2009).

256 Jamnejad, Wood, *LJIL* (2009) 347. Similarly vague: *Nicaragua*, 108 para 205.

257 Jackamo III, *VaJIntlL* (1991-1992) 968; Lowe, *Non-intervention*, 72 "began as an abstract and amorphous principle". The lack of definition has led some to questioning the existence of the rule all together: see for references Helal, *NYUJIntlL&Pol* (2019) 26-27, 4 n 9.

armed force as force would not be successful.[258] States aimed to lower the necessary threshold to include non-forceful measures. The main characteristics of intervention and the static of the Charter were not intended to be changed, however.[259] This is further reflected in the historic development of the rule, decisively rooted in and influenced by Latin American practice.[260] As Gaetano Arangio-Ruiz sets out, the Latin American regulation did not proscribe all forms of interaction. Diplomatic intercourse, or trade were not considered unlawful intervention.[261] Instead, the rule primarily sought to capture measures short of war such as economic or political pressure against a specific State. Last but not least, extending the rule beyond conduct specifically targeting another State may lead to incongruity with well-accepted permitted conduct. For example, it would be challenging to distinguish between potentially unlawful military assistance and (self)-armament that is widely considered permissible under international law.[262]

This would not necessarily be changed, even if the assisted actor sat within the targeted State's territory or found itself within its "territorial sphere of influence". This might be a *direct* violation of the territorial exclusiveness and inviolability of a State.[263] But, as for State autonomy, conceptually, assistance even then remains primarily an abstract *risk*. The coercive nature depends on the assisted actor's conduct. Yet, such cases could still open the door for a classification as coercion. It is characteristic for such cases that the risk is less abstract and vague, and arguably more concretized against a specific State.

258 Stephen Townley, 'Intervention's Idiosyncrasies: The Need for a New Approach to Understanding Sub-Forcible Intervention', 42(4) *FordhamIntlLJ* (2018-2019) 1173, 1181-1184 who also stipulates that the discussion on the outer limits of "force" was downgraded into non-intervention rule. Arangio-Ruiz, *RdC* (1977) 255 who describes the development of the rules in parallel to the prohibition of force. In particular Western States fiercely opposed to see included in Article 2(4) forms of coercion other than armed force. Helal, *NYUJIntlL&Pol* (2019) 31.

259 Jamnejad, Wood, *LJIL* (2009) 352-355. For the early discussions see: Jackamo III, *VaJIntlL* (1991-1992) 954-956.

260 Arangio-Ruiz, *RdC* (1977) 252 et seq sketching the development of the rule; Townley, *FordhamIntlLJ* (2018-2019) 1173, 1182, 1184-1185.

261 Arangio-Ruiz, *RdC* (1977) 264 para 38.

262 Helal, *NYUJIntlL&Pol* (2019) 59-60.

263 See on this below VII.B. It may be this aspect that Henderson, *Use of Force*, 61 refers to when arguing that the mere assistance without the actual perpetration of the assisted act violates the principle of non-intervention.

The conceptual constraints to qualify assistance as direct intervention shift the attention in cases of assistance to the assisted actor and its conduct, moving the analysis from the realm of a direct to indirect intervention, i.e. coercion through an intermediary.[264]

### b) Assistance as indirect intervention

A conduct that qualifies as threat or use of force also qualifies as coercion. This is not at least affirmed by the *lex specialis* character of Article 2(4) UNC in relation to the prohibition of intervention.

When the assisted actor engages in coercive conduct, the assisting State could be considered to have committed an indirect intervention, too.[265]

In view of Article 2(4) UNC that allows for indirect use of force, *indirect* intervention is likewise conceptually possible under similar conditions. Through its involvement in another actor's coercion, the assisting State may also be considered to coerce. Conceptually, two features are noteworthy: first, there is nothing in the design of the rule that limits its application to cases of assistance to non-State actors. Second, the general prohibition of intervention may not only allow to deviate from the prohibition against the threat or use of force in the sense that it may also cover less intense forms of intervention short of armed force.[266] The lower threshold may also capture less proximate involvement or participation in another actor's threat or use of force than what would be required for an indirect use of

264 This of course is without bearing on the question whether a specific act of assistance that may (also) contribute to a use of force may for its means also violate the prohibition of intervention. This question is of particular relevance if the act of assistance is immediately directed *against* the targeted State (e.g. economic sanctions taken against a targeted State to support another State's use of force). This does not render the act's *contribution* to a use of force however prohibited as intervention.

265 For a similar argument *Nicaragua*, 108 para 205. But in contrast to the prohibition to use force, the obligation of non-intervention it is not predetermined what the assisted actor's conduct must consist of. It is not excluded that already the assisted actor's concrete intention suffices to render assistance an intervention. Cf also Henderson, *Use of Force*, 61. *Nicaragua*, 124 para 241.

266 *Nicaragua*, 108 para 206; Lowe, *Non-intervention*, 67; Helal, *NYUJIntlL&Pol* (2019) 43-44. See also the Friendly Relations Declaration stating: "*use of economic, political or any other type of measures* to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind", (emphasis added).

force.[267] Accordingly, as no specific *form* of participation in another actor's intervention is *prima facie* excluded, interstate assistance may also qualify as indirect intervention.

### B. Assistance and the prohibition to infringe upon territorial sovereignty

Respect for a State's territorial sovereignty demands i.a. respect for a State's territorial inviolability.[268] The territorial State has exclusive jurisdiction and an exclusive right to exercise operational powers on its territory.[269] As a consequence, any non-consensual interference with such territorial rights is prohibited.[270] It is not necessary for the conduct to infringe upon the targeted State's territorial *integrity*, in the sense of a change of State territory and boundaries.[271] Neither is it required that the conduct is of a coercive nature,[272] nor that physical damage occurs.[273] Instead, the legality is crucially judged based on where the relevant sovereign act takes place.[274]

In and of itself, assistance may only constitute a *direct* infringement of territorial inviolability, when it impacts the territory, for example, when provided to an actor within the territory of the targeted State.[275] For interstate assistance, this will typically not be the case. Unlike assistance

267 For such a proposition for example Henderson, *UNSWLJ* (2013) 649.

268 Jennings, Watts, *Oppenheim's International Law: Volume 1 Peace*, 382, 385. Another aspect of territorial sovereignty is a State's territorial integrity.

269 Aloupi, *CJICL* (2015) 572. *Island of Palmas Case (Netherlands v USA)*, 4 April 1928, 2 UNRIAA 829, 838; *Corfu Channel*, 35; *Nicaragua*, 111 para 212; Buchan, *Cyber Espionage*, 49.

270 Aloupi, *CJICL* (2015) 572.

271 On the concept of territorial integrity see Christian Marxsen, 'Territorial Integrity in International Law – Its Concept and Implications for Crimea', 75 *ZaöRV* (2015) 9-10.

272 See e.g. ibid 12-13; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Declaration Judge Yusuf, ICJ Rep 2015, 665, 744-745 para 6, 9.

273 *Nicaragua*, 128 para 251.

274 Cf *Nicaragua*, 111 para 213; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Judgment, ICJ Rep 2015, 665, 703 para 93.

275 In this respect it is crucial to carefully define the act of assistance. An act of assistance may presuppose and build on a violation of territorial inviolability. But this does not mean that the act of assistance itself violates territorial inviolability. For example, the gathering of intelligence by reconnaissance aircraft unauthorizedly overflying another State constitutes a violation of the norm. *Nicaragua*, 128 para 251. But, sharing this information (that is the relevant act of assistance) does not constitute an (additional) violation.

to non-state groups that are situated within the targeted State's territory, assistance to States will not impinge upon the targeted State's territorial sovereignty.[276]

This does not exclude, however, that assistance, through its contribution to another actor's violation, may violate the territorial inviolability *indirectly*.[277] As before, this requires a connection through an actor acting against the territorial inviolability. Through an intermediary, the assisting State could violate the territorial inviolability. Again, this raises the question of what connection with the actor is required.

## VIII. An unwritten prohibition of participation in a use of force?

So far, the survey has suggested that the UN Charter does not spell out a prohibition comprehensively governing interstate assistance outside the realm of UN action. But the mere fact that such a prohibition has not found its way into the express terms of the Charter does not mean that its existence was precluded.

In particular, the Charter's silence does not reflect Roberto Ago's famous observation made in his 1939 Hague Lectures. Ago had stated, based on a strictly bilateral understanding of international law:

> "Every form of complicity in, participation in or instigation to a delict is inconceivable in international law. International law, with its current structure, cannot provide for these forms of the common consideration of a plurality of actors with respect to one individual delict. These forms appear to be the feature of the elaboration and nature of the domestic criminal law."[278]

Ago had thereby not sought to generally deny the possibility that interstate assistance may be governed by international law. He required however *explicit* bi- or multilateral obligations that defined assistance to the assisted

276 Assistance in terms of 'contribution' is to be distinguish from how assistance is operationalized. The act of providing assistance, for example the transportation of assistance by the assisting State itself, to a State operating within the territory of another State, may also violate the targeted State's territorial sovereignty.

277 Aloupi, *CJICL* (2015) 573; Marxsen, *ZaöRV* (2015) 18.

278 Roberto Ago, 'Le délit international', 68 *RdC* (1939) 523. Translation by Aust, *Complicity*, 12.

State's conduct as an interference in the rights of the targeted State.[279] Ago's observation was hence limited to a general and universal prohibition of complicity. In any event, his structural concerns against a rule of complicity[280] would not apply to the UN Charter and the prohibition to use of force.[281] The prohibition to use force under the Charter transcended the bilateral conception. It was not only established in a multilateral treaty, but was from the outset established as a prohibition with the claim to universal application in which the community as a whole has an interest in its compliance. By now, the prohibition to use force is well accepted not only as a universally applicable rule of treaty and customary law[282] but also as an obligation *erga omnes*.[283]

In assessing whether the Charter contains a prohibition of participation, it is essential to understand the Charter in light of its function. The UN Charter claims primacy and defines firm boundaries.[284] But it does not purport to stipulate a comprehensive or rigid framework. As such, the Charter is a living instrument capable of adapting to political realities and developments.[285] The Charter establishes a framework that allows States to also go beyond what is required under the Charter. Also, crucially for the present context, the Charter lays out basic *principles*, not a conclusive, sophisticated set of *rules* and *obligations*.

The introductory sentence in Article 2 UNC leaves little doubt:

> "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles."

279 See in detail on Ago, Aust, *Complicity*, 12-15. For a similar view Klein, *Beihilfe*, 436.

280 See on the persuasiveness of such considerations: Pacholska, *Complicity*, 79-81. Critical Aust, *Complicity*, 11-49. But see Klein, *Beihilfe*, 434-436; Lanovoy, *Complicity*, 23-24.

281 This is also widely accepted by those critical of a general complicity rule in a bilateral conceptualization. See e.g. Klein, *Beihilfe*, 436-437; Pacholska, *Complicity*, 80. Recall also the early regulation of assistance in the pre-Charter era to which a prohibition of participation in a use of force was not foreign.

282 *Nicaragua*, 27 para 34, 99 para 188. In detail on the Court's view Kreß, *ICJ and Use of Force*, 567-570.

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

284 Article 103 UNC.

285 Delanis, *VandJTransnatlL* (1979) 116; Thomas M Franck, *Fairness in International Law and Institutions* (1998) 260; Henderson, *Use of Force*, 86, 121; Ruys, *AJIL* (2014) 163.

The recognition as 'principles' does not challenge the binding character of Article 2 UNC.[286] It indicates the basic character of their content. It also means that Article 2 UNC may serve as the basis for more specific obligations.[287] In fact, the principle is concretized by various specific rules and obligations. The fact that an obligation has not found its way into the express text of the Charter hence does not mean that the Charter may not nonetheless embrace such an obligation as corollary of the recognized principle. As such, the Charter is a realistic reflection of the (time) constraints which defined the drafting of the Charter, and which did not allow for a detailed stipulation of a comprehensive regulation of the rights and duties of States under international law.[288] Furthermore, the Charter mirrors its foundational nature, which for some even exposes characteristics of a global 'constitution'. In the words of the Rapporteur of the Drafting Committee 1:

> "The chapter on "Principles" sets, in the same order of ideas, the methods and regulating norms according to which the Organization and its members shall do their duty and endeavor to achieve the common ends. Their understandings should serve as actual standards of international conduct."[289]

The Rapporteur stressed that

> "[T]he Charter cannot be amplified to include all major purposes and principles that cover international behavior; but should include the basic ones, which, by virtue of their being basic, can and shall serve the Organization and its members to draw from them, whenever necessary, their corollaries and implications."[290]

This understanding of Article 2 UNC is also well accepted in international practice. The ICJ frequently derives specific obligations from general principles under the Charter.[291] For example, in the Nicaragua case the ICJ

286 Andreas Paulus, 'Article 2' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 125 para 8.

287 Ibid; Jamnejad, Wood, *LJIL* (2009) 358.

288 There had been attempts to introduce such regulatory regimes in the Charter, that further concretized Article 2. Detailed discussions in that respect were however not considered adequate at that time in that context. See in detail Chapter 4, II.A.1.

289 Doc 944 I/1/34 (1), June 13, 1945, VI UNCIO, 447.

290 Jamnejad, Wood, *LJIL* (2009) 449; Paulus, *Article 2 UNC*, 125 para 9. See also VI UNCIO 18 (Commission I).

291 Just see e.g. *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, ICJ Rep 2012, 99, 123 para 57 where the ICJ derived State immunity

noted that the fact that "this principle [of non-intervention], as such, is not spelled out in the Charter" did not mean that States do not recognize that principle. In response, the ICJ held that "[i]t was never intended that the Charter should embody written confirmation of every essential principle of international law in force."[292] States share the ICJ's jurisprudential stance. They consistently seek to define and refine the rights and duties deriving from the general principles under the Charter. For example, the very purpose of UNGA resolutions, like the Friendly Relations Declaration, the Definition of Aggression or the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Use of Force in International Relations, is to spell out the specific aspects and obligations entailed in the principles under the Charter.[293] In fact, the UNGA has been tasked to consider the principles under Articles 11 and 13 UNC.

On that note, Article 2(4) UNC is not confined to an obligation for member States to refrain from the threat or use of force in their international relations.[294] It establishes a *principle of non-use of force*.[295] It embodies a holistic commitment to non-use of force.[296] It shall inform and guide all States' actions in their international relations to the extent that it conforms with the overall goal: abstinence from armed force except in the common interest.[297] While the *obligation* – expressly mentioned in the Charter – to refrain from the threat and use of force is arguably the most prominent and central implication and corollary of the principle under Article 2(4)

from the principle of sovereign equality. See also *Nicaragua*, 101 para 191. This is also true for Article 2(7) and the prohibition of intervention, see Nolte, *Article 2(7) UNC*, para 7.

292 *Nicaragua*, 106 para 202. See also above VII.A on conceptualization of the rule of non-intervention.

293 See in more detail on each resolution individually Chapter 4 below.

294 This is the difference to a "mere" prohibition from which it may not be inferred that assistance is prohibited as a "logical agreement". See above VI.B.

295 It is noteworthy that the ICJ consistently refers to the *principle* of non-use of force. E.g. *Nicaragua*, 118 para 227; *Armed Activities*, 280 para 345. See in detail Kreß, *ICJ and Use of Force*, 565.

296 See also Alan Vaughan Lowe, *International law. A Very Short Introduction* (2007) 102-103 "the first function focuses upon the whole of international society and on the system of international law". He also stresses that the interest of the international community derives from there.

297 VI UNCIO 447. Paulus, *Article 2 UNC*, 121 para 1: "principles provide the means to achieve the purposes".

UNC, it is not the only one.[298] As such, the *principle* of non-use of force in international relations could be the basis for a prohibition of participation in another State's use of force.

Such a prohibition would originate in more than a (mere) universal multilateral commitment to the *obligation* to refrain from the threat or use of force.[299] It likewise would not be, as Helmut Aust contemplates,[300] a good faith application of the spirit of collective security or based exclusively on the specific *erga omnes* or *ius cogens* nature of the prohibition to threat or use force. It would be grounded in Article 2(4) UNC. Ultimately, however,

298 Another prominent and well-accepted example is the duty of non-recognition as legal of territorial acquisitions resulting from the threat or use of force. Despite the fact that it is not spelled out in the Charter, it is by now well-accepted in State practice. David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law', 2(1) *CJIL* (2003) 130. The duty's origin and basis lie in the *principle* of non-use of force. See for example the ICJ which refers to it as a "*corollary*" duty, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, 136 para 87, see also *East Timor (Portugal v Australia)*, Dissenting Opinion Skubiszewski, ICJ Rep 1995, 90, 262-263. Also, in the Friendly Relations Declaration and the Aggression Definition it is seen as one emanation of the principle. This becomes also clear by looking at the origins of the rule. The principle of non-use of force was also advanced as justification already at the duty's emergence. Initially, it was not a legal obligation in the regulatory framework. But the accepted legal *principle* was only later fleshed out by State practice. See Brownlie, *Use of Force*, 418-419; Quincy Wright, 'The Legal Foundation of the Stimson Doctrine', 8(4) *PacAff* (1935) 439-440 who sees it as a "authentic interpretation" of the respective obligations. He also refers to "principles of the Pact and the Covenant."; Marcelo G Kohen, Mamadou Hébié, 'Territory, Acquisition' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2011) para 48. For example, the Stimpson Doctrine derived the *duty* of non-recognition from the prohibition in Kellogg-Briand Pact. Arnold McNair, 'The Stimson Doctrine Of Non-Recognition - A Note On Its Legal Aspects', 14 *BYIL* (1933); Quincy Wright, 'The Stimson Note of January 7, 1932', 26(2) *AJIL* (1932). Also, the ILA Budapest Articles came to a similar conclusion. The League responding to the Manchurian incident derived this from the anti-aggression guarantee of Article 10, seeing it as "incumbent" on Members. Claud Humphrey Meredith Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *RdC* (1952) 480-481; Brownlie, *Use of Force*, 418.

299 In this direction Lanovoy, *Complicity*, 23 ("by-product of multilateralisation"). But see 204 where he claims without substantiation that complicity constitutes a use of force in and of itself. This is discussed above.

300 Aust, *Complicity*, 34-35.

the existence and scope of such a rule depend on States positively accepting the obligation.[301]

Still, the general sentiment of the previous discussion of the conception of the Charter remains: a general prohibition of participation was initially met with reluctance, if not ignorance. Yet, beyond general normative reasons that may speak for a prohibition of participation,[302] there are good (policy) reasons to recognize such a rule. Not only does the Charter recognize this concept repeatedly.[303] Moreover, such a rule seems a natural corollary to the commitment to refrain from the threat or use of force, in particular in view of the Charter's preamble, where States commit "to *ensure*, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest".[304] Although not a logical necessity, it seems counterintuitive if a State can do through another what it cannot do by itself. Such a prohibition could disincentivize as well as factually render it more difficult for States to unilaterally resort to force. In fact, it is hard to believe that in a system seeking to establish the maintenance of international peace and security, participation in a use of force should *not* be prohibited. The value and importance of the cornerstone of international law militate for such a rule.

Nonetheless, a prohibition of participation can only lie within the Charter's framework. A prohibition of participation would concentrate on interstate assistance that qualifies as *participation* rather than *perpetration*. The latter would rather fall under the prohibition to *use* force. Moreover, a prohibition of participation would not establish automatic sanctions through the backdoor. A prohibition of participation derived from Article 2(4) UNC would not depend on a decision of the Security Council. Also, it would not cover forms of assistance as remote as mere interstate cooperation. Furthermore, as part of the regulation of Article 2(4) UNC, a prohibition of participation would be concerned with participation in a use of force that actually takes place, not with general prevention, which has been

301 See emphatically Pacholska, *Complicity*, 196-198. For a similar approach also Aust, *Complicity*, 97.

302 Aust, *Complicity*, 50-96 views responsibility for complicity as essential part of the international rule of law and the concept of abuse of rights. Similarly Kelsen, *AJIL* (1950) 271. Jackson, *Complicity*, 106, 120, 142-144 views such a rule necessary to live up to a "principle of fair labelling", and to adequately describe in legal terms a State's involvement in another State's conduct.

303 See for example Article 2(5) UNC. Recall also Article 51 UNC as analyzed above.

304 Preambular para 7 UNC, emphasis added.

left to the Security Council. Last but not least, a prohibition of participation would not interfere with rights to provide assistance recognized in the Charter. Participation in a use of force would hence not be prohibited in absolute terms, but only to the extent that it is implicated in the unlawful use of force. All these systematic boundaries share the characteristic, however, that they are not impermeable. As all provisions relate to interstate assistance, overlap is inevitable.[305]

Finally, the recognition of a prohibition of participation, by its nature, would embrace a general and automatic duty of solidarity – if only minimal and negative in scope, yet still potentially powerful. To the extent that the express terms of the Charter would only be complemented, the static of the Charter would not be altered, however. As a system of collective security, the Charter is receptive to the idea of non-assistance to a State violating the basic principles. Still, the conception of the Charter indicates that the recognition of a prohibition of participation has to strike a delicate balance – a balance that the Charter does not further elaborate but leaves to international practice to clarify.

## IX. The UN Charter – Not comprehensive, but guidance for international practice

The Charter details a stringent and powerful mechanism to subject interstate assistance to rules in cases where the UN takes action. But, for scenarios where the UN does not take action, the Charter leaves a legal limbo.

The different regulatory strands developed in the treaty practice of the pre-Charter era to address assistance have not found their way into the express terms of the Charter. Neither did the Charter address the extent to which interstate assistance may qualify as a use of force, nor did it stipulate a general prohibition of participation.

One may have wished that the Charter had provided a more comprehensive answer on the relationship of third States to the use of force in the new *ius contra bellum* era. But in 1945, a time of upheaval when the world was only about to reorganize and when the principle of non-use of force itself sought recognition, it may not have been the right time to comprehensively address this multifaceted problem of interstate assistance to force and the relationship and role of third States in situations of war.

305 For example, any co-perpetration also qualifies as (proximate form of) participation.

It is interesting, yet in view of a system of collective security not surprising that throughout the Charter the importance and relevance of interstate assistance for any military efforts are reflected. All the more it is astonishing that the Charter does not spell out a rule on interstate assistance unless the UN takes action. But this fact does not mean that interstate assistance in this situation may not be subject to regulation; the Charter is neither exclusive nor expressly excluding such rules. Article 2(4) UNC constitutes a potential basis for rules governing interstate assistance that may be further interpreted (not modified) by practice. Whether or not, and if so, how such rules are fleshed out, the Charter leaves to international practice to which the next Chapter is dedicated.

# Chapter 4 Interstate Assistance in International Practice – Filling the United Nations Charter with Life

The previous chapter has shown that the UN Charter establishes a regulatory regime for assistance in cases where the UN has taken action, which is dependent on political agreement among the international community represented by the members of the Security Council. The rules governing assistance without involvement of the United Nations remained underdeveloped in the Charter. This chapter seeks to determine if, and if so, how international practice fills with life the Charter's rudimentary regime on interstate assistance.

In a first step, the role of international practice in the identification of (the scope of) the regulatory regime governing interstate assistance will be briefly sketched (I). The core of the chapter will then survey international practice since the Charter's genesis relating to the provision of interstate assistance to a use of force (II).

## I. Methodological approach

International practice is relevant for the regulatory framework of interstate assistance in two ways.

The following survey primarily aims to elucidate the legal framework governing interstate assistance as inchoately postulated by the UN Charter. At its core, this renders the present analysis an operation of treaty interpretation. Accordingly, it is crucial to recall the place of international practice in the methodology of treaty interpretation.

The rules of treaty interpretation are codified in Articles 31 and 32 VCLT, and are well accepted as customary international law.[1] Those rules also apply to constituent instruments of an international organization, such as

1 Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/73/10 (2018) para 51 [Subsequent practice Conclusion], Conclusion 2 para 1.

the Charter of the United Nations.[2] 'Subsequent practice' and 'subsequent agreements' are allotted a dual role in the 'single combined operation of treaty interpretation'.[3] The ILC, whose approach forms the basis for the present analysis, distinguishes between three forms of subsequent practice:

1. "subsequent *agreement* between the parties regarding the interpretation of the treaty or the application of its provisions"
2. "subsequent practice consisting of *conduct* in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and
3. any "subsequent practice in the application of the treaty".[4]

The latter (3) constitutes a supplementary means while the former two (1 and 2) are authentic means of interpretation.[5] The former two may be used to determine the meaning of the norms. The function of the latter in determining the meaning of a norm is limited to cases where the authentic interpretation leads to ambiguous, obscure, or manifestly absurd or unreasonable results. Notably, in any event, the practice may be used to *confirm* the meaning resulting from authentic interpretation.[6] It may also serve as an indicator for trends in interpretation.

With respect to rules that do not require the involvement of the United Nations, the other means of interpretation allowed only for limited conclusions, not going beyond 'indicatory guidelines'.[7] Accordingly, international practice has a decisive role in the "interactive process" of interpretation of the regulatory system governing interstate assistance.[8]

As the goal is to *determine* rather than to *confirm* the scope of the rules governing interstate assistance, it is crucial to determine whether the

2 Subsequent practice Conclusion 12; Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries A/73/10 (2018) para 52 [Subsequent practice Commentary] Conclusion 12, 94 para 7.

3 Subsequent practice Conclusion 2 para 5; Malgosia Fitzmaurice, 'Subsequent Agreement and Subsequent Practice', 22(1) *IntlCLRev* (2020) 17.

4 Note that such practice need not be "regarding the interpretation of the treaty" and does not require the agreement of all the parties. Subsequent practice Commentary, Conclusion 4, 33 para 23-24.

5 Subsequent practice Conclusion 3.

6 Subsequent practice Commentary, Conclusion 7, 56 para 15.

7 See Chapter 3.

8 Cf in a similar manner on the weight of international practice Claus Kreß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995) 36-40.

surveyed international practice qualifies as "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" or "practice in the application of the treaty which establishes agreement of the parties regarding its interpretation." This will allow for robust conclusions on the *lex lata*.

According to the ILC, this requires first that the respective practice is "in the application" of, and in regard to, "the interpretation" of the treaty.[9] As such, the practice must be sufficiently linked to the clarification of the meaning of the treaty, either explicitly or implicitly.[10] This may be demonstrated by a reference to the treaty.[11] Crucially, the practice must be motivated by the treaty obligation and not by other considerations.[12] For example, "voluntary practice" does not apply or interpret the treaty. The State must seek to state its legal position and believe in its obligatory nature. Further, the respective practice must intend to interpret, not amend or modify, the treaty.[13]

Second, the practice must allow for the conclusion that an agreement between the parties of the treaty has been established. There are two ways to infer this. An agreement of the parties can be identified as such. This is typically a deliberate common act or undertaking by which parties "reach" an agreement ('subsequent agreement'). It need not necessarily be legally binding.[14] Alternatively, several separate acts viewed in combination may demonstrate a common position and understanding of the parties as to the meaning of the terms ('subsequent practice').[15] In this case, joint conduct by the parties is not necessarily required. It suffices that all other relevant

9 See on the terminological nuances and differences with respect to "application" and "interpretation" of the treaty: Subsequent practice Commentary, Conclusion 6, 43-44, para 3-6.

10 Subsequent practice Commentary, Conclusion 4, 30-31 para 13-14, 32, para 20; Commentary Conclusion 5, 37 para 2 n 147.

11 Subsequent practice Commentary, Conclusion 4, 31 para 14.

12 Ibid Conclusion 6, 43-45 para 1-9, 18.

13 Subsequent practice Conclusion 7 para 3; Commentary Conclusion 7, 58 para 21. See also in context of the UN Charter Tom Ruys, *"Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010) 19-29; Paulina Starski, 'Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility', 4(1) *JUFIL* (2017); Raphaël van Steenberghe, 'State practice and the evolution of the law of self-defence: clarifying the methodological debate', 2(1) *JUFIL* (2015) 93.

14 Subsequent practice Conclusion 10; Commentary, Conclusion 10, 78 para 10.

15 Subsequent practice Commentary, Conclusion 4, 30 para 9, 10.

forms of conduct by the parties are parallel.[16] This presupposes that the parties are mutually aware of other States' understanding and accept the interpretation contained therein, although it may sometimes also be sufficient that the parties reach the same understanding individually.[17] Not every difference can be understood as disagreement over the interpretation, however. It may also reflect a certain scope for the exercise of discretion in its application.[18] Agreement presupposes, in principle, a common understanding by all parties. It is, however, not necessary that all parties engage in a particular practice to constitute agreement.[19] Agreement may also follow from States' silence.

The interpretative weight of the respective subsequent practice depends particularly on its clarity, specificity in relation to the treaty, and whether and how it is repeated.[20] The test is often summarized under the formula "concordant, common, and consistent".[21] The time when the practice occurred, as well as the practice's consistency, breadth, and nature,[22] likewise determines the interpretative weight.[23]

In addition, international practice relating to interstate assistance may lead to the development of rules governing interstate assistance under customary international law. In order to determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio iuris*).[24] Pertinent practice consists of the conduct of States, which may take a wide range of forms.[25] It must be general in the sense that it is sufficiently widespread,

16 Ibid Conclusion 6, 50 para 23.
17 Ibid Conclusion 10, 75, para 1, 77 para 8.
18 Ibid Conclusion 10, 76 para 4.
19 Subsequent practice Conclusion 10 para 2; Commentary 10, 79 para 12.
20 Subsequent practice Conclusion 9.
21 Subsequent practice Commentary, Conclusion 9, 73, para 10-11.
22 For example, statements before international fora such as the UNGA or UNSC as well as official letters to such institutions typically have more weight than media statements. See also van Steenberghe, *JUFIL* (2015) 87 note 31.
23 Subsequent practice Commentary, Conclusion 9, 71 para 2, 74 para 12.
24 Article 38 ICJ-Statute, 33 UNTS 933. Draft conclusions on the identification of customary international law with commentaries, A/73/10 (2018) para 65-66 [CIL Conclusion/CIL Commentary] Conclusion 2, 124.
25 For an overview see CIL Commentary Conclusions 5 and 6, 132-134.

representative, and consistent.[26] Crucially, the practice must be undertaken with a sense of legal right or obligation.[27]

The fact that the practice may also be undertaken with the intention to comply with the UN Charter does not necessarily preclude the inference of the existence of a rule of customary international law.[28] States may feel bound by both a conventional and a customary provision.[29]

On that note, given that the conditions for the evolution of customary and conventional law through international practice run widely in parallel,[30] the scope of the rules under customary and conventional law will also be similar. This does not mean, however, that the customary rule can be equated in its entirety. For example, the reporting obligation under Article 51 UNC or the primacy clause under Article 103 UNC are limited to the conventional obligations only.[31] Given the quasi-universal ratification of the Charter, the distinction has however only limited practical relevance.[32]

## II. Assistance in international practice

The above-sketched methodological approach requires the assessment of several sources of international practice.

Section A is dedicated to what are called here 'abstract statements' on international law by international actors. While the focus lies on pertinent UN General Assembly Resolutions, the International Law Commission's work as well as a selection of abstract statements of law by States are part of the analysis, too. Section B examines assistance in treaty practice beyond the UN Charter from two angles: first treaties that prohibit assistance, second treaties by which assistance is provided. Interstate assistance in concrete conflict practice is then the subject of section C, while section

26 CIL Conclusion 8 para 1.
27 CIL Conclusion 9.
28 CIL Commentary Conclusion 9, 139, para 4.
29 Critical as for proof Richard R Baxter, 'Treaties and Custom', 129 *RdC* (1970) 27, 64, 73. But see van Steenberghe, *JUFIL* (2015) 88. CIL Commentary Conclusion 9, 139, para 4.
30 van Steenberghe, *JUFIL* (2015) 91; Starski, *JUFIL* (2017) 19-20.
31 For details with respect to self-defense van Steenberghe, *JUFIL* (2015) 87-88.
32 It may be relevant in judicial proceedings. For example, in the *Nicaragua* case, the Court's jurisdiction was limited to rules of customary international law, *Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [*Nicaragua*].

D concerns the International Court of Justice's jurisprudence relating to assistance. To further clarify the meaning of 'assistance', section E briefly explores how States understand the Charter's express references to permissible 'assistance' in the *ius contra bellum* context. As these sections concern practice of interstate assistance governed by rules where the UN has not taken measures, the final section F shifts the focus to practice in case the UN has entered the stage, in view of prohibitions of assistance that presuppose UN action.

In line with this book's design, practice relating to general rules of international law, and to assistance that is not provided to a use of force is not part of the analysis.[33]

## A. Assistance in abstract international practice

In various settings, relevant international actors make abstract statements about international law, unrelated to a specific situation.[34] Typically, such practice benefits from a less politicized context and thus allows for more robust conclusions about the understanding of international law. In fact, while the outcome may not necessarily be legally binding, in particular when discussed in the realm of the UN Sixth Committee as the primary universal interstate forum for the consideration of legal questions, such international practice as a matter of principle may be in any event ascribed legal relevance.

At its core, this section embraces practice arising from or being expressed within the practice of an international organization. In this context, the 1970 'Friendly Relations Declaration' (2), the 1974 'Definition of Aggression' (3) and the 1987 'Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Use of Force in International Relations' (4) will be analyzed in detail.

The exact nature of each instrument will be assessed in detail below. While it is clear however that none of those instruments is legally binding itself, this does not diminish their (legal) relevance for the present purposes. Each instrument was drafted by the Sixth Committee. Each in-

33 See for an analysis of those norms Chapter 6 and with further references on relevant State practice Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (2007); Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011).

34 Noted that this classification relates to the presentation of international practice only. It does not mean to describe conclusively the legal value of such practice.

strument set out to elucidate the principles under the UN Charter from a specific angle. Each instrument allowed for all UN member States to participate in and influence the process. Each instrument was adopted by consensus. And last but not least, each instrument thus reflects a compromise which States could universally agree upon.

On that note, such instruments are widely understood even as authentic interpretations of the Charter in form of a "subsequent agreement".[35] For example, in the Nicaragua judgment, the ICJ viewed States' "consent to the text of such instruments" in any event to have the effect of a "'reiteration or elucidation' of the treaty commitment undertaken in the Charter."[36] Moreover, such instruments may assist in the determination of customary international law, in particular to the extent that the respective rule is couched in legal language, is viewed as declaratory of customary international law, and has received a wide degree of (continuous) support.[37]

In addition, statements by States in the generation and development of these instruments not only inform the understanding and intended effect of the respective instrument upon which States agreed. As they arise from the practice of an international organization, they may also count as subsequent practice in relation to the UN Charter.[38]

Moreover, the International Law Commission's work shall have its place in this section. Two projects are of particular interest for interstate assistance to a use of force. The 1949 Draft Declaration on the Rights and Duties of States recognized a prohibition of assistance to a use of force (1). In the course of its work on the Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC also commented on interstate assistance to the use of force (5).

This section shall conclude with a selective overview of remarkable abstract positions taken by States on the permissibility of interstate assistance to a use of force (7).

There is other abstract international practice that may, at least indirectly, inform the debate. For example, in the context of the ILC's work on international criminal law, questions of assistance were discussed as well.[39]

35 Subsequent Practice Commentary, Conclusion 12, 99 para 20.

36 *Nicaragua*, 100 para 188.

37 CIL Conclusion 12; Commentary, Conclusion 12, 147-149; *Nicaragua*, 99 para 188; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996 [*Nuclear Weapons*], 226, 255 para 70.

38 Subsequent practice, Commentary, Conclusion 12, 97 para 15.

39 For example, the Draft Code of Offenses Against the Peace and Security of Mankind.

Moreover, other UNGA resolutions that have reiterated and elucidated the principle of non-use of force as well as the prohibition to use force might deserve closer analysis.[40] In view of the focus on interstate assistance to a use of force, however, this practice will be left aside.

1) The ILC Draft Declaration on Rights and Duties of States (1949)

The adoption of the UN Charter not only institutionalized a new legal world order and created an international organization to ensure international peace and security. It had significant impact on the development of international law.[41] The Dumbarton Oaks draft, proposed by the USA, USSR, UK, and China, stipulated principles according to which member States should act.[42] During the San Francisco conference, other States had the opportunity to provide comments and to propose amendments. In this context, Mexico,[43] the Netherlands,[44] Cuba,[45] and Panama[46] aimed to further clarify *inter alia* the foundational rights and duties of States, to complement and amend the mentioned principles.[47] They requested that besides a Declaration of the Essential Rights of Man, a Declaration of the Rights and Duties of Nations should be adopted. For this Panama presented a concrete draft as basis for discussions.[48] Those States did not purport

40 For example, the principle of indirect use of force through non-State actors has been affirmed in several resolutions, e.g. Peace through Deeds, A/RES/380 (V) (17 November 1950), para 1; Declaration on Strengthening of International Security, A/RES/2734 (XXV) (16 December 1970), para 5. See also resolutions relating to the rule of non-intervention, e.g. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, A/RES/2131 (XX) (21 December 1965), para 1, 2.

41 See also preamble Draft Declaration on Rights and Duties of States, para 3; A/RES/375 (IV) (6 December 1949), preamble.

42 III UNCIO 1-23, Doc 1 G/1, Chapter II.

43 III UNCIO, 54-188, 64, Doc 2 G/7 (c) (23 April 1945); III UNCIO 176, Doc 2 G/7 (c) (1), 2 para 10 (5 May 1945).

44 III UNCIO 322-330, Doc. 2 G/7 (j) (1) (1 May 1945). For the Netherlands this was meant to reasonably compensate the unequal position between permanent and non-permanent Security Council members. Similarly, Belgium, III UNCIO 336-337, Doc 2 G/7 (k) (1), (4 May 1945).

45 III UNCIO 495, Doc. 2, G/14 (g), 3 (2 May 1945). Cuba proposed this as a guide in the maintenance of international peace and security and as basis for all agreements.

46 III UNCIO 265, Doc 2 G/7 (g) (2) (5 May 1945).

47 A/CN.4/2, 13-17.

48 III UNCIO 265, 272-273, Doc 2 G/7 (g) (2) (5 May 1945).

to comprehensively study *all* rights and duties of States, i.e. international law *as a whole*. They focused on identifying and enunciating fundamental rights and duties of States.[49]

But neither were these calls integrated into the Charter, nor did the dimension of those proposals allow States to do justice to those ideas at that stage of drafting. Instead, States agreed to discuss those basic principles once the Charter had come into force.[50]

Accordingly, in 1947, Panama resumed the previous discussions and submitted a draft declaration.[51] Panama not only sought thereby to improve Article 2 UNC which, in its view, "as a statement of principle, [… left] much to be desired […]"[52] and was "far from being a true enumeration of principles in international law, in as much as all its clauses, save the first, are drafted in form of treaty engagement."[53] Panama also aimed at stipulating *general* international law rights and duties, going beyond the (mere) treaty nature that the UN Charter still had at that time. In particular, Panama sought specificity which it was missing in Article 2 UNC:

> "The declaration does not contain what may be called postulates of international law, that is to say, dogmas or maxims which do not, really, establish rights or duties, but merely expound certain truths of international life, without stating any specific concrete direct or positive manner that could be properly called right or duty."[54]

In this fundamental context the regulatory regime on interstate assistance to the use of force received attention for the first time.

49 See also Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States - Memorandum submitted by the Secretary General, A/CN.4/2, v. On the historical background see A/CN.4/2 part I and II.

50 VI UNCIO 456, Doc 944, I/1/34 (1) (13 June 1945), for the report of the Rapporteur of Committee 1 to Commission I on Chapter I, in response to Cuba, VI UNCIO 303-304, Doc 382. 1/1/19 (17 May 1945).

51 Rights and Duties of States, A/285 (15 January 1947).

52 Ibid 14.

53 Ibid 15.

54 Ibid 24.

a) The nature of the Draft Declaration

The UNGA tasked the newly established ILC to prepare, in its first session, a draft declaration on the rights and duties of States based on the Panamanian proposal.[55] The result was the ILC's Draft Declaration on Rights and Duties of States.[56] In 1949, the ILC presented it to the UNGA.[57] The UNGA took note of the Draft Declaration and requested States to furnish further comments on whether the UNGA should take further action and, if so, what exact nature of the document should be aimed for.[58] As comments remained rare, however, the UNGA first postponed and ultimately discontinued the project.[59]

In light of this, the Draft Declaration's legal value and impact was debated.

The ILC conceptualized the Draft Declaration as a "common standard of conduct."[60] But it did not specify its legal nature. Neither did it explain which provisions were meant to codify and which provisions progressively develop international law.[61] However, the ILC did not specifically aim for a legally binding enunciation of general international law.[62] Expressly, it worked on a draft declaration, not a convention.[63]

On that basis, it would be going too far to view the Draft Declaration *as such* as statement of positive international law.[64] Many States were reluctant towards a "semi-permanent" declaration, not least as the debates took place during a "period of transition in international law" where principles "were

55 A/RES/178 (III) (21 November 1947). On the procedure leading to the decision A/CN.4/2 (15 December 1948), 18-34.
56 Reprinted in ILCYB 1949, vol I, 287-288.
57 Ibid.
58 A/RES/375 (IV) (6 December 1949) para 1, 4.
59 A/RES/593 (VI) (7 December 1951).
60 ILCYB 1949 vol I, 66 para 37 and 41, 67 para 45.
61 ILCYB 1949, SR.8, 66 para 37, 45 (Hudson as Chairman). The Commission agreed on that narrative: SR.8, 67 para 41. [All SR in this section 1 refer to the summary records reprinted in ILCYB 1949 vol I, unless indicated otherwise].
62 E.g. ILCYB 1949 vol I, 67 para 58 (Spiropoulos).
63 For an argument for drafting a convention: ILCYB 1949 vol I, 63 para 7 (Amado). The ILC did not exclude however that the draft may later be turned into a convention (Alfaro, ILCYB 1949 vol I, 66 para 40).
64 See also Hans Kelsen, 'The Draft Declaration on Rights and Duties of States', 44(2) *AJIL* (1950) 259.

as yet untried".[65] Yet, most States acknowledged that the Draft Declaration contained both: statements of positive international law and progressive development.[66]

In addition, this debate was intertwined with a more fundamental disagreement among States. The ILC's role, and institutional place, and accordingly, the value and impact of its pronouncements were controversial. Yugoslavia summarized the debate well:

> "According to one point of view, advanced by the United Kingdom representative, the International Law Commission was to become an Areopagus of independent jurists; according to the other point of view that Commission was to be only an auxiliary organ of the General Assembly, upon which alone fell the responsibility for the codification and development of international law."[67]

Some States saw the ILC's Draft Declaration as an authoritative statement of international law that stood on its own merits[68] and could be considered a source of law as Article 38 I (d) ICJ Statute.[69] Others were more reluctant to grant such merits to the ILC and called for more comments from States.[70] Furthermore, it was controversial to what extent the ILC could enunciate *general* rules of international law applicable to all States, given that not all States had joined the UN. The ILC stressed that "most of the other States of the world have declared their desire to live within [the] order [established under the UN Charter]"[71] and invoked Article 2(6) UNC to justify its efforts in that respect.[72] This justification however did not receive universal approval.[73]

65 A/C.6/177, 232 para 7 (USA); A/C.6/171, 194 para 66 (Venezuela). See also A/C.6/168, 167, para 82 (USA); A/C.6/168, 166 para 72, 74 (USA), A/C.6/169, 172 para 45 (Greece).

66 For example: A/C.6/170, 174 para 2, 3 (Belgium); A/C.6/170, 177 para 26 (Brazil); A/C.6/171, 190 para 32 (India); A/C.6/175, 216 para 9 (Chile). Critical on the lacking clear distinction Kelsen, *AJIL* (1950) 260-261.

67 A/C.6/159, 109 para 71 (Yugoslavia).

68 A/C.6/168, 166-167 para 70, 77, 78, 85, 86 (USA); A/C.6/159, 106 para 35 (UK); A/C.6/177, 235 para 38 (Cuba); A/C.6/170, 177 para 24 (Brazil).

69 A/C.6/168, 166-167 para 87 (USA); A/C.6/172 para 18 (UK); A/C.6/171, 190 para 36 (India); A/1338/Add.1 para 5 (Netherlands).

70 E.g. A/C.6/172 196-197 para 9-11 (France). See also e.g. A/C.6/168, 168 para 99-103 (Poland); A/C.6/168 169 para 114 (USSR).

71 Draft Declaration, preambular paragraph 3.

72 E.g. SR.19, 136 para 2-7; SR.15, 115 para 27 (Koretsky); SR.20, 144 para 28 (Alfaro).

73 E.g. SR.15, 115 para 23 (Hsu); SR.20, 144 para 29 (Cordova).

It is against the background of these discussions that the UNGA

> "deemed the draft Declaration as notable and substantial contribution towards the progressive development of international law and its codification and as such commends it to the continuing attention of Member States and jurists of all nations."[74]

Regarding the legal value of the Draft Declaration *itself,* the controversies may have persisted. Yet, the debate as well as the UNGA's statement show also that the Draft Declaration, despite being only a *draft* and a *declaration* issued by the *ILC,* was not without any legal value. States similarly agreed.[75] The exact legal value depended on the context of each respective article.[76]

### b) The Draft Declaration – an overview

The ILC submitted a draft declaration containing fourteen articles. Again, the ILC did not aim to codify a comprehensive "treatise of international law",[77] but rather focused on basic rights and duties. At the outset, three characteristic features of the articles deserve mention.

First, the ILC was well aware of the philosophical background and theoretical debate regarding "fundamental rights and duties of States".[78] But the ILC members refrained from addressing these questions of the normative implications and the specific nature of those rights and duties.[79] The primary focus was on their technical identification.[80] Similarly, States were well aware of the theoretical background of the proposal.[81] Their reaction

74 A/RES/375 (IV) (6 December 1949) para 2.
75 E.g. A/C.6/170, 174 para 2, 3 (Belgium); For a detailed discussion A/1338, 3-5 (Canada); A/1338/Add.1 (Netherlands).
76 It is also this approach that many States took: e.g. A/C.6/170, 174 para 2, 3 (Belgium); A/1338/Add.1 para 5, 6 (Netherlands).
77 ILCYB 1949 vol I, 66 para 29 (Chairman). States agreed also on that approach: e.g. A/C.6/159, 106, para 32 (UK), A/C.6/177, 237 para 59 (UK); A/C.6/170, 177 para 21 (Brazil).
78 See for this debate Sergio M Carbone, Lorenzo Schiano di Pepe, 'States, Fundamental Rights and Duties' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2009) para 3-8.
79 ILCYB 1949 vol I, 63 para 8-9 (Amado), 67, para 57 (Brierly).
80 E.g. ILCYB 1949 vol I, 63 para 8-9 (Amado), 64 para 17 (Sandström), 67, para 57 (Brierly), 70 SR.9, para 12 (Koretsky). See also A/C.6/170, 177 para 21 (Brazil).
81 See also A/C.6/177, 236 para 50 (Israel) on the meaning of "basic" in A/RES/375 (IV), preambular paragraph 3.

through UNGA Resolution 375 (IV) that mentioned "basic rights" however was also understood in line with the ILC's approach.[82]

Second, the Draft Declaration was drafted to be "in harmony with the provisions of the Charter of the United Nations."[83] It did not purport to deviate from, change, or challenge the obligations under the Charter.[84] Thus, the ILC responded to concerns from some States that a "double series of partly overlapping rules" is "apt to leads to doubts and difficulties of interpretation in the future."[85] At the same time, the ILC neither aimed to repeat nor to redraft the UN Charter.[86] Instead, in line with the UNGA mandate,[87] the ILC focused on *general* rights and duties of international law, applicable to both UN member States and non-member States.[88] The rights and duties were by no means however meant to challenge the authority of the UN Charter.[89] UN member States just may have additional and different obligations.[90] States generally agreed on that relationship between the Charter and the Draft Declaration.[91]

Third, the ILC observed that "[t]he rights and duties [were] set forth in general terms, without restriction or exception, as befits a declaration of basic rights and duties."[92] Accordingly, it explained that "[t]he articles of the draft Declaration enunciate general principles of international law, the

82 A/C.6/177, 236 para 50 (Israel); A/C.6/177, 237 para 59 (UK), A/C.6/177, 237, para 63 (USSR); A/C.6/178, 238 para 4 (Israel) withdrawing its amendment on that understanding. "Basic" was just a synonym for "fundamental", Kelsen, *AJIL* (1950) 266-267.

83 Draft Declaration preambular para 5; ILCYB 1949, 288-289, para 47 (guiding considerations). See also A/C.6/177, 231, para 2 (Norway). Critical on this statement Kelsen, *AJIL* (1950) 263, 266.

84 See e.g. ILCYB 1949 vol I, 64 para 17 (Sandström); 63 para 6 (Amado).

85 A/CN.4/2, 183 (Sweden). See also A/CN.4/2, 163-164 (Czechoslovakia); A/C.6/170, 182-183 para 81-84 (Israel).

86 See e.g. ILCYB 1949 vol I, 63 para 6 (Amado); 75 para 51; SR.12, 92 para 25 (Spiropoulos).

87 ILCYB 1949 vol I, 74 para 41.

88 Ibid 74 para 38, Brierly brought up this question. After a discussion, 74-75, para 39-48, it was agreed however that "the Declaration should be drafted so as to apply to all States", 75, para 48. See also 75 para 51; 136 para 2.

89 ILCYB 1949 vol I, SR.19, 136 para 2-3 (Kerno); SR.19, 136 para 6 (Alfaro). See also Draft Declaration preambular paragraph 5. States confirmed this later: e.g. A/C.6/170, 174 para 3 (Belgium).

90 ILCYB 1949 vol I, 75 para 49, 50. See for example Kelsen, *AJIL* (1950) 261 explaining how some obligations went beyond or stayed behind the UNC.

91 E.g. A/CN.4/2, 163-164 (Czechoslovakia).

92 "Observations concerning the Draft Declaration", ILCYB 1949, 290 para 52.

extent and the modalities of the application of which are to be determined by more precise rules."[93] This took account of statements like those by Jean-Pierre A François who noted that "most of the articles contained guiding principles, but that in concrete cases the special circumstances of each justified exceptions."[94] Not at least, it enabled agreement masking some unresolved controversies.

States widely shared this observation, in particular that the articles required further definition and specification. The UK, for example, noted that "the draft declaration was less a statement of positive rules and laws than a formulation of fundamental principles on which such rules were based."[95] Therefore, it "would go too far" to adopt the present text and institute some machinery for its formal signature and acceptance by members of the United Nations.[96] Similarly, China pointed out that "the draft dealt with basic principles, and not with particular rules. It drew upon both law and policy, whereas an ordinary piece of codification drew upon law almost exclusively. The draft declaration should be compared with a charter or constitution, rather than with a code of laws."[97]

With these features in mind, two sets of norms may apply to the regulation of interstate assistance. The most notable is Article 10 of the Draft Declaration. It entails a duty of non-assistance that so far had not been explicitly expressed in a document raising a claim of universality.

In Article 10 the ILC enunciated a two-pronged prohibition:

> "Every State has the duty to refrain from giving assistance to any State which is acting in violation of article 9, or against which the United Nations is taking preventive or enforcement action."

On the articles' origin, the ILC commented:

> "This text was derived from article 19 of the Panamanian draft. The second phrase follows closely the language employed in the latter part of Article 2.5 of the Charter of the United Nations."

93 ILCYB 1949, 290 para 52.
94 SR.8, 62, para 3. See also 64 para 16 (Sandström). See also SR.14, 110 para 95, 96 (Scelle), para 97 (Amado), para 98 (Cordova).
95 A/C.6/172 para 17 (UK, Fitzmaurice).
96 A/C.6/172 para 17, 13 (UK, Fitzmaurice).
97 A/C.6/170, 185 para 116. See also A/C.6/179, 173, para 51 (Greece); A/C.6/170, 174 para 2 (Belgium); A/C.6/171, 191, para 46 (Yugoslavia).

This article was distinct from norms relating to the concept of intervention which, in the ILC's view, was prohibited in the following different, yet not exhaustive forms.

In Article 9, to which Article 10 referred, the ILC laid down a general prohibition to use force, which it "fashioned upon a provision in the Treaty of Paris for the Renunciation of War of 1928" and "Article 2.4 of the Charter of the United Nations":

> "Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

In Article 3 of the Draft Declaration, the ILC recognized a "duty to refrain from intervention in the internal or external affairs of any other State."[98] Article 4 then specified a "duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."[99] The latter "principle has been enunciated in various international agreements", so the ILC.[100] Article 7 extended this obligation, and required every State "to ensure that conditions prevailing in its territory do not menace international peace and order."[101]

Finally, in that context of drawing on Article 51 UNC, the Draft Declaration in Article 12 recognized that "[e]very State has the right of individual and collective self-defence against armed attack."

### c) 'Intervention' and assistance

At first sight, the articles related to the general concept of intervention appear to add only little to clarify the application of rules to interstate assistance. In fact, the existence of Article 10 of the Draft Declaration might give the impression that this is a comprehensive regulation of assistance.

This assumption would not do justice to the development and shaping of those articles, however. The articles relating to "intervention" were not without relevance for the regulation of assistance. Of course, the Draft

98 Article 3 Draft Declaration.
99 Article 4 Draft Declaration.
100 Comment to Article 4 Draft Declaration.
101 Denying the article's legal basis in general international law, Kelsen, *AJIL* (1950) 270.

Declaration did not allow for comprehensive conclusions on what amounts to prohibited "intervention." But this was never the goal, as was also reflected in the nature of the articles stipulating principles rather than precise rules. Beneath the surface of these general pronouncements, the regulation of the provision assistance was by no means excluded, even though not comprehensively settled.

Article 9 of the Draft Declaration bears witness to the transition period between two legal orders. Despite numerous calls for "simpler" wording,[102] the ILC retained the reference to the Kellogg-Briand Pact and its prohibition of "war", not least because the ILC felt that the "world opinion would favor the restatement of the pact."[103] In this light, it appears that a conservative understanding of the prohibition prevailed in the ILC that was particularly concerned with classic forms of use of force. The concept of "indirect use of force" was neither discussed nor mentioned in the context of Article 9.

The provision of assistance to non-State actors, fomenting civil strife, was nonetheless acknowledged to be legally problematic and in fact expressly prohibited in Article 4 of the Draft Declaration. This scenario was viewed to be "a most important point" and "topical", hence justifying the emphasis on this specific form of intervention, despite the general agreement not to "enumerate all forms of intervention in the Declaration".[104] The ILC derived this from "various international agreements",[105] which, as Chapter 2 showed, referred to assistance to States and non-State actors alike. This was further confirmed by the argument that "behind that principle there was an ancient principle of international law that States could not tolerate the organization on their territories of armed forces intended for an attack on another State."[106] Notably, however, this prohibition was connected to the duty of non-intervention, rather than to the prohibition to use force.[107]

102 SR.14, 107 para 38, 39; 108 para 59, 60.
103 SR.14, 107 para 40.
104 SR.15, 119 para 84-90. In particular Hsu insisted on an express stipulation not only of a duty of prevention, but that the "State itself [was obliged not] to foment civil war in another State." SR.15, 119 para 84, 86.
105 Commentary Article 4 Draft Declaration.
106 SR.15, 119 para 78.
107 SR.15, 119 para 85. See also the systematic placement to immediately follow the rule duty of non-intervention. The Panamanian draft had arranged the article in a distinct section concerned with the "preservation of peace", A/285 19-20.

One should however be cautious to read this as a rejection of the concept of "indirect use of force". First, in line with its general approach, the ILC refrained from attempting precise definitions.[108] In that light, the ILC did not comprehensively answer whether this also includes certain forms of assistance. In fact, even Article 9 leaves the door open, as the ILC for example did not specify at any point what acts may amount to "war" or "use of force". Second, the lines distinguishing the different forms of intervention and in particular the duty of non-intervention and the prohibition to use force were not (yet) clearly drawn, again due to the ILC's general approach to enunciate general principles that masked some unresolved controversies.[109] Some members argued for a narrow understanding of "intervention" to require a threat or use of force – minimizing the difference between the prohibition to intervene and the prohibition to use force.[110] Others disagreed, arguing for a broader scope of intervention.[111] For example, Jesús María Yepes called it "hypocrisy to condemn war but not to condemn intervention which often led to war."[112] Third, there seemed to be a tendency to conceptualize the prohibition to foment civil strife narrowly, requiring force, in line with present day standards for "indirect use of force". For example, it was deemed important not to "suppress the right of free criticism of another State".[113] Rather "the activities in question should be forbidden only if they were of such a kind as to foment disturbances in other States."[114]

On that basis, it seems fair to note that it was feasible to qualify assistance (also) as (indirect) intervention (in some form, depending on its defini-

108 On intervention: SR.12, 90 para 3 (Brierly), para 11 (Cordova), 91 para 14 (François) (also for force). On self-defense SR.14, 110 para 95, 96 (Scelle), para 97 (Amado), para 98 (Cordova). States also took note of this for aggression: A/C.4/2, 103 (Venezuela). See also A/C.6/169, 173 para 51 (Greece) arguing for the omission of the principle of non-intervention due to its elusiveness.

109 SR.12, 90-93, para 1-47.

110 SR.12, 90 para 4 (Brierly), para 11 (Cordova), para 16 (Scelle). This was also the view by commentators of that time: Kelsen, *AJIL* (1950) 268 commented that "If Article 3 is to be interpreted in conformity with existing general international law, "intervention" means dictatorial intervention, that is, intervention by the threat or use of force. Hence, the duty formulated in Article 3 is covered by the duty laid down in Article 9 […], and Article 3 is redundant".

111 SR.12, 91 para 14 (François); SR.12, 91 para 18 (Koretsky).

112 SR.12, 92 para 24 (Yepes).

113 SR.15, 118 para 76.

114 SR.15, 118 para 76.

tion). At the same time, there was also a clear tendency to allow assistance issued to a state lawfully resorting to force.

This is once more reflected in the discussion of a proposal introduced by Benegal Rau. He submitted to qualify the prohibition of intervention with the words "except as permitted in international law"[115] and illustrated his concern by pointing

> "to the possibility of one State permitting its territory to be used by a second State as a base of operations against a third State. The third State then, by using force against the first State in order to dissuade it from opening its territory to the second State, would be committing an act of intervention in the narrow sense, although its object would be prevention of aggression. Such intervention was not prohibited by the United Nations Charter or the present declaration."[116]

The proposal was rejected,[117] not because of disagreement on the example, but because members were reluctant to allow for extensive exceptions to the general rules.[118] There appeared to be agreement that assistance may be a prohibited intervention that even could trigger a right to respond. Roberto Cordova argued that

> "in the example given by Mr. Rau, the first State would actually be participating in the aggression against the third State, and the action of the latter would be self-defence, not intervention."[119]

On a similar note, Greece stressed in the Sixth Committee that

> "it should […] be remembered that certain actions which some might call intervention were permitted to States under international law. The idea of intervention was liable to misconstruction and improper interpretation. In support of that statement, Mr. Spiropoulos [speaking for Greece] cited the case of a State granting a loan to another State on the understanding that its foreign policy would follow specific lines. A third State might regard the action of the country granting the loan as intervention. *It might also be claimed that a State had intervened by giving military or financial*

115 SR.12, 93 para 37 (Rau).
116 SR.12, 93 para 38 (Rau).
117 SR.12, 93 para 41.
118 SR.12, 93 para 39-40.
119 SR.12, 93 para 39 (Cordova). Notably, he did not qualify the assistance as "intervention" but as "participation".

> *aid to another State to enable it to defend itself against aggression of which it had been a victim*. The Greek delegation believed that States were free to enter into any treaties they considered useful for the protection of their interests."[120]

Greece implied here that the provision of assistance might be a prohibited intervention – albeit only if it did not purport to enable another State to defend itself against aggression.

Irrespective of the exact basis for a prohibition of assistance, the decisiveness of the latter aspect was affirmed by the express recognition of the right of collective self-defense against an armed attack acknowledged in Article 12 of the Draft Declaration.[121]

Initially, the ILC had decided to omit a reference to collective self-defense without discussion or specific reasons.[122] However, it immediately reconsidered this decision.[123] Reasons for the apparently premature omission of the reference remained nonetheless vague. Some thought, though they accepted the concept, that the clarification was not necessary.[124] Others voiced more substantial concerns. For example, Jean Pierre François pointed out that "the Charter made the exercise of [the] right [of collective self-defense] subject to the supervision of the UN Security Council and that such a guarantee did not exist in general international law."[125] Georges Scelle "admitted that such a guarantee was a step forward, but he thought that nothing prevented the right of collective self-defence from being proclaimed an absolute right, pending such a guarantee becoming effective in regard to all States, that is, when they all became Members of the United Nations."[126]

Eventually, the concept was reintroduced,[127] not at least to avoid "the impression that the article established the right of self-defence *only* for

120 A/C.6/169, 173 para 51, emphasis added.
121 The necessity of an armed attack was repeatedly emphasized. SR.14, 108, para 68, 69, 109 para 76; SR.14, 109 para 72 (Brierly). See also the debate SR.14, 109-110 para 85-112 on "anticipatory self-defense". Critical on this requirement if it is *general* international law, Kelsen, *AJIL* (1950) 274.
122 SR.14, 108, para 66.
123 SR.14, 108, para 67.
124 SR.14, 109 para 77.
125 SR.14, 109 para 73. See also SR.14, 108 para 67 (Scelle noting this for Article 51 UNC); SR.20, 144, para 22 (Cordova). See also Kelsen, *AJIL* (1950) 274.
126 SR.14, 109 para 74 (Scelle).
127 SR.14, 109 para 84.

the State attacked".[128] Throughout the debate on that article emphasis was placed on the importance to also recognize the right of a "State going to the assistance of another State not in a position to defend itself" [129] – the core idea behind the term "collective self-defense."[130] Moreover, it was argued that "the concept must be extended to all members of the community of States, even to those who were not member of the United Nations[131] and that "collective self-defense" was part of general international law,[132] being rooted in State practice also by non-UN-members.[133] Jean Spiropoulos for example claimed that "any State attacked had always had a natural right of self defence, and *other States* had *always* had the right, under the law of intervention, to come to its defence."[134] Roberto Córdova maintained that it was "logical" to allow for collective self-defense against the background that "war of aggression" was prohibited.[135]

For Shushi Hsu, this was not enough. He proposed an additional article which concretized the right of collective self-defense which he feared to be "not sufficiently precise:[136] "Every State is entitled to take measures in support of any State which exercises the right [of self-defense]."[137] Thus Hsu aimed to ensure that first States had the right to provide assistance to a victim of aggression also for cases of "collective self-defence [that] would come into action after aggression and without any previous agreement."[138] Second, he meant to specify that "if every State had the right to decide for itself the kind of measures it would take to support the State which had been attacked, it would be free to determine the extent and duration of

128 SR.14, 109 para 75 (Yepes); para 76 (Rau); para 79 (Cordova), emphasis added. This was also a main reason for the ILC not to adopt an alternative formulation, SR.20, 146 para 57, 58, 61 (Brierly, Sandstrom, Scelle).

129 For example, SR.14, 109, para 76 (Rau); SR.20 146 para 57 (Brierly), para 61 (Scelle); 147 para 64 (Cordova), para 65 (Sandstrom).

130 But see for the linguistic criticism SR.20, 146 para 59, 147 para 73 (Brierly). See also Kelsen, *AJIL* (1950) 275.

131 SR.14, 108, para 70 (Cordova).

132 SR.14, 108 para 70 (Cordova), 109 para 71 (Scelle), para 72 (Brierly), para 76 (Rau), para 79 (Cordova).

133 SR.14, 109 para 71 (Scelle referring to the Kellogg-Briand Pact and the NATO treaty), 108 para 67 (Scelle referring to French legislation), 109 para 77 (Spiropoulos).

134 SR.14, 109 para 77 (Spiropoulos), emphasis added.

135 SR.14, 108 para 70.

136 SR.16, 124 para 54.

137 SR.16, 124 para 50.

138 SR.16, 124-125 para 54.

the aid to be supplied by it."[139] Hsu's proposal was rejected on the basis that those points mentioned were already covered in the term "collective self-defense".[140]

The recognition of collective self-defense was however not understood as constituting a prohibition if the prerequisites were not fulfilled.

The Draft Declaration does not allow for revolutionary insights into the regulation of assistance as some form of prohibited "intervention", as it does not undertake to settle these questions definitively. Still, at a time of considerable transition when the UN was far from universal membership, the ILC thus enunciated articles governing intervention as part of *general* international law, and not merely specific to the UN Charter. This claim and impression of the Draft Declaration should not be underestimated. And even if the ILC did not elaborate specific rules, the origin of the articles points a way for further development: interstate assistance is not inherently and necessarily excluded from the scope of intervention.

### d) Article 10 of the Draft Declaration

Article 10 of the Draft Declaration, in contrast, was clearly addressing interstate assistance. It imposed a duty on States to refrain from giving assistance in two distinct but related situations: first, to any State which is acting in violation of the general prohibition to use force (Article 10 alt 1); second, to any State against which the UN is taking preventive or enforcement action (Article 10 alt 2).

#### (1) Article 19 Panama Draft

The ILC based Article 10 ILC Draft Declaration on Article 19 of the Panamanian draft.[141] But at first sight, the Panamanian draft seemed to regulate assistance to the use of force only peripherally, if at all. It did not seek to establish a general prohibition of the kind what would later

139 SR.16, 125 para 54. Later, the USA also stressed this point, A/C.6/168 para 80: "It must also be recognized that self-defence included measures other than the extreme sanction of the use of armed force against an aggressor. Surely a State victim of aggression was entitled to employ measures of self-defence short of that."

140 SR.16, 124-125 para 51, 52, 53, 55, 57, 58.

141 Commentary to Article 10, ILCYB 1949, 288.

become the first part of Article 10 ILC Draft Declaration. Article 19 of the Panamanian Draft made grander claims, as it stipulated:

> "It is the duty of every State to afford the community of States every kind of assistance in whatever action that community undertakes, and it should abstain from rendering assistance to any State against which the community is conducting preventive or coercive action."[142]

Article 19 was not designed to "contain the general doctrine of submission to law and the proscription of force" like the previous four articles of Panama's draft.[143] Panama rather viewed the article "to deal with international co-operation" more generally.[144]

This idea was also reflected in the fact that Article 19 was not limited to the context of (unlawful) force but applied to all enforcement action. Also, the trigger for the duty of non-assistance, i.e. preventive or coercive action taken by the community of States, gave the obligations a different spin. It shaped it into a general obligation of cooperation, where non-assistance was a means to assist the community of States. At its heart, Panama sought to establish not only a *prohibition* of assistance, but a *duty to provide* assistance to the community of States who takes enforcement measures.

As such, Article 19 was at the same time narrower than a general assistance obligation. Inspired by Article 2(5) UNC, Panama conceptualized the provision with the "community of States" at the center of all obligations contained in Article 19.[145] The obligation presupposed the existence of an organization of the entire community of States.[146] The prohibition to provide assistance was triggered only when preventive or coercive action was in progress. The same was true for the duty to provide assistance. It was no 'automatic' obligation for each State in light of another State's use of force. It required the "community of States" to collectively decide to take action.

Despite the proposal's general nature, Panama's primary regulatory goal was assistance in the situation of a use of force. Panama entitled Article 19 with "Cooperation in the Prevention of Acts of Force". Panama openly

142 A/285, 7.
143 A/285, 19.
144 Ibid. States commenting on draft Article 19 agreed, e.g. Dominican Republic, A/C.4/2, 115.
145 This also led Professor McGehan speaking for New Zealand to comment that this provision is "superfluous". A/CN.4/2, 179.
146 SR.15, 113 para 1 (Hudson).

based its draft on Article 8 of "International Law of the Future",[147] which established a positive duty:

> "Each State has a legal duty to take, in co-operation with other States, such measures as may be prescribed by the competent agency of the community of States for *preventing or suppressing a use of force by any State in its relations with another State*."[148]

And Panama further proposed Article 20,[149] which was understood to have "a wider scope than Article 19" and govern "cooperation with respect to not only promoting peace and security, but friendly cooperation of nations.[150] Hence, Panama saw the illegal use of force as lying at the heart of the regulation.[151]

In other words, accordingly, Panama effectively proposed to place upon non-UN-member States the same duties as on member States (Article 2(5) UNC).[152]

This characteristic prompted opposition among those States commenting on the proposal. States agreed that these duties applied to UN members. But they were doubtful "whether, and to what extent", as the UK put it, "propositions of this kind can also be laid down as part of general international law applicable also to non-member States".[153] Greece even urged to delete the article.[154]

147 A/285, 18.

148 Principle 8 International Law of the Future, Reprinted in Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum submitted by the Secretary General A/CN.4/2, 161, Appendices No. 19, emphasis added.

149 "Cooperation in the Pursuit of the Aims of the Community of States: It is the duty of every State to take, in co-operation with other States, the measures prescribed by the competent organs of the community of States in order to prevent or put down the use of force by a State in its relation with another State, or in the general interest."

150 SR.15, 116 para 45 (Koretsky).

151 Similarly, A/CN.4/2, 103 (Turkey).

152 See also for this conclusion later in the ILC debates SR.15, 114, para 18 (Alfaro); para 11 (Hudson).

153 Reprinted in Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum submitted by the Secretary General A/CN.4/2, 92 (UK). See also 103 (Turkey), 115 (Greece), 115 (Dominican Republic).

154 Reprinted in Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum submitted by the Secretary General A/CN.4/2, 115 (Greece).

(2) Discussions within the ILC

Against this background, the ILC drafted Article 10 of the Draft Declaration.

At the outset, Panama's draft prompted criticism for regulating assistance in regard to the precondition of a "community of States".[155] As Ricardo Alfaro explained, Panama thereby meant to include not only the United Nations, but also regional organizations like the Organization of American States.[156]

Such a broad and general duty of international co-operation, in the ILC's view however, did not have a basis in international law. Specifically, the expression "community of States" was viewed to be too vague and broad.[157] There was "as yet no [universal] community of States."[158] As a consequence, the discussions were qualified in two ways. The ILC focused the discussion on cooperation with the UN, although being well aware that the UN also was not an organization representing the community of States on a universal basis.[159] Yet, conceptually, the UN was at the center of the community of States, and was intended to achieve recognition of all States.[160] Moreover, the norm's objective of "maintenance of international peace and security" was emphasized.[161]

On that basis, it was however controversial whether the obligations that UN member States had accepted applied to non-UN member States. Most notably, the discussion revolved around the application of *general* international law. Manley Hudson, acting as Chairman, for example, observed that "the duties of Members of the United Nations were not being decreased, but that the duties of non-member States were being increased."[162] To what extent this was permissible was the key controversy.

155 SR.15, 113-114 para 1-21.
156 SR.15, 113 para 2. See also SR.15, 113 para 5 (Scelle) whose proposal also entailed this idea.
157 E.g. SR.15, 114, para 7 (Sandstrom); 9 (Hudson), para 14 (Koretsky), feared that this included the NATO, too.
158 SR.15, 113 para 5 (Scelle).
159 SR.15, 113-114 para 1, 4, 9 (Hudson); para 5 (Scelle); para 7 (Sandstrom); para 12-15 (Koretsky).
160 SR.15, 113-114 para 2 (Alfaro), 114 para 12 (Koretsky); para 16 (Scelle).
161 SR.15, 114-115 para 13 (Koretsky); para 17 (Hudson); para 23-24 (Hsu).
162 SR.15, 114 para 10, 20 (Hudson).

First, a duty to afford assistance to the UN was viewed as problematic and eventually omitted from the article. In the ILC's view, the Panamanian duty to provide assistance was dependent on action taken by the Security Council, and accordingly specific to the UN Charter. Non-members did not have a positive duty to provide assistance to the UN.[163] A more general duty "to come to the assistance to a victim of aggression," decoupled from the UN, was briefly mentioned, but doubts prevailed whether this had a basis in the UN Charter or general international law.[164]

The duty of non-assistance to a State against which the UN is taking preventive or enforcement action was confronted with similar concerns. In particular, the concerns States had voiced against the Panamanian draft resurfaced. It was argued, forcefully in particular by Hsu, that this obligation could not be applied to non-member States.[165] Not all agreed.[166] But after the first reading, this aspect was omitted from the article.[167] Instead, a general prohibition of assistance to unlawful use of force was included. The article read:

> "Every State has the duty to refrain from giving assistance to any State which has failed to perform the duty set forth in article 16 [Condemnation of War as an Instrument of National and International Policy and of the Threat or Use of Force]."

This formula had its origin in a compromise proposal tabled by Hsu, in direct reaction to his observation that the ILC "did not have the power to extend to non-member States a duty imposed on Members of the United Nations by the Charter".[168] He explained that

> "the principle that States should refrain from assisting a State engaged in acts of aggression was excellent. The Commission could lay it down in an article replacing article 19 to be inserted immediately after article 16."[169]

163 SR.15 113, 114 para 6 (Spiropoulos), para 8 (Brierly), para 9 (Hudson). But see Koretsky arguing for such a duty on the basis that all States could join the UN, SR.15 para 115 para 12, 13, 15, 27.
164 SR.15, 114 para 6 (Spiropoulos); para 8 (Brierly).
165 SR.15, 115-116, para 23, 30, 35 (Hsu). See also SR.15, 115, para 25 (Spiropoulos); 116 para 37 (Cordova).
166 SR.15, 115, para 26 (Sandstrom); para 27 (Koretsky); para 28, 29 (Hudson); 116 para 34 (Alfaro).
167 SR.15, 116 para 37.
168 SR.15, 115, para 23, 30.
169 SR.15, 115, para 24 (Hsu).

Roberto Córdova summarized the idea underlying the proposal:

> "Mr. Hsu's amendment was based on the principle that the duty of giving assistance to the United Nations could not be imposed upon non-member States. On the other hand, the duty to abstain from rendering assistance to aggressors could be imposed upon all States. Mr. Hsu's amendment was thus designated to preserve the substance of Mr. Alfaro's text, while respecting legal principles."[170]

An obligation of non-assistance of *general* nature was hence introduced. It was decoupled from the requirement of a universally recognized organization of the entire community of States",[171] i.e. UN system and the Security Council. And it was limited to the realm of unlawful use of force. For example, Hudson explained that "[t]he whole difference lay in the Security Council's establishing the facts."[172] Spiropoulos considered that the original version based on Article 2(5) alt 2 UNC

> "was narrower than that of Mr. Hsu. By merely saying that it was the duty of States to refrain from giving assistance to States against which the United Nations had taken preventive or enforcement action, cases in which the Security Council had taken no decision were omitted. In Mr. Hsu's formula, no State should render assistance to an aggressor State, even if the Security Council had not ordered any preventive or enforcement action against it. His proposal thus covered all acts of aggression and not only those which had been 'established' by the Security Council."[173]

Hsu's proposal was questioned neither in substance nor in its nature as general international law. Only Alfaro opposed the amendment "because it did not express the essential principle which should be laid down."[174] He thought Hsu's text "had only a purely negative significance" and was "not sufficient".[175]

It was only in the second reading that the Subcommittee reintroduced the obligation not to assist States "against which the United Nations is

170 SR.15, 116 para 37 (Cordova).
171 SR.15, 113 para 1 (Hudson) – this was what Article 19 presupposed.
172 SR.15, 115, para 32 (Hudson).
173 SR.15, 115, 116 para 33 (Spiropoulos).
174 SR.15, 115 para 31 (Alfaro).
175 SR.15, 115 para 31, 40 (Alfaro).

taking preventive or enforcement action." Bengal Rau explained this as follows:

> "the purpose of the proposed addition was to provide for a case in which State "A" came to the support of State "B" because it considered that State "B" was not acting in violation of article 8. If, on the contrary, the Security Council was of the opinion that State "B" was acting in violation of article 8 and took measures accordingly, State "A" was bound to discontinue its support to State "B".[176]

It appears that the addition was meant to protect the primacy of the Security Council and to counter the inherent risk that potentially diverging conclusions on the legality of the assisted action and the lack of a judge allow States to provide assistance nonetheless.[177] The right to provide assistance (even in a situation of collective self-defense) should be limited in case the Security Council takes enforcement measures. Notably, however, it again stopped short of a "positive duty of States to come to the assistance of the State victim of aggression" (or to assist the UN) that was necessary in Alfaro's view.[178]

Again, the addition sparked fierce opposition – not so much on substance, but with respect to the addition's nature as *general* international law applicable to non-UN-member States. Most prominently, Hsu argued against the addition. He stated that "a question of principle was involved":[179] "[t]he obligations of the Charter could not be imposed upon States which were not Members of the United Nations."[180] "The Security Council was a political organ responsible for taking measures in the interest of the community of States, and not necessarily for enforcing respect for international law. Non-member States could not be forced to accept the Security Council's judgment."[181] In addition, substantial concern was added that "although it might in fact be hoped that [the Security Council] would respect international law in all circumstances, it was by no means bound by the principles of international law."[182] This seems to be a warning about a scenario in which "UN member States, under the direction of the Security

176 SR.20, 144 para 21 (Rau).
177 Implying this SR.20, 144 para 22 (Cordova).
178 SR.15, 116 para 40 (Alfaro).
179 SR.20, 144 para 26 (Hsu)
180 SR.20, 144 para 24, 26 (Hsu). See for his previous arguments: SR.15 115, para 23.
181 SR.20, 144, para 30 (Hsu).
182 SR.20, 144 para 29 (Cordova).

Council, use force against a non-member State which has not violated the law".[183] The addition would prohibit assistance to the non-member State.

Others responded that "all the non-Member States except Switzerland, a neutral by tradition, and Franco Spain, had declared their readiness to respect the principles of the Charter. Hence the Sub-Committee's proposed addition would not seem to give rise to any practical difficulty."[184] Some recalled that "all peace-loving States could [and eventually will] become members of the Organization",[185] and that the Declaration "should be a perpetual instrument, and none of its provisions should bear the mark of temporary situations or conditions".[186] Moreover, Article 2(6) was viewed as basis according to which "the United Nations could impose certain obligations upon non-Member States."[187] Furthermore, in the context of the risk of accepting the primacy of the Security Council it was argued that the concerns "would be valid only if the Security Council decided to take steps in violation of international law. The Commission could not entertain such an assumption."[188] In fact, in their view, the Security Council was "bound to act in conformity with international law."[189] Eventually, the ILC adopted the addition proposed by the subcommittee.[190]

Some questions, however, remain. Most notably, it remains unclear why a duty of *non-assistance* in case of UN action was feasible, while a duty to *afford assistance* to the United Nations was not. It seems that similar arguments could have been applied.[191] This is all the more noteworthy as the duties were viewed to be closely connected to non-assistance. It was acknowledged that a duty to afford assistance to the UN would entail the duty to abstain from rendering assistance to the State targeted by enforcement action and to an aggressor State.[192]

183 Kelsen, *AJIL* (1950) 272.
184 SR.20, 144 para 25. See also SR.19 para 2 (Kerno) and 5 (Amado).
185 SR.15, 114, para 16 (Scelle); 115 para 27 (Koretsky).
186 SR.15, 113, para 2 (Alfaro).
187 SR.20, 144 para 28 (Alfaro).
188 SR.20, 144 para 27 (Brierly).
189 SR.20, 144 para 31 (Spiropoulos).
190 SR.20, 145, para 32.
191 See also Kelsen, *AJIL* (1950) 263 on Article 2(6) UNC.
192 SR.15, 116 para 36 (Hudson) pointing out that "if the first part was adopted, the second would be superfluous as any State which had fulfilled its duty to lend assistance to the United Nations would have accomplished *ipso facto* its duty to abstain from rendering assistance to an aggressor State."

> Only Hudson appeared to touch upon that question when he argued that
>
> non-members "could hardly be required to assist the Organization in any action it might take, but […] it was quite permissible to request them to refrain from assisting States against which the Organization was taking preventive or enforcement action for the maintenance of international peace and security."[193]

His observation suggests that a positive duty to afford assistance was perceived to have the broadest scope and far-reaching practical consequences. It appears that this broad scope prevented the ILC, but for Alfaro[194] and Vladimir Koretsky,[195] from agreeing on the obligation.

(3) The status of Article 10 of the Draft Declaration

The origin of the two prongs of Article 10 of the Draft Declaration and the debate among ILC members were also reflected in States' reaction to the provision. Like for the Panamanian Draft,[196] States were critical about whether the article codified international law. Belgium, for example, stated:

> "Although such a state of affairs would have been desirable, there was no such rule in international law. Consequently, to affirm that non-member States were under that obligation, which flowed from the Charter, would be to affirm that the Charter was binding upon them; that would amount to questioning their independence."[197]

Likewise, Israel stated that Article 10 "could be viewed rather as representing a certain "development" of international law." [198] Others again adopted the ILC's arguments to defend Article 10 in its present form.[199] Some

193 SR.15, 115 para 29 (Chairman).
194 SR.15, 116 para 40 (Alfaro).
195 SR.15, 114 para 15 (Koretsky).
196 A/CN.4/2, 92 (UK), 103 (Turkey).
197 A/C.6/170, 175 para 7 (Belgium).
198 A/C.6/170, 181 para 68 (Israel); A/C.6/176, 226 para 45 (Australia). See also France noting that Article 10 restated Article 2(5) in different wording, A/C.6/ 172, 196 para 2.
199 A/C.6/170, 177 para 22 (Brazil).

States observed the narrower scope of Article 10 of the Draft Declaration compared to the previous ambitious Panamanian draft.[200]

The legal status under general international law of Article 10 alt 2, was contested, at times vehemently, even though the conceptualization was familiar and well-accepted for the UN regime.[201]

In direct contrast, much like in the ILC debates, the general rule in Article 10 alt 1 did not spark opposition. States acquiesced. Even though it was the first time this rule was expressly put into words in a document with a claim to universal application, no State questioned its nature as general international law.

Most notably, thereby Article 10 alt 1 was also understood to reflect the (implicit content of the) UN Charter. Article 2(5) UNC was not viewed to exclude it. For instance, Ivan Kerno, the Assistant Secretary General, concluded Article 10 to have "specifically affirmed as a principle of general international law a principle already contained in the Charter."[202] In a similar manner one may understand France that held "[i]n articles 8, 9, 10 and 12 of the draft, certain principles set forth in Article 2, paragraphs 3, 4, and 5 and in Article 51, respectively, of the Charter were restated in different wording".[203]

Accordingly, Article 10 had a twofold origin: The ILC's starting point was an obligation of cooperation inspired by Article 2(5) UNC. The general rule may also be embodied in Article 2(5) UNC. But the norm's basis appears not to be Article 2(5) UNC exclusively. Rather, a reason for its wide acceptance was that it derived from States' (in the ILC's view, universal[204]) commitment to outlaw war and the use of force. The ILC[205] and States accepted the obligation contained in Article 10 alt 1 because it was limited

200 A/C.6/170, 178 para 33 (Panama) noting that "article 10 of the Commission's draft, which had been said to be derived from article 19 of the Panamanian draft, limited cooperation in the prevention of the use of force to abstaining from lending aid to a State which had resorted to force whereas the Panamanian draft provided that positive and collective action should be taken"; A/C.6/173, 202 para 9 (Cuba) wishing to amend the second part of Article 10 by adding a reference to "regional organs which also may be legally entitled to take measures against the aggressor."

201 A/1338/Add.1 (1950), 6 (Netherlands) proposing to delete the words. See also Kelsen, *AJIL* (1950) 271-272.

202 SR.19, 136, para 3 (Kerno).

203 A/C.172, 196 para 2.

204 This view is reflected in Article 9 of the Draft. During the debates the universal application of the rule to non-UN members was not questioned.

205 The purpose of "maintenance of international peace and security" was now stressed. E.g. SR.15, 114 para 9 (Hudson). See also Mr Hsu's proposal: SR.15, 115 para 24.

to States using unlawful force and did not extend to States against which enforcement action is taken, and thus was decoupled from the UN. Cordova's explanation showed this particularly clearly:

> "Mr. Hsu's amendment was based on the principle that the duty of giving *assistance to the United Nations* could not be imposed upon non-member States. On the other hand, the duty to abstain from rendering *assistance to aggressors* could be imposed upon all States."[206]

This origin is further stressed in the norm's systematic position: The ILC no longer placed Article 10 with norms regulating general cooperation among States. Instead, it arranged the provision systematically with the norms governing the use of force.[207] Last but not least, the ILC described Article 10 in its commentary as "corollary" of the principle of non-use of force.[208]

The rule, for the ILC hence, seemed to derive from a connection of the core ideas laid down in Articles 2(4) and 2(5) UNC. At the same time, the ILC's draft Declaration made clear that while the first part of Article 10 may derive from those rules together, they were distinct, and were themselves not generally prohibiting assistance.

First, assistance to unlawful use of force was not generally prohibited under Article 9 of the Draft Declaration, i.e., the general prohibition to use force. It was prohibited by a distinct prohibition – Article 10. The ILC and States thereby took a different position than Kelsen, who later commented:

> "[t]he first clause of [article 10] is covered by Article 9, and hence is redundant. If a state assists another state which is acting in violation of the law, it participates in an illegal action, and its duty to refrain from illegal actions is implied in the concept of international law."[209]

Rather it suggests that the prohibition of perpetration did not necessarily imply the prohibition of participation (although, as seen, it did not exclude the possibility that some form of assistance may be considered a "use of force").

Second, the general non-assistance obligation was a distinct prohibition from the obligation not to assist a State against which the UN is taking preventive or enforcement action. This again is suggested by the fact that

206 SR.15, 116 para 37 (Cordova), emphasis added.
207 SR.20, 145 para 35.
208 Commentary to Draft Declaration, ILCYB 1949, 289 para 48.
209 Kelsen, *AJIL* (1950) 271.

it has a separate textual basis. Also, it indicated the relationship between Article 2(5) UNC and a general non-assistance obligation: It was only a specific form of the general non-assistance obligation, "strengthening" and adjusting the obligation in and to the UN context.

(4) The scope of the prohibitions in Article 10 of the Draft Declaration

The obligation entailed in the second part of Article 10 "follows closely the language employed in the latter part of Article 2.5" UNC.[210] The ILC's Draft Declaration did not clarify the exact content of the rule, but for affirming the general obligation. The debates only clarified that a key objective of the provision was to ensure the Security Council's primacy, even in a case of assistance to a use of force that is claimed to be in accordance with international law. It thereby also reminded of the problem of *ultra vires* action by the Security Council in violation of international law.[211] This, however, is not a problem specific to assistance, but only yet another scenario in which an absolute primacy of the Council could be problematic.

With respect to the general non-assistance obligation stipulated in the first part of Article 10 however, the ILC's draft helps to determine the rule's scope – for the fact that it is the first time that the rule is laid down in express words. Still the fact that the ILC sought to enunciate principles rather than precise rules calls for reservation in this exercise that should not go beyond structural conclusions. The UK was most clear on this point. It explained why the Draft Declaration can be no more than a guide to progressive development:

> "Without some definition of the type of conditions which could be held to menace peace and order, practical application of the article would be difficult and even open to abuse. Article 10 afforded another illustration: did "refrain from giving assistance", as mentioned there, mean breaking off relations with the State concerned? The mere maintenance of relations with such a State could be regarded as giving assistance. The UK delegation was concerned that with such possible differences of interpretation or definition which would discourage Governments from accepting the declaration."[212]

210 ILCYB 1949, 288, commentary to Article 10.
211 Kelsen, *AJIL* (1950) 272.
212 A/C.6/172, 197 para 17 (Fitzmaurice speaking for the UK).

On that note, the following structural features are noteworthy. Article 10 suggests that the general prohibition of assistance is accessory and derivative in nature. It is accessory in the sense that a threat or use of force must take place. It is derivative in the sense that the prohibition depends on the illegality of the respective use of force. As a consequence of the latter, the assisting State hence may benefit from disagreement on the lawfulness of the assisted use of force among States – the loophole that the ILC attempted to close by re-introducing the second part of Article 10. Also, this requirement limits the norm's application to actors capable of violating international law, i.e., States rather than non-State actors.

No definitive conclusion can be drawn with respect to the question of whether only assistance is prohibited if the assisted use of force is *in progress*, or whether it also covers assistance provided in advance. The present progressive tense used in Article 10 ("is acting") points towards the former interpretation. So does the previous formula "which has failed to perform the duties set forth in article 8".[213] On the other hand, Hsu's insistence that the right to collective self-defense also entails assistance that was agreed to in advance, might indicate that even preparatory assistance was covered. In addition, some path dependency may explain rather limited scope. Not at least did the original draft concern enforcement action.

It remained also unsettled to what extent the Security Council's primacy applied here. The addition of the second part of Article 10 points in this direction.[214] Cordova, however, for example, was inclined to say that "the provision of Article 51 of the Charter *implied* that the measures taken by States should be discontinued when the Security Council took the necessary action to maintain or restore peace."[215] Cordova's statement was based on the assumption that the *right* to collective self-defense runs parallel with the *prohibition* of assistance. As he noted, this is, however, no more than an "implication", yet it requires further proof. In particular, it was not possible to conclusively read the primacy of the Security Council into the unlawfulness-criteria. It is true that the right of self-defense was only permitted *until* the Security Council had taken action. If the Security Council took action, the assisted use of force was hence arguably unlawful. This understanding was however not easily applied to non-UN member States

213 SR.20, 145 para 33.
214 See in particular SR.20, 144 para 21 (Rau).
215 SR.20, 144 para 23 (Cordova), emphasis added.

not recognizing the Security Council. This limitation was not recognized as general international law.[216]

Likewise, no further conclusions can be drawn going beyond the structural difference to a prohibited "intervention". Generally, Article 10 is not concerned with the perpetration of aggression, as prohibited under the general prohibition of war and the use of force; but it is the prohibition of *participation in* that aggression, to which Cordova has referred in his exchange with Rau.[217] In that respect, it is noteworthy that both Rau and Cordova appeared to allow measures of self-defense against a participating State. Again, this intermezzo did not lead to a discussion of the consequences of the prohibition of assistance – it thus remains no more than a side note.

In contrast to Article 2(5) UNC, the general prohibition of assistance was understood to be narrower as it was limited to unlawful use of force. Article 2(5) UNC was not interpreted to require a breach of international law. It also did not need to relate to the use of force. And it did not require that the assisted State had already taken action. On the other hand, the general prohibition of assistance was broader. UN enforcement action was not a necessary element of the norm. It was to be triggered even without the Security Council establishing the facts, and without taking measures accordingly.[218] In this respect, it is interesting to draw a parallel to Scelle's explanations on the principle of non-recognition of territorial acquisitions by force. Scelle found that

> "if there was a supranational organization, able to act as a police force in cases of aggression and to enforce the restitution of acquisitions obtained by the use of force, it would be unnecessary to proclaim the principle [of non-recognition]. Unfortunately, however, it must be admitted that the United Nations lacked the necessary force to ensure respect for the law. It must be hoped that a world super government would be established one day, for that was the only possible solution; in the meantime principles such as that of the non-recognition of territorial acquisitions obtained by force must be maintained, since respect for them was one of the substitutes for defence at the disposal of States."[219]

216 See Article 12 of the Draft Declaration. But, in light of the now achieved universality of the UN, this seems a mainly theoretical problem. There seems to be no reason not to read the primacy of the UNSC into the unlawfulness criteria.
217 See above note 119. SR.12, 93 para 39
218 SR.15, 115 para 32 (Hudson); para 33 (Spiropoulos); SR.20, 144 para 21 (Rau).
219 SR.14, 112, para 123.

Although this thought was not mentioned with respect to non-assistance, it explained the first part of Article 10 well: it made up for the limitedness of the UN regime – at that time the UN's non-universal membership. At the same time, it also showed that the rule of non-assistance existed independently from Security Council action.

### e) The relevance of the Draft Declaration for assistance

Pursuant to the ILC's Draft Declaration, under general international law applicable to *all* States, there were three distinct normative responses to assistance at the time of drafting in 1949: First, the concept of 'intervention' may cover the provision of assistance. Second, assistance may be proscribed as participation in unlawful use of force. Third, in case the Security Council has taken action, States need to refrain from assistance with respect to that State.[220]

The Draft Declaration was not, and was never meant to be, a definitive and conclusive statement of the regulatory regime of interstate assistance. As the UK has pointed out in unsparing detail for Article 10, the precise scope of the rules was all but clear. This cannot be surprising. The Draft Declaration was drafted in a period of transition where the prohibition to use force itself was only about to gain universal acceptance.

Still, the Draft Declaration, on the level of principle, highlighted and delimited the relevant regulatory avenues. It thus contributed to and guided States in the development and clarification of the regulatory regime on assistance, under general international law as well as the UN Charter.

The Draft Declaration may not have been the prominent guide that many States at that time thought it would be. Yet, with respect to the regulatory regime on assistance, States did not forget the Draft Declaration. As will be seen, sporadically but consistently it resurfaced in debates. Structurally for the regime of non-assistance, the Draft Declaration's approach to interstate assistance was timeless, having identified (almost) all relevant normative approaches to assistance. In any event, it has thus shaped subtly and subliminally the general legal framework as well as the principles themselves governing assistance.

220 A fourth approach, UN sanctions, was not universal and hence did not find consideration.

This is in particular true for the general prohibition of assistance stipulated in Article 10. Now that the UN enjoys quasi-universal membership, it might be seen as a relic of past times, not at least as it was introduced in light of difficulties applying the UN regime to non-members.

But first, this does not change its legal relevance in clarifying the very existence of the norm. The reactions show that the norm was not revolutionary, but an accepted rule of general international law, also implicit in the UN Charter. Second, if understood more generally as reaction to a deficiency of the UN regulatory regime on assistance that prevented its (universal) application, the approach may still be timely and relevant. Even though the relationship of the UN to non-members is no more than a theoretical problem now, the inherent limitation of the UN system remains, with the Security Council at the center that limits the application of the UN regime on assistance.

Likewise, the Draft Declaration suggests that regulatory avenues such as the concept of "intervention" may be open to govern assistance – an avenue that was pursued by States in the following, in particular for non-State actors, not least in light of the accessory nature identified for the general rules of non-assistance.

Beyond these avenues accepted as general international law, the ILC extended (only) the non-assistance obligation Article 2(5) UNC to all States. While this was controversial at that time, it only featured the UN's claim for universality. Notably in substance, the rule was not questioned.

The Draft Declaration in its comprehensiveness (but corresponding vagueness) was the first and sole statement of that kind for a long time. Still, in retrospect, the Draft Declaration laid out the most important principles that subsequent practice filled in a piecemeal approach. The ILC invited States to determine the extent and the modalities of these general principles of international law by more precise rules. As will be seen, States followed the invitation.

### 2) The Friendly Relations Declaration (1970)

In 1970, States concluded a drafting process initiated under the umbrella of the UNGA in fulfillment of its task to codify and progressively develop in-

ternational law.[221] The celebrated outcome, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations [Friendly Relations Declaration], was a resolution aiming to further "strengthen and elucidate"[222] seven principles set out in the Charter that were identified as central to the realization of the purposes of the United Nations Charter. By now, the Declaration has been accepted in the here relevant parts as customary international law, and authoritative interpretation of the UN Charter.[223]

Despite its ambitious and fundamental program, the Friendly Relations Declaration remains silent on interstate assistance – a striking contrast to other comparable "abstract" declarations. The Declaration only refers to the support of non-State actors, such as armed bands and irregular forces.[224] As the following section seeks to show, this silence has been also characteristic for the nine-year drafting process. In the debates on 'the *principle* that States shall refrain in their international relations from the threat and use of force',[225] States neglected the topic of *interstate* assistance.

But it is submitted that the Friendly Relations Declaration does not serve as evidence that interstate assistance is unregulated. Nor is it without relevance for the legal regime governing interstate assistance. Accordingly, while the Declaration does not affirm the existence of an independent general prohibition of assistance, it does not exclude it either (a, b). Instead, the Friendly Relations Declaration demonstrates that the prohibition to use force may cover certain acts of assistance. The debate on support to non-State actors allows general insights into the conception of the prohibition to use force that may apply to interstate assistance, too (c).

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221 See also A/RES/2625 XXV (24 October 1970), preamble para 1, Annex preamble para 16.

222 A/5746 (1964), 15 para 18. States were cautious to spell out only the meaning of Article 2 UNC, and distinguish between *lex lata* and *lex ferenda*, 17-18 para 23.

223 *Nicaragua*, 99 para 188, 101 para 191; Helen Keller, 'Friendly Relations Declaration (1970)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2009) para 3, 36-42. See in detail Jorge E Viñuales, *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (2020).

224 A/RES/2625 principle 1 para 8 and 9.

225 This was the official title under which States' discussion ran in the Committee and the mandate of the Committees to work on A/RES/1815 (XVII) (18 December 1962), para 1 a, emphasis added. See also Friendly Relations Declaration, Annex, preamble para 16.

Moreover, the Friendly Relations Declaration illustrates that assistance to actions involving threat or use of force, if it does not amount to a "use of force", is captured by the principle of non-intervention (d). In contrast, there has been reluctance to consider assistance as threat of force (e).

a) Assistance in the framework of discussions

When initiating the Declaration, States brainstormed issues to discuss and to eventually include in a declaration. At this stage, several States expressly proposed to deal with interstate assistance as well –only to then be silent on the issue for the remainder of the nine-year debate.

Czechoslovakia submitted a proposal of a declaration to the Sixth Committee, addressing *i.a.* the "principle of prohibition of threat or use of force" and "the principle of collective security". To specify the former, Czechoslovakia proposed the following formulation:

> "[…] In conformity with the generally recognized rules of international law, and the Charter of the United Nations in particular, the threat or use of force against territorial integrity or political independence of any State, as well as *plotting, preparing or unleashing an aggressive war,* shall be prohibited."

On the latter, Czechoslovakia proposed to add the following paragraphs:

> "Peace is indivisible. States shall strive to unite their efforts in conformity with the United Nations Charter with the purpose of maintaining international peace and security. An armed attack against any State affects the interest of all others."
> "*All States shall have the obligation to refrain from giving any assistance to the aggressor* and in accordance with the provision of the Charter shall participate in collective measures aimed at the removal of any breach of peace." [226]

This proposal is interesting in two respects. First, Czechoslovakia seemed to have a broad understanding of "threat and use of force", including not only the direct use, but also prior stages leading up to an "aggressive war". It distinguished this from the second remarkable aspect: it recognized a prohibition of assistance to aggressors. This obligation was on the one hand

226 A/C.6/L.505, taken from A/AC.119/L.1 (24 June 1964), 9 para 6.

self-standing and independent from UN action, but on the other hand, as "consequence" of a violation, it was closely connected to collective action.

Mexico's approach appeared narrower than the Czechoslovakian proposal. Mexico concluded that a "comparative analysis of principles concerning international law" allowed to deduce agreement on:

> "The obligation to refrain from assisting a State against which the United Nations had taken preventive or enforcement measures (Article 2, para. 5 of the Charter, article 10 of the Commission's draft)."[227]

While Mexico repeated the narrow Article 2(5) UNC requiring non-assistance in case of UN action, its citation to Article 10 Draft Declaration on Rights and Duties of States, in view of the above, seemed to allow for a more comprehensive prohibition.

Guatemala conceptualized the obligation independent of any considerations of the lawfulness of the assisted act, or of the consequences of unlawful conduct or collective security, but rather as a self-standing obligation. It

> "hoped that there might be added to the declaration [...] the obligation not to support or direct *international parties* or groups, either directly or indirectly and the banning of their use for purposes of intervention in the internal politics of other countries [...]."[228]

The USSR stated in the Sixth Committee in 1963:

> "Under the United Nations Charter, *it was the duty of States not to give assistance to aggressors* and to participate in collective measures for the maintenance of international peace and security. In an interdependent world in which aggression against one State might lead to a world war, all States had an obligation to take steps to avoid a threat to international peace."[229]

The Soviet interpretation of the Charter was notable as it drew a connection to the high risk of escalation associated with interstate assistance. This rationale might have indicated a broad and comprehensive understanding of the prohibition. At the same time, it could also have a limiting effect, setting the bar high for assistance to be prohibited. In any event, the statement suggests that for the USSR the prohibition was an independent obligation

227 A/C.6/SR.758 (13 November 1962) para 32.
228 A/C.6/SR.756 (9 November 1962) para 35, emphasis added.
229 A/C.6/SR.802 (29 October 1963), 110-111, para 26.

as part of the "principle of non-aggression" under the UN Charter, distinct from, although still closely connected to, obligations under the collective security regime.[230]

Last but not least, the UN Secretary General prepared a "systematic summary of comments, statements, proposals and suggestions of member states" to assist the first Special Committee put in place in 1964. Therein, he dedicated a sub-section on the "principle of non-use of force" to interstate assistance. He referred to the Mexican and the Soviet statement. Notably, the Secretary General allowed himself a slight, but not unimportant interpretative room. In his systematization, he omitted any reference to collective security, thereby understanding the statements in a broad(er) manner to refer to a general and separate "prohibition of assistance to States resorting illegally force."[231] At the same time, he constructed the prohibition accessory also with respect to the illegality of the assisted act.

### b) Assistance and the negotiations

These statements and proposals neither met a direct response (affirmative or disapproving) with States during the debates, nor did they find their way into the final declaration. Interstate assistance was not discussed, but for the related case of non-recognition of territorial acquisitions resulting from the threat or use of force. This is all the more striking as the Friendly Relations Declaration from the outset and in retrospect was meant and endeavored, as the Kenyan delegate put it, "to give flesh and blood" to the main principle of the threat and use of force.[232]

The omission of a specific rule on interstate assistance from the declaration may not be understood to exclude the existence of such a rule, however. From the outset, States agreed that the declaration was not to be exhaustive. States were well aware that drafting the Friendly Relations Declaration was a complex task, which required compromise. In view of the fact that the final stretch of the negotiations was undertaken under time

230 Ibid 110-111, para 25-26.

231 A/AC.119/L.1 (24 June 1964) 39-40 para 94-95.

232 A/AC.125/SR.22 (25 July 1966), 4; see also India who considered it to be "more than a mere reiteration of the provisions of the Charter", as it seeks to "take account of the evolution that had occurred in international law during the past twenty years both in the practice of States […] and of the provisions of various bilateral treaties and certain declarations." A/AC.119/SR.3 (31 August 1964), 8.

pressure to finish by the UN's 25th anniversary, States affirmed the incompleteness of the declaration.[233] States widely noted that the Declaration did not include many issues that not only did not meet with disagreement but even might have found consensus.[234] In particular, States emphasized that the mere fact that a provision was missing, did not mean that the rule did not exist. For example, most to the point, Italy stressed that

> "any principle of general international law and/or of Charter law not embodied in the declaration was not, as a consequence, any less part of international law. More precisely, it was no less fundamental than the principles actually embodied in the declaration. In other words, even if something was overlooked by the Commission in drafting the declaration, it was still alive." "That understanding […] not only applied to the whole formulation of each of the principles, but also within each principle to any subparagraphs of the formulation. It applied in particular to the elements missing from the formulation of the prohibition on the threat or use of force and of the principle of peaceful settlement."[235]

In that light, it is interesting to see the topic of interstate assistance resurfacing only at dusk of the nine-year debate marked by silence on that matter. Most expressly, Belgium held that the Friendly Relations Declaration, "like article 10 of the draft Declaration on Rights and Duties of States, could have stipulated that every State had the duty to refrain from giving assistance to any State which was guilty of unlawful use of force, or against which the United Nations was taking preventive or enforcement action."[236]

Unfortunately, the records are silent on the reasons *why* States did not consider interstate assistance specifically. Besides the pragmatic reason of limited capacities, the debates also give the impression that States rated other issues more pressing. Reappearing concerns with respect to the use of force were the danger of nuclear weapons, subversive activities, (military) assistance and decolonization, or territorial questions (acquisition and international demarcation lines). In view of the political situation in the era of cold war interstate assistance was not on the top of States' agenda. In light

233 See UNGA debates, and Sixth Committee [C.6] debates in 1970.

234 For example, the Group of African States: A/PV.1860 para 59: "Many elements have unfortunately been omitted from the draft, despite the fact that there was no disagreement about them, from the point of view either of substance or of their juridical validity."

235 A/AC.125/SR.114 (1 May 1970), 46.

236 A/C.6/1182 para 67.

of the predominant position of the two antagonists, the clear alignment of the world in two camps, and (mostly) partisan adherence to the camp strategy in combination with the still weak and dependent third world States just in the verge of enjoying their independence,[237] rules treating interstate assistance was not at the center of interest. Quite the contrary, strict and elaborate rules, or even a transparent discussion on interstate assistance might have been seen to impede military potential. In this respect, discussions about and rules on interstate assistance might have met similar reluctance of States to agree as rules on absolute disarmament.[238]

A brief interlude between the USSR and the USA in the 1967-debate points in a similar direction. The six-day war in 1967 was not without impact on the debates on the Friendly Relations Declaration,[239] and would have given sufficient reason to States to address interstate assistance. In fact, the six-day war had prompted in particular Arab States to protest against Anglo-American support to, incitement and encouragement of Israel.[240] The USSR then brought the topic of inter-state assistance to the negotiating table. It attempted to translate the protest voiced in the Security Council to a prohibition of such "assistance" within the context of the Friendly Relations Declaration:

> "incitement to aggression by others must be condemned as demonstrated by recent events in the Middle East. It was imperative to devise a principle concerning responsibility for such incitement since States were taking advantage of its absence."[241]

And still, this did not spark a legal discussion on interstate assistance. The US responded merely on the basis of facts. It did not reject but ignored the legal claims.[242] Other States likewise did not pick up the recent events to

237 Illustrative are the debates about the right to remove foreign troops and military bases. See on this Venkateshwara Subramaniam Mani, *Basic Principles of Modern International Law. A Study of the United Nations Debates on the Principles of International Law concerning Friendly Relations and Co-operation among States* (1993) 148-149.

238 See the result in the Friendly Relations Declaration which was far from what some States were calling for in light of nuclear danger: A/RES/2625, I para 11: "All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective control […]."

239 See e.g. the references to the war in A/AC.125/SR.64-66.

240 S/PV.1348, para 110 (Iraq), para 210 (Syria).

241 A/AC.125/SR.65, 11.

242 Ibid 15.

engage in a discussion of legal principle. Rather they preferred to remain within the realm of the pre-agreed agenda. This is further supported by a general discussion regarding the degree to which legal principles should factor in recent events. Some States argued that the "realities of life" must be taken into account,[243] and that the discussions should not take place within an "ivory tower".[244] Others sought to "de-politicize" the discussions, and hence exclude discussions of specific instances.

Accordingly, the silence on interstate assistance appears to have been driven more by politics rather than by legal considerations.

c) Assistance and the prohibition to use force

Despite the sparse direct reference to interstate assistance, the Friendly Relations Declaration nonetheless allows some conclusions on interstate assistance. Most notably, the declaration generally suggests that assistance, under specific circumstances, may constitute a 'use' of force (1) as opposed to than 'force' itself (2).

(1) The debate on assistance to non-State actors

It is of course true that the Friendly Relations Declaration does not say so with respect to interstate assistance. Paragraphs 8 and 9 of the Declaration, both fleshing out the principle of non-use of force, hold that

> "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State."
> "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

Those two sub-rules address support typically provided to *non-State actors*, in the Declaration's terminology: "irregular forces or armed bands including mercenaries" or "acts of civil strife or terrorist acts."

243 E.g. A/AC.125/SR.64, 6 (Algeria).
244 E.g. A/AC.125/SR.65, 9 (USSR).

But the discussions show that with respect to States providing assistance to other actors using force, the Friendly Relations Declaration was a preliminary universal culmination of a trend in State practice that can be traced at least back to the inception of the prohibition of the use of force.[245] As such, the declaration also reveals States' general understanding of the conception of the prohibition to use force in relation to assistance (c) that is not necessarily limited to non-State actors only (b).

(a) Application to States?

States neither defined "irregular forces or armed bands" nor specified who they viewed to be responsible for "acts of civil strife or terrorist acts". The terms "irregular forces" and "armed bands" are used in context and delineation from the typical scenario of States using force: via their own regular naval, military, or air forces.[246] Accordingly, the terminology refers to military groups that are not part of a regular army organization, and are not under control of the State.[247] Technically, this could also embrace armed forces of other States.

And yet, those terms are not those typically used to describe the military forces of a foreign State. They are more commonly used to refer to non-State actors. Similarly, although it is not specified in whose "acts of civil strife or terrorist acts" a State is participating, these acts are typically carried out by non-State actors, not foreign States.[248] States were primarily occupied with these scenarios of assistance to non-State actor violence. In the debates States referred to incidents of State support for non-State actors, such as in Congo[249] or Southeast Asia.[250]

The reference to "irregular forces" and "armed bands" reflects the agreed understanding that not every individual who joins a fight against a foreign

245 Recall Chapter 2.
246 See e.g. the proposals of UK, A/AC.119/L.8, para 2 reprinted in A/5746 (1964) para 29, or of Ghana, India, Yugoslavia, A/AC.119/L.15 para 2 reprinted in A/5746 para 31.
247 See on the factor "control" UK: A/AC.119/L.8, Commentary para 2, reprinted in A/5746 (1964) para 29.
248 Then they would be called foreign intervention rather than "acts of civil strife". "Terrorist act" is however more neutral. And time and again, States accuse each other of "terrorist acts". See e.g. Israel alleging that Iran is engaged in terrorist acts when attempting to launch "killer drones". S/2019/688 (27 August 2019).
249 E.g. A/AC.119/SR.16, 11 (UK); A/AC.125/SR.71, 5 (Czechoslovakia).
250 E.g. A/8018 (1970) para 201.

State or government and whom a State has failed to prevent from joining is considered a violation of Article 2(4) UNC. States debated whether the "isolated participation of insular volunteers" amounted to a violation. Notably, with reference to the law of neutrality, in particular the US and the USSR stressed that individuals joining was in accordance with international law.[251] Only a "dispatch of volunteers" on a large scale might amount to a violation.[252] It may be against this background that the reference to "volunteers" was omitted in the final declaration.[253]

What is more, it is notable that States, unlike in other discussions and practice,[254] generally refrained from drawing parallels to assistance to States. The exception was Guatemala which expressed the hope "that there might be added to the declaration [...] the obligation not to support or direct *international parties* or groups, either directly or indirectly, and the banning of their use for purposes of intervention in the internal politics of other countries [...]."[255]

While the Guatemalan statement was the only one arguably also extending the obligation to *States*, it is interesting to note that States were also careful not to commit themselves to a position that was too stringent and limited when agreeing on "irregular forces". Ultimately, the declaration was accepted only on the understanding that "the term 'irregular forces' includes other similar forces not expressly mentioned in said point."[256] In the debates, Canada described them as "forces similar in type" to those mentioned.[257] France referred to "all categories of irregular forces irrespective of their composition, and no circumstances could limit the scope of it's

251 A/AC.119/SR.14, 9 (USSR); A/AC.119/SR.3, 12-13 (USA).

252 A/AC.119/SR.3, 12-13. See also Argentina which also only referred to "irregular forces or armed bands leaving a State to operate in another State", A/AC.119/SR.3, 11. See also UK, A/AC.119/SR.16, 11, and Australia, A/AC.119/SR.17, 11, stating that States could not organize volunteer forces and send them to another State, and that the law has changed since the 19th century. The UK in its statement even expressly stated that its proposal "spoke only of the use by a Government of irregular or volunteer *forces*." Thereby, they seem to acknowledge that isolated participation by insular volunteers is not covered.

253 It had been accepted in the 1964 consensus A/5746 (1964), 51 para 2(b).

254 See below II.A.3 and II.B.

255 A/C.6/SR.756 para 35, emphasis added.

256 A/8018 (1970) para 86. See also comments by France (para 147), Canada (para 171), India (para 214), New Zealand A/C.6/1181 para 7. For an earlier but similar comment see Italy A/AC.125/SR.89, 82 (irregular forces, armed bands *and the like*), emphasis added.

257 A/8018 (1970) para 171.

application."[258] This still suggests that for the specific rules, States were mostly concerned with non-State actors. It however also indicates that States were aware that the problem of "indirect use of force" was not limit exclusively to those non-State actors mentioned and scenarios discussed. It points more towards a principled understanding: States seemed to generally establish that the prohibition to use force does not only involve direct use of force by forces under the government's control, but that it may also extend to indirect use of force.

In fact, States consulted this very idea to justify the inclusion of the two paragraphs.

The UK provided the most elaborate reasoning. Introducing its draft proposal to the Special Committee of 1964, it drew a line between "irregular or volunteer forces" under Government control and "the case where the threat and use of force results from the connivance and collusion by the authorities of a State".[259] It then continued that for the latter, "the principle imputing responsibility [for a violation of Article 2(4) UNC] to any State which organizes or encourages such activities is clearly established, although, in particular cases, it may not always be easy to determine the true facts of the situation."[260] The UK later explained, in response to the USSR's critique that "international law considered the participation of volunteers lawful" that "the point was that a Government or a state was not permitted to evade the prohibition of the threat or use of force by the transparent device of organizing irregular or volunteer forces to participate in armed ventures outside its own territory and with that point he was sure the USSR representative would agree."[261] Notably, the UK stressed the *principled* approach it was taking to that problem of assistance to non-State actors; it viewed the question of the exact circumstances as only secondary.

The Canadian representative argued in a similar manner. He held that it would be "unreasonable to condemn [...] direct and overt force while not making an attempt to outlaw subversion, infiltration by trained guerrillas, and the supply of arms to insurrectionary forces, practices which were the cause of dangerous tension in many parts of the world."[262]

258 Ibid para 147.

259 Note that the passive construction, focusing on the result (threat and use of force) rather than the responsible actor.

260 A/5746 (1964) para 29 Commentary para 3 and 4.

261 A/AC.119/SR.16, 11.

262 A/AC.119/SR.6, 9. See also: A/C.6/SR.878, 223 para 15 (Malaysia): "That was a situation which must be faced firmly, or else States which were enemies of peace

Various States likewise identified the fact that States increasingly resorted to those forms of "indirect" use of force as a recent development that had not been sufficiently addressed in San Francisco. They argued that the prohibition to use force would not serve its purpose if it did not cover this recent tendency.[263]

But not all States immediately and unequivocally agreed that (any form of) assistance fell under the prohibition to use force. Initially, primarily Western and American States were soliciting for the extension of such a rule.[264] In particular, States were concerned that the recognition of these rules would impede the possibility to provide military support to peoples fighting for self-determination.[265] Also, the potential connection with a right to self-defense prompted critique, in particular without an appropriate system of verification.[266] These concerns related however to the implementation, the design, and application for the specific case, and the consequences, not the principle as such. In fact, all States agreed that not only the classic view of interstate attacks by direct use of force committed by forces under the control of the State were covered by Article 2(4) UNC. States from all political and ideological spectrums agreed that *indirect* use

would be able to continue to commit what amounted in fact to an aggression, without incurring the consequences of their acts."

263 See for such claims A/AC.125/SR.86, 39 (Nigeria), A/AC.125/SR.63, 3 (India); C.6/SR.820 para 24 (Cuba). See also A/6799 (1967) para 48. Arguing that the prohibition would otherwise not serve its purpose: A/AC.119/SR.3, 11 (Argentina); A/AC.125/SR.25, 18-19 (UK); A/AC.119/SR.3, 13 (USA). Referring to it as most common form: A/C.6/SR.808, 147 (USA); A/C.6/SR.878, 223 para 15 (Malaysia), Venezuela A/AC.119/SR.32, 16, A/AC.119/SR.30, 12 (Mexico); A/AC.125/SR.25 para 44, 46 (UK); A/8018 (1970) para 201 (Australia).

264 The proposals which included this principle were: A/AC.119/L.8 para 3 and 4 (UK, 1964); A/AC.125/L.22 para 2(b) and (c) (Australia, Canada, UK and USA, 1966); A/AC.125/L.44, para 2(b) and (c) (UK); A/AC.125/L.49/Rev.1, para 2(b) and (c) (Argentina, Chile, Guatemala, Mexico, Venezuela). Moreover, it is interesting to see that after the (not adopted) consensus draft in 1964, the Czechoslovakian draft submitted in 1966 omitted reference to indirect force again. This led to surprised reaction in the debates, A/AC.125/SR.18-26, (e.g. USA SR.26 para 8). See also the USA noting the "growing support", A/AC.125/SR.84, 20.

265 Mani, *Basic Principles*, 22, 33. A/AC.125/SR.25 para 24 (United Arab Republic); A/8018 (1970), 106 (Syria); A/8018, 101, A/AC.125/SR.65, 17 (Kenya); A/AC.119/SR.14 para 11 (USSR).

266 See Mexico which felt urged to stress that indirect use of force would not constitute an armed attack. A/AC.125/SR.66, 6; see also Latin American States (Argentina, Chile, Guatemala, Mexico, Venezuela) in the 1967-proposal, A/AC.125/L.49/Rev.1 para 2(b); United Arab Republic, A/AC.125/SR.25 para 23, A/8018 (1970), 117.

of force is at least as dangerous as direct force, and that it should be prohibited henceforth. Even those States initially reluctant stressed the danger of the recent trend in international practice of "indirect aggression/indirect use of force."

In brief, the rules under the Friendly Relations Declaration apply only to non-State actors. But they are reflective of a more general problem, not excluding a similar application to structurally similar actors, including States, also.[267]

### (b) Structural elements of the prohibition of indirect use of force

On this understanding that force can be used not only through one's own forces,[268] States addressed the necessary forms of involvement in assisted actors' activities. Obviously, the discussions and the final declaration were concerned with the specific situation of non-State actor violence only. The specifics in this respect are not of interest here. Instead, the debates are enlightening as they reveal three aspects of the general conception of "indirect use of force" that claim validity irrespective of through which actor the State is 'using force'.[269]

First, the Friendly Relations Declarations identified as necessary and most basic condition that there is an (assisted) act directed against a targeted State. Mere assistance on its own without action may neither amount to a "use of force" nor to an act of "intervention".

The wording of paragraph 8 may leave room for argument that the assisted acts need not necessarily in fact take place, as they refer to a "duty to refrain from organizing […] armed bands, *for* incursion." States acted however on the assumption that the assisted act must occur. Accordingly, paragraph 9 requires that the "acts […] *involve* a threat or use of force." The

267 See also Olivier Corten, 'La complicité dans le droit de la responsabilité internationale: un concept inutile?', 58 *AFDI* (2012) 62 who however does not separate between indirect use of force and participation.

268 This indicates also the common reference that any intervention is prohibited whether "direct or indirect". See e.g. A/C.6/809 para 7 (Indonesia); A/C.6/812 para 10 (Syria); A/C.6/SR.815 para 33 (Ghana).

269 This in particular so as States took a principled approach towards that matter. States stressed the importance and clarification of the principle as such. See for example Argentina which "considered it essential for indirect methods of force to be included in the concept of force." A/AC.125/SR.26 para 18; A/AC.125/SR.86, 35 (USSR); A/C.6/1180 para 22 (USA); A/C.6/1183 para 25 (Thailand).

discussions on the definition of an intervention, that was considered the *lex generalis* to the prohibition to use force, also convey this understanding.[270] The inevitable fact that States' actions affected other States was not prohibited.[271] The principle of non-intervention did not prohibit the exercise of a State's fundamental freedom of choice in essential matters.[272] Instead, "any interference or pressure" should be prohibited.[273] But crucially, States agreed that this presupposed that the act was "*directed towards* producing a desired effect on another State".[274] Mere bilateral conduct, like assistance, was not considered to be covered.[275]

When a conduct is directed against another State again always depends on the specific circumstances. A certain conduct cannot be generally excluded, as Mexico illustrated: A ban on imports of a certain product as it is dangerous to public health is as a matter of principle no intervention. If, however, the ban is applied discriminatorily against one State from the same ecological zone, it may be considered an intervention.[276] In this light, in order to qualify as use of force, there must be an assisted action directed against the target State or other specific circumstances.

At the same time, States made clear that the violating act was the provision of assistance itself. States did not necessarily seek to establish the responsibility of the assisted (private) actors through this concept.[277]

Second, the assisted act must "involve a threat or use of force". This prerequisite was included already in the first draft text formulating con-

270 See for example A/5746 (1964) para 205 (UK), para 207 (USA), para 221; A/AC.119/SR.30, 7 (Mexico); A/6230 (1966) para 302. See also A/8018 (1970) para 201 and A/C.6/1178 para 37 (Australia); A/C.6/1179 (Finland) who stressed the importance of the clarification as a principle, but was not so much concerned with the specificities of the forms.

271 A/C.6/SR.825 para 8 et seq (USA); A/AC.119/L.8 Commentary, para 3 (UK); A/AC.119/SR.30, 8 (Mexico).

272 A/AC.119/SR.30, 14-15 (Netherlands). See also Mani, *Basic Principles*, 61-62.

273 Ibid 75 quoting the proposals.

274 Ibid 67. There was a variety of opinions how this "direction against someone" was to be determined. See e.g. France: "abnormal or improper pressure exercised by one State on another State in order to force it"; Thailand: "all activities – even those not involving armed force – which were calculated to impair the authority of the legal government of another State." A/C.1/SR.1398, 265; Ghana: "dictatorial exercise of influence", A/AC.119/SR.29, 6.

275 A/6799 (1967) para 353.

276 A/C.6/SR.886, 278; Mani, *Basic Principles*, 76.

277 A/AC.119/SR.29, 6 (Ghana). See also A/AC.125/SR.26 para 31 (Australia); indirectly A/AC.125/SR.25 para 44 (UK).

sensus,[278] and was retained in the final version.[279] Accordingly, all examples that were viewed to fall under the principle of non-use of force included activities involving the use of force, i.e. the activity would amount to a use of force if committed by the assisting State itself.

States considered the prerequisite key to delineate conduct falling under the prohibition to use force from conduct covered by the prohibition of intervention.[280] This requirement explains itself against the background of the protracted debate on the meaning of force. A central point of contention throughout the debates was the scope and meaning of "force". Some understood "force" to only embrace "armed force". Others interpreted it in a broader manner to include other forms, such as economic force, too.[281] Despite elaborate and extensive arguments, neither interpretation found approval among all States. Yet, as a compromise, there was (at least in principle) agreement that the principle of non-intervention may also cover forms of coercion not involving (armed) force. States agreed that the principle of non-intervention was broader as it covers coercion even if not amounting to force.[282] Views initially advanced that intervention equals the use of force did not prevail.[283] Accordingly, the principle of non-interven-

278 A/5746 (1964), 51. The draft consensus text was not adopted as the US rejected it. Later, the US however accepted the text, A/6230 (1966) para 47. See on the discussions of the status of this paper: A/6230 para 45-52.

279 A/RES/2625 Principle I, para 9, but not para 8.

280 See the for example the 1968 Drafting Committee's Report A/7326 (1968) para 111, 40-41, where some States agreed to the inclusion only if this factor was explicitly added. See also A/7619 (1969), 39 para 117. See also for proposals submitted and statements on that matter: A/6230 (1966) para 27 (UK et al proposal); A/6230 para 29 (Netherland and Italy proposal); A/6799 (1967) para 48 and 61; A/7326 (1968) para 47, and drafting committee during that debate; A/7326 para 116 (Mexico); A/C.6/SR.878, 223 para 15 (Malaysia); A/AC.125/SR.66, 19 (Argentina); A/AC.125/SR.71, 6 (Czechoslovakia).

281 For a summary of the debates see A/5746 (1964) para 47-63, A/6230 (1966), para 65-76.

282 See for this rationale also A/5746 (1964) para 251; A/AC.119/SR.30, 7 (Mexico), A/AC.125/SR.26 para 36 (Yugoslavia); A/AC.125/SR.26 para 53 (Netherlands); A/AC.125/SR.86, 43 (Sweden); A/AC.125/SR.64, 6-7 (UK); A/AC.125/SR.66, 15-16 (Canada). Everything involving force should be covered by the prohibition to use force, see Australia A/AC.119/SR.32, 12-13, Czechoslovakia A/AC.119/SR.32, 29; A/6230 (1966) para 302-303.

283 See the US which argued initially for a narrow interpretation of a principle of non-intervention, not going beyond Article 2(4) UNC itself. A/5746 (1964), 142 para 219: A/AC.119/SR.29, 8-12, A/AC.119/SR.32, 25-27. See also A/6230 (1966) para 302-303.

tion covers both, forcible and non-forcible action. The prohibition to use force covers only "force" – whatever this meant.

In this light, it is interesting to see that with respect to assistance to non-State actors, there was some controversy about whether to include this in the prohibition of the use of force *or* the principle of non-intervention.[284] Eventually, States agreed that both, the principle of non-intervention *and* the prohibition to use force, embraced assistance to non-State actors engaged in subversive acts.[285] And eventually, States agreed that to fall under the prohibition to use force, the assisted act must involve the threat or use of force. Thereby, States made clear that – without solving their dispute on the meaning of force – the threshold of the prohibition to use force is in any event not lowered. At the same time, they ensured that it was still a comprehensive prohibition.

Notably, however, this was only a *necessary* condition to fall within the principle of non-use of force.

For example, the 1964-consensus was found only on the understanding that "the acts mentioned in the two sub-paragraphs [i.e., those prohibiting assistance to non-State actors] are pre-eminently acts of intervention although *under certain circumstances* they could become acts involving the threat or use of force."[286] Likewise, the UK stated that the classification as intervention or use of force depended on the circumstances.[287] For example, with respect to volunteers, the USA and USSR voiced concern that even if individuals joined armed fights against a State, States did not have an obligation unless it applied on a large scale.[288] Australia referring to the example discussed of British Lord Byron joining Greek independence fighters in 1824, stated that this may not have been a violation of international law in 1824, but this in itself was not enough to say that it was allowed

284 A/AC.125/SR.65, 13-14 (Yugoslavia). A/6799 (1967) para 49, see also report of the working group, 61. A/7326 (1968) para 114 (USA). Already in 1964, States included these forms in their proposals: see e.g. A/5746 (1964) para 204 (Yugoslavia); A/5746 (1964) para 208 (Mexico); A/5746 (1964) para 209 (Ghana, India, Yugoslavia).

285 Statements in reports: A/6799 (1967) para 50; A/7326 (1968) para 47; A/7326, 40 para 111. Statements by States: A/AC.125/SR.86, 42 (Sweden); A/AC.119/SR.32, 18, A/AC.125/SR.86, 38 (UK); A/AC.125/SR.87, 54 (France); A/AC.125/SR.89, 89 (Canada); A/AC.125/SR.71, 6 (Czechoslovakia).

286 A/5746 (1964), 51, emphasis added.

287 A/7326 (1968) para 119. See also Mexico also speaking on behalf of the delegations of Guatemala, Argentina, Chile, and Venezuela A/7326 para 116 "certain circumstances."

288 A/AC.119/SR.3, 13; A/AC.119/SR.14, 9.

today.[289] In the 1967 debate, the argument for not limiting the prohibition of assistance to the principle of non-intervention was that the assisted acts "*could* be, and in fact often were, accompanied by the use of force".[290] This was also reflected in the final version: the duty of non-intervention includes "finance[ing]" and "tolerate[ing]" as sufficient State conduct – conduct that is not included in the principle of non-use of force.[291] Accordingly, this implies that if the assisted act does not "involve a threat or use of force" it may not amount to a "use of force." If the assisted act *does* "involve a threat or use of force", this, however, does not mean that any assistance amounts to a use of force. Rather, it depends on the circumstances.

This is linked to the third remarkable aspect: what kind of involvement is necessary that an assisting State can be considered to "use" the assisted force? States argued based on two presumptions: first, that there is a conduct amounting to use of force. Second, and importantly, States were primarily preoccupied with situations in which they do not exercise control over the assisted actor. States wished to expressly clarify that the prohibition also extends to other forms of involvement short of control in activities by those non-State actors.

As a result, States dedicated two paragraphs to the problem: one dealing with the organization and encouragement of the organization of irregular forces and armed bands for incursion; the other addressing the involvement in civil strife or terrorist acts.

289 A/AC.119/SR.17, 11. See also A/AC.119/SR.16, 11 (UK).

290 A/6799 (1967) para 50, emphasis added.

291 But this needs to be taken with caution. The Netherlands flagged that "the draft declaration, despite its title, could not be interpreted as a carefully drafted legal document would be interpreted. The method of work adopted by the Committee, according to which the wording of principles or parts of principles had been negotiated at different sessions and between different groups of members had inevitably led to overlapping, inconsistencies in wording, lacunae and redundancies. No opportunities had as yet been given to review the draft declaration as a whole from a legal point of view, and it did not seem likely that such a review could be seriously undertaken. Consequently, legal consequences could not be attached to the fact that the same notions had often been expressed in the draft declaration in different wordings and that clauses which, once incorporated in one principle or part of a principle, should, in logic and law, also be inserted in another principle or part of a principle, had not been so inserted. In particular, any argumentation a contrario - already in any case a dubious process of reasoning in the interpretation of international legal documents - would be inadmissible in respect of the terms of the present draft declaration." A/8018 (1970), 95 para 164.

Different forms of involvement were agreed on for those two paragraphs. Yet, the difference between those paragraphs should not be overstated. First, it needs to be borne in mind that States, when agreeing on paragraphs 8 and 9, noted that the alternatives were not easily differentiable.[292] Second, during the discussions and the drafting process, both paragraphs were treated as a unit, seen more as an important clarification of the principle that the prohibition to use force also extends to indirect uses than as an elaborate and comprehensive analysis of which forms are covered.[293] For example, the USA, seconded by Italy, stated:[294]

> "The provision against instigating civil strife and terrorist acts was important. It should be made clear that the word "encouraging" in the agreed statement on armed bands should also be taken to cover organization, instigation, assistance and participation which were the actions referred to in the statement on civil strife and terrorist acts, and that acquiescence in the organization by alien sources of armed bands on national territory could be as much a violation of national responsibilities as acquiescence in civil strife and terrorist acts perpetrated by foreigners on and from the territory of the State."[295]

The same was true vice versa with respect to the requirement that acts need to involve a threat or use of force.

To get a sense of what States deemed sufficient for an "indirect use of force", it is more interesting to see what forms of involvement were required. Of interest here is however not the specific application to non-State actors. Many different standards were discussed, ranging from covering the provision of military supplies, arms, and training to fomenting and provoking civil strife, as well as the tolerance or non-prevention of such acts.[296] In light of the variety of potential measures, States agreed not to opt for a definitive list of actions but to define them in general terms.[297] In any event, these conclusions should be treated with due care: virtually

292 E.g. A/7618 para 127 (Syria). In general: A/AC.125/SR.72, 9 (Mexico).
293 For example, with respect to the fact that the assisted acts need to involve a "threat or use of force."
294 See for example Italy which voiced its understanding that encouragement encompasses acquiescence as well, A/7618 para 128, A/AC.125/SR.109, A/AC.125/SR.114, 43.
295 A/7619 (1969) para 119.
296 For an overview on the views see A/5746 (1964), 62.
297 See A/5746 (1964) para 29 (UK).

all States agreed that the drafting was by no means perfect and necessarily representative of what States meant.[298] In particular, States warned against drawing systematic conclusions[299] and taking the wording too literally.[300] Accordingly, States emphasized that the debates were key to understand the declaration's key messages.[301]

Nonetheless, the Friendly Relations Declaration allows to sketch lines of principle. First, the fact remains that States draw lines between the alternatives.[302] States voiced concern about the exact wording; they distinguished between different forms. Second, the ultimate wording on which States agreed cannot just be disregarded, most notably as States argued explicitly on a legal level. The text remains the best evidence for States' consensus. Implicit agreement not reflected in the text is not irrelevant. It is particularly important for the specificities of the application to the situation dealt with. It is however not decisive for the general lines. This is all the more so as, last but not least, through subsequent practice and repetition, the initially only vague differences have been solidified over time.

Irrespective of the specific details, the Friendly Relations Declaration displays two general features. First, as a matter of reasoning and methodology, States *inter alia* referred to and were inspired by notions of the law of neutrality in assessing the extent of (im)permissible support.[303] Second, the broad forms of involvement, like "instigating, assisting, participating or acquiescing in" the non-State actor violence were only prohibited for "civil strife or terrorist acts *in* another State."[304] In the case of "incursion *into* the territory of another State" involving the use of force, only the more involved "organization or encourage[ment of] the organization" suffices.[305] On the other hand, "financing" and "toleration" are only deemed sufficient

298 E.g. Cameroon A/PV.1860 para 37; Asian Group A/PV.1860 para 69. See for example on the shortcomings of the drafting process: A/AC.125/SR.66, 12-13 (Italy).

299 A/8019 97 para 164 (Netherlands). But see also statements that indicated that it was an "integrated" declaration with "inter-related" principles. For example, A/AC.125/SR.71, 4, A/PV.1860 para 88 (UK), A/AC.125/SR.72, 4 (USA).

300 For example, Japan reminded the Committee that they are "engaged not in any academic exercise of theory." A/AC.125/SR.88, 64.

301 E.g. A/PV.1860 para 22, 25, 27 (Japan, as Rapporteur of the Sixth Committee), para 83 (UK).

302 E.g. A/AC.119/SR.16, 16-17 (Venezuela).

303 E.g. A/AC.119/SR.3, 13 (USA); A/5746 (1964), 29 para 45.

304 Emphasis added.

305 But see Italy arguing that acquiescence is the same as encouraging, A/7618 para 128, A/AC.125/SR.109, A/AC.125/SR.114, 43.

for a violation of the principle of *non-intervention*, not the principle of non-use of force (and this seems to be so despite the fact that the assisted act involves the threat or use of force). Also, statements like those by the US and USSR on volunteers point in a similar direction: mere non-prevention of isolated volunteers does not lead to a use of force; this connection is too weak and remote; it rather requires a specific involvement and direct contribution.[306]

These distinctions may not be entirely precise for the application in the specific case, not least against the background of 'implicit understandings' voiced by several States. But crucially, they show that States distinguish between different forms of involvement, and they allow to deduce different abstract factors.

Generalizing this practice, the Friendly Relations Declaration hence indicates that assistance to acts involving the use of force by non-State actors may violate different norms: the prohibition to use force and the principle of non-intervention. An independent norm of non-assistance was not discussed.

To fall within the realm of the prohibition to use of force, assistance needs to be *direct.* States did not alter the Charter's default rule: to "use force" States providing assistance must still be a "perpetrator". They must be the ones essentially contributing to and shaping the assisted use of force. The situation States had in mind was, as Cuba aptly put it, that the assisted actors were "*tools* of the country without whose arms and training they would not have been able to attack."[307]

To determine when this is the case requires a case-by-case assessment involving many different factors. Abstractly speaking, relevant factors seem to include the position and role of the assisted actor, the extent and form of assistance provided (including the role and knowledge of the assisting State), the timing, the immediate effect of assistance in the use of force,

306 A/AC.119/SR.3, 12-13 (USA); A/AC.119/SR.14, 9 (USSR). See also A/AC.119/SR.29, 6-7 (Ghana).

307 A/C.6/SR.820 para 24 (Cuba), emphasis added. See also UK that described "terrorism and armed violence by subversive groups" as "instrument whereby one State attacked another", A/AC.125/SR.25 para 24. Argentina referred to a "method of force", A/AC.125/SR.26 para 18; Cameroon referred to "armed intervention by intermediaries" (conceptualizing and defining the problem under the principle of non-intervention, yet not engaged in a delineation exercise) A/AC.125/SR.73, 15.

the (seriousness of the) consequences and effects of assistance,[308] and the importance, decisiveness, and relevance of assistance.[309]

For example, the Friendly Relations Declaration suggests that if the State directly and immediately contributes to the use of force, the State is viewed to "use" the other actor's force. Also, if the assisted group is already within the territory of the target State and engaged in ongoing civil strife, lesser forms of involvement are deemed as use of force, as the assistance has *immediate* effects. In fact, such attacks from within the State were deemed particularly dangerous, and problematic, as they are difficult to detect and prove, and can potentially have highly effective destructive effects. Accordingly, any assistance, even if it was only a minor contribution to such groups and their activities, had such an immediate and close connection to the threat or use of force that it was classified as use of force. On the other hand, if the assisting State engaged in more remote forms of assistance, the threshold of a "use" was not met. Accordingly, funding itself did not suffice in contrast to providing weapons.

The Friendly Relations Declaration's focus on non-State actors further implies that the application of the principle and other factors depend on the nature and character of the assisted actor. This means that the specific application of the Declaration has to be viewed against the typical specific characteristics of non-State actors: (1) Non-State actors engaged in a use of force often have only one specific purpose, be it terrorists, or rebel groups – usually they pursue a specific goal and specific action directed directly against one particular State. (2) Non-State actors are often (at least when operating from within the targeted State) very closely connected to the targeted State. Mexico has distilled this well when stating: "In the world of today, subversion was perhaps the most common and most dangerous form of intervention […]. Their goal was no longer to overthrow a rival or hostile government, but to change completely the political, economic and social structure of another State in the name of supposedly ideological principles."[310] Assistance to rebel groups hence targets a State from within. The close connection of non-State actors to the State itself goes against the very core of State sovereignty. (3) Another feature specific to non-State actors, reoccurring in the debates, is that assistance is often non-transparent and

308 E.g. A/6799 (1967) para 360.
309 A/C.6/SR.820 para 24 (Cuba).
310 A/AC.119/SR.30, 12.

covert, and difficult to trace, detect and prove.[311] Assistance was a means that was considered more subtle, disguised, and clandestine, and hence more dangerous.[312] (4) In addition, non-State actors have more limited possibilities and power in the international arena. For example, compared to States, non-State actors have a more limited market for weapons and tools necessary to engage in violence of sufficient intensity to qualify as a threat or use of force. This meant that certain assistance, like providing general funding, may be more remote than for States. (5) At the same time, non-State actors cannot violate *the ius contra bellum*.[313] This may explain why States did not require a legality requirement, like for States where they prohibit assistance only to an aggressor, i.e., a State illegally resorting to force.

Crucially, the Declaration's focus on non-State actors has implications for the specific preconditions and may explain why specific elements such as knowledge do not feature prominently. For example, the specific one-dimensional nature of non-State rebel groups implies that the assisting State typically has knowledge, or at least can be reasonably expected to have knowledge about the acts for which the assistance is used. Similarly, as rebel groups typically sit within the targeted State, the location of the actor determines the directness of the effect of assistance. Last but not least, the Friendly Relations Declaration makes clear that those factors are interconnected, without one factor being fully determinative. This means that while the nature of the assisted actor will be in many respects already determinative, other factors are important, too. In fact, the nature of the assisted actor may suggest how the other factors are shaped. However, it is crucial to scrutinize those nonetheless independently as well. Not all non-State actors are alike; the other factors help to create a case-specific assessment fair to each individual case.

(2) Assistance as 'force'

States also controversially debated the definition of "force". At the center of the debate was the question of whether the prohibition of use of force

311 See for example A/AC.119/SR.16, 11 (UK); A/6799 (1967) para 350; A/AC.125/SR.72, 18 (Kenya).

312 A/6799 (1967) para 48.

313 A/AC.119/SR.29, 6 (Ghana) making clear that the responsibility for the assisting State does not change this.

prohibits only *armed* force or also economic, political, or ideological force. States did not argue that assistance *per se* constituted force. This was only discussed under the distinct question of "indirect use of force". Still, at the same time, it is helpful to see that any force discussed needed to be directed against another actor. States made clear that acts being merely directed inwards, which might also affect other States, could be considered as force.[314]

### d) Assistance and intervention

Besides the principle of non-use of force, the Friendly Relations Declaration clarified the principle of non-intervention. The discussions are interesting for interstate assistance in two respects.

First, the very fact that States recognized the concept of non-intervention explicitly and universally without any objection, despite the fact that the principle is not explicitly recognized in the Charter, is remarkable at the methodological level. The recognition of the principle demonstrated that States did not conceive the text of the Charter to be exclusively limited to those principles and rules expressly laid down in the Charter. The Charter was viewed to also contain "implicit" rules.[315] The American text-oriented argument that the Charter prohibited only interventions that meet the threshold expressly stipulated in Article 2(4) UNC did not prevail.

Second, the Friendly Relations Declaration suggests that assistance to acts involving the use of force may fall under the principle of non-intervention as well. In defining the principle, States agreed that "no State shall

314 A/5746 (1964) para 60 (e.g. exchange control).

315 Reports: A/5746 (1964) para 214, 216. See for example statements: A/AC.119/SR.30 4-5, 6 (Mexico): "Principle is implicit in the charter without being stated expressly"; A/AC.119/SR.25, 7, A/AC.119/SR.31, 11 (Yugoslavia): "principle is implicit in the Charter", and in a principled manner: A/C.6/753 98, para 27 (Yugoslavia ) "some principles are implicit in its very essence"; A/AC.119/SR.26, 7 (Romania); A/AC.119/SR.28, 11 (USSR) (initially only use of force, now broader), A/AC.119/SR.30, 18-19; A/AC.119/SR.25, 4-5, A/AC.125/SR.8, 4, A/AC.125/SR.71, 5 (Czechoslovakia); A/AC.119/SR.20, 16, A/C.6/SR.885, 269 (India); A/AC.125/SR.73, 10 (Canada). But see A/AC.119/SR.29, 9, 12, A/AC.119/SR.30, 30 (USA), arguing that at least Article 2(4) only covers armed force, and warning that stretching this concept could lead to a "dilution of legal standards and depreciation of Charter standards." Ultimately, the USA however also accepted the principle of non-intervention. Also cautiously: Sweden A/C.6/SR.886, 275 entertaining "little doubt" that the principle was inherent. See also Mani, *Basic Principles*, 57.

organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

As already discussed, States agreed that assistance to acts that involve the threat or use of force principally fall under the prohibition to use force. More remote involvement of the assisting State, or as the Swedish delegate Blix has put it "far less serious"[316] action could then be considered a prohibited intervention. As such, States sought to close loopholes that Article 2(4) UNC may have eventually left.[317] Accordingly, even though the Friendly Relations Declaration focused exclusively on assistance provided to non-State actors, States did not exclude that interstate assistance could technically fall within the ambit of non-intervention, too.

e) Assistance as a threat of force

States did not ultimately agree on a definition with respect to a threat of force.[318] But during the debates, an interesting exchange relating to assistance and the threat of force evolved.

In defining a "threat of force", States widely agreed that a threat of force need not be voiced directly but may also be "deduced from the circumstances as well as from express words".[319] On that basis, those States engaging in the debate appeared to agree that in any event, the threat must be *directed against* another actor.

The exact circumstances when this was the case may have been controversial. Among the examples discussed were the presence of an overwhelming foreign military force at the border, or interruptions of economic relations or means of communications.[320] *Mere* interstate assistance was not mentioned, however, suggesting that assistance is only problematic to the extent that it is directed against another State.

This impression is also affirmed by the discussions on military bases.[321] Some States had asserted that the mere existence of military bases

316 A/AC.125/SR.73, 12.
317 E.g. A/AC.119/L.1 para 182.
318 See for an overview Mani, *Basic Principles*, 16-18.
319 A/C.6/SR.305, 125 (UK); See also Chile who considered "justified fear" as decisive criterion: A/AC.125/SR.25, 10.
320 A/AC.125/SR.19, 7 (Madagascar).
321 A/5746 (1964) para 41; A/6799 (1967) para 435; see e.g. C.6/SR.815 para 33 (Ghana).

amounted to a threat of force.[322] As such claims were formulated imprecisely and broadly, it remained unclear who threatened whom with force by establishing a military base. It seems that those States were primarily concerned with non-consensual military bases as relics of colonial times.[323] Accordingly, the threat would be directed against the involuntary host State, not against third States. The threatening State would be the State establishing the military base. To the extent that the military base could be considered a threat against a State other than the host State, this reading was forcefully rejected. For example, later Judge Schwebel, in an intervention for the USA, held that a threat "hardly" included "a simple increase in military potential."[324] He added that "at least the threat must be openly made and communicated by some means to States threatened". And more specifically, in reply to arguments advanced which he was not sure whether to classify as legal or rather political, he held that "the *mere existence* of military bases, whether foreign or national, did not represent a threat."[325]

The Friendly Relations Declaration did not lead to absolute clarity on the issue, in particular as the claims advanced remained imprecise. It can be noted however in any event that such claims did not receive universal agreement. To the contrary, they sparked principled objection.

### 3) The Definition of Aggression (1974)

To define aggression was a long and controversial process, during which Benjamin Ferencz observed that "[i]t is seemingly [...] easier to commit aggression than to define it."[326] After long years of discussions, the UNGA eventually adopted by consensus a Definition of Aggression,[327] various paragraphs of which are by now accepted to reflect customary international

322 See e.g. C.6/SR.815 para 33 (Ghana).
323 A/6230 (1966) para 390; A/6799 (1967) para 435. This is also suggested by the fact that the issue was discussed in the realm of State sovereignty and the right to remove military bases if so wished.
324 A/AC.119/SR.3, 14.
325 A/AC.119/SR.3, 15 (emphasis added).
326 Benjamin B Ferencz, 'Defining Aggression: Where It Stands and Where It's Going', 66(3) *AJIL* (1972) 491.
327 A/RES/3314 (XXIX), Definition of Aggression (14 December 1974), Annex.

law.[328] The Definition of Aggression is an important part of the legal framework governing interstate assistance.

### a) Nature and purpose of the Definition

The Aggression Definition set out to determine the meaning of 'aggression'. As an authoritative statement of the law, so the wish of some States, the declaration was meant to define and thus contain the broad powers of the Security Council as set out in Article 39 UNC.[329] It is not the place to discuss whether this ambitious goal was reached.[330] But even to the extent that the resolution might not effectively limit the Security Council's great prerogative,[331] it adds clarity and guidance on the trigger for Security Council action.[332]

The resolution, however, is not limited to defining the Security Council's power. By its very nature, the Definition of Aggression also addresses States

328 *Nicaragua*, 103-104 para 195. Against the fact that the *entire* Definition has become customary international law: Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 95; Oscar Solera, *Defining the Crime of Aggression* (2007) 202; Theodor Meron, 'Defining Aggression for the International Criminal Court Lead Articles', 25(1) *SuffolkTransnatlLRev* (2001-2002) 9-10. With the Kampala Definition, at least Article 3 is considered to reflect customary international law, Tom Ruys, 'The impact of the Kampala definition of aggression on the law on the use of force', 3(2) *JUFIL* (2016) 188.

329 See Definition of Aggression, para 4; Annex preamble para 2, Articles 2, 4. As Bruha explains this was part of a political agenda by new States to affect the power relationship through influencing the legal landscape by expressing authoritative statements of general international law. Thomas Bruha, 'The General Assembly's Definition of the Act of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (2017) 151; Solera, *Crime of Aggression*, 50 et seq; Ahmed M Rifaat, *International Aggression. A Study of the Legal Concept: Its Development and Definition in International Law* (1979) 266.

330 Critical Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71(2) *AJIL* (1977) 224-226; Solera, *Crime of Aggression*, 201-204. On the international community's reception see McDougall, *Crime of Aggression*, 83-96.

331 It may not effectively limit the Council because (1) the prerogative was expressly conserved, and (2) the definition is not exhaustive. For States stressing this see A/7185/Rev.1, 20-21 para 41.

332 For example, Articles 2 and 4 Definition of Aggression; preamble paragraph 5: "basic principles as guidance". States stressed this as well: e.g. A/C.6/SR.1472, 46 para 24 (Italy). See also Rifaat, *Aggression*, 267.

themselves. Not at least it concerns their conduct.[333] As such, it further elucidated and refined obligations in international law. In the present context, the resolution is legally important and relevant for two more concepts:[334] It further defines what conduct States understand to be a *use* of force. Moreover, it sheds some light on the question against which actions States may invoke and exercise their right to self-defense.

First, the Definition of Aggression concretizes what conduct amounts to a "use of force." Article 1 defines 'aggression' in the abstract as "the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[335] It then cites an enumeration of situations which amount to aggression. Hence, any conduct enumerated in the Aggression Definition can positively be seen as a use of force prohibited under Article 2(4) UNC.[336] What may be ultimately embraced by the Definition, however, depended on various considerations: political priority as well as other relevant circumstances.[337]

Also, the Definition does not define "use of force" exhaustively.[338] It merely reflects "the most serious and dangerous form of illegal use of force," as the preamble stresses. The concept of aggression is hence open to other acts even if they are not expressly stipulated. On a related note, one should be careful to conclude *a contrario* that what is *not* entailed in the Definition

333 A/AC.134/SR.112, 18 (Romania); A/AC.134/SR.113, 30-31 (Yugoslavia); A/C.6/SR.1472, 45 para 10 (Sweden); A/C.6/SR.1480, 88 para 7 (Jamaica). But see for a narrow reading A/AC.134/SR.113, 39 (UK) "valuable guidance to the Security Council – no less and no more", A/C.6/SR.1480, 95 para 68 (USA).

334 See on the relationship between aggression and other concepts: McDougall, *Crime of Aggression*, 63-70; Michael Bothe, 'Die Erklärung der Generalversammlung der Vereinten Nationen uber die Definition der Aggression', 18 *GYIL* (1975).

335 Article 1 Definition of Aggression.

336 For States stressing this parallel see for example A/2162 (1952), 26 (Netherlands); A/C.6/SR.1474 (1974), 53 para 2 (Nigeria); A/C.6/SR.1475 (1974), 61 para 11 (Romania); A/C.6/SR.1478 (1974), 79 para 54 (Sri Lanka); A/C.6/SR.1477 (1974), 70 para 18 (UK).

337 The latter was a formula compromise to overcome the disagreement whether or not aggressive intent was required. The Six Power Draft required an unlawful purpose, while the Soviet and 13 Power Draft preferred an objective conceptualization. Benjamin B Ferencz, 'A Proposed Definition of Aggression: By Compromise and Consensus', 22(3) *ICLQ* (1973) 423; Stone, *AJIL* (1977) 228-229.

338 Article 4 Definition of Aggression.

is legal.[339] The limitation to the use of armed force was agreed upon the understanding that the controversies whether or not aggression should entail also forms below (armed) force were not conclusively settled.[340] Moreover, States aimed to adopt a resolution by consensus.[341] This provided States with a quasi-veto power that heavily influenced the drafting process and the proposals and that led to omissions and limitations of the Definition.

In relation to the prohibition of the use of force, the Definition of Aggression has two effects. It defines acts that qualify as aggression, and thus refines the understanding of prohibition to use force. Through the consensual stipulation of the rules, it also contributes to the development of parallel rules of customary international law. In addition to this quasi-legislative function, the Definition of Aggression sets a precedent that provides structural guidance on the classification of State conduct under the prohibition to use of force that may qualify as aggression.[342] This function is also reflected in the Definition's flexible design that incorporates one of States' main arguments against an (enumerative) definition of aggression: that an enumeration was necessarily incomplete and rigid, opening many loopholes, and thus dangerously providing the pretense of legitimacy for those acts not captured.[343]

Second, the word of caution on the impact of the Definition is strongly tied to the second implication of the Aggression Definition: shedding light

339 For example, A/C.6/SR.413 (1954), 87 para 29 (Norway); A/AC.134/SR.112 (1974), 22 (Cyprus); A/AC.134/SR.113, 28 (USA); A/C.6/SR.1472 (1974), 44 para 7 (Sweden).

340 For example, other forms of aggression were controversially debated (most illustratively A/2638 (1953) para 41, 70-78 (economic aggression), 79-82 (ideological aggression)), but not settled. Thomas Bruha, *Die Definition der Aggression: Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974; zugleich ein Beitrag zur Strukturanalyse des Völkerrechts* (1980) 265.

341 A/8019 (1970) para 16. Bruha, *Definition of Aggression*, 151, 152-153; Stone, *AJIL* (1977) 230-231.

342 See for example Bruha, *Definition of Aggression*, 160, 166. The debate to what extent other acts must be similar in nature and gravity is not relevant for here. (see for this ibid 166; McDougall, *Crime of Aggression*, 77. Even if the concept of aggression was also open to non-comparable forms, it seems more likely that acts comparable to those mentioned in Article 3 may be consensually classified as aggression.

343 This latter aspect is often not sufficiently reflected in analyses, as well as States defending themselves against criticism. See for the arguments against a Definition of Aggression and an enumerative definition in particular, illustrative the debates in the Sixth Committee in 1954. For a summary see A/2806 (1954) para 11-19. See also Rifaat, *Aggression*, 243.

on the concept of (collective) self-defense.[344] Throughout the debates, the right of self-defense was omnipresent.[345] Many States repeatedly drew parallels to the right of self-defense, indicating not only when a State may individually exercise self-defense,[346] but also when the international community may come to the assistance of a State.[347] In fact, the looming exercise of self-defense was for many States a decisive element in drafting the Definition.[348] It is also in this context that the Aggression Definition is widely understood and referred to.[349] Nonetheless, one should be careful to fully equate aggression with the permission to exercise self-defense.[350] Throughout the debates, various States were reluctant to go that far.[351] And

344 Some States made this claim expressly: A/AC.134/SR.113 (1974), 25 (France). The ICJ likewise has used the concept to sketch out the contours of the concept of armed attack. See Dapo Akande, Antonios Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (2016) 219-220. On the conceptual relationship between aggression and armed attack, the trigger to self-defense, see: McDougall, *Crime of Aggression*, 68.

345 E.g. *inter alia* A/2638 (1953), 4 para 35 (USSR) "primary importance"; A/3574 (1957), 6 para 39, 15-16 para 119-129; A/7185/Rev.1 (1967), 24 para 56-58; A/7620 (1969) para 25. See also Ferencz, *AJIL* (1972) 501; Bruha, *Definition der Aggression*, 231.

346 E.g. A/2162 (1952), 16 para 2, 3 (France), 26 (Netherlands); A/2689 (1954), 6-12 (Sweden); A/C.6/SR.410 (1954) para 33, 39 (Netherlands); A/C.6/SR.1475 (1974), 61 para 11 (Romania); A/C.6/SR.1477 (1974), 70 para 18 (UK) "vitally relevant". See also Bengt Broms, *The Definition of Aggression in the United Nations* (1968) 66.

347 E.g. A/C.6/SR.1482 (1974), 106 para 8 (Burundi) (Facilitation of protection of rights of the victim).

348 E.g. A/AC.66/L.8 para 2 (Mexico), reprinted in A/2638 (1953), Annex, 14; A/AC.134/SR.67-78 (1970), 50 (UAR); A/AC.134/SR.67-78 (1970), 51 (Italy); A/AC.134/SR.67-78 (1970), 52 (Congo).

349 Most famously, *Nicaragua*, 101 para 191, 103-104 para 195; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Rep 2005, 168 [*Armed Activities*], 222-223, para 146. See in detail on the ICJ Claus Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2016) 581; Akande, Tzanakopoulos, *ICJ and Aggression*, 221-224.

350 Bothe, *GYIL* (1975) 137; Stephen M Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law', 136 *RdC* (1972) 455. But see Bengt Broms, 'The Definition of Aggression', 154 *RdC* (1978) 346. See for a discussion of views: Akande, Tzanakopoulos, *ICJ and Aggression*, 216-217.

351 See e.g. A/C.6/SR.414 (1954), 92 para 28 (New Zealand); A/3574 (1957), 15 para 123, 124; A/AC.91/1 (1959), 3-4 para 1, 3-4 (Afghanistan); A/AC.134/SR.105 (1973), 16 (USSR); A/C.6/SR.1477 (1974), 70 para 18 (UK); A/C.6/SR.1480 (1974), 87 para 2 (Jamaica). On Article 3(g) in detail Bruha, *Definition der Aggression*, 228-239.

not least, the deliberations were not set out to comprehensively define the trigger justifying the exercise of self-defense or the term armed attack.[352] This calls for a nuanced approach, according to which it depends on the specific form of aggression whether or not self-defense is permissible.[353]

### b) The Definition of Aggression and assistance

The Definition of Aggression is a combined definition. Article 1 generally defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Article 3 then enumerates specific acts that "qualify as an act of aggression." Here, the Definition of Aggression becomes relevant for assistance. Article 3 (f) holds that

> "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State"

may qualify as act of aggression. Article 3 (g) refers to

> "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

Three aspects attract attention. First, the Definition, as a universally accepted document, includes a hitherto unprecedented regulation for interstate assistance. Second, the reference to assistance is confined to territorial assistance only. Third, assistance to non-State actors is treated not only separately but differently.

The paragraphs relating to assistance were the peak of a long and controversial history of discussions, in particular on 'indirect aggression'. The

352 Various States repeatedly stressed this: e.g. A/AC.134/SR.105 (1973), 17 (USA). Hilaire McCoubrey, Nigel D White, *International Law and Armed Conflict* (1992) 39.

353 See also A/AC.134/SR.112 (1974), 18 (Romania) "brought into play"; A/AC.134/SR.113 (1974), 25 (France) "in some measure"; A/C.6/SR.1477 (1974), 60 para 19 (UK) "vitally relevant [...but] not in itself a definition of the right of self-defence."

Definition of Aggression was a compromise reconciling many different views. It is hence not enough to look at the text alone.[354]

The following sections explore the development of the Definition through the lens of *interstate* assistance – in order to do full justice to the Aggression Definition's above-described double function; and to fully understand the meaning, and reasons for the scope of these subparagraphs and the Aggression Definition's impact and relevance for and contribution to the regulatory framework on interstate assistance generally.

### c) Assistance in the early debates on aggression

A Definition of Aggression was already debated, albeit rejected during the drafting of the UN Charter (1). In 1950, the topic resurfaced. The UNGA (2) and the ILC (3) took upon the topic. In 1952, the UN Secretary General provided a comprehensive report on the question of defining aggression (4).[355]

#### (1) Debates when drafting the UN Charter

Already during the San Francisco Conference, the question of defining aggression was discussed at length. Bolivia and the Philippines had made proposals.[356] Both listed not only direct forms as act of aggression, but also "support given to armed bands for the purpose of invasion" and "supplying arms, ammunition, money and other forms of aid to any armed band, faction or group, or [...] establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation," respectively. The Third Committee of the Third Commission accepted neither proposal.[357] While the ideas met "considerable support", the opinion prevailed that "a preliminary definition of aggression went beyond the possibilities of this

354 Bruha, *Definition of Aggression*, 154; McDougall, *Crime of Aggression*, 63.

355 For a general overview see UNSG, Survey of Previous United Nations Practice on the Question of Defining Aggression, A/AC.134/1 (1968); Broms, *Definition of Aggression*; Rifaat, *Aggression*, 223-246.

356 III UNCIO 585, Doc 2 G/14(r) (5 May 1945) (Bolivia); III UNCIO 538, Doc 2 G/14(k) (5 May 1945) (Philippines).

357 XII UNCIO 505, Doc 881 III/3/46 (10 June 1945), Rapport of Mr Paul-Boncour (Rapporteur) on Chapter VIII.

Conference and the purpose of the Charter."[358] The Third Committee of the Third Commission did not reject the content of the proposals, but instead voiced concern about defining aggression in general, in light of the Security Council's broad discretionary powers and a definition's inherent limitations.[359]

(2) The UNGA debates in the First Committee

In 1950, the First Committee considered the "Duties of States in the Event of the Outbreak of Hostilities" upon Yugoslavia's request for further clarification.[360] Specifically, Yugoslavia was concerned about "the general question of the behaviour of a State engaged in hostilities, or how such a State should manifest its will to preserve peace even in the event of hostilities."[361]

The agenda item however did not, as one could have thought, spark a discussion on obligations of third States in case of hostilities in general, or the permissibility of assistance more specifically. Rather it focused on clarifying the trigger for those obligations. Yugoslavia had identified the "subjective political criteria" the Security Council could use to identify an aggressor as most problematic. It observed that "[o]ften States not involved directly in the conflict had tended to adopt a position with regard to the parties to the conflict based not on the actions of those parties but on their own general political attitude."[362] On that basis, the key principle that "the aggressor knew that his action would unite all peace-loving States against him," from which the prohibition to use force derived its strength, was not observed.[363] Hence Yugoslavia proposed "definite legal rules which all States were obliged to observe" – in particular technical and procedural rules to facilitate the identification of an aggressor.[364]

358 Ibid.
359 Ibid. See for more details also Broms, *RdC* (1978) 315-316.
360 Request for the Inclusion of an Additional Item in the Agenda of the Fifth Regular Session, A/1399 (27 September 1950).
361 A/C.1/SR.384 para 8.
362 Ibid para 10.
363 Ibid para 6.
364 A/C.1/604; For the explanations see: A/C.1/SR.384 para 11-17 (Yugoslavia); A/C.1/SR.387 para 21-38. For a revised version see A/C.1/604/Rev.1 and 2, and the respective explanations A/C.1/SR.388 para 1-2 (Yugoslavia). This approach was ultimately adopted in UNGA A/RES/378 (V) A (17 November 1950).

In this connection, the USSR argued for a different approach. It viewed it essential to identify an aggressor immediately.[365] Accordingly, it proposed a definition of aggression along the lines of the London Convention 1933.[366] Any reference to prohibit 'assistance' was missing. In particular, the concept of "indirect aggression" that the London Convention of 1933 entailed[367] was omitted, giving the impression that the previous Soviet reluctance towards the concept resurfaced.[368] The draft only stipulated that the "refusal to allow the passage of armed forces proceeding to the territory of a third State" "may not be used as justification for attack."[369]

The Soviet proposal was controversial for many reasons.[370] Not least, the omission of the concept of 'indirect aggression', in particular through assistance to non-State actors, was repeatedly criticized.[371] Some States feared that this may implicitly suggest that this form of aggression was not (already) prohibited, but legal.[372] Others, like for example, Canada, held that "indirect aggression, […] at the present time, was proving much more dangerous than aggression of the old type, which was preceded by a declaration of war and was now as out-of-date as a cavalry charge."[373] Hence, already at this early stage of deliberations, States promoted the openness of the Charter and its prohibition of aggression. A conceptualization of 'aggression' limited to direct forms of aggression only met with opposition.

Yet this was merely the starting point for a controversial debate that should occupy the international community for a long time.

365 A/C.1/SR.385 para 26, 35-36 (USSR).
366 A/C.1/608 (Draft by USSR).
367 147 LNTS 3391, para 5: "support to armed bands".
368 See on the background, ILCYB 1951 vol I, SR.93, 92 para 27 (Hsu).
369 A/C.1/608, 2, 3.
370 See the debates A/C.1/SR.385-390, and the report A/1500 (13 November 1950).
371 E.g. A/C.1/SR.386 para 36 (USA); A/C.1/SR.386 para 49 (Canada); A/C.1/SR.387 para 5 (Greece); A/C.1/SR.387 para 57 (El Salvador); A/C.1/SR.388 para 34 (New Zealand); A/C.1/SR.388 para 41 (Turkey); A/C.1/SR.389 para 14 (Ecuador).
372 E.g. A/C.1/SR.387 para 5 (Greece); A/C.1/SR.388 para 41 (Turkey).
373 A/C.1/SR.386 para 49 (Canada).

(3) The ILC debate

The UNGA referred the question of defining aggression to the ILC,[374] which ultimately, however, could not agree on a definition.[375] Reasons for this were diverse.[376] Nonetheless, even if not definitive and conclusive, the ILC "felt that a definition of aggression should cover not only force used openly by one State against another, but also indirect forms of aggression such as fomenting of civil strife by one State in another, the arming of a State or organized bands for offensive purposes directed against another State, and the sending of "volunteers" to engage in hostilities against another State."[377] As the debates reveal, for the ILC, the concept of aggression was wide enough to also qualify interstate assistance as prohibited act of aggression.[378]

(a) The report of the special rapporteur

The special rapporteur Jean Spiropoulos argued in his report on the "possibility and desirability of a definition of aggression"[379] that aggression is, "by its very essence, not susceptible of definition."[380] "A 'legal' definition of aggression would be an artificial construction which could never be comprehensive enough to comprise all imaginable cases of aggression, since the methods of aggression are in a constant process of evolution."[381] In his view, the concept of aggression was a "'natural' notion."[382] Still, the concept of aggression as applied in international practice always consisted of an objective and a subjective factor: first, an act of violence, and second, aggressive

374 A/RES/378 (V) B (17 November 1950).
375 ILCYB 1951, vol I, SR.96, 120 para 73.
376 Ibid 120 para 74-80.
377 Report to the UNGA, ILCYB 1951 vol II, 132 para 47. The term "indirect" aggression was used differently, Solera, *Crime of Aggression*, 95. For the present purposes, it shall be confined to indirect aggression through providing assistance.
378 The UNSG drew a similar conclusion from the ILC report: "It will be noticed that the examples quoted referred to cases involving the complicity of a State in violent activities directed against another State." A/2211 (1952), 56 para 412.
379 Second report by Mr. J. Spiropoulos, Special Rapporteur, A/CN.4/44 in ILCYB 1951 vol II, A/CN.4/SER.A/1951/Add.1, 60-69.
380 ILCYB 1951 vol II, 68, para 153, 69 para 165.
381 Ibid 131 para 39.
382 Ibid 67 para 152. See also further explanations A/C.6/SR.291, 234 para 27-28.

intention. Beyond this general structure, an *a priori* determination of what amounts to an act of aggression was however impossible; it was rather rooted in the "'feeling' of the Governments concerned."[383]

Spiropoulos hence argued for a broad conceptualization of aggression, open to include various forms. In particular, in the rapporteur's view, the objective prerequisite of violence can also be "indirect" aggression. He stated:

> "However, not only violence committed by a State *directly* may constitute 'aggression under international law', but also *complicity* of a State in acts of violence committed by third parties – private individuals or States (indirect or disguised violence)."[384]

An illustrative example of this case of aggression, in his view, was "the support given to armed bands invading the territory of another State."[385] What "degree of violence or complicity" must exist then, could only be answered "in each concrete case in conjunction with *all* constitutive elements of the concept of aggression".[386]

Already at this early stage, the report of the Special Rapporteur identified a conceptualization of indirect aggression that was about to find acceptance among States. For the Special Rapporteur, the provision of assistance may be equalled with violence directly committed by a State. Notably, to provide support was not sufficient as such. It was an accessory prohibition, requiring first violence committed by another party, and second, some form of assistance to that violence. The key question was the "degree of complicity" that remained flexible, depending on the situation. Notably, sufficient was even a failure "to take the measures in its power to deprive [the actor resorting to violence] of help and protection."[387] Also, for the Special Rapporteur, it was a general rule – independent of the recipient of assistance and the actor resorting to violence. Although the support of armed bands featured more prominently, he placed interstate assistance on the same level and expressly included it.

383 ILCYB 1951 vol II, 67-68 para 153, 155.
384 Ibid 67 para 153, emphasis original.
385 Ibid.
386 Ibid emphasis original.
387 Ibid.

(b) The debate within the ILC

Not all members shared the conclusions of the Report of the Special Rapporteur.[388] But they shared the Rapporteur's opinion that the concept of aggression should not be limited to "direct violence". In fact, all members thought that aggression could also cover indirect forms of aggression to the extent that they amount to assistance.[389] This was not only reflected in the various proposals,[390] but it also found express mention in the ILC's report to the UNGA.[391]

As for example, Hsu, the most persistent advocate for a regulation of indirect aggression, held:

> "At the present time no one dared be found guilty of direct aggression unless he wished to start the third world war. Only indirect aggression was thought of, so that unless the definition covered that form of aggression it would be worthless."[392]

From then on, disagreement prevailed. For example, there were arguments for a prohibition covering mere support, irrespective of whether (assisted) force was committed or not.[393] Hsu argued for a prohibition of "the arming of organized bands or of third States, hostile to the victim State, for offensive purposes."[394] Support for defensive purposes, as "the arming of certain States by the USA" was not prohibited.[395] Others required some force to be actually committed. Moreover, the necessary degree of support

388 Critical that no definition was possible: E.g. ILCYB 1951, vol I, A/CN.4/SR.92, 89 para 123 (Yepes), para 124 (Alfaro) para 130 (Amado). SR.93, 90 para 5 (Yepes); 91 para 16 (François); SR.93, 93 para 37 (Cordova); SR.93, 94 para 56 (El Khoury). In fact, the ILC decided to make an attempt to formulate an abstract definition of aggression. See on the background: SR.93, 98 para 102, 106; Critical that *animus agressionis* is necessary: SR.93, 91 para 18 (François).

389 ILCYB 1951 vol I, SR.94, 106 para 96; SR.95, 114 para 100-118.

390 A/CN.4/L.7, L.12 reprinted in ILCYB 1951, vol II, 32, 40 (Yepes); A/CN.4/L.8 reprinted in ibid 33 (Alfaro), para 36, 41, 49, SR.94, 106 para 101; A/CN.4/L.10 reprinted in ibid 40 (Cordova); A/CN.4/L.11 reprinted in ibid 40 (Hsu); A/CN.4/L.12 reprinted in ILCYB 1951, vol II, 41-42 para 15 (Scelle).

391 ILCYB 1951, vol II, 132 para 47, emphasis added.

392 ILCYB 1951, vol I, SR.94, 104 para 51; SR.95 para 16 (Hsu).

393 ILCYB 1951, vol I, SR.95, 109 para 19-21 (Hsu); para 24, 25 (El Khoury).

394 ILCYB 1951, vol I, SR.95, 109 para 19-21 (Hsu); A/CN.4/L.11 reprinted in ILCYB 1951, vol II, 40 (Hsu).

395 ILCYB 1951, vol I, SR.95, 109 para 21 (Hsu).

remained ambiguous.[396] Notably, however, "active" as well as "passive" (in form of toleration or lack of prevention) support was widely viewed to be prohibited.

Irrespective of all those discussions, one feature appeared to be clear. "Indirect aggression" was a general concept, directed at outlawing a specific form of conduct by the assisting State. At this stage, the supported actor was only of limited relevance. It was not confined to assistance to non-State actors, although such examples were once again at the center of attention. But this did not exclude the applicability of the concept to support provided to States. For example, Scelle thought it important to mention "the possibility of aggression through *intermediaries*".[397] Hsu as seen expressly included the arming of *third States* for offensive purposes.[398]

In that light, examples of interstate support were brought forward. For example, Spiropoulos referred to a State's failure to prevent "a very important portion of its male population to enter the territory of a belligerent State in order to serve in the army of that State as volunteers".[399]

### (c) States' reactions

The Sixth Committee, when discussing the report of the ILC, was deeply divided on the possibility and advisability of defining aggression, as well as

396 For example on "fomenting civil strife": ILCYB 1951, vol I, SR.95, 117 para 22; SR.94, 100 para 17 (Scelle); 107 para 116-117 (Hudson) on sending "volunteers without arms to join the ranks of a belligerent army". Some referred to the law of neutrality: SR.94, 105 para 79 (Spiropoulos) according to whom "if a State gave *military* assistance [in violation of the law of neutrality] to an aggressor, it was considered an aggressor itself."; SR.95, 109 para 20 (Hsu).

397 ILCYB 1951 vol I, SR.94, 100 para 17 (Scelle), emphasis added. See also SR.94, 105 para 79 (Spiropoulos).

398 A/CN.4/L.11 reprinted in ILCYB 1951, vol II, 40 (Hsu), emphasis added.

399 ILCYB 1951, vol II, 67 para 159, ILCYB 1951, vol I, SR.94, 105 para 83 (Spiropoulos). See also SR.94, 107 para 116-117, (Kerno, Hudson); Report to the UNGA, ILCYB 1951 vol II, 132 para 47. Spiropoulos also held that "A few centuries ago, for instance, the idea of neutrality had not been developed. The support given by a neutral to a belligerent was not considered as aggression, whereas nowadays, if a State gave military assistance to an aggressor, it was considered as an aggressor itself." SR.94, 105 para 79.

on the definition's format. In particular, Western States opposed the general undertaking.[400]

The provision of assistance as indirect aggression was a prominent and controversial feature in the deliberations as well. Several States took note of the ILC's suggestion to also include indirect forms of aggression.[401] Various States argued that if there was a definition it should entail indirect forms of aggression[402] – a feature that they found lacking in the Soviet draft.[403] The USSR saw this feature to be (now) sufficiently acknowledged, as it had added to its original draft a provision that prohibited assistance to armed bands.[404] Others again were reluctant to expand the concept, fearing a departure from the Charter's limitation of defensive measures to armed attacks only.[405]

The content of the concept remained ambiguous and diverse.[406] With respect to assistance, however, the concept was not confined to assistance in the context of non-State actors and subversion.[407] It was frequently viewed to cover assistance to third States, in particular support by sending volun-

400 See for example forcefully A/C.6/SR.292, 237-240 para 27-54 (UK). For a general overview see: UNYB 1951, Part 1 Chapter 6, F, 834-837; Broms, *RdC* (1978) 321-322.

401 A/C.6/SR.283, 185 para 38, 39 (Dominican Republic); A/C.6/SR.284, 187 para 1 (Bolivia).

402 A/C.6/SR.278, 152 para 49, 50 (China); A/C.6/SR.279, 154 para 16 (Greece); A/C.6/SR.290, 226 para 30 (Ecuador); A/C.6/SR.290, 228 para 49 (Indonesia); A/C.6/SR.289, 219 para 29 (Pakistan); A/C.6/SR.289, 220 para 37 (Netherlands); A/C.6/SR.282, 177 para 46 (India).

403 A/C.6/SR.279, 153 para 1 (Greece); A/C.6/SR.281 para 9 (UK); A/C.6/SR.281 para 53 (Columbia); A/C.6/SR.282 para 42 (Canada); A/C.6/SR.283, 185 para 38, 39 (Dominican Republic); A/C.6/SR.284, 188 para 6 (Bolivia); A/C.6/SR.284, 189 para 20 (Brazil); A/C.6/SR.288, 212 para 9 (Uruguay).

404 A/C.6/L.208, Article 1 f (5 January 1952). See also A/C.6/SR.278, 150 para 33 (USSR); A/C.6/SR.288, 212 para 18 (USSR); A/C.6/SR.290, 224 para 7 (Ukraine).

405 A/C.6/SR.291, 232, 233 para 9-10, 15 (Egypt), A/C.6/SR.293, 244 para 11 (Egypt). See the UK's response A/C.6/SR.292, 239 para 40-41. Arguing for a right to self-defense in case of indirect aggression: A/C.6/SR.289, 220 para 37-38 (Netherlands); A/C.6/SR.285, 197 para 40 (China).

406 See e.g. A/C.6/SR.290, 226 para 30 (Ecuador). See e.g. UK which thought for example that German behavior towards Austria and Czechoslovakia before World War II was an indirect aggression, A/C.6/SR.292, 238 para 34, 35 (UK), and also para 40 (sending of unarmed men). Covering also economic aggression, A/C.6/SR.293, 246 para 31 (Bolivia).

407 Focusing on this aspect: A/C.6/SR.281, 168 para 24 (Chile); A/C.6/SR.282, 177 para 46 (India).

teers to join another State's army.[408] It is little surprising that the early stage of the debate did not show agreement among States. But there were notable trends of arguments: First, in line with traditional international law (in particular the law of neutrality) direct State involvement, i.e. "complicity" was viewed to be covered; increasingly there were however also voices departing from traditional paths, for which a due diligence violation was sufficient.[409] Second, whether or not an act amounted to aggression was often seen as a question of degree.[410]

(4) The UN Secretary General report 1952

By Resolution 599 (VI) (1952), the UNGA deemed it "possible and desirable" to define aggression. At the UNGA's request, the UN Secretary General presented a report on the question of defining aggression.[411] Based on a comprehensive survey of international practice, the Secretary General observed that

> "[t]he characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, *operates through third parties* who are either foreigners or nationals seemingly acting on their own initiative. […] Indirect aggression is a general expression of recent use (although the practice itself is ancient), and has not been defined. The concept of indirect aggression has been construed to include *certain forms of complicity in hostilities* in progress"[412]

In addition, the UN Secretary General considered other cases that "do not constitute acts of *participation* in hostilities in progress, but which are designed to prepare such acts, to undermine a country's power of resistance, or to bring about change in its political or social system."[413] Those cases, he observed, were also referred to as 'indirect aggression'. The concept of 'indirect aggression', according to the Secretary General, hence

408 See e.g. A/C.6/SR.278, 152 para 49, 50 (China); A/C.6/SR.279, 154 para 16 (Greece); A/C.6/SR.287 para 38 (Belgium); A/C.6/SR.290, 226 para 30 (Ecuador).
409 A/C.6/SR.287 para 38 (Belgium); A/2211 (1952), 47-48, para 320-322.
410 Ibid.
411 UNSG, Report, Question of defining aggression, A/2211 (3 October 1952).
412 Ibid 56 para 414, 415, emphasis added.
413 Ibid 56 para 416, emphasis added. Examples are "intervention in another State's internal or foreign affairs", "subversive action", "incitement to civil war", "ideological aggression and propaganda" (56-58 para 417-440).

had different layers. Those additional cases discussed under the heading of 'indirect aggression', however, were distinct from interstate assistance and did not bear on the question to what extent interstate assistance is included.

### d) Assistance in the era of Special Committees

As these early attempts to define aggression remained inconclusive, the UNGA tasked a total of three Special Committees to take upon a definition of aggression.[414] First, in 1952 the General Assembly established a Special Committee to present "draft definitions of aggression or draft statements on the notion of aggression" in 1954.[415] Between 1954 and 1956 a second Special Committee was entrusted with defining aggression.[416] Between 1957 and 1967, the UNGA invited the Special Committee to study relevant aspects of the question.[417] In 1967, in light of the progress made in the deliberations on the Friendly Relations Declaration, the UNGA tasked a third Special Committee[418] that was ultimately able to conclude the task.

#### (1) The first two Special Committees

For some States, the deliberations of the first two Special Committees stood under the motto "undesirable, unacceptable and unnecessary."[419] As such, most debates often circled around the question of whether to define aggression at all.[420] Some States even declined to constructively participate in the deliberations. And with the increasing political tensions of the Cold War, the Special Committees made only little progress on substance. With this in mind, the deliberations on substantial questions did not fall silent and are nonetheless noteworthy to look at.

414 For a general overview on the debates, see Rifaat, *Aggression*, 231-262.
415 A/RES/688 (VII) (20 December 1952).
416 A/RES/895 (IX) (4 December 1954).
417 A/RES/1181 (XII) (29 November 1957).
418 A/RES/2330 (18 December 1967).
419 Ferencz, *ICLQ* (1973) 408. For example: A/2806 (1954) para 12-13. A/3574 para 28-32, 94-106; In 1965: A/AC.91/4, 13 (UK).
420 For an overview on the arguments see Ann Van Wynen Thomas, Aaron J Thomas, *The Concept of Aggression in International Law* (1972) 4-13.

(a) The 1953 Committee

In 1953, four States submitted texts to the Committee, all of which stipulated that the provision of assistance can amount to aggression. On the required degree of assistance they varied, however. The Soviet text declared a State an "attacker" for its "support of armed bands organized in its own territory which invade the territory of another State, or the refusal, on being requested by the invaded State to take in its own territory any action within its power to deny such bands any aid or protection."[421] Bolivia also focused on "armed bands". In its proposal "support given [...] for purposes of invasion" was enough.[422] The Chinese Working Paper went a step further to include "arming organized bands or *third States* for offence against a State marked out as victim" among the acts amounting to aggression.[423] The Mexican Working Paper, building on the Soviet proposal, generally referred to "direct or indirect use of force".[424] Notably, Mexico qualified subversive acts in particular:

> "In view of the influence which the definition of aggression may have on the application and interpretation of the Article 51 of the United Nations Charter, it seems, in the opinion of the Mexican delegation, hazardous to extend the concept of aggression to include separate elements of the use of force. Thus, acts constituting so-called indirect, economic or ideological aggression should be regarded as aggression only if they involve or are accompanied by the use of force."[425]

Even if they didn't, Mexico thought such acts could still justify enforcement measures by the Security Council.

The proposals reflect well the range of arguments voiced in the debates. Opinions on the notion of indirect aggression were divided. Some did not want to include it, as it was merely a "threat to peace or breach of peace".[426]

421 A/AC.66/L.2/Rev.1 para 1 (f) (USSR), reprinted in A/2638 (1953), Annex, 13. Broms, *Definition of Aggression*, 57.
422 See A/AC.66/L.9 para 2 (Bolivia) reprinted in A/2638, Annex, 15.
423 A/AC.66/L.4/Rev.3 (b) (China), reprinted in A/2638, Annex, 14, (again Mr Hsu), emphasis added.
424 A/AC.66/L.8 para 1 (Mexico), reprinted in A/2638, Annex, 14.
425 Ibid para 2 (Mexico).
426 A/2638 (1953) para 69. For example A/C.6/SR.408, 59 para 8 (Mexico).

For others, it was a necessary part of any definition of aggression, for some however only if the threat or use of force was involved.[427]

The notion of "indirect aggression" remained diverse, however. The activities it was thought to cover varied significantly. For example, the USSR distinguished the provision of support to armed bands invading another State, which it classified as armed attack, from "indirect aggression". This notion, for the USSR, only included subversive activities and the promotion of civil war or internal upheavals. Economic and ideological aggression were again distinct forms.[428] The Dominican Republic classified the same activities differently. It sought to place subversive activities on the same level as supporting armed bands invading another State, considering them as the "most reprehensible and insidious forms of indirect aggression".[429] That concept, in its view, also included economic or ideological aggression.[430]

Of course, the debates were general, remaining on the level of principle. Notwithstanding the disagreements on indirect aggression, the early trend was affirmed: the provision of assistance was not categorically excluded from the concept of aggression.[431] And again, States were open to include *interstate* assistance.

None of the proposals were put to a vote; they were merely discussed in the UNGA.[432] In the debates in the Sixth Committee, the notion, scope, and henceforth the inclusion of indirect aggression was controversial.[433] In that context, some delegations identified questions of assistance that

427 A/2638 para 69. This was also linked to the general debate whether the concept of aggression should be limited to armed aggression only, A/2638 para 41-54. See also the later C.6 debate e.g. Netherlands A/C.6/SR.410 para 37.

428 A/AC.66/L.2/Rev.1 para 2 (USSR), reprinted in A/2638, Annex, 13. Whether this aspect was consistent with the UNC was challenged, A/2638 para 46. It is also interesting that the "refusal to allow the passage of armed forces proceeding to the territory of a third State" may not be a justification.

429 A/2638 (1953) para 86, "when they included *inter alia* the arming of certain groups, training them by permitting them to use the facilities provided by the country maintaining them against another State or by receiving subsidies and other assistance in preparation for an attack on another State." In its view this even "justified retaliatory measures and the exercise of the right of self-defense by the State thus endangered."

430 A/2638 (1953) 8 para 72 (Dominican Republic). Similarly, for example, also Argentina A/2689/Add.1, 2.

431 A/2638 (1953) para 85 (China), para 86 (Dominican Republic).

432 Ibid para 26, 27.

433 A/2806 (1954) para 20-22.

should be separately included. They focused on subversion and assistance to non-State actors, but argued from a general principle:

> "War was armed attack from outside, subversion armed attack from inside and accordingly should be outlawed equally with war. Any State which encouraged and assisted the people of another State to take up arms against its own Government was not less guilty than if it had itself taken part in an armed attack. The principle that the instigator of a crime is as guilty as the person committing it should apply both in international law and in domestic criminal law."[434]

On that basis, several States argued particularly for the inclusion of the organization of armed bands in the definition of aggression.[435] Others took a more general approach, not specifying the assisted actor.[436]

In general, it seems that there was agreement that "indirect aggression" was in any event contrary to international law.[437] States also concurred that assistance *could* amount to a prohibited intervention, even aggression; it was widely viewed to be as dangerous as direct aggression.[438] But, the scope

434 Ibid para 23. See A/C.6/SR.411 para 5 (Philippines) stating: "Whereas aggression should not be defined as including economic and ideological aggression, the definition should certainly cover subversion aimed at the overthrow of a Government and the destruction of the established order of society in a State, because the object of such subversion was to disturb the peace and to destroy the sovereignty of the State. *He was unable to agree with the Netherlands representative [A/C.6/SR.410 para 33] that when one nation aided and abetted the people of another to rise in arms against their Government it was committing a less serious offence than if it had itself resorted to an armed attack.* The principle that the *planner of a crime was as guilty as his agent should apply in international as it did in domestic criminal law*. Subversion was a particularly dangerous form of aggression because it was underhanded, and It should certainly be included in any definition adopted by the Committee." Emphasis added. A/C.6/SR.412, 80 para 8 (UK) "subversive activities had very close affinities with armed aggression". The same argument was also repeated in 1956: A/3574, 8 para 59.

435 A/C.6/SR.409 para 37 (Peru); A/C.6/SR.410, 70 para 16 (Belgium); China; Iran (A/C.6/SR.405 para 10); A/C.6/SR.406, 46 para 8 (Panama); SR.404 (Paraguay); A/C.6/SR.405, 42 para 36 (Czechoslovakia). See also Ian Brownlie, 'International Law and the Activities of Armed Bands', 7(4) *ICLQ* (1958) 717.

436 E.g. A/C.6/SR.412 para 25 (China), A/C.6/SR.417, 110 para 33 (China).

437 A/C.6/SR.408, 60 para 8, 9 (Mexico); A/C.6/SR.410, 70 para 14 (Belgium); A/C.6/SR.414, 90 para 16 (Ecuador).

438 A/C.6/SR.412, 80 para 8 (UK) "subversive activities had very close affinities with armed aggression"; A/C.6/SR.410 (Netherlands); A/2806 (1954) para 23. See A/C.6/SR.411 para 5 (Philippines); A/C.6/SR.412, 81 para 22, 24, 25 (China).

sparked disagreement, for example with respect to whether assistance *per se* is sufficient,[439] to what extent armed force must be involved,[440] what forms of assistance suffice,[441] or to what extent it might trigger a right of self-defense.[442]

### (b) The 1956 Committee

During the 1956-Committee, several States presented drafts.[443] The provision of assistance (especially to non-State actors within or outside the targeted State) was a prominent feature in all of them and, consequently, the deliberations.[444] Unlike in earlier debates, references to assistance provided to States were absent. The nature of the assisted actor was only discussed concerning the question of what defines an armed band.[445]

Criticism was sparked particular by several drafts that let suffice "the organization, toleration of the organization or encouragement of the organization" *per se*. "It was felt that to consider these actions as aggression would promote rather than discourage preventive war, for it followed that acts could be considered as aggression without any actual fighting having taken place."[446] In general, it was the right to self-defense in reaction to States providing assistance that was at States' mind when discussing the scope of aggression.[447]

439 E.g. A/C.6/SR.418, 114 para 28 (Peru criticizing the Soviet draft for being too broad, rendering already mere assistance an aggression).
440 SR.410 (Netherlands); Belgium; A/C.6/SR.412, 81 para 25 (China).
441 E.g. A/C.6/SR.412 para 25 (China); A/C.6/SR.409 para 37, (Peru distinguishing between "active assistance" and "mere toleration"). A/C.6/SR.419, 121 para 16 (Paraguay).
442 A/C.6/SR.408, 60 para 8 (Mexico); A/C.6/SR.410, 72 para 33, 39 (Netherlands); A/C.6/SR.413, 87 para 29 (Norway).
443 A/3574, 30-33, Annex II.
444 A/AC.77/L.7 para 2 (b) (Paraguay), A/AC.77/L.9 para 2 (d) (Iran, Panama), A/AC.77/L.8/Rev.1 (Iraq), A/AC.77/L.10 (Mexico), A/AC.77/L.11 para 2 (e) (Dominican Republic, Mexico, Paraguay, Peru).
445 A/3574, 20 para 162, SR.13, 5-6 (USA).
446 A/3574, 10 para 80. See also A/3574, 20 para 165, SR.17, 5 (Syria) with respect to the Paraguayan draft. In the same direction also A/3574, 20 para 162, SR.13, 5-6 (USA) with respect to the Paraguayan draft; A/3574, 21 para 175 SR.17, 6 (Netherlands) with respect to the Iranian and Panamanian draft, and 23 para 193 with respect to the Mexican draft.
447 A/3574, 21 para 178 (USA).

Notably, the critique primarily related to the general uncertainty about the kinds of activities to be covered by a definition of aggression. States' opinions spanned on a wide spectrum, from being confined to "armed attack" to extending to ideological aggression.[448] On that note, the critique of the drafts has to be viewed in a nuanced manner. To the extent that the provision of assistance met the general threshold required for aggression, States did not disagree that a State *participating* in aggression may be placed on the same footing as a State *perpetrating aggression*.[449] When this would be the case remained however unclear. The subsequent debate in the Sixth Committee did not further illuminate this question – provision of assistance did not play a significant role.[450]

### (c) The 1957 Committee

Only little progress was made under the reign of the Special Committee instituted in 1957,[451] especially, as the Special Committee adjourned its deliberations between 1959 and 1962,[452] 1962 and 1965,[453] and in 1965.[454] Virtually no substantial debates in the Special Committee took place. But States were invited to provide their views on defining aggression.[455] New views with respect to the provision of assistance were scarce. Where States made substantial comments, they mostly repeated earlier views. Still there were some notable statements.

For example, in 1959, Afghanistan argued for the inclusion of indirect aggression "at least in its especially dangerous forms, such as fomenting civil strife in a foreign country through assistance to armed bands"[456] –

448 A/3574 (1957), 7-8 para 47-63.
449 Report of the Special Committee on the question of Defining Aggression, A/3574 (1957), 7 para 52, 8 para 59: "any State that encouraged or assisted groups of the people of another State to take up arms against its own Government was no less guilty than if it had itself taken part in an armed attack".
450 A/3756.
451 A/RES/1181 (IX) (29 November 1957).
452 A/AC.91/2 para 14.
453 A/AC.91/3 para 7.
454 A/AC.91/5 para 14. For more details on the 1181-Special-Committee see Rifaat, *Aggression*, 247-251.
455 Comments by Governments: A/AC.91/1 (1959); A/AC.91/4, Add.1-5 (1962); A/AC.91/7.
456 A/AC.91/1, 6 para 4 (Afghanistan).

remaining ambiguous whether this form could be equated with "armed attack."[457]

Burundi issued a nuanced statement in 1965, in which it argued for the inclusion of interstate assistance in the concept of aggression.[458] It placed aggression between the concepts of provocation that included preparatory acts on the one hand and of the state of war on the other hand.[459] Aggression "goes beyond the simple notion of the unfriendly act and merges with the act of belligerency. It straddles the notion of the act of hostility, which initially is unilateral, and that of the act of war or belligerency, which is complex and reciprocal."[460] Notably, Burundi considered interstate assistance in that context as well. An "alliance with traditional adversary or potential enemy" was considered no more than a "breach of international decorum and courtesy", an "unfriendly act".[461] Among hostile acts synonymous with provocation, Burundi considered "acts of subversion".[462] Those acts were meant to incite "one or more States to take the initiative in opening hostilities."[463] These preparatory acts were "distinguished quite clearly" from acts of aggression.[464] "True aggression" involved "warlike acts or acts of belligerence".[465] Among those acts, Burundi counted, besides "direct attack (bombardment…)", a "breach of neutrality", and "co-operation with the enemy (alliance with the declared enemy, benevolent neutrality, logistic support)".[466]

Dahomey, which is now Benin, argued for a broad understanding of aggression, not confined to "armed aggression".[467] For Dahomey, indirect aggression included "encouragement of subversive activities against another State, assistance to and arming of organized bands against another State, incitement of the local population to revolt against the State authorities, etc…"[468] Dahomey thus equated aggression with the rule of non-interven-

457 Afghanistan considered "aggression" wider than "armed attack", A/AC.91/1 para 3-4.
458 A/AC.91/4, 3-8.
459 Ibid 3, 6-7.
460 Ibid 3.
461 Ibid 4.
462 Ibid 5.
463 Ibid 4.
464 Ibid 6-7.
465 Ibid 5.
466 Ibid 6.
467 Ibid 9.
468 Ibid 10.

tion. It held that "[s]uch acts are in violation of the principles of respect for the sovereignty of states and non-intervention in their internal affairs."

Similarly, Congo suggested that "the dispatch of arms, instructors, or advisors, and particularly volunteers to bands operating in the territory of another State should be considered pure and simple acts of aggression."[469]

(d) Some observations

The first two Special Committees did not lead to agreement among States, not at least due to the principled rejection of a definition by some States. In that light, progress on substance was only limited. However, different options to conceptualize aggression with respect to assistance were on the table.

The considerable disagreement that hampered progress related on the one hand to general concerns about defining aggression, and on the other hand to the general conceptualization of aggression. States disagreed on what kinds of activities a definition should cover: should it be confined to the armed attack or use of force only, or should it include threats, or even extend to "mere" interventions. Irrespective of how States decided on that level, it seems that not only direct commission of these forms, but also the indirect involvement, i.e., the participation in those forms may amount to aggression. Aggression could also be committed through an intermediary. This basic idea did not spark opposition.

Yet, again, the required scope of aggression informed the debate on and the conceptualization of a rule on assistance. In fact, if mere intervention was deemed sufficient, already the mere provision of assistance could amount to aggression. If aggression required the use of armed force, provision of assistance as such was not sufficient. The prohibition of participation had to be accessory.

(2) The Third Special Committee – Interstate assistance as free rider

In 1967, the UN General Assembly recognized the need to expedite the definition of aggression and established a new Special Committee.[470] Delib-

469 A/AC.91/4/Add.1, 5.

470 A/RES/2330 (XXII) (18 December 1967). On the background see Rifaat, *Aggression*, 249-251, 251-262 on the Committee's work.

erations became more constructive. Notably, States maintained their ambition to decide by consensus.[471]

The work of the third Special Committee may be divided in retrospect into three phases. While the sessions between 1967 and 1969 were described as "introductory and debate phase,"[472] between 1969 and 1974, States were engaged in negotiations and compromise building. Here, the famous three drafts (by the group of non-aligned countries, by six Western States and by the USSR) stood at the center of attention.[473] By 1973, consensus was near with details still requiring adjustment. The last phase in 1974 was an 'acceptance or declaration of votes phase'.[474]

(a) 1967-1969

The debate in the 1968 Special Committee was highly politicized. The armed confrontations in Vietnam and Israel were also present in the deliberations.[475] States used them as examples for what, in their view, amounted to aggression. Notably, the provision of assistance was considered aggression, too. For example, the USA stated that "the only aggressor was North Viet-Nam and those in complicity with it."[476] It then specified that the "USSR was a major supplier of that aggression."[477]

In general, indirect aggression remained controversial.[478] It again met with substantial concerns that this would unduly stretch the concept of aggression.[479] In fact, some proposals omitted any express reference to indirect aggression.[480] Others wanted to include it, at least if it involved

471 A/8019 (1970) para 16.
472 Bruha, *Definition of Aggression*, 152.
473 Ibid 152-153.
474 Ibid 154.
475 A/7185/Rev.1, 13-18; Broms, *Definition of Aggression*, 100.
476 Report of the Special Committee on the Question of Defining Aggression A/7185/Rev.1 (1968), 14 para 24.
477 A/7185/Rev.1, 15, para 25.
478 In the discussions on all draft proposals this issue took a prominent place. A/7185/Rev.1 para 81, para 91-93. See also the debates in the Sixth Committee, A/7402 para 15-16.
479 A/7185/Rev.1, 23, para 49, 101.
480 See A/AC.134/L.3 reprinted in A/7185/Rev.1, para 7 (its general definition prohibited "the use of force in any form", but forms of support were not listed). Thomas, Thomas, *Concept of Aggression*, 38. It also received support for being confined to direct aggression only: A/7185/Rev.1 (1968) 26 para 70.

armed force.[481] Again, however, States did not have a common understanding of the notion of indirect aggression. To the extent it was understood as dealing with the provision of assistance, the focus once again lay on "the support of armed bands of one State against another, sabotage, terrorism and subversion."[482] Moreover, opinions were divided in particular if subversive or terrorist activities supported by a State gave rise to the right of self-defense.[483] Various States acknowledged that States could take reasonable and adequate steps to safeguard their existence and their institutions,[484] but excluded self-defense.[485] Others strongly disagreed.[486]

In line with previous deliberations, States considered interstate assistance, too – albeit not prominently. For example, Japan argued against a distinction between direct and indirect aggression; the latter could be as serious as the former. In that context, Japan held, with reference to the UNGA's condemnation of Chinese assistance to North Korea in 1951, that "[t]o give direct aid and assistance to those already committing aggression, as mentioned in General Assembly resolution 498 (V), should, for example, constitute an act of aggression."[487]

At the end of the session, taking into account the deliberations, 13 States submitted a draft.[488] It defined aggression as "the use of armed force, direct or indirect."[489] The subsequent enumeration did not include any specific forms of providing assistance, neither assistance to non-State actors nor to

481 E.g. A/AC.134/SR.6, 40 (Italy); A/AC.134/SR.7, 56 (France); A/AC.134/SR.8, 73 (UK); A/AC.134/SR.1-24, 120 (USA). Also, the Twelve-Power proposal received criticism for its omission, A/7185/Rev.1 para 72, 81.

482 A/7185/Rev.1, 22 para 48. See e.g. also A/AC.134/SR.10, 117 (Columbia). But some also referred to these cases as "direct aggression" see e.g. A/AC.134/SR.5, 34 (Indonesia). See also the ensuing debate in the Sixth Committee A/7402 para 15-16.

483 A/7185/Rev.1 (1968) 24 para 58.

484 Ibid 24 para 57.

485 See for example: Four-Power draft proposal A/AC.134/L.4/Rev 1 para 4, 5; A/7185/Rev.1 para 92; 13-Power Draft: A/AC.134/L.6 and Add.1-2, para 8, reprinted in A/7185/Rev.1 para 9. A/AC.134/SR.1-24, 169 (Syria).

486 A/7185/Rev.1 para 93.

487 A/AC.134/SR.9, 100, See also A/AC.134/SR.6, 40 (Italy) referring to the dispatchment of volunteers; A/AC.134/SR.9, 95 (Syria) referring to the Saad Abad Pact.

488 A/AC.134/L.6 and Add.1-2 reprinted in A/7185/Rev.1 para 9 (Colombia, Congo, Cyprus, Ecuador, Ghana, Guyana, Indonesia, Iran, Mexico, Spain, Uganda, Uruguay, Yugoslavia).

489 This prompted criticism. Sudan and the United Arab Republic proposed an amendment that asked to delete "direct or indirect" (A/AC.134/L.8 reprinted in A/7185/Rev.1 para 10).

States. Moreover, it excluded the recourse to the right of self-defense when a State is victim of subversive and/or terrorist acts by irregular, volunteer, or armed bands organized by another State in its own territory.[490]

In 1969, when the Special Committee reconvened, the deliberations finally gained momentum. Finally, aggression was comprehensively debated. Once more, the extent to which the provision of assistance may fall under the concept of aggression occupied a prominent place.

Previous stages of deliberation had shown that aggression was generally understood as concept that may, and – for many – should, embrace the provision of assistance, most prominently assistance to non-State actors (from the outside to invade the targeted State, and from the inside to undermine the targeted State), but also assistance provided to States. On the precise implementation States' views had varied widely. On that basis, States began working towards a consensus solution.

In 1969, three groups of States submitted draft proposals, each reflecting a different approach to the definition. None of them contained a(n express) reference to interstate assistance. In line with the focus of previous discussions and the vast majority of proposals, all of them attempted to regulate assistance provided to non-State actors.

Closely following its earlier drafts, the USSR in its draft proposal included "armed aggression (direct or indirect)" that was "the use by a State, first, of armed force".[491] As "indirect aggression" the USSR considered

> "the use by a State of armed force by sending armed bands, mercenaries, terrorists or saboteurs to the territory of another State and engagement in other forms of activities involving the use of armed force with the aim of promoting an internal upheaval in another State or a reversal of policy in favour of the aggressor."[492]

Moreover, the Soviet draft's preamble recognized that a definition of aggression "would also facilitate the rendering of assistance to the victim of aggression and the protection of his lawful rights and interests."[493]

490 A/AC.134/L.6 and Add.1-2 para 8, reprinted in A/7185/Rev.1 para 9. It prompted however critique: A/7185/Rev.1 para 106.
491 A/AC.134/L.12 and Corr.1, reprinted in A/7620 (1969) para 9.
492 Ibid para 1, 2 C.
493 Ibid preamble para 7.

The revision of the 13-power draft proposal from 1968 omitted the earlier express qualification of "direct or indirect" use of armed force but remained otherwise unchanged.[494]

In addition, six Western States made a proposal that applied the term 'aggression' i.a. "to the use of force in international relations, overt or covert, direct or indirect, by a State," i.a. by means of:

> "(6) organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State;
> (7) organizing, supporting or directing violent civil strife or acts of terrorism in another State;
> or (8) organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State." [495]

(b) 1969-1970

These proposals were discussed in the sessions in 1969[496] and 1970 without coming to agreement. In particular, whether or not to include "indirect aggression" was controversial.[497]

Some States were hesitant to include indirect aggression in the definition of aggression at least at the present stage of drafting[498] – in particular, if the right of self-defense for those acts was not expressly excluded, or at least limited to cases of 'armed attack'.[499] They feared that the inclusion might lead to the recognition of the concept of preventive war, weaken

494 A/AC.134/L.16 and Corr.1 para 2, reprinted in A/7620 (1969) para 10.

495 A/AC.134/L.17 para II, IV B 6-7, reprinted in A/7620 (1969) para 11 (Australia, Canada, Italy, Japan, USA, UK). In 1970, the States added a preamble: A/8019 (1970) Annex I C, 58.

496 In 1969, the Soviet draft proposal was scrutinized.

497 A/8019 (1970), 6-7 para 26, 51-57, 126-130; A/AC.134/SR.67-78, SR.70, SR.74 (1970).

498 A/8019 (1970), 9 para 28, 18-19 para 52, 56, 45 para 127. A/AC.134/SR.52-66. SR.55 (1970), 22 (United Arab Republic); A/AC.134/SR.52-66, SR.57 (1970), 32 (Uruguay); A/AC.134/SR.52-66, SR.57 (1970), 46 (Bulgaria); A/AC.134/SR.52-66, SR.58 (1970), 57 (Colombia); A/AC.134/52-66, SR.59 (1970), 77 (Syria).

499 A/7620 (1969) para 28, 29, 62, 63, 66. For example, A/AC.134/SR.41, 141 (Yugoslavia); A/AC.134/SR.44, 162 (Cyprus); A/AC.134/SR.41, 137 (Iran); A/AC.134/SR.52-66, SR.57 (1970), 32, SR.74, 112-113 (Uruguay); A/AC.134/SR.52-66, SR.60 (1970), 86 (Mexico); A/AC.134/52-66, SR.60 (1970), 88 (Madagascar); A/AC.134/SR.67-78, SR.70 (1970), 50 (United Arab Republic). This was also the underlying view in the 13-power proposal, A/8019 (1970), 19 para 53.

the preconditions for self-defense, and serve as a pretext to use force.[500] Self-defense should only be granted in cases where "there was no time for deliberation or appropriate action by the Security Council."[501] In any event the examples relating assistance to non-State actors, in their view, did not meet these requirements. In addition, they were concerned about the difficulty to draw a line between internal revolts and acts of aggression of external origin and the problems of proof that become more decisive if a response in self-defense was at stake.[502] However, none of these States argued that such behavior was not dangerous or even lawful. But for them, it "only" qualified as a violation of the rule of non-intervention and breach of peace.[503]

For others, in particular the States submitting the six-power proposal, the inclusion of indirect aggression was essential.[504] Aggression by indirect means was viewed as at least as serious as the direct use of force itself.[505] Not least, as this was included in the prohibition to use force and the Charter, it should also be included in the concept of aggression.[506]

Whether or not those acts triggered the right of self-defense was contested even among those States that argued to include indirect aggression. The Soviet Union, for example, remained ambiguous in its draft. While including indirect aggression, it treated it distinct from "acts of aggression".[507] Western States criticized the Soviet draft in that respect.[508] For them, this allowed the conclusion that such assistance did *not* have the "same legal consequences under the Charter", i.e., giving "rise to the right of individual

500 See also A/8019 (1970), 19 para 53, 46 para 127. A/AC.134/SR.52-66, SR.57 (1970), 37 (Norway); A/AC.134/SR.67-78, SR.74 (1970), 118-119 (France).
501 A/8019 (1970), 10 para 28.
502 A/7620 (1969) para 30, 63, 66.
503 A/8019 (1970), 9-10 para 28. A/AC.134/SR.52-66, SR.58 (1970), 61 (Yugoslavia): in particular if no force is involved, or support is only "political or moral, or take the form of the provision of medical supplies". A/AC.134/SR.52-66, SR.57 (1970), 36 (France); A/AC.134/52-66, SR.60 (1970), 90 (Cyprus).
504 A/8019 (1970), 10 para 29, 18-19 para 51, 54, 45 para 126. See A/AC.134/SR.52-66, SR.55 (1970), 20 (Italy); A/AC.134/52-66, SR.59 (1970), 66-67, SR.61, 97 (USA); A/AC.134/52-66, SR.63 (1970), 115 (Turkey).
505 A/8019 (1970), 9 para 27. States: A/AC.134/SR.52-66, SR.56 (1970), 25 (Canada); A/AC.134/52-66, SR.62 (1970), 109; A/AC.134/52-66, SR.63 (1970), 114 (Indonesia).
506 A/AC.134/SR.52-66, SR.56 (1970), 26 (Canada).
507 Later the USSR explained that "indirect aggression need not necessarily be equated with direct armed attack." A/AC.134/SR.52-66, SR.58 (1970), 52 (USSR).
508 A/7620 (1969) para 28.

or collective self-defense provided for in Article 51 UNC.[509] For them, the Charter did not make a distinction.[510] Self-defense should also apply to indirect aggression.[511] If not, this might encourage States with expansionist ambitions.[512] The existence of a State targeted by indirect aggression may be equally jeopardized if the Security Council was unable to act (quickly).[513] Also, if attacking the bases of mercenaries across the frontier was found to be the only way to stop persistent incursions, the defending State should not be considered the aggressor.[514] The risk of abuse was sufficiently taken into account by the requirement of proportionality.[515]

To the extent that the provision of assistance could amount to aggression, States agreed on two points:

First, the assisted act must involve the use of force. The respective drafts should be clearer on this.[516] In fact, many States required a certain degree of gravity to justify equating indirect and direct aggression.[517]

Second, conceptually, "indirect aggression" addressed a State using force "through the agency"[518] of non-State actors. The assisted actors were a "medium" used by the assisting State.[519] Later Judge Schwebel, speaking for the USA, explained the underlying idea:

509 Ibid. For example: A/AC.134/SR.34, 60 (Japan). See also A/AC.134/SR.38, 98 (Ghana).
510 See for example the 6-power proposal, A/7620 (1969) para 61; A/8019 (1970), 9 para 27, 19 para 54, 46 para 128. See also Schwebel, *RdC* (1972) 458
511 A/8019 (1970), 46 para 128. E.g. A/AC.134/SR.52-66, SR.57 (1970), 40-41 (Japan); A/AC.134/SR.67-78, SR.73 (1970), 107 (UK); A/AC.134/SR.67-78, SR.74 (1970), 114 (USA); A/AC.134/SR.67-78, SR.74 (1970), 116 (UK).
512 A/8019 (1970), 46 para 128; A/AC.134/SR.67-78, SR.74 (1970), 115 (USA).
513 A/8019 (1970), 47 para 128.
514 Ibid; A/AC.134/SR.67-78, SR.74 (1970), 115 (USA).
515 I.e. if the "presence of an armed attack constituted an imminent danger similar to an armed attack" A/7620 (1969) para 65, A/8019 (1970), 19 para 54; A/AC.134/SR.52-66, SR.57 (1970), 40 (Japan); A/AC.134/SR.52-66, SR.63 (1970), 116, 121 (USA); A/AC.134/SR.67-78, SR.74 (1970), 117 (UK). Critical in this respect: A/AC.134/SR.52-66, SR.63 (1970), 119 (United Arab Republic).
516 A/7620 (1969) para 25-26, 28, 33. E.g.: A/AC.134/SR.32, 40 (Mexico), A/AC.134/SR.33, 56 (Italy); A/AC.134/SR.38, 106 (Australia); A/AC.134/SR.52-66, SR.57 (1970), 38 (Australia); A/AC.134/SR.59 (1970), 65 (USA).
517 A/AC.134/SR.74 (1970), 120 (Canada); A/AC.134/SR.67-78, SR.70 (1970), 52 (Congo).
518 A/8019 (1970), 9 para 27. A/AC.134/SR.52-66, SR.55 (1970), 20 (Italy).
519 A/8019 (1970), 20 para 57. See also A/AC.134/SR.67-78, SR.74 (1970), 116 (UK).

> "The principle involved was simple and familiar and one of the general principles of law recognized by civilized nations as applied by the ICJ: "He who brought the act of another procured a result was held responsible for the result; the principal was held to be responsible for the act of his agent." That principle should attract the support of all of the members of the committee"[520]

When this was the case, however, remained fiercely disputed: many States argued for a narrow understanding. They required an active and major role of the assisting State, such as "sending".[521] For example, France justified this as "aggression did not depend upon the wearing of a uniform or the legal status of the armed force employed."[522] This understanding would have excluded other forms of assistance, like "mere" "encouragement", "support", or the "refusal to take all necessary measures to deny armed bands aid or protection".[523] Again, France explained that "the link was not so close between the use of armed force and "organizing, supporting or directing [...] subversive activities".[524] Other States disagreed and called for the broader understanding.[525]

On that basis, the Working Group established in 1970 only included a rule prohibiting the *sending* of armed bands, on the understanding that in any event this form "could amount to direct armed aggression".[526]

Notably, in light of those controversies, there were also thoughts to stipulate a general rule that would have left the dispute unresolved. For

520 A/AC.134/SR.59 (1970), 67.

521 A/AC.134/SR.35, 77 (Congo); A/AC.134/SR.67-78, SR.73 (1970), 108 (France); A/AC.134/SR.52-66, SR.58 (1970), 51 (USSR according to which "volunteer forces" should be treated differently); A/AC.134/SR.52-66, SR.58 (1970), 55 (Ecuador requiring an "acting under the order of a foreign Government").

522 A/AC.134/SR.52-66, SR.57 (1970), 36 (France).

523 A/7620 (1969) para 28.

524 A/AC.134/SR.67-78, SR.73 (1970), 108 (France). See also A/AC.134/SR.67-78, SR.74 (1970), 119 (Syria): "The support or encouragement of armed bands, subversive activities or civil strife in another State were also acts of aggression, but not as *direct or as serious* as the classic cases of flagrant, direct aggression", emphasis added.

525 E.g A/AC.134/SR.28, 19 (Canada); A/AC.134/SR.31, 32 (USA); A/AC.134/SR.32, 38 (UK); A/AC.134/SR.34, 60 (Japan); A/AC.134/SR.38, 106 (Australia); A/AC.134/SR.39, 116 (Finland); A/AC.134/SR.45, 172 (Canada); A/AC.134/SR.52-66, SR.57 (1970), 39 (Australia).

526 A/8019 (1970) Annex II, 65 para 22, 23.

example, some States proposed to add to the general definition, if not the qualification "direct or indirect", at least "however exerted."[527]

The survey illustrates well that in that debate on indirect aggression, interstate assistance did not play a prominent role. Almost exclusively, States referred to support to non-State actors (acting externally in form of armed bands invading the targeted State or acting internally through subversion, etc.).[528] Also, the Working Group only addressed support to non-State actors when considering acts proposed for inclusion.[529] Furthermore, most arguments that could have been equally valid for interstate assistance were tailored narrowly towards these scenarios relating to non-State actors. For example, one representative argued that "treaties defining aggression that have been concluded in the past always contained a paragraph dealing with support given to armed bands."[530] That these treaties also referred to interstate assistance, found no mention, however.

But, as the reports of the Special Committee diligently recorded,[531] there was one exception. One State applied the concept also to interstate assistance, at least to one specific form: Romania.[532] It persistently expressed the opinion that "if a State permitted another State to use its territory in order to attack a third State, that constituted an act of indirect aggression."[533]

In 1969, Romania argued for a generic description of armed aggression that should be supplemented by an indicative list of typical acts of armed aggression. It based this list on "international experience so far gained, the conventional practice of States and world public opinion."[534] The enumeration should include *inter alia* "the use of armed bands on the territory of another State."[535] Then, Romania added: "If a State permitted another State to use its territory in order to attack a third State, that constitutes an act of indirect aggression which should be condemned as one element of the crime of aggression".[536]

527 Ibid 61 para 4.
528 See for example: A/AC.134/SR.52-66, SR.56 (1970), 25 (Canada).
529 A/8019 (1970), Annex II, 65 para 22.
530 Ibid 18 para 51.
531 A/7620 (1969) para 35; A/8019 (1970), 10 para 30.
532 A/AC.134/SR.41 (1969), 137-139; A/AC.134/SR.59 (1970), 64.
533 A/7620 (1969) para 35.
534 A/AC.134/SR.25-51, 138.
535 Ibid.
536 Ibid 139.

In 1970, it was again Romania that "noted the absence from all drafts of any reference to the case where one State puts its territory at the disposal of another for use as a base in an armed attack against a third" State.[537] Romania emphasized that this act merited inclusion in the list of acts of aggression.[538]

Yet, Romania's request remained no more than the howling of a lonesome wolf in the thicket. It did not spark a comprehensive discussion of the application of indirect aggression to interstate assistance or the regulatory framework of interstate assistance in general. Neither did it trigger a debate on whether to include other forms of interstate assistance – but this Romania's call was arguably not meant to do given its very specific nature. No State replied or referred to the idea throughout the discussions. In the debates in 1969 and 1970, interstate assistance remained no more than a side note.

### (c) 1971

In 1971, the Working Group combined the various positions into a single text, although large parts were put in square brackets, indicating that they were not acceptable to all States.[539] There was agreement to limit the definition to the use of armed force.[540]

The general debate once again circled around the indirect use of armed force, exchanging primarily familiar arguments. It was again the application of the right of self-defense to those situations that remained at the center of the debate.[541] Some thought that acts such as "organizing, supporting or directing armed bands that infiltrated into another State" did not entitle the targeted State to exercise its rights to self-defense, although they admitted that in "marginal cases in which the infiltration was so substantial and the danger so great that they were tantamount to an armed attack," this might be justified.[542] Others argued that the right could not depend on the means

537 A/AC.134/SR.52-56, SR.59, 64 (Romania).
538 A/8019 (1970), 10 para 30.
539 A/8419 (1971) Annex III, 30-37.
540 A/C.6/SR.1268, 123 para 7 (Iraq as Chairman).
541 A/8419 (1971), 8-9 para 27-28. Against or cautious: A/AC.134/SR.81, 12-13, SR.89, 82-83 (Cyprus); A/AC.134/SR.84, 35 (USSR); A/AC.134/SR.84, 39 (Syria). For: A/AC.134/SR.82, 18 (USA).
542 A/8419 (1971), 8-9 para 27. A/AC.134/SR.81, 13 (Cyprus).

of aggression used, at least if the indirect use of force is fully comparable to direct uses of force.[543]

And again, the debate primarily concerned the involvement in violence by non-State actors.[544] On the subject of specific acts of aggression, Romania remained alone with its call to include interstate assistance in form of making "territory available to another State so that the latter could commit aggression against a third State."[545]

The single text did not include any explicit reference to interstate assistance. But at least, it allowed for the inclusion also of interstate assistance, albeit it was certainly not States' primary concern.

First, the general definition stipulated that "aggression is the use of armed *[*however exerted*]* […]".[546] This was introduced to embrace indirect aggression, not defining it any further.[547] Second, one aspect of the provision on indirect aggression (although entirely in brackets) read

> "The carrying out, directing, assisting or encouraging by a State of acts of incursion, infiltration, terrorism or violent civil strife or subversion in another State, whether by regular or irregular forces, armed bands, including mercenaries, or otherwise, or the acquiescing by a State in organized activities within its territory directed towards the commission of such acts."[548]

Notably, this provision referred to those acts also when committed by *regular* forces. This might also embrace assistance provided to the regular forces of a third State. The constellation of assistance to and encouragement of a State's own regular forces would arguably be no *indirect* aggression.

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543 A/8419 (1971), 9-10 para 28. A/AC.134/SR.82, 19 (USA); A/AC.134/SR.84, 33 (Japan); A/AC.134/SR.85, 43 (Italy); A/AC.134/SR.85, 50-51 (UK).

544 E.g. A/AC.134/SR.84, 31 (Australia); A/AC.134/SR.85, 42 (Italy). See also in the Sixth Committee: A/C.6/SR.1270, 134, para 22 (Greece), 134 para 26, 28 (Burma); A/C.6/SR.1271, 140 para 30.

545 Report of the Special Committee on the Question of Defining Aggression, A/8419 (1971), 10 para 30; A/AC.134/SR.87, 68. It made the same request also in the Sixth Committee A/C.6/SR.1272, 145 para 23.

546 A/8419 (1971) Annex III, 30.

547 See e.g. A/AC.134/SR.84, 31 (Australia). See also A/AC.134/SR.89, 77 (Syria). The scope then again varied: e.g. A/AC.134/SR.86, 62-63 (Ghana) limiting it to "armed force necessitating the exercise of the right of self-defense", hence requiring that indirect forms were "of particularly great intensity."

548 A/8419 (1971) Annex III, 34-35.

The views expressed on the Working Group's report, however, did not clarify the scope; once again, States were only concerned with the question of whether this would create a *casus belli*.[549]

(d) 1972

In 1972, the Working Group made considerable progress through informal negotiating groups, and was able to resolve many brackets – not so, however, on the subject of indirect aggression. The stalemate on what was described as the "crux of the negotiations"[550] was reflected in two alternative proposals included in the report of the informal negotiating group established by the working group. The first adopted a high threshold. It was confined to sending by a State of non-State actors, required the latter to use force amounting to an armed attack. The right of self-defense was excluded.[551] The second alternative proposed by the six-powers sought to incorporate the formula agreed upon in the Friendly Relations Declaration.[552] The formula therein was generally accepted as prohibited conduct. But again, views diverged if it was appropriate to include it in a definition of aggression.[553]

Interstate assistance again found no consideration, neither in the realm of the deliberations of the Special Committee nor in the Sixth Committee,[554] but for Romania's remark that "the list of acts which constituted acts of aggression should include other examples, and in that regard the proposals made by his delegation at earlier sessions remained valid."[555]

549 A/8419 (1971), 17-18 para 52-57.
550 A/AC.134/SR.95 (Australia). See also A/AC.134/SR.96, 45 (Turkey); A/AC.134/SR.96, 51 (UK).
551 A/8719 (1972), 15.
552 Ibid; A/AC.134/SR.96, 51-52 (UK).
553 See e.g. A/AC.134/SR.98, 71 (Bulgaria): "it took on a different meaning and tended to obliterate the borderline between the crime of aggression and other forms of the use of force."
554 In the Sixth Committee indirect aggression was also discussed, again however only with respect to support to non-State actors A/C.6/SR.1348, 207 para 19 (France), 208 para 27 (Greece); A/C.6/SR.1349, 215 para 64 (Philippines); A/C.6/SR.1350, 222 para 31 (Kenya); A/C.6/SR.1351, 227 para 20 (Nigeria).
555 A/AC.134/SR.95, 35 (Romania).

(e) 1973

It was only in 1973 that Romania's insistence bore fruits. A change of procedure opened the door. So far, the Working Group consisted of selected delegations. In 1973, all delegations of the Special Committee were welcome to join the Working Group.[556] Now that Romania participated,[557] the provision of territorial interstate assistance had an advocate with more direct influence.

It was then also the Romanian delegate that reported from the Working Group to the Special Committee that "at his request" the Working Group had added to its list *i.a.* "[t]he use of the territory of one State as a basis for attack against another State."[558] The Working Group then established Contact Group 2 that was instructed to examine "the acts proposed for inclusion, indirect use of force", among others.[559] Romania joined this group, too.[560]

Ultimately, States came up with a consolidated text of the reports of the contact groups and of the drafting group.[561] Among the acts proposed for inclusion were also acts that were referred to as indirect aggression that had occupied much space in the negotiations.[562] First, States reproduced a text that was discussed on indirect aggression through non-State actors. On the basis of previous proposals and drafts, the consolidated text defined as aggression:

> "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out invasion or attack involving acts of armed force against another State of such gravity as to amount to the acts listed above, or its open and active participation therein."[563]

556 A/9019 (1973), 3 para 6. The Yugoslavian Chairman, Mr Todorić, had proposed this, A/AC.134 SR.103, 11.
557 A/9019 (1973) Report of the Working Group, 13 para 3, 4.
558 A/AC.134/SR.104 para 14 (Romania).
559 A/9019 (1973) Report of the Working Group, 13 para 4; A/AC.134/SR.105, 15.
560 Ibid.
561 A/9019 (1973) Report of the Working Group, Appendix A, 15. On the course of negotiations: 13-14 para 1-7.
562 A/AC.134/SR.106, 21 (Turkey).
563 A/9019 (1973), 17, Article 3(g). It remained however controversial: ibid 19: some proposed that it should be covered by a separate article. Likewise, the clause on "participation" was controversial.

States however did not stop there. Secondly, they included a provision on interstate assistance. Along the lines of Romania's proposal,[564] the concept of aggression also embraced:

> "(f) The action of a State placing its territory at the disposal of another State when the latter uses this territory for perpetrating an act of aggression against a third State with the acquiescence and agreement of the former."[565]

(i) Some observations

The consolidated text was remarkable in several respects.

First, that and how the concept of indirect aggression was extended in the final stretch of the deliberations to embrace also interstate assistance in Article 3(f) was noteworthy. While the provision did not come out of the blue, there were only little signs that its inclusion was to be expected. It stood at the end of fierce and lengthy struggle on indirect aggression that only sporadically included some sparse references to interstate assistance. Previous deliberations did not give the impression that States would attach particular importance to the interstate assistance scenario in general, or territorial assistance in particular, as the five-year ignorance of Romania's suggestion illustrates best. In this light all the more remarkably, Article 3(f) did not spark substantial disagreement. No State challenged the rule as a whole. States from all camps expressly accepted the provision.[566] The few formal and recorded remarks only concerned nuances of the definition.[567] For example, Italy and Syria both reserved their position on aspects of the provision. Both however expressly noted their support of the idea contained in Article 3(f).[568]

Second, States considered Article 3(f) a feature of the concept of indirect aggression, as not at least the systematic position and the drafting history suggest. Despite the same conceptual origin States distinguished between

564 A/C.6/SR.1441, 238 para 36 (Romania) admitting that it was its proposal.
565 A/9019 (1973), 17, Article 3(f).
566 A/AC.134/SR.106, 27 (Italy); A/AC.134/SR.108, 38 (Syria); A/AC.134/SR.108, 42 (Bulgaria); A/AC.134/SR.108, 42 (USA).
567 Similarly, Bruha, *Definition der Aggression*, 262. One State made a reservation. A/9019 (1973) Appendix A, 19.
568 A/AC.134/SR.106, 27 (Italy); A/AC.134/SR.108, 38 (Syria). See also A/AC.134/SR.109, 47 (USSR) that called for reconsideration of the wording.

the recipients of assistance: States (Article 3(f)) and non-State actors (Article 3(g)). States set up two different rules with different scope – the recipient being the main distinguishing feature. States neither discussed nor applied the standards applicable to non-State actors to States.

Third, on that basis, it is interesting to see the parallelism and differences between the provisions regulating interstate assistance and assistance to non-State actors.

In both cases the provision of assistance *itself* was not sufficient to amount to aggression. Both provisions are accessory in nature. Pursuant to Article 3(f), neither the placement of territory at the disposal *itself*, nor the agreement and acquiescence in the use of force, are enough. Only *once* the assisted States commits aggression, has the assisting State committed an act of aggression as well. Likewise, Article 3(g) requires that the "acts of armed force" are carried out.[569] The mere provision of assistance does not amount to aggression, in line with the general agreement that only armed aggression was to be defined.

Furthermore, both provisions require that the assisted armed force reaches a certain magnitude and gravity, and thus is equal to an act of aggression.[570] Here the provisions deviate. Article 3(f) requires an (unlawful) aggression. Article 3(g) does not require illegality. Article 3(f) refers to "an act of aggression," a legal category.[571] Article 3 (g) refers in a rather clumsy manner to "invasion or attack involving the acts of armed force against another State of such gravity as to amount to the acts listed above". This is a factual description only – also limiting the defense to the facts, which could refer to the characteristics of the assisted non-State actor or to the force used.[572] It was certainly a decisive difference for the application of the rule. But it was not a *structurally* relevant difference. In fact, this difference merely accommodated the fact that non-State actors could not commit an act of aggression in legal terms. This common characteristic once more underlined the similar origin in the concept of indirect aggression: in both

569 Ghana reported that this condition was important as the question on elements without use of armed force had divided States before. A/AC.134/SR.109, 49 (Ghana).

570 See for example A/AC.134/SR.106, 29 (Mexico); A/AC.134/SR.108, 37 (Syria) (but also pointing to the difficulty of proof); A/AC.134/SR.109, 50 (Ghana).

571 This allows for the argument that the assisted use of force was no aggression, as a justification applied.

572 For example, supporting "volunteers" for example could fall outside the scope. Note also the reference to "invasion or attack" that points towards a right of self-defense, but also appears to exclude support to civil strife from within a State. On the background Bruha, *Definition der Aggression*, 235.

cases, the assisting State was committing an act of aggression *through an intermediary*.

The key difference lied in the form of contribution by the assisting State that justified States to equate the assisting State with an aggressor.

In the context of the use of force by non-State actors, Article 3(g) required "sending" or "open and active participation" by the assisting State. The former alternative met acceptance. The latter, however, was the beginning of a compromise. France summarized the positions of States as follows:

> "Some States considered it inappropriate to define rigidly the link between the receiving State and armed bands. The mere fact that a State received, organized, encouraged or assisted armed bands which committed incursions should be regarded as an act of aggression. The extreme view was that the mere fact that a State made its territory available to armed bands should be regarded as an act of aggression. On the other hand, many delegations, including his own, considered that aggression should not be regarded as having occurred unless first, the activities of a State were involved – otherwise the case would fall outside the scope of the definition of aggression – or second, an invasion of another State took place involving the use of a sufficient degree of armed force by the armed bands."[573]

The proposed compromise did not follow the previous argument that any form of assistance that was accepted in the Friendly Relations Declaration to amount to a "use of force" was enough to qualify as aggression.[574] However, it accommodated in particular the wish of the six-power-States for a broadening of the scope.[575] On that basis, a general provision of "participation" was introduced, albeit in a qualified manner to raise the bar.[576] Opinions on this qualification were and remain divided. Initially, States had proposed to refer to "collaboration therein."[577] As this terminology met with strong opposition, the notion of "open and active participation" was

573 A/C.6/SR.1441, 239 para 45 (France), emphasis added.
574 See above A/8719 (1972), 15.
575 A/9019 (1973) Report of the Working group, Appendix B, 23 (USA); A/AC.134/SR.108, 41 (UK).
576 But see A/AC.134/SR.106, 20, A/9019 (1973) Report of the Working group, Appendix B, 22, (Indonesia), 23 (USA), 24 (Guyana) arguing to broaden the scope.
577 A/9019 (1973) Appendix A, 19.

introduced, which again did not find general agreement.[578] Article 3(g) then represented no more than the text discussed during the last stage of consultations. It suggested that States were about to include a general provision, the precise qualification to be still discussed.

For assistance to States, on the other hand, States chose a different approach. They neither included the sending requirement, nor did they adopt a (qualified) general rule nor apply the same rule of non-State actors to States (as was at times proposed in the early debates). Instead, States stipulated a specific rule governing territorial assistance only.

Reasons for the inclusion of the rule, and the different scope in the interstate context remain ambiguous. There are no records of the discussions in the Working Group,[579] and many deliberations were held informally. In formal meetings, States kept a low profile on their motives. Still, several reasons come to mind:

First and pragmatically, Romania was the driving force behind Article 3(f). Romania's call was confined to territorial assistance. It did not propose a broader rule. In fact, Romania's proposal also was not meant to *mirror* the rules on assistance to non-State actors, but to *complement* them. Without an advocate for a broader rule at that final and decisive stage, it was also not considered.

Second, the widely accepted rule of "sending" appeared as rather unlikely scenario in the interstate context. That indirect aggression also embraced a general rule, i.e., the prohibition of "open and active participation," on the other hand, was fiercely contested in the present context of aggression.[580] Applying such a general rule to interstate assistance that had as many nuances arguably would have opened Pandora's box. States wanted anything but opening yet another imbroglio. At the present stage of deliberations,

578 Ibid; States against the "participation"-clause: A/AC.134/SR.107, 31 (Algeria); A/AC.134/SR.107, 33 (Egypt); A/AC.134/SR.108, 37 (Syria); A/AC.134/SR.108, 40 (Iraq); A/AC.134/SR.108, 42 (Bulgaria); A/AC.134/SR.109, 47 (USSR); A/C.6/SR.1443,253 para 32 (USSR) – requiring a "direct link" States for the clause (or even broader): A/AC.134/SR.106, 21 (Turkey); A/AC.134/SR.106, 22 (Canada); A/AC.134/SR.106, 24 (Indonesia); A/AC.134/SR.108, 41 (UK).

579 A/AC.134/SR.103, 11.

580 A/9019 (1973) Appendix A, 19. A/AC.134/SR.107, 31 (Algeria with a reservation on that aspect); A/AC.134/SR.108, 37 (Syria); A/AC.134/SR.107, 33 (Egypt); A/AC.134/SR.108, 40 (Iraq); A/AC.134/SR.108, 42 (Bulgaria); A/AC.134/SR.109, 47 (USSR). It was accepted however for the "use of force", in the Friendly Relations Declaration.

they aimed for ending two decades of controversies and a conclusion acceptable for all States – at best through consensus.[581]

Third, against that background, following Romania's lead appeared the easiest way through which States *could* come to agreement. In fact, that the provision sparked so little debate suggested that the proposed rule was not controversial. It appeared to be fairly well established in international law – although at least formally, States did not refer to previous practice. It was a proposal behind which all States could rally. As Romania did not belong to any of the three groups that had submitted a proposal, political considerations did not come into play.

Fourth, interstate territorial assistance was a well-suited example for interstate indirect aggression. It may not necessarily have been the most pressing issue. But the provision of territory was a common phenomenon. It was an essential and decisive contribution to the use of force. Last but not least, it was relevant in the context of a potential response by armed force in self-defense, which States had in mind. The territorial base from where an attack was launched was inherently linked to and highly relevant for the question of proportionate self-defense, if the attack comes from that very State. (Also) striking the territorial State from where an attack originates may be the only possible way to effectively defend oneself against the attack. This is even more relevant in the interstate context than in the non-State actor context. While the latter can *typically* be more easily defended within territorial confines,[582] States have more sophisticated military means that often do not allow for defense other than targeting the roots.

Fifth, in light of the concerns voiced about assistance to non-State actors, territorial assistance in the interstate context appears to have caused less concern.[583] On the one hand, the placement of territory at the disposal was more formalized and verifiable in the interstate context, thus mitigating the feared difficulty of proof and the risk of being subject to abusive exercise of self-defense.[584] On the other hand, territorial assistance may pose an increased risk to be subject to acts of self-defense.

581 E.g. A/AC.134/SR.103, 11, SR.106, 21 (Turkey), 22 (Canada), 30 (Japan), SR.108, 41 (Bulgaria), SR.109, 51 (Finland). See also Schwebel, *RdC* (1972) 447-448.

582 Of course, as the US has pointed out in the 1970 debate, this is necessarily true for all cases.

583 It is not clear that territorial assistance to armed bands was excluded from the prohibited forms. It only was not expressly included. As such, it was more controversial.

584 Also, in the interstate context territorial assistance was necessarily a voluntary decision (or otherwise a violation of State sovereignty); in the context of non-State

Fourth, it is remarkable that States included an act of assistance and equated it with perpetration of aggression. States were well aware of the critical observation later voiced by many scholars:[585] Article 3(f) concerned acts that were traditionally qualified as *participation*. For example, Italy described the "idea contained in article 3(f) [as] the need to condemn the *complicity* of a State with another State *perpetrating* an act of aggression."[586] The USSR described the subject of that subparagraph as the "complicity or joint participation in aggression."[587]

This did not mean however that States attempted to eliminate the line between participation and perpetration entirely. Already the fact that not all forms of assistance qualified as aggression shows that the two concepts remain separate in principle. On the condition that participation met a certain standard of gravity,[588] acts of participation could exceptionally be placed on the same footing as prohibited perpetration.[589] As the USSR put it, in those cases there is "*an* act of aggression *perpetrated* by *two* or more States."[590] Both States are then responsible for the same act of aggression.

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actors, as the armed bands may form involuntarily within the territorial State, are less controllable for the territorial State that may have less effective means to take action against these armed bands In the interstate context, the territorial State can revoke the consent. Legally, the State using force has to leave the country. The territorial State has done all to advert the risk of self-defense. Of course, the aggressor State may continue to use the territory. But this is then in violation of international law. In this context, hence this was a clear category to draw a line, which was missing in the non-State actor context.

585 E.g. Andreas Paulus, 'Second Thoughts on the Crime of Aggression', 20(4) *EJIL* (2009) 1121; Kai Ambos, 'The Crime of Aggression after Kampala', 53 *GYIL* (2010) 488; McDougall, *Crime of Aggression*, 76-77; Miles Jackson, *Complicity in International Law* (2015) 143-144; Bruha, *Definition of Aggression*, 163; Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression. A Commentary* (2017) 446.

586 A/AC.134/SR.106, 27 (Italy), emphasis added. See also A/AC.134/SR.108, 38 (Syria).

587 A/C.6/SR.1443, 253 para 32 (USSR), A/AC.134/SR.109, 47 (USSR). See also A/C.6/SR.1442, 248 para 65 (Ghana).

588 States remained rather silent on this exact standard. It may be deduced however from the general debates, the conception of aggression in general, and the fact that not all forms of assistance were included (as proposed for example for non-State actors by the six powers), but only a careful selection, all of which are based on a certain form of involvement of the assisting State. This is also based on the general idea behind the concept: perpetration through an intermediary, which implicates that not any assistance or even implication in the use of force is sufficient.

589 Critical whether this was true for the 1972-draft A/AC.134/SR.108, 38 (Syria).

590 A/AC.134/SR.109, 47 (USSR), emphasis added. In fact, the USSR sought to emphasize that not only the territorial State bore responsibility.

In doing so, States did no more than to continue their practice that had culminated in the Friendly Relations Declaration, that acts of assistance, of *participation*, could qualify as use of force, as *perpetration*. Now, States refined this and concluded that some acts of assistance could even qualify as aggression. At the same time, the narrow scope did *not* mean that those forms of assistance that were not mentioned could *never* be a perpetration, i.e., a *use* of force.

On that note, it is important to see that draft Article 3(f) did not consider any form of territorial assistance as sufficient. The scope was deliberately and carefully designed.

The mere fact that a State's territory was used by another State for aggression was not enough. Rather, this might come in the realm of Article 3(e) that prohibited the use of armed forces in the receiving State in contravention of the conditions provided in the agreement.

It was required that the territory was placed "at the disposal" "with the acquiescence and agreement" to the aggression. Unlike the somewhat unfortunate phrasing might suggest, the placement of territory at the disposal of a State was not the exclusively relevant act of assistance.[591] "Acquiescence and agreement" in the perpetration of an act of aggression were required as well. The relationship between those two assisting actions remained unclear. The word "with" allowed for an understanding that acquiescence and agreement had to be present at the time of placing the territory at the disposal of the later aggressor State.[592] Accordingly, Article 3(f) would only cover cases where the State had placed the territory for a specific aggression. This would have excluded cases where a State had placed the territory, e.g. through a stationing agreement, beforehand.

With respect to due diligence violations, i.e., the failure to prevent the use of the territory for aggression, ambiguity prevailed, largely due to the cumulative use of the notions of "acquiescence" and "agreement", connected by an "and". The notion of "acquiescence" seemed to open the door. It suggested that a territorial State might also be responsible to the extent that it should have known about the aggression and could have but failed to

591 Voicing that concern: A/AC.134/SR.109, 47 (USSR).

592 See also Bruha, *Definition der Aggression*, 263. The systematic placement at the end of the paragraph might be read to relate this to the use of the territory for perpetrating aggression; this interpretation hence was not definitive.

prevent it.[593] The notion of "agreement" appeared to close the door again, and to set the bar higher, effectively requiring consent, on the basis that the territorial State positively knew about and agreed to the aggression. Without at least foreseeability, there could not be agreement.[594] This uncertainty caused some States to reserve their position.[595]

At the same time, the required contribution remained still participation by nature.[596] It was not required that the threshold of attribution was met. Nor was it necessary for the territorial State invite or expressly endorse the aggression. Again, States maintained a low profile on the reasons for this conceptualization. It appears, however, that States again understood the forms of assistance as a continuum. While all was prohibited, the debate revolved around what was enough to qualify as aggression. States arguably tended towards a higher threshold, requiring active participation.

The difference in tendencies towards assistance provided to non-State actors was again notable. The latter did not include a provision on territorial assistance. It could be covered by the general (qualified) participation clause.[597] The decisive distinguishing criteria seemed to be the recipient of assistance as well as the type and nature of assistance. States again kept a low profile when explaining this distinction.

All of this, however, must again be understood against the backdrop that States were discussing examples that were neither exhaustive nor conclusive.[598] Hence one cannot necessarily conclude that those mentioned were the only forms of assistance that were prohibited. States made a specific statement on the *discussed* and *included* forms of assistance. For those forms, one can assume that they are prohibited uses of force. There,

593 See for non-State actors: A/AC.134/SR.108, 41 (UK): no responsibility if a State "could do nothing to stop the misuse of its territory by others;" but "a State should not escape responsibility if it were itself at fault," i.e. supporting or encouraging, or standing back and allowing its territory to be used for acts of aggression if it was in a position to prevent.

594 See also Broms, *RdC* (1978) 353; Kreß, *State Conduct Element*, 447; Jackson, *Complicity*, 141 linking this to the placement requirement.

595 A/AC.134/SR.106, 27 (Italy); A/AC.134/SR.108, 38 (Syria).

596 States did not want to challenge this, see above notes 586-587.

597 One *could* however make the argument that as Article 3(f) covered territorial assistance it should not be covered by Article 3(g). See also Bruha, *Definition der Aggression*, 262.

598 See for this also A/C.6/SR.1440, 230 para 33 (Finland, Broms, Chairman of the Working and Contact Groups) ("near-consensus […] was largely due to consensus on Article 4"). A/C.6/SR.1441, 235 para 16. See also e.g. A/C.6/SR.1441, para 23 (Mongolia); A/C.6/SR.1441, 240 para 55 (USA).

participation amounts to perpetration. On other forms, no statement was made. Of course, the regulation of some forms of assistance indicated and predefined the scope within which other forms of assistance might fall; at least the assistance must meet similar criteria. Taking Article 3(f) as standard, however, one should be careful to draw conclusions with respect to the general permissibility of assistance. It should be remembered that States were concerned with aggression (that possibly allowed for self-defense). This substantially determined the high threshold.

(ii) States' observations

The consolidated text was not yet final. Agreement might have been close and various principles had already gained acceptance. But the text as a whole still lacked consensus. This was again particularly true for indirect aggression. The necessary or sufficient involvement of the assisting State remained especially controversial.[599]

Some States continued to press for a broadening of the involvement: Guyana, for example, wanted to expand Article 3(g) to include "organization or supporting".[600] So did Indonesia.[601] The US again argued for a wording aligned with the Friendly Relations Declaration.[602] The UK wanted to include a failure to prevent acts of aggression originating from a State's territory.[603] Uruguay's proposal included a broadened scope for non-State actors, but omitted – without further comment – the provision on interstate assistance. Others rejected even any general concept of "participation".[604] Syria explained that the "large majority of subversive and infiltration activities came rather under the category of minor acts, and at the worst constituted a threat or a breach of the peace, a condition which did not give rise to the automatic application of the right of legitimate self-defense under Article 51 of the Charter."[605] It also feared exaggerations to justify retaliatory action. France insisted that it should be "made abso-

599 See also A/C.6/SR.1440, 230 para 33 (Finland); A/C.6/SR.1441, 239 para 45 (France) setting out the provisions.
600 A/9019 (1973), 24 (Guyana).
601 Ibid 22 (Indonesia).
602 Ibid 23 (USA). See also A/C.6/SR.1442, 242 para 7-8 (India).
603 A/AC.134/SR.108, 41 (UK). Rejecting this: A/C.6/SR.1441, 239 para 46 (France).
604 For example: A/C.6/SR.1441, 235 para 16 (German Democratic Republic).
605 A/AC.134/SR.108, 37 (Syria).

lutely clear that such groups were genuinely involved in an international situation, in other words in an incident between two States."[606]

States did not challenge the inclusion of Article 3(f). But they commented on its scope. Italy expressed reservations about the formulation "with the acquiescence and agreement".[607] It also proposed to omit the words "when the latter uses this territory" and instead to formulate "for the purpose of perpetrating an act of aggression".[608] In Italy's view, this change would more clearly express the idea underlying Article 3(f).[609] At first sight, Italy's suggestion could be understood to structurally change the prohibition. It would no longer require the use. Already the provision of assistance itself would be sufficient. But this was not Italy's intent. When stating the general idea, it referred to the need for "*complicity* [...] with another State *perpetrating* an act of aggression." Also, Italy alternatively proposed to clarify the act of assistance to "allowing the *use* of its territory." It seemed that Italy's primary concern with this proposal was the wording and the content of the permission, not the structure.[610]

Syria "had strong reservations with regard to Article 3(f). While it did not object to the concept stated, it felt that the form of action referred to should not be placed on the same footing as the direct and flagrant acts of aggression mentioned in [the other] sub-paragraphs."[611]

In the Sixth Committee, various States commented on interstate assistance. Ghana commented on the "new element" that it

> "strongly supported the new concept contained in subparagraph (f), although it was of the opinion that a State which had agreed to the stationing in its territory of the armed forces of another State should not be held liable for the latter's acts if it was in no position to do anything about them. In other words, to be classified as an aggressor the receiving State must be a willing accomplice, a fact which was reflected in the text of the subparagraph in the reference to the "acquiescence and agreement" of that State."[612]

606 Ibid 40 (France).
607 A/AC.134/SR.106, 27 (Italy).
608 Ibid. See also A/9019 (1973) Appendix B, 24.
609 A/AC.134/SR.106, 27.
610 See also Bruha, *Definition der Aggression*, 253.
611 A/AC.134/SR.108, 38 (Syria).
612 A/C.6/SR.1442, 248 para 65 (Ghana).

The USSR stated:

> "If his delegation understood subparagraph (f) correctly, the subject of that subparagraph was the complicity of States or joint participation in aggression whereby one State provided armed forces and the other State provided a staging area for perpetrating an act of aggression against a third State. However, according to the literal meaning of subparagraph (f), the responsibility for the aggression rested exclusively with the State which placed its territory at the disposal of another State."[613]

Other States expressed their acceptance with the concept as such.[614] Several States – without further specification – called for further considerations of the rule.[615]

### (f) 1974

In 1974, States finally agreed on a definition of aggression. It was adopted by consensus.

The relevant provisions on indirect aggression then read:

> "(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

As reported to the Working Group, in a Contact Group,[616] both subparagraphs were "subject to (some) discussion."[617] On Article 3(f), "the opinion had been expressed that it should be deleted, but the majority had felt

613 A/C.6/SR.1443, 253 para 32 (USSR).
614 A/C.6/SR.1441, 238 para 36 (Romania); A/C.6/SR.1442, 243 para 21 (Kenya); A/C.6/SR.1442, 246 para 43 (Yugoslavia); A/C.6/SR.1444, 261 para 25 (Madagascar).
615 A/C.6/SR.1440, 229 para 24 (Czechoslovakia); A/C.6/SR.1440, 232 para 48 (Ukraine); A/C.6/SR.1441, 235 para 16 (German Democratic Republic); A/C.6/SR.1443, 253 para 32 (USSR); A/C.6/SR.1443, 257 para 64 (Hungary).
616 A/6919 (1974), 4 para 11. A/AC.134/SR.110, 6.
617 A/AC.134/SR.111, 9 (Finland, Broms acting as Chairman).

that it should be retained with drafting changes."[618] Both provisions were referred to a small negotiation group.

The resulting changes to the consolidated 1973 text primarily related to the role of the assisting State.

The formulation "to be used" allowing for the understanding that the requirement for the supported aggression to actually take place was omitted. But States did not modify the general rule that using armed force indirectly, through an intermediary, may likewise qualify as aggression.[619] Both cases were considered as part of the concept of "indirect aggression."[620] Accordingly, the provision of assistance itself did not qualify as aggression. It only did so if the assisted actor actually used force.[621] The force used had to meet the threshold of aggression.[622] Indirect aggression remained accessory in nature.[623]

As such, States were again well aware that this was in fact a situation of participation[624] that was exceptionally equated with the perpetration of an act of aggression. For example, Bulgaria critically noted that "Article 3(f) was not quite in harmony with the other provisions of that article," and feared that "[t]he element of "double aggression" introduced by article 3(f) might be used to complicate the process of identifying and condemning an aggressor."[625]

618 Ibid.

619 A fact that was highlighted in particular by 6-power-States: A/AC.134/SR.113, 29 (USA); 42 (Australia); 44, 45 (Canada); A/C.6/SR.1472 para 25 (Italy). See also A/C.6/SR.1474, 58 para 49 (Brazil).

620 A/AC.134/SR.112, 15 (Japan); A/C.6/SR.1479, 86 para 50 (Afghanistan); A/C.6/SR.1473 para 13 (Canada); A/C.6/SR.1480, 95 para 71 (USA); A/C.6/SR.1488, 148 para 25 (Afghanistan). See also Rifaat, *Aggression*, 273.

621 This was made clear in the text: "(f) "to be used", (g) "carry out". See e.g. also France emphasizing this for non-State actor support: A/AC.134/SR.113, 26, A/C.6/SR.1474, 56 para 29 (France): "Until [the armed bands] had been dispatched, no act of aggression had occurred; the mere fact of organizing or preparing armed bands did not of itself constitute an act of aggression." Also A/C.6/SR.1472, 44 para 7 (Sweden); A/C.6/SR.1474, 56 para 24 (Kenya). Indirectly A/C.6/SR.1475, 62 para 14 (China). Similarly: Samuel G Kahn, 'Private Armed Groups and World Order', 1 *NYIL* (1970) 40-41.

622 In Article 3(g), States omitted the qualification of "invasion or attack", but merely referred to "acts of armed force."

623 A/AC.134/SR.113, 36 (Bulgaria).

624 A/C.6/SR.1472, 46 para 25 (Italy).

625 A/AC.134/SR.113, 36 (Bulgaria).

As Romania stressed, the assisting State nonetheless was viewed to commit a "separate act of aggression."[626] Indirect aggression hence does not qualify the assisting action as such as aggression. It was the connection with the assisted aggression that States sought to prohibit.

It was implied that the degree of involvement in the assisted actor's use of force justified the inclusion.[627]

(i) The degree of involvement

States re-configured the degree of involvement that was sufficient. Syria's concern, voiced in 1973, did not prevail. But States decided to raise the threshold with respect to the necessary link between the assisting State and the assisted actor, and thus to narrow the scope of application of the provisions.

With respect to non-State actors, States compromised on "substantial involvement" as alternative to "open and active participation."[628] Yet it was more of a non-agreement put into words, little more than a deferral of the problem, skillfully masked in constructive ambiguity. Already when commenting on the outcome, States indicated that they had not substantially departed from their previous views.[629]

626 A/C.6/SR.1475 para 8 (Romania).

627 See below on the scope. This was also in line with the general principle of gravity acknowledged in preamble para 5, Article 2 Definition of Aggression. For non-State actors A/C.6/SR.1473 para 13 (Canada); A/C.6/SR.1477 para 27 (Turkey); A/C.6/SR.1475 para 20 (Syria). In general: A/C.6/SR.1474, 56 para 24 (Kenya); A/C.6/SR.1474, 57 para 37 (Madagascar); A/C.6/SR.1476, 66 para 6 (Belgium) "most reprehensible", "most serious".

628 For an interpretation against the background of the drafting history see Bruha, *Definition der Aggression*, 236-239. Stone, *AJIL* (1977) 237-238.

629 For example, Indonesia explained that it agreed on the understanding that support and organization was covered, A/AC.134/SR.111, 10, A/C.6/SR.1482, 110 para 35 (Indonesia). The USA thought that the "subparagraphs did not, of course, purport to spell out in detail all the illicit uses of force which could qualify as acts of aggression. They should be understood as a summary, and reference to such documents as the Declaration on Friendly Relations was particularly helpful in understanding some of them and accepting the summary treatment of the issues in, for example, subparagraphs (f) and (g)." A/C.6/SR.1480, 95 para 71 (USA). Others were glad that it was limited, for example: A/C.6/SR.1475 (1974), 63 para 20 (Syria). In general, the compromise was viewed critically already at the time of adoption: e.g. A/C.6/SR.1480 (1974), 93 para 59 (Israel). See also Stone, *AJIL* (1977) 238.

Article 3(f) was again less controversial. States from all camps expressly welcomed the final version.[630] In the context of interstate assistance, States in general agreed to require a more active role of the assisting State. The relevant act of assistance was now "the action […] in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating".

The final version thus clarified that not the placement of the territory at disposal was the decisive tipping point of assistance, but "allowance". A State was not considered aggressor if only making territory available without allowance of an aggression. Neither the mere fact of providing territory for a purported aggression nor the unlawful use of the territory by the aggressor made the territorial State an aggressor.

At the same time, the permission in itself was not enough if the territory was not in fact made available to the other State. Also, the double requirement suggests (although not beyond doubt) that the territory needs to be in fact used by the aggressor State. Although the final text[631] is less clear in that respect than the 1973-version which stipulated "when the latter *uses* this territory for perpetrating an act of aggression,"[632] the drafting history indicates that States did not intend to loosen the (accessory) standard here.[633]

Moreover, it was only required that the territory was used "*for* perpetrating an act of aggression."[634] This precise contribution of the territory to the act of aggression was not further qualified, hence not excluding any specific use of the territory that contributed to the act of aggression. It left the precise use of the territory undefined. It was not expressly required that the armed forces or weapons used were stationed on and launched from the territory. It therefore remains open to cover also certain less direct contributions to the assisted act of aggression, such as the permission of

630 A/AC.134/SR.112, 15 (Japan); A/AC.134/SR.113, 40 (UK); A/C.6/SR.1474, 55 para 19 (Chile); A/C.6/SR.1474, 56 para 24 (Kenya); A/C.6/SR.1475, 61 para 8 (Romania). A/C.6/SR.1473, 52 para 13 (Canada) – interestingly, Canada seems to view this a new principle: "subparagraphs (f) and (g) described situations which had not traditionally been thought of as acts of aggression, at least when that concept was equated with acts of war."

631 It only requires allowing "*to be used*".

632 See above, emphasis added.

633 See also above for the direction of the Italian proposal, note 607-610. See also Bruha, *Definition der Aggression*, 253.

634 Emphasis added.

overflight to bring the armed forces into position to launch the act of aggression, the permission to use the territory as the central logistical hub for an act of aggression, or the permission to use a command facility or an essential relay station on that territory. The definition is hence sufficiently flexible to account for the characteristics of modern, decentralized warfare, such as drone wars. At the same time, States were reluctant to accept *any* use of the territory. They rather required, in line with the general gravity-requirement of aggression, a certain gravity, proximity, and directness.[635] Both considerations were reflected, for example, in Kenya's statement that

> "the action of a State, in allowing its territory to be so misused must amount to active collusion with the aggressor State. It would be unreasonable to extend that paragraph to such an instance as routine permission of overflight to military aircraft which proceeded to attack a third State."[636]

Hence, a case-by-case assessment is required. Use of the territory that is by nature more remote from the act of aggression is not excluded, but it needs to be of such a degree that it meets the required threshold.

Also, the modified wording took into account the Soviet concern that the Article did not adequately reflect the fact that it dealt with "an act of aggression perpetrated by two or more States".[637] The assisted actor did not have to be a mere tool, but could also bear responsibility.[638] In fact, the new wording made clearer that two States, both the assisting and the assisted State, are responsible for one act of aggression.[639] At the same time, the assisting State needs to actively collude in the act of aggression; mere participation was not enough.

Furthermore, the modification also removed uncertainty over whether the placement of the territory and the allowance had to take place simultaneously. The paragraph has been (re)phrased making clear that they need not necessarily take place simultaneously. If the territory was placed at the disposal of another State even without allowing aggression, and if the State only later allowed the use, this could fall within the scope of Article

635 Kreß, *State Conduct Element*, 447 likewise submitted a requirement of 'directness'. But see Jackson, *Complicity*, 140-141 who seems to adopt a more lenient approach.
636 A/C.6/SR.1474, 56 para 24 (Kenya). See also A/C.6/SR.1443, 253 para 32 (USSR referring to the assisting State providing a "staging area").
637 A/AC.134/SR.109, 46-48 (USSR). See also A/C.6/SR.1443, 253 para 32 (USSR).
638 Contrary to the impression that Thomas, Thomas, *Concept of Aggression*, 66 give.
639 Underlining this conclusion as well Broms, *RdC* (1978) 353.

3(f). Allowance and placing at the disposal could – but need not – be two separate acts. An allowance could implicitly contain a placement at the disposal, if the State in fact granted access to the territory. The latter did not require that the territory was made available formally.[640]

Moreover, replacing "with acquiescence and agreement" with "allowing its territory to be used" was meant to raise the required threshold. Italy that had already pressed for a change in 1973[641] explained in an interpretative comment:

> "Turning to specific provisions of the definition, he said that article 3, subparagraphs (e) and (f), should be taken to mean that the territorial State could be *called upon to answer for an act of aggression only if it had actively participated in the wrongdoing,* for example by specifically allowing troops of another State stationed in its territory commit aggression against a third State. The territorial State could not be held responsible for acts of aggression carried out without its consent. In his delegation's view, only the active participation of the territorial State in aggression committed by another State could be the source of international responsibility for the territorial State."[642]

Canada similarly "hoped that that criterion would be applied with caution, for it should be remembered that the knowledge and control of a State regarding the improper use of its territory might vary considerably, and that that State might suffer more than the third State as a result of the act in question."[643]

It may not be reflected beyond any doubt in the text of Article 3(f), but the drafting history clearly suggests that not *any* territorial participation was enough. States required a qualified, an active participation in the act of aggression that justified the equation with an act of aggression, even if they did not unambiguously specify it.[644] This was for two reasons in particular. First, as Canada's statement implied, States were well aware that participation pursuant to Article 3(f) would allow for the far-reaching consequence of self-defense against the assisting State. Second and pragmatically, States

640 See also A/C.6/SR.1442, 248 para 65 (Ghana).
641 It had reserved its position to comment later, A/AC.134/SR.112, 13.
642 A/C.6/SR.1472 para 23, 25 (Italy).
643 A/C.6/SR.1473, 52 para 13 (Canada). See also A/C.6/SR.1477 para 15 (Libya) calling for a cautious application.
644 A/C.6/SR.1472 para 23, 25 (Italy); A/C.6/SR.1473, 52 para 13 (Canada); A/C.6/SR.1474, 56 para 24 (Kenya); A/C.6/SR.1442, 248 para 65 (Ghana).

were aware that Article 3(f) may be intrusive in every-day interaction among States, as the Kenyan intervention suggests.

On that basis "allowing" requires valid[645] consent from the assisting State.[646]

This does not mean that *due diligence* violations were excluded from the outset. While States stressed the necessity of an active role, they referred to due diligence violations, too.[647] They only excluded clear cases where the territorial State did not even violate *due diligence* standards.[648] The notion of "allowing" likewise did not completely close the door. Not at least, by allowing the aggressor State into its territory, the assisting State has actively created already a risk of misuse – which is to be distinguished from the case where the aggressor State merely uses the territory without any due diligence violation.

Yet, by no means do *all* due diligence violations suffice. For example, the drafting history and the wording clearly indicate that *acquiescence* is not sufficient. Instead, only extreme cases of due diligence violations seem to be able to meet the requirements.[649] It seems that a due diligence violation has to at least amount to an *implicit permission/allowance*.[650] A key feature here is that in this case, the assisting State provides the aggressor State with sufficient certainty that it positively agrees with the use of the territory. In the former (acquiescence), the aggressor State cannot rely on a similar certainty. If the assisting State does merely not voice its disagreement, the State cannot be as sure as in a case of a permission; it cannot plan and organize with similar planning reliability. Only in case of a permission, does it seem justified in States' view to equate the territorially assisting State with an aggressor. This consideration is also reflected in the requirement

645 As Kenya rightly points out, the permission must not be "obtained through coercion or other pressures" – in accordance with general international law, A/C.6/SR.1474, 56 para 24 (Kenya).

646 Recall the statements by Italy and Kenya.

647 See statements by Ghana: "no position to do anything about them"; Canada: "knowledge and control may vary considerably"; Kenya thought that it was unreasonable to include "routine permission of overflight".

648 In particular A/C.6/SR.1442, 248 para 65 (Ghana).

649 For example, it conceivable that due diligence violations are covered if they are of a high degree, scale and intensity, e.g. because the State tolerates aggression from its territory for a long time period, despite having positive knowledge about it, or actively avoiding knowledge.

650 A similar distinction draw Kreß, *State Conduct Element*, 447 and Jackson, *Complicity*, 141-142.

that the territory must be placed at the disposal of the State using force. Admittedly, to draw the line is difficult; as Canada noted, the scenarios can vary considerably. Hence, it is a question of degree. In line with the general approach taken in the Aggression Definition, States set the bar high.[651]

Not least, this is indicated by the fact that acquiescence was deleted from the draft and Kenya excluded a failure to detect an aggressive goal of the routinely authorized overflight.

This again further underlines that the mere use of the territory without any participation of the territorial State does not fall within the realm of Article 3(f). Kenya and Italy flagged that cases where the territory is used in violation of international law (i.e., without or with invalid (express or implicit) consent) are not covered.[652] In particular, States stressed once more that the mere use of the territory against the express will was not enough – Italy even brought Article 3(e), i.e., an aggression against the territorial State into play.[653] If the aggressor State uses the territory at its disposal against the express will of the territorial State, the latter cannot be equated with an aggressor. At the same time, the mere fact that the territory was not used in violation of international law (e.g., because an implicit consent/toleration excludes the unlawfulness) does not *necessarily* mean that the territorial State commits an act of aggression.

(ii) 'Its territory'

What constituted territorial assistance, States did not specify. How States understood the key notion of "its territory" was not assessed. Nothing hence indicates that the understanding was to depart from the meaning in general international law. The notion "territory" hence may be understood to extend to water, land, and airspace as defined in general international law.[654] Naturally, the main field of application States had in mind was the provision of territory as a launching base for aggression, be it for a specific permission, or through a permanent military base.[655] That the permission of overflight however may fall within the realm of the norm is not least indicated by the Kenyan intervention to exclude *routine* overflight

651 See e.g. Italy requiring *active* participation.
652 A/C.6/SR.1474, 56 para 24 (Kenya); A/C.6/SR.1472 para 23, 25 (Italy).
653 A/C.6/SR.1472 para 25 (Italy).
654 See also Jackson, *Complicity*, 140.
655 See for example A/C.6/SR.1443, 253 para 32 (USSR).

permissions. In general, the airspace is hence within the scope of the norm. Whether or not this then suffices to conclude an act of aggression depends on the extent of the participation.

Given the purpose of the Definition, it also seems reasonable to understand the notion "its" not to refer to a legitimate territorial sovereign title, but to territory under control of the assisting State.[656] The former would otherwise leave a loophole inviting misuse. It has to be acknowledged, however, that at least the Aggression Definition itself does not provide absolute clarity in that respect.[657]

Again, in all this, it is important to have in mind that States defined "only" aggression. They did not stipulate a general prohibition.[658] It is telling that States qualified the "complicity", indicating that only a specific form of complicity may qualify as aggression. Other forms of complicity not mentioned by the Aggression Definition however may still be prohibited.[659] Also, States repeatedly stressed that the Aggression Definition should be read together with the Friendly Relations Declaration, suggesting that the Aggression Definition qualified and refined certain acts as aggression.[660] And once again, States stressed that the examples were illustrative, rather than exhaustive.[661] In particular, States warned of the risk that unlisted acts are regarded as untypical.[662] Only the minimum of possible cases of aggression were included here.[663]

### e) The concept: Assistance as aggression

'Indirect aggression' was among the most controversial issues throughout the debates on the Definition of Aggression.[664] Not at least terminological

656 See also Jackson, *Complicity*, 141.
657 In light of controversies on human rights law, a different interpretation is not excluded.
658 Likewise, yet cautious Kreß, *State Conduct Element*, 447. See also Jackson, *Complicity*, 141.
659 See on indirect aggression: A/C.6/SR.1472, 44 para 7 (Sweden).
660 A/AC.134/SR.112, 15 (Japan); A/AC.134/SR.113, 31 (Yugoslavia); A/AC.134/SR.113, 39 (UK); A/C.6/SR.1472, 44 para 7 (Sweden).
661 See among many A/C.6/SR.1473, 52 para 11 (Canada).
662 A/C.6/SR.1480, 87 para 4 (Jamaica).
663 A/C.6/SR.1481, 105 para 85 (Ivory Coast).
664 Ferencz, *AJIL* (1972) 499; Stone, *AJIL* (1977) 237 described it as the point which "caused the greatest dissension"; Broms, *RdC* (1978) 353.

uncertainties contributed significantly to the disagreement.[665] To the extent that 'indirect aggression' related to 'indirect use of force', there was remarkable agreement among States. On a c*onceptual level,* the starting point was rather uncontroversial. After some uncertainty at the beginning of the deliberations,[666] States quickly agreed that the prohibition to use force was not limited to direct means,[667] but generally open to comprise indirect means, not at least as the latter were among the most pervasive forms in modern times.[668] If a State is operating through an intermediary,[669] if it colludes with another actor to use force, it might be viewed as *perpetrator* of a use of force, qualifying as aggression. Even if this meant to prohibit participation as *use* of force, as well – a fact that States were well aware of – this principle did not spark substantial controversies among States. In any case, with the adoption of the Friendly Relations Declaration, opposition to this understanding was mooted. On that basis, the deliberations on and the Definition of Aggression itself affirmed once more an accepted conceptualization of the use of force. Here, the Definition of Aggression remained on familiar terrain.[670]

The Definition of Aggression, however, refined previous practice in three respects.

First, the Aggression Definition removed any potential doubt that the developments captured in the Friendly Relations Declaration could apply only to States. In line with its primary mandate, it made clear that the UN Security Council may act in reaction to assistance to a use of force also based upon an act of aggression.[671]

665 See above, but also Thomas, Thomas, *Concept of Aggression*, 46-47, 67-68. See also UNSG A/2211 (1952), 56-57; Schwebel, *RdC* (1972) 455-456 calling to draw a line.

666 Recall the USSR refusing to include the rule.

667 I.e. through own State's military force, Bruha, *Definition der Aggression*, 229. E.g. A/AC.134/SR.31, 33 (USA).

668 Schwebel, *RdC* (1972) 458; Stone, *AJIL* (1977) 237; Rifaat, *Aggression*, 217-218; Thomas, Thomas, *Concept of Aggression*, 46.

669 A/2211 (1952) para 414, 415; Schwebel, *RdC* (1972) 455-456; Thomas, Thomas, *Concept of Aggression*, 65-66.

670 See e.g. A/C.6/SR.1478, 74-75 para 1 (Bangladesh). This was also recognized in Definition, Annex preamble para 8.

671 Throughout the debates States agreed that the provision of assistance may qualify as threat to or breach of the peace.

Second, the Aggression Definition made clear that the concept of indirect use of force can also embrace *interstate* assistance.[672] For the first time, a universal document qualified a form of interstate assistance as a "*use* of force." In doing so, the Aggression Definition did not create a new regulation. It put a rule in writing that already met with acceptance by States. States did not view the application of the concept *in principle* to the interstate context as particularly problematic, as the (marginal) deliberations as a side note in the debates on non-State actors suggest. Moreover, although less prominent than assistance to non-State actors, various States repeatedly proposed to include some form of interstate assistance. It hardly met opposition from other States, conceptually or otherwise. The ILC as well as the UN Secretary General applied the concept to assistance to third States as well. When debating Article 3(f) in the consensus building period, only Romania may have been pushing to include the idea. While this fact may suggest a rather low (political) priority for regulation, it was no expression of doubt as to the legal validity of the concept as a rule of international law. In rare unanimity, States from all camps expressly endorsed the concept.[673] All States voicing critique were sensitive to underline that they did not object to the underlying concept.[674] The deliberations went along with an apparently increased political appreciation: despite last-minute attempts to delete the paragraph from the final version, the idea was retained.[675]

Third, the Definition of Aggression formally opened the door towards self-defense against an assisting State. The looming risk of a reaction in (preventive) self-defense was a decisive factor in States' considerations of what form of participation may not only qualify as a use of force, but also as aggression.[676] This should not be mistaken with States going through the door in any case. Not at least it was not the primary goal of the Definition

672 Some authors assumed this already, e.g. Thomas, Thomas, *Concept of Aggression*, 65-66.

673 For a similar impression see Bruha, *Definition der Aggression*, 253.

674 Recall in particular: A/AC.134/SR.106 (1973), 27 (Italy); A/AC.134/SR.108 (1973), 38 (Syria); A/AC.134/SR.109 (1973), 47 (USSR); A/C.6/SR.1442, 248 para 65 (Ghana).

675 A/AC.134/SR.111 (1974), 9.

676 Note in particular the debate between the States of the 13 power draft and of the six power draft on unrestricted recourse to self-defense for indirect use of force, Schwebel, *RdC* (1972) 457. Most illustrative A/AC.66/L.8 (Mexico); A/C.6/SR.415, para 45; A/AC.134/SR.108 (1973), 37 (Syria); A/C.6/SR.1473 (1974), 52 para 13 (Canada). This was also noted in the literature: Ferencz, *AJIL* (1972) 505; Ferencz, *ICLQ* (1973) 419, 420-421, 426-427; Bruha, *Definition der Aggression*, 231.

of Aggression to define the right of self-defense. Some forms of aggression *may* qualify to trigger the right to self-defense.

The controversies on the exact scope of the concept should also not disguise another notable, truly consensual contribution of the (process of drafting of the) Aggression Definition: It shed further light on State consensus on conceptual pillars of indirect aggression and indirect use of force. It provided principled insights for when the action of providing assistance may qualify as aggression.

First, the Aggression Definition affirmed what the Friendly Relations Declaration and State (treaty) practice had indicated. The prohibition of *indirect* aggression and *indirect* use of force is by nature accessory. Without the assisted actor in fact using force, the assistance is no *use of force* that may qualify as aggression. The act of providing assistance itself may be prohibited under some (other) norm of international law. Yet, the Aggression Definition clearly shows that the act of providing assistance *itself does not* qualify as force or aggression used by the assisting State, not at least for the risk of a preventive counterstrike.[677] It only does so and hence falls under the prohibition through its connection with another actor's use of force. Through assistance the other actor's force may be considered to be "used."

Second, as a logical consequence of the accessory nature of indirect *aggression*, the assisted action must involve the use of armed force and be of such gravity to amount to aggression. If the assisting State *uses* the assisted actor's action, the latter must meet the necessary threshold of the norm to qualify as aggression. The divergence here from the Friendly Relations Declaration originates hence in the different regulatory goal.

Third and crucially, again following from the accessory nature, through its assistance the assisting State must *use* the use of force by the assisted actor. The assisting State must be operating through the third actor. The relevant conduct is the action of assistance. It is hence not about the relationship between the assisting and the assisted State. It is about the relationship between the assisting action and the use of force. It is the implementation of this element, what degree of involvement justifies qualifying *participation in a use* as *use* of force, that was particularly controversial. Interestingly, however, throughout the debates States spoke the same language – they referred to the same relevant abstract parameters to describe the relationship between the assistance and the use of force. The deliberations on the Definition of Aggression were particularly valuable in that respect.

677 Recall A/3574 (1956), 10 para 80.

It was clear for States that the assistance must relate to the action (the use of force), not solely to the actor. Not least, the prohibition was not concerned with the permissibility of assistance *per se*, but with assistance in connection to another actor's use of force.

The relevant parameters that States considered more or less prominently were then the objective action (nature, form, and effects[678] of assistance),[679] a subjective element of the assisting State (knowledge and direction),[680] and causality.[681] Likewise, part of the equation was the nature of the assisted actor using force.[682]

The discussions circled around the question of how to weigh the different elements in the context of defining aggression. In implementing these features, the Aggression Definition did by no means answer all questions, but it did answer at least some.[683]

It provides answers for *territorial interstate* assistance.[684] Article 3(f) captured, consolidated, and codified on a universal level widespread, yet mostly scattered or often unuttered State practice. States agreed on the rule elaborated above. Some ambiguities may have remained and were still to be fleshed out in practice, which was however not uncharacteristic for any stipulation of a general rule. Most importantly, however, the rule had the support of all States, as was not at least demonstrated by the little controversies and the widespread agreement from all camps on Article 3(f). This is only affirmed by the fact that Article 3(f) is frequently referred to,[685]

678 For example, how much control or influence State had to have about the assisted use of force? What was the exact form of assistance: the *de facto* contribution to the use of force (stronger if it was actually used, or if "only" enabled but was not used)?

679 Just see the exclusive focus on territorial assistance, despite the fact that other forms of interstate assistance were brought up as well. See also in the context of Article 3(g), the main controversy was about what forms of assistance should be included.

680 Most expressly Canada. See also the discussions on *due diligence*.

681 Recall the difference between the 1973 and 1974 version of Article 3(f).

682 The distinction between Article 3(g) and (f) points in that direction. States treated those subparagraphs as part of the same concept. Also, States discussed what qualities a non-State actor had to fulfil to fall under Article 3(g).

683 See for a summary of critique on various aspects of the Definition McDougall, *Crime of Aggression*, 76-78.

684 See the analysis of the answers provided by Article 3(f) above. But see Bruha, *Definition der Aggression*, 118 saying that the causality problem is not solved, as it is "entirely open" what means "placement at the disposal means".

685 Most recently Iraq S/2020/15 (6 January 2020).

and by now accepted as customary international law.[686] States answered these questions in the shadow of the politicized and heated controversies on assistance provided to non-State actors.

For such assistance the Aggression Definition provided only little guidance. Article 3(g) was not much more than a consensus-saving compromise.[687] Interstate assistance other than that covered by Article 3(f) shared a similar fate. States were aware of the possibility to include it, as the consistent reference to those forms throughout the debates showed. Yet, States refrained from even discussing other forms of interstate assistance other than the allowance to use its territory during the compromise building phase.

Nonetheless, the regulated examples of Article 3 were not exhaustive. As the US explained, for example, it "did not purport to spell out in all detail all the illicit use[s] of force that may qualify as aggression".[688] Articles 3(f) and (g) "should be understood as a summary"[689] or as "illustration of typical examples of armed aggression".[690] Other States saw in Article 3 a "presumption" of an act of aggression.[691] Hence, the focus on territorial assistance that may be traced back to Romania's persistence should not be understood as deliberate confinement to territorial assistance only.

Against that background, the Definition of Aggression may be understood to provide a general framework governing assistance that was specified for some cases. The deliberations and the conceptualization on indirect aggression in Article 3 thus provided indicators for when other forms of *interstate* assistance may be included:

First, it was not necessarily required that the assisting State exercises control to the extent of attribution of conduct. Notably, this observation does not necessarily hold true for assistance provided to non-State actors,

686 For example, this was the underlying and uncontroversial assumption of States during the negotiation of the Crime of Aggression, Kreß, *State Conduct Element*, 421.

687 For similar conclusions and further details see Stone, *AJIL* (1977) 237; Bruha, *Definition of Aggression*, 164-165, 172-173; Schwebel, *RdC* (1972) 456 et seq; Olivier Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (2010) 443.

688 A/C.6/SR.1480 (1974) para 71 (USA).

689 Ibid.

690 Ibid 93 para 59 (Israel). Generally, on the nature of the enumeration: ibid 75 para 45 (India).

691 E.g.: A/C.6/SR.1472, 44 para 8 (Sweden); A/C.6/SR.1478 para 55 (Sri Lanka). Bruha, *Definition of Aggression*, 166.

where the final version referring to "sending" and "substantial involvement" left more room for ambiguity.[692]

Second, it was not required that the assistance itself involved direct use of force.[693] Assistance could remain short of direct use of force. As States themselves acknowledged, the objective assisting action may take the nature and form of what is traditionally considered as "complicity" or participation. States like Syria[694] that had had doubts about whether this sufficed to qualify a State as aggressor, ultimately agreed to the consensus solution as well.

Third, not any participation in the use of force was sufficient. Instead, the participation was always qualified.[695] Generalizing this practice, only participation proximate to the assisted use of force may be designated itself as a(n indirect) use of force that qualifies as aggression. Notably, the proximity requirement was applied to all parameters: to the subjective (recall the discussions on acquiescence), to the causality standard, and to the assisting action.

States applied these trends to the definition of a use of force that may qualify as aggression, possibly giving rise to self-defense. While the same abstract parameters are also relevant for a prohibition of participation, States did not (mean to) clarify those rules. Still, States implied that the provision of assistance may be prohibited, albeit not classified as aggression.

692 For different readings: For Kreß, *State Conduct Element*, 448-450 Article 3(g) comprises cases that "do not fall within the ambit of articles 4-6 of the ILC Articles on State responsibility and within the concept of de facto organs of a state". He requires for a "sending" however "effective control" in line with Article 8 ARS, and for "substantial involvement", at least "overall control". See also Akande, Tzanakopoulos, *ICJ and Aggression*, 223 according to whom "article 3(g) simply reflects the rule (later codified in article 8 [ARS] that the acts of non-State actors are attributable to a state when the non-State actor is under the 'direction or (effective) control' of the state". Corten, *Law against War*, 446 arguing that the State is "then directly responsible for the act constituting the engagement, without any need to impute to it actions by private persons".

693 This would be a scenario where the assisting State directly uses force to provide assistance. This case would however also be prohibited as direct aggression already, if the gravity threshold is met.

694 A/AC.134/SR.100-109, 38 (Syria).

695 Notably, whenever States referred to participation, collusion, complicity, acknowledging the theoretical inconsistency, they qualified it as e.g. "active", "direct" or used stronger terms like "collusion" or "agency". E.g. A/AC.134/SR.100-109, 27 (Italy); A/AC.134/SR.9 (1968), 100 (Japan, "*direct* aid and assistance"); A/C.6/SR.1472 para 25 (Italy); A/C.6/SR.1473 para 13 (Canada); A/C.6/SR.1474 para 24 (Kenya, *active* collusion*);* A/C.6/SR.1477 para 15 (Libya, apply with caution).

They endeavored to distinguish mere participation from a use of force qualifying as aggression committed through an intermediary, thus indicating that a different balance of the parameters may have to be struck. The final version was expressly specific to the definition of *aggression*.

### 4) The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Use of Force in International Relations (1987)

The UNGA Resolution 42/22 of 18 November 1987, the "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations" (1987-Declaration), includes two noteworthy provisions relating to the provision of assistance. It is in that respect that the otherwise inconspicuous declaration stands out. In fact, it is the first (and only) time that an abstract universal declaration includes an express and general prohibition of participation distinct from the *prohibition* to *use* force.

The Declaration's fourth paragraph stipulates a general prohibition of participation in another State's use of force in violation of the Charter:

> "States have a duty not to urge, encourage or assist other States to resort to the threat or use of force in violation of the Charter."

In addition, paragraph 6 relates to obligations governing the provision of assistance in the context of non-State actors:

> "States shall fulfill their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts."

It does not suffice to only take note of those two provisions, which in isolation and without context do not convey the full picture as regards the regulation of the provision of assistance. Besides clarifying the declaration's content, States' statements reveal insights into their conceptualization and understanding of the regulatory framework on the provision of assistance in general, and interstate assistance in particular.

a) A controversial and conservative resolution

Undeniably, the 1987-Declaration does not hold the same renown or influence as the Friendly Relations Declaration or the Definition of Aggression. Its footprint in later State practice and legal arguments pales in comparison to these resolutions.[696] Moreover, the legal value of the declaration itself has been controversial. On that note one might question the relevance of the declaration.

The reasons for this fact are diverse, and do not need to detain us here in full detail.[697] Two aspects are however worth noting in the present context.

First, and arguably most crucially, the project's scope was controversial from the outset. This led States to take a reserved approach to the project already from the very beginning of debates that continued to define States' stance on the final outcome. From the outset, the resolution was conceived as, and in fact embodied, an unpopular compromise.

The Declaration began as a proposal for a "World Treaty on the Non-Use of Force in International Relations" submitted by the USSR. To ensure strict observance of the principle of non-use of force, the USSR aimed for a *binding* instrument that interpreted, clarified and codified the different strands of the principle of non-use of force, thus continuing the efforts of the UN and its members to consolidate international peace and security.[698] From the outset this proposal's goal of concluding a treaty met with firm opposition.[699] In particular Western States rejected this approach.[700] On

696 Christine Gray, 'The Principle of Non-Use of Force' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst* (1994) 39-40.

697 See in general on the declaration Tullio Treves, 'La Déclaration des Nations Unies sur le renforcement de l'efficacité du principe du non-recours à la force', 33(1) *AFDI* (1987); Vladimir N Fedorov, 'The United Nations Declaration on the Non-Use of Force' in William Elliott Butler (ed), *The Non-Use of Force in International Law* (1989); Gray, *Principle of Non-Use of Force*.

698 A/31/243 (1976) (USSR), A/C.6/33/SR.50 para 8-9 (USSR); Report, A/34/41 (1979), 38, para 113; A/38/41 (1983) para 22; A/39/41 (1984) para 26-27.

699 Report, A/33/41 (1978) 7-9, para 21-27; A/34/41 (1979) para 36-61 for a detailed summary of the pro and contra arguments. Most forcefully, scenting a propaganda move here: e.g. A/C.1/31/PV.16, 41-51 (China); A/C.6/36/SR.7 para 11 (USA); also A/C.6/31/SR.50 para 101 (Saudi-Arabia).

700 A/C.6/33/SR.55 para 24 (USA); see also A/34/41 (1979) para 52 where the difference between developing declarations and a binding compact with the characteristic of a treaty is set out; A/39/41 (1984) para 31 et seq.

that basis, much of the discussions circled around the (politicized[701]) question of the scope of the project. This led to a deadlock in the debates, prompting Mexico to express frustration at one point that "there had been no real negotiations in the Committee as regards to the possible content of such a treaty."[702] The standstill was only overcome in 1985[703] when States agreed to pursue the adoption of a declaration as an intermediate step towards a world treaty.[704]

Still categorical controversies continued. Even during the stage of drafting a declaration, States fundamentally disagreed on the approach to take: whether it should be part of the declaration to reaffirm, clarify, and reiterate specific rights and duties deriving from the principle of non-use of force, or rather to focus on ways and means to enhance the principle's effectiveness.[705] For some States, it was essential to reaffirm and reiterate certain aspects of the principle.[706] In particular Western States feared that the reaffirmation and reiteration of certain aspects of the principle of non-use of force would be counterproductive.[707] In this light, also the declaration's juridical effect was controversial from the outset.[708] In particular Western States whenever possible emphasized their opinion that despite being drafted by the Sixth Committee, the declaration is a "non-normative" resolution[709] that does "not claim to constitute a gloss on the actual content of

701 The debate was especially heated in A/37/41 (1982). For a similar description A/C.6/39/SR.15 para 26 (Tanzania).

702 A/C.6/34/SR.18 para 13. Other States spoke of a "standstill" and "fruitless discussions", e.g. A/34/41 para 19, A/35/41 (1980) para 118 (Nicaragua), or of a "dialogue of the deaf which replaced discussions "A/34/41 (1979) para 136; A/37/41 (1982) para 237 (Cyprus). A/C.6/39/SR.13 para 22 "very little progress" (Uganda); A/40/41 (1985) para 30.

703 Before there were attempts like a very informal working paper proposed by the Chairman A/37/41 (1982) para 372.

704 The UNGA allowed the Special Committee to work for a declaration (A/40/PV.112, A/RES/40/70 (11 December 1985). The USSR (A/C.6/41/SR.9 para 18) and NAM States (A/41/697-S/18392, 126 para 284) eventually agreed, too.

705 The conflict was ultimately also reflected in the different draft declarations proposed. Western States submitted a simple draft without provisions specifying the content of the principle of non-use of force, focusing on alternative means, A/42/41 (1987) para 19. Other drafts were more detailed, like e.g. A/42/41 (1987) para 22.

706 E.g. A/C.6/42/SR.21 para 2 (Cuba). See also Gray, *Principle of Non-Use of Force*, 35.

707 E.g. A/34/41 (1979) para 130, 54-56; A/39/41 (1984) para 67; A/41/41 (1986) para 79-80, 84-85; A/C.6/42/SR.50 para 14 (New Zealand).

708 A/41/41 (1986) para 24, 26. See also Gray, *Principle of Non-Use of Force*, 36-37.

709 E.g. A/C.6/41/SR.14 para 16-18 (Italy); A/C.6/42/SR.17 para 15 (Denmark speaking for 12 EU member States). See also A/C.6/41/SR.21 para 26 (Tanzania).

the principle of non-use of force".[710] Others, on the other hand, stressed the legal relevance of the resolution.[711]

Against this background the declaration was considered no more than the best possible compromise to conclude the debates, and it was expected from the outset to have only limited impact.[712]

Resulting from those controversies and the compromise character of the declaration, a second factor may have reduced the impact and legal weight of the declaration.

Many perceived the declaration as not adding anything to the existing state of the law governing the use of force.[713] This sentiment was a common thread throughout the debate. With respect to the Soviet proposal, some States emphasized this fact to defend the project and explain the relationship between the Charter and the proposed World Treaty;[714] some did so to question the added value of a declaration.[715] Other States again thereby criticized the undertaking as weakening, rather than strengthening, the principle of non-use of force.[716]

Similar arguments were brought forward with respect to the declaration itself, again for different reasons. Some States were eager to emphasize

710 A/C.6/41/SR.14 para 28 (France). See also A/C.6/42/SR.50 para 11 (France). A/C.6/42/SR.50 para 4 (UK).

711 E.g. A/C.6/42/SR.17 para 8 (Mexico); A/C.6/42/SR.18 para 7 (Jamaica); A/C.6/42/SR.18 para 31 (Afghanistan); A/C.6/42/SR.20 para 30 (Greece). See also the debate on the value of the Declaration, A/41/41 (1986) para 18-28; Fedorov, *Declaration on the Non-Use of Force*, 83.

712 A/C.6/42/SR.17 para 5 (Mexico); A/C.6/42/SR.18 para 11 (USSR); A/C.6/42/SR.18 para 26 (Argentina); A/C.6/42/SR.16 para 6 (Italy); A/C.6/42/SR.50 para 6 (Israel); A/C.6/42/SR.50 para 9 (Netherlands).

713 A/C.6/42/SR.17 para 7 (Mexico); A/C.6/42/SR.18 para 11 (USSR); A/C.6/42/SR.20 para 44 (Tunisia); A/C.6/42/SR.50 para 14 (New Zealand); Gray, *Principle of Non-Use of Force*, 37, 39; Fedorov, *Declaration on the Non-Use of Force*, 79; Treves, *AFDI* (1987) 390-392, 395 with the exception of part II and III of the resolution.

714 E.g. A/32/112 (German Democratic Republic); A/32/108 (Hungary); A/32/114 (Bulgaria); A/C.6/31/SR.50 para 8 (USSR); A/C.6/33/SR.52 para 52-53 (USSR); A/C.1/31/PV.19, 66 (Chile), A/C.1/31/PV.19, 76 (Bahrain); A/C.1/31/PV.19, 93, 96 (USSR, "neither narrows nor broadens that principle"); Report, A/34/41 (1979), 36, para 113 "Aside from affirming the obligations of the Charter, the provisions of the draft Treaty are intended to extend them and make them more specific"; A/38/41 (1983) para 22.

715 See for example A/C.6/31/SR.50 para 18-19 (Australia); A/C.1/31/PV.19, 66, A/C.6/31/SR.50 para 65 (USA); A/C.1/31/PV.19, 81 (Sweden); A/C.1/31/PV.19, 83 (New Zealand); A/C.6/31/SR.51 para 15 (Italy).

716 Ibid; A/C.6/42/SR.50 para 9 (Netherlands).

that the declaration did not augment the existing law governing the use of force.[717] Others again thereby expressed their disappointment about the conservative outcome.[718] In the end, for different reasons and with different moods, the general tenor of the debates was that the declaration was not much more than – as Morocco, for example, stated – a "faithful reproduction of provisions already set forth in the Charter."[719] Likewise, States stressed that the declaration was firmly grounded in States' widespread bilateral and multilateral treaty practice,[720] as well as UN practice, in particular the Friendly Relations Declaration or the Definition of Aggression.[721] However this was without the "intention to give prominence to a particular provision or propose an interpretation of any of them other than that deriving from their original context".[722] It is in this way that the reiteration of specific provisions should only be understood. It was meant to be neither comprehensive nor to alter the systematic balance. Rather, it was intended to be understood in light of the goal to enhance the effectiveness of the principle of non-use of force.[723] The appeal of the Chairman of the Special Committee is noteworthy in that respect as well:

> "Those who had not been completely satisfied with some of its provisions had none the less associated themselves with the consensus because it seemed the best possible compromise. He urged those delegations

717 E.g. A/C.6/42/SR.19 para 23 (USA); A/C.6/42/SR.21 para 93 (Peru); A/C.6/42/SR.16 para 6; A/C.6/42/SR.17 para 15 (Belgium) ("did not add or subtract", "in no way change the meaning").

718 A/C.6/42/SR.17 para 7 (Mexico); A/C.6/42/SR.18 para 4 (Brazil).

719 A/42/41 (1987) para 19. See also A/C.6/42/SR.19 para 23 (USA); A/C.6/42/SR.21 para 13 (Jordan); A/C.6/42/SR.21 para 16 (Turkey); A/C.6/42/SR.21 para 56 (Morocco); A/C.6/42/SR.21 para 17 (Turkey); A/C.6/42/SR.21 para 93 (Peru); A/C.6/42/SR.50 para 7 (Israel). Also A/C.6/42/SR.19 para 22 (Canada "moderate advance on the existing instruments").

720 E.g. A/31/243 (1976), 2 (USSR).

721 E.g. A/C.6/42/SR.17 para 19 (Poland); A/C.6/42/SR.16 (Italy); A/C.6/42/SR.17 para 15 (Denmark); A/C.6/42/SR.19 para 18 (Canada); A/C.6/42/SR.19 para 66 (Bulgaria).

722 A/C.6/42/SR.16 para 3 (Italy as Chairman); A/C.6/42/SR.20 para 30 (Greece). See also A/RES/42/22 (1987) preambular paragraph 3. Already the proposed World Treaty relied on those resolutions: e.g. A/C.1/31/PV.11, 8-10 (USSR); A/C.1/31/PV.15, 3 (Poland); Yugoslavia A/C.1/31/PV.14, 7; A/C.1/31/PV.15, 41-42 (Finland). Throughout the debates, States called for respect of those resolutions.

723 The USA stated the "instrument should be only descriptive dedicated to improving practice" A/C.6/40/SR.12 (1985) para 36 (on the agreement to now pursue a declaration); A/C.6/41/SR.14 (1986) para 28 (France).

> which might feel that a particular provision could have been drafted differently, or that a particular problem required more adequate treatment, to look at the draft Declaration as a whole and to be primarily guided by the desirability of preserving the general agreement. [...] Its adoption would be a manifestation of good will on the part of the Member States and, as such, would contribute to the improvement of the international climate."[724]

This reflects well the general tenor: the declaration aimed at enhancing the effectiveness and implementation of the principle of non-use of force, and not innovatively redeveloping or changing the legal framework.[725] Realizing this aim, the recommendatory declaration was primarily viewed as reaffirming and reiterating certain aspects deriving from the principle of non-use of force – notably without, however, altering the *lex lata* or consolidating it in a binding manner. This specific background and conservative nature of the declaration may have contributed to the declaration's little prominent footprint in subsequent international practice.

b) A relevant resolution – particularly for non-assistance

The little footprint does not mean, however, that the resolution is without any legal relevance for the interpretation of the principle of non-use of force.

First, the declaration used normative language. Even if its own innovative legal value was limited, it reaffirmed and reiterated the content of the principle of non-use of force. States may not have developed the law. States may not have codified the law in a binding manner. The declaration itself may not be customary law itself. But the resolution has elucidated the obligations under the Charter. States have certainly added further *authority* and *clarity* to the *status quo* of States' rights and obligations with respect to the principle of non-use of force set forth in the Charter and developed through UN and State practice. Despite the controversies, and with the forementioned understanding, States agreed on the declaration by consensus.[726] The declaration can be seen as unanimous interpretation of

724 A/C.6/42/SR.16 para 6-7 (Italy as Chairman).
725 This also was the main concern from the outset: Report, A/33/41 (1978) 4 para 13; A/C.6/31/SR.53 para 40 (USSR); A/C.1/31/PV.19, 93.
726 A/42/PV.73, 91 (adopted without a vote).

the principle of non-use of force – at least on a conceptual level[727] and with respect to certain aspects of the principle.[728]

What is more, the Committee's cumbersome and little effective work that Mexico had complained about and the politicized controversies about the goal should not disguise that relevant questions of substance were not ignored, but in fact discussed.[729] In particular in the Sixth Committee and working groups established by the Special Committee, States grappled with legal principles, made legal proposals, and exchanged their legal views.[730] States voiced their concerns with respect to specific trends in practice or legal rules. States expressed disagreement or agreement on certain aspects. While this exchange may not have led to new rules, this intensive exchange still is indicative of States' understanding of the principle of non-use of force, if only with respect to certain aspects of the principle.

These general observations especially apply to the declaration's provisions governing assistance. It is hence in order to have a closer look at how States conceptualized, debated, and understood the regulatory regime for providing assistance, in particular now that the prohibition of participation has been for the first time expressly acknowledged and given a textual basis.

### c) Assistance in the proposals

From the outset, the regulation of assistance to a use of force was on the minds of States. Notably, all main proposals included provisions governing assistance.

The USSR proposed a "Draft World Treaty on the Non-Use of Force in international Relations."[731] This treaty was to be closely coordinated with

727 Against the background of the Chairman's statement quoted above.

728 Fedorov, *Declaration on the Non-Use of Force*, 83. See also Gray, *Principle of Non-Use of Force*, 36; Treves, *AFDI* (1987) 390-392, 395.

729 States were also keen to emphasis this: A/34/41 para 20; A/40/41 (1985) para 124; A/C.6/40/SR.9 para 19 (German Democratic Republic).

730 The various reports of the Special Committee on Enhancing of the Principle of the Non-Use of Force in International Relations 1978-1987 are sufficient proof. Some States explicitly advocated such an approach: "Since there was no disagreement on the purpose of the work but only divergence on questions of method, the debate should concentrate on issues of substance." A/35/41 (1980) para 148.

731 "Draft World Treaty on the Non-Use of Force in International Relations, submitted by the Union of Soviet Socialist Republic", A/AC.193/L.3 reprinted in A/33/41 (1978), Annex, 23-25.

already existing obligations on the non-use of force under international law.[732] The treaty was not to affect the obligations under the UN Charter,[733] and was to be understood "on the basis of [the] obligations under the Charter of the United Nations to maintain peace and to refrain from the threat or use of force".[734]

Accordingly, the proposed Article I, paragraph 1, sentence 1 repeated – with some slight alterations[735] – the general principle of non-use of force. The proposed treaty took "into consideration" the Friendly Relations Declaration and bore "in mind that the definition of aggression […] provides new opportunities for the principle of the non-use of force or the threat of force to be consolidated in inter-State relations".[736] It thus allowed for an argument to include agreed interpretations, like the concept of "indirect use of force" in the proposed treaty. But it did not *explicitly* refer to any "indirect use of force" or forms of assistance that would fall within the prohibition to use force, which States were quick to point out and criticize.[737]

The draft treaty referred to another different legal concept – distinct from States' duty to "refrain from the use of armed forces […]". Paragraph 2 of proposed Article I read:

> "[The High Contracting Parties] agree not to assist, encourage or induce any States or groups of States to use force or the threat of force in violation of the provisions of this Treaty."

Thus, the USSR introduced a rule expressly concerned with interstate assistance, separate and independent from the well-accepted, yet not (again) specifically endorsed concept of "indirect use of force."

732 See also the USSR's explanatory memorandum: A/31/243 (1976), 2. The USSR later stressed this, too e.g. A/35/41 (1980) para 169.

733 Article III of the proposed treaty held: "Nothing in this Treaty shall affect the rights and obligations of States under the Charter of the United Nations and treaties and agreements concluded by them earlier."

734 Preamble para 3 "Proceeding on the basis of their obligations under the Charter of the United Nations to maintain peace and to refrain from the threat or use of force".

735 For a sharp analysis see A/C.6/31/SR.50 para 15-31 (Australia).

736 Preamble para 4, A/31/243 (1976). See also para 5 taking into considerations the Friendly Relations Declaration, para 6 referred to other bilateral and multilateral agreements and declarations.

737 E.g. A/AC.193/SR.8 para 11 "Art I should also cover force against another state by aiding subversion from within the territory of the latter" (Italy); A/C.6/31/SR.51 para 19 (Italy); A/C.6/31/SR.51 para 38 (Chile); A/C.6/31/SR.53 para 17 (Senegal); A/C.6/34/SR.20 para 34 (China); Report, A/33/41 (1978) para 49.

This approach was also reflected in a working paper Belgium, France, the Federal Republic of Germany, Italy, and the UK introduced in 1979.[738] It concerned what the "Committee might wish, after discussion of the causes or reasons which lead States to the recourse to force, to examine the following items on the peaceful settlement of disputes and the non-use of force." The working paper reflected a different approach to the topic. Additional normative regulation was not deemed necessary.[739] In particular, they rejected the conclusion of a treaty.[740] Instead, those States aimed to tackle the causes and reasons which drive States to use force. Accordingly, the great majority of the proposals concerned alternative dispute settlement mechanisms, such as peaceful settlement of disputes, disarmament, or peace keeping. In addition, those States also proposed to reaffirm (and thus clarify) the legal principle governing the use of force. Like in the USSR's draft, indirect use of force through providing assistance was not expressly mentioned. This omission was, however, without prejudice to existing interpretations of Article 2(4) UNC, in particular the Friendly Relations Declaration and the Definition of Aggression. Notably, after repeating the wording of Article 2(4) UNC, the States added:

> "The reaffirmation that the principle mentioned under point (1) applies also to group of States, and that no State shall assist, encourage or induce any State or group of States to use force or the threat of force in violation of the political independence, territorial integrity or sovereignty of other States".

A group of non-aligned countries (Benin, Cyprus, Egypt, India, Iraq, Morocco, Nepal, Nicaragua, Senegal, and Uganda) introduced a working paper in 1980, titled "the definition of the use of force or threat of force,"[741] that was revised in 1981 but differed from the previous text only in nuances.[742] All provisions were based on existing instruments such as the Friendly Relations Declaration or the Aggression Definition. Those States argued – once more – for a broad definition of the "use of force or threat of force". They proposed to define it "not only in terms of military force, but also in terms of all uses of coercion". This included "activities such as subversion, […] support of terrorism, […], the use of mercenaries or

738 A/AC.193/WG/R.1 reprinted in A/34/41 (197), 51-54, para 129.
739 A/34/41 (1979) para 130, 54-56 (Belgium on behalf of the sponsors).
740 Ibid 55 (Belgium on behalf of the sponsors).
741 A/35/41 (1980) para 172.
742 A/AC.193/WG/R.2/Rev.1 reprinted in A/36/41 (1981), 67-70, para 259.

financing or encouraging them." On that basis, the NAM-States sketched 17 principles. Two principles concerned the indirect use of force through assistance to non-State actors. Principles 3 and 4, which were based on UNGA Resolution 2625 (XXV) and Security Council resolutions 404, 405, and 419, read:

> "All States have the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries for incursion into the territory of another State."
> "All States have the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."[743]

Unlike the other two proposals, the working paper did not expressly stipulate a separate prohibition to provide assistance to a use of force in violation of the prohibition. However, the working paper included principle 11 that was based on UNGA Resolution 3314:

> "The duty of all States to support the victim of the use of force by all means at their disposal – material and moral – until all the consequences of such use of force are eliminated."[744]

This provision suggests that the NAM-States at least did not rule out the duality of the regulatory regime on the provision of assistance that the other two proposals hinted at. A duty to "support the victim of the use of force" *a fortiori* embraces a prohibition to provide assistance to the State responsible for the use of force targeting the "victim" that however would equally be confined to "all means at [States'] disposal".[745]

743 In the revised version paragraph 3 stipulated that all States shall refrain from […] (h) Sending, organizing or encouraging the organization of irregular forces or armed bands, including mercenaries; (i) Organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."

744 Paragraph 8 of the revised version again entailed "[t]he duty of States to support the victim of the use of force as defined in paragraph 3 above by all means at their disposal – material or moral – until all consequences of such use of force are eliminated."

745 Greece in a later stage of the proceedings also drew this connection, A/C.6/42/SR.20 para 27.

The proposal by NAM-States hence can be read neither as support nor rejection of the duality of the regulatory regime on the provision of assistance. Instead, the NAM-States were following well-known paths.

Throughout the nine-year process of debating the issue, many more minor proposals were made. The attention dedicated to the regulation of the provision of assistance varied. In 1982, the Chairman circulated a very informal working paper, aimed at structuring the proposals and future work under 7 main headings. The problem of assistance did not have a place therein, except for a brief reference stating that "all States shall refrain in their international relations from the threat or use of force *directly or indirectly* [...]."[746] A technical compilation of officially made proposals within the framework of the 7 headings, contained in an informal working paper circulated by the Chairman in 1982, then again included the above-mentioned rules on assistance.[747] In 1986, some delegations presented a list of proposals for inclusion in a possible future document. While indirect use of force was not expressly mentioned, it embraced a general prohibition of participation.[748]

### d) Assistance in the debates

The resolution and the underlying proposals suggest a two-stranded regulation of the provision of assistance. First, it may be considered an (indirect) *use* of force through assistance. The provision of assistance in that sense is prohibited as perpetration of a use of force. Second, assistance may be governed by a separate prohibition of participation. Both are independent concepts. There are two separate rules governing assistance under the umbrella of the principle of non-use of force.

This impression is substantiated and further refined in States' debate on those principles.

746 A/37/41 (1982) para 372.
747 A/39/41 (1984) para 122-123.
748 A/41/41 (1986), 23-26, para 90.

(1) Indirect use of force

Resolution 42/22 is another reaffirmation of States' interpretation of the prohibition to use force to cover indirect use of force through providing support.

For some States, the reiteration of this interpretation was not a main priority to enhance the effectiveness of the principle of non-use of force. The interpretation was frequently missing in drafts and proposals.[749] But at no time were these omissions meant to call into question the agreed interpretation of the Friendly Relations Declaration and the Aggression Definition. Even if they did not expressly mention the content of those resolutions, States based their proposals on those resolutions.[750] States made clear that they still embraced their content, including the prohibition of indirect use of force.[751]

For other States on the other hand, dealing with the provision of support and qualifying it under international law was crucial.[752] They criticized any omission of the rule.[753] They called for and endorsed an explicit stipulation of the rule.[754] For example, China emphatically stated: "Whatever document was approved should include all forms of force, whether overt or covert, direct or indirect, as well as intervention, subversion, control of other States, sending of mercenaries, and proxy wars, and should list

749 See e.g. the USSR draft treaty and Western States working paper. See also A/41/41 (1986) para 90.

750 See e.g. Report A/33/41 (1978) 6 para 20. See also A/34/41 (1979) para 150 (Mexico, Egypt) who proposed to base the deliberations on the Friendly Relations Declaration; A/C.6/34/SR.23 para 39 (Togo).

751 For the USSR see A/C.1/31/PV.11, 21, Report, A/34/41 para 106, 30, 31 "The Treaty follows existing practice for drafting the text of documents similar in content, such as the Definition of Aggression, the Declaration on Principles of International Law", and responding to Senegal that it is willing to include concrete proposals to expressly clarify that indirect use of force is covered as well. Western States stated that the "list does not claim to be exhaustive", A/34/41 (1979), 54 para 129; A/C.6/38/SR.18 para 18 (UK). In general: A/41/41 (1986), 24 para 90.

752 A/36/41 (1981) para 238 (in particular the NAM countries); Sri Lanka A/C.6/41/SR.14 para 49.

753 E.g. A/AC.193/SR.10 para 25 (Senegal); A/C.6/34/SR.20 para 34, 36 (China); A/35/41 (1980) para 174; A/AC.193/SR.8 para 11 (Italy); A/C.6/31/SR.51 para 19 (Italy); A/C.6/31/SR.51 para 38 (Chile); A/C.6/31/SR.53 para 17 (Senegal); Report, A/33/41 (1978) para 49.

754 A/34/41 (1979) para 33, 150; see for example forcefully A/C.6/34/SR.20 (1979) para 34, 36 (China). A/C.6/34/SR.23 para 39 (Togo); A/35/41 (1980), 17 para 60 (Romania).

all such unlawful acts."[755] States also made corresponding proposals.[756] Ultimately, they welcomed the inclusion of paragraph 6 in the final declaration to which they attached particular importance.[757]

Paragraph 6 is notably broad. It appears to synthesize the prohibition of intervention and the prohibition to use force, borrowing language from both prohibitions stipulated in the Friendly Relations Declaration. Thus paragraph 6 captures the debates among States. States often imprecisely referred to *two* separate prohibitions when concerned with the provision of assistance: the prohibition of indirect use of force and the prohibition of intervention. Notably, paragraph 6 is not explicitly and exclusively connected to the principle of non-use of force. Instead, it stipulates that States have "obligations under international law" with respect to the provision of certain forms of support to acts committed by certain non-State actors and calls upon States to fulfill those obligations. Paragraph 6 hence reaffirms and calls for the enforcement of *pre-existing* obligations under *general* international law. This is even more salient as it stands in contrast with other provisions of the declaration which are introduced by "States have the duty".[758] States used this language to refine and clarify the principle of non-use of force exclusively, not to merely refer to international law more generally. Against the background of controversial debates on an analogous introduction of a provision contained in the USSR draft ("abide by their undertaking", Article I paragraph 1), it seems unlikely that States did not deliberately choose this wording.[759]

At the same time, paragraph 6 is narrow in scope. It concerns only State assistance to activities that are typically conducted by non-State actors. This feature is even more salient, as paragraph 4 stipulates an independent prohibition to assist other *States*.

Thus, paragraph 6 relates to and reaffirms two rules: the prohibition to indirectly use force through providing assistance, and the prohibition of intervention. It clarifies the law in that sense at least expressly for its

755 A/C.6/34/SR.20 (1979) para 36, and also 34 (China).

756 Most notably the working papers submitted by a group of non-aligned countries (Benin, Cyprus, Egypt, India, Iraq, Morocco, Nepal, Nicaragua, Senegal, Uganda), reprinted in A/35/41 (1980) para 172, principles 3 and 4, and A/AC.193/WG/R.2/Rev.1 reprinted in A/36/41 (1981), 67-70, para 259.

757 E.g. A/C.6/42/SR.18 para 13 (Ghana); A/C.6/42/SR.19 para 5 (Ethiopia); A/C.6/42/SR.21 para 95 (Nicaragua).

758 As it does in para 4, 7, 9, 10, 11.

759 On the debate see e.g. Report, A/34/41 para 110, 34.

application to the provision of support to non-State actor activities, yet due to its double reference stays behind already achieved doctrinal clarity. What is more, the strikingly careful wording used to introduce the obligations in paragraph 6, and the generic level of agreement made clear that there was no agreement among States to go beyond and change interpretations accepted in international practice. The resolution here remained true to its generally conservative approach.

This conservative, indirect, and cautious reaffirmation of the prohibition of indirect use of force should not, however, disguise that States had engaged in a detailed exchange of views on the subject that contributed to further sharpening and clarifying (the idea of) the concept, even though it did not result in new developments of the law.

(a) No broad understanding of 'force'

Throughout the debates, some States advocated for a broad understanding of "force" to include also other forms of pressure, such as attempted destabilization, economic and political coercion, hostile propaganda, intimidation, or support of terrorism.[760] Yet, once more this view did not find unanimous support.[761] It led only to an exchange of familiar arguments. The declaration, hence, may not be understood to have changed the playing field.[762] It is on the basis and within the boundaries of this understanding of the principle of non-use of force that States are concerned with the provision of assistance and conceptualize the prohibition of "indirect use of force."

(b) An assisted act that involves the threat or use of force as precondition

On that basis, it is only little surprising that States refrained from conceptualizing the prohibition of *indirect use of force* as a non-refoule-

760 For example A/41/41 (1986) para 54, 83; A/C.6/42/SR.20 para 22 (Algeria).

761 A/41/41 (1986) para 55; A/42/41 (1987) para 28.

762 See e.g. A/C.6/42/SR.16 para 3, 4 (Italy as Chairman); A/C.6/42/SR.19 para 23 (USA) "[…] in an interdependent world it was desirable and inevitable that States should seek to influence other States. Such conduct was, of course, not prohibited by the Declaration, nor by the Charter or any other existing international instrument, as long as States did not employ force in contravention of the Charter. Where the Declaration spoke of 'coercion', his delegation understood that term to mean "unlawful force" within the meaning of the Charter."

ment-like prohibition according to which the creation of a mere risk through the provision of assistance would suffice.

This does not mean that States refrained from thinking in this direction. For example, Chile made an argument for a prohibition of indirect use of force that does not require the supported act to be actually committed. The mere fact that "people are given the means to kill each other on their own land" would be enough.[763] "It has not been necessary to have actual war for these painful warlike situations to be created."[764] "Interference by one Power in the internal affairs of another State is a violation of the international order, and when it takes the form of sending weapons, instructors and agitators, its effects are tantamount to the use of force."[765]

Other States carefully explored that conception, too. For example, the revised working paper submitted by NAM-States regarded the "(h) sending, organizing, or encouraging the organization of irregular forces or armed bands, including mercenaries"[766] as a "form of coercion […] coming under the head of the use of force."[767] As Morocco explained, the "paper was not a definitive text; it represented an attempt to give new impetus to the

763 A/C.1/31/PV.15, 58-60.

764 Ibid.

765 Ibid 61. Whether this was a conceptual and foundational argument may be doubted. The argument should be handled with care for three reasons: First, Chile was specifically concerned with assistance provided to non-State actors sitting within the territory of their home State, and qualified its intervention accordingly. The mere risk of the breakout of thereby enabled or facilitated violence, and its corresponding disrupting effects on internal peace, stability and national unity of the home State may have been Chile's cause of concern. Arguably, it was not the destabilizing risk of violence as such, but the destabilizing risk of violence among the State's subjects within its territory, that are essentially viewed as sovereign and internal matter, that stood at the core of Chile's argument. This emphasis narrows the claim considerably, not only with respect to applying the principle to the interstate situation, but also with respect to the general conceptualization of the law. In this light, second, Chile's comment particularly related to States' right to sovereignty, and States' corresponding duty to "fully respect" "all its sovereign rights", ibid 58-60. In particular, the legal basis on which Chile was arguing was not beyond doubt. The statement that "its effects are tantamount to the use of force" is no more than an indicator that Chile's comment could relate to the scope of indirect use of force. Third, it should be noted that Chile made this argument in the first, not the sixth committee. Also, it introduced it as "another political aspect that calls for comment", at least adding another question mark on its legal value.

766 A/36/41 (1981) para 259 para 3 h.

767 A/37/41 (1982) para 397, as one of the sponsors explained in the working group.

debate."[768] But this proposal was ambiguous. It was based on resolution 2625 that required the commission of such acts. Also, a related provision (i) of the paper required the commission of an assisted act. In any event, at a later stage, the NAM-States returned to the conventional path, proposing a prohibition of "directly or indirectly sponsoring or supporting forcible activities of individuals or groups of States."[769]

Accordingly, little suggests that the prohibition of indirect use of force should no longer be of an accessory nature. Already the declaration as described above points in that direction. What is more, not only did these proposals prompt critique on that question, but these proposals were also isolated.

There was less clarity and unanimity on the question of how the assisted action must be qualified, i.e. whether the assisted act must "involve the threat or use of force."

This is again reflected in the declaration. Notably, it did not state that the assisted act must 'involve the use or threat of (armed) force'. But did this mean that the qualification that became prominent with the Friendly Relations Declaration and the Definition of Aggression as necessary criterion to distinguish a use of force from an act of intervention has disappeared? This would mean that a key criterion definitive for the fine line separating the principle of non-intervention and use of force with respect to assistance would have been abolished. Indeed, States made similar observations. For example, the Netherlands noted that:

> "Paragraph 6 of the Declaration […] was broader in scope than similar provisions of existing instruments. Those existing provisions, which his Government fully supported, qualified such acts as acts involving the threat or use of force."[770]

It is true that paragraph 6 arguably referred to both rules – the prohibition of intervention and of indirect use of force. Nonetheless, in light of the Netherlands' observation it seems legitimate to ask (although this exactly is what was feared by Western States opposing the declaration) whether

768 A/C.6/36/SR.15 para 36 (Morocco).
769 A/42/41 (1987) para 22, 9.
770 A/C.6/42/SR.50 para 10.

paragraph 6 might not also imply an alteration in the conceptualization of the (indirect) use of force.[771]

And indeed, some States, in particular those arguing for a broad definition of "force", systematically proposed that even acts not involving the use of force may fall under the prohibition to (indirectly) use force, too.[772] Other States disagreed. They criticized the wording as too broad, too vague, and too ambiguous.[773] Instead, they suggested to add the qualification "involving the use or threat of force" in line with the Friendly Relations Declaration and Article 3(g) of the Definition of Aggression.[774] They questioned whether it was "wise and justified to confuse intervention and the use of force".[775] And ultimately, most States referred to this distinguishing criterion,[776] and built their claim to prohibit indirect use of force on existing and well-accepted resolutions, in particular the Definition of

771 But denying "any real difference from the outset", Gray, *Principle of Non-Use of Force*, 37.

772 As such the formulation was frequently missing from proposals: see e.g. A/35/41, 47 para 172, principle 4.

773 A/36/41 para 238; See e.g.: A/C.6/36/SR.10 para 14 (Netherlands): "When it came to determining whether a State had used or threatened to use force, a clear and unambiguous definition of those terms was of the utmost importance. Otherwise, the parties to a conflict would use those terms at will in order to justify their use of weapons. He had strong objections to the excessively vague definition of those principles. A broad definition of the term "use or threat of force" would enable the affected party to claim that countermeasures were justified, thus leading to an escalation of the conflict and even to an erosion of the right of self-defence embodied in Article 51 of the Charter. That fear was not groundless, for in recent years parties to conflicts had all too often and too easily invoked Article 51 of the Charter in order to justify their acts." A/42/41para 52.

774 In reaction to the NAM proposal: A/36/41 para 239; A/37/41 (1982) para 445. Also previously this claim has been made: See Mexico's proposal to take as basis of the work the Friendly Relations Declaration A/34/41 (1979), 61 para 150; Report, A/33/41 (1978) para 66.

775 A/37/41 (1982) para 435.

776 Report, A/33/41 (1978) para 66; A/C.6/33/SR.53 para 36 (Gabon): "operating"; A/34/41 (1979) para 69; A/C.6/34/SR.18 para 56 (Romania) "taking up arms", A/35/41 (1980), 17 para 60 (Romania) "groups using force"; A/42/41 (1987) para 22 (Benin, Cyprus, Egypt, Ecuador, Nepal) "forcible activities"; A/42/41 (1987) para 27 (Mexico) "armed activities". See also for other contexts: A/39/41 (1984) para 82 "possession of arms is no violation of the principle of non-use of force"; A/C.6/41/SR.18 para 58 (Federal Republic of Germany) "arms control is not identical with non-use of force"; A/42/41 (1987) para 31. With respect to prohibiting propaganda, it was stated that "does not involve the use of force and hence was alien to the subject matter".

Aggression.[777] Last but not least, States regarded paragraph 6 to reflect the findings of the ICJ in its Nicaragua decision where the qualification criterion was reaffirmed.[778]

Ultimately, the Netherlands – against the background of its observation of a narrower scope of existing instruments – felt the need to place on record that

> "The term "subversive acts" used in paragraph 6 of the Declaration remained undefined and was therefore too vague to be subscribed to by his Government. Equally, the term "interference" and "threats against the personality" used in paragraph 7 should be limited, in the context of the Declaration, to acts in which armed force was used."[779]

Accordingly, in line with the declaration's general conservative approach to existing instruments, no agreement can be concluded to abolish the requirement that the assisted act must "involve a use or threat of force" at least for an indirect use of force.

### (c) Application to interstate assistance?

#### (i) A prohibition of perpetration…

The continued reliance on the requirement of an "involvement of the threat or use of force" also makes sense in light of the conceptualization of and *rationale* behind the prohibition of indirect use of force, in particular if the broad definition of force continues to not find a majority.

States emphasized that the general idea behind indirect use of force is concerned with a State, despite only supporting another actor using force, being the *perpetrator* of a use of force. The actor eventually engaged in forcible acts was viewed as the *"instrument"* to use force.[780] When discussing "indirect use of force" States were concerned with the "advent of puppet

777 A/34/41 (1979) para 66.
778 A/C.6/42/SR.18 para 13 (Ghana).
779 A/C.6/42/SR.50 para 10. See also the other part of the quote above.
780 A/C.6/31/SR.50 para 33 (Australia).

regimes"[781], the instalment of "agents in power which are then controlled through technical assistance",[782] or the waging of "proxy wars".[783]

It was hence not merely the provision of support that was prohibited; it was the acting "through intermediaries".[784] In addition, States repeatedly stressed the basis of a disguised, covert, yet likewise disruptive form of using force that enables States to circumvent their direct obligation and avoid responsibility.[785] The parallelism between a direct and an indirect use of force becomes clear as States continued to highlight that "it was no longer possible to condemn in words the use of force", if indirect forms are not covered as well.[786] The assisting State was not an accomplice. It was on the same level as if it was *directly* using force.[787] The assisting State was viewed to be a perpetrator,[788] "engineering the military operation."[789]

(ii) … applicable in the interstate context…

States' description of the rule as prohibiting a specific form of perpetrating the use of force already indicates that States conceptualized and viewed the prohibition of indirect use of force as a *general* rule. States addressed a certain general pattern of State behavior – using force through an intermediary by providing support – well aware that this embraces many different forms that cannot be regulated comprehensively.

781 A/C.1/31/PV.17, 54-56 (Congo).
782 Ibid.
783 A/C.6/31/SR.50 para 103 (Saudi-Arabia); A/C.1/31/PV.17, 16 (Bangladesh); A/C.6/34/SR.20 para 33, 34, 36 (China); A/AC.193/SR.6 para 5 (UK); A/C.6/33/SR.54 para 34 (Somalia); A/C.6/33/SR.55 para 8 (Liberia).
784 A/C.6/35/SR.32 para 35 (Zaire): "Many States were continuing, *through intermediaries*, to threaten the peace and security of other States, if not of mankind as a whole; however, the main theatre of operations was not in the northern hemisphere, but in the southern. Some States, including the largest and most advanced, still refused to acknowledge the responsibility of States in those cases […]."
785 For example: A/C.1/31/PV.17, 54-56 (Congo); A/C.6/31/SR.50 para 103 (Saudi-Arabia); A/AC.193/SR.6 para 5 (UK); A/C.1/31/PV.14, 4 (Yugoslavia); A/AC.193/SR.24 para 6 (Nepal); A/AC.193/SR.10 para 25 (Senegal); Report, A/33/41 (1978) para 32, 49; A/C.6/33/SR.54 para 35 (Somalia); Spain A/36/41 (1981) para 25-26; A/C.6/41/SR.14 para 49 (Sri Lanka).
786 Report, A/33/41 (1978) para 32; A/AC.193/SR.22 para 33 (Morocco).
787 A/C.6/33/SR.58 para 29 (China).
788 A/C.6/42/SR.21 para 57 (Morocco).
789 A/C.6/34/SR.20 para 33 (China).

Indeed, the 1987-Declaration did not go beyond familiar obligations: it merely called upon States to fulfill their obligations with respect to assistance provided to "paramilitary, terrorist or subversive acts" or "organized activities". All these actions are typically performed by non-State actors. Again, it seems that States were *primarily* concerned about situations in which States "use" non-State actors, not other States.[790]

But the outcome should not disguise that this was not States' *exclusive* concern. In light of the generally conservative approach, States opted for a path dependent rule, merely reaffirming (the politically narrowed scope of) the Friendly Relations Declaration. Thereby States may also have agreed on the regulation of the most common and most dangerous[791] form of indirect use of force. That this however does not necessarily fully cover the entire possible legal dimension of the rule is clearly shown (once more) throughout the debates on that rule.

In particular, although there may not have been an elaborate argument to apply the concept explicitly also to cases where States provide assistance to other States,[792] States did not exclude the application of the rule here. At the outset, States continued to use generic terms that describe certain activities, but did not definitively specify, and hence leave open the receiving actor.[793] Throughout the debates, States indicated that also *States* could be "instruments" to use force. For example, some States, when giving examples for indirect use of force, referred to States as being a potential tool of assistance.[794] Most frequently States stated that a "proxy war" should also

790 E.g. A/40/41 (1985) para 75.

791 Ibid.

792 In general, one should be careful to argue that this is a disappointing result. It may not be ideal in light of clarity and transparency. But this outcome cannot be surprising. First States were generally reluctant to define or exemplify what conduct amounts to the use of force. The Aggression Definition was a controversially discussed exception rather than the rule. Second, as assisted States lack the inherent proximity of non-State actors to the targeted State, States may have arguably been reluctant to clarify the factors in the abstract according to which interstate assistance may be considered an indirect use of force.

793 See paragraph 6 of resolution 42/22. "Paramilitary, terrorist or subversive acts" or "organized activities" are typically not performed by other *States*, but this is not impossible. In this light for example also A/37/41 (1982) para 167 (Chile); A/AC.193/SR.24 para 6 (Nepal); A/C.6/35/SR.32 para 35 (Zaire).

794 A/C.1/31/PV.15, 57 (Chile); A/C.1/31/PV.14, 4 (Yugoslavia); A/C.6/34/SR.20 para 36 (China); A/37/41 (1982), 21 para 74 (USSR); A/37/41 (1982) para 430.

be covered.[795] Others equated the problem of assistance to States and non-State actors, putting them on the same conceptual level.[796]

(iii) … but applied to non-State actors only

The prohibition of indirect use of force is hence not a rule specific for support provided to non-State actors but embodies a "central idea"[797] that is open to include also inter-State support.

And yet, again the primary emphasis of the Declaration on assistance to non-State actors is striking. The Declaration hence helps to abstractly clarify the necessary preconditions.

The defining characteristics of the assisted actor appear to be decisive.

States are in particular concerned about "subversion", i.e. situations of civil strife which are inherently defined as support to a population taking against its own government, i.e. support to internal fighting within and against the own sovereign entity.[798] The close spatial connection and the fact that the force comes from within the State makes it particularly dangerous as it is difficult to detect and fight. If the prohibition was to cover only those scenarios, this would arguably exclude the application of the rule to the inter-state context. But again, States drafted the prohibition broader. It also embraces external force. The inclusion of acts of mercenaries as well as paramilitary and terrorist acts are not necessarily internal.[799] Still, this situation is also defined by a certain proximity of the assisted actor and the targeted State that inherently involves a particular danger for the targeted State.

It is in this light that the broad forms of State involvement (i.e. organizing, instigating, assisting, participating, acquiescing) should be understood. Here in any case special caution is essential with respect to any conclusions with respect to the scope of indirect use of force for two reasons: paragraph

795 A/C.6/31/SR.50 para 103 (Saudi-Arabia); A/C.1/31/PV.17, 16 (Bangladesh); A/C.6/34/SR.20 para 33, 34, 36 (China); A/AC.193/SR.6 para 5 (UK); A/C.6/33/SR.54 para 34 (Somalia); A/C.6/33/SR.55 para 8 (Liberia).

796 A/C.6/31/SR.50 para 33 (Australia).

797 A/36/41 (1981) para 238.

798 For many see: e.g. A/AC.193/SR.8 para 11 (Italy): "Art I should also cover force against another state by aiding subversion *from within the territory* of the latter."; A/C.6/34/SR.18 para 56 (Romania); A/C.6/33/SR.53 para 36 (Gabon).

799 A/35/41 (1980), 47, Definition; A/36/41 (1981) para 229; A/37/41 (1982) para 423-424.

6 does not exclusively deal with the principle of non-use of force; and paragraph 6 implements indirect use of force only for assistance to non-State actors. As such, the remarkably comprehensive list of assistance that is considered to be prohibited is not necessarily indicative for the scope of the prohibition of indirect use of force in the interstate context. But it gives structural indicators:

First, it is again confirmed that the prohibition of indirect use of force is accessory: it requires the actual commission of the assisted act. Notably, the legality of the assisted act appears not to be decisive.

Second, to consider a State's involvement as indirect use of force, the assisting State must play a major role in the respective forceful operation. The assisting State must pull the strings. Thereby, the threshold of attribution of conduct however needs not be fulfilled. States consistently refer to forms of assistance that would not meet that threshold.[800] On the other hand, *without* any State involvement there cannot be indirect use of force.[801] Between those two parameters, the necessary threshold for involvement seems to be case-specific. In the abstract States consider different factors. Besides the nature of the assisted actor, its size and power are relevant aspects. If ordinary individuals received assistance, this was not deemed enough.[802] Moreover, the proximity of the assistance to the assisted force, as well as its intensity and nature seem to play a role. For example, Morocco stated that "when subversion reached certain proportions and revealed the flagrant complicity of a State, it could be qualified as an act of aggression and thus gave rise to the right to self-defence."[803] For Morocco, this was the case if the requirements of Article 3(g) Aggression Definition were fulfilled.[804] And Morocco was even clearer when commenting on the final declaration. It stated:

> "Paragraph 1 of section I, which reaffirmed the principle set forth in Article 2, paragraph 4 of the Charter, should be read in conjunction with paragraph 6 of section I. When armed subversion reached *certain proportions* and showed *evidence of flagrant complicity* by one or more

800 A/RES/42/22 para 6; A/AC.193/SR.6 para 5 (UK) "organization"; A/AC.193/SR.8 para 11 (Italy) "aiding".
801 A/36/41 (1981) para 229.
802 The UK for example required a "group of individuals", A/AC.193/SR.6 para 5 (UK).
803 A/35/41 (1980), 14 para 50. See also on the "flagrant complicity" standard: A/AC.193/SR.22 para 33.
804 A/35/41 (1980), 14 para 50.

> States, it could not fail to be classified as use of force prohibited under the Charter and entailing international responsibility on the part of its *perpetrator* or perpetrators."[805]

Guyana stated that this could also be the case for "certain omissions by States",[806] indicating that whether State involvement is active or passive may be important. Romania stressed that "the provision of *armed* support to groups using force" was prohibited,[807] signifying the relevance of the sort of assistance provided.

The 1987-Declaration applied those factors only to the situations mentioned in paragraph 6. Whether those forms of assistance are applicable also to inter-State assistance, States do not answer explicitly. But if those factors are similar and comparable to the situation of assistance to non-State actors, States do not exclude the application of the prohibition of indirect use of force to those cases.

#### (d) Conclusion

The 1987-Declaration suggests that assistance to a use of force is prohibited, irrespective of whether the assisted use of force is committed by a non-State actor or a State. Its broad wording further implies that to the extent that assistance amounts to "perpetration," it may be covered by the prohibition to (indirectly) use force as well as the prohibition of intervention.

### (2) The separate prohibition of participation

#### (a) Uncontroversial…

The decision to include a prohibition of participation in a use of force was remarkably uncontroversial.

The prohibition quickly found common ground across the different "camps" during the debates. This is notable given the fact that a comparable rule in that form had not yet been expressly and universally recognized in a UN declaration. All three main proposals can be understood to include

805 A/C.6/42/SR.21 para 57 (Morocco), emphasis added.
806 Ibid para 42 (Guyana).
807 A/35/41 (1980), 17 para 60 (Romania).

a prohibition of participation. Throughout the debates, States across the blocs explicitly welcomed and affirmed such a prohibition of participation as being part of international law.[808] After States had agreed to pursue a declaration rather than a treaty, i.e. during the decisive drafting phase the prohibition of participation was not viewed to "give rise to any difficulties".[809] From the beginning, it was among those provisions proposed to be included in the document.[810]

At some points, however, the prohibition was omitted. For example, a draft declaration submitted by Belgium, Finland, France, Germany, Italy, Spain, and the UK was silent on that issue.[811] It merely recalled the "obligation to observe the principle of the Charter of the United Nations concerning the non-use of force in their international relations with any State."[812] This was not meant to challenge the existence of a prohibition of participation. Rather the draft was marked with an effort to be as neutral as possible towards the UN Charter, refraining from highlighting any detailed rules deriving the principle of non-use of force, to not open doors to controversies whether the existing law may have been changed. The first NAM working paper also did not contain an (explicit) provision on that matter.[813] Again, it would go too far to see this as a rejection of the rule. First, this may have been motivated by the fact that the NAM States had sought to establish a duty to support victims. Second, the NAM States stressed that its proposals were not meant as a definitive text, but rather to be an impetus to the debate that complements the other proposals.[814] Last but not least, the proposal immediately prompted critique that it was "missing […] the obligation of States not to assist States having resort to force."[815]

Likewise, it is noteworthy that no substantial criticism was voiced with respect to the provision. At no point was the rule challenged as such. For

808 See for example A/AC.193/SR.6 para 5 (UK); A/C.6/33/SR.58 para 29 (China); A/C.6/33/SR.58 para 31 (Turkey); A/35/41, 51 para 129, A/35/41, 54 para 130 (Western States); A/AC.193/4/Add.3 (Iran); A/C.1/31/PV.14, 11 (German Democratic Republic); A/C1/31/PV.18, 13-15 (Laos); A/C.6/31/SR.50 para 32 (Australia); A/C.6/31/SR.50 para 83 (UK); A/C.6/31/SR.51 para 8. Generally: A/C.6/31/SR.54 para 11, A/C.6/38/SR.13, 6, para 18 (Tunisia); A/38/41 para 83.

809 A/41/41 (1986) para 84 (c).

810 A/41/41 (1986), 26 para 90; A/42/41 (1987) 22, para 56.

811 A/42/41 (1987), 5, para 19, I (1).

812 Ibid.

813 A/35/41 (1980) para 172.

814 A/C.6/36/SR.15 para 36 (Morocco).

815 A/35/41 (1980), 52 para 181. See also A/C.6/38/SR.13, 6, para 18 (Tunisia).

example, Mexico when criticizing the USSR provision, only feared that the wording the USSR used to introduce the provision "might imply that the validity of the principle was limited to the States parties to the treaty and did not apply to all States Members of the United Nations. A similar problem arose in paragraphs 2 and 3 of article I."[816] Other States opposed to include the provision in the final declaration. It was no legal rejection of the rule.[817] To the contrary, they noted that "these proposals" were "already mandatory for all States Members of the United Nations and that there was no need to stress it or confirm its mandatory character. […] [I]t served no useful purpose to repeat provisions of the Charter."[818]

(b) … and not new…

The little controversy on the existence of this general provision is not surprising. States did not view the provision as a "new" norm to which the 1987-Declaration gave birth. Instead, it seems States only have put into words a long-standing and implicit agreement among States on a well-established rule, which had only remained unuttered.

Already the USSR, when introducing the norm to a Working Group created by the Special Committee, did not present it as a new norm, but rather saw it as a "*reaffirmation* of the ban on giving assistance to States which have already used force".[819] The USSR explained that "[t]he prohibition of participation in the use of force laid down in paragraph 2 of article I is a self-sufficient constituent of the principle of the non-use of force."[820]

States across the blocs shared this assessment. States commenting on the initial USSR treaty draft, without engaging with the substance in any detail, were not of the opinion that the recognition of the rule added something which was not already included in the Charter.[821] This general attitude pre-

816 A/C.6/35/SR.29 para 47 (Mexico). See also Turkey A/C.6/34/SR.18 para 15, 16 (Turkey).

817 Thereby they referred to the proposal "to include the following provisions, which it was stated, should not give rise to difficulties:" "(c) All states shall not assist, encourage or urge other States or groups of States to resort to the threat or use of force in violation of the Charter of the United Nations." A/41/41 (1986) para 84.

818 Ibid para 85.

819 A/34/41 (1979), 32 para 106, emphasis added.

820 Ibid.

821 A/C.1/31/PV.17 47 (USA); A/C.1/31/PV.18, 32 (Netherlands speaking for 9 State members of the European Communities). Both were arguing that the treaty hence

vailed throughout the debates – in particular with respect to a prohibition on non-assistance. The UK aptly summed up this sentiment. It commented on the USSR draft, attempting to show that the proposed treaty's reiteration does not add anything but only runs risk of confusing clear norms: "As for article I, paragraph 2 of the draft, what did it say beyond what was in the Charter?"[822] The working paper submitted by Belgium, France, Germany, Italy, and the UK, circulated in the working group in 1979, showed that these comments were no coincidence. They introduced the rule stating that "the Committee might also wish to consider […] (2) The *reaffirmation*" of the prohibition of participation.[823]

That the rule is grounded in practice and is not an innovative interpretation or further development of the Charter is further indicated by numerous States that referred to this provision as already underlying their foreign policy. For example, Laos stated that one of its five foreign policy pillars is:

> "Non-Use of force or threat of force in relations among States and, at the same time, prohibition of any use by a third State of its own territory for the purpose of intervention, threat or aggression against another State." [824]

Likewise, Turkey recalled that:

> "In 1933 Turkey had concluded several international agreements in which it had undertaken not to resort to war as a means of policy or to aggression or *participation in an act of aggression committed by a third State*, and had undertaken to condemn all aggression or *participation in any kind of aggression attempted by third parties* as well as any aggressive alli-

only creates confusion about already clear obligations. A/C.6/31/SR.52 para 18-19, 21 (Canada); A/C.6/31/SR.53 para 20, A/C.6/33/SR.54 para 30-31 (Netherlands); A/C.6/31/SR.51 para 28 (Chile); A/C.6/33/SR.56 para 87 (Belgium). See also for a meticulous analysis: Lauterpacht, speaking for Australia A/C.6/31/SR.50 para 15-19.

822 A/C.6/31/SR.50 para 83, see also para 89. In a similar, yet more concealed manner see: A/C.6/31/SR.50 para 32 (Australia); A/AC.193/SR.10 para 43 (Spain, commenting in detail on the USSR draft: "Article I seemed to refer to certain prior undertakings rather than to any new undertakings.")

823 A/34/41 (1979), 54 para 127, emphasis added. This is especially noteworthy as States otherwise referred to obligations.

824 A/C1/31/PV.18, 13-15.

> ances against one of the contracting States. Turkey continued to pursue the same policy within the United Nations."[825]

What is more, States referred to examples of interstate assistance to illustrate that the principle of non-use of force was frequently violated – thus presupposing that there was a norm that could be violated.[826]

### (c) … but still welcome

But even though there was rare unanimity among States on the existence of the provision, States welcomed the clarification, and pointed out the novelty and importance of the express provision. For example, the German Democratic Republic, when commenting on the first USSR draft, viewed the USSR draft not as "a mere repetition of existing obligations," but as "confirmation and further clarification of those obligations."[827] In particular, it pointed to "some favorable consequences that would flow from such a treaty":[828]

> [T]he prohibition to eschew aggression would also include the prohibition of support and encouragement for the use of force against other States. Experience has shown with sufficient cogency the great significance of such a measure."[829]

In a similar manner, Viet Nam placed emphasis on the provision when commenting on the final declaration.[830]

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825 A/C.6/33/SR.58 para 31, emphasis added. A/C1/31/PV.18, 43 (Afghanistan) and A/35/41 para 121 (Iraq, referring to the National Charter A/35/110) may be understood in a similar manner.

826 A/C.6/36/SR.12 para 1 (Kuwait); A/37/41 (1982), 21 para 74, 293 (USSR) on US subversion, on US providing territory to armed bands, and to use territory of third countries to conduct (illegal) use of force; A/C.6/39/SR.15 para 58 (USSR); A/C.6/38/SR.14 para 19-20, 22 (Albania); A/C.6/38/SR.17 para 30, A/C.6/40/SR.12 para 19 (Cuba); A/C.6/38/SR.17 para 69 (Democratic Yemen); A/C.6/38/SR.17 para 73 (Byelorussia Soviet Social Republic); A/C.6/40/SR.8 para 20-21, A/C.6/41/SR.12 para 49 (Syria).

827 A/C.1/31/PV.14, 17.

828 Ibid.

829 A/C.1/31/PV.14, 17. Similarly, pointing to welcome clarifications as regards assistance: A/C.6/31/SR.50 (1976) para 96 (Bulgaria); A/C.6/31/SR.51 (1976) para 8 (Hungary); A/C.6/33/SR.57 para 1-3 (Uruguay, most explicitly); Report, A/34/41, 34 para 107: "useful additional safeguards".

830 A/C.6/42/SR.19 para 9 (Vietnam). See also A/C.6/33/SR.57 para 1 (Uruguay).

(d) The substantiation of the prohibition

While the existence of the prohibition of participation was uncontroversial, States could not refer to an express prohibition in the Charter. In fact, States made special efforts to substantiate the rule. The debates followed a similar pattern and a similar line of arguments as the debates on the existence of the principle of non-intervention during the Friendly Relations Declarations – albeit not in the same detail, arguably because a prohibition of assistance was not as controversial as the rule of non-intervention.[831]

States did not ignore that the UN Charter does not expressly acknowledge such a prohibition. But they treated the rule as being *implicitly included* in the Charter.[832] States viewed the prohibition of participation to have its origin in the *principle* of non-use of force.[833] It is a corollary thereof. This view finds textual expression in the resolution, as States distinguished between the principle of non-use of force, and specific rules deriving from and elaborating this principle.[834] In that sense, States widely understood the declaration and its provisions as clarification of certain corollaries stemming from the principle of non-use of force.[835] This also applies to paragraph 4, the prohibition to participate. For example, the USSR described "the prohibition of participation in the use of force laid down in [its] paragraph 2 of article I" as "basic element of the principle of the non-use of force" and a "self-sufficient constituent of the principle of the non-use of force."[836] Likewise the Polish Chairman of the Special

831 Mani, *Basic Principles*, 59-60. See also Chapter 3 VII, 1.

832 Expressly so for example: A/C.6/31/SR.50 para 83, 89 (UK); A/C.6/33/SR.57 para 1 (Uruguay); A/C.6/33/SR.50 para 3 (Mexico); A/C.6/42/SR.19 para 9 (Vietnam); A/C.6/42/SR.20 para 27 (Greece).

833 See e.g. States in note 826. See also A/C.6/33/SR.50 para 3 (Mexico).

834 See e.g. paragraph 2 for a reference to the "principle", and paragraphs 4, 7, 8, 10, 11 for establishing a rule, or duty.

835 In general on the relationship between the principle and rules: A/C.6/34/SR.22 para 8 (Pakistan); A/36/41 para 28 (Spain); A/C.6/SR.14 para 30 (Venezuela); A/35/41 (1980), 8 para 31 (Mongolia); A/C.6/41/SR.12 para 34 (Jordan); A/C.6/41/SR.14 para 10 (Byelorussia); A/C.6/42/SR.18 para 11 (USSR); Working Group Report, A/34/41, 34 para 107. See for respective statements on the principle of non-recognition: Anne Lagerwall, 'L'Administration du Territoire Irakien: Un Exemple de Reconnaissance et d'Aide au Maintien d'Une Occupation Resultant d'Un Acte d'Agression Dossier: Aspects Contemporains de l'Occupation et de l'Administration en Droit International', 39(1) *RBDI* (2006) 257.

836 Report, A/34/41, 30, 32 para 106. See also A/C.6/36/SR.12 para 1 (Kuwait).

Committee located the proposals on the prohibition to participate under the heading "general prohibition of the threat or use of force."[837]

The principle embodied in Article 2(4) UNC may stand at the heart of the provision. But States did not leave it there. They further bolstered the prohibition.

The USSR, having initiated the discussions and being the first to introduce the provision, gave the most detailed account on the provision's origin:

> "Initial material for formulating this element is provided by the provision in paragraph 5 of Article 2 of the Charter, according to which all Member States of the Organization undertook the obligation to refrain 'from giving assistance to any state against which the United Nations is taking preventive or enforcement action'. The United Nations can only resort to preventive or enforcement action through implementation by the Security Council of the provisions of Article 39 of the Charter, i.e. when this body determines the existence 'of any threats to the peace, breach of the peace or act of aggression'. In practice such situations embrace a broad and ill-defined range of international illegalities arid conflicts, inasmuch as acknowledgement of their existence is based on the discretionary authority of the Security Council. However, in objective terms such situations principally embrace all instances of the infringement by States of the principle of non-use of force. It is therefore natural that this provision of the Charter primarily obliges States to refrain from giving aid to States acting in contravention of the principle of non-use of force, and it is precisely this interrelated interpretation of paragraphs 4 and 5 of Article 2 of the Charter which forms the basis for paragraph 2 of article I of the Treaty."[838]

Thereby, the USSR openly acknowledged that the prohibition was not entailed in Article 2(4) UNC alone. Rather, it invoked an "interrelated interpretation of paragraphs 4 and 5 of Article 2." Interestingly, the USSR also showed awareness that Article 2(5) UNC only applied when the Council takes action. But in the USSR's view, Article 2(5) embodies the idea of non-assistance, as the Council takes enforcement measures in reaction to

837 A/39/41 (1984), 30 para 122.
838 A/34/41 (1979), 32 para 106.

"infringements by States of the principle of non-use of force."[839] Hence the spirit of Article 2(5) UNC that requires third States not to assist in unlawful conduct inspired the prohibition of participation. This is not to be confused however with the legal basis itself. States were clear that the prohibition of participation was distinct from Article 2(5) UNC, which was viewed as an enforcement provision.[840]

Australia viewed the prohibition of participation as a "logical consequence of the *prohibition* to use force."[841] Thereby, it stressed first the connection to the *principle* of non-use of force but second it derived the prohibition of participation as a complement from the *prohibition* to use force. This argument was reminiscent of Lauterpacht's argument on the Kellogg-Briand pact.[842] Irrespective of the question whether this argument is a family tradition,[843] as discussed in that context, it is not clear that this is a *necessary* logical conclusion.[844] Accordingly, it remains doubtful whether Australia in fact uses "logical" as a legalistic term, or rather as argumentative and persuasive terminology, as being obvious and reasonable.

Vietnam drew a connection of the prohibition of participation and general rights and obligations deriving from sovereignty. In its view, the prohibition expressed and was founded on general sovereignty. It stated:

> "Mention should also be made of the principle that States had the duty not to urge, encourage or assist other States to resort to the threat or use of force in violation of the Charter, since all peoples had the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every State had the duty to respect that right in accordance with the Charter."[845]

839 Likewise Article 2(5) was used as basis for the duty to assist a victim: see e.g. A/33/41 para 64; A/36/41 (1981), 113-114 para 478-480; A/42/41 (1987) para 48.

840 Cyprus' repeated statements on Article 2(5) made this clear: A/AC.193/SR.7 para 9-23, in particular 16 (Cyprus); A/AC.193/SR.21 para 12 (Cyprus); A/C.1/31/PV.11, 50 – 51; A/C.6/31/SR.54 para 19; A/C.6/33/SR.56 para 17 (Cyprus). But see also: A/AC.193/SR.19 para 24 (Greece); A/C.6/33/SR.56 para 42 (Greece); A/C.1/31/PV.15, 67 (Kuwait); Report, A/33/41 (1978) para 64.

841 A/C.6/31/SR.50 para 32 (Australia), emphasis added.

842 See Chapter 3.

843 Elihu Lauterpacht was speaking for Australia.

844 Chapter 3 VI, B.

845 A/C.6/42/SR.19 para 9.

In addition, several States referenced historical roots, in particular in treaty practice, to endorse and explain the rule.[846] Most notably, Turkey invoked and relied on treaty practice from the 1930s that it viewed as the foundation of the prohibition.[847]

(e) The relationship with other rules

No State argued that the prohibition of participation is identical to the prohibition to (directly or indirectly) use force. Both stemmed from the same principle of non-use of force. But they were separate and distinct prohibitions with separate and distinct scopes.

At the outset, the USSR in its World Treaty dedicated two separate paragraphs to the prohibitions, drawing a line between the prohibition to use force and to participate in a use of force.[848] Later, when introducing and explaining the draft treaty, the USSR introduced this paragraph 2 as "*self-sufficient* constituent of the principle of non-use of force,"[849] which it saw as an "additional means of ensuring the fulfilment of the key obligation of the non-use of force."[850] Likewise, the Western proposal referred to two, expressly separate, prohibitions.[851] This view resonated widely with those States commenting on the issue.[852] There is only one statement that may cast doubt on the distinct character. Australia, criticizing the scope of the USSR's proposed prohibition of participation, stated:

> "Everyone was aware that organizations which did not possess statehood might be assisted, encouraged or induced by States to use force. By adopting such restrictive language, one would impliedly be licensing

846 Making this general argument: E.g. A/32/112 (German Democratic Republic); A/32/122 (Mongolia); A/C.6/31/SR.51 (1976) para 4, A/C.6/34/SR.18 para 38 (Ukraine).
847 A/C.6/33/SR.58 para 31 (Turkey). See also A/C.6/31/SR.53 para 2 (Brazil).
848 A/AC.193/L.3 reprinted in A/33/41 (1978), Annex, 23-24, Article 1 para 1 and 2.
849 A/34/41 (1979) para 106, 32.
850 A/AC.193/SR.3 para 9, 12. See also A/C.6/33/SR.52 para 57 (USSR).
851 A/34/41 (1979), 53-54 para 129.
852 A/C.6/33/SR.57 para 1, 3 (Uruguay); A/C.6/31/SR.51 para 8 (Hungary); A/AC.193/4/Add.3 (Iran); A/AC.193/SR.8 para 11 (Italy); A/C.6/31/SR.51 para 19 (Italy); A/C.6/33/SR.58 para 5 (India); A/C.6/34/SR.20 para 34 (China); A/C.6/33/SR.58 para 29 (China); A/C.1/31/PV.18, 13-15 (Laos).

> the use of subversive non-statal elements as instruments for the use of force."[853]

Thereby, it appears that Australia placed assistance to States on the conceptually same level as assistance to non-State actors. The prohibition of participation covers the same conduct as the prohibition of indirect use of force, but only for States. Yet, this statement must be understood in the context of the proposed World Treaty that did not expressly include a prohibition of indirect use of force. Australia's comment may hence be no more than a criticism that indirect use of force was not addressed. But in light of the final declaration, it would go too far to conclude that this statement is denying a line between those two rules. Still, this statement nonetheless reminds of the fact that assistance to States and non-State actors are conceptually similar. Theoretically, to the extent that non-State actors can fulfill the prerequisites,[854] the prohibition of participation might also apply to those scenarios.

And yet, States draw a line and establish different norms – not between the actors, which as Australia had feared would be dangerous, but between the forms of involvement.

### (f) A prohibition of participation

The distinct and separate nature of the prohibition of participation from the prohibition to use force is also reflected in its scope. Unlike the prohibition to indirectly use force that regulates *perpetration* through an intermediary, the prohibition of participation focuses on *participation* or complicity – a different form of involvement in another actor's force that calls for a different legal qualification.[855]

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853 A/C.6/31/SR.50 para 33.

854 Under the present international law, however, they cannot. Non-State actors would have to be capable of violating international law – a condition which they – at least for the *ius contra bellum* dimension – do not (yet) fulfill. This is why States extended the prohibition of intervention to cover those cases that may not be classified as a "indirect use of force." But for a debate of extending complicity to non-State situations, see Jackson, *Complicity*, 201 et seq. See also Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct', 28(2) *EJIL* (2017).

855 A/C.6/33/SR.58 para 31 (Turkey); A/C.6/42/SR.19 para 9 (Vietnam); A/C.6/33/SR.52 para 57 (USSR); A/C.6/33/SR.57 para 1-3 (Uruguay).

The different spirit of the norm is already embodied by the title the USSR used to refer to the provision: a "prohibition of participation."[856] Accordingly, States viewed different situations to fall under the prohibition: States were concerned about assistance in the classical sense – assistance that may be important and relevant, even enable for the assisted use of force, but that by nature remains support. The assisting State does not use the other State as an "instrument", but it provides assistance to the other States' use of force.[857] China, for example, drew a line between indirect use of force and participation in describing the different scenarios:

> "Those super-Powers either *directly used* force to perpetrate aggression, send armed forces and dispatch military troops and personnel to subvert another State, or, through *indirect means*, used agents, mercenaries and regional hegemonism as a form of the use of force and the threat of force*; or they incited and helped* some States to start armed invasions, while they themselves seized the opportunity to meddle and fish in troubled waters. Therefore, when discussing the enhancement of the principle of the non-use of force, it was necessary to proceed from the actual situation, to face up to reality and the primary problems existing, and to consider possible solutions."[858]

States did not discuss the exact boundaries when assistance qualified as "participation", however. This may have been reason for the rare unanimity among States. Still, the 1987-Declaration and its discussions give some indicators, which importantly must not be confused with definitive conclusions.

First and most notable, in particular in contrast with the prohibition of indirect force, is the requirement that the assisted State has to "resort to the threat or use of force in violation of the Charter."[859] It is interesting to note that different versions were circulated in this respect. While the Soviet proposal referred generally to a threat or use of force "in violation of the provisions of the Treaty", the Western States' proposal refrained from a general reference to the Charter. Rather they formulated the prohibition as follows:

856 A/34/41 (1979), 32 para 106.
857 A/C.1/31/PV.15, 29 (Albania); A/C1/31/PV.18, 68-70 (Zambia); A/C.6/33/SR.57 para 1-3 (Uruguay).
858 A/C.6/33/SR.58 para 29 (China), emphasis added.
859 A/RES/42/22 paragraph 4.

> "[N]o State shall assist [... ] any State [...] to use force or the threat of force in violation of the political independence, territorial integrity or sovereignty of other States."

States did not discuss this in any detail. But the formulation left open questions. In particular, it was unclear whether this was a result of lax drafting, as the working paper was primarily meant to be a "programme of work"[860], or whether this was meant to establish the prohibition for assistance in all those cases, thus broadening the prohibition's scope considerably. The relationship with justified force (in particular by (collective) self-defense) would have been unclear. Technically, any use of force, even when justified, at least *prima facie* violates the political independence, territorial integrity or sovereignty. As a consequence, the accessory nature may have been loosened. The assisting State would not have automatically benefited from the lawfulness of the assisted use of force. Assistance itself would have to be justified; any defect would render the assistance unlawful.

The reference to a "violation of the Charter" in any event removed any doubt that assistance to a use of force in accordance with the provisions of the Charter is not prohibited. This is also reflected in the fact that whenever States referred to wrongful assistance, it was always linked to an *unlawful* use of force.[861] Likewise, the general notion among States was that assistance of any form to rebuff an illegal use of force must remain always legal.[862]

At the same time, this requirement precludes the application of the rule to actors that cannot violate the Charter.

Second, the forms of assistance covered by the prohibition are broad and comprehensive. The resolution prohibits "to urge, encourage or assist". This formulation again did not receive much attention and was adopted without much debate in all relevant proposals.

In particular, the action of providing "assistance" to States is not fundamentally different from the action of providing "assistance" to paramilitary forces that qualifies as indirect use of force. Still, States established two separate norms, leading to a different legal qualification. States did not discuss these discrepancies. On an abstract level this suggests however again that the "action" of assistance is not the only criterion. It seems that the nature

860 A/341/41 (1979) para 130 (Belgium).
861 See above, and also A/37/41 (1982), 21 para 74 (USSR).
862 A/C.1/31/PV.15, 71-72 (Kuwait); A/C.6/38/SR.13 para 18 (Tunisia); A/C.6/38/SR.13 para 34 (China); A/C.6/38/SR.14 para 7 (Greece).

of the assisted actor is an important factor acknowledging that the same form of assistance may have different impacts on the assisted actor, different effects for the targeted State, different consequences for the situation – all of which may call for a different legal assessment. On the other hand, the form of assistance provided may be likewise relevant for the legal classification. "Urging" and "encouraging" may not be enough to establish responsibility for a "perpetration"; apparently, it is enough however for responsibility for "participation."

This case-specific approach, taking into account different factors and characteristics of the situation at hand, was also at the basis of States' few comments on what kind of conduct is embraced by the prohibition of assistance.

Again, the USSR allowed some insights:

> "The draft Treaty not only proposes a reaffirmation of the ban on giving assistance to States which have already used force but it is intended to avert the of force through a prohibition on encouraging and inciting other States to illegal conduct. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State (article 3 (f) of the Definition of Aggression) is an example of action which contravenes paragraph 2 of article I of the draft Treaty. A similar infringement would be the sale by States of weapons to an aggressor State or to a state which is carrying out a policy of preparing for aggression." […][863]

Iran argued that in addition to direct use of force, it should be included:

> "Incitement to the use of force, collaboration and material and moral support for a State which uses force, particularly by supplying arms to a State which, acting in its own initiative or on behalf of a super-Power, uses armed force against another State"[864]

These statements again indicate that several abstract indicators are relevant: the form of assistance (material and moral); an active rather than a passive role. The point in time may also be relevant. The USSR stressed that it may constitute unlawful participation not only if assistance is provided to an ongoing aggression, but also if assistance is provided in a preparatory

863 A/34/41, 32-33 para 106.
864 A/AC.193/4/Add.3.

stage. This is also reflected in the wording of the declaration – which is particularly noteworthy when comparing it with, for example, the 1949 Draft Declaration on Rights and Duties of States. Subjective elements received remarkably little attention, albeit they may be implicitly underlying the other factors.

Last but not least, the specific substantiation of the prohibition, in particular the structural parallelism to the duties entailed in Article 2(5) UNC, indicates the openness to other practice on (prohibited and permissible) assistance to flesh out the content of the prohibition for the specific cases – a task that was left to State practice.

### e) Nothing new, but more clarity

Overall, the 1987-Declaration may rightly be treated as a featherweight in international practice relating to the use of force. It may also be accurate to note that even modest advance on existing instruments regulating the use of force, that Canada has observed,[865] can hardly be concluded.[866] These general observations may apply to the regulatory regime on inter-State assistance as well. Also in that respect, the 1987-Declaration may not have led to the progress one might expect after eleven years of debate. Still, it has nonetheless significantly added clarity. For many aspects of the resolution, this may not even be worth noting; it may indeed be no more than a trivial repetition. With respect to the regulatory regime on non-assistance, however, this added clarity should not be underestimated. Here the resolution was new, and unique.

First, the declaration continues along the (unuttered) lines of the two-prong conceptual approach States take to the provision of assistance. But it is the first time that a declaration clearly and expressly confirms that the provision of assistance may amount to a violation of two norms: the prohibition of indirect use of force and the prohibition of participation. The prohibitions coexist. They are not mutually exclusive. They are not separate rules only applicable to certain actors. Rather, they deal with different forms of involvement. This again does not mean that in practice the prohibitions in fact may be rules for a specific recipient of assistance. But this is not a *necessary* prerequisite. In theory, they may apply to *both actors alike*.

865 A/C.6/42/SR.19 para 22.
866 Gray, *Principle of Non-Use of Force*, 37.

Second, the debates on the prohibition of indirect use of force, while not adding substance to its scope, showed that States viewed this as a general concept.

Third, the added clarity is most notable with respect to the prohibition of participation. Again, the Declaration is not as revolutionary as it might seem at first sight, only in view of UNGA resolutions. The Declaration did not and was not meant to give birth to the prohibition. It repeated yet another existing instrument. But for the first time it has put the prohibition into words. For the first time, States affirmed expressly and universally that the prohibition exists. States also clarified and consolidated the prohibition's scope.

Moreover, the Declaration added clarity with respect to the prohibition's nature, when firmly anchoring it in the UN Charter in general and the principle of non-use of force in particular. The significance that it is one of the "certain corollaries [that] stemmed from that principle"[867] was well expressed by Pakistan:

> "The principle of the non-use of force, *and its corollary*, were jus cogens not only by virtue of Article 103 of the Charter, but also because they had become norms of customary international law recognized by the international community. They were, therefore, obligatory not only for States which were signatories to the Charter but for all States."[868]

Furthermore, through the declaration, States dispersed doubts that omissions in previous instruments were not legally, but politically motivated: States reaffirmed an *existing* instrument.

Last but not least, States indirectly acknowledged the importance of this provision in the legal architecture to secure international peace and security. It is telling that the prohibition was recognized for the first time when discussing how to enhance the effectiveness of the prohibition to use force. Uruguay, for example, expressed this general sentiment when observing that the "importance of [the prohibition of participation] needed no emphasis in view of the frequency with which the acts of aggression to which it related took place."[869] And arguably, it is also this sentiment that is reflected in States' remarkable unanimity on that provision – a unanimity

867 A/C.6/34/SR.22 para 8 (Pakistan).
868 Ibid emphasis added.
869 A/C.6/33/SR.57 para 1 (Uruguay).

that no State apparently dared to threaten through a detailed discussion on the prohibition's scope.

It may also be for this reason that States did not bring up the concerns they voiced with respect to a duty of assistance that did not receive the necessary consensus to find its way in the final declaration. States were well aware of the structural similarity. For example, Greece, regretting that the proposal for a duty to assist victims was not adopted, stated that such a duty "would have filled the gap in paragraph 4 of the draft declaration and would have emphasized the general obligation of solidarity inherent in the letter and spirit of the Charter."[870] But they did not challenge the rule as they did for the duty of assistance. For example, in this respect, the Netherlands worried:

> "The term "victim" suggested that a clear distinction could always be made between the guilty aggressor and the innocent victim, but a study of recent conflicts showed that such a distinction often could not be made objectively. Conflicts were often the result of rising tensions and escalation on both sides. The designation of a party as "victim" by a third party has therefore usually a political choice rather than the establishment of a fact."[871]

Similar concerns could have been discussed with respect to the prohibition of participation.

In conclusion, the 1987-Declaration may not go beyond setting the fundaments of the regulatory regime on interstate assistance, leaving many questions open. But by setting the fundaments, it added much light to the dark. As a matter of principle, the rules on non-assistance are well-accepted. The Declaration structured and streamlined previous State practice. And it constitutes a fundament that future practice can build on, even though it may not have received the credit it deserved.

### f) A duty to provide assistance to the victim?

Prohibitions of assistance were not the only subject of discussion in the drafting of the Declaration. States belonging to the group of Non-aligned

870 A/C.6/42/SR.20 para 27 (Greece).

871 A/C.6/SR.10 para 15 (Netherlands). See also e.g. A/35/41 para 192; A/C.6/35/SR.32 para 55 (Austria).

Movement proposed to include a "duty of all States to support the victim of the use of force by all means at their disposal – material and moral – until all the consequences of such use of force are eliminated."[872] This found support from some other States.[873]

The proposal was widely rejected, and also did not find its way into the declaration. In the words of the Austrian delegate, such an obligation went "beyond existing international law."[874] These States rejected the claim that the duty could be based on Article 2(5) UNC, which was concerned with support to the UN only.[875] Moreover, in light of the difficulties to define a "victim" in practice,[876] States were concerned that establishing a "duty" might automatically "result in an expansion of the conflict."[877]

### 5) The Articles on State Responsibility

According to Article 16 ARS, a State providing aid and assistance to an internationally wrongful act bears international responsibility. In the present context, Article 16 ARS is interesting in two ways.

First, the evolution of Article 16 ARS may allow insights not only about the existence of a general rule on assistance in international law. The discussion and emergence of the rule may also help understand the specific regime governing assistance in the *ius contra bellum* (a).

872 A/35/41 (1980), 49 para 172 (Principle 11).

873 China A/C.6/SR.10 para 59; Vietnam A/C.6/SR.10 para 26; Greece A/C.6/SR.11 para 6, A/C.6/42/SR.20 para 27, A/42/41 (1987) para 47 (submitted a proposal to that extent); A/37/41 (1982), 113 para 478.

874 A/C.6/35/SR.32 para 55 (Austria). Some delegations viewed it only as a "moral obligation that flowed from the Charter." A/40/41 para 100. See also: A/36/41 (1981) para 249 assistance "was a right not a duty." A/C.6/SR.10 para 15 (Netherlands).

875 A/37/41 (1982), 113-114 para 478-480.

876 A/C.6/SR.10 para 15 (Netherlands); A/C.6/35/SR.32 para 55 (Austria). Moreover, the question was raised "whether the duty referred to in principle 11 was limited to States or extend to national liberation movements and peoples under colonial racial and alien regimes and foreign occupation." A/35/41 para 192.

877 A/35/41 para 192; A/37/41 (1982), para 479-480; A/40/41 para 100. For a further counterargument see A/C.6/35/SR.32 para 55 (Austria): "That principle could be regarded as conflicting with the obligation under the Hague Conventions, to which express reference was made in connexion with principle 7. His delegation would assume that the obligation resulting for States from the Hague Convention could not be prejudiced by the idea underlying principle 11, worthy as it was. Also, it would seem imperative to get an agreed definition of the notion of "victim" and also of the cases to which the principle would be applicable."

Second, as a general rule governing assistance that is by now accepted as customary international law, Article 16 ARS is a further piece of the regime governing assistance in international law (b).

a) The evolution of Article 16 ARS as proof of a pre-existing special rule governing assistance in the *ius contra bellum*

Article 16 ARS embraces a general rule applicable to any internationally wrongful act. The general rule is derived from State practice on assistance in specific fields of international law.[878] The ILC's process also entailed an assessment of specific pre-existing rules on assistance. Notably, the *ius contra bellum* featured particularly prominently in the ILC's considerations.

This is in particular true for territorial assistance to a use of force. Article 3(f) Aggression Definition was widely quoted.[879] The ILC further relied upon some instances of State practice. For example, it referred to Germany's and Britain's territorial assistance to US intervention in Lebanon and Libya in 1958 and 1986 respectively.[880] The ILC did not see only territorial assistance to be prohibited. Rather, it implied a general rule of non-assistance to an unlawful use of force. For example, the ILC saw the supply of weapons to an aggressor State as classic example of prohibited assistance.[881]

878 ILC ARS Commentary, Article 16, 66 para 2, 7-9; 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". Critical on this approach: Germany, that had doubted the rule's solid foundation in international law, noted: "It would appear that many of the situations envisaged by the Commission and quoted as examples of aid and assistance actually refer to independent breaches of obligations under international law. For example, the action of a State allowing its territory to be used by another State for perpetrating an act of aggression as described in article 3 (f) of the Definition of Aggression qualifies as an act of aggression and not as aiding aggression." A/CN.4/488 (20 July 1998), 75-76.

879 Ago, 7th Report 1978 A/CN.4/307 and Add.1-2 and Corr.1-2, ILCYB 1978 vol II(1), 31 [Seventh Report Ago], 58, para 71; ILC ARS Commentary, Article 27, ILCYB 1978 vol II, 102 para 13; ILC ARS Commentary, Article 16, 66 para 2, n 273.

880 Seventh Report Ago, 58, para 73; ILC ARS Commentary, Article 27, ILCYB 1978 vol II, 103 para 15; ILC ARS Commentary, Article 16, 66-67 para 8.

881 The ILC illustrated this by reference to UK supplies of financial and military aid to Iraq which Iran viewed to facilitate aggression, ILC ARS Commentary, Article 16, 66 para 7. See also Seventh Report Ago, 58, para 71, 59 para 73. See also ILCYB 1978 vol I, 236, para 28, 237 para 36, 239 para 12-13. See also in the debates in the Sixth Committee e.g. A/C.6/33/SR.38 para 14 (6 November 1978) (Thailand).

The prohibition of assistance extended also to the placement of troops at the disposal of another State, the provision of means of transportation, the supply of raw materials[882] or delivery of food to an aggressor.[883]

The ILC's considerations on assistance to a use of force are of special significance as they describe and rely upon practice of prohibited assistance *before* there was agreement on a general rule, ultimately encapsulated in Article 16 ARS. In other words, the ILC assumed assistance to a use of force in its various facets to be governed by specific rules of international law.

However, in light of the ILC's cursory review of State practice, the ILC did not elaborate on many aspects of the pre-existing regime *governing assistance to the use of force*. Apparently, the regime in the ILC's view did not require the assisted use of force to meet a specific threshold. Without distinguishing, the ILC referred to assistance to acts qualifying as "act of aggression", "use of force", "armed attacks" or violations of the "prohibition on the use of force". As such, the ILC left however open whether these acts were all governed by the same rule(s). Moreover, it did not precisely circumscribe the necessary degree of assistance. It did not elaborate on the exact lower or upper limit. While it indicated that requirements of knowledge may follow from the practice on assistance to the use of force, it did not specify what this meant. Whether there existed an intent requirement likewise remained unsettled. Many ILC members criticized the requirement, illustrating their concerns with examples relating to a use of force. But State practice was not the prime means to derive answers from.[884] Likewise, the ILC did not dedicate specific attention to the exact qualification of assistance. In particular, it appeared not to play a role whether the assistance may qualify

882 ILC ARS Commentary, Article 27, ILCYB 1978 vol II, 102 para 13; Seventh Report Ago, 58, para 71, 72.

883 ILCYB 1978 vol I, 239 para 11 (Ushakov) excluding it in any event if it seeks to "ensure the survival of the population for humanitarian reasons."

884 E.g. Castañeda noted that "if one State supplied another with small arms solely as replacement, and those arms were subsequently used in an attack on a third State, it would be very hard to determine whether or not there had been any intention to participate in, or prior knowledge of that act." ILCYB 1978, vol I, 230, para 12; 236, para 28 (Njenga); 239 para 11 (Ushakov). Ago, 240 para 26 argued that the conclusion of a treaty "undertaking to maintain benign neutrality if the [treaty party] committed an act of aggression, […] was not mere incitement but aid and assistance, and it would then be proper to speak of complicity." But see Schwebel, 237, para 36 who viewed the requirements of knowledge and intent to be grounded in State practice. He cited UK supplies of arms and military equipment to Yemen, which had subsequently used them in an attack against Aden.

as indirect use of force or not. Neither did the legal consequences of the prohibition play a special role during the debates.[885]

Finally, the ILC did not specify the legal origin of a prohibition to provide assistance to a use of force, but for some loose indications. The final commentary to the Articles suggests that the prohibition to use force itself embraces a prohibition of assistance.[886] The reference to Article 3(f) Aggression Definition as a specific substantive rule may suggest that (this form of) assistance is governed by a specific rule of customary international law.[887] Interestingly, the ILC also cites the first principle of the Friendly Relations Declaration,[888] which, as seen above, governs only assistance to non-State actors. The ILC thereby gives the impression that this rule may apply to the interstate context as well.

It is true that the ILC derived its general conclusions from this practice. One could view Article 16 ARS hence as the answer to all the open questions. Yet, first, Article 16 ARS was not exclusively based on practice relating to assistance to a use of force. It factors in State practice from different areas of international law, too. Second, more generally, not at least in absence of a comprehensive review of State practice, Article 16 ARS was not an attempt to create a uniform rule. Article 16 ARS was conceptualized as general, basic rule. But it did neither replace nor equate nor embody every nuance of the specific regime it was derived from. Accordingly, beyond the existence of a *ius contra bellum* regulatory regime on assistance to a use of force, the ILC's work on aid and assistance in the context of general rules concerning State responsibility is of limited impact.

885 But see Seventh Report Ago, 59-60, para 75 asking whether the "conduct of a State which provides arms or other means to another State to help it commit aggression [… should] likewise be characterized forthwith as aggression […]".

886 ILC ARS Commentary, 66, para 8. "The *obligation not to use force* may also be breached by an assisting State through permitting the use of its territory […]." The discussion of the examples, e.g. German assistance to the US in Lebanon remain ambiguous, as the ILC refers here simply to an "internationally wrongful act" without further specification. See also para 9: "the obligation not to provide aid or assistance […] is not limited to the *prohibition to use force*." Emphasis added.

887 ILC ARS Commentary, 66, para 2 n 273.

888 Ibid.

b) Article 16 ARS applied to the use of force

That Article 16 ARS by now reflects a rule of customary international law is no longer seriously contested. It is beyond doubt that Article 16 ARS also applies to violations of the prohibition to use force.[889] Remarkably, in the context of the use of force States only rarely invoke Article 16 ARS expressly to make legal claims regarding assistance to a violation of the prohibition to use force. It is primarily in court proceedings that Article 16 ARS found express mention.[890] It should not go unnoticed, however, that Article 16 ARS forms the basis of some States' general policies on assistance to a use of force.[891]

6) Selection of abstract views of individual States on assistance

Some States have set out in a general manner their understanding of the legal framework on the use of force, including the permissibility of interstate assistance specifically. This section will not revisit the common national legislation governing the supply of military supplies and services, most notably export regulations for arms sales by private actors under a State's jurisdiction. Others have done so *in extenso*.[892] Likewise, a comprehensive assessment of the national implementation of the *ius contra bellum* in relation to interstate assistance would go beyond the scope of the present analysis.[893] Last but not least, the various tools put in place by States to minimize the risk of involvement in unlawful support by other States are

889 Cf already States commenting on Article 16, e.g. A/CN.4/488 (20 July 1998), 76 (UK).

890 E.g.: Iran: Oil Platforms, Iran, Further Response to the United States of America Counter-Claim, 24 September 2001, para 7.50, 7.51; Germany: BVerwG, 2 WD 12/04, BVerwGE 127, 302-374, judgment (21 June 2005) para 221.

891 E.g. USA 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operation', 5 December 2016; Joint Commission on Human Rights, (2016-2017, HC 747, HL Paper 49), Appendix 1, 17.

892 Aust, *Complicity*, 138-142; Laurence Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (1 edn, 2020).

893 E.g. Article 26 German Basic Law. For an overview of the German debate: Matthias Herdegen, 'Artikel 26' in Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (Werkstand: 92. EL August 2020 edn, 2017) para 39.

not subjected to analysis here.[894] While those measures are essential to and often key implementation of the regime governing assistance, in the abstract there remains an "element of deliberate ambiguity" whether those measures are based on considerations of *international law*.[895]

Instead, emphasis will be placed solely on a few, notably detailed positions, without asserting a claim of universal representation.

### a) The Tripartite Declaration

In May 1950, the UK, France and the United States issued the Tripartite Declaration regarding Security in the Near East. In view of the Arab-Israeli-conflict, an evolving arms race, and conflicting political interests,[896] they declared in line with their UN obligations that:

> "assurances have been received from all the states in question, to which they permit arms to be supplied from their countries, that the purchasing state does not intend to undertake any act of aggression against any other state. Similar assurances will be requested from any other state in the area to which they permit arms to be supplied in the future."[897]

### b) USA

In an effort to enhance transparency on use of force operations, the White House issued a "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operations" on December 5, 2016.[898] Under the section "working with others in armed

894 Cf for example on US policies towards sharing of intelligence Jonathan Howard, 'Sharing Intelligence with Foreign Partners for Lawful, Lethal Purposes', 226(1) *MilLRev* (2018).

895 On due diligence Neil McDonald, 'The Role of Due Diligence in International Law', 68(4) *ICLQ* (2019) 1049-1050.

896 On the background see Shlomo Slonim, 'Origins of the 1950 Tripartite Declaration on the Middle East', 23(2) *Middle Eastern Studies* (1987); David Tal, 'The Making, Operation and Failure of the May 1950 Tripartite Declaration on Middle East Security', 36(2) *BrJMidEastStud* (2009).

897 22(570) DeptStBull (5 June 1950), 886.

898 Available at https://www.hsdl.org/?abstract&did=798033. For an overview see Benjamin Wittes, 'The White House Releases a "Report on the Legal and Policy Frameworks" on American Uses of Military Force', *Lawfare* (5 December 2016).

conflict", the American government set out "key legal and policy considerations", yet refrained from a "complete discussion of the legal and policy framework":

> "The United States and foreign partners provide one another a range of support, including training, provision of materiel, intelligence sharing, and operational support. When supporting foreign partners, the *United States ensures that it understands their legal basis for acting, and, as laid out in more detail below, takes a number of steps to ensure U.S. assistance is used lawfully and appropriately under domestic and international law*."[899]

It then set out the "international law considerations":

> "The U.S. military's ability to engage and work with partners can and often does turn on international legal considerations. The United States military seeks to work with partners that will comply with international law, and U.S. partners expect the same from the United States. The United States' commitment to upholding the law of armed conflict also extends to promoting compliance by U.S. partners with the law of armed conflict. Receiving credible and reliable assurances that U.S. partners will comply with applicable international law, including the law of armed conflict, is an important measure that the United States military routinely employs in its partnered operations. As a matter of policy, the United States always seeks to promote adherence to the law of armed conflict and encourages other States and partners to do the same.
> As a matter of international law, the United States looks to the law of State responsibility and U.S. partners' compliance with the law of armed conflict in assessing the lawfulness of U.S. military assistance to, and joint operations with, military partners. The United States has taken the position that a State incurs responsibility under international law for aiding or assisting another State in the commission of an internationally wrongful act when: (1) the act would be internationally wrongful if committed by the supporting State; (2) the supporting State is both *aware* that its assistance will be used for an unlawful purpose *and intends* its assistance to be so used; and (3) the assistance is *clearly and unequivoc-*

899 Report, 12, emphasis added.

> *ally connected to* the subsequent wrongful act [here referring to the ILC ARS]."[900]

This report further fleshed out what the US Legal Advisor Brian Egan had set out earlier that year in light of the Counter-Daesh Campaign. Egan shed light on the relevance of "legal diplomacy" when operating in international coalitions and partnerships.[901] He explained that "private consultations" about "each other's legal rationale for military operations" were crucial to secure cooperation. The assisted State's compliance with international law was an important feature in State cooperation. He concluded that "[a]s a matter of international law, we would look to the law of State responsibility and our partners' compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners."

### c) Germany

In view of its historical burden, Germany has a rich record of staying out of hostilities. Given its political and economic weight, Germany nonetheless frequently contributes to other States' use of force. Germany is hence often confronted with the need to explain its general position under international law.[902]

The German government was asked "to what extent a State could be held responsible under international law for the military (armed) attacks *of another State* on the basis of it providing arms to that State, rather than on the basis of a State's territory being used for the attack or the attack being attributed to a State's regular armed forces." It replied:

> "The responsibility of a State under international law is based on rules of customary law, whose content is reflected, *inter alia*, in the project of the International Law Commission of the United Nations on the codification of the 'Articles on State Responsibility'. According to these

900 Ibid 14, emphasis added. This coincides with the US position on Article 16 ARS. The USA insisted that Article 16 ARS should refer to an intent requirement. Comment by the United States, ILCYB 1998 vol II(1), 129. See also A/CN.4/515, 52.

901 Brian Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations', 92(1) *IntlLStud* (2016) 244-245. On US policy with respect to sharing intelligence: Howard, *MilLRev* (2018) 33 et seq.

902 For German positions on specific conflicts see below.

> Articles, the international responsibility of States for military measures requires that the measures are contrary to international law and can be attributed to the State concerned. In international law, attribution is linked to the sphere of control and influence of the State concerned. What is important here is an overall assessment of the facts. The origin of the weapons used may also play a role in this assessment."[903]

This general statement is remarkable in two respects. First, although the German government refrained from providing a full picture of the regulatory framework on interstate assistance and surprisingly focused on the general law of attribution, it acknowledged that the regulatory framework is multifaceted ("inter alia").[904] Second, it accepted that the concept of attribution of conduct could theoretically lead to responsibility for the provision of assistance also in the *interstate* context. Germany confirmed this in a position paper on the application of international law in cyberspace:

> "Generally, the mere (remote) use of cyber infrastructure located in the territory of a State (forum State) by another State (acting State) for the implementation of malicious cyber operations by the latter does not lead to an attribution of the acting State's conduct to the forum State. However, the forum State may under certain circumstances incur responsibility on separate grounds, for example if its conduct with regard to another State's use of its cyber infrastructure for malicious purposes qualifies as aid or assistance. This inter alia applies if the forum State actively and knowingly provides the acting State with access to its cyber infrastructure and thereby facilitates malicious cyber operations by the other State."[905]

In addition to governmental positions, German Courts have repeatedly expressed their understanding of the international legal regime governing interstate assistance. While German Courts are mostly concerned with

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903 BT Drs 19/14983 (11 November 2019), 7-8, Question 30, translated by Carl-Philipp Sassenrath, Stefan Talmon, 'Misreading Nicaragua: The German position on State responsibility in connection with arms exports', *German Practice in International Law* (20 March 2020), emphasis added. See also below II.C.19.

904 Cf also Germany's comment on the ARS, referring to Article 3(f) Aggression Definition discussed above note 878, A/CN.4/488 (20 July 1998), 75-76.

905 Available at https://www.auswaertiges-amt.de/blob/2446304/2ae17233b62966a4b7f16d50ca3c6802/on-the-application-of-international-law-in-cyberspace-data.pdf, footnotes omitted.

*national* rules on interstate assistance,[906] they have also turned to international obligations on assistance. The 2005 judgment of the German Federal Administrative Court best illustrates the structural understanding of the regime governing interstate assistance dominant in German Courts. In the context of deciding whether a soldier had the right to refuse obedience, the Court addressed international law applicable to Germany's involvement in the Iraq war 2003.[907]

The Court took note of the German government's emphasis on the fact that "German soldiers were not engaged in combat activities." It did not accept this to exonerate Germany from responsibility for "a violation of the prohibition to use force" under international law.[908] On the assumption that wrongful involvement in a use of force can be committed also "in a manner different" to engaging in combat activities, the Court identified three norms to be "reference point and scale". First, it asked whether the assistance qualified as aggression under the Aggression Definition, in particular Article 3(f).[909] In that respect, it held that the pertinent act of aggression would be "attributable" ("zuzurechnen") to the assisting territorial State.[910] Second, it referred to Article 16 ARS according to which the assisting State was responsible as participant.[911] Third, it referred the law of neutrality.[912] The Court did not comment on potential due diligence obligations. The case, however, did not give particular reason to engage with such questions.

## B. Assistance in treaty practice

The provision of assistance plays a crucial role in States' treaty practice. Two types of treaty practice are of main interest here: (1) treaties regulating assistance in the abstract, and thereby entailing a prohibition of assistance and (2) treaties by which States agree to provide assistance and thus shape

906 Cf below on the Ramstein cases, Chapter 4II.C.27)e)(2). See also BVerwG 4 A 3001/07, BVerwGE 131, 316-346.
907 BVerwGE 127, 302-374 (21 June 2005).
908 Ibid para 216.
909 Ibid para 217-220.
910 Ibid para 220. It seems however that in the present context, the term "zuzurechnen" used to describe the effect of Article 3(f) Aggression Definition, was not meant to be attribution of conduct, but rather *of responsibility*. Para 216 suggests that the Court viewed the assisting State to violate the prohibition by *its own conduct.*
911 Ibid para 217, 221-224. Note that it allowed omissions to qualify as assistance.
912 Ibid para 217, 225-226.

the conditions of concrete assistance. Specific attention deserves the Arms Trade Treaty that has elements of both kinds (3).

Given the vast number of treaties, the following does not claim to be an exhaustive, yet paradigmatic discussion of treaty practice. Moreover, the treaties are considered in their design only, leaving the implementation in practice of the respective treaty to further analysis.[913]

1) Treaties regulating assistance

The primary regulatory regime on the principle of non-use of force is the UN Charter. But the UN Charter is not exclusive. By now, the principle of non-use of force is also firmly entrenched in customary international law that as a matter of principle widely runs in parallel to the regime established by the UN Charter.[914] In addition, the substance of the principle of the non-use of force and in particular the prohibition to use force has been repeatedly incorporated in various bilateral, multilateral and (sub-)regional treaties.[915]

Thereby, States primarily seek to reaffirm and endorse the principle in their bilateral relationships or to contextualize it to specific situations. Obviously, as States commit to legally binding agreements, they establish distinct legal obligations. The treaties' own legal impact and relevance in practice is limited, however.[916] The universal norm laid down in Article 2(4) UN Charter dominates the discourse, as it applies in any case, and enjoys primacy over any contradicting norm in case of conflict.[917] Those

913 But see below II.C. where some treaties play a role.

914 *Nicaragua*, 99-100, para 188; Enzo Cannizzaro, Paolo Palchetti, *Customary International Law on the Use of Force: A Methodological Approach* (2005); Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, 2017) 100-105.

915 Dinstein, *Aggression*, 105-108 para 288-296. This typically receives special attention when (regional) regimes might be understood to deviate from the existing universal treaty regime and allow for the use of force in a specific situation. On this see for example Jeremy I Levitt, 'Pro-democratic Intervention in Africa' in Jeremy I Levitt (ed), *Africa: Mapping New Boundaries in International Law* (1 edn, 2008); David Wippman, 'Treaty-Based Intervention: Who Can Say No?', 62(2) *UChiLRev* (1995); John-Mark Iyi, 'The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes and the UN Charter', 21(3) *AfrJIntlCompL* (2013).

916 E.g. Ian Brownlie, *International Law and the Use of Force by States* (1963) 121-122: "no longer prominent", "legally, though not politically, superfluous".

917 Article 103 UNC. Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', 57(3) *ICLQ* (2008).

treaty rules are hence mostly and generally of political and symbolic relevance, albeit some provisions may (bilaterally) complement and expand the universally agreed framework.[918]

Systematically, and crucially for the current context, these parallel commitments may be understood to endorse the legitimacy of the universal principle of non-use of force. As such, in line with the respective rules of interpretation, these treaties may also contribute to *elucidate* the meaning of the universal principle of non-use of force[919] – at least where the universal *principle* is defined only ambiguously or undefined,[920] and to the extent that States conclude these treaties claim to operate within the (customary) framework established by the UN Charter,[921] acknowledge the hierarchy of the framework of the UN Charter,[922] (seek to) define and refine the *same* rules, and pursue to rather "codify" general norms than to establish

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918 See also Gerhard Erasmus, *The Accord of Nkomati: Context and Content* (Occasional Paper, South African Institute of International Affairs, 1984) 4, 9; Marco Roscini, 'Neighbourhood Watch? The African Great Lakes Pact and Ius ad Bellum', 69 *ZaöRV* (2009) 933-934. Treaties may be particularly legally relevant if they extend the personal scope of the prohibition to use force. See e.g. African Union Common Defense Pact. This was also relevant for example in the Georgian-Russian conflict in 2008, where Georgia acknowledged the application of Article 2(4) UNC to South Ossetia, Report, Independent International Fact-Finding Mission on the Conflict in Georgia, vol I (September 2009), para 19. On the reasons for ratifying such treaties Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice', 13(2) *MelbJIL* (2012) 644-649.

919 For a similar approach using treaty practice see Brownlie, *ICLQ* (1958); Brownlie, *Use of Force*, 120-127; Kahn, *NYIL* (1970) 35-36; John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57(1) *BYIL* (1987) 107. This approach was particularly important when the UN Charter lacked quasi-universal membership.

920 This is particularly true for a rule under the principle that is not expressly enunciated rules in the UN Charter. If the rule was crystal-clear leaving no room for interpretation, a non-repetitive norm stands in violation of that rule. See generally ILC Customary International Law, Commentary, Conclusion 11; Subsequent Practice, Commentary Conclusion 4, 31, para 14.

921 For a related debate whether the customary rules are identical to the UN Charter see Cannizzaro, Palchetti, *Customary International Law on the Use of Force*.

922 Only if States claim to operate within the UN framework, and acknowledge the hierarchy, one can assume that States themselves want to interpret, rather than deviate from (and potentially violate) the established rules. Only to the extent there is *no conflict* that would trigger the primacy of the established UN rules, one can understand the treaty as interpretation. This will is lacking when States seek to establish new exceptions and rights to use force. Iyi, *AfrJIntlCompL* (2013) 497-498.

new rules.[923] In line with the general rules on the interpretative weight, the ultimate impact of the treaties on the understanding of the universal principle of course depends on the consistency, universality, and uniformity of treaty practice.[924]

States themselves acknowledge the influence of treaties on the universal principle of non-use of force. The discussions about the "Draft World Treaty on the Non-Use of Force in international Relations" proposed by the USSR for example illustrate this well.[925] Opposing (Western) States warned about the potentially destructive impact of treaties on the UN Charter's system. To the extent that the treaty contradicted the UN Charter, those States viewed it to weaken the system. To the extent the treaty only mirrored existing obligations, States considered its legal value to be limited.[926] Proponents however pointed to the refining function of a universal treaty. A universal treaty could constitute a binding interpretation. Treaties of a more limited scope hence might contribute to the interpretation of the principle of non-use of force.[927] While in the 1980s States disagreed on the usefulness of such an approach to the principle of non-use of force, they acknowledged – and this is the decisive point here – the possible interaction between treaties and the UN system.

The African Union's policy to encourage "the conclusion and ratification of non-aggression pacts between and among African States", despite acknowledging the (primary) obligations under the Charter, serves as another example that further suggests the relevance of treaties in the develop-

923 If States seek to establish new rules, this indicates that these rules previously were deemed lacking, and *not* included in the Charter. Still even new rules can be a development principle of non-use of force.

924 In general, it is by now accepted that treaties, despite establishing obligations of their own, may influence the development of international law, in particular customary international law. Conclusions 6(2), 10(2), 11 ILC Draft Conclusions on Identification of Customary International Law.

925 See above Chapter 4II.A.4).

926 Just recall for example: A/C.6/31/SR.50 para 17-18, A/C.6/38/SR.15, para 24-28 (Australia); A/C.6/34/SR.18 para 27 (USA); A/C.6/34/SR.22 para 32 (Belgium).

927 E.g. A/32/112 (German Democratic Republic); A/32/108 (Hungary); A/32/114 (Bulgaria); A/C.6/31/SR.50 para 8 (USSR); A/C.6/33/SR.52 para 52-53 (USSR); A/C.1/31/PV.19, 66 (Chile), A/C.1/31/PV.19, 76 (Bahrain); A/C.1/31/PV.19, 93, 96 (USSR, neither narrows nor broadens that principle); Report, A/34/41 (1979) para 113, 36 "Aside from affirming the obligations of the Charter, the provisions of the draft Treaty are intended to extend them and make them more specific" (and also citing more States in agreement); A/38/41 (1983) para 22.

ment of the universal rules.[928] It may be understood as cautious attempt to consolidate regional approaches to the *ius contra bellum* and to thus make an African contribution to the understanding of universal norms through legally binding regional practices that can no longer be ignored.

Last but not least, the treaties' relevance is reflected in statements of States. Throughout the various general debates on the principle of non-use of force, States frequently consulted treaty practice to substantiate their position on, and interpretation of, the (rules deriving from) universal principle. Treaties are considered instruments to refine the principle of non-use of force.[929]

Through the conclusion of distinct (friendship, security, and defense) treaties, States continue to generally (re)-subscribe to the *prohibition* to use force, albeit perhaps not as prominently as in the pre-Charter era.[930] But States do not stop there. They further flesh out the *principle* of non-use of force by treaty.[931] Notably, the (non)-provision of assistance likewise (again) played a substantial role in bilateral and multilateral security treaties.

928 Chapter III, para 13 (t) Solemn Declaration on a Common African Defense and Security Policy (27-28 February 2004) [CADSP]. See Chaloka Beyani, 'Pact on Security, Stability and Development in the Great Lakes Region', 46(2) *ILM* (2007) 174. See on the general African policy which however implemented rather reluctantly, especially with respect to security treaties: Maluwa, *MelbJIL* (2012) 637, 660-661. See also Article 9 Pact of the League of Arab States, March 22, 1945, UNTS 70, 237. See also Erasmus, *Accord of Nkomati*, 8 for Eastern European States' treaties 'seeking to water down the prohibition to use force'. In general Torsten Stein, 'South Africa's Non-Aggression Agreements with the Frontline States', 10 *SAfrYIL* (1984) 14-17.

929 For example, in the context of the Friendly Relations Declaration: Secretary General, Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations: selected background documentation, A/C.6/L.537/Rev.1 (23 March 1964), 13-23. In the context of the aggression definition: Secretary General, Question of defining aggression, A/2211 (3 October 1952). See also from the rich debate on the Declaration on the Enhancement of the Effectiveness of the Principle of Non-Use of Force, A/40/41 (1985) para 22; A/31/243 (1976), 2 (USSR); A/C.6/34/SR.18 (1979) para 38 (Ukraine).

930 Brownlie, *Use of Force*, 121-122: "no longer prominent"; Dinstein, *Aggression*, 108 para 295: "no longer common practice". For a list between 1945-1961 see Brownlie, *Use of Force*, 127-129. But see the practice below that suggests that such treaties are still prevalent, in particular in times of political change.

931 Probably most prominent is the invalidity of treaties procured by the threat or use force, Article 52 VCLT.

a) Assistance as prohibited 'use of force' or 'aggression'

Some States not only reaffirm but refine their commitment to the prohibition to use force, most notably with view to the provision of assistance.

Some treaties indicate that States understand the prohibition to include *indirect* use of force as well.[932]

More frequently, treaties qualify the provision of assistance as *casus foederis* that triggers obligations of solidarity. These treaties typically define an "(armed) attack" or an "act of aggression".

Each trigger is specific to its respective treaty. Generally, one must exercise caution when transferring bilateral definitions to the universal concepts. In the specific context of the treaties, they may be more permissive. For example, not every act qualified as "aggression" necessarily constitutes a "use of force". States do not necessarily (need to) understand "aggression" in line with the Definition of Aggression as armed use of force per Article 2(4) UNC. These treaties nonetheless show that in any event the provision of assistance is prohibited. Moreover, to the extent that a treaty is conceptualized in alignment with and in compliance with the UN Charter, and for example allows for the use of force in support of the assisted State, the treaties may contribute to the understanding of "use of force."

The Treaty of Brotherhood and Alliance between the Kingdom of Iraq and the Hashemite Kingdom of Transjordan, for example, defined "direct or indirect support or assistance to the aggressor" as "act of aggression" that triggered *inter alia* a duty of consultation.[933]

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932 Treaty of friendship, good-neighbourliness and cooperation (Morocco, Spain) (signed on 4 July 1991), 1717 UNTS 173, Article 4: "[…] Both Parties shall accordingly refrain from any act which might constitute a threat of force or a direct or *indirect use of force*." Similarly, Treaty of friendship, good neighbourliness and cooperation (Spain, Tunisia) (26 October 1995), 1965 UNTS 193, Article 4.

933 Treaty of Brotherhood and Alliance between the Kingdom of Iraq and the Hashemite Kingdom of Transjordan (Iraq, Transjordan) (14 April 1947), 23 UNTS 345, Article 5 (b)(4), (c)(1). See also Treaty of Friendship, Co-Operation and Mutual Assistance (Poland, Bulgaria) (signed on 29 May 1948), 26 UNTS 231: "Should either of the High Contracting Parties be subjected to aggression by Germany or *any other State which might be associated with Germany* directly or *indirectly or in any other way* […]". Likewise, Treaty of friendship, co-operation and mutual assistance (Czechoslovakia, Hungary) (signed on 16 April 1949), 477 UNTS 183, Article 3; Treaty of Friendship, Alliance and Mutual Assistance (China, USSR) (14 February 1950), 226 UNTS 3, Article 1; Treaty of friendship, good neighbourship, cooperation and security between the Republic of Bulgaria and the Republic of Turkey (Bulgaria, Turkey) (6 May 1992), 2156 UNTS 357, Article VIII: "Should one

The Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) from 1975 sought to amend the Inter-American Treaty of Reciprocal Assistance of 1947.[934] In particular, it reconsidered its definition of aggression, and aligned it with the UNGA's Definition of Aggression. Accordingly, it reaffirmed and repeated Articles 3(f) and (g) Definition of Aggression, thus extending it to acts of assistance.[935]

Worth mentioning is also the 2005 African Union Non-Aggression and Common Defence Pact.[936] *Inter alia* to define the trigger for a mutual assistance obligation, it set out to define aggression.[937] The definition was conceptualized along the lines of UNGA resolution 3314 (1974). The treaty stipulated that "'aggression' means the use, intentionally and knowingly, of *armed force or any other hostile act* by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union."[938]

Assistance featured prominently in the enumeration of acts that were considered acts of aggression. First, the treaty echoed the UNGA Definition of Aggression:

> "vii. the action of a Member State *in allowing its territory*, to be used by another Member State for perpetrating an *act of aggression* against a third State;

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of the Contracting Parties be subjected to an *attack* either directly or *indirectly by a third country* or third countries or be threatened with the use of force, the other Party shall provide no political, military, moral or other assistance or support of any kind to the aggressor by any means."

934 OEA/Ser.A/1.Add, 14(5) *ILM* (1975) 1122-1132. The Protocol has not yet entered into force. Jean-Michel Arrighi, 'Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro (1947)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) para 9. On the background see Francisco V Garcia-Amador, 'The Rio De Janeiro Treaty: Genesis, Development, and Decline of a Regional System of Collective Security', 17(1) *UMiamiInterAmLRev* (1985) 26-28.

935 Article 9 (2) (f), (g).

936 (adopted 1 January 2005, entered into force 18 December 2009), 2656 UNTS 285.

937 Article 4(a), (b). The definition was repeated almost literally by the Protocol on Non-Aggression and Mutual Defence in the Great Lake Region (30 November 2006), https://peacemaker.un.org/greatlakes-nonagression2006. Likewise, the Memorandum of Understanding on Non-aggression and Cooperation (Sudan, South Sudan), S/2012/135 (6 March 2012) builds on the definition.

938 Article 1 (c).

> viii. the sending by, or on behalf of a Member State or the provision of any support to armed groups, mercenaries, and other organized trans-national criminal groups which *may* carry out hostile acts against a Member State, of such gravity as to amount to the acts listed above, or its substantial involvement therein".[939]

Notably, there were several crucial differences that may widen the scope.[940] In contrast to Article 3(f) Aggression Definition, the Pact omitted the qualification "which it has placed at the disposal". Thereby it shifted the focus for the relevant act of assistance once again on the 'permission'.[941] Furthermore, the assisted actor needs not (plan to) commit acts of armed force. Instead, "hostile acts" – which remained undefined but appeared to be something distinct – sufficed. Moreover, the accessory nature appeared to be loosened (at least with respect to non-State actors), as the Pact let suffice that the assisted actor *may* carry out hostile acts.

Second, the Pact added new forms of assistance that qualified as aggression:

> "x. technological assistance of any kind, intelligence and training to another State for use in committing acts of aggression against another Member State; and
> xi. the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State."[942]

Again, it is striking that the accessory nature does not seem to be appreciated. As *Roscini* accurately observed, the acts involved "technically amount to preparatory conduct or threats, and not to *acts* of aggression."[943]

The 2005 Pact's definition of aggression is remarkable. Its impact on other concepts is however not beyond any doubt. Unlike Resolution 3314 (1974), there remain questions as to whether any aggression as set out

939 Article 1 (c) (vii), (viii), emphasis added.
940 See in general Roscini, *ZaöRV* (2009) 939; Raphael Van Steenberghe, 'Le Pacte de non-agression et de défense commune de l'Union africaine: Entre unilatéralisme et responsabilité collective', 113(1) *RGDIP* (2009) 136-145. Missing these nuances David Barthel, *Die neue Sicherheits-und Verteidigungsarchitektur der Afrikanischen Union: eine völkerrechtliche Untersuchung* (2011) 192-193.
941 Note the Protocol on Non-Aggression and Mutual Defence in the Great Lake Region referred to "authorizing".
942 Article 1 (c) (x), (xi).
943 Roscini, *ZaöRV* (2009) 940.

in the Pact may be equated with a use of (armed) force.[944] Moreover, it is not certain that aggression defined in the Pact requires its members (assistance to a) use of force in (collective) self-defense. But it is at least not ruled out.[945] States "undertake to provide mutual assistance towards their common defence and security vis-à-vis any aggression" and "individually and collectively to respond *by all available* means to aggression".[946] In any event, irrespective of the exact classification, the Pact leaves little doubt that first assistance violates international law, and second that an assisting State may be perpetrator.

When considering this practice, it must be kept in mind that treaties with express enumerations and specific reference to assistance were relatively rare. Most treaties did not specifically define the *casus foederis* but subscribed to the universal understanding of the terms.[947]

944 The general definition also refers to "hostile acts." It is unclear if States viewed this as a "use of armed force", too. But see the Memorandum of Understanding on Non-aggression and Cooperation (Sudan, South Sudan), Article 5, that applies these definitions to the "rejection of the use of force in conducting their relations". The Protocol on Non-Aggression and Mutual Defence in the Great Lake Region likewise recalls a duty to refrain from acts of aggression, which it treats distinct from the prohibition to use force (Articles 3-5).

945 Van Steenberghe, *RGDIP* (2009) 140 even asks whether the Pact allows for preventive self-defense. See also Barthel, *Sicherheits-und Verteidigungsarchitektur der AU*, 193-196, 203.

946 Article 4 (a), (b), emphasis added. Note that States did not want to derogate from the UN Charter, Article 17. This could mean that States undertake to use force only against those acts of aggression that meet the required threshold under the UN Charter. Other acts of aggression shall be countered only through measures short of force.

947 See for example: North Atlantic Treaty (4 April 1949), 34 UNTS 244, Article 5. On this Aurel Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats', 10(2) *HarvNatSecJ* (2019) 411-413. See also the Treaties of friendship, cooperation and mutual assistance in the Soviet bloc: e.g. (Czechoslovakia, USSR) (6 May 1970), 735 UNTS 219, Article 10; (Romania, USSR) (7 July 1970), 789 UNTS 115, Article 8; (Bulgaria, Romania) (19 November 1970), 855 UNTS 221, Article 7; (German Democratic Republic, USSR) (7 October 1975), 1077 UNTS 75, Article 8; (German Democratic Republic, Hungary) (24 March 1977), 1201 UNTS 19, Article 8. On States' reasons to be reluctant to define the *casus foederis* ibid 410-411.

b) A separate prohibition: non-assistance to a use of force or aggression

More frequently, when States regulate assistance by treaty, they dedicate specific prohibitions against interstate assistance. Typically, this is also reflected in the treaty's structural design. Treaties widely include a separate article on (non)-assistance, distinct from an express prohibition to *use* force. Still, States thereby seek to flesh out the *principle* of non-use of force.[948]

The implementation of the prohibition of assistance again varies.

Several treaties contain a general obligation not to provide assistance to another State's (unlawful) use of force.[949]

948 Some States "reaffirm" the *principle* of non-use of force, to then stipulate specific obligations. For example: Treaty on friendship, good-neighbourliness and cooperation (Romania, Turkey) (19 September 1991), 2536 UNTS 179, Article 2. Others generally establish specific obligations, yet claiming to be under the framework of the UN Charter. Others expressly flesh out general principles, like CADSP para 11 (o).

949 Multilateral: Agreement among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, S/20346-A/43/989 (22 December 1988) paragraph 5: "Consistent with their obligations under the Charter of the United Nations, the Parties shall refrain from the threat or use of force, and *shall ensure that their respective territories are not used by any State, organization, or person in connection with any acts of war, aggression, or violence*, against the territorial integrity, inviolability of borders, or independence of any State of southwestern Africa." ECOWAS Protocol on Non-Aggression (concluded 22 April 1978), 1690 UNTS 39, Article 2: "Each Member State shall refrain, from committing, *encouraging* or *condoning* acts of subversion, hostility or *aggression* against the territorial integrity or political independence of the other Member-States"; Treaty on Long-Term Good-Neighbourliness, Friendship and Cooperation among the Member States of the Shanghai Cooperation Organization (16 August 2007) 2896 UNTS, 267, Article 4: "The Contracting Parties, respecting the principles of state sovereignty and territorial integrity, shall take measures to prevent on their territories any activity inconsistent with those principles. The Contracting Parties shall not participate in alliances or organizations aligned against other Contracting Parties and *shall not support any actions hostile* to other Contracting Parties."
Bilateral: Agreement on non-aggression and good neighbourliness (The Accord of Nkomati), (Mozambique, South Africa) (signed on 16 March 1984) 174 UNTS 24, Article Two (3); Treaty on good neighborliness and cooperation (Belarus, Lithuania) (signed 5 February 1995) 1951 UNTS 117, Article 4: "Each High Contracting Party shall *ensure that the activities of the armed forces deployed or situated* in its territory shall be in conformity with the provisions of the Charter of the United Nations, the Helsinki Final Act, the Charter of Paris for a New Europe and other documents of the Organization for Security and Cooperation in Europe."; Memorandum of understanding (Saudi Arabia, Yemen) (26 February 1995) 2389 UNTS 193, Article 1, reaffirming the Treaty of Taif (1934), which contained a duty

Moreover, States widely undertake specific obligations of non-assistance, either in addition to or in place of a general prohibition of assistance. For example, States agree not to permit their territory to be used for hostile acts, and specifically aggression, directed against another party.[950] In doing so,

not to provide assistance; Treaty of understanding, cooperation and good neighborliness (Hungary, Romania) (16 September 1996) 1966 UNTS 103, Article 3(1): "The Contracting Parties reiterate that in their mutual relations they *shall refrain from the threat of force or the use of force*, directed either against the territorial integrity or political independence of the other Contracting Party, or in any other way which is incompatible with the goals of the United Nations Organization and with the principles of the Final Act in Helsinki. *They shall also refrain from supporting such actions and shall not allow a third party to use their territory to commit activities of this kind against the other Contracting Party*."; Treaty on the relations of good neighbourliness and cooperation (Romania, Ukraine) (2 June 1997) 2159 UNTS 311, Article 3(1): "The Contracting Parties reaffirm that they shall not have recourse, in any circumstances, to the threat of force or use of force, directed either against the territorial integrity or political independence of the other Contracting Party, or in any other manner which is inconsistent with the principles of the Helsinki Final Act. *They shall also refrain from supporting such actions and shall not allow a third party to use their territory to commit such activities against the other Contracting Party*."
On assistance to non-State actors only: Framework Treaty on Democratic Security in Central America (15 December 1995) 2007 UNTS 191, Article 8: "[T]he Parties reaffirm their commitment to *refrain from providing political, military, financial or any other suppor*t to individuals, groups, irregular forces or armed bands which threaten the unity and order of a State or advocate the overthrow or destabilization of the democratically elected Government of any other Party. They also *reaffirm their commitment to prevent the use of their territory for planning or carrying out armed actions*, acts of sabotage, kidnappings or criminal activities in the territory of another State." Treaty of Brotherhood and Alliance (Iraq, Transjordan) (14 April 1947), 23 UNTS 147, Article 6; Pact of Amity (Nicaragua, Costa Rica) (21 February 1949), 1465 UNTS 217, Article IV and Annex; Agreement pursuant to article IV of the Pact of Amity, (signed on 21 February 1949) (with a declaration by the Government of Costa Rica), (Nicaragua, Costa Rica) (9 January 1956) 1465 UNTS 227, Article II-IV; Agreement on the Principles of Mutual Relations, in Particular on Non-Interference and Non-Intervention (Pakistan, Afghanistan) (14 April 1988), 27 ILM (1988) 577, 581, Article II. All emphasis added.

950 For example: Multilateral treaties: Agreement among Angola, Cuba, South Africa, Paragraph 5: "Consistent with their obligations under the Charter of the United Nations, the Parties shall refrain from the threat or use of force, and shall ensure that their respective territories are not used by any State, organization, or person in connection with any acts of war, aggression, or violence, against the territorial integrity, inviolability of borders, or independence of any State of southwestern Africa." ECOWAS Protocol on Non-Aggression**,** Articles 3-4**:** "ARTICLE 3 Each Member State shall undertake to *prevent Foreigners resident on its territory* from committing the acts referred to in Article 2 above against the sovereignty and territorial integrity of other Member-States. ARTICLE 4 Each Member State shall undertake to *prevent*

the obligations agreed upon are not entirely uniform. Still, some general

*non-resident Foreigners from using its territory as a base* for committing the acts referred to in Article 2 above against the sovereignty and territorial integrity of Member States"; African Union Non-Aggression and Common Defence Pact, Article 5 b), c); CADSP, para 11 (o), that was fleshing out the principles: "prohibition of any Member State from allowing the use of its territory as a base for aggression and subversion against another Member State"; Protocol on Non-Aggression and Mutual Defence in the Great Lake Region 2006, Article 3(3): "Member States shall assume primary responsibility for not permitting the use of their territories as a base for any form of aggression or subversion against another Member State.

Bilateral treaties: Treaty of Friendship (Egypt, Yemen) (27 September 1945), 9 UNTS 373, Article 1: "Each of the High Contracting Parties undertakes to maintain friendly relations with the other, to draw closer the bonds of friendship which unite its subjects to those of the other, and *to take all measures to prevent the commission on its territory of any act against peace and tranquillity within the territory of the other party.";* Treaty of Friendship (Pakistan, Saudi-Arabia) (25 November 1951) 177 UNTS 3, Article III: "The High Contracting Parties agree to prohibit the use of their respective territories as a base for illegal activities against the territories of the other party."; Accord of Nkomati, Article Three; Treaty on friendship, good-neighbourliness and cooperation (Romania, Turkey), Article 2: "The Parties reaffirm the inadmissibility of the use of force and the threat of the use of force in international relations and the need to solve international problems by peaceful means. They shall not allow their territories to be used for aggressive and subversive activities directed against the other Party."; Treaty on friendly and good-neighbourly cooperation (Poland, Russia) (signed 22 May 1992) Reg I-54299, Article 3(2): "Neither Party shall allow a third State or third States to commit an act of armed aggression from its territory against the other Party."; Treaty on friendship and cooperation (Romania, Estonia) (11 July 1992) 2536 UNTS 269, Article 3: "The Contracting Parties shall agree not to allow the use of their territories for armed aggression against the other Contracting Party. […]"; Treaty on the foundations of friendly relations and cooperation (Hungary, Lithuania) (8 August 1992) 1819 UNTS 180, Article 4: "The Contracting Parties undertake not to use, *nor allow others to use*, their respective territories for armed aggression against other Contracting Party."; Agreement on friendship and cooperation (Hungary, Estonia) (signed 8 August 1992) 2188 UNTS 389, Article 4: "Each Contracting Party undertakes not to use, *nor to allow others to use*, its territory for armed aggression against the other Contracting Party."; Treaty of friendship and cooperation (Russia, Mongolia) (20 January 1993) 1926 UNTS 93, Article 5: "Neither Party shall allow its territory to be used by a third State for the purposes of aggression or any other act of force against the other Party."; Treaty on friendship, cooperation and mutual assistance (Georgia, Ukraine) (13 April 1993) 2472 UNTS 7, Article 4: "The High Contracting Parties shall not allow use of their territories for acts of aggression and other violent actions against the other Contracting Party.";) Treaty on friendly relations and good-neighbourly cooperation (Lithuania, Poland) (26 September 1994) 1851 UNTS 3, Article 3(2): "*Neither Party shall allow its territory to be used by a third State or States to carry out acts of aggression against the other Party.*"; Treaty on good neighborliness and cooperation (Belarus, Lithuania) Article 5(2): "Neither High Contracting Party shall allow its territory to be used to carry out armed aggression against the other High Contract-

trends can be identified. Obligations are not confined to the use of territory by a specific actor – they cover actions by non-State actors and State actors alike. Treaties establish obligations of conduct, not result. While some treaties expressly require States to "prevent" the use,[951] others remain

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ing Party."; Memorandum of understanding (Saudi Arabia, Yemen) (26 February 1995) 2389 UNTS 193, Article 8: "Each of the two countries affirms its commitment not to permit the use of its country as a base and center for carrying out aggression against the other staging any political, military or propaganda activities against the other."; Treaty of Friendship and Cooperation (Latvia, Uzbekistan) (6 June 1995) 1928 UNTS 183, Article 4: "The High Contracting Parties undertake not to allow their territory to be used by any party for the purpose of engaging in hostile activity against the other High Contracting Party."; Treaty on friendship and cooperation (Belarus, Kazakhstan) (17 January 1996) 2038 UNTS 3, Article 3: "Each of the Contracting Parties shall refrain from participating in or supporting any actions or measures directed against the other Contracting Party, and *shall not allow its territory to be used for preparing and carrying out aggression or other violent acts against the other Contracting Party*."; Treaty on eternal friendship (Kyrgyz Republic, Uzbekistan) 1997, Reg I-54326, Article 2: "The High Contracting Parties undertake to prevent the use of their territory for armed aggression or hostile activities against the other High Contracting Party."; Treaty on friendship relations and cooperation (Belarus Socialist Republic of Viet Nam) (24 April 1997) 2038 UNTS 33, Article 13: "Each of the Contracting Parties shall undertake […] not to permit the use of its territory by any third party for the purpose of carrying out hostile activities against the other Contracting Party."; Treaty on friendship, cooperation and partnership (Ukraine, Russia) (31 May 1997) I-52240, Article 6: "[…] Nor shall either of the Parties allow its territory to be used to the detriment of the security of the other Party."; Treaty on friendship, cooperation and partnership, (Azerbaijan, Ukraine) (16 March 2000) 2233 UNTS 121, Article 7: "The Contracting Parties shall not allow use of their territories for acts of aggression and other violent actions aimed against the other Contracting Party."; Treaty of Good-Neighborliness and Friendly Cooperation (Russia, China) (signed 16 July 2001), http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t15771.shtml, Article 8: "[…] Neither side of the contracting parties shall allow its territory to be used by a third country to jeopardize the national sovereignty, security and territorial integrity of the other contracting party." Treaty of Friendship and Cooperation (Belarus, Armenia) (26 May 2001) 2181 UNTS 557, Article 4: "Each of the High Contracting Parties shall pledge to refrain from participation in or support of any kind of action or measure directed against the sovereignty, independence and territorial integrity of the other High Contracting Party, and shall not allow its territory to be used to damage the security interests of the other High Contracting Party."; Memorandum of Understanding on Non-aggression and Cooperation, (Sudan, South Sudan), Article 5(4): "Neither State shall allow its territory to be used by another State, or by any armed group or movement to conduct any acts of aggression or to undertake military acts or other subversive activities against the territory of the other State". All emphasis added.

951 Notably Treaty on good neighborliness and cooperation (Belarus, Lithuania), Article 4: "Each High Contracting Party shall *ensure that the activities of the armed*

more ambiguous, obligating States "not to allow" the use of their territory. Likewise, ambiguity persists regarding the kind of use that is forbidden. While some treaties refer to specific uses, such as a "base and center" or for "carrying out" aggression, other treaties are less precise in describing the relationship between the assistance and the assisted act, and thus arguably broader in scope. Rarely, there are treaties as detailed as the Accord of Nkomati.[952] Therein Mozambique and South Africa first undertook not to use force against each other.[953] They then concurred that they "shall not in any way assist the armed forces of any state or group of states deployed against the territorial sovereignty or political independence of the other."[954] Article Three constituted the heart of the Accord. Its primary concern was assistance to non-State actors, in particular guerrilla fighters of the African National Congress and Mozambique National Resistance Movement.[955] Still, in an inclusive manner, it proscribed in paragraph 1 that "Parties shall not allow their respective territories, territorial waters or air space *to be used as a base*, thoroughfare, or *in any other way* by *another state, government, foreign military forces*, organisations or individuals which plan or prepare *to commit acts of violence*, terrorism or *aggression* against the territorial integrity or political independence of the other or may threaten the security of its inhabitants."[956] Paragraph 2 then defined the scope of the obligation in remarkable detail.[957]

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*forces deployed or situated in its territory* shall be in conformity with the provisions of the Charter of the United Nations, the Helsinki Final Act, the Charter of Paris for a New Europe and other documents of the Organization for Security and Cooperation in Europe."

952 174 UNTS 24. See on the background and challenges Stein, *SAfrYIL* (1984); Erasmus, *Accord of Nkomati*; GKA Ofosu-Amaah, 'The Nkomati Accord: International Law and the African Struggle against Apartheid', 16 *UGhanaLJ* (1982-1985) in particular 93-106.

953 Article Two (1). See also (2) for a definition of "use of force", which did not refer indirect means or assistance, however.

954 Article Two (3).

955 Erasmus, *Accord of Nkomati*, 17, 15, 25.

956 Emphasis added. As Mozambique was party to a treaty of friendship and cooperation with the USSR (which Mozambique was reluctant to activate), a risk of another State's use of force existed for South Africa. Ofosu-Amaah, *UGhanaLJ* (1982-1985) 95.

957 "[I]n order to prevent or eliminate the acts or the preparation of acts mentioned in paragraph (1) of this article" States then undertook "in particular to":
(a) Forbid and prevent in their respective territories the organisation of irregular forces or armed bands, including mercenaries, whose objective is to carry out the acts contemplated in paragraph (1) of this article;

Treaties also regulate non-territorial types of assistance. Generally, they are not as specific as the treaties previously described, yet with some noteworthy exceptions. For example, some treaties add specific due diligence obligations with respect to the member State's own population[958] or general

(b) Eliminate from their respective territories bases, training centres, places of shelter, accommodation and transit for elements who intend to carry out the acts contemplated in paragraph (1) of this article;
(c) Eliminate from their respective territories centres or depots containing armaments of whatever nature, destined to be used by the elements contemplated in paragraph (1) of this article;
(d) Eliminate from their respective territories command posts or other places for the command, direction and co-ordination of the elements contemplated in paragraph (1) of this article;
(e) Eliminate from their respective territories communication and telecommunication facilities between the command and the elements contemplated in paragraph (1) of this article;
(f) Eliminate and prohibit the installation in their respective territories of radiobroadcasting stations, including unofficial or clandestine broadcasts, for the elements that carry out the acts contemplated in paragraph (1) of this article;
(g) Exercise strict control, in their respective territories, over elements which intend to carry out or plan the acts contemplated in paragraph (1) of this article;
(h) Prevent the transit of elements who intend or plan to commit the acts contemplated in paragraph (1) of this article, from a place in the territory of either to a place in the territory of the other or to a place in the territory of any third state which has a common boundary with the High Contracting Party against which such elements intend or plan to commit the said acts;
(i) Take appropriate steps in their respective territories to prevent the recruitment of elements of whatever nationality for the purpose of carrying out the acts contemplated in paragraph (1) of this article;
(j) Prevent the elements contemplated in paragraph (1) of this article from carrying out from their respective territories by any means acts of abduction or other acts, aimed at taking citizens of any nationality hostage in the territory of the other High Contracting Party; and
(k) Prohibit the provision on their respective territories of any logistic facilities for carrying out the acts contemplated in paragraph (1) of this article."
(3) The High Contracting Parties will not use the territory of third states to carry out or support the acts contemplated in paragraphs (1) and (2) of this article.

958 African Union Non-Aggression and Common Defence Pact, Article 5 b): "Each State Party shall *prevent* its territory and *its people* from being used for encouraging or committing acts of subversion, hostility, *aggression* and other harmful practices that might threaten the territorial integrity and sovereignty of a Member State or regional peace and security; c) Each State Party *shall prohibit the use of its territory* for the stationing, transit, withdrawal or incursions of irregular armed groups, mercenaries and terrorist organizations operating in the territory of another Member State." Emphasis added.

duties to prevent aggression against the contracting party.[959] Others, such as Article 5(6) Memorandum of Understanding on Non-aggression and Cooperation between Sudan and South Sudan held that "[n]either State shall provide technological assistance, intelligence or training of any kind to another State or other entity which may be used in committing acts of aggression against the other State".[960]

Apart from rules expressly dealing with assistance *to the use of force* generally, some treaties stipulate more inclusive obligations. Some treaties are again narrower in scope.

On the one hand, several treaties contain *broader* non-assistance rules. The prohibitions are not confined to but include assistance to a use of force. Treaties require State parties to refrain from assistance to *any action* directed against another party in violation of international law generally, and its sovereignty and territorial integrity more specifically.[961] Notably,

959 Treaty of Friendship, Co-operation and Mutual Assistance (People's Republic of China, Democratic People's Republic of Korea) (11 July 1961), http://worldjpn.grips.ac.jp/documents/texts/docs/19610711.T1E.html, Article II: The Contracting Parties undertake jointly to adopt all measures to prevent aggression against either of the Contracting Parties by any state. […]"

960 S/2012/135 (2012).

961 Treaty of Friendship and Cooperation (Niger, Burundi) (17 September 1983) 1436 UNTS 143, Article 1: "[…] the High Contracting Parties undertake to give each other mutual support in their struggle for the progress of their peoples and the defence of peace, and *to refrain from any action which might be detrimental to* the interests of either Party."; Treaty of Friendship and Cooperation (Yemen, USSR) (9 October 1984) 1430 UNTS 85, Article 7: "Each of the High Contracting Parties declares that *it will not participate in any actions directed against* the other High Contracting Party." Treaty of mutual respect, friendship and co-operation (Indonesia, Papua New Guinea) 27 October 1987 1463 UNTS 9, Article 9: "(1) The Contracting Parties *shall not cooperate with others in hostile or unlawful acts against* the other nation, or allow their territory to be used for such acts."; Treaty of friendship, good neighbourship, cooperation and security (Bulgaria, Turkey) (6 May 1992) 2156 UNTS 357, Article IV: "The Republic of Bulgaria and the Republic of Turkey shall not act or behave towards each other *in a hostile or unfriendly manner and shall not encourage such conduct.* […] The Contracting Parties shall not allow their territory to be used by organizations or groups for the purpose of launching an attack against each other's territory or for destructive or separatist activities or activities threatening the peace and security of the other Party."; Treaty on friendly relations and cooperation (Romania, Slovakia) (24 September 1993) 2537 UNTS 202, Article 5: "[…] Each Contracting Party shall abstain from any action that could infringe upon the universally recognized principles and norms of international law with regard to the inviolability of the borders and national frontiers of the other Contracting Party and *shall in no way support such action.* […]"; Treaty between

the terminology describing "assistance" varies. Some treaties refer to "no assistance" or "no support", others require "no participation" or "no cooperation". It is unclear whether States thereby seek to make a legally relevant distinction. Again, other treaties go even further and demand States not to *enter into any alliance* or to participate in any coalition.[962]

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Romania and the Republic of Armenia on friendship and cooperation (Romania, Armenia) (20 September 1994) 2537 UNTS 159, Article 4: "The Contracting Parties mutually recognize the present borders and shall respect the territorial integrity of each State. Each Contracting Party shall abstain from any action that could violate the principles and norms unanimously recognized under international law and could lead to the infringement of the inviolability of borders and the territorial integrity of the other Contracting Party, and *they shall not support any such action*."; Treaty on friendship, good-neighbourliness and cooperation (Belarus, Ukraine) (17 July 1995) 1993 UNTS 93, Article 3: "Each High Contracting Party undertakes to *refrain from participating in or supporting* any actions directed against the other High Contracting Party, and *to prevent its territory from being* used to the detriment of the security interests of the other High Contracting Party."; Treaty on friendship and cooperation (Belarus, Kazakhstan) (17 January 1996) 2038 UNTS 3, Article 3: "Each of the Contracting Parties shall *refrain from participating in or supporting any actions or measures directed against the other Contracting Party*, and shall not allow its territory to be used for preparing and carrying out aggression or other violent acts against the other Contracting Party."; Treaty on friendship, cooperation and partnership (Ukraine, Russa) (31 May 1997) Reg I-52240, Article 6: "Each of the High Contracting Parties *shall refrain from participating in or supporting any actions* whatsoever that are directed against the other High Contracting Party and shall obligate itself not to enter into any agreement with third countries that is directed against the other Party. […]"; Treaty of Friendship and Cooperation (Belarus, Armenia) (26 May 2001) 2181 UNTS 557, Article 4: "Each of the High Contracting Parties shall pledge *to refrain from participation in or support of any kind of action* or measure directed against the sovereignty, independence and territorial integrity of the other High Contracting Party, and shall not allow its territory to be used to damage the security interests of the other High Contracting Party." Emphasis added.

962 Multilateral: Treaty of Alliance, Political Co-operation and Mutual Assistance (Greece, Turkey, Yugoslavia) (9 August 1954) 211 UNTS 237, Article VIII. CADSP para 11 (n), that was fleshing out the principles: "restraint by any Member State from entering into any treaty or alliance that is incompatible with the principles and objectives of the Union"; Treaty on Long-Term Good-Neighbourliness, Friendship and Cooperation among the Member States of the Shanghai Cooperation Organization, (16 August 2007) 2896 UNTS 267, Article 4.
Bilateral: Treaty of Friendship, Co-Operation and Mutual Assistance (Hungary, Bulgaria) (16 July 1948) 477 UNTS 176, Article 4: "Each High Contracting Party undertakes not to *enter into any alliance* or *participate in any coalition or in any action or measures directed against the other.*" Similar treaties: Treaty of friendship, co-operation and mutual assistance (Poland, Bulgaria) (29 May 1948) 26 UNTS 213; Treaty of friendship, co-operation and mutual assistance (Bulgaria, USSR) (18 March 1948) 48 UNTS 135; Treaty of friendship, co-operation and mutual assist-

On the other hand, several treaties demand non-assistance (only) if an *"aggression"* or *"armed attack"* occurred. Several treaties with a general prohibition of assistance highlight this scenario.[963] In fact, some treaties expressly address solely this scenario. Characteristically, the obligations stipulate that in the event a State commits an (armed) aggression/(armed) attack, States must not support that State.[964] At times, these non-assistance

ance (Hungary, Romania) (24 January 1948) 447 UNTS 155; Treaty of friendship, peaceful co-operation and mutual aid (Romania, Yugoslavia) (19 December 1948) 116 UNTS 89; Treaty of friendship and mutual aid (Poland, Czechoslovakia) (10 March 1947) 25 UNTS 231; Treaty of Friendship and Mutual Assistance (Albania, Yugoslavia) (9 July 1946) 1 UNTS 81; Treaty of Friendship, Alliance and Mutual Assistance (China, USSR) (14 February 1950) 226 UNTS 3, Article 3; Treaty of friendship, co-operation and mutual assistance (USSR, Democratic People's Republic of Korea) (6 July 1961) 420 UNTS 145, Article 2; Treaty of brotherhood, good-neighbourly relations and cooperation (Morocco, Algeria) (15 January 1969) 703 UNTS 327, Article 5; Treaty of friendship and cooperation (USSR, Egypt) (27 May 1971) 798 UNTS 175, Article 9; Treaty of friendship and cooperation (USSR, Angola) (8 October 1976) 1146 UNTS 123, Article 11; Treaty of friendship and cooperation (USSR, Mozambique) (31 March 1977) 1154 UNTS 409, Article 10; Treaty of friendship and cooperation (USSR, Ethiopia) (20 November 1978) 1145 UNTS 309, Article 11; Treaty of friendship and cooperation (German Democratic Republic, Mozambique) (24 February 1979) 1166 UNTS 11, Article 11; for similar "Treaties of Friendship and Cooperation", all with participation of States belonging to the Soviet bloc: 1211 UNTS 77; 1181 UNTS 145; 1225 UNTS 311; 1331 UNTS 175; 1222 UNTS 343; 1317 UNTS 75; 1293 UNTS 179; 1331 UNTS 205; 1350 UNTS 355; 1331 UNTS 219; 1413 UNTS 128; 1490 UNTS 151; 1495 UNTS 55; Treaty of friendship and cooperation (Russia, Mongolia) (20 January 1993) 1926 UNTS 93, Article 5; Treaty on friendship relations and cooperation (Belarus, Viet Nam) (24 April 1997) 2038 UNTS 33, Article 13; Treaty of Good-Neighborliness and Friendly Cooperation (China, Russia) (16 July 2001), http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t15771.shtml, Article 8.

963 See above note 949.

964 Treaties on friendship, cooperation and good-neighbourliness (Romania and several States): Greece, (28 November 1991), 2536 UNTS 211, Article 4: "In the event that either Party suffers aggression, the other Party shall abstain from providing any military or other support to the aggressor."; Turkey (19 September 1991) 2536 UNTS 179, Article 3: "The Parties undertake that in the event of one of them being subjected to armed aggression by a third State or States, the other Party shall not provide the aggressor or aggressors with any kind of assistance, military or of any other nature. […]"; Bulgaria (27 January 1992) 2536 UNTS 239, Article 6: "Neither Contracting Party shall allow its territory to be used by a third State in order to commit an act of armed aggression against the other Contracting Party, nor shall it provide any assistance to such a third party."; Estonia (11 July 1992) 2536 UNTS 269, Article 3: "[…] Should a situation arise in which one of the Contracting Parties is the victim of armed aggression, the other Contracting Party shall not support that aggression […]"; Belarus (7 May 1993) 2537 UNTS 3, Article 7(2): "In the event that

obligations are comprehensive. For example, Bulgaria and Turkey agreed to "provide no political, military, moral or other assistance or support of

one of the Contracting Parties is the victim of aggression, the other Party shall not support the aggressor"; Slovakia (24 September 1993) 2537 UNTS 202, Article 6: "Neither one of the Contracting Parties shall allow their territory to be used by a third party for an act of aggression against the other Contracting Party and shall in no way help such a State." Note that not all treaties included a non-assistance provision, in particular if State parties agreed on a duty to provide assistance, e.g. Treaty on friendly relations and cooperation (Romania, Poland) (25 January 1993) 2536 UNTS 349, Article 3; Lithuania (8 March 1994) 2550 UNTS 177, Article 3; but see Spain (19 June 1993) 1730 UNTS 167.

Treaty of friendship, good neighbourship, cooperation and security (Bulgaria, Turkey) (6 May 1992) 2156 UNTS 357, Article VIII: "Should one of the Contracting Parties be subjected to an attack either directly or indirectly by a third country or third countries or be threatened with the use of force, the other Party shall provide no political, military, moral or other assistance or support of any kind to the aggressor by any means."; Treaty on friendly and good-neighbourly cooperation (Poland, Russia) (22 May 1992) Reg I-54299, Article 6(2): "In the event that a third State or third States launch(es) an armed attack on one of the Parties, the other Party shall undertake not to provide any assistance and support to such State or States throughout the armed conflict […]";Treaty on the foundations of friendly relations and cooperation (Hungary, Lithuania) (8 August 1992) 1819 UNTS 180, Article 4: "Where either Contracting Party is victim of an armed attack the other Party shall not support the aggressor […]";Agreement on friendship and cooperation (Hungary, Estonia) (8 August 1992) 2188 UNTS 389, Article 4: "Where either Contracting Party is the victim of an armed attack, the other Party shall not support the aggressor"; Treaty on friendship, cooperation and mutual assistance (Georgia, Ukraine) (13 April 1993) 2472 UNTS 7, Article 4: "In the event that one of the Parties suffers an act of aggression, the other Party shall not grant the aggressor military aid or any other assistance."; Treaty on friendly relations and good-neighbourly cooperation (Lithuania, Poland) (26 September 1994) 1851 UNTS 3, Article 6(2): "If a third State or States commits armed aggression against one of the Parties, the other Party undertakes not to give any assistance or support to that State or those States for the entire duration of the armed conflict […]"; Treaty on good neighborliness and cooperation (Belarus, Lithuania), Article 5(3): "If a third State or States carry out an armed attack against one of the High Contracting Parties, the other High Contracting Party undertakes not to render military assistance or any other kind of support to that State or those States for the entire duration of the armed conflict […]"; Agreement on friendship and cooperation (Latvia, Ukraine) (23 May 1995) 2655 UNTS 347, Article 4: "Should one of the Parties be subject to an armed attack by one or more third States, the other Party shall not give support to such State or States […]."; Treaty of Friendship and Cooperation (Latvia, Uzbekistan) (6 June 1995) 1928 UNTS 183, Article 4: "Should one of the Parties be subject to an armed attack by one or more third States, the other Party shall not give support to such State or States […]".

any kind to the aggressor by any means."[965] The narrow trigger does not argue against a general rule of non-assistance to any use of force. Instead, it owes to the specific context of the treaties, which were not concerned with stipulating general prohibitions, but with the specific situation of an attack. In other words, these treaties were intended as the most minimal duty of solidarity in case of aggression.

### c) Treaties' indication for the general framework of assistance

Treaty practice points towards a dualistic framework governing assistance. The *prohibition* to use force does not automatically and comprehensively cover any assistance. States widely distinguish, establishing a prohibition of assistance distinct from the prohibition to use force.

On one hand, treaty practice indicates that there is a general prohibition to provide assistance to an unlawful use of force. This prohibition is widely appreciated as a rule under the umbrella of the principle of non-use of force.[966] Generally, States do not impose prohibitions on general cooperation with other States. They do not pre-emptively outlaw the risks of military and potentially preparatory cooperation. Instead, States tie the prohibition of *assistance* (rather than cooperation) to a specific violent or hostile action taken by the assisted State against the other treaty party. Treaties are diverse with regard to the characteristics of the assisted act. Typically, it must involve the use of force in violation of international law.[967] With respect to what kinds of assistance are prohibited, treaties widely remain generic. Notably, States are specific only in relation to one form of assistance: the permission to use territory.

965 Treaty of Friendship, Good Neighbourship, Cooperation and Security (6 May 1992) 2156 UNTS 357 Article VIII.

966 Treaties widely implement rather than complement the UN principle of non-use of force. The treaties endorse the system established by the UN and seek to conform with it. This is certified in particular by references in the preambles and provisions affirming that State parties do not want to deviate from the UN system.

967 This means that assistance to a use of force in accordance with international law remains permissible. An absolute prohibition to provide assistance to any use of force is not stipulated. This explains also why States may remain simultaneously parties to treaties of solidarity like the NATO without taking up contradicting obligations. E.g. in view of the Friendship Treaty between Italy and Libya see Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New prospects for cooperation in the Mediterranean?', 1(1) *BullItPol* (2009) 127-128.

On the other hand, treaty practice further affirms that Article 3(f) Aggression Definition has not been an outlier. In specific circumstances, treaties equate the provision of assistance with a use of force or aggression and consider an assisting State a perpetrator. In implementing this concept, States mostly adhere to universally accepted understandings. Notably, States again view the concept to be open to both assistance to non-State and to State actors engaged in hostilities. For the specific obligation, the difference of the assisted actors is accommodated in the scope of the provision, however. In this respect the recent regional practice is also remarkable. It takes into account forms of interstate assistance that have gained increasing importance in modern warfare and that deviates from conventional paths. It may still be primarily a regional development. But it certainly is a noteworthy trend with the potential to signpost ways to escape path dependency.

### 2) Treaties by which States provide assistance

Treaties are not only a means to regulate assistance. Assistance is often implemented through treaties. States often define the exact circumstances under which assistance may be or is provided.

Those treaties are too numerous and too nuanced to do full justice to them. An exhaustive analysis would exceed the scope of the present analysis. But this is also not necessary. Such treaties only allow limited conclusions with respect to a *prohibition* to provide assistance. States may take measures to ensure that the prohibition is not violated. But this does not mean that these measures are motivated *by* a prohibition and are the only legally possible ones.[968] Unless States express the belief that assistance may not be afforded in cases other than those provided for in the treaty, caution is required to deduce a prohibition of assistance in other cases. Accordingly, from the fact that States establish certain safe-guard mechanisms, one cannot confidently conclude that the failure to establish or comply with such measures generally leads to a responsibility for assistance.[969] Limitations and safeguards in the treaties cannot necessarily be traced back to international law in general, and a duty of non-assistance in particular.

968 Cf Subsequent Practice, Commentary Conclusion 6, 44-45 para 6.
969 Cf ibid 45 para 7.

Other considerations, such as constitutional and national legal constraints or political reasons, may also play a role.

Nonetheless, these treaties may also be part of the implementation of the principle of non-use of force. As such they are interesting in two ways: First, these treaties are concluded on the assumption of a right to provide assistance in the specific situations mentioned in the treaty. Thus, they (unambiguously) indicate under what circumstances States perceive assistance to be permissible. Second, as will be seen, the vast majority of assistance treaties expressly claim to conform with the relevant *ius contra bellum*.[970] The practice may only cautiously be understood to endorse the regulatory framework of non-assistance, but at least it does not challenge or contradict the rules governing assistance.

Hence in order to complement the picture of non-assistance rules under the UN Charter, four types of treaties will be briefly surveyed: (a) treaties that establish an *obligation* to assist, (b) treaties of general (military) cooperation, (c) treaties whereby States grant permission to use their territory, and (d) treaties permitting transit.

### a) Treaties of solidarity

Treaties of mutual assistance are prevalent in international treaty practice. Usually, in the case of an "armed attack" or an "armed aggression", States agree to show solidarity. Article 5 NATO Treaty[971] or Article 4 Warsaw

970 One could consider this a truism, given the primacy of the principle of non-use of force, see Article 103 UNC and its widely recognized nature as peremptory norm. Still, it may be understood as reaffirmation or preemptive anticipation of the non-assistance obligation. See for example above note 915 for discussions whether treaties allowing for use of force not in accordance with the UN Charter are void.

971 North Atlantic Treaty (4 April 1949) 34 UNTS 243, Article 5: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an *armed attack* occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, *will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force*, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security." For details Thilo Marauhn, 'North Atlantic Treaty Organization'

Treaty[972] are only the most famous examples of numerous other multilateral[973] and bilateral agreements[974] of such nature.

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in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2016).

972 Treaty of friendship, co-operation and mutual assistance (Albania, Bulgaria, Hungary, German Democratic Republic, Poland, Romania, USSR, Czechoslovak Republic), (Warsaw Treaty) (14 May 1955) 219 UNTS 3, Article 4: "In the event of an armed attack in Europe on one or more of the States Parties to the Treaty by any State or group of States, each State Party to the Treaty shall, in the exercise of the right of individual or collective self-defence, in accordance with Article 51 of the United Nations Charter, afford the State or States so attacked immediate assistance, individually and in agreement with the other States Parties to the Treaty, by all the means it considers necessary, including the use of armed force. The States Parties to the Treaty shall consult together immediately concerning the joint measures necessary to restore and maintain international peace and security. Measures taken under this article shall be reported to the Security Council in accordance with the provisions of the United Nations Charter. These measures shall be discontinued as soon as the Security Council takes the necessary action to restore and maintain international peace and security." For details Pál Sonnevend, 'Warsaw Treaty Organization' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2011).

973 Just see for example Inter-American Treaty of Reciprocal Assistance (26 July 1947) 21 UNTS 77, Article 3(1): "The High Contracting Parties agree that an *armed attack* by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties *undertakes to assist in meeting the attack* in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations." Article 6: "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an *aggression which is not an armed attack* […], the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent." See for a discussion Garcia-Amador, *UMiamiInterAmLRev* (1985). Brussels Treaty, Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence (17 March 1948) 19 UNTS 51, Article IV: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power."; Treaty of Joint Defense and Economic Cooperation Between the States of the Arab League (17 June 1950) 49 AJIL Supplement 51 (1955), Article 2; Security Treaty between Australia, New Zealand and the United States of America (1 September 1951) 136 UNTS 45, Article IV: "Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." Treaty of Alliance, Political Cooperation, and Mutual Assistance between the Turkish Republic, the

Through mutual assistance clauses States undertake a duty to support measures countering the circumstances that activate a *casus foederis*. The required solidarity can take many forms. Several treaties expressly envisage that the assistance involves direct use of force in support of the other treaty party. Yet, most of the obligations are generic. Usually, individual State parties are granted a prerogative on how to discharge their promise of

Kingdom of Greece, and the Federal People's Republic of Yugoslavia (Balkan Pact) (9 August 1954) 211 UNTS 237, Article II: "The Contracting Parties agree that any *armed aggression* against one or more of them on any part of their territory shall be deemed to constitute aggression against all of them, and, the Contracting Parties, exercising the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, shall accordingly, individually and collectively assist the attacked Party or Parties by immediately taking, by common agreement, *all measures, including the use of armed force, which they consider necessary for effective defence*." According to Article VII, States had to inform the Security Council about the "measures that they have taken in self-defence"; African Union Non-Aggression and Common Defence Pact, Article 4(2): "State Parties undertake, individually and collectively, to respond by all available means to aggression or threats of aggression against any Member State"; Treaty on the European Union, Article 42(7). See in general with further (references on the) treaties George K Walker, 'Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said', 31(2) *CornellIntlLJ* (1998) 359-370; Stanimir A Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) 233.

974 E.g. Joint Defence Agreement (Syria, Egypt) (20 October 1955) 247 UNTS 125, Article 2; Agreement on good-neighbourliness, friendly relations and cooperation (Czech Republic, Slovakia) (23 November 1992) 1900 UNTS 95, Article 5: "In the event of an *armed attack* on one of the Contracting Parties, the Parties agree that assistance may be rendered to the attacked party under Article 51 of the Charter of the United Nations, and shall endeavour to resolve the conflict in a manner consistent with the provisions of the Charter of the United Nations and the documents of the Conference on Security and Cooperation in Europe." Treaty on friendly relations and cooperation (Romania, Poland) (25 January 1993) 2536 UNTS 349, Article 3(2): "In the event *of armed aggression* against one of the Contracting Parties, the Contracting Parties shall, irrespective of the consultations cited in Paragraph 1, reach agreement with regard to the possibility of *offering assistance to the attacked Party in accordance with Article 51 of the Charter of the United Nations* and shall make every effort to solve the conflict in accordance with the Charter of the United Nations and the documents of the Conference on Security and Cooperation in Europe."

assistance.[975] States may hence also support the targeted State's use of force countering the attack by means short of force.[976]

Notably, none of the solidarity obligations are designed as blank check.[977] The obligations only arise for a *casus foederis*, i.e. usually in cases of an armed attack or an act of armed aggression. Thereby, States are at pains to underline the compatibility with the UN Charter and general international law.[978] Assistance is only obligatory in situations of self-defense.[979] The assisted use of force or the assistance itself must comply with Article 51 UNC. In addition, assisting States typically retain the authority to independently decide whether the *casus foederis* has occurred, considering both factual and legal aspects.[980]

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975 E.g. on the NATO Marauhn, *NATO* para 16. See also BVerfGE 68, 1, 93. On the EUT: BVerfGE 123, 267, 424; Elfriede Regelsberger, Dieter Kugelberger, 'Art. 42 EUV' in Rudolf Streinz (ed), *EUV/AEUV. Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (3rd edn, 2018) para 11. But see Hans-Joachim Cremer, 'Art. 42 (ex-Art. 17 EUV)' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (5th edn, 2016) para 16 claiming that States do not have discretion on the kind of support.

976 Given that the treaties usually link the duty to assist to a *situation* allowing for a use of force in response (armed attack/aggression), and not to the *action taken in response to the situation*, assistance does not need to be necessarily linked to a response by a use of force. It can also be more general defensive assistance, like the patrolling of airspace of an attacked State, or general solidarity. Marauhn, *NATO* para 17.

977 Recall such treaties from the pre-Charter era.

978 See for example for the NATO Sari, *HarvNatSecJ* (2019) 412. BVerfGE 104, 151, 213; BVerwG NJW 2006, 77, 97. On Article 42 (7) EUT Martín de Nanclares Pérez, José, 'The Question of the Use of Force in Spanish Practice (2012-2015): A Legal Perspective', 19 *SpanYIL* (2015) 326.

979 It is true that some solidarity obligations, e.g. Article 42(7) EUT, apply in case of armed aggression. Some understand this concept to be broader than the armed attack requirement. The duty to assist would hence apply in a situation where a use of force was not permitted under international law. Even on the basis of such an understanding, in view of the generic promise of assistance, this does not necessarily mean however that States accept a duty to assist in a (unlawful) use of force by the targeted State. The duty of solidarity is designed broadly to allow for other forms solidarity that are not related to a use of force. E.g. see for the discussion on the EUT Sari, *HarvNatSecJ* (2019) 416-419.

980 Ibid. For NATO, BVerwG NJW 2006, 77, 97, rejecting any automaticity. See also Richard H Heindel, Thorsten V Kalijarvi, Francis O Wilcox, 'The North Atlantic Treaty in the United States Senate', 43(4) *AJIL* (1949).

Solidarity treaties clearly reflect that States do not claim a right to assist a use of force with full knowledge of its unlawfulness. While the treaties imply that assistance in situations of (collective) self-defense is permissible, one should hesitate to draw definitive conclusions from these treaties about the precise conditions under which States *may* provide assistance short of force. First, the obligatory nature and, second, the diversity of required assistance (that may include direct use of force) may explain specific limitations of assistance to situations of the *casus foederis*. The limitations hence cannot be viewed as necessary precondition for assistance short of force.

b) Treaties of general military cooperation and security assistance

Many treaties form the basis of general military assistance that States provide before a use of force occurs. This assistance is typically marked by a lack of positive knowledge of how the assistance will be utilized.[981] Again, the kinds of cooperation vary widely. Some States, most prominently NATO members, establish an integrated military structure and concrete military plans for specific scenarios.[982] Other States provide bilateral security assistance. They furnish military supplies or services to another government.[983] Probably the most common form of assistance is the licensing and authorization of private sales and supplies of military goods.[984]

A common feature of this diverse practice is that several treaties factor in how their assistance may be used in the future. This includes potential use of armed force.

States widely condition assistance on the legality of the potential use of force for which the assistance is used.[985] The US security assistance is

981 This is different to cases of treaties of solidarity, where the assistance is provided specifically to, and with full knowledge of a use of force.

982 See also e.g. the Treaty of Joint Defense and Economic Cooperation Between the States of the Arab League, June 17, 1950, Military Annex.

983 Aust, *Complicity*, 129.

984 Ibid; Patricia Egli, 'Rechtliche Schranken des Handels mit Kriegsmaterial', 15(5) *SwissRevIntl&EurL* (2005).

985 E.g Mutual Defense Assistance Agreement (USA, Portugal) (5 January 1951) 133 UNTS 75; Exchange of letters constituting an agreement concerning the provision of arms and equipment to the Government of India, (UK, India) (27 November 1962) 466 UNTS 189. See the US treaty practice Jennifer Kavanagh, *U.S. Security-Related Agreements in Force Since 1955: Introducing a New Database* (2014). See for an overview on domestic legislation, which limit security assistance to use of force

exemplary in that respect.[986] Usually, such conditions do not apply to any State cooperation, but only in cases where there is a connection to a use of force. The link will be based on the type of assistance, the recipient of assistance, or the situation in which assistance is provided. For example, even food aid has been supplied on the condition that it does not fuel aggressive behavior.[987]

Sometimes States also require additional assurances.[988] In some instances, States even establish further safeguards to prevent a use of assistance for purposes other than the agreed ones. For example, States included observation and control mechanisms or reporting obligations.[989] States

in accordance with the UN Charter system: Aust, *Complicity*, 138-147; Stefan Oeter, *Neutralität und Waffenhandel* (1992) 174 et seq.

986 Carl J Woods, 'An Overview of the Military Aspects of Security Assistance', 128 *MilLRev* (1990). Starting with the Truman Doctrine, the US provided military assistance first to allies, then to friends, primarily to fight the perceived threat of communism. The provision of security assistance was and remains a major pillar in US foreign policy. Assistance was widely provided on the condition of a use in accordance with international law and the UN Charter in particular. Ibid 105. See e.g. treaties with Yugoslavia: 93 UNTS 45; 162 UNTS 173; 174 UNTS 201; 269 UNTS 89; 357 UNTS 77. For later developments of conditions on compliance with human rights see Duncan L Clarke, Steven Woehrel, 'Reforming United States Security Assistance', 6(2) *AmUIntlLRev* (1990-1991); Stephen B Cohen, 'Conditioning US Security Assistance on Human Rights Practices', 76(2) *AJIL* (1982).

987 Agreement relating to supplies of food for the armed forces of the Federal People's Republic of Yugoslavia, effected by an exchange of notes (USA, Yugoslavia) (20, 21 November 1950) 93 UNTS 45.

988 See for example the Al-Yamamah Contract (1985-1986), http://image.guardian.co.uk/sys-files/Politics/documents/2006/10/27/PJ5_39AYMoUSep1985.pdf. The cooperation agreement continues to play a decisive role for the UK's support to Saudi-Arabia's use of force in Yemen 2015. Arron Merat, 'The Saudis couldn't do it without us': the UK's true role in Yemen's deadly war', *Guardian* (18 June 2019), https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war. While it does not contain a clause denying armament in cases of war (against the Foreign Office's advice as this might lead to the involvement of "unlawful military adventures"), then Prime Minister Margaret Thatcher required Saudi-Arabia to give an (unpublished) assurance that it would not use British weapons aggressively against other States. For details see David Leigh, Rob Evans, 'Secrets of al-Yamamah', *Guardian* https://www.theguardian.com/baefiles/page/0,,2095831,00.html. See also BT Drs 13/1246 (2 May 1995), question 12.

989 See e.g Mutual Defense Assistance Agreement (USA, Germany) (30 June 1955) 240 UNTS 47, Article VIII. States also verify the use of their assistance. For example, the USA investigated the use of American weapons during the Entebbe incident 1976,

require end-use and end-user certificates.[990] Some assistance is earmarked; alternative uses of assistance require consent of the assisting State.

Moreover, some States conduct prior risk assessments. For example, the 2008 EU 'Common Position defining common rules governing control of exports of military technology and equipment' establishes a stringent regime.[991] It upgraded the 1998 'Code of Conduct on Arms Exports' to a legally binding common position.[992] According to eight common criteria that set out minimal standards, EU "Member States shall assess export licence applications made to it, including government-to-government transfers […] on a case-by-case basis."[993] Three of those criteria, by which "Member States are [*inter alia*] determined to prevent the export of military technology and equipment which might be used" *inter alia* for "international aggression,"[994] allow to take into consideration the *ius contra bellum*.

According to *criterion one*, States must take into account the "[r]espect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations and commitments." Export licenses shall be denied if the approval would be inconsistent with specifically mentioned obligations. But these obligations characteristically concern acts of assistance that are *per se* unlawful, irrespective of the *use* of the assistance. Remarkably, obligations under the UN Charter are not mentioned, except for obligations to enforce UN Security Council arms embargoes. They are relevant under *criterion four* that specifically concerns the *use* of the assistance. Accordingly, "Member States shall deny an export licence if there

S/PV.1943 para 34. See also Germany on the use of German weapons in Turkish an invasion, BT Drs 13/1246 (2 May 1995), question 7.

990 Alexandra Boivin, 'Complicity and Beyond. International Law and the Transfer of Small Arms and Light Weapons', 87(859) *IRRC* (2005).

991 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, (OJ L 335, 13.12.2008, 99), amended by Council Decision (CFSP) 2019/1560 of 16 September 2019 (OC L 239, 17.9.2019, 16)

992 Criterion Four of the Code held: "Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim." Council of the European Union, European Union Code of Conduct on Arms Exports, 8675/2/98 Rev 2 (5 June 1998).

993 Article 1(1) Common Position 2008/944/CFSP.

994 Preamble para 4 Common Position 2008/944/CFSP.

is a clear risk that the intended recipient would *use* the military technology or equipment to be exported *aggressively against another country* or to assert by force a territorial claim."[995] The *sixth criterion* requires States to "take into account" the buyer's record of "compliance with its international commitments, in particular on the non-use of force [...]".[996]

The EU regulation hence requires States to refrain from exporting weapons with a clear risk of being used in an unlawful use of force and to take respective safeguards to ensure compliance.

The European approach of a legally binding regulation is, however, not universally shared. For example, under the 'Wassenaar Arrangement' 42 States establish "best practices" for the export of conventional arms and dual use goods and technologies.[997] Thereby States chose a *non-binding* regulatory form. Still, the best practices entail provisions on the circumstances when arms may be provided, as well as how safeguards may be implemented, which take into account legal considerations.[998] For example, the Best Practice Guide on the export of small arms and light weapons (SALW) provides that:

> "1. Each Participating State will [...] *take into account*:
> (c) The record of compliance of the recipient country with regard to *international obligations and commitments*, in particular [...] *on the non-use of force* [...],
> (f) Whether the transfers would contribute to an appropriate and proportionate response by the recipient country to the military and security threats confronting it; [...]"

995 Article 2 (4) Common Position 2008/944/CFSP. It continues that "When considering these risks, Member States shall take into account inter alia:(a) the existence or likelihood of armed conflict between the recipient and another country; (b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force; (c) the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient; (d) the need not to affect adversely regional stability in any significant way." See also the User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment: http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf, 60.

996 Article 2 (6) Common Position 2008/944/CFSP.

997 Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, available at https://www.wassenaar.org/.

998 Available at https://www.wassenaar.org/best-practices/.

> 2. "Each Participating State *will avoid issuing licences* for exports of SALW where it deems that there is a *clear risk* that the SALW in question *might*: […]
> (d) *Contravene its international commitments*, in particular in relation to sanctions adopted by the Security Council of the United Nations, agreements on non-proliferation, SALW, or other arms control and disarmament agreements;
> (e) Prolong or aggravate an existing armed conflict, taking into account the legitimate requirement for self-defence, […]."[999]

But numerous treaties of cooperation lack such conditionality or procedural safeguards.

Treaties of general cooperation hence show that States are well aware of the inherent risk of potentially contributing to an unlawful use of force. Still, States are reluctant to consider general military cooperation, provided irrespective of a specific use of force, as being prohibited under international law. States' safeguard measures, however, indicate that this may be different in case they have full knowledge of an unlawful use. But generally, States may provide assistance based on the trust that it will be used, if at all, in accordance with international law.

In any event, the practice of military cooperation agreements does not oppose prohibitions of assistance. In fact, when States actively take measures to ensure they do not assist in an unlawful use of force, they may, by extension, actively support a legal framework requiring non-assistance. The fear of legal responsibility may be at the heart of States' efforts. But it cannot be deduced that States automatically accept responsibility for assistance in case no such measures are taken.[1000]

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999 Agreed at the 2002 Plenary and amended at the 2007 and 2019 Plenary, https://www.wassenaar.org/app/uploads/2019/12/Best-practice-guidelines-on-export-of-SALW-web-version.pdf, emphasis added. Critical whether "international obligations and commitments" refers to *legal* considerations Aust, *Complicity*, 144-145. This position is not beyond doubt, however. For example, Article 2(d) refers to Security Council sanctions as "international commitments." Those are legally binding, and not merely of political nature. Likewise, *obligations* on the non-use of force may be understood as reference to Article 2(4) UNC, again a legal obligation.

1000 See also Boivin, *IRRC* (2005).

c) Treaties establishing military bases

It is a common feature of various (powerful) States' defense strategies to maintain military installations overseas in strategically important places. Installations take many different forms ranging from permanent structures to more temporary facilities used for specific operations only. The USA, in particular, but by no means exclusively, has pursued such a policy. By now the US has established a comprehensive network of military bases and installations strategically spanning across the globe.[1001] The bases serve various functions.[1002] They not only house thousands of troops. They host decisive military facilities like the relay stations in Ramstein, or LORAN (Long Range Navigation) stations in Lampedusa, or command centers in Stuttgart. They serve as depots for armaments, transport hubs, or centers for communication, intelligence, or logistical support. Finally, they may serve as staging grounds for military strikes, aerial or naval alike, as seen with the US bases in the Middle East or on the Azores.

Those installations may not be imposed on other States.[1003] Legally, they require the host State's consent. Given that effective military operations often require immediate contingency responsiveness that requires advanced planning and existing structures, States often do not agree upon those installations *ad hoc*. They obtain the consent in advance. The permission

1001 US Department of Defense, Base Structure Report, https://www.acq.osd.mil/eie/BSI/BEI_Library.html; Military Bases Oversees, https://militarybases.com/overseas/. See for other States, e.g. Zdzislaw Lachowski, *Foreign Military Bases in Eurasia* (Policy Paper, SIPRI, vol 18, June 2007).

1002 Christian Raap, 'Die Stationierung von Streitkräften in fremden Staaten unter besonderer Berücksichtigung Deutschlands', 29(1/2) *AVR* (1991); Sean D Murphy, 'The Role of Bilateral Defense Agreements in Maintaining the European Security Equilibrium', 24(3) *CornellIntlLJ* (1991).

1003 Article 3(e) Definition of Aggression indicates that the overstepping of the consent by using the armed forces may even be considered an act of aggression against the host State. In light of State practice, one should be reluctant, however, to accept that any act overstepping consent, in particular if not expressly *directed against* the host State, is aggression. Aurel Sari, 'Ukraine Insta-Symposium: When does the Breach of a Status of Forces Agreement amount to an Act of Aggression? The Case of Ukraine and the Black Sea Fleet SOFA', *Opinio Juris* (6 March 2014); Bruha, *Definition of Aggression*, 163. Critical on the provision in general: Mindia Vashakmadze, *Die Stationierung fremder Truppen im Völkerrecht und ihre demokratische Kontrolle. Eine Untersuchung unter besonderer Berücksichtigung Georgiens* (2008) 88-94.

to use the other State's territory hence typically derives from – multilateral, but even more crucially bilateral – international agreements.[1004]

Such agreements are common practice and *per se* in accordance with international law.[1005] But, States allowing the use of their territory are aware that what is now permissible military cooperation could soon become unlawful assistance. It is the use of the military base by the assisted State against another State that may be critical – especially as these installations are crucial parts of almost any operation between non-neighboring States and are accordingly described as "force multipliers".[1006]

It is hence a common characteristic to subject the potential use of the territory for a use of the force to conditions.[1007]

The promise of assistance in treaties concluded in implementation of NATO obligations, for example, typically only extends to operations taken within the NATO context.[1008] In any event, this is only further expression

1004 Vashakmadze, *Stationierung fremder Truppen*, 110, see for an overview: 119-179; Murphy, *CornellIntlLJ* (1991) 419. This are typically specific treaties granting the *ius ad presentiam*, which are typically distinct from Status of Forces Agreements (SOFAs) that regulate the *ius in presentia*. For example, the Agreement between the parties of the North Atlantic Treaty regarding the Status of their Forces (19 June 1951) 199 UNTS 67 only concerns how troops are to be treated once they are present in another State. Pursuant to its preamble, however, "the decision to send them and the conditions under which they will be sent, in so far as such conditions are not laid down by the present Agreement, will continue to be the subject of separate arrangements between the Parties concerned." For a detailed analysis of the *ius in praesentia* Dieter Fleck (ed), *The Handbook of the Law of Visiting Forces* (2018). It should be noted that frequently agreements granting permission are not published.

1005 But recall that some States attempted to qualify the maintenance of military bases *per se* as intervention or threat of force against third States at times in debates on the principle of non-use of force, in particular during the Cold War period: e.g. the debates during the Friendly Relations Declaration. See also Vashakmadze, *Stationierung fremder Truppen*, 75. This view did not find broad support, however. It hence does not surprise, that usually States voice political protest against the establishment or maintenance of a (new) base.

1006 Alexander Cooley, *Base Politics: Democratic Change and the U.S. Military Overseas* (1st edn, 2008) 4-5.

1007 E.g. Strategic Framework Agreement for a Relationship of Friendship and Cooperation (USA, Iraq) (17 November 2008) TIAS 09-101.1, Section I (4): "The United States shall not use Iraqi land, sea, and air as a launching or transit point for attacks against other countries."

1008 Defense Agreement (United States, Iceland) (5 May 1951), 205 UNTS 175; Defense Agreement (Portugal, USA) (6 September 1951) 237 UNTS 217 (This agreement has been extended several times 303 UNTS 354 (15 November 1957); 851 UNTS

of the general characteristic that permission to use the territory is only provided for a use of force that is in accordance with the UN Charter. States do not seek to (impose obligations to) assist a use of force in violation of the obligations under the UN Charter.[1009] Treaties result from complex negotiations and various political interests.[1010] In the abstract, however, none of these treaties should be understood as claim to a right to provide assistance to an unlawful use of force.[1011]

The current regulation of the *ius ad praesentiam* of foreign troops in Germany illustrates this well.[1012] Article 53 (1) German NATO SOFA Supplementary Agreement stipulates that "Within accommodation made available for its exclusive use, a force or civilian component may take all the measures necessary for the satisfactory fulfillment of its defense responsibilities. German law shall apply to the use of such accommodation except as provided in the present Agreement and other international agree-

274 (9 December 1971); TIAS No 10050 (June 18, 1979); TIAS No 10838 (13 December 1983)); Agreement Concerning Defense of Greenland, (USA, Denmark (27 April 1951) 2 UST 1485, TIAS No 2292, 94; Agreement Regarding Certain Air Bases and Facilities in Metropolitan France Placed at the Disposition of the United States Air Force (USA, France) (4 October 1952) 5(4) ILM 690, 695-704; Agreement concerning Military Facilities (USA, Greece) (12 October 1953) 191 UNTS 319; Agreement concerning the Preparation and Operation of an American Line of Communication in Belgium (Belgium, USA) (19 July 1971) reprinted in Olivier Corten, 'Les Arguments Avances par la Belgique pour Justifier son Soutien aux Etats-Unis dans le Cadre de la Guerre contre l'Irak', 38(1-2) *RBDI* (2005) 440-446, for an interpretation: 422-425, 425-427; Agreement on Defense Cooperation (Spain, USA) (1 December 1988), https://es.usembassy.gov/embassy-consulates/madrid/sections-offices/office-defense-cooperation/agreement-defense-cooperation/. On the amendments: https://es.usembassy.gov/embassy-consulates/madrid/sections-offices/office-defense-cooperation/three-protocols-amendment-adc/. On treaties with Turkey Vashakmadze, *Stationierung fremder Truppen*, 137.

1009 Many treaties expressly stipulate this, e.g. Article VII Treaty of Mutual Cooperation and Security (Japan, USA) (19 January 1960) 373 UNTS 186.

1010 See on the politics underlying military bases Cooley, *Base Politics*. Critical David Vine, *Base Nation: How US Military Bases Abroad Harm America and the World* (2015).

1011 See for examples of implementation and interpretation of the treaties in practice below, Section C.

1012 For the historical development see Raap, *AVR* (1991); Dieter Fleck, 'The Law of Stationing Forces in Germany: Six Decades of Multilateral Cooperation' in Dieter Fleck (ed), *The Handbook of the Law of Visiting Forces* (2018).

ments, […]."[1013] This is understood to mean that foreign troops must respect international law, including the *ius contra bellum*.[1014]

At the same time, States acknowledge that by allowing the use of their territory, they create a risk of their territory being used beyond the agreed purposes. They include safeguards beyond the confines of the generally permitted use of the military base. Treaties are often limited in time or allow for termination. For certain types of uses, treaties require prior consultations[1015] or specific and individual approval.[1016] This does not change the fact that usually, States trust the assisted States. Assisted States are not required to report or seek permission for each specific operation. Accordingly, host States do not determine the lawfulness of each respective operation. But States do not resign any control and leave the use and determination of the lawfulness of the use to the assisted State entirely. They usually retain a right to some control and to prevent certain unlawful uses.[1017] The scope of this right, however, varies.

Again, the German NATO SOFA Supplementary Agreement is a good example. Article 53 (3) holds that "the force or the civilian component shall ensure that the German authorities are enabled to take, within the accommodation, such measures as are necessary to safeguard German interests." It counts among the "German interests" that the territory is not used for illegal purposes, even when it might not suffice to establish responsibility

1013 Agreement to amend the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971 and 18 May 1981, to supplement the agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, Federal Law Gazette 1994 II p.2594.

1014 BVerwG, NVwZ 2016, 1176, 1177 para 20. Note that furthermore the *ius ad praesentiam* is limited according to the Convention on the Presence of Foreign Forces in the Federal Republic of Germany (23 October 1953) 334 UNTS 3: "In view of the present international situation and the need to *ensure the defence of* the free world." In German practice, "out of aera" activities always required specific consent, Fleck, *Stationing Forces in Germany*, 583-584. Another example is Agreement on the Withdrawal of United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq, (USA, Iraq) (17 November 2008), available at https://www.peaceagreements.org/viewmasterdocument/1577, Preamble, Articles 3, 4.

1015 See e.g. the treaties cited by Michael J Strauss, 'Foreign bases in host states as a form of invited military assistance: legal implications', 8(1) *JUFIL* (2021) 13.

1016 See e.g. Article 57 para 1 sentence 1 German NATO SOFA Supplementary Agreement. On this clause BVerwGE 127, 302-374 (21 June 2005), para 244-248. See also Italy's drone policy, below II.C.26.d.

1017 See also Strauss, *JUFIL* (2021) 13-14.

for its complicity.[1018] Germany hence may take necessary measures to prevent the use of its territory for (support of) illegal combat activities.[1019]

### d) Permissions of transit

#### (1) Transit through water

The international law of the sea sets out a nuanced regulatory regime for international navigation through waters.[1020] This is not the place to revisit it in detail. Suffice it to note that, under *general* international law, States enjoy a right of navigation through some waters, even when a State may otherwise exercise sovereign rights.[1021]

For example, States enjoy "transit passage" through straits connecting high seas or EEZs with other areas of high seas or EEZs, which are used for international navigation, even though these waters may be entirely within territorial seas.[1022] Accordingly, any ships, (debatably submerged) submarines, and even aircraft may proceed without delay if they refrain from any threat or use of force against the State bordering the strait.[1023] The bordering State, although enjoying sovereignty, must not prevent States from transiting under general international law. As Malcolm Evans illustrates,

1018 BVerwGE 127, 302-374, para 251.

1019 Ibid.

1020 In detail Yoshifumi Tanaka, 'Navigational Rights and Freedoms' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (2015); James Kraska, 'Military Operations' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (2015).

1021 Note that in maritime zones that do not form part of States' territory, but where States enjoy only functional limited competences (e.g. contiguous zone or the Exclusive Economic Zone (EEZ)), all ships, including warships, generally enjoy freedom of navigation. Sarah Wolf, 'Territorial Sea' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) 2; Wolff Heintschel von Heinegg, 'Warships' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2015) para 34; Albert J Hoffmann, 'Navigation, Freedom of' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2011) 13.

1022 Article 37 UNCLOS. For the exclusions see Article 36, 38(1) UNCLOS. Notably, it also does not apply to man-made structures like the Panama Canal or the Suez Canal, Said Mahmoudi, 'Transit Passage' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2008).

1023 Malcolm D Evans, 'The Law of the Sea' in Malcolm D Evans (ed), *International Law* (2014) 664.

this means that "for example, hurrying through the Straits of Gibraltar to conduct military activities in the eastern Mediterranean would be permissible."[1024]

Akin rights exist under the regime of innocent passage through territorial waters. If and how warships enjoy such a right, however, is still not ultimately settled.[1025]

These general rights of transit are not without relevance for State responsibility of assistance. To the extent that States have a general right of passage, the respective State does not need to consent to the passage; their sovereignty is *a priori* restricted.[1026] There is hence no "permission" for the passage that could lead to responsibility. Similarly, this excludes a *due diligence* violation, as States are normatively barred from taking measures.[1027]

It should be noted that these regimes do not apply to all waters. For example, general international law does not generally recognize a right to passage for internal waters.[1028] Moreover, rights are strictly confined to passage only. The use of territorial waters as place from where missiles are launched, for instance, still requires permission, and hence may be an act of assistance. This is also reflected in treaty practice. For those cases, States first conclude treaties, and second, require the assisted State to comply with international law.[1029]

1024 Ibid. This was also a major motivation for States to insist on such a right when the outer limit of the territorial sea was extended to 12 nautical miles, Heintschel von Heinegg, *Warships* 34.

1025 Some voices require prior authorization of the costal State. Others require prior notification, which however would not change the fact that a right of passage existed. Evans, *Law of the Sea*, 662; Heintschel von Heinegg, *Warships* 35-43; Kari Hakapää, 'Innocent Passage' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) para 29-33; Anh Duc Ton, 'Innocent Passage of Warships', 1(2) *AsiaPacJOceanL&Pol* (2016) 211-216. The existence of such a right is particularly contested in times of war. In any event it does not apply to aircraft, however, Hakapää, *Innocent Passage* para 6. On the definition of warships see Heintschel von Heinegg, *Warships* 1-14, in particular 10. Note in particular that auxiliary vessels (i.e. logistic ships, troop transport, cargo ships, colliers, destroyer and submarine tenders, mine countermeasure vessels, hospital ships, survey ships, tankers, tugboats, and other vessels engaged in non-commercial service that complement warships, Kraska, *Military Operations*, 871) are widely considered distinct from warships.

1026 Wolf, *Territorial Sea* 21.

1027 See also for the law of neutrality that likewise does not limit those rights, Heintschel von Heinegg, *Warships* 57-60.

1028 Ibid 47.

1029 Hoffmann, *Navigation, Freedom of* para 7.

(2) Overflight

Every State enjoys full and exclusive sovereignty over its national airspace above its territory.[1030] Under general international law, there is no "universal freedom of overflight", in particular not for flights with a military function.[1031] Rights to pass through said airspace (not higher than the airspace), are however widely granted via treaty, mostly for civil use.[1032] For military aircraft,[1033] States grant overflight and transit rights on an *ad hoc basis* or – in particular if States have military bases on another State's territory – generally by treaty.[1034]

In the latter case, States once again usually impose limits. Transit rights for military purposes are granted on the general condition of compliance with the system established by the UN Charter, or earmarked for specific purposes only that are deemed in compliance with international law.[1035] For example, overflight rights granted for NATO members are usually confined

1030 Article 1 Paris Convention on the Regulation of Air Navigation, 11 LNTS 173; Article 1 Chicago Convention, 15 UNTS 295. The latter is considered customary international law. Jan Wouters, Bruno Demeyere, 'Overflight' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2008) para 8. Notably, this applies also to overflight over territorial waters, ibid para 9. The overflight over international airspace (i.e. the air space above certain maritime areas) is governed by special regimes. Ibid para 1; Michel Bourbonniere, Louis Haeck, 'Military Aircraft and International Law: Chicago Opus 3', 66(3) *JAirL&Comm* (2001) 957. According to Article 87 and 58 UNCLOS, military aircraft enjoy freedom of navigation and overflight over the high seas, including the exclusive economic zones.

1031 Bourbonniere, Haeck, *JAirL&Comm* (2001) 954. There may be exceptions under the UN Charter, however.

1032 Most famously, for civil aircraft only, Article 3 Chicago Convention, Wouters, Demeyere, *Overflight* para 11, 15.

1033 The distinction is contingent upon the aircraft's function. Bourbonniere, Haeck, *JAirL&Comm* (2001) 888, 902-912 with more details identifying relevant characteristics and discussing specific situations (use of "civil" aircraft by military).

1034 Wouters, Demeyere, *Overflight* para 17.

1035 See for example Agreement between the Government of the Federal Republic of Germany and the Government of the Russian Federation concerning the Transit of Defence Materiel and Personnel through the Territory of the Russian Federation in connection with Bundeswehr Contributions to the Stabilization and Reconstruction of Afghanistan, Federal Law Gazette 2003 II p.1620, Article 1(1), 2(6), (8); Agreement Concerning Overflight and Transit Through the Territory and Airspace of Slovenia by US Aircraft, Vehicles, and Personnel for the Purpose of Supporting Security, Transition and Reconstruction Operations in Iraq, https://www.state.gov/03-902. See on South African practice Erasmus, *Accord of Nkomati*, 22.

to operations within the NATO context.[1036] In any event, States grant permissions on the understanding of a legal use. Again, it cannot be concluded that States view such limitations necessary to preclude legal responsibility for the permission itself, as blanket overflight clearances for the US military flights related to operations against terrorism that many States granted in view of the terrorist attacks of 9/11 show.[1037] This again does not exclude that States may accept responsibility in case they had specific knowledge about specific uses.

(3) Territorial passage

The same applies under general international law for territorial passage. Transit through a State's territory requires consent.[1038] If it is provided *in abstracto* by treaty, like for overflight permission, States typically first condition the passage and secondly take safeguards to prevent abuse of the permission.

e) Preliminary observations

On a regular basis, treaties relating to assistance acknowledge, uphold, and reaffirm the *ius contra bellum* in general, and rules governing assistance to

1036 See for example Article 57 (1) NATO SOFA Supplementary Agreement (Federal Law Gazette 1994 II 2594) requires movements over or within Germany to be (1) to take place within the context of NATO operations, and (2) "within the scope of German legal provisions". See on this also BVerwGE 127, 302-374 para 244-250. It concludes that the NATO SOFA Supplementary Agreement does neither cover overflight outside the NATO context nor unlawful overflights. Those require a separate and individual authorization. See on this also Peter Becker, 'Völkerrechtswidrige Nutzung deutschen Hoheitsgebiets und Luftraums durch ausländische Streitkräfte' in Peter Becker, Reiner Braun and Dieter Deiseroth (eds), *Frieden durch Recht?* (2010) 229-230. See generally Murphy, *CornellIntlLJ* (1991).

1037 Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States (4 October 2001), https://www.nato.int/docu/speech/2001/s011004b.htm. Note however that these (very broad) permissions were still granted under the cover of collective self-defense in implementation of Article 5 NATO-Treaty. Note further that the text of the actual agreement remained secret, Amnesty International, *Europe: State of denial: Europe's role in rendition and secret detention* (2008) 6.

1038 But see for different historical approaches: Vashakmadze, *Stationierung fremder Truppen*, 67.

a use of force, in particular. Widely, they are accessory in nature and hence condition the assistance to lawful uses only. Interestingly, States frequently do not stop there and set up safeguards to ensure compliance with the purposes. Notably, these rules apply primarily to military assistance.

It is difficult to ascertain, however, whether this practice can be related to a prohibition of non-assistance. State practice is not unambiguous with respect to the consequence of a violation of those measures. First and foremost, a failure to comply with those measures leads to a violation of the treaty. Yet, the treaties suggest that it is not for political reasons *only* that States behave accordingly. In fact, systematically, States may have been motivated to avoid a contribution to a violation of the *ius contra bellum* – to avoid responsibility for complicity. No treaty actively seeks to challenge the *ius contra bellum*. And in case of violations, States instead of challenging a rule of complicity, advance different arguments: either they invoke a justification, or invoke the conditionality and a lack of knowledge of the "misuse" of the assistance.

### 3) The Arms Trade Treaty

The Arms Trade Treaty (ATT), adopted by the UNGA in 2013 and entered into force on 24 December 2014, relates to international trade in conventional arms.[1039] As a key regulation of an essential means of interstate assistance, it deserves scrutiny with view to its implications on prohibitions of interstate assistance to a use of force.

Apart from Article 7 ATT that mandates States to conduct a risk assessment for arms exports, the core of the Arms Trade Treaty is the prohibition of transfer of arms as stipulated in Article 6 ATT.[1040] It holds:

> "1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article

1039 A/RES/67/234B (2 April 2013), adopted by 154 votes to 3, with 23 abstentions, At the time of writing, the treaty has 141 signatories including 113 States Parties, https://thearmstradetreaty.org/treaty-status.html, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en.

1040 On the definition of the scope of the prohibition, "transfer" and "arms" that require a direct connection between arms and the assisted action, Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (2020) 150-151; Laurence Lustgarten, 'The Arms Trade Treaty: Achievements, Failings, Future', 64(3) *ICLQ* (2015) 578-586.

> 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
> 2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
> 3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

The immediate impact of Article 6 (1) and (2) ATT is limited. It essentially requires non-authorization of arms transfers in cases where the member State would be violating existing international obligations it had already committed to. As such, the ATT does not establish new prohibitions but presupposes and reaffirms them.[1041] In contrast, Article 6(3) ATT describes a specific situation in which authorization is prohibited, independent (and arguably deviating) from existing (customary) rules of international law.[1042]

What is conspicuous is what is missing in Article 6 ATT. It does not articulate a prohibition of authorization of an arms transfer if States had knowledge at the time of authorization that the arms would be used in a violation of the prohibition to use of force – such as Article 6(3) ATT stip-

1041 See e.g. critical on the additional impact A/67/PV.71 (2 April 2013), 19 (Iran), ATT Memorandum of the Federal Government [of Germany] on the Arms Trade Treaty (1 March 2014) 8. See also Luca Ferro, 'Western Gunrunners, (Middle-) Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?', 24(3) *JCSL* (2019) 518; Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', 37(3) *FordhamIntlLJ* (2013-2014) 704-705; Pacholska, *Complicity*, 145. For a profound analysis Stuart Casey-Maslen and others, *The Arms Trade Treaty: A Commentary* (1st edn, 2016) 178, para 6.02.

1042 For details Casey-Maslen and others, *ATT Commentary*, 204-205, para 6.84-6.85; Marlitt Brandes, 'All's Well that Ends Well or Much Ado about Nothing: A Commentary on the Arms Trade Treaty', 5(2) *GoJIL* (2013) 411-416; Pacholska, *Complicity*, 146-148, 155 claiming that Article 6(3) ATT has codified or at least crystalized a rule of customary international law.

ulates for genocide, crimes against humanity, and war crimes.[1043] Neither does it expressly refer to existing international rules that arms transfer may violate in the case where a State uses force, such as a prohibition of interstate assistance to a use of force or the prohibition to use force. Instead, in the realm of the *ius contra bellum,* the prohibition is limited to transfers that would violate the already obligatory measures of the Security Council.[1044]

Such a prohibition might be tacitly captured by Article 6(2) ATT that refers to the State Parties' international conventional (treaty) obligations. "Obligations under international agreement" is sufficiently broad to include violations of the UN Charter.[1045] But it remains open to challenge if this is what States were contemplating in view of the Article's illustrations ("in particular …") and of a systematic comparison with the express reference to the UN Charter in Article 6(1) ATT. Taking into account that States in the preambular paragraph committed to act in accordance with the principle under Article 2(4) UN Charter, it would go too far to read the omission of such a rule to mean an outright rejection of its existence.

But the fact remains that the ATT's invisible reference to a non-assistance rule under the UN Charter is highly ambiguous. Even if it embraced

1043 Three general aspects of Article 6(3) ATT are noteworthy for the present purposes. First, it does not require genocide, crimes against humanity, or war crimes to occur. It thus prohibits already the creation of a risk, not the contribution, 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) 124. Second, knowledge is sufficient; intent is not required. Third, States must have knowledge at the time of the authorization, not of the transfer. States do not accept a *duty* to reassess an authorization in view of new information, also not under Article 7 ATT which only "encourages" to reassess. Brandes, *GoJIL* (2013) 412; Laurence Lustgarten, 'The Arms Trade Treaty: A Measure of Global Governance' in Laurence Lustgarten (ed), *Law and the Arms Trade: Weapons, Blood and Rules* (1 edn, 2020) 411-412; Nina H B Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty', 108(4) *AJIL* (2014) 733.

1044 Casey-Maslen and others, *ATT Commentary*, 186 para 6.26-6.27.

1045 Ibid 193 para 6.47; Lustgarten, *ATT*, 431. Note that Article 6(2) ATT arms transfer was not prohibited in case a State would thereby violate Article 16 ARS. Article 6(2) ATT has been deliberately limited to treaty rules. It does not apply in case customary international law would be violated. On the term 'international agreements' cf Lustgarten, *ICLQ* (2015) 587-588; Casey-Maslen and others, *ATT Commentary*, 181, para 6.10.

such a rule,[1046] it merely presupposes its existence. In particular, it does not give any guidance on the rule's content and conditions. Accordingly, in any event, the ATT has not strengthened such a non-assistance rule, in any case with respect to the ATT's scope, the transfer of arms.

This is all the more significant, as the topic of arms transfer in case of a use of force had been tabled. Most vigorously, States called for a reference to rules regulating arms transfer to non-State actors.[1047] But also contributions to a use of force, most notably such that amounted to a crime of aggression, were proposed to be included. For example, Liechtenstein submitted that the transfer of arms should be prohibited in case of it was "used to commit or facilitate" crimes of aggression.[1048] Likewise, a Chairman's paper from 3 July 2012 required States to "assess whether there is a substantial risk that the export" *i.a.* "be used in a manner that would […] provoke, prolong or aggravate acts of aggression or other breaches of the peace".[1049] Neither proposal found its way into the ATT. Already the draft treaty text submitted by the President of the Conference from 26 July 2012 omitted any references to interstate assistance to an unlawful use of force.[1050]

It was hence a deliberate omission of a politically sensitive topic suitable to revive substantial controversies that may have put at risk the entire negotiation process.[1051] While no State openly rejected such a rule, it seems

1046 For such a view, yet without detailed inquiry how such arms transfer violated the UN Charter: Antonio Coco, 'I divieti di trasferimento ai sensi degli articoli 6 e 7 del Trattato sul commercio delle armi', 96(4) *RivDirInt* (2013) 1238; Casey-Maslen and others, *ATT Commentary*, 200 para 6.67 drawing a parallel between non-State actors and States.

1047 Paul Holtom, *Prohibiting Arms Transfers to Non-State Actors and the Arms Trade Treaty* (UNIDIR Resources, 2012)

1048 A/CONF.217/2, 10 May 2012, 52. See also 31 (Ecuador that stated: "Sales bans should be envisaged for countries that have violated the prohibition of the threat or use of force against the territorial integrity or political independence of any other State, established in Article 2 of the Charter of the United Nations.") Also several States called during the debates for such a rule, most notably Syria, Iran and Cuba.

1049 Draft Article 6(B)(1)(a), https://www.reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference/documents/ChairPaper-3July2012.pdf.

1050 A/CONF.217/CRP.1, 1 August 2012. This was criticized by Cuba, ATT Monitor 5.18, 27 July 2012, at 4. This also speaks against the proposal to view Article 8bis ICC-Statute to be included as "other war crime" under Article 6(3) ATT. Lustgarten, *ATT*, 413.

1051 In this direction also Casey-Maslen and others, *ATT Commentary*, 199-200 para 6.65-6.67; Kellman, *FordhamIntlLJ* (2013-2014) 703.

that the majority of States preferred the above-sketched ambiguity.[1052] But not all States shared this approach. Several States openly criticized the ATT for failing to include a rule on interstate assistance to a State's unlawful use of force.[1053] Iran and Syria eventually refrained from signing the ATT for this very reason.[1054] Cuba's position is illustrative of those States' views:

> "It is unjustifiable that the final draft of the treaty eliminates the ban on the transfer of arms for actions involving the use or threat of the use of force in contravention of the Charter of the United Nations, including acts of aggression in particular. The principles that should guide the application of the treaty, the minimum guarantee that the majority of States will rely on in order to deal with possible abuses or manipulation, are still unreasonably excluded from the treaty's operative part; their relevance in the context of the treaty's application was intentionally weakened."[1055]

It is worth noting, however, that those States' criticisms were tailored not to the fact that the ATT may not have embraced such a prohibition. In fact, their statements presuppose that such a rule exists, not only under customary but also as conventional treaty law under the UN Charter regime, and accordingly also under the ATT. Rather, their critique was directed towards the fact that the ATT did not embrace the rule in *express and clear* terms thus allowing room for arguments that such assistance was not prohibited.

Accordingly, the ATT itself does not substantially add to the legal framework governing interstate assistance to the use of force. In particular, the innovative and comprehensive prohibition under Article 6(3) UNC has

1052 E.g. with respect to non-inclusion of a rule on support non-State actors, Brazil acknowledged that this may have contributed to an even stronger treaty, A/67/PV.71 (2 April 2013), 13.

1053 A/67/PV.71 (2 April 2013), 6 (Syria), 7 (Cuba), 8 (Nicaragua), 9 (Venezuela), 9 (Bolivia), 10 (Ecuador), 14 (Egypt), 18 (Iran). On Egypt's position: Paul Meyer, 'A Banner Year for Conventional Arms Control? The Arms Trade Treaty and the Small Arms Challenge', 20(2) *GlobGov* (2014) 209. See also more generally 11 (Sudan). Critical also only about the omission of armed support provided to non-State actors e.g. 9 (Russia), 13 (India).

1054 Luis Charbonneau, 'Iran, North Korea, Syria block U.N. arms trade treaty', *Reuters* (29 March 2013), https://www.reuters.com/article/us-arms-treaty-un/iran-north-korea-syria-block-u-n-arms-trade-treaty-idUSBRE92R10E20130329.

1055 A/67/PV.71 (2 April 2013), 7. See also A/CONF.217/2013/3 (1 April 2013).

not been extended to a use of force.[1056] Still, the drafting and adoption of the ATT cannot be understood to contest the existence of a prohibition of interstate assistance to a use of force. Not least in view of several States recognizing and calling for an express reference to such a rule, it may silently endorse the existence of such a rule through Article 6(2) ATT. Whether it proves true that the ATT's omission to mention use of force has weakened the rule needs to be assessed in light of general practice holistically over time. The fact remains however that the ATT may have been a deliberately missed opportunity to further clarify and refine the regime governing interstate assistance to a use of force.

### C. Assistance in conflict practice

States provide assistance to other States' use of force. It is a common feature of each and every armed conflict among States. Do, and if so, how do States legally explain their behavior in their concrete cases?

The following assessment is not concerned with the *legality* of State's individual contribution to a use of force. It also does not claim to appraise the often contentious factual circumstances of the respective individual contribution.[1057] Here, the argumentative pattern used by States relating to (allegations of) interstate assistance is of interest. It is through the lens of States themselves that their positions and their underlying assumptions, whether ultimately convincing or not, are mapped.[1058]

Before delving into the survey of international practice, a general reflection is in order on the analysis' perspective and the potential impact of States' positions. As already sketched above, only practice is relevant if driven by *opinio iuris*. This requires careful analysis for each case. Still, some general observations are apposite.

The analysis is grounded on the assumption that all States respect the international legal order, and thus always seek to comply with international law. Without a specific indication of a State seeking to deviate from, or

1056 Note Article 7 ATT also does not require States to consider a risk of a violation of the prohibition to use force in their risk assessment, unlike several States had proposed, A/CONF.217/2, 10 May 2012, 11 (Austria), 37 (Germany), 43 (Ireland), 79 (Poland), 96 (Macedonia), 112 (Vietnam).

1057 E.g. it will be controversial whether and to what extent a State has provided assistance, whether it had knowledge or not, or if and how assistance has contributed to the military operation.

1058 The analysis is based on publicly available information.

actively change international law, and thus acknowledging a breach of its international obligations, a State's legal position can be understood as its interpretation of what is permissible under the *lex lata*.

Accordingly, to the extent a State provides a justification on the international level[1059] (in particular in contrast to denying the application of the norm), this not only indicates that the State thereby seeks to confirm the (breached) rule,[1060] but also that it considers it legally necessary to provide a justification. As illustrated by the ICJ in its Nicaragua judgment with view to self-defense:

> "[T]he normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful. If advanced as a justification in itself, not coupled with a denial of the conduct alleged, it may well imply both an admission of that conduct, and of the wrongfulness of that conduct in the absence of the justification of self-defence."[1061]

Not always will the justification allow to draw conclusions on the specific norm violated. Here, the availability of justifications as well as the specific conduct to be justified are relevant factors. For example, the invocation of self-defense may set out to justify not only the contribution to a use of force, but relevant acts in connection with that assistance, such as reconnaissance flights on another State's territory without that territorial State's consent. As a general rule, the invocation of the high hurdles of the trinity of justifications applicable specifically for the *ius contra bellum* points however to the application of the *ius contra bellum* framework.

Likewise, the details of States' explanations may bear legal relevance, in particular when using legal terminology or relating to relevant legal concepts. For example, the emphasis on the legality of the assisted use of force, denial of knowledge, or highlighting the nature of assistance may indicate that otherwise assistance was prohibited. While States omit the "legal heading", i.e., the precise norm they could have violated, their explanations may be skillfully tailored to avoid responsibility under the norm.

States are free to choose whether, how, or where to provide a justification or an explanation for their behavior. In view of the *ius contra bellum*, and the application of the UN Charter framework, positions expressed towards

1059 This aspect distinguishes the specific language used and justification invoked that may be motivated by national constitutional reasons.
1060 *Nicaragua*, 98, para 186.
1061 Ibid 45 para 74.

the UN bear considerable interpretative weight. This applies particularly to letters addressed to the Security Council.[1062] Statements by official representatives of the States may complement the picture of States' position.[1063]

An assisting State's non-articulation of its legal position when providing assistance neither supports nor counters a specific interpretation. Its interpretative weight is hence diminished. But importantly, it need not be equated with contestation of the legal framework. Without further indication, such silent assistance may be understood to embrace a belief in its legality.[1064]

A different inference may be drawn from States' (factual) denial of an involvement or clandestine assistance.[1065] Again, without specific legal positioning, it is neither a claim for a right to provide assistance nor does it substantiate the opposite. Yet, the decision to secretly provide assistance may be indicative of a State's concern about the legality of assistance.

Protest against another State's assistance on the other hand is in and of itself neutral, unless framed in legal terms. Crucially, the forum and the means chosen to protest may be crucial factors. Specific attention may be required when a State claims to exercise self-defense against an assisting State. This could imply that in the State's view, the assisting contribution is illegal and allows for self-defense.

Caution should also prevail in view of third States' inaction, e.g., States refraining from or limiting their assistance, or from protesting against specific States providing assistance. Here, it is crucial to determine whether States' behavior is driven by *international law*. This is in particular true for non-assisting States where it may not be easy to discern whether restraints are driven by the *ius contra bellum* framework, or rather constitutional or policy concerns or even other commitments under international law.

1062 *Nicaragua*, 105, para 200 on the relevance of letters to the Security Council. Jutta Brunnée, Stephen J Toope, 'Self-Defence against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?', 67(2) *ICLQ* (2018) 270 "From a normative perspective these statements help us understand the legal meaning of these concrete actions".

1063 See also *Nicaragua*, 41 para 64.

1064 This conclusion might be reached through several levels of argumentation: it may mean that there is no rule prohibiting the conduct, that the conduct does not fall within the scope of an existing prohibition, or that it is justified.

1065 See generally Alexandra H Perina, 'Black Holes and Open Secrets: The Impact of Covert Action on International Law', 53(3) *ColumJTransnatlL* (2014-2015); Marie Aronsson-Storrier, *Publicity in International Lawmaking: Covert Operations and the Use of Force* (2020).

Without specific indications, such behavior does not allow the conclusion that it would otherwise be prohibited.[1066]

With respect to the specific impact of conflict practice on the greater picture, it is important not to understand singular instances of conflict practice in isolation. This is true for the conflict itself; it is patterns of State practice that are of interest. It also requires assessing conflict practice against the background of the accepted legal framework, marked by the UN Charter, and abstract interpretative pronouncements on the state of the *lex lata*. This leads into the intricate field of questions on how and when State practice is an interpretation that may develop or change the *ius contra bellum*, in delimitation from a breach of accepted rules. There may be certain defining moments that affect a specific conflict's precedential value. Certain trends may solidify, and thus define the threshold for development. But ultimately, only a comprehensive assessment of international practice viewed over time will provide an adequate and solid picture of the influence of a specific conflict.

The sheer vastness of potentially relevant practice in relation to interstate assistance to a use of force inherently limits the following survey. In view of the above, it is attempted to provide both an overview of States' positions taken throughout conflicts over time and a detailed analysis of specific selected conflicts.

### 1) The Korea war 1950

That interstate assistance to a use of force does not fall into a legal void became already clear during one of the first military conflicts that tested the newly established system: the 1950 Korean War. On 25 June 1950, North Korean armed forces crossed the 38th parallel that separated North from South Korea. This prompted a US-led coalition to intervene on the side of South Korea.[1067] Both the US-led military operation and the North Korean operations received considerable foreign support short of

1066 The behavior may reveal the belief of such States that there is no prohibition to refrain from assistance, or a duty to perform a due diligence procedure. Note this is particularly relevant for positive due diligence measures. While they may support the respect for a prohibition, they cannot be understood to always be guided by a legal belief.

1067 For a detailed assessment of the legal questions Nigel D White, 'The Korean War - 1950-53' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018).

force. The relevance of assistance was mirrored in States' legal reactions, too. While the incident may point to agreement that assistance is not unregulated for members of the United Nations, the exact legal framework remained vague. This is reflected in practice concerning assistance to South Korea and the US-led military operation (a) and North Korea (b).

a) Assistance to South Korea and the US-led military operation

The Security Council played a dominant role in the first phase of the conflict for both the intervening and the assisting States. The Soviet policy of an empty chair allowed the US to embed the military operations within the newly established UN framework of collective security, albeit in a more decentralized manner than the Charter intended. After an initial response in which the Council "not[ed] with grave concern the armed attack on the Republic of Korea from North Korea" that constituted a "breach of peace",[1068] the Security Council "recommend[ed] that Member States furnish assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security."[1069] Assistance, without doubt, referred primarily to military force.[1070]

Accordingly, an *ad hoc* international coalition formed under US command to use military force against North Korea that the Security Council soon "welcome[ed as] prompt and vigorous support [...] to assist the Republic of Korea in defending itself against armed attack".[1071] 52 States participated. Several States provided troops and actually used military force.[1072] The majority of participating States, however, contributed by

1068 S/RES/82 (25 June 1950), S/1501. This finding was reaffirmed by S/RES/83 (27 June 1950), S/1511.

1069 S/RES/83 (27 June 1950), S/1511 (27 June 1950).

1070 See e.g. the debate S/PV.474 (27 June 1950) in which States referred to deployment of US sea and air forces in support of South Korean troops.

1071 S/RES/84 (7 July 1950), S/1588.

1072 17 States contributed troops: Australia, Belgium, S/1542/Rev.1; China, S/1562 (3 July 1950); Canada, Colombia, Ethiopia, France, Greece S/2231 (6 July 1951), Luxembourg, Netherlands, New Zealand, Philippines S/1584 (7 July 1950), Thailand, Turkey, South Africa, UK and USA. List from White, *Korean War*, 20. See UNYB 1951, 249-250. Most of the troop contributing States also provided transport, UNYB 1951, 250-251.

means short of force.[1073] Their contributions short of force varied and included the provision of territory as a base to conduct military operations (e.g., Japan[1074]),[1075] transportation[1076] (Denmark, Norway, Panama[1077]), medicine[1078] and foodstuff (e.g., Nicaragua, Sweden),[1079] and "farmland to supply troops."[1080] The coalition's military operation, and in particular assistance short of force, was organized through United Nations organs, notably the Security Council and the Secretary General. Yet, despite their dominant roles, this did not change the assistance's *inter-state character*.[1081] The Security Council took note of the assistance offered, created a "unified command under the United States" that was allowed to fly the UN flag, and recommended member States to make their assistance available to the US.[1082] But the operations remained under US control.[1083] Likewise, assistance was not provided to the UN. Flying the UN flag was considered primarily symbolic, representing UN endorsement. The Security Council's involvement was only intended to facilitate the organization of those differ-

1073 For an overview of States' different contributions see UNYB 1950, 224-225, 226-228, and UNYB 1951, 249-257.

1074 136 UNTS 203, A detailed and illustrative account on Japanese assistance through its ports: Ishimaru Yasuzo, 'The Korean War and Japanese Ports: Support for the UN Forces and Its Influences', 8 *NIDS Journal of Defense and Security* (2007). For an account of minesweeping activities see: Tessa Morris-Suzuki, 'Japan and the Korean War: A Cross-Border Perspective', 61(2) *AsianStud* (2015).

1075 See also Costa Rica, S/1645 (28 July 1950).

1076 Also China, S/1562 (3 July 1950). For example, the US Command reported cargo lifts of 35000 personnel, evacuated 4500 sick and wounded personnel, and moved 4500 tons of supply in 1951. See UNYB 1951, 241, 250-251.

1077 UNYB 1951, 250-251. Most of the transport was provided by the troop contributing States, but these were the States which only provided transport. Thailand provided also troops. Yet, it also provided transport means for others. The same is true for Greece, and the UK.

1078 Denmark, India, Italy, Norway, Sweden. The UK and the US had also troops, so they provided this for themselves, but also for other participating States, UNYB 1951, 251.

1079 UNYB 1950, 224-225, 226-228.

1080 Panama, S/1673 (7 August 1950), UNYB 1951, 251.

1081 In fact, some even viewed the operation not as a Security Council 'authorized' operation, but a mission of collective self-defense.

1082 S/RES/84 (7 July 1950) para 2, 3, 5.

1083 Third Report of the Special Rapporteur Roberto Ago, A/CN.4/246 and Add.1–3, in ILCYB, 1971, vol II(1), 272 para 210 with further references.

ent forms of assistance.[1084] The same is true for the fact that the UN Secretary General coordinated and channelled the assistance.[1085] It remained the USA that called for assistance from its allies,[1086] and that authorized, in its function as unified command, the respective contributions.[1087] This is further exemplified by the fact that treaties governing assistance were concluded not with the UN or the Security Council, but among States themselves.[1088]

Without exception, assisting States provided legal justification for their contribution. Essentially, they advanced two reasons for the legality of their actions.[1089]

States relied on the Security Council's call for assistance in SC Res 83 (1950) when notifying their contribution. This was true for troop contributing States, irrespective of whether they had placed the troops at full disposal of the US.[1090] It also applied to States that exclusively contributed by means short of force,[1091] which some States were eager to explicitly distinguish

1084 S/PV.476, 3 (UK). Also reflected in draft resolution S/1587, and final resolution para 1 (welcoming support), 2 (noting offers of assistance), 3 (creating a unified command).

1085 S/1619 (21 July 1950).

1086 See e.g. Belgium's statement S/1542/Rev.1 (29 June 1950).

1087 E.g. Agreement concerning assistance to be rendered by a German Red Cross Hospital in Korea (12 February 1954) 223 UNTS 153, Article I (2). States hence saw the US as party to the conflict (in light of Article 27 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces).

1088 E.g. 136 UNTS 203. 177 UNTS 233 (Netherlands). See also Derek W Bowett, George Paterson Barton, *United Nations Forces: A Legal Study of United Nations Practice* (1964) 456. This was different than with UN peacekeeping forces, where the UN was contracting partner. States were saying that they were cooperating with the States responsible for the operations, e.g. Chile S/1556 (3 July 1950).

1089 For an overview on the different readings of practice: White, *Korean War*, 31-34. It was controversial if the US-led forces operated on a basis of collective security or collective self-defense. It is not necessary to revisit this discussion here.

1090 Troop contributing States: e.g. Belgium: S/1542/Rev.1 (29 June 1950); Netherlands: S/1526, S/1570: interesting side note is that the US then again supported Dutch troops: see 177 UNTS 233; UK S/1515 (29 June 1950). There were also discussions about Japanese volunteer forces, but ultimately, there was no such request, Nam G Kim, 'US-Japanese Relations During the Korea War' (Doctor of Philiosophy, University of North Texas 1995) 69-75.

1091 Assisting States: Brazil S/1525 (29 June 1950): assistance in terms of Article 49 UNC; Chile S/1556 (3 July 1950): regular and adequate supply of copper, saltpeter, and other strategic materials; Cuba S/1574 (5 July 1950); Denmark, S/1572 (5 July 1950): medicinal preparations at expense of Danish government; Ecuador S/1560 (3 July 1950); Greece S/1546 (1 July 1950), S/1578 (6 July 1950): export embargo;

from the use of force and the provision of troops.[1092] The Security Council's recommendation was the underlying basis for States' contributions. For example, Norway offered "tonnage for transportation purposes". It repeated the Council's recommendation and then held that it "*accordingly* is prepared to take such measures as may be found desirable in order to assist the South Korean Government."[1093] Moreover, contributing States, whether assisting by or without force, maintained a narrative of a North Korean unprovoked armed attack against South Korea.[1094]

Irrespective whether States advocated for an "authorization" or a "recommended and endorsed collective self-defense", they suggested that under the present circumstances, assistance was permissible under international law. Crucially, States' reaction indicated that their contribution was lawful *because* of the authorization or self-defense-situation.[1095]

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Japan 136 UNTS 203-208 (8 September 1951): facilities (such as ports, railway transport) and services (such as mine sweeping of old World War II mines, transport, technicians) (explicitly limited to UN members participating in UN action) for details on the support provided see Kim, *US-Japanese Relations*, 76 transport and minesweeping; Lebanon S/1585 (7 July 1950): non-assistance to North Korea; Nicaragua S/1573 (5 July 1950): foodstuff and personnel if necessary; Norway S/1576 (5 July 1950): transportation mechanism; Panama S/1540 (30 June 1950), S/1577 (6 July 1950), S/1673 (7 August 1950): bases, free passage, transport; Philippines, S/1584 (7 July 1950): arms, tanks, medicine, foodstuff (and volunteers); Sweden, S/1564 (3 July 1950): hospital unit; Syria S/1591 (8 July 1950); Thailand S/1547 (1 July 1950) foodstuff; Uruguay S/1516 (29 June 1950), S/1569 (5 July 1950).

1092 E.g. Sweden S/1564 (3 July 1950). See also Ecuador in S/PV.523, 12 describing the other States as "accomplices" rather than perpetrators when holding: "My delegation, I repeat, cannot believe that the Peking Government knows the United Nations as little as to believe that approximately fifty States - I am deliberately not counting the permanent members of the Security Council - *should wish to be accomplices to a preposterous scheme of aggression* against the Communist Government, or that they should *lend their assistance to imagined - and, of course, non-existent - ventures of conquest*." See also S/RES/84 (7 July 1950) para 3, in which the Council referred to "military forces and other assistance".

1093 S/1576 (5 July 1950) emphasis added.

1094 States also continued to support this narrative also in reaction to criticism: See e.g. S/2112 (2 May 1951) for a report in which the intervening States provided "additional corroboration of the reports of the United Nations Commission on Korea to the effect that the unprovoked attack on the Republic of Korea on 23 June 1950, was thoroughly planned in advance by the North Korean regime."

1095 Notably, some States even sought to discharge their obligations under the UN Charter: Chile S/1556 (3 July 1950); China S/1521 (29 June 1950); Costa Rica S/1645 (28 July 1950); Philippines S/1584.

The same parameters were considered relevant by those States opposing assistance to South Korea. The military operation met with fierce critique and was denounced to be contrary to international law, in breach of Article 2(4) UNC.[1096] Naturally, the criticism was primarily directed against the USA as leader of the intervening coalition and the main actor using force.[1097] But other States implicated in the military operation were target, too, for example, when States referred to the United States and its accomplices.[1098] Notably, criticism did not relate to the legal framework applicable to assistance. States did not raise doubts that assistance may not be justified in view of a Security Council resolution or collective self-defense. Instead, criticism was directed against the legality of the resolution and the application of self-defense to the facts on the ground.[1099]

With respect to situations in which assistance is *not* permissible, only limited conclusions may be drawn from support to the coalition's intervention. But it is clear that assistance to authorized force by member States is in accordance with international law – at least if the Security Council "recommends" the use of force and assistance to that use of force.

In contrast to the military assistance described above, States appeared to apply a different legal regime of "humanitarian assistance" provided to *South Korea* that sought to mitigate the effects of the war.[1100] Thereby, States aimed at providing relief and rehabilitation, rather than facilitating South Korea's ability to defend itself. It was directed towards supporting South Korea's economic re-development, and the South Korean civilian population. Such contributions included food, clothes, shelter, medical care, tents

1096 S/PV.495, 18 (USSR). In this respect it is also irrelevant that the USSR viewed the conflict as a civil war, and not an interstate war (see e.g. UNYB 1950, 232, 262). It was not about the assistance to South Korea, but to the assistance to the US-American use of force.

1097 See White, *Korean War*, 20.

1098 E.g. A/1782, 4 (23 February 1951) (Central Peoples Government of the Peoples Republic of China). Note also the Soviet condemnation of American involvement in South Korea's military operations, before the USA intervened by force. The USSR claimed that South Korea had attacked with assistance of US military advisors, and were part of "aggressive plans" S/1603.

1099 E.g. A/C.1/SR.429 para 21 (USSR).

1100 S/PV.479 (31 July 1950): France, Norway, and UK introduced the draft: S/1562.

for practical housing, and clothing for the suffering Korean population.[1101] In addition, a rebuilding program was set up.

From the outset, States drew a line between both types of assistance.[1102] Humanitarian assistance was not viewed to fall under the assistance called for under Resolution 83 (1950). It was not entangled with any military considerations. Even those that opposed "the lawless aggression […] by all means"[1103] acknowledged that an "equally important task" was "to relieve the hardship and privations which are inflicted upon the victim of the crime".[1104] Given the different direction of assistance, States "all agree[d] that military operations and the problem of civilian relief and support need to be integrated by placing responsibility for both in the same authority [i.e., the Unified Command]."[1105] The fact that such assistance was provided through the same channel as military assistance, i.e. through the Unified Command, was not considered to alter the humanitarian character. Instead, it was viewed as the "most practical method of handling relief".[1106]

States neither invoked an "authorization" or recommendation by the Council nor collective self-defense for humanitarian assistance. While the narrative of aggression and unlawful armed attack against South Korea as victim continued to prevail,[1107] it was not legally decisive for States to justify their humanitarian contribution. In fact, the inclusion of such references prompted protest.[1108] Likewise, it does not surprise that humanitarian assistance to (South) Korea did not spark the fierce protest that the military assistance to South Korea and the assistance to US military operations triggered.[1109] For example, the USSR participated in the subsequent meetings of the Economic and Social Council, and did not protest – yet emphas-

1101 S/PV.479, 2 (Korea was asking for this), 6 (China thinking about offering rice). This was also what the Unified Command then requested in 1950: UNYB 1950, 269, and what States offered. See also UNYB 1951, 251-257.
1102 E.g. UNYB 1951, 249-257.
1103 S/PV.479, 3.
1104 Ibid 3-5.
1105 Ibid 4.
1106 Ibid 5. For the procedure of the coordination of relief activities UNYB 1950, 268-269, 271.
1107 E.g. S/RES/83 (1950) Preamble; for the discussions in the Economic and Social Council: UNYB 1950, 268.
1108 See e.g. UNYB 1950, 273; UNYB 1951, 232.
1109 Yugoslavia abstained because of its general attitude to the war S/PV.479 (31 July 1950), 7.

ized that "assistance should not serve as a means for foreign economic and political interference in the internal affairs of Korea.[1110]

### b) (Non-)Assistance to North Korea

Just as the Security Council called for assistance to South Korea, it also addressed assistance to North Korea. Already within the very first resolution in reaction to the North Korean invasion of South Korea, the Council

> "call[ed] upon all Member States to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities."[1111]

Such a call was echoed and reaffirmed in other Security Council resolutions and – once the USSR had resumed its place in the Security Council – UNGA resolutions.[1112]

The resemblance in the appearance of those calls to Article 2(5) UNC was no coincidence. Although Article 2(5) UNC may have found only cautious reference in the debates,[1113] States advocating for a non-assistance clause viewed it as essential element for protecting and facilitating the UN recommended enforcement action.[1114] Accordingly, the legal basis underlying such calls was not exclusively the illegality of North Korea's "armed

1110 UNYB 1950, 272, and 273.

1111 S/RES/82 (25 June 1950) para III. There were no discussions on the meaning of that resolution. All the drafts proposed included the non-assistance clause: S/1497-S/1501. The only State which eventually abstained, Yugoslavia, argued that the Council should hear North Korea's position before taking action: S/1500.

1112 S/RES/82 (1950), para III; A/RES/498 V (1951) para 4, 5.

1113 But see A/C.1/SR.428 para 57 (Iraq); Japan Treaty, 214 UNTS 51, preamble; 136 UNTS 203, 136 UNTS 45, Article 5. Cautious reference: A/C.1/SR.426 11 (USA). Interestingly, the UN repertory of practice (1945-1954) vol 1, Articles 1-2, 14 para 26 available at: https://legal.un.org/repertory, cites the resolutions as practice relating to Article 2(5) UNC.

1114 See the draft resolutions, and States' explanations of their vote. See e.g. USA in S/PV.495, 6 (5 September 1950) on its draft resolution S/1653. This is also reflected in the resolutions themselves: see e.g.: A/RES/498 V (1951) para 1, see also para 2, the UNGA being concerned about its finding that China was "engaging in hostilities against United Nations forces." and in the debates: e.g. A/C.1/SR.424 para 3 (Uruguay), A/C.1/SR.430 para 6 (Ecuador), para 70 (Australia).

attack" as determined by the Security Council.[1115] It was the expectation of solidarity with UN (endorsed) enforcement action required under the Charter that was tied to a Security Council determination under Article 39 UNC.

In this light, the support of the resolutions for a general rule of non-assistance to a violation of the prohibition to use force may not be as unambiguous as it is often understood.[1116] This, of course, does not exclude the parallel presumption of such a general rule. In fact, States called for non-assistance not only to facilitate UN enforcement action, but for example to "isolate the conflict" and "prevent its spread to other areas."[1117] But the fact remains that such broad resolutions found no majority. Instead, they were associated with attacks against "UN forces".

The factual background to the calls for non-assistance were allegations of clandestine support by the USSR and the People's Republic of China (PRC) to North Korea. Throughout the debates, States drew attention to the circumstance that the North Korean "aggression" was committed with the "encouragement, participation and support of the authorities in both Peking and Moscow", in particular through trained military personnel and military material.[1118]

Notably, unequivocal and direct condemnations of this behavior as *illegal* in violation of a specific norm were rare.[1119] States preferred to address such behavior through the UN framework, which had not least the added benefits of greater legitimacy and increased legal certainty.[1120] But that assistance was permissible otherwise – i.e. without UN resolution – would be a premature conclusion.

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1115 It is controversial whether the initial conflict was an interstate or rather a civil war. The latter reading would further suggest such an understanding. On this question White, *Korean War*, 30; Corten, *Law against War*, 331.

1116 But see e.g. Aust, *Complicity*, 109; Pacholska, *Complicity*, 138.

1117 E.g. the USA introduced a draft resolution, S/1653, in the 479th meeting and discussed in 495-497th meeting, that would have called for upon "all States to refrain from assisting or encouraging the North Korean authorities and to refrain from any action which might lead to the spread of the Korean conflict to other areas and thereby further endanger international peace and security." E.g. S/PV.495, 6 (USA), 11-12 (France), 13 (Norway). See also a joint draft resolution, S/1894 (10 November 1950).

1118 S/1796, 6-7 (18 September 1950); S/PV.479, 7; A/C.1/SR.430 para 54 (USA). S/PV.502, 23. On PRC, e.g. S/1796, 10: conclusion 5.

1119 E.g. A/C.1/SR.428 para 57-58 (Iraq, referring to a violation of Article 2(5) UNC as the PRC was helping North Korea whom the UN had branded as aggressor).

1120 In particular based on the determination of the aggressor.

Moreover, several States informed the Security Council that they would refrain from assisting North Korea. The exact legal reason for doing so remained again unclear. Some States stressed that their decision not to assist was a reaction to the aforementioned calls by the Security Council. For example, Greece imposed an export embargo against North Korea.[1121] Sweden severed any diplomatic, commercial, or maritime relationship with North Korea.[1122] While they shared the determination of a North Korean aggression, their non-support does not allow for conclusions about a non-assistance rule without UN action.

Others were less ambiguous in promoting a general prohibition of assistance to an aggressor. For example, Lebanon explained that it would "at all times refrain from rendering any assistance whatsoever to any aggressor."[1123] Syria similarly stated that "[d]esirous of conforming to the principles and provisions of the United Nations Charter, it will always refrain from giving assistance to any aggressor."[1124]

UNGA Resolution 498 (V) adopted on 1 February 1951 seemed to take this view even a step further. The resolution concerned the intervention of the PRC in Korea. The UNGA found i.a. that the PRC

> "by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations force there has itself engaged in aggression in Korea."[1125]

On 25 October 1950, the PRC had intervened in addition to its previous support, which led to several hundred thousand troops known as the People's Volunteer Army fighting on the side of North Korea.

The UNGA thereby had taken up a matter under the controversial Uniting for Peace regime[1126] that had not found agreement in the Security Council. In the debates before the Council, States had held China responsible for "large-scale assistance in the form of men and matériel furnished

1121 S/1578 (7 July 1950).
1122 S/1564 (3 July 1950).
1123 S/1585 (7 July 1950).
1124 S/1591 (8 July 1950).
1125 A/RES/498 (V) (1 February 1951), operative para 1, adopted by 44 yes, 7 no, 8 abstentions, 1 non-voting.
1126 In the debates several States maintained that the UNGA's finding was ultra vires, as it was the Security Council not the UNGA to make such determinations: e.g. A/PV.327 para 30 (Byelorussia), para 75 (India). The PRC also stressed this in its reaction to the resolution, A/1782 (23 February 1951), 3, 5.

to North Korea."[1127] The USSR had vetoed a draft that called upon states and authorities responsible for military action to "refrain from assisting or encouraging the North Korean authorities, to prevent their nationals or individuals or units of their armed forces to give assistance to North Korean forces, and to cause the immediate withdrawal of any such nationals, individuals or units which may presently be in Korea."[1128]

The UNGA resolution is remarkable in that it went beyond previous calls of non-assistance and expressions of illegality. It specifically characterized the Chinese contribution in and of itself as 'aggression'. Notably, it thereby distinguished between "engagement in hostilities" and "aid and assistance". The resolution did not, however, resolve the relationship between the two. In other words, it remains unclear whether assistance in and of itself sufficed, or only in cumulation with an engagement in hostilities.

The First Committee had elaborated the resolution based on an American draft.[1129] The debates on this paragraph that was already at that time identified as the resolution's kernel,[1130] do not, however, bring further clarity. The debates were dominated by the question of the (political) wisdom of making such a finding for promoting ongoing efforts of peaceful settlement.[1131] But it met little opposition that such a determination may have legal relevance.[1132] Also, there was remarkably little debate on the qualification of the specific acts as aggression.[1133] Some States challenged

1127 E.g. S/PV.530, 10 (Yugoslavia).

1128 S/1894 and S/PV.530.

1129 A/C.1/654 (20 January 1951).

1130 E.g. A/PV.327 para 12 (USSR). See also A/C.1/SR.433 para 50 (Lebanon), A/C.1/SR.437 para 20 (UK).

1131 A/C.1/SR.435 para 15 (Burma). See in detail Leland M Goodrich, 'Korea: Collective Measures against Aggression Document No. 494 - October 1953', 30 *IntlConc* (1953-1955) 147-149.

1132 Despite the fact that the resolution was drafted in the First Committee, States seemed to widely agree that the resolution's finding was a determination based on law. E.g. A/C.1/SR.432 para 25 (Canada). In particular, several States stressed the determination's relevance for further action taken by the UN, which eventually followed by resolution 500 (V). This was widely used as a counter-argument as those States feared that this may serve as a pretext to extend military operations to China, too. See for the view that it is a 'moral' condemnation, A/PV.327 para 48, A/C.1/SR.431 para 24 (UK).

1133 E.g. A/C.1/SR.430 para 21 (Venezuela "question of urgency not of substance"); para 79 (Australia "inescapable conclusion"); A/C.1/SR.433 para 39 (Union of South Africa). But see A/C.1/SR.433 para 20 (Poland) arguing that irrespective of the numbers of volunteers, "the action of volunteers was not considered as an act of intervention"; A/C.1/SR.428 para 16-18 (Dominican Republic, viewing

the determination as they saw the US-led coalition to be aggressor, and PRC to act in self-defense.[1134] But in general, States considered the issue a question of urgency and fact, not of substance.[1135]

In their description of the relevant facts, States referred to both, assistance to North Korea by furnishing manpower and military matériel, and deploying its own organized armed forces to Korea waging war against 'UN forces'.[1136] Still, the fact remains that military supplies by the USSR, although repeatedly target of protest, were not considered aggression.[1137] Also, the determination as aggression was only made once the PRC openly intervened by force, at a time where the recipient of assistance was already denounced by the Security Council as aggressor[1138] and was actively fighting against 'UN forces'.[1139] While this, of course, may have had a political background, it further adds to the uncertainty under what circumstances assistance was considered an act of aggression. In this respect, two qualifications to the UNGA's determination deserve specific attention. First, the assisted actor was "already committing aggression".[1140] This may imply that the point in time when assistance is provided, and the legality of the as-

PRC's invasion as aggression under the Litvinov definition). A/C.1/SR.435 para 32 (India) questioning the PRC's aggressive intentions, but suggesting that it defended its territorial integrity), A/C.1/SR.435 para 64 (Columbia) responding to India that PRC failed to advance a justification.

1134 This was also the PRC's argument, A/1782.

1135 Agreeing that the paragraph was in accordance with the facts: A/C.1/SR.435 para 22 (Iceland) para 42 (Norway); A/C.1/SR.430 para 6 (Ecuador), para 79 (Australia); A/C.1/SR.431 para 33 (Philippines), para 43 (New Zealand); A/C.1/SR.435 para 8 (Lebanon); A/C.1/SR.435 para 70.

1136 E.g. A/C.1/SR.42 para 48 (Belgium), A/C.1/SR.430 para 6 (Ecuador) para 54-56 (USA), para 76 (Australia), A/C.1/SR.431 para 24 (UK stressing that PRC's involvement may have previously been unclear, but now that it is actively taking part, it is reprehensible), A/C.1/SR.433 para 11 (Bolivia). Critical of the factual basis: UNGA A/PV.327 para 12 (USSR: falsely and without any foundation), para 61-62 (Ukraine); A/C.1/SR.433 para 18-19 (Poland).

1137 But see A/C.1/SR.432 para 23 (Canada referring to "the Soviet Union's complicity").

1138 For example, Canada stressing this aspect ("helping those already designated by the United Nations as aggressors"), A/C.1/SR.437 para 16. See also A/C.1/SR.428 para 42 (Columbia).

1139 A fact stressed for example by A/C.1/SR.432 para 40 (Brazil), para 53 (Israel), para 79 (Greece).

1140 A/C.1/SR.432 para 24 (Canada): The resolution "did not of course deal with a new and separate aggression requiring new and separate action but rather with an old aggression in which communist China had been participating." Cf also A/C.1/SR.434 para 41 (France).

sisted act is decisive. Second, 'aid and assistance' was considered 'direct'.[1141] Proximity in a temporal and a causal manner seemed hence to be relevant factors to the determination.

Accordingly, while the exact contours of the footprint of the determination may remain subject to questions, the inescapable fact remains that the resolution introduced 'aid and assistance' to the concept of aggression in the UN Charter era: as a means to commit or at least a relevant factor in determining an act of aggression.

States that were accused of providing assistance to North Korea did not challenge the abstract parameters under which assistance was discussed.[1142]

The USSR argued primarily on a level of facts. It emphasized that since the beginning of the fighting, it had not provided any assistance.[1143] Moreover, it held that "[i]t is not surprising that the Korean army is well equipped, as it has been able to equip itself from captured booty and, of course, from arms sold by the USSR when it withdrew its troops from Korea in December 1948."[1144] Also, the USSR viewed the USA, not North Korea, as aggressor and violator of the Charter,[1145] a view the PRC shared. With respect to its contribution to North Korea, the PRC made a two-sided argument.[1146] First, it emphasized that it was not official military troops that supported North Korea, but the Chinese people.[1147] In this respect, in its view, "there [were] no grounds for hindering the dispatch to Korea of volunteers wishing to take part, under the command of the Government of the Korean People's Democratic Republic, in the great liberation struggle of the Korean people against United States aggression."[1148] This "sincere desire [was] absolutely natural, just, magnanimous and lawful".[1149] Second, the PRC alluded to self-defense. It viewed US operations as aggression not only against North Korea, but also Chinese territory.[1150] Against this background, it did not prevent the "volunteers" to assist North Korea.

1141 Stressing this aspect also A/C.1/SR.428 para 44 (Cuba).
1142 Note that they did challenge however the legality of the UN resolutions themselves in the concrete case.
1143 According to the USA: S/1796, 6.
1144 USSR responds in S/PV.502, starting in 29, relevant in 35.
1145 White, *Korean War*, 25.
1146 Its position on its military intervention on 29 November 1950 is less clear, ibid 27-28.
1147 S/1902 (15 November 1950), 4.
1148 Ibid 3.
1149 Ibid.
1150 S/1722, S/1743, S/1902, 4. See also S/PV.530 19 (PRC). See also UNYB 1951, 260.

2) The Suez crisis 1956

In the course of the Suez-Crisis in 1956, the UNGA recommended "that all Member States refrain from introducing military goods in the area of hostilities and in general refrain from any acts which would delay or prevent the implementation" of the resolution.[1151] This incident illustrates the connection between the non-assistance obligation and the enforcement measure taken by the UN. In this case, it was a call for a cease-fire that should not be obstructed.[1152]

Unlike in the Korea incident, the UN did neither identify a clear aggressor nor an unlawful conduct. It merely noted that "France and the [UK] are conducting military operations against Egyptian territory".[1153] This may explain why the UN called States to refrain from introducing military goods *into the area of hostilities*, rather than to a specific violator. Also, the measure taken by the UN was broader than in Korea, as it was not directed against one isolated State only. This again indicates that the non-assistance obligation is concerned only with strengthening the UN action.

3) American and British intervention in Lebanon and Jordan 1958

In July 1958, the United States and the UK deployed to Lebanon and Jordan in reaction to the request of the respective governments.[1154] In the preparatory stage of the use of force, other States were involved. The Federal Republic of Germany permitted the US to use airbases in Frankfurt and Fürstenfeldbruck to airlift American troops to Lebanon. Italy allowed a US troop carrier plane to take off from Capodichino airport. Israel granted overflight rights to the US. Austria, primarily guided by neutrality considerations, took an ambiguous approach, ultimately tolerating the overflight of

1151 A/RES/997 (ES-I) (2 November 1956).
1152 Ibid para 1.
1153 Ibid preamble para 2.
1154 See in detail: UNYB 1958, 36-51, Quincy Wright, 'United States Intervention in the Lebanon', 53(1) *AJIL* (1959). For the US position on its intervention in Lebanon: S/PV.827 (15 July 1958), para 34-36, 43-45 (USA), para 87 (UK) (on the US intervention). On the British intervention in Jordan: S/PV.831 (17 July 1958), para 28-30 (UK), para 35 (USA).

American aircraft.[1155] Other States, e.g., Greece, refused to grant overflight rights.[1156]

Not only the American and British use of force, but also the assistance sparked protest, in particular by the USSR. The USSR denied that the use of force could be based on a valid invitation.[1157] On that basis, it protested against assistance. It called on Germany and Italy not to allow their territory to be used for aggression, and to "take effective measures" to ensure that their territory is not used for the purpose of aggression.[1158] Moreover, the USSR accused Israel of becoming a "direct accomplice in the aggressive actions of the United States and Britain."[1159] The USSR also protested against Austria's contribution, yet only as violation of the law of neutrality. In light of Austria's at that time underdeveloped military, the USSR even proposed to defend Austrian neutrality.[1160]

None of the assisting States had reported their contributions to the Security Council. But they denied the Soviet allegations of complicity – although they did not challenge the conceptualization of the law governing such assistance. Germany, for example, held that as the use of force was based on a request for assistance, there is "no doubt that Germany's allies were not guilty of aggression in the Near or Middle East," and hence the Soviet claim "lacked any foundation." Germany further added that "it had never tolerated or promoted acts of aggression. It had never placed its territory at the disposal for such actions. It would not do so in accordance with the obligations under general international law accepted by Germany […]."[1161] Italy argued along similar lines.[1162] Israel similarly responded that its authorization of overflight was limited in time, and only issued because Jordan's existence was threatened by an external attack.[1163]

1155 For the background of a fascinating diplomatic thriller behind the decision see Walter Blasi, 'Krise um Österreichs Luftraum: Politische Aufwallungen und Verstimmungen im Zuge der Libanonkrise des Jahres 1958', 83(3) *ÖMZ* (2008).
1156 Ibid 311.
1157 On the US intervention in Lebanon: S/PV.827 (15 July 1958), para 113-118. On the UK intervention in Jordan: S/PV.831 (17 July 1958), para 61-81.
1158 Quigley, *BYIL* (1987) 98.
1159 Ibid 84.
1160 Blasi, *ÖMZ* (2008) 314-315.
1161 Helmut Alexy, 'Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1958', 20 *ZaöRV* (1959-1960) 663-664. Translation by the author.
1162 Felder, *Beihilfe*, 182.
1163 Ibid.

4) The U2 incident 1960

On 1 May 1960, the Soviet Union shot down an American high-flying reconnaissance airplane, a U2. The U2 had been transferred from Incirlik Air Base in Turkey to Peshawar airport in Pakistan. From there, the aircraft had been intended to cross Soviet territory, gather accurate information on Soviet weapon projects, and land at an airfield near the Norwegian town of Bodø. Over Sverdlovsk in the USSR, a Soviet surface-to-air missile shot down the plane, after a 2000 km flight over Soviet territory.

The USSR labelled the American reconnaissance flight as an "aggressive act".[1164] While the legal qualification a "use of force" or an "act of aggression" may be debatable,[1165] suffice it for the present purpose that the USSR made its arguments on that basis.[1166]

The USSR protested against Norway, Pakistan, and Turkey for authorizing of the US to use their territories for such missions. In a speech, Nikita Khrushchev held that "[t]he governments of the three countries must clearly realize that they were accomplices in this flight because they permitted the use of their airfields against the Soviet Union. This is a hostile act on their part against the Soviet Union."[1167] Hence, the USSR held that these countries bear responsibility.[1168] The USSR even threatened retaliatory measures against the three States and reserved the right to initiate military

1164 S/4314 (18 May 1960); S/4315 (19 May 1960); S/4321 (23 May 1960). See also The U2 Incident 1960, https://avalon.law.yale.edu/20th_century/u2.asp.

1165 Several States challenged the qualification as "act of aggression", S/PV.858 (24 May 1960), 8-11 (France), 25 (UK), 66 (China), 44-45, 48-49 (Argentina); S/PV.589 (25 May 1960), 7, 9, 12-23 (Tunisia). For more details about the debate see Quincy Wright, 'Legal Aspects of the U-2 Incident', 54(4) *AJIL* (1960) 846-847; Ki-Gab Park, 'The U2-Incident - 1960' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 70-71, 73-74.

1166 Note that this distinguishes this case from the widely cited "Observation balloon incidents". The USSR protested against the US violating its sovereignty by observation balloons. It also formally protested against Germany and Turkey, from which the balloons were allegedly launched. Germany stated that the US had assured that it will prevent these balloons from intruding Soviet territory. Turkey suggested that the American balloons flying over the USSR did not violate international law. Quigley, *BYIL* (1987) 84-85; Helmut Steinberger, 'Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1956', 18 *ZaöRV* (1957) 723-724.

1167 Keesing's Contemporary Archives 1959-1960, vol 12, 17425.

1168 For Norway: "not inconsiderable share of the responsibility for the aggressive acts". For Turkey: "grave responsibility for the possible dangerous consequences of such actions."

measures to render harmless any base that is used for aggressive actions against the USSR in the future.[1169] In the Security Council, the USSR unmistakably held:

> "[A]ny aggressor who dares again to intrude into the territory of the Soviet Union will be fittingly repulsed, as will the accomplices who, voluntarily or involuntarily, aid and abet him. The Soviet armed forces have clear and simple instructions to strike a blow against the aggressor and his accomplices who dare to infringe the sovereignty of our country and the inviolability of its frontiers."[1170]

All three assisting States accepted that their territory was implicated in the intrusion. None of them claimed that the assisted act was no act of aggression, or more generally in accordance with international law. But they denied having authorized the use of their territory for the specific operation, suggesting that the use of their territory by the US occurred without their knowledge and will.[1171] For example, Pakistan instituted an inquiry to ascertain whether the U-2 incursion had taken off from Pakistan and sent a protest note to the US.[1172] Norway likewise sent a letter of protest to the US. Moreover, it held that, in the specific case, it had denied the authorization of landing rights and, in general, had requested the US not to repeat such flights, and that its permission to use Norwegian bases and airspace was conditioned on the US not overflying the USSR.[1173] Turkey argued that it had "never authorized any American aircraft to fly over Russian territory for reconnaissance or any other reason."[1174] Thereby, it did not answer to the Soviet protest in this particular incident that was primarily concerned with the Turkish *preparatory* contribution. But in any event, it suggested it did neither have knowledge nor intention to support such operations.

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1169 E.g. Olav Riste, *The Norwegian Intelligence Service, 1945-1970* (1999). Hafeez Malik, *Soviet-Pakistan Relations and Post-Soviet Dynamics, 1947–92* (1994) 171. See for the notes of protest: CIA, Information Report, Soviet Version of the U-2 incident, https://www.cia.gov/library/readingroom/docs/CIA-RDP80T00246A074400420001-9.pdf.

1170 S/PV.860 (26 May 1960), 47. See also 61 where the USSR compares the UNSC to a "court of law".

1171 See also Wright, *AJIL* (1960) 850.

1172 Malik, *Soviet-Pakistan Relations and Post-Soviet Dynamics, 1947–92*, 171-172.

1173 Park, *U2-Incident*, 69.

1174 Nasuh Uslu, *The Turkish-American Relationship between 1947 and 2003: The History of a Distinctive Alliance* (2003) 77.

In general, the USSR seemed to accept such lines of defense against the allegations of complicity. Notably, it based its accusations on the fact that these States had 'allowed' the use of their territory. In this case, the USSR did not consider the assurances however sufficient. Instead, the USSR considered the States to 'allow' the use of their territory, thus suggesting that States had to take effective measures to prevent such action. It rejected Pakistan's protest to the US as "insufficient" as the US retained the "military bases under their own exclusive control."[1175] Also, it questioned what the repeated Norwegian assurances were worth, if the territory was used in any event for aggressive flights. With respect to Turkey, the USSR protested against "giving the opportunity to foreign warplanes to use Turkish territory for preparing and carrying out intrusions into the Soviet Union."[1176] In all three cases, the USSR was however also eager to underline that it had warned against that behavior in advance, and that such behavior had taken place previously.

This incident suggests that first, States generally agree that the permission to use one's territory for an act of aggression may lead to responsibility for that act. On what constitutes a "permission" however, there was some disagreement. For the USSR, this depended on the context. Assurances may protect from responsibility as 'accomplice', yet not if States created a risk of misuse that has previously repeatedly realized and that they – despite warning and protest – did not prevent with sufficient measures. On the other hand, the three assisting States seemed to believe that the limitation of their agreement on the use of the territory was enough to discharge claims of responsibility for complicity. Notably, that territorial States were required to prevent an act of aggression was not controversial as such.[1177] The disagreement, however, only concerned the extent of the measures necessary to discharge claims of complicity.

Second, the USSR suggested that self-defense may be exercised against "accomplices". It is noteworthy that in this respect, unlike for establishing the *responsibility* of the accomplices, the USSR did not make the same

1175 Malik, *Soviet-Pakistan Relations and Post-Soviet Dynamics, 1947–92*, 172. See also the protest note, in which it was concerned with the general loaning of territory to the US.

1176 CIA, Information Report, Soviet Version of the U-2 incident, https://www.cia.gov/library/readingroom/docs/CIA-RDP80T00246A074400420001-9.pdf, 41.

1177 For a similar observation see Wright, *AJIL* (1960) 850. Interestingly, he sees the prohibition *a fortiori* included in States' duty to prevent the initiation from their territory of privately organized military enterprises.

detailed arguments but threatened to use force against any assisting State, irrespective of whether the assistance was voluntary or involuntary. Still, it is worth bearing in mind the general context of this claim: although the mere statement taken in isolation may suggest so, the USSR did not claim a right to self-defense against any assistance (even involuntary) to an intrusion of territory. It claimed a right to self-defense against repeated assistance ("again"), that was directly contributing to an act of aggression that meets the required threshold.[1178] Not any toleration hence already allowed to resort to force.

5) Stanleyville 1964

In 1964, Belgium and the USA launched an evacuation operation to rescue nationals abroad who were *de facto* taken hostage by the Popular Liberation Army Forces in the Congo. American Hercules transport planes dropped Belgian paratroopers who secured the airfield and freed the hostages. The Congolese government had authorized the Belgian and American governments to render the "necessary assistance in organizing a humanitarian mission to make it possible for these foreign hostages to be evacuated."[1179]

Several States challenged the sincerity of the intervening States' motives, and hence viewed the operation as not only a violation of international law, but also an aggression.[1180] In that light, assistance received international attention, too.

It is noteworthy that States did not distinguish between the different contributions of Belgium and the USA. While Belgian paratroopers were on the ground and engaged in hostilities, the US merely provided trans-

1178 Note that with respect to Turkey the threats of retaliatory measures were not made in case of preparatory contribution (as in the present case), but in case of the "use" of the base for aggressive acts. In fact, some previous flights had launched from Turkish territory, Uslu, *Turkish-American Relationship*, 76; Wright, *AJIL* (1960) 851 argues that the threshold of armed attack was not met.

1179 S/6060 (24 November 1964).

1180 Robert Kolb, 'The Belgian Intervention in Congo - 1960 and 1964' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 79-80; Tom Ruys, 'The 'Protection of Nationals' Doctrine Revisited', 13(2) *JCSL* (2008) 241; Corten, *Law against War*, 293-294; Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56 *BYIL* (1986) 217-218.

portation. However, Belgium,[1181] the Congo,[1182] and in particular the USA itself,[1183] considered the operation as a joint Belgian-American operation. Likewise, third States commenting on the operation did not make a distinction between the US contribution.[1184] To the extent they made legal arguments, they applied them to both, Belgium and the USA.

This is in particular striking as States behaved differently with respect to the United Kingdom's role in the operation. The UK had provided facilities on Ascension Island in connection with the operations. The UK was, however, widely considered as an *assisting*, rather than an intervening State – a fact that was also reflected in legal statements.

Several States specifically pointed to the British "assistance".[1185] Some States even characterized the British contribution in legal terms. For ex-

1181 S/6063 (24 November 1964). S/6067 (26 November 1964): "in collaboration with" the US. Note however that the Belgian letter described the US contribution to be carrying the Belgian paracommandos.

1182 See S/6060 (24 November 1964), where Congo did not distinguish between the Belgian and the US contribution. Interestingly, however, in the Congolese letter the US and Belgium attached to their letters, the Congo issued two authorizations: one to Belgium to send an adequate recue force", and one to the US by which it "authorize[d] the American Government to furnish necessary transport for this humanitarian mission") S/6062 (24 November 1964), 3; S/6063 (24 November 1964), 3.

1183 It is remarkable that US emphasized the distinction between its own and the Belgian contribution. The US reported to the Security Council that it "supplied the transport aircraft to help accomplish the rescue mission". Still, despite the fact that its contribution was technically assistance only, the US provided a distinct justification for its own conduct. It claimed that the landing of the Belgian paratroopers carried by American military transporters was authorized by the Congolese Government, and in exercise of the responsibility to protect US citizens. The US thus treated its contribution as a "use of force" that required justification. Also, later the US refers to the Stanleyville incident when arguing that *a use of force* with the consent of the territorial State is not a violation of Article 2(4) UNC, US Department of Defense, Law of War Manual, (June 2015, updated December 2016), 45. The US did not elaborate on why providing transport capabilities qualified as a "use of force". Interestingly, the US reported that it had taken the decision to send the rescue force "jointly" with the Belgian Government, "with full knowledge of the legal Government of the Congo". The US hence understood the mission as a joint operation where both States provided equally important contributions. S/6062 (24 November 1964). See also S/6068 (26 November 1964), S/6075 (1 December 1964).

1184 See the UNSC debates S/PV.1171-1175.

1185 For example: S/6076 (1 December 1964), 16 States: "[T]he Governments of Belgium and the United States, *with the concurrence of the United Kingdom*, launched military operations in Stanleyville and in other parts of the Congo." Emphasis

ample, Guinea accused the United Kingdom of "complicity".[1186] Likewise, Mali sought to "pin-point the share of responsibility in the tragic events at Stanleyville which the United Kingdom assumed by making its colonial bases on Ascension Island available to the troops engaging in the United States and Belgium intervention."[1187]

The USSR took a different approach. It did not distinguish between the Belgian, American, and British contributions, factually *and* legally. It consistently referred not only to Belgium and the United States, but also the United Kingdom when condemning the acts which it considered an "act of armed interference", "aggressive action" and "military intervention". Accordingly, the Soviet Union concluded that "full responsibility for the consequences of these actions lies squarely with the Governments of the aforementioned States."[1188]

The UK itself acknowledged that it "facilitate[d]" the operation. But it viewed its actions as distinct from the Belgian and American intervention.[1189] Accordingly, unlike Belgium or the United States, it did not see it necessary to set out a legal basis for its contribution. In particular, it did not rely on Congo's consent,[1190] although it shared the assessment that it was the legitimate government that had called for help.[1191]

Still, the UK suggested that its contribution was governed by legal rules, albeit arguably not by the prohibition to use force, but a non-assistance rule. The UK sought to explain its contribution, in the Security Council as well as by sending two letters to the Security Council. It explained that it had taken note of the Belgian and American letters setting out the situation, and hence provided the facilities "in light of the humanitarian objective of this action".[1192] It was well aware of the "risk of misunderstanding and

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added. S/PV.1172 (10 December 1964), para 4 (Algeria); S/PV.1174 (14 December 1964), para 2 (United Arab Republic); S/PV.1175 (15 December 1964), para 28, 32, 64 (Kenya), para 82, 85 (Central African Republic) "we disapprove the intervention of Belgium and the United States of America, perpetuated with the aid of the United Kingdom."

1186 S/PV.1171 (10 December 1964), para 8.

1187 Ibid para 53.

1188 S/6066 (25 November 1964).

1189 S/PV.1175 (15 December 1964), para 15. Responding to Soviet accusations, the UK also stressed that it only provided facilities, S/6069 (27 November 1964).

1190 The Congo also did not extend its authorization to the UK.

1191 S/PV.1175, para 20.

1192 S/6059 (24 November 1964); S/6069 (27 November 1964). It stressed both aspects again in the Security Council S/PV.1175 (15 December 1964), para 13: "We clearly

the imputation of false motives". The UK acknowledged that it did not fully assess the Belgian and American motives. But based on its *prima facie* assessment, given the desire to "save lives", it sought it necessary to provide assistance.[1193] The UK thus suggested that from what it knew, the assisted operation was lawful. At the same time, it indicated that its assistance was strictly based on this understanding, and that accordingly it would only accept responsibility for its assistance under these (known) circumstances.

6) US operations in Cambodia against North Vietnam 1970

In 1970, the USA took "appropriate (military) defense measures" in Cambodia in reaction to North Vietnam's "aggressive military operations".[1194] The USA invoked both individual and collective self-defense.[1195] It expressly did not rely on an invitation by the Cambodian government, although this may have been possible, and Cambodia expressed 'understanding'.[1196]

Self-defense, in view of the US, was justified due to the fact that North Vietnam heavily used Cambodian territory as supply points and base areas against the express wishes of the Cambodian government, and thus violated Cambodia's neutrality.[1197] Notably, while the US pointed to some minor breaches of neutrality by Cambodia, it did not introduce the notion of complicity. It did not hold Cambodia responsible for North Korean attacks originating from Cambodian grounds against the Republic of Vietnam and the United States armed forces, not least portraying Cambodia as a

understood that the object of the operation was solely one of saving lives. We understood that the troops employed would be engaged on that object and that object alone. We understood that they would be withdrawn as soon as that object had been achieved. We knew and we accepted the purpose. The purpose was to save lives."

1193 S/PV.1175 (15 December 1964), para 14.

1194 S/9781 (5 May 1970).

1195 Ibid.

1196 Steven C Nelson, 'Contemporary Practice of the United States Relating to International Law', 64(5) *AJIL* (1970) 935, 941.

1197 S/9781 (5 May 1970). See for a detailed illustration: Statement on Legal Aspects of U.S. Military Action in Cambodia by John R. Stevenson, Legal Adviser of the U.S. Department of State to the NYC Bar Association New York City, May 28, 1970. On the possibility of a justification based on the law of neutrality see James Upcher, *Neutrality in Contemporary International Law* (2020) 95.

victim of occupation[1198] and acknowledging Cambodia's limited capacity to prevent such infiltration.[1199]

At first sight, this does not easily square with the invocation of self-defense. In that respect it is however noteworthy that the US was eager to stress its measures were "restricted in extent, purpose and time", directed exclusively at facilities used in the aggression against the Republic of Viet Nam, and to "reiterate its continued respect for the sovereignty, independence, neutrality and territorial integrity of Cambodia."[1200] The USA concluded that "these measures are limited and proportionate to the aggressive military operations of the North Viet-Namese forces and the threat they pose."[1201]

It appears that the US viewed a duty to tolerate self-defense and responsibility for the armed attack to be distinct. Instead, the US suggested that its measures were justified by the necessity to respond to North Vietnam.

### 7) The rescue operation in Entebbe 1976

In 1976, Israel launched a military operation, Operation Thunderbolt, to free hostages taken by terrorists, and held captive in Uganda. The operation was controversially discussed in the Security Council.[1202] The majority of States, and in particular the Group of African States in the United Na-

1198 Statement on Legal Aspects of U.S. Military Action in Cambodia by John R. Stevenson, Legal Adviser of the U.S. Department of State to the NYC Bar Association New York City, May 28, 1970.

1199 At the same time, the USA suggested that a State's invitation to enter its territory would have rendered it a co-belligerent, Nelson, *AJIL* (1970) 935. This argument obviously relates to the law of neutrality, and is ultimately policy driven. As such, it leaves open whether in case Cambodia had 'assisted' the US through the permission to use its territory, Cambodia would have had to invoke a justification under the *ius contra bellum*, too, although it suggested that Cambodia had such a right (as this would mean that it "moved much closer to a situation in which the United States was committing its armed forces to help Cambodia defend itself against the North Vietnamese attack.")

1200 S/9781 (5 May 1970).

1201 Ibid.

1202 S/PV.1939-1943. For the complaint see S/12126 (6 July 1976).

tions,[1203] condemned the Israeli operation as unlawful.[1204] That the Israeli rescue operation was a use of force falling within the scope of Article 2(4) UNC was little controversial.[1205]

The Israeli military operation was highly complex for several reasons.[1206] Not least among these was the distance to cover and States' lack of readiness to support Israel, particularly in granting Israel permission for overflight and refueling, which made the operation challenging for Israel. In particular, ensuring the return was controversially debated before deciding to conduct the operation.

Notably, Israel itself claimed that "[t]he decision to undertake this operation was taken by the Government of Israel, on its *sole responsibility*. We did not consult any other Government in advance, and *we shall not place responsibility on any other country or Government*."[1207]

Nonetheless, Uganda not only condemned the Israeli raid as "act of naked aggression"[1208] for which it requested compensation and reserved its right to retaliate.[1209] Uganda also strongly and expressly protested against the "full collaboration of some other countries", singling out Kenya in particular.[1210] It alleged that the Israeli

1203 S/PV.1939, 6 para 47.

1204 See for an overview Claus Kreß, Benjamin Nußberger, 'The Entebbe Raid - 1976' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 222-225; Ruys, *JCSL* (2008) 250.

1205 Kreß, Nußberger, *Entebbe Raid*, 230.

1206 Francis A Boyle, 'The Entebbe Hostages Crisis', 29(11) *NILR* (1982) 38-45 describing the dilemma Israel was facing.

1207 S/12123 (5 July 1976) (Israel). See also S/PV.1939, 10 para 88: "I wish to reiterate on this occasion that Israel accepted *full and sole responsibility* for the action, that no other Government was at any stage party to the planning or the execution of the operation.", emphasis added.

1208 S/PV.1939, 35. Kreß, Nußberger, *Entebbe Raid*, 224.

1209 S/12124 Annex, 3; S/PV.1939, 5 para 37.

1210 S/12124 Annex, 2-3. As the conclusion's formulation suggests, this may have even been a major objective of Uganda's letter to the Security Council: "Uganda has been aggressed by Israel with the close collaboration of some States, including Kenya, a sister neighbouring State". See also S/PV.1939, 5 para 32, 38: "I should like to draw the attention of the Council to some aspects of the Israeli invasion that clearly indicate that Israel did not mount the invasion without the knowledge, collaboration and assistance of a few other countries, Africa *should not* allow any part of its soil to be used by the Zionist Israelis and their imperialist masters or collaborators to attack another sister country." And S/PV.1939, 27 para 257-261.

> "decision [to invade] was communicated to the Kenya authorities, whose consent and assistance in the operation was immediately obtained. This collaboration has been confirmed by the fact that the Israeli planes on their way to and from Uganda stopped at Nairobi where, for example, a mobile operating theatre was set up to take care of the invaders' casualties. It is most, disturbing and disheartening to us in Uganda that such a blatant and open invasion of our country should have been mounted by the Zionists with the close collaboration of Kenya, a neighbouring sister State which is a member of both the OAU and the United Nations."[1211]

Uganda would refrain however from retaliatory measures against Kenya.[1212] Furthermore, Uganda said:

> "It is further reported that the Foreign Minister of Israel is today, 4 July, making direct reports on the invasion to the American Secretary of State and to the Foreign Ministers of France and West Germany. These are reports clearly revealing well planned international collaboration in a plot to violate and abuse the territorial integrity of Uganda."[1213]

Kenya did not disagree with Uganda on the legal framework governing assistance: the UN Charter.[1214] But, it strongly countered the Ugandan claims by advancing a threefold argument, arguing that it stood "*firmly in the support of the purposes and principles of the Charter of the United Nations […]*."[1215] First, Kenya stated that "[t]here is no evidence whatsoever to indicate my country's collaboration with Israel […]. Kenya has not and will not be used as a base for aggression against a neighbouring or indeed any other country in the world, least of all Uganda".[1216]

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1211 S/12124 Annex, 2-3. See also in detail S/PV.1939, 27 para 257-261.

1212 S/PV.1939, 27 para 261.

1213 S/12124 Annex, 3. Also highlighting the US contribution to the Israeli raid: S/PV.1943, 6 para 34 (Libya).

1214 That Uganda viewed Kenya legally responsible is suggested by the facts that i.a. (1) Uganda emphasized Kenya's UN membership, and expressed the general rule that States should not allow their territory to be used for an attack (2) Uganda drew the link to a violation of international law, (3) Uganda called for compensation and reserved its right to retaliate (which it however did not wish to exercise), and (4) the fact that Kenya made a legalistic reply. As the statements in the Security Council (S/PV.1939, 27 para 257, 261) suggests, Uganda's reluctance to issue a more straightforward legal statement may have had political reasons.

1215 S/12131; S/PV.1939, 148, 152-155, 158, 257-261.

1216 S/12131. See also S/12140 (12 July 1976).

Second, Kenya then claimed no country en route from Israel to Uganda had knowledge about or consented to the Israeli overflight and added that "[i]f in the process they overflew Kenya's territory, as is being alleged, then Kenya, too, was the victim of aggression and therefore condemns most unreservedly this blatant aggression and violation of our air space."[1217]

Third, Kenya acknowledged the landing of Israeli aircraft after the Israeli raid. It stressed however that it "was only allowed following a last-minute request for medical facilities with respect to the injured persons. Thus, Kenya's assistance in this regard was given *purely on humanitarian grounds and in accordance with international law*. Kenya cannot *therefore* be held responsible in any manner or form for collaborating with those forces hostile to Africa."[1218]

Later, Kenya complained to the Security Council that since Uganda's "utterly false and malicious allegations [...] about Kenya's alleged collaboration in the recent Israeli raid at Entebbe airport", "the Ugandan authorities have engaged in systematic and indiscriminate massacre of Kenyan citizens in Uganda."[1219] Also, Kenya reported a Ugandan military buildup at the border with Kenya.[1220]

Other States did not respond to Ugandan allegations in detail. They were however eager to dispel any rumors about potential assistance.[1221] Yugoslavia, believing the Israeli operation was an "open act of aggression," held that "[a]ny encouragement of such behavior or open support of any act of State terrorism is, in the opinion of my delegation, contrary to the Charter and to the international rules governing relations among States."[1222]

1217 S/12131; S/PV.1939, 18-19, para 152, 158.

1218 S/12131; S/PV.1939, 18-19, para 153, 158. Emphasis added.

1219 S/12140 (12 July 1976).

1220 Ibid. The US likewise feared a military action against Kenya in retaliation, Murrey Marder, 'State Dept. Upholds Israel's Use of U.S.-Made C-130s in Raid', *WaPo* (14 July 1976).

1221 For example, the Group of African States in the United Nations suggested it did not have knowledge, S/PV.1939, 6 para 43: "abusing the good faith of the countries of transit". Germany, S/PV.1940, 6 para 55: "It has been alleged that the Federal Government participated in the operation to save the hostages and that it knew about the rescue plan in advance. This assertion is false and without any foundation." In the course of discussions on the fact that Israel apparently had used American equipment, the USA concluded that its assistance was lawful as Israel acted in self-defense. Murrey Marder, 'State Dept. Upholds Israel's Use of U.S.-Made C-130s in Raid', *WaPo* (14 July 1976). See also for the US position on the Israeli operation S/PV.1941, 8 para 77-78.

1222 S/PV.1940, 7 para 65, 67 (Yugoslavia).

8) The Osirak incident 1981

On 7 June 1981, the Israeli air force bombed and destroyed the Osirak nuclear research reactor near Baghdad, Iraq. The strike was widely condemned as a violation of the prohibition to use force.[1223] Israel conducted the strike alone. Questions of assistance arose, nonetheless: the American Israeli security cooperation received wide attention.

The Non-Aligned Movement "called upon all States, and especially the United States of America, to refrain from giving Israel any assistance, whether military, political or economic, that might encourage it to pursue its aggressive policies against the Arab countries and the Palestinian people."[1224] The Arab League "call[ed] upon the States that support the Zionist entity and provide it with economic, political, military and technological aid, notably the United States of America, to take determined action to put an end to the Israeli aggression and to take practical and concrete steps to terminate such aid."[1225] Moreover, the UN General Assembly reiterated "its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States."[1226]

These statements may reflect a general belief that military and security cooperation is prohibited to the extent it 'enables' or even 'encourages' an act of aggression.[1227] While the qualifiers "enabling" and "encouraging" might suggest a broad scope, the incident in fact points in the opposite direction: In the emotionally charged but also remarkably legally driven debates in the Security Council and the General Assembly, States either stopped short of condemning and characterizing the American assistance as unlawful or took stricter conditions as basis for their arguments on complicity.

1223 S/RES/487 (19 June 1981), para 1; A/RES/36/27 (13 November 1981); S/14511-44; S/PV.2280-88 (12-19 June 1981); A/36/PV.52-56 (11-13 November 1981). See also Tom Ruys, 'Israel's Airstrike Against Iraq's Osiraq Nuclear Reactor - 1981' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 329-334, in particular n 35, 36.

1224 S/14544 (16 June 1981).

1225 S/14529 (12 June 1981), para 5.

1226 A/RES/36/27 (11 November 1981), para 3.

1227 In this direction: S/PV.2285 para 143 (Poland). Citing the Osirak incident as support for a customary rule of complicity Aust, *Complicity*, 112.

The Security Council resolution remained silent on other States' involvement; sporadic proposals to address assistance did not find their way into the consensus draft or the final resolution. The UNGA resolution sought to address the problem of assistance, i.e., the contribution to a use of force ("enable"). Some States thought this to exclusively fall within the competence of the Security Council.[1228] In any event, the UNGA's call on States to cease the provisions of weapons was only directed to the future ("forthwith").[1229] It did not address nor establish the responsibility for the Israeli raid of assisting States, or of the US in particular. It addressed all States generally.

Preambular paragraph 9 of the resolution hints at the underlying reasons. It held that the UNGA was "gravely concerned over the *misuse* by Israel, in committing its acts of aggression against Arab countries, of aircraft and weapons supplied by the United States of America."[1230] Hence, while it was critically noted that American military supplies to Israel were used for the raid, and while the US was singled out, mentioning the US was not meant to hold it responsible for the raid: the Israeli use of the weapons was characterized as *"misuse."*[1231]

The UNGA's approach illustrates well States' debates in the UNSC and UNGA.

States widely noted the (American) general military and economic assistance to Israel.[1232] Several States even considered it a *conditio sine qua non* for the Israeli strike. Without American assistance, the Israeli strikes were

1228 E.g. A/36/PV.56 para 116 (Norway), 125 (Canada).
1229 See on this also A/36/PV.56 para 129 (Uruguay).
1230 A/RES/36/27 preambular para 9, emphasis added.
1231 See also the background: A/36/PV.56 para 34, 42. States also did not understand the resolution to condemn the US for complicity. A/36/PV.56 para 65 (Spain), 72 (New Zealand), 105 (Turkey), 111 (Fiji).
1232 E.g. S/PV.2281 para 56 (Cuba); S/PV.2282 para 36 (Uganda), para 61, 69 (German Democratic Republic); A/36/PV.53 para 107 (Jordan), para 157, 163 (Vietnam); A/36/PV.55 para 8 (Kuwait), 105 (Albania), 114 (Cuba).

widely believed to have been impossible.[1233] Likewise, States drew attention to the fact that the Israeli raid was conducted with US-supplied aircraft.[1234]

But legally motivated accusations of complicity holding the US legally responsible for a contribution to the strikes, were rare. Instead, States called on the United Nations to redress such assistance.[1235] States were generally critical of US support, and viewed it to foster Israeli "aggressive policies" in general.[1236] On that basis, States took this incident as an occasion to call on States generally, and the US in particular, to no longer cooperate with Israel.[1237] Why States left it to the UN, and did not see the US as complicit in the raid, cannot answered with certainty. It is noteworthy, however, that as reflected in the UNGA's preamble, several States took note of the conditions of the US supplies and concluded that Israel *misused* the American weapons.[1238]

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1233 S/14529 (12 June 1981), para 4 (Arab League): "the Israeli aggression [...] would not have been possible without the support by certain great powers, notably the United States of America, to the Zionist entity in all areas and the unlimited economic, political, technological, and military aid rendered to it by these powers." S/PV.2281 para 85 (Bulgaria); S/PV.2282 para 165 (Tunisia); S/PV.2283 para 68 (USSR), 88 (Egypt), 137 (Vietnam), 166 (Mongolia); S/PV.2284 para 52-53 (Yemen); S/PV.2285 para 62 (Hungary); S/PV.2288 para 103 (Libya); S/PV.2288 para 168-169 (USSR), 185 (Iraq); A/36/PV.55 para 123 (Ukraine).

1234 E.g. S/PV.2281 para 47 (Cuba); S/PV.2282 para 61 (German Democratic Republic); S/PV.2283 para 69-70 (USSR); S/PV.2286 para 7 (Nicaragua); A/36/PV.55 para 78 (Czechoslovakia), 100 (Albania).

1235 Calling on the UNSC: S/PV.2280 para 52 (Iraq), A/36/PV.52 para 24-26 (holding the US responsible for the UNSC failure to address the issue); S/PV.2282 para 85 (Spain).

1236 E.g. S/14526 (12 June 1981) (Vietnam); A/36/PV.54 para 95 (Morocco); A/36/PV.55 para 16 (Kuwait).

1237 S/PV.2280 para 138 (Tunisia); S/PV.2282 para 132 (Lebanon); S/PV.2283 para 60 (Yugoslavia), 179 (Zambia); S/PV.2284 para 52-53 (Yemen).

1238 S/PV.2280 para 205, 211 (Jordan); S/PV.2281 para 25 (Kuwait) "excesses"; S/PV.2282 para 131 (Lebanon) "against their will"; S/PV.2283 para 88-89 (Egypt); S/PV.2284 para 37 (Panama); A/36/PV.52 para 93, 94 (Arab League). Spain's statement was also interesting, S/PV.2282 para 81, 85 (Spain). Spain thought the Council should "appeal to all countries to refrain from supplying areas of conflict with highly developed weaponry that may be used for offensive actions." Moreover, it held that "[t]he action we are considering today obviously could bring about a further delay in the achievement of a general solution to the Middle East conflict. It should make all those who supply large amounts of war matériel to that region aware of the responsibility they have for the use to which that matériel may be put - for it is extremely difficult to identify purely defensive uses, and operations can be carried out with such matériel to penetrate deeply into the territory of another country." While Spain saw supplier States to be responsible, it did not

Only some Soviet-aligned States went a step further and accused the US to be complicit in, and hence responsible for, Israel's violation of international law. For Czechoslovakia,[1239] the mere fact of American supplies used by Israel seemed to suffice. Others construed their claim more nuancedly.

For example, the USSR stated that it was "difficult to imagine [the US] did not know in advance" about the intended raid. But for the USSR, the answer to this question was not "important".[1240] Instead, it was eager to underline the relevance of US assistance and encouragement for Israel's policies in general. It stressed that the Israeli raid was carried out by American aircraft. "Their use was not hindered by statements by the United States Government to the effect that the weapons given by them to Israel were to be used only for defensive purposes."[1241] In addition, the USSR held that it would have been "extremely naïve indeed not to draw any conclusions at all" from a request by Israel for "information regarding the results of the possible bombing of a nuclear installation."[1242] The USSR hence suggested that the US was complicit for its essential contribution. While the US may not have had positive knowledge, it sufficed that the US had sufficient indications about the Israeli strikes, which the US did not sufficiently prevent, but instead implicitly encouraged or condoned.[1243] Likewise, Bulgaria and Syria suggested that the US had not taken sufficient

take the step holding those States complicit. Instead, that Spain sought to place this phenomenon in the hands of the Security Council. This may suggest that the supplying State's 'responsibility for the use of the weapons' was not enough to establish responsibility for complicity – if it had no certainty about the use.

1239 S/14533 (15 June 1981) (Czechoslovakia): "Complicity in this act falls also on the United States of America without the political support and military assistance of which Israel would be unable to carry out similar gangster actions which the Israeli Government demagogically excuses by the need for preventive protection of Israel." S/PV.2285 para 96, 100 "directly responsible". Later, in the UNGA, Czechoslovakia suggests however that the US had directly agreed, had given "green light" and at least had known about the strike, A/36/PV.55 para 77-79.

1240 S/PV.2283 para 68.

1241 Ibid para 69.

1242 S/PV.2288 para 169.

1243 S/14525 (12 June 1981) (USSR) "directly participated in and essentially instigated"; S/PV.2283 para 68-71 (USSR) "the responsibility for that raid lies with Israel and with the United States of America, which arms the aggressor and provides it with support of every kind."; S/PV.2288 para 168-169, A/36/PV.54 para 83. The German Democratic Republic and the Ukraine connected the accusation of "direct responsibility" for the raid to the American-Israeli strategic partnership, A/36/PV.54 para 11-12, S/14516 (GDR), A/36/PV.55 para 123 (Ukraine). The following States underlined US 'knowledge' and 'encouragement', albeit they did not accuse

steps to prevent, but tolerated Israeli 'misuse' of American weapon supplies for such acts of aggression.[1244]

The USA did not leave its role in the Israeli airstrikes uncommented. The USA rejected and voted against the UNGA resolution, because it thought it was "unfair" that it had been singled out.[1245] But it did not understand the UNGA's call as an accusation of complicity. Nor did it oppose the principle not to provide assistance enabling acts of aggression.

The US sought to establish that by supplying aircraft and weapons to Israel, it did not bear responsibility in the present case – despite the fact that the US thought the Israeli airstrikes to violate international law.[1246] Thereby, the US also responded to the Soviet accusations. The US acknowledged that US-supplied aircraft were used in the Israeli raid. But it was eager to underline that its supply of aircraft and weapons were conditioned on a *lawful* use,[1247] and that the American supplies may have been employed in possible violation of the applicable agreement.[1248] In addition, the US

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the US of complicity: S/PV.2281 para 60-61 (Cuba); S/PV.2283 para 137 (Vietnam); S/PV.2286 para 69 (Arab League).

1244 S/PV.2281 para 85-86, A/36/PV.54 para 67 (Bulgaria), saying that the condemnation or delay of new weapons does not change the fact that the US should bear a share of the responsibility. For Bulgaria it was crucial that the US gave the impression to tolerate such actions, and to continue to provide assistance notwithstanding the (mis)use. At least, the US should have known about the Israeli use. S/PV.2284 para 60-72, 82 (Syria), scrutinizing the US condition to arms supplies to Israel, and reaction to the Israeli strike, suggesting that the US condones the Israeli strikes under pre-emptive self-defense. A/36/PV.53 para 121-122. See also Iraq noting that it had warned already in 1980 that the American-manufactured airplanes enabled Israel to strike Iraqi nuclear facilities, S/14073 (29 July 1980), S/PV.2280 para 50, 52; A/36/PV.52 para 25-27. Iraq saw however the Security Council to have the main responsibility to deal with such questions.

1245 A/36/PV.54, para 22-23; A/36/PV.56 (13 November 1981), para 88. The US was together with Israel the only State voting against the resolution.

1246 S/PV.2288 para 157. The US rejected however the description as "aggression", A/36/PV.54 para 20; A/36/PV.56 para 86 (13 November 1981). It seems hence that the US also accepted a non-assistance norm in case of a use of force in violation of Article 2(4) UNC.

1247 Mutual Defense Agreement of 23 July 1952 (United States, Israel); A/36/PV.55 para 178; Israel's Raid on Iraq's Nuclear Facility, 81 *DeptStBull* No 2053, August 1981, 79-80.

1248 Later the US government submitted a letter to the Senate in which it reported that "a substantial violation of the 1952 Agreement may have occurred." Israel's Raid on Iraq's Nuclear Facility, 81 *DeptStBull* No 2053, August 1981, 79-80.

repeatedly stressed that it had neither prior knowledge of nor encouraged the Israeli operation.[1249]

Furthermore, the US deferred a shipment of F-16 aircraft to Israel. This decision, however, was not legally motivated. Neither was it linked to the Israeli raid. Rather the US thought it inappropriate to send additional armaments to the region during a tense period.[1250] This is also illustrated by the fact that the deferral did not involve other equipment.[1251]

In addition to the American role in the strikes, it is interesting to see whom States did *not* hold responsible: Jordan and Saudi-Arabia, through whose airspace Israel had flown.[1252] Both States did not prevent the use of their airspace. But both States protested.[1253] Neither of these States was confronted with an accusation of having assisted in an unlawful use of force. On the contrary, States widely agreed that Israel had also violated their sovereignty without justification.[1254] Most States rejected the application of self-defense in the present case. Hence, they did not specifically address the question if the right to self-defense could have justified this intrusion into the airspace of non-involved States. Israel's remarks likewise remained silent on this matter. But the question did not go unnoticed: Sudan, Lebanon, and Bangladesh raised doubts about whether a justification of force against one State (Iraq) also justified a violation towards a third State (Jordan/Saudi-Arabia).[1255]

1249 S/PV.2288 para 34; Israel's Raid on Iraq's Nuclear Facility, 81 *DeptStBull* No 2053, August 1981, 79-80.

1250 U.S. Defers F-16 Shipment to Israel, 81 *DeptStBull* No 2053, August 1981, 81-82.

1251 Ibid.

1252 See also Mexico that stressed that maintaining relations with Israel should not be understood as encouragement, S/PV.2288 para 125.

1253 S/PV.2280 para 194 (Jordan).

1254 Just see: S/PV.2280 para 125 (Tunisia), para 165 (Algeria), 179-180 (Sudan); S/PV.2281 para 96 (Arab League); S/PV.2282 para 125 (Lebanon); S/PV.2283 para 145 (Sierra Leone), 179 (Zambia); S/PV.2284 para 34 (Panama); S/PV.2285 para 49 (PLO), 123-124 (Bangladesh); S/PV.2288 para 112 (Mexico); A/36/PV.52 para 86, 93 (Arab League); A/36/PV.55 para 100 (Albania).

1255 S/PV.2280, para 179 -180 (Sudan); S/PV.2282 para 125 (Lebanon) with respect to the Israeli argument that the state of war between Israel and Iraq allowed the strikes; S/PV.2285 para 124 (Bangladesh) "Israel quotes Article 51 of the Charter. What a travesty. Who has given Israel the right to distort the concept of self-defence as defined in the Charter by the use of spurious excuses? Can it arrogate to itself the right to commit acts of aggression against another sovereign nation and in the process throw to the winds all approved international law, including the inviolability of the rights of sovereign States over their airspace?".

9) The Falklands/Malvinas conflict 1982

When Argentina invaded the Falkland/Malvinas Island in early April 1982, several States suspended the sale of military equipment to Argentina. For example, ten member States of the European Community imposed a "total embargo on the exports of arms and military equipment to Argentina" and suspended all imports from Argentina.[1256] Likewise the US ceased to sell military equipment and took measures against certain Argentinean banks.[1257]

At the time these States took these measures, they shared the belief that Argentina's use of force violated international law.[1258] But it cannot be verified beyond doubt that States believed that they were *obliged* to take *all* these steps to avoid unlawful assistance. In fact, several of these measures primarily have the characteristics of *countermeasures* to induce Argentina to comply with international law.[1259] This was also reflected in the criticism against these measures. They were not criticized for "assisting" the UK, but for restricting the rights of Argentina. For example, the OAS adopted a resolution, in which the European community's "coercive measures of an economic and political nature" were 'deplored' inasmuch they were "incompatible with the Charter of the United Nations, and of the OAS and the General Agreement on Tariffs and Trade (GATT)."[1260]

1256 S/14976 (14 April 1982).

1257 United States: Statements concerning Assistance and Sales to Argentina', 21(3) *ILM* (1982); Domingo E Acevedo, 'The US Measures against Argentina Resulting from the Malvinas Conflict', 78(2) *AJIL* (1984). Bernard Gwertzman, 'U.S. Sides With Britain In Falkland Crisis, Ordering Sanctions Against Argentines', *NYT* (1 May 1982), https://www.nytimes.com/1982/05/01/us/us-sides-with-britian-falkland-crisis-ordering-sanctions-against-argentines.html.

1258 Etienne Henry, 'The Falklands/Malvinas War - 1982' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 366-367.

1259 See again e.g. the US explanations for its measures pointed in this direction. The US undertook its measures "to underscore that the United States could not and would not condone the unlawful use of force to resolve disputes." 82 *DeptStBull* No 2063 (June 1982), 87-88. See for a discussion: Acevedo, *AJIL* (1984) in particular 340-341. Note also that the US seemed to draw a (legal) line between assistance to the UK and measures taken with respect to Argentina.

1260 Twentieth Meeting of Consultation of Ministers of Foreign Affairs Resolutions on the Serious Situation in the South Atlantic, 21 ILM 669 (1982), 670, para 6. See also S/15155 (3 June 1982), para 5, 6 (OAS). Both resolutions were adopted by 17 votes in favor with Chile, Colombia, Trinidad Tobago and the United States abstaining.

Some measures, in particular the suspension of arms exports, however also sought not to contribute to the Argentinean use of force.[1261] Accordingly, these measures may have been considered necessary to avoid complicity charges.

The German position illustrates this particularly well, although not all States were as unambiguous as Germany.[1262] It set out that within its decision process, "the fact that Argentina is responsible for a use of force contrary to international law" was an "important consideration" when assessing the authorization of arms exports. It explained that it would especially deny an authorization, if there was a risk that the war material would be used for an action disturbing peace, in particular an aggression (Angriffskrieg).[1263] Accordingly, Germany decided that "it will prevent German delivery of arms to a State responsible for a use of force contrary to international law and that refuses to comply with UN Security Council resolutions." [1264] Concerning the fact that it had delivered weapons to Argentina since 1974, Germany explained that "an armed confrontation was not expected by either party", and even "the UK was taken by surprise by the unilateral use of force."[1265] Only in September 1982 did Germany resume the delivery of armaments to Argentina.[1266]

Moreover, a non-assistance norm was also implied in State practice concerning *direct assistance* to the British military measures to repel the Argentinean forces, as well as to Argentina's resort to arms.

For example, Peru – which viewed the British use of force to violate international law – deplored the American "political and material support" to the UK, for the fact that it *contributed* to an unlawful use of force. Peru

1261 See e.g. the US decided to take the measures only once it also concluded viewed the Argentinian use of force "unlawful". 82 *DeptStBull* No 2063 (June 1982), 87-88; 82 *DeptStBull* No 2067 (October 1982), 80. See also the ten States members of the European Community, S/14976 (14 April 1982), which previously did not qualify the Argentinian use of force as unlawful, S/14949 (3 April 1982).

1262 Aust, *Complicity*, 133-134. Jean Charpentier, 'Pratique française du droit international - 1982', 28(1) *AFDI* (1982) 1025 suggests the same conclusion for France's suspension of delivery of arms ("ne laisse à ce dernier que la possibilité d'édicter un embargo"). The official statement seems to be more cautious and open.

1263 BT Drs 9/1593 (23 April 1982), 16, translation by the author. See for the German position on the Argentinian use of force: S/PV.2368, 2 para 11.

1264 BT Drs 9/1593 (23 April 1982), 16, translation by the author.

1265 BT Drs 9/1618 (30 April 1982), 1, translation by the author.

1266 Hans-Heinrich Lindemann, 'Völkerrechtspraxis der Bundesrepublik Deutschland im Jahre 1982', 44 *ZaöRV* (1984) 558.

held that "[i]n addition to going against the letter and spirit of paragraph I of resolution 502 (1982), it has, with its support and co-operation, made it possible for the Government of the United Kingdom to feel encouraged to carry out and capable of carrying out wide-scale armed actions against the Argentine Republic."[1267]

Instead of denying the underlying rule, the USA sought to explain its assistance to the UK. For a long time, the USA pursued a peace mission, seeking to negotiate between the parties. It hence stopped short of legally qualifying the Argentinean resort to arms.[1268] Only when Argentina rejected a compromise did the US describe the Argentinean use of force as "unlawful" and align itself with the UK. The US ruled out direct military involvement. But it provided intelligence, communication facilities, and military equipment.[1269] At that time, it was careful not to disclose the exact extent of assistance, suggesting rather remote contributions. The real importance and relevance of the American contribution became public only once the archives were declassified. The US did neither report its assistance to the Security Council nor invoked self-defense itself.[1270] Still, it was supportive of the British reaction and its foundation in international law.[1271]

The US was not the only State to provide assistance. States took different approaches. None suggested however that directly contributing to another use of force was not subject to limits.

Some openly acknowledged to provide support. While they did not report their assistance to the Security Council, those States also were at least sympathetic towards the respective justification. For example, New Zealand, in addition to imposing economic sanctions against Argentina, provided frigates as replacement for British vessels in the Indian Ocean.[1272]

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1267 S/PV.2363 (23 May 1982), 15, para 163 (Peru). See also OAS, S/15115 (3 June 1982), para 5. There the US assistance was (1) treated distinct from its "coercive measures" and (2) measured against the solidarity obligations under the OAS Charter. In that light OAS States called on the US to "refrain from providing material assistance". The resolution was adopted by 17 votes in favor with Chile, Colombia, Trinidad Tobago and the United States abstaining.

1268 S/PV.2350, 6-7 para 71-74.

1269 82 *DeptStBull* No 2063 (June 1982), 87-88; S/PV.2360 para 220; Acevedo, *AJIL* (1984) 325.

1270 Ibid 340.

1271 S/PV.2360 para 220-221; S/PV.2362, 20 para 225.

1272 Robert Muldoon, "Why we stand with our mother country", *The Times*, (20 May 1982), 14. See for New Zealand's position on the British justification: S/PV.2363, 6, para 52. For the British reaction: HC Deb 20 May 1982, Hansard vol 24 cols

The OAS took a cautious approach towards the Argentinean invasion itself, as the members were divided on the legality to use force.[1273] The OAS did not promise support to Argentina.[1274] But the OAS raised serious concerns about the legality of the British response.[1275] It was only in that light that the OAS States pledged "appropriate" support to Argentina in reaction to the British "unjustified and disproportionate armed attack", although in practice this did not entail much.[1276]

Other States provided support only clandestinely, and vigorously denied any contribution. Notably, they were however at least careful not to characterize the supported use of force as unlawful.[1277]

### 10) The Iraq-Iran conflict 1980-1988

During the Gulf war, assistance was crucial for Iran and Iraq alike. The conflict is famous for States' extensive debates on the law of neutrality.[1278] Aside from political reasons not to become involved in the conflict, the popular invocation of neutrality was based on the fact that the factual circumstances were unclear, rendering it difficult to clearly assess the legal

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467-472. Sierra Leone allowed British ships to refuel. MT message to President Stevens of Sierra Leone (thanks for allowing Navy ships to refuel at Freetown), Thatcher MSS (Churchill Archive Centre): THCR 3/1/20 f104 (T81C/82), https://www.margaretthatcher.org/document/123285. For its legal position see: A/37/PV.55, 953 para 197.

1273 For an overview see Henry, *Falklands/Malvinas War*, 367-368.

1274 In the first stage, the Argentinian government did not officially ask for military assistance against Britain. Gordon Connell-Smith, 'The OAS and the Falklands Conflict', 38(9) *The World Today* (1982) 345.

1275 Henry, *Falklands/Malvinas War*, 370.

1276 S/15155 (3 June 1982), para 7. The US, Chile, Columbia and Trinidad-Tobago abstained. Connell-Smith, *The World Today* (1982) 346. The US argued that no obligations under the Rio Treaty arose. Critical about the validity of the OAS resolution John Norton Moore, 'The Inter-American System Snarls in Falklands War', 76(4) *AJIL* (1982).

1277 For example, Chile provided the UK intelligence, providing an early warning of impending Argentinian air force attacks, Margaret Thatcher, *Statecraft: Strategies for a Changing World* (2002) 267. Chile however denied any support to the UK, Connell-Smith, *The World Today* (1982) 344. At the same time, Chile also abstained on the OAS resolution condemning the British "unjustified and disproportionate armed attack." Peru denied that it had sent Argentina Mirage aircraft. Ibid 346. S/15071 (11 May 1982).

1278 See for a detailed analysis Upcher, *Neutrality*, 57 et seq.

situation. This uncertainty was only to be resolved through an inquiry mandated by the Security Council in 1987, which eventually led to a report by the Secretary General finding Iraq responsible for the outbreak of the war.[1279]

In contrast to the law of neutrality, *ius contra bellum* considerations with respect to interstate assistance may not have been as conspicuous. Still, they informed States' practice in relation to interstate assistance.

In fact, the policy of neutrality widely professed by States did not mean that States, most notably the superpowers, refrained from military assistance. To the contrary. For example, China supplied weapons to both sides.[1280] The USSR's stance on the conflict was marked by a change of policy. Eventually, it provided substantial amounts of weaponry to Iraq that preserved Iraq from defeat.[1281] Western States, most notably France, were likewise a persistent supporters of Iraq, providing military equipment. The UK refused to supply lethal equipment to either side. This did not prevent it however to provide spare parts for tanks and aircraft.[1282] Support for Iran came from Syria and Libya.[1283] Other Arab States, most notably Kuwait, were alleged to support Iraq.[1284]

To the extent that States did not define their legal position and did not claim the legality of the supported actions, but maintained neutrality instead, States did not openly disclose or were eager to stress the remoteness of their contribution.

This approach differed from those States that provided open and substantial assistance. They viewed the assisted use of force to be in accordance with international law. The French and the Soviet positions are illustrative in this respect.

1279 S/23273 (9 December 1991).

1280 Andrea de Guttry, 'The Iran-Iraq War - 1980-88' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 321.

1281 M S El Azhary, 'The Attitudes of the Superpowers towards the Gulf War', 59(4) *IntlAff* (1983) 615 et seq.

1282 Christine Gray, 'The British Position in Regard to the Gulf Conflict', 37(2) *ICLQ* (1988) 421-422. But see for clandestine support, see the BMARC affaire: HC Deb 19 June 1995, Hansard vol 262 cols 39-80.

1283 de Guttry, *Iran-Iraq War*, 321.

1284 See in detail Eric David, 'La Guerre du Golfe et le Droit International', 20(1) *RBDI* (1987) 170.

Initially, France[1285] held Iraq responsible for the military confrontation.[1286] It changed its assessment, however, once Iraq had withdrawn to the recognized borders.[1287] In its view, Iran was now the aggressor.[1288] France wanted its support, in particular its delivery of 29 Mirage fighters, to Iraq to be expressly understood in this light.[1289] It further stressed that France thereby did not seek to participate in the war, that the fighters were exclusively defensive in nature, did not facilitate Iraqi aggression, and did not change Iraq's military capacity. Moreover, it noted that it would not have shared these weapons if Iraq were still operating on Iranian soil.[1290] In this context, the French delivery of Mirage F1 fighters in 1981 is interesting to note. France explained that it was driven by two considerations: first the necessity to honor treaty-commitments; second, the fact that the treaty was concluded long before the bilateral Iran-Iraq war erupted, which in effect meant that it did not intervene in the conflict.[1291] With respect to a delivery of weapons to Saudi-Arabia, France viewed the fact that those weapons were meant for Saudi-Arabia's self-defense only. In view of allegations of cooperation between Saudi-Arabia and Iraq, France relied on a clause prohibiting re-export.[1292]

The USSR initially kept a low profile on the legal responsibility of the warring factions and also professed neutrality.[1293] Initially, this meant even a refusal to continue to provide Iraq with military equipment as agreed under the 1972 treaty. But this position was gradually loosened. First, the USSR pursued a policy of indirect supply of arms to Iraq under the 1972 treaty of cooperation, through Soviet allies.[1294] In light of the Iranian counter-offensive, large-scale arms deliveries were resumed.[1295] Eventually,

1285 Upcher, *Neutrality*, 81; Jean Charpentier, 'Pratique française du droit international - 1983', 29 *AFDI* (1983) 909; Jean Charpentier, 'Pratique française du droit international - 1984', 30 *AFDI* (1984) 951, 1012-13.
1286 Charpentier, *AFDI* (1984) 1012; Charpentier, *AFDI* (1982) 1095.
1287 Charpentier, *AFDI* (1983) 909; Charpentier, *AFDI* (1984) 1012.
1288 Ibid.
1289 Charpentier, *AFDI* (1983) 909; Charpentier, *AFDI* (1984) 1012-1013.
1290 Charpentier, *AFDI* (1983) 853-854; Charpentier, *AFDI* (1984) 1013.
1291 Jean Charpentier, 'Pratique française du droit international - 1981', 27 *AFDI* (1981) 859; Charpentier, *AFDI* (1982) 1095.
1292 Charpentier, *AFDI* (1981) 859-860.
1293 Oles M Smolansky, *The USSR and Iraq: the Soviet Quest for Influence* (1991) 232-233.
1294 El Azhary, *IntlAff* (1983) 616-619; Smolansky, *USSR and Iraq*, 236-237.
1295 Smolansky, *USSR and Iraq*, 240-242.

in 1986, the USSR openly sided with Iraq, and supplied Iraq with weapons and ammunition. It cannot be denied that this change in policy was guided by geo-political considerations. But notably, it also corresponded with legal language. The USSR cast doubt about the legality of Iran's counter offensive and invasion of Iraq, rejecting in particular the Iranian argument that war would continue until Saddam Hussein was overthrown.[1296]

The warring factions themselves did not let assistance go unnoticed. Consistently, foreign involvement sparked legally driven protest. For instance, Iran repeatedly accused Kuwait of "cooperation" and "complicity" with Iraq for its alleged territorial support[1297] and eventually attacked Kuwait in self-defense. Kuwait repeatedly refuted such allegations on factual grounds.[1298] Also illustrative is Iran's complaint about American involvement through economic diplomatic assistance, military assistance in form of intelligence, military and dual use equipment, non-prevention and blockade of arms flows to Iraq and Iran respectively.[1299] On legal grounds, Iran again may have focused on the law of neutrality. But it took the position that this was only a minimum obligation. It further suggested that "U.S. obligations both under Article 1 of the Treaty of Amity and under the U.N. Charter might have required more than neutrality from the United States."[1300] Similarly, Iran pointed to Soviet military support and responsibility for the military actions.[1301]

1296 Ibid 250-251, see also 238.

1297 S/16585 (25 May 1985) "backing of the aggressor Iraq in its war of aggression"; S/19797 (18 April 1988), S/19865 (5 May 1988) "complicity with Iraqi aggression". Violations of the law of neutrality with no express references to *ius contra bellum* violations were much more prominent in Iranian protest notes, e.g. S/19041 (14 August 1987). For a detailed overview Upcher, *Neutrality*, 57-61. This should not disguise however Iran's emphasis on Kuwaiti assistance to an aggressor.

1298 E.g. S/18582 (12 January 1987); S/19417 (11 January 1988).

1299 See in detail below Iran's submissions to the ICJ, II.D.4.

1300 Observations and Submissions on the U.S. Preliminary Objection submitted by Iran, vol I (1 July 1994), https://www.icj-cij.org/public/files/case-related/90/8626.pdf, Annex 4. See also for complicity in violations of international humanitarian law: S/18522 (15 December 1986). See for further analysis of the below II.D.4.

1301 S/17871 (28 February 1986).

### 11) Operation El Dorado Canyon in Libya 1986

Twelve minutes lasted the US Operation 'El Dorado Canyon'. Thereby the USA attacked several targets in Libya in reaction to the bombing in a West Berlin nightclub, for which the USA held Libya responsible.[1302] Nonetheless, the operation was considered among the "longest and most demanding combat missions" in US military history.[1303]

This fact may also be attributed to many States denying assistance. A controversial statement by the NATO Secretary General that there would be a "great deal of sympathy" in the NATO alliance for US retaliation if it presented evidence for Libyan involvement, did not materialize.[1304] Various European[1305] and neighboring States denied overflight and refueling rights, forcing the US air strikers to take a detour of 1200 nautical miles. Ultimately, it was a roundtrip of 13 hours flight over 6400 miles, requiring up to 12 in-flight refuelings for each aircraft.

Not all States denying assistance grounded their decision unambiguously on international law.[1306] Several others, most notably States belonging to the

1302 For a minute-by-minute protocol: 'Tension Over Libya: An Exodus Before Dawn', *NYT* (18 April 1986), https://www.nytimes.com/1986/04/18/world/tension-over-libya-an-exodus-before-dawn-air-raid-on-libya-minute-by-minute.html. Maurice Kamto, 'The US Strikes Against Libya - 1986' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 408, also for more details and summary of States' reactions. For the background see also UNYB 1986, 247-260, including the discussions surrounding the US use of force in March (in particular 248-251).

1303 Walter J Boyne, 'El Dorado Canyon', 82(3) *Airforce Magazine* (March 1999).

1304 'Spain Recalls Libya Envoy', *FT* (11 April 1986) 3; Matthias Peter, Daniela Taschler, *Akten zur Auswärtigen Politik der Bundesrepublik Deutschland 1986* (2017) 530. See for Libya's immediate criticism: A/41/278-S/17983 (12 April 1986); S/PV.2673, 8.

1305 Most notably France and Spain rejected an US request. The US did not ask West Germany for permission, as then they would have had to cross Austria and Switzerland, who both were neutral. R.W. Apple Jr, 'U.S. Plays Down Idea of NATO Split', *NYT* (16 April 19896), A14.

1306 The position of Western States seemed primarily politically motivated, E.J. Dionne, 'West Europe Generally Critical of U.S.', *NYT* (16 April 1986), A16. This does not necessarily mean however that international law did not play any role. France for example referred to the US use of force as "action de répressailles", Jean Charpentier, 'Pratique française du droit international - 1986', 32 *AFDI* (1986) 1026-1027. Reading it as a legal statement: Olivier Corten, *Le Droit Contre la Guerre. L'Interdiction du Recours à la Force en Droit International Contemporain* (2008) 277. More careful: Aust, *Complicity*, 112-113. See also S/PV.2682, 42-43. Spain was not overflown either. It did not prohibit the overflight expressly, however. After secret (and discouraging) deliberations, the US thought it to be wiser not to "compel

Non-Aligned Movement, however, did so: they expressly based their refusal to assist on the principle of non-use of force.[1307]

It was the United Kingdom then that enabled the US airstrikes. After initially being reluctant, the UK permitted the US to use its airbases as launching pads for the strikes.

The British contribution triggered widespread protest among States in the Security Council and the General Assembly. Several States not only took note of the UK assistance and qualified it as "collaboration",[1308] but

countries to make a choice". Spain allowed however an emergency stop for an overheated US plane on the retour flight. 'Tension over Libya', *NYT* (18 April 1986), https://www.nytimes.com/1986/04/18/world/tension-over-libya-an-exodus-before-dawn-air-raid-on-libya-minute-by-minute.html; Edward Schumacher, 'Spain's New Face', *NYT* (22 June 1986); R.W. Apple Jr, 'U.S. Plays Down Idea of NATO Split', *NYT* (16 April 19896), A14. Interestingly, several States commended the denial of overflight rights and attributed it to legal reasons, for example S/PV.2675, 12 (Syria), 37 (Cuba) "refused to be an accomplice"; S/PV.2678, 21 (Iran); S/PV.2680, 51 (Nicaragua). See also Libya that understood the French decision to deny the US to use its airspace to be "inspired by the spirit of the United Nations Charter and international law." S/PV.2674 (15 April 1986), 7 (Libya), see also S/PV.2677, 51 (Libya). The French representative did not dispute this understanding.

1307 A/39/526-S/16758 (27 September 1984) (Mediterranean Members of the Non-Aligned Movement), para 12: "The Ministers reaffirmed the determination of their countries to seek viable and lasting solutions to outstanding problems among them without resort to force or the threat of force. *In further fulfilment of this principle* in the region the Ministers called upon the non-Mediterranean and other Mediterranean European States to *adhere strictly to the principle of non-use or threat of force and urged them not to use their armaments, forces, bases and military facilities against non-aligned Mediterranean members*." A/41/156-S/17811 (10 February 1986), (NAM) para 4: reiterates the call; A/41/285-S/17996 (15 April 1986); S/18065 (28 May 1986), 71 para 196, 197. Yugoslavia referred to call in the Security Council debate claiming that this was stipulated also in the Final Act of Helsinki, and then stating that it "is an *obligation* incumbent on all signatories of the Act." Yemen also affirmed the rule A/41/PV.77, 31. Emphasis added.

1308 AHG/Decl. 1 (XXII), 28-30 July 1986 (African Union): "collaboration of the British Government"; S/PV.2675, 51 (NAM): "noted with deep shock and profound indignation the armed attack by the United States of America *undertaken with support and collaboration of its NATO military ally the United Kingdom* against the territory of the Socialist People's Libyan Arab Jamahiriya." See also for NAM A/41/285-S/17996 (15 April 1986), para 4, S/PV.2675, 49-50 (India), S/PV.2683, 9-10, A/41/697-S/18392, 99; S/PV.2676, 5 (Algeria): "it is alarming to note that the military actions of the United States against Libya were prepared with consent of some of its allies and with the overt participation of another Permanent Member of the Security Council, the United Kingdom." For more neutral statements: S/17999 (15 April 1986) (USSR): "United State planes based in the United Kingdom", S/18012 (16 April 1986), but see S/PV.2675 (15 April 1986), 8 "Western

expressly held the UK responsible for the strikes, which they viewed as illegal.[1309] Syria even believed that the debate in the General Assembly should have been titled "United States and United Kingdom aggression against Libyan Arab Jamahiriya."[1310] This criticism was also the background

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Europe and the countries of the North Atlantic Treaty Organization (NATO) were faced with a grave choice. Passivity – or, worse still, complicity with and connivance at – such actions threatened to disrupt international relations, with unpredictable consequences." (Bulgaria): "United State warplanes, which had taken off from military bases in the United Kingdom […] A strong pressure was exerted on the NATO allies of the United States to join in this campaign.". S/18006 (16 April 1986) (Burundi); S/18003 (16 April 1986) (Ghana): "expresses great surprise that Britain, which originally opposed the use of United States bases in Britain for the attack, has now turned round to conjure reasons to justify the shameful action." S/18026 (21 April 1986) (Nigeria); S/18015 (17 April 1986) (Mongolia); S/PV.2675, 11 (Syria); S/PV.2676, 12 (Ukraine); S/PV.2677, 7 (Qatar); S/PV.2677, 28 (Poland), S/PV.2677, 34-35 (Vietnam); S/PV.2678, 17 (Benin), 21 (Iran); S/PV.2680, 7 (Belarus); S/PV.2682, 14 (Uganda); A/41/PV.77, 2 (Zimbabwe).

1309 Libya: "Britain would be held partly responsible for the raid, in having 'supported and contributed in a direct way' to the bombardment by allowing American planes to take off from British soil." Quoted in Diana Geddes, 'Airspace denial confirmed / French response to US Libya crisis', *The Times* (16 April 1986); See also in detail S/PV.2674, 11-12, S/PV.2680, 12-15, 21-22 (Libya): "ally and accomplice in aggression", "The United Kingdom is an active partner in the aggression. It must shoulder its responsibility for that. Indeed, the United Kingdom have shown that they are aware of the United Kingdom's responsibility for the aggression." "This aggression by two permanent members of the Council". See also S/PV.2680, 53; S/PV.2674, 6 (UAE): "we also hold the United Kingdom responsible, since it authorized the use of bases on its territory for the purpose of launching a military act of aggression against Libya."; S/PV.2675, 42 (Yemen): "brutal act of aggression carried out by the United States of America with the *complicity* of the United Kingdom", emphasis added; S/PV.2675, 38 (Cuba) "the United States government managed to win first place by involving as an *accomplice* to its misdeeds the British Government, which lent its territory as staging ground for the aggressors", emphasis added; S/PV.2677, 24-25, (Mongolia): "It is also of particular concern that the United States, in carrying out its new, barbaric attack on Libya, made use not only of its enormous war machine in the Central Mediterranean but also of its aircraft based in one of the countries that is Washington's closest partner in the aggressive bloc of the North Atlantic Treaty Organization (NATO)." S/PV.2677, 39-40 (Burkina Faso): "in which it had the *collaboration, which we equally condemn*, of the United Kingdom, which allowed American aircraft to make use of its territory." Christopher Greenwood, 'International Law and the United States' Air Operation Against Libya', 89(4) *WVaLRev* (1986-1987) 938 argued Article 3(f) Aggression Definition to be the relevant legal standard.

1310 A/41/76, 49-50 (Syria). Syria explained however that the organizations organizing the debate, refrained from the decision due to the "lesser role" that the UK played in the aggression. After detailed discussions of the UK role, Syria concluded A/41/

for several resolutions addressing assistance in addition to condemning the US strikes. The Organization for Islamic Cooperation, and the UN General Assembly, both called "upon all States to refrain from extending any assistance or facilities for perpetrating acts of aggression against" Libya.[1311]

The UK did not challenge the legal grounds for the criticism. Instead, the UK countered the accusations making a detailed argument as to why it believed that the US strikes were in accordance with international law.[1312] Prime Minister Thatcher stated

> "I believe that the attacks made by the United States on Libya were within the inherent right of self-defence under article 51. *That was why* we gave our support to that action and our consent to the use of bases in Britain for that purpose. […] [A]ction by the United States took place against continued state-sponsored terrorism by Libya. I believe *we were entitled to use*, that the United States was entitled to use, its inherent right of self-defence. If one refuses to take any risks because of the consequences, the terrorist Governments will win and one can only cringe before them."[1313]

PV.76, 58: "Britain is the partner of the United States in aggression." A/41/PV.77, 128-130 (Syria): "the United Kingdom came forward and offered such facilities for those bombers. That was complicity in a terrorist act."

1311 Resolution No. 21/5-P(IS), Fifth Islamic Summit Conference, Kuwait, 26 - 29 January 1987; A/RES/41/38 (20 November 1986), 79 votes in favor, 28 votes against, 33 abstentions. The UNGA resolution was motivated by the perceived failure of the Security Council to adequately deal with the situation. The preamble and the (many expressly legal arguments in the) debates left little doubt that the main purpose of the debate and resolution was to defend and preserve the principles of the UN Charter. See A/41/PV.76-78, in particular for example S/41/PV.77, 22 (Kuwait), 77 (Vanuatu), S/41/PV.78, 66 (Peru). It is true that the latter resolution was far from unanimous. Abstentions and dissenting votes were however widely explained with the resolution's failure to mention terrorism. A/41/PV.78, 72 (Spain); 72-73 (Chile); 67 (Turkey), 71 (Sweden). Note that despite the frequent reference to UK's assistance, it was not mentioned in the draft resolution in the Security Council that was ultimately rejected, S/18016/Rev.1 (21 April 1986), for a discussion of the draft see S/PV.2682, 26 et seq.

1312 S/PV.2675, 54; S/PV.2679, 13-31, S/PV.2680, 52-53 (UK). The UK was well aware of the criticism and saw its statement as a reply. See also HC Deb 15 April 1986, Hansard vol 95 cols 729-739.

1313 Geoffrey Marston, 'United Kingdom Materials on International Law 1986', 57 *BYIL* (1987) 637.

The UK believed that the "the United States Administration acted fully in accordance with international law and with the United Nations Charter."[1314] Moreover, it made reference to "long-standing arrangements:

> "The arrangements under which American bases are used in this country have been the same for well over 30 years and they have not changed. Under those arrangements, our agreement was required. It was sought and, after discussion and question, it was obtained on the basis that the action would be on targets that were within article 51."[1315]

Other factors apparently also weighed in:

> "[The US President] made it clear that use of F111 aircraft from bases in the United Kingdom was essential, because by virtue of their special characteristics they would provide the safest means of achieving particular objectives with the lowest possible risk both of civilian casualties in Libya and of casualties among United States service personnel."[1316]

At the same time, the British government "reserved the position of the United Kingdom on any question of further action which might be more general or less clearly directed against terrorism."[1317]

Libya also alleged that the US was using "Tunisian territory and airspace for its aggression against Libya. The passage towards our aggression and the aggressive approach are directed against us from Tunisia."[1318] Tunisia firmly denied the allegations as "totally unfound accusations," without however challenging the Libyan position in law.[1319]

Even more emphatically, Libya reacted against alleged Italian support. It fired missiles at a radar installation located on the island of Lampedusa; they left them, however, unscathed.[1320] Italy immediately lodged protest with Libya "for this act of hostility against Italy which nothing can justify".[1321] Libya, however, saw the justification for the strikes in the fact that the US had made use of the US transmission station situated on

1314 Ibid 642.
1315 Ibid 638, 639.
1316 HC Deb 15 April 1986, Hansard vol 95 cols 729-739, see also col 726.
1317 Ibid.
1318 A/41/297 (18 April 1986).
1319 Ibid.
1320 Judith Miller, 'Italian Islands, a Libyan Target, Escapes Unscathed', *NYT* (16 April 1986).
1321 S/18007 (16 April 1986).

Lampedusa.[1322] Also Libya stressed that it targeted the US facilities, not Italy. Italy asserted, however, it had requested the US not to use the base for tasks outside the institutional functions of the NATO.[1323] In the Security Council and General Assembly debate, the incident hardly received attention.

### 12) The Chadian-Libyan conflict 1987

In 1987, Libya officially protested against an American delivery of Stinger missiles to Chad "for use in its war against Libya."[1324] Libya described the American assistance as "active and direct participation [...] in the war against Libya" and as "direct intervention."[1325] Libya alleged that the USA had provided "unlimited [...] support". In addition to the Stinger missiles, it claimed that the US "has not ceased to provide financial support for weapons, experts, technicians and troops to take part in the battle against Libya and the aggression against the inviolability of the Libyan territory."[1326]

Chad responded by making a two-stranded argument. First, it stressed that the US delivered only defensive weapons and claimed that this "delivery of defensive weapons [...] falls within the scope of the military co-operation of the two countries and is in conformity with Article 51 of the Charter of the United Nations." Second, Chad added to be only "exercising its right of self-defense".[1327]

1322 Ronzitti, *BullItPol* (2009) 126. S/PV.2677, 51 (Libya): "Italy and Spain must prevent any action against us by the Sixth Fleet and from United States bases."
1323 Lawrence Gray, Paolo Miggiano, 'The Lampedusa Incident and Italian Defense Policy', 2 *Italian Politics* (1988) 140.
1324 S/19260 (9 November 1987).
1325 Ibid.
1326 Ibid. Note that Libya also complained about French support.
1327 S/19261 (10 November 1987). Note that Chad condemned support by other Arab States.

13) No-flight zones in Iraq 1991-2003

Early in 1991, in reaction to reports of increased repression of the Kurdish population in Northern Iraq,[1328] and the Shi'ite and Marsh Arab population in Southern Iraq,[1329] the USA, UK, and France decided to take action. Initially, they airdropped humanitarian supplies.[1330] In a next step, they established safe havens for the Kurds in Northern Iraq by ground forces, which was soon ended, however, in mid-July 1991 and replaced by a UN mission.[1331] On 6 April 1991 and 27 August 1992 respectively, the USA and France established two no-flight zones in Iraq to protect the Kurdish population in Northern Iraq and Shi'ite and Marsh Arab populations in Southern Iraq. The latter was extended in 1996.[1332] France withdrew from the operations in 1996 and 1998 respectively.[1333] The operations were terminated in 2003.[1334]

To enforce the no-flight zones, American, British, and French military aircraft were regularly patrolling Iraqi airspace. In the course of their patrolling, the aircraft were permitted to strike specific military targets in

1328 S/22435 (3 April 1991) (Turkey); S/22447 (4 April 1991) (Iran). The situation was discussed in the UN Security Council S/PV.2982 (5 April 1991), see also resolution 688 (5 April 1991).

1329 S/24386 (5 August 1992). Marc Weller, *Iraq and the Use of Force in International Law* (2010) 74.

1330 Iraq complained: S/22459 (8 April 1991). Weller, *Iraq and the Use of Force*, 71-72.

1331 S/22663 (31 May 1991). Weller, *Iraq and the Use of Force*, 73.

1332 S/1996/711 (3 September 1996) (USA); Tarcisio Gazzini, 'Intervention in Iraq's Kurdish Region and the Creation of the No-Fly Zones in Northern and Southern Iraq – 1991-2003' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 470.

1333 Christine Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq', 13(1) *EJIL* (2002) 17-18; Nico Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', 3(1) *MaxPlanckUNYB* (1999) 74; Michael N Schmitt, 'Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement', 20(4) *LoyLAIntl&CompLJ* (1997-1998) 735-736.

1334 For a more detailed account of the facts: Gazzini, *No-Fly Zones*, 469-470; Michael Wood, 'Iraq, Non-Fly Zones' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2010) para 1-6; Christine Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 *BYIL* (1995) 160-169; Krisch, *MaxPlanckUNYB* (1999) 73-74; Peter Malanczuk, 'The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War', 2(2) *EJIL* (1991) 115-123; Weller, *Iraq and the Use of Force*, 73-80. For a factual account by Iraq: S/1999/45 (15 January 1999). See also UNYB 1991, 204.

Iraq.[1335] This included the use of force against aircraft intruding the zones, as well as appropriate use of force to ensure the safety of the patrolling aircraft. In particular after the controversial Operation Desert Fox, the USA and the UK interpreted the latter criterion rather broadly, resulting in several strikes against various targets in Iraq.[1336]

The legal basis of the operations was not without controversy. First, the *implementation and enforcement* of the no-flight zone itself, and second, the intervening States' *aerial bombing* called for a justification under international law. The three intervening States did not always pursue a coherent and consistent legal rationale. They provided different legal arguments for the implementation and enforcement of the no-flight zone and the concomitant strikes, which evolved over time.[1337] Over time, various States (increasingly expressly) opposed the no-flight zone, and in particular the accompanying use of military force, as violation of international law.[1338]

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1335 See for example S/1996/711 (3 September 1996) (USA), explaining US use of force. Weller, *Iraq and the Use of Force*, 75; Wood, *Non-Fly Zones* para 12.

1336 Christine Gray, *International Law and the Use of Force* (4th edn, 2018) 172; Weller, *Iraq and the Use of Force*, 79-80.

1337 For detailed discussions of the justifications see Malanczuk, *EJIL* (1991); Gazzini, *No-Fly Zones*, 472-474, 479; Gray, *BYIL* (1995) 164; Gray, *EJIL* (2002); Krisch, *MaxPlanckUNYB* (1999) 73-79; Alain E Boileau, 'To the Suburbs of Baghdad: Clinton's Extension of the Southern Iraqi No-Fly Zone', 3(3) *ILSAJIntl&CompL* (1996-1997) 888-890; Gazzini, *No-Fly Zones*, 474: The UK excluded the possibility of an argument of collective self-defense; Weller, *Iraq and the Use of Force*, 75-80.

1338 E.g. Russia S/PV.4008 (21 May 1999), 1: "Against the backdrop of the humanitarian crisis, we condemn in particular the continuing aerial bombing of Iraq civilian and military facilities by the United States and the United Kingdom under the illegal pretext of the no-fly zones, which were created unilaterally, in circumvention of the Security Council. As a result of this illegal use of force, innocent people are dying." S/1996/712, S/1996/715; China, S/PV.4008 (21 May 1999), 4, S/PV.4084 (17 December 1999), 12: "It should also be pointed out here that the so-called no-fly zone in Iraq has never been authorized or approved by the Council. The members concerned should immediately cease such actions, which fly in the face of international law and the authority of the Council."; NAM: Final Document XII Summit of the Non-Aligned Movement (Durban, 2-3 September 1998), A/53/667-S/1998/1071 (13 November 1998) para 235: "The Heads of State or Government deplored the imposition and continued military enforcement of "No Fly Zones" on Iraq by individual countries without any authorisation from the United Nations Security Council or General Assembly."; Belarus S/2001/149 (20 February 2001); League of Arab States: Gray, *BYIL* (1995) 168. See also France once it had withdrawn from the operations: "We have believed for a long time that there is no basis in international law for this type of bombing" 'No-fly zones: The legal Position', *BBC* (19 February 2001), news.bbc.co.uk/2/hi/middle_east/1175950.stm.

a) Iraq

Iraq qualified the imposition of the no-fly zone by the USA and the UK, and the concomitant missile strikes, in particular, as violation of the UN Charter, the provisions of the Friendly Relations Declaration, and of the Definition of Aggression.[1339] Consistently and periodically, it sent detailed documentations of alleged violations to the UN Security Council. In addition, Iraq reserved its right to self-defense. After an initial period of restraint, it frequently claimed to exercise it, which repeatedly led to military confrontations.[1340]

But Iraq did not leave it there. It objected against the assistance provided to those military operations. In its numerous letters of protest, Iraq took note from where the patrolling aircraft were coming: Saudi-Arabia, Turkey, and Kuwait.[1341] It further noted that AWACS operating in those States' territories supported the air raids. On that basis, Iraq then concluded that the assisting States were internationally responsible for acts of aggression.[1342] With respect to Kuwait, Iraq for example held:

> "The logistic support being provided to the Americans and British by one of our neighbouring States — specifically Kuwait, which has transformed its territory into a base from which the United States threatens to commit aggression against Iraq — means that that country incurs full

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The UNSG was also critical: SG/SM/8081. Gray, *BYIL* (1995) 167 who noted that in the initial phase, there seemed to be at least tacit support, which however disappeared. See also Krisch, *MaxPlanckUNYB* (1999) 77.

1339 See for example in particular detail, responding to US claims: S/1999/45(15 January 1999). See also S/1992/24496 (27 August 1992); S/1996/782 (25 September 1996); S/1998/965 (19 October 1998); S/1999/220 (1 March 1999); S/2002/1316 (3 December 2002).

1340 Weller, *Iraq and the Use of Force*, 75-76, 78-79; Gazzini, *No-Fly Zones*, 470. Wood, *Non-Fly Zones* para 14. Iraq reported its responses in self-defense in its letters, for example A/51/339 (9 September 1996); A/51/401-S/1996/782 (25 September 1996); S/1997/881, (12 November 1997); S/1999/45, (15 January 1999); S/2002/963 (27 August 2002). See also for example S/PV.4152 (8 June 2000), 3, (Russia), 4 (UK) noting the increased military confrontations.

1341 Noting just assistance: A/51/339 (9 September 1996).

1342 E.g. S/1998/52 (20 January 1998); S/1998/613 (7 July 1998); S/1999/45 (15 January 1999); S/2000/924 (29 September 2000); S/2002/858 (1 August 2002); S/2002/963 (27 August 2002); S/2002/1222 (4 November 2002); S/2002/1316 (3 December 2002); S/2002/1439 (31 December 2002); S/2003/108 (29 January 2003). See also in the context of prisoners of war: S/2001/340 (10 April 2001). See for a report in the Iraqi media: S/2001/412 (26 April 2001), Annex.

> responsibility under international law, including liability for the payment of compensation for the losses and damage, in both human and material terms, caused by these unlawful practices." [1343]

Furthermore, Iraq complained about Anglo-American warplanes flying from Kuwaiti territory into Iraqi territory, and stated:

> "I further urge [the Security Council] to intervene with Kuwait and urge it […] to halt its participation in this barbaric aggression that violates Iraq's territorial integrity […]. Because of its participation in this aggression, Kuwait has international responsibilities under the Charter of the United Nations."[1344]

Criticism was not limited to Kuwait:

> "The *logistic support* provided by Saudi Arabia, Kuwait and Turkey to the Americans and the British makes these countries *key partners in the aggression* being committed against Iraq, so that they bear international responsibility for actions that are deleterious to the people of Iraq."[1345]

In another letter, Iraq claimed that:

> "As such, the United States and the United Kingdom bear the full international responsibility for their illegal actions. Moreover, the Governments in the region which *render facilities and support* to the United States and the United Kingdom to *enable them* to impose and enforce the no-fly zones *share with them the same violation* and consequently *the same* international responsibility."[1346]

Occasionally, Iraq also threatened to attack the bases in the States permitting US and British warplanes to fly from their country. For example, it stated: "We warn the rulers of Saudi Arabia and Kuwait and tell them you

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1343 S/2003/108 (29 January 2003). Similarly: S/2002/1439 (31 December 2002); S/2000/1248 (29 December 2000). See also S/2002/1222 and S/2002/1316: "and that [the Security Council] will urge the regional parties that are facilitating its continuation to desist from doing so."

1344 S/2003/58 (17 January 2003), emphasis added. See also S/2003/222 (4 March 2003), stating that "Kuwait bears *legal* responsibility under the Charter of the United Nations for its involvement in this aggression," emphasis added.

1345 S/2000/820 (22 August 2000), S/2000/942 (29 September 2000), emphasis added. See also A/51/344-S/1996/734 (10 September 1996): "concerted effort with those supporting them."

1346 S/1999/45, (15 January 1999), emphasis added.

are now involved in an aggressive war […]. […] we are capable of attacking the bases which are a departure point for aggression."[1347]

Iraq, hence, was arguing from the assumption that interstate assistance leads to responsibility under the UN Charter, that may even allow for self-defense against the assisting State. Iraq acknowledged the assistance as "participation", distinct from the direct use of force. It claimed the assistance to be prohibited not as *force*, but because of the *States' involvement* in another State's notably illegal use of force. At the same time, against the background of the assisting States' key role ("key partners", "enables") and the nature of the assistance (territory as staging area) Iraq seemed to equate the assisting States' responsibility with the intervening States' responsibility for acts in violation of the prohibition to use force.

b) Assisting States

Factually, Iraq's reports were correct and mostly corresponded with the accounts of the intervening States.[1348] Saudi-Arabia provided a military base, allowing American and British aircraft to enforce the Southern no-fly zone. In addition, Saudi-Arabia shared reconnaissance information and provided aerial refueling, although it was cautious to conduct this from its own airspace only.[1349] At times, there were even accounts asking whether Saudi-Arabia had actively conducted air strikes in Iraq.[1350] Moreover, US and UK troops were stationed in and operating from Kuwait, Bahrain, Jordan,[1351]

1347 'Iraq Issues Warning To U.S. Gulf Allies', *NYT* (15 February 1999); Howard Schneider, 'Iraq threatens broader attacks', *WaPo* (16 February 1999), https://www.washingtonpost.com/archive/politics/1999/02/16/iraq-threatens-broader-attacks/f5f6fd52-aa47-4dbe-9e9b-0e0a9c4ee881/; Ian Black, 'Iraq threatens neighbours', *Guardian* (13 January 1999), https://www.theguardian.com/world/1999/jan/13/iraq.ianblack.

1348 Committee on Defence, Defence - Thirteenth Report (HC 1999-2000), para 35-39.

1349 John H Cushman, 'Saudis in Supporting Role To Allied Flights Over Iraq', *NYT* (30 August 1992), 10; John R Bradley, 'US troops 'pouring into Saudi Arabia'', *Telegraph* (7 March 2003), https://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1423984/US-troops-pouring-into-Saudi-Arabia.html.

1350 Barton Gellman, 'Ann Devroy, U.S. Delivers Limited Air Strike on Baghdad', *WaPo* (14 January 1993) A1.

1351 Douglas Jehl, 'Second, any support going beyond operations claimed to be legal, States publicly denied any contribution', *NYT* (9 April 1996), A9, https://www.nytimes.com/1996/04/09/world/jordan-allowing-us-to-use-its-air-base-for-flight

and the United Arab Emirates.[1352] The northern no-fly zone was executed by forces based at and operating from Turkey, primarily Incirlik Air Base. For refueling, patrolling fighters would return into Turkish airspace.[1353]

Nonetheless, Iraq's consistent complaints were widely ignored and legally uncontested. Like the intervening States, the assisting States maintained a low profile on acknowledging and explaining their contributions.[1354] Neither State provided a letter to the UN Security Council indicating their contribution.

But assisting States did not ignore international law in their decisions to contribute. None of them challenged the legal framework underlying the Iraqi accusations. Instead, they followed a rather nuanced approach to argue compliance therewith. Importantly, they drew a distinction between the enforcement of the no-fly zone and concomitant military strikes against Iraq.

First, on their support to the implementation and enforcement of the no-flight zone itself, assisting States remained guarded, and did not advance a specific justification. But it was deemed at least not to violate international law. For example, the Ministerial Council of the Gulf Cooperation Council that entailed all assisting States, but Turkey, affirmed

> "that the declaration of an exclusion zone for Iraqi airspace south of the 32nd parallel accords with the resolutions and statements of the Security Council and falls within the framework of the international community's concern to halt the campaigns of annihilation being carried out by the Iraqi regime against the Iraqi people."[1355]

In contrast and secondly, regional States were generally restrained towards using force against Iraq outside the immediate enforcement of the no-flight zone. States remained reluctant to *publicly* endorse and actively support a

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s-over-iraq.html: aircraft did not however fly directly into Iraq but flew through Saudi-Arabia.

1352 Douglas Jehl, 'Saudis Admit Restricting US Warplanes in Iraq', *NYT* (22 March 1999) A6.

1353 'Containment: The Iraqi no-fly Zones', *BBC* (29 December 1998), news.bbc.co.uk/2/hi/events/crisis_in_the_gulf/forces_and_firepower/244364.stm; Stephen Wrage, Scott Cooper, *No Fly Zones and International Security: Politics and Strategy* (2019).

1354 For example, for Saudi-Arabia's efforts: John H Cushman, 'Saudis in Supporting Role to Allied Flights Over Iraq', *NYT* (30 August 1992), 10.

1355 A/47/411-S/4599 (15 September 1992).

use of force against Iraq.[1356] In particular, during the later years of the operations, when the Anglo-American forces extended their strikes and clashes with Iraq increased, States assisting the enforcement of the no-fly zone were increasingly critical, and denounced strikes against Iraq as illegal.[1357] Notably, if critique was voiced, it was confined to a specific raid, not to the no-flight zone generally. As a consequence, assistance to those military strikes was widely denied and disavowed.

The Saudi response to the Iraqi "letter*s*" was exemplary. Above all, Saudi-Arabia assured that the allegations that US and British planes were coming from Saudi territory were "completely gratuitous and unfounded", fallacious and did not "contain the slightest particle of truth, either in their totality or in their minute details." In addition, Saudi-Arabia wished to "point out that there exist Security Council resolutions." In response to Iraqi claims for compensation, Saudi-Arabia reaffirmed "that the liability for such damage falls squarely on the Iraqi Government, whose policies of aggression, and the consequences arising therefrom, led to the adoption of international resolutions and measures based on the international legal order." In conclusion, Saudi-Arabia wished to restate its "firm resolve" to be abiding by international law, and the UN Charter in particular.[1358]

This nuanced approach is evident again in another Saudi letter to the Security Council, in which it held:

> "The letter of the Permanent Mission of Iraq asks whether the fact that United States and British aircraft take off from Saudi territory in order to bomb Iraq is compatible with the enhancement of the international peace and security of which Saudi Arabia speaks. *The Permanent Mission of Saudi Arabia once again affirms that the United States and British*

1356 Douglas Jehls, 'On the Record, Arab Leaders Oppose U.S. Attacks on Iraq', *NYT* (29 January 1998), A6.

1357 For example the Arab League stated that the raid "has no justification, violates international law, and has provoked anger and resentment in the Arab world"; The NAM, A/53/762 (18 December 1998), "deplores the *ongoing military actions* against Iraq by individual countries without any authorization from the Security Council in flagrant disregard of the Charter of the United Nations.", emphasis added; Alfred E Prados, *Iraq Post-War Challenges and U.S. Responses, 1991-1998* (CRS Report for Congress, Congressional Research Service, 98-386 F, 31 March 1999) 20-23; Alfred E Prados, Kenneth Katzman, *Iraq-U.S. Confrontation* (CRS Report for Congress, Congressional Research Service, IB94049, Updated 27 February 2001), 12-13 with further statements.

1358 S/1999/277 (15 March 1999).

> *aircraft to which reference is made do not take off from Saudi territory in order to bomb Iraq and that Saudi Arabia has nothing to do with them. As has been affirmed by senior Saudi officials on numerous occasions, the United States and British aircraft to which Iraq refers do not take off from Saudi territory.*"[1359]

In the next paragraph Saudi-Arabia then addressed the no-flight zones more generally:

> "Member States are fully aware that the establishment of the no-flight zone in southern Iraq was *due to circumstances linked with Iraq's aggression against Kuwait and its threats against neighbouring countries.* The relevant United Nations resolutions provide for the adoption of whatever measures are necessary for the security and integrity of the neighbouring countries and to ensure that they are not constantly under threat. The no-flight zone is to be regarded as an essential means of achieving the desired objective, and Security Council resolution 949 (1994) is therefore to be understood as the basis for the establishment of an essential mechanism and for the implementation of the no-flight zone as a means of giving effect to the resolution."[1360]

Saudi-Arabia, however, did not reject *any* use of force beyond the enforcement of the no-flight zone, but allowed and supported strikes in self-defense. At first, Saudi-Arabia seemed to grant the intervening States a margin of appreciation. The Saudi Defense Minister Prince Sultan, for example, stated that the zone "is not a Saudi decision, so how can we say if we are with it or not?"[1361] Saudi-Arabia only refused to allow the use of their bases for any new overt military campaign.[1362] This appeared to change, however, with the experience of the controversial and widely rejected Operation Desert Fox in 1998, with which States' readiness to publicly acknowledge and provide assistance generally eroded.[1363] Thereafter, Saudi-

1359 S/2001/517 (25 May 2001), emphasis added.
1360 Ibid.
1361 Alfred E Prados, *Saudi Arabia: Post-War Issues and U.S. Relations* (CRS Report for Congress, Congressional Research Service, IB93113, Updated 14 December 2001) 3.
1362 Douglas Jehl, 'Saudis Admit Restricting US Warplanes in Iraq', *NYT* (22 March 1999) A6.
1363 See Weller, *Iraq and the Use of Force*, 119-130 on the operation which primarily concerned Iraqi non-compliance with UNSC resolutions. For general criticism see: S/PV.3955 (16 December 1998). Douglas Jehl, 'On the Record, Arab Leaders Oppose U.S. Attacks on Iraq', *NYT* (29 January 1998), A6. Saudi-Arabia denied

Arabia reportedly adopted a new official policy. It expressly prohibited offensive aircraft to be deployed from bases in Saudi-Arabia, and objected "to loosened rules of engagement for American warplanes in the region, which include an expanded definition of self-defense."[1364] Instead, Saudi-Arabia supported strikes only in response to a direct threat.[1365] Indicating that its decision was legally motivated, it added that its position would change "only if the United Nations Security Council authorized the use of force against Iraq."[1366]

It is worth mentioning, however, the Saudi restrictions apparently did not extend to refueling aircraft to take off, and or the use of Saudi airspace.[1367] Yet, in any event, Saudi-Arabia did not make an express claim that it had a right to do so. Instead, despite the emphasis on the territorial launch base, its denial was broad enough to also cover this reported behavior. But some ambiguity remains.

Not all assisting States followed the Saudi example with respect to the use of force beyond enforcement of the no-flight zone.[1368] Notably, the operational effectiveness was not decisively hampered, as the USA and UK relocated their operations to be conducted from other States, for example,

any assistance to that operation, Steven Lee Myers, 'US Will not Ask to Use Saudi Base for A Raid on Iraq', *NYT* (9 February 1998); Douglas Jehl, 'Saudis Admit Restricting US Warplanes in Iraq', *NYT* (22 March 1999) A6; Committee on Defence, Defence - Thirteenth Report (HC 1999-2000) para 50.

1364 Douglas Jehl, 'Saudis Admit Restricting US Warplanes in Iraq', *NYT* (22 March 1999) A6.

1365 Ibid quoting Saudi officials: "We object to any nation taking matters into its own hands, and using bombing as an instrument of diplomacy." "We have adopted the principle that our bases will not be used as a means of punitive operations beyond the purposes of the no flight zones." "In December, that meant that planes going out of here to hit Iraqi targets were not allowed, and they are not being allowed now."

1366 Douglas Jehl, 'Saudis Admit Restricting US Warplanes in Iraq', *NYT* (22 March 1999) A6.

1367 Steven Lee Myers, 'US Will not Ask to Use Saudi Base for A Raid on Iraq', *NYT* (9 February 1998) A1; Prados, *Saudi Arabia*, 3; Prados, Katzman, *International Attitudes*, 12.

1368 But see, not at least due to substantial doubt on the legality of such use of force: Egypt, Morocco, Jordan: Douglas Jehl, 'Only One Arab Nation Endorses U.S. Threat of Attack on Iraq', *NYT* (8 February 1998), https://archive.nytimes.com/www.nytimes.com/library/world/020998iraq-us-arabs.html; Douglas Jehl, 'On the Record, Arab Leaders Oppose U.S. Attacks on Iraq', *NYT* (29 January 1998), A6.

Kuwait.[1369] None of those supporting States, however, claimed to support an illegal use of force. Instead, they continued to view their contributions to the use of force within the legitimate framework, either disavowing their support to the use of force or viewing it as legal.[1370]

The Non-Aligned Movement's stance on no-flight zones does not stand against the proposed interpretation of assisting States' practice. In 1998, "[t]he Heads of State or Government deplored the imposition and continued military enforcement of "No Fly Zones" on Iraq by individual countries without any authorization from the United Nations Security Council or General Assembly."[1371] Notably, however, the assisting States, Saudi-Arabia and Kuwait, both entered a reservation to this paragraph.[1372] "Kuwait [even] strongly believe[d] that the said paragraph contradicts Security Council resolution 688 (1991). The "No Fly Zone" over Iraq has been enforced to make possible the implementation of resolution 688."[1373]

### 14) US strikes in Afghanistan 1998

In reaction to bombings of US embassies in Nairobi and Dar Es Salaam, on 20 August 1998, an American submarine based in the Arabian Sea launched several Tomahawk cruise missiles targeting terrorist-related facilities within Afghanistan.[1374] The missiles had overflown Pakistani airspace. Pakistan, that condemned the strikes as a violation of international law, issued a protest noted to the Security Council.[1375] It emphasized that this action

1369 Steven Lee Myers, 'US Will not Ask to Use Saudi Base for A Raid on Iraq', *NYT* (9 February 1998), A1.

1370 'Turkey: Howard Schneider, Iraq threatens broader attacks', *WaPo* (16 February 1999), https://www.washingtonpost.com/archive/politics/1999/02/16/iraq-threatens-broader-attacks/f5f6fd52-aa47-4dbe-9e9b-0e0a9c4ee881/: "The U.S. and British pilots open fire only to defend themselves". Kuwait: Douglas Jehl, 'Only One Arab Nation Endorses U.S. Threat of Attack on Iraq', *NYT* (8 February 1998). Bahrain did not admit its support, ibid; On February 17, however, Bahrain's Minister of Information said his country "has not allowed the use of its territories for any military action against Iraq." *Reuters News Wire* (17 February 1998).

1371 A/53/667-S/1998/1071 (13 November 1998) para 235.

1372 Ibid Annexure, Reservations.

1373 Ibid.

1374 S/1998/780 (20 August 1998). For details see Sean D Murphy, 'Contemporary Practice of the United States Relating to International Law', 93(1) *AJIL* (1999) 161-166.

1375 S/1998/794 (24 August 1998); 'Muslims, Yeltsin denounce attack, Allies express support', *CNN* (21 August 1998).

constituted a violation of its airspace since, as the government was eager to emphasize, there had been no prior consultations, and it has been taken by surprise. As such, Pakistan seemed to dispel any impression of its active contribution to the strikes. In fact, it further held that "[s]uch action, if condoned, sets a precedent which can encourage other countries to pursue aggressive designs against their neighbours on flimsy or unsubstantiated pretexts."[1376]

### 15) Operation Iraqi Freedom 2003

On 19 March 2003, a coalition led by the United States and the UK intervened in Iraq. The Security Council did not specifically authorize the military operation.[1377] It had only decided in November 2002 that Iraq had been in material breach of its obligations under resolution 687 (1991) and warned Iraq of serious consequences.[1378] On 9 April 2003, Iraq conceded its defeat.[1379] On 1 May 2003, President Bush announced the end of "major" military operations in Iraq.[1380]

On 8 May, the USA and UK announced their intention to create a "Coalition Provisional Authority […] to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction,"[1381] after their initial efforts to establish an Iraqi interim government had been without success.[1382] After intense negotiations, on 22 May the Security Council adopted resolution 1483 (2003) that regulated a pragmatic legal framework governing the post-war reconstruction for the occupying powers,[1383] and the international community, i.e., other States,[1384] the

1376 S/1998/794.
1377 For States' efforts to receive a Security Council resolution see: Weller, *Iraq and the Use of Force*, 176-182.
1378 S/RES/1441 (8 November 2002).
1379 Sean D Murphy, 'Use of Military Force to Disarm Iraq', 97(2) *AJIL* (2003) 427.
1380 US Office of Press Secretary, President Bush Announces Major Combat Operations in Iraq Have Ended (1 March 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html.
1381 S/2003/538 (8 May 2003).
1382 Eyal Benvenisti, *The International Law of Occupation* (2012) 251-253.
1383 S/RES/1483 (22 May 2003), preambular para 13, para 4, 5, 6, 24 (information).
1384 Ibid preambular para 14, 15, para 1-3, 5, 26. See also S/PV.4761, 11 (22 May 2003) (Pakistan).

United Nations as well as other organizations.[1385] Not least, legal considerations with respect to the legality of an occupation had prompted the USA and UK to promote the resolution.[1386]

In October 2003, the Security Council authorized a multinational security force under unified command.[1387]

It was on 28 June 2004 that the occupation ended officially.[1388] From then on, the multinational security force was present in Iraq at the request of the Iraqi Interim government and authorized by the Security Council.[1389]

This is not the place to revisit the legality of the military operations in detail.[1390] Suffice it to note that particularly the legality to use force in the initial combat phase from March to May 2003 was fiercely contested before, during and after the intervention, and widely rejected by many States and scholars.[1391] For the latter stages, the question of legality was less prominent, although not always beyond any doubt. For example, the question of the lawfulness of "post-war" occupation arose, in light of the precise effects of Security Council Resolution 1438 (2003).[1392] The coalition's presence was

1385 S/RES/1483 para 8 (Special Representative for Iraq), 12-14 (Development Fund for Iraq), 15 (international financial institutions), para 16, 17 (Secretary-General). See also States' statements S/PV.4761 (22 May 2003).

1386 Benvenisti, *Occupation*, 249. With respect to *ius in bello* (belligerent occupation) as well as *ius contra bellum*: Mahmoud Hmoud, 'The Use of Force against Iraq: Occupation and Security Council Resolution 1483', 36(3) *CornellIntlLJ* (2003-2004) 438, 445.

1387 S/RES/1511 (16 October 2003); Adam Roberts, 'The End of Occupation: Iraq 2004', 54(1) *ICLQ* (2005) 32.

1388 Some doubts remained, however. See e.g. Roberts, *ICLQ* (2005) 39 et seq; Benvenisti, *Occupation*; Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (2008) 185.

1389 S/RES/1546 (8 June 2004), reaffirmed by S/RES/1637 (11 November 2005), S/RES/1723 (28 November 2006).

1390 See for details, e.g. Weller, *Iraq and the Use of Force*; Sean D Murphy, 'Assessing the Legality of Invading Iraq', 92(2) *GeoLJ* (2003-2004); Hmoud, *CornellIntlLJ* (2003-2004).

1391 For an overview see Olivier Corten, 'Operation Iraqi Freedom: Peut-on Admettre l'Argument de l'Autorisation Implicite du Conseil de Securite', 36(1) *RBDI* (2003). See also S/PV.4726 (Resumption 1).

1392 For example, on whether it constituted a retroactive authorization of the initial combat phase or authorizes the occupation: Alexander Orakhelashvili, 'The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law', 8(2) *JCSL* (2003) 310; Hmoud, *CornellIntlLJ* (2003-2004) 453; Christine M Chinkin, 'The Continuing Occupation? Issues of

in legally calmer waters following resolution 1511 (2003), and the official termination of the occupation in 2004.

### a) The role of assistance in Iraq: the US 'coalition' narrative

Who was and who was not part of the coalition intervening in Iraq in 2003 was an omnipresent question at all stages of the military operations.

From the outset, the USA under President George W. Bush attempted to form a coalition of the willing, and thus to draw a line to the coalition intervening in Iraq 1990.[1393] The UK and USA led an intense diplomatic campaign to garner support, not only legally through an authorization by the Security Council, but also politically and militarily.[1394]

In that light, the US official communications to the Security Council always referred to a "coalition" that used force.[1395]

By 27 March 2003, the White House released a list counting 49 States that had "publicly committed to the Coalition".[1396] It explained that "[c]ontributions from Coalition member nations range from: direct military participation, logistical and intelligence support, specialized chemical/biological response teams, over-flight rights, humanitarian and reconstruction aid, to political support."[1397] The list led to much quarrel, and was re-

Joint and Several Liability and Effective Control' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (2008) 174. See also State comments in S/PV.4761 (22 May 2003).

1393 Press Conference by US President George W. Bush and Vaclav Havel, President of the Czech Republic (20 November 2002), https://www.nato.int/docu/speech/2002/s021120b.htm; Stephen A Carney, *Allied Participation in Operation Iraqi Freedom* (2011) 5. Murphy, *GeoLJ* (2003-2004) 241-243.

1394 On details see Anne Peters, 'The Growth of International Law between Globalization and the Great Power', 8(1) *ARIEL* (2005) 116-117.

1395 S/2003/351 (21 March 2003).

1396 White House, Who are the current coalition members? (27 March 2003), https://georgewbush-whitehouse.archives.gov/infocus/iraq/news/20030327-10.html. Marc Weller, 'The Iraq War - 2003' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 644.

1397 Ibid.

peatedly edited and revised.[1398] Not at least, the numbers of coalition States varied subject to the author of the list.[1399]

The official American narrative demonstrated: (any form of) assistance was decisive for the Anglo-American use of force against Iraq, for US-American internal politics,[1400] for the international legitimacy, but also for "deploying meaningful military power."[1401] But (not) being part of the coalition cannot necessarily be equated with (not) providing assistance.

Behind the controversial US coalition narrative, a nuanced web of assistance and non-assistance to the military operations developed. Just like States' general position towards the use of force, States took a careful stance on the question whether and how to support the USA, arguably more nuanced than the coalition narrative suggested. Assistance varied greatly with respect to the extent and the phase of the military operations, and so did States' explanations. Moreover, many States that were not listed provided not indecisive support. Others again that were listed were careful in providing more than the political support of being listed.

1398 Scott Althaus, Kalev Leetaru, 'Airbrushing History, American Style' (25 November 2008), https://clinecenter.illinois.edu/project/NewsAnalytics/airbrushing-history-american-style.

1399 The US senate published a list with 50 members; the US State department had a list of 30 coalition States. See also Glenn Kessler, 'United States puts a Spin on Coalition Numbers', *WaPo* (21 March 2003). The UK referred to "well over 40 States" providing political or material support, S/PV.4726, 23.

1400 See for example 63 percent of Americans thought that the President should not intervene without allies. Congressional support likewise depended on support by foreign governments. Murphy, *GeoLJ* (2003-2004) 241.

1401 Ibid 243-244. "U.S. military power is such that it can undertake actions using solely its own military forces, but the deployment of those forces typically requires access to foreign airfields, ports and railways as well as the pre-positioning of equipment and supplies abroad." See for example for the military buildup: Vernon Loeb, Bradley Graham, 'Rapid Buildup in Gulf on Horizon', *WaPo* (20 December 2002), A45.

b) Assistance to the use of force or occupation

(1) States engaged in combat

In the first stage of the operation, alongside the USA,[1402] the United Kingdom and Australia deployed troops and directly used force.[1403] Both States reported to the Security Council to be engaged in "military action" "in association with" the USA and Australia/UK respectively, which they claimed to be in accordance with international law.[1404]

(2) States deploying troops to assist

Few States deployed troops in assistance to the Anglo-American-Australian coalition invading Iraq. Only one of them reported military action to the UN Security Council between March and May: Uganda.[1405] It had placed troops at the disposal of the Anglo-American military forces.[1406] Uganda informed the Council – using strikingly different terms than Australia or the UK – that it had "decided to *support* the US-led coalition to disarm Iraq by force," and that "if need arises, Uganda will be ready to *assist* in any way possible."[1407] In justifying its assistance, Uganda did not take up the coalition's revival of the Security Council argument. It did not unambiguously claim the legality of the assisted use of force. Instead, it drew a clear link to its own relationship with Iraq. It explained that it had "taken this position for the […] reasons" of the Iraqi government's "active support" of "state sponsored terrorism of the worst type" which had led to many victims. It further noted that the "potential link between terrorism and weapons of mass destruction […] poses a very serious threat to international peace and security" and claimed that Saddam Hussein "has in the past used chemical and biological weapons against not only its own people, but also against […] Iran."

1402 S/2003/351. William H Taft, Todd F Buchwald, 'Preemption, Iraq, and International Law', 97(3) *AJIL* (2003).
1403 Weller, *Iraq War*, 644; Murphy, *GeoLJ* (2003-2004) 173.
1404 S/2003/350 (20 March 2003), S/PV.4726, 22-24 (UK); S/2003/352 (20 March 2003), S/PV.4726, 27 (Australia).
1405 S/2003/373 (24 March 2003) (Uganda). See also S/PV.4726 Resumption 1, 13-14.
1406 It is however unclear if or to what extent Uganda retained control over the troops.
1407 S/2003/373 (24 March 2003) (Uganda), emphasis added.

Other States' contributions at this stage were minor, and remote to the use of force.[1408] For example, Poland was reported to have participated in the hostilities, "to a very limited extent" with an unknown number of special forces.[1409] Those operations were however only acknowledged after press reports. Officially, Poland performed tasks of logistical character only.[1410] Other States deployed troops, yet in a non-combatant function, remaining aloof from hostilities. For example, the Czech Republic affirmed that the NBCR battalion deployed for Enduring Freedom was ready to be used for emergency and humanitarian assistance in case WMD were used.[1411] The troops were however not authorized to engage in any attack on Iraq that was not authorized by the Security Council.[1412] Slovakia sent a unit to protect against biological and chemical agents, stressing its humanitarian nature.[1413] Bulgaria sent a non-combatant unit for chemical and biological decontamination assistance under the requirement that "'Bulgaria should not take part in direct action' meaning that Bulgarian troops would not be engaged in direct combat and would not be deployed into Iraq."[1414] Denmark sent two warships and a medical unit in non-combatant capa-

1408 For an overview see Steven A Hildreth and others, *Iraq: International Attitudes to Operation Iraqi Freedom and Reconstruction* (CRS Report for Congress, Congressional Research Service, RL31843, 2003) 34.

1409 Weller, *Iraq and the Use of Force*, 182; Olivier Corten, 'Quels droits et quels devoirs pour les Etats tiers?' in Karine Bannelier, Théodore Christakis and Pierre Klein (eds), *L'intervention en Irak et le droit international* (2004) 106; Hildreth and others, *International Attitudes*, 34. 'Newsline – March 25, 2003', *RFERL* (25 March 2003), https://www.rferl.org/a/1142883.html.

1410 'Newsline - March 19, 2003', *RFERL* (19 March 2003), https://www.rferl.org/a/1142878.html; President of Poland, President of the Republic of Poland sign a decision to use Polish troops outside Poland (18 March 2003), https://www.prezydent.pl/en/archive/news-archive/news-2003/art,9,president-of-the-republic-of-poland-sign-a-decision-to-use-polish-troops-outside-poland.html. Poland sent a letter to the Security Council only in September 2003, S/2003/867 (9 September 2003).

1411 White House, Statement of Support from Coalition, https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030326-7.html; Hildreth and others, *International Attitudes*, 27, 34.

1412 Hildreth and others, *International Attitudes*, 34.

1413 S/PV.4726 Resumption 1, 6, Hildreth and others, *International Attitudes*, 27; Alan Cowell, 'A Pledge of Assistance for Bush From 8 European Leaders', *NYT* (30 January 2003), https://www.nytimes.com/2003/01/30/international/europe/a-pledge-of-assistance-for-bush-from-8-european-leaders.html; 'Newsline - March 19, 2003', *RFERL* (19 March 2003).

1414 Hildreth and others, *International Attitudes*, 34.

city.[1415] Spain provided "military backing to the coalition [...] by sending a joint humanitarian force".[1416] Although the Spanish government took at least a favorable stance on the US-led intervention (without expressly endorsing the legality however),[1417] Spain stressed that "Spain's mission had an identity of its own and was noncombatant."[1418] Latvia pledged support and readiness to join the coalition with a small contingent, but contributed only in the reconstruction period under Polish command.[1419]

Those States not providing their own justification acknowledged the (defensive) support to the US operation which they viewed to be in accordance with international law.[1420] Notably, some States, like for example Slovakia, were specific to see their participation *itself* to be covered by Security Council resolutions.[1421]

1415 Hartwig Hummel, *A Survey of Involvement of 15 European States in the Iraq War 2003* (Parliamentary Control of Security Policy Working Paper, Research project on Parliamentary Control of Security Policy, vol 7, 2007) 11; Hildreth and others, *International Attitudes*, 34; Corten, *Etats Tiers*, 118.

1416 Jimenez Piernas and others, 'Spanish Diplomatic and Parliamentary Practice in Public International Law, 2003', 9(1) *SpanYIL* (2003) 183. See also Hildreth and others, *International Attitudes*, 34; Al Goodman, 'Spain, no combat role in Iraq war', *CNN* (18 March 2003), https://edition.cnn.com/2003/WORLD/meast/03/18/sprj.irq.spain/index.html.

1417 Piernas and others, *SpanYIL* (2003) 181-182; S/PV.4726, 29. For the same conclusion Weller, *Iraq and the Use of Force*, 185.

1418 Piernas and others, *SpanYIL* (2003) 183.

1419 S/PV.4726, 42; Carney, *Allied Participation*, 76.

1420 Denmark: MFA Denmark, Det Juridiske Grundlag for Iværksættelse af Militære Forholdsregler mod Irak, (18 March 2003), https://web.archive.org/web/20070213095826/http://www.um.dk/da/menu/Udenrigspolitik/FredSikkerhedOgInternationalRetsorden/InternationaleOperationer/Irak/DanskMilitaertBidragTilDenMultinationaleSikringssyrke/DetJuridiskeGrundlagForIvaerksaettelseAfMilitaereForholdsreglerModIrak.htm; Poland: S/PV.4726, 25; Postanowienie Prezydenta Rzeczypospolitej Polskiej, (17 March 2003); Latvia: Martins Paparinskis, 'Republic of Latvia Materials on International Law 2003', 4 *BaltYBIL* (2004) 272-279, in particular 275-277; S/PV.4726, 42. In this direction S/PV.4726 Resumption 1, 31 (Bulgaria).

1421 Slovakia: 'Newsline - March 21, 2003', *RFERL* (21 March 2003), https://www.rferl.org/a/1142880.html: "Premier Dzurinda said the deployment to Kuwait of a Slovak/Czech anti-nuclear, -biological, and -chemical (NBC) unit and Slovakia's decision to grant the United States overflight and transit rights all stem from UN Security Council resolutions, up to and including Resolution 1441. 'This represents the legal framework and the limits within which we move,' he said."

(3) States refraining from assistance

Various States around the world rejected the provision of *any* assistance in direct connection to the war.

Some States were primarily guided by principles of neutrality. For example, Austria that had allowed US flights to Iraq in 2002 denied the permission for the transit of US troops and the use of Austrian facilities in 2003.[1422] The Austrian Chancellor said that military action required an authorization by the Security Council.[1423] Switzerland, likewise traditionally guided by the principle of neutrality, also denied any direct or indirect assistance, and thus closed *inter alia* its airspace for coalition aircraft, unless for humanitarian or medical purposes, once the aircraft evidently were preparing the not expressly authorized invasion. It primarily based this on its neutrality, yet the conceived illegality of the invasion was a not indecisive element in its considerations.[1424] Iran that called the attack "unjustifiable and illegitimate" and henceforth closed its airspace to belligerent forces, later urged the coalition forces to "fully respect [its] neutrality", and strongly protested against violations of Iranian airspace.[1425]

For others, the principle of non-use of force played a predominant role. For example, Norway denied any assistance but for humanitarian purposes. Norway conditioned support on a new Security Council decision on a "clear basis in international law", although it held that the absence of a Security Council resolution did not necessarily mean that military operations

1422 Hummel, *Involvement of European States*, 7-8.

1423 Bundeskanzler Wolfgang Schüssel, 10. Sitzung des Nationalrates der Republik Österreich, XXII. Gesetzgebungsperiode, Stenographisches Protokoll, (26 March 2003), 37 "Wir halten daran fest, dass militärische Aktionen die Ermächtigung des Weltsicherheitsrates voraussetzen. Wir bekräftigen, dass das neutrale Österreich an keinerlei militärischen Operationen gegen den Irak beteiligt sein wird und auch keine Überflugsrechte einräumt."

1424 Lucius Caflisch, 'La pratique suisse en matière de droit international public 2003', 14(5) *SwissRevIntl&EurL* (2004) 710-719; Lucius Caflisch, 'La pratique suisse en matière de droit international public 2005', 16(5) *SwissRevIntl&EurL* (2006) 648-655. S/PV.4726, 30: "despite the efforts to disarm Iraq within the framework of United Nations Security Council resolutions 1284 (1999) and 1441 (2002), a military intervention has been launched against Iraq without the explicit authorization of the United Nations Security Council." See also Corten, *Etats Tiers*, 126. More reluctant Aust, *Complicity*, 115.

1425 S/2003/391 (31 March 2003).

were a breach of international law.[1426] Canada's Prime Minister explained that "the Security Council does not have a resolution to authorize action, so we are not participating."[1427] He further stressed that Canadian troops had only the mandate to take part in Operation Enduring Freedom in Afghanistan, not in Iraq.[1428] This applied not only to combat operations, but also to logistical support.[1429] Kyrgyzstan stressed that while being fully aware of its responsibilities under its agreements with coalition forces, its consent to use its airbase was limited to the purpose of ensuring the successful conduct of the anti-terrorism operation in Afghanistan.[1430]

In fact, most States did not provide assistance and remained silent on the reasons. Albeit the majority of those States condemned the Anglo-American use of force as violation of international law,[1431] States did not expressly tie their non-assistance to that conclusion – unsurprisingly and naturally so, as for most States the question had just not arisen, for political, geographical or strategic reasons.[1432]

1426 Rolf Einar Fife, 'Elements of Nordic practice 2001/2003: Norway', 73(4) *NordicJIL* (2004) 563-569, emphasis added. As Aust, *Complicity*, 119-120 rightly notes Norway's decision not to support the war was however not "primarily based on a consideration of international law".

1427 HC Deb (Canada) 17 March 2003, Hansard vol 138 No 71, col 1420. Later he explained that in Canada's view the coalition's conduct was not justified, HC Deb (Canada) 18 March 2003, Hansard vol 138 No 72, 1430.

1428 HC Deb (Canada) 17 March 2003, Hansard vol 138 No 71, col 1420; HC Deb (Canada) 18 March 2003, Hansard vol 138 No 72, col 1425. This also applied to transport mean, 1430: "We have three transport aircraft there. We have given extremely explicit instructions that these planes cannot be used to transport materiel for Iraq or for the war in Iraq. This is very explicit. They received these instructions just recently." The government however did not address the fact that this might unburden the US in Afghanistan. But see reports about clandestine support: Greg Weston, 'Canada offered to aid Iraq invasion: WikiLeaks', *CBC* (15 May 2011), https://www.cbc.ca/news/politics/weston-canada-offered-to-aid-iraq-invasion-wikileaks-1.1062501; Joshua Keating, 'Was Canada in the coalition of the willing?', *Foreign Policy* (16 May 2011), https://foreignpolicy.com/2011/05/16/was-canada-in-the-coalition-of-the-willing/.

1429 HC Deb (Canada) 18 March 2003, Hansard vol 138 No 72, col 1430.

1430 S/PV.4726 Resumption 1, 17. Aust, *Complicity*, 116.

1431 Corten, *RBDI* (2003) 230-241.

1432 Corten, *Etats Tiers*, 118; Corten, *Le Droit Contre la Guerre*, 279.

(4) Regional States

The situation was different for regional States and organizations in which those States were members. Political ties and geographical proximity rendered it a pertinent and difficult question for those States. In particular, Arab States struggled to reach a consensus position. Ultimately, their declarations were explicit not only on the Anglo-American use of force, but also with respect to assistance.

(a) Declarations of non-assistance…

The Council of the League of Arab States[1433] had categorically rejected and petitioned against a use of force against Iraq.[1434] In an immediate reaction to the start of the use of force, on 24 March 2003, the Council adopted a resolution with decisions "[i]n conformity with the Charter of the United Nations […], in particular […] Article 2 paragraphs 3 and 4, […] and Article 51" and "[i]n accordance with the general rules of international law, particularly with respect to aggression." The Council decided first to condemn the "American/British aggression against Iraq" as "violation of the Charter of the United Nations and the principles of international law."[1435] Second, it decided to "affirm commitment to the decision whereby Arab States *must* refrain from joining in any military action against the security and territorial integrity of Iraq or of any other Arab State."[1436]

This decision, yet slightly modified, stands in line with previous resolutions on which the question of assistance initially had led to a divide between Arab States. At a meeting of Foreign Ministers of the Arab League on 16-17 February 2003, States "frankly" discussed the issue of military assistance.[1437] Syria's proposal to urge member States to "deny any military

1433 Members were at that time: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi-Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

1434 See e.g. denying that resolution 1441 (2002) allowed for an automatic recourse to force, Corten, *RBDI* (2003) 220. See also S/2003/247, 2-3 (3 March 2003).

1435 S/2003/365, 2-3 para 1, 2 (26 March 2003). See also A/57/766 (26 March 2003) and S/PV.4726, 8 where they did not stress para 4, however.

1436 S/2003/365, 1 preambular para 8, 3 para 4 (26 March 2003), emphasis added.

1437 According to the account of Arab League Secretary General Moussa: 'Kuwait objected to Arab final statement', *KUNA* (17 February 2003), https://www.kuna.net.kw/ArticlePrintPage.aspx?id=1319996&language=en.

assistance" for an attack on Iraq was not accepted.[1438] Still, the Foreign Ministers released a resolution calling on Arab States to "*refrain* from offering *any assistance or facilities* to any military operation that might threaten the security, safety and territorial integrity of Iraq."[1439]

At a Summit meeting of the Arab League on 1 March 2003, States – as was widely noted in the press – did not repeat the Foreign Minister's statement. Nonetheless, a number of States castigated Kuwait and Saudi-Arabia for their support to the US.[1440] And more importantly, the Council of the League of Arab States reiterated its rejection of strikes against Iraq and decided "[t]o affirm that its member States *will* refrain from participating in any military action against the security and territorial integrity and unity of Iraq or any other Arab country."[1441]

The General Secretariat of the Gulf Cooperation Council rejected "any violation of territorial integrity and independence of Iraq" and stressed that "it was *imperative* for the GCC States, and in particular Kuwait, to remain outside the field of military operations."[1442]

On 5 March 2003, in the communique adopted at the second emergency session of the Islamic Summit, the conference of 57 States expressed – on the basis of the Charter of the Organisation of the Islamic Conference[1443] –

1438 Michael Jansen, 'War may shatter illusion of coup-proof Arab states', *Irish Times* (22 February 2003) https://www.irishtimes.com/opinion/war-may-shatter-illusion-of-coup-proof-arab-states-1.349840.

1439 Steven L Myers, 'Arab League is Struggling for Consensus on Iraq Crisis', *NYT* (20 February 2003), emphasis added.

1440 Jean-Christophe Peuch, 'Iraq: Arab Governments' Silence on U.S. Attack Reflects Uneasiness', *RFERL* (20 March 2003), https://www.rferl.org/amp/1102600.html.

1441 Letter to the Secretary General S/2003/247, 3 para 5 (3 March 2003), emphasis added. Also identical Letter to the Security Council S/2003/254 (3 March 2003). See also Arab League Secretary-General Moussa stating: ""We *shall* definitely oppose the war. We cannot be a part of it or contribute to it or sympathize with it." 'Arab leaders declare opposition to war in Iraq', *CNN* (2 March 2003), https://edition.cnn.com/2003/WORLD/meast/03/01/sprj.irq.arab.ministers/index.html, emphasis added. For more background see: 'Public spat mars Arab summit', *BBC* (1 March 2003), http://news.bbc.co.uk/2/hi/middle_east/2811403.stm; Anthony Shadid, 'UAE Urges Hussein To Go Into Exile', *WaPo* (2 March 2003), https://www.washingtonpost.com/archive/politics/2003/03/02/uae-urges-hussein-to-go-into-exile/a63d6067-1195-4ee2-a13c-6d8e1fe0787e/.

1442 S/2003/376 (27 March 2003), emphasis added. For the role of the Secretary-General see Article 14-16 GCC Charter.

1443 S/2003/288, 2, preambular para 3 (10 March 2003). Article 2 B 4 of the Charter of the Islamic Conference (4 March 1972), 914 UNTS 111 holds that States shall be "inspired and guided" *inter alia* by "[a]bstention from the threat or use of force

"its categorical rejection of any strike against Iraq", and "[a]sserted that the Islamic States will refrain from participating in any military action targeting the security and territorial integrity of Iraq or any other Islamic State."[1444]

Despite a largely identical membership in the aforementioned State groups, the Non-Aligned Movement did not expressly refer to assistance or participation. It clearly condemned the "war against Iraq" as "violation of the principles of international law and the Charter," and appealed to all States to adhere to the "fundamental principle of non-use of force."[1445] The formulation in general terms, without being addressed to the States using force only, is sufficiently open, yet ambiguous on the issue of assistance.[1446]

Overwhelming opposition from the citizens of the respective States against a war against Iraq, as well as a complex web of different political interests, may have been the main reasons that prompted the declarations.[1447] Yet, the legal language in which the non-participation was couched, as well as the connection to the use of force's illegality, allow for the conclusion that legal considerations guided States' decisions, too. In fact, the consistently voiced position that force would be illegal was repeatedly put in context with the decision not to assist. For example, when asked whether Saudi-Arabia would allow the US to use its military bases, the Saudi Foreign minister answered: "It depends on the war. If it is a war that is through the United Nations, with consensus on it, we will have to decide on that based on the national interests of Saudi Arabia."[1448]

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against the territorial integrity, national unity or political independence of any member State."

1444 S/2003/288, 3, para 2, 4 (10 March 2003). See also S/2003/343 (20 March 2003).

1445 S/PV.4726, 7 (Malaysia speaking on behalf of the NAM). See also S/2003/329.

1446 But see a statement by the Troika of the NAM that referred to "the US and *its allies*." S/2003/357 (21 March 2003), emphasis added.

1447 Shafeeq Ghabra, 'An Arab House, Openly Divided', *WaPo* (9 March 2003), https://www.washingtonpost.com/archive/opinions/2003/03/09/an-arab-house-openly-divided/a5cac861-a977-486b-bdee-4d657ec4a223/.

1448 Eric Schmitt, 'Saudis Are Said to Assure U.S. on Use of Bases: Signals of Cooperation for Air War on Iraq', *NYT* (29 December 2002). See also 'U.S. setting up military base in Saudi Arabia', *CNN* (7 March 2003), https://edition.cnn.com/2003/WORLD/meast/03/07/sprj.irq.secret.base/. See also Iraq that based these decisions on international law and the UN Charter, S/2003/296 (11 March 2003). The fact that States "affirm" the non-assistance obligation may be understood to indicate that they are affirming rather than creating a legal rule. Likewise, States are expressly deciding in light of obligations under international law. Moreover, it is noteworthy that the League remained silent on Iraqi missile attacks against Kuwait. A condemnation thereof could have been understood as give grounds

The form of assistance deemed prohibited by these statements was not unambiguously set out. The language allows for an interpretation to only prohibit participation of a direct character in close connection to the Anglo-American use of force itself,[1449] or to also cover *any,* and thus more remote forms of contribution as well.[1450]

(b) … not implemented in practice?

This ambiguity also allowed States that subscribed to these statements to not stand in open self-contradiction and to avoid having their conduct labelled unlawful by their own standards. In fact, the clearly and officially pronounced conviction to refrain from assistance did not preclude States from providing – decisive – assistance. In particular, regional States were reported to provide substantial territorial assistance in direct connection with the Anglo-American use of force. Anglo-American special forces apparently moved from Jordan and Saudi-Arabia into Iraq.[1451] Saudi-Arabia was also reported to continue to host and cooperate with US troops at its air bases, and to provide discounted oil, gas, and fuel.[1452] In Qatar, combat forces were provided with housing and supplies. Command and control

to military response and assistance. This omission preserving (legal) consistency could henceforth point towards the legal nature of the call for non-assistance.

1449 See in particular the fact that the formula was stopping short of condemning any assistance, as the previous resolution by Foreign Ministers. Susan Sachs, 'Arab Foreign Ministers Urge U.S. Withdrawal', *NYT* (25 March 2003), https://www.nytimes.com/2003/03/25/world/a-nation-at-war-cairo-arab-foreign-ministers-urge-us-withdrawal.html.

1450 See for that understanding the statements of Syria and the Arab League Secretary General. For this reading speaks the fact that the Council "affirmed" the commitment, which may refer to the previous decision.

1451 Murphy, *AJIL* (2003) 425; Hildreth and others, *International Attitudes*, 20. Jason Burke, 'Martin Bright, US 'to attack Iraq via Jordan'', *Guardian* (7 July 2002), https://www.theguardian.com/world/2002/jul/07/terrorism.iraq.

1452 Craig S Smith, 'Reluctant Saudi Arabia Prepares Its Quiet Role in the U.S.-Led War on Iraq', *NYT* (20 March 2003). Barbara Starr, 'U.S. to move operations from Saudi base', *CNN* (29 April 2003), https://edition.cnn.com/2003/WORLD/meast/04/29/sprj.irq.saudi.us/; AP, 'Saudis Secretly Provided Extensive U.S. Help During Iraq War', *Haaretz* (24 April 2004), https://www.haaretz.com/1.4787668; Michael Dobbs, 'U.S.-Saudi Alliance Appears Strong', *WaPo* (27 April 2003), https://www.washingtonpost.com/archive/politics/2003/04/27/us-saudi-alliance-appears-strong/2921a4e8-7d5d-4e3a-a69f-7572b4c18720/.

facilities were located there.[1453] Oman allowed the coalition to use military facilities.[1454] The United Arab Emirates permitted the use of military bases. Its ports were a major logistics hub.[1455]

To determine the precise scope and operational details of States' assistance is difficult. This may be attributed not least in part to the policy of those States with respect to their assistance. States did not argue that their assistance was not prohibited, nor did they expressly rely on the ambiguity in their general statements. Instead, they chose a path of (shallow) secrecy. Either they denied support, or they refrained from publicly committing to the coalition and from officially confirming their contribution, a fact that the USA notably acknowledged as well when it did not list any of those States as coalition members.[1456]

Bahrain, the United Arab Emirates, and Oman remained quiet.[1457] Qatar, likewise, was reluctant to officially express support to the US.[1458] For example, preparations for war were officially run as measures improving military readiness.[1459] Others were more articulated about their "non-assistance". For example, Saudi-Arabia officially and publicly declared that it "will not participate in any way", and, in particular, prohibited to launch combat missions from Saudi-Arabian territories.[1460] Saudi officials were

1453 Hildreth and others, *International Attitudes*, 25. 'Qatar base becomes U.S. military hub', *CNN* (3 January 2003), https://edition.cnn.com/2003/WORLD/meast/01/03/sprojects.irq.qatar.us/.

1454 Ibid 23, 36.

1455 Ibid 30. Eric Schmitt, 'Franks Foresees a Weapons Hunt at 'Several Thousand Sites'', *NYT* (28 April 2003), https://www.nytimes.com/2003/04/28/world/aftereffects-forbidden-arms-franks-foresees-weapons-hunt-several-thousand-sites.html.

1456 White House, Who are the current coalition members? (27 March 2003).

1457 Hildreth and others, *International Attitudes*, 10, 30. 'US has 100,000 troops in Kuwait', *CNN* (18 February 2003), https://edition.cnn.com/2003/WORLD/meast/02/18/sprj.irq.deployment/index.html.

1458 Ibid 25.

1459 Michael E Gordon, ' U.S. Is Preparing Base in Gulf State to Run Iraq War: Command Exercise Is Set Qatar Emerges As Vital Player In Plans By Americans – General To Arrive Soon', *NYT* (1 December 2002).

1460 'Saudi Arabia Says it Won't Join a War', *NYT* (19 March 2003); Craig S Smith, 'Reluctant Saudi Arabia Prepares Its Quiet Role in the U.S.-Led War on Iraq', *NYT* (20 March 2003). 'Saudi Arabia rejects participation in war against Iraq', *CNN* (18 March 2003), https://edition.cnn.com/2003/WORLD/meast/03/18/sprj.irq.saudi/; AP, 'Saudis Secretly Provided Extensive U.S. Help During Iraq War', *Haaretz* (24 April 2004); John R Bradley, 'US troops 'pouring into Saudi Arabia'', *Telegraph* (7 March 2003); Oliver Burkeman, 'America signals withdrawal of troops from Saudi Arabia', *Guardian* (30 April 2003), https://www.theguardian.com/world/2003/a

unequivocal in denying any reports about (secret) agreements with the USA on Iraq.[1461] While the Jordanian government admitted that 6000 US troops were stationed on its territory, it insisted that they only trained local troops and helped to defend the country against missile attacks.[1462] Jordan stressed that it was "not party to the ongoing war and will never be used as a launching pad for a military operation against Iraq."[1463] Moreover, Jordan claimed to have steadfastly refused any requests to open the airspace to any military aircraft or to allow passage of US troops through Jordan.[1464]

(c) A special case: Kuwait

Kuwait did not align with the other neighboring States' approach. Kuwait openly placed its territory at the disposal of the intervening coalition.[1465] It

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pr/30/usa.iraq. But see ibid for reports that Saudi-Arabia publicly acknowledged permission for non-strike missions.

1461 The New York Times reported about private assurances with respect to the use of air bases for refueling, reconnaissance, surveillance and cargo planes. Officials were also confident about attack missions. Saudi-Arabia officially denied the truth of the reports. Eric Schmitt, 'Saudis Are Said to Assure U.S. On Use of Bases: Signals of Cooperation for Air War on Iraq', *NYT* (29 December 2002); 'Saudis deny letting US use bases', *BBC* (30 December 2003), http://news.bbc.co.uk/2/hi/middle_east/2614635.stm.

1462 Justin Huggler, 'King Abdullah under pressure after furious subjects urge support for Saddam', *The Independent* (26 March 2003), https://www.independent.co.uk/news/world/middle-east/king-abdullah-under-pressure-after-furious-subjects-urge-support-for-saddam-112432.html; John F. Burns, 'Threats and Responses: Allies; Jordan's King in Gamble, lends hand to the U.S. ', *NYT* (9 March 2003), https://www.nytimes.com/2003/03/09/world/threats-and-responses-allies-jordan-s-king-in-gamble-lends-hand-to-the-us.html; Antoine Blua, 'Iraq: Jordanian King Issues Strong Criticism Of War', *RFERL* (3 April 2003), https://www.rferl.org/a/1102804.html.

1463 'La participation secrète de la Jordanie et de l'Arabie saoudite à la guerre contre l'Irak', *Le Monde* (10 May 2003), https://www.lemonde.fr/archives/article/2003/05/10/la-participation-secrete-de-la-jordanie-et-de-l-arabie-saoudite-a-la-guerre-contre-l-irak_319704_1819218.html; 'Jordan steps up warnings against US war on Iraq', *Sydney Morning Herald* (30 December 2002), https://www.smh.com.au/world/middle-east/jordan-steps-up-warnings-against-us-war-on-iraq-20021230-gdg1dd.html; 'Iraq Report: March 2003', *RFERL* https://www.rferl.org/a/1343112.html.

1464 'Jordanian king slams 'invasion' of Iraq', *Sydney Morning Herald* (3 April 2003), https://www.smh.com.au/world/middle-east/jordanian-king-slams-invasion-of-iraq-20030403-gdgjgv.html.

1465 Murphy, *AJIL* (2003) 425; Hildreth and others, *International Attitudes*, 20-21, 36. Patrick E Tyler, 'U.S. And British Troops Push Into Iraq As Missiles Strike Baghdad

hosted US soldiers and allowed the US to use airbases to station combat aircraft. Kuwait even actively removed some border barriers.[1466] US and UK forces ultimately crossed the border from Kuwait. Against that background, it was little surprising that Kuwait was the only neighboring State to be listed as part of the coalition.[1467] From the outset, Kuwait followed a different line of argument.

First, it did not subscribe to the above-mentioned decisions: Kuwait refused to subscribe to the League of Arab States Foreign Ministers' statement from 17 February 2003, and even challenged its legal validity.[1468] On the Arab League's resolution on the Anglo-American use of force, Kuwait entered a reservation.[1469] Kuwait thereby only protested against the decision's failure to mention Iraqi missile attacks against Kuwait. At least not officially, it did not reject a rule of non-assistance.[1470]

With respect to its own contribution, Kuwait did not claim that this behavior was *per se* permissible. It advanced a nuanced line of argument:

At the outset, Kuwait emphasized that US troops were present in Kuwait in accordance with international law, based on bilateral security agreements

Compound', *NYT* (21 March 2003), https://www.nytimes.com/2003/03/21/world/nation-war-attack-us-british-troops-push-into-iraq-missiles-strike-baghdad.html.

1466 S/2003/393 (31 March 2003), para 6.

1467 White House, Who are the current coalition members? (27 March 2003).

1468 Michael Jansen, 'War may shatter illusion of coup-proof Arab states', *Irish Times* (22 February 2003); Steven Lee Myers, 'Arab League Is Struggling For Consensus On Iraq Crisis', *NYT* (20 February 2003), https://www.nytimes.com/2003/02/20/world/threats-responses-regional-discord-arab-league-struggling-for-consensus-iraq.html; Rashid Al-Shemmari, 'Lebanon violated Arab League bylaws at ministerial meeting – experts', *KUNA* (21 February 2003), https://www.kuna.net.kw/ArticlePrintPage.aspx?id=1321232&language=en; 'Arabs reject "aggression" on Kuwait and Iraq', *KUNA* (16 February 2003), https://www.kuna.net.kw/ArticleDetails.aspx?language=en&id=1319974; 'Kuwait objected to Arab final statement', *KUNA* (17 February 2003).

1469 S/2003/365 (26 March 2003), 3; 'Kuwait expresses reservations over the "imbalanced" final Arab statement', *KUNA* (24 March 2003), https://www.kuna.net.kw/ArticlePrintPage.aspx?id=1330666&language=en.

1470 S/PV.4726, 14. Note Kuwait appeared not to challenge the GCC Secretary-General's statement, or the OIC statement. The latter called upon Iraq to respect Kuwait's independence and sovereignty (S/2003/288 (10 March 2003), para 8, see also S/2003/289 (10 March 2003), 3). As such, unlike the Arab League's statement, it did not foreclose Kuwait's line of argument, as advanced in the following.

between Kuwait and both the US and the UK.[1471] This decision, so Kuwait, was covered by its sovereign rights. It went on to say that any preparation measures were taken for defensive or at least non-aggressive purposes.[1472] Its reply to Iraqi protest on the partial removal of the border fence illustrated this stance well. Kuwait claimed that work on the border fence was covered by its "absolute right to maintain its sovereignty on its whole territories in security of its national safety and political independence."[1473] In addition, it claimed that it was maintenance work.[1474]

In that light, Kuwait defended its actions once the use of force against Iraq was underway: first, Kuwait claimed, "it has not participated and will not participate in any military operation against Iraq." In light of its publicly acknowledged contributions, the denial seems to refer to *direct* participation through its own military force, not to assistance, although some ambiguity remains.[1475]

Second, Kuwait indicated that its defensive precautionary measures were warranted. Iraq had "continued its aggressive policies against Kuwait" since its invasion and occupation of Kuwait in 1990. Kuwait placed the most recent Iraqi missile strikes in the same line. These "reaffirm[ed] the appropriateness of the defensive measures taken by Kuwait." In fact, it expressly stressed, "all measures we are undertaking are aimed at protecting our security, safety and territorial integrity." Notably, Kuwait qualified the Iraqi strikes twofold: as "flagrant violation of the Charter of the League of Arab States and the Charter of the United Nations" and as "further material breach of relevant Security Council resolutions."[1476] On that basis, "Kuwait reaffirm[ed] that its position on the ongoing military operations against

1471 'Kuwait refutes Iraqi claims regarding security agreements with US, Britain', *KUNA* (20 March 2003), https://www.kuna.net.kw/ArticleDetails.aspx?id=1328459&language=en.

1472 'Foreign troops to defend Kuwait, not to assault others - diplomat', *KUNA* (16 March 2003), https://www.kuna.net.kw/ArticlePrintPage.aspx?id=1327231&language=en.

1473 'Kuwait refutes Iraqi claims regarding security agreements with US, Britain', *KUNA* (20 March 2003).

1474 'Foreign troops to defend Kuwait, not to assault others- diplomat', *KUNA* (16 March 2003).

1475 See also its comment that "the Iraqi Government is trying to drag Kuwait into the war and to compel it to participate in these operations. However, Kuwait will not be drawn in by desperate Iraqi attempts aimed at achieving such an objective." S/PV.4726, 15. But see Corten, *Etats Tiers*, 128.

1476 S/PV.4726, 15; S/2003/367 (25 March 2003).

Iraq is in conformity with relevant Security Council resolutions and with the legal obligations on Iraq that proceed from them." Further, the Iraqi government bore "full responsibility for the grave consequences confronting it now." All members of the international community had been cognizant of "the decisions of international legitimacy, which authorize, according to Chapter VII of the United Nations Charter, the adoption of all measures to ensure Iraq's observance of relevant Security Council resolutions and ending Iraq's defiance of those resolutions."[1477] Later, Sheikh Al-Sabah expressly stated that "the war was executed under the umbrella of international law."[1478]

Kuwait thus not only claimed that the Anglo-American use of force was in accordance with international law, but it also interwove an argument of self-defense – it appears not at least against the background of its decisive involvement in the war. Kuwait thereby showed awareness of the rules governing interstate assistance, despite its formal reservations on the decisions by the Arab League.

(5) States providing assistance

Many (primarily) European States also contributed to the Anglo-American invasion.[1479] Their assistance comprised primarily logistical support ranging from overflight[1480] and transit rights to the permission to use relevant infrastructure, ports, and military bases.[1481] Some States were reported to

1477 S/PV.4726, 15. See also S/PV.4717, 6.

1478 'Sheikh Mohammed Al-Sabah: War in Iraq is legitimate', *KUNA* (13 April 2003), https://www.kuna.net.kw/ArticleDetails.aspx?id=1337008&language=en.

1479 For an overview see Hildreth and others, *International Attitudes*, 35-36; Hummel, *Involvement of European States*; Carney, *Allied Participation*.

1480 Croatia: 'Newsline - March 19, 2003', *RFERL* (19 March 2003); Egypt: continued to allow overflights and transit through the Suez Canal Hildreth and others, *International Attitudes*, 14. France: Hummel, *Involvement of European States*, 16. Turkey: White House, Statement of Support from Coalition (26 March 2003); Slovakia: Alan Cowell, 'A Pledge of Assistance for Bush From 8 European Leaders', *NYT* (30 January 2003).

1481 Albania: 'Reuters, Threats And Responses: Briefly Noted; Albania Offers Troops', *NYT* (10 March 2003), https://www.nytimes.com/2003/03/10/world/threats-and-responses-briefly-noted-albania-offers-troops.html, S/PV.4726, 45; Belgium: Corten, *RBDI* (2005) 417-418 para 2. Czech Republic: Hildreth and others, *International Attitudes*, 27. Bulgaria provided the Sarafovo airbase and allowed overflight: ibid 35. Cyprus: ibid 12. Germany: Matthias Hartwig, 'Völkerrechtliche

(also) share intelligence.[1482] Other States supported the Anglo-American invasion only through diplomatic, moral or political endorsement[1483] or promised to provide post-war assistance.[1484] Unlike the group of primarily Arab States, these States publicly confirmed their contributions, albeit they not necessarily committed to the coalition.

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Praxis der Bundesrepublik Deutschland im Jahre 2003', 65 *ZaöRV* (2005) 775. Georgia: White House, Statement of Support from Coalition (26 March 2003); Greece Hummel, *Involvement of European States*, 21. Italy: Natalino Ronzitti, 'Italy's Non-belligerency during the Iraqi War' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005). Hungary allowed the US to use Taszar base but not for military training, 'Europe and Iraq: Who stands where? ', *BBC* (29 January 2003), http://news.bbc.co.uk/2/hi/europe/2698153.stm. Iceland provided Keflavik airport, Ireland Shannon airport, White House, Statement of Support from Coalition (26 March 2003), see also Irish High Court, *Edward Horgan v An Taoiseach and others*, 2003 No. 3739P (28 April 2003) for further details. Netherlands: P. C. Tange, 'Netherlands State Practice for the Parliamentary Year 2002–2003', 35 *NYIL* (2004). Slovakia: 'Newsline - March 21, 2003', *RFERL* (21 March 2003). Romania allowed the use of Constanta Air Force base for cargo planes to open the northern front, 'Europe Split Over War', *BBC* (20 March 2003), http://news.bbc.co.uk/2/hi/europe/2868127.stm; Şedinţa comună a Camerei Deputaţilor şi Senatului (12 February 2003), http://www.cdep.ro/pls/steno/steno.stenograma?ids=5382&idm=4&idl=1. Singapore; Pakistan Hildreth and others, *International Attitudes*, 23. Portugal: Hummel, *Involvement of European States*, 29. Spain allowed the use of the bases Morón and Rota, ibid 32.

1482 See for instance the reports about Germany: Bericht der Bundesregierung zu Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des internationalen Terrorismus (2006), 5-33, in particular 20-23. See also BT Drs 16/800, 11. Matthias Hartwig, 'Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 2006', 68 *ZaöRV* (2008) 859 para 63. Bericht des 1. Untersuchungsausschusses, BT Drs 16/13400, 266-335 (18 June 2009); Israel: Hildreth and others, *International Attitudes*, 35.

1483 For example, Afghanistan; Colombia; Costa Rica; Dominican Republic; Eritrea; El Salvador; Georgia; Honduras; Iceland S/PV.4726, 46; Japan; Netherlands; Macedonia; Micronesia; Panama; Philippines; Slovakia; Solomon Islands; Uzbekistan. See White House, Statement of Support from Coalition (26 March 2003); Glenn Kessler, 'United States puts a Spin on Coalition Numbers', *WaPo* (21 March 2003).

1484 For example El Salvador; Azerbaijan; Estonia; Hungary; Romania; Spain; Japan: S/PV.4726, 39; Howard W French, 'Japan Premier Supports US', *NYT* (19 March 2003) (viewed the war as legal); Italy; Netherlands; Mongolia; Mauritius (S/PV.4726, 38); Latvia (SPV.4726, 42). See White House, Statement of Support from Coalition (26 March 2003); Hummel, *Involvement of European States*, 24, 28.

Political support and promises of future post-war assistance were untied from legality concerns. Often, these coincided with the view that the use of force was in compliance with international law, but not necessarily so.[1485]

In contrast, States providing logistical assistance were eager to explain their behavior, and hence left little doubt that their behavior was governed by international law.[1486] For example, Ireland suggested these forms of assistance are not only a question of neutrality but of States' commitments under the UN Charter.[1487] In that light, no State suggested that assistance was *per se* and in any event permissible. Belgium, for example, stated expressly as a matter of principle that it would not support an illegal use of force.[1488] Instead, States qualified their assistance in several ways.

Remarkably, all States emphasized the rather remote nature of assistance to the use of force (in particular in contrast to the Arab neighboring States), thereby suggesting that a different legal regime applies. All States drew a line to participation by military means, which they expressly excluded. Instead, they highlighted that assistance was provided merely in the context of the use of force, and in preparation for the use of force, but not in immediate direction to combat operations. Italy, for example, stressed that it did not "participate with its own troops or means in military actions", and was "not a co-belligerent country".[1489] It allowed the use of bases and overflight,

1485 E.g. S/PV.4726, 39-40 (Macedonia); S/PV.4726 Resumption 1, 8 (Micronesia). Japan viewed the use of force to be legal but refrained from assistance for constitutional reasons. S/PV.4726, 39; Howard W French, 'Japan Premier Supports US', *NYT* (19 March 2003); Press Conference 22 March 2003, https://www.mofa.go.jp/announce/press/2003/3/0322.html. Most other States remained silent on the legal basis for the use of force. See for example S/PV.4726, 41 (Uzbekistan), 45 (Albania); S/PV.4726 Resumption 1, 4 (Marshal Islands). See also Weller, *Iraq and the Use of Force*, 185.

1486 E.g. Spain claimed to act "in accord with international legality", 'Aznar: War is precursor to peace', *CNN* (20 March 2003), https://edition.cnn.com/2003/WORLD/europe/03/20/sprj.irq.spain.briefing/index.html.

1487 "The Government's position to allow US aircraft to overfly and land in Ireland is fully consistent with both our neutrality *and our commitment to the UN*." Bertie Ahern, 'We stand by neutrality and support for UN', *Irish Times* (22 March 2003), https://www.irishtimes.com/opinion/we-stand-by-neutrality-and-support-for-un-1.353079, emphasis added. See similar also the German Federal Administrative Court: BVerwGE 127, 302-374 para 217.

1488 Corten, *Etats Tiers*, 106; Corten, *RBDI* (2005) 425, 433-434. See also France: 'Interview télévisée de Jacques Chirac, le 10 mars 2003', *Réseau Voltaire* (10 March 2003) https://www.voltairenet.org/article9314.html.

1489 Lara Appicciafuoco and others, 'Diplomatic and Parliamentary Practice', 13(1) *ItYBIL* (2003) 288-289; Ronzitti, *Italy's Non-Belligerency*, 201. This meant according

but not for direct attack on Iraqi objectives.[1490] The Netherlands denied an "active military contribution."[1491] Turkey refused to allow the use of military bases and its territory as a launch base for opening the Northern front and to use Turkish territory for refueling, but merely allowed overflight rights.[1492] Later, it permitted the US to use its territory for overland supply of non-lethal necessities to US forces in Iraq.[1493] Others in a similar manner highlighted the limitation of their contribution to technical purposes, such as refueling or logistics for the preparation of the use of force, excluding a direct employment of their assistance in the use of force,[1494] or to human-

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to the Italian Supreme Court that "it abstained from direct participation in the conduct of hostilities." Georg Nolte, Helmut Aust, 'Equivocal Helpers - Complicit States, Mixed Messages, and International Law', 58(1) *ICLQ* (2009) 4.

1490 'Italy offers U.S. bases, airspace', *CNN* (19 March 2003), https://edition.cnn.com/2003/WORLD/meast/03/19/sprj.irq.italy.berlusconi/. But the Italian territory was launch base for "one of the largest paratroop drops since the Second World War" conducted by the USA. Yet, it was argued that these paratroopers may be considered as stabilization force rather than engaged in combat activities. Ronzitti, *Italy's Non-Belligerency*, 201.

1491 Tange, *NYIL* (2004) 376.

1492 This had a decisive impact on the military operations, requiring the US to use paratroopers. Murphy, *GeoLJ* (2003-2004) 244. 'Turkey holds out for extra U.S. aid over Iraq', *CNN* (18 February 2003), https://edition.cnn.com/2003/WORLD/meast/02/18/sprj.irq.erdogan/index.html; Helena Smith, 'Turkey opens airspace but blocks airbases', *Guardian* (20 March 2003), https://www.theguardian.com/world/2003/mar/20/iraq.helenasmith; Frank Bruni, 'Turkey Sends Army Troops Into Iraq, Report Says', *NYT* (22 March 2003), https://www.nytimes.com/2003/03/22/world/a-nation-at-war-ankara-turkey-sends-army-troops-into-iraq-report-says.html; Frank Bruni, 'Air Rights In Turkey Given U.S. By Deputies', *NYT* (21 March 2003). While Aust, *Complicity*, 116-117 seems correct in stating that this decision was primarily guided by political concerns, it cannot be excluded that international law played a role as well. For example, in an interview President Erdogan had argued that the use of force without a second resolution was illegal: Dieter Bednarz, Bernhard Zand, 'Blut, Tod, Tränen', *Spiegel* (9 February 2003), https://www.spiegel.de/spiegel/print/d-26329212.html. See also Cameron S. Brown, 'Turkey in the Gulf Wars of 1991 and 2003', 8(1) *Turkish Studies* (2007) 98-99. Moreover, the Turkish decision was apparently also based on disagreement how much information the US provided about the military flights. Whether or not Turkey was motivated by legal concerns, Theodor Schweisfurth, 'Aggression – Politik', *FAZ* (2003) seems correct to assume that Turkey may have mitigated its responsibility through its behavior. Its practice is however of limited relevance legal value.

1493 Steven R Weisman, 'Powell Patches Things Up as Turkey Consents to Help', *NYT* (3 April 2003), https://www.nytimes.com/2003/04/03/world/a-nation-at-war-diplomacy-powell-patches-things-up-as-turkey-consents-to-help.html.

1494 Italy (refueling), Hildreth and others, *International Attitudes*, 35.

itarian operations only. Ireland went even so far to state (yet it remained rather isolated) that by providing those facilities it was not "participating in [the] war", emphasizing that it was "not sending Irish troops or munition to Iraq".[1495] Egypt and Pakistan granted permission for overflight only to aircraft not attacking Iraq, and further denied to have extended any type of support to the US use of force.[1496] Germany faced allegations that members of the secret service had shared intelligence with US forces. In defense, it underlined that they did not provide military relevant information for possible targets; information was only shared with respect to non-military objects to minimize harm against civilians.[1497] France excluded the use of any military means, but allowed "routine" overflight.[1498]

On that basis, the legality of the operation was an *important* (but not the exclusive) feature in States' decisions whether to provide assistance, and what form of assistance to provide. States took different approaches.

1495 Bertie Ahern, 'We stand by neutrality and support for UN', *Irish Times* (22 March 2003). For example, it also stressed that it was refueling planes on a commercial basis only, and that only small civil aircraft and transporters were used which did not require special permission and made it likely that only a low number of passengers were on bord. See also Irish High Court, *Edward Horgan v An Taoiseach and others*, 11-13. See also Romania that stated that "this does not mean that we get involved in a military conflict. Corten, *Etats Tiers*, 126.

1496 Egypt: 'Mubarak warns of '100 bin Ladens'', *CNN* (1 April 2003), https://edition.cnn.com/2003/WORLD/meast/03/31/iraq.egypt.mubarak.reut/: "Egypt's position has been and still is clear in rejecting [...] the military option and rejecting participation in military action of the coalition forces against brotherly Iraq". Pakistan: 'Pakistan regrets US-led attack on Iraq', *KUNA* (22 March 2003), https://www.kuna.net.kw/ArticleDetails.aspx?id=1329589&language=en; S/PV.4844, 6.

1497 See in detail, describing safe-guards (e.g. delay of answers, sharing of already familiar information) Bericht der Bundesregierung zu Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des internationalen Terrorismus (2006), 5-33 in particular 20-23. See also BT Drs 16/800, 11. Hartwig, *ZaöRV* (2008) 859 para 63. For a detailed assessment see also a parliamentary inquiry: BT Drs 16/13400, 266-335 (18 June 2009).

1498 'Interview télévisée de Jacques Chirac, le 10 mars 2003', *Réseau Voltaire* (10 March 2003); Moreover, France required that no military planes transit openly Corten, *Etats Tiers*, 120.

Some States argued that the assisted use of force was in accordance with international law,[1499] or at least not illegal.[1500] Some States introduced some shading to the assessment of legality of the use of force. They argued that for the want of a new Security Council decision, the Anglo-American may not have had a *firm* or *clear* or *unambiguous* basis in international law, yet took note that some States viewed the use of force to be in accordance with international law, and hence the position was "arguable".[1501] Against that background, States qualified their assistance – either refraining from assistance or limiting it to more remote forms.[1502]

In contrast to the previous group, some other States refrained from making an express statement that the use of force was illegal (despite a political condemnation).[1503] They did not view the use of force to take place in a

1499 Expressly: Italy; Spain S/PV.4726 Resumption 1, 31: "Resolution 1441 (2002) and its reference to others adopted by this Council supported the legality of the action undertaken by the coalition."; Slovakia: 'Newsline - March 21, 2003', *RFERL* (21 March 2003); More carefully: Netherlands: "a new Security Council mandate to use force if required is highly desirable but not strictly essential." Singapore: Singapore Parliamentary Deb 14 March 2003, Hansard (Singapore) vol 76 col 862, seeing a "strong argument" that the legal basis may be drawn from Security Council resolutions, see also S/PV.4726, 26; acknowledging a material breach: Bulgaria: S/PV.4726 Resumption 1, 31.

1500 Italy: Appicciafuoco and others, *ItYBIL* (2003) 288-289 "not operating outside international law"; Ireland: "[T]he Government is not prepared to describe the coalition action as illegal under international law." Romania stated that it supported "military operations designed to enforce UN resolutions." Europe 'Split Over War', *BBC* (20 March 2003); Georgia: S/PV.4726, 41. See also Christine Gray, *International Law and the Use of Force* (3rd edn, 2008) 360 who explained that assisting States, in particular Italy, Saudi Arabia, Turkey and Japan were pressuring the USA to make a plausible case to be able to provide assistance.

1501 Netherlands; Norway; Ireland. See also Nolte, Aust, *ICLQ* (2009) 18 in more detail on that argument.

1502 Again, it is hard to determine with certainty that States were acting upon a belief of legal necessity, and not guided merely by political considerations. The fact that States however consider these concerns about legality and connect it to the form of assistance suggests that the permissibility of the form of assistance may relate to the legal basis. All States claimed to act within the framework of international law. States thus in any event (attempted to) avoided legal responsibility. It is difficult however to determine the exact line. The legality did play a role, however.

1503 See e.g. Ireland. For the German government's position: BT Drs 15/988, 2; Hartwig, *ZaöRV* (2005) 774 para 50, 775 para 52. See also the German Chief Federal prosecutor: Claus Kress, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2(1) *JICJ* (2004). But see for the government's previously critical position denying that resolution 1441 authorized the military action for a regime overthrow Hartwig,

legal limbo. Whether this silence was legally motivated to avoid responsibility for assistance to an unlawful use of force is difficult to determine. While this behavior in any case does not speak for a claim of a right to provide assistance to an unlawful use of force, it remains ambiguous whether States thus merely avoid a self-contradiction (and hence seek to comply with (and indirectly endorse) the framework governing assistance) or whether States argue that their assistance remains permissible under international law if there is no express condemnation (and States also do not have a duty to make a proper assessment before providing this kind of assistance).

Some States indicated that the invasion was illegal. For them, the Anglo-American invasion could not be based on a Security Council authorization. Nonetheless, they provided support.[1504] Notably, those States did not claim that their assistance was permissible *per se*. Instead, they advanced various arguments. Belgium, for example, denied that the contribution assisted the offensive use of force, but instead put forward different purposes.[1505] Most commonly, States adhered to a popular line of argument that many other (in particular European) States that refrained from acknowledging the illegality of the Anglo-American use of force advanced as well:

They emphasized that they were executing *pre-existing* alliance obligations (i.e., treaties implementing the solidarity among NATO States,[1506]

*ZaöRV* (2005) 773-774 para 48. The German Federal Administrative Court voiced serious concern with respect to the legality of the war and the respective German assistance, German Federal Administrative Court: BVerwGE 127, 302 para 258-259, hence making the German legal contribution indecisive and ambiguous.

1504 Greece: http://www.parliament.gr/ergasies/showfile.asp?file=es0327.txt; Belgium: Corten, *RBDI* (2005) 417. But see Nolte, Aust, *ICLQ* (2009) 4 who see the Belgian government to adopt a more careful position after the commencement of the use of force. France S/PV.4726 Resumption 1, 31; 'Chirac's View A Heavy Responsibility', *NYT* (19 March 2003).

1505 Belgium: Corten, *RBDI* (2005) 428.

1506 Germany: Hartwig, *ZaöRV* (2005) 775-776 para 53, 54; Bundesregierung, *Bericht der Bundesregierung zu Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des internationalen Terrorismus* (2006) 3-4. France: 'Interview télévisée de Jacques Chirac, le 10 mars 2003', *Réseau Voltaire* (10 March 2003); AP, 'Villepin justifie l'autorisation de survol de la France', *Le Devoir* (26 March 2003), https://www.ledevoir.com/monde/24049/villepin-justifie-l-autorisation-de-survol-de-la-france; Elaine Sciolino, 'Focus on Chirac- At Home and Abroad, Wondering if His Stance Goes Too Far', *NYT* (19 March 2003). Italy: Ronzitti, *Italy's Non-Belligerency*, 200. Iceland: Eiríkur Tómasson, „Lögfræðiálit um lögmæti þeirrar ákvörðunar þáverandi forsætisráðherra og utanríkisráðherra frá 18. mars 2003 að styðja áform Bandaríkjanna, Bretlands og annarra ríkja um tafarlausa afvopnun Íraks" in (Lögfræðiálit Unpublished, Reykjavík 2005); Excerpts from

or permissions granted in the wake of Operation Enduring Freedom[1507]). Notably, States argued that they were continuing the fulfillment of *prior* commitments. They did not claim that the Iraq war triggered solidarity obligations[1508] and did not actively grant new rights for the war specifically. They did little more than not to suspend ongoing permissions and cooperation that the intervening coalition could use in the context of the use of force against Iraq.

At the outset, States 'justifying' their behavior in that manner acknowledge that their behavior contributes to the use of force. The invocation of existing obligations may have different, yet not exclusive argumentative implications. First, it may be understood to further underline the "routine" character of assistance and the fact that the assistance is not a direct and immediate contribution to the use of force.[1509] Second, with their argument, States framed the relevant act of assistance not as active provision of assistance, but highlighted the passive and tolerating nature.[1510] This allows for two conclusions: while it is yet another example that whether to qualify the

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the opinion can be found in: 'Stuðningur við afvopnun Íraks var í samræmi við Íslensk lög' *Morgunblaðið* (25 January 2005) 27. Spain: 'Aznar: War is precursor to peace', *CNN* (20 March 2003): Belgium: Corten, *RBDI* (2005) 418-420. Ireland: Irish High Court, *Edward Horgan v An Taoiseach and others*, 12-13.

1507 In October 2002, many States granted blanket overflight rights for military flights related to operations against terrorism, Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision On Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States, https://www.nato.int/docu/speech/2001/s011004b.htm. Croatia: 'Newsline - March 19, 2003', *RFERL* (19 March 2003); Singapore: Corten, *Etats Tiers*, 126 "Singapore has a memorandum of understanding with the US which was signed in 1990 whereby we allow US aircraft to over fly Singapore and we allow US military assets, ships and aircraft to call at Singapore".

1508 The Iraq war was not covered by the NATO treaty nor by the 1999 NATO strategic doctrine, Ronzitti, *Italy's Non-Belligerency*, 200.

1509 For that argument see Ireland: "In the absence of a fresh and clear endorsement for military action from the Security Council, we have decided that Ireland will not participate in the current military campaign against Iraq. […] Maintaining these facilities does not mean we are participating in a war; this has been the unambiguous legal advice offered to successive governments. We are not sending Irish troops or munitions to Iraq." Italy: (refueling) Hildreth and others, *International Attitudes*, 35. Bertie Ahern, 'We stand by neutrality and support for UN', *Irish Times* (22 March 2003). See also France where Chirac argued that "Cela fait partie des relations normales qui existent entre pays alliés." 'Interview télévisée de Jacques Chirac, le 10 mars 2003', *Réseau Voltaire* (10 March 2003).

1510 Note for example Italy's description of its contribution: "avoiding the refusal of the transit on the national territory", Appicciafuoco and others, *ItYBIL* (2003) 288.

act of assistance as action or omission is a question of perspective that is hardly distinguishable, it is noteworthy that States see their contribution to have the character of an omission. In any event, the nature of the contribution, action or omission, plays a role. It seems that States are more reluctant to accept the illegality of assistance in the latter case. Closely related with the contribution's nature, States thereby also imply that the act of assistance was not *specifically* provided to the specific use of force, but was general in nature.[1511] They thus indicate that the assistance remained rather within the bounds of general interstate cooperation that was not prohibited. States appear to set the bar rather high for a prohibition of assistance curtailing general interstate cooperation. It is noteworthy that States hereby do not rely merely on pre-existing cooperation, but instead tie this to (allegedly existing) legal *obligations* assumed earlier under (bilateral) treaties, as proof for the generality of their support.[1512]

The invocation of an obligation also invites a third possible interpretation: it may suggest that for those States for remote assistance the continuation of fulfilling existing obligations prevails – which may be solved either through excluding this behavior from the scope of a non-assistance obligation, or through a justification, such as the necessity to comply.[1513]

(6) Political assistance

Several States' contributions to the military operation were confined to being member of the coalition of the willing. No substantial military, logistical, humanitarian, or intelligence assistance was reported. Hence, the

1511 While this could also be understood as an argument that States do not have (enough) knowledge and do not need to further inquire about the specific use of the permissions provided, Corten, *Etats Tiers*, 120, States did not make this argument. States were well aware how and for what their assistance was used. See only Germany BT Drs 16/3400, 271 (18 June 2009), or Ireland, Italy (refueling), Hildreth and others, *International Attitudes*, 35. Bertie Ahern, 'We stand by neutrality and support for UN', *Irish Times* (22 March 2003).

1512 Yet, even within the respective States there was serious doubt whether the governments' position was correct that an obligation to continue assistance existed. See e.g. German Federal Administrative Court: BVerwGE 127, 302-374 para 228. Critical also Corten, *RBDI* (2005) 425; Corten, *Etats Tiers*, 120-122; Nolte, Aust, *ICLQ* (2009) 19.

1513 In this direction Greece emphasizing the importance to respect bilateral treaties also for a national interest.

support was no more than political. These States widely remained guarded with respect to the legality of use of force, although some indicated understanding or, at least, criticized Iraq for lacking disarmament. Moreover, legal considerations seemed not to play a role in States' decisions to join.[1514]

c) Assistance, but not to the use of force or occupation?

States sought to distinguish the following forms of assistance from assistance to a (potentially illegal) use of force.

(1) Assistance in the preparation stage

States drew a line between participation in the preparations for the use of force and participation once the operation was launched. States did not consider the former legally problematic. In striking contrast to the arguments relating to assistance once the use of force took place, they did not provide justifications. Some, like Kuwait, expressly relied on their sovereign rights. States believed that preparatory assistance, such as through the permission of overflight, was in accordance with international law. Italy, for example, said (only) "[i]n case of war, government would resubmit its opinions and decisions to the Parliament."[1515]

At the same time, some States showed awareness of the fact that by contributing to the military buildup, they were assisting in a threat of force against Iraq.[1516] This fact did not legally bar their contribution, however. To put it in the Netherlands' words, the threat of force was an "acceptable instrument" pursuant to Security Council Resolution 1441 (2003).[1517] As most States agreed that Iraq was legitimately pressured, it does not seem far-fetched to see this understanding to be essential for the silence of the other States on that question as well.

1514 For the example of Panama see Alonso E Illueca, 'International Coalitions and Non-Militarily Contributing Member States', 49(1) *UMiamiInterAmLRev* (2017) 10-12.

1515 Appicciafuoco and others, *ItYBIL* (2003) 287-288. Recall also the statements of League of Arab States that used the future tense but refrained from condemning the built-up.

1516 See for example the UK acknowledging this fact: S/PV.4726, 23.

1517 Tange, *NYIL* (2004) 374, 376. See also Appicciafuoco and others, *ItYBIL* (2003) 288. (Italy). The discussions on resolution 1441 (2003) primarily centered on whether it (re)-authorizes the *use* of force, and who could decide this.

(2) Humanitarian assistance

Humanitarian assistance was widely offered and considered unproblematic and distinct from assistance to the use of force.[1518] For example, Argentina called for and provided humanitarian assistance. Thereby, it stressed that "[t]his position does not in any way prejudge the legality or legitimacy of the armed conflict. It is aimed only at giving the necessary protection to the civilian population in accordance with the principles of humanity, neutrality and impartiality."[1519] Finland likewise noted that "the fact that the Finnish government is prepared to discuss humanitarian assistance and reconstruction in a post-war Iraq does not imply Finnish support for military action."[1520]

(3) Assistance to reconstruction – assistance to occupation?

After the end of the combat phase, the number of States involved in Iraq increased substantially.[1521] Many States seconded governmental and military personnel to the occupying powers.[1522] Many others, many of which had

1518 E.g. ASEAN: Statement by Chairman of the ASEAN standing committee on the looming war in Iraq (ASEAN Foreign Ministers' Informal Meeting) (19 March 2003), https://asean.org/statement-by-the-chairman-of-the-asean-standing-committee-on-the-looming-war-in-iraq-at-the-asean-foreign-ministers-informal-meeting-karambunai-sabah-malaysia/; Singapore Parliamentary Deb 14 March 2003, Hansard (Singapore) vol 76 col 890; S/PV.4726, 23 (New Zealand), 24 (India), 25 (Poland), 26 (Singapore), 32 (Vietnam), 40 (Columbia), 43 (Norway), 45 (Venezuela); S/PV.4726 Resumption 1, 5 (Thailand), 28 (China); S/PV.4732. Security Council resolutions 1472 (2003) para 2 and 1476 (2003) further strengthened States' conclusion in that respect.

1519 S/PV.4726, 37 (Argentine). See also S/PV.4726, 30 (Switzerland).

1520 Foreign Minister Erkki Tuomioja: Finland prepared to participate in UN-led non-military missions in Iraq, (11 January 2003), https://finlandabroad.fi/web/prk/foreign-ministry-s-press-releases/-/asset_publisher/kyaK4Ry9kbQ0/content/ulkominister i-erkki-tuomioja-suomi-varautunut-osallistumaan-yk-n-johtamiin-ei-sotilaallisiin-toimiin-irakissa/35732. Similarly, S/PV.4726, 23 (Cuba), 28 (Brazil); S/PV.4726 Resumption 1, 27 (Russia). See also for UNSC resolution 1472 on humanitarian assistance S/PV.4732, 3 (Syria), (Russia).

1521 On the details Talmon, *Plurality of Responsible Actors*.

1522 Spain: Piernas and others, *SpanYIL* (2003) 183, 187-188; Australia: Commonwealth of Australia, Official Committee Hansard, Senate, Foreign Affairs, Defense and Trade Legislation Committee Estimates, (Budget Estimates Supplementary Hearing), 6 November 2003, 52; Poland; Netherlands. For an overview Hildreth and others, *International Attitudes*, 37-41; Talmon, *Plurality of Responsible Actors*, 191,

decided not to participate in the first combat phase,[1523] provided essential support in various forms.[1524]

States' positions demonstrated, however, that they were well aware this might qualify as assistance to an ongoing occupation that remains subject to the *ius contra bellum,* and legitimize a situation created through the previous Anglo-American use of force.[1525]

In fact, the increased participation did not at least also fall back on the new legal framework provided through Security Council resolutions.[1526] Spain expressed a view shared by many other troop contributing States. It saw resolution 1483 (2003) "undoubtedly the key document to understanding the missions to be performed by our Armed Forces in Iraq and to lend full legitimacy to such missions in accordance with international law."[1527] A similar pattern may be found in legal explanations of States that provided other forms of assistance to Iraq, governed by the occupation forces. Again, Security Council resolutions, in particular resolution 1483 (2003), resolution 1511 (2003), and resolution 1546 (2004), were central to explaining their involvement.[1528] In fact, many States conditioned their support on a clear UN mandate.[1529]

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see also 217-220, explaining that those States were not occupying powers, as they placed the troops at the disposal of the occupying powers in the sense of Article 6 ARS. Hence, they were merely assisting the occupying powers, i.e. the US and the UK. Also for more details about responsibility of non-*ius contra bellum* norms.

1523 E.g. Lithuania, Estonia; 'Where Europe stands on the war', *Politico* (19 March 2003), https://www.politico.eu/article/where-europe-stands-on-the-war/.

1524 See in general also Lagerwall, *RBDI* (2006) 252.

1525 For the difficulties to establish responsibility for violations not relating to the *ius contra bellum* Talmon, *Plurality of Responsible Actors*, 217-220.

1526 S/RES/1483 (22 May 2003), S/RES/1511 (16 October 2003), 1546 (2004). See also S/PV.4761 (22 May 2003); S/PV.4844 (16 October 2003). Frederic L Kirgis, 'Security Council Resolution 1483 on the Rebuilding of Iraq', *ASIL Insights* (6 June 2003).

1527 Piernas and others, *SpanYIL* (2003) 183-186. See i.a. Poland, S/2003/867; Netherlands, Tange, *NYIL* (2004) 378, 379.

1528 E.g. S/2003/612 (3 June 2003); League of Arab States: S/2003/613, 4 (3 June 2003), S/2004/84 (3 February 2004); Organisation of Islamic States: Final Communiqué, para 24 (October 2003) http://ww1.oic-oci.org/english/conf/is/10/10is-fc-en.htm. Switzerland: Caflisch, *SwissRevIntl&EurL* (2004) 710-711; Caflisch, *SwissRevIntl&EurL* (2006) 655-657. Norway: Fife, *NordicJIL* (2004) 569-575. Italy: Appicciafuoco and others, *ItYBIL* (2003) 290; Lara Appicciafuoco and others, 'Diplomatic and Parliamentary Practice', 14(1) *ItYBIL* (2004) 398, 399, 400.

1529 Lagerwall, *RBDI* (2006) 266.

At the same time, at the abstract legal level,[1530] States were particularly careful to draw a line between the assistance provided and the assistance to the combat operation and upholding occupation: First, they emphasized that assistance was provided within the confines of the Security Council resolutions. Second, heavy emphasize was put on the fact that assistance was provided to Iraq for reconstructing State structures and re-establishing security with the goal to end the occupation.[1531] Some States explicitly flagged that their assistance to reconstruction should not be mistaken with assistance to the occupation[1532] or the preceding invasion.[1533]

Still, many States refused to provide assistance to the occupying forces even under resolution 1483 (2003), in particular those that had viewed Operation Iraqi Freedom as illegal. There was no universal agreement that the respective resolutions provided a sufficient legal basis. Those States conditioned their support on a stronger role for the UN, which they only found realized in resolution 1511 (2003), or once Iraqi representatives gave consent.[1534]

1530 For the factual implementation see Talmon, *Plurality of Responsible Actors*.

1531 For example Italy: Appicciafuoco and others, *ItYBIL* (2003) 290; Appicciafuoco and others, *ItYBIL* (2004) 397-398. See also Islamic Conference of Foreign Ministers S/2003/619, 30 para 13, 77 para 7, 8. This was also the goal of the UNSC Res: Lagerwall, *RBDI* (2006) 271.

1532 See e.g. Italy: "[I]t is and it will be a mission aimed at facilitating the operations of humanitarian assistance and rebuilding the country, while favouring the timely establishment of a provisional Iraqi Government. It is not aimed […] at military control of the territory." Appicciafuoco and others, *ItYBIL* (2003) 290-291. See also Ronzitti, *Italy's Non-Belligerency*, 203-204. Netherlands: Tange, *NYIL* (2004) 380.

1533 Netherlands: Tange, *NYIL* (2004) 380-381.

1534 Gray, *Use of Force 2008*, 365; Lagerwall, *RBDI* (2006) 267. For example, for Pakistan resolution 1511 (2003) was not enough: S/PV.4844, 7: "[T]he forces deployed must be acceptable to the Iraqi people and must evoke their full co-operation. Otherwise, they will be unable to impose security. On the contrary, their presence might intensify insecurity. It is for that reason that, during our consultations on the draft resolution, Pakistan consistently advocated that the multinational force which was to be created should have an identity separate and distinct from the occupation forces and that its deployment should be the result of an invitation from the Iraqi people and should take place with the concurrence of the other States of the region. Unfortunately, those considerations could not be reflected in the resolution we have just adopted. Under these circumstances, Pakistan will not be able to contribute troops to the multinational force in Iraq."

(4) NATO involvement: assistance to Turkey and Poland, but not more

Several States were also involved in NATO operations providing assistance to Turkey and Poland. They sought to distinguish this contribution from assistance to the Anglo-American use of force and occupation.

The US proposed in December 2002, six possible contributions by NATO in the event of a military campaign against Iraq. *Inter alia* this included the protection of US military assets in Europe from potential terrorist attacks and defensive assistance to Turkey in the event of a threat from Iraq.[1535] As the NATO members however remained divided on whether or not to use force against Iraq, the proposal was rejected.[1536] Notably, the States leading the opposition – Belgium, France, Germany, and Luxembourg –emphasized that any NATO involvement had to be limited to strict defensive purposes only.[1537] In particular, they countered the impression of a beginning of military planning to signal a forceful solution to the situation.

From February 20, 2003, until April 16, 2003, the NATO provided defensive assets to Turkey as precautionary measures under Article 4 NATO Treaty, upon the decision of the Defence Planning Committee.[1538] About the (only) defensive nature of this "Operation Display Deterrence", States left little doubt.[1539] At the same time, States acknowledged the connection to the Iraq invasion.[1540] Notably, States were attentive to draw a line between this operation and the US-led invasion. For example, the German Chancellor made clear that the operation's "exclusive task is the strictly defensive

1535 NATO and the 2003 campaign against Iraq (Archived), (1 September 2015), https://www.nato.int/cps/en/natohq/topics_51977.htm.

1536 Murphy, *AJIL* (2003) 421.

1537 Corten, *Etats Tiers*, 127.

1538 NATO and the 2003 campaign against Iraq (Archived), (1 September 2015), https://www.nato.int/cps/en/natohq/topics_51977.htm; Conclusion of Operation Display Deterrence (3 May 2003), https://www.nato.int/docu/update/2003/05-may/e0503a.htm; Conclusion of Operation Display Deterrence and Article 4 security consultations (16 April 2003), https://www.nato.int/docu/pr/2003/p03-040e.htm. See for a discussion of the legal basis by the Netherlands: Tange, *NYIL* (2004) 320.

1539 Disagreement among States during the decision process, notably, did not relate to the commitment to defend Turkey, but when to formally task the military planning. Statement by NATO Secretary General, Lord Robertson (6 February 2003), https://www.nato.int/docu/speech/2003/s030206a.htm.

1540 E.g. Spain: Piernas and others, *SpanYIL* (2003) 183. Canada: Aliaksandra Logvin, 'Parliamentary Declarations in 2002-3', 41 *ACDI* (2003) 495.

aerial surveillance in Turkey." The NATO-AWACS-aircraft "contribute – and this follows from the Rules of Engagement – in no means assistance to the operations in or against Iraq. The assignment of the AWACS-aircraft to the command of NATO-Supreme Allied Commander Europe, SACEUR, draws a strict line to the tasks of Commander of the US Central Command, General Franks."[1541] Should Turkey become involved in the war in Iraq, the German crew would be withdrawn.[1542] States hence seemed to assume that the Turkish permission of overflight would not already trigger a right of self-defense of Iraq against Turkey.

Furthermore, in the post-invasion period, at Poland's request, the NATO provided assistance including force generation, communications, logistics, and movements to Poland in the context of its leadership of one of the sectors of the US-led Multinational Force.[1543]

d) Protest against assistance

The crucial role of assistance did also not go unnoticed by the targeted State, Iraq. Iraq strongly protested not only against the Anglo-American use of force that it classified as an aggression and a violation of international

1541 Rede von Bundeskanzler Gerhard Schröder zum Haushaltsgesetz 2003 vor dem Deutschen Bundestag am 19. März 2003 in Berlin, *Bulletin der Bundesregierung* 24-3 (19 March 2003), unofficial translation. Hartwig, *ZaöRV* (2005) 774 para 49. See also for the German Chief Federal Prosecutor's view Kress, *JICJ* (2004) 248. The German Federal Administrative Court: BVerwGE 127, 302-374 para 260-269 was not without doubt whether the German contribution to the protection of Turkey was not facilitating the war and accepted comprehensible indicators that it was not. First, it asked whether the information gained through AWACS-flights were relevant for the use of force in Iraq and whether the US had access to this information. Second, the German deployment of troops could have compensated US troops that could then be deployed to Iraq. Like the German government, the Netherlands stressed the defensive and distinct nature. Tange, *NYIL* (2004) 319-320, 376. See also Belgium: Corten, *RBDI* (2005) 429, who is critical on this argument 438.

1542 Hartwig, *ZaöRV* (2005) 774 para 50. See also Michael Bothe, 'Der Irak-Krieg und das völkerrechtliche Gewaltverbot', 41(3) *AVR* (2003) 268.

1543 NATO and the 2003 campaign against Iraq (Archived), NATO (1 September 2015); Press Point, NATO (21 May 2003), https://www.nato.int/docu/speech/2003/s030521a.htm; Piernas and others, *SpanYIL* (2003) 187.

law.[1544] Iraq also condemned States providing assistance to the Anglo-American forces as violation of international law.

For example, Iraq reported the opening of the electric border fence between Kuwait and Iraq, and stated:

> "The presence on Kuwaiti territory of massive groups of American and British troops who, *aided and abetted by Kuwait*, are ready to mount aggressions against Iraq, constitutes a violation of the Charter of the United Nations, in particular Article 2, paragraph 4 [... and] a blatant violation of the relevant Security Council resolutions concerning the situation between Iraq and Kuwait, which call on all States to respect the sovereignty, political independence and territorial integrity of Iraq."[1545]

Pointing to the resolutions adopted by the League of Arab States, the NAM, and the OIC, Iraq stated that "Kuwait must assume the legal responsibilities incumbent upon it as a result of its participation in the aggression."[1546]

Later, Iraq informed the Security Council that it "will take the necessary steps to exercise its legitimate right of self-defence, pursuant to Article 51 of the Charter of the United Nations."[1547] At the early stages of the operations, it did so by launching missiles against Kuwait.

While Iraq primarily complained about Kuwait,[1548] it also commented on assistance by other States, yet primarily those regional States providing more proximate forms of assistance.[1549] For example, Iraq reminded other Arab States they had "an obligation not to allow their territory to be used for launching attacks on Iraq."[1550] Iraq's Vice President Taha Yassin

1544 See e.g. S/PV.4726, 5-6.

1545 S/2003/296 (11 March 2003).

1546 Ibid. In that context, although not directly related to the (preparation of the) Iraq war 2003, see Iraq's letters protesting against violations of the demilitarized zone by US and British warplanes. Iraq qualified them as aggression, and protested in particular against Kuwaiti involvement, S/2003/58, and S/2003/222. See for more details, above II.C.13.

1547 S/2003/327 (18 March 2003).

1548 A fact which Kuwait took note of and saw as reason for its precautionary measures. 'Kuwait refutes Iraqi claims regarding security agreements with US, Britain', *KUNA* (20 March 2003).

1549 But see S/PV.4726 Resumption 1, 36, where Iraq referred to other participating States: "I apologize to all those States that participated with the United States in this vision and in the aggression, such as Spain, Bulgaria and many other small States, because they will get nothing from the cake, if Iraq falls."

1550 'Arab states line up behind Iraq', *BBC* (25 March 2003), http://news.bbc.co.uk/2/hi/middle_east/2882851.stm.

Ramadan criticized Iraq's Western neighbors, in particular Jordan, for not closing their waterways and overland routes to the coalition, saying that "these routes are open to the aggressors' equipment […]."[1551]

These protests did not mean that Iraq was not well aware of the power-politics behind assistance.

> "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.*"[1552]

Referring to "coercion" and "occupation" Iraq seemed however not to seek to absolve assisting States from their responsibility for their unlawful assistance to the use of force. The statement indicated political understanding but no justification, which notably no assisting State had even claimed.[1553] Instead, it appears that Iraq's main goal was to flag the US role in States' assistance, thereby to politically emphasize that the US remained isolated nonetheless, and to (legally) add to the responsibility of the US.

Despite many States condemning the use of force, Iraq remained notably isolated in its protest against assistance.[1554] Express critique on assisting States remained rare. On the reasons one may only speculate. Several States, however, condemned somewhat ambiguously the United States *and its allies* – notably not using the term the "coalition".[1555]

1551 'Newsline - March 25, 2003', *RFERL* (25 March 2003).
1552 S/PV.4726 Resumption 1, 35 (Iraq), emphasis added.
1553 As the ILC suggested in its commentary to the ARS, this would have been arguably a "force majeur" defense. ILC ARS Commentary, Article 18, 69-70.
1554 But see for discussions among regional States above.
1555 S/PV.4726, 8 (Malaysia), 16 (Libya), 19 (Indonesia), 33 (Iran).

### e) Assistance to Iraq

There were remarkably little reports on assistance provided to Iraq, despite the fact that many States condemned the Anglo-American use of force against Iraq and showed solidarity with Iraq. This omission must not necessarily be equated with a denial of a right to provide assistance to the target of unlawful use of force. Instead, States seemed to not have exercised their right mainly for political reasons. In addition, strict sanctions against Iraq curtailed States' options, as an incident about alleged Russian deliveries of weapons to Iraq illustrates well. The US issued an official protest, as this would violate UN sanctions. Russia "was mindful of such concerns", acknowledged the obligations imposed by sanctions (only), but dismissed any allegations as baseless.[1556]

### f) Some general observations

The 2003 Iraq war demonstrated that assistance is not detached from power politics.[1557] Yet, it also showed that assistance is not provided arbitrarily in oblivion of relevant rules of international law. Whether or not the assisting States' reasoning hold up to the standard of international law is to be seen when situating the practice within the Iraq war in the larger picture of the previous analysis and the general practice. It goes without saying that the persuasive power of some arguments may be seriously doubted. In fact,

1556 Richard W Stevenson, 'Bush Calls Putin to Protest Sales of Russian Equipment', *NYT* (25 March 2003), https://www.nytimes.com/2003/03/25/world/nation-war-kremlin-role-bush-calls-putin-protest-sales-russian-equipment.html; President Vladimir Putin spoke by telephone with US President George W. Bush (24 March 2003), http://en.kremlin.ru/events/president/news/28363. Russian Minister of Foreign Affairs Igor Ivanov Speaks to US Secretary of State Colin Powell by Telephone (26 March 2003), https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/527590. Iraq likewise denied having received any assistance, 'Iraq latest: At a glance', *BBC* (25 March 2003), http://news.bbc.co.uk/2/hi/middle_east/2883171.stm.

1557 Note the remarkable statement by the Chairman of Islamic Summit, S/2003/289 (10 March 2003): "We are not here to pretend that we can make an international political or strategic decision which will direct and command the course of these developments. Yet we certainly can influence the course of such a decision and its possible results and effects, provided that we act together, unify our positions, and adhere to our objectives which are dictated by the common priorities and interests and the principles and values that bind us as one Muslim nation."

caution should be applied to accept all arguments voiced by some States as accurate interpretations of the law. Nonetheless, based on the assumption that States seek to act in accordance with international law, they shed light on States' understanding of the relevant and the developing international law – the impact of which will be seen in later stages.

In the wake of the Iraq war, over 300 scholars had stipulated a joint declaration. It stated yet without further explanations:

> "All forms of participation in such a war on the part of the United States, including all forms of assistance to the United States by third states or a regional organization, also constitutes a violation of the prohibition of the use of force."[1558]

Despite the fact that many States provided not indecisive assistance, no State disagreed with the principal statement. Not a single State claimed that assistance could be provided to an illegal use of force.[1559] At least implicitly, all States acknowledged a general rule of non-assistance.

Various States expressed the rule explicitly. Many behaved accordingly, although only few specifically invoked legal grounds for their action. The fact that first the majority of States condemned the use of force, and then once the legal framework came into more settled grounds many States provided assistance in some form should however not go unnoticed. States that provided assistance pursued different lines of arguments. States factually denied their assistance. States argued that the assisted use of force was lawful. States qualified the direction of their assistance, claiming it did not support the use of force but served different objectives. States argued that assistance in exercise of pre-existing obligations was permissible.[1560] Or States deemed assistance to be too remote to facilitate a use of force (political support/promise of reconstruction). But no State provided publicly acknowledged support without explanation.

And yet, State practice added more shading to the joint declaration. The declaration could have been more precise if it had concluded that all forms of assistance constituted a violation of the *principle* of the non-use of force.

1558 Appel de juristes de droit international concernant le recours a la force contre l'Irak', 36(1) *RBDI* (2003) 273.

1559 See also Corten, *Etats Tiers*, 124; Corten, *RBDI* (2005) 433.

1560 For the interpretation of that argument see above.

Indeed, States measured assistance against the background of the UN Charter. A prohibition was generally accessory, requiring the actual use of force.

But States drew distinctions between different forms of assistance, suggesting that a different set of rules applies – although under the regime of the UN Charter. Explanations varied with respect to the form of assistance provided. While States providing logistical or territorial assistance made more explanatory efforts, States that merely promised post war assistance or offered political, diplomatic, or moral support were considered (against the background of the discussed framework) legally unproblematic. Assistance of humanitarian nature, such as medical support (even for combatants) or support for the Iraqi population, was viewed clearly distinct from assistance to the use of force and questions relating to its legality.

States moreover drew a line between *assistance in the context or in preparation* of a use of force (transfer, overflight for troop deployment) and assistance directly *to* a use of force (launch base, overflight for combat operations).[1561] This was not exclusively linked to the form of assistance provided. Factors that States emphasized included the means used (non-combatant/non-lethal/non-military), the purpose of assistance (military, but defensive/humanitarian only), or the characteristic of the contribution (action/omission).

There was a trend for States to act upon this distinction. Those States publicly acknowledging *direct* support, like Kuwait and Uganda, sent a letter to the Security Council, justifying their own contribution. States providing more *remote* assistance in the context of the use of force resorted to different arguments. They focused on several (not necessarily exclusive) arguments, such as the (remote) nature of their contribution or the legality of the assisted use of force.

Furthermore, States acknowledged post-war assistance could not be provided in a legal vacuum. They were cautious to draw a line to assistance upholding the situation created by the (illegal) use of force or facilitating an ongoing (illegal) use of force, i.e., the Anglo-American occupation.

1561 Recall most notably Italy's "non-belligerency".

### 16) The Georgian-Russian war 2008

From 7th to the 12th of August 2008, the smoldering conflict between Russia and Georgia briefly but intensely flared up.[1562] Arguably, also due to the relative short duration of the war, assistance played only a limited role in the conflict.

States scarcely provided military assistance to either Russia or Georgia during the war.[1563] For example, the United States primarily sent humanitarian and reconstruction aid and called for Russia to "ensure that all lines of communication and transport, including seaports, airports, roads and airspace, remain open […]".[1564] But it refrained for example "from protecting the airport or the seaports"[1565]

But notably the United States did provide airlifts to Georgian elite troops that had been deployed in Iraq. On 9 August 2008, the Georgian President called these troops back.[1566] On 10-11 August, US transport facilities flew them back to Georgia. An US official explained that the US was "supporting the Georgian military units that are in Iraq in their redeployment to Georgia so that they can support requirements there during the current security situation."[1567] Ultimately, the redeployed troops did not take part in combat; they had arrived too late.[1568]

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1562 See in detail Heidi Tagliavini, *Independent International Fact-Finding Mission on the Conflict in Georgia* (I, September 2009) Volumes I-III; Christine Gray, 'The Conflict in Georgia - 2008' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018); Otto Luchterhandt, 'Völkerrechtliche Aspekte des Georgien-Krieges', 46(4) *AVR* (2008). See on the question whether it was a war between Georgia and Russia: Angelika Nußberger, 'The War between Russia and Georgia - Consequences and Unresolved Questions', 1(2) *GoJIL* (2009).

1563 Luca Ferro, Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties', 17(1) *CJIL* (2018) 21.

1564 Steven Lee Myers, 'Bush, Sending Aid, Demands That Moscow Withdraw', *NYT* (13 August 2008), https://www.nytimes.com/2008/08/14/world/europe/14georgia.html.

1565 Ibid.

1566 'Georgian Troops Back from Iraq – Saakashvili', *Civil.ge Daily News Online* (10 August 2008), https://old.civil.ge/eng/article.php?id=19027&search=Iraq.

1567 Kim Gamel, 'U.S. begins flying Georgian troops home from Iraq', *AP* (10 August 2008), https://www.deseretnews.com/article/700249766/US-begins-flying-Georgian-troops-home-from-Iraq.html.

1568 Heidi Tagliavini, *Independent International Fact-Finding Mission on the Conflict in Georgia* (II, September 2009) 214.

Nonetheless, the incident did not go unnoticed by Russia.[1569] Russia's then Prime Minister Putin stated:

> "It is a pity that some of our partners are not helping us, and are *even trying to intervene*. What I am talking about, for example, is the transfer of the Georgian military contingents from Iraq *directly into the conflict zone* using the United States' military transport planes. This will not change anything, but this is a step in the opposite direction from resolving the situation. What is surprising is not even the cynicism of such actions, because politics, as they say, is a cynical business in general. What is surprising is the level of cynicism. What surprises is the ability to swap good and bad, black and white, the *slick ability to pose an aggressor as a victim of the aggression, and to make the victims responsible for its consequences*."[1570]

The US openly acknowledged the transport.[1571] But it did not disclose the exact location where Georgian troops were flown and firmly denied Putin's allegation that they were flown "directly into the fight".[1572] The US did not offer an express legal explanation for the airlifts. But it underscored that "We are fulfilling our agreement with the Georgian government that in an emergency we will assist them in redeploying their troops. We are honoring that commitment."[1573] In addition it is at least noteworthy that the airlifts occurred in reaction to, and once Russia had extended and intensified its

1569 Luke Harding Ian Traynor, 'Russians march into Georgia as full scale war looms', *Guardian* (12 August 2008), https://www.theguardian.com/world/2008/aug/11/georgia.russia13.

1570 Government of the Russian Federation, Prime Minister Vladimir Putin chaired a Government Presidium meeting, (11 August 2008), archive.government.ru/eng/docs/1648/, emphasis added.

1571 See for example: Office of the Press Secretary, Setting the Record Straight: President Bush Has Taken Action to Ensure Peace, Security and Humanitarian Aid in Georgia, (13 August 2008), https://georgewbush-whitehouse.archives.gov/news/releases/2008/08/20080813-2.html.

1572 Kim Gamel, 'U.S. begins flying Georgian troops home from Iraq', *AP* (10 August 2008); 'Airlift of Georgian troops from Iraq near complete: Pentagon', *Space War* (11 August 2008), https://www.spacewar.com/reports/Airlift_of_Georgian_troops_from_Iraq_near_complete_Pentagon_999.html.

1573 John J Kruzel, 'U.S. helps redeploy Georgian forces', *American Forces Press Service* (12 August 2008), https://www.army.mil/article/11603/us_helps_redeploy_georgian_forces.

military operations, which the US perceived to be disproportionate and violate Article 2(4) UNC.[1574]

Russia further alleged that Ukrainian soldiers and volunteers fought for Georgia. Even more insistently, Russia accused Ukraine to have supplied tanks and anticraft systems to Georgians at reduced prices.[1575] Russia claimed that the latter was "a policy which can only be assessed as unfriendly towards Russia."[1576] It held that "[…] by its supplies of heavy weapons to the Georgian army the Ukrainian side *bears a portion of the responsibility* for the blood spilled."[1577] Putin explained that "when it comes to arms deliveries, this is understandable because it's a business. But when military systems and people are used to kill soldiers – in this case, Russian soldiers – then, in this case, it is a signal, a very alarming signal for us."[1578] On the legal level, Russia did not explain this any further. International

1574 S/PV.5953, 6 (USA). Previously, the USA had been critical, raising questions about Russia's commitment to Georgia's sovereignty, but did not condemn it as violation of international law, S/PV.5952, 7; S/PV.5951, 6. Similarly, S/PV.5953, 11 (UK), 13, (Croatia), 14 (Costa Rica), 15 (Panama).

1575 Russian Minister of Foreign Affairs Sergey Lavrov Speaks to Ukrainian Verkhovna Rada Speaker Arseniy Yatsenyuk by Telephone, (11 August 2008), https://www.mid.ru/en/web/guest/foreign_policy/international_safety/conflicts/-/asset_publisher/xIEMTQ3OvzcA/content/id/328606; Conor Humphries, 'Russia Says Ukrainians Fought For Georgia In 2008 War', *Reuters* (24 August 2009), https://www.reuters.com/article/idUSLO588076._CH_.2400. Russia also noted other States (Czechoslovakia, Israel, United States, Poland, Lithuania, Bosnia and Herzegovina, Bulgaria) that previously provided weapons and training to Georgia, within the scope of general military cooperation. Russia criticized them, too. Yet, it did not accuse them of shared responsibility. The fact that Russia considered Ukraine "leading arms supplier" and to have knowledge, may explain the focus on Ukraine (besides internal politics). FSC.JOUR/564, Annex 1, 1 October 2008, https://www.osce.org/fsc/34253?download=true. See also Peter W Schulze, 'Geopolitics at Work: the Georgian-Russian Conflict', 1(2) *GoJIL* (2009) 332-333 arguing for US knowledge; Tagliavini, *Independent International Fact-Finding Mission on the Conflict in Georgia*, Volume I, 15 para 8, Volume II, 189, 193.

1576 Statement of the Russian Ministry of Foreign Affairs on Russian-Ukrainian Relations, (11 September 2008), https://www.mid.ru/en/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNIr/content/id/325730.

1577 Ibid emphasis added. See also Article of Russian Minister of Foreign Affairs Sergey Lavrov, 'On the Caucasus Crisis and Russia's Ukrainian Policy,' Published in the Weekly '2000,' No. 38, September 19-25, Kyiv, (20 September 2008), https://www.mid.ru/en/web/guest/foreign_policy/international_safety/conflicts/-/asset_publisher/xIEMTQ3OvzcA/content/id/324418.

1578 'Putin Sharply Criticizes Ukraine Over Georgian Arms Reports', *RFERL* (3 October 2008), https://www.rferl.org/a/Putin_Sharply_Criticizes_Ukraine_Over_Georgian_Arms_Reports/1293613.html.

*legal* obligations leading to complicity were at least not the dominant factor in the matter. While Russia charged Ukraine to have contradicted "international agreements", Russia primarily accused Ukraine of violating "political obligations" under the OSCE and the Wassenaar Arrangement.[1579]

The Ukraine rejected the allegations about the participation of Ukrainian personnel in the fighting. It acknowledged that Ukrainians had trained Georgian troops and provided repair services to the Georgian military prior to the war as part of general technical and military cooperation with Georgia. Yet it claimed to have withdrawn them as soon as military clashes broke out.[1580]

A Ukrainian parliamentary commission, instituted following Russian allegations, verified reports of arms supplies prior to the outbreak of the military confrontation and noted that these arms were used by Georgian forces during the war.[1581] The Ukrainian government stressed that it "breached neither international obligations nor agreements".[1582] It deemed discussions

1579 Commentary by Russian MFA Spokesman Andrei Nesterenko Regarding Statements by Ukrainian Officials concerning Arms Supplies to Georgia, (1 November 2008), https://www.mid.ru/en/web/guest/kommentarii_predstavitelya/-/asset_publisher/MCZ7HQuMdqBY/content/id/318418. See also in the OSCE Framework, Russia applied these considerations to other States that previously provided arms and training, FSC.JOUR/564 (1 October 2008). Russia threatened also primarily with political consequences: Medvedev was quoted "Unfortunately, several countries close to us participated in this. We will never forget this, and, for sure, we will consider this when formulating policy." Michael Schwirtz, 'Claims of Secret Arms Sales Rattle Ukraine's Leaders', *NYT* (29 November 2008), http://www.nytimes.com/2008/11/30/world/europe/30ukraine.html; 'Pipe down', *Economist* (10 January 2009), http://www.economist.com/node/12903050. See also Aust, *Complicity*, 135.

1580 'Interview with Ukrainian President Viktor Yushchenko: 'The Problems Began After the Orange Revolution'', *Spiegel* (7 September 2009), https://www.spiegel.de/international/world/interview-with-ukrainian-president-viktor-yushchenko-the-problems-began-after-the-orange-revolution-a-647401.html; 'Ukraine's "helping hand" in Ossetian war', *RT News* (19 September 2009), https://www.rt.com/news/ukraine-helping-hand-ossetian/.

1581 Temporary Commission of the Parliament of Ukraine on Clarifying the Circumstances and Investigating the Facts of Supplies of Ukrainian Military Equipment to Georgia in Violation of Ukrainian Legislation and International Law; https://zakon.rada.gov.ua/laws/main/344-VI (Law establishing the Commission); https://zakon.rada.gov.ua/laws/show/776-17 (referral to General Prosecutor); http://gska2.rada.gov.ua/pls/zweb_n/webproc34?id=&pf3511=33873&pf35401=131916 (for the report).

1582 'Ukraine hasn't breached international laws when supplying weapons to Georgia', *UNIAN* (3 November 2008), https://www.unian.info/society/158778-ukraine-hasn

of Ukraine's involvement or responsibility "senseless".[1583] It claimed that "Ukraine has every right to sell weapons to any country, including Georgia, that is not under international sanctions."[1584] It explained that the deliveries of weapons were part of a technical and normal military cooperation with Ukraine "within the framework of international law".[1585] On that basis, it denied any allegations about arms deliveries *during* the war[1586] as well as any prior knowledge about Georgian use of force.[1587] It added that it was also pursuing military cooperation with Russia, and could not exclude that Russia had used those weapons in the war too.[1588] Moreover it also stressed the defensive nature of the weapons provided. In general, Ukraine sided with Georgia. As one of the only few States, it sent a letter to the Security Council. Therein, Ukraine expressed concern about the deterioration of the situation in Georgia and called for both parties to end hostilities. At the same time, it reaffirmed "its position on the territorial integrity and sovereignty of Georgia".[1589]

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t-breached-international-laws-when-supplying-weapons-to-georgia.html. See also 'Ukraine: Lawmakers to probe weapons to Georgia', *KyivPost* (4 September 2008), https://www.kyivpost.com/article/content/world/ukraine-lawmakers-to-probe-weapons-to-georgia-29587.html. See also FSC.JOUR/564 (1 October 2008), Annex 5.

1583 FSC.JOUR/564 (1 October 2008), Annex 5.

1584 Michael Schwirtz, 'Claims of Secret Arms Sales Rattle Ukraine's Leaders', *NYT* (29 November 2008), http://www.nytimes.com/2008/11/30/world/europe/30ukraine.html; FSC.JOUR/564 (1 October 2008), Annex 5.

1585 'Interview with Ukrainian President Viktor Yushchenko: 'The Problems Began After the Orange Revolution'', *Spiegel* (7 September 2009).

1586 "*From the beginning of the armed conflict in Georgia*, Ukraine did not supply a single round of ammunition", emphasis added. 'Ukraine Denies Sending Arms to Georgia During War', *RFERL* (3 October 2008), https://www.rferl.org/a/Ukraine_Denies_Sending_Arms_To_Georgia_During_War/1293840.html.

1587 But see the parliamentary inquiry commission that concluded that there were indicators that the president had knowledge about the plans. James Marson, 'Kremlin hyping Georgia arms Sales', *Kyiv Post* (23 October 2008), https://www.kyivpost.com/article/content/ukraine-politics/kremlin-hyping-georgia-arms-sales-30555.html?cn-reloaded=1.

1588 FSC.JOUR/564 (1 October 2008), Annex 5.

1589 A/62/928-S/2008/546 (11 August 2008).

17) The Abu Kamal raid 2008

In late October 2008, a fleet of American helicopter-borne troops conducted a military raid targeting terrorist entities near Abu Kamal in Syria.[1590]

Syria protested against the US operation as violation of the prohibition to use force. It also specifically addressed and reiterated that the US operation was launched from Iraqi territory:

> "The Syrian Arab Republic also demands that the Government of Iraq should carry out a full investigation into the goals and background of that attack, shoulder its *responsibility to prevent any repetition of the use of its territory to launch attacks* that are in contravention of the Charter of the League of Arab States, the Charter of the United Nations and international law and honour the mechanisms that were agreed bilaterally by the Syrian Arab Republic and Iraq and in the framework of meetings between neighbouring countries."[1591]

The Syrian position allows for two interpretations. First, it might be understood to claim that Iraq bears international responsibility for an internationally wrongful act. In this case, Syria would not have specified the violated norm, and would have only implied a breach by focusing on the content of such an Iraqi responsibility – a duty of non-repetition.[1592] This reading would indicate a strict norm on territorial assistance that does not rest on high premises but on the unlawfulness of the use of force that originated from the assisting State's territory.

Second, and more convincingly, the protest note may suggest that Syria did not claim that *Iraq* violated international law by the mere fact that its territory was the point of departure, unlike Syria did expressly with respect to the American use of force. Instead, it suggested that Iraq had a duty to prevent *further* uses of its territory in a similar manner ("repetition"). Only for future and similar attacks originating from Iraq, in Syria's view, would Iraq breach international law. The Syrian letter left open why Syria refrained from (at least expressly) holding Iraq responsible for its assistance and appeared to distinguish the present from future territorial assistance.

1590 Eric Schmitt, Thom Shanker, 'Officials Say U.S. Killed an Iraqi in Raid in Syria', *NYT* (27 October 2008), https://www.nytimes.com/2008/10/28/world/middleeast/28syria.html?hp.

1591 S/2008/676 (28 October 2008).

1592 See on this Article 30(b) ARS.

Notably, it only qualified the "repetition of the use" generally to have to violate international law – a criterion that, pursuant to the Syrian view, would have been fulfilled in the present case, too. Accompanying statements by Syrian officials, however, suggested that the careful Syrian formulation may account for Syria's doubts whether Iraq had agreed to the operation.[1593] This is also demonstrated by the fact that Syria called for "full investigations." It hence seems that without *a territorial State's agreement*, Syria remained cautious to advance legal accusations for a violation of a duty to prevent. Syria acknowledged that a State cannot prevent *any* (mis)use of its territory, even if it had placed the territory at another States' disposal. All Syria required in these circumstances was an investigation. At the same time, Syria made clear that for a "repetition" of such conduct, stricter standards applied. Against the background of the required investigations, Syria suggested that territorial States can no longer benefit from doubt with respect to their involvement and agreement, and have to effectively prevent similar conduct.

Iraq, in reaction to the incident, seemed to understand the Syrian protest in line with the second reading. It even accepted the Syrian premises here. Iraq did not seem it necessary to defend itself against a breach of international law. With respect to the present attack, Iraq acknowledged that the area targeted by the US was a staging ground for terrorist and insurgent activities against Iraq,[1594] but it rejected the raid as illegal. Moreover, Iraq generally emphasized that it does not allow its territory to be used as launch pad for such actions.[1595] It instituted an investigation, and urged the US

1593 Syrian Foreign Minister Muallem said: "Also, the question arises here: Is this the production of the agreement between the administration and Iraq, the defensive agreement, where many Iraqis are saying that the sovereignty of Iraq is at stake and the American will use the Iraqi's territories to launch aggression against neighbouring countries? These are question marks." Syrian information minister saw the raid as "a flagrant violation of the new [security] agreement between Iraq and the US." "One of the points of that agreement is that they do not attack bordering countries." 'Syria says raid is 'terrorist' act', *Al Jazeera* (27 October 2008), https://www.aljazeera.com/news/middleeast/2008/10/200810271623413494 4.html.

1594 Eric Schmitt, Thom Shanker, 'Officials Say U.S. Killed an Iraqi in Raid in Syria', *NYT* (27 October 2008), https://www.nytimes.com/2008/10/28/world/middleeast/28syria.html?hp.

1595 Martin Chulov, 'Iraq rebukes US for commando raid as Syria appeals to UN', *Guardian* (29 October 2008), https://www.theguardian.com/world/2008/oct/29/iraq-syria-usa-un-commando.

to not repeat such action.[1596] Furthermore, against the background of the raid, Iraq announced to limit an agreement accordingly that was under discussion governing the US presence in Iraq after the UN mandate ended.[1597] As regards the law, Iraq seemed to endorse the Syrian legal position.

Others from the international community, while critical of the US operation, remained silent on Iraq's role in the operation.[1598]

### 18) The intervention in Libya 2011

In reaction to a civil war in Libya, on 17 March 2011, the Security Council authorized "Member States that have notified the Secretary General" to take all necessary measures "to protect civilians and civilian populated areas under threat of attack in the Libyan Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory" and "to enforce compliance with [a] ban of flights".[1599]

That all the authorized measures, by their nature, also required a use of force met with agreement across the Council.[1600] The no fly zones required first the destruction of Libyan air defense means, followed by monitoring and coordinating activities in Libyan airspace, and, if necessary, intercepting (again, if necessary by force) any aircraft that violated the no

1596 Mariam Karouny, 'Iraq denounces U.S. raid on Syria', *Reuters* (28 October 2008), https://www.reuters.com/article/us-syria-usa-iraq-dabbagh-sb/iraq-denounces-u-s-raid-on-syria-idUSTRE49R3FO20081028?virtualBrandChannel=10112.

1597 Ibid. This was reflected in Section I (4) Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States and the Republic of Iraq (17 November 2008).

1598 See for example NAM S/2008/687 (5 November 2008); France: Estelle Shirbon, 'France expresses concerns over U.S. raid', *Reuters* (27 October 2008), https://www.reuters.com/article/us-iraq-syria-france/france-expresses-concerns-over-u-s-raid-idUSTRE49Q78320081027; Russia: 'Russia says U.S. fuelling tension with Syria attack', *Reuters* (27 October 2008), https://www.reuters.com/article/us-iraq-syria-russia/russia-says-u-s-fuelling-tension-with-syria-attack-idUSTRE49Q4CZ20081027.

1599 S/RES/1973 (17 March 2011), para 4, 6, 8. The Security Council also authorized States to use all measures commensurate "to carry out […] inspections" necessary to enforce an arms embargo, para 13.

1600 S/2011/204 (30 March 2011) para 4 (NATO). See also S/PV.6498 (17 March 2011), 5 (Germany), 5 (USA), 6 (Brazil), 8 (Russia), 10 (China).

fly zone.[1601] To implement the mandate to protect civilians, States first had to identify forces which presented a threat to civilians, which were then to be targeted through air and naval strikes.[1602]

On 19 March 2011, the United States, the UK, and France initiated military strikes.[1603] NATO took over all operations under the name "Operation Unified Protector" at the end of March that endured until October 2011.[1604] As the conflict progressed, several States complemented the operation through support to non-State actors fighting Gaddafi in form of military advice and equipment.[1605]

Considerations included assistance to the operations right from the outset. The Security Council set the tone. It "call[ed] upon all Member States, acting nationally or through regional organizations or arrangements, to provide assistance, including any necessary overflight approvals, for the

1601 NATO No-Fly Zone over Libya Operation UNIFIED PROTECTOR, https://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-no-fly-zone.pdf.

1602 Operation UNIFIED PROTECTOR Protection of civilians and civilian populated areas, https://www.nato.int/nato_static/assets/pdf/pdf_2011_04/20110407_unified-protector-protection-civilians.pdf.

1603 S/PV.6505 (24 March 2011), 2.

1604 It was however not an exclusive NATO operation. Other States were invited to participate and participated as well, S/2011/203 (30 March 2011). On the termination see S/RES/2016 (27 October 2011) para 5 and 6. Only the enforcement of the arms embargo was still permitted. See in detail on the command structure of the operation: Matteo Tondini, 'Coalitions of the Willing' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017) 727-731.

1605 UK: S/2011/269 (26 April 2011); France: S/2011/274 (27 April 2011) (military advisors), S/2011/402 (1 July 2011) (airdrops of self-defense weapons); USA: S/2011/372 (17 June 2011) (non-lethal supplies and equipment); Italy: S/2011/270 (26 April 2011) (personal protective equipment, military advisors); Qatar: Ian Black, 'Qatar admits sending hundreds of troops to support Libya rebels', *Guardian* (26 October 2011), https://www.theguardian.com/world/2011/oct/26/qatar-troops-libya-rebels-support. It is controversial whether the authorization also covered such engagement. See on this Christian Henderson, 'International Measures for the Protection of Civilians in Libya and Cote D'ivoire', 60(3) *ICLQ* (2011) 770-772; Christian Henderson, 'The Provision of Arms and Non-Lethal Assistance to Governmental and Opposition Forces', 36(2) *UNSWLJ* (2013); Natalino Ronzitti, 'NATO's Intervention in Libya: a Genuine Action to Protect a Civilian Population in Mortal Danger or an Intervention aimed at Regime Change?', 21(1) *ItYBIL* (2011) 9-10; Ahsley S Deeks, 'The NATO Intervention in Libya - 2011' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018) 756.

purposes of implementing paragraphs 4, 6, 7 and 8 above."[1606] This call is notable for three reasons. First, the Council distinguished between 'assistance' and the authorized 'necessary measures', calling for the former, and authorizing the latter. It may not allow to conclude that 'assistance' does not amount to an authorized 'necessary measure'. 'Assistance' may still benefit from the legalizing effect of the authorization of the 'necessary measures', which is comprehensive in scope and arguably embraces 'assistance' *a fortiori*. But it indicates that 'assistance' is a separate category that may not require an authorization. Second, while the call suggested that 'assistance' was considered in accordance with international law, the Council tied this to the authorization – to the extent that assistance was provided *for the purpose* of the implementation of the authorized enforcement measures. Third, by referring to overflight approvals, the Council allowed a glimpse what (kind of) contributions it primarily considered as 'assistance'.

Various States heeded the Security Council's call. On that note, contributions short of force also prominently featured in States' legal reasoning. Resolution 1973 (2011) stood at the center of States' legal considerations.[1607] In detail, practice suggested a nuanced approach to the permissibility of assistance, depending on the respective individual contribution.

a) States engaged in combat and providing assistance

Mostly NATO States conducted Operation Unified Protector: Belgium, Bulgaria, Canada, Denmark, France, Greece, Italy, Netherlands, Norway, Spain, Romania, Turkey, the UK, and the USA. As non-NATO States, Jordan, Sweden, Qatar, the United Arab Emirates, and Morocco officially joined the intervening coalition.

1606 S/RES/1973 para 9.

1607 This was also true for the criticism against the operation. Several States viewed the military operation as it eventually progressed to overstep the authorization's (inchoate) boundaries and to violate international law. The fact that the scope of the authorization was not well defined enough led also to States abstaining on (but still accepting) the resolution: S/PV.6498, 6 (India), 8 (Russia), 10 (China). In particular, criticism was directed against providing support to Libyan rebels: for example: A/C.3/66/3, S/2011/544, S/2011/571 (Venezuela); S/2011/209, S/PV.6528 (Russia), African Union S/2011/307, S/2011/337.

France, the UK, Canada, Denmark, Italy, Norway, Belgium, and the UAE conducted military strikes.[1608] Others contributed by means short of force. Most States notified the Secretary General of their contribution. Interestingly, States not only reported the provision of troops empowered to use force and conducted the kinetic strikes. They also disclosed assistance widely. This included acts carried out over Libyan soil, such as reconnaissance activities, intelligence gathering, or monitoring measures, as well as measures whose sole purpose was to support other States in using force according to the authorization, such as transport, refueling, or the provision of military bases.[1609] All such measures had in common that they were deemed decisive for the very success of the operation. This was in particular true for refueling and intelligence.[1610] None of those States specified

1608 The USA did so only in the first phase to take down the air defense. The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011), https://2009-2017-fpc.state.gov/176760.htm.

1609 States doing so were: Italy, Qatar: S/2011/163 (21 March 2011); S/2011/195 (25 March 2011); S/2011/321 (9 May 2011) (enforcing no fly zone *and* transport, medical supply); Norway: S/2011/193 (25 March 2011) (reconnaissance); UK: S/2011/177 (23 March 2011) (reconnaissance measures to protect civilians); France: S/2011/175 (23 March 2011) (maritime surveillance), S/2011/212 (30 March 2011) (surveillance radar, reconnaissance and support missions); Spain: S/2011/197 (28 March 2011) in addition to military crafts to patrol the no-fly zone and enforce the arms embargo, referred to "participation" and "contribution". This may have included further Spanish contributions such as for example its approval of the use of Spanish military bases, for which the government stressed that the forces were acting "under the umbrella of the resolutions" 1970 and 1973, 'Spain sets own rules of engagement for Libya mission', *El País* (24 March 2011), https://english.elpais.com/elpais/2011/03/24/inenglish/1300947641_850210.html; Sweden reported "military measures" S/2011/217 (1 April 2011) and S/2011/262 (21 April 2011) that included fighter jets to enforce the no-fly zone as well as airborne early warning and control and aerial refueling capacity. Fredrik Doeser, 'Sweden's Libya Decision: A case of Humanitarian Intervention', 51(2) *IntlPol* (2014) 206.

1610 See on the necessity of refueling for UAE's participation: Karl P Mueller, *Precision and Purpose: Airpower in the Libyan Civil War* (2015) 354. On the necessity of US and Canadian tanking of Danish fighters see: ibid 279. Qatar was also dependent on overflight approvals and assistance. On the importance of tanking see ibid 101-102. The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011).

a norm that assistance may have *prima facie* violated.[1611] But all of them explicitly based their measures on the Security Council authorization.[1612]

For example, Italy informed the Secretary General that *inter alia* it was "contributing to the operations of the coalition by making available seven air bases and providing the direct use of a few aircraft. The Italian Air Force carried out air defence, reconnaissance, convoy and in-flight refuelling missions."[1613] Once NATO had taken over, Italy reported that "all Italian assets including aircraft, were placed under NATO control for operation "Unified Protector" for a total of *7 air bases*, 12 aircraft and 4 naval units."[1614] In particular, the airbases were considered crucial without which "the participation of many coalition members [was] virtually impossible in practical terms, particularly considering the shortage in coalition air-to-air refuelling assets."[1615] Italy emphasized that these measures were "adopted in accordance with paragraphs 4 and 8 of Security Council resolution 1973 (2011)."[1616] At the time of the submission of the letters, Italian forces had a limited targeting policy. Their mandate was confined to the protection of other aircraft against possible surface-to-air threats,[1617] but did not include "taking part in bombing raids" and hostilities directed against Libya.[1618] Its main role at that time was support, including through defending and protecting other States that conducted airstrikes. It was only later, in April,

1611 A similar observation applies to the literature. But note for example Ronzitti, *ItYBIL* (2011) 11 who mentions the Libyan-Italian Treaty of Friendship but does not discuss the *ius contra bellum* regime.

1612 In that light, various States, like e.g. Italy, Norway or the Netherlands that contributed to other States' military activities, set up red card holders seeking to ensure their contribution to be used in accordance with the resolution's mandate. Cf Mueller, *Libyan Civil War*.

1613 S/2011/185 (25 March 2011). On the refueling see Mueller, *Libyan Civil War*, 227-228.

1614 S/2011/216 (1 April 2011). This also included "infrastructure, logistics, consumables and services that Italy was asked to provide as host nation." Mueller, *Libyan Civil War*, 206.

1615 Mueller, *Libyan Civil War*, 206. Without the Italian consent the air bases could not have been used. Ibid 214. PM statement to the House on Libya (21 March 2011), https://www.gov.uk/government/speeches/pm-statement-to-the-house-on-libya.

1616 Notably, it did not invoke paragraph 9 of the resolution: S/2011/185 (25 March 2011).

1617 Mueller, *Libyan Civil War*, 220.

1618 Ceasefire only possible if Ghaddafi leaves, says Frattini (12 April 2011), https://www.esteri.it/mae/en/sala_stampa/archivionotizie/approfondimenti/2011/04/20110412_focuslibia.html.

that Italy's government gave in to international pressure and agreed to conduct air-to-ground strikes.[1619]

Similarly, Turkey explained "on the basis of the relevant provisions of Security Council resolutions 1970 (2011) and 1973 (2011)" that in addition to assets involved in hostilities, it is providing "solely for the purpose of implementing the arms embargo" "one logistic support vessel [...] and one tanker aircraft" which "are being used to support the operations of NATO naval and air assets."[1620]

Qatar, which also resorted to force to enforce the no-fly zone and to protect civilians, noted in its letters to the Secretary General that it was "*contributing* to military operations with a number of military aircraft, *military transport aircraft and helicopters*" and that it viewed these measures "in compliance with the authorizations conferred under resolution 1973 (2011)".[1621] The Qatari contributions were essential to the intervening coalition. They constituted a direct link to the Libyan opposition,[1622] and accordingly facilitated the support to Libyan rebels. At a later stage, Qatar also notified the Secretary General of the provision of medical supplies and transportation to the Libyan people,[1623] although in this case it did not provide a legal basis.

Also, assisting States that were part of the coalition but that refrained from engaging in combat missions and remained outside of Libya submitted letters to the United Nations. They, too, invoked the Security Council authorization as a legal basis for their conduct.

1619 Readout of the President's call with Prime Minister Berlusconi of Italy (25 April 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/04/25/readout-presidents-call-prime-minister-berlusconi-italy; 'Libya: Berlusconi backs Nato strikes by Italy jets', *BBC* (25 April 2011), https://www.bbc.co.uk/news/world-africa-13188951; Mueller, *Libyan Civil War*, 223, 225-226.

1620 S/2011/346 (8 June 2011).

1621 S/2011/195, emphasis added; S/2011/321, noting that it has "taken *practical measures to contribute* to the operations undertaken by military aircraft of the international alliance. It has also *contributed* to the enforcement of the no-flight zone *by assisting* international alliance forces", emphasis added. See also S/2011/163.

1622 Mueller, *Libyan Civil War*, 346. Later Qatar also admitted to have supported Libyan rebels: Ian Black, 'Qatar admits sending hundreds of troops to support Libya rebels', *Guardian* (26 October 2011).

1623 S/2011/321.

The case of Jordan illustrates this well. Jordan supported the authorized measures by conducting a 'purely logistical' mission.[1624] Still, Jordan sent a letter to the Secretary General, in which it invoked the authorization for its measures.[1625] And in fact, Jordan was an important actor for the operations – not least as it was one of three Arab States that were considered important for the "optics" of the coalition,[1626] and as such of imminent political importance. It was not suggested that this fact in and of itself prompted Jordan to invoke the profound justification of the authorization. Instead, it may be also taken into account that Jordan's logistical assistance was closely connected to military operations, albeit not in a classical manner to direct combat operations conducted by the intervening States, but because of its contributions to indirect use of force by the coalition. Jordan's transport operations became a "key air bridge" to the Libyan opposition that permitted the coalition to provide humanitarian assistance as well as material support.[1627]

Greece likewise was not directly involved in military operations. And while it excluded direct participation in bombing, it played a key supporting role.[1628] It made available military bases as well as infrastructure to States involved in combat operations. Also, it provided a patrol frigate, a

1624 'Jordan insists no participation in Libya operation', *Jordan Times,* 24 March 2011; 'Jordan sends jets to support Libya no-fly zone', *Reuters* (6 April 2011), https://www.reuters.com/article/us-libya-jordan-idUSTRE73528Q20110406; 'After hesitation, Jordan joins in Libya no-fly campaign', *ALL Headline News* (6 April 2011), https://web.archive.org/web/20110412120322/http:/www.allheadlinenews.com/briefs/articles/90043651?After%20hesitation%2C%20Jordan%20joins%20in%20Libya%20no-fly%20campaign.

1625 S/2011/238 (12 April 2011).

1626 Mueller, *Libyan Civil War*, 345.

1627 Ibid 346. Richard Norton-Taylor, 'Nato ends military operations in Libya', *Guardian* (31 October 2011), https://www.theguardian.com/world/2011/oct/31/nato-ends-libya-rasmussen.

1628 Press conference of the political leadership of the Ministry of Foreign Affairs for Libya and issues of the Ministry (22 March 2011), https://web.archive.org/web/20180209115538/www.mod.mil.gr/mod/el/content/show/132/3908/; 'Greece will not be neutral on Libya, PM says', *Kathimerini* (22 March 20011), www.ekathimerini.com/132667/article/ekathimerini/news/greece-will-not-be-neutral-on-libya-pm-says; 'Greece to let bases be used for NATO operations in Libya', *Kathimerini* (18 March 2003), www.ekathimerini.com/132594/article/ekathimerini/news/greece-to-let-bases-be-used-for-nato-operations-in-libya; Stamatia Boskou, Kjell Engelbrekt, 'Keeping a Low Profile: Greek Strategic Culture and International Military Operations' in Malena Britz (ed), *European Participation in International Operations: The Role of Strategic Culture* (2016) 92-93.

search and rescue helicopter operating within Greek jurisdiction, and a radar aircraft supporting the measures taken.[1629] Like Jordan, Greece also sent a letter to the Secretary General. It reported that it was "providing *assistance* [sic!] for the purpose of implementing paragraphs 4, 6, 7, 8 of Council resolution 1973, *in accordance with paragraph 9 of the resolution*".[1630] Notably, Greece did not rely on the authorization, but on the Council's call to assist. At the same time, Greece was eager to emphasize that the supported conduct was implementing the Security Council authorization.[1631]

Not all States, which had essential assisting roles, notified the UN in a similar manner.[1632]

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1629 Press conference of the political leadership of the Ministry of Foreign Affairs for Libya and issues of the Ministry (22 March 2011), https://web.archive.org/web/20180209115538/www.mod.mil.gr/mod/el/content/show/132/3908/; Greek Defence Ministry: No participation in operations outside the NATO, Keep Talking Greece (20 March 2011), https://www.keeptalkinggreece.com/2011/03/20/greek-defence-ministry-no-participation-in-operations-outside-the-nato/.

1630 S/2011/334 (2 June 2011).

1631 Press conference of the political leadership of the Ministry of Foreign Affairs for Libya and issues of the Ministry (22 March 2011), https://web.archive.org/web/20180209115538/www.mod.mil.gr/mod/el/content/show/132/3908/.

1632 Norway only used force. It did not provide assistance to other states, but only logistics to its own operation: S/2011/167, S/2011/193, Mueller, *Libyan Civil War*, 281. UAE did not refer to assistance, as it did not provide it, and did not have capacities to do so: S/2011/169 (21 March 2011); S/2011/192 (25 March 2011), Mueller, *Libyan Civil War*, 355. The same applies to Bulgaria, that sent a frigate for reconnaissance purposes, but no letter to the UN, Bulgarian frigate on its way to Libyan coast, Sofia Echo (30 March 2011), https://web.archive.org/web/20110831014300/http://thesofiaecho.com/2011/03/30/1067837_bulgarian-frigate-on-its-way-to-libyan-coast; 'Bulgarian Frigate Sets Out for Libya Embargo Operation April 27', *Novinte* (21 April 2011), https://www.novinite.com/view_news.php?id=127541. Similarly, Dumitrina Galantonu, Romania Traian Basescu, 'Romania va trimite fregata Regele Ferdinand cu 205 militari in Mediterana pentru operatiuni de blocare a oricarei nave suspecte ca transporta armament catre Libia', *Hotnews* (22 March 2011), https://www.hotnews.ro/stiri-politic-8423876-traian-basescu-sustine-declaratie-presa-ora-21-00-dupa-sedinta-csat.htm. The Netherlands, however, also provided tanker operations to other States' fighters, S/2011/196 (28 March 2011). This mission was however only very short. Mueller, *Libyan Civil War*, 299. In addition, the Netherlands shared information for both air and ground targets, although it did not conduct strikes against ground targets itself. Mueller, *Libyan Civil War*, 296. Palash Ghosh, 'Almost half of NATO members not offering any military support to Libya campaign', *IBTimes* (15 April 2011), https://www.ibtimes.com/almost-half-nato-members-not-offering-any-military-support-libya-campaig

For example, the United States, which ultimately provided roughly 75% of surveillance and 80% of air refuelling,[1633] only informed the Secretary General that "pursuant to paragraphs 4 and 8 of the resolution", it used "military measures" to enforce the no flight zone and to help protect civilians.[1634] It must however not go unnoticed that the US had substantially changed its role in the military operation from 'active engagement' to 'leading from behind'. At the time the USA sent its letter, it conducted its own operation, Odyssey Dawn. To establish a no-fly zone, US fighters themselves directly targeted Libyan military assets.[1635] With NATO stepping in, the USA "significantly ramped down" its commitment.[1636] The US focus was now on "electronic attack, aerial refuelling, lift, search and rescue, and intelligence, surveillance and reconnaissance support,"[1637] leaving it to other States to conduct military strikes. And yet, the USA did not send an additional letter to the Security Council, arguably as it saw their involvement already covered in the previous justification.[1638] Similar considerations may

n-280199. A red card holder retained however the decision-making authority over any mission, Mueller, *Libyan Civil War*, 299.

1633 Roger Cohen, 'Leading from Behind', *NYT* (31 October 2011), https://www.nytimes.com/2011/11/01/opinion/01iht-edcohen01.html; The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011). See illustratively on the importance of US assistance for the UAE to participate in the operation Mueller, *Libyan Civil War*, 354-355.

1634 S/2011/156 (20 March 2011). See also S/2011/152 (20 March 2011).

1635 DOD News Briefing with Vice Adm. Gortney from the Pentagon on Libya Operation Odyssey Dawn (28 March 2011), https://web.archive.org/web/20150905205721/https://archive.defense.gov/transcripts/transcript.aspx?transcriptid=4803; Kate Parrish, Gates Outlines U.S. Role as NATO Takes Libya Mission (31 March 2011), https://web.archive.org/web/20190413152541/http://archive.defense.gov/news/newsarticle.aspx?id=63378; The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011).

1636 Kate Parrish, Gates Outlines U.S. Role as NATO Takes Libya Mission (31 March 2011); Mueller, *Libyan Civil War*, 25.

1637 Kate Parrish, Gates Outlines U.S. Role as NATO Takes Libya Mission (31 March 2011); 'Transcript: Hillary Clinton, Robert Gates and Donald Rumsfeld', *ABC News* (27 March 2011), https://abcnews.go.com/ThisWeek/week-transcript-hillary-clinton-robert-gates-donald-rumsfeld/story?id=13232096; ibid 139 et seq for details. The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011).

1638 This may be inferred from the fact that the US sent another letter to the SC, S/2011/372 (17 June 2011), in which it announced the provision of non-lethal supplies and equipment to Libyan groups in support of efforts to protect civilians. It suggests that this behavior, unlike the more limited involvement, was conceived to require a new justification.

apply to Canada. The Canadian letter referred only to "military measures" "authorized by paragraphs 4 and 8 of resolution 1973 (2011),[1639] although it also sent tanker airplanes which turned out to be decisive for the success of the operations.[1640] At the time of sending the letter, Canadian tankers were not meant to be part of the operation. In fact, the tanker should have only accompanied the Canadian fighters on their way to the theater of operations.[1641]

Against the background of the military operation's profile,[1642] and the fact that the Security Council only issued the authorization to "States that notified the Secretary General" and requested to inform and coordinate with the Secretary General the measures States were taking in accordance with the authorization,[1643] it may not be surprising that States also *report* measures of assistance. It is, however, noteworthy, to the extent that States not only reported, but explicitly *invoked* the authorization as legal basis for assistance (rather than invoke paragraph 9 of resolution 1973 (2011)) which may indicate the belief that a justification was necessary. In application thereof, two patterns are striking. *First*, States, in particular, report and justify contributions to other States' combat operations. States seemed not to report and justify these measures when 'assisting' their own military operation, but do so when contributing to other States (also).[1644] *Second*, the authorization was invoked for specific forms of assistance only: reconnaissance, intelligence, transport, refuelling, provision of military bases, and the protection of military operations.

1639 S/2011/191 (25 March 2011).

1640 Statement by Minister MacKay on the Deployment of CF-18s to Enforce a No-fly Zone over Libya (18 March 2011), https://web.archive.org/web/20131223213219/http://www.forces.gc.ca/en/news/article.page?doc=statement-by-minister-mackay-on-the-deployment-of-cf-18s-to-enforce-a-no-fly-zone-over-libya/hnpslv8v; Mueller, *Libyan Civil War*, 249-250.

1641 Ibid 250, 257.

1642 See above the NATO factsheets notes 1601-1602.

1643 S/RES/1973 para 4 and 8, second part of the sentence.

1644 Cf for example Norway that had provided the necessary logistics for its own fighters did not report it to the Council: S/2011/167 (21 March 2011), S/2011/193 (25 March 2011), Mueller, *Libyan Civil War*, 281, 283.

b) States providing assistance

Not all States that supported the coalition followed this approach. Many States did not submit a letter to the United Nations. Thereby, it was not suggested that legal considerations did not apply to their contributions. It was common to all States to emphasize that *all* of the supported conduct was in line with the Security Council authorization. But unlike the States sketched above, they did not invoke the authorization as *legal basis* for their contribution. Instead, it was deemed sufficient that the specific aspect of the military operation to which assistance was provided was covered by the authorization.

These considerations were prominent with forms of assistance that were more remote. Those States, for example, provided weapons, unburdened the warring States in other areas of conflict, granted overflight and transit rights,[1645] or endorsed the operations in political terms. To illustrate, Morocco opened its airspace for military operations monitoring the embargo and the no-fly zone.[1646] It also joined the coalition officially, which was viewed as crucial political support by States directly using force.[1647] Estonia stated that while it did not participate in the military operations, it fully supported the military operations.[1648] Croatia sent two military officers to support the NATO operation, seeking to implement resolution 1973

1645 Albania: 'Albania supports international coalition on Libya', *SeTimes* (30 March 2011), https://web.archive.org/web/20110401173045/http://www.setimes.com/cocoon/setimes/xhtml/en_GB/newsbriefs/setimes/newsbriefs/2011/03/30/nb-09; 'Albania supports the attacks on Libya', *Albeu* (20 March 2011), https://web.archive.org/web/20120321154438/english.albeu.com/albania-news/albania-supports-the-attacks-on-libya/32495/ (on the basis that the operations are "entirely legitimate"), S/PV.4717, 31; Sudan: Louis Charbonneau, 'Sudan allows overflights for Libya ops: diplomats', *Reuters* (25 March 2011), https://www.reuters.com/article/ozatp-libya-sudan-20110325-idAFJOE72O03I20110325; Switzerland: Konvoi britischer Militärfahrzeuge durch die Schweiz (21 March 2011), https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-38214.html (on the basis of Resolution 1973; interestingly it also states it is obliged to implement measures decided under Chapter VII); Ireland, Austria: Steve James, 'Scandinavian and other "neutral" states support assault on Libya', *WSWS* (12 April 2011), https://www.wsws.org/en/articles/2011/04/scan-a12.html; Morocco, The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011).

1646 Ibid.

1647 Ibid.

1648 Estonia and NATO, https://vm.ee/en/estonia-and-nato; Foreign Minister Paet: NATO-Led Mission Will Remain in Libya Until Gadhafi Regime Ends Violence

(2011).[1649] Cyprus repeatedly stressed that it (for political reasons) was not taking part in any military action in Libya. Yet, it acknowledged that the UK was using its bases as this was their sovereign right which Cyprus could not legally prevent.[1650] Cyprus was eager to stress that the bases were not used for "offensive strikes", but only for support means and reconnaissance.[1651] To the extent it permitted landing and refuelling to planes directly engaged in hostilities, Cyprus limited to cases of distress.[1652] Malta took a similar approach. It sought to comply with the resolution's obligations, allowing overflight and emergency landings, but denying the use of its military bases.[1653] Last but not least, the German position squares with this pattern. Germany took a diverse stance on the military operation. It famously abstained in the Security Council, as it thought a military operation to be the (politically) wrong approach to Libya. On that basis, Germany explained in the Security Council that it "therefore decided not to support a military option, as foreseen particularly in paragraphs 4 and 8 of the resolution. Furthermore, Germany will not contribute to such a military effort with its own forces."[1654] While this meant that Germany did not join the coalition, the remarks were carefully tailored not to close the door for assistance, as foreseen in paragraph 9 of the resolution. Accordingly, though

Against Citizens (14 April 2011), https://vm.ee/en/news/foreign-minister-paet-nato-led-mission-will-remain-libya-until-gadhafi-regime-ends-violence.

1649 'Croatia to send two officers for NATO´s Libya mission', *Croatian Times* (29 April 2011), https://archive.is/20120731105228/http://www.croatiantimes.com/news/General_News/2011-04-29/18912/Croatia_to_send_two_officers_for_NATO%B4s_Libya_mission#selection-1171.0-1166.5.

1650 On the basis of the Treaty of Zurich (1960), two military bases (Akrotiri and Dhekelia) remained under the sovereignty of the UK (Article 1 Treaty of Zurich), Treaty (with annexes, schedules and detailed plans) concerning the Establishment of the Republic of Cyprus (16 August 1960), 382 UNTS 8.

1651 Elias Hazou, 'Qatari warplanes refuel in Cyprus', *Cyprus Mail* (23 March 2011), https://web.archive.org/web/20110325235401/http://www.cyprus-mail.com/cyprus/qatari-warplanes-refuel-cyprus/20110323; 'Cyprus says against use of British bases for Libya', *Reuters* (20 March 2011), https://www.reuters.com/article/oukwd-uk-libya-britain-cyprus-idAFTRE72J2NJ20110320; 'Qatar fighter jets make Cyprus emergency landing for fuel', *Malta Today* (22 March 2011) https://www.maltatoday.com.mt/news/world/33643/qatar-fighter-jets-make-cyprus-emergency-landing-for-fuel#.XU1Rs5NKgWp.

1652 Elias Hazou, 'Qatari warplanes refuel in Cyprus', *Cyprus Mail* (23 March 2011).

1653 'Foreign military advisers for Libyan rebel bastion', *Times of Malta* (21 April 2011), https://timesofmalta.com/articles/view/Foreign-military-advisers-for-Libyan-rebel-bastion.361564.

1654 S/PV.6498, 5.

it did not exercise its veto right to decisions in the NATO,[1655] German troops were withdrawn from NATO operations, i.e., the navy and AWACS to the extent they could otherwise be involved in hostilities. At the same time, Germany did not "remain neutral".[1656] It silently provided support in various manners that was decisive for the military operation. First, the US command for the air strikes in the first phase to establish the no-fly zone (Operation Dawn) was AFRICOM, based in Stuttgart, Germany. Second, Germany supported the NATO operations in Libya by unburdening NATO in Afghanistan. Germany mandated AWACS flights in Afghanistan, freeing non-German AWAC groups for Libya.[1657] As the USA acknowledged, this was conceived as a key contribution without which "one of the two operations [i.e. either in Afghanistan or in Libya] would have come to an end".[1658] Third, Germany released stocks of precision weapons to NATO States using force in Libya.[1659] Later, Germany also admitted that German soldiers were involved in a NATO command post based in Poggio Renatico,

1655 The NATO operation was a non-Article V mission in which NATO member States were not obliged to participate. However, by casting a negative vote, Germany could have blocked the mission. Ronzitti, *ItYBIL* (2011) 7; Mueller, *Libyan Civil War*, 25.

1656 Pressestatement von Bundeskanzlerin Angela Merkel zur aktuellen Entwicklung in Libyen (18 March 2011), https://archiv.bundesregierung.de/archiv-de/dokumente/pressestatement-von-bundeskanzlerin-angela-merkel-zur-aktuellen-entwicklung-in-libyen-842900; Rede von Außenminister Westerwelle vor dem Deutschen Bundestag zum AWACS-Einsatz (23 March 2011), https://www.auswaertiges-amt.de/de/newsroom/110323-bm-bt-afghanistan/242856.

1657 In the debate, the unburdening aspect played a significant role, as Germany just earlier decided not to be involved in the AWACS flights in Afghanistan. The German government however saw it not only as unburdening, but as an independently reasonable operation (although it had decided against this just month earlier). In the legal justification, however, Libya and unburdening NATO did not play a role. The AWACS flights were based exclusively on Security Council authorizations with respect to Afghanistan; the fact that they are also meant to assist NATO in Libya was not mentioned. BT Drs 17/5190 (23 March 2011).

1658 The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011).

1659 Thomas Harding, Matthew Day, 'Foreign military advisers for Libyan rebel bastion', Telegraph (28 June 2011), https://www.telegraph.co.uk/news/worldnews/europe/germany/8603885/Libya-Germany-replenishes-Natos-arsenal-of-bombs-and-missiles.html. Again on the importance see: The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011).

Italy, specifically created for the operations in Libya.[1660] Although not acting upon German instructions, they were involved in targeting decisions and communication with the AWACS flights.[1661] For none of its support, Germany invoked a justification. It did not send a letter to the Security Council. But importantly, for all those contributions, Germany made it clear that it viewed the operation as in line with international law, as it was based on and lawfully implementing the Security Council authorization.[1662] It made sure to emphasize that its non-participation was solely politically motivated.[1663]

c) Non-Supporting States

It is true that various States, including NATO members, decided not to participate. For example, Australia, although pushing for a no-fly zone, refrained from becoming a "military contributor to the campaign in Libya". This was, however, not for legal reasons. Rather, it decided to become a "significant humanitarian contributor."[1664] Other States, like Egypt[1665] or

1660 Manuel Brunner, Das letzte Gefecht droht in Karlsruhe, LTO (23 August 2011), https://www.lto.de/recht/hintergruende/h/bundeswehr-beteiligung-im-libyen-konflikt-das-letzte-gefecht-droht-in-karlsruhe/.

1661 The Success of NATO Operations in Libya and the Vital Contributions of Partners Outside of NATO (7 November 2011).

1662 BT Drs 19/4619 question 8 (1 October 2018); Rede von Außenminister Westerwelle vor dem Deutschen Bundestag zum AWACS-Einsatz (23 March 2011), https://www.auswaertiges-amt.de/de/newsroom/110323-bm-bt-afghanistan/242856; Regierungserklärung des Bundesaußenminister Guido Westerwelle zum Umbruch in der arabischen Welt (Mitschrift) (16 March 2011), https://archiv.bundesregierung.de/archiv-de/regierungserklaerung-des-bundesaussenminister-guido-westerwelle-zum-umbruch-in-der-arabischen-welt-mitschrift-%E2%80%A61/4; Regierungserklärung von Bundesaußenminister Guido Westerwelle zu den aktuellen Entwicklungen in Libyen (Mitschrift), https://archiv.bundesregierung.de/archiv-de/regierungserklaerung-von-bundesaussenminister-guido-westerwelle-zu-den-aktuellen-entwicklungen-in-libyen-mitsc%E2%80%A6.

1663 Ibid.

1664 Richard Willingham, 'Australia funding Libyan evacuation ship, reveals Rudd', *The Age* (28 April 2011), https://www.theage.com.au/national/australia-funding-libyan-evacuation-ship-reveals-rudd-20110427-1dwx0.html; Tom Wald, 'Aust prepared to send C17s to Libya: Smith', *The Age* (10 March 2011), https://www.smh.com.au/world/aust-prepared-to-send-c17s-to-libya-smith-20110310-1bo7h.html.

1665 S/2011/288 (16 May 2011).

Kuwait,[1666] took similar approaches: while not condemning the military operations, they focused on humanitarian assistance. Notably, none of them invoked the authorization for such humanitarian assistance, which rather was treated distinct from military assistance.[1667] Other States, like Poland, for example, did not veto the NATO operation but explained their non-assistance with lacking capacity to contribute.[1668]

### d) Conclusion

Whether resolution 1973 (2011) justified all aspects of the NATO-led intervention remains controversial.[1669] To the extent that the military operations had the effect of ousting al-Gaddafi from the Libyan government, it met with fierce opposition that the Security Council had given its blessing in this respect. Various States viewed these effects and support to non-State actors fighting al-Gaddafi in particular to overstep the authorization's (consciously inchoate[1670]) boundaries and violate international law.[1671] As such, the ultimate legality of providing assistance to certain aspects of the intervention in Libya may have been contested, too. But this remained a question of interpretation of resolution 1973 (2011), underlying the grounds for assistance. The nuanced regime applicable to different forms of assistance depicted in practice found wide acceptance.

1666 S/2011/184 (25 March 2011); S/2011/306 (17 May 2011).

1667 For example: UAE: S/2011/169; S/2011/192; Spain: S/2011/222 (which sent a separate letter for military contribution and humanitarian assistance). But see Kuwait S/2011/306 (17 May 2011).

1668 Poland had sufficient troops but argued that they were not sufficiently trained. Mueller, *Libyan Civil War*, 29, 41.

1669 For an overview see Deeks, *NATO in Libya*.

1670 The fact that the scope of the authorization was not well defined enough led also to States abstaining on the resolution: S/PV.6498, 6 (India), 8 (Russia), 10 (China).

1671 In particular, providing support to Libyan rebels was viewed critically: for example: A/C.3/66/3, S/2011/544 (29 August 2011), S/2011/571 (15 September 2011) (Venezuela); S/2011/209 (1 April 2011), S/PV.6528 (Russia), S/2011/307 (17 May 2011), S/2011/337 (6 June 2011) (African Union).

### 19) The war in Yemen since 2015

#### a) Operations Decisive Storm and Restoring Hope

In March 2015, in the wake of an escalating civil war with the Houthi rebels, Yemen's transitional president Hadi issued an invitation addressed to Saudi-Arabia, the United Arab Emirates, Bahrain, Oman, Kuwait, and Qatar:

> "I therefore appeal to *you, and to the allied States that you represent*, to stand by the Yemeni people as you have always done and come to the country said. I urge you, in accordance with the right of self defence set forth in Article 51 of the Charter of the United Nations, and with the Charter of the League of Arab States and the Treaty on Joint Defence, *to provide immediate support in every form and take the necessary measures, including military intervention*, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al Qaida and Islamic State in Iraq and the Levant."[1672]

In April 2015, Hadi reaffirmed his invitation:

> "In the face of the actions by the Houthis and forces loyal to Ali Abdulla Saleh, the President of the Republic of Yemen, Abd Rabo Mansour Hadi *requested the Cooperation Council for the Arab States of the Gulf and the League of Arab States* to immediately *provide support, by all necessary means and measures, including military intervention, to protect Yemen* and its people. The Security Council has been informed of that request […]."[1673]

##### (1) The Coalition using force

The States that Hadi asked for support (excluding Oman[1674]) sent a letter to the Security Council. They reported that they "have therefore decided to

1672 S/2015/217 (27 March 2015)

1673 S/2015/238 (7 April 2015). Later, he also specified that the operation may entail "land forces", S/2015/355 (19 May 2015).

1674 Oman refrained from participating to "work on peace efforts", Noah Browning, Fatma Arimi, 'Yemen combatants not ready for talks, says neighbour Oman', *Reu-*

respond to President Hadi's appeal to protect Yemen and its great people from the aggression of the Houthi militias, which have always been a tool of outside forces that have constantly sought to undermine the safety and stability of Yemen."[1675] On 26 March 2015, a coalition of nine States (Bahrain, Egypt, Jordan, Kuwait, Morocco, Qatar, Sudan, United Arab Emirates) led by Saudi-Arabia launched a military operation to support Yemen's transitional president Hadi in the civil war with the Houthis (Operation Decisive Storm).[1676] From April 2015 onwards, the campaign continued under the name Operation Restoring Hope. While the contributions differed in scale, all coalition States deployed combat troops.[1677]

(2) States providing support short of direct use of force

Several States refrained from officially joining the coalition. None of those States directly used force themselves. Nonetheless, they have made an essential contribution to the military operations.

(a) United States

The USA was involved in the military operations from the outset. President Obama authorized "the provision of logistical and intelligence support to the GCC-led military operation" and established a Joint-Planning Cell to coordinate US military and intelligence support.[1678] This meant in practice

*ters* (2 April 2015), https://uk.reuters.com/article/yemen-security-oman/interview-yemen-combatants-not-ready-for-talks-says-neighbour-oman-idUKL6N0WZ3E720150402.

1675 S/2015/217. See also S/2015/279 (27 April 2015), S/2015/357 (20 May 2015); S/2015/359 (21 May 2015).

1676 Benjamin Nußberger, 'Military strikes in Yemen in 2015: intervention by invitation and self-defence in the course of Yemen's 'model transitional process'', 4(1) *JUFIL* (2017) 111.

1677 See for the respective States' statements and justifications: ibid 119-121.

1678 Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen (25 March 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen. The US was not strictly confining this support to the GCC, but to other States joining the military operation, too, Jeff Rathke Daily Press Briefing (26 March 2015), https://2009-2017.state.gov/r/pa/prs/dpb/2015/03/239810.htm.

that the US conducted air-to-air refueling for warplanes.[1679] Deliveries of armaments, in particular for precision guided munition, were expedited,[1680] and complemented the previous American supply of weapons that were the backbone of the Saudi military.[1681] American intelligence sharing did not entail direct targeting information.[1682] But the USA supplied target-specific satellite imagery (e.g., "no-strike" locations, including civilian targets and infrastructure).[1683] Also, US forces were providing on-site advice and coordination at a Saudi operations center (including the vetting of targets proposed by the Saudis).[1684] US military personnel assisted in coordinating the coalition's air campaign.[1685] At all times, the USA was eager to emphasize that it did not partake in "direct military action."[1686]

1679 Dion Nissenbaum, 'U.S. Military Planes Cleared to Refuel Saudi Jets Bombing Yemeni Targets', *WSJ* (2 April 2015), https://www.wsj.com/articles/u-s-military-planes-cleared-to-refuel-saudi-jets-bombing-yemeni-targets-1428010588; Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operation" (5 December 2016), 18, https://www.hsdl.org/?abstract&did=798033. See also in detail William Pons, 'Defeating the Object and Purpose of the Arms Trade Treaty: An Analysis of Recent US Arms Sales to Saudi Arabia', 35(1) *AmUIntlLRev* (2019) 158 et seq.

1680 Jamie Crawford, 'U.S. boosts assistance to Saudis fighting rebels in Yemen', *CNN* (8 April 2015), https://edition.cnn.com/2015/04/08/politics/yemen-u-s-assistance-saudi-coalition/index.html.

1681 For example, most of the Saudi combat capable aircraft were of American origin. William Hartung, *U.S. Military Support for Saudi Arabia and the War in Yemen* (Arms & Security Project, Center for International Policy, 23 November 2018) 6.

1682 'Jamie Crawford, U.S. boosts assistance to Saudis fighting rebels in Yemen', *CNN* (8 April 2015); U.S. Department of State Press Release, Daily Press Briefing (9 December 2016), https://2009-2017.state.gov/r/pa/prs/dpb/2016/12/265016.htm.

1683 Kristina Daugirdas, Julian Davis Mortenson, 'United States Strikes Houthi-Controlled Facilities in Yemen, Reaffirms Limited Support for Saudi-Led Coalition Notwithstanding Growing Concerns About Civilian Casualties', 111(2) *AJIL* (2017) 523. Mark Hosenball, Phil Stewart, Warren Strobel, 'Exclusive: U.S. expands intelligence sharing with Saudis in Yemen operation', *Reuters* (11 April 2015), https://www.reuters.com/article/us-usa-saudi-yemen-exclusive/exclusive-u-s-expands-intelligence-sharing-with-saudis-in-yemen-operation-idUSKBN0N129W20150410.

1684 Mark Hosenball, Phil Stewart, Warren Strobel, 'U.S. expands intelligence sharing with Saudis in Yemen operation', *Reuters* (11 April 2015); Robert Chesney, 'U.S. Support for the Saudi Air Campaign in Yemen: Legal Issues', *Lawfare* (15 April 2015).

1685 Daugirdas, Mortenson, *AJIL* (2017) 523.

1686 Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen (25 March 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen. See also 'Pentagon denies involvement in Yemen's Hudaida military offensive', *Al Jazeera* (14

Scholars had no uniform opinion how to qualify the American contributions in legal terms. Some, like Chesney or Hathaway *et al*, qualified it as "indirect use of force", by applying the Nicaragua criteria and relying in particular on the lethal nature of support.[1687] Others remained ambiguous[1688] or only considered the Articles on State Responsibility.[1689]

The American position was not unambiguous, not least because the Obama administration did not send a letter to the Security Council.[1690] It was unambiguous only with respect to two points. First, *ius contra bellum* considerations were relevant.[1691] Second, the US clearly thought the coalition to act in this respect in accordance with international law.[1692]

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June 2018), https://www.aljazeera.com/news/2018/06/pentagon-denies-involvement-yemen-hudaida-military-offensive-180614185851507.html. For example, when the US conducted strikes directly against the Houthis on 12 October 2016, the US sought to clearly distinguish from any support to the coalition operation. U.S. Department of State Special Briefing, Senior Administration Officials on Yemen (14 October 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263158.htm; U.S. Department of Defense News Transcript, Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room (13 October 2016), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/973367/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in/. See also Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operation 2016.

1687 Chesney, *US Support in Yemen* (2015); Oona A Hathaway and others, 'Yemen: Is the US Breaking the Law?', 10(1) *HarvNatSecJ* (2019) 61-62, also applying the Nicaragua jurisprudence.

1688 John Hursh, 'International humanitarian law violations, legal responsibility, and US military support to the Saudi coalition in Yemen: a cautionary tale', 7(1) *JUFIL* (2020) 127; Nußberger, *JUFIL* (2017) 127-128. Germany also avoided a classification: BT Drs 19/7967 (20 February 2019), question 7.

1689 In this direction Daugirdas, Mortenson, *AJIL* (2017) 531-532.

1690 This does not point against a classification as "use of force". The USA does not believe that there is a reporting obligation for actions taken with consent of the territorial State, S/2016/869 (17 October 2016).

1691 The US claimed its actions to be "fully consistent with applicable domestic and international legal requirements", Mark Hosenball, Phil Stewart, Warren Strobel, 'U.S. expands intelligence sharing with Saudis in Yemen operation', *Reuters* (11 April 2015). See also Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operation" (5 December 2016), 18, https://www.hsdl.org/?abstract&did=798033.

1692 Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen (25 March 2015). In particular, Hadi was considered legitimate president, Press Briefing by Press Secretary Josh Earnest (23 March 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/23/press-briefing-press-secretary-josh-earnest-3232015; Report on the Legal and Policy Frameworks Guiding the United

With respect to the legal basis for its support to the coalition, the USA stated in light of "international law":

> "The U.S. support for the Saudi-led coalition military operations is being provided in the context of the Coalition's military operations being undertaken in response to the Government of Yemen's request for assistance, including military support, to protect the sovereignty, peace, and security of Yemen."[1693]

This justification is in particular noteworthy when contrasted with situations where the US conducted strikes in Yemen itself.[1694] In that respect, the US stated that the strikes were "conducted with the consent" of Yemen.[1695] The chosen formulation hence does not indicate that basing the *assisted operation* on consent is not sufficient. It rather suggests that in addition, the *assisting State's contribution* has likewise to be covered by Hadi's consent.[1696]

The US thus seems to acknowledge that its assistance may be interfering (through the assisted coalition's use of force) with Yemeni rights and requires justification itself. The US appears to accept that Yemen had the right to request military assistance from the Gulf States *without* foreign assistance of the nature provided – a right that (the US thought) Yemen did not exercise, however.

Hadi's initial invitation may have been addressed *rationae personae* primarily to the Gulf States.[1697] *Rationae materiae,* it allows for the provision of assistance to the extent it takes place upon the request of the addressees, under their lead and in close cooperation.[1698] Hence, under Hadi's invitation, the US may not have been authorized to directly use force

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States' Use of Military Force for National Security Operation" (5 December 2016), 18.

1693 Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operation" (5 December 2016), 18, emphasis added. See also Howard, *MilLRev* (2018) 10.

1694 The US did so for counterterrorism operations against AQAP, and in response to missiles launched by the Houthis targeting US ships, Daugirdas, Mortenson, *AJIL* (2017) 524-527.

1695 Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operation" (5 December 2016), 18; See also S/2016/869.

1696 Similarly Daugirdas, Mortenson, *AJIL* (2017) 526.

1697 See above note 1672-1673.

1698 See for a detailed analysis Nußberger, *JUFIL* (2017) 127-128.

itself in support of the coalition. This may have contributed to why the US was keen to emphasize that its own strikes did not support the coalition's operation, that it did not take part in "direct military action", and that the strikes were based on Yemeni consent distinct from the invitation to the coalition. Hadi's invitation to the coalition entailed however consent to an American contribution *through support* to the coalition's use of force, on the condition it remained short of direct use of force. Accordingly, the US was careful to ensure that its contribution was merely supportive and always channeled through the coalition. For example, US troops did not operate on Yemeni territory.[1699]

Later Yemeni statements bolster this interpretation, as they (re-)issued and thus clarified a "derivative" invitation to the US. Yemen's Ambassador to the United States put it most unequivocally. While rejecting US troops in Yemen he said: "We need the U.S. government to continue to lend its political and logistical support to the legitimate government and the Arab coalition."[1700]

There was another prominent feature in the US explanation for its assistance. The US asserted that in particular by its intelligence assistance it was seeking to help the coalition to avoid civilian casualties.[1701] The US did not tie this back to the reasons *why*, but rather *how* it was providing assistance.

The US assistance adapted to developments on the ground. Notably, considerations whether the coalition may use force did not feature prominently, albeit the US seemed to have joined the coalition in its adjustment of its justification, now focusing on Saudi-Arabia's right to self-defense

1699 'Jamie Crawford, U.S. boosts assistance to Saudis fighting rebels in Yemen', *CNN* (8 April 2015). This is further noteworthy, as it makes clear that the American contribution does not interfere with Yemeni rights other than through its contribution to the coalition. It is only this feature that requires justification. No other interference, e.g. a violation of Yemeni territorial sovereignty, renders reliance on Yemeni consent necessary.

1700 Hollie McKay, 'US troops in Yemen not needed, nation's US ambassador says', *Fox News* (3 August 2017), https://www.foxnews.com/world/us-troops-in-yemen-not-needed-nations-us-ambassador-says.

1701 Jean Galbraith, 'Congress Signals Concern Over U.S. Role in Aiding Saudi Arabia's Activities in Yemen', 113(1) *AJIL* (2019) 161. Mark Hosenball, Phil Stewart, Warren Strobel, 'Exclusive: U.S. expands intelligence sharing with Saudis in Yemen operation', *Reuters* (11 April 2015).

against cross-border attacks.[1702] On that note, the US remained committed to assistance to measures defending the Saudi borders based on self-defense at all times.[1703]

With respect to assistance to the coalition's military operation, the US decided to constrain its assistance at times. Notably, those decisions were primarily related to concerns about the coalition's compliance with international humanitarian law. For example, in 2016, Obama, after having reminded the coalition that American assistance was not a blank check, canceled a delivery of precision-guided munition kits and reduced US personnel.[1704] The steps to refocus information-sharing and the American personnel's responsibilities in Saudi Arabia were all taken in light of the high rate of civilian casualties.[1705] Notably, refueling operations remained unimpressed by these considerations, perhaps because one could assert that their contribution to the *indiscriminate* nature of the attacks that laid at the core of the allegations was only limited. They were only halted in November 2018, following the murder of Jamal Khashoggi, when Saudi Arabia asserted the service was no longer required.[1706] With Donald Trump entering office, cooperation, in particular arms sales, intensified, yet again

1702 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).

1703 For example: Special Briefing, Senior Administration Officials to Yemen, (14 October 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263158.htm. For example, this became particularly clear after the attacks on the Saudi oil facilities Aramco, see below.

1704 Daugirdas, Mortenson, *AJIL* (2017) 529. Nicolas Niarchos, 'How the U.S. Is Making the War in Yemen Worse', *New Yorker* (15 January 2018), https://www.newyorker.com/magazine/2018/01/22/how-the-us-is-making-the-war-in-yemen-worse; Phil Stewart, 'U.S. withdraws staff from Saudi Arabia dedicated to Yemen Planning"', *Reuters* (19 August 2016), https://www.reuters.com/article/us-yemen-security-usa-saudiarabia/exclusive-u-s-withdraws-staff-from-saudi-arabia-dedicated-to-yemen-planning-idUSKCN10U1TL.

1705 White House Press Release, Press Briefing by Press Secretary Josh Earnest and Special Envoy for the Global Coalition to Counter ISIL, Brett McGurk (13 December 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/12/13/press-briefing-press-secretary-josh-earnest-and-special-envoy-global.

1706 Galbraith, *AJIL* (2019) 168. Julian E Barnes, Edward Wong, 'Trump Administration to Punish Saudis in Moves That Could Stop Tougher Acts by Congress', *NYT* (9 November 2018), https://www.nytimes.com/2018/11/09/us/politics/trump-saudi-sanctions-refueling.html.

not "unconditional".[1707] For example, the US refrained from supporting an offensive on the port of Hodeidah.[1708] Also, US Congress pushed for restrictions. While these restrictions were motivated by legal concerns, primarily international humanitarian law was at the basis of the considerations.[1709]

### (b) United Kingdom

Even before the war, the UK and British companies were one of the major suppliers of armaments to Saudi-Arabia.[1710] Throughout the war, the UK government saw no reason to suspend military assistance.

At the outset, Foreign Minister Hammond announced, "We have a significant infrastructure supporting the Saudi air force generally and if we are requested to provide them with enhanced support – spare parts, maintenance, technical advice, resupply – we will seek to do so. We'll support the Saudis in every practical way short of engaging in combat."[1711] Precisely, this meant that the UK accelerated the delivery of laser-guided bombs, provided and increased "routine engineering support" for aircraft supplied under a government-to-government MoU, and provided "generic training" in targeting and weapon use to the aircrew through personnel of the Royal

1707 Missy Ryan, Sudarsan Raghavan, 'Mattis: U.S. assistance to Saudi-led coalition fighting in Yemen 'is not unconditional'', *WaPo* (29 August 2018), https://www.washingtonpost.com/world/national-security/mattis-us-assistance-to-saudi-led-coalition-fighting-in-yemen-is-is-not-unconditional/2018/08/28/bee8%E2%80%A6/?arc404=true.

1708 Elise Labott, Ryan Browne, 'US rejects UAE request for support to capture Yemeni port city', *CNN* (15 June 2018), https://edition.cnn.com/2018/06/14/politics/us-port-city-yemen/index.html.

1709 Galbraith, *AJIL* (2019); Jeremy M Sharp, Christopher M Blanchard, *Congress and the War in Yemen – Oversight and Legislation 2015-2020* (CRS Report, Congressional Research Service, R45046, Updated June 19 2020). Also, the Congress required the US government to certify that Saudi-Arabia takes steps to reduce civilian harm, Ryan Goodman, 'Annotation of Sec. Pompeo's Certification of Yemen War: Civilian Casualties and Saudi-Led Coalition', *Just Security* (15 October 2018).

1710 Shavana Musa, 'The Saudi-Led Coalition in Yemen, Arms Exports and Human Rights: Prevention Is Better Than Cure', 22(3) *JCSL* (2017) 436.

1711 Peter Foster, Almigdad Mojalli, 'UK 'will support Saudi-led assault on Yemeni rebels - but not engaging in combat'', *Telegraph* (27 March 2015), https://www.telegraph.co.uk/news/worldnews/middleeast/yemen/11500518/UK-will-support-Saudi-led-assault-on-Yemeni-rebels-but-not-engaging-in-combat.html.

Air Forces.[1712] Moreover, also after the military operations commenced, the UK continued to license weapon sales by UK companies.[1713]

The UK claimed to have assessed the export licenses on a case-by-case basis according to its export control regime and international law. Albeit the coalition's compliance with international humanitarian law stood at the center of scrutiny, this also included an assessment with respect to a prospective aggressive use.[1714] Likewise, government-to-government support was considered in light of the UK's "international obligations."[1715] On that note, the UK viewed the coalition's use of force to comply with the *ius contra bellum*, as it was based on the legitimate government's consent.[1716]

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1712 Written Evidence from the Foreign and Commonwealth Office (UKY 13), March 2016, para 29 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/committees-on-arms-export-controls/use-of-ukmanufactured-arms-in-yemen/written/31698.html; Saudi Arabia: Military Aid: Written question – 228761, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-03-05/228761/; Saudi Arabia: Military Aircraft: Written question – 149016, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-06-01/149016/; Arron Merat, 'The Saudis couldn't do it without us': the UK's true role in Yemen's deadly war', *Guardian* (18 June 2019), https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war.

1713 Written Evidence from the Foreign and Commonwealth Office (UKY 13), March 2016, para 33-34; Committee on International Relations, Yemen: giving peace a chance (HL 2017-2019, Paper 290), para 26.

1714 HC Deb 25 March 2014, Hansard vol 578 c12WS. See for example Jacques Hartmann, Sangeeta Shah, Colin Warbrick, 'United Kingdom Materials on International Law 2015', 86 *BYIL* (2017) 434-435, 589, 612-613, 613, 614-615, 663-664.

1715 Written Evidence from the Foreign and Commonwealth Office (UKY 13), March 2016, para 29.

1716 Foreign Minister Hammond held that the intervention was "perfectly legal within the norms of international law" because Mr Hadi had requested it as the "legitimate president of Yemen", Peter Foster, Almigdad Mojalli, 'UK 'will support Saudi-led assault on Yemeni rebels - but not engaging in combat'', *Telegraph* (27 March 2015). See also Written Evidence from the Foreign and Commonwealth Office (UKY 13), March 2016, para 28. Later the UK also seemed to support Saudi-Arabia's right of self-defense, see e.g. Saudi Arabia: Written statement - HCWS716, (23 May 2018), https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-05-23/HCWS716/. There are several reports stating that the coalition is highly dependent on a continued British support, just see David Wearing, 'Britain could stop the war in Yemen in days. But it won't', *Guardian* (3 April 2019), https://www.theguardian.com/commentisfree/2019/apr/03/britain-war-in-yemen.

In order to provide assistance, the UK hence deemed it sufficient that the assisted actor had a right to use of force pursuant to the UN Charter and exercised it legitimately.[1717] It did not, unlike the USA, think it necessary to rely on Hadi's invitation or to view his invitation to cover its assistance as well, thus, to claim its own and direct right towards Yemen to justify its assistance.

In this respect, it is not only interesting to see that the British assistance was more remote than the American, but that the UK also further qualified its assistance. It stressed that munition and personnel were supplied under "longstanding" and "preexisting government-to-government arrangements,"[1718] and emphasized the assistance's "routine" character. It appears that the UK drew a line between general military cooperation with Saudi-Arabia and support provided specifically to the military operation, although it acknowledged that both forms were essential for the coalition's operation.[1719] Particularly for the latter, the UK stressed its rigorous assessment. Furthermore, the UK asserted that some of its assistance sought to mitigate the threat from airstrikes, and induce compliance with interna-

1717 "There is the potential that the military equipment that has been sold could be used, but that would be deemed a legitimate use of those weapons systems. It comes down to the fundamental right, guaranteed in article 51 of the UN Charter and mentioned by the shadow Minister, for any country to have the means and the right to defend itself, or to provide support to other countries for the same reason.", HC Deb 17 September 2015, Hansard vol 599 cols 400WH, 408WH. On the question whether the use of British manufactured weapons was a violation of the arms export guidelines a minister answered: "No it is not. I will make it very clear: the coalition that has been formed is legitimate. The legal basis for military intervention follows President Hadi's request to the United Nations Security Council and, indeed, the Gulf Co-operation Council, in support of UN Security Council resolution 2216, for "all means and measures to protect Yemen and deter Houthi aggression". Therefore, the concept and principle of using warfare in such a manner is legitimate; the real issue, widely put by everyone, is about making sure that any arms are used according to the Geneva conventions.", HC Deb 22 October 2015, Hansard vol 700 c444WH. See also Hartmann, Shah, Warbrick, *BYIL* (2017) 434-435, 589, 612-613, 613, 614-615, 663-664.

1718 Ibid 723. Saudi Arabia: Arms Trade: Written question, UIN 11948 (14 October 2015), https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-14/11948. Relevant was in particular the Al-Yamamah Government-to-Government MoU (1985), http://image.guardian.co.uk/sys-files/Politics/documents/2006/10/27/PJ5_39AYMoUSep1985.pdf.

1719 HC Deb 22 October 2015, Hansard vol 700 c444WH; Saudi Arabia: Arms Trade: Written question – 11948.

tional humanitarian law.[1720] At all times, the UK put weight on the fact that this "does not represent a direct UK involvement in operations."[1721] In particular, it claimed that the "support does not involve the loading of weapons for operational sorties, nor does it include any involvement in the planning of operational sorties."[1722] Neither were British personnel "involved in carrying out strikes, directing or conducting operations in Yemen or selecting targets and were not involved in the Saudi targeting decision-making process."[1723]

### (c) African States

Other States likewise provided (less extensive but still not unimportant) support to the Saudi-led coalition. For example, Senegal sent troops to protect the holy sites of Islam and justified this with fighting "terrorism".[1724]

Horn of Africa States provided conveniently situated and strategically important military bases.[1725] Somalia "officially approved its airspace, land and territorial waters to be used for the air invasion to prevent the Shia Houthis' takeover of Yemen".[1726] The same was reported for Djibouti, after

1720 Saudi Arabia: Written statement - HCWS716, (23 May 2018). This was a reaction to the severe doubts about the coalition's compliance with international humanitarian law. The UK then decided to provide targeting training: Owen Bowcott, 'UK military officers give targeting training to Saudi Military', *Guardian* (15 April 2016) https://www.theguardian.com/uk-news/2016/apr/15/uk-army-officers-provide-targeting-training-saudi-military.

1721 Saudi Arabia: Arms Trade: Written question – 11948.

1722 Saudi Arabia: Military Aid: Written question – 228761. See also that they are not "loading" weapons: Saudi Arabia: Military Aircraft: Written question – 149016.

1723 Written Evidence from the Foreign and Commonwealth Office (UKY 13), March 2016, para 32.

1724 'Senegal to support Yemen campaign', *BBC* (5 May 2015), https://www.bbc.com/news/world-middle-east-32586230; Macky Sall, 'Senegal joined Saudi-led coalition 'to protect Islam'', *The New Arab* (8 May 2015), https://english.alaraby.co.uk/analysis/macky-sall-senegal-joined-saudi-led-coalition-protect-islam. Senegal also subscribed to the statement of the Organization of Islamic Cooperation, S/2015/497 (7 July 2015).

1725 Magnus Tayler, 'Horn of Africa States Follow Gulf into the Yemen War', *ICG* (25 January 2016), https://www.crisisgroup.org/africa/horn-africa/horn-africa-states-follow-gulf-yemen-war.

1726 Abdalle Ahmed, 'Somalia lends support to Saudi', *Guardian* (7 April 2015), https://www.theguardian.com/world/2015/apr/07/somalia-aids-saudi-led-fight-against-houthis-yemen.

some political tensions during the first phase of the operations had been settled.[1727] Both States did not set out a detailed justification on their own. But they shared the coalition's legal view on the situation in Yemen, and the military operations.[1728] Whether or not they relied on Hadi's invitation for their assistance cannot be determined unequivocally. It is worth mentioning, however, that Hadi's refined invitation from April 2015 addressed explicitly both States as members of the Arab League.[1729] Moreover, both States only granted support *after* Hadi's April invitation that was no longer limited to the Gulf Cooperation Council members, but extended to the League of Arab States, too.

Somaliland likewise offered the UAE the use of Berbera base for any purposes including "training, surveillance or military operations".[1730] It remains unclear whether the coalition accepted the proposal.[1731]

What is more, the coalition, in particular the UAE, also established a military presence in Eritrea as part of its campaign, as reported by the Monitoring Group on Somalia and Eritrea.[1732] While the exact details of the partnership remain unclear, importantly Eritrea allowed its land, airspace, and territorial waters to be used for the campaign.[1733]

Eritrea soon became a central hub for the military campaign. From the port of Assab and the Hanish islands, the coalition launched military operations and in particular airstrikes in Southern Yemen. They further

1727 Magnus Tayler, 'Horn of Africa States Follow Gulf into the Yemen War', *ICG* (25 January 2016); 'The United Arab Emirates in the Horn of Africa, Crisis Group Middle East Briefing N°65', *ICG* (6 November 2018), https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/united-arab-emirates/b65-united-arab-emirates-horn-africa.

1728 Both agreed to the Arab League's resolution on the situation in Yemen: S/2015/232 (15 April 2015), para 1, 4 in particular. This was affirmed by the OIC, S/2015/497.

1729 See above note 1673.

1730 Abdulaziz Osman, 'Somaliland Says UAE Can Launch Attacks From New Base', *VOANews* (26 May 2017), https://www.voanews.com/africa/somaliland-says-uae-can-launch-attacks-new-base.

1731 Rahma A Hussein, 'The UAE's Military and Naval Reliance on Eritrea Makes the War in Yemen Even Riskier for the U.S.', *Just Security* (31 May 2017).

1732 S/2015/802 (19 October 2015) para 21-36; S/2016/920 (31 October 2016) para 28-40; S/2017/925 (6 November 2017) para 54-58; S/2018/1003 (9 November 2018) para 21-24.

1733 S/2015/802 para 21, 24, 29-31. See also Naomi Conrad, Nina Werkhäuser, 'In Yemen war, coalition forces rely on German arms and technology', *DW* (26 February 2019), https://www.dw.com/en/in-yemen-war-coalition-forces-rely-on-german-arms-and-technology/a-47684609.

functioned as hubs to train, equip, and transit Yemeni and other (African) troops to Yemen.[1734] In addition, Eritrea committed to banning the Houthis from operating from its territory.[1735] Moreover there were controversial reports that Eritrea embedded 400 soldiers in a UAE contingent fighting on behalf of the coalition.[1736]

Eritrea's position was not always uniform. In a letter dated April 2, 2015, it denied any support when it reiterated "that the islands, ports and land territory of Eritrea are not for sale or rent. Eritrea is the only State in the region that, since gaining its independence, has refused to accept foreign intervention or host foreign bases, troops and warships."[1737] It described the report of the Monitoring Group as an "amalgam of outright falsehoods, errors, inaccuracies and insinuations."[1738] At the same time, with respect to the conflict in Yemen, Eritrea "[s]upport[ed] the territorial integrity of Yemen and the unity of its people. It recognize[d] only the legitimate leadership of Yemen, as established in accordance with the constitution."[1739]

Only in December 2015 did Eritrea and coalition members start to publicly acknowledge Eritrean involvement "without reservations" in the war.[1740] Eritrea saw the war as part of ongoing endeavors to combat terrorism.[1741] Eritrea also used the growing regional instability caused by the conflict in Yemen to legally challenge the arms embargo imposed on it.[1742] It argued that its right to self-defense under Article 51 UNC amid the increasing instability was justification to lift the arms embargo.[1743] The implication of self-defense was particularly relevant if Eritrea had, in fact, sent troops, as the arms embargo would have prohibited that.[1744]

1734 S/2016/920 para 32. See also S/2017/81 (31 January 2017) para 35. Hussein, *Reliance on Eritrea* (2017).
1735 S/2015/802 para 30, 33. Eritrea denied any presence by the Houthis and Iran on its territory, S/2015/224 para 4.
1736 S/2015/802 para 32.
1737 S/2015/224 (2 April 2015) para 8.
1738 S/2015/802 Annex 1.5, IV.
1739 S/2015/224 para 3.
1740 S/2016/920 para 36. Eritrea described the claim that it had leased the Port of Assab for 30 years however as "wild and speculative." S/2017/925 para 57.
1741 'Eritrea joins Saudi Military Alliance against Terrorism', *TesfaNews* (21 December 2015), https://www.tesfanews.net/eritrea-joins-saudi-military-alliance-against-terrorism/. For a summary of statements see S/2016/920 para 36-38. See also S/2015/802 para 12, 28, Annex 1.1; S/2016/920 para 48.
1742 S/RES/1907 (23 December 2009).
1743 S/2015/802 para 28; S/2016/920 para 29, 50.
1744 S/2015/802 para 32, 35.

Eritrea thus saw its assistance to the coalition's use of force in Yemen not outside of international law. Instead, it seemed to pursue two paths: first, by endorsing the legality of the coalition's operation; second, by implying its involvement to fall within the realm of the right of self-defense.

### (d) States licensing arms export

Essential for the coalition's military operations has been the continuous provision of armaments. Several States were implicated in the war in Yemen through their flourishing *licensing* of arms exports, both before and during the military operations.[1745]

This practice has been critically assessed by States, scholars, and courts in particular in light of numerous air strikes considered to violate international humanitarian law. The same considerations were also reflected in several States' decisions to suspend their arms exports to coalition States that are engaged in hostilities in Yemen.[1746] Judicial pronouncements in Belgium, Canada, France, and the UK on arms exports were instituted and decided upon these factors primarily.[1747]

But although the *ius contra bellum* dimension did not feature prominently, it was not ignored in States' assessments on whether to

1745 See for the UK's and the US record: Musa, *JCSL* (2017) 436-438, 440-441. See also Linde Bryk, Miriam Saage-Maaß, 'Individual Criminal Liability for Arms Exports under the ICC Statute: A Case Study of Arms Exports from Europe to Saudi-led Coalition Members Used in the War in Yemen', 17(5) *JICJ* (2019) 1124-1126 with further references. For EU States: Giovanna Maletta, 'Legal challenges to EU member states' arms exports to Saudi Arabia: Current status and potential Implications', *SIPRI*

1746 Denmark, Finland, Germany, Netherlands, Switzerland, Norway: Ferro, *JCSL* (2019) 506-507; Arron Merat, 'The Saudis couldn't do it without us': the UK's true role in Yemen's deadly war', *Guardian* (18 June 2019), https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war; Arms export: implementation of Common Position 2008/944/CFSP, European Parliament, P8_TA(2018)0451, para 11, 13, 14

1747 See in particular the UK: High Court of Justice, *Campaign Against Arms Trade (CAAT) v The Secretary of State for International Trade*, Case No CO/1306/2016, 10 July 2017, [2017] EWHC 1726 (QB); Court of Appeal, *CAAT v The Secretary of State for International Trade*, Case No T3/2017/2079, 20 June 2019, [2019] EWCA Civ 1020; For a summary of the cases see Ferro, JCSL (2019) 521-530. See also a case in Italy: https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/PR_Yemen_Italy_Arms_ECCHR_Mwatana_ReteDisarmo_20180418.pdf.

provide weapons.[1748] In that respect several aspects were notable. No State thought it necessary to align the 'licensing of arms exports only' against the prohibition to use force. No State invoked a distinct justification or relied itself on Hadi's invitation for the delivery of weapons to the coalition. Instead, States let it suffice to argue that the supported military operation complied with the rules governing the resort to force. All arms exporting States either approved of the coalition's legal justification or shared the assessment of critical features, like Hadi's legitimacy.[1749] This observation applies to arms licensed both during and before the military campaign, although some States qualified that in the latter case, they only had an *ex ante* perspective, thus pointing to an additional relevant factor: knowledge.[1750] Besides, States emphasized various further aspects. France, for example, highlighted that the weapon shipments were part of "long-term partnerships" and questioned whether the victims in Yemen were the result of the use of French weapons.[1751] The German government was asked to what extent Germany, as a country of production, origin, and export of armaments, was internationally responsible for Saudi Arabia's military (armed) attacks on civilian objects such as schools and hospitals in Yemen. The German government replied, referring to the 1986 Nicaragua judgment, that it does not "exercise control over other [the supported] sovereign States," and hence denied responsibility "as a country producing and exporting

1748 Just see for example Italy that at the outset of the debate stressed that the intervening and supported coalition intervened upon request of the legitimate government. Iotam Andrea Lerer, 'Armed Conflict, Neutrality, and Disarmament - The Legality of Italy's Export of Arms', 27(1) *ItYBIL* (2018) 505, 507. See also Riccardo Labianco, 'Armed Conflict, Neutrality, and Disarmament - The Legality of Italy's Export of Arms', 26(1) *ItYBIL* (2017) 610 taking into account "involvement in certain conflicts".

1749 Nußberger, *JUFIL* (2017) 121-125.

1750 E.g. Germany: BT Drs 197/9895 (6 May 2019), Vorbemerkung. "Die Bundesregierung weist in diesem Zusammenhang darauf hin, dass nahezu sämtliche in der Berichterstattung erwähnten Rüstungsgüter bzw. die zugrunde liegenden Genehmigungsentscheidungen *vor der Zuspitzung des Jemen-Konflikts* geliefert bzw. getroffen wurden" (emphasis added).

1751 'France: France confirms contested arms shipment to Saudi Arabia', *France24* (8 May 2019), https://www.france24.com/en/20190508-france-confirms-contested-arms-shipment-saudi-arabia. The latter aspect seemed to be tailored particularly to IHL violations. It is unclear if the same standard shall apply to *ius contra bellum* considerations.

military goods", for military measures taken by the recipient States of these goods.[1752]

Moreover, States constantly considered and adapted their assistance in respect to the dynamic factual basis. While the adaptation of their assistance was ultimately motivated *primarily* by *ius in bello* considerations, this does not mean that States did not deem it necessary to do the same for the *ius contra bellum*. It is true that several developments over time could have cast doubt on the permissibility to continue to use force under the *ius contra bellum*. The transitional process – which the coalition initially principally sought to protect – has virtually failed. The civil war situation is protracted. Not only Hadi's effectiveness but also his legitimacy and thus his capacity to call for foreign assistance could be increasingly questioned. States did not ignore these developments, however. Some States shifted with the coalition to a self-defense narrative, which alleviates pressure from the intervention by invitation doctrine.[1753] Others continued to endorse the narrative that allowed to rely on Hadi's invitation.[1754] Yet again others merely cited *ius in bello* concerns, remaining ambiguous with respect to other factors.[1755] Importantly, however, States took all developments into account.[1756] They assessed all legal aspects, including the *ius contra bellum*

1752 BT Drs 19/14983 (11 November 2019), question 31. This statement was made primarily with respect to IHL but was not restricted to those concerns. For a criticism see Sassenrath, Talmon, *Misreading Nicaragua* (2020).

1753 Nussberger, *Language as Door-Opener for Violence?* (2019).

1754 See for example Germany BT Drs 19/9895 (6 May 2019), Vorbemerkung: "Zur Einordnung der bisherigen Genehmigungspraxis in Bezug auf Saudi Arabien und die Vereinigten Arabischen Emirate: Der Bitte des von der internationalen Gemeinschaft als legitim anerkannten Staatspräsidenten der Republik Jemen, Abed Rabbo Mansur Hadi, um Unterstützung gegen die Huthi-Rebellen, die vom UN-Sicherheitsrat in Resolution 2216 (2015) zur Kenntnis genommen wurde, ist eine größere Gruppe von Staaten unter der Führung Saudi-Arabiens nachgekommen, die sogenannte Arabische Koalition, die somit mit Zustimmung der Regierung in Jemen agieren." BT Drs 19/7967 (20 February 2019), question 1; BT Drs 18/4824 (6 May 2015), question 4.

1755 See for example Ministry of Foreign Affairs Finland, No foundations for arms export authorisations to Saudi Arabia or the United Arab Emirates, (22 November 2018), https://um.fi/press-releases/-/asset_publisher/ued5t2wDmr1C/content/ei-edellytyksia-uusille-asevientiluville-saudi-arabiaan-tai-arabiemiraatteihin; Government Norway, Export licenses to Saudi Arabia, (9 November 2018), https://www.regjeringen.no/en/aktuelt/eksportlisenser-til-saudi-arabia/id2618605/.

1756 See for example European Parliament, Resolution of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP (2018/2157(INI)), P8_TA(2018)0451, para 11, 13, 14.

– although this did not lead to different conclusions, in particular with respect to assistance – unlike for the *ius in bello,* which was accordingly particularly stressed.

b) Attacks directed against Saudi-Arabia

Aside from the military confrontation in Yemen, the situation in the Gulf region was tense, and repeatedly escalated in military clashes.

In May[1757] and June 2019, tankers were attacked in the territorial waters of the United Arab Emirates and the Gulf of Oman. Several States traced the attacks back to a State actor, i.e. Iran.[1758] On September 14, 2019, the state-owned Saudi Aramco oil facilities in Abqaiq and Khurais were attacked by drones. As the Houthi rebels claimed responsibility,[1759] discussions primarily revolved around if and to what extent Iran may be held responsible for the (unlawful) attacks.[1760]

1757 S/2019/392 (15 May 2019); S/2019/502 (18 June 2019).

1758 On the exact state-involvement, States disagreed. For example, the USA (S/2019/536) concluded that Iran was behind the attacks. Other States were more careful and concluded that it was likely that the attack was carried out by a "state-actor", S/2019/502. The Arab League likewise left the question open, S/2019/834. Iran consistently denied any involvement, S/2019/667 (19 August 2019).

1759 AP, 'Major Saudi Arabia oil facilities hit by Houthi drone strikes', *Guardian* (14 September 2019), https://www.theguardian.com/world/2019/sep/14/major-saudi-arabia-oil-facilities-hit-by-drone-strikes.

1760 The USA described the attack as "an act of war by this Iranian regime." France, Germany, and the UK issued a carefully drafted joint statement holding that Iran "bears responsibility", Joint statement by the heads of state and government of France, Germany and the United Kingdom, (23 September 2019), https://www.gov.uk/government/news/joint-statement-by-the-heads-of-state-and-government-of-france-germany-and-the-united-kingdom. Germany later specified what this meant: BT Drs 19/14983, (11 November 2019). See also Merkel's explanation that the statement did not mean "full responsibility": Thomas Balbierer, Jana Anzlinger, Thorsten Denkler, 'Macron kritisiert Iran-Sanktionen', *SZ* (24 September 2019), https://t.co/HpFGrynFwB?amp=1. See a discussion: Stefan Talmon, 'The distinction in international law between "bearing responsibility" and "being responsible"', *German Practice in International Law* (21 October 2019). Iran again denied any involvement, Foreign Ministry Strongly Condemns E3's Anti-Iran Statement, (24 September 2019), https://en.mfa.ir/portal/newsview/540059/Foreign-Ministry-Strongly-Condemns-E3%E2%80%99s-Anti-Iran-Statement. The UN was unable to affirm that weapons used for the attack were of Iranian origin, Michelle Nichols, 'U.N. unable to verify that weapons used in Saudi oil attack were from Iran', *Reuters* (11 December 2019), https://www.reuters.com/article/us-saudi-a

In light of the factual uncertainty about the attack's origin, protest against assisting States to the possibly Iranian use of force was absent. Still, several States felt it necessary to deny having assisted the attacks. For example, Iraq denied "media reports that (Iraqi) territory was used to attack Saudi oil installations using drones," and once more referred to its constitutional commitment to prevent the use of Iraq as launchpad for such aggressions.[1761] In the wake of the tanker attacks, for instance, Djibouti was eager to deny that Iranian warships had docked in its territorial waters or ports.[1762]

### 20) Fighting ISIS in Iraq and Syria since 2014

On June 29, 2014, the terrorist organization 'Islamic State' (IS/ISIS/ISIL/Daesh) proclaimed itself a "world caliphate".[1763] It extended territorial control over swathes in Iraq and Syria, where it established a brutal reign. ISIS also claimed responsibility for numerous terror attacks around the world, including in Paris in November 2015. States worldwide decided to engage in combatting ISIS with military force. This fight is conducted in two areas of operation, Iraq and Syria, by different groups of States.

On one hand, there was the "Global Coalition to Defeat Daesh/ISIS" formed in September 2014, conducting operation "Inherent Resolve".[1764] It counted 82 States, in particular 'Western' States, the Gulf, and some African States.[1765] States' contributions to the operations varied widely, depending

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ramco-attacks-un/u-n-unable-to-verify-that-weapons-used-in-saudi-oil-attack-were-from-iran-idUSKBN1YE2UD.

1761 'Iraq denies links to drone attack on Saudi oil facilities', *Arab News* (16 September 2019), https://www.arabnews.com/node/1554791/saudi-arabia.

1762 'Djibouti denies presence of Iran warships in its territorial waters', *Middle East Monitor* (10 June 2019), https://www.middleeastmonitor.com/20190610-djibouti-denies-presence-of-iran-warships-in-its-territorial-waters/.

1763 2014 Kessing's Record of World Events 53340-41.

1764 83 Partners United in Ensuring Daesh's Enduring Defeat, https://theglobalcoalition.org/en/; About JCTF-OIR, https://www.inherentresolve.mil/About-CJTF-OIR/; U.S. Central Command, Combined Joint Task Force - Operation Inherent Resolve (CJTF-OIR), https://www.centcom.mil/OPERATIONS-AND-EXERCISES/OPERATION-INHERENT-RESOLVE/; US Department of State, The Global Coalition to Counter ISIL, https://2009-2017.state.gov/s/seci//index.htm.

1765 83 Partners United in Ensuring Daesh's Enduring Defeat, https://theglobalcoalition.org/en/partners/; US Department of State, The Global Coalition to Counter ISIL: Partners, https://2009-2017.state.gov/s/seci/c72810.htm.

not least on the area of operation and the time when States contributed. Several States were actively engaged in combat operations, i.e., the classic use of force, in Iraq and Syria. Several States supported non-State actor groups in Iraq and Syria to fight ISIS. Numerous States limited their contributions to assistance to the combating States' use of force.[1766] Several States refrained from contributions to the use of force during specific phases.

On the other hand, distinct from but in coordination with the Global Coalition's operations, there were States joining the fight upon the invitation of Syria, most notably Russia and Iran.

It is not the practice of States that are supporting Iraq or Syria in their respective military action against ISIS on their territory that is subject to analysis in the following. Likewise, the practice of States providing support to non-State actor groups that may qualify as an indirect use of force is not of direct interest. The focus lies here on States' practice concerning assistance to other States' conduct that may qualify as use of force in international relations.[1767]

a) Assistance to airstrikes in Iraq in the realm of the 'Global Coalition'

*Inter alia* Australia, Belgium, Canada, Denmark, France, Jordan, the Netherlands, the United Kingdom, and the United States were conducting airstrikes in Iraq.[1768] Several other States provided military support to non-State actors, in particular Kurdish combatants based in Iraq to fight ISIS. Both actions *prima facie* qualify as use of force.

1766 E.g. Assistance to Iraq for fighting ISIS within Iraqi territory, e.g. training of Iraqi security forces, or provision of military equipment.

1767 It should be noted that the military operations that are currently still ongoing have many *ius contra bellum* facets, which cannot all be assessed. For example, the coalition's continued presence after ISIS territorial defeat poses specific problems of justification. E.g. on this Benjamin Nußberger, '"Sustainable Self-Defense"? How the German Government justifies continuing its fight against ISIL in Syria', *EJIL:Talk!* (2 October 2019). The US decision to "protect Syrian oil fields" is likewise controversial, see for Syrian protest e.g. S/2020/471 (3 June 2020); S/2020/775 (6 August 2020). To what extent coalition States provide assistance (or not) to these continuing developments will not be analyzed in detail here.

1768 US Department of Defense, Air Strikes Update prior to Jan. 1, 2017, https://dod.defense.gov/OIR/Airstrikes/.

States engaged in Iraq were operating upon the request of Iraq.[1769] In June 2014, Iraq invited the "United Nations and international community" and in particular "Member States to assist [us] by providing military training, advanced technology and the weapons required to respond to the situation."[1770] In September 2014, Iraq then "requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent."[1771]

Several States supported these military efforts, yet refrained from engaging in combat activity. For example, some provided aerial refueling for coalition air strikes offering air support to Iraqi troops.[1772] Some contributed by flying reconnaissance and surveillance missions for the American-led airstrikes.[1773] Others again transported weapons gifted by donor States to non-State actor groups.[1774]

Notably, States widely did not let it suffice that the assisted use of force was in accordance with international law. On one hand, Iraq emphasized its sovereignty, and hence the right to exclude the involvement of specific States. For example, it excluded any assistance from Arab States.[1775] On the other hand, assisting States widely acknowledged that any specific form of engagement, also a mere assistance mission, required the *specific* request of the territorial State, i.e., Iraq. This was the case even when the assisted use of force was already viewed to be legitimately based on the territorial

1769 Just see e.g. UK: Summary of the government legal position on military action in Iraq against ISIL (25 September 2014), https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil. For an analysis see Karine Bannelier-Christakis, 'Military Interventions Against ISIL in Iraq, Syria and Libya and the Legal Basis of Consent', 29(3) *LJIL* (2016) 350.

1770 S/2014/440 (25 June 2014).

1771 S/2014/691 (22 September 2014).

1772 Italy: Kathleen J McInnis, *Coalition Contributions to Countering the Islamic State* (CRS Report for Congress, Congressional Research Service, R44135, 2016) 9. Contributio Nazionale, http://www.difesa.it/OperazioniMilitari/op_intern_corso/Prima_Parthica/Pagine/contributo_nazionale.aspx.

1773 E.g. France: Iraq: first aerial reconnaissance flight (28 September 2015), https://in.ambafrance.org/Iraq-first-aerial-reconnaissance.

1774 E.g. HC Deb (Canada) 24 March 2015, Hansard vol 147 No 188, 1010; Standing Committee on National Defence, Evidence, (4 November 2014), 2, 11; UK, Denmark: Jacques Hartmann, Sangeeta Shah, Colin Warbrick, 'United Kingdom Materials on International Law 2014', 85 *BYIL* (2016) 634-636, 638.

1775 Christina Hey-Nguyen, 'Australian Practice in International law 2014', 33 *AustYBIL* (2015) 361.

State's invitation. Accordingly, Australia, for example, explained that only once it had a "request for aerial assistance" did it fly a mission *in support* of other operations, even when Iraq had already authorized the supported strikes.[1776] New Zealand deployed, in addition to instituting a training mission for Iraqi security forces, staff to the headquarters. None of the armed forces deployed since 2015 by New Zealand in support of the coalition were authorized to engage in direct targeting or to participate in offensive operations.[1777] Likewise, New Zealand based its support on express consent by Iraq.

At the same time, States required the assisted use of force to be in accordance with international law. For example, Iraq's consent did not cover Turkey's military incursion into Iraq.[1778] On that note States were careful not to assist Turkey's use of force.[1779]

Two general points are noteworthy. First, it seems that while some forms of assistance took place over Iraqi territory and thus required justification, States generally also sought to justify the specific *contribution* to a use of force – despite the fact that the assisted use of force was in accordance with international law.

Second, States saw themselves part of a global coalition fighting ISIS in Iraq *and* Syria. Direct military strikes conducted against ISIS in Iraq might have freed capacities for other actors to strike ISIS in *Syria*. The US might bear the biggest share in the military operations. The mere fact that the US requested other States to provide *some* contribution indicates that any contribution was considered to be, if not enabling, at least not insignificantly facilitating strikes in Syria. Legally, this contribution was however not reflected in States' considerations. States provided legal explanations only for the specific use of force that was supported.

b) Assistance to airstrikes in Syria in the realm of the 'Global Coalition'

The Global Coalition's military operations against ISIS also extended to Syria.

1776 Ibid 359-361, 362.
1777 New Zealand's Military Contributions to the Defeat-ISIS Coalition in Iraq, https://defence.govt.nz/assets/Uploads/6d2b164af9/NZ-Military-Contribution-to-Defeat-ISIS-in-Iraq.pdf.
1778 S/2016/870 (19 October 2016).
1779 See in more detail below.

Initially, it was primarily the United States that carried out the strikes,[1780] with Bahrain, Jordan, Saudi-Arabia, and the United Arab Emirates participating first occasionally, and from October 24, 2014, onwards regularly. In 2015, several other States, most of which were already engaged in combat operations in Iraq, decided to conduct air strikes in Syria, too: Canada joined in April 2015,[1781] Turkey in July 2015[1782], Australia and France in September 2015, the UK in December 2015.[1783] The Netherlands and Denmark extended their area of operation to Syria only in March 2016 and August 2016 respectively.[1784] In May 2016, Belgium joined the air strikes in Syria as well, taking turns with the Netherlands.[1785] The planning and coordination of the respective military contributions, and in particular the strikes, were entrusted to the US CENTCOM.

1780 Statement by the President on ISIL, (10 September 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1.

1781 The Canadian mission was formally extended on 30 March 2015, https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-impact.html.

1782 Ceylan Yeginsu, Turkey, 'Anticipating Attack, Strikes 3 ISIS Targets in Syria With Jets', *NYT* (24 July 2015), https://www.nytimes.com/2015/07/25/world/europe/turkey-isis-syria-airstrikes.html?_r=1. Turkey engaged in limited operations before, see e.g. S/2015/127 (23 February 2015).

1783 The UK launched a limited airstrike in August 2015 before, S/2015/688 (8 September 2015).

1784 These dates are based on the U.S. Department of Defense [DoD]'s report of air strikes in Syria and refer to the dates when States were reported to have actually conducted strikes, DoD, Air Strikes Update prior to Jan. 1 2017, https://dod.defense.gov/OIR/Airstrikes/. The DoD defined strikes as a "strike, as defined in the CJTF releases, means one or more kinetic events that occur in roughly the same geographic location to produce a single, sometimes cumulative effect for that location." See for further updates also https://www.inherentresolve.mil/Releases/Strike-Releases/. See also British forces air strikes in Iraq and Syria: monthly list (22 January 2015, last updated 25 June 2021), https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list. See also S/2014/756 para 14 (23 October 2014).

1785 Statement by Secretary of Defense Ash Carter on Belgium's Expanded Role in the Counter-ISIL Air Campaign (13 May 2016), https://www.defense.gov/Newsroom/Releases/Release/Article/759621/statement-by-secretary-of-defense-ash-carter-on-belgiums-expanded-role-in-the-c/; Alissa J Rubin, 'Belgium's Anti-ISIS Airstrikes Expand From Iraq Into Syria', *NYT* (13 May 2016), https://www.nytimes.com/2016/05/14/world/europe/belgiums-anti-isis-airstrikes-expand-from-iraq-into-syria.html. Belgium was not listed to have struck in Syria in the DoD airstrikes update, however.

All those States claimed their air strikes to be in accordance with international law. The self-defense argument at the core of these States' reasoning had many nuances and was subject to varying interpretations.[1786] States and scholars alike have widely criticized many aspects of the invocation of self-defense, the details of which need not interest here.[1787]

1786 USA: S/2014/695 (23 September 2014), Egan, *IntlLStud* (2016). Canada: S/2015/221 (31 March 2015); Turkey: S/2015/563 (24 July 2015); Australia: S/2015/693 (9 September 2015); France: S/2015/745 (9 September 2015); UK: S/2015/928 (3 December 2015); Denmark: S/2016/34 (13 January 2016); Netherlands: S/2016/132 (10 February 2016); Norway: S/2016/513 (3 June 2016); Belgium: S/2016/523 (9 June 2016). Belgium's statement that it "will *support* the military measures of those States that have been subject to attacks by ISIL", emphasis added, hence refers to combat operations. In fact, Belgium announces to be "taking necessary and proportionate measures against the terrorist organization" – hence not limiting it to "mere assistance". Bahrain, Jordan, Saudi-Arabia, and United Arab Emirates did not send a letter to the Security Council. For an overview see Laurie O'Connor, 'Legality of the use of force in Syria against Islamic State and the Khorasan Group', 3(1) *JUFIL* (2016).

1787 States' arguments, their scope, impact and validity has been subject to extensive debate in legal literature. Just see i.a.: Louise Arimatsu, Michael N Schmitt, 'Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape', 53(1) *ColumJTransnatlLBul* (2014); Ali Fuat Bahcavan, 'Legal Aspects of Using Force against the Islamic State in Syria after Russian Intervention', 224(3) *MilLRev* (2016); Oliver Corten, 'The Military Operations Against the 'Islamic State' (ISIL or Da'esh) - 2014' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018); Olivier Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?', 29(3) *LJIL* (2016); Claus Kreß, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against 'IS' in Syria', *Just Security* (17 February 2015); Olivia Gonzalez, 'The Pen and the Sword: Legal Justifications for the United States' Engagement Against the Islamic State of Iraq and Syria (ISIS)', 39(1) *FordhamIntlLJ* (2015-2016); Oren Gross, 'Unresolved Legal Questions Concerning Operation Inherent Resolve', 52(2) *Texas International Law Journal* (2017); Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play', 91 *IntlLStud* (2015); Gabor Kajtar, 'The Use of Force Against ISIL in Iraq and Syria-A Legal Battlefield', 34(3) *Wisconin International Law Journal* (2016-2017); Michael P Scharf, 'How the War Against ISIS Changed International Law', 48(1&2) *Case Western Reserve Journal of International Law* (2016); Michael Wood, 'The Use of Force against Da'esh and the Jus ad Bellum', 1 *AsianYBHR&HumL* (2017); Saeed Bagheri, *International Law and the War with Islamic State: Challenges for Jus ad Bellum and Jus in Bello* (2021); Tom Ruys, Luca Ferro, 'Divergent Views on the Content and Relevance of the Jus Ad Bellum in Europe and the United States? The Case of the US-Led Military Coalition against „Islamic State"' in Chiara Giorgetti and Guglielmo Verdirame (eds), *Whither the West? International Law in Europe and the United States* (2021); Dire Tladi, Maryam Shaqra, 'Assessing the Legality of Coalition Air Strikes Targeting the

This was also reflected in the fact that several States were initially reluctant to commit to combat operations in form of airstrikes or ground troops over Syrian territory, not at least due to *legal* reasons. It was only in reaction to recent developments in 2015, most notably terror attacks in France, Belgium, and Turkey for which ISIS claimed responsibility, and the adoption of the ambiguous Security Council resolution 2249 (2015), that those States adapted their arguments.

Throughout the years, the air strikes received widespread support from 'Coalition' States. How did these supporting States explain their assistance? In line with States' own distinction between States engaged in actual combat and assisting States, first, States that eventually resorted to force will be assessed. In a second step, the positions of exclusively assisting States will be looked at.

(1) States eventually conducting air strikes in Syria

(a) Australia

Australia joined the global coalition fighting ISIS in 2014. Australia conducted combat as well as air support operations. For the latter, it contributed two capabilities. It deployed an E-7 Wedgetail "providing direction for fighter aircraft, surface combatants and land based elements, as well as supporting aircraft such as tankers and other intelligence platforms."[1788] Also, it sent Multi Role Tanker Transport aircraft to be used for both air-to-air refueling and strategic transport.[1789]

For its own armed forces, it limited the area of operations to Iraq, which was covered by Iraqi consent. At the outset, Australian officials stressed that this was what the armed forces were only requested to do, and that a decision (which was not excluded) about extending Australian operations to Syria was still to be made.[1790]

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Islamic State in Iraq and the Levant (ISIS) in Syria under International Law', 40(1) *SAfrYIL* (2015); Mary Ellen O'Connell, Christian J Tams, Dire Tladi, *Self-Defence against Non-State Actors*, vol 1 (2019); Gray, *Use of Force (2018)*, 190 et seq.

1788 Air Task Group (ATG), https://www.defence.gov.au/Operations/Okra/ATG.asp.

1789 Ibid.

1790 E.g. David Wroe, 'Australia sends 330 extra troops to Iraq, but Tony Abbott won't rule out future Syria attacks', *Sydney Morning Herald* (14 April 2015), https://www.smh.com.au/politics/federal/australia-sends-330-extra-troops-to-iraq-but-tony

Nonetheless, Australia gradually acknowledged that its armed forces were involved in fighting ISIL *in Syria*, too: First, its refueler also fueled planes that flew over Syria. Similarly, the Wedgetail commanded not only Australian aircraft flying over Iraq, but also other aircraft from other nations that operated in Syria.[1791] Second, Australian personnel was integrated into the US headquarters. Third, Australian Air Force personnel was embedded in the US Air Force units that were responsible for operating armed Reaper drones in support of the coalition operations in both Iraq and Syria.[1792]

It was however only in September 2015, when Australia decided to extend its own airborne operations to Eastern Syrian airspace, that Australia sent a letter to the Security Council. Only then it reported that it was "undertaking necessary and proportionate military operations against ISIL in Syria *in the exercise of the collective self defence* of Iraq."[1793] The operations Australia sought to justify embraced not only airstrikes but also assistance operations, i.e., the tanker transporter and the Wedgetail.[1794] Both operated now in Syrian airspace as well.[1795]

Prior to the extension of operations, Australia did not invoke self-defense. It did not seek to provide a distinct justification for its assistance, i.e., the fact that its operations in Iraq also contributed to air strikes in Syria. The Australian positions taken before and after September 2015 were however not necessarily inconsistent. Two aspects distinguish the situations.

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-abbott-wont-rule-out-future-syria-attacks-20150414-1mkoyo.html; Hey-Nguyen, *AustYBIL* (2015) 357-358; Ryan Goodman, 'Australia, France, Netherlands Express Legal Reservations about Airstrikes in Syria [Updated]', *Just Security* (25 September 2014).

1791 In doing so, the Australian aircraft stayed in Iraqi airspace. David Wroe, 'Australia sends 330 extra troops to Iraq, but Tony Abbott won't rule out future Syria attacks', *Sydney Morning Herald* (14 April 2015); David Wroe, 'Australian pilots begin missions over Syria, flying American Reaper drones', *Sydney Morning Herald* (14 August 2015), https://www.smh.com.au/politics/federal/australian-pilots-begin-missions-over-syria-flying-american-reaper-drones-20150814-giz3hn.html.

1792 'ABC 774 Radio Interview with Rafael Epstein', (14 August 2015), https://kevinandrews.com.au/abc-774-radio-interview-with-rafael-epstein/; David Wroe, 'Australian pilots begin missions over Syria, flying American Reaper drones', *Sydney Morning Herald* (14 August 2015).

1793 S/2015/693 (9 September 2015), emphasis added. Jenny Samiec, Skye Bale, 'Australian Practice in International Law 2015', 34(1) *AustYBIL* (2017) 348.

1794 Ibid 345.

1795 For figures: Renee Westra, *Syria: Australian military operations* (Research Paper Series 2017-18, Parliament of Australia, 20 September 2017) 6.

First, with the assisting operations taking place in Syrian airspace, there was now a *prima facie* violation of Syrian sovereignty that required justification. Second, the assistance to coalition airstrikes in Syria was accompanied by *Australian* airstrikes in Syria.[1796] These features, alternatively or conjunctively, may have prompted Australia to provide a justification. On that note, the 2015 letter reinforces rather than refutes the impression that Australia gave before September 2015: It did not view the assistance to the coalition in need of a justification.[1797]

Australia did not set out a legal framework governing these contributions to other States' airstrikes in Syria. It did not elaborate in any detail on legal aspects of its assistance. But this did not mean that Australia would leave its assistance uncommented. It was careful to highlight some features. First, it pictured its contributions as assistance to operations by *other States,* distinct from its *own* military operations. Second, it was careful not to ascribe the assistance component of its campaign an excessive role. Australia always stressed that its focus was on Iraq.[1798] For example, concerning the embedded soldiers, Australia emphasized that this was a "small number of Royal Australian Air Force personnel" based on "long-standing arrangements".[1799] Third, Australia *indicated* that the supported States' use of force in Syria was in accordance with international law. While it acknowledged that a different legal framework applied to military operations in Iraq and Syria, Australia did not view the US-led airstrikes in Syria to be unlawful.[1800] But

1796 Note however that in 2018, Australia ceased its airstrikes, but assistance continued. ADF contributes to the defeat of Daesh in Iraq (2017-2018), https://www.defence.gov.au/annualreports/17-18/Features/Daesh.asp. Australia did not update its legal position. One cannot infer however that Australia would have also sent the letter for assistance operations in Syria without airstrikes.

1797 Australia here seems to take a different approach than Germany, see below.

1798 Official Committee Hansard, Senate, Foreign Affairs, Defence and Trade Legislation Committee, (1 June 2015), 12.

1799 David Wroe, 'Australian pilots begin missions over Syria, flying American Reaper drones', *Sydney Morning Herald* (14 August 2015). Unlike the UK, Australia did not stress that the integrated soldiers are "effectively operating as foreign troops." But it said that they "operate as part of a US unit", Minister of Defence – Statement on Iraq, Syria, Afghanistan and operations in the Middle East, (16 September 2015), https://www.minister.defence.gov.au/minister/kevin-andrews/statements/minister-defence-statement-iraq-syria-afghanistan-and-operations. It seems that thereby Australia acknowledged that it is not only the integration in the foreign military that is assistance, but the actual operation by Australian soldiers.

1800 Hey-Nguyen, *AustYBIL* (2015) 353, 357, 358, 359. But for a different conclusion: Corten, *Operations against ISIL*, 875; Corten, *LJIL* (2016) 782.

until it decided to extend its area of operation itself on 9 September 2015, Australia was more guarded than, for example, the UK: it did not take any position on the legality of the use of force in Syria, but for when it conducted airstrikes in Syria itself.[1801] In particular, while arguably sympathetic with it, Australia did not positively endorse the American legal position.[1802] Instead, it took note of it, but it did not judge it.[1803]

At least implicitly, Australia aligned its assistance with a prohibition of *participation*. Most remarkably, it appears that Australia did not feel it necessary to make its own assessment of the legality of the assisted State's use of force. Australia would not accept an onus to justify or to judge the assisted use of force. Instead, it seemed to suffice for Australia that the assisted actor advanced a justification. Australia thereby would subscribe to a broad reading of the accessory nature.[1804]

1801 Hey-Nguyen, *AustYBIL* (2015) 358-359 "Should there be a request in relation to Syria, well we would consider it, we would also consider the legal framework that the United States is relying upon in order to go into Syria but we would make our own judgment about that".

1802 Exemplary is the notion of "ungoverned space" that Australia used. Australia did not want it to be understood as taking position that a use of force in Syria was lawful, ibid 357, 362. "JOURNALIST: You used a term there, Minister, 'ungoverned space'? Is that our way of saying that Australia could go into parts of what used to be Syria on the basis that it is now Islamic State? JULIE BISHOP: No, it's my way of saying the fact is the eastern part of Syria is ungoverned space and the United States has indicated for some time that it intended to disrupt ISIL wherever it could find it and that includes in Syria." "This notion of ungoverned space - is that a form of words that would give cover for Australia *and others* to actually act in there without being invited in there by the Assad regime? JULIE BISHOP: No it's not." Emphasis added

1803 See for example ibid 358-359. "The United States has taken its legal advice, which says that under article 51, and the collective self-defence right, that they can move into Syria." Samiec, Bale, *AustYBIL* (2017) 343. "The legal basis for the air strikes in Syria has been laid out by the United States, some time ago, in a letter to the United Nations. The Coalition have been invited into Iraq at the invitation and with the consent of the Iraqi Government, and under the principle of collective self-defence of Iraq and its people, the Coalition have extended that self- defence into Syria."

1804 Critical Rob McLaughlin, 'State Responsibility for Third Country Deployed / Embedded Military Personnel Engaged in Armed Conflict', *EJIL:Talk!* (10 September 2015).

(b) Regional (Arab) States

Several regional Arab States participated in strikes, yet without providing substantial legal arguments to justify the resort to force.[1805] In that light, it is little surprising that on questions about the legal basis for assisting contributions to the coalition's use of force in Syria, these States largely left the international community in the dark. Still, in particular the territories of regional States were essential to the coalition. The majority of the coalition's armed forces were based in these countries and staged their respective operations (combat operations as well as supporting operations) from these territories.[1806]

It would go too far however to understand the regional practice as argument that assistance may be provided without legal limitations. First, States remained silent on the law, which allows no firm conclusion either way. In fact, some States seemed at least sympathetic to the argument of self-defense, indicating the lawfulness of the assisted measures.[1807] Second, some States, such as Qatar, conditioned their support on Washington not publicly acknowledging the use of their territory for combat and air missions.[1808] Such policies of factual denial diminish the legal value of the practice.

(c) Canada

In 2014, Canada decided to deploy armed forces to Iraq to support the coalition's fight against ISIS. Canada conducted airstrikes in Iraq. In addition, Canada deployed a Polaris aerial refueler and two Aurora surveillance air-

1805 Corten, *LJIL* (2016) 783-784.

1806 Coalition armed forces were based in Kuwait, Jordan, UAE, and Qatar, see HC Deb (Canada) 26 March 2015, Hansard, vol 147, no. 190; Ceylan Yeginsu, Helene Cooper, 'U.S. Jets to Use Turkish Bases in War on ISIS', *NYT* (23 July 2015), https://www.nytimes.com/2015/07/24/world/europe/turkey-isis-us-airstrikes-syria.html.

1807 In particular, Bahrain: A/69/PV.17 (29 September 2014), 25; S/PV.7316 (19 November 2014), 77. Olivia Flasch, 'The legality of the air strikes against ISIL in Syria: new insights on the extraterritorial use of force against non-state actors', 3(1) *JUFIL* (2016) 60. See also the Jeddah Communique, (11 September 2014), https://2009-2017.state.gov/r/pa/prs/ps/2014/09/231496.htm.

1808 Robert Burns, Adam Schreck, 'Tiny Qatar plays outsize role in U.S. war strategy', *AP* (15 September 2014), https://web.archive.org/web/20140915205632/https://www.militarytimes.com/article/20140915/NEWS08/309150052/Tiny-Qatar-plays-outsize-role-U-S-war-strategy/.

craft that supported the Canadian and coalition aircraft operating against ISIL.[1809] The area of any of those operations was however confined to Iraq only.[1810] Officially, Canada thus supported airstrikes in Iraq only. Operations in Syria were believed not to have "any legal basis".[1811] The Canadian government took a different position in March 2015 when it extended its operations to Syria.[1812] In a letter to the Security Council, Canada invoked collective self-defense for its "military action." Thereby, Canada sought to justify not only its airstrikes but also assistance operations, too.[1813] The justification of assistance, in particular in light of the previous limitations, is at least remarkable, albeit one should be careful to draw conclusions that Canada believes the justification to be necessary for assistance itself.

In that context, it may be further noteworthy that in November 2015, Canada, under a newly elected government, decided to refocus the operation and thus cease combat operations in both Iraq and Syria. Canadian armed forces however continued to provide "air-to-air refueling and aerial intelligence, surveillance, and reconnaissance missions in support of coalition air operations."[1814] In addition, they were transporting coalition cargo and personnel, and serving in the coalition headquarters.[1815] The new Canadian government did not review its legal justification, but seemed

1809 HC Deb (Canada) 6 October 2014, Hansard vol 146 no 123, 8269; Standing Committee on National Defence, *Evidence* NNDN no 35, (4 November 2014), 2, 3, 9; Standing Committee on Foreign Affairs and International Development, *Evidence* FAAE no 42 (29 January 2015), 2, 4.

1810 Standing Committee on National Defence, *Evidence* NNDN No 35, (4 November 2014), 12. Note that it cannot be established here that the Canadian assistance was not used for operations against ISIL in Syria, too.

1811 HC Deb (Canada) 6 October 2014, Hansard vol 146 no 123, 1225.

1812 S/2015/221 (31 March 2015).

1813 HC Deb (Canada) 24 March 2015, Hansard vol 147 No 188, 12208: "Specifically, we will extend our air combat mission, that is our air strike capability, our air-to-air refuelling capability, our Aurora surveillance mission, and the deployment of air crew and support personnel." See also 12244. See also HC Deb 26 March 2015, Hansard vol 147 no 190, 12411.

1814 Government of Canada, Canadian Armed Forces cease airstrike operations in Iraq and Syria, (17 February 2016), https://www.canada.ca/en/department-national-defence/news/2016/02/canadian-armed-forces-cease-airstrike-operations-in-iraq-and-syria.html; Air Task Force – Iraq transitions its support to Coalition operations during Operation IMPAC, (3 March 2016), http://www.forces.gc.ca/en/news/article.page?doc=air-task-force-iraq-transitions-its-support-to-coalition-operations-during-operation-impact%2Fildchscn.

1815 Operation IMPAC, https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-impact.html.

to operate on the same legal basis as it thought necessary for airstrikes. Whether the new government thinks this to be legally required remains open.[1816]

### (d) United Kingdom

The UK was a key contributor to the coalition's fight against ISIS. Initially, it confined its airstrikes to Iraq only.[1817] Only in December 2015, it expanded its lethal operations to Syria.[1818]

Still, already in November 2014, the UK sent a remarkable letter to the Security Council in fulfillment of its reporting obligation under Article 51.[1819] It indicated that it was "taking measures in support of the collective self defence of Iraq as part of international efforts led by the United States." Thereby, it referred to airstrikes against "ISIL sites and military strongholds *in Syria*." The UK left little doubt that it considered these efforts to be lawfully based on the right of self-defense.[1820]

The British letter remained silent on how the UK "fully support[ed]" the strikes in Syria.[1821] It is unlikely that the UK here referred to its own strikes *in Iraq,* i.e., the act of striking as such, for which the UK relied on Iraqi

1816 Brunnée, Toope, *ICLQ* (2018) 274 suggest that the new government just may not have had an opportunity to fully review its position on self-defense. This seems to not take into account the continuing Canadian contributions, however.

1817 The British parliament had voted against *airstrikes* (not use of force) in Syria. Unlike Canada or Australia, the UK however did not see a legal obstacle to conduct use of force in Syria. The government frequently indicated towards intervening, but did not see a "clear legal authority" which it saw politically necessary in light of previous interventions in the Middle east. Foreign Affairs Committee, *The Extension of offensive British Military Operations to Syria*, *Second Report* (2015-16, HC4 457) (3 November 2015); Hartmann, Shah, Warbrick, *BYIL* (2016) 638.

1818 S/2015/928. But in August 2015, the UK conducted a limited airstrike, S/2015/688.

1819 S/2014/851 (26 November 2014).

1820 But the UK remained reluctant to flesh out the arguments in detail on UN level, as Corten, *LJIL* (2016) 782-783; Brunnée, Toope, *ICLQ* (2018) 274 criticize this with respect to "unable and/or unwilling". A later letter the UK summarizing the 2014 letter however left little doubt about the conclusion of legality in the 2014 letter. In fact, it reiterated it in more express terms: "As reported in our letter of 25 November 2014, ISIL is engaged in an ongoing armed attack against Iraq, and therefore action against ISIL in Syria is lawful in the collective self defence of Iraq." S/2015/688. See also HC Deb 26 September 2014, Hansard vol 858, col 1263. Hartmann, Shah, Warbrick, *BYIL* (2016) 619-620.

1821 S/2014/851.

consent and for which the legality of the international efforts in Syria was irrelevant.[1822] Instead, it seems the UK thereby set out the legal basis for its assistance to the coalition's airstrikes *in Syria*. In fact, despite committing not to conduct air strikes in Syria,[1823] the UK conducted aerial refueling as well as surveillance and reconnaissance missions, which were not limited to Iraqi territory and expressly sought to support the coalition's campaign in

1822 Summary of the government legal position on military action in Iraq against ISIL, (25 September 2014), https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil. In particular in contrast to a possible *contribution to strikes in Syria* (e.g. by freeing capacities).

1823 The government was eager to stress that its motion did not entail (at this point in time) *air strikes in Syria*. Note that the Government referred to the factual description "airstrikes" but not legal term "use of force" that may comprise different forms of engagement. HC Deb 26 September 2014, Hansard vol 858, col 1255 et seq, 1265, 1266. See also the Memorandum to the Foreign Affairs Select Committee Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria (November 2015), https://www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf. Further Peter Rowe, *Legal Accountability and Britain's Wars 2000-2015* (2016) 73 et seq.

Syria.[1824] The UK itself acknowledged that its contributions were of "crucial importance"[1825] and "significant".[1826]

Whether or not the UK invoked and exercised the right to collective self-defense for its *support,* or whether the UK sought to do no more than express to the Security Council its legal position that action against ISIL in Syria was lawful in collective self-defense for Iraq, the 2014 letter does not answer beyond doubt. On the one hand, unlike when the UK conducted airstrikes in Syria,[1827] the UK government did not *expressly* state to *exercise* the right of self-defense by its support. On the other hand, the UK government still sent the letter "in accordance with Article 51 UNC."[1828] Further

1824 PM Speech at the UN General Assembly, 25 September 2014, https://www.gov.uk/government/speeches/pm-speech-at-the-un-general-assembly-2014; HC Deb 21 October 2014, Hansard vol 586 col 63WS: "As well as their operations over Iraq, both Reapers and Rivet Joint surveillance aircraft will be authorised to fly surveillance missions over Syria to gather intelligence as part of our efforts to protect our national security from the terrorist threat emanating from there. Reapers are not authorised to use weapons in Syria; that would require further permission. The legal basis for this authorisation is as set out to Parliament in the debate on 26 September." HC Deb 16 July 2015, Hansard vol 498 col 32WS; HC Deb 20 July 2015, Hansard vol 598 col 1233, 1234; Memorandum to the Foreign Affairs Select Committee Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria (November 2015), 9, 18, 24. On refueling: 'Syria Airstrikes Conducted by UK Military Pilots', *BBC* (17 July 2015), https://www.bbc.com/news/uk-33562420; House of Commons, Foreign Affairs Committee, The Extension of offensive British Military Operations to Syria, Second Report of Session 2015-16, (3 November 2015), 9 para 13. Hartmann, Shah, Warbrick, *BYIL* (2017) 590. Note that the British strikes in Iraq might also qualify as assistance to the US in Syria.

1825 HC Deb 16 July 2015, Hansard vol 598, col 32W (Secretary of Defense Michael Fallon).

1826 HC Deb 20 July 2015, Hansard vol 598, cols 1233, 1234; Hartmann, Shah, Warbrick, *BYIL* (2017) 599.

1827 S/2015/688: "This air strike was a necessary and proportionate *exercise* of the individual right of self-defence of the United Kingdom." Emphasis added. Here the difference was particularly striking as it added: "As reported in our letter of 25 November 2014, […] action against ISIL in Syria is lawful in the collective self-defence of Iraq." S/2015/928: "measures against ISIL/Daesh in Syria […] *in exercise* of the inherent right of individual and collective self-defence." Emphasis added.

1828 S/2014/851. According to the ICJ, this is an indicator that a State is *"exercising"* or *"acting on the basis of"* self-defense, *Nicaragua*, 121 para 235. HC Deb 21 October 2014, Hansard vol 586 col 63WS, is likewise ambiguous. With respect to intelligence gathering by drones in Syria, Secretary of Defence Fallon stated: "The legal basis for this authorisation is as set out to Parliament in the debate on

government statements aimed primarily at the domestic British audience likewise do not conclusively resolve the ambiguity.[1829]

The UK's statements are remarkable in that they, first, draw a line between military strikes and assistance to strikes in Syria also with respect to the applicable law. Notably, British assistance to the strikes has received considerably less attention. Still, secondly, the statements suggest that assistance may not be provided without legal explanation.[1830] They did not cite to a specific norm that governs assistance. Based on the British explanations, assistance might qualify either as "indirect use of force" that would require the UK to invoke self-defense itself. Or assistance might be viewed as participation "only". The British statements are framed to allow discharging both obligations. With certainty it can only be said however that, in the UK's view, it is necessary to substantiate that the assisted use of force is in accordance with international law. One may hence conclude that the UK views its assistance in any event as "participation." Whether or not a distinct own justification is necessary, and thus whether or not the assistance may also qualify as "indirect use of force", the Government did not answer beyond any doubt.

The British contribution to fighting ISIL in Syria before its own UK airstrikes is moreover interesting because British pilots were embedded within Canadian and US armed forces that flew reconnaissance and strike missions in Syria.[1831]

In reaction, the UK government claimed that the embedded soldiers were under the command of those forces.[1832] Thereby, the UK may have

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26 September." Therein ambiguity remained, HC Deb 26 September 2014, Hansard vol 585, col 1255.

1829 E.g.: Describing "only" the legality of the supported operations: HC Deb 20 July 2015, Hansard vol 598 col 1236. However, in the Memorandum to the Foreign Affairs Select Committee Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria (November 2015), 16, the Government seems to indicate that it relied on collective self-defense itself for its supporting role. Likewise ambiguous Hartmann, Shah, Warbrick, *BYIL* (2017) 603.

1830 In particular S/2015/688 indicates this. The UK again stresses that "action against ISIL in Syria" is lawful.

1831 UK Embedded Forces, HLWS139 (20 July 2015). See also HC Debate, 20 July 2015, Hansard vol 598 col 1234.

1832 UK Embedded Forces, HLWS139 (20 July 2015). This was particularly important for national reasons, as the UK parliament voted against *airstrikes* in Syria. HC Debate, 20 July 2015, Hansard cols 1234, 1235, 1238. Understanding the UK in this way, critically in light of the law on the responsibility of States Dapo Akande,

hinted at an argument to deny the attribution of the conduct of the embedded soldiers to the UK. At the same time, the Government acknowledged however that the embedded soldiers were deployed with allied forces on operations with "ministerial approval", and remained "subject to UK domestic, international and host nation law."[1833]

Irrespective whether the attribution argument holds, the UK government sought to portray the embedding of soldiers as *assistance*, not as *own* direct use of force.[1834] Moreover, it emphasized that embedding soldiers was a long-standing and general practice, that had only little impact on the operations in the present situation and that sought to primarily enhance the UK's military capabilities.[1835]

In that context, it is interesting to see that the UK government did not dwell on the question how to justify this contribution to the airstrikes. In particular, it did not invoke a distinct justification or, unlike for the assistance discussed above, make statements that would lead to that conclusion. Instead, the Defence Minister (only) noted that the "supported" actions were legal and in accordance with the right of self-defense. [1836]

With respect to an offer to France to use the British airbase in Cyprus for its airstrikes against ISIL in Iraq and Syria on November 23, 2015, the UK did not provide a separate justification.[1837] As this support constituted another feature of support to the strikes in Syria, and was placed at the

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'Embedded Troops and the Use of Force in Syria: International and Domestic Law Questions', *EJIL:Talk!* (11 September 2015); McLaughlin, *Embedded Military Personnel* (2015).

1833 HC Deb 20 July 2015, Hansard vol 598 col 1234.

1834 "This is not a British military operation." HC Deb 20 July 2015, Hansard vol 598 col 1238. If the "exclusive attribution" argument held, the UK government would still support the coalition. The support then would constitute the authorization to participate. If the "exclusive attribution" argument failed, the relevant assistance would be the soldiers' contribution soldiers to the coalition's military operation. In that case, even if the soldiers were still (also) attributable to the UK, and thus might qualify also as the UK's use of force (that required independent justification), the soldiers' contribution to the coalition constituted "assistance."

1835 HC Deb 20 July 2015, Hansard vol 598 col 1234, 1238; UK Embedded Forces, HLWS139 (20 July 2015).

1836 HC Deb 20 July 2015, Hansard vol 598 col 1235, 1236. At no point did Minister Fallon indicate that the UK invoked collective self-defense itself (unlike for the other contributions discussed earlier).

1837 Cyprus RAF base offered in support of French, (23 November 2015), https://www.gov.uk/government/news/cyprus-raf-base-offered-in-support-of-french; Hartmann, Shah, Warbrick, *BYIL* (2017) 599.

same level as British intelligence support, it seems that the same legal considerations applied here.[1838]

(e) France

Alongside its fighter planes, France also deployed surveillance planes that conducted ISR (intelligence, surveillance, and reconnaissance) missions over Iraq. Moreover, France provided refueling for the coalition's aircraft. Until September 2015, its operations were however limited to Iraqi airspace only. The question of whether France thereby eventually also directly supported the coalition operations in Syria cannot be answered with certainty here.[1839] But it is interesting that France, after some hiccups in the communication, assured that it did not view any legal obstacles to conducting airstrikes in Syria and noted that Daesh has to be obviously fought there, too.[1840] Responding to a question about whether France could thus *assist* ("soutenier") air strikes in Syria, the French Foreign Minister responded: "nous verrons si la question est soulevée mais nos analystes juridiques nous disent qu'il n'y a pas d'empêchement."[1841]

1838 In fact, the UK prime minister stated that it "firmly supported" the French strikes, Leigh Thomas, 'French jets strike Islamic State as Britain offers help', *Reuters* (23 November 2015), https://uk.reuters.com/article/uk-france-shooting-abaaoud/french-jets-strike-islamic-state-as-britain-offers-help-idUKKBN0TC0LZ20151123.

1839 Apart from indirect support through freeing capacities elsewhere (a contribution that was not mentioned). Indication that France was supporting the coalition as well: Opération Chammal: Nouvelle mission de reconnaissance en Irak, (23 September 2014), https://www.defense.gouv.fr/operations/chammal/breves/operation-chammal-nouvelle-mission-de-reconnaissance-en-irak; Chammal: 1000e mission aérienne, (21 July 2015), https://www.defense.gouv.fr/operations/chammal/breves/chammal-1000e-mission-aerienne; Déclaration de M. François Hollande, Président de la République, sur la lutte contre le groupe terroriste Daech en Irak et en Syrie et sur la situation en Libye, (31 March 2016), https://www.elysee.fr/francois-hollande/2016/03/31/declaration-de-m-francois-hollande-president-de-la-republique-sur-la-lutte-contre-le-groupe-terroriste-daech-en-irak-et-en-syrie-et-sur-la-situation-en-libye.

1840 Déclarations officielles de politique étrangère du 23 septembre 2014 (23 September 2014), https://basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=bafr2014-09-23.html#Chapitre11; Goodman, *Legal Reservations about Airstrikes in Syria* (2014). France rules out air strikes in Syria, Al Arabia News (21 September 2014); AP, 'France considers joining Syria Airstrikes', *WaPo* (25 September 2014).

1841 Déclarations officielles de politique étrangère du 23 septembre 2014 (23 September 2014).

On September 8, 2015, France reported to the Security Council in accordance with Article 51 UNC that it had been taking "*actions involving the participation of military aircraft* in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic."[1842] Thereby, as also indicated by the convoluted description of the action taken, France appeared to justify not only French airstrikes, which only commenced on September 27. It also embraced ISR missions beginning on September 7, 2015.[1843]

### (f) Netherlands

At the time of its deployment of F-16 fighter aircraft to Iraq, in September 2014, the Netherlands took the position that there was "no international agreement on an international legal basis for military deployment in Syria."[1844] As it was "not possible to say with certainty whether there is self-defense as a mandate under international law", the Dutch efforts, i.e. "military deployments", were limited to Iraq.[1845] Only in June 2015 did the Netherlands positively conclude that there was a sufficient basis to use violence against ISIS in Syria.[1846] In January 2016, it also saw the political and military necessity to lift the restrictions on the "deployment" of the F-16s, allowing them to operate in Eastern Syria.[1847] In February 2016, the Netherlands reported its "measures" under Article 51 UNC to the Security Council.[1848]

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1842 S/2015/745, emphasis added.

1843 John Irish, Elizabeth Pineau, 'France to begin Syria reconnaissance flights, mulls air strikes', *Reuters* (7 September 2015), https://www.reuters.com/article/us-mideast-crisis-france/france-to-begin-syria-reconnaissance-flights-mulls-air-strikes-idUSKCN0R70Y920150907. Those missions initially primarily sought to enable *French* strikes against ISIL in Syria. The coalition conceived it still as help, Brian W Everstine, 'France Begins ISR Flights Over Syria', *Air Force Magazine* (9 September 2015), https://www.airforcemag.com/france-begins-isr-flights-over-syria/. But this changed once the military strikes against ISIS in Syria intensified.

1844 Letter from the Ministers for Foreign Affairs, Defense and Foreign Trade and Development Cooperation, Parliamentary Paper 27925, no 506 (24 September 2014), https://zoek.officielebekendmakingen.nl/kst-27925-506.html.

1845 Ibid.

1846 Letter from the Ministers for Foreign Affairs, Defense and Foreign Trade and Development Cooperation, Parliamentary Paper 27925, no. 539 (16 June 2015), https://zoek.officielebekendmakingen.nl/kst-27925-539.html.

1847 Letter from the Ministers for Foreign Affairs, Defense and Foreign Trade and Development Cooperation, Parliamentary Paper 27925, 570 (29 January 2016).

1848 S/2016/132.

Still, as early as September 2014, the Netherlands placed a Dutch planning team at American CENTCOM "as a contribution to the strategic planning of the operation" against ISIS.[1849] The Netherlands did not specifically elaborate on the legal basis for this contribution. In this respect it is however interesting that, irrespective of the uncertainty about the invocation of self-defense, the Netherlands voiced understanding for the American air offensive over Syria. In particular, it took note of the American letter to the Security Council relying on self-defense and identified crucial (factual) questions in that respect.[1850]

The Netherlands hence believes that strategic general planning is assistance that requires, though not itself a basis in self-defense, legal explanation. The (legality of the) assisted act is what is relevant. Thereby, the Dutch practice indicates that it is sufficient if the assisted military operations *are not unlawful*. In particular, the legal basis of the assisted use of force need not be *internationally agreed upon*. Neither is the assisting State required to conclude that there is a sufficient basis to resort to force. Instead, it suffices that the assisted actor provides a legal basis that is cursorily assessed by the assisting State. Uncertainty as to the legal basis for the use of force is not a legal obstacle to contributing to that use of force. Notably, the Netherlands draws a line between assistance and the use of force. As such, these observations are limited to strategic general planning (assistance). They do not apply to "military deployment" or "measures" which in this case referred to airstrikes, but which were sufficiently open to also include other forms of (more direct) assistance to military operations. For the Netherlands, those require distinct justification under Article 51 UNC.

### (g) Turkey

Turkey's non-combat contributions, most notably its military bases and airspace, were crucial for the coalition fighting against ISIS, not least be-

1849 Letter from the Ministers for Foreign Affairs, Defense and Foreign Trade and Development Cooperation, Parliamentary Paper 27925, no 506 (24 September 2014). Note that the Dutch government did not (at least expressly) limit their contribution to the planning of operations in Iraq. See also Letter from the Ministers for Foreign Affairs, Defense and Foreign Trade and Development Cooperation, Parliamentary Paper 27925, no. 539 (16 June 2015).

1850 Letter from the Ministers for Foreign Affairs, Defense and Foreign Trade and Development Cooperation, Parliamentary Paper 27925, no 506 (24 September 2014).

cause the military base Incirlik is just fifteen flight minutes from the Syrian border.

From the outset, Turkey committed to the global coalition.[1851] President Erdogan promised support that could be "military or logistics".[1852] For a long time, Turkey only permitted the US to use the base for unarmed surveillance missions.[1853] It was however not until July 2015 that Turkey and the US struck a deal that allowed the use of its military base and airspace for launching airstrikes against ISIL.[1854]

Interestingly, this permission coincided with Turkey's decision to initiate "necessary and proportionate military actions against Daesh in Syria, including in coordination with individual members of the Global Coalition" on the basis of individual and collective self-defense.[1855] While this letter may embrace the Turkish territorial assistance, it is at least doubtful whether this was what Turkey sought and thought necessary to justify. Following the letter, Turkey also conducted air strikes against ISIL in Syria.

Moreover, there were compelling reasons to believe that Turkey denied the use for military strikes not because it sensed legal obstacles, but due to political considerations.[1856] Turkey was at least sympathetic to an argument of self-defense[1857] and conducted limited military operations in Syria even

1851 S/2015/1029 (28 December 2015).

1852 'U.S. and allies unleash airstrikes on ISIS in Syria', *Al Arabia* (23 September 2014), https://english.alarabiya.net/en/News/middle-east/2014/09/23/U-S-strikes-ISIS-targets-in-Syria-.html.

1853 Ceylan Yeginsu, 'Turkey Votes To Allow Operations Against ISIS', *NYT* (3 October 2014) A6; Claire Mills, *ISIS/Daesh: The Military Response in Iraq and Syria* (Briefing Paper, House of Commons, 06995, 8 March 2017) 33. Justine Drennan, 'Who Has Contributed What in the Coalition Against the Islamic State? ', *Foreign Policy* (12 November 2014), https://foreignpolicy.com/2014/11/12/who-has-contributed-what-in-the-coalition-against-the-islamic-state/.

1854 Daily Press Briefing - July 24, 2015, https://2009-2017.state.gov/r/pa/prs/dpb/2015/07/245262.htm; No: 212, 24 July 2015, Press Release Concerning Turkey-US Understanding On Countering DEASH, http://www.mfa.gov.tr/no_-212_-24-july-2015_-press-statement-concerning-turkey_us-understanding-on-countering-deash.en.mfa.

1855 S/2015/563.

1856 See for the background Kristina Daugirdas, Julian Davis Mortenson, 'Contemporary Practice of the United States Relating to International Law', 109(4) *AJIL* (2015) 885-888.

1857 In 2014 the Turkish parliament authorized cross-border military incursions against groups in Syria, including ISIS, going beyond mere retaliatory action. The Turkish government claimed that the authorization also allowed to open Turkish military bases to foreign troops. 'Turkish MPs back operations in Syria and Iraq', *Al Jazeera*

prior to July 24, 2015. But it is noteworthy that the measures were specific in scope.[1858] Moreover, it was not until July 24, 2015, when Turkey actually allowed the use of its territory for combat operations, that Turkey elaborated in detail on the right of self-defense to take comprehensive measures against ISIL in Syria *in connection with the coalition* at the international level.[1859]

In any event, Turkey's practice suggests that the prospective use of assistance is relevant for the permissibility of assistance. It indicates first that indirect assistance (here territorial assistance for surveillance activities that assist a use of force) does neither require a distinct justification by the assisting State, nor an express endorsement of legality of the assisted use of force at the international level, as long as it is not declared illegal. This observation may change for more proximate assistance directly related to the use of force (staging ground for airstrikes). In any event, it is considered permissible if the assisted use of force is considered legal and a justification is provided. Whether this is, however, necessary, the Turkish position does not answer without ambiguity.

### (h) Denmark

Denmark's contributions to the fight against ISIL varied over time. Initially, Danish contributions were limited to Iraqi territory only. This was true

(3 October 2014), https://www.aljazeera.com/news/middleeast/2014/10/turkish-lawmakers-back-action-against-isil-20141021714203697 07.html; 'Turkey's ISIL mandate includes 'military action abroad, opening bases to foreign troops', *Hurriyet Daily News* (30 September 2014), https://www.hurriyetdailynews.com/turkeys-isil-mandate-includes-military-action-abroad-opening-bases-to-foreign-troops-72388. For more details see Fionnuala Ní Aoláin, 'Authorizing Force: A Review of Turkish, Dutch and French Action', *Just Security* (16 October 2014). See also S/2016/163 (19 February 2016) referring to "rules of engagement vis à vis Syria, adopted on 26 June 2012, which are a concrete manifestation of our right to self defence, in line with Article 51 of the Charter of the United Nations".

1858 S/2015/127, e.g. the relocation of a memorial outpost. See S/2015/132 (25 February 2015) for Syria's response.

1859 Turkey voiced concern about the situation in Syria, e.g. S/2015/434 (15 June 2015), and reserved its right to self-defense. Note however that the Turkish parliament had already in 2014 authorized cross-border military incursions against groups in Syria, including ISIS. 'Turkish MPs back operations in Syria and Iraq', *Al Jazeera* (3 October 2014). See also S/2016/163 referring to "rules of engagement vis à vis Syria, adopted on 26 June 2012, which are a concrete manifestation of our right to self defence, in line with Article 51 of the Charter of the United Nations".

for the airstrikes Denmark conducted against ISIL, as well as for tactical transport aircraft. The latter only supported operations in Iraq. During this time, Denmark relied exclusively on the Iraqi request for assistance.[1860]

In September 2015, Denmark extended its "contribution to the international coalition's efforts also in Syria."[1861] Denmark deployed a mobile ground-based radar to Iraq from where it also operated. Unlike for previous contributions, it was now also tasked to support the coalition's military operations in eastern Syria. The government stressed, however, that the radar did not directly contribute to combat activities.[1862] At that time, the radar was the only Danish contribution to operations in Syria.[1863] The Danish government saw the international law basis for its contribution to be "the consent of Iraq and the right to collective self-defense of Iraq against ISIL pursuant to Article 51 UNC." The government even announced to report the "supplementary Danish contributions" to the Security Council in

1860 For a summary see: Danish Parliament approves military contribution to Iraq (27 August 2014), https://syrien.um.dk/en/news/newsdisplaypage/?newsid=032540 85-63a8-4df6-ab0f-d396b7c7ffba; Large parliamentary majority supports Danish military action against ISIL (2 October 2014), https://syrien.um.dk/en/news/new sdisplaypage/?newsid=553f88ae-22c7-44cb-b179-77b1c2808f45. For the legal basis see: Forslag til folketingsbeslutning om yderligere dansk militært bidrag til støtte for indsatsen mod ISIL (30 September 2014), https://www.ft.dk/samling/20131/bes lutningsforslag/B123/som_fremsat.htm.

1861 Forslag til folketingsbeslutning om udsendelse af et supplerende dansk militært bidrag til støtte for indsatsen mod ISIL (8 October 2015), https://www.ft.dk/samlin g/20151/beslutningsforslag/B8/som_fremsat.htm.

1862 The mobile ground-based radar provided a "picture of the airspace over Iraq and *eastern Syria* to be used in air surveillance and control during the Coalition's air operations against ISIL/Daesh." "Among other things, the aerial view will be used by the Coalition and the Danish operators to monitor and coordinate the total deployment of air forces etc., to keep the Coalition's missions separate from one another and from possible civilian air traffic, to guide the aircraft to tanker aircraft, and to steer them to the areas where they will perform their operational tasks. The aerial view from the Danish radar will not be used to identify ground targets." The Danish government wants to deploy a mobile ground-based radar to the Global Coalition to Counter ISIL/Da'esh, (24 September 2015), https://syrien.um.dk/en/ news/newsdisplaypage/?newsID=89272D3E-1B4A-4C01-BA1D-ED2D163B99F3. Forslag til folketingsbeslutning om udsendelse af et supplerende dansk militært bidrag til støtte for indsatsen mod ISIL, (8 October 2015), https://www.ft.dk/samli ng/20151/beslutningsforslag/B8/som_fremsat.htm.

1863 It should be noted however that the government already acknowledged its plan to contribute fighter aircraft in 2016, Ministry of Foreign Affairs, FOU B8 spørgsmål 1, (2 November 2015), https://www.ft.dk/samling/20151/beslutningsforslag/B8/sp m/1/svar/1274614/1562543/index.htm.

"accordance with Article 51 UNC."[1864] It did so in January 2016. The Danish government reported "measures against ISIL in exercise of the right of collective self-defense as part of the international efforts led by the United States of America". [1865] In June 2016, Denmark deployed fighter jets as well as a tactical transport plane whose mandate also included operating in Syria.[1866]

Denmark's position is interesting in that it sought to justify not only the act of assistance *per se*, but its "supportive contribution" to the use of force in Syria. For Denmark, assistance was clearly governed by the *ius contra bellum*. Notably, Denmark, therefore, invoked self-defense, and did not let it suffice to argue that the assisted use of force complied with international law. Whether it sought this necessary, however, cannot be conclusively answered – Denmark may also have prepared the legal stage to launch airstrikes in Syria – the timing of the justification is, however, a strong indicator that the Danish government thought it was necessary.

(2) States providing assistance only

Most coalition States did not engage in offensive operations in Syria. Instead, these States' contributions ranged from logistical support, such as aerial refueling or transportation, to reconnaissance and surveillance, and to mere membership in the coalition.[1867] States drew a clear line between forms of involvement (military use of force vs "assistance").[1868] Nonetheless, the latter was widely considered critical for the operation's success.[1869] Like

1864 Forslag til folketingsbeslutning om udsendelse af et supplerende dansk militært bidrag til støtte for indsatsen mod ISIL, (8 October 2015), https://www.ft.dk/samling/20151/beslutningsforslag/B8/som_fremsat.htm.

1865 S/2016/34.

1866 Denmark, https://theglobalcoalition.org/en/partner/denmark/.

1867 In 2016, the USA counted 19 States. White House, Office of the Press Secretary, FACT SHEET: Maintaining Momentum in The Fight against ISIL, (15 January 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/15/fact-sheet-maintaining-momentum-fight-against-isil. For capacity reasons not all States could be analyzed.

1868 Ibid; McInnis, *Coalition Contributions to Countering the Islamic State*

1869 By States engaging in combat operations, e.g. Terri Moon Cronk, Carter: Counter-ISIL Defense Ministers Unanimously support objectives, MOD News (11 February 2016), https://www.defense.gov/Explore/News/Article/Article/655155/carter-counter-isil-defense-ministers-unanimously-support-objectives/, as well as by assisting States themselves: see e.g. Germany below.

most States that eventually resorted to force, the assisting States did not claim to operate in a legal vacuum. Yet, States' positions varied.

### (a) Iraq

Iraq, (especially from a legal standpoint) stood at the center of the conflict. Iraq argued that it was necessary to fight ISIS in Syria. But Iraq did not deploy its own armed forces to fight against ISIS *in Syria*. Still, Iraq contributed to the airstrikes in an essential manner. Various States used Iraqi territory as staging grounds for their contributions, including airstrikes and assisting flights.[1870] Moreover, Iraq opened its airspace for other coalition members.[1871]

Interestingly, Iraq did not provide a distinct justification for its contribution to fighting ISIS. Iraq's letters to the Security Council neither invoked self-defense nor referred to self-defense language. It only described the situation and identified Syria as the origin of ISIL attacks.[1872] In that context, Iraq requested "the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent."[1873] *Corten* is hence correct in noting that the *express* request for self-defense as called for by the ICJ's Nicaragua jurisprudence was missing.[1874] As such, Iraq did not take a positive, unambiguous position on the legal basis for the strikes against ISIL in Syria.[1875]

At the same time, Iraq, if only implicitly, saw operations in Syria to be in accordance with international law. Putting its letters into context, Iraq may be legitimately understood to also call for strikes against ISIS in Syria.[1876]

1870 For example the American, Canadian and Italian armed forces were based in and operating from Iraq.

1871 Justine Drennan, 'Who Has Contributed What in the Coalition Against the Islamic State?', *Foreign Policy* (12 November 2014).

1872 S/2014/440.

1873 S/2014/691.

1874 Corten, *LJIL* (2016) 784-785; Corten, *Operations against ISIL*, 895. See also Gray, *Use of Force (2018)*, 190-191.

1875 See also Corten, *LJIL* (2016) 785. Iraq's wish to remain ambiguous may also be reflected in the fact that Iraq conspicuously omitted mentioning Syria in its request.

1876 First, the letter may be read in conjunction with Iraq's first letter, S/2014/440. Second, Iraq essentially calls for effective defense against ISIS. Iraq leaves the scope of its "express consent" undefined with respect to the specific location of the necessary targets (i.e. ISIL sites and military strongholds). Third, this is even more

To read its statement as anything other than an agreement with the strikes would be close to absurd, if not contradictory. This is even more so as Iraq claimed to have requested US-led assistance "*in accordance with* international law and the relevant bilateral and multilateral agreements".[1877] In particular, Iraq referred to the Strategic Framework Agreement that prohibits the US to use Iraqi territory for "attacks against other countries".[1878] It is hence fair to assume that Iraq did not see the strikes in Syria to violate this condition. Yet Iraq's cautious and only little explicit approach is striking.

(b) Germany

The German contribution to fighting ISIS has been widely and rightly assessed through the lens of *ius contra bellum*.[1879] A fact that was not sufficiently taken into account in the debate thus far was that – despite engaging in a full conversation (inter-institutionally, nationally, and internationally) about the permissibility of a use of force under self-defense and the German position in that respect – Germany did not engage in hostilities, but only provided assistance. The German government's position was however nuanced in that respect.

striking as Iraq "welcome[s] the commitment by 26 States" to provide military support to Iraqi operations against ISIS that were confined to Iraqi territory, S/2014/691. Still, Iraq seems not to believe that these operations taking place in Iraq were sufficient when it adds a wider formulated request. Fourth, Iraq bases its request i.a. on the fact that "ISIL has established a safe haven outside Iraq's borders." Fifth, States widely understand Iraq to have called for measures of collective self-defense *in Syria*, see e.g. USA S/2014/695; Canada S/2015/221; Australia S/2015/693; Denmark S/2016/34; France S/2015/745 and S/PV.7565, 2; UK S/2014/851, S/2015/688, S/2015/928. For the same conclusion Arimatsu, Schmitt, *ColumJTransnatlLBul* (2014) 23; Gray, *Use of Force (2018)*, 190-191; Marc Weller, 'Striking ISIL: Aspects of the Law on the Use of Force', *ASIL Insights* (11 March 2015).

1877 S/2014/691, emphasis added.

1878 Section I.4 Strategic Framework Agreement for a Relationship of Friendship and Cooperation, 2008. On this see above II.B. and Abu Kamal Raid 2008.

1879 Mehrdad Payandeh, Heiko Sauer, 'Die Beteiligung der Bundeswehr am Antiterroreinsatz in Syrien. Völker- und verfassungsrechtliche Rahmenbedingungen', 49(2) *ZRP* (2016); Helmut Philipp Aust, Mehrdad Payandeh, 'Praxis und Protest im Völkerrecht', 73(13) *JZ* (2018) 639-640; Helmut Aust, Mehrdad Payandeh, 'German Practice with Regard to the Use of Force in Syria', 61 *GYIL* (2018).

Germany assisted the global coalition in Iraq by equipping and training Kurdish Peshmerga forces.[1880] Germany decided to support the coalition's efforts *in Syria* only in November 2015 when France appealed for support following the Paris attacks.

Germany deployed six Tornado reconnaissance aircraft, a naval frigate as part of the French *Charles de Gaulle* aircraft carrier group, refueling planes, and up to 1200 military personnel to be used as coalition staff.[1881] The German reconnaissance flights and refueling operations took place in both Iraq *and Syria*.[1882] The German armed forces' actions hence remained limited to providing *assistance* to the coalition's military operations. The Federal Government consistently referred to German "assistance" as being distinct from the force used by other members of the coalition.[1883] It was eager to stress that German armed forces were not engaged in hostilities or combat operations.[1884] Instead, they provided logistical and intelligence support to countries conducting the air strikes. While Germany was not involved in targeting selection or planning, the intelligence was used in lethal operations.[1885] Moreover, 650 German military personnel were deployed to Mali to unburden France.[1886] In 2020, Germany expressly also authorized "air transport for the anti-ISIS coalition, international organizations, allies and partners."[1887]

Germany sent a letter to the UN Security Council – whereby it sought to comply with the reporting obligation under Article 51 – indicating that "in exercise of the right of collective self-defence" it had "initiated military measures".[1888]

1880 It relied on the Iraqi invitation. BT Drs 18/2568 (19 September 2014), 6; BT Drs 18/3561 (17 December 2014).
1881 BT Drs 18/6866 (1 December 2015), 2-3, 4; BT Drs 18/9960 (13 October 2016); BT Drs 19/23 (25 October 2017); BT Drs 19/1093 (7 March 2018); BT Drs 19/7200 (29 January 2019), 72; BT Drs 19/13290 (18 September 2019); BT Drs 19/17790 (11 March 2020).
1882 BT Drs 18/7947 (21 March 2016), question 2.
1883 BT Drs 18/6866 (1 December 2015).
1884 "German armed forces do not participate in the international coalition's airstrikes themselves", BT Drs 19/13290 (18 September 2019), 29.
1885 BT Drs 18/11885 (7 April 2017), 55 question 73.
1886 BT Drs 18/6866 (1 December 2015), 6.
1887 BT Drs 19/17790 (11 March 2020).
1888 S/2015/946 (10 December 2015).

Germany set out in detail the existence of a situation allowing for self-defense.[1889] Against that background, Germany held that "States that have been subject to armed attacks by ISIL originating in [...] Syrian territory" (it mentioned Iraq, France and other States) were "justified to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic."[1890]

With respect to its own "military measures", the letter likewise reflected Germany's distinction between assistance and combat operations. Germany reported it "will now *support* the military measures of those States that have been subject to attacks by ISIL."[1891] Notably, in doing so, Germany stated it was "*exercising* the right of collective self-defence."[1892]

The German argument is remarkable as it is two-fold. Germany makes an argument of self-defense that applies to two acts. It not only held that it was supporting *lawful* military measures; thus, assessing the intervening States' actions (airstrikes). But also, it invoked collective self-defense *for its own assistance short of force*. The argument that the situation in Iraq and Syria justifies measures of self-defense hence serves two functions: it substantiates the legality of the assisted airstrikes *and* of German assistance.[1893]

With the invocation of the justification of collective self-defense for its "support to military measures," Germany does not unambiguously answer *what* exactly (i.e., a violation of what norm) is justified. It merely suggests that, in Germany's view, a justification is *required* and, in the present case,

1889 In fact, Germany diligently updated and adjusted its legal argument justifying the continuing exercise of self-defense despite territorial gains against ISIS. See on this in detail: Nußberger, „*Sustainable Self-Defense*"*?* (2019); Benjamin Nußberger, 'The Federal Government continues to justify the fight against ISIL in Syria on grounds of collective self-defence', *German Practice in International Law* (21 October 2019).

1890 S/2015/946.

1891 Ibid, emphasis added. Note in particular the difference to States conducting airstrikes.

1892 Ibid, emphasis added. The German Constitutional Court likewise understood the German Government to rely on self-defense itself, BVerfG 2 BvE 2/16 (17 September 2019). See a for a commentary Clauß Kreß, Benjamin Nußberger, 'The German Constitutional Court on the Right of Self-defense against ISIS in Syria', *Just Security* (16 October 2019).

1893 This double argument is also reflected in the German Government's position advanced in the German parliament, where the Government primarily claims that the military measures taken by the assisted States can be based on self-defense, but then adds that the German armed forces' assistance is based on self-defense as well. BT Drs 18/6866 (1 December 2015); BT Drs 19/22207 (9 September 2020). See also Nußberger, *Germany's fight against ISIL* (2019).

discharged. Collective self-defense can justify any infringement of international law. To take the high hurdle of self-defense is however only *necessary* for acts qualifying as "use of force". At first sight Germany behaves as if it views its conduct to be governed by the prohibition to use force.

It is true that some German acts of assistance, for example, the presence of military planes in Syrian airspace without Syrian consent, constitutes a *prima facie* violation of Syria's sovereignty requiring (some) justification. But, first, it was not as such prohibited as *use of force* requiring an argument of self-defense. Second, this was not true for all acts of assistance.[1894] Moreover, Germany – although well aware that overflight required justification[1895] – more generally invoked the right to self-defense for its "*support* of [*lawful*] military measures" by other States. This suggests that Germany's invocation of collective self-defense sought to justify not (only) the *act* of providing assistance (flying in Syrian territory), but (also) the *contribution* to the supported use of force.

Germany may implicitly have qualified this contribution as indirect "use of force" prohibited under the prohibition to use force that requires independent justification. This may explain why Germany made the double argument and did not let it suffice to argue that the assisted military force was lawful. In cases where assistance qualified as "indirect use of force", the assisting State needed to not only invoke an independent justification, but also substantiate the requirements of self-defense. While the prohibition to indirectly use force was still accessory in nature in the sense that it required the assisted use of force to actually take place, the accessory nature did not extend to the *legality* of the assisted use of force. If the lawfulness of the assisted act rendered assistance lawful, it would have sufficed for Germany to merely argue that the assisted States were justified to resort to self-defense. It would not have been necessary to invoke self-defense itself.[1896]

1894 For example, the NATO AWACS flights in which Germany decided to participate in 2016 took place only in NATO or international airspace. BT Drs 18/9960 (13 October 2016), 4.

1895 Germany acknowledges that when stressing that all neighboring states have authorized overflight. BT Drs 19/15243 (15 November 2019), question 9.

1896 Albeit it is acknowledged that the fact that Germany was *exercising* the right to self-defense in the present case, and actively joined the coalition's justification may strengthen the impact of coalition's interpretation of the law of self-defense (in contrast to "mere" endorsement of the justification).

This conclusion is not without ambiguity. Germany making a double argument might just be playing it "safe" by substantiating the highest standard of justification. Thereby, Germany may have engaged in legal diplomacy, seeking to strengthen legally the coalition's argument of self-defense and politically giving the impression to make a contribution equal to States conducting airstrikes. But first, when put into context with general practice[1897] and with German practice in other incidents, and second, given the nuances in the German argument, it does not seem unreasonable to conclude that the German argument reflects that interstate assistance may qualify as indirect use of force.

On that note, it is interesting to see what features defined Germany's assistance that may have led it to qualify as interstate indirect "use of force."

First, Germany provided extensive assistance, with various distinct contributions. Germany did not treat them distinctly but justified them comprehensively. Second, Germany and the assisted States alike widely acknowledged that the German contribution was substantive, essential, and significant.[1898] Third, Germany's assistance was closely related to the combat operations, albeit some features (like unburdening France in Mali) were more remote. Fourth, Germany was well aware of risks of assistance, and thus sought to clearly define its assistance. For example, with respect to the sharing of intelligence, Germany instituted a strict procedure.[1899] German aircraft coming from Turkey collected data in Iraq and Syria. This data was confined to mandate related data only. Particularly, Germany stressed that no intelligence was gathered on Kurdish positions. On that basis, reconnaissance assignments were only accepted if a "connection to fighting ISIS" could be drawn.[1900] Germany installed a national "red card holder" under German command in the headquarters in Qatar. The thus collected information was shared with the entire global coalition, yet only

1897 See in particular the UK above, which does not exercise self-defense itself.

1898 BT Drs 18/6866 (1 December 2015), 6 "direct participation". BT Drs 19/13290 (18 September 2019), 7 "special importance", 17, 25 "essential aspect", 28 "central element". BT Drs 19/22207 (9 September 2020), 11. Fight against terrorism/Germany's commitments in Syria and Iraq, Communiqué issued by the Presidency of the Republic, (26 November 2015), https://franceintheus.org/spip.php?article7224: "very significant contribution".

1899 BT Drs 18/7947 (21 March 2016), questions 5, 10- 29. BT Drs 18/12344 (16 May 2017) question 4. BT Drs 18/7265 (14 January 2016) question 16.

1900 BT Drs 18/7947 (21 March 2016), question 26.

after a German releasing officer sighted the raw material.[1901] The assessment included an inquiry whether the data could be used in conformity with the mandate.[1902] In sharing the information, Germany conditioned its use "for Counter-DAESH operations only". Germany was aware of potential uses beyond the official label. But Germany did neither know how many sorties against ISIS fighters were flown, nor to what extent the shared information factored into the decisions to conduct specific air strikes against specific targets.[1903] On that note, Germany assumed that the partners, in trusting cooperation, comply with the conditions for sharing the information.[1904] The procedure itself, however, sought to prevent abuse. Notably, the purpose of those mechanisms was expressly to ensure compliance with the mission's mandate that was diligently justified under international law. This allows for the argument that, at least indirectly, (and despite the fact that the government seeks to ensure compliance with the *political* mandate), Germany also circumscribed its participation to ensure compliance with international law.

(c) Italy

Italy did not conduct airstrikes.[1905] Instead, similar to Germany, Italy contributed reconnaissance aircraft, Predator surveillance drones, and tankers to the coalition in Iraq along with transportation helicopters. The latter were in charge of personnel transportation in Iraqi Kurdistan. The former carried out ISR and aerial refueling activities "in favor of coalition as-

1901 Since 9 October 2019, in light of Turkey's military operations against Kurdish fighters in Syria, Germany limited recipient States, excluding Turkey from the pool, BT Drs 19/14492 (25 October 2019), question 65.

1902 BT Drs 18/151 (16 January 2016), 14877.

1903 BT Drs 18/7947 (21 March 2016), question 5; BT Drs 18/12344 (16 May 2017) question 10.

1904 E.g. with respect to Turkish attacks against Kurds, Germany claims that its data is used only as required by the mandate. BT Drs 18/151 (27 January 2016), 14849-14850. See also BT Drs 18/1962 (12 June 2016) question 2 "no reason to assume that the information provided is used for other purposes than fighting ISIS."

1905 'US launches anti-ISIS raids in Syria, Italy to provide Support', *ANSA* (23 September 2014), https://www.ansa.it/english/news/politics/2014/09/23/italy-to-send-isis-trainers-refuelling_6b884db4-7033-40be-8a90-1397c39c25e7.html.

sets".[1906] The reconnaissance activities did neither involve the selection nor the "illumination" of targets, but aimed to discover and identify armed formations.[1907] Italian armed forces were mandated to operate in Iraq, Kuwait and Jordan only. It was not specified, however, if this excluded Italian support to the US led-campaign in Syria as well, as was reported by some.[1908]

Unlike Germany, Italy did not send a letter to the Security Council. Italy viewed Operation Inherent Resolve *in general* to comply with international law, stating that "*[a]rmed Forces of the countries that have joined the Coalition* operate in compliance with Article 51 of the UN Charter, as well as Resolutions 2170 (15 August 2014) and 2178 (27 September 2014), on the basis of a request for assistance submitted to the Chairman of the Security Council by the Iraqi Representative to the UN on 20 September 2014."[1909] In the domestic setting, however, Italy cited – without further explanation – the Iraqi invitation *and* Article 51 UN Charter as legal basis for the deployment of troops.[1910] Italy did not answer why it invoked Article 51 UNC. As the Italian conduct did not *in itself prima facie* violate Syrian sov-

1906 How Italy supports The Global Coalition Against Daesh, (21 June 2019), https://theglobalcoalition.org/en/how-italy-supports-the-global-coalition-against-daesh/; David Cenciotti, 'This is how Italian Tornado jets and Predator drones will contribute to the war on ISIS', *Aviationist* (17 November 2014), https://theaviationist.com/2014/11/17/italy-joins-fight-on-isis-tornado/; Sebastian Payne, 'What the 60-plus members of the anti-Islamic State coalition are doing', *WaPo*, (25 September 2014), www.washingtonpost.com/news/checkpoint/wp/2014/09/25/what-the-60-members-of-the-anti-islamic-state-coalition-are-doing/; Alessio Gracis, 'The Minister of Foreign Affairs, Mr Paolo Gentiloni Silveri, on the International Fight against Terrorism in the aftermath of the Terrorist Attacks against the Satirical Magazine Charlie Hebdo', *Italy's Diplomatic and Parliamentary Practice on International Law* (12 January 2015); Contributo nazionale, https://www.difesa.it/OperazioniMilitari/op_intern_corso/Prima_Parthica/Pagine/contributo_nazionale.aspx?fbclid=IwAR2wyM7SC2cQtgVerPLASm172XaNTwp_GO_tMpFIvCNulodi65Rb1VbQS9w. See also S/PV.7271, 27.

1907 Speech by Minister Pinotti to the Joint and Joint Commissions, Foreign and Defense, (20 November 2014), https://www.difesa.it/Il_Ministro/Archivio_Audizioni/Pagine/InterventoPinottiCommissioniEsterieDifesa.aspx.

1908 'US launches anti-ISIS raids in Syria, Italy to provide Support', *ANSA* (23 September 2014).

1909 How Italy supports the Global Coalition Against Daesh, (21 June 2019); Operazione Prima Parthica, https://www.difesa.it/OperazioniMilitari/op_intern_corso/Prima_Parthica/Pagine/default.aspx. Emphasis added.

1910 Camera dei Deputati, Senato del Repubblica, XVIII Legislatura — Disegni Di Legge E Relazioni, Doc XXVI N. 2, 194-195, https://www.camera.it/_dati/leg18/lavori/documentiparlamentari/indiceetesti/026/002/00000013.pdf.

ereignty, this may suggest that Italy thereby sought to justify its (possible) contribution towards airstrikes *in Syria*.

### (d) Poland

Since July 2016, Poland was conducting reconnaissance missions.[1911] While Polish armed forces were mandated to operate in Iraq, Kuwait and Jordan, Poland described them more generally to be conducted "in support of Inherent Resolve operations".[1912] Notably the US welcomed that Poland conducted reconnaissance missions over Iraq *and Syria*.[1913]

Poland did not send a letter to the Security Council. Poland did not claim to *exercise* (collective) self-defense. Instead, it more generally stated that "[t]he Inherent Resolve operation is a military operation conducted within the scope of the Global Coalition to fight the so-called Islamic State, on the basis of article 51 of the UN Charter, as well as at the request of the Government of the Republic of Iraq."[1914]

### (e) Spain

Spain neither sent combat troops nor participated in combat operations. But it authorized the use of two bases, as well as its airspace and territorial

1911 The President of Poland has Decided to Use Polish Military Contingents (PKW) in the State of Kuwait and Republic of Iraq, (18 June 2016), http://en.mon.gov.pl/?arch=/news/article/the-president-of-poland-has-decided-to-use-polish-military-contingents-pkw-in-the-state-of-kuwait-and-republic-of-iraq-q2016-06-21/pdf/; Polish FM attends meeting of the Global Coalition to Counter ISIL, (24 March 2017), https://poland.pl/politics/foreign-affairs/polish-fm-attends-meeting-global-coalition-counter-isil/; Foreign minister confirms Polish readiness to back anti-IS coalition, PAP dispatch from 19 May 2016, https://www.msz.gov.pl/en//news/they_wrote_about_us/foreign_minister_confirms_polish_readiness_to_back_anti_is_coalition__pap_dispatch_from_20_may_2016.

1912 E.g. Postanowienie Prezydenta Rzeczypospolitej Polskiej (27 December 2019), https://www.wojsko-polskie.pl/u/b0/c4/b0c44c88-602d-4053-bad9-7fl10d4aea49/irak.pdf.

1913 Carter Lauds Poland's Expansion, New Zealand's Extension of Counter-ISIL Roles (21 June 2016), https://www.defense.gov/Explore/News/Article/Article/805642/carter-lauds-polands-expansion-new-zealands-extension-of-counter-isil-roles/.

1914 The President of Poland has Decided to Use Polish Military Contingents (PKW) in the State of Kuwait and Republic of Iraq, (18 June 2016).

sea, for coalition forces.[1915] Moreover, it indicated willingness to take up further logistical support, like transportation or air support capabilities.[1916] Over time, Spain deployed helicopters to transport coalition troops to Iraq.[1917] Moreover, a Spanish ISR unit operated in Western Iraq to support Spanish, coalition, and Iraqi forces.[1918] But Spain made clear that it would not participate in any operations in Syria.[1919] This limitation as well as the rather remote and indirect assistance, may also reflect Spain's initial substantial legal doubts regarding the permissibility of the use of force in Syria, which only seemed to have cleared in light of the terrorist attacks in Paris.[1920]

### (f) Greece

In particular, the Greek military base at Souda Bay was used in the war against ISIS. Greece left little doubt that the legality of the thereby supported operation played an important role in granting concession: "They will have to say what it is they want, how they justify it, and what is being offered in exchange."[1921]

1915 'Miguel González, Spain will send about 300 soldiers to Iraq to instruct its Army', *El País* (9 October 2014), https://elpais.com/politica/2014/10/09/actualidad/1412867011_131222.html.

1916 Ibid.

1917 Task Force Toro, https://emad.defensa.gob.es/en/operaciones/10-Coalicion-internacional-Operacion-IR-IRAQ/; Babak Taghvaee, An-22 in the war on terror, Air International, (January 2019), http://dl.booktolearn.com/emagazines2/aviation/AIR_International_January_2019_949e.pdf, 21.

1918 https://emad.defensa.gob.es/en/operaciones/10-Coalicion-internacional-Operacion-IR-IRAQ/.

1919 Mills, *ISIS/Daesh*, 38. To what extent e.g. the bases were also used for logistics for strikes in Syria could not be answered with certainty.

1920 de Nanclares Pérez, *SpanYIL* (2015) 323-325, 328 who was writing however in personal capacity. See also Angel José Rodrigo, 'Between Traditional Rules and New practices: Spanish practice with Regard the Use of Armed Forces (1990-2015)', 19 *SpanYIL* (2015) 335.

1921 Foreign Minister N. Kotzias' interview with Alexis Papahelas, on SKAI TV's "Istories" (Tuesday, 21 February 2017), (22 February 2017), https://www.mfa.gr/en/current-affairs/top-story/foreign-minister-kotzias-interview-with-alexis-papahelas-on-skai-tvs-istories-tuesday-21-february-2017--part-1-.html.

(g) Sweden

Reacting to France's request under Article 42(7) EUT, Sweden refused to send fighter jets to the Levant. The "main" reason for this was that "so far this is a legal gray area. That could change if there is a very clear UN mandate. But so far it hasn't been established by international law."[1922] Still, Sweden assisted with several support measures, all of which it saw as being "in line with the UN Charter":[1923] In addition to the continuation of its military training mission in Iraq, it sold the requested ammunition to France. Furthermore, Sweden placed strategic airlift capability at France's disposal, and contributed to French-led missions in Mali.[1924]

Sweden thus drew a line between the legal standards allowing assistance and (direct) use of force. It did not see itself entitled to engage in the latter. The former Sweden thought however to be permissible. That the assisted use of force is in a "gray area" sufficed for Sweden to provide assistance "in line with the UN Charter". Sweden may not have positively endorsed a right to intervene in Syria. But notably, Sweden also did not deny that France had a right to use force in Syria under self-defense. Sweden thought this sufficed, however, only for assistance that was indirectly and remotely contributing to the use of force.

Hence, given these conditions, Sweden assumed that its contribution did not violate the UN Charter, and would require a distinct justification. This again suggests that Sweden contended that its contributions remained

1922 Ilgın Karlıdağ, Sweden to not send fighter jets to France in Daesh fight, (17 December 2015), https://www.aa.com.tr/en/todays-headlines/sweden-to-not-send-fighter-jets-to-france-in-daesh-fight/492303. The government did not see this to have changed through S/RES/2249 (20 November 2015), Debate in parliament 26 January 2016, Riksdagen protokoll 2015/16:58, https://data.riksdagen.se/fil/219B0839-BCA5-433F-8E55-6B7594EDA63F.

1923 The Government presented Sweden's support to France, (16 December 2015), https://www.government.se/articles/2015/12/the-government-presented-swedens-support-to-france/; Speech by Margot Wallström at the University of Helsinki, (27 November 2015), https://www.government.se/speeches/2015/11/speech-by-margot-wallstrom-at-university-of-helsinki/.

1924 The Government presented Sweden's support to France, (16 December 2015), https://www.government.se/articles/2015/12/the-government-presented-swedens-support-to-france/. The deployment itself was likewise considered to comply with international law, Speech by Minister for Foreign Affairs Margot Wallström at the Folk och Försvar Annual National Conference, (13 January 2016), https://www.government.se/speeches/2016/01/speech-by-minister-for-foreign-affairs-margot-wallstrom-at-at-the-folk-och-forsvar-annual-national-conference/.

below the level of a prohibited use of force, but instead fall under an accessory prohibition of assistance.

### (h) European States "unburdening France"

In November 2015, in reaction to the Paris terror attacks, France invoked Article 42(7) EUT. It called for support for its military operations in the Levant. Further, it requested increased contributions to military operations in Africa. Despite the fact that support was provided under Article 42(7) EUT, it was negotiated and provided bilaterally. The EU only had a coordinating and facilitating role.[1925]

All 28 European States granted France's request. The contributions varied widely. Apart from the European contributions discussed above, several European States decided to assist France in the African theaters in order to – as requested by France – relieve French forces and free capacity for increased operations against ISIL.[1926] Given that the assistance was provided under Article 42(7) EUT, and given the French exercise of *individual* self-defense in Syria in response to the Paris attack,[1927] the support in Africa was related to unburdening the military operations in the Levant. It was hence acknowledged as contribution to fighting ISIS in the Levant. None of these States sent a letter to the Security Council or invoked a distinct justification. As Article 42(7) EUT is arguably limited to self-defense in accordance with Article 51 UNC, it may be assumed that the assisting States saw *their supportive action* to comply with international law. But this does not mean that States necessarily believe the thus supported French military action to be in accordance with international law.[1928] Despite the acknowledged connection to the use of force in the Levant, States did not see it necessary to make a statement concerning the use of force's legality.

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1925 Carlos Espaliú Berdud, 'The EU Response to the Paris Terrorist Attacks and the Reshaping of the Rights to Self-Defence in International Law', 20 *SpanYIL* (2016) 184.

1926 This were 9 States, according to Suzana Elena Anghel, Carmen-Cristina Cirlig, *Activation of Article 42(7) TEU France's request for assistance and Member States' responses* (European Council Briefing, European Parliamentary Research Service, PE 581.408, July 2016) There were however also States that did not stop there, see for the discussion of some above.

1927 S/PV.7565 (20 November 2015), 2.

1928 O'Connor, *JUFIL* (2016) 91.

(i) Singapore

Singapore Armed Forces were also involved in the coalition. Singapore contributed staff members (planning and liaison officers, Intelligence Fusion Officers, Imagery Analysis Team), as well as tanker aircraft that refuel coalition planes operating in Iraq and Syria.[1929] Singapore did not send a letter to the Security Council nor did the government take position on the legal basis in parliamentary debate in Singapore.[1930]

(j) Coalition States without making contributions: the example of Panama

Several States joined the coalition but did not make specific contributions to the use of force.[1931] Still, these States subscribe to and are conceived as supporters of the military activities as well. For example, Panama reflects the behavior of such States well. It joined the coalition in 2015 despite having no army.[1932] Panama focused on stopping ISIS' funding and financing. It stressed that it did not make any contribution to military activities. Still, by joining the coalition, Panama sought to endorse the military ends, too. While Panama underlined that it did not compromise its principles of being a peace-loving nation, it did neither provide a specific legal justification nor sought it necessary to take position on the permissibility of the coalition's air strikes.[1933] Legal considerations seemed to play no role for such "remote" assistance to a use of force.

1929 Fact Sheet: SAF's Participation in the Defeat-ISIS Coalition, (2 March 2018), https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2018/march/02mar18_fs2; Remarks by Singapore Minister for Defence Dr Ng Eng Hen at the Fourth Reagan National Defense Forum Panel "A View of US National Defense from Friends and Allies", (4 December 2016), https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2016/december/04dec16_speech.

1930 Singapore Parliament Deb 3 November 2014, Hansard (Singapore) vol 92.

1931 Sebastian Payne, 'What the 60-plus members of the anti-Islamic State coalition are doing', *WaPo*, (25 September 2014).

1932 Elisa Vásquez, 'Panama Joins Coalition against ISIS Despite Having No Army', *Panam Post* (9 February 2015), https://panampost.com/elisa-vasquez/2015/02/09/panama-joins-coalition-against-isis-despite-having-no-army/.

1933 For details see Illueca, *UMiamiInterAmLRev* (2017) 15-18.

(3) Protest against Assistance?

While several States voiced legal concerns about the military operations against ISIS extending into Syria,[1934] legal criticism relating to acts of assistance, even when substantial, remained rare. Syria repeatedly, but rather generally, protested against the US and "its ally States" or the coalition in general.[1935] Russia expressly denounced Germany's actions in Syria as illegitimate.[1936] As a general rule, however, the Syrian protest against British military involvement illustrated the picture of opposition well: despite the UK openly acknowledging and justifying assistance to the coalition's airstrikes in Syria, primarily combat activities triggered legal opposition.[1937]

c) Assisting assistance to Syrian opposition forces

For several States, in particular the USA,[1938] the UK,[1939] or France[1940], the provision of military assistance to the Syrian opposition, i.e., the Kur-

1934 At least since September 2015, Bannelier-Christakis, *LJIL* (2016) 770-773. For an overview: Corten, *Operations against ISIL*, 884-885.

1935 E.g. S/2015/851 (16 November 2015): USA "and its alliance"; S/2015/933 (8 December 2015): "blatant aggression by coalition forces"; S/2015/1043 (30 December 2015): "ally States"; S/2016/820 (30 September 2016): coalition; S/2019/15 (8 January 2019): "illegal so-called international coalition"

1936 'Lavrov dismisses claims Russia plays policeman's role in Middle East', *TASS Russian News Agency* (12 November 2019), https://tass.com/politics/1088268.

1937 S/2015/690 (9 September 2015); S/2015/1048 (4 January 2016). Syria did not react to the UK's letter in 2014. It should be noted however that the British 2014 letter fell in a time during which Syria was however remarkably silent on the US-led strikes against ISIS, Bannelier-Christakis, *LJIL* (2016) 770-773. See also S/2015/719 (21 September 2015); S/2015/727 (22 September 2015).

1938 Statement by the President on ISIL (10 September 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1; Combined Joint Task Force Operation Inherent Resolve Fact Sheet, https://www.inherentresolve.mil/Portals/14/Documents/Mission/20170717-%20Updated%20Mission%20Statement%20Fact%20Sheet.pdf?ver=2017-07-17-093803-770; Statement on the U.S. Military Strategy in the Middle East and the Counter-ISIL Campaign before the Senate Armed Services Committee, https://www.defense.gov/Newsroom/Speeches/Speech/Article/626037/statement-on-the-us-military-strategy-in-the-middle-east-and-the-counter-isil-c/.

1939 PM speech at the UN General Assembly 2014, (2 September 2014), https://www.gov.uk/government/speeches/pm-speech-at-the-un-general-assembly-2014; Hartmann, Shah, Warbrick, *BYIL* (2016) 621, 626.

1940 Ferro, Verlinden, *CJIL* (2018) 26.

dish-led 'Syrian Democratic Forces' and the 'Syrian Arab Coalition' was an essential pillar in fighting ISIS.[1941] For example, the USA instituted a (rather unsuccessful) "train and equip" program that was soon replaced by an "equip and enable" program.[1942] Moreover, US Special Forces on Syrian ground advised and logistically assisted local forces.[1943] To what extent this behavior may be legitimately qualified as "indirect use of force" against Syria requiring justification shall not be discussed here.[1944]

More interesting for the present purpose is that these efforts likewise required and received assistance. Two forms of engagement shall be assessed here:

First, some States allowed the establishing and training of rebel groups on their territory. For example, Jordan or Saudi-Arabia agreed to host US efforts to train and equip Syrian opposition forces.[1945] Once again, these

1941 These programs were distinct from previous assistance to the Syrian opposition that sought to fight the Assad-regime. See on the relationship ibid 23-24.

1942 Missy Ryan, ' US faces challenges in building up Syrian training program', *WaPo* (3 June 2015), https://www.washingtonpost.com/world/national-security/us-faces-challenges-in-building-up-syrian-training-program/2015/06/03/e7511788-0a2c-11e5-9e39-0db921c47b93_story.html; Eric Schmitt, Ben Hubbard, 'US revamping rebel force fighting ISIS in Syria', *NYT* (6 September 2015), https://www.nytimes.com/2015/09/07/world/middleeast/us-to-revamp-training-program-to-fight-isis.html; Missy Ryan, 'After setbacks, US military looks for ways to recalibrate new Syrian force', *WaPo*, 12 August 2015, https://www.washingtonpost.com/world/national-security/after-setbacks-us-military-looks-for-ways-to-recalibrate-new-syrian-force/2015/08/12/e6c5664e-4103-11e5-8e7d-9c033e6745d8_story.html; Mills, *ISIS/Daesh*, 40-41.

1943 Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room, (26 May 2016), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/783071/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in/.

1944 Akande, *Embedded Troops* (2015). See for discussions on the support to Syrian opposition forces in the realm of the Syrian civil war: Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', 13(1) *CJIL* (2014) 31-32; Henderson, *UNSWLJ* (2013) 648-650; Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels', 7(1) *JNSLP* (2014) 140-142.

1945 Ashley Fanz, 'Who's doing what in the coalition battle against ISIS', *CNN* (9 October 2014), https://edition.cnn.com/2014/10/09/world/meast/isis-coalition-nations/; Ian Black, 'US axes $500m scheme to train Syrian rebels, says NYT', *Guardian* (9 October 2015), https://www.theguardian.com/world/2015/oct/09/us-to-axe-5-scheme-train-syrian-rebels-nyt. Georgia likewise considered such an offer: John Hudson, 'Exclusive: Georgia Offers to Host Training Camp for Syrian Rebels', *Foreign Policy* (23 September 2014), https://foreignpolicy.com/2014/09/23/exclusive-georgia-offers-to-host-training-camp-for-syrian-rebels/.

States remained guarded with respect to legal explanations. In light of the Doha Declaration in March 2013, where these States stressed "the right of each member state, in accordance with its wish, to provide all means of self-defense, including military support to back the steadfastness of the Syrian people and the free army",[1946] it seems however that they believed such assistance was in accordance with international law.

Second, there have been reports that the US has transported weapons and ammunition to Syrian rebels, including through ports in Eastern Europe as well as the airbase Ramstein, Germany.[1947] Germany's reaction was exemplary: unlike the States hosting trainings, Germany did not comment on the legality of the training program or of the German role under international law.[1948] Instead, it argued on two levels. First, the German government denied having authorized transit of such weapons.[1949] Second, it denied to tolerate such behavior. As such, the German government asserted to have no knowledge about the reported weapons deliveries, but was in "continuing exchange" with the US government, and repeatedly asked the US to comply with German law.[1950] The German government reported that the US had stated that weaponry for the delivery to Syria was neither stored in nor transferred through US-bases in Germany, and that it complied and will comply in the future with German law.[1951] The German position indicates that in case of previously provided military bases, lacking positive knowledge may be a sufficient argument to defend itself against potential complicity claims – at least to the extent that consultations with the possibly assisted State have taken place and assurances were given.

1946 24th Arab League Summit Issues Doha Declaration, http://arableaguesummit2013.qatarconferences.org/news/news-details-17.html.

1947 Frederik Obermaier, Paul-Anton Krüger, 'Heikle Fracht aus Ramstein', *SZ* (12 September 2017).

1948 BT Drs 19/16813 (28 January 2020), question 4: Germany asserted it had not enough authoritative information to make an assessment. But see BT Drs 18/13704 (23 October 2017), question 19, on the compliance of armament exports *to foreign States* with international law, in particular Article 2(1) and (7) UN Charter.

1949 BT Drs 18/13704 (23 October 2017), question 2.

1950 Ibid questions 3, 5, 7, 11, 12, 16.

1951 Ibid questions 3-4; BT Drs 19/4619 question 9 e (1 October 2018).

d) Assistance to Russia for its operations in Syria

The Russian military operations in Syria were premised on the request of Syrian president Assad.[1952] Assad had requested "military support for the [Syrian] counter-terrorism efforts", in particular against "ISIL, the Nushrah Front and other terrorist organizations."[1953]

Assistance played an important role also with respect to Russia's military operations. For example, Iran temporarily allowed Russia to use a military base in Iran to "fight terrorists", which reduced the flight time for Russian bombers significantly and allowed Russia to use larger bombers.[1954] Several States like Armenia, Iraq, or Egypt granted rights to overflight or use of bases, in the military buildup as well as the combat phase.[1955] Other States were, however, hesitant to provide assistance. Russia asked the coalition to share intelligence on ISIS positions, which coalition States, like Germany, did not do.[1956] Some States expressly refused overflight.[1957] Turkey com-

1952 S/2015/792 (15 October 2015). Iran also intervened, yet remained more guarded. Bannelier-Christakis, *LJIL* (2016) 760.

1953 S/2015/789 (16 October 2015).

1954 Erin Cunningham, Karen DeYoung, 'Strikes from Iranian air base show Russia's expanding footprint in the Middle East', *WaPo* (16 August 2016), https://www.washingtonpost.com/world/russia-uses-iranian-air-base-to-bomb-syria/2016/08/16/6b2a30e2-6393-11e6-96c0-37533479f3f5_story.html; 'SNSC official: Iran, Russia cooperation on Syria strategic', *IRNA* (16 August 2016), https://en.irna.ir/news/82190729/SNSC-official-Iran-Russia-cooperation-on-Syria-strategic; Andrew Osborn, 'Russia uses Iran as base to bomb Syrian militants for first time', *Reuters* (16 August 2016), https://www.reuters.com/article/us-mideast-crisis-russia-iran/russia-uses-iran-as-base-to-bomb-syrian-militants-for-first-time-idUSKCN10R0PA; Anne Barnard Andrew E. Kramer, 'Iran Revokes Russia's Use of Air Base, Saying Moscow 'Betrayed Trust'', *NYT* (22 August 2016), https://www.nytimes.com/2016/08/23/world/middleeast/iran-russia-syria.html.

1955 Andrew Osborn, 'Russia uses Iran as base to bomb Syrian militants for first time', *Reuters* (16 August 2016); Eric Schmitt, 'In Syria's Skies, Close Calls With Russian Warplanes', *NYT* (8 December 2017), https://www.nytimes.com/2017/12/08/world/middleeast/syria-russia-us-air-war.html; Richard Giragosian, 'Resurgent Russia takes on tenacious Turkey', *Al Jazeera* (9 December 2015), https://www.aljazeera.com/indepth/opinion/2015/12/resurgent-russia-takes-tenacious-turkey-151209071618920.html. See also Bannelier-Christakis, *LJIL* (2016) 751-752.

1956 'Russia wants intelligence on IS terrorists' location in Syria from anti-IS coalition – Defense Ministry', *Interfax* (7 October 2015); BT Drs 18/7947 (21 March 2016), question 17; BT Drs 18/9162 (12 July 2016), question 5.

1957 Carol J Williams, 'Russia says Bulgaria's refusal of flyovers to Syria is a U.S. plot', *LA Times* (8 September 2015), https://www.latimes.com/world/europe/la-fg-russia-syria-us-bulgaria-20150908-story.html; Giorgi Lomsadze, 'Georgia: Russia Has

plained over alleged Russian intrusions in its airspace and even downed a Russian plane.[1958]

Legal considerations relating to the *ius contra bellum* did not play a prominent role with respect to assistance to Russia. Assisting States did not provide specific justifications or legal explanations.[1959] To the extent States commented on assistance, the statements were primarily politically driven or did not concern *ius contra bellum* aspects.[1960] Likewise, decisions to refrain from assistance had political, rather than legal reasons.[1961] Neither of them felt obliged to refrain from assisting the Russian operations for *ius contra bellum* considerations. The limited role of the *ius contra bellum* was little surprising as it reflects the international community's stance towards Russia's intervention: it hardly met with legal criticism.[1962] At the same time, States' practice with respect to assistance to Russia also indicated that as a general rule, legal considerations were relevant for decisions on assistance.

Russia's controversial inquiry to use Spanish ports en route to Syria is another example that illustrates these observations well. Following standard practice, Spain had allowed the Russian aircraft carrier to refuel and take supplies at the Spanish port Ceuta. This sparked protest. For example, NATO Secretary General voiced concern that "[t]he battle group may be used to increase Russia's ability to take part in combat operations over Syria and to conduct even more air strikes against Aleppo". He added, however, that it was "up to each nation to decide whether these vessels

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Not Asked for Transit to Syria', *Eurasianet* (15 September 2015), https://eurasianet.org/georgia-russia-has-not-asked-for-transit-to-syria.

1958 S/2015/962 (11 December 2015), para 9; S/2016/108 (3 February 2016); S/2016/148 (16 February 2016). For Russia's response: S/2016/116 (4 February 2016). Kubo Mačák, 'Was the Downing of the Russian Jet by Turkey Illegal?', *EJIL:Talk!* (26 November 2015).

1959 Yet Iran maintained that its own and Russian strikes were based on Syrian consent. Saeed Kamali Dehghan, 'Russia uses Iranian airbase for first time in Syria campaign', *Guardian* (16 August 2016), https://www.theguardian.com/world/2016/aug/16/russia-uses-iranian-airbase-for-first-time-in-syria-campaign.

1960 E.g. the US described the Russian-Iranian cooperation as "unfortunate". Legally, it only sought to look into a violation of UN Security Council resolution 2231, ibid.

1961 In fact, some even argued that Russia should be involved. Bianca Maganza, 'The Minister of Foreign Affairs, Mr Paolo Gentiloni Silveri, on the possible involvement of the Russian Federation in the international coalition against ISIL/Daesh', *Italy's Diplomatic and Parliamentary Practice on International Law* (26 November 2015).

1962 Bannelier-Christakis, *LJIL* (2016) 760-766; Corten, *Operations against ISIL*, 879.

may obtain supplies and refuel at different ports along the route to the eastern Mediterranean".[1963] An US official explained: "The problem would arise if this ship contributes to the indiscriminate bombing of civilian targets in northwest Syria, particularly in and around Aleppo."[1964] When Spain announced to review its authorization and sought clarification from Russia about the "purpose and destination" of the ships, Russia eventually withdrew its request.[1965]

21) Fighting ISIS in Libya 2015 and 2016

The USA has carried out a series of airstrikes targeting ISIS in Libya. After some sporadic strikes in 2015 and early 2016, the US conducted almost 500 airstrikes between August and December 2016 within its Operation Odyssey Lightning. In any event since August 2016, the USA claimed to have responded to an invitation of Libya's unity government.[1966] Previously, the USA was less clear about the legal basis.[1967]

In 2016, the Italian government allowed the US to use its national airbases and airspace in support of the US operations, which it qualified as "indirect support". It denied having participated previously. Italy was eager to underline that "[t]he activities carried out by the US forces comply with UN Resolution no. 2259 of 2015 and follow a specific request for assistance by the legitimate Libyan Government with a view to fighting

1963 'Anger as Spain prepares to let Russian warships refuel on way back to Aleppo bombing', *Guardian* (26 October 2016), https://www.theguardian.com/world/2016/oct/26/spain-russian-warships-refuel-aleppo-bombing-ceuta-syria.

1964 'Anger as Spain prepares to let Russian warships refuel on way back to Aleppo bombing', *Guardian* (26 October 2016).

1965 Patrick Wintour, 'Spain reviews plan to let Russian warships refuel en route to Syria', *Guardian* (26 October 2016), https://www.theguardian.com/world/2016/oct/26/spain-reviews-plan-to-let-russian-warships-refuel-en-route-to-syria; 'Russian warships: Spain says refuelling request withdrawn', *BBC* (26 October 2016), https://www.bbc.com/news/world-europe-37779204.

1966 Kristina Daugirdas, Julian Davis Mortenson, 'United States Justifies Its Use of Force in Libya Under International and National Law', 110(4) *AJIL* (2016) 808.

1967 Bannelier-Christakis, *LJIL* (2016) 758; Jake Rylatt, 'The Use of Force against ISIL in Libya and the Sounds of Silence', *EJIL:Talk!* (6 January 2016). Egypt also conducted airstrikes on 16 February. 'Egypt Urges UN Mandate for Libya Coalition', Al Arabiya News, (17 February 2015), http://english.alarabiya.net/en/News/middle-east/2015/02/17/Egyptian-FM-use-of-force-is-right-to-self-defense-.html.

ISIS in the area of Sirte".[1968] Moreover, assistance was only provided to the extent that the US operations remained defensive in purpose, i.e., only aiming to enable Libya to defeat terrorist forces in the area of Sirte.[1969] More generally, Italy saw the US use of the airbase in Sigonella for operations in Libya and the area of North Africa as justified, as the usage "encompasses exclusively defensive profiles of their personnel, when necessary, and that is an exemplification of the right to self-defence set forth by Article 51 of the UN Charter. In full respect of that principle, the usage by the US of the base of Sigonella is every time discussed and authorized."[1970]

In view of strikes in February 2016, which the US claimed to have taken consistent with international law and with "the knowledge of Libyan authorities"[1971] and that involved the British air base Lakenheath, the UK stated:

> "The United States followed standard procedures, and made a formal request to use our bases. Once we had verified the legality of the operation, I granted permission for the United States to use our bases to support it, because they are trying to prevent Daesh from using Libya as a base from which to plan and carry out attacks that threaten the stability of Libya and the region, and indeed, potentially, the United Kingdom and our people as well. I was fully satisfied that the operation, which

1968 Chamber of Deputies, XVII Legislature, 667th Meeting, 3 August 2016, Chiara Tea Antoniazzi, 'The Minister of Defence, Ms. Roberta Pinotti, on the involvement of Italy in the US operations against ISIS in Libya', *Italy's Diplomatic and Parliamentary Practice on International Law* (3 August 2016).

1969 Anthony Dworkin, *Europe's New Counter-Terror Wars* (European Council on Foreign Relations Policy Briefs, ECFR, 21 October 2016) 9; Isla Binnie, 'Italy agrees to let anti-Islamic State drones depart from Sicily', *Reuters* (22 February 2016), https://www.reuters.com/article/us-mideast-crisis-italy-drones-idUSKCN0VV2GY; Gordon Lubold, Julian E Barnes, 'Italy Quietly Agrees to Armed U.S. Drone Missions Over Libya', *WSJ* (22 February 2016), https://www.wsj.com/articles/italy-quietly-agrees-to-armed-u-s-drone-missions-over-libya-1456163730; Camera dei Deputati, "Resoconto Stenografico 576", 24 February 2016, 61, https://www.camera.it/leg17/410?idSeduta=0576&tipo=stenografico.

1970 Iotam Andrea Lerer, 'The Legal Requirements for Military Intervention and for Humanitarian Assistance in Libya', *Italy's Diplomatic and Parliamentary Practice on International Law* (13 September 2016).

1971 Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook (19 February 2016), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/659088/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in/.

was a United States operation, would be conducted in accordance with international law."[1972]

22) Strikes in reaction to use of chemical weapons 2017 and 2018

On 6 April 2017, the United States launched 59 Tomahawk missiles targeting the Syrian Air Force airfield in response to the use of nerve gas in the Syrian town of Khan Shaykhun. On 14 April 2018, the United States, France and the United Kingdom conducted airstrikes in reaction to the alleged use of chemical weapons by the Syrian Army in Douma. With respect to both incidents, the international community was divided, politically as well as legally – not least because only the UK provided a legal justification for the military operation.[1973]

Italy acknowledged that it provided logistical support to the 2018 air strikes "on the basis of bilateral treaties signed in 1954 and 1995."[1974] Italy stressed, however, that it "did not participate in the airstrike".[1975] It claimed that the explicit conditions Italy had attached to logistical support (here the use of the air base located in Aviano) were complied with: Its assistance was "contingent on no military action being conducted from the Italian territory directly against Syria."[1976] In fact, it was reported that on 14 April 2018, "tanker aircraft, drones for reconnaissance missions and escort fighters supposedly took off from air bases located in Italy."[1977] On that basis, Italy did not see it necessary to provide a distinct justification for the logistical support. Italy however also did not expressly claim the supported airstrikes to be legal. Instead, Italy remained ambiguous on their legality. It politically supported the strikes and described them as "motivated, […] targeted and circumscribed response."[1978] But it did not refer to international law and refrained from making a (public) legal assessment.

1972 HC Deb 29 February 2016, Hansard, vol 606, col 671.
1973 Alonso Gurmendi Dunkelberg and others, 'Mapping States' Reactions to the U.S. Strikes Against Syria of April 2018 - A Comprehensive Guide', *Just Security* (7 May 2018).
1974 Jean Paul Moinet, 'Use of Force and Peacekeeping - The Airstrikes against Syria in Response to the Alleged Use of Chemical Weapons', 28(1) *ItYBIL* (2018) 556.
1975 Ibid.
1976 Ibid.
1977 Ibid.
1978 Ibid 554.

Germany held before the strikes that it would not directly participate in strikes.[1979] While Germany refrained from an unambiguous endorsement of the legality of the strikes, it did not qualify them as illegal, but as "necessary and appropriate".[1980] One should be careful in assuming that legal considerations prompted the decision of non-assistance.[1981] In particular, one should not ascribe to Germany the view that assistance to a use of force that is not expressly viewed in accordance with international law is *legally* impermissible. At the same time, German practice is also no support for the permissibility of assistance in this situation.

### 23) The Soleimani incident 2020

On 3 January 2020, the United States launched a drone strike over Iraqi territory killing, i.a. the head of Iran's Quds force, Quassem Soleimani. In reaction, Iran struck a US airbase in Iraq. States[1982] and scholars[1983] alike focused on the permissibility of the strikes, in particular on the controversial claims of having acted under self-defense. Other States' involvement did not receive the same amount of attention, although it did not go unnoticed.

For example, several States were eager to expressly deny any involvement.[1984] While some of these statements may have reflected legal concerns

1979 Einsatz von Chemiewaffen inakzeptabel, (13 April 2018), https://www.bundesregierung.de/breg-de/aktuelles/einsatz-von-chemiewaffen-inakzeptabel-1004318.

1980 BT Drs 19/3512 (19 July 2018); Aust, Payandeh, *JZ* (2018) 641.

1981 But see the German Parliamentary Research Service that argued that as the strikes were illegal, German participation would be unlawful, too. Wissenschaftlicher Dienst, *Rechtsfragen einer etwaigen Beteiligung der Bundeswehr an möglichen Militärschlägen der Alliierten gegen das Assad-Regime in Syrien* (Sachstand, Deutscher Bundestag, WD 2 - 3000 - 130/18, 2018)

1982 Mehrnusch Anssari, Benjamin Nußberger, 'Compilation of States' Reactions to U.S. and Iranian Uses of Force in Iraq in January 2020', *Just Security* (22 January 2020).

1983 Olivier Corten and others, 'L'exécution de Quassem Soleimani et ses suites : aspects de jus contra bellum et de jus in bello', 124(1) *RGDIP* (2020); Stefan Talmon, Miriam Heipertz, 'The US Killing of Iranian General Qasem Soleimani: Of Wrong Trees and Red Herrings, and Why the Killing May Be Lawful after All', *German Practice in International Law* (23 January 2020).

1984 Germany emphasized that the US action was not an action by the anti-Daesh coalition, Erklärungen des Auswärtigen Amts in der Regierungspressekonferenz (3 January 2020), https://www.auswaertiges-amt.de/de/newsroom/regierungspressekonferenz/2290686. Israel as well as the NATO stressed that it were US decisions and actions in which they were not involved, Julian Borger, 'US allies distance themselves from Trump decision to assassinate Suleimani', *Guardian* (6 January

about the permissibility of the strikes, and hence may reflect *opinio iuris* with respect to a non-assistance obligation,[1985] most of these statements were not couched in legal terms.[1986]

Legal considerations played a role, however, for some States. For example, Iran warned "US allies that are providing bases to America's terrorist army" that "any country serving as the origin of bellicose and aggressive attacks in any form against the Islamic Republic of Iran" will be, and hence may be legally, targeted.[1987] In this light, Iran accused Kuwait that the US drones had taken off from Kuwaiti bases.[1988] Kuwait emphatically rejected the allegation of being involved in the US operations with "dismay" and "amazement".[1989]

Also, Iraq made clear that especially the US use of force on its soil was conducted without Iraqi consent and in violation of international law.[1990]

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2020), https://www.theguardian.com/world/2020/jan/06/us-allies-trump-suleimani-killing-reaction-response. Afghanistan and Pakistan denied the use of their territory, 'Pakistan will not allow its soil to be used for any regional conflict', *Times of India* (6 January 2020), https://timesofindia.indiatimes.com/world/pakistan/pakistan-will-not-allow-its-soil-to-be-used-for-any-regional-conflict-fm-shah-mahmood-qureshi/articleshow/73126626.cms; Mohammad Habibzada, 'Afghan Leaders Lament Soleimani's Death, Worry About Regional Escalation', *VOANews* (3 January 2020), https://www.voanews.com/middle-east/voa-news-iran/afghan-leaders-lament-soleimanis-death-worry-about-regional-escalation.

1985 Pakistan used legal language to voice concern about the US strikes, Anssari, Nußberger, *Compilation Reactions Soleimani* (2020).

1986 Afghanistan remained neutral towards the strikes and did not invoke legal reasons for the "non-use of Afghani soil against a third country or other regional conflicts. Israel thought the US to legitimately act in self-defense, ibid.

1987 'IRGC targets US airbase in Iraq in response to assassination of General Soleimani', *IRNA* (8 January 2020), https://en.irna.ir/news/83625455/IRGC-targets-US-airbase-in-Iraq-in-response-to-assassination.

1988 Farah Elbahrawy, Golnar Motevalli, 'Iran Says Drone Used in Soleimani Strike Came From Kuwait', *Bloomberg News* (23 January 2020), https://www.bloomberg.com/news/articles/2020-01-23/iran-says-drone-used-in-soleimani-strike-came-from-kuwait.

1989 'Kuwait summons Iran envoy over Soleimani killing claim', *Arab News* (24 January 2020), https://www.arabnews.com/node/1617716/middle-east.

1990 S/2020/15. Iraq not only held that the US force was not covered by Iraqi consent. It also stressed that it had warned against and explicitly prohibited such a use in particular already beforehand. And it claimed that such a use constituted an act of aggression in violation of the UN Charter and a flagrant violation of the terms under which the US forces are present in the country. See also for US strikes in March 2020, S/2020/213 (17 March 2020). Other States shared this assessment, on details see Anssari, Nußberger, *Compilation Reactions Soleimani* (2020).

Thereby, it did not respond to any specific accusation that its involvement amounted to unlawful assistance. Most notably, Iran neither charged Iraq with unlawful behavior, nor sought to build its claim to self-defense to justify the strikes against US bases *in Iraq* on illegal involvement of Iraq in the US strikes against Soleimani.[1991] But it seems that Iraq was aware of this dimension and sought to preempt such accusations.[1992]

Likewise, the German role in relation to the strike sparked protest in remarkably legal terms. Iran "condemned German supportive positions attributed to the German government" in legal terms. It regarded "the German government's stances in support of brutal and unilateral US actions which are against international law *as complicity* in these actions."[1993]

The fierce Iranian protest was directed against the German reaction to the strike, despite the fact that Germany had reacted rather carefully to the US strikes.[1994] Germany saw the onus for legal explanation to be on the USA. Hence Germany refrained from qualifying the strikes legally or politically. But it flagged that the attack should be assessed in light of the overall situation, and that it was a response to several military provocations for which Iran bears responsibility. It also noted that Soleimani was listed on the EU terror list. When asked about the Iranian comment, Germany did not seek to clarify its statement,[1995] nor did it respond to the accusation of complicity.

It is intriguing that the Iranian protest seemed not to have also referred to the potential role of the US airbase Ramstein in Germany, which had

1991 S/2020/44 (16 January 2020). See also Statement by Ambassador Esmaeil Baghaei Hamaneh Permanent Representative of the Islamic Republic of Iran to the United Nations and other International Organizations in Geneva before the Human Rights Council 44th Session. Note also that the USA likewise did not allege Iraq was responsible for unlawful assistance to any unlawful (Iranian) attack, S/2020/20 (9 January 2020). See also Adil Ahmad Haque, 'U.S. Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment', *Just Security* (10 January 2020).

1992 Note that Iraq "stressed that it is fully committed to the provisions of the Iraqi Constitution and, in particular, the provision that *Iraqi territory shall not be used as a theatre of operations against neighbouring States*." S/2020/15 (6 January 2020).

1993 Spokesman Condemns Germany's Backing for US Brutal, Illegal Actions, (4 January 2020), https://en.mfa.gov.ir/portal/newsview/570712/Spokesman-Condemns-Germany%E2%80%99s-Backing-for-US-Brutal-Illegal-Actions, emphasis added.

1994 Anssari, Nußberger, *Compilation Reactions Soleimani* (2020).

1995 Erklärungen des Auswärtigen Amts in der Regierungspressekonferenz vom 06.01.2020, https://www.auswaertiges-amt.de/de/newsroom/regierungspressekonferenz/2290926.

led to discussions in Germany. Still, the German government argued that it had "no insights that Ramstein was involved in any form in the specific airstrikes." But it stressed that the "US has to and has assured to comply with German and international law on its bases in Germany."[1996]

The German role in the Soleimani case even concerned the German Chief Federal Prosecutor. In reaction to a controversial complaint advancing criminal charges against the Federal Government for i.a. "aiding and abetting by omission to murder" (§§ 211, 27, 13 StGB), he decided, however, not to institute criminal investigations against members of the German government.[1997]

The prosecutor did not answer whether the US drone strike could have not been launched without the involvement of a relay station based in Ramstein. Instead, he concluded that even on the assumption that the use of the US relay station in Ramstein was a "*conditio sine qua non*" for the killing, criminal charges for omission could not be substantiated.

In particular, the prosecution did not see a duty of prevention ("Erfolgsabwendungspflicht") established. In the present case, members of the German government were not guarantors. In particular, the prosecutor held that "[a] criminal duty of guarantee to prevent possible sovereign conduct of foreign officials that is in violation of international law derives neither from international law nor the provisions of the Basic Law (Grundgesetz)." With respect to the German constitution, it explained that Germany and its officials are prohibited to "actively participate" in the perpetration of international crimes or other violations of general rules of international law. A criminal duty of guarantee which would have led to criminal responsibility of German officials for violations of international law by officials of foreign States did not follow from the constitutional requirement.

The prosecutor did not elaborate why, in his view, international law did not establish a duty of guarantee. Regardless, it is important to note that the prosecutor's statement was solely concerned with *criminal* liability. In fact, he drew a line between criminal and constitutional/international

1996 Ibid; Erklärungen des Auswärtigen Amts in der Regierungspressekonferenz vom 08.01.2020, https://www.bundesregierung.de/breg-de/suche/regierungspressekonferenz-vom-8-januar-2020-1710838.

1997 https://neu-alexander.de/files/2020/04/SKP1817354420032617380.pdf; The decision was based on §152(2) of Germany's Code of Criminal Procedure. For explanations in that respect see Kress, *JICJ* (2004) 247.

complicity.[1998] The prosecutor's decision must not be understood to absolve the German government from a possible claim for complicity under international law for a violation of *Article 2(4) UNC*.

This is not altered by the fact that the prosecutor rejected the charge of complicity in a crime of aggression (§ 13 VStGB). The prosecutor did so *exclusively* based on the local and temporal limitations of the US strike. He did not reject the charge on the grounds that the US strike may not have been an "Angriffshandlung" *in violation of international law* – notably, a question that – unlike for other questions – he did not expressly reserve his opinion on.

At the same time the prosecutor's decision may serve as guidance for the qualification of assistance under the *ius contra bellum*. The prosecutor did not discuss the alleged German involvement as independent act of aggression (under Article 3(f) Aggression Definition), but as complicity in a crime of aggression.[1999] While he does not even set attempt to answer where to draw the line, this still may indicate that the toleration of the use of a relay station would not meet the threshold of Article 3(f) Aggression Definition.

### 24) The war in Ukraine since 2022

On 24 February 2022, Russia launched what it called a "special operation" against Ukraine. As Ukraine fiercely resisted the Russian attack, a full-scale war is ongoing.

The Russian invasion sparked little debate regarding its legality. The international community almost unanimously agreed that the Russian "special operation" cannot be justified as Russia claimed.[2000] UNGA resolution A/RES/ES 11/1, adopted with 141 votes, reflects this.[2001] Therein States deplored "in strongest terms the aggression by the Russian Federation

1998 See also below on a discussion of the 2013 German Federal Prosecutor's decision not to investigate Ramstein.

1999 Note that unlike the Rome Statute, the German VStGB does not include the 1974 Definition of Aggression.

2000 A/ES/11/PV.1, 8. See for a first analysis James A. Green, Christian Henderson, Tom Ruys, 'Russia's attack on Ukraine and the jus ad bellum', 9(1) *JUFIL* (2022).

2001 See also the draft Security Council resolution S/2022/155 (25 February 2022) that would have deplored Russia's "aggression against Ukraine in violation of Article 2 paragraph 4" UNC that was co-sponsored by 82 States.

against Ukraine in violation of Article 2(4) of the Charter."[2002] Only five States voted against the resolution.[2003] The 35 States that abstained did not necessarily reject the condemnation of Russia.[2004] In general, States widely agreed that the international legal order was at stake, and that a principled stance in defense of international law was called for.[2005]

In response to Russia's military operations, Ukraine activated its right to self-defense under Article 51 UNC – remarkably without sending a letter to the UN Security Council.[2006] Notwithstanding that the widespread qualification of Russia's military operation as "aggression" can be understood to implicitly acknowledge Ukraine's right to self-defense, it remains yet another notable fact that neither the UNGA in its resolution[2007] nor States in the realm of the United Nations[2008] have affirmed the right to self-defense in express terms in their initial responses to the invasion. In the meanwhile, this has changed: Ukraine's right to defend itself is more prominent in the UN.[2009]

Against this background and in view of the lacking blitz in Russia's blitzkrieg that has led to a prolonged armed confrontation, interstate assistance has attracted international attention. Assistance to both Russia (a)

2002 A/RES/ES-11/1 (18 March 2022), para 2.

2003 A/ES/11/PV.5, 14.

2004 They rather criticized that the resolution was not well-balanced, and should have focused more on diplomacy as the means to resolve the conflict, e.g. A/ES/11/PV.5, 19 (Iran), 20 (Tanzania), 21 (South Africa).

2005 E.g. S/PV.8979, 3 (USA), 3 (Albania), 4 (Gabon), 6 (Brazil), 9 (Ghana). S/PV.8980, 2 (USA), 3 (Albania). A/ES/11/PV.5, 13-14 (Saint Vincent and the Grenadines), 15 (Tunisia), 17 (Thailand), 20 (Egypt).

2006 Ukraine orally reported to the Security Council to have "been exercising its right to self-defence under Article 51 of the Charter", S/PV.8979, 16. It also informed the UNGA in the emergency session that it "has activated its right of self-defence, in accordance with Article 51 of the United Nations Charter", A/ES/11/PV.1, 6.

2007 A/RES/ES-11/1.

2008 A/ES/11/PV.1-5. "Self-defence" is mentioned only 5 times, "Article 51" 7 times during the debate. Only Ukraine PV.1, 6, and Germany, PV.4, 10, however, referred to Ukraine's right to self-defense. Other States refuted the Russian claim to act in self-defence. Several States however noted that Ukraine is defending itself, e.g. PV.1, 27 (Canada), PV.2, 19 (Albania), PV.5, 3 (Djibouti), PV.5, 7 (USA). In abstract terms, Mexico recognized Ukraine's right to self-defense, S/PV.8983, 6. The draft Security Council resolution, S/2022/155, did not reserve Ukraine's right to self-defense.

2009 For example, in the UNGA debate on 22 and 23 February 2023, Ukraine's right to self-defense was mentioned expressly by Ukraine, EU, New Zealand, Estonia, Iceland, Palau, Denmark, France, UK. https://press.un.org/en/2023/ga12492.doc.htm. https://press.un.org/en/2023/ga12491.doc.htm. See also S/PV.9269.

and Ukraine (b) is discussed and assessed in diplomatic forums. This is particularly true for Belarusian involvement in Russia's military operations and China's stance towards Russia, as well as the extensive security assistance, provided to Ukraine by Western States.

The international (legal) positions on questions of assistance may not yet be fully consolidated given the dynamic situation on the ground. Similarly, the compilation cannot yet be comprehensive. Still, the reaction of (selected) States concerning assistance not only complement States' defense of the international legal order against Russia's repudiation of its cornerstone.[2010] They shed light on the relevant legal framework on interstate assistance.

### a) Assistance and Russia's military operation

The Ukraine conflict is yet another reminder that even military superpowers like Russia are not entirely self-sufficient in their military operations. Russia, albeit arguably primarily for strategic reasons, heavily relied on Belarusian territory as a staging ground for its march on Kiev (1). There were also reports about Syrian recruits fighting for Russia (2). Discussions about Russia asking for Chinese assistance (3) and drone transfers by Iran point in a similar direction (4). The fact that denial of benefits to Russia is considered as sanctions rather than non-assistance does not necessarily contradict this general observation (5). In the following, however, States' legal positions on such support will be of interest.[2011] They reflect the various facets of the legal landscape on assistance in a nutshell.

#### (1) Belarus

According to reports, Russian troops, in particular tanks and infantry vehicles, crossed the border from Belarus, where they had previously conducted military drills near the Belarusian-Ukrainian border.[2012] Also, Russia

2010 Cf A/RES/ES-11/1 (18 March 2022), preambular para 14.

2011 In general, it is interesting to note that the debate is led primarily by States affected or involved; the majority of States does not express a position.

2012 Report of the Mission of Experts, established to address the violations of international humanitarian and human rights law, war crimes and crimes against humanity committed during Russia's war of aggression against Ukraine, in Re-

launched air operations and ballistic missile strikes against Ukraine from Belarusian territory.[2013] Wounded Russian soldiers were being treated in Belarusian hospitals.[2014] Belarus further granted overflight rights, provided refueling points, and stored Russian military equipment.[2015] However, to date, accounts of Belarusian troops taking part in military operations in Ukraine remain unconfirmed.[2016] Belarusian troops were deployed to the Belarusian-Ukrainian border in reaction to increased NATO activities.[2017] Reports suggested that this maneuver aimed to bind Ukrainian troops in the north to prevent them from moving towards the Donbass.[2018]

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port on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022 by Professors Wolfgang Benedek, Veronika Bilkova and Marco Sassoli, ODIHR.GAL/26/22/Rev.1 (13 April 2022).

2013 'Senior Defense Official Holds a Background Briefing' (3 March 2022), https://www.defense.gov/News/Transcripts/Transcript/Article/2954139/senior-defense-official-holds-a-background-briefing/; 'Ukrainian official says missiles launched from Belarus to Ukraine', *Reuters* (27 February 2022), https://www.reuters.com/world/europe/ukrainian-official-says-missiles-launched-belarus-ukraine-2022-02-27/; Natasha Bertrand, 'Intelligence: Russia has taken to trying to jam NATO plane's radar', *CNN* (11 March 2022), https://edition.cnn.com/2022/03/10/politics/nato-surveillance-flight-russia-belarus/index.html; Lexi Lonas, 'NATO: Russia is launching many air operations from Belarus', *The Hill* (11 March 2022), https://thehill.com/policy/international/597806-nato-russia-is-launching-many-air-operations-from-belarus/.

2014 Olga Stefanowitsch, 'Wounded Russian soldiers fill Belarusian hospitals', *DW* (19 March 2022), https://www.dw.com/en/wounded-russian-soldiers-fill-belarusian-hospitals/a-61181434.

2015 'Belarus' role in the Russian military aggression of Ukraine: Council imposes sanctions on additional 22 individuals and further restrictions on trade' (2 March 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/belarus-role-in-the-russian-military-aggression-of-ukraine-council-imposes-sanctions-on-additional-22-individuals-and-further-restrictions-on-trade/.

2016 'Pentagon Press Secretary John F. Kirby Holds a Press Briefing', (5 May 2022), https://www.defense.gov/News/Transcripts/Transcript/Article/3022007/pentagon-press-secretary-john-f-kirby-holds-a-press-briefing/.

2017 'Ministry of Defense of the Republic of Belarus, Statement by the Chief of the General Staff of the Armed Forces - First Deputy Minister of Defense of the Republic of Belarus, Major General Viktor Gulevich' (10 May 2022), https://t.me/modmilby/14150.

2018 'Belarus to deploy special forces to southern border near Ukraine', *Reuters* (10 May 2022), https://www.reuters.com/world/europe/russia-help-ally-belarus-create-iskander-type-missile-lukashenko-says-2022-05-10/; UK Ministry of Defence, 'Latest Defence Intelligence update on the situation in Ukraine' (16 May 2022), https://twitter.com/DefenceHQ/status/1526071888329441282.

The role of Belarus did not go without mention in the international community. Remarkably, (the legal clarity of) States' assessments of Belarus' involvement varied across different forums.

Within the Security Council, Belarus' role was a side issue at best. The draft Security Council resolution that Russia vetoed would have remained silent on that matter.[2019] Only few States even took note of the Belarusian contribution. Norway "condemn[ed] Belarus for facilitating those attacks."[2020] Ukraine

> "condemn[ed] the fact that Belarus is deeply engaged in the armed aggression against Ukraine. Since the beginning of the Russian aggression, Belarus has provided its territory for the Russian offensive. Today, Zhytomyr Airport, in the Ukrainian city of Zhytomyr, was hit by Iskander missiles launched from the territory of Belarus."[2021]

In their initial responses to the conflict, the involvement of Belarus was not part of all regional statements commenting on the crisis in Ukraine. The OAS,[2022] the CARICOM[2023] and ASEAN[2024] remained silent on Belarus. On the other hand, already in their first reaction to Russia's invasion,

2019 S/2022/155 (25 February 2022).

2020 S/PV.8979, 5.

2021 S/PV.8980, 9. See also S/PV.8979, 5 where Ukraine pointed to the fact that "[t]he territory of Belarus was used for missile attacks."

2022 'Declaration The Situation in Ukraine' (25 February 2022), https://usoas.usmission.gov/oas-member-states-condemn-russian-attack-on-ukraine/, https://twitter.com/OAS_official/status/1497361482773848069.

2023 'CARICOM Statement on the Situation in Ukraine' (24 February 2022), https://caricom.org/caricom-statement-on-the-situation-in-ukraine/.

2024 'ASEAN Foreign Ministers' Statement on the Situation in Ukraine' (26 February 2022), https://asean.org/wp-content/uploads/2022/02/ASEAN-FM-Statement-on-Ukraine-Crisis-26-Feb-Final.pdf.

the NATO,[2025] the G7[2026] and the EU[2027] condemned the involvement of Belarus in the aggression.[2028]

There was more unity on and interest in Belarus' role in the UNGA. Most notably, the UNGA

> "deplored the involvement of Belarus in this unlawful use of force against Ukraine, and call[ed] upon it to abide by its international obligations."[2029]

Yet, the UNGA's statement is remarkable for its vagueness in several ways.

First, it is noteworthy that – unlike with respect to Russia[2030] – States refrained from deploring Belarus' involvement as a violation of international law. Instead, legal considerations were mentioned only in view of the call for Belarus to abide by its international obligations. In doing so, States left it to imply that Belarus was currently *not* abiding with its international obligations.

Second, States refrained from clarifying the pertinent "international obligations". Here again, the UNGA differed from its approach towards Russia. The same wording was used to call upon Russia to abide by international law. Yet it expressly specified the pertinent international obligations, i.e., the UN Charter and the Friendly Relations Declaration.[2031] This leaves ample room for speculation about the UNGA's view with which obligations

2025 'Statement by the North Atlantic Council on Russia's attack on Ukraine' (24 February 2022), https://www.nato.int/cps/en/natohq/official_texts_192404.htm: "We also condemn Belarus for enabling this attack." 'Statement by NATO Heads of State and Government on Russia's attack on Ukraine', (25 February 2022), https://www.nato.int/cps/en/natohq/official_texts_192489.htm: "We condemn in the strongest possible terms Russia's full-scale invasion of Ukraine, enabled by Belarus. […] The world will hold Russia, as well as Belarus, accountable for their actions."

2026 'G7 Leaders' Statement on the invasion of Ukraine by armed forces of the Russian Federation' (24 February 2022), https://www.g7germany.de/resource/blob/998352/2007730/6a4fc79947784765833b23ed762de76d/2022-02-24-g7-erklaerung-en-data.pdf.

2027 'Ukraine: Declaration by the High Representative on behalf of the European Union on the invasion of Ukraine by armed forces of the Russian Federation' (24 February 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/ukraine-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-invasion-of-ukraine-by-armed-forces-of-the-russian-federation/.

2028 See also the Baltic States: S/2022/166 (1 March 2022): "Equally, we strongly condemn actions by Belarus which have enabled and supported this aggression."

2029 A/RES/ES-11/1 (18 March 2022), para 10.

2030 Ibid, para 2: "Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter".

2031 Ibid, para 7.

Belarus must abide and with which rules Belarus may not have been abiding. It could be the prohibition of aggression – in view of Article 3(f) of the Aggression Definition, the prohibition to use of force according to Article 2(4) UNC, a general prohibition to participate in an unlawful use of force under the UNC or general rules of State responsibility prohibiting complicity. On that note, it is at least noteworthy that the UNGA used the word "aggression" only with respect to Russia.[2032]

Third, the act that Belarus is accused of – its "involvement" – remained unspecified. It might refer to the fact that Belarus served as a staging point for the Russian advance on Kiev or that Russian missiles were launched at Ukraine from Belarusian territory. It leaves however also room to include allegations of Belarusian soldiers joining the Russian invasion.

Fourth, the discrepancy with the strong language used to deplore Russia is remarkable. Belarus' involvement was "deplore[d]", not "deplor[ed] in strongest terms".[2033]

States' comments in the UNGA reflect an interpretative spectrum.

Ukraine began the discussions by inviting the UNGA to be "clear about the "treacherous role of Belarus and its involvement in [Russian] aggression".[2034] Clarity was missing in the Ukrainian statement, however, too. Ukraine did not further specify the role of Belarus or legal consequences.

Primarily Western States drew special attention to Belarus' involvement.[2035] Denmark for example wanted the resolution to be understood as "clear message to Russia and to Belarus. We are telling them to stop the aggression now — full stop — and that what they are doing is unacceptable. It is wrong."[2036] Most other States, even those condemning Russia's actions

2032 Ibid, para 2, 15.
2033 Ibid, para 2, 10.
2034 A/ES/11/PV.1, 6.
2035 Ibid, 5, 6 (Ukraine), 11, 12 (EU, North Macedonia, Montenegro, Albania, Bosnia and Herzegovina, Iceland, Norway, Moldova, Georgia, San Marino, Andorra, Monaco, Liechtenstein), 13 (Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Sweden, Denmark), 15 (UK), 16 (Poland), 20 (Switzerland), 22 (New Zealand), 23 (Bulgaria), 24 (Italy), 26, 27 (Canada), A/ES/11/PV.2, 2 (Slovakia), 3 (Belgium), 4 (Netherlands), 7 (Slovenia), 8 (Croatia), 9 (Ireland), 10 (Japan), 19 (Albania), A/ES/11/PV.3, 8 (Australia), 10 (Luxembourg), 14 (Spain); A/ES-11/PV.4, 13 (Montenegro); A/ES/11/PV.5, 6 (USA), 23 (EU).
2036 A/ES/11/PV.5, 24.

and supporting the UNGA resolution, did not elaborate on Belarus or clarify the applicable law.[2037]

At the same time, States considering Belarus' involvement hardly provided specifics.[2038] Also, a specific condemnation in legal terms or attribution of responsibility to Belarus remained rare, in stark contrast to the – often resolute – condemnation of Russia's offensive.[2039]

Still, some States used legalistic terms such as "enabler", "complicity", "accomplice", or "facilitator".[2040] Others, like for example Canada, used stronger language:

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2037 Just see e.g. A/ES/11/PV.1, 22 (Panama, Costa Rica, Dominican Republic), A/ES/11/PV.2, 4-5 (Australia, Micronesia, Kiribati, Nauru, New Zealand, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, Fiji).

2038 An exception: A/ES/11/PV.1, 23 (Bulgaria): "We strongly condemn the involvement of Belarus in this aggression, including by letting its territory be used as a launching ground for aggression and call on it to refrain from such action and abide by its international obligations.", 26 Canada ("allowing Russia to use its territory" and sending of forces), A/ES/11/PV.2, 10 (Japan): "Belarus has allowed Russian troops to *pass through* its territory and is clearly involved in Russia's aggression, which Japan strongly condemns" (emphasis added), A/ES/11/PV.3, 10 (Luxembourg): "particularly by letting the Russian forces use its territory." A/ES/11/PV.5, 6 (USA) "allowing its territory to be used to facilitate aggression".

2039 Particularly remarkable: A/ES/11/PV.1, 20 (Switzerland): "Switzerland *strongly condemns* Russia's attack on Ukraine. We are *also concerned* about the use of Belarusian territory for this military operation." Emphasis added; A/ES/11/PV.2, 2 (Slovakia) "We condemn in the strongest possible terms the Russian Federation's aggression against Ukraine, which is a blatant violation of international law. We also denounce Belarus's behaviour in facilitating Russia's assault on Ukraine." But see also A/ES/11/PV.1, 24 (Italy): "The unprovoked aggression decided by the Russian leadership is a blatant violation of international law and the Charter of the United Nations and must therefore be condemned in the strongest possible terms. The involvement of Belarus as facilitator of the Russian aggression is also to be condemned.", A/ES/11/PV.2, 10 (Japan): "Japan condemns in the strongest terms Russia's acts of aggression. […] Belarus has allowed Russian troops to pass through its territory and is clearly involved in Russia's aggression, which Japan strongly condemns."

2040 Carefully in this direction: A/ES/11/PV.1, 14 (Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Sweden, Denmark): "The world will hold Russia and Belarus accountable for their actions – Russia as the main aggressor and Belarus as the enabler.", 16 (Poland): "Russian aggression, facilitated by the complicity of the Belarusian regime", 22 (New Zealand): "We acknowledge with a grim sense of horror but, sadly, with little surprise, the role of accomplice and facilitator that Belarus has played in support of Russia's invasion.", 27 (Canada): "enabled by Belarus", A/ES/11/PV.2, 8 (Croatia): "being an accomplice to this crime of aggression"; A/ES/11/PV.5, 23 (EU) "complicity of Belarus".

> "Russia has not been alone in undermining these foundational norms and rules. Belarus has also violated its obligations under the United Nations Charter and international law. By allowing Russia to use its territory to invade and launch attacks against Ukraine, Belarus is aiding and abetting Russia's illegal war of aggression. The decision of Belarus to send its forces into Ukraine and to revoke its non-nuclear status are completely unacceptable to us and completely incompatible with its obligations under the Charter of the United Nations. There must be accountability for those actions."[2041]

The Netherlands was the only State that condemned Belarus for committing an act of aggression:

> "We condemn the aggression by the Russian Federation against Ukraine, which is unprovoked and unjustified. Russia alone is responsible for this war. We condemn Belarus for facilitating the attack, which is also an act of aggression under international law."[2042]

Liechtenstein stopped just short of this. It did not mention Belarus when it put on record that "acts of aggression, as defined by the Assembly, include a State "allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State"."[2043] In a similar manner, Colombia abstractly referred to the Articles on State Responsibility, reminding States of their obligation to refrain "from assisting or enabling such a situation" of a serious breach of international law", which flows from Russia's violation of the peremptory prohibition to use force.[2044]

States were more outspoken in the OSCE.

Ukraine, commenting on an OSCE report, classified Belarus' involvement as aggression in terms of Article 3 (f) Aggression Definition.[2045] Accordingly, while Ukraine implied that it may strike Belarus, it rejected

2041 A/ES/11/PV.1, 26.
2042 A/ES/11/PV.2, 4.
2043 Ibid, 6.
2044 A/ES/11/PV.3, 2.
2045 Comments by Ukraine, in Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022 by Professors Wolfgang Benedek, Veronika Bilkova and Marco Sassoli, ODIHR.GAL/26/22/Rev.1 (13 April 2022).

such reports as false-flag operations. It showed restraint, defining only a crossing of Belarusian soldiers into Ukrainian territory as a red line.[2046]

The European Union eventually subscribed to the qualification of Belarusian involvement as aggression, too.

Initially, it used the same rather cautious formulation as it did in the UNGA.[2047] This might be traced back to factual uncertainty about the exact involvement. For example, Sweden, despite its in legal terms strong statement that went beyond the general EU-position, acknowledged some uncertainty when it held:

> "*If* Belarus has allowed its territory to be used by Russia for perpetrating acts of aggression against Ukraine, *this would* in itself constitute aggression by Belarus against Ukraine for which they must be held responsible."[2048]

Also, the exact legal classification may have been deliberately left open. For example, Romania stated:

> "Belarus, by allowing its territory to be used for the military aggression against Ukraine, is also violating international law. Its shared responsibility in the current situation cannot and will not be overlooked. We resolutely call on Belarus to refrain from these actions and abide by its international obligations and OSCE commitments."[2049]

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2046 'Ukraine says Russia wants to drag Belarus into war, warns of invasion plan', *Reuters* (11 March 2022), https://www.reuters.com/article/us-ukraine-crisis-belarus-attacks-idAFKCN2L81M3; 'Ukraine Accuses Moscow Of 'False Flag' Operation To Lure Belarus Into War', *RFERL* (11 March 2022), https://www.rferl.org/a/ukraine-belarus-false-flag-operation-russia/31748531.html; 'Security Council Secretary Danilov: Ukraine can launch a pre-emptive missile strike on Belarus', *Kiev Independent* (1 March 2022), https://kyivindependent.com/uncategorized/security-council-secretary-danilov-ukraine-can-launch-a-pre-emptive-missile-strike-on-belarus/.

2047 PC.JOUR/1358, 24 February 2022, Annex 3, "We also condemn the involvement of Belarus in this aggression against Ukraine and call on it to abide by its international obligations." Similarly, Annex 25 (Montenegro), Annex 38 (Bulgaria), PC.JOUR/1359 27 February 2022 Annex 23 (Malta).

2048 PC.JOUR/1358, 24 February 2022, Annex 10, emphasis added.

2049 PC.JOUR/1359 27 February 2022 Annex 9. Similarly vague: Annex 10 (France): "It likewise condemns the use of Belarusian territory, as approved by the Lukashenko regime, for conducting this aggression against a sovereign country in violation of all the fundamental principles on which this Organization is based and which constitute the kernel of its founding texts." Annex 15 (Germany): "flagrant violations of international law by Russia and Belarus". Annex 19 (Czech Republic) is also in-

The Swedish statement and Slovenia's condemnation of "the unprovoked and unprecedented military aggression by Russia *and* Belarus against Ukraine"[2050] suggest, however, that States were willing to qualify Belarusian assistance as an act of aggression itself already in the early stage of the war. Latvia was clear in this respect:

> "The troops are entering Ukraine from the territory of the Russian Federation, from Belarus and from the territories of Ukraine temporarily occupied by Russia. We strongly condemn Belarus for enabling this attack thus becoming an aggressor itself."[2051]

With its statement from 3 March 2022, the EU fully subscribed to this view, too. It underlined that Belarus "directly" and "actively" supported Russia's war of aggression,[2052] and denounced Belarus for its "direct participation" as "co-aggressor".[2053] In general, the act of support that justified this qualification was the use of Belarusian territory, as approved by the Belarusian government.[2054]

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teresting. It held: "We also condemn the involvement of Belarus in this aggression against Ukraine. We call on Belarus to abide by its international obligations that is not to offer its territory for an aggression against a third country." The Czech Republic specified the content of the obligation; the legal origin remained open, however.

2050 PC.JOUR/1358, 24 February 2022, Annex 29, emphasis added. In this direction also Annex 31 (Lithuania). Viewing it as a violation of international law, yet without further specification, Annex 35 (Malta).

2051 PC.JOUR/1358, 24 February 2022, Annex 33.

2052 Emphasizing the same wording: PC.JOUR/1360 3 March 2022 Annex 8 (Albania). Similarly now NATO: Statement by the North Atlantic Council marking one year of Russia's war of aggression against Ukraine, https://www.nato.int/cps/en/natohq/official_texts_212268.htm "actively facilitating".

2053 OSCE, PC.JOUR/1360, 3 March 2022, Annex 3, 1; PC.JOUR/1361, 7 March 2022, Annex 3, 2; PC.JOUR/1363, 17 March 2022, Annex 4, 2.

2054 E.g. PC.JOUR/1358, 24 February 2022, Annex 4 (France), Annex 12 (Switzerland), Annex 18 (Moldova); PC.JOUR/1362 10 March 2022 Annex 4 (UK): "We condemn Belarus' facilitation of the Russian invasion by hosting Russian military forces and assets and providing access through its territory." More vaguely: PC.JOUR/1358, 24 February 2022, Annex 9 (Germany): "co-operation", Annex 14 (Denmark): "involvement", Annex 17 (Estonia): "involvement", Annex 35 (Malta): "participation", Annex 36 (Italy): "collaboration", Annex 37 (Portugal): "involvement"; PC.JOUR/1359 27 February 2022 Annex 14 (Lithuania): "accomplice"; PC.JOUR/1364 24 March 2022 Annex 5 (Portugal): "complicity".

While the USA initially seemed more careful, announcing to "hold Belarus accountable for the role it is playing in the invasion",[2055] it eventually left little doubt:

> "To the representative of Belarus, you have stabbed your neighbor in the back. Do not come here with words to try and excuse that fact. You are a co-aggressor, your territory has been used as a launch pad for a vicious, barbaric attack on a neighboring state, and you bear responsibility for that."[2056]

Canada also joined the European position:

> "Russian armed forces invaded Ukraine from the territory of Belarus and conduct offensive bombing operations from airfields on Belarusian territory. This makes Belarus a co-aggressor."[2057]

Belarus' position towards the reproaches of involvement in the war is not unambiguous. Its defense strategy appears multilayered.

Belarus voted against the UNGA resolution. But, especially in international forums, Belarus remained silent on the *legality* of Russia's military operations.[2058] Although it sympathized with the Russian justification narrative,[2059] it did not unequivocally support the Russian position. Instead, it stressed the importance of, and its role in, negotiations[2060] and emphasized

2055 PC.JOUR/1358, 24 February 2022, Annex 6. See also PC.JOUR/1359, 27 February 2022, Annex 7 "We are also taking note of all those enabling this war, including the regime in Belarus, and they too will be held to account."; PC.JOUR/1361 7 March 2022 Annex 6 "with the support of Belarus"; PC.JOUR/1362 10 March 2022 Annex 6: "We condemn the Lukashenka regime's support for Russia's premeditated attack on its peaceful neighbour."

2056 PC.DEL/359/22, 7 March 2022.

2057 PC.JOUR/1364 24 March 2022 Annex 18. See also PC.JOUR/1360 3 March 2022 Annex 20; PC.JOUR/1358, 24 February 2022, Annex 5.

2058 A/ES/11/PV.5, 5-6. Belarus' statements in the OSCE are unfortunately not publicly available.

2059 'Lukashenko explains essence of crisis in Ukraine', *BelTA* (1 March 2022), https://eng.belta.by/president/view/lukashenko-explains-essence-of-crisis-in-ukraine-148272-2022/; 'Lukashenko describes Russia's military operation as pre-emptive strike against West', *BelTA* (12 April 2022), https://eng.belta.by/president/view/lukashenko-describes-russias-military-operation-as-pre-emptive-strike-against-west-149451-2022/; 'Transcript: AP Interview with Belarusian President Alexander Lukashenko', *AP* (6 May 2022), https://apnews.com/article/alexander-lukashenko-interview-transcript-883228111287.

2060 Cf A/ES/11/PV.5, 5-6. See also 'MFA: Belarus ready to do everything to help bring peace to Ukraine', *BelTA* (25 February 2022), https://eng.belta.by/politics/view

that it "categorically does not accept any war. We have done and are doing everything now so that there isn't a war."[2061] On that note, Belarus – unlike Russia[2062] – did also not send a letter to the Security Council with a justification for its involvement.

Instead, on the international stage, Belarus generically denied any involvement in the "special operation". In the UNGA, Belarus "categorically den[ied] any accusations that Belarus is involved in any unlawful use of force against Ukraine."[2063] In an interview, Lukashenko further stressed:

> "We do not intend to take part in Russia's special military operation in Ukraine because there is no need at all. Anything we can or could offer to the Russian Federation, they have already. So, there's absolutely no need to take part in that special military operation."[2064]

It appears however that – contrary to what the generic nature of the denial in the UNGA may suggest – Belarus did not refute any support.[2065] First, it is remarkable that in denying accusations, President Lukashenko repeatedly reiterated that the "[Belarusian] army has not taken part and is not taking part in hostilities, [Belarus] is not going to participate in special operation in [Ukraine]."[2066] Second, Lukashenko alluded to a right of preventive self-defense in connection with territorial support. He acknowledged that

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/mfa-belarus-ready-to-do-everything-to-help-bring-peace-to-ukraine-148158-2022/; 'Lukashenko reveals details of his phone call to Ukrainian president', *BelTA* (1 March 2022), https://eng.belta.by/president/view/lukashenko-reveals-details-of-his-phone-call-to-ukrainian-president-148283-2022/. See also Ian Phillips, 'The AP Interview: Belarus admits Russia's war 'drags on'', *AP* (5 May 2022), https://apnews.com/article/belarus-alexander-lukashenko-ap-interview-9bc1f6524eb65841b924883705684b7f.

2061 'Belarus doing 'everything' to end Ukraine war: Lukashenko', *AlJazeera* (5 May 2022), https://www.aljazeera.com/news/2022/5/5/belarus-doing-everything-to-end-ukraine-war-lukashenko. 'Transcript: AP Interview with Belarusian President Alexander Lukashenko', *AP* (6 May 2022). "This conflict must be stopped. […] Bad Putin or good Putin, Russia did the right thing or the wrong thing. I repeat: not now. Now we need to stop the war then we'll figure it out."

2062 S/2022/154 (5 March 2022).

2063 A/ES/11/PV.5, 5.

2064 'Transcript: AP Interview with Belarusian President Alexander Lukashenko', *AP* (6 May 2022).

2065 For an uncritical account: Niklas Reetz, 'Belarus is Complicit in Russia's War of Aggression', *EJIL:Talk!* (1 March 2022).

2066 Belarus Embassy Bulgaria (1 March 2022), https://twitter.com/by_emb_bg/status/1498679313587130371?s=20&t=OVJcd6E3Euu8RNt4-eQBxA. See also 'Belarusian army does not participate in special operation in Ukraine, Lukashenko says', *TASS*

> "[Russian] Plans also included the use of the Russian troops temporarily stationed on the territory of Belarus. I was informed about it at 5am on 24 February. Before such a decision was made, Belarusian and Russian intelligence services detected several anti-aircraft and missile divisions on Ukrainian territory in the vicinity of the Belarusian border (it was about 23.00 on 23 February). Those systems were on standby to strike Russian troops on our territory, the troops I asked Putin to keep in Belarus for some time."[2067]

Also, as regards strikes launched from Belarusian territory, President Lukashenko confirmed that two or three rockets were launched from the territory of Belarus in reaction to Ukrainian preparations for a strike "within the next few minutes".[2068] In fact, Lukashenko repeated the narrative of a Russian strike from Belarusian territory preventing an immediate crushing

(4 March 2022), https://tass.com/world/1416713. See also 'Lukashenko reiterates Belarus has "no plans to fight in Ukraine"', *TASS* (25 March 2022), https://tass.com/world/1427563; 'Lukashenko: Belarus will not take part in special operation in Ukraine', *BelTA* (1 March 2022), https://eng.belta.by/president/view/lukashenko-belarus-will-not-take-part-in-special-operation-in-ukraine-148274-2022/.

2067 'Lukashenko explains essence of crisis in Ukraine', *BelTA* (1 March 2022), https://eng.belta.by/president/view/lukashenko-explains-essence-of-crisis-in-ukraine-148272-2022/.

2068 'It was a forced step. Lukashenka on launching missiles from Belarus on positions in Ukraine', *BelTa* (27 February 2022), https://www.belta.by/president/view/lukashenko-podtverdil-chto-s-territorii-belarusi-byli-zapuscheny-rakety-po-pozitsijam-v-ukraine-no-eto-487330-2022/. 'Transcript: AP Interview with Belarusian President Alexander Lukashenko', *AP* (6 May 2022): "And the fact that the Russian Federation used part of those troops for the military operation after the end of the drills – by the way, after the exercises, Russia began to withdraw troops from Belarus and it all began with a provocation. Again, with the provocations. The Ukrainians have built four Tochka-U missile launching sites targeted at Belarus. Lucky for us, there were still troops left there after the drills. And the Russians helped us trace and hit those four positions just 30 minutes before the start of the military operation. And part of the troops really left Belarus to the south to Ukraine."

attack against Belarus that left no other choice.[2069] He backed this by claiming to have intercepted Ukrainian missiles directed against Belarus.[2070]

Third, while acknowledging that Russian injured soldiers were treated in Belarus, Lukashenko suggested that this was not prohibited.[2071]

Belarus' response to other States' accusations also confirms this multilayered approach of (deliberate) ambiguity. Lukashenko stated that "Belarus was declared an accomplice of the aggressor without reason or evidence.[2072] He further stressed that

> "Belarus and I are waging a weird 'war', as our military did not kill a single Ukrainian and a single Russian in this war. Russians and Ukrainians did not kill a single Belarusian. It is a strange war, is not it? So wake up, what are you blaming me for?"[2073]

Finally, Lukashenko stated:

> "We are reproached for supporting Russia. Come to your senses! Belarusians have neither the legal nor the moral right to abandon Russia. We've always been together, we've always been one. No matter what you

2069 'Details of Lukashenko-Putin lengthy talks in Kremlin revealed', *BelTA* (11 March 2022), https://eng.belta.by/president/view/details-of-lukashenko-putin-lengthy-talks-in-kremlin-revealed-148549-2022/; 'Lukashenko: It was not us who unleashed this war, our conscience is clear', *BelTA* (11 March 2022), https://eng.belta.by/president/view/lukashenko-it-was-not-us-who-unleashed-this-war-our-conscience-is-clear-148527-2022/; 'Transcript: AP Interview with Belarusian President Alexander Lukashenko', *AP* (6 May 2022).

2070 'Kyiv sees high risk of attack on western Ukraine from Belarus', *AlJazeera* (20 March 2022), https://www.aljazeera.com/news/2022/3/20/ukraine-sees-high-risk-of-belarus-attack-on-volyn.

2071 'Injured Russian military personnel to continue getting medical aid in Belarus', *BelTA* (1 March 2022), https://eng.belta.by/president/view/injured-russian-military-personnel-to-continue-getting-medical-aid-in-belarus-148293-2022/: "I told Zelenskyy about it [during a phone call on 27 February]. He reproached me for taking in the injured. I said we will continue taking in, treating, and saving them. Every morning the healthcare minister reports what is going on over there to me. We treat them and will continue treating these guys – in Gomel, Mozyr, and I think in some other district capital when they are transported to us. What's wrong with that? Injured people have always received medical treatment during any war."

2072 'Lukashenko: Belarus was groundlessly dubbed 'co-aggressor'', *BelTa* (7 April 2022), https://eng.belta.by/president/view/lukashenko-belarus-was-groundlessly-dubbed-co-aggressor-149305-2022/.

2073 'Lukashenko accuses West of using sanctions for no reason', *BelTA* (6 May 2022), https://eng.belta.by/president/view/lukashenko-accuses-west-of-using-sanctions-for-no-reason-149986-2022/.

> do, no matter what arrows you send our direction, you will not be able to drive us apart. […] We should not be reproached for supporting Russia. There are not 50 of us. I want everyone in the West to hear me once again: Belarusians are not aggressors. But, being an ally and strategic partner of fraternal Russia, we will support it in every possible way."[2074]

On a legal level, as in particular Belarus' UNGA statement with the generic reference to "*any* unlawful use of force" implies, even to the extent that Belarus is not supporting the Russian justification for its military operations, it is accepting that involvement in an unlawful use of force would be unlawful. It is noteworthy, however, that Belarus appears rather reluctant to accept responsibility for "aggression" in case its armed forces are not participating.

Syria criticized that the resolution extended to Belarus.[2075] The reasons remained however unclear.

(2) Syria

Syrian troops are said to be engaged in Ukraine on Russia's side.[2076] Russia welcomed any foreign fighters willing to join their cause. Putin said "If you see that there are these people who want of their own accord, not for money, to come to help the people living in Donbas, then we need to give them what they want and help them get to the conflict zones."[2077] Despite backing Russia's right to self-defense against Ukraine,[2078] Syria denied any

2074 'Lukashenko: Belarus will support Russia in every possible way', *BelTA* (9 May 2022), https://eng.belta.by/president/view/lukashenko-belarus-will-support-russia-in-every-possible-way-150039-2022/. See also 'Transcript: AP Interview with Belarusian President Alexander Lukashenko', *AP* (6 May 2022): "[…] there's only one country openly siding with Russia on this – Belarus […]".

2075 A/ES/11/PV.5, 13.

2076 Ministry of Defense of Ukraine, 17 March 2022, https://twitter.com/defenceu/status/1504465977119023106; Greg Myre, 'Russia is trying to recruit Syrians to fight in Ukraine, U.S. says', *NPR* (7 March 2022), https://www.npr.org/2022/03/07/1084963489/us-russia-is-trying-to-recruit-syrian-fighters-to-go-to-ukraine.

2077 Martin Chulov, 'Syria recruiting troops from its military to fight with Russian forces in Ukraine', *Guardian* (11 March 2022), https://www.theguardian.com/world/2022/mar/11/putin-approves-russian-use-of-middle-east-fighters-against-ukraine.

2078 'Syrian president Assad backs Putin on Ukraine - Syrian presidency', *Reuters* (25 February 2022), https://www.reuters.com/world/middle-east/syrian-president-assad-backs-putin-ukraine-syrian-presidency-2022-02-25/.

recruitment drive.[2079] Ukraine reacted: "If they freeze, our artillery will warm them."[2080]

(3) China

China did not comment on Russia's military operation in legal terms. It abstained in both the UNGA and the Security Council. It advocated for a diplomatic solution respecting every country's legitimate security concerns. China faced criticism for its "political support" of Russia and for sharing misinformation.[2081] Notably, States did not seem to make legal claims in that respect. China merely responded that these allegations were disinformation.[2082]

Aside from the fact that China did not view the Russian military operation as illegal, China reacted similarly to perceived accusations of complicity: it firmly denied reports that it had prior knowledge about the Russian invasion or had agreed to the military operation.[2083]

2079 'Russia drafting thousands in Syria for Ukraine war: monitor', *France24* (15 March 2022), https://www.france24.com/en/live-news/20220315-russia-drafting-thousands-in-syria-for-ukraine-war-monitor.

2080 Jeyhun Aliyev, 'Russia wants to involve Assad regime troops in Ukraine war: Ukrainian ministry', *AA* (18 March 2022), https://www.aa.com.tr/en/russia-ukraine-war/russia-wants-to-involve-assad-regime-troops-in-ukraine-war-ukrainian-ministry/2538883#.

2081 'NATO warns China not to help Russia in Ukraine war', *Reuters* (23 March 2022), https://www.reuters.com/world/nato-warns-china-not-help-russia-ukraine-war-2022-03-23/. See also 'Deputy Secretary Sherman and EEAS Secretary General Sannino at a Joint Press Availability' (22 April 2022), https://www.state.gov/deputy-secretary-sherman-and-eeas-secretary-general-sannino-at-a-joint-press-availability.

2082 'Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on March 24, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202203/t20220324_10655064.html.

2083 E.g. 'Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on March 16, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202203/t20220316_10652302.html; 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on February 24, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202202/t20220224_10645282.html.

Accusations of helping Russia evade sanctions seemed to be primarily politically driven.[2084] In any event, China's response suggested that it neither felt obliged to comply with Western sanctions nor viewed this as potentially unlawful assistance to Russia – at least to the extent that its normal trade relations are affected:

> "oppose[s] unilateral sanctions and long-arm jurisdiction without basis in international law and UN Security Council mandate as well as undue prohibition or restriction on normal economic and trade activities between Chinese and foreign companies. […] There is no reason to make the people of all countries pay for a regional conflict. […] We urge the US to avoid undermining China's legitimate rights and interests in any form when handling the Ukraine issue and relations with Russia. We will take all necessary measures to resolutely uphold the legitimate and lawful rights and interests of Chinese companies and individuals."[2085]

Accordingly, China noted while it did not deliberately circumvent Western sanctions,[2086] it continued normal trade cooperation.[2087]

However, allegations of Chinese readiness to provide material military support to Russia led to a more intense diplomatic exchange. Reportedly, Russia asked China for assistance, including military assistance.[2088] Russia

2084 James Politi, 'US threatens to punish third parties helping Moscow evade sanctions', *FT* (25 March 2022), https://www.ft.com/content/867dc0d2-fb7b-461e-9e54-0c545ccd8c47.

2085 'Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on April 21, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202204/t20220421_10671466.html.

2086 Yew Lun Tian, 'China says not deliberately circumventing sanctions on Russia', *Reuters* (2 April 2022), https://www.reuters.com/world/china/china-says-not-deliberately-circumventing-sanctions-russia-2022-04-02/.

2087 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on February 24, 2022'; 'Spokesperson Ministry of Foreign Affairs China (9 March 2022)', https://twitter.com/MFA_China/status/1501561637647818754.

2088 Edward Wong, Julian Barnes, 'Russia Asked China for Military and Economic Aid for Ukraine War, U.S. Officials Say', *NYT* (13 March 2022), https://www.nytimes.com/2022/03/13/us/politics/russia-china-ukraine.html; Demetri Sevastopulo, 'Russia has asked China for military help in Ukraine, US officials say', *FT* (14 March 2022), https://www.ft.com/content/30850470-8c8c-4b53-aa39-01497064a7b7; Stuart Lau, 'EU has 'very reliable evidence' China is considering military support for Russia', *Politico* (18 March 2022), https://www.politico.eu/article/eu-has-very-reliable-evidence-china-is-considering-military-aid-for-russia/. See also Oona Hathaway, Ryan Goodman, 'Why China Giving Military Assistance to Russia Would Violate International Law', *Just Security* (17 March 2022).

denied any such request.[2089] Also, China rejected the reports as American "disinformation" with malicious intentions.[2090] It claimed to have never heard about such a Russian request.[2091] Its general position was:

> "When we see the risk of conflict, we won't do the same as the US, who has offered Ukraine a large amount of military equipment. I believe that as a strong country, Russia doesn't need China or other countries to provide weapons to it."[2092]

In fact, States did see indications that China was supporting Russia.[2093]

Still, States voiced their concern about Chinese support for the Russian war, albeit legal considerations seemed to underly States' statements at best. For example, the G7 called:

> "on China not to assist Russia in its war of aggression against Ukraine, not to undermine sanctions imposed on Russia for its attack against the sovereignty and territorial integrity of Ukraine, not to justify Russian action in Ukraine, and to desist from engaging in information manip-

2089 Guy Faulconbridge, 'Russia could take full control of major Ukrainian cities – Kremlin', *Reuters* (14 March 2022), https://www.reuters.com/world/russia-has-not-asked-china-military-help-use-ukraine-kremlin-2022-03-14/.

2090 'Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on March 14, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202203/t20220314_10651590.html; 'Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on March 15, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202203/t20220315_10651967.html; 'Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on March 24, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202203/t20220324_10655064.html; 'Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on February 20, 2023', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202302/t20230220_11027934.html.

2091 'Chinese embassy says has never heard of Russian requests for help', *Reuters* (13 March 2022), https://www.reuters.com/world/chinese-embassy-says-has-never-heard-russian-requests-ukraine-help-2022-03-13/.

2092 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on February 24, 2022'.

2093 'Pentagon Press Secretary John F. Kirby Holds a Press Briefing, March 30, 2022', https://www.defense.gov/News/Transcripts/Transcript/Article/2983648/pentagon-press-secretary-john-f-kirby-holds-a-press-briefing-march-30-2022/; 'Transcript: Secretary of State Antony Blinken on "Face the Nation", CBC (19 February 2023), https://www.cbsnews.com/news/antony-blinken-face-the-nation-transcript-02-19-2023/.

> ulation, disinformation and other means to legitimise Russia's war of aggression against Ukraine."[2094]

The NATO called:

> "on all states, including the People's Republic of China (PRC), to uphold the international order including the principles of sovereignty and territorial integrity, as enshrined in the UN Charter, to abstain from supporting Russia's war effort in any way, and to refrain from any action that helps Russia circumvent sanctions."[2095]

That this opinion was arguably also driven by legal considerations is shown by the NATO Secretary General's previous explanations:

> "On China, China should join the rest of the world condemning strongly the brutal invasion of Ukraine by Russia. And any support to Russia, military support or any other type of support, would actually help Russia conduct a brutal war against an independent sovereign nation, Ukraine, and help them to continue to wage war which is causing death, suffering and an enormous amount of destruction. So China has an obligation as a member of the UN Security Council to actually support and uphold international law. And the Russian invasion of Ukraine is a blatant violation of international law so we call on [China] to clearly condemn the invasion and of course not support Russia. And we are closely monitoring any signs of support from China to Russia."[2096]

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2094 'G7 Germany 2022 Foreign Ministers' Communiqué 14 May 2022, Weissenhaus', https://www.g7germany.de/resource/blob/997532/2039866/59cf2327ee6c90999b069fca648a2833/2022-05-14-g7-foreign-ministers-communique-data.pdf?download=1. Note that initially, G7 was more careful, without specific reference to specific States: "we urge all countries not to give military or other assistance to Russia to help continue its aggression in Ukraine. We will be vigilant regarding any such assistance.", https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/g7-leaders-statement/.

2095 'Statement by NATO Heads of State and Government, 24 March 2022', https://www.nato.int/cps/en/natohq/official_texts_193719.htm.

2096 'Press conference by NATO Secretary General Jens Stoltenberg ahead of the Extraordinary meeting of NATO Ministers of Defence' (15 March 2022), https://www.nato.int/cps/en/natohq/opinions_193085.htm. For China's response to that remark: 'Spokesperson of the Chinese Mission to the EU Speaks on a Question Concerning NATO Leader's Remarks on China, 17 March 2022', http://eu.china-mission.gov.cn/eng/fyrjh/202203/t20220317_10652463.htm. See also Monika Scislowska, 'NATO Chief sees 'some signs' China could back Russia's war', AP (22

Against that background, Western States further warned China that it would face sanctions in case it supported Russian war efforts.[2097] For example, the US warned China that since "military or other assistance" "violates sanctions and supports the war effort", it would face "significant consequences."[2098]

(4) Iran

Russia was reported to use Iranian 'kamikaze drones' to attack Ukrainian infrastructure. This led to a diplomatic scuffle, which was also legally driven.

Ukraine claimed that Iran was an "accomplice of aggression".[2099] "Providing weapons to wage a war of aggression in Ukraine makes Iran complicit of aggression and terrorist acts of Russia against Ukraine."[2100] But Ukraine built its accusation in legal terms not only on 'complicity': in addition, it accused Iran of violating Security Council resolution 2231 (2015).[2101]

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February 2023), https://apnews.com/article/russia-ukraine-nato-politics-jens-stoltenberg-e8874580698b31cdfac96a60f13eef5b.

2097 Jennifer Rankin, Vincent Ni, 'EU leaders urged to be tough on China if it backs Russia in Ukraine', *Guardian* (31 March 2022), https://www.theguardian.com/world/2022/mar/31/eu-leaders-urged-to-be-tough-on-china-if-it-supports-russia-war-in-ukraine.

2098 'Press Briefing by Press Secretary Jen Psaki', (14 March 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/03/14/press-briefing-by-press-secretary-jen-psaki-march-14-2022/. See also Michael Martina, 'U.S. says China could face sanctions if it supports Russia's war in Ukraine', *Reuters* (6 April 2022), https://www.reuters.com/world/us-says-china-could-face-sanctions-if-it-supports-russias-war-ukraine-2022-04-06/; 'Readout of President Joseph R. Biden Jr. Call with President Xi Jinping of the People's Republic of China' (18 March 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/18/readout-of-president-joseph-r-biden-jr-call-with-president-xi-jinping-of-the-peoples-republic-of-china-2/.

2099 'Podolyak: Iran must be recognized as accomplice of aggression in Europe', *Kyiv Independent* (1 November 2022), https://kyivindependent.com/news-feed/podolyak-iran-must-be-recognized-as-accomplice-of-aggression-in-europe.

2100 'Statement of the Ministry of Foreign Affairs of Ukraine regarding Iran's Complicity in Russia's Crimes against Ukraine', 17 October 2022, https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-spivuchasti-iranu-v-zlochinah-rosiyi-proti-ukrayini; PC.DEL/1598/22 (25 October 2022).

2101 S/2022/771 (18 October 2022); S/PV.1967, 16.

Charges of complicity were not prominent in other (Western) States' reactions. Instead, they primarily focused on the violation of Security Council resolution 2231 (2015).[2102] Resolution 2231 (2015) did not address complicity, but generally prohibited Iran from transferring specifically listed items.[2103] The attempt by Western States to bring into play UN authority may have contributed to this rather limited focus. Western States requested an investigation by the UN Secretary General of the situation.[2104]

This attempt to use the institutional enforcement powers attached to a sanction regime provoked vehement pushback, particularly from Russia and Iran and especially with respect to UN investigations.[2105] In addition, Russia declared all allegations to be false and unsubstantiated by evidence.[2106]

In its first response, Iran similarly rejected "the unfounded allegation that Iran has supplied unmanned aerial vehicles *for* the use in the conflict in Ukraine.[2107] Eventually, however, Iran acknowledged that it sold a "small number" of drones, but no missiles to Russia in the course of general defense cooperation.[2108] Crucially, Iran stressed that the transfer only took place "months before the Ukraine war".[2109] Iran continued to maintain that weapons were never provided *to be used for* the Ukraine war, and even

2102 E.g. S/2022/781 (21 October 2022) (France, Germany, UK); S/2022/782 (21 October 2022) (USA); S/PV.9167, 11 (Norway). Still, States noted that Iran supported Russia's illegal war, but did not condemn it in legal terms. E.g. France, S/PV.9167, 6: "France calls on Iran to immediately cease all forms of support for Russia's war of aggression on Ukraine and to stop violating resolution 2231 (2015)." Germany, S/PV.9225, 21: "we have been observing clear evidence of Iran's covert support for Russia's brutal and unprovoked war of aggression against Ukraine. Iran has transferred hundreds of unmanned aerial vehicles to Russia. That is a deeply concerning violation of resolution 2231 (2015)". See also S/PV.9225, 4 (EU), 17 (UK). For a call to "call out that illegality", Marco Milanovic, 'The Complicity of Iran in Russia's Aggression and War Crimes in Ukraine' *Articles of War* (19 October 2022).

2103 S/RES/2231 (20 July 2015), Annex B para 4 a.

2104 S/2022/782 (21 October 2022) (USA); S/PV.9167; S/PV.9225.

2105 S/2022/783 (21 October 2022); S/2022/794 (24 October 2022); S/PV.9167, 4, 17.

2106 S/PV.9127, 18; S/PV.9167, 4; S/PV.9225, 16.

2107 S/2022/776 (19 October 2022); S/PV.9167, 18. Emphasis added.

2108 Reuters, 'Iran says it supplied drones to Russia before Ukraine war began', *Guardian* (5 November 2022), https://www.theguardian.com/world/2022/nov/05/iran-says-it-supplied-drones-to-russia-before-ukraine-war-began.

2109 'Drone Delivery dates back to month before Ukraine war: Iran FM', *IRNA* (5 November 2022), https://en.irna.ir/news/84933185/Drone-delivery-dates-back-to-months-before-Ukraine-war-Iran. See also S/PV.9225, 21.

added that in case Russia's use of Iranian drones in Ukraine proved true, "we will not remain indifferent to this issue".[2110] Iran further put emphasis on its general position towards the war: Iran had abstained on the UNGA resolution condemning Russia, and declared itself neutral.[2111] Iran also underlined that it was not part of the war, and that Iran's bilateral military cooperation with Russia was legal.[2112]

(5) Western (non)-sanctions

Many Western States decided to impose far-reaching sanctions against Russia. For example, States closed their airspace to Russian aircraft and restricted trade and financial relations.[2113] Such measures were considered sanctions. While also an expression of solidarity with Ukraine, they were treated distinct from assistance provided to Ukraine.[2114] Similarly, States seemed not to accept that sanctions were legally necessary to avoid otherwise unlawful support to Russia, in any event to the extent that sanctions concerned normal trade relations and did not immediately facilitate Russian war efforts. Instead, sanctions were conceived as political means to confront Russia's aggression and increase its cost, thereby aiming to degrade Russian war efforts and forcing Russia to end its operations.[2115] This is not least illustrated by the fact that States widely continue to procure

2110 Reuters, 'Iran says it supplied drones to Russia before Ukraine war began', *Guardian* (5 November 2022). See also S/PV.9225, 21.

2111 S/PV.9167, 18.

2112 'A delegation from Atomic Energy Agency is coming to Tehran', *IRNA* (14 November 2022), https://www.irna.ir/news/84942370.

2113 European Commission, 'Sanctions adopted following Russia's military aggression against Ukraine', https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-aggression-against-ukraine_en.

2114 Drawing such a line e.g. A/ES-11/PV.4, 13 (Romania); 'Additional support to Ukraine (20 March 2022)', https://www.foreignminister.gov.au/minister/marise-payne/media-release/additional-support-ukraine; 'Australian Support to Ukraine (1 March 2022)', https://www.pm.gov.au/media/australian-support-ukraine (Australia).

2115 E.g. PC.JOUR/1358 24 February 2022 Annex 7 (UK); 'Fact Sheet: United States and G7 Partners Impose Severe Costs for Putin's War Against Ukraine', (8 May 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/08/fact-sheet-united-states-and-g7-partners-impose-severe-costs-for-putins-war-against-ukraine/.

Russian fossil fuel although those revenues contribute to financing the Russian military operations.

Ukraine did not leave this understanding unchallenged. For example, in view of the fact that Russia was using oil and gas revenues "to continue financing [its] war machine", Ukraine's Foreign Minister stated:

> "If there is any country in Europe who will continue to oppose the embargo on Russian oil, there will be good reason to say, this country is complicit in the crimes committed by Russia in the territory of Ukraine, […T]hey play on the Russian side and they share responsibility for everything Russia does in Ukraine."[2116]

Notwithstanding the legal language of such a statement, the specific legal value of this argument is not unequivocal. Said statement was made in the context of a heated political rather than a legal debate on an embargo on Russian oil. Also, many aspects of such a legal claim, e.g., the exact contribution of the revenues, or the relevant "crimes" for which States are alleged to bear responsibility, remain hardly specified.

### b) Assistance and Ukraine's defense

Assistance to Ukraine was not provided in a legal vacuum. The supporting States provided legal explanations (1) that did not go unnoticed by other States (2).

2116 'EU countries blocking oil embargo 'complicit' in Russian 'crimes': Kyiv', *Alarabya News* (4 May 2022), https://english.alarabiya.net/News/world/2022/05/04/EU-countries-blocking-oil-embargo-complicit-in-Russian-crimes-Kyiv. It is interesting to note arguments against such an embargo like the one of Hungary that deny such sanctions as this would ruin their economy. If understood in legal terms, those could point towards a justification of "necessity". Paul Kirby, 'Ukraine war: EU plans Russian oil ban and war crimes sanctions', *BBC* (4 May 2022), https://www.bbc.com/news/world-europe-61318689.

(1) Western States' military assistance

Ukraine called for support repeatedly.[2117] States paid heed.[2118] States widely provided humanitarian assistance, irrespective of their position towards the military operation.[2119]

In addition to substantial economic and financial support,[2120] Western States also provided significant security assistance. This assistance stopped short of engaging in active combat activities.[2121] Still, it had substantial impact on the battlefield.[2122] The arsenal provided was diverse and tailored towards the specific military needs of Ukraine. Accordingly, military support

2117 S/PV.8983, 15 "Security assistance is needed […]." S/PV.8986, 16 "It is already the shared duty of the international community to stop the Russian murderers and terrorists by closing the skies over Ukraine, supporting Ukraine in terms of security and humanitarian assistance […]"; S/PV.9008, 21: "The negotiation process, which is under way, by no means removes the need to provide to Ukraine additional assistance with weapons and to implement the new sanctions imposed on the Russian Federation for the act of aggression committed." 'Speech by President of Ukraine Volodymyr Zelenskyy at the NATO Summit, 24 March 2022', https://www.president.gov.ua/en/news/vistup-prezidenta-ukrayini-volodimira-zelenskogo-na-samiti-n-73785: "Ukraine needs military assistance - without restriction."

2118 For an overview see: Emma Nix, Akshat Dhankher, Nancy Messieh, 'Ukraine Aid Tracker: Mapping the West's support to counter Russia's invasion', *Atlantic Council* (13 May 2022), https://www.atlanticcouncil.org/commentary/trackers-and-data-visualizations/ukraine-aid-tracker-mapping-the-wests-support-to-counter-russias-invasion/; 'Ukraine Support Tracker', https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/; Claire Mills, *Military assistance to Ukraine since the Russian invasion* (Briefing Paper, House of Commons, 21 February 2023).

2119 E.g. S/PV.8983, 7 (USA), 8 (Ireland, EU), 11 (UK), 13 (Brazil), PC.JOUR/1362 10 March 2022 Annex 8 (Turkey); S/PV.9126, 11 (China), 12 (India). Note that humanitarian assistance was widely treated as distinct from the question of legality of the use of force. States agreed that such assistance to the population in distress was necessary and permissible.

2120 E.g. PC.JOUR/1361 7 March 2022 Annex 5 (UK); E.g. 'Press conference with NATO Secretary General Jens Stoltenberg and the President of Poland, Andrzej Duda at Łask Military Airbase in Poland, 1 March 2022', https://www.nato.int/cps/en/natohq/opinions_192582.htm?selectedLocale=en.

2121 E.g. 'Remarks by President Biden on Russia's Unprovoked and Unjustified Attack on Ukraine' (24 February 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/24/remarks-by-president-biden-on-russias-unprovoked-and-unjustified-attack-on-ukraine/.

2122 'Department Press Briefing – May 17, 2022', https://www.state.gov/?post_type=state_briefing&;p=92333Assignment; 'Moskva sinking: US gave intelligence that helped Ukraine sink Russian cruiser – reports', *BBC* (6 May 2022), https://www.bbc.com/news/world-us-canada-61343044.

in the initial phase of the conflict included, for example, anti-tank weapons, anti-aircraft systems, ammunition, protective gear, and surveillance equipment. States also sent fuel and field rations.[2123] Moreover, States shared intelligence with Ukraine, providing high-resolution satellite imagery and real-time intelligence on Russia's plans and activities.[2124] With the war dragging on, States eventually stepped up their support by providing missiles, heavy weapons like tanks, heavy artillery, drones, helicopters, armored transport vehicles or patrol boats, and radar systems.[2125]

Assisting States directly transferred equipment from their own military stocks to the Ukrainian army. They permitted third States to reexport weapons that originated from the assisting State. Or they authorized private arms exports to Ukraine. Security assistance was organized either as a donation, loan, lease, or purchase.

Moreover, Ukrainian soldiers received weapons training on military bases outside Ukraine.[2126] Several States also did not stop their citizens from

2123 'Which countries are sending military aid to Ukraine?', *AlJazeera* (28 February 2022), https://www.aljazeera.com/news/2022/2/28/which-countries-are-sending-military-aid-to-ukraine.

2124 'Press Briefing by Press Secretary Jen Psaki' (3 March 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/03/03/press-briefing-by-press-secretary-jen-psaki-march-3rd-2022/; Natasha Bertrand, Katie Lillis, 'US officials say Biden administration is sharing intelligence with Ukraine at a 'frenetic' pace after Republicans criticize efforts', *CNN* (4 March 2022), https://edition.cnn.com/2022/03/04/politics/us-ukraine-intelligence/index.html; Natasha Bertrand, 'Intelligence: Russia has taken to trying to jam NATO plane's radar', *CNN* (11 March 2022), https://edition.cnn.com/2022/03/10/politics/nato-surveillance-flight-russia-belarus/index.html.

2125 For example: 'U.S. Security Cooperation with Ukraine. Fact Sheet', *DOD* (3 March 2023), https://www.state.gov/u-s-security-cooperation-with-ukraine/; 'Liste der militärischen Unterstützungsleistung', https://www.bundesregierung.de/breg-de/themen/krieg-in-der-ukraine/lieferungen-ukraine-2054514; 'Canadian military support to Ukraine', https://www.canada.ca/en/department-national-defence/campaigns/canadian-military-support-to-ukraine.html; 'Denmark's Contribution to support of Ukraine', https://en.kriseinformation.dk/war/denmarks-response/denmarks-contributions; 'Norwegian support to Ukraine and neigboring countries', https://www.regjeringen.no/en/topics/foreign-affairs/humanitarian-efforts/neighbour_support/id2908141/#mil; 'Invasion of Ukraine by Russia', https://www.dfat.gov.au/crisis-hub/invasion-ukraine-russia.

2126 'Ukrainian troops get training in Germany', *DW* (4 May 2022), https://www.dw.com/en/ukrainian-troops-get-training-in-germany/a-61682712.

following President Zelensky's invitation to join the "International Legion of Ukraine".[2127]

The assistance to Ukraine was closely coordinated among the supporting States. To illustrate: They set up ring exchange programs to organize weapon deliveries more efficiently and to effectively meet Ukraine's needs.[2128] Some States took up logistical and coordinative tasks to ensure the assistance reaches Ukraine. For example, Poland became the main transportation hub,[2129] once Hungary prohibited the transit of lethal weapons directly to Ukraine through its territory.[2130] Canada and the UK

2127 https://fightforua.org/. See e.g. Germany: Felix Zimmermann, 'Ist Kämpfen und Töten für die Ukraine strafbar?', *LTO* (4 March 2022), https://www.lto.de/recht/hintergruende/h/freiwillige-ukraine-strafbarkeit-kriegsgefangene-international e-legion/; 'Ukraine conflict: Liz Truss backs people from UK who want to fight', *BBC* (27 February 2022), https://www.bbc.com/news/uk-60544838; Jaqueline Thomsen, 'Explainer: Is it legal for foreigners to fight for Ukraine?', *Reuters* (14 March 2022), https://www.reuters.com/world/europe/is-it-legal-foreigners-fight-ukraine-2022-03-14/.

2128 E.g. on a German-Czech deal to provide tanks to Ukraine: 'Germany to give Czechs tanks so it could provide more weapons to Ukraine — as it happened', *DW* (18 May 2022), https://www.dw.com/en/germany-to-give-czechs-tanks-so-it-could-provide-more-weapons-to-ukraine-as-it-happened/a-61832918. Generally on the German "ring swap program": 'So funktioniert der geplante Ringtausch zur Unterstützung der Ukraine' (22 April 2022), https://www.bmvg.de/de/aktuelles/ringtausch-zur-unterstuetzung-der-ukraine-5397036. The Polish proposal to swap its air fighters with the US did not materialize. 'Statement of the Minister of Foreign Affairs of the Republic of Poland in connection with the statement by the US Secretary of State on providing airplanes to Ukraine' (8 March 2022), https://www.gov.pl/web/diplomacy/statement-of-the-minister-of-foreign-affairs-of-the-republic-of-poland-in-connection-with-the-statement-by-the-us-secretary-of-state-on-providing-airplanes-to-ukraine; Julian Borger, Patrick Wintour, 'US dismisses Polish plan to provide fighter jets to be sent to Ukraine', *Guardian* (9 March 2022), https://www.theguardian.com/world/2022/mar/08/poland-mig-29-jets-us-ukraine. See on this John Curtis, Claire Mills, *Military assistance to Ukraine since the Russian invasion* (Briefing Paper, House of Commons, 23 March 2022), 21-23.

2129 Rob Mudge, 'Western arms supplies for Ukraine: How are they getting there?', *DW* (1 March 2022), https://www.dw.com/en/western-arms-supplies-for-ukraine-how-are-they-getting-there/a-60959864. 'Ukraine and Poland agree to improve logistics opportunities at the border', (11 May 2022), https://www.kmu.gov.ua/en/news/ukrayina-ta-polshcha-domovilis-pro-pokrashchennya-logistichnih-mozhlivostej-na-kordoni.

2130 'PM Orban signs decree allowing deployment of NATO troops in western Hungary', *Reuters* (7 March 2022), https://www.reuters.com/world/europe/pm-orban-signs-decree-allowing-deployment-nato-troops-western-hungary-2022-03-07/.

supported the delivery of aid logistically.[2131] Germany permitted the use of military bases for the US training of Ukrainian troops.[2132]

At all times, supporting States continuously emphasized that they were not part of the conflict,[2133] and that their forces were not directly involved in the conflict.[2134] In fact, States were eager to stress that they did not seek to overstep the line to become a 'conflict party'. The USA even made "clear that the United States *is not using force* against Russia."[2135]

Accordingly, NATO States generally denied any prospect of active military support and did not participate in the immediate execution of a use of force. France, for example, excluded to send tanks or aircraft.[2136] The UK underlined that the weapons provided do not allow Ukraine to attack Russian territory.[2137] The US emphasized that it did "not provide intelligence on the location of senior military leaders on the battlefield or participate in

2131 https://www.canada.ca/en/department-national-defence/campaigns/canadian-military-support-to-ukraine.html.

2132 'Ukrainian troops get training in Germany', *DW* (4 May 2022).

2133 E.g. 'Press conference with NATO Secretary General Jens Stoltenberg and the President of Poland, Andrzej Duda at Łask Military Airbase in Poland, 1 March 2022', https://www.nato.int/cps/en/natohq/opinions_192582.htm; DOD Official Says U.S. Not Yet Seeing China Giving Lethal Aid to Russia, DOD News (22 February 2023), https://www.defense.gov/News/News-Stories/Article/Article/3306439/dod-official-says-us-not-yet-seeing-china-giving-lethal-aid-to-russia/.

2134 'Press conference by NATO Secretary General Jens Stoltenberg following the Extraordinary meeting of NATO Ministers of Foreign Affairs, 4 March 2022', https://www.nato.int/cps/en/natohq/opinions_192739.htm.

2135 S/PV.9127, 9, emphasis added.

2136 Philippe Ricard, 'France is delivering Caesar cannons and Milan anti-tank missiles to Kiev', *LeMonde* (24 April 2022), https://www.lemonde.fr/en/international/article/2022/04/24/france-is-delivering-caesar-cannons-and-milan-anti-tank-missiles-to-kiev_5981417_4.html

2137 "The United Kingdom's weapons, first of all, we haven't really given them weapons that probably could allow them to [attack Russian territory]. We haven't given them helicopters or aircraft or very long range equipment. So it is unlikely British weapons could be used across their border, but we are giving weapons to Ukraine in accordance with sort of United Nations Article 51, allowing them to defend themselves, and if they used British weapons, French weapons, German, anybody's weapons to achieve that effect, as long as it's in accordance with international law and humanitarian law and Geneva Conventions, then, of course, that's something that we recognize as a low possibility because of the type of weapons we provided but nevertheless a possibility because that was the condition we gave it to the Ukrainians was to defend themselves." 'Transcript: World Stage: The Rt. Hon. Ben Wallace MP, U.K. Secretary of State for Defense', *WP* (12 May 2022), https://www.washingtonpost.com/washington-post-live/2022/05/12/transcript-world-stage-rt-hon-ben-wallace-mp-uk-secretary-state-defense/.

the targeting decisions of the Ukrainian military … [The Ukrainians] make their own decisions, and they take their own actions."[2138]

States' desire not to escalate the conflict and to ensure not to become a conflict party under the *ius in bello* may have been the driving force behind these limitations.[2139] Yet, States thereby did not imply that they thought themselves legally prevented from doing so. UK Prime Minister Boris Johnson put it:

> "[t]hat does not mean that we cannot help our friends. It does not mean that they do not have a right to self-defense and we can help them in that self-defense and that is what we are doing."[2140]

This position is further affirmed by the fact that assisting States denied a right to attack those convoys outside Ukraine. For example, NATO Secretary General Stoltenberg emphasized the clear distinction between supply lines inside Ukraine and those operating outside its borders:

> "There is a war going on in Ukraine and, of course, supply lines inside Ukraine can be attacked. […] An attack on NATO territory, on NATO forces, NATO capabilities, that would be an attack on NATO."[2141]

At the same time, not becoming a party seemed not to have been irrelevant for the legal position on providing assistance. It may have contributed to the fact that assisting States did not unequivocally invoke an independent justification for their support. Instead, States limited themselves to underline the illegality of the Russian invasion, and to emphasize that the military aid seeks to assist Ukraine in its legitimate defense against Russian aggression:

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2138 'Pentagon Press Secretary John F. Kirby Holds a Press Briefing' (5 May 2022).

2139 See on the relevance: Alexander Wentker, 'At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?', *EJIL:Talk!* (14 March 2022).

2140 'Press conference with NATO Secretary General Jens Stoltenberg, the Prime Minister of Estonia, Kaja Kallas and UK Prime Minister Boris Johnson at Tapa Military Base in Estonia, 1 March 2022', https://www.nato.int/cps/en/natohq/opinions_192584.htm.

2141 Murray Brewster, 'NATO chief warns Russia away from attacking supply lines supporting Ukraine', *CBC* (8 March 2022), https://www.cbc.ca/news/politics/ukraine-russia-putin-stoltenberg-nato-1.6377675. So far, Russia has merely attacked supply lines within Ukraine: Emma Graham-Harrison, Vera Mironova, 'Russia attacks infrastructure in western Ukraine to slow supply lines', *Guardian* (27 April 2022), https://www.theguardian.com/world/2022/apr/27/russia-attacks-infrastructure-western-ukraine-slow-supply-lines.

For example, NATO-States held:

> "Ukraine has a *fundamental right to self-defence* under the United Nations Charter. Since 2014, we have provided extensive support to Ukraine's ability *to exercise that right*. We have trained Ukraine's armed forces, strengthening their military capabilities and capacities and enhancing their resilience. NATO Allies have stepped up their support and will continue to provide further political and practical support to Ukraine *as it continues to defend itself*."[2142]

NATO Secretary General Stoltenberg explained this position further:

> "I think that this distinction between offensive and defensive is a bit strange, because we speak about providing weapons to a country which is defending itself and self defence is a right which is enshrined in the UN Charter. So everything Ukraine does with the support from NATO Allies is defensive because they are defending themselves."[2143]

He further added:

> "Allies have also provided significant quantities of critical equipment. Including anti-tank and air defence weapons, drones, ammunition and fuel. This training and equipment is helping Ukraine to defend itself. Ukraine has a fundamental right to self-defence, enshrined in the UN Charter. And *NATO Allies and partners will continue to help Ukraine uphold that right*. By providing military equipment, and financial and humanitarian assistance."[2144]

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2142 Statement by NATO Heads of State and Government, 24 March 2022, https://www.nato.int/cps/en/natohq/official_texts_193719.htm, emphasis added. See also 'Opening remarks by NATO Secretary General Jens Stoltenberg at the start of the extraordinary virtual summit of NATO Heads of State and Government 25 February 2022', https://www.nato.int/cps/en/natohq/opinions_192454.htm?selectedLocale=en.

2143 'Press conference by NATO Secretary General Jens Stoltenberg following the meetings of NATO Ministers of Foreign Affairs' (7 April 2022), https://www.nato.int/cps/en/natohq/opinions_194330.htm.

2144 'Press conference by NATO Secretary General Jens Stoltenberg ahead of the Extraordinary meeting of NATO Ministers of Defence, 15 March 2022', https://www.nato.int/cps/en/natohq/opinions_193085.htm, emphasis added. See also 'Press conference by NATO Secretary General Jens Stoltenberg following the Extraordinary meeting of NATO Ministers of Foreign Affairs, 4 March 2022', https://www.nato.int/cps/en/natohq/opinions_192739.htm "NATO Allies have stepped up support for Ukraine. Helping to uphold the country's right of self-defence, as

The G7, after expressly recognizing Ukraine's right to self-defense,[2145] stated:

> "Today, we, the G7, reassured President Zelenskyy of our continued readiness to undertake further commitments to help Ukraine secure its free and democratic future, *such that Ukraine can defend itself now and deter future acts of aggression. To this end, we will pursue our ongoing military and defence assistance to the Ukrainian Armed Forces*, continue supporting Ukraine in defending its networks against cyber incidents, and expand our cooperation, including on information security."[2146]

The European Union also connected its recognition of Ukraine's right to self-defense with a reference to its support to Ukraine:

> "The European Union resolutely supports Ukraine's inherent right to self-defence, and the Ukrainian armed forces' efforts to defend Ukraine's territorial integrity and population in accordance with Article 51 of the UN Charter. The European Union will continue to provide co-ordinated political, financial, material and humanitarian support and we have just adopted a fourth package of restrictive measures against Russia."[2147]

Individual States argued along the same lines.[2148] France for example stated:

> "La France est depuis le début aux côtés du peuple ukrainien. Nous avons livré pour plus de 100 millions d'€ d'équipements militaires et

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enshrined in the U.N. Charter." 'Press conference with NATO Secretary General Jens Stoltenberg and the President of Latvia, Egils Levits, 8 March 2022', https://www.nato.int/cps/en/natohq/opinions_192804.htm: "Allies provide military support to help Ukraine to uphold the right for self defence." 'Press conference by NATO Secretary General Jens Stoltenberg ahead of the Extraordinary meeting of NATO Ministers of Defence 15 March 2022', https://www.nato.int/cps/en/natohq/opinions_193085.htm.

2145 'Statement on Russia's war against Ukraine - G7 Foreign Ministers' (14 May 2022), https://www.auswaertiges-amt.de/de/newsroom/g7-russias-war-aginst-ukaine/2531274.

2146 'G7 Leaders' Statement' (8 May 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/08/g7-leaders-statement-2/.

2147 PC.JOUR/1363 17 March 2022 Annex 4, 3. See also PC.JOUR/1360 3 March 2022 Annex 3; PC.JOUR/1362 10 March 2022 Annex 5; PC.JOUR/1364 24 March 2022 Annex 3. North Macedonia, Montenegro, Albania, Bosnia and Herzegovina, Iceland, Liechtenstein and Norway, Ukraine, Georgia, Andorra, and San Marino aligned themselves with these statements.

2148 A/ES-11/PV.1, 13 (Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Sweden, Denmark), 14 (France), 24 (Italy), 27 (Canada), A/ES/11/PV.3, 8 (Aus-

> œuvré au déblocage de 1,5 milliard d'€ par l'UE *pour aider l'Ukraine à se défendre. C'est son droit.* C'est sa sécurité. C'est aussi la nôtre."[2149]

Spain explained:

> "We are in an obvious case of legitimate self-defence on the part of the citizens of Ukraine, and in view of this, everything we can do to help […]"[2150]

Similarly, Canada held:

> "Canada will do everything in its power to help them as they hold strong and defend their homeland against this terrible Russian aggression."[2151]

Even before the armed confrontation, the UK stated:

> "*Ukraine has every right to defend its borders*, and this new package of aid further enhances its ability to do so. Let me be clear: this support is for short-range, and clearly defensive weapons capabilities; they are not strategic weapons and pose no threat to Russia. They are to use in self-defence."[2152]

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tralia).PC.JOUR/1358, 24 February 2022, Annex 7 (UK); PC.JOUR/1359 27 February 2022 Annex 3 (UK), Annex 25 (Slovenia); PC.JOUR/1361 7 March 2022 Annex 9 (Montenegro); PC.JOUR/1362 10 March 2022 Annex 4 (UK); PC.JOUR/1363 17 March 2022 Annex 13 (Australia); Sweden: 'Speech by Prime Minister Magdalena Andersson concerning Russia's military attack on Ukraine' (1 March 2022), https://www.government.se/speeches/2022/03/speech-by-prime-minister-magdalena-andersson-concerning-russias-military-attack-on-ukraine/.

2149 https://twitter.com/florence_parly/status/1514275166158790666?s=20&t=2BeRINNEDpiwlKKdFWQJiw, emphasis added.

2150 Fernando Heller, 'Spanish defence minister: We can't turn a blind eye to war', *Euractive* (4 March 2022), https://www.euractiv.com/section/all/short_news/spanish-defence-minister-we-cant-turn-a-blind-eye-to-war/.

2151 A/ES-11/PV.1, 27.

2152 'Statement by the Defence Secretary in the House of Commons' (17 January 2022), https://www.gov.uk/government/speeches/statement-by-the-defence-secretary-in-the-house-of-commons-17-january-2022. On further specifics of the support during the war: 'Defence Secretary statement to the House of Commons on Ukraine' (9 March 2022), https://www.gov.uk/government/speeches/defence-secretary-statement-to-the-house-of-commons-on-ukraine-9-march-2022. See also 'Government response to Petition Pledge any necessary military support to defend Ukraine' (22 April 2022), https://petition.parliament.uk/petitions/607314.

These positions are remarkable in that no assisting State unequivocally invoked the right to collective self-defense.[2153] They denied any "collective" element. They did not form a coalition with Ukraine. They did not associate themselves with Ukraine's use of force. They did not consider it "their" or a "joint" use of force against Russia. Instead, also in legal terms, they phrased it as *Ukraine's* right to self-defense, which they are supporting.[2154]

In other words, assisting States considered their assistance lawful (already and only) because Ukraine's supported use of force was lawful.[2155]

This is further reflected in the fact that none of these specific positions were reported to the UN Security Council. Most notably, no assisting State sent the typical form of communication for such matters, a letter, to the Security Council in adherence to Article 51 s 2 UNC.

Still, when assessing this practice, several factors should also be borne in mind. First, Ukraine itself had not sent such a letter. This may have influenced assisting States to refrain from formally reporting their assistance to the Security Council, too. Second, States may have feared that providing a full justification might have made the impression of associating with Ukraine's use of force itself and becoming a conflict party. Third, the Security Council was blocked in view of a Russian veto, so the UN was operating under the Uniting for Peace scheme. Fourth, many States considered the Russian invasion a "manifest" act of aggression. Fifth, the degree of assistance has intensified with the war dragging on, but internationally harmonized communications often remain path dependent. Sixth, assisting States were well aware that the assistance provided was significant and had

2153 Note that this has been the primary legal basis authors – yet without an analysis of State practice – saw for assistance to Ukraine, Michael N Schmitt, 'Providing Arms and Materiel to Ukraine: Neutrality, Cobelligerency, and the Use of Force', *Articles of War* (7 March 2022); Marko Milanovic, 'The United States and Allies Sharing Intelligence with Ukraine', *EJIL: Talk!* (9 March 2022); Tomas Hamilton, 'Articulating Arms Control Law in the EU's Lethal Military Assistance to Ukraine', *Just Security* (30 March 2022); Wentker, *Parties to the Conflict* (2022). More considerate of the practice: Stefan Talmon, 'The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine', *Bonn Research Papers on Public International Law* (6 April 2022). See also Maurizio Acari, 'The Conflict in Ukraine and the hurdles of collective action', *QIL Zoom Out* (2022), 7, 20.

2154 See also with particular clarity: S/PV.9127, 9 (USA), 16 (Ireland), 16-17 (Norway).

2155 The Ukraine stressed this, too: e.g. S/PV.9216, 19: "We are grateful to all friends and allies who support Ukraine in this noble endeavour, including by supplying modern weapons. Their use has been an element of Ukraine exercising the inherent right to self-defence under Article 51 of the United Nations Charter."

substantial and immediate impact on the ongoing fighting.[2156] They intended to support Ukraine specifically in the fight against Russia. They knew how and where assistance was used. In fact, the assistance was specifically tailored to the situation on the ground. Also, assisting States may not have associated with Ukraine's use of force. But there was no disagreement that Ukraine was defending the international legal order and thus the assisting States' security, too.

Against that background, some States seemed to acknowledge that military support may be at the border line of requiring an independent justification. All the more remarkable is the fact that several States orally reported the security assistance and military support to the Security Council[2157] or the UNGA.[2158] In addition, some statements could imply an invocation of an independent justification, albeit none of them are unequivocal. Poland, for example, held generically:

> "Poland, in cooperation with its allies, will take all action provided for by international law to support Ukraine and stop Russian aggression."[2159]

Slovakia could be understood to invoke self-defense itself:

> "I can confirm that Slovakia donated the S-300 air defence system to Ukraine based on its request to *help in self defence* due to armed aggression from the Russian Federation."[2160]

2156 E.g. 'Press conference by NATO Secretary General Jens Stoltenberg ahead of the Extraordinary meeting of NATO Ministers of Defence' (15 March 2022), https://www.nato.int/cps/en/natohq/opinions_193085.htm.

2157 S/PV.8979, 7; S/PV.8980, 3 (USA); S/PV.8980, 5 (Norway); S/PV.8983, 10 (Albania); S/2022/289 (5 April 2022) (Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Sweden).

2158 A/ES-11/PV.1, 13 (Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Sweden, Denmark), 14 (France: "financing […] defence equipment for Ukraine"), 24 (Italy), 27 (Canada), A/ES/11/PV.3, 8 (Australia); A/ES-11/PV.4, 10 (Germany), 13 (Romania); A/ES-11/PV.6, 1 (UK).

2159 'MFA statement on Russia's armed aggression against Ukraine, 24 February 2022', https://www.gov.pl/web/diplomacy/mfa-statement-on-russias-armed-aggression-against-ukraine.

2160 Robert Muller, 'Slovakia sends its air defence system to Ukraine', *Reuters* (8 April 2022), https://www.reuters.com/world/europe/slovakia-gives-s-300-air-defence-system-ukraine-prime-minister-2022-04-08/, emphasis added.

Similarly, Albania stated:

> "Article 51 of the Charter is clear. It provides an unquestionable legal basis for individual States to offer any assistance to a country exercising its inherent rights to self-defence and the defence of its sovereignty and territorial integrity." [2161]

Also, the German statement to the UNGA left such a reading open:

> "We have decided to support Ukraine also militarily so that it can defend itself against the aggressor, in line with Article 51 of the Charter of the United Nations."[2162]

Not only has Germany been the only State to invoke Article 51 UNC in relation to security assistance before the UNGA that took place for the blocked Security Council. This could be understood as the required "report" of actions taken in self-defense. Also, the subtly placed comma before "in line with" in connection with the unspecific reference to Article 51 UNC allows for two readings: Either Germany stressed that Ukraine was defending itself in line with Article 51 UNC, hence could rely on its right to *individual* self-defense. Germany's assistance would have been considered lawful for that reason. Or *Germany* supported Ukraine militarily in line with Article 51 UNC. Hence Germany would have invoked *collective* self-defense to support the Ukrainian defense against the aggressor.

It should not go without mention, however, that despite this ambiguity, the German government seemed to lean towards the first alternative reading[2163] – at least during the initial stage of the conflict when Germany had

2161 S/PV.9127, 12. Similarly, S/PV.9256, 11.

2162 UNGA A/ES-11/PV.4, 10. See also the publication by the foreign ministry with a slightly different punctuation, which does not fully resolve that ambiguity, however: 'Speech by Foreign Minister Annalena Baerbock at the Emergency Special Session of the UN General Assembly on Ukraine' (1 March 2022), https://www.auswaertiges-amt.de/en/newsroom/news/baerbock-unga-ukraine/2514752. But see the German version: https://www.auswaertiges-amt.de/de/newsroom/baerbock-vnga-ukraine/2514746. See also similarly, the European Parliament, 'Resolution Russia Aggression against Ukraine, 2022/2564(RSP)', (1 March 2022), para 28.

2163 See also 'Pressestatements von Bundeskanzler Scholz und Generalsekretär Stoltenberg zu seinem Besuch am 17. März 2022', https://www.bundesregierung.de/breg-de/suche/pressestatements-von-bundeskanzler-scholz-und-generalsekretaer-stoltenberg-zu-seinem-besuch-am-17-maerz-2022-2017208.

not yet provided heavy weaponry.[2164] In its explanation of its legal position to the parliament, it stated:

> "The German government views the Russian attack against Ukraine which is ongoing since 24 February 2022 as an armed attack contrary to international law.
> Accordingly, Ukraine has the right to self-defense as *granted by Article 51 UNC*. The German government *is free to* provide assistance to another State, so that this State can defend itself against an armed attack in violation of international law. The German government is doing so *in accordance with the UNC*."[2165]

(2) Reactions to Western assistance

On multiple occasions, Russia commented on the heavy military assistance provided to Ukraine.[2166] Most criticism was primarily driven by political considerations.

> "We regard the announcements currently being made by several NATO countries about their preparing to supply further military goods to Ukraine, this time comprising lethal weapons, as a continuation of the irresponsible policy aimed at directly inciting a military escalation in Ukraine. The point is not simply that such steps can in no way be squared with the appeals for peace voiced by these very same countries. The dispatching of weapons to the Kyiv regime that can be used against Russian military personnel and civilians creates risks that are categorically unacceptable. We believe that it is extremely important now to avoid situations and incidents that could lead to a direct confrontation between Russia and NATO. We urge everyone to think hard about that."[2167]

2164 BT Drs 20/957, 3; 'Auftaktstatement von Außenministerin Annalena Baerbock zur Befragung der Bundesregierung im Deutschen Bundestag über Waffenlieferungen an die Ukraine', (27 April 2022), https://www.auswaertiges-amt.de/de/newsroom/-/2524174.

2165 Answer of the Parliamentary State Secretary Siemtje Möller (7 April 2022), BT Drs 20/1355, 96, emphasis added.

2166 E.g. S/PV.8983, 14; S/PV.8986, 8; S/PV.9008, 11-12; S/PV.9011, 16; S/PV.9127, 5; S/PV.9216, 6-8; S/PV.9256, 5-7.

2167 PC.JOUR/1360 3 March 2022 Annex 19 (Russia).

Russia attempted to interweave legal considerations, too.[2168] But, those focused more on the law governing the "how" of support, rather than the "if".[2169] The *ius contra bellum* dimension did not play a role. Russia did not claim that assistance per se was unlawful, but rather invoked arms control law.

Russia's letter to the Security Council "to express […] grave concerns regarding intensified supplies of weapons to Ukraine by a number of Western countries" serves as a good illustration.[2170] Therein, Russia voiced concerns about the manner by which assistance was provided and the nature of the weapons provided, and pointed to "serious implications" for the civilian population with respect to MANPADS and ATGMs. Also, Russia emphasized the danger of the weapons falling into the wrong hands.[2171] Russia claimed in this respect that "the obligations undertaken by Western countries are neglected." Thereby, it referred primarily to rules of non-proliferation, such as UNGA resolution 62/40 in 2007 on the prevention of the illicit transfer and unauthorized access to and use of man-portable air defence systems, the 2003 "Elements for export controls of man-portable air defense systems" of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies as well as its policies on end-user certificates.[2172] Russia further invoked the EU Common position and the Arms Trade Treaty.[2173]

What is more, Russia did not expressly claim or reserve its right to self-defense in this respect, albeit its threats about a direct confrontation between Russia and NATO might be understood in that manner.[2174] Also,

2168 E.g. S/PV.9216, 8: "We should assess to what extent this is legal."

2169 On similar points, see Hamilton, *Articulating Arms Control* (2022). See also S/PV.9127, 6.

2170 A/76/752–S/2022/217 (14 March 2022).

2171 See also PC.JOUR/1364 24 March 2022 Annex 17.

2172 See also PC.JOUR/1361 7 March 2022 Annex 11.

2173 See also e.g. 'Briefing by Foreign Ministry Spokeswoman Maria Zakharova' (28 April 2022), https://mid.ru/en/press_service/spokesman/briefings/1811231; S/PV.9216, 8.

2174 But see that Russia considered arm shipments as legitimate target, 'Russia warns U.S. over arms shipments to Ukraine', *Politico* (12 March 2022), https://www.politico.com/news/2022/03/12/russia-warns-u-s-over-arms-shipments-to-ukraine-00016820. This narrative also came into action when a US drone crashed after an encounter with a Russian fighter jet. The Russian ambassador to the US stated: "The unacceptable actions of the United States military in the close proximity to our borders are cause for concern. We are well aware of the missions such reconnaissance and strike drones are used for…What do they do thousands

Russia stated to have neutralized military training centers for foreign mercenaries that also served as transit points and arms depots,[2175] as well as batches of Western weapons and military equipment[2176] – yet only once the assistance was in Ukraine in Ukrainian hands.

Syria criticized Western States to "have rushed to arm Ukraine with heavy weapons and missiles and encouraged volunteers from among their citizens to fight in Ukraine".[2177] While Syria acknowledged the "legitimate position that Russia has taken based on its security concerns", Syria stopped short of accusing those States of an unlawful behavior. Instead, it confined itself to criticizing a provocative and hypocritical behavior.[2178]

The majority of States perceived the Russian invasion as an attack against the international legal order. Not all of them offered substantial support to Ukraine beyond political solidarity and humanitarian aid. This fact must not be equated, however, with the view that more substantial assistance was perceived impermissible. Those States may not have expressly affirmed Ukraine's right to self-defense and to receive assistance for that matter. But, in connection with their silence on Western assistance, it cannot be understood as rejection thereof either. This becomes especially clear if juxtaposed with States' reactions to unilateral sanctions that garnered not unsubstantial legal criticism.[2179]

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of miles away from the United States? The answer is obvious – they gather intelligence which is later used by the Kiev regime to attack our armed forces and territory…We perceive any actions involving the use of American weapons and military equipment as openly hostile." 'US drones gather data for Kiev's future strikes on Russia – ambassador to US', *TASS* (15 March 2023), https://tass.com/russia/1588813.

2175 PC.JOUR/1363 17 March 2022 Annex 15.

2176 E.g. 'Russian missiles destroy major consignments of weapons arriving in Ukraine from US, EU', *TASS* (18 April 2022), https://tass.com/politics/1439371. Peter Beaumont, Julian Borger, 'Russian airstrikes target western arms arriving in Ukraine', *Guardian* (4 May 2022), https://www.theguardian.com/world/2022/may/04/russian-airstrikes-target-western-arms-arriving-in-ukraine; Mark Trevelyan, 'Russian military says it destroys Western arms consignment in Ukraine', *Reuters* (21 May 2022), https://www.reuters.com/world/europe/russian-military-says-it-destroys-western-arms-consignment-ukraine-2022-05-21/.

2177 A/ES/11/PV.5, 13.

2178 Ibid.

2179 Critical: S/PV.9008, 17 (Brazil). See also 'Details of Lukashenko-Putin lengthy talks in Kremlin revealed', *BelTA* (11 March 2022), https://eng.belta.by/president/view/details-of-lukashenko-putin-lengthy-talks-in-kremlin-revealed-148549-2022/: "Because all of it is illegitimate as they are fond of saying. All of it is illegal, in violation of all the international agreements and treaties." 'Russia: Sanctions can

Not all States shared the belief that military support for Ukraine was the wisest political choice, yet without contesting the right to do so. As Ecuador put it: States were "concerned about the risk of diversion, spread and escalation.[2180] For example, China generically called on States to "refrain from exacerbating the situation"[2181] and asked:

> "If two people near you are arguing and a fist fight seems to be coming next, what will you do? Hand one of them a gun, a knife or some other sorts of weapon? Or break up the fight with persuasion first and then get to know the whole story leading to the argument and helping them resolve the issue peacefully? It's as simple as that. Weapons can never solve all problems. This is not the time to pour oil on the flame, but to put our heads together to come up with a way to put out the fire and safeguard peace."[2182]

China also noted that the weapons could fall into the hands of criminals.[2183] Brazil that condemned Russia's invasion as aggression pointed to the fact that

> "the supply of weapons […] entail the risk of exacerbating the conflict and not of resolving it. We cannot be oblivious to the fact that these measures enhance the risks of wider and direct confrontation between NATO and Russia."[2184] "Supplying arms to the region and promoting its militarization will hardly promote dialogue and will probably provoke more tensions."[2185] "On the other hand, all States have the inherent right to self-defence, as enshrined in the Charter of the United Nations, and consequently, the right to acquire arms for their security, including from outside sources."[2186]

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be qualified as act of aggression against Russia — Medvedev', *TASS* (8 April 2022), https://tass.com/politics/1434969.

2180 S/PV9256, 15.

2181 S/PV.8983, 13. See also S/PV.8986, 12.

2182 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on February 24, 2022', https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202202/t20220224_10645282.html. See also S/PV.9256, 8.

2183 S/PV.9216, 11.

2184 S/PV.8980, 6.

2185 S/PV.8983, 13. See also S/PV.9127, 14. In this direction warning about a protracted conflict, S/PV.9216, 12 (UAE).

2186 S/PV.9216, 16; S/PV.9256, 8.

Mexico's position was particularly clear:

> "[A]lthough we recognize the right of States to legitimate self-defence, the substantial increase in the flow of weapons and the impact that it will have on the civilian population is no less worrying."[2187]

Other States generically pointed to the danger of availability of weapons and to the importance of arms control.[2188]

At the same time, some States questioned the Western States' explanation not to be a party to the conflict, and thus implicitly also challenged their decision not to invoke an independent justification. For example, Nicaragua stated

> "Because we want peace and because we believe in the prevention and solution of conflicts by peaceful means, we reject such unilateral measures as the political, economic and other kinds of sanctions that are being launched against the Russian Federation by the United States and NATO, while increasing their shipments of weapons to Ukraine. This makes it clear that the United States and NATO are already involved in this conflict and that it has global dimensions."[2189]

Also, Belarus President Lukashenko was of the view that the NATO was already involved in the war. He added that the NATO "became aggressor a long time ago".[2190] Later he added:

> "You criticize me for being an aggressor... I have just told you: you are bigger aggressors than I am, because you are involved directly through private military companies, mercenaries, and you supply weapons to Ukraine. Therefore, you are bigger aggressors".[2191]

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2187 S/PV.8983, 6. Mexico also refrained from supporting Ukraine militarily: 'Mexico will not send arms to Ukraine, president says', *Reuters* (4 March 2022), https://www.reuters.com/markets/rates-bonds/mexico-will-not-send-arms-ukraine-president-says-2022-03-04/. See S/PV.9008, 6; S/PV.9127, 11. See also S/PV.9216, 15. In a similar manner, S/PV.9256 (Mozambique).

2188 E.g. S/PV.9127, 6 (Russia), 12 (Mexico), 14 (Brazil), 15 (UAE).

2189 A/ES-11/PV.4, 12.

2190 'Lukashenko: NATO bloc is already involved in the Ukrainian conflict', *BelTA* (5 May 2022), https://eng.belta.by/president/view/lukashenko-nato-bloc-is-already-involved-in-the-ukrainian-conflict-149977-2022/.

2191 'Lukashenko accuses West of using sanctions for no reason', *BelTA* (6 May 2022), https://eng.belta.by/president/view/lukashenko-accuses-west-of-using-sanctions-for-no-reason-149986-2022/.

> "You don't need any United Nations resolutions to understand that since you supply someone with weapons, sell them or just give them away, as they are doing now with Ukraine, if you supply mercenaries in droves, support them in this hybrid information war, then you are not an outside observer."[2192]

Also Russia eventually disagreed with the Western narrative that Western States are not part of the conflict, yet without attaching specific legal implications to this. For example, President Putin was cited: "They are sending tens of billions of dollars in weapons to Ukraine. This really is participation. This means that they are taking part, albeit indirectly, in the crimes being carried out by the Kyiv regime." [2193]

25) Israeli airstrikes in Syria against Iran

For long, it has been an open secret that Israel has repeatedly conducted airstrikes against Iranian military targets in Syria over the last five years in response to cross-border attacks.[2194] These instances implied not only a

2192 'Lukashenko: Belarus will support Russia in every possible way', *BelTA* (9 May 2022), https://eng.belta.by/president/view/lukashenko-belarus-will-support-russia-in-every-possible-way-150039-2022/.

2193 'NATO Taking Part in Ukraine Conflict With Arms Supplies — Putin', *Moscow Times* (26 February 2023), https://www.themoscowtimes.com/2023/02/26/nato-taking-part-in-ukraine-conflict-with-arms-supplies-putin-a80340. For a stronger wording by the Foreign Minister see: S/PV.9127, 18 "not merely indirectly, but directly participated in this proxy war", 'Russia FM: US, NATO directly involved in Ukraine conflict', *AP* (1 December 2022), https://apnews.com/article/russia-ukraine-nato-europe-business-moscow-5b3ca7ea4e005c0908fb86b6d28f79d5. See also 'Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow, January 27, 2023', https://mid.ru/en/foreign_policy/news/1850728/#103. See also S/PV.9256, 5 "proxy war", 6 "directly involved". Initially, Russia had been more reluctant: 'Foreign Minister Sergey Lawrov's interview with Newsweek, September 21, 2022', https://mid.ru/en/foreign_policy/news/1830540/ "teetering on the brink of turning into a party to conflict".

2194 Some cases confirmed by Israel were the following: in February and July 2018, Israel struck a launching site in Syria from which an Iranian drone was alleged to have intruded into Israeli airspace, S/2018/111 (12 February 2018), S/2018/349 (16 April 2018), S/2018/686 (11 July 2018). In May 2018, Israel retaliated against rockets launched from within Syria by the Iranian revolutionary guard, S/2018/443 (10 May 2018). In January 2019, Israel responded to Iran firing a surface-to-surface missile into Golan Heights with an attack against Iranian and Syrian targets in Syria. In August 2019, Israel conducted an operation targeting a military site near

territorial intrusion into Syria but usually entailed personal and material damage for Syria. Other States' involvement has been prevalent in two respects.

First, Israel was alleged to conduct its air strikes from within Lebanese airspace. In this respect it is remarkable that Lebanon has not been charged with unlawful assistance to those strikes. On the contrary, States that condemned Israeli action also viewed Lebanon as having its rights violated, too.[2195] Lebanon was eager to persistently protest against the Israeli use of its air space. Lebanon even classified such actions as acts of aggression:

> "Israel not only violated Lebanese airspace by its actions, it also could have endangered civilians and Lebanese territory had fire been opened on the source of the missiles. This violation by Israel is an act of aggression and constitutes a threat to international peace and security because

Damascus from which it alleged "multiple killer drones" had been launched by Iranian Quad forces, S/2019/688 (27 August 2019). Several Israeli raids were also reported for 2020 and 2021. In November 2020, Israel struck Iranian and Syrian military targets in reaction to explosives discovered in Israeli territory. In January 2021, Israeli airstrikes were reported. See in general: Benjamin Nußberger, Paula Fischer, 'Justifying Self-defense against Assisting States: Conceptualizing Legal Consequences of Inter-State Assistance', *EJIL:Talk!* (23 May 2019); Assaf Lubin, 'Israeli Airstrikes in Syria: The International Law Analysis You Won't Find', *Just Security* (3 May 2017). Israeli Defense Forces, Iran Attacks Israel from Syria (20 November 201), https://www.idf.il/en/minisites/iran/iran-in-syria/iran-attacks-israel-from-syria/; Isabel Kershner, 'Israel Confirms Attacks on Iranian Targets in Syria', *NYT* (20 January 2019), https://www.nytimes.com/2019/01/20/world/middleeast/israel-attack-syria-iran.html; Anna Ahronheim, 'Israel has taken out 1/3 of Syrian air defenses in last two years', *JPost* (13 August 2020), https://www.jpost.com/arab-israeli-conflict/israel-has-taken-out-13-of-syrian-air-defenses-in-last-two-years-watch-638516. Military strikes with similar patterns are also reported in Iraq and Lebanon, e.g. S/2014/278 (23 April 2014), S/2019/708 (6 September 2019). As those are however primarily targeted against non-State actors (who are alleged to receive State support), the present analysis is confined to classic interstate situation of classical interstate assistance. For an Israeli request for overflight in Iraq to strike Iran in 2008: Aust, *Complicity*, 114.

2195 S/PV.8449, 31-32 (Syria). Similar positions have been articulated in view of Israeli attacks from Lebanese air space against Syria itself. Cf for example an incident in 2003: S/2003/943 (5 October 2003) (Lebanon), and S/PV.4836, 2-3 (Syria), 14 (Arab League), 15 (Lebanon), 19 (Tunisia), 19 (Saudi-Arabia), 21 (Cuba), 21 (Iran), 22 (Bahrain), 23 (Libya), 24 (Qatar), 24 (Sudan).

> Israel violated the sovereignty of Lebanon and used Lebanese territory to attack a third State."[2196]

In remarkable contrast, Syria criticized Western States for their support. It noted American "limitless and ongoing support" as essential to Israeli strikes.[2197] Moreover, Syria accused Western Security Council members of shielding Israel from responsibility in the Security Council, thereby enabling Israeli strikes.[2198] Most recently, without specification, Syria reiterated

> "that the acceptance by certain parties of Israeli and United States justifications for attacks against Syrian sovereignty makes those parties primary accomplices in the terrorist crimes being committed against the Syrian State. They therefore bear international responsibility for the consequences of their failure to implement and respect the Charter of the United Nations […] and the principles of international law […]."[2199]

Second, responsibility for interstate assistance was an essential element in Israel's justification for its strikes.

In general, Israel has usually pursued a policy of neither confirming nor denying the operations. Only on rare occasions has it publicly acknowledged its use of military force. In those cases, Israel has alluded to its right of self-defense in reaction to what it set out to describe as a pattern of attacks against its (claimed[2200]) territory.[2201]

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2196 A/74/789-S/2020/276 (8 April 2020). See similarly A/74/817–S/2020/319 (20 April 2020), A/74/820-S/2020/321 (21 April 2020); A/74/836–S/2020/349 (5 May 2020); A/74/938-S/2020/642 (7 July 2020).

2197 S/2018/100 (9 February 2018); S/2018/447 (15 May 2018); S/2021/341 (12 April 2021).

2198 S/2018/447 (15 May 2018); S/2019/898 (21 November 2019).

2199 S/2021/391 (26 April 2021).

2200 On the problem of defending annexed territory, see Alessandro Mario Amoroso, 'The Israeli Strikes on Iranian Forces in Syria: a case study on the use of force in defence of annexed territories', *EJIL:Talk!* (8 June 2018).

2201 S/2015/65 (28 January 2015); S/2018/111 (12 February 2018); S/2018/443 (10 May 2018); S/2019/688 (27 August 2019); S/2020/1140 (24 November 2020); IDF, Iran attacks Israel from Syria (20 November 2019), https://www.idf.il/en/minisites/iran/iran-in-syria/iran-attacks-israel-from-syria/; Isabel Kershner, 'Israel Intercepts Four Rockets Launched From Syria', *NYT* (19 November 2019), https://www.nytimes.com/2019/11/19/world/middleeast/israel-syria-rockets-golan.html. Note that not in all cases, Israel expressly referred to self-defense.

Israel did not exclude Syria from the legal equation. It suggested that its right of self-defense also justifies the use of force in and against Syria – notably not without stressing the narrow confines of its military strikes, targeting Syria only to the extent that it has allegedly contributed to the attack.[2202] Notably, Israel did not claim that Syria itself conducted the attacks.[2203] It attributed the attacks to Iran's Islamic Revolutionary Guard Corps Quds Forces.[2204]

Still, Israel insisted that it held Syria "directly" "responsible" or "accountable" for the fact that the attack had been committed.[2205] Israel did not view the attacks as *attributable* to Syria. On factual grounds, crucial for Israel's assertion of responsibility was the fact that the attacks were "emanating from Syria".[2206] In 2019, Israel specified this:

> "[T]he Syrian regime knowingly allows its territory to be used by Iran and its proxies for terrorist activities, including armed attacks. It is imperative that the Security Council acknowledges Syria's responsibility in this regard and holds it accountable."[2207]

Ambiguity remains which norm Israel accused Syria of violating. It is unclear whether Israel viewed Syria to have committed an independent act of aggression, too, or to have 'only' been substantially involved in Iran's act. Unlike the attacks themselves that were qualified as "acts of aggression",

2202 S/2018/111 (12 February 2018) "against the launch site".

2203 Strikingly in other cases Israel attributed the attack to Syria, e.g. S/2018/1077 (3 December 2018).

2204 S/2015/659 (21 August 2015), S/2018/349 (16 April 2019), S/2018/443 (10 May 2018); S/2019/292 (5 April 2019); S/2019/688 (27 August 2019); S/PV.8449, 8. This excludes for the present purposes attacks that Israel attributed to non-State terrorist actors such as Hezbollah. While in those cases counter attacks were also directed against targets in Syria, the target was not Iran, but the respective terrorist group.

2205 E.g. S/2015/65 (28 January 2015); S/2018/443 (10 May 2018); S/PV.8449, 8. S/2019/234 "Israel also holds the Syrian regime entirely responsible for any and all acts connected with or carried out or sponsored by the Iranian regime from its territory."

2206 S/2015/65 (28 January 2015), S/2015/659 (21 August 2015), S/2018/111 (12 February 2018), S/2018/686 (11 July 2018), S/2020/1140 (24 November 2020) "Israel holds the Syrian Government accountable for every attack originating from its territory." Isabel Keshner, 'Israel Confirms Attacks on Iranian Targets in Syria', *NYT* (20 January 2019), https://www.nytimes.com/2019/01/20/world/middleeast/israel-attack-syria-iran.html.

2207 S/2019/688 (27 August 2019). See also S/2015/293 (28 April 2015), "allow […] to use territory as launching base".

Israel did not articulate a specific breach of international law for which Syria should be responsible.

Syria labeled the Israeli strikes "acts of aggression targeting the Syrian Arab Republic", a "gross violation of international law" and the UN Charter that would even allow "exercising [its] legitimate right of self-defense".[2208] Notably, Syria's assessment of the situation was also based on the fact that it denied having had knowledge about the firing of rockets.[2209]

Iran likewise condemned the Israeli action, with particular emphasis the infringement of Syria's sovereignty.[2210] It further rejected the Israeli allegations, and underlined that it had "legitimately deployed" its Iranian nationals to Syria, who were merely engaged in activities fighting terrorist groups in Syria.[2211]

Other States took position on the conflict, too. For example, the USA[2212] reaffirmed Israel's right to self-defense. Thereby, it commented on the assumption that the launch of rockets was an "unacceptably provocative act by the Iranian and Syrian regimes."[2213] Russia took a more critical stance, in particular in view of Syria's sovereign rights.[2214] Similarly, for example,

2208 E.g. S/PV.8449, 31 f; S/2019/898 (21 November 2019); S/2015/98; S/2021/341 (12 April 2021); S/2021/391 (26 April 2021).

2209 S/PV.8669 (20 November 2019), 4.

2210 S/2013/270 (7 May 2013), 'Iran warns Israel of 'firm' response to air raids in Syria', *Al Jazeera* (5 February 2019), https://www.aljazeera.com/news/2019/02/iran-warns-israel-firm-response-air-strikes-syria-190205133522150.html.

2211 S/2018/142 (20 February 2018); S/2018/445 (10 May 2018); S/2018/459 (14 May 2018).

2212 S/PV.8449 (22 January 2019), 12; S/PV.8674 (22 November 2019), 6.

2213 See also France, 'Urging Iran against destabilizing Syria, France says backs Israeli security', *Reuters* (20 November 2019), https://www.reuters.com/article/us-syria-security-missiles-france-idUSKBN1XU1XX.

2214 'Russia says 'arbitrary' Israeli air strikes on Syria must stop', *Reuters* (23 January 2019), https://www.reuters.com/article/us-mideast-crisis-syria-israel-russia/russia-says-arbitrary-israeli-air-strikes-on-syria-must-stop-idUSKCN1PH1K5; 'Russian ambassador says Israeli attacks in Syria violate int'l law', *I24 News* (28 November 2019), https://www.i24news.tv/en/news/international/1574855323-russian-ambassador-tells-i24news-moscow-condemns-israeli-attacks-in-syria; 'Russia says Israeli air strikes on Syria a wrong move: Ifax', *Reuters* (20 November 2019), https://www.reuters.com/article/us-syria-security-missile-russia/russia-says-israeli-air-strikes-on-syria-a-wrong-move-ifax-idUSKBN1XU0VL. See also a joint statement by Iran, Russia and Turkey, S/2021/170 (23 February 2021) para 5: "Condemned continuing Israeli military attacks in Syria in violation of the international law and international humanitarian law and undermining the sovereignty of Syria and neighboring countries as well as endangering the stability and security in the region and called for cessation of them."

Kuwait condemned "Israel's repeated attacks on Syria's sovereignty and its territories, which violate the Charter of the United Nations, international law […]."[2215]

26) Assistance and Turkey's military operations against Kurdish groups

The use of force in Iraq and Syria against Kurdish groups has been a recurring part of Turkey's policy in the Turkish-Kurdish conflict.[2216] Most recent examples were Operations 'Peace Spring' in 2019, 'Olive Branch' in 2018 and 'Euphrates Shield' in 2017, all conducted in Syria, or Operations 'Claw-Tiger' and 'Claw-Eagle' in 2020, and 'Claw' in 2019 in Iraq. Military operations in Turkey's neighboring regions root far back in time. The legality of such military engagement widely met with doubt. As such, third States, in particular NATO partners, have been repeatedly presented with the politically and legally delicate challenge to explain their military cooperation with Turkey. A selective examination of German (a) and American (b) positions on their contributions to specific incidents will seek to illustrate this. The Arab League's position serves as an example of States' critical towards support for Turkey (c).

a) Germany

Over time, the German government has been well aware of Turkish incursions against the Kurds.[2217] But as a general rule, it remained reluctant to take position on their legality.[2218] It did not positively determine them as lawful, albeit it sometimes recognized Turkish legitimate security concerns. It refrained from denouncing them as expressly illegal, notwithstanding it

2215 S/PV.8674 (22 November 2019), 11.

2216 Kimberley N Trapp, 'The Turkish Intervention Against the PKK in Northern Iraq - 2007-08' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (2018); Tom Ruys, 'Quo Vadit Jus ad Bellum: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq', 9(2) *MelbJIL* (2008).

2217 E.g. BT Drs 13/1361 (15 September 1995), question 31; BT Drs 17/2207, (17 June 2010), question 10; BT Drs 18/8031 (5 April 2016), question 19; BT Drs 19/17001 (3 February 2020), question 1.

2218 Iraq: BT Drs 13/1246 (2 May 1995), question 1, 3, 5; BT Drs 18/6480 (23 October 2015), question 8.

sometimes voiced concern and took note of critical positions denouncing the strikes as illegal.[2219]

On that note, Germany continued to cooperate with Turkey, most notably providing armaments. But Germany did not assert an unrestricted right to cooperate with Turkey.

For example, Germany emphasized to have established a mechanism ensuring not to share intelligence with Turkey that may allow to target Kurdish aims.[2220] Concerning the delivery of German Leopard tanks, since 1995 Germany no longer insisted on a condition of lawful use ("for exclusive use in accordance with Article 5 NATO treaty (self-defense against armed attack)"). Still, the exports were premised on the understanding that Turkey, as a NATO partner, would use them in accordance with international law.[2221] Since 2011, Germany stressed not to have delivered any tanks to Turkey.

With respect to the concrete use of German armaments in operations against Kurds, the German government emphasized it did not have knowledge of their use by Turkey (sometimes: in an unlawful manner), thereby not even confirming any German contribution in the military operations.[2222] This was also the initial response to news reports showing Leopard 2 tanks involved in the Euphrates Shield and Olive Branch operations

2219 E.g. on strikes in Iraq: BT Drs 18/7265 (14 January 2016), question 22; BT Drs 18/12170 (26 April 2017), question 4b; BT Drs 19/15243 (15 November 2019), answer 13-14. On strikes against Syria: BT Drs 18/8031 (5 April 2016), question 22; BT Drs 18/12455 (18 May 2017), question 4; BT Drs 19/939 (27 February 2018), question 2. On Operation Olive Branch Stefan Talmon, 'Difficulties in assessing the illegality of the Turkish intervention in Syria', *GPIL - German Practice in International Law* (26 January 2018). But see Operation Peace Spring Stefan Talmon, 'A roundabout way to say that the Turkish invasion of north-eastern Syria is illegal under international law', *GPIL - German Practice in International Law* (16 October 2019).

2220 With respect to Operation Peace Spring: BT Drs 18/7265 (14 January 2016), question 16; BT Drs 17/12026 (21 April 2017); BT Drs 19/939 (27 February 2018), question 3-5. See also BT Drs 13/1246 (2 May 1995), question 10.

2221 BT Drs 13/1246 (2 May 1995), question 12, 14, 15; BT Drs 17/2207 (17 June 2010), question 9, 12; BT Drs 17/7084 (23 September 2011), question 51; BT Drs 18/8031 (5 April 2016), question 10.

2222 BT Drs 18/8031 (5 April 2016), question 3, 4, 19. With respect to Iraq: BT Drs 13/1246 (2 May 1995), question 9, 11; BT Drs 19/15243 (15 November 2019), answer 10, 12; BT Drs 18/6480 (23 October 2015), question 9, 10; BT Drs 18/11212 (16 February 2017), question 17.

in the Syrian border region.[2223] In the meantime, the German government has acknowledged the use of German tanks in Syria.[2224]

In view of Operation Peace Spring, which Germany viewed as not "legitimized" under international law,[2225] Germany also declined to license further exports of armament.[2226] This decision was not expressly linked to legal considerations. While it would go too far to infer that Germany considered denying licenses to be required by international law, it is noteworthy that Germany also did not actively assert a right to further license arms. This observation requires some qualifications. First, the German government did not revoke licenses already issued.[2227] Second, it only denied armament that could be used as part of the Turkish offensive.[2228]

Other European States went further, halting not only arms exports but also reviewing preexisting licenses. Again, such steps were not based on international law but were, as for example Norway has put it, a precautionary measure.[2229]

2223 Matthias Gebauer, 'Türkei bestätigt Einsatz deutscher Leopard-Panzer', *Spiegel* (29 January 2018), https://www.spiegel.de/politik/ausland/syrien-tuerkei-bestaetigt-einsatz-deutscher-leopard-panzer-a-1190398.html; Regierungspressekonferenz vom 22. Januar 2018, https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-22-januar-2018-843306.

2224 BT Drs 19/17001 (3 February 2020), question 8, 9. With respect to Operation Euphrates shield it referred to "its knowledge", while for Operation Olive Branch it referred to "declarations by the Turkish government".

2225 Staatsminister Annen in der Aktuellen Stunde im Bundestag zur türkischen Intervention in Nordsyrien (16 October 2019), https://www.auswaertiges-amt.de/de/newsroom/annen-bundestag-tuerkei-nordsyrien/2257764.

2226 Außenminister Maas zu Rüstungsexporten in die Türkei (13 October 2019), https://www.auswaertiges-amt.de/de/newsroom/maas-bams-ruestungsexporte-tuerkei/2256388; BT Drs 19/17001 (3 February 2020), question 22.

2227 'Turkey: Which countries export arms to Turkey? ', *BBC* (23 October 2019) https://www.bbc.com/news/50125405. Similarly: UK and Spain.

2228 BT Drs 19/15243 (15 November 2019). Similarly: Communique conjoint du Ministre de l'Europe et des Affaires étrangères et de la Ministre des armées (12 October 2019), https://onu.delegfrance.org/Syrie-11832.

2229 Netherlands joins Norway in halting weapon exports to Turkey, *I24 News* (10 October 2019), https://www.i24news.tv/en/news/international/middle-east/1570724206-reports-norway-suspends-new-arms-exports-to-nato-ally-turkey.

b) USA

The USA likewise was frequently confronted with questions about whether or not to cooperate with Turkey. For example, in 2007 the USA provided actionable intelligence helping in the selection of targets for Turkish airstrikes in Northern Iraq.[2230] It further acknowledged to have been informed about the operation but denied having "approved" the operation by opening Iraqi airspace.[2231] Legally, the US did not positively endorse the military operation. But it was careful not to condemn it.[2232] Instead, it showed understanding, when, for example, it described the PKK as "common enemy" and "backed Turkey's right to rout the terrorists who have used mountain camps across the border of Iraqi Kurdistan to stage attacks on Turkey."[2233]

The USA did not always take a supportive approach to Turkey's operations, however. For example, in view of Operation Peace Spring, the USA ensured not to contribute to the Turkish operation which they "did not endorse".[2234] Accordingly, it ended sharing intelligence, surveillance and

2230 'U.S. giving Turkey intelligence on PKK in Iraq', *Reuters* (31 October 2007), https://www.reuters.com/article/us-turkey-usa-intelligence-idUSN3130705020071031; 'U.S. Helps Turkey Hit Rebel Kurds In Iraq', *WaPo* (18 December 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702150_pf.html; 'Bush Pledges to Help Turkey on Intelligence', *NYT* (6 November 2007), http://www.nytimes.com/2007/11/06/world/europe/06prexy.html

2231 'US denies backing Turkey PKK raid', *BBC* (17 December 2007), http://news.bbc.co.uk/2/hi/europe/7147375.stm.

2232 Ruys, *MelbJIL* (2008) 340.

2233 Office of the Press Secretary, President Bush and Prime Minister Tayyip Erdogan Discuss Global War on Terror, November 5, 2007, https://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071105-3.html; Trapp, *Turkish Intervention against PKK*, 649.

2234 Statement Attributable to Assistant to the Secretary of Defense for Public Affairs Mr. Jonathan Hoffman, 7 October 2019, https://www.defense.gov/Newsroom/Releases/Release/Article/1982590/statement-attributable-to-assistant-to-the-secretary-of-defense-for-public-affa/; Rebecca Kheel, 'Pentagon insists US does not endorse Turkish operation in Syria', *The Hill*, 7 October 2019.

reconnaissance of the region with Turkey,[2235] although Foreign Minister Pompeo acknowledged Turkey's "legitimate security concerns".[2236]

But the fact remained that the US withdrawal had at the least contributed, if not "enabled" the Turkish intervention as a retired US general asserted.[2237] It was in particular the fact that Kurdish allies fighting ISIS were now target of the Turkish intervention that prompted a politicized debate, in which international law was not at the forefront. The US government's remarks hence cannot be exclusively attributed legal relevance. Still, they implicitly discharged claims of complicity for omission.

It is difficult to deny that the US did not foresee the looming intervention, including the relevant factors to determine questions concerning the *ius contra bellum*. Turkey had not hidden its plans.[2238] In fact, the US acknowledged that the Turkish operation was a "long-planned one".[2239] But, the US stressed that it never gave "green light" to Turkey. On the contrary, it flashed a "very clear red light".[2240] The US was even considering sanctions. Also, the US would ultimately have been unable to militarily deter Turkey from entering Syria, as American soldiers deployed were outnumbered by far.[2241]

Last but not least, it remained questionable whether the US bore an obligation to act, i.e., to remain in the area. Emphasizing that the withdrawal had been a free decision prioritizing the safety of US soldiers, the

2235 Senior State Department Officials on the Situation in Syria, Special Briefing Office of the Spokesperson (10 October 2019), https://2017-2021.state.gov/senior-state-department-officials-on-the-situation-in-syria/index.html; Humeyra Pamuk, Phil Stewart, 'Exclusive: U.S. halts secretive drone programme with Turkey over Syria incursion', *Reuters* (5 February 2020); Rebecca Kheel, 'Pentagon insists US does not endorse Turkish operation in Syria', *The Hill* (7 October 2019).

2236 Ali Rogin, 'Turkey had 'legitimate security concern' in attacking Syrian Kurds, Pompeo says', *PBS* 19 October 2019, https://www.pbs.org/newshour/world/turkey-had-legitimate-security-concern-in-attacking-syrian-kurds-pompeo-says.

2237 Julian E. Barnes, 'Eric Schmitt, Trump Orders Withdrawal of U.S. Troops from Northern Syria', *NYT* (13 October 2019).

2238 Jean Galbraith, 'Contemporary Practice of the United States', 114(1) *AJIL* (2020) 143-144.

2239 Statement from the Press Secretary (6 October 2019), https://2017-2021-translations.state.gov/2019/10/06/statement-from-the-press-secretary-11/index.html.

2240 Senior State Department Officials on the Situation in Syria, Special Briefing Office of the Spokesperson (10 October 2019), https://2017-2021.state.gov/senior-state-department-officials-on-the-situation-in-syria/index.html.

2241 Julian E Barnes, Eric Schmitt, 'Trump Orders Withdrawal of U.S. Troops from Northern Syria', *NYT* (13 October 2019).

USA apparently rejected such a duty. The US was operating in Syria in exercise of its (claimed[2242]) *right* of collective self-defense of Iraq against ISIS. Unlike with respect to operations initiated upon UN Security Council authorizations, *duties* to continue operations of (collective) self-defense once a State has taken up its operation have not been prominently maintained. Rather, questions of ending military operations have been discussed from the angle of effectiveness. In any event, it would remain to be established that such a duty protected against other foreign invasions. Other obligations to remain in the area did also not exist. The USA had cooperated with Kurdish-led Syrian Democratic Forces, but apparently not based on formal agreements.[2243]

This leaves the US *de facto* power over the territory.[2244] Whether this sufficed to establish a duty to remain is doubtful. On the assumption that the US had been *lawfully* present in Syria, and Syria had an obligation to tolerate US presence, one could argue that the US was required to take appropriate protective measures. But while it is arguable that the US bore responsibility as long as it exercised *de facto* power, it is difficult to infer a duty to continue to exercise such power.

The US position advanced thus addressed also the legally critical issues, in line with its legal views on participation.[2245] In any event, it offered a counter narrative that challenged (i) its duty to remain in the area, (ii) the withdrawal's (extent of) contribution to the operation, (iii) its intention to support Turkey, and (iv) its ability to prevent Turkey's operation. Last but not least, the US in any event was careful not to designate Turkey's conduct as unlawful behavior.

Ultimately, the international community's silence with respect to legal charges of complicity against the US seems to affirm this implicit understanding. The US decision met with criticism, but only politically.

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2242 The legality of US presence in Syria would be the very assumption of such a duty. Should the US for some reason be illegally present under the *ius contra bellum*, a duty to remain could not be established.

2243 Beatrice Walton, Paul Strauch, 'Three Lingering Questions about the Legality of Withdrawal from Syria: Part I – Complicity by Omission', *Opinio Juris* (7 January 2020).

2244 It would require further investigation if the US in fact exercised sufficient (military) control over the Northern Syrian area, or this power consisted of the US presence and political weight in particular towards Turkey, a NATO ally.

2245 See on this above.

c) The Arab League

Interstate assistance concerned also States that took a clear stance against Turkish operations. For example, the Arab League condemned Operation Peace Spring as aggression in violation of the UN Charter. On that note, it called on the Security Council to "urge the international community to [...] prevent Turkey from receiving any military support or information that might help it in its aggression against Syrian territory."[2246] Remarkably, the Arab League thereby did not reiterate a non-assistance obligation, but appealed to the Security Council's power to address assistance.

27) Assistance and drone strikes

Drone strikes have become a common means of States using force. Most notably, drones are a key element in the US war against terror in Yemen, Pakistan, Somalia, or Libya. But it is by no means an American weapon only. Other States, for example, Turkey, the UK, or Israel, are reported to be engaged in drone strikes, too. It is common to drone operations that they heavily rely on interstate assistance.[2247] States' contributions to drone operations take many forms. Besides classic means of cooperation, such as the provision of launch bases, sharing of intelligence, or furnishing operational support, the permission to establish relay stations has become an important contribution. Maintaining and enhancing wireless signals, they have become an essential premise for the success of overseas operations.[2248]

That the lethal[2249] use of drones in another State must be measured against the prohibition to use force is well accepted[2250] – notwithstanding the fact that it is particularly compliance with *ius in bello* that gives rise to

2246 A/74/516 (28 October 2019).

2247 The present inquiry is not concerned with assistance provided through drones, e.g. reconnaissance flights conducted by drones.

2248 Amnesty International, *Deadly Assistance. The Role of European States in US Drone Strikes* (2018) 52. See also on the relevance of sharing intelligence: Jessica Dorsey, Nilza Amaral, *Military Drones in Europe Ensuring Transparency and Accountability* (International Security Programme, Chatham House, 30 April 2021) 18.

2249 It may be debated to what extent non-lethal use of drones already constitutes a use of force.

2250 A/HRC/44/38, 15 August 2020, para 30-31; Christof Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones', 65(4) *ICLQ* (2016) 796; Max Byrne, 'Consent and the use of force: an examination of 'intervention

concerns in practice. As the following selective survey of practice shows, in discussions relating to the legal basis for States' contributions, the *ius contra bellum* dimension is usually included, too, albeit its specific characteristics may not always feature prominently.

a) United Kingdom's contributions

Various reports describe a rich practice of British participation in US drone strikes, ranging from providing bases and critical infrastructure in the UK, sharing intelligence, and embedding personnel.[2251] The UK government generically[2252] described the legal position for cooperation:

> "In cooperating with other States the Government seeks to ensure that its actions remain lawful at all times. The circumstances in which a State can be found responsible in international law for aiding or assisting another State in committing an unlawful act are set out in Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Unlawful Acts. Although the Articles have not been adopted as a treaty, the Government considers Article 16 as reflecting customary international law."[2253]

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by invitation'as a basis for us drone strikes in Pakistan, Somalia and Yemen', 3(1) *JUFIL* (2016).

2251 All-Parliamentary Group on Drone Inquiry Report, the UK's Use of Armed Drones: Working with Partners, 2018, 67; Amnesty International, *Deadly Assistance*, 36-50; Peter Burt, *Joint Enterprises. An overview of US co-operation on armed drone operations* (Drone Wars UK, 2020)

2252 The Joint Committee on Human Rights criticized this as too unspecific: "We expect the Government to provide a more detailed response", Joint Commission on Human Rights, (2016-2017, HC 747, HL Paper 49), para 34.

2253 Ibid Appendix 1, 17; The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015-16, Appendix, https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74705.htm#_idTextAnchor032. Similarly Question for Attorney General, (3 November 2007), https://questions-statements.parliament.uk/written-questions/detail/2017-10-31/l10693. See also the position of the All-Parliamentary Group on Drone Inquiry: All-Parliamentary Group on Drone Inquiry Report, the UK's Use of Armed Drones: Working with Partners, 2018, 43, referring to Article 16 ARS and Article 3(f) Aggression Definition.

b) Djibouti and Camp Lemonnier and Chabelley

The Djiboutian government has been reluctant to comment on the legal aspects of its involvement in US drone operations. The military bases Camp Lemonnier and Chabelley have become the center of the US program and serve as launch pads. That Djibouti, despite the substantial economic benefits it received, did not grant a blank check to the US is indicated by two facts: First, the bases were leased to the US within the framework of a bilateral agreement between the US and Djibouti. Accordingly, US personnel was required to respect the laws of the Republic of Djibouti.[2254] Second, Djibouti's president noted with concern that the military base Chabelley has increasingly become an exclusive American zone and called it a problem to be solved. Whether this was a denial of shared responsibility for drone strikes remains ambiguous, however. Initially, Djibouti was closely involved in the specific drone operations. Djiboutian air traffic controllers were responsible to handle US drone flights. But since 2013, there is no public information in this respect available.[2255] It should not go unnoticed that Djibouti views its involvement in drone operations in connection with the threat of terrorist attacks against Djibouti and expressly supports the US lethal operation targeting terrorist leaders.[2256]

c) The Netherlands and intelligence

The Netherlands, faced with charges of having provided intelligence that facilitated unlawful killings, emphasized that "the Netherlands does not cooperate in illegal targeted killings".[2257] It further added that it had "no

2254 Article IV Agreement between the Government of the United States of America and the Government of the Republic of Djibouti on Access to and Use of its Facilities in the Republic of Djibouti, 19 February 2003.

2255 Strauss, *JUFIL* (2021) 11; Michael J Strauss, 'Territorial Leases' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2017) 82.

2256 Frank Gardener, 'US military steps up operations in the Horn of Africa', *BBC* (7 February 2014), https://www.bbc.com/news/world-africa-26078149. Djibouti also rejected an Iranian military base "because we think that Iran's policy in the region is not a peaceful one". Katarina Manson, 'Jostling for Djibouti', *FT* (1 April 2016).

2257 Tweede Kamer der Staten-Generaal, Kamervragen (Aanhangsel) 2013-2014, nr. 1710 (10 April 2014), https://zoek.officielebekendmakingen.nl/ah-tk-20132014-1710.html.

indications" that its intelligence "has been used for acts that are contrary to international law."[2258] Also, while the Netherlands stressed that it did not have the information necessary to assess the legality of the use of force in specific incidents, it recognized and shared the US position that the right of self-defense also applied against organized armed groups.[2259]

### d) Italy and the base in Sigonella

Italy has also been confronted with questions about its involvement in US drone operations.

The joint US-Italian-NATO airbase located in Sigonella, which was (partly) ceded to the US back in the 1950s,[2260] takes pride in being a multi-functional "hub of the Med".[2261] Throughout history, it has been used to support several American military operations in the Mediterranean and the Sahel. Meanwhile, it is of great importance for the US drone program. Since 2011, surveillance drones are said to operate from there.[2262] Also, armed drones are stored on the airbase. Since 2016, Sigonella has been serving as launching pad for armed drone operations in Libya. Most recently, the base was equipped as a relay station to support the transmission of data necessary for remotely operating drones, similar to the Ramstein base in Germany.

Sigonella air base is placed under Italian command. But the US commander has "full military command over US personnel, equipment and

2258 Ibid.

2259 The government agreed to implement recommendations that would have required it to make a risk assessment. Yet, it remains unclear to what extent the recommendations were in fact implemented. Amnesty International, *Deadly Assistance*, 67.

2260 Bilateral Infrastructure Agreement between the United States of America and Italy, signed on 20 October 1954; Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of Defense of the Italian Republic concerning the use of the installations and infrastructures by the United States in Italy, signed on February 2, 1995; Article V(1) Technical Arrangement between the Ministry of Defense of the Italian Republic and the Department of Defense of the United States of America Regarding the Installations/Infrastructure in Use by the U.S. Forces in Sigonella, Italy, 6 April 2006 [TAS].

2261 Remarks by Secretary Carter at a Troop Event at Naval Air Station Sigonella, Italy, October 6, 2015, https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/622168/remarks-by-secretary-carter-at-a-troop-event-at-naval-air-station-sigonella-ita/.

2262 Amnesty International, *Deadly Assistance*, 70.

operations." The US commander notifies the Italian commander of "all significant US activities", in contradistinction to "routine activities". The Italian commander again advises the US commander if he believes US activities are not respecting applicable Italian law and intervenes "to have the U.S. Commander immediately interrupt U.S. activities which clearly endanger life or public health and which do not respect Italian law."[2263]

Complementing this general framework, Italy and the US have concluded specific non-public agreements governing drones launched from Sigonella for reconnaissance purposes and for military strikes.[2264] With respect to the latter, Italian authorities accordingly authorize operations on a case-by-case basis and for defensive purposes only.[2265]

The Italian position, hence, appears as follows: the US must comply with Italian law, including the *ius contra bellum*. Italy does not see its responsibility limited to the time of the placement at the disposal of the US. It accepts responsibility for the future use of the base, by undertaking due diligence obligations to ensure a use in accordance with international law. The agreement structurally provides for scrutiny in different forms of intensity depending on different uses. This may lead to responsibility for contributing to drone strikes, yet indicates that it depends on knowledge by Italy. Whether Italian authorities have such knowledge ultimately remains a question of fact in the specific case and depends on the extent of compliance with the agreement.[2266]

### e) Germany and the Ramstein base

Germany has placed the air base Ramstein at the disposal of the US on the basis of the Convention on the Presence of Foreign Forces in Germany

2263 Article VI (1), (3), (5), Annex 5 1, 2 TAS.

2264 Diego Mauri, 'Droni A Sigonella: Quale Valore Ha (E Quale Impatto Produrrà) L'accordo Italo-Americano?', *SIDIBlog* (12 May 2016).

2265 See also above Chapter 4.II.C.21). Diego Mauri, 'On American Drone Strikes and (Possible) European Responsibilities: Facing the Issue of Jurisdiction for "Complicity" in Extraterritorial Targeted Killings', 28(1) *ItYBIL* (2019).

2266 See for efforts to obtain more information in this respect: ECCHR, Drohnen – Italien – Sigionella, https://www.ecchr.eu/fall/stuetzpunkt-sizilien-informations-klage-zu-italiens-beteiligung-am-us-drohnenprogramm/.

in the Federal Republic of Germany from 23 October 1954.[2267] Over the years, the American use of the air base has led to many controversies. It prompted i.a. criticism for its alleged nature as transport hub,[2268] or as stopover for CIA flights transferring terrorism suspects in violation of human rights law.[2269] Recently, it is particularly scrutinized with respect to its alleged involvement as essential relay station in the US drone wars in the Middle East and East Africa. Accordingly, Germany is confronted with explaining what constitutes in factual terms interstate assistance to a use of force. The German government (1), and meanwhile also courts (2), have been concerned with shaping the German position.

Again, in the relevant cases, the US use of drones raised major concerns with respect to international humanitarian law. Compliance with the *ius contra bellum* was not actively put into question. Yet, as will be seen, those questions were included in Germany's considerations.

(1) German government's position

The German government rejects any responsibility in connection with the American use of drones – for complicity in an internationally wrongful act as well as for an international wrongful act itself.[2270] It does not generally deny that through its placement of the air base it could bear responsibility.[2271] It does so only for the "mere fact that Germany has placed the air

2267 Federal Law Gazettel955 II, 253. It remains in force after the two-plus-four-agreement, Notenwechsel vom 25. September 1990, Federal Law Gazette 1990 II, 1390. The Agreement between the Parties of the North Atlantic Treaty regarding the Status of their Forces, and the Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany from 3 August 1959 specify the applicable rights and duties. Federal Law Gazette 1961 II, 1183, 1218.

2268 E.g. BT Drs 18/237 (23 December 2013), 6 question 9; BT Drs 1813704 (23 October 2017).

2269 BT Drs 16/325 (27 December 2005); BT Drs 16/355 (12 January 2006).

2270 BT Drs 19/2318 (24 May 2018), question 5: „Es besteht keine Veranlassung, davon auszugehen, dass die Überlassung des Luftwaffenstützpunktes Ramstein eine Beihilfe zu einem völkerrechtlichen Delikt oder selbst ein völkerrechtliches Delikt sein könnte".

2271 Plenarprotokol, 18/205 (30 November 2016), 20453; Regierungspressekonferenz vom 8. Januar 2020, https://www.bundesregierung.de/breg-de/suche/regierungspressekonferenz-vom-8-januar-2020-1710838, „Wir kommen unseren rechtlichen

base Ramstein at the disposal of the US", "solely because relevant functional signals could be relayed through Ramstein."[2272] In other words, the German government accepts that its toleration *could* lead to responsibility, even if it does not in the concrete case. This, it bases on several grounds.

The German government stresses that responsibility must be assessed for the specific case only. It points to the US assurance that the "US Air Force does not launch or operate remotely piloted aircraft from Germany as part of our counter terrorism activities".[2273] And while it in the meanwhile acknowledges that global communication channels to assist remotely piloted aircraft in general also include Ramstein as a relay station[2274] (notably not in order to evaluate data[2275]), in response to the specific cases, it denies any knowledge that Ramstein has been used for the specific military operation.[2276] The US government does neither prior nor after the use provide specific information.[2277] At all times, the US government ensures however that it is acting in accordance with international law.[2278] Against this background, the German government itself does not positively evaluate the

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Verpflichtungen selbstverständlich nach." See also with respect to German constitutional law: BT Drs 18/237 (23 December 2013), 12 question 25a.

2272 Plenarprotokol, 18/205 (30 November 2016), 20453.

2273 BT Drs 17/14401 (18 July 2013), 7 question 17; BT Drs 18/819 (14 March 2014), 4, question 10, 11; Plenarprotokol, 18/205 (30 November 2016), 20452.

2274 Plenarprotokol, 18/205 (30 November 2016), 20452-20453; Regierungspressekonferenz vom 8. Januar 2020, https://www.bundesregierung.de/breg-de/suche/regierungspressekonferenz-vom-8-januar-2020-1710838. For an earlier position cf BT Drs 17/14401 (18 July 2013), 9, question 22.

2275 E.g. BT Drs 18/1214 (24 April 2014), 5 question 7c. Germany acknowledges however that Ramstein „assists further tasks, including planning, controlling, and evaluating air operations." Plenarprotokoll 18/205, 20453 Mündliche Frage 16; BT Drs 18/11023 (25 January 2017). But it has no indications that operations were planned, controlled or evaluated in Ramstein, BT Drs 18/10827 (13 January 2017), 7 question 8. But see OVG für das Land Nordrhein-Westfalen, 4 A 1361/15, judgment (19 March 2019), juris [in the following OVG NRW], 68. It remains not beyond any doubt whether Ramstein has this role for drone strikes.

2276 BT Drs 18/11734 (29 March 2017), question 14; BT Drs 19/25737, (8 January 2021), Frage 12; Regierungspressekonferenz vom 8. Januar 2020, https://www.bundesregierung.de/breg-de/suche/regierungspressekonferenz-vom-8-januar-2020-1710838.

2277 BT Drs 18/1318 (5 May 2014), 6, question 25. The German government also stresses that there is no title under international law against the US to receive such information, Regierungspressekonferenz vom 8. Februar 2017, https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-8-februar-843652.

2278 E.g. BT Drs 17/14401 (18 July 2013), 5, question 11; BT Drs 18/237 (23 December 2013), 4, question 5.

potentially assisted military operation, neither factually nor legally, for it is lacking the information on the specific case. Crucially, the German government does not maintain that the mere reliance was sufficient; it underlines that it is engaged in a continuous and trustful dialogue with the US, in order to receive the necessary information, and has no reason to doubt the integrity of the information received.[2279] In its view, currently, there is no indication for unlawful action.[2280] Further, it stresses that the permission to use the airbase is strictly confined to the use in accordance with German, and hence also international law.[2281] Also, it adds that generally the US has concrete rules for drone programs "oriented on international law".[2282]

Notably, in the course of the court proceedings, the German government stated that it viewed the drone strikes to be compatible with the *ius contra bellum*.[2283] Its non-position on US compliance with international humanitarian law indicates, however, that the German government does

2279 E.g. BT Drs 17/14401 (18 July 2013), 5 question 13; BT Drs 18/237 (23 December 2013), 10 question 18; BT Drs 18/2794 (8 October 2014), question 10, 19-20, 28; Plenarprotokol, 18/205 (30 November 2016), 20454; BT Drs 18/11023 (25 January 2017), 3; BT Drs 19/2318 (24 May 2018), 4, zu questions 1 bis 3: „im regelmäßigen, vertrauensvollen Austausch mit ihren US-Partnern zu politischen, militärischen und rechtlichen Fragen, die US-Streitkräfte in Deutschland betreffen. Dies umfasst Aktivitäten am US-Luftwaffenstützpunkt Ramstein wie auch in Deutschland insgesamt. Die Bundesregierung hat keinen Grund zur Annahme, dass ihr Informationen zu allen wesentlichen Fragen zur Rolle des US-Luftwaffenstützpunktes Ramstein beim Einsatz von Unmanned Aerial Vehicles (UAV) vorenthalten werden. Dies gilt insbesondere für die Frage nach der am Standort vorhandenen Kommunikationsinfrastruktur sowie den dort übernommenen Aufgaben. Im Übrigen gilt weiterhin die der USA, dass unbemannte Luftfahrzeuge für Antiterroreinsätze weder von Ramstein gestartet noch gesteuert werden. Es gilt ebenso die Aussage der USA, bei ihren Aktivitäten in Ramstein – wie in Deutschland insgesamt – deutsches Recht zu achten". BT Drs 19/2766 (15 June 2018), 45 question 53.

2280 Cf BT Drs 17/14401 (18 July 2013), 10 question 27. It may trust the US because, first, Germany has a long-standing and trustful cooperation with the US; second, the US is a "constitutional state" ("Rechtsstaat") with institutionally anchored traditions to respect and enforce international (humanitarian) law, cf BT Drs 18/11023, (25 January 2017), question 11; BT Drs 19/2318 (24 May 2018), question 7.

2281 BT Drs 19/21199 (22 July 2020), question 5; BT Drs 19/2318 (24 May 2018), question 3; BT Drs 18/11023 (25 January 2017) question 11; BT Drs 17/14401 (18 July 2013), 4, question 9.

2282 Plenarprotokol, 18/205 (30 November 2016), 20454; BT Drs 18/11023 (25 January 2017), question 21.

2283 OVG NRW, para 34.

not believe that such statements are necessary under the given circumstances to deny responsibility.[2284]

(2) German courts

The role of the Ramstein airbase in the US drone program has also occupied German Courts in several respects.[2285]

In a case of a resident living near Ramstein base seeking protection through controlling or ending the use of Ramstein for drone strikes,[2286] the Federal Court of Administrative Law did not engage with the merits, as it found that the claimant could not substantiate that he was violated in his own rights.

The Court's finding was primarily based on German national law.[2287] But it also briefly considered the standards established by the European Court of Human Rights for shared responsibility in case of violations of human rights. On that basis, the Federal Court rejected Germany's responsibility. The Court noted that Germany had denied any "qualified knowledge about drone operations being operated from German territory". Further, it had not been asserted that Germany "actively" supported the drone strikes. In particular, the mere placement at the disposal of the infrastructure of a military air base does not suffice to establish Germany's shared responsibility

2284 Similarly Dieter Deiseroth, 'Verstrickung der Airbase Ramstein in den globalen US-Drohnenkrieg und die deutsche Mitverantwortung – Zugleich ein Beitrag zur Bestimmung der individuellen Klagebefugnis nach § 42 II VwGO', 132(16) *DVBl* (2017) 985-986.

2285 See also in view of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Committee against Torture, Concluding observations on the sixth periodic report of Germany, 11 July 2019, CAT/C/DEU/CO/6, para 44, 47. The Committee was "gravely concerned" that Germany "enables counter-terrorism measures that violate human rights to be committed from its territory, in particular the transmittal of electronic signals through facilities at Ramstein airbase, which allow unmanned aerial vehicles of a foreign power to conduct operations in third countries, including targeted killings outside of the context of armed conflict (arts. 11 and 16)."

2286 BVerwG, 1 C 3/15 (5 April 2016), BVerwGE 154, 328-351 [in the following BVerwG, 1 C 3/15, juris].

2287 But Deiseroth, *DVBl* (2017) 987-988 suggesting that the Federal Court has applied general international law.

for risking the human rights of a person living in Germany through acts originating from Ramstein.[2288]

Notably, the Court also raised the question of whether Germany was required to prevent US drone strikes in violation of Article 2(4) UNC. The Court ultimately did not give an answer, as the claimant could not rely on such violation.[2289] In any event, it would have done so, however, only in view of German constitutional, not international law.[2290]

The case of Salem bin Ali Jaber that received attention far beyond Germany also deserves special mention.[2291] The Higher Administrative Court of North Rhine-Westphalia issued what was considered a "watershed ruling".[2292] It required the German government to ascertain through "appropriate measures" that US airstrikes conducted via Ramstein comply with international law, and eventually to work towards compliance. The holding, however, has been widely winded back by the Federal Court of Administrative Law, which largely affirmed the German government's position.[2293]

But again, the judgments are only of limited relevance for the present purposes. The permissibility of German contribution to the US drone program has been generally discussed under the angle of German national law, i.e., basic rights obligations.[2294] In view of the constitutional principle

2288 BVerwG, 1 C 3/15, juris para 27.

2289 Ibid para 46, 47. For a critique Deiseroth, *DVBl* (2017) 993 in view of potential rights of self-defense on the (questionable) assumption that Germany violated Article 3(f) Aggression Definition.

2290 BVerwG, 1 C 3/15 juris, para 32 citing BVerfGE 112, 1, 27.

2291 Another case concerning US drone operations in Somalia was rejected for procedural reasons. The Court noted however that it could not determine German knowledge about the use of Ramstein as a relay station for drone strikes in Somalia, OVG NRW, 4 A 1072/16, judgment (19 March 2019), juris.

2292 OVG NRW, 4 A 1361/15, judgment (19 March 2019), juris. A/HRC/44/38, 15 August 2020, para 28.

2293 BVerwG, 6 C 7/19 (25 November 2020), juris [in the following BVerwG, 6 C 7/19]. The Court of first instance came to the same conclusion: VG Köln, 3 K 5625/14 (27 May 2015), juris [in the following VG Köln].

2294 VG Köln, para 56; OVG NRW, para 133; BVerwG, 6 C 7/19, para 28. Structurally, the Courts first discussed whether the conduct was an attributable interference in the claimants' rights, and asked, second, whether a duty to prevent was violated. See for detailed discussions Thomas Giegerich, 'Can German Courts Effectively Enforce International Legal Limits on US Drone Strikes in Yemen?', 22(4) *ZEuS* (2019); Helmut Philipp Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: »German exceptionalism«? Zugleich Besprechung von OVG Münster, Urteil vom 19.3.2019 – 4 A 1361/15', 75(6) *JZ* (2020); Leander Beinlich, 'Drones, Discretion, and the Duty to Protect the Right to Life:

of friendliness towards international law, Germany is obliged under certain circumstances to protect individual's rights from other States' interference in violation of international law, when they take place within Germany's area of responsibility.[2295] In other words, Courts applied what could be termed a German national specific "no harm rule". In this respect, Germany was not in the dock over alleged *complicity*. The Courts were rather concerned with Germany's duty to prevent the use of drones contrary to international law, which, as the Higher Court noted, was independent from Germany's own responsibility under Article 16 ARS.[2296] The Higher Court and the Federal Court eventually disagreed over the specific circumstances in which such national duties to protect apply, the measures that would have been required, and what review standards courts may apply.

In their assessment, the Courts remained notably silent on Germany's specific *international* obligations relating to its contributions.[2297]

The parties had not spared those questions, although they disagreed on whether an individual could derive actionable rights from general rules on assistance. The claimants invoked also Germany's *international* obligations to prevent the operation of drone strikes from its territory.[2298] The German government responded by denying any contribution in factual terms. As an alternative argument, it held that it was not obliged to take measures going beyond the close dialogue with the US in view of international responsibility for internationally wrongful acts by the US. By application of Article 16 ARS, this would require "positive knowledge and intent".[2299] It denied any knowledge about circumstances indicating the unlawfulness of the strikes.

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Germany and its Role in the United States' Drone Programme Before the Higher Administrative Court of Münster', 62 *GYIL* (2019).

2295 OVG NRW, para 204.

2296 Ibid para 215.

2297 Note that the parties did consider complicity: Ibid para 8, 25. The government denied as an alternative argument that it was not obliged to take measures going beyond the close dialogue with the US in view of an international responsibility for internationally wrongful acts by the US. In application of Article 16 ARS, both required positive knowledge and intent, 8 para 18, 34. It has no knowledge about circumstances which indicate the unlawfulness of the strikes. Also, the use of the airbase only is part of its contribution in the context of the execution of the NATO-troop statute that is reciprocal to US security guarantees. On duties to protect arising from international human rights law: para 34.

2298 OVG NRW, para 8, 25

2299 Ibid para 18, 34 "positive Kenntnis des Unterstützerstaats und Zweckgerichtetheit der Unterstützungsleistung".

Also, the use of the airbase only had been part of its contribution in the context of the execution of the NATO-troop statute that is reciprocal to US security guarantees.[2300]

The Higher Court confined itself to holding that claimants in the specific case could not invoke general international law, without specifying the generally applicable international framework.[2301] It noted, however, that the customary elementary core of international human rights was applicable, but would not provide for further protection than national basic rights.[2302] To what extent the *ius contra bellum* provided for specific rules (or general international law prohibited complicity in violations of the *ius contra bellum* or German basic law required States to prevent violations of the *ius contra bellum*[2303]), the High Court did not address. Brushing over concerns one could have discussed with respect to the Yemeni government's consent to the drone strikes, the Higher Court considered the US drone program to comply with the prohibition to use force.[2304]

While the Federal Court disagreed with the High Court's interpretation of constitutional law, it saw no reason to scrutinize international obligations relating to Germany's contribution at all, with the exception of the ECHR, which led to shared responsibility only in case of a State's acquiescence or connivance.[2305] Implicitly, it hence upheld the parallelism between international human rights law and German basic law suggested by the High Court.

While one should be cautious to apply the Courts' considerations on national law directly to the international sphere, the judgments are nonetheless interesting in at least two respects for the present purpose of assessing interstate assistance under the *ius contra bellum*. First, they add some clarity on the facts that are also relevant for international obligations. It is now a fact established by Court that the base is used as relay station for US drone strikes.[2306] Whether or not Ramstein air base is also used to evaluate

2300 Ibid para 18, 34. On duties to protect arising from international human rights law: para 34.
2301 Ibid para 573-575.
2302 Ibid para 576-580.
2303 Expressly left open: ibid para 218-220.
2304 Ibid para 220, 427-433. On the possible concerns see above II.19.
2305 BVerwG, 6 C 7/19 juris para 33.
2306 OVG NRW, para 252. The German government had rejected this, ibid para 33, 34: kein "Kausalitäts- oder Zurechnungszusammenhang mit einem Verhalten der Beklagten".

information in relation to the drone strikes, remains contentious, albeit the Courts found "weighty factual indications" for such activities.[2307]

Second, the judgments leave no doubt that the placement of its territory at the disposal of a military base does not create a lawless space, even if judicial review in relation to individual cases may be limited. Albeit the specific case was dominated by national law, the Courts did not exclude, if not imply, that international obligations applied to Germany's contributions, too. In this respect, even if the question of whether US drone strikes complied with international humanitarian law featured most prominently, the *ius contra bellum* mattered, too. In view of the facts relevant for such an assessment that Germany could not have easily denied to have known, it is noteworthy that the German government, as well as the Courts, positively determined that the US operations complied with the *ius contra bellum*.

## D. Assistance and the International Court of Justice

International jurisprudence itself does not contribute to the identification of the rules governing interstate assistance. Unlike the decisions by national courts, it is neither subsequent practice relevant to the interpretation of a treaty,[2308] nor does it count as practice relevant to the formation of customary international law.[2309] International jurisprudence is nonetheless relevant as subsidiary means for the identification of rules of customary international law, as well as a persuasive, if not authoritative, source for the interpretation of the UN Charter to the extent that it examines the existence and content of such rules. With this in mind, it is still important that the judgments are decisions *inter partes*. As a general rule, a court's pronouncement on the law is essentially informed by the specific fact pattern it is called upon to decide.

The following analysis will focus on the International Court of Justice, to the extent that it has been presented with the opportunity to pronounce on the law relating to the use of force and State involvement in conduct by a third actor.[2310] So far, the law governing interstate assistance to the use of force itself was not yet subject to the Court's primary assessment.

2307 BVerwG, 6 C 7/19 juris para 61.

2308 Subsequent Practice Commentary, Conclusion 3, 26-27 para 11.

2309 CIL Commentary Conclusion 13, 149-150.

2310 For a detailed overview see Kreß, *ICJ and Use of Force*; Christine Gray, 'The International Court of Justice and the Use of Force' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court*

Nonetheless, the cases reflect the realities of interstate use of force: in all major cases relating to the use of force, (interstate) assistance had a role to play. And as such, the Court's case-law is not without relevance for the question at hand.

### 1) The Corfu Channel Case

The Corfu Channel case concerned naval mines in the Corfu Channel in Albanian territorial waters that had struck British warships passing through the Channel, and that were swept in reaction by British minesweepers in 1946.

The UK held Albania responsible for a breach of its obligations under international law in view of the explosions.[2311] To what extent Albania was involved in the minelaying became soon the center of attention, in particular once it became clear that it could not have been Albania that had laid the minefield itself. In this respect, no questions on the law governing the use of force were raised. The case is still noteworthy in the present context for two reasons. First, the argumentative structure reflects a (and the Court's) general approach to questions of another State's involvement in other acts.[2312] Second, while neither the parties nor the Court gave consideration to the question of whether the explosion of naval mines might have amounted to a use of force against the British warships, it would not have been unreasonable to appraise the question from this perspective also.[2313]

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*of Justice* (2013). Not of interest here are cases in which the ICJ touches upon assistance to other violations of international law.

2311 *Corfu Channel Case (United Kingdom, Albania)*, merits, ICJ Rep 1949, 4, 10 [*Corfu Channel*].

2312 See e.g. for the same structural approach *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, 199-200 para 379.

2313 In this direction: John Norton Moore, 'Jus ad Bellum Before the International Court of Justice', 52(4) *VaJIntlL* (2011-2012) 917-918, 948-949; David Letts, 'Beyond Hague VIII: Other Legal Limits on Naval Mine Warfare', 90 *IntlLStud* (2014) 450; David Letts, 'Naval mines: Legal considerations in armed conflict and peacetime', 98(902) *IRRC* (2016) 15. As the Court was called upon to decide whether Albania "committed a breach of its obligations under international law", *Corfu Channel* 10, the Court might have addressed this question, too. On the Court's general reluctance to invoke the principle of non-use of force: e.g. Christine Gray, 'A Policy of Force' in Karine Bannelier, Sarah SK Heathcote and Théodore Christakis (eds),

The Court's judgment has widely and rightly received attention for its famous pronouncements on due diligence.[2314] Importantly, this dictum did not stand isolated. It is part of the Court's three-stranded approach of "various grounds for responsibility" to address the involvement of a State in another actor's action through 'territorial assistance'. It thereby responded to the three factual assertions advanced by the UK to establish responsibility of Albania under international law: "that the minefield which caused the explosion was laid [...] by or with the connivance or knowledge of the Albanian Government."[2315]

First, the Court considered grounds for attribution, according to which it would be the 'assisting' State itself that committed the act.[2316] Second, it asked whether the act was committed with connivance of the 'assisting' State, which would imply "collusion" in the assisted wrongful act.[2317] This avenue was distinct from the third option that the Court ultimately found to be established: responsibility for a failure to exercise due diligence.[2318] In this case, the 'assisting' State could bear responsibility for the assisted act taking place.[2319] Its responsibility may, however, also be established due to

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*The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (2012).

2314 E.g. 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).

2315 *Corfu Channel*, 15.

2316 It focused only on the question if Albania itself had laid the minefield. As the UK had hardly provided evidence in support of this submission, the Court did not pay further attention to this matter. Corfu Chanel, 15-16.

2317 *Corfu Channel*, 16-17.

2318 Ibid 18-22.

2319 This would have been the case, if the Court found Albania responsible for *not having prevented* the unlawful act, i.e. the minelaying, from occurring. The Court turned a blind eye to this option, and neither examined it in fact nor in law. Dissenting opinions addressed this, however. E.g. Dissenting opinion Judge Krylov 71-72 (rejecting Albanian responsibility on that ground), Dissenting Opinion Judge Winiarski, 51-56 (finding Albania responsible for not taking appropriate protection measures). Pacholska, *Complicity*, 184, 186 claims that this obligation was only triggered in case the conduct was not attributable to a State. In the case, there was agreement however that only States could have laid the mines. E.g. Judge Winiarski, 50; 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) 316.

its involvement in the result of another actor's act (here the explosions), without the territorial State being responsible for the assisted act.[2320] On that basis, the Court found the territorial State Albania to be responsible for an omission in relation to the results of the act: it failed to warn and notify the UK about the minefield.[2321]

During the proceedings, interestingly, the second argument, which the Court later called 'collusion', featured most prominently. The UK had charged Albania to be complicit in the mine laying, which it alleged Yugoslavia to have carried out with Albania's connivance.[2322]

The Court, however, did not find the alleged collusion between Albania and Yugoslavia to be established. It rejected the evidence presented as insufficient to allow firm conclusions on the allegations. Neither did evidence of what may be considered 'hearsay' nor the circumstantial evidence suffice to prove "a charge of such exceptional gravity against a State".[2323] This, so the Court, "would require a degree of certainty that has not been reached

2320 *Corfu Channel*, 17, 18.

2321 But see Individual Opinion Judge Alvarez, 45, who qualified this failure as 'complicity'. On the relationship between due diligence applied in the *Corfu Channel* case and 'complicity', see Corten, Klein, *Limits of Complicity*; Aust, *Complicity*, 227. In its submissions, the UK widely shared this three-stranded approach. Doubt may arise with respect to the UK's submission that "the responsibility of Albania rests, firstly, upon direct complicity in the existence of the minefields which is created by knowledge of it, whether or not she laid it or connived in its actual laying", Memorial submitted by the government of the United Kingdom of Great Britain and Northern Ireland (30 September 1947), 48 para 94. This could be understood as a proposal of a fourth avenue to responsibility, which the Court would not have addressed. But the UK subsequently did not clearly distinguish knowledge and connivance, which led Judge Badawi Pasha to remark that "in the British argument, knowledge is so confused with connivance, that it is impossible to separate them." Dissenting Opinion Judge Badawi Pasha, 61. Hence, the UK did not press on this potential additional ground for responsibility for complicity based solely on knowledge. See in detail on the British argument Corten, Klein, *Limits of Complicity*, 318-320. Moreover, it seems that in this light the Court understood the British argument also to be three-stranded, *Corfu Channel*, 15.

2322 *Corfu Channel*, 16; Reply submitted, under the Order of the Court of 26th March 1948, by the Government of the United Kingdom of Great Britain and Northern Ireland (30 July 1948), 257-258 para 37. For a detailed account of the British argument and the Albanian response Corten, Klein, *Limits of Complicity*, 317-322. Note that throughout the proceeding, the UK only invoked Albanian-Yugoslav complicity. Its final submission was phrased more broadly, however, that implies also collusion between Albania and an unknown actor. See on this observation, Dissenting Opinion Judge *ad hoc* Ecer, 117.

2323 *Corfu Channel*, 17.

here." This statement related primarily to the mine laying being attributed to Yugoslavia. It appears to also be the standard against which the act of collusion with which Albania was charged is measured.[2324]

The Court most elaborately rejected the claim of collusion for the fact that "the authors of the minelaying remain unknown".[2325] The logic underlying the Court's finding hence seemed to be, as Judge Kyrlov, who concurred on this charge, put in his dissenting opinion:

> "Neither can it be affirmed that Albania was an accomplice in the minelaying operation. The assertion of such complicity would be a departure from juridical logic. If there is no evidence to show who was guilty of laying the mines, how can the Court find that Albania was an accomplice in the minelaying operation?"[2326]

The Court further added that it could not conclude that also Albania participated. It held that "[i]t is clear that the existence of a treaty [… the Treaty of friendship and mutual assistance signed on 9th July 1946 establishing a political and military alliance] however close may be the bonds uniting its signatories, in no way leads to the conclusion that they participated in a criminal act."[2327]

The Court hence rejected the allegations of collusion on a factual level. It did not engage in a legal discussion.[2328] It remained silent on the relevant normative framework of 'collusion'. In particular, it did not suggest under which obligation a colluding State might be responsible. There may be good reason to assume that a collusion would have also (*a fortiori)* violated "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary

2324 For a similar understanding see Quincy Wright, 'The Corfu Channel Case', 43(3) *AJIL* (1949) 493.

2325 *Corfu Channel*, 17. Neither a witness nor circumstantial evidence allowed a firm conclusion.

2326 *Corfu Channel*, Dissenting Opinion by Judge Krylov, 68, 69.

2327 *Corfu Channel*, 17.

2328 The Court developed the legal argument in view of the facts established. It did not measure the facts against the legal framework.

to the rights of other States."[2329] Whether 'collusion' might also constitute a more serious violation of other norms, the Court did not disclose.[2330]

The requirements for 'collusion' seem, however, not to be easily established. The mere fact that the mining and explosion occurred on Albanian territory was not sufficient to determine collusion. This is the case even when "the laying of the minefield which caused the explosions on October 22nd 1946 could not have been accomplished without the knowledge of the Albanian Government."[2331] Instead, the Court sought to prove "collusion […] consisting either of a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines."[2332] 'Collusion' hence requires a specific contribution with the contributing State's 'connivance'.[2333]

One cannot infer from the Court's holding, however, that it is a requirement that the colluding State knows who the author of the act is. There is good reason to assume that Albania has colluded with *some* actor, given that the minelaying has taken place, that the Court found no evidence to support that it was Albania that laid the mines itself, and that Albania knew not only of the minefield but of the laying of the minefield. It is not apparent why Albania should not also have known the author of the minelaying. And in fact, the Court did not suggest that *Albania* did not know about the author, but confined itself to stating that the authors remain unknown. The Court did not require, unlike Judge Kyrlov suggested, that specific knowledge about the guilty actor was necessary.

2329 *Corfu Channel*, 22.

2330 E.g. collusion could have also led to attribution of conduct, as André Nollkaemper, *Issues of Shared Responsibility before the International Court of Justice* (SHARES Research Paper, Amsterdam Center for International Law, 1, 2011) 28 suggests.

2331 *Corfu Channel*, 22. Notably, the Court did not assert that Albania knew *who* the author of the minelaying was. Critical that such a conclusion might have been possible: Judge Winiarski, 50: "It seems difficult to assert that Albania knew *in abstracto;* if she knew, she knew in a concrete manner: when, under what conditions, and no doubt by whom the mines had been laid […] we are now faced once again with the hypothesis of collusion, and it has not been suggested that the operation was carried out in collaboration with another party possessing governmental means of performing it effectively." He continues that if Albania did not know about the Yugoslavian vessels it would be contradictory to claim that Albania knew about unknown vessels, 51.

2332 *Corfu Channel*, 16.

2333 Connivance seemed to also imply knowledge.

It is important to note that the Court's finding with respect to collusion is hence a limited one. The Court did not find that Albania did not collude.[2334] It only found it not established what had been asserted by the UK, i.e., that Albania did collude *with Yugoslavia*. The Court hence ignored that Albania may (if not must) have colluded with an unknown actor.[2335] As such, the Court's holding allows only limited conclusions with respect to the responsibility for collusion with unknown actors. It is hence not excluded that a State may be responsible for collusion even when the author of the act remains unknown. The Court did not decide on this issue.

Similarly, the relationship between 'collusion' and 'complicity' remains ambiguous. The Court only referred to 'collusion'. It did not adopt the British notion of 'complicity'.[2336] Whether Judge *ad hoc* Ecer was right not to be concerned with the terminology[2337] remains unclear in view of the majority judgment. In any event, the Court applied a test of 'collusion' which was based on connivance, not mere knowledge.[2338] Whether the Court found 'collusion' based on connivance and the (intentional) collaboration to preclude a (lower) test of 'complicity' remains an open question. What can be said, however, is that at least at the time of its judgment, *nota bene* in 1949, the Court was reluctant to apply such notion.[2339]

2334 Claiming that the Court was bound to state that the "complicity or participation of Albania in the laying of mines, by whatever agency effected, has not been established." Judge *ad hoc* Ecer 117.

2335 One may disagree on whether the Court was called upon to decide on this question. See Judge *ad hoc* Ecer, 117. The Court's judgment is ambiguous on how it understood the British submission. While it took note of the *general* charge of responsibility for connivance, *Corfu Channel*, 10, it defined it narrowly to consist of collusion between Albania and Yugoslavia, *Corfu Channel*, 16.

2336 Memorial submitted by the government of the United Kingdom of Great Britain and Northern Ireland (30 September 1947) para 77, 94.

2337 Judge *ad hoc* Ecer, 116. See also other Judges using 'complicity', e.g. Judge Alvarez, 45.

2338 At times, the UK submissions indicated that for "direct complicity" mere knowledge is sufficient, UK Memo, 48 para 94. In later stages of the proceeding, the UK does not seem to uphold the claim, but intertwines connivance and knowledge in a manner that led Judge Badawi Pasha, 61, to find that "in the British argument, knowledge is so confused with connivance, that it is impossible to separate them." See also Corten, Klein, *Limits of Complicity*, 319. In fact, the UK sought to substantiate knowledge by establishing connivance.

2339 Even seriously doubting the usefulness of 'complicity' in international law based on the Court's focus on due diligence standard: Corten, Klein, *Limits of Complicity*, 334.

### 2) The Case concerning Military and Paramilitary Activities in and against Nicaragua

In its Nicaragua dictum, the ICJ had the occasion to address State involvement in and assistance to armed activities by a distinct actor under the *ius contra bellum*.[2340] At its core, the judgment concerned the US involvement in armed activities of non-American armed rebel groups within and outside Nicaragua. It goes without saying that the ICJ's pronouncements are confined to the resolution of the specific dispute. Most notably, the legal regime identified is only applicable to the case-specific support to non-State actors at the time of the judgment, in 1986.

While the judgment has been received not uncritically in contemporary times,[2341] by now, States and scholars alike seem to have accepted the ICJ's pronouncement as the primary reference point with respect to many aspects of the law governing the use of force. This is in particular true for the legal regime relating to military operations involving several actors and assistance.[2342] One may doubt if the Court's holding is as crystal clear as it is often presented to be. To the extent that those questions relate to the specific question of assistance to non-State actors, this need not be of interest here. Instead, the judgment is read here through the lens of the Court's general conceptualization of assistance to a use of force. Needless to say, in doing so, the specific characteristics of the recipient of assistance, non-State actors, that defined the case in which the Court has established the general criteria, cannot be ignored.

2340 *Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [*Nicaragua*].

2341 This is true for critics within and outside the Court. Dissenting Opinion Judge Schwebel, 259-527; Harold G Maier (editor), 'Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)', 81(1) *AJIL* (1987). For a general assessment and further references see Robert Kolb, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (1984 to 1986)' in Cameron Miles and Eirik Bjorge (eds), *Landmark Cases in Public International Law* (2017) 359; Fernando Lusa Bordin, 'The Nicaragua v. United States Case: An Overview of the Epochal Judgments' in Edgardo Sobenes Obregon and Benjamin Samson (eds), *Nicaragua Before the International Court of Justice: Impacts on International Law* (2018).

2342 Just see e.g. Christian Henderson, *The Use of Force and International Law* (2018) 60-62; James Crawford, *Brownlie's Principles of Public International Law* (8th ed. edn, 2012) 720. For an example of applying the *Nicaragua* jurisprudence also to interstate assistance: Hathaway and others, *HarvNatSecJ* (2019).

a) Factual assumptions of the Court

The Court found the US to have been involved in Nicaragua through different channels. The US provided assistance to two distinct groups in Nicaragua: the UCLA ('Unilaterally Controlled Latino Assets') and the Contras. The latter was a non-State actor armed group within Nicaragua, consisting of the Fuerza Democratica Nicaragüense (FDN) and Alianza Revolucionaria Democrática (ARDE). The former were not Nicaraguan nationals or other members of the FDN or ARDE, but persons of unidentified Latin American countries paid by and acting on the direct instructions of United States military or intelligence personnel.

Nicaragua complained about US attacks on oil installations and a naval base. While the ICJ did not follow Nicaragua's submission that US personnel took a direct part in the operations,[2343] the Court found it sufficiently established that US agents participated in the planning, direction of, and support to the attacks.[2344]

With respect to Contra forces in Nicaragua, the Court did not find it established that the US created the contra forces.[2345] The US however "largely financed, trained, equipped, armed and organized the FDN",[2346] an element of the contra force.[2347]

2343 Memorial of Nicaragua (30 April 1985), available at https://www.icj-cij.org/en/case/70/written-proceedings, 60-63 para 216-225.

2344 *Nicaragua*, 50 para 85.

2345 *Nicaragua*, 54 para 94, 61-62 para 108.

2346 Ibid 62 para 108. For financing: "As to the ways in which the financial support has been translated into practical assistance," the Court limited itself to a "general finding." (61 para 107); "Finance for supporting military and paramilitary activities from 1981 until 30 September 1984." (55-59 para 95-100, 61 para 107); Finance limited to "humanitarian assistance" since 30 September 1984 until 30 September 1986, (57 para 97); Also private sources in the United States supplied the latter with the knowledge and active encouragement of the US government, (58 para 98). Referring to an affidavit, the Court made reference to the following assistance, although it remains not entirely clear if all those forms of assistance were found to be established: For equipment: supply aircraft, 61 para 106 (which the Court found "clear"), regular salaries, arms, munitions, and military equipment, including uniforms, boots, radio equipment and food (59 para 100). For training: "guerilla warfare, sabotage, demolitions, use of variety of weapons, field communication, (59 para 101). Intelligence (which the Court found "clear"): Nicaraguan troop movements, code-breaking, surveillance by aircraft and satellites (59 para 101, 61 para 106).

2347 It remained unclear for the other wing, the ARDE (59 para 100).

The Court was not satisfied that all operations launched by the contra forces, at every stage of the conflict, reflected strategy and tactics solely devised by the US.[2348] It was clear to the Court, however, that "a number of operations were decided and planned, if not actually by the United States advisors, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer."[2349]

While, according to the Court, US support did not embrace direct combat support, it took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, deployment of field broadcasting networks, radar coverage, etc.[2350]

Moreover, the Court concluded that the "various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but insufficient to demonstrate their complete dependence on United States aid."[2351] It found it "fundamental in the present case" that at least at one period, the *contra* force has been "so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States."[2352]

Furthermore, allegations about Nicaraguan assistance to armed groups in El Salvador were subject to inquiries, in view of the US claim of collective self-defense.[2353] The Court concluded that it could not conclude that no transport of or traffic in arms from Nicaraguan territory existed.[2354] In any event, the Court was not satisfied that Nicaragua was responsible for any flow of arms at either period.[2355] It was not convinced that the military aid originating from Nicaraguan territories was the result of a deliberate

2348 *Nicaragua*, 60-61 para 103-106.
2349 Ibid 61 para 106. See on the Nicaraguan allegations, Memorial of Nicaragua, 69-73 para 252-269.
2350 *Nicaragua*, 61 para 106.
2351 Ibid 62 para 110.
2352 Ibid 63 para 111.
2353 Ibid 71-72 para 128-130.
2354 Ibid 83 para 153.
2355 Ibid 86 para 160.

official policy. It held that it could also be well pursued unknown to the territorial government.[2356]

b) Overview of the Court's legal framework on assistance

Under these factual impressions, the ICJ applied three legal concepts to the US contribution to the armed activities by the contras and by the UCLA, and the Nicaraguan support to armed groups in El-Salvador: the prohibition against the threat and use of force[2357] (c), the obligation of non-intervention in internal affairs (d), and the principle of sovereignty (e).

Thereby, the Court applied customary international law, not the UN Charter. In doing so, it did not exclude that both, treaty and customary rule, may have the exact same content and coexist,[2358] and took the Charter's regulations into account to ascertain the content of customary international law.[2359]

c) Assistance and the prohibition against threat and use of force

The Court viewed the prohibition against the threat and use of force applicable to assistance in two manners. First, by means of providing assistance, the assisted armed conduct could be imputed to a State. As a consequence, the assisting State would violate the prohibition to use force in a direct manner, by the assisted conduct that is attributed to the assisting State and hence considered its own (1). Second, assistance *itself* through its connection with the assisted act may breach the prohibition to use force (2). In addition, in passing the ICJ left open the door for assistance to also qualify as threat of force (3).

2356 Ibid 85 para 158. For a different factual appraisal Dissenting Opinion Schwebel, 268-269 para 6, 273-283 para 17-41. Also Dissenting Opinion Jennings, 544. See also John Norton Moore, 'The Nicaragua Case and the Deterioration of World Order Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)', 81(1) *AJIL* (1987) 158.

2357 Notably, the Court derived those two prohibitions from the "principle of non-use of force", cf e.g. 118 para 227. See also on the Court's terminology Kreß, *ICJ and Use of Force*, 565. The Court thereby seemed to accept that the *principle* of non-use of force contains several, at least those two, obligations.

2358 *Nicaragua*, 94 para 175-176.

2359 Ibid 97 para 183.

(1) Direct use of force

The Court held the US to be responsible for a direct violation of the obligation not to use force against another State for mining Nicaraguan internal and territorial waters, and for launching certain attacks on Nicaraguan territory.[2360] While the Court did not hold it necessary for US personnel to conduct the relevant acts themselves, nor that they were present on the targeted State's territory,[2361] it was not the mere fact of the US providing assistance[2362] that allowed for this conclusion. This finding hence affirms that assistance *on its own* does not amount to direct use of force. In connection with the assisted conduct, supportive conduct may, however, constitute a vehicle to lead to attribution of conduct, i.e., of the assisted armed activities.

(2) Indirect use of force

According to the Court, also assistance below the threshold of *attribution* can amount to a use of force.[2363] The ICJ thereby subscribed to the view that the prohibition against the use of force is not limited to direct and imputable conduct of the State that is considered to *use* force. (Mere) assistance can "*amount* to a use of force"[2364] "when the acts committed in another State "involve a threat or use of force"." Such assistance is "wrongful in light of […] the principle of non-use of force.[2365]

2360 Ibid 118 para 227 (the Court referred here to the *principle* of the prohibition), para 292 (here the Court referred to the *obligation*).

2361 Ibid 60 para 102.

2362 Ibid 48 para 80 ("supervision and […] logistic support" for mining) and para 85 (participation in the "planning, direction, support" for attacks, i.a. through supplying a 'mothership' and helicopters).

2363 *Nicaragua,* 118 para 228, read in connection with para 227. Note the dissenters shared this view, in particular Judge Schwebel 340 para 160, and Judge Jennings, 543.

2364 *Nicaragua,* 119 para 228. Interestingly, see *Nicaragua,* 108 para 205 where the ICJ "*equates* assistance […] with the use of force by the assisting State." It is furthermore noteworthy that the ICJ consistently referred to the *principle* of non-use of force and did not share Nicaragua's terminology referring to an obligation.

2365 *Nicaragua*, 108 para 205.

In view of the relationship to acts imputable to the assisting State, the Court stipulated:

> "If such a finding of the imputability of the acts of the contras to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the contras to commit them."[2366]

In this case of assistance without attribution, the assisted actor remains responsible for its acts. The assisting actor is not responsible for the assisted actor, but for its own conduct vis-à-vis the targeted State, including conduct related to the acts of the assisted actor.[2367]

(a) The Court's conceptualization of indirect use of force

Without further explanations, the ICJ derived this "particular aspect of the principle"[2368] from UNGA resolution 2625, most notably section 1 paragraphs 8 and 9,[2369] which it viewed as reiteration and elucidation of the commitments undertaken in the Charter and reflective of customary international law.[2370] It further referred to similar resolutions of the inter-American system where "this approach can be traced back at least to 1928".[2371]

Thereby, in line with those resolutions, the Court was careful to stress that the provision of assistance *per se* does not amount to a use of force. In fact, it made clear – with reference to Res 2625 – that any responsibility of the assisting State depends on the fact that the assisted actor *actually* commits an act that "involves a threat or use of force".[2372]

2366 *Nicaragua*, 64 para 114.

2367 Cf Ibid 65 para 116 (with view to violations of IHL). For a similar interpretation Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18(4) *EJIL* (2007) 652-653.

2368 Note that the ICJ described this as a "form of the use of force", not as "force", *Nicaragua*, 101 para 191. See also 103, para 195.

2369 Ibid 101 para 191.

2370 Ibid 100 para 188.

2371 Ibid 102, para 192. While in the section in which the Court determined the "substance of the customary rules relating to the use of force" (98 para 187), the Court referred to the rules under the principle of non-intervention.

2372 *Nicaragua*, 101 para 191, 108 para 205, 118 para 228. See also on the context of self-defense 103-104, para 195. A view that was shared also by Judge Schwebel, 340 para 160 and is widely shared in literature, in particular in view of the *Nicaragua* judgment: e.g. Henderson, *Use of Force*, 61; Thomas, Thomas, *Concept of Aggression*, 55 with reference to the Nuremberg Tribunals already, 57; Quincy

Remarkably, yet in view of the recipient being a non-State actor not surprisingly, the legality and legitimacy of the assisted armed activities did not play a role.[2373] Nonetheless, the Court required that the assisted act must take place and must be of such degree and gravity that it can be considered a threat or use of force.[2374]

Conceptually, it is accordingly a use of force through the assisted actor as an intermediary that the Court described. It is the assisting State's involvement in other actor's armed activities that constitutes a *use* by the assisting State of the assisted, but non-attributable force by the assisted actor.

(b) Necessary involvement for indirect 'use'

The ICJ adopted a narrower understanding of sufficient involvement of the assisting State than the textual framework of UNGA resolution 2625 may have allowed for. The Friendly Relations Declaration broadly refers to the organization, instigation, assistance, participation, or acquiescence for the necessary involvement of the assisting State. The ICJ held that "the provision of weapons or logistical or other support [...] may be regarded as a threat or use of force."[2375] Appraising the facts in relation to the legal rules applicable, the Court was of the view that the "arming and training" violates the principle of non-use of force.[2376] "[T]he mere supply of funds to

Wright, 'The Prevention of Aggression', 50(3) *AJIL* (1956) 527; Piereluigi Lamberti Zanardi, 'Indirect Military Aggression' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (1986) 112-113; Albrecht Randelzhofer, Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 213 para 28.

2373 In contrast to the principle of non-intervention, 108 para 206, where the Court indicated that the cause for the armed activities ("process of decolonization", "cause appear[ing] particularly worthy by reason of the political and moral values with which it was identified") could, but ultimately did not matter.

2374 That the contra's activities met this threshold was accepted by the Court without further elaboration.

2375 *Nicaragua*, 104 para 195.

2376 Ibid 118-119 para 228. In 119 para 230 the Court indicated that the supply of arms must be imputable to the assisting State, at least to qualify as armed attack. It did not set out however whether already a State's failure to prevent arms transfer from its territory amounts to a use of force.

the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, […] does not in itself amount to a use of force."[2377]

Beyond these casuistic limitations, the Court did not – at least in express terms – stipulate additional preconditions. The Court did not designate a specific causal link between the assistance and the "activities involving a threat or use of force" or a subjective standard for the assisting State. Neither was it important how the assistance was exactly translated into practice. Likewise, the Court did not require specific evidence that the assistance has facilitated a *specific* military operation. Instead, it seemed sufficient that the assistance supports armed activities *in general*.

The ICJ's casuistic approach is hence a restricted one. This is even more the case as it does not answer all questions that have arisen in the case. For example, the Court's omission of 'logistical support' in its appraisal of the facts in view of the use of force that had previously been identified as relevant in the section on the applicable law, and that has been found to have taken place, remains enigmatic. Did the Court categorize 'training' as 'logistical' support?[2378] Can the omission be explained by the specific facts of the case, suggesting that logistical support was not relevant?[2379] Or was it an (unlikely inadvertent[2380]) inaccuracy? Moreover, the meaning and function of the Court's reference to 'other support' is indeterminate. Last but not least, one is left to wonder how to qualify other assistance, such as 'sharing of intelligence', 'the deployment of field broadcasting networks and radar coverage' or the 'organization of the contras', which the Court found

2377 Ibid 118-119 para 228. Thereby, the Court qualified its previous determination which suggested that any assistance mentioned in the Friendly Relations Declaration amounted to a use of force, *Nicaragua* 108 para 205: "General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in light of […] the principle of non-use of force."

2378 The ICJ's use of the terminology in ibid 61-62 para 106, 108, 124 para 242 suggest that it does not equate them.

2379 This would not easily square with the Court's finding that it is clear that the US provided intelligence and logistic support, 61 para 106. See above. Also, the Court notes "logistic support" to violate the principle of non-intervention, 124 para 242.

2380 The ICJ found that "financial support, training, supply of weapons, intelligence and *logistic support* constitutes a clear breach of the principle of non-intervention." *Nicaragua*, 124 para 242, emphasis added.

to be established, but again did not appraise in relation to the applicable legal rules.[2381]

The judgment's operative paragraph does not lead to further clarity. The Court decided that

> "the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law *not to intervene in the affairs of another State.*"[2382]

Notably, the Court neither specified the exact form of assistance nor referred to the prohibition against the threat and use of force – seemingly contradicting its elaborations in the judgment. This stands in remarkable contrast to other operative paragraphs that not only clearly and specifically identify the relevant fact pattern but also conclude a breach of the obligation not to use force.

As a consequence, the exact standard for involvement remains elusive. The ICJ's answers are nothing more than fragmentary.

That the Court confidently presented the legal differentiation between the respective forms of assistance, i.e., arming, training, logistical support, and other support on the one hand, and the supply of funds on the other hand, as a self-explanatory *fait accompli,* contributes to this impression.

The only reason the court offered is whether or not the assistance "involves the threat or use of force". This, it is argued, does not significantly improve clarity, however. In full, the relevant passage reads:

> The Court finds that [...] the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua by "organizing or encouraging the organization of irregular forces or armed bands. . . for incursion into the territory of another State" and "participating in acts of civil strife ... in another State", in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, *while the arming and training*

2381 See above. The Court only qualified them – without reasons – as intervention.
2382 *Nicaragua*, 146 para 292(3), emphasis added.

> *of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government*. In particular, the Court considers that *the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force*.[2383]

At face value, the unfortunate formulation of paragraph 228 suggests that the distinguishing criterion is whether the assistance "involves a threat or use of force". But it does not constitute one. While the Court may present it as a distinction criterion, it in fact does no more than describe the result.

Based on UNGA resolution 2625, the ICJ first stipulated that the supported acts, here the "acts of civil strife", need to "involve a threat or use of force". The ICJ thereby re-emphasized its (and the UNGA's) concept of indirect use of force.[2384] By its next sentence, the ICJ seemed to refer to and further elaborate on this statement, when it says that "while the arming and training […] can certainly be said to involve the threat or use of force […], this is not necessarily so in respect of all […] assistance […]." The ICJ shifted the point of reference of the requirement of "involving threat or use of force" from the *activities* of the supported actor to the form of *assistance* provided – seemingly making it a requirement for the form of assistance to involve a threat or use of force.[2385] It is here where distinctions between non-lethal and lethal assistance seem to have their origin.[2386]

Such a specification of the form of assistance is however not convincing. It has been rightly criticized as being "incompatible with wording and respective meaning" of Resolution 2625.[2387] What is more, such a reading would be inherently contradictory. Assistance *in and of itself*, and arming and training of another actor in particular, never *involves* a threat or use of force. Even what is described as 'lethal' assistance (e.g., the provision of lethal military equipment or lethal military training) as such, as seen above, does not entail force; it is only the assisted conduct that does so. Accord-

2383 Ibid 118-119 para 228, emphasis added.
2384 See above II.A.2.
2385 That this has not been a negligence is made clear by the fact that the Court refers again to this qualifier in its conclusion, *Nicaragua*, 123 para 238. See also 109-110 para 209.
2386 Michael N Schmitt, Andru E Wall, 'The International Law of Unconventional Statecraft', 5(2) *HarvNatSecJ* (2014) 363.
2387 Randelzhofer, Dörr, *Article 2(4) UNC*, n 60.

ingly, adopting such a specification for assistance would limit assistance to assistance by force.[2388] It would not embrace, as stipulated by the ICJ, arming and training.

For those reasons, the better reading is to understand the Court here not to establish a specifying requirement for the act of assistance.[2389] It does nothing more than describe the result: that these forms of assistance constitute a "threat or use of force".

In fact, this might explain why the Court did not elaborate further on the requirement when excluding funding from the scope of the prohibition against the threat or use of force. In this respect, the Court merely held that "[i]n particular, […] the mere supply of funds to the *contras* […] does not *in itself amount* to a *use* of force."[2390] Here the ICJ used the term "amount" instead of "involve", and only referred to "use" of force.

This reading is also consistent with the Court's statement that "*acts* constituting a breach of the customary principle of non-intervention will also, if they *directly or indirectly* involve the use of force, constitute a breach of the principle of non-use of force."[2391] 'Acts' that 'directly involve the use of force' describe situations in which the assistance constitutes a direct use of force, e.g. active combat support. 'Acts' that 'indirectly involve the use of force' do not involve a use of force themselves, but only through their connection with another actor's use of force – like assistance to a use of force. Accordingly, it seems to be the ICJ's view that, *as a result*, funding does not amount to a "use" of another actor's force (that is necessary), while arming and training does.

Accordingly, the ICJ's holding stimulates imagination with respect to the distinction criteria, in particular in view of the great diversity of potential acts of assistance.[2392]

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2388 I.e. when the assisting State uses force itself to support another actor. This would not be met in the specific case. Evidence did not warrant the finding that the US provided such assistance, however, i.e. "direct and critical combat support", *Nicaragua*, 62 para 108. See for details above.

2389 In line with other pronouncements, it is however a precondition that the assisted act involves a threat or use of force (para 205, 209, 228).

2390 Emphasis added. See also *Nicaragua,* 109-110 para 209 where the Court says that the acts may "[directly or] indirectly involve the use of force", thereby suggesting that the assistance does not *involve* force, but only the assisted act – which then is an "indirect involvement."

2391 *Nicaragua,* 110 para 209, emphasis added.

2392 For discussions on the criteria see e.g. Henderson, *UNSWLJ* (2013) 648-650 for non-lethal assistance such as "radio communications equipment, non-armoured

This is not the place to find a conclusive answer, as the Court was solely concerned with support to non-State actors in the specific case. For the current purposes, the Court's underlying conceptual motivation is interesting, however. The casuistic approach may allow only for a glimpse into the Court's overall conceptualization – not least, as the Court's pronouncement was informed by the underlying facts of the case. Still, abstract criteria, although not articulated by the Court, may have been decisive for the Court's determination. As such, the Court appears to have factored in i.a. the assistance's (potential) impact on the assisted use of force,[2393] the impact and relevance of assistance for the assisted actor,[2394] as well as the

vehicles, and body armour"; Schmitt, Wall, *HarvNatSecJ* (2014) 361-364 who distinguish between lethal and non-lethal activities. It remains unclear what this refers to. "Non-lethal" activities is used to describe the assisted activities ("logistical support related solely to non-lethal activities"), as well as leadership training, organizational assistance, political or economic intelligence gathering…".

2393 Arming and training (and logistical support) has only one, i.e. a military, purpose. Moreover, the support can be immediately without further intermediate steps used for armed activities. Funds may be used for other purposes, too. Arming and training has a direct and immediate bearing on a non-State actor's capacity to resort to force. Funding, even if used for military purposes, may allow non-State actors to *build* such capacity. Funding may have overall the same effect, but it requires the assisted actor to first invest the funds. In view of legal and factual restrictions to acquire military equipment for non-State actors, the impact of funding is however less direct on a non-State actor's military operation. This is particularly evident in the case of support to non-State actors, which may have difficulties investing the money beneficially for armed activities, as they need to invest secretly. Furthermore, funding, in contrast to specific supply of arms, training, or logistical support, typically is *general* support to the actor, rather than to a specific action. In this direction, for example Henderson, *Use of Force*, 61 who requires a "intentional and material contribution" (emphasis added). So does 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) 282-283 who argues for the contribution constituting "an element of the unlawful act", yet without any subjective element. Some sort of gravity threshold would be in accord with what some scholars required for a use of force generally e.g. Corten, *Law against War*, 73. But Tom Ruys, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Uses of Force Excluded from UN Charter Article 2(4)?', 108(2) *AJIL* (2014).

2394 Note that the Court has considered US assistance to be "crucial to the pursuit of the [contras'] activities" (62 para 110) and the contras "dependent" on US assistance (63 para 11).

involvement and role of the assisting State in the military operation.[2395] Likewise, the knowledge and intention about the assisted act may have played a role.[2396] Ultimately, as the operative paragraph as well as the fact that the ICJ stresses that the *mere* provision of funds *in itself* does not amount to a use of force may suggest, assistance may require a comprehensive and joint assessment, not singling out specific acts.

In abstract terms, the distinction could be based on an overall assessment of the proximity between assistance and the assisted act, the decisiveness and causality of assistance for the assisted actor, and/or the subjective element of the assisting State.

Such an interpretation again would also argue against an absolute understanding of the ICJ's classification of assistance on the legal spectrum. Instead, the Court's distinction would be a specific implementation of an unexpressed standard for the specific case at hand. As such, the Court would stay true to the origin of its considerations, the broader prohibition stipulated by UNGA Resolution 2625, and sufficiently allow for tolerance of the specific needs and realities of assistance in international practice, that indicate against an artificially rigid division of commonly associated acts of assistance.[2397]

2395 An assisting State that is taking part in the military operation, i.e. that is advising, planning, arming and training, may require a different treatment than the State that is providing funds from afar. In that respect also the character of the assistance may be decisive. Assistance that is beneficial for armed operations, that is "lethal", may be treated differently than assistance that merely reduces suffering but is without specific impact.

2396 In the present case, it has been uncontroversial that the US had not only knowledge about, but the certified intent to assist in the contras' armed activities. See e.g. Henderson, *Use of Force*, 76 who understands the ICJ's distinction between 'training and arming' and 'funding' to be based on an implicit requirement of intention to use force. It should be noted however that the Court did not establish that, in the context of a use of force, the US had full knowledge about the specific operations by the contras, but only found the US to have general knowledge.

2397 The ICJ also seems to acknowledge this in its operative paragraph and its factual findings where it makes a joint assessment of all US support.

(c) Consequences – self-defense against assistance

The Court adopted a similar casuistic, yet considerably more controversial,[2398] approach with respect to the precondition of self-defense, an armed attack. At the outset, the Court considered assistance to a use of force under the Friendly Relations Declaration as a "less grave form" in contrast to "most grave forms of the use of force (those constituting an armed attack)".[2399]

In view of Article 3(g) Aggression Definition, the Court took the position that the "sending of armed bands" may nonetheless qualify as armed attack. Decisively, it required that "such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."[2400] The Court thereby remained elusive whether "operations" refers to the assisted armed activities or the "sending".[2401]

In any event, "the Court [did] not believe that the concept of "armed attack" includes […] *assistance* to rebels in form of the provision of weapons or logistical or other support." [2402] Thereby, the Court seemed to exclude assistance by its very nature, irrespective of its scale and effect.[2403] Involvement short of attribution, an indirect armed attack, was apparently conceived to be too remote to allow for self-defense against the 'assisting' State.

The Court's finding is – in express terms – confined to support to non-State actors. Still, its position raises questions for self-defense in case

2398 Expressly endorsing the Court's holding Separate opinion Judge Nagendra Singh (154), Separate opinion Judge Ruda (175–176 para 11-13). Taking a broader position: Judge Schwebel (271 para 13, 331-362 para 154-200), Judge Jennings (542-544). See also Abdulqawi A Yusuf, 'The Notion of Armed Attack in the Nicaragua Judgment and Its Influence on Subsequent Case Law', 25(2) *LJIL* (2012); James A Green, *The International Court of Justice and Self-Defence in International Law* (1 edn, 2009) 23 et seq.

2399 *Nicaragua*, 101 para 191.

2400 Ibid 103 para 195.

2401 One possible reason, that is also corroborated by the fact that the ICJ only refers to the first alternative in Article 3(g) 'sending' and omits the second, 'substantial involvement', could be that in case of 'sending' the armed band's operation is attributed to the 'sending' State. Legally, it would hence be only one operation. For a similar understanding Green, *ICJ and Self-Defence*, 34.

2402 *Nicaragua*, 104 para 195, emphasis added, 119 para 230.

2403 See also Green, *ICJ and Self-Defence*, 37.

of interstate assistance.[2404] In particular, given the Court's heavy reliance on the Definition of Aggression, the value of the principle that addresses interstate support – Article 3(f) Aggression Definition – may become questionable. As may be recalled, it concerns "the action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state". It thus considers an act of *(other) assistance par excellence* (not meeting the threshold required for attribution or "sending") as an independent act of aggression that, following the ICJ's approach with respect to the value of the Definition of Aggression in Nicaragua, one would be tempted to consult in determining the scope of an "armed attack".

In this respect, it is hence interesting that the Court has been careful to qualify the assistance according to the recipient of assistance, and to only refer to assistance *to rebels.* As such, the ICJ did not close the door to self-defense in case of interstate assistance – irrespective of the fact that it seemed to indicate its reluctance towards easily accepting acts of self-defense in case of triangular relationships.[2405] Instead, the Court left it to States and scholars to determine whether or not it was required to distinguish between assistance to States and non-State actors.

Another aspect worth mentioning in view of collective self-defense is that the Court operated on the presumption that the right of collective self-defense justifies not only direct but also indirect use of force through assistance.[2406]

(3) Assistance as a threat of force

In passing, the Court also allowed for assistance to be regarded as a threat of force.[2407] It is true that, as was attentively noted, the French version of the judgment allows for ambiguity. One passage only refers to "l'emploi de la force".[2408] In view of the fact that the Court also allowed the assisted act to involve a threat of force, the English version allows to assume that 'the

2404 Asking whether the *Nicaragua* holding applies to both attacks by regular and irregular forces, ibid 36.
2405 Sharing this observation Kreß, *ICJ and Use of Force*, 584.
2406 *Nicaragua*, 123 para 238.
2407 Ibid 104 para 195;
2408 Kreß, *ICJ and Use of Force*, 574; Kreß, *Gewaltverbot und Selbstverteidigung*, 124.

threat' in the French version has been lost in translation.[2409] Otherwise, this would mean that assistance to a threat of force by the assisted actor could amount to a use of force by the assisting State. The qualification of assistance as (indirect) 'use' or (indirect) 'threat' of force hence seems to depend on the specific qualification of the assisted act as 'use' or 'threat' of force.

The Court did not elaborate further on the concept. This does not surprise as, ultimately, it did not find any assistance to amount to a threat of force.[2410] Nonetheless, in view of the parallelism by which the Court referred to assistance as a use and threat of force, it seemed to adopt a conceptually similar approach (in particular with view to the involvement casuistic). This is also affirmed by the fact that the Court did not consider a State's militarization and self-armament,[2411] as well as military maneuvers near the border, as (direct) threat of force.[2412] It would be questionable, if not contradictory, if then the provision of arms to an (State) actor amounted to a (direct) threat of force itself.

### d) Assistance and the principle of non-intervention

Assistance to armed activities may amount to an unlawful act in violation of the principle of non-intervention.

The ICJ stipulated that unlawful intervention requires "bearing on matters in which each State is permitted to decide freely" through "methods of coercion".[2413] In assessing whether such coercion was present,[2414] it is important to note that the ICJ here did not deal primarily with questions of *direct* intervention[2415] – guided by the confined scope of the case it had to decide. It was primarily concerned with an indirect conception – an intervention *through* another actor.

2409 See also *Nicaragua,* 123 para 238 that also in the French version refers to "implique une menace ou l'emploi de la force".
2410 Note that the Court always limited its conclusions to a 'use of force', e.g. ibid 119 para 228.
2411 *Nicaragua*, 135 para 269.
2412 Ibid 118 para 227.
2413 Ibid 108 para 205.
2414 Ibid.
2415 But see briefly on cutting economic ties: Ibid 125-126 para 244-245.

In that light, the ICJ did not define coercion, but only stated that it was "particularly obvious in the case of the intervention which uses force, either in the direct form of military action,[2416] *or in the indirect form of support to subversive or terrorist military action within another State*."[2417] The ICJ particularly referred to the fact that "resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force."[2418] Like for the prohibition against the use of force, this clarifies two assumptions: first, intervention is not limited to coercive actions that are attributable to the intervening State, but extends to assistance to coercive activities.[2419] Second, in the scenario of indirect intervention discussed here,[2420] it is not the assistance that is coercive itself. The ICJ derived the required coercive nature from the supported acts rather than from the assistance.[2421]

On that basis, the Court pursued to explain under which circumstances what kind of assistance falls under the prohibition. It thereby viewed the prohibition to use force as *lex specialis* of the principle of non-intervention.[2422] In cases where the assisted activities involve a threat or use of force, for the ICJ, the difference between those two norms was not in the assisted activity. The type of involvement was decisive to distinguish those norms.[2423] For example, unlike for the use of force, already "the mere

2416 I.e. a State's own forces or armed forces under the effective control of that State.
2417 *Nicaragua*, 108 para 205, emphasis added.
2418 Ibid 108 para 205.
2419 I.e. e.g. State's own forces or other forces under effective control of that State, ibid 64 para 115.
2420 Note that the ICJ's analysis, as is the present analysis, was expressly limited to the fact that a threat or use of force is involved, ibid 108 para 205: "the Court will define only those aspects of the principle which appear to be relevant to resolution of the dispute." In this light, the Court also emphasized that the assisted activities of the *contras* involved a threat or use of force ("in case of an intervention which uses force, either in the direct form of military action, or in the indirect from of support for subversive or terrorist *armed* activities within another State." Emphasis added). Accordingly, it is only in that setting that the ICJ's statements bear relevance. Still, there should not be drawn further conclusions that support is *only* wrongful if force is involved. When this is the case, the Court did not answer. In particular, it remains open whether support to an actor that does not engage in activities that involve the use or threat of force violates the principle of non-intervention.
2421 *Nicaragua*, 108 para 205. Note here how the Court, using passive voice, avoided to specify *who* has to commit those acts.
2422 Ibid 104 para 195, 108 para 205, 119 para 228.
2423 Ibid 119 para 228.

supply of funds" sufficed to be considered intervention.[2424] Accordingly, for cases where the supported activity involves a(n ongoing) threat or use of force, this indicates that the bar for involvement prohibited under the rule of non-intervention is lower.

This broader scope is especially indicated by the Court's discussion of "the provision of strictly humanitarian aid". With respect to the provision of funds limited to "humanitarian assistance",[2425] the ICJ held that it only "escape[s] condemnation as an intervention in the internal affairs", if it is "limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'" *and* if "it […] also, and above all, [is] given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents."[2426]

Notably, this approach indicates that the assistance's nature and purpose *per se* are irrelevant for the determination of the threshold of necessary participation in coercive conduct, as long as it somehow benefits one conflict party more than another. In fact, even assistance that complies with the standards of the Red Cross is considered an intervention, in any event if the assisted activities involve a threat or use of force, and if it is distributed discriminately. In other words, *any* discriminatory assistance, irrespective of its purpose and nature and even if it supports a threat or use of force only peripherally, amounts to an indirect intervention.

At the same time, the nature of assistance is relevant if assistance is provided *without discrimination*. It is true that it may be unlikely for States to provide non-discriminatory assistance outside the context of a Red-Cross-purpose. For example, it may be unlikely for States to provide arms to both sides. Yet, in particular if large coalitions are involved in the fighting, it is not unrealistic. Still, in the ICJ's view, only Red-Cross-purpose assistance in those scenarios is not prohibited.[2427] *E contrario*,

2424 The Court also considered that "training, supply of weapons, intelligence and logistic support" constitutes an unlawful intervention, ibid 124 para 242.

2425 Ibid 124 para 242. That included the "provision of food, clothing, medicine, and other humanitarian assistance, [… that] does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death", ibid 125 para 243.

2426 Ibid 125 para 243.

2427 Ibid 125 para 243. Red-Cross purpose assistance still might violate territorial sovereignty, unless there is consent by the government. See Dapo Akande, Emanuela-Chiara Gillard, *The Oxford Guidance on the Law Relating to Humanitarian Relief*

non-discriminatory assistance that does not align with the Red-Cross-purpose would amount to an indirect intervention in internal affairs[2428] – even though the assistance provided to both actors arguably neutralizes itself, the outcome of the fighting is arguably not affected (though potentially prolonged), and activities involving the threat or use of force are arguably not decisively facilitated.[2429]

Accordingly, in view of the Court, assistance does not need to cause a specific result, a requirement which would render the rule impractical to handle in practice. It suffices that it at least remotely contributes to and facilitates the forceful action.

Moreover, two aspects are interesting to note. First, the Court seemed to consider in passing the legality and legitimacy of the assisted acts, noting that it is not concerned with the process of decolonization.[2430] Moreover, in contrast to the use of force, the ICJ discussed a subjective element for non-intervention. Initially, in paragraph 205 where the Court set out the applicable law, the ICJ did not require any subjective element. When applying the principle, the Court however underlined that the US "intended, by its support to the *contras*, to coerce" and that the *contras* intended "to overthrow the present Government of Nicaragua."[2431] This, according to the Court, sufficed to qualify such assistance as intervention, even if the assisting State pursued a different political objective. It was not necessary for the Court to establish that the assisting State also shared the intentions of the assisted actor.[2432]

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*Operations in Situations of Armed Conflict: An Introduction* (Oxford Institute for Ethics, Law and Armed Conflict, United Nations Office for the Coordination of Humanitarian Affairs, Oxford Martin Programme on Human Rights for Future Generations, 2017); Schmitt, Wall, *HarvNatSecJ* (2014) 361-362.

2428 In fact, the ICJ did not limit its statements on other forms of assistance, such as funding or training, to being discriminatory.

2429 This may however be the reason for non-discriminatory *humanitarian* assistance to not be prohibited by its very nature. Such assistance has no other effect than a humanitarian one. Also, it does not support force, but alleviates the consequences of force. Last but not least, it cannot have coercive effects.

2430 *Nicaragua,* 108 para 206.

2431 Ibid 124 para 241.

2432 This is also affirmed by the fact that the humanitarian assistance, when provided discriminately, is considered to constitute an intervention – even though the assisting State pursues humanitarian purposes only and does not share the rebels aim of using force to overthrow the government.

On that note, it constitutes prohibited intervention at least when the assisted actor intends to overthrow a government and is engaged in armed activities against the targeted State, and when the assisting State intentionally seeks to coerce the targeted State.[2433] On the question of whether the assisting State must know about the assisted actor's intention, the Court remained elusive. It suggested that it suffices to accept an intervention that a State supports an actor whose very foundational purpose was armed opposition against a government. Whether the US knew about this fact, the Court did not answer.[2434] It implies, however, that it should have known in any event. Likewise, the Court left open, whether other scenarios are also prohibited.

e) Assistance, sovereignty and territorial inviolability

The obligation to respect States' sovereignty applies in two manners in the context of assistance. First, it applies to necessary preparatory conduct to provide assistance. On that note, the Court found unauthorized high-altitude flights for reconnaissance purposes to directly infringe upon a State's territorial sovereignty.[2435] Second, the act of supplying assistance may, as a general rule, infringe upon the territorial State's sovereignty. While in the present case, the ICJ was not convinced that the "overflights of aircraft for

2433 Also requiring intent: Stephen Townley, 'Intervention's Idiosyncrasies: The Need for a New Approach to Understanding Sub-Forcible Intervention', 42(4) *FordhamIntlLJ* (2018-2019) 1178 who also recognizes the motive clause; Gaetano Arangio-Ruiz, 'Human rights and Non-intervention in the Helsinki Final Act', 157 *RdC* (1977) 261 para 36; Maziar Jamnejad, Michael Wood, 'The Principle of Non-intervention', 22(2) *LJIL* (2009) 348, 371 "only acts of a certain magnitude are likely to qualify as 'coercive', and only those that are intended to force a policy change in the target state will contravene the principle". See also Vaughan Lowe, 'The Principle of Non-Intervention: Use of Force' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst* (1994) 67 "It is the intention, rather than the means adopted, which may qualify a State's action as unlawful intervention"; Arangio-Ruiz, *RdC* (1977) 261 para 36 describing the Bogota Charter. Questioning whether an intent requirement is practical: Townley, *FordhamIntlLJ* (2018-2019) 1190.

2434 Unlike for violations of international humanitarian law, the Court does not mention knowledge as a requirement, *Nicaragua*, 130 para 256.

2435 Ibid 52 para 91, 128 para 251.

supply purposes" were conducted by the US,[2436] the ICJ viewed "assistance to the contras" to also violate an infringement of the territorial sovereignty of Nicaragua.[2437]

The ICJ's application of the obligation to respect sovereignty calls for two observations. First, the obligation to protect sovereignty applies irrespective of whether or not the assistance contributes to armed force. It only depends on where the respective act takes place.[2438] As such, the rule does not in itself regulate the *contribution* to armed activities. Second, the ICJ seemed to only accept 'direct' infringements of territorial sovereignty.[2439] In fact, it does not qualify *assistance* to an intrusion of territorial sovereignty as an (indirect) violation of sovereignty.[2440]

### 3) The Legality of the Use of Force Cases

In a case where the Court might have had the opportunity to address issues of interstate cooperation in a use of force, the Court did not decide on the merits. The Court found it had no jurisdiction in the Legality of the Use of Force cases. Yugoslavia had held 10 NATO States responsible for the bombardment of Yugoslav territory in relation to the Kosovo conflict. Instituting the proceedings, Yugoslavia claimed that "by taking part in the bombarding" the respondent States had acted in breach of the obligation not to use force.[2441] In its written proceedings, it reformulated its charge. It held that by the "bombing of Yugoslav territory," the respondents had violated the prohibition to use force.[2442] Yugoslavia thereby did not specify

2436 *Nicaragua*, 52 para 91.
2437 Ibid 128 para 251. For Nicaragua's allegations: Memorial of Nicaragua, 31, para 120, 62, para 224, 115 para 437 et seq.
2438 *Nicaragua*, 111, para 213, 128 para 251.
2439 Note ibid 128 para 251 where the Court expressly uses the term 'directly infringed".
2440 Ibid 52 para 91 (the US supplied planes to the contras for "overflights of aircraft for supply purposes").
2441 Application Instituting Proceedings filed in the Registry of the Court on 29 April 1999, 1999 General List No. 105-113
2442 *Legality of Use of Force (Yugoslavia v Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and United Kingdom)*, Memorial Yugoslavia (5 January 2000), 301. See *Legality of the Use of Force (Serbia and Montenegro v Germany)*, Preliminary Objections, Judgment, ICJ Rep 2004, 720, 728-729, para 20-21.

each respondent's role. Instead, it relied on the fact that it had been a NATO operation which all States had accepted and participated in.[2443]

The Court did not address any of these issues. Nonetheless, in the final paragraph of its judgments and orders, the Court sought to stress:

> "Whether or not the Court finds that it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States"."[2444]

However, the Court did not offer enlightenment on which acts this might be, whether participation in an international organization led operation led to attribution, and what norms were violated.

### 4) The Oil Platforms Case

The Oil Platforms Case concerned only a specific part of a broad conflict between Iran and Iraq from 1980-1988, what has later become known as 'Tanker war'. The US destruction of Iranian oil platforms and alleged Iranian attacks against vessels in the Persian Gulf was at the docks.

The case did not concern the role of third States on various levels in the conflict, although it had been a defining feature of the Iran-Iraq war.[2445] The aspects under scrutiny were designed as bilateral issues between the USA and Iran.[2446]

Still, the Court noted that Iran

> "has emphasized that Iraq was the aggressor State in the conflict, and has claimed that Iraq received diplomatic, political, economic and military support from a number of third countries that were not formally parties to the conflict, including Kuwait, Saudi Arabia and the United States."[2447]

Judge Kooijmans, in his separate opinion, feeling that the factual background of the case was not sufficiently reflected in the judgment, drew

2443 Memorial Yugoslavia, 291-300, para 1.9-1.10.
2444 E.g. Legality of the Use of Force (Serbia and Montenegro v Germany), Preliminary Objections, Judgment, ICJ Rep 2004, 720, 764 para 114.
2445 See above II.C.10.
2446 E.g. the US did not claim to exercise collective self-defense on behalf of other neutral States engaged in shipping in the Persian Gulf, *Oil Platforms (Iran v USA)*, Judgment, ICJ Rep 2003, 161, 186 para 51 [*Oil Platforms*].
2447 *Oil Platforms,* 176 para 26.

even more detailed attention to this aspect.[2448] He noted that Iran accused a "number of influential United Nations member States, notably the Arab countries and the United States," "of in fact supporting Iraq and preventing the Security Council from taking meaningful measures to bring the war to an end. Iran accused Kuwait, Saudi Arabia, and the United States in particular of enabling Iraq to continue its unlawful use of force and of not respecting their duties as neutral States."[2449]

By taking note of the issue of support, the Court took up a controversy among the parties.

Iran had introduced the matter, although it expressly did not ask the Court to decide on the legality of US support to Iraq.[2450] Iran addressed the (American) assistance to Iraq's – pursuant to Iran, unlawful – use of force from two perspectives.[2451] First, it considered it relevant background against which the US attacks on the oil platforms and, in particular, its invocation of self-defense was to be considered.[2452] Second, Iran submitted that, guided by the principle of *abus de droit*, US complicity with Iraq in violation of international law excluded Iranian responsibility and barred the US from claiming compensation for the alleged damages which are subject to its counterclaim.[2453]

For those purposes, Iran argued that US assistance to Iraq "*clearly* violated the principles of international law".[2454] It is interesting to contrast

2448 *Oil Platforms*, Separate Opinion Kooijmans, 247 para 2, 250 para 14.

2449 Ibid 248-249 para 9. See also para 12: "Iran blam[ed] the United States for its alleged undisguised support of the aggressor Iraq."

2450 For the written proceedings: *Oil Platforms*, Memorial submitted by the Islamic Republic of Iran (8 June 1993), 34-35 para 1.80-1.85; for the oral proceedings: CR 2003/5, presentation Mr Bundy, 52-57 para 1-17.

2451 For the factual account of Iran's allegations see Iran, Memorial (8 June 1993), 34-35; Iran, Observation and Submissions on the US Preliminary Objections (1 July 1994), Annex 4-6; Iran, Further Response to the United States of America Counter-Claim (24 September 2001), 15-20 para 3.28-3.38; CR 2003/5, 58-67 para 19-49; CR 2003/15, 10-14 para 1-22.

2452 Iran, Memorial (8 June 1993), 34 para 1.80, 84, para 3.49; Iran, Observation and Submissions on the US Preliminary Objections (1 July 1994), Annex, 3 para 8; CR 2003/5, 25 para 27, 53 para 6, 57 para 17 (Bundy); CR 2003/14 12 para 7-8; CR 2003/15, 14-16 para 23-29. Iran also called upon the Court to take into account assistance i.a. by Kuwait and Saudi-Arabia, see Iran, Reply and Defense to Counter-Claim (10 March 1999), 11-13; Iran, Further Response to the United States of America Counter-Claim (24 September 2001) 12-15.

2453 Ibid 103-109, para 7.32-7.51 On the connecting element of abus de droit, para 7.39-7.43; on the prohibition to use force, para 7.44-7.51.

2454 Iran, Memorial (8 June 1993), 84 para 3.48, emphasis added.

Iran's confidence with respect to the 'clear' violation of international law with Iran's caution as regards the legal basis for the conclusion. Iran viewed assistance to violate international law on two distinct grounds: the law of neutrality, and an obligation not to assist an aggressor State. While Iran confidently claimed and consistently and primarily focused on the former,[2455] it was more reluctant with respect to the latter, which it mainly used as an additional argument. This is also reflected in Iran's substantiation of the norm. Over the time of the 12-year proceedings, Iran derived this obligation from different legal bases: Article I Treaty of Amity of 1955,[2456] the first principle of the Friendly Relations Declaration,[2457] the UN Charter in general,[2458] and Article 16 Articles on State Responsibility.[2459] Ultimately, it asserted such assistance to violate the prohibition to use force

2455 Iran, Observation and Submissions on the US Preliminary Objections (1 July 1994), Annex, 4 para 9, 6 para 15; Iran, Reply and Defense to Counter-Claim (10 March 1999), 13-19.

2456 Treaty of Amity, Economic Relations and Consular Rights (USA, Iran) (signed 15 August 1955 and entered into force on 16 June 1957), 284 UNTS 93. Iran, Memorial (8 June 1993), 78-79 para 3.30-3.31, 83-84 para 3.48 "In its support for Iraq, an aggressor State as recognized by the United Nations itself and in obstructing the actions taken in lawful self-defence by Iran, the victim of Iraq's aggression, the United States clearly violated the principles of international law concerning friendly relations described above, and thus committed a violation of treaty obligations resulting from Article 1 of the 1955 Treaty." According to Iran, the asserted breach of the Treaty of Amity must be interpreted in light of its Article I, hence the invocation. The Treaty of Amity must be interpreted in view of general international law.

2457 Iran, Memorial (8 June 1993), 82 para 3.43: "The first principle is that which defines a war of aggression as a "crime against the peace, for which there is responsibility under international law". By reference to this principle, it can be maintained that each Party to the Treaty of Amity has, in case of aggression against the other Party by a third State, at a very minimum the obligation not to support the latter's action, but rather to refrain from the threat or use of force as a means of solving international disputes." Iran Observation and Submissions on the US Preliminary Objections, (1 July 1994), Annex, 4 para 9.

2458 Iran, Observation and Submissions on the US Preliminary Objections (1 July 1994), Annex, 4 para 9 "At a very minimum, therefore, the United States had a duty to remain strictly neutral. In Iran's view, U.S. obligations both under Article 1 of the Treaty of Amity and under the UN Charter might have required more than neutrality from the United States." Iran, Reply and Defense to Counter-Claim (10 March 1999), 13 para 2.27, 221.

2459 Iran, Further Response to the United States of America Counter-Claim (24 September 2001), para 7.50, 7.51.

itself.[2460] On the prohibition's content, Iran stressed that the prohibition did not depend on Security Council action and that it went beyond the law of neutrality. The prohibition was triggered by an unlawful use of force.

The USA, on the other hand, did not engage with the substance of Iran's argument.[2461] It focused instead on reminding the Court that the issue was outside its jurisdiction, denying any relevance for the present case, and called upon the Court to ignore the issue.[2462]

With its brief note of the Iranian position in the section describing the factual background of the case, the Court avoided to position itself, and did not seize the opportunity to address the issue in more detail.

In fact, beyond this reference, the Court did not dedicate further attention to this aspect of the case (nor did Judge Kooijmans). The Court implied that it shared the parties' view that it had not been called upon to decide those aspects of the case, i.e. the legality of US support to Iraq.[2463] The Court therewith also suggested that it did not see any relevance to engage with these aspects for the issues it had to decide. As a matter of fact, the Court's judgment on the respective submissions did not render it necessary for the Court to further address the issue,[2464] although the Court was perhaps in principle not debarred from doing so.[2465] As the asserted assistance was not subject to the Court's scrutiny, neither legally nor factually, it neither rejected nor affirmed the Iranian arguments. The judgment itself, hence, did not make a clarifying contribution to the regime

2460 Ibid. Note that Iran did not assert Article 16 ARS to apply. It claimed that the prohibition of assisting an aggressor "was based on the general principle" of non-participation in a violation of international law, reflected by Article 16 ARS. The norm that was claimed to be violated was the prohibition of use of force.

2461 Only in a footnote, it commented on a Kuwaiti apology to Iran for its assistance to Iraq. It commented that "While such statements may be of diplomatic or historical interest, they shed no light on the specific facts or legal issues raised by this case." Rejoinder submitted by the United States of America (23 March 2001), 7, 1.08.

2462 USA, Counter-Memorial of the United States, 5-6 para I.13; Rejoinder submitted by the United States of America (23 March 2001), 6-7, 1.08-1.10. See also CR/17, 11 para 23.8-23.9.

2463 Rejoinder submitted by the United States of America (23 March 2001), 6-7, 1.08-1.09. See also CR/17, 11 para 23.8-23.9. Iran, Memorial, 8 June 1993, 84, para 3.49; CR 2003/5, 53 para 4 (Mr Bundy).

2464 The Court rejected the US claim of self-defense for other reasons. With respect to the counterclaim, the Court did not find a violation, rendering the question of compensation irrelevant.

2465 For example, it would have raised interesting questions in view of the Monetary Gold rule.

governing interstate assistance. The fact that the aspect of assistance found its way into the judgment, nonetheless, despite not being relevant to the case, may have been motivated by due process considerations in light of the extensive reference to the matter in the proceedings. At the same time, the judgment leaves the questions raised by this submission open for further consideration.

### 5) The Armed Activities on the Territory of the Congo Case

The Case Concerning Armed Activities on the Territory of the Congo, brought by the Democratic Republic of Congo against Uganda, was the first and so far only contentious case in which the Court directly pronounced on the law governing the use of force under the UN Charter. It concerned certain aspects of the intricate Congo war.

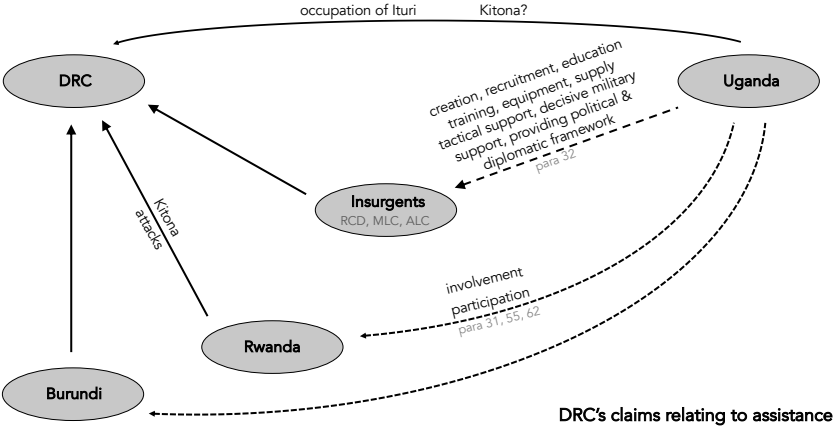
The case did not only concern direct use of force.[2466] Instances of assistance to other actor's use of force were also tabled in front of the Court.[2467] Most prominently allegations of assistance related to the DRC's and Uganda's involvement in non-State actor cross-border violence. Issues of interstate assistance were presented, too: Uganda invoked the DRC's

2466 Uganda had troops present in DRC, and was engaged in extensive military action, in particular in eastern DRC, *Armed Activities on the Territory of the Congo* (DRC v Uganda), Judgment, ICJ Rep 2005, 168, 194-195 para 39, 194 para 36, 205-209 para 72-91 [*Armed Activities*]. For the Court's factual determinations, see 205-209 para 72-91. The Court viewed this as grave violation of Article 2(4) UNC, 224 para 153.

2467 The DRC initially had also filed separate proceedings against Rwanda and Burundi for their involvement in the military activities in the Congo, which it later withdrew. For example, in the application instituting the proceedings against Burundi, the DRC asserted: "This aggression was in reality the result of a clearly established common intent, formed in close collaboration with foreign powers, who provided the necessary financial backing and a large degree of logistic support." Application Instituting Proceedings Filed in the Registry of the Court on 23 June 1999, *Armed Activities on the Territory of the Congo (Congo v Burundi)*, 1999 General List, No 115. See also *Armed Activities on the Territory of the Congo (Congo v Burundi)*, Order of 30 January 2001, ICJ Rep 2001, 3; *Armed Activities on the Territory of the Congo (Congo v Rwanda)*, Order of 30 January 2001, ICJ Rep 2001, 6. The DRC filed a new application instituting proceedings against Rwanda, which was rejected by the Court on grounds of lacking jurisdiction, *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v Rwanda)*, Jurisdiction of the Court and Admissibility, Judgment, ICJ Rep 2006, 6.

contribution to Sudanese military action against Uganda; the DRC raised Uganda's involvement in airborne attacks conducted by Rwanda at Kitona.

In concrete terms, on one hand, the DRC claimed that Uganda had violated i.a. the principles of non-use of force and non-intervention by engaging in military and paramilitary activities, by "actively extending military, logistic, economic and financial support to irregular forces having operated [on the territory of the DRC]".[2468] In addition, the DRC asserted that Uganda, together with Rwanda, was involved in heavy military action at Kitona.[2469]




Uganda rejected those allegations on factual and legal terms. With respect to the specific Kitona attacks, it denied any participation and asserted that

2468 Provision of support to Congolese armed groups opposed to the government (For DRC's claims see: *Armed Activities*, 192-193 para 32, 34). Memorial of the DRC (6 July 2000) [DRC Memorial], 172 (Finance, economic but also direct military assistance, in particular important logistical assistance). It did not seek to make a claim of attribution. Instead, its claim concerned Uganda's own acts, DRC Memorial, 175-176. The DRC claimed, however, that Uganda has both created and controlled rebel groups, *Armed Activities*, 225 para 155.

2469 *Armed Activities,* 192 para 31, 199 para 55, 201-202 para 62. While the DRC suggested that it was a joint operation of Rwanda and Uganda, in which both States' troops engaged in hostilities, its language in describing the exact extent of the asserted involvement and role of Ugandan troops was ambiguous. The same applied to the evidence presented by the DRC. Cf e.g. Reply of the DRC (29 May 2002) [DRC Reply], 72, 77-86.

no Ugandan troops were present.[2470] The provision of support to rebels Uganda did not deny; but it emphasized that it did not participate in the formation of the rebel groups and that the support did not reach "the kind or amount of support [the rebels] would have required to achieve such far-reaching purpose as the conquest of territory or the overthrow of the Congolese Government."[2471] It also denied having any "involvement in or foreknowledge" of the Congolese Armed Forces' rebellion and the attempted coup d'état.[2472]

On the other hand, Uganda relied on assistance to back a claim of self-defense. Initially, as the Court observed, "the DRC accepted that Uganda could act, or *assist in acting* against rebels on the eastern border and in particular to stop them operating across the common border."[2473] But by August 1998, Congo had withdrawn its consent at the latest.[2474] Accordingly, Uganda claimed that its support of rebels was consistent with a right of self-defense. Uganda based this right on two grounds: first, on cross-border violence by anti-Ugandan non-State actors, being supported or tolerated by the DRC. Second, Uganda claimed "DRC's complicity with Sudan in carrying out armed aggression against Uganda."[2475] It thus asserted a military alliance between Sudan and Uganda. Besides support from Sudan to the

2470 *Armed Activities,* 194 para 38. See in particular with respect to the Kitona attacks: Rejoinder of Uganda (6 December 2002) [Uganda Rejoinder], 52-63 para 120-144. Uganda focused on the "imputability" of Rwanda's actions, para 120-121. In view of the DRC's claim of an Ugandan tank being used in the operation, Uganda not only denied that the tank belonged to Uganda, but also preempted the impression that it had provided tanks. It maintained that all conflicting parties acquired the relevant tanks by Russia, 62 para 143.

2471 *Armed Activities,* 195 para 41, 225 para 157.

2472 Ibid 194, para 38.

2473 Ibid 198, para 52, emphasis added.

2474 Ibid 199, para 53-54. Further questions on the scope of Congolese consent need not be of interest here.

2475 Uganda Rejoinder, 36 para 81 (notably against Ugandan troops (according to Uganda legally) present in the DRC). For details see Uganda counter-memorial (21 April 2001) [Uganda counter-memorial], para 38, 48-50, 52-54, para 363-366; Uganda Rejoinder, para 78-88. The Court described this claim as "a tripartite conspiracy in 1998 between the DRC, the ADF and the Sudan", 216 para 121. See also 200 para 56: the fact that the DRC had turned to Sudan for assistance "caused great security concerns to Uganda. Uganda regarded the Sudan as a long-time enemy, which now, as a result of the invitation from President Kabila, had a free reign to act against Uganda and was better placed strategically to do so."

DRC, specifically, Uganda referred to the DRC's territorial support for Sudanese (direct[2476] and indirect[2477]) armed activities against Uganda.[2478]

In addition, Uganda presented a counter-claim. It asserted that it had been "the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC and either supported or tolerated by successive Congolese governments".[2479] With view to a violation of the prohibition to use force, Uganda built its claim on two strands. First, it asserted that "through its alliance with armed insurgents based in eastern Congo and *with the Government of Sudan*" the DRC has, "either directly or indirectly, carried out devastating cross-border attacks against Uganda and conducted aerial bombardments of Ugandan towns and villages."[2480] Second, Uganda maintained that the DRC itself had taken actions in support of anti-Ugandan insurgents.[2481]

2476 Uganda claimed that Sudan had a direct combat role in Uganda. E.g. *Armed Activities,* 216-217 para 121 (Sudanese aircraft bombed the UPDF positions at Bunia (a town within the DRC) on 26 August 1998); Uganda counter-memorial, para 50; para 22 (Sudanese aircraft bombing); para 39: "Sudan prepared to attack Ugandan forces in eastern Congo".

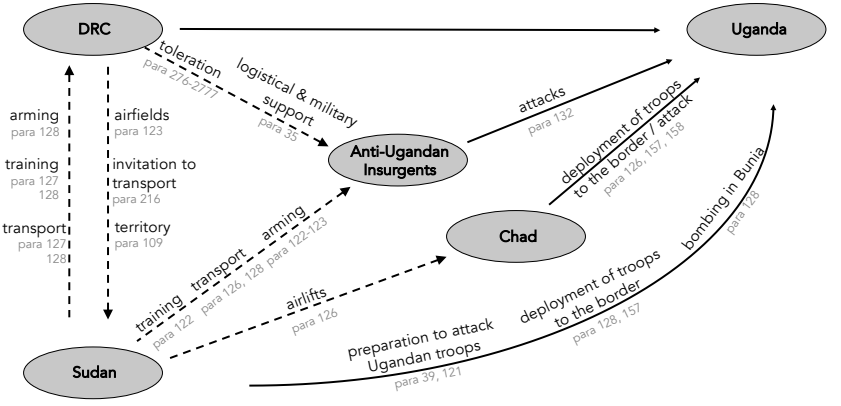
2477 Uganda claimed that using Congolese airfields, Sudan supported anti-Ugandan non-State actors engaged in cross-border attacks against Uganda by training and arming. *Armed Activities,* 216-217 para 121-122, 262 para 276. Uganda Counter-Memorial, para 50 (delivery of weapons, transporting of troops, equipment), see also para 19-22, 34-35, 40, 54 and 95-96.

2478 *Armed Activities,* 213-214, para 109. The Court reproduced the High Command document that served as basis for Uganda's operations. Therein, Uganda noted that "[w]hereas for a long time the DRC has been used by the enemies of Uganda as a base and launching pad for attacks against Uganda [...] to deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda." See also 217 para 124.

2479 Cf *Armed Activities,* 193 para 35, 262 para 276. See for Uganda's position in detail: Uganda counter-memorial, 217 et seq, para 372 et seq.

2480 Uganda counter-memorial, 219 para 380, referring for more details on concrete activities to para 19-22, 34-35, 40, 54 and 95-96. At least at times, the DRC's role was limited hereby to allowing its territory and airfields to be used for direct bombing missions carried out by Sudan (e.g. the reference to para 22) and for Sudanese support of anti-Ugandan armed groups, i.e. an indirect use of force by Sudan. The Court summarized Uganda's claim that "the DRC cultivated its military alliance with the Government of the Sudan, pursuant to which the Sudanese army occupied airfields in north-eastern Congo for the purpose of delivering arms, supplies and troops to the anti-Ugandan rebels." *Armed Activities,* 262 para 276.

2481 *Armed Activities,* 193 para 35, 262 para 277. Uganda claimed this to violate a customary prohibition to provide support to paramilitary activities, Uganda counter-memorial 220-221 para 385-386.




Uganda's claims relating to assistance

In response, the DRC contended that neither a military alliance with Sudan nor support for rebel groups had been proven.[2482] Moreover, it had not violated any duty of vigilance. In the alternative it argued that it had been justified by self-defense to use force to repel Ugandan aggression and to seek support from other States.[2483]

Ultimately, the Court did not follow Uganda's arguments, except for its non-involvement in the Kitona attack. It found that "the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention." Moreover, the Court rejected Uganda's counterclaim.[2484]

For the present purpose, the Court's elaborations on the use of force (a) and self-defense (b) are worth revisiting.

2482 *Armed Activities,* 264 para 285.
2483 Ibid 264 para 283, 287.
2484 Ibid 281 para 345 (1) and (9).

a) Assistance and the use of force

Conceptually, the Court reaffirmed the general approach towards assistance developed in the Nicaragua case.[2485]

First, it considered whether involvement in another actor's armed activities led to attribution of the thereby assisted use of force. In the case at hand, it did not find sufficient evidence for Ugandan contributions that met the tests of attribution. It was neither established that Uganda created the rebel group engaged in armed activities, nor that Uganda controlled the military venture, nor controlled or could control the manner in which the rebels put such assistance to use.[2486] Also, the DRC was not found to have incorporated anti-Ugandan rebels into its military structure.[2487]

Still, assistance that was considered distinct from participation by regular troops[2488] could violate "certain obligations of international law".[2489] Precisely, the Court referred to distinct customary rules laid down in the Friendly Relations Declarations, as well as the principles of non-use of force and non-intervention.[2490] The Court thereby confirmed its conception of indirect use of force and intervention developed in the Nicaragua case, prohibiting use of force "through" the assisted actor as intermediary.[2491]

Again, it was a necessary precondition that the assisted act had in fact taken place.[2492] In delineation to the principle of non-intervention, the Court reaffirmed that a breach of the principle of non-use of force required that the (assisted or the assisting?) "acts" "directly or indirectly involve the

2485 The Court expressly referenced the *Nicaragua* jurisprudence.

2486 *Armed Activities* 225-226 para 158, 160, 161.

2487 Ibid 221 para 138-140. Note that the Court discussed this in view of a Ugandan right to self-defense and did not expressly link this to direct use of force.

2488 Ibid 269 para 304.

2489 Ibid 226, para 161.

2490 Ibid 226-227 para 162, 163, 280 para 345.

2491 Ibid 227 para 163-165. Note that the Court did not repeat the *obiter dictum* on assistance as a threat of force made in the *Nicaragua* judgment, but confined its findings to acts that involve a use of force only.

2492 *Armed Activities,* 280 para 345 (operated on the territory). See also with respect to Uganda's complaint about the DRC's support to rebels, 219, para 132, 268 para 300. The Court rejected Uganda's claim based on the fact that the DRC was not sufficiently involved. It considered the DRC's responsibility, however on the assumption that rebels were in fact engaged in military activities against Uganda.

use of force".[2493] With respect to the reference point of this qualification, the Court did not provide further clarification.[2494]

As to the assisting State's involvement in the assisted use of force, the Court required "actual support" for the specific attacks.[2495] It was not necessary that the assisting State shared the same objectives as the assisted actor.[2496] Unlike in the Nicaragua judgment, the Court did not, however, set out what kind of support was considered a use of force or an intervention. The operative paragraph was formulated accordingly: Uganda "by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention."[2497]

This might give the impression that the Court has abandoned its famous Nicaragua formula, i.e., the distinction between training, arming, and mere supply of funds. Not at least, the Court qualified all forms without distinction as violations of the principles of both non-use of force *and* non-intervention. But such a reading would overstate the Court's holding. On factual grounds, the Court focused on Uganda's "training and military support"; in any event, the former has been recognized by the Court to constitute a violation of the principle of non-use of force in Nicaragua. Still, questions remain, in particular with respect to the Court's findings on the facts and its ultimate holding.

For example, first, the Court does not answer how to categorize 'training' under its operative paragraph. Second, the notion of "military support" is unclear, especially against the background that military support is treated distinct from other forms of support throughout the judgment.[2498] For example, one is left to wonder to what extent the notion embraced the DRC's allegations of Uganda recruiting, educating, equipping, or supplying assisted actors, or providing them with a political and diplomatic framework.[2499] As such, the notion of "military support" is unspecific in both its

2493 *Armed Activities,* 227 para 164. The Court however does not refer to, and hence does not expressly uphold the controversial para 228 in the *Nicaragua* judgment.
2494 See on the discussion above Chapter 4II.D.2)c)(2)(b).
2495 *Armed Activities,* 267 para 298, 268 para 303.
2496 Ibid 227 para 163 "objectives of Uganda".
2497 Ibid 280 para 345 (1).
2498 Ibid para 160, 161, 297, 298, 345 (1).
2499 *Armed Activities,* 192 para 32.

factual content and its legal qualification,[2500] as well as its relationship to the support discussed in the Nicaragua judgment.[2501]

Third, the qualifier "active" used in the operative paragraph could be understood as an additional requirement for support to amount to an (indirect) use of force. In its entirety, the judgment suggests however that the adjective is primarily descriptive. Not only did the Court merely repeat the wording of the DRC's submission. As the Court did not differentiate between the prohibition to use force and to intervene, it remains unclear how the criterion might contribute to distinguishing the scope of both norms. Moreover, throughout its judgment, the Court itself used the adjective only once – to delineate a State's active support for rebels from tolerating rebels on its territory in view of evidentiary questions.[2502] At the same time, the Court implied that even a State's toleration of non-State actors to use that State's territory to launch cross-border attacks may amount to a violation of the prohibition to use force and the prohibition of intervention.[2503] The Court, with reference to provisions under UNGA Resolution 2625, noted that toleration was prohibited under customary international law. The Court did not expressly designate toleration as potential involvement to commit an indirect use of force. But it cited paragraphs from the resolution that interpret the principles of non-use of force and non-intervention.[2504] In this light, the Court then discussed whether the DRC's behavior is tantamount to "tolerating" or "acquiescing" in the rebels' activities[2505] – a discussion which would not have been necessary if it could not lead to responsibility as claimed by Uganda. The Court implies this further when holding that a State may bear responsibility if, despite its capacities, it does not take "clear action" against the rebels but tolerates or acquiesces in cross-border activities by non-State actors.[2506]

2500 It should be noted however that the Court discussed the issue under the heading "Findings of Law on the Prohibition Against the Use of Force" and connected it to the prohibitions recognized by the Friendly Relations Declaration under the principle of non-use of force, 226 para 162.

2501 The same is true for the alleged "political and military support" provided by the DRC/Zaire (267-2688 para 298-299).

2502 *Armed Activities,* 268 para 300 "different issue […] because the Parties do not dispute the presence of the anti-Ugandan rebels on the territory of the DRC as a factual matter."

2503 Similarly Kreß, *ICJ and Use of Force*, 574.

2504 *Armed Activities*, 268 para 300.

2505 Ibid 268 para 301.

2506 Ibid 267 para 297, 268-269 para 301, 303.

Similar to the Nicaragua case, the detailed application of the legal framework on assistance only concerned assistance to non-State actors. But the Court's pronouncements in relation to the allegations of the Congolese-Sudanese military alliance and of Uganda's involvement in Rwandan military operations indicate that, in, general the same conceptual framework applies,[2507] although in view of the factual evidence, the Court may have addressed legal aspects of interstate assistance only piecemeal.

(1) Sudanese involvement

The Court considered the allegations of Congolese assistance to Sudan[2508] as well as Sudanese assistance to the DRC[2509] under what it cursorily described as "tripartite conspiracy between the DRC, [anti-Ugandan rebels], and the Sudan",[2510] primarily under the angle of Uganda's invocation of self-defense. It also briefly touched upon the question with respect to the Ugandan counter-claim, under the claim that "the DRC cultivated its military alliance with the Government of Sudan, pursuant to which the Sudanese army occupied airfields in north-eastern Congo for the purpose of delivering arms, supplies and troops to the anti-Ugandan rebels."[2511]

The Court engaged with these allegations primarily on factual terms.

It considered any Sudanese action in and of itself factually uncertain.[2512] Contrary to Uganda's assertion, the Court did not find it established that Sudan assisted, i.e., trained, armed, and airlifted insurgent groups,[2513] or

2507 The Court did not pronounce on questions of attribution in relation to Sudanese involvement, as it had not been suggested by Uganda. Also, questions of imputability of Rwandan action to Uganda, as denied under this legal conception by Uganda, did not arise for lack of evidence of any Ugandan "participation", see below.

2508 *Armed Activities,* 262 para 276 (invitation and provision of airfields).

2509 Ibid 218 para 127-128 (arming, training and transportation of DRC's troops).

2510 Ibid 216 para 121. Although the Court did not use the term 'complicity' used by Uganda in its submissions, the Court thereby dealt with those Ugandan allegations.

2511 Ibid 262 para 276.

2512 Ibid 219 para 130.

2513 Ibid 217 para 122 ("trained and armed"), para 123 (support), 218 para 126 (airlifted insurgents). See also 219, para 129, 202 para 133, 136. But see 220, para 135 ("some Sudanese support"). Critical Judge *ad hoc* Kateka 369, para 28.

State actors[2514] attacking Uganda. Neither did it find to have sufficient evidence to accept that Sudan itself bombed Ugandan positions in Bunia or deployed its troops to the Ugandan border.[2515]

In addition, "an agreement between the DRC and the Sudan to participate in or support military action against Uganda" was not found backed by sufficient evidence.[2516] The Court was not persuaded that the DRC had invited Sudan to "occupy and utilize airfields in north-eastern Congo for two purposes: delivering arms and other supplies to the insurgents; and conducting aerial bombardments of Ugandan towns and villages".[2517]

Similarly, Sudanese support to the DRC through arms delivery and backing for Congolese troops remained factually uncertain.[2518]

On that note, the Court hence only hinted at the regulatory framework of interstate assistance under the *ius contra bellum*. Notably, it did not rule out international responsibility in that respect. On the contrary, it repeatedly alluded to the existence of such framework.

This is not only indicated by the fact that the Court thought it necessary to refute Uganda's factual allegations in view of both the argument relating to self-defense[2519] and the counterclaim.[2520] More expressly, the Court noted that the relevant reports were "too general to support a claim of Congolese involvement rising to a level engaging State responsibility".[2521] It is true that in addressing the counterclaim, the Court discussed only the DRC's relationship with the anti-Ugandan rebels. Further express mention of Sudan

2514 *Armed Activities,* 218 para 126 ("transported an entire Chadian brigade […] (whether to join in attacks against Uganda or otherwise)"), para 127-128 ("training and transporting FAC [the DRC's] troops" and delivering "three planeloads of weapons")

2515 Ibid 218 para 128.

2516 Ibid 218 para 130.

2517 *Armed Activities,* 217 para 124, 125, 128. Also, with respect to "some Sudanese support", the Court did not find it "a matter of Congolese policy, but rather a reflection of its inability to control events along its borders" (220 para 135).

2518 Ibid 218 para 128.

2519 Ibid 216 para 121.

2520 Ibid 262 para 276 (the Court takes note of Uganda's assertion), 264 para 285 (the Court takes note of DRC's response on Sudanese involvement), 267 para 298 (the Court discusses evidence suggesting supply of weapons to the rebels by Sudan), 269 para 304 (the Court refers to its finding in paragraphs 121-147, which concern the Sudanese involvement, too, to reject Uganda's claim).

2521 Ibid 267 para 298 (in relation to Zairian help to Sudanese supply of weapons to the rebel group ADF).

was absent. Still, it is noteworthy that in concluding, the Court was careful to also reference allegations of the DRC's involvement in Sudanese armed activities. The Court held that

> "the *participation* of DRC regular troops in attacks by anti-Ugandan rebels against the UPDF and the training, arming, equipping, financing and supplying of anti-Ugandan insurgents, cannot be considered as proven (see paragraphs 121-147 above)."[2522]

The English version remained ambiguous about whether the Court considered the DRC regular troops to have participated only in the former of the two alternative acts, i.e. 'attacks by rebels'. But the French version, in addition to the reference to paragraphs 121-147 in which the Court discussed the relationship between Sudan and the DRC, leaves little doubt that the Court also had the DRC's *contributions* to Sudanese indirect use of force by supporting insurgents in mind:

> "la participation des troupes régulières de la RDC à des attaques menées par des rebelles antiougandais contre les UPDF, ainsi que *sa contribution* à l'entraînement, à l'armement, à l'équipement, au financement et à l'approvisionnement des insurgés antiougandais, ne sauraient être considérés comme établis (voir paragraphes 121 à 147 cidessus)."[2523]

That those unproven contributions would have been *prima facie* wrongful, the Court hence only implied. In an *obiter dictum* presented as an additional argument, the Court held that "the DRC was entitled to use force in order to repel Uganda's attacks", from which it followed that "*any military action* by the DRC against Uganda during this period could *not be deemed wrongful since* it would be justified as action taken in self-defense under Article 51" UNC.[2524]

The Court stopped short of describing interstate assistance in legal terms as "use of force" but referred to the neutral (factual) notion of "military action".

Still, the passage in connection with the Court's findings on self-defense can be understood to mean that the Court followed a similar conceptualization as for non-State actor support. The assisting State would be responsible for its 'participation in' and 'contribution to' another actor's use of force,

2522 Ibid 269 para 304, emphasis added.
2523 Ibid.
2524 Ibid, emphasis added.

not the assisted act itself. Responsibility hence presupposed that the assisted act must take place, and the assisting State must be implicated in those activities. Also, it is noteworthy that the Court considers exclusively the assisting State's right to take military action under Article 51 UNC, including the right to provide assistance.[2525]

(2) Uganda and the Kitona attacks

The Court's pronouncement on Uganda's role in the Kitona attacks is interesting in that the Court concluded that it has not been established that "Uganda *participated* in the attack on Kitona on 4 August 1998."[2526] This was no more than a determination on the facts.

But, again, it was not without legal relevance. The Court noted that its findings on the facts were necessary to respond to the parties' submissions.[2527] It remains not without ambiguity what the Court meant by 'participation'. As a general rule, the Court appeared to distinguish between participation and support.[2528] In the context of the Kitona attacks, however, the term 'participation' allows for a reading that included *any* Ugandan involvement, i.e., co-perpetration as well as assistance. The ICJ referred to both active engagement in hostilities by troops attributable to Uganda, and involvement that may be considered as assistance and would not impute the use of force itself to Uganda. The Court's focus certainly was the former, asking who "carried out" the Kitona operation and "invaded" the DRC. But the Court also asked about Uganda "taking part" and being "involved" in the military operations and considered news reports on Ugandan troops under the command of Rwandan leadership, allegations that Ugandan nationals (in addition to Ugandan soldiers or forces) were taken as prisoners of war, and the fact that Ugandan tanks were used in the Kitona operation.[2529] The Court's indeterminate language implied that it did not find proof for any Ugandan participation as asserted without specification

2525 Ibid 269 para 304, 218 para 126 (invitation to airlifting insurgents and a Chadian brigade), para 218 (invitation to assist).
2526 Ibid 205 para 71, emphasis added.
2527 Ibid 200 para 57.
2528 Cf ibid para 130, where the Court referred to both "participate in" and "support" military action. See also the Friendly Relations Declaration referenced by the Court in 226 para 162. Less clear 264 para 284.
2529 *Armed Activities,* 203-204 para 55, 65-66, 68, 69.

as to Uganda's exact role by the DRC, thus implying that also interstate assistance may have been relevant under the prohibition to use force.

Since the Court decided on factual grounds only, it did not pronounce on questions of attribution in relation to Rwandan involvement. The Court thus ignored Uganda's narrative, which presented this as a question of imputability of Rwandan action to Uganda. Its silence cannot be understood however as a general rejection of the applicability of the attribution regime in such situations.

### b) Assistance and self-defense

The Court's elaborations with respect to self-defense have been highly controversial, most notably for their ambiguity in relation to the relevant question of the permissibility of self-defense against large-scale attacks by irregular forces.[2530]

In the interstate context, the judgment is likewise marked by vagueness. The Court dismissed Uganda's invocation of self-defense for its use of force in the DRC in view of Sudanese involvement in attacks against Uganda on factual grounds in two respects: First, Sudanese assistance to the DRC, and second, Congolese territorial involvement in alleged Sudanese action did not entitle Uganda to self-defense. However, the Court also added statements of legal character as alternative arguments. Accordingly, the Court held that the DRC was entitled to invite Sudan to airlift insurgents to fight alongside Congolese forces, and the invitation "could not of itself have entitled Uganda to use force in self-defense".[2531] The Court further observed

2530 Ibid 223 para 146-147. See for the criticism: Declaration Judge Koroma, Separate Opinions Simma and Kooijmas. The debate on whether to qualify Uganda's military activities not only as "grave violation of the prohibition of the use of force" but also aggression (e.g. Separate Opinion Simma and Elaraby) is only of limited relevance for the present context, as no interstate assistance by Uganda had been proven.

2531 *Armed Activities,* 218 para 216. This observation is interesting in two aspects. First, the Court did not qualify against whom (the DRC or also Sudan) Uganda would not have been entitled to use force in self-defense. Later, the Court specified the scope of its elaborations: "the use of force by Uganda within the territory of the DRC", 221 para 141, "a right of self-defence by Uganda against the DRC", 223, para 147. Second, in this light, the relationship between the DRC's entitlement "so to have acted" and the invitation itself leave room for interpretation. Is it for the DRC's entitlement that the invitation does not allow for self-defense? Or is

that the alleged Sudanese assistance to the DRC could not entitle Uganda to self-defense.[2532] With reference to Article 51 UNC, the Court noted that "a State may invite another State to assist it in using force in self-defence."[2533] The Court concluded that it could not find evidence that "any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda's claim that it was acting in self-defense."[2534]

As a general rule, the Court hence appeared to accept that interstate assistance may justify self-defense. But, without positively defining the preconditions, it rejected its application in the present case. At the same time, it was clear that if a State may defend itself against another State, it may receive assistance – such assistance again will not justify self-defense, even if this meant an increased security risk for other States.[2535]

The Court's findings may have sufficed for the case at hand. But they raise questions for other situations. Naturally, the Court was concerned with Uganda's use of force within the DRC's territory. It is still noteworthy that such qualifications are only mentioned in its conclusion paragraph,[2536] but missing in the Court's elaborations where it rejected an entitlement to use force in self-defense.[2537] Moreover, the Court's emphasis on the Congolese invitation "of itself" is remarkable, as it leaves open whether additional contributions might have entitled Uganda to self-defense. In this light, the relationship between the DRC's entitlement "so to have acted" and the invitation itself leaves room for interpretation. Is it because of the DRC's entitlement that the invitation does not allow for self-defense? Or is the invitation, irrespective of the entitlement, not sufficient to allow for self-defense? Similarly, the Court's reference to "*any action by the Sudan*" remains ambiguous as to whether assistance in itself may theoretically

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the invitation, irrespective of the entitlement, that is not sufficient to allow for self-defense?

2532 The Court explained this only with respect to Sudan's "training and transporting of FAC [i.e. the DRC's] troops", 218 para 127. It did not comment on this for the alleged Sudanese bombing of Ugandan positions in Bunia or the alleged deployment of Sudanese troops along with those of the DRC on the border (218 para 128), or the alleged Sudanese assistance to insurgents (para 126).

2533 Ibid 218 para 128.

2534 Ibid 219 para 130.

2535 Ibid 218-219 para 127-129.

2536 "A right of self-defence by Uganda against the DRC", *Armed Activities*, 223 para 147.

2537 See e.g also "the use of force by Uganda within the territory of the DRC", ibid 221 para 141.

justify self-defense. It could relate to Sudanese assistance to the DRC's use of force or to Sudanese own use of force that has been assisted by the DRC.

Last but not least, the Court did not elaborate what defined the 'character' of the asserted Sudanese action to not justify self-defense. The 'character' could refer to the nature of Sudanese action against Uganda. This might then relate to Sudan's asserted indirect use of force by training, transporting, and arming insurgents and State actors, which according to the Court does not amount to an armed attack. Such an interpretation would leave open questions about the alleged Sudanese bombing of Ugandan positions in Bunia; its nature does not seem to exclude it from being qualified an armed attack. This may suggest that besides an action's nature, its scale and extent might be relevant, too.[2538]

The 'character' could also refer to the fact that the Court considered a State under Article 51 UNC may invite another State to assist it in using self-defense.[2539] Accordingly, the Court was careful not to comment on the legality of the alleged Sudanese actions and did not assume that Sudanese actions would have been justified under collective self-defense. Still, it did not fail to observe that the Sudanese actions, if proven, would have taken place in the context of assistance to a State acting in self-defense.

The insights are limited in view of the Court's only fragmentary negative determinations. The Court indicated however that, conceptually, it is not assistance in itself that triggers a right of self-defense, but its connection with the assisted action.

### 6) The Bosnia Genocide Case

Similar to the Corfu Channel Case, the ICJ discussed State involvement in third actor's conduct in the Bosnia Genocide Case. While the judgment offers interesting insights into the general framework in this context, most notably as it affirms the rule of complicity as customary law,[2540] there is no

2538 It should be noted that the Court does not discuss the scale and extent of the bombing.

2539 *Armed Activities,* 218 para 128, 126. See also 269 para 304.

2540 *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*], 217 para 420.

need to revisit the extensive discussion on this judgment here.[2541] First, the judgment pertains to the Genocide Convention and, indirectly, to general international law related to complicity, not the laws governing the use of force. Second, it relates to State involvement in acts committed by non-State actors.

Two general aspects deserve mention in the present context, however. First, the Court made reference to the "general law of international responsibility" under Article 16 ARS to "ascertain responsibility for complicity in genocide" under the Genocide Convention.[2542] As far as the "furnished aid and assistance" is "in a sense not significantly different" from the general concept, the meaning could be assimilated.[2543] The Court thought this to be justified as it saw, yet without further elaboration, "no reason to make any distinction of substance" between the regulatory regimes.[2544] In this context, second, it is interesting to note that the Court was open to apply the rules across both non-State and State actors interchangeably.[2545]

## E. Permissible assistance under the UN Charter

As seen in Chapter 3, the UN Charter only mentions assistance to a use of force by armed forces of the UN itself. Article 43 UNC asks States to provide assistance to the armed forces of the Security Council. This regime never came into full effect. Instead, it is now accepted that the Security Council authorizes States to use force. In addition, the Charter recognizes a right of collective self-defense.

It is true that only limited conclusions may be drawn from the practice of implementing these provisions with respect to a *prohibition* to provide assistance. Neither Article 43 UNC nor the authorization regime of the Security Council nor the right of collective self-defense seek to establish an exclusive regime.

2541 For literature discussing the judgment in view of complicity e.g. Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016); Aust, *Complicity*.

2542 *Bosnia Genocide,* 217 para 419, 420.

2543 Ibid 217 para 420.

2544 Ibid.

2545 Ibid. The Court held that rules applicable to interstate relationships may not be "directly relevant" to the relationship between States and non-State actors, but "nevertheless merit […] consideration".

Nonetheless, assistance practice relating to both the original (1) and the lived (2) regimes of assistance to UN action, as well as assistance practice in a situation of self-defense (3), is interesting for interstate assistance in two ways. First, they clearly indicate when assistance to a use of force is permissible. Second, they help refine the understanding of what constitutes 'assistance' to military operations in contradistinction to a use of force itself.

### 1) 'Assistance' in Article 43 UN Charter

Practice relating to Article 43 UNC is rare, as it was never filled with life.[2546] Some few attempts to do so deserve mentioning, however, to the extent they shed light on 'assistance.'

In 1947, the Security Council asked the Military Staff Committee to submit recommendations from a military perspective for the content of agreements pursuant to Article 43 UNC.[2547] In response, the Committee issued a report in April 1947 titled 'General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations' that was subsequently discussed in the Security Council.[2548]

The report primarily concerned the establishment of the Armed Forces.[2549] In Chapters VII and VIII, it clarified "the provision of assistance and facilities, including rights of passage, to the armed forces" as well as "logistical support".

The implementation of Article 43 UNC stirred considerable controversies among permanent members of the Security Council regarding the forms of assistance that should be required. But these discussions were based on some common ground. First, the provision of assistance was

2546 See for the attempts to do so: Robert Kolb, *International Law on the Maintenance of Peace. Jus Contra Bellum* (2018) 164-166; James E Rossman, 'Article 43: Arming the United Nations Security Council', 27(1) *NYUJIntlL&Pol* (1994-1995); Donald C Blaisdell, 'Arming the United Nations: Special Agreements under Article 43 of the Charter', 42 *DeptStBull* (1947) 240-246.

2547 S/268/Rev.1 (13 February 1947), para 4. See also UN, Repertoire of the Practice of the Security Council 1946-1951 (1954), 366-367.

2548 S/336 (30 April 1947). See on this also Eric Grove, 'UN Armed Forces and the Military Staff Committee: A Look Back', 17(4) *IntlSec* (1993).

2549 S/336 Chapter I-VI.

predicated on the fact that the UN armed forces must not operate in violation of the UN Charter.[2550] Second, any UN member had the opportunity to contribute. If States were unable to furnish armed forces, they could provide facilities and assistance only, too.[2551] This aimed to ensure not only the effectiveness of Article 42 UNC measures but also the universality of the UN measures.[2552]

The permanent members agreed, in principle, on what constituted pertinent assistance. First, relevant 'assistance' embraced transit rights.[2553] Crucially, this also included military bases, which led to substantial political disagreement among permanent members if and how States should be obliged to grant access to military bases.[2554] During the discussions, the USA made a noteworthy differentiation in defining "assistance and facilities". "Bases constitute[d] the major element of this term". But it also included "minor elements [...] such as communication facilities, weather services and the like."[2555] Second, assistance included 'logistical support' to armed forces. The Military Staff Committee assumed that States providing troops should be self-sufficient, meaning they should contribute their own logistics. This included "all necessary replacements in personnel and equipment and [...] all necessary supplies and transport,"[2556] But, it was recognized that other States could provide such assistance as well.[2557]

Moreover, the Collective Measures Committee established by UNGA resolution 377 A (V) also (in light of the experience in the Korea war)

2550 Ibid Articles 1-2.
2551 Ibid Articles 9, 14.
2552 Grove, *IntlSec* (1993) 174, 178. This is also reflected in Article 44 UNC. Maybe see also: S/336 Article 9. This is shown by the fact that the composition to ensure universality was contested.
2553 S/336 Articles 26-28.
2554 China, UK and the USA argued the provision of bases is included, S/336, 54 (China), 57 (UK) 58 (USA). The USSR was of different opinion, 56. France wanted to include an express provision that bases shall be included to the extent necessary for the maintenance of international peace and security (p 55). See also for the background of those controversies: Grove, *IntlSec* (1993) 178-179; Rossman, *NYUJIntlL&Pol* (1994-1995) 228.
2555 S/336, 58.
2556 Article 29 and 30 of the Report, S/336, 19. "personnel, transport, equipment, ammunition, spare parts, and all other forms of supply" (Article 30).
2557 S/336 Article 31, 19-20. The exact implementation was controversial between Western States and the USSR however, 62-65.

commented on what should be required as assistance.[2558] It noted that it "may constitute important, and sometimes indispensable, supplements to armed forces."[2559] It proposed that States should make contributions that "directly support the armed action":[2560]

> "1. Land, sea and air transportation; 2. Armaments and other materiel; 3. Communications equipment and facilities; 4. Medical and hospital units and facilities; 5. Non-combatant manpower; 6. Rights of passage and related rights; 7. Other supporting supplies and services, including for civilian relief purposes."[2561]

Thereby, the Committee distinguished between "logistic support" that included "equipment, training or supplying of […] forces" and "ancillary support" that covered "necessary rights of passage through or over its territory and related rights and facilities."[2562]

Last but not least, the ICJ in the *Certain Expenses Advisory Opinion* also touched upon Article 43 UNC. It understood assistance to include "for example, transport of forces to the point of operation, complete logistical maintenance in the field, supplies, arms and ammunition, etc."[2563]

It is not surprising to see how international practice defined assistance in relation to Article 43 UNC. It is not a comprehensive definition. But the focus on specific types aptly illustrates what types of assistance States consider essential in the context of a use of force. Several features merit specific attention. First, not any cooperation was considered assistance. States focused on direct types of military assistance that had a close and specific link to the use of force. The absence of general non-specific cooperation with the UN is not conclusive but still remarkable. Second, disagreements over what types of assistance to include should not overshadow the general definition of assistance. The controversies were ignited by the specific

2558 On the differences to the proposal of the Military Staff Committee see Bowett, Barton, *UN Forces*, 27.
2559 Collective Measures Committee, First Report, A/1891 (1951) para 211.
2560 Ibid para 214.
2561 Collective Measures Committee, Second Report, A/2215 (1952) Annex E. See also Collective Measures Committee, First Report, A/1891 (1951) para 211-216. For background on the committee see Bowett, Barton, *UN Forces*, 21-28.
2562 Collective Measures Committee, Third Report, A/2713-S/3283 (1954), 7 para 10.
2563 *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Rep 1962, 151, 166.

context of imposing a *duty* to assist, coupled with its permanent nature.[2564] Third, the expectation of self-sufficiency is evidence of the importance and essentiality of logistic support to military operations. Transit rights are considered only 'ancillary'. Fourth, the mention of civilian relief and assistance programs is noteworthy. In light of the Korea War, this was considered an essential burden of war.[2565] Last but not least, even in case of use of force by UN armed forces, States sought to emphasize that States may contribute to lawful uses of force only.

### 2) The Security Council's understanding of assistance to an authorized force

The concept of UN forces as outlined in the Charter has not come to fruition. Agreements pursuant to Article 43 UNC have never been concluded. The Security Council, at least in exercising force itself, has loosened its monopoly. If force is used "through" the United Nations, it is now well accepted that the Security Council may "authorize" member States to act, hence shifting back the focus on member States to take action themselves.[2566] It is these member States using force – authorized by the Security Council but acting on their own command.[2567]

In accordance with the case-by-case nature of the authorization model, assistance is no longer required permanently but temporarily and on an *ad*

2564 For example, this was the crux with respect to the provision of bases, Niko Krisch, 'Article 43' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol II (3rd edn, 2012) para 3.

2565 Bowett, Barton, *UN Forces*, 24.

2566 The authorization model has *de facto* replaced the original UN system. By now, this concept has been accepted as a legitimate development of the Charter. By now it is accepted that a special agreement according to Article 43 UNC is not necessary for the authorization to be lawful. On the discussions of the different basis see Niels M Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'', 11(3) *EJIL* (2000).

2567 Authorized use of force hence constitutes a use of force in international relations, even when the authorized State targets non-State actors within a State. See also Gray, *Use of Force (2018)*, Chater 7. It is hence interstate assistance within the scope of the analysis.

*hoc* basis for the specific military operation. Also, it is not provided to the UN, but to the specific States using force.[2568]

The Security Council, when authorizing the use of force, continues to acknowledge the importance of assistance. But, as a general rule, it treats 'assistance' as distinct from the use of force.

The Security Council distinguishes between the authorized use of force ('all necessary means') and assistance. The Council *authorizes* only the former. Assistance is treated as a distinct conduct. It is not only addressed through a separate provision of the resolutions. The Security Council also only *calls for, encourages, or urges* States to provide assistance.

This pattern may be traced back to the Security Council's first transformative authorizing resolution: SC Resolution 678 (1990), which dedicated an independent paragraph to assisting States, "request[ing] all States to provide support for the actions undertaken in pursuance of paragraph 2 above," i.e., the "use of all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."[2569] This Council practice has been followed consistently. It is general practice of the Security Council to

2568 The focus on assistance allows to identify a further departure from the original conception. In general, the authorized State that resorts to force is viewed to be acting for the Security Council and the international community's interest in maintaining international peace and security. While decentralized in nature, the use of force is viewed to be "collective action". In this effort, despite the fewer and less stringent control mechanisms, and the criticism and risks of this "decentralization" of force, international practice opted for the same standard of support necessary for States authorized to use force as if the Security Council used force through own troops. The risk of the decentralization is arguably diminished by the fact that only *ad hoc* coalitions act. In order for this *ad hoc* approach to be effective, coalitions are built on permanent military cooperation between States – military networks upon which a coalition then may draw when the Council issues an authorization to use force. The decentralized approach hence incentivizes and legitimizes to deepen permanent interstate military cooperation. This is a side effect of the authorization model that the original conception would not have had. It is interstate (preparatory) military cooperation that is incentivized under the cloak of collective action, rather than military cooperation between States and the UN that had a centralizing effect. It bears risks of improved and deepened networks that may contribute and facilitate to use of force also outside the realm of the UN.

2569 S/RES/678 (25 September 1990), para 3, 2.

include a provision on assistance necessary for the implementation of the use of force.[2570]

Typically, the Security Council calls for assistance in general terms. What falls under the call for assistance and what is considered to require an authorization is primarily determined through the conduct of States.[2571] Occasionally, the Security Council gives examples, too. Then it refers to more remote types of assistance, such as overflight clearance and transit rights, rather than essential and irreplaceable contributions like military bases or logistics.[2572]

In contradistinction to an 'authorization', a "call for assistance" does not create legal obligations, neither for the addressee[2573] nor the target State of recommended conduct.[2574] It seems that the call serves a political purpose only to ensure support for its enforcement measures. But assuming that the Security Council does not seek to call for conduct in violation of

2570 E.g. Liberia: S/RES/1497 (1 August 2003), para 11; Libya: S/RES/1973 (17 March 2011) para 9. See also Yugoslavia: S/RES/787 (16 November 1992) para 15; Easter Zaire: S/RES/1080 (15 November 1996), para 6; East Timor: S/RES/1264 (15 September 1999), para 6 (contributions of personnel, equipment and other resources); Bosnia and Herzegovina: S/RES/1305 (21 June 2000), para 16; S/RES/1357 (21 June 2001), para 16; S/RES/1423 (12 July 2002), para 16; S/RES/1491 (11 July 2003), para 16; Afghanistan: S/RES/1386 (20 December 2001), para 7 (overflight clearance and transit); DRC: S/RES/1484 (30 May 2003), para 8; Iraq and Kuwait: S/RES/1511 (16 October 2003), para 14; AU in Somalia: S/RES/1772 (20 August 2007), para 14 (financial resources, personnel, equipment and services); EU in Congo: S/RES/1671 (25 April 2006), para 2 and 13; Iraq: S/RES/1546 (8 June 2004), paras 9 and 15; Afghanistan: S/RES/1623 (13 September 2005), para 1 and 3; Mali: S/RES/2085 (20 December 2012) para 13-15, 20.

2571 For States' conduct see in detail the conflict practice above, e.g. Libya 2011, Korea 1950.

2572 E.g. S/RES/1386 (20 December 2001) para 7; S/RES/1973 para 9 (7 March 2011). This is also affirmed by the related practice of peacekeeping. See generally Repository Practice of the UN on Article 43. See for example the reports by the Special Committee on Peace-Keeping Operations that dealt with those questions: A/8081 (1 October 1970); A/8550 (3 December 1971); A/8888 (13 November 1972); A/9236 (21 November 1973); A/9827 (31 October 1974); A/10366 (18 November 1975); A/31/337 (23 November 1976); A/32/394 (2 December 1977).

2573 Similar to the Council's authorization practice of 'all necessary means', the Council does not establish a *duty* to assist states using force in implementation of an authorization. Neither does the Council establish a right. Rather, the SC seems to assume that such a right exists, the basis of which is however unclear (a preexisting right or based on the authorization itself?).

2574 "Call upon" is accepted to not be a legally decisive measure.

international law, the call implies that the Security Council perceives the provision of assistance to be in accordance with international law.

The legal basis however remains ambiguous. Assistance could be deemed in accordance with international law because the Council believes that assistance to a use of force is not unlawful *per se* and does not require justification. Assistance to *authorized* force might not be prohibited. Alternatively, on the assumption that assistance is *prima facie* wrongful, there may be a pre-existing right in the Charter allowing to assist UN-authorized action that constitutes an exception to a prohibition.[2575] Last but not least, the specific authorization may embrace and justify the provision of assistance.[2576]

The fact that the Security Council does not *authorize* assistance but only recommends the provision of assistance does not allow for a conclusive observation at this stage. Again, similar to the definition of assistance, it is the conduct of States that concretizes the reasoning behind the Security Council's practice.

#### 3) Article 51 UN Charter – assistance in collective self-defense

It is well-accepted in international practice that assistance can also be provided in collective self-defense. Self-defense does not only require assistance by force, as States' frequent invocation of collective self-defense for contributions short of force shows.

### F. Assistance in case the UN takes action

Chapter 3 has shown that the UN Charter provides two provisions that may relate to interstate assistance to a use of force in cases where the United Nations has taken action.

Interstate assistance to a use of force may be directly prohibited through an enforcement measure imposed by the UN. Assistance would consequently be prohibited by virtue of Article 25 UNC (1). Article 2(5) UNC may prohibit interstate assistance to a use of force if the assisted State

2575 Such a right might be based on Article 43 UNC.

2576 The Security Council usually authorizes 'all necessary means'. *Ratione personae* and *materiae* this may embrace assistance, too. It is however noteworthy that the Security Council typically refers to two distinct and separate conducts: the use of force, and the assistance to that use of force.

that uses force is subject to an enforcement action by the United Nations (2).

1) Non-assistance as UN enforcement measure

The Security Council may take enforcement action under Chapter VII UNC either by taking a measure involving the use of force (a) or by imposing a sanction (b). These measures may relate to interstate assistance *to a use of force* in the following ways.

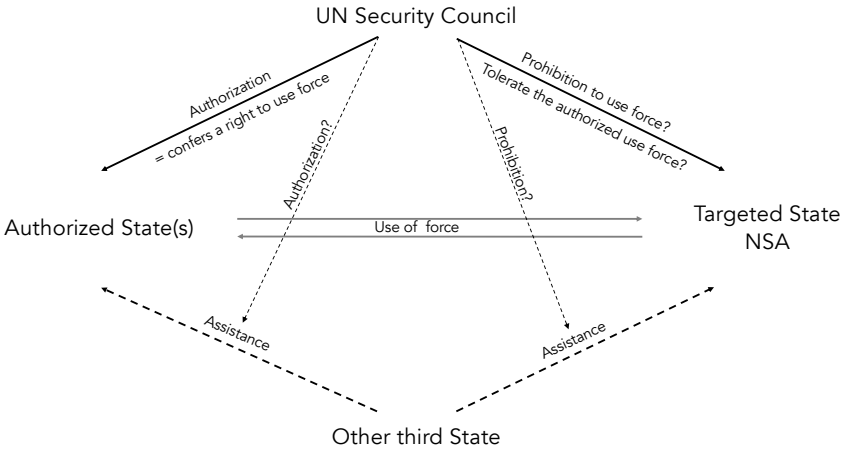
The latter measure (b) presupposes that the Security Council acts in view of interstate use of force. This is not necessary for the former, as in this case an interstate use of force may only arise due to the Security Council's authorization. Accordingly, if the Security Council authorizes a use of force not because of interstate use of force,[2577] but for example in light of gross violations of human rights in a raging civil war,[2578] the enforcement measure (a) may have nonetheless bearing upon interstate assistance to a use of force when it automatically prohibits a response by force.

In addition, the United Nations may address interstate assistance in a non-binding manner. While in this case no specific obligations arise for assisting States, the UN measure may still hold legal value and relevance (c).

a) Authorization of a use of force – an implicit prohibition to provide assistance to the targeted State (when) using force?

In case the Security Council authorizes the use of force, the Security Council entitles certain States to use force within the scope of the authorization. This confers a right to those States. The direct legal effect of the authorization does not extend further, although it carries wide indirect implications.

2577 E.g. in the situation between Iraq/Kuwait 1990 or in Korea 1950.
2578 E.g. in Libya 2011.




One could argue that the Security Council, as the other side of the coin, might also implicitly create additional obligations for the targeted State against which the enforcement action is directed. The Security Council might require the targeted State to *tolerate* the authorized use of force and/or not to resort to force itself. In practice, the Security Council does not formulate such obligations, however. These would also not be legally necessary. It is an inherent consequence of the Council creating a right. First, the targeted State, as a member of the United Nations, has accepted the Security Council's powers. It is hence not necessary to impose an obligation in the specific situation. Second, the authorization of force causes and affects the application of existing obligations that, as a consequence, adequately govern the situation. For example, it is not necessary to (legally) protect the States exercising the authorized use of force. It follows already from the authorization that the targeted State may not respond by force against the military operations authorized by the Security Council. For two reasons, the right to self-defense is precluded. The targeted State is not subject to an unlawful, but a rightful (authorized) use of force. In any event, the Security Council's primacy applies. There is little doubt that the Security Council has clearly intended to take the necessary measures to maintain international peace and security.[2579]

2579 Article 51 s 1 UNC.

In that light, targeted States that resort to force in defending themselves generally challenge the lawfulness of the resolution[2580] or claim that the use of force exceeded the authorization.[2581] They do not challenge, however, the above-sketched premise.

This background already suggests that by issuing an authorization the Security Council also does not impose obligations on other third States. In particular, an authorization to use force does not entail an implicit *prohibition* to provide assistance to a use of force directed against the authorized use of force[2582], just as it does not create a *right* to provide assistance to a use of force.[2583]

Again, this also conforms with international practice. Not only does the Security Council opt against stipulating such a prohibition in *express* and binding terms. If the Security Council seeks to prohibit assistance, it usually complements the authorization with specifically circumscribed sanctions.[2584] At times, the Security Council "calls upon" States to refrain from assistance.[2585] The Council does not *create and impose* an obligation by virtue of Article 25 UNC. Using such language, the Security Council instead is making a political argument, arguably on the assumption that such assistance is prohibited under general international law or Article 2(5) UNC.[2586] At the same time, the very existence of such calls for non-assistance implies that an authorization by the Security Council does not

2580 E.g. the Gulf War 1990, e.g. Iraq S/PV.2963 (29 November 1990), S/PV.2981 (3 April 1991).

2581 Recall Libya 2011, II.C.18.

2582 By States or non-State actors alike.

2583 On the practice see above II.E.2.

2584 Most frequently, the Security Council complements an authorization to use force by an arms embargo. Note that in interstate conflicts the Security Council rarely authorizes a use of force, cf also Gray, *Use of Force (2018)*, 342. Gulf war 1990: S/RES/661 (9 August 1990) and S/RES/678 (29 November 1990). The distinction between sanctions requiring non-assistance to the targeted actor and an authorization is however wide practice also with respect to authorizations not in an interstate conflict. Just see for example: Somalia 1992: S/RES/733 (23 January 1992), S/RES/794 (3 December 1992); Rwanda 1994: S/RES/918 (17 May 1994), S/RES/929 (22 June 1994); Haiti: S/RES/841 (16 June 1993), S/RES/940 (31 July 1994); Libya 2011: S/RES/1970 (26 February 2011), S/RES/1973 (17 March 2011). For an overview of arms embargoes and authorizations see jointly: Arms Embargoes, SIPRI, https://www.sipri.org/databases/embargoes; Gray, *Use of Force (2018)*, 341-343.

2585 Recall Korea 1950, above II.C.1.

2586 For a more detailed discussion see below.

already *implicitly* prohibit assistance to the State against which the Security Council authorizes force.

Still an authorization impacts the permissibility of interstate assistance, nonetheless. On one hand, the authorization ensures that (at least remote) assistance to the authorized use of force is lawful. On the other hand, assistance to a forceful response by the targeted State to the authorized use of force will be considered unlawful. This is the result however from the general rules, exclusively, and not from a specific prohibition imposed by the Security Council. It follows from the authorization by the Security Council. As seen, the authorization has the effect that the use of force in 'defense' against an authorized use of force is unlawful.

b) Sanctions with respect to interstate use of force

It is firmly entrenched in UN and State practice that, by imposing a sanction against a State, the Security Council *creates* a specific and new obligation for other member States under Article 41 UNC whose mandatory effect derives exclusively from the Council's decision in connection with Article 25 UNC.[2587] In this case, the Council uses mandatory, rather than hortatory language: it "decides", rather than reaffirms.[2588] As such, sanctions are formulated as obligations of "all States," not of the State being sanctioned.[2589]

Such obligations created by UN sanctions allow for regulation of interstate assistance to a use of force in international relations in international practice in a twofold manner. First, the sanction may primarily prohibit interstate assistance itself. As such, the sanction would be directed against the assisting State itself and its assistance. Second, interstate assistance may be prohibited as an enforcement measure against the assisted State. Other

2587 E.g. S/RES/670 para 1 (25 September 1990). Krisch, *Article 41*, 1310 para 10; Benedetto Conforti, Carlo Focarelli, *The Law and Practice of the United Nations* (5th rev edn, 2016) 186-187; Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (2007) 65-66.

2588 For example, when the Council calls for compliance with international human rights law or international humanitarian law, the Council "reaffirms" the obligation rather than decides. Georg Nolte, 'The Different Functions of the Security Council with Respect to Humanitarian Law' in Vaughan Lowe and others (eds), *The United Nations Security Council and War. The Evolution of Thought and Practice since 1945* (2008) 519 et seq.

2589 Farrall, *UN Sanctions*, 67.

(potentially) assisting States accordingly may be (also) obliged not to assist the State using force.

(1) Sanction against the assisting State: a prohibition of interstate assistance

The Security Council has not in express terms qualified the assistance itself as threat to the peace, breach of the peace or act of aggression. Accordingly, when imposing a sanction aimed at preventing assistance, the Security Council has prohibited assistance only for its contribution to another actor's/State's conduct.[2590]

The fact that the enforcement measure may be triggered by the assistance *itself* is, however, not only a theoretical scenario. The UNGA, by a Uniting for Peace resolution, qualified the Chinese "assistance" as "aggression".[2591] On that very basis (in addition to the goal of seeking to end armed opposition to the US-led forces), the UNGA also recommended an embargo against China, which could be described as an obligation of non-assistance to assistance to a use of force.[2592]

Under Article 39 UNC, it would even suffice if the act of assistance itself constituted a 'threat to the peace' for the Security Council to prohibit assistance. States frequently feel 'threatened' by the very fact that assistance is provided and criticize the provision of military support as destabilizing the region and a threat to international peace and security. So far, the Council has not acted upon assistance alone. Instead, the Security Council qualifies the situation to which the assisting State contributes through its assistance, rather than the act of interstate assistance or interstate military cooperation *itself,* as threat to the peace.[2593] In any event, to the extent

2590 E.g. S/RES/418 para 1, 2 (4 November 1977), where the Security Council determined "having regard to the policies and acts of South African Government, that the acquisition by South Africa of arms and related matériel constitutes a threat to international peace and security" and hence required States to cease any provision of arms and related matériel. See also S/RES/558 (13 December 1984) para 1, 2. S/RES/1298 (17 May 2000): the hostilities between Eritrea and Ethiopia constituted the threat of force which led the Security Council to impose the non-assistance obligation.

2591 A/RES/498 (V) (1 February 1951), para 1.

2592 A/RES/500 (V) (18 May 1951), preambular para 2, para 1.

2593 For a similar observation on Security Council resolutions and State armament, Krisch, *Article 39*, 1280-1281 para 16-17. Note that this observation does not apply to assistance to non-State actors that constitutes an interference itself.

assistance violates international law this seems – in light of the UNGA precedent – not to be precluded.[2594]

(2) Sanction against the assisted recipient State: prohibition of interstate assistance to a use of force

It is accepted that sanctions pursue at least three goals: "(i) to *coerce* or change behaviour, (ii) to *constrain* access to resources needed to engage in proscribed activities, or (iii) to *signal* and stigmatize."[2595] That UN sanctions may embrace specific obligations requiring non-assistance is widely agreed upon, albeit they themselves may not always constitute evidence for a general rule of complicity.[2596] In international practice of UN sanctions in view of interstate use of force this nature of sanctions features particularly prominently. Sanctions (are meant to) prohibit other States' contributions to interstate assistance to a sanctioned use of force in international relations. Sanctions impose specific and distinct obligations of non-assistance.

Early practice relating to sanctions that developed against the backdrop of classic interstate use of force is particularly clear on this dimension. The Collective Measures Committee's reports are instructive in this respect. The UNGA established the Committee in 1950 in light of the Korea war as part

2594 See also Johanna Friman, 'Deblurring the concept of a breach of the peace as a component of contemporary international collective security', 6(1) *JUFIL* (2019) 46-49.

2595 Larissa J van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes', 19(3) *JCSL* (2014) 433; Francesco Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the Cold War* (2011).

2596 Eckart Klein, 'Beihilfe zum Völkerrechtsdelikt' in Ingo von Münch (ed), *Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (1981) 437; Aust, *Complicity*, 136, 158-162; Helmut Aust, 'Article 2(5)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 244, para 19; Felder, *Beihilfe*, 206-208; Daniel Thürer, 'Comment: UN Enforcement Measures and Neutrality. The Case of Switzerland', 30(1) *AVR* (1992) 75; Quigley, *BYIL* (1987) 92-93; Pacholska, *Complicity*, 138-140. That non-assistance obligations can (in any event) follow from UN sanctions was also held by the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, 16, para 119 in connection with para 115. On the controversy whether the ICJ also embraced a non-assistance obligation under general international law see Aust, *Complicity*, 160-161.

of the Uniting for Peace resolution.[2597] The Committee's reports constituted the first systematic attempt by the UN to study the field of collective action and included guiding principles for future action.[2598]

The Committee viewed UN collective action as a tool to render the resort to force, contrary to the Charter, less probable and to increase the likelihood that an aggressor accepts a peaceful settlement.[2599] As such, sanctions were understood to be primarily enforcement measures, exerting pressure on the aggressive State.[2600] At the same time, their aim was not only to weaken but also to handicap the aggressor in pursuing its aggression. Sanctions were conceptualized to specifically weaken an aggressor's war-making potential and its ability to continue its aggressive action, in particular when it was dependent on foreign contributions.[2601] Measures could be "designed to strike directly at the supplies which that country may need to support an aggressive act," or "to hit indirectly at its supplies."[2602] That sanctions were about (non)-assistance is further affirmed by the Committee viewing assistance to the victim as a complementary part of the imposition of collective action.[2603]

This character that the Committee developed through abstract considerations defining the nature of sanctions has then been concretized in specific proposals. The Committee drew up lists which sought to facilitate the effective preparation of selective embargoes beforehand.[2604] The lists were then to be specifically applied to the targeted State. The catalogue distinguished between items that had a direct bearing on the military operation,[2605] items of primary strategic importance which are essential to military operations,[2606] as well as items of vital importance depending on

2597 A/Res/377 (V) (3 November 1950).
2598 Collective Measures Committee, A/1891 (1951), para 162-164.
2599 Ibid para 13.
2600 Ibid para 42.
2601 Ibid para 27, 43, 48, 51, 67, 79, 80, 85; Collective Measures Committee, A/2215 (1952), para 35. Note that these measures could be taken even before a use of force actually took place.
2602 A/1891 (1951), para 92, see also para 97.
2603 Ibid para 57-59.
2604 Ibid para 33, 85, 87 (prepare basic lists); A/2215 (1952) Annex E.
2605 Arms, ammunition and implements of war, A/2215 (1952) para 33, 34, detailed Annex H.
2606 A/1891 (1951), para 81-85; A/2215 (1952) para 36, 37, for details see Annex I.1. Other items that are intimately related to an aggressor's ability to initiate military operation, e.g. transport equipment, fuel and lubricant, communication equipment.

the situation.[2607] The latter two categories were distinguished by the "degree of general applicability". While the former was to be prohibited always, the latter depended upon the specific circumstances of the case.[2608] The catalogues were driven by practical considerations of effectiveness, not legal value judgments. Still, its content indicates that the extent to which the item contributed to the use of force was an essential motivation. Selective embargoes were to be tailored to hamper war efforts, not only to replace military use of force with economic weapons. Sanctions aimed to legally proscribe and thus minimize third States' contribution to war.

Notably, the Committee also stressed the crucial importance of flexibility and specificity of the imposed measure,[2609] its universal and solidary application,[2610] and its procedural coordination among States[2611], not least to absorb the costliness of sanctions,[2612] for an effective response. Despite first signs of gridlock in the Security Council, the Committee remained committed to the UN (the Security Council or the General Assembly) being at the center of the sanction regime, and was critical about the automaticity in applying sanctions.[2613]

The rare, early applications of sanctions relating to interstate use of force affirmed this ideal. For example, in view of South Africa's persistent acts of aggression against its neighboring States and its military buildup, the Security Council imposed an arms embargo.[2614] The idea to increase pressure on South Africa to change path dominated the debates. Still, several States also emphasized that the sanctions sought to curb South Africa's military powers.[2615]

2607 A/2215 (1952) para 38, for details see Annex I.2. E.g. chemicals and chemical equipment, electrical and power generating equipment, general industrial, equipment, metals, minerals, metal working, machinery, petroleum equipment, precision instruments, and rubber.
2608 A/2215 (1952) para 39.
2609 A/1891 (1951), para 41, 43
2610 Ibid para 33, 62, 117-147.
2611 Ibid para 113.
2612 Ibid para 52.
2613 Ibid para 63, 113.
2614 The sanctions were not exclusively based on South African use of force. They were dominantly motivated by the fact that South Africa was governed by an apartheid regime.
2615 E.g. S/RES/418 (4 November 1977), S/PV.2046, para 41 (UK), 49 (USSR), 63 (Federal Republic of Germany), 54 (Benin, critical that the embargo has been imposed too later, when South Africa "has succeeded, thanks to the co-operation of some countries, in becoming military self-sufficient"), 68 (Pakistan). For a

More recently, the focus of debating sanctions among international scholars and States has shifted.[2616] The end of the Cold War heralded the 'decade of sanctions'. A pluralistic understanding of a 'threat to peace' prevailed. Sanctions were applied to increasingly diverse situations. Accordingly, the design and procedure governing sanctions, UN accountability, and their effectiveness dominated the debates.

It is agreed that the "purpose of sanctions is to modify the behavior of the target State, party, individual or entity threatening international peace and security and not to punish or otherwise exact retribution."[2617] The extent to which UN sanctions also pursue other purposes is subject to debate. That sanctions (still) aim to limit third States' contribution to the situation considered a threat of peace, remains however an underlying assumption, if not in many instances the essential means to restore international peace and security.[2618] In fact, it seems that the dimension of non-assistance has regained more prominence with the renunciation of the practice of comprehensive sanctions and the move to particular/targeted sanctions that are specifically tailored towards specific domains relevant for the threat to peace upon which the Security Council is acting.[2619]

This dimension of non-assistance is perhaps most vividly illustrated by the most common measure taken by the Security Council: arms embargoes. By their very nature, arms embargoes are designed to deny a State using force the tools of war.[2620] This is not at least illustrated by the fact that such measures usually not only prohibit the supply of arms but also related ma-

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detailed summary of the discussions Repertoire of the Practice of the Security Council, 1975-1980, 307-319. See also Farrall, *UN Sanctions*, 136.

2616 Mary Ellen O'Connell, 'Debating the Law of Sanctions', 13(1) *EJIL* (2002). See e.g. the Working Group on General Issues of Sanctions, S/2000/319 (17 April 2000); S/2005/841 (29 December 2005).

2617 A/RES/64/115 (15 January 2010), Annex para 2; A/RES/51/242 (26 September 1997), Annex II para 5.

2618 For an overview on sanctions see Vera Gowland-Debbas, Djacoba Liva Tehindrazanarivelo, *National implementation of United Nations Sanctions: A Comparative Study* (2004) Annex 27-31; Gary Clyde Hufbauer, Jeffrey J Schott, Kimberly Elliott, *Economic Sanctions Reconsidered* (3rd edn, 2007) 70, and 84-85 for case studies.

2619 Farrall, *UN Sanctions*, 107. To what extent the non-assistance dimension applies for targeted sanctions against individuals may deserve further scrutiny. For the debate on the limits on targeted sanctions against individuals see e.g. S/2006/331 (14 June 2006).

2620 David Cortright, George A Lopez, Linda Gerber-Stellingwerf, 'The Sanctions Era: Themes and Trends in UN Security Council Sanctions since 1990' in Vaughan

terial designed for military purposes.[2621] The scope is specifically tailored to the target.[2622] For example, the arms embargo imposed on both Eritrea and Ethiopia in 2000 was driven by the motivation to contain the conflict by constraining the States' ability to resort to force.[2623] It is further reflected in the recognized tensions between arms embargoes and States' right to (collective) self-defense.[2624]

But reducing other States' contribution to the threat to peace is also a crucial aspect of general economic sanctions. The coercive element may be dominant. This does not exclude however that the measures are also chosen to deny essential resources for war efforts. The comprehensive sanctions against Iraq in reaction to its invasion of Kuwait not only sought to bring about Iraq's withdrawal from Kuwait and induce compliance with international law.[2625] Sanctions also sought to restrain assistance to Iraq.[2626]

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Lowe and others (eds), *The United Nations Security Council and War. The Evolution of Thought and Practice since 1945* (2008) 214.

2621 Michael Brzoska, *Design and implementation of arms embargoes and travel and aviation related sanctions. Results of the 'Bonn-Berlin Process'* (Bonn International Center for Conversation, Auswärtiges Amt, United Nations Secretariat, 2000) 26; Cortright, Lopez, Gerber-Stellingwerf, *The Sanctions Era*, 214. Arms embargoes are usually phrased as a State's duty to *prevent* the sale and supply by its nationals or from their territory. This is understood to also entail a duty for States themselves not to engage in sale or supply.

2622 Brzoska, *Bonn-Berlin Process*, 28.

2623 S/RES/1298 (17 May 2000); Farrall, *UN Sanctions*, 90.

2624 States ask the Security Council to lift sanctions to allow to receive military assistance necessary to defend itself, e.g. relating the fight against ISIS: S/PV.7387, 5 (Libya), 7 (Egypt); S/2020/269 (Libya); Bosnia in view of S/RES/713 (25 September 1991): Craig Scott and others, 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina', 16(1) *MichJIntlL* (1994-1995). Some claim that the sanction is only valid to the extent it does not restrict the right to self-defense, e.g. France relating to sanctions against South Africa, S/PV.2044 para 39. See in more detail Gray, *Use of Force (2018)*, 132-134. This general understanding seems to be also reflected in the fact that a practice of express exemptions of sanction regimes has developed: Recognition of self-defense: S/RES/661; Humanitarian assistance: S/RES/687, S/RES/986 (Iraq); specific addressee: S/RES/661 para 9 (assistance to Kuwait); S/RES/2216 (14 April 2015) para 14.

2625 E.g. S/PV.2933, 18 (USA), 21 (France), 24-25 (Canada).

2626 E.g. S/PV.2933, 18 (USA) ("will not countenance the continuation"), 22 (Malaysia) (not punitive, but removal of prospect of unilateral military action), 29-30 (China), 53 (Romania).

On that note, in discussions on compliance with the sanction regime, "allegations of complicity" in Iraqi action featured widely.[2627]

On a more general note, the extent to which an act may contribute to the defined threat is a widely used criterion to determine who and how to sanction, be it by the Security Council itself or sanction committees established to give life to the Security Council's sanctions.[2628]

Perhaps most clearly, the goal of non-assistance is embodied in non-proliferation sanctions, which impose a specifically tailored arms embargo that is not necessarily linked to a specific action, but a general risk, such as in the case of North Korea or Iran.[2629] Such sanctions may be considered a particularly far-reaching prohibition of assistance. They not only prohibit assistance to a specific conduct but assistance to a potential use of force.

Sanctions may not stop at prohibiting assistance. They pursue a rich variety of goals.[2630] But by their nature, sanctions restrict interstate cooperation in view of a use of force. They prohibit certain State conduct in relation to another State. However, it is more than just this *de facto* ((sometimes marginal) side) effect of sanctions on interstate cooperation that renders them non-assistance obligations. International practice suggests that sanctions *may*, and widely *do,* relate to the threat itself. A core function of sanctions as applied in practice, especially when taken in reaction to an ongoing use of force in violation of the Charter, is to cut support to the violator and the violation.[2631] Sanctions aim to maintain and restore international peace and security. Typically, albeit perhaps not necessarily, the first step to achieve this goal is not to provide any support but rather to cut any assistance

2627 E.g. S/1996/700 (26 August 1996), para 97 (Iran denying "allegations of complicity").

2628 Alain Pellet, Alina Miron, 'Sanctions' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) para 40.

2629 Sue E Eckert, 'United Nations Nonproliferation Sanctions', 65(1) *IntlJ* (2010).

2630 Barry E Carter, 'Economic Sanctions' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2011) para 5. Security Council Report, Special Research Report UN Sanctions (25 November 2003), 3-6. See for a discussion of goals of sanctions Pellet, Miron, *Sanctions* para 4-11; Hufbauer, Schott, Elliott, *Economic Sanctions Reconsidered*, 71; Alexandra Hofer, 'Creating and Contesting Hierarchy: The Punitive Effect of Sanctions in a Horizontal System', 125 *RevCIDOBAfersInt* (2020).

2631 Aust, *Complicity*, 158 who adds the caveat that sanction regimes are relevant to the extent that "notions of lawfulness have clearly played a role"; Aust, *Article 2(5) UNC*, para 19 refers to embargo as "non-assistance obligation"; David Mitrany, *The Problem of International Sanctions* (1925); Hufbauer, Schott, Elliott, *Economic Sanctions Reconsidered*, 69 et seq.

that could benefit the threat to the peace. In other words, sanctions also prohibit the *contribution* to the situation that constitutes a threat to the peace. Sanctions are primarily directed against the sanctioned State. But they are also meant to hold third States responsible for their contribution to a threat of peace.

It goes without saying that the conditions prohibiting assistance depend on the specific case.[2632] No two situations are likely to be identical, nor is the Security Council's response that is heavily influenced by world politics. Still, in general, it can be said that sanctions impose a strict regime. They usually concern specific and concretized conduct.

Accordingly, sanctions are usually absolute in two ways.

First, they are 'absolute' in content. While the measures may be (also) driven by the ideal of non-assistance to the specific fact, it is usually not reflected in the prohibition. The specific conduct is prohibited irrespective of its relationship with the triggering situation or the State responsible. It does not depend on whether or not the prohibited "conduct" in fact contributes to the use of force. It may not even be necessary that a specific use of force occurs, or that use of force is contrary to international law.[2633] Likewise, it is irrelevant whether the assisting State has knowledge or intent to contribute to the sanctioned conduct. In other words, the factual uncertainty surrounding the contributory effects of State cooperation to the use of force[2634] is met with totality in legal terms. Even if the act of assistance did not in fact contribute to the use of force, it was prohibited, nonetheless.

Second, non-assistance obligations imposed through the Security Council's sanctions are absolute in effect. They are conceptualized to even trump rights to assist established under the UN Charter itself, unless the Security Council makes explicit exemptions for certain forms of assistance. At the same time, sanctions ensure that non-assistance is lawful, notwithstanding any potentially opposing international obligations. Sanctions thus protect States that *refrain* from providing assistance from potential responses (e.g., countermeasures or self-defense) by the sanctioned State.

2632 van den Herik, *JCSL* (2014) 434.

2633 The latter fact is well illustrated by the tension between the right to self-defense and sanctions. On that note, it is important to understand the above purpose of constraining "access to resources needed to engage in *proscribed* activities" to refer to activities that constitute a threat of peace.

2634 Hufbauer, Schott, Elliott, *Economic Sanctions Reconsidered*, 71.

These strict obligations are based on the primacy of the Security Council and its regulatory will. The political agreement allows for strict and comprehensive regulation that was considered impossible to establish unilaterally in view of the experiences of the League of Nations. Despite all limitations of the Security Council, this ideal still prevails. In fact, arguments against non-assistance without UN sanctions, at least for remote forms, resemble those that led the UN drafters to introduce the Security Council as centralized organ deciding on sanctions. States are still reluctant to bear the costs of non-assistance unless universal application is ensured.[2635]

In practice, more often than not, however, it is this need for political agreement in the specific situation – intended to render sanctions more effective – that limits sanctions *in scope*. For example, political realities often result in the Security Council "only" agreeing on a minimum of universal non-assistance obligations by imposing an arms embargo. Likewise, the absolute prohibition of a particular form of cooperation is compensated by the fact that essential contributions facilitating the use of force are (deliberately) omitted.[2636]

Against this background, it is crucial to note that the Security Council's power to impose specific prohibitions of assistance, and its frequent limitations of its exercise of this power to such non-assistance obligations, do not preclude the existence of general prohibitions. Not only does this correspond with the State practice sketched above that accepts (other) general obligations despite (possible) Security Council action. It is not uncommon for the Security Council to stipulate, in a binding or a non-binding, merely endorsing manner, obligations on States as an enforcement measure that already exists in general international law.[2637] This applies

2635 For example, the United States is willing to deliver weapons to Turkey despite Turkey openly threatening to fight Kurdish fighters in Syria. A main motivation is the fear that Russia will otherwise take its place.

2636 The (deliberate) limitation of sanctions is often reason for complaint. For a particularly illustrative example, on how such political considerations may frustrate the effectiveness of sanctions, recall sanctions against Italy in the Abyssinia crisis. Also recall the critical comments on the South Africa embargo.

2637 For example, the non-recognition duty is widely accepted as a general duty, despite the fact that the Council does not reaffirm, but imposes the duty. Cf S/RES/662, S/RES/664, S/RES/670 (1990) for Iraq's annexation of Kuwait. Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten: Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern* (2006) 318. For example, when the Council calls for compliance with international human rights law or international humanitarian law, the Coun-

to non-assistance obligations, too. The Security Council (as well as the UNGA) repeatedly have called upon States to refrain from assistance in a non-binding manner, which will be assessed in the following section.

### c) UN non-binding calls for non-assistance

Aside from binding sanctions that govern interstate assistance, the Security Council (1) and the General Assembly (2) also address interstate assistance in a non-binding manner.

#### (1) Practice of the Security Council

Repeatedly, the Security Council has called upon States not to provide assistance to States using force.[2638] In contrast to sanctions couched in mandatory language, such calls are typically non-binding. They do not in and of themselves add to the *legal* framework on assistance.

Whether or not such calls go beyond a political dimension often remains open and requires careful interpretation. Unlike calls relating to other areas of law, the Security Council does not specify why States should refrain from assistance. The calls hence may not easily be equated with calls for compliance with a non-assistance obligation that would, as a consequence endorse the existence and application of a prohibition of assistance in the present case. Even if it were established that the call rested upon a legal belief, in any event, the call may relate to different legal bases. It could reflect and endorse the non-assistance obligation under Article 2(5) UNC,[2639] as well

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cil "reaffirms" the obligation rather than decides. Nolte, *Functions of the Security Council*, 519 et seq. See generally Brownlie, *Use of Force*, 410 et seq.

2638 In the context of interstate use of force see for example: Korea: S/RES/82 (25 June 1950) para III; Eritrea Ethiopia: S/RES/1227 (10 February 1999) para 7 ("strongly urges all States to end sales of arms and munition to Ethiopia and Eritrea"). In the vicinity of occupation and following settlements S/RES/465 (1 March 1980), para 7; S/RES/471 (5 June 1980), para 5. See also in other situations: Southern Rhodesia and apartheid: S/RES/217 para 8 (20 November 1965), S/RES/232 para 5 (16 December 1966); South Africa: S/RES/276 (30 January 1970) para 2, 5, S/RES/569 (26 July 1985) para 6.

2639 Note that the call would not trigger the non-assistance obligation under Article 2(5) UNC. In case that the UN has already taken enforcement action, it may provide political attention to the (already existing) obligations under Article 2(5) UNC.

as the belief that the assisting State is obliged to refrain from assistance under general international law.

In any event, such calls for non-assistance may have legal effects in two manners: First, under the presumption that the Security Council does not recommend acts contrary to international law, the call indicates that non-assistance would be permissible (albeit not necessarily obligatory) under international law. Second, as these calls are case specific, they may assist in the application of other norms.

(2) Practice of the General Assembly

Similar to the Security Council, the General Assembly is frequently concerned with States providing assistance to a State resorting to force in conflict situations.[2640]

Thereby, it is crucial to carefully distinguish different objectives that the UNGA pursues.[2641]

Often, the UNGA's call for non-assistance aimed at ensuring the effective implementation of the UNGA's resolution,[2642] or the protection of UN enforcement action.[2643] In these cases, these resolutions primarily depended on and sought to protect UN action. They were exclusively of vertical nature, and as such, only of limited relevance for identifying the legal framework governing interstate assistance without UN involvement. As such, these resolutions are based on Article 2(5) UNC, not a general horizontal non-assistance norm.

But, first, there may be overlap. While a certain measure may be guided by Article 2(5) UNC, it does not exclude that it also reflects a general horizontal non-assistance norm. The practice is however ambiguous, and requires specific indication that it is also reflective of a general non-assistance norm. Second, independently of any UN enforcement action, the UNGA also touched upon horizontal assistance in different manners:

2640 See on the abstract resolutions interpreting the principles of the UN Charter, above II.A.
2641 See also Talmon, *Kollektive Nichtanerkennung*, 325-326.
2642 E.g. Suez Crisis, A/RES/997 ES-I (2 November 1956) para 1, 3.
2643 Recall Korea, above II.C.1.

The UNGA condemned the provision of support.[2644] The UNGA called upon States to refrain from providing support to ongoing military operations.[2645] The UNGA voiced a call on States not to provide assistance in the future.[2646]

In doing so, the UNGA was concerned itself with various types of assistance – ranging from 'volunteers' and territorial support to general security assistance.

Unlike Security Council resolutions, such UNGA resolutions do not have a binding effect.[2647] As such, the resolutions' effect is – in general – merely political. But, to the extent that the resolution indicates that the UNGA assumed that States are or were *obliged* not to provide assistance to the assisted State using force, the resolution may point towards a prohibition of assistance under general international law.

The UNGA thereby followed a dual approach. The provision of assistance was qualified as aggression or perpetration of a use of force itself as well as, more often, as participation in an unlawful use of force.

### 2) International practice relating to Article 2(5) UNC

Article 2(5) UNC may prohibit interstate assistance to a use of force of an assisted State against which the UN is taking enforcement action.[2648] Article 2(5) UNC applies to two scenarios that are of interest for the present purpose. Either the assisted State that uses force is subject to a measure short of force, i.e., a UN sanction. Or the assisted State is lawfully targeted by force by States authorized by the Security Council to use force. Article

2644 Ibid. E.g. Situation of the Middle East: A/RES/ES-7/4 (28 April 1982), para 9b; A/RES/38/180 (19 December 1983), para A9, A13, A14, D11, E2, E3; A/RES/39/146 (14 December 1984), para A11, B9, B13–14; A/RES/40/168 (16 December 1985), para A11, B9, B13–14; A/RES/41/162 (4 December 1986), para A11, B9, B13–14.

2645 Operation El Dorado Canyon, II.C.11. E.g. Situation of the Middle East: A/RES/ES-7/4 (28 April 1982), para 9b; A/RES/38/180 (19 December 1983), para A9, A13, A14, D11, E2, E3; A/RES/39/146 (14 December 1984), para A11, B9, B13–14; A/RES/40/168 (16 December 1985), para A11, B9, B13–14; A/RES/41/162 (4 December 1986), para A11, B9, B13–14. Situation of Angola: A/RES/1819 (18 December 1962) para 7.

2646 Recall the Osirak incident II.C.8.

2647 Talmon, *Kollektive Nichtanerkennung*, 318-319.

2648 Preventive measures are not considered here as this would assume that no use of force has yet occurred. On the meaning of preventive action: Aust, *Article 2(5) UNC*, 244 para 18.

2(5) UNC establishes both, a duty to assist the United Nations (b), and a prohibition to assist the State subject to the UN measure (c). After some general observations (a), it shall be scrutinized how the norm is applied in international practice with respect to interstate assistance.

There is only little State practice that directly concerns Article 2(5) UNC. It may be that the rule was still considered to be "clear enough" as States had noted when adopting the rule.[2649] In any event, it is already indicative that Article 2(5) UNC does not play a major role in governing assistance in practice.

But it is not a dead letter. In the Repertoire of the Practice of the Security Council[2650] and the Repertory of Practice of United Nations Organs,[2651] the little pertinent State practice is compiled and classified. In fact, the repertoires themselves, both being prepared by the UN,[2652] contribute to clarifying the meaning given to Article 2(5) UNC by international practice through their classification of the practice. At the outset, it can be noted that Article 2(5) UNC is only rarely referred to in express terms. In particular, a 'constitutional discussion' has not arisen in connection with the provision. Aside from sparse explicit references to Article 2(5) UNC, most pertinent international practice is such that the UN qualifies to have "implicit bearing upon" Article 2(5) UNC.[2653]

2649 Doc 739 I/1/A/19(a) (1 June 1945), VI UNCIO 721.

2650 The Repertoire is mandated by A/RES/686 (VII) (1952) entitled "Ways and means to make evidence of customary international law more readily available" and provides a comprehensive coverage of the interpretation and application of the UN Charter through the Security Council. It is prepared by the Security Council Practices and Charter Research Branch. https://www.un.org/securitycouncil/content/purposes-and-principles-un-chapter-i-un-charter#rel3.

2651 The repertory is based on A/RES/769 (VIII), http://legal.un.org/repertory/.

2652 Note that since 2005, in reaction A/RES/60/23 (23 November 2005), certain studies of the Repertory are prepared in collaboration with and assistance of academic institutions.

2653 This is the language used in the Repositories to describe the practice and its effect on Article 2(5) UNC. The repository understands "implicit reference" as: "An implicit reference is an instance where a speaker or text has used language that is similar or identical to that found in an Article or rule of procedure, or that invokes the same principles." https://www.un.org/securitycouncil/content/repertoire/search-options-and-faq.

a) General observations: application if the UN takes action

The survey of State practice confirms the theoretical conceptualization of Article 2(5) UNC elaborated in Chapter 3. States understand Article 2(5) UNC as two-tiered provision that is only triggered once the Council is actually taking binding enforcement action. It is not applied to cases where the Council *could* have taken action. As such, it is not understood to stipulate a general prohibition of assistance to any violator of the Charter. For States, its application depends on UN action.

The UN enforcement action is not considered to be an expression of the principle. Instead, it is the trigger and reference point of the obligations under Article 2(5) UNC.[2654]

Enforcement action itself is not cited in the repertories. Rather, UN practice is only then viewed to bear upon Article 2(5) UNC when the UN reaffirms, reiterates or calls to comply with the previously established enforcement action.[2655] States' rare comments on Article 2(5) UNC likewise

2654 Binding decisions taken under Article 41 UNC are not relevant State practice for Article 2(5) UNC. This confirms the conceptual distinction. The normative force of measures under Article 41 UNC derives from Article 25 UNC. Binding decisions trigger Article 2(5) UNC. They directly regulate horizontal assistance; but they do not concern vertical assistance to the United Nations. They are the enforcement measure that needs to be supported. Nussberger, *MLLWR* (2020) 124. For the same conclusion see Jochen Abr Frowein, Nico Krisch, 'Article 2(5)' in Bruno Simma (ed), *The Charter of the United Nations. A Commentary*, vol I (2nd edn, 2002) 139 para 9. But see Aust, *Article 2(5) UNC*, 244-245, para 19-20 who sees sanctions, i.e. non-assistance obligations imposed by the Security Council, to be a "specific emanation" of Article 2(5) UNC. Likewise Pacholska, *Complicity*, 138-139.

2655 For Council practice see e.g. in connection with the situation in Southern Rhodesia: S/RES/277 (18 March 1970) preambular para 4 c; S/RES/320 (29 September 1972), preambular para 6, para 3 (effective implementation of sanctions); and S/RES/333 (22 May 1973), preambular para 4 (effective observation and implementation of sanctions against Southern Rhodesia). In connection with the complaint by Zambia: S/RES/326 (2 February 1973), para 5 (contrary to Security Council resolution 277). In connection with the situation in the Middle East: S/RES/340 (25 October 1973) para 5 (in the implementation of […] resolutions […]). In connection with the situation of Yugoslavia, S/RES/740 (7 February 1992) preambular para 7 ("expressing concern at the indications that the arms embargo imposed on Yugoslavia by resolution 713 (1991) is not being fully observed"). In connection with the situation in Liberia: S/RES/972 (13 January 1995), preambular para 7; S/RES/985 (13 April 1995), para 4; S/RES/1020 (10 November 1995), para 11; S/RES/886 (18 November 1993), para 11; S/PRST/1995/22 (27 April 1995); S/RES/1013 (7 April 1995) preambular para 5; S/RES/1343 (7 March 2001), para 21; S/RES/1737 (27 December 2006), para 17; S/RES/1630 (14 October 2005), pre-

indicate that Article 2(5) UNC is concerned with the implementation of enforcement action, rather than with the enforcement action itself. For example, in a debate on enhancing the effectiveness of sanctions, Ukraine held:

> "We see two major challenges in making United Nations sanctions more efficient. The first [...] is a lack of political will, which prevents the Council from responding promptly and decisively to grave violations of international law. The *second is outright obstruction or evasion of existing sanctions*. While the lack of political will and abuses of the right to the veto should be the subject of a separate debate, *I would like to recall that paragraph 5 of Article 2 of the Charter of the United Nations* states, among other things, that Member States shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action. In that respect, Security Council should explore ways to further strengthen the roles of the respective Committees in identifying possible cases of non-compliance and determining the appropriate course of action with regard to those who violate the relevant international obligations." [2656]

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ambular para 9; S/RES/1676 (10 May 2006), preambular para 10; S/RES/1724 (29 November 2006), preambular para 9; S/RES/1725 (6 December 2006), preambular para 4; S/RES/1766 (23 July 2007), preambular para 10; S/RES/1592 (30 March 2005), para 9; S/RES/1649 (21 December 2005), para 15; S/RES/1811 (29 April 2008), preambular para 8; S/RES/1853 (19 December 2008), preambular para 9; S/RES/1972 (17 March 2011), preambular para 4; S/RES/2118 (27 September 2013), para 18; S/RES/2133 (27 January 2014), para 1; S/RES/2170 (15 August 2014), para 11; S/RES/2199 (12 February 2015), preambular para 11; S/RES/2253 (17 December 2015), preambular para 10. In connection with the situation in Libya: S/RES/2323 (13 December 2016), preambular para 11. In connection with the situation in Somalia: S/RES/2317 (10 November 2016), S/RES/2385 (14 November 2017), preambular para 4. In connection with the situation in Burundi: S/PRST/2018/7 (5 April 2018), para 6. In connection with the situation concerning the Democratic Republic of the Congo: S/RES/2348 (31 March 2017), para 18, S/RES/2409 (27 March 2018), para 23. On Yemen: S/RES/2481 (15 July 2019) para 6. For UNGA see e.g.: A/RES/997 (ES-I) (2 November 1956): "Recommends that all Member States refrain from introducing military goods in the area of hostilities and *in general refrain from any acts which would delay or prevent the implementation*" of the resolution.

2656 S/PV.8018 (2017), 9, emphasis added. See also the USA who stated in that context that "When States Members of the United Nations do not comply with the sanctions levelled against an aggressor, the Council's threats become hollow." S/PV.8018 (2017), 14. This understanding is reoccurring in practice: e.g. S/PV.7865 (2017), 8 (USA on implementation of S/RES/2231 (20 July 2015)); S/PV.7865 (2017), 10

Article 2(5) UNC hence establishes obligations distinct from the enforcement action itself, albeit they relate to the enforcement action. The decisive question then is: what does Article 2(5) UNC require States to do in view of the enforcement action?

b) A duty to assist the UN

The duty to assist the UN is understood narrowly. It requires (only) compliance and implementation of the *specific* enforcement action taken by the UN. In particular, there is no practice indicating that Article 2(5) UNC is understood to *oblige* States to take other measures than those already *required* by the specific enforcement action. This is irrespective of the fact that the enforcement action would be rendered more effective.

This reading is already implied in the ICJ's Reparations for Injuries Advisory Opinion. The ICJ – stressing the duty to render "every assistance" under Article 2(5) UNC – "noted that the effective working of the Organization – the accomplishment of its task, and the independence and effectiveness of the work of its agents – require that these undertakings should be strictly observed."[2657]

Accordingly, if the Council imposes a sanction under Article 41 UNC, all member States, including the targeted State, only need to implement and comply with the measure taken.[2658]

It is more complex when the Council does not impose direct obligations on member States, but takes action itself, or authorizes member States to take enforcement actions. This includes, for example, cases where the Council authorizes member States to use force, establishes peace keeping forces, or institutes fact-finding missions.

Typically, the Security Council complements such measures with a call for assistance, e.g. to allow overflight and transit.[2659] While this practice

(UK), S/PV.7865 (2017), 20 (Sweden); S/PV.8353 (2018), 23 (Japan on North Korea); S/PV.8439 (2018), 4 (US on Iran with respect to Houthis); S/PV.1632 (1972), para 27-28 (Liberia).

2657 *Reparation for injuries in the service of the United Nations*, Advisory Opinion, ICJ Rep 1949, 174, 183.

2658 For such an understanding for example Ecuador S/AC.37/2003/(1455)/67, 2. See also statements above.

2659 For authorized force: E.g. Yugoslavia: S/RES/787 (16 November 1992) para 15; Easter Zaire: S/RES/1080 (15 November 1996), para 6; East Timor: S/RES/1264

implies the UN's view that such assistance is (already) lawful, i.e., States have a *right* to provide assistance to those states using force,[2660] one should be careful to equate this with an *obligation* on States to provide assistance.

There have been voices that read this as "concretization of what the Security Council expects UN member States to do."[2661] In fact, the argument has been made that these "calls for assistance" are obligatory based on Article 2(5) UNC.[2662] Without the assistance called for, so the argument goes, the enforcement measure could otherwise not be successfully implemented. In addition, one could be tempted to read these calls as a reminder of a pre-existing obligation to assist.

It should be noted that the Council "calls upon" or "urges" States to provide assistance. But it does not choose however to impose legal obligation on them. It is a political request and a recommendation by nature.[2663] This is also reflected in the frequent formulation of these calls

(15 September 1999), para 6 (contributions of personnel, equipment and other resources); Congo: Resolution 1501 (2003), para 2; Bosnia and Herzegovina: S/RES/1305 (21 June 2000), para 16; S/RES/1357 (21 June 2001), para 16; S/RES/1423 (12 July 2002), para 16; S/RES/1491 (11 July 2003), para 16; Afghanistan: S/RES/1386 (20 December 2001), para 7 (overflight clearance and transit); DRC: S/RES/1484 (30 May 2003), para 8. Liberia: S/RES/1497 (1 August 2003), para 11; Iraq and Kuwait: S/RES/1511 (16 October 2003), para 14; AU in Somalia: S/RES/1772 (20 August 2007), para 14 (financial resources, personnel, equipment and services); EU in Congo: S/RES/1671 (25 April 2006), para 2 and 13; Iraq: S/RES/1546 (8 June 2004), para 9 and 15; Afghanistan: S/RES/1623 (13 September 2005), para 1 and 3. For peacekeeping forces: e.g. Haiti: S/RES/1063 (28 June 1996), para 6, S/RES/1086 (5 December 1996), para 5; S/RES/1123 (30 July 1997), para 6; S/RES/1141 (28 November 1997), para 6; S/RES/1212 (25 November 1998), para 4; Yugoslavia: S/RES/1058 (30 May 1996), para 3; 1082 (27 November 1996), para 2; Central African Republic: S/RES/1159 (27 March 1998), para 17; Bosnia Herzegovina: S/RES/1103 (31 March 1997), para 3; S/1995/999 (30 November 1995), annex; Cote d'Ivoire: S/RES/1312 (31 July 2000), para 3. For humanitarian aid to Iraq: A/RES/1004 ES-II, para 8; A/RES/1007 ES-II, para 4; S/RES/1302 (8 June 2000), para 16 (facilitating transit); S/RES/1330 (5 December 2000), para 16 and 21; 1360 (3 July 2001), para 10 and 13; S/RES/1454 (30 December 2002), para 4.

2660 See above II.E.

2661 Aust, *Article 2(5) UNC*, para 8.

2662 See in a very vague and indecisive manner, for a duty to tolerate overflight of an authorized force, both ibid para 8; Michael N Schmitt, 'Wings over Libya: the No-Fly Zone in Legal Perspective', 36 *YaleJIntlL Online* (2011) 56.

2663 Aust, *Article 2(5) UNC*, para 8 comes to the same conclusion. His subsequent, ambiguous argument that effectiveness of the enforcement action may require assistance, seems to suggest however that the Security Council establishes such an obligation, nonetheless. Aust's argument is also self-contradictory in that he

for assistance, for example, to "provide *in accordance with the United Nations Charter* such assistance as may be required".[2664]

On that assumption, should Article 2(5) UNC impose an obligation on States to provide such assistance, those calls would not only foil the Security Council's enforcement approach that provides an explicit regulation for assistance to the enforcement action that is tailored to the specific situation and that represents a fine balance and expresses what States could politically agree upon. Article 2(5) UNC would deplete the effects of Article 25 UNC and the distinction between a decision and a recommendation. More importantly, it also does not find a basis in international practice. While the repertoires cite these calls for assistance as *implicit* reference to Article 2(5) UNC, it is at least noteworthy that Article 2(5) UNC has never been invoked *explicitly* in the context of an authorized use of force. In addition, international practice seems consistent in the assumption that there is no obligation to assist.[2665] Neither the Security Council nor States seem to assume that there is an obligation. Lack of support for authorized military operations does not spark *legal* protest, neither by the Council nor

(rightly) claims that Article 2(5) UNC cannot require what would put the "carefully circumscribed system of competences of the Charter [...] into jeopardy". As such, he claimed that "Article 2(5) UNC did not grant the SC the power to order States to make troops available", referring to Article 43 UNC. It must not be forgotten, however, that Article 43 UNC also mentions the right to passage.

2664 E.g. S/RES/787 (17 November 1992) para 15 (Yugoslavia). For a comparable formulation see A/RES/1001 ES-I (7 November 1956) para 10: "Requests all Member States to afford assistance as necessary to the United Nations Command in the performance of its functions, including *arrangements* for passage to and from the area involved." The UNGA did not see an obligation to assist by allowing passage, but only to *arrange for passage.*

2665 This is a decisive feature of the authorization model: States do not have an obligation to use force; whoever is willing, has a right to do so. There are however some discussions whether there is an obligation to continue to use force once it has started. But see S/1645 (Costa Rica), UNTS 214, 51, No 2899 preamble (Japan); S/1673 (Panama), who claim that they are providing support in accordance with duties as member of the UN. These statements may be understood however also to only refer to the implementation of the measures. The same is true for support for peacekeeping, where many ways of improving triangular cooperation are discussed, all of which are based on the unequivocal understanding that there is no obligation to assist: see e.g. Bowett, Barton, *UN Forces*, 401 describing the logistical problems of UN peacekeeping forces, 457 explicitly; Edward H Bowman, James E Fanning, 'The Logistics Problems of a UN Military Force', 17(2) *IntlOrg* (1963). Most recently S/PV.8570 (2019).

by States.[2666] This practice seems hence to reflect and respect the systematic concerns against an obligation to assist, as discussed in Chapter 3.[2667]

All this again indicates that Article 2(5) UNC is not understood to establish further obligations to provide assistance other than those explicitly recognized in the Charter.

As such, without further indication, one should be hesitant to interpret these calls for assistance as evidence for a pre-existing obligation. It touches upon the principle underlying Article 2(5) UNC, solidarity with the UN, but it does not relate to an obligation.

Sporadically, States have attempted to breath more life into the obligation to assist, going beyond compliance of what was required by the resolution. For example, France introduced a draft resolution in the course of the Lebanese Civil War in 1984. The resolution, *inter alia*, aimed to establish UN forces – in agreement with the Lebanese government – to monitor a cease-fire and to protect the civilian population. It is interesting to see how the request for assistance evolved. In a first draft, France proposed the following paragraph:

> "4. Requests Member States to facilitate the task of the United Nations Force, in particular by refraining from any intervention in the internal affairs of Lebanon and any action that might jeopardise the re-establishment of peace and security in the Beirut area".[2668]

Here, assistance to the UN forces was broadly framed: anything that did not contribute to the threat of peace and security in the area was deemed to "facilitate the UN force". 'Assistance' in that sense included also no further contribution to conduct that constituted a threat to peace.

Through rearrangement in a final draft, this interpretation was however softened, if not reversed. The resolution that was ultimately put to vote held:

> "Requests Member States to refrain from any intervention in the internal affairs of Lebanon and any action, in particular military action, that

2666 Unlike with respect to non-compliance with the binding enforcement measures, the Council does not invoke Article 2(5) UNC, or reaffirms the obligation, but just repeats the call for assistance.

2667 Chapter 3, IV.B.

2668 S/16351 (23 February 1984), para 4.

> might jeopardise the re-establishment of peace and security in Lebanon, and to facilitate the task of the United Nations Force."[2669]

Thereby, the conduct contributing to the threat of peace was decoupled from the assistance to the UN. The request for assistance was phrased in general terms, couching the non-contribution to the threat in terms of general international law, and leaving the request "to facilitate the task" unspecified and, in fact, meaningless (limited to compliance). Ultimately, the resolution was vetoed and not adopted. This incident does not allow for comprehensive conclusions. But it is further indication for States' reluctance to interpret the obligation to assist broadly and tailoring it towards the implementation of the concrete enforcement measure taken. In particular, prohibiting contributions to the threat of peace are not necessarily prohibited.

c) Non-assistance to the target State

States adopt a similarly narrow understanding for the non-assistance component: again, it is the enforcement action itself that stands in the center. Article 2(5) UNC is understood to prohibit assistance that specifically obstructs the enforcement measure. Obstruction then is understood narrowly: it seems that neither the United Nations nor States understand Article 2(5) UNC in practice to go beyond what is required by the enforcement measure itself.[2670] States consider only assistance that is directly in contravention to the specific decision as unlawful. What is in contravention is defined by the enforcement action.

Notably, the lawfulness of the supported conduct, specific causation requirements, or subjective elements, like knowledge or intent, do not play a role in international practice.

2669 S/16351/Rev.2 (28 February 1984), para 4.

2670 E.g. again A/RES/997 (ES-I) (2 November 1956): "Recommends that all Member States refrain from introducing military goods in the area of hostilities and in general refrain from any acts which would delay or prevent the implementation." It is concerned about the *implementation* of the specific resolution. See above note 2638.

(1) UN measures short of force

If the Council acts under Article 41 UNC, Article 2(5) UNC is not understood to impose an obligation beyond those already imposed. Rather, the non-obstruction imperative in Article 2(5) UNC is understood to be specifically limited to what the specific measure requires. The Council "reaffirms", "reiterates" or "calls for" pre-existing obligations to refrain from support that is already prohibited under a specific enforcement measure.[2671]

This interpretation is affirmed by the Council's rare explicit references to Article 2(5) UNC. For example, in the context of the border dispute between Djibouti and Eritrea, the Council demanded, in light of Eritrea's non-compliance with previous enforcement action, Eritrea to "[a]bide by its international obligations as a Member of the United Nations, respect the principles mentioned in article 2, paragraphs 3, 4, and 5, and article 33 of the Charter."[2672]

The same understanding prevails in the UNGA. For example, considering the question of Southern Rhodesia, the UNGA

> "strongly deploring the increasing collaboration in violation of Article 25 of the Charter of the United Nations, and of the relevant decisions of the United Nations, which certain States, particularly South Africa, maintain with the illegal racist minority regime, thereby seriously impeding the effective application of sanctions and other measures taken thus far against the illegal régime". […]
> 1. "Strongly condemns those Governments […] which, in violation of the relevant resolutions of the United Nations and in open contravention of their specific obligations under Article 2 paragraph 5, and Article 25 of the Charter of the United Nations, continue to collaborate […]."
> 2. "Condemns all violations of the mandatory sanctions imposed by the Security Council, as well as the continued failure of certain Member States to enforce those sanctions strictly, as being contrary to the obligations assumed by them under Article 2 paragraph 5, and Article 25 of the Charter of the United Nations." [2673]

2671 See above note 2638.
2672 S/RES/1862 (14 January 2009), para 5 (iii); and 1907 (23 December 2009), para 3 (iii).
2673 A/RES/31/154 B, para 1, 2 (20 December 1976); A/RES/ 32/116 B preamble, para 1 (16 December 1977); A/RES/33/38 B preamble (13 December 1978).

States, in the rare cases that they refer to Article 2(5) UNC explicitly, adopt a similar understanding. For example, Yugoslavia invoked Article 2(5) UNC in the context of South African support to the Southern Rhodesia:

> "South Africa has directly, openly, and in a wholesale manner violated the sanctions imposed by the Security Council against the illegal racist regime of the white minority in Southern Rhodesia. South Africa is thereby infringing one of the fundamental principles of the Charter embodied in Article 2, paragraph – namely, that every Member State shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action."[2674]

Occasionally, practice may suggest at first sight that Article 2(5) UNC extends beyond compliance and implementation of enforcement measures. For example, in connection with the situation concerning the Republic of Congo, the Council demanded "that the Governments of Uganda, Rwanda, as well as the Democratic Republic of the Congo, cease using their respective territories to support violations of the arms embargo imposed by resolution 1493 of 28 July 2003 or activities of armed groups operating in the region".[2675] Similarly, the Council called on States to investigate,[2676] monitor,[2677] or report[2678] on situations, thus, at first sight complementing the obligations required by the enforcement action. A closer analysis, however, shows that this aligns with the scope of the obligation in the enforcement measure. Its legal and obligatory basis is grounded in the resolution, which the Council subsequently only reiterated or called upon to enforce.

2674 S/PV.1800 para 4. See also S/PV.1803 (1974) para 15 (Romania); S/PV.8018 (2017), 9 (Ukraine).

2675 S/RES/1592 (30 March 2005), para 9. See also S/RES/1649 (21 December 2005), para 15; S/RES/1856 (22 December 2008), preambular para 8, para 20.

2676 E.g. S/RES/1053 (23 April 1996), para 5, 9 which referred to obligations established in S/RES/918 (17 May 1994), S/RES/997 (9 June 1995) and S/RES/1011 (16 August 1995).

2677 E.g. S/RES/ 928 (20 June 1994) preambular para 5 was just a call for an obligation imposed by resolution S/RES/918 (17 May 1994) para 13 (obligation to prevent).

2678 S/RES/1407 (3 May 2002), para 4, 8 and 9; S/RES/1519 (16 December 2003), para 5.

(2) Measures involving the use of force

When the Security Council takes action involving the use of force, e.g., by authorizing the use of force, in most cases, the Council's authorization to use force is complemented with specific sanctions and non-assistance obligations under Article 41 UNC that derive their normative force from Article 25 UNC.[2679] To the extent that States refrain from providing specific assistance, they are guided by the sanction and Article 25 UNC, not Article 2(5) UNC. The Council's calls for non-assistance in that respect are also based on the specific non-assistance measure it has imposed.

In the rare case that the Security Council takes action involving the use of force without imposing specific sanctions that govern assistance, the call for non-assistance was, like in the case of measures short of war, aimed at assistance (also) obstructing the enforcement action.[2680] As such, Article 2(5) UNC does no more than require compliance with a pre-existing obligation of all member States to tolerate the enforcement action. For example, in the scenario of a UN imposed no-fly zone, Article 2(5) UNC only required that all member States comply with their duty to tolerate the implementation of the no-fly zone. This means that only assistance to conduct in contravention of the no-fly zone would be prohibited.

This interpretation does not exclude, however, that Article 2(5) UNC also generally requires not to provide assistance to the State considered an aggressor, as the Korean incident illustrated. In this particular case, this was, however, due to the broad scope of the specific enforcement action and the fact that the assistance was specifically directed against the UN enforcement action. It was on that basis that this practice was viewed to have an implicit bearing on Article 2(5) UNC.

d) Preliminary observations

Practice acknowledges that Article 2(5) UNC establishes separate and independent obligations for States not to provide assistance to a State against which enforcement action is taken. States define these obligations however narrowly to ensure compliance with the specific UN action only. Thereby,

2679 E.g. Libya: S/RES/1973 (17 March 2011).

2680 UN practice in Korea 1950 or Suez Crisis 1956, which are considered to have 'implicit bearing' on Article 2(5) UNC.

States uphold the primacy of the Security Council in deciding not only the 'if', but also the 'how' of the enforcement regime for the specific case.

Accordingly, in defining Article 2(5) UNC's scope, States do not go beyond the very minimal understanding that was "tacitly accepted" during the drafting process when accepting France's understanding that Article 2(5) excludes permanent neutrality.[2681] Every State needs to comply with the *specific* UN action,[2682] and must not obstruct it.[2683]

This interpretation may give the impression that the Security Council, by adopting a specific enforcement action, concretizes the obligation under Article 2(5) UNC. But it does not. Article 2(5) UNC and the obligation deriving from the enforcement action remain legally separate. They are interpreted in parallel, however. The UN enforcement action is the reference point of the obligation from Article 2(5) UNC, the subject of protection. As such, the content of the enforcement action defines the obligation States have – as Article 2(5) UNC is viewed to require no more than compliance with the specific enforcement measure.

If States do not comply with an enforcement measure, they not only violate the specific obligation deriving from the Council's decision in con-

2681 In fact, this was the same (limited) effect the French proposal had, which should have clarified that permanent neutrality was meant to be incompatible with the membership in the Charter. France wanted to include this effect in the text. While the proposal was rejected, however, the sub-committee when taking the vote "tacitly accepted" that the French draft was covered. VI UNCIO 312, Doc 423 I/1/20, VI UNCIO 722, Doc 739, I/1/19(a). See in more detail Aust, *Article 2(5) UNC*, 242-243, para 17. The same understanding may be seen in the rejection of the Chilean proposal to limit the duty to assistance to participate for regional conflicts to States within the region. III UNCIO 282-291, 284, Doc 2 G/7(i). Frowein, Krisch, *Article 2(5) UNC (2002)*, para 1.

2682 This is noted also by the repertoire of the practice of the Security Council (1972-1974), Chapter 12, 234 and (1975-1980, Chapter 12, 416: in fact, State practice relating the obligation of Article 2(5) does not go beyond the effect of Article 25 UNC: "all the […] references could be linked to Article 25 which states the principle of Article 2, paragraph 5 in a narrower and more specific manner."

2683 This understanding seems also to be the basis of Uruguay's statement made in the context of greater regionalization of UN peace keeping forces. While Uruguay acknowledged benefits of regionalization of UN peace keeping forces, it also emphasized that certain provisions of the UNC need to be "strictly adhered to." Here, Uruguay invoked Article 2(5) UNC, taking it as indicator for a requirement that "[Any UN] action is collective, and thus, all share the obligation, under equal conditions. That framework for action will ensure that the rule is applied properly and, ultimately, that the action is legitimate." S/PV.5649 Resumption 1, 4 Uruguay deduces a call that everyone should participate in UN action. But underlying this understanding is also that anyone has to participate.

nection with Article 25 UNC. They also violate their general commitment to collective security and solidarity with the UN. This is what Article 2(5) UNC protects.

Article 2(5) UNC could play a more prominent role if it was understood more broadly to prohibit assistance to the violator in general. International practice does not understand it this way. The reasons for this "non-practice" remain unclear. Yet, as Article 2(5) UNC is only triggered by UN enforcement action, a broader understanding of Article 2(5) UNC may risk making the Security Council even more reluctant to take enforcement measures. If any enforcement measure would come with a broad and automatic bouquet of non-assistance obligations, and an obligation to participate in the enforcement action, it would not come as a surprise if political agreement among the Security Council members became even more difficult.

# Chapter 5 The Regulatory Framework Governing Interstate Assistance as Elucidated by International Practice

Assistance matters. Assistance is influential. Assistance is political. And assistance is governed by the *ius contra bellum* specifically.

The mere length of the preceding, by no means comprehensive survey demonstrates the crucial role of interstate assistance in almost any use of force in international relations. Time and again, conflicts illustrate that even major powers like the United States crucially rely on contributions from other States for their military operations. Germany's extension of the mandate to continue aerial refueling of the coalition's aircraft in the fight against ISIL over Syria as the "refueling capacities could otherwise not be covered in their entirety," is only a most recent example illustrating the essentiality of assistance.[1]

Against this background, one might expect to call for strict regulation of assistance. All the more, States' almost nonchalant reluctance to engage in-depth with the legality of interstate assistance is striking.

States hardly specify the legal basis when providing assistance or protesting against assistance. In general debates on the principle of non-use of force, interstate assistance was widely neglected – in remarkable contrast to other corollaries of the principle of non-use of force, and most notably the support to non-State actors using force. Express abstract stipulations of a rule specifically tailored to interstate assistance are comparatively rare. The few express articulations of such rules receive only relatively little express reiteration and endorsements.[2] The rags-to-riches provision of Article 3(f) Aggression Definition, which had been included only due to Romania's persistence but now enjoys wide support, is the salient exception. In fact, debates at the UN level suggest that the discourse among States on interstate assistance is underdeveloped, to put it mildly. All this may generate the impression that States do not feel it necessary to establish a clear normative basis, let alone detailing the exact scope of prohibited interstate assistance.

1 BT Drs 19/17790 (11 March 2020), 6.

2 The 1987-Declaration has a little prominent footprint in subsequent international practice. The 1949 Draft Declaration on Rights and Duties of States likewise plays a relatively minor role, although it should not go unnoticed that Article 10 has been repeatedly endorsed on various occasions.

The little express concretization of the regulation seems to reflect a second key feature that the survey of international practice brings to light. The decision on assistance is highly political and goes to the heart of interstate cooperation. In many cases, support to a use of force is as politicized as the resort to force itself. Each decision on whether or not to provide assistance, or whether or not and to what extent to continue relations with another State engaged in a use of force, has its own history. Each decision on whether or not to provide assistance has wide implications in an interdependent community of States. Often, political commitments and allegiances arising from long-standing political alliances and affiliations already preordain the decision on assistance. The decision to provide assistance to a use of force or not may decisively influence the relationship between States, forging new alliances or heralding the termination of old ones. A State's decision not to provide assistance may come with a high political price. Moreover, not only the States resorting to force are interested in and benefit from assistance. The decision on whether to provide assistance or not equips assisting States with not unsubstantial influence. This is widely reflected in the price assisted States are willing to pay for assistance.[3] Last but not least, the high political stakes associated with assistance are mirrored in some powerful States' policies of "leading from behind" or engaging in full-fledged proxy wars, which allow States in most cases to avoid the spotlight and scrutiny of the international community[4] and give them further arguments to disavow (full) responsibility. Assistance can be a powerful tool to reach goals while still purporting to have clean hands.

These are only some features that may contribute to States' apparent preference to leave the regulatory regime on interstate assistance beyond general standards in the vague, and to refrain from creating an unambiguous objective legal regulation that clearly circumscribes the parameters for the permissibility of assistance.

But, irrespective of the advantages and disadvantages of a legal regime stipulated in clear terms,[5] international reluctance to engage with legal

3 Recall e.g. the American economic promises when soliciting the participation of other States in the Iraq war 2003.

4 Obviously, there are exceptions, recall the British role in Stanleyville 1964 or Libya 1986.

5 This is not the place to do justice to the (political) question whether there should be an explicit regulation of the framework governing interstate assistance. The value of codification and expressly stipulated rules and interpretations has been discussed in general terms more comprehensively elsewhere e.g. Shabtai Rosenne, 'Codification

rules must not be misunderstood to mean that interstate assistance is not governed by international law. Viewed in its entirety, international practice suggests a multifaceted framework of rules applying to interstate assistance.

The generation and development of Article 3(f) Aggression Definition, that although only added but for Romania's persistence was remarkably uncontentious, illustrates well States' general approach to interstate assistance. It is little controversial that interstate assistance does not take place in a legal vacuum. Despite a lack of open discourse and rare express stipulation, other abstract declarations defining the principles of international law affirm this conclusion. Several abstract declarations define rules for interstate assistance. And even when interstate assistance is not mentioned specifically, such as most famously by the Friendly Relations Declaration, States are open to applying some rules developed for support to non-State actors, as a matter of principle, to interstate assistance too.

It is true that some of the resolutions left only a relatively light footprint in international practice. But this cannot challenge the general regulation of interstate assistance. In fact, the lack of reiteration does not reflect States' doubts as to the rules applicable to interstate assistance, but can be traced back to the resolutions as a whole. For example, the 1987 declaration was a project highly controversial from the outset that resulted in a compromise that left all participating States discontent. Likewise, the 1949 ILC Draft Declaration was not outright rejected. It was rather felt that the time for such a codification was not yet ripe.

States' treaty practice and the provision of assistance in concrete conflict practice corroborate this conclusion. Despite the politically high stakes, over time States do not claim an unlimited right to provide assistance. They are careful to qualify their contribution, notably irrespective of the specific type of assistance, in various manners. There is a bouquet of possible arguments – ranging from the denial of knowledge of the assisted act, to diminishing the role of their assistance, or the claim that the assisted act is lawful, to an autonomous justification.

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Revisited after 50 Years', 2(1) *MaxPlanckUNYB* (1998). Should debate on the wisdom of codification arise in this context, it might be worth drawing on arguments exchanged during the process of defining aggression. In any event, it should be considered that lacking transparency and a missing open discourse may give the impression of arbitrary practice that again may be understood as contestation of the general principle of non-use of force. Leaving the rules unuttered, underdeveloped and in the vague also may have the consequence that there is no common language for States to address interstate assistance.

This does not mean that there is no practice that may suggest the opposite. But such practice has widely either been in denial of the contribution or attempted to be kept non-public or secret – and accordingly does not embrace a *legal* claim that such assistance is permitted under international law. Moreover, the fact that charges of complicity were and are often widely used as a political tool rather than couched in legal terms does not exclude that there may also be a legal regulation.[6]

Despite its importance, practice relating to interstate assistance is not prominent. This should not come as a surprise. The State resorting to force always stands at the center of attention – of the international community in debates in international fora or of scholarly assessments. Rightly so. But the present survey of State practice serves as reminder that behind the prominent practice relating to the use of force, there is a remarkably nuanced and widespread practice relating to interstate assistance. The rules governing assistance are grounded in 'unsung' but well-established international practice.

Before sketching the legal framework, one caveat is in order. Practice relating to interstate assistance is too rich to allow the present survey of practice to claim universality or comprehensiveness for each facet of the legal regulation. Given the fact that any remote form of State cooperation, in theory, may qualify as assistance, this would require to assess virtually any State's behavior towards the State using force in any international conflict. In fact, the field is by no means mined out. This book invites further research, in particular for the application of the regulatory regime to specific types of assistance.

Nonetheless, it is submitted that the present survey allows for an adequate and fair picture of international practice. It uncovers common ground among the parties to the UN Charter as to the interpretation of the provisions of the UN Charter applicable to interstate assistance. Likewise, a parallel customary rule of international law has developed. This can be said in particular for the general conception of the rules, which may be claimed to represent the *lex lata*. The survey draws upon examples from each time period. Obviously, for the interest in States' current understanding of the *lex lata* and due to the greater interpretative weight, the last twenty years of practice are featured prominently. Likewise, the survey is based on a reasonable representation of conflicts as well as of States throughout the conflicts. In particular, regional States providing territorial assistance that

6 Recall e.g. the many accusations between the United States and USSR in Cold war.

have been widely ignored in previous assessments were included. Nonetheless, it is acknowledged that the analysis has an Anglo-American European-(German) spin, with in particular South American and African States being underrepresented. While this is openly admitted, this may be traced not only to language barriers, capacity limitations, and accessibility of practice, which as a matter of fact is better documented and reported for specific regions than for others. But it also reflects a policy of louder legal advocacy pursued by certain States, to which other States – for various reasons – do not always and only partially respond. It should be noted, however, that in particular statements by associations of States, such as the Group of 77, the Non-Aligned Movement, ASEAN, or the OIC, carried great weight in the assessment.

International practice suggests that the regulation of interstate assistance to another State's use of force under the UN Charter primarily rests on four normative pillars.

International practice affirms that the Security Council uses it's authorization under the UN Charter to impose legally binding obligations upon States to also regulate interstate assistance. As such, interstate assistance is not generally prohibited, but only through secondary obligations specific to a special situation. Article 2(5) UNC complements this assistance regime, yet as international practice shows, in a limited manner, and only indirectly with respect to the use of force.

Besides, practice indicates that interstate assistance is subject to regulation independent from UN action. Two norms stand at the center of the regulation of interstate assistance: First, the prohibition of indirect use of force as part of the prohibition to use force; second, the unwritten but implicit prohibition of participation. Other rules that in theory may also capture assistance to a use of force, such as the rule of non-intervention, are hardly applied in the interstate context. The same is true for the prohibition of a threat of force.

This legal regime, the rules independent (I) and dependent (II) on UN action, will be fleshed out in the following.

## I. Regulation of interstate assistance without UN action – duality in practice

International practice as a whole implies that two norms regulate interstate assistance when the UN has not taken action. First, the prohibition to use force is interpreted broadly to cover also some forms of interstate State assistance as an "indirect use of force". In this case, the assisting State may thus be described and treated as perpetrator of its own use of force. Second, practice recognizes a general prohibition of participation. The assisting State here qualifies as participant in another State's use of force.[7] Assistance that is not covered under that prohibition is only subject to regulation if the UN takes action.[8]

With respect to the two-pronged normative regulation, the surveyed subsequent practice demonstrates 'concordant, common, and consistent' agreement among UN members.

Both rules derive from the principle of non-use of force, laid down in Article 2(4) UNC. Both rules are hence obligations under the UN Charter, which benefit from Article 103 UNC in case of a conflict of obligations. Given the wide and universal acceptance, both rules have also emerged in parallel as rules of customary international law. Whether or not both rules are peremptory requires an independent assessment.[9]

Still, it is not without reason that States distinguish between the rules. Ultimately, the different content and scope of the rules reflect different consequences. Before detailing the conceptualization of both norms (B), the criteria which States use in practice to describe and ultimately qualify assistance to a use of force shall be identified in the abstract (A).

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7 Recall that 'participation' is used here not as the generic term that captures different forms of involvement. 'Participation' describes here a specific form of involvement in another State's act. The terminology is based on the one used in the discussion on the 1987 Declaration, the only general universal recognition of the rule. The survey of international practice indicates that there is no universal and consistent terminology to describe interstate assistance. Terms include i.a. 'assistance', 'support', 'participation', 'complicity', 'aid and assistance', 'perpetration', 'indirect use of force', and 'use of indirect force'.

8 See on this below under II.

9 There are good arguments for accepting that the prohibition to (indirectly) use force constitutes a norm of *ius cogens*. Cf Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, A/CN.4/727 (31 January 2019), 27-30 para 62-68.

### A. The distinguishing criteria in the abstract: proximity vs remoteness

Both norms apply to assistance to a *use of force*. Unlike, for example, the rule of non-intervention, which may be distinguished also through the assisted act ('coercion' rather than 'use of force'), the qualification of the assisted use of force does not matter. Even if assistance is provided to an armed attack or an act of aggression, both norms apply equally.

The key distinguishing criterion is hence based on the relationship between the act of assistance and the use of force. Ultimately, it is a question of degree. The ILC member Nikolai Ushakov's observation during the Commission's 1978 session in view of a general rule of complicity puts it well:

> "[P]articipation must be active and direct. It must not be too direct, however, for the participant then becomes a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity."[10]

Similarly, the act of assistance qualifies as "indirect use of force" leading to a perpetration of the assisted use of force if the relationship between the assisting and assisted act is *proximate*. In case the relationship can be described as *remote*, 'assistance' is not prohibited, unless the Security Council takes action. If the relationship is *neither proximate nor remote*, assistance is captured by the rule of non-participation.

International practice suggests that various factors determine the proximity or remoteness. Those factors need to be assessed and applied on a case-by-case basis. Given the wide diversity and uniqueness of the pertinent relationships, it is hardly possible to make conclusive and generalized statements regarding whether a specific form of assistance falls under a particular norm. For this reason, State practice relating to interstate assistance may appear arbitrary at first sight. Yet, the varying compositions of the factors justify different treatments while still complying with a general framework.

This approach in international practice also means that the determination of proximity or remoteness of assistance is a holistic assessment of various factors. In particular, focusing on only one factor, such as the type of assistance, is not adequate. The determination is a matter of degree, not

10 ILCYB 1978 vol I, 1519th meeting (18 July 1978) 239, para 11.

merely the form of assistance.[11] Absolute statements about certain types of assistance to qualify under a specific norm do not accord with international practice.

At the same time, this approach does not exclude the possibility that there may be presumptions on how to qualify assistance. The factors mutually interact and influence each other. This allows for specific 'rules' qualifying a certain type of assistance under a specific norm. But it also means that such rules serve as no more than indicators, that under different circumstances also allow for different qualifications.

At first glance, this conclusion might generate opposition.[12] It appears to fundamentally contradict some of the most famous, widely cited, and accepted international practice. For example, the ICJ's renowned Nicaragua-formula or Article 3(f) Aggression Definition seem to make such absolute qualifications. But this would misconceive these practices, by taking them out of context, and artificially divide assisting contributions. For example, it is important to remember that the Nicaragua-formula was developed and applied in an individual decision, specifically tailored to the facts of the case. The ICJ's substantiation corroborates this conclusion. The ICJ based its conclusions on the Friendly Relations Declaration and the Aggression Definition. Both were however not meant as absolute rules but rather as illustrative examples for the specific application of general rules.[13]

As such, unlike widely understood, these instances do not stipulate a rigid formula. They are the result of weighing several relevant factors that lead to specific conclusions in[14] or for[15] a particular case. This does not mean that the formula may not adequately apply to most cases. But under different circumstances, allowing the use of one's territory, providing arms, logistical support, or funds, may lead to different legal qualifications.

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11 Similarly for other areas Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', 27(3) *EJIL* (2016) 824.

12 Just see for example: Michael N Schmitt, Andru E Wall, 'The International Law of Unconventional Statecraft', 5(2) *HarvNatSecJ* (2014); Christian Henderson, *The Use of Force and International Law* (2018), 60-62; Christian Henderson, 'The Provision of Arms and Non-Lethal Assistance to Governmental and Opposition Forces', 36(2) *UNSWLJ* (2013); Jonathan Howard, 'Sharing Intelligence with Foreign Partners for Lawful, Lethal Purposes', 226(1) *MilLRev* (2018) who focus on specific types of assistance when qualifying assistance.

13 Cf e.g. Article 2 Aggression Definition.

14 *Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [*Nicaragua*].

15 Article 3(f) Aggression Definition.

For the entire assessment, it is crucial to carefully define the relevant act of assistance through the general rules of attribution.[16] The relevant relationship can only be defined on the basis of the pertinent conduct being attributable to the assisting State. This is relevant in particular if the direct contribution to the use of force comes from a third actor.[17]

After turning first to abstract factors according to which international practice distinguishes its assessment of assistance (1), the analysis will proceed to show that States do not necessarily align the evaluation of the factors with related, but distinct concepts concerning assistance (2).

#### 1) Distinguishing factors

International practice takes into account various factors to describe the relationship between the act of assistance and the assisted use of force, and thus normatively evaluate assistance.

After describing abstract features according to which States distinguish different scenarios of interstate assistance (a), key factors in application of those criteria will be identified (b).

##### a) Assistance – how?

The key factor in determining how to qualify assistance relates to the role of the assisting State. What form of assistance does the assisting State provide (1, 2), and what is the assisting State's subjective attitude (3)?[18] It is crucial to note the lines between the criteria are not always clear-cut. They substantially influence each other. As such, the elements must not be viewed in isolation, but need to be seen holistically.

16 See also Chapter 1 II.A.2.

17 E.g., this is typically the case for arms sales that are licensed, but not conducted by States.

18 Similarly, Berenice Boutin, 'Responsibility in Connection with the Conduct of Military Partners', 56(1) *MLLWR* (2017-2018) 77-78 who identifies knowledge, capacity, proximity and diligence as key criteria.

(1) Assistance – what is provided? The objective criteria

First and foremost, the type and content of assistance are decisive. It will predetermine various other factors. At the heart of differentiation between different forms is their (potential) contributory effect. Several aspects are relevant: How, and how closely and immediately, might assistance contribute to the assisted use of force? How can it be utilized? Where is the assisted act's place in the materialization of the assisted use of force? What is the exact function of the assistance in the military chain? Is assistance provided in the context of the use of force, in preparation for the use of force, or in immediate direction to combat operations?

Some forms of assistance, if used, are by their nature closely connected to a use of force (e.g. refueling, providing targeting information, supplying offensive weapons). For other forms, the connection to the use of force is not as strong. It ultimately depends on the possible use. For example, one may need to distinguish between the permission to use an assisting State's air space to position troops in a combat area, and the permission to use it as a launch base for air strikes. Dual use goods fall into the same category. Other forms of assistance, for example funds, are generally neutral toward a use of force by their nature.

Moreover, the assisting State may provide assistance to assistance, rather than to a use of force.

Another important indicator and factor is the temporal connection to the use of force. When is the assistance provided – before, during, or after (i.e. in the termination phase of) the lethal operation? Determinative is also by what means the assisting State provides the assistance. Do States provide assistance through military means and their own troops, or are they contributing through civilian means?

Second, the nature of the contributory act factors into the equation. If the assisting State's contribution is a positive action it is typically more proximate than an omission.

Third, the specificity of assistance is relevant. As such, it is taken into account whether the assisting States decides to actively participate in and specifically contributes to a use of force, or whether it provides assistance more generally in continuation or as part of normal interstate cooperation.

Fourth, the quantitative extent and intensity of the assistance, in terms of scope and duration, matter. It may make a difference if it is marginal, single, one-time, or a continuous and comprehensive assistance operation. In this respect it is interesting to note that the provision of assistance is not

assessed act by act but is instead evaluated in terms of its contribution to a use of force 'as a whole'.

Fifth, the location where assistance is provided is significant. Assistance that is provided within the combat theater is usually more proximate than assistance that is provided elsewhere.

(2) The implication of assistance in the use of force

The implication of the act of assistance in the use of force is a key factor to consider. The extent of the contribution of the act of assistance needs to be assessed.

On that note, it may be asked whether, and more importantly to what extent the assistance *is causal* for the assisted use of force.[19] Is the assistance ultimately used by the assisted State, or does the assistance merely contribute by creating an option or increasing the risk?[20] Does the assistance not only *facilitate* but *enable* the assisted use of force? How actively does the assistance contribute to the military operation against the targeted State? Is the impact of assistance focused on general, albeit possibly war-sustaining activities, or does the assistance directly contribute to the assisted use of force? Would the core of the assisted operation be altered if the assistance were not provided? Is the specific State's contribution irreplaceable, or is it more general in nature?

The role the assisted State ascribes to assistance may be of indicative value in this respect. Assistance may warrant a different assessment if it is perceived as indispensable by the assisted State, e.g. because the assisting State is providing an essential capacity.

(3) The subjective attitude of the assisting State

Another significant factor in the qualification of assistance is the subjective attitude of the assisting State. In international practice, distinctions are drawn whether a State has knowledge of, first, the assisted act and, second,

19 Cf also John Gardner, 'Complicity and Causality', 1(2) *Criminal Law and Philosophy* (2007) 128 "the difference between principals and accomplices is a causal difference, i.e. a difference between two types of causal contributions, not a difference between a causal and a non-causal contribution".

20 This again is closely related to precisely defining what exactly constitutes the act of 'assistance'.

its contribution to that act, and if so, what degree of knowledge (ranging from constructive knowledge, to positive knowledge, to certainty) the State has. Moreover, the assisting State's intentions may be relevant. The legal qualification may depend on whether the assistance is provided specifically with the purpose to contribute and facilitate the pertinent use of force, or whether it was provided for other reasons but has been used by the assisted State in that manner.

Moreover, the assisting State's diligence when providing assistance may factor into the equation.

Last but not least, it may be decisive how the assisting State identifies with the assisted use of force. Does the State consider itself part of a coalition, viewing the assisted use of force as its own, or does the State take a more distant position towards the operation, treating the assisted use of force clearly as another State's action? Does the assisting State consider itself part of the conflict? Does the assisting State benefit from the assisted act itself, or is its benefit confined to the (political or economic) gains that providing assistance brings to the relationship with the assisted State?

b) Key features in application of the distinguishing criteria

Ultimately, the legal qualification of assistance is a matter of balancing these factors.

In assessing the relationship between the act of assistance and the assisted use of force, and thereby assembling the distinguishing criteria to form a normative evaluation of the assisting contribution, international practice allows for a pre-assessment as it attaches great weight to the recipient actor (1) and the modalities of assistance (2).

(1) Assistance – to whom? The assisted actor

The recipient of assistance may be relevant in two ways: the nature of the assisted actor (a) and the specific position of the recipient of assistance within the organization of the assisted entity (b).

(a) Nature of the assisted actor: State or non-State

Whenever States spell out rules on assistance in detail,[21] international practice expressly distinguishes whether the recipient of assistance is a State or a non-State actor.[22] Different forms of assistance are qualified differently depending on whom they are provided to. This suggests that the rules on non-State actors, while structurally similar and as a matter of principle applicable to interstate assistance, too, cannot be applied one-to-one to interstate assistance.

At first sight, one might question why the nature of the actor using force should make a difference. With new technologies, non-State actors may be as powerful and effective in using force as States. Some non-State actors and armed groups may have a state-like structure and organization when resorting to force. The so-called 'Islamic State', which controlled swathes of territory not only in Syria and Iraq, has recently illustrated this with appalling brutality.[23]

Nonetheless, following the general trend in State practice to deny such actors the seal of statehood – States also draw a line concerning under what circumstances an assisting State may be viewed as *perpetrator* of the assisted use of force. In doing so, States appear to take into account decisive differences between non-State actors and States.

Statehood is widely associated with features that non-State actors are generally not perceived to possess.[24]

First, armed non-State actors have fewer (internal and external) structural capacities. This has several implications. These actors are less likely to conduct a military operation self-sufficiently. It is more difficult for them to possess and acquire the necessary know-how and armaments

21 This observation is not invalidated by the fact that – in particular in treaty practice – States widely treat assistance to non-State actors and States alike. This has implications however only on the application of the relevant provision. It suggests that the concept may apply to both interstate assistance and assistance to non-State actors. Whenever the exact conditions are spelled out and whenever States apply the specific rules to both cases, States draw a line. Illustrative in this respect *i.a.* Aggression Definition, African treaty practice.

22 Recall most notably Article 3(f) and (g) Aggression Definition, AU Non-Aggression and Common Defense Pact 2005.

23 See also the concept of *de facto* regimes Jochen Abr Frowein, *Das de facto-Regime im Völkerrecht: eine Untersuchung zur Rechtsstellung" nichtankerkannter Staaten" und ähnlicher Gebilde* (1968).

24 See also Nußberger, Fischer, *Justifying Self-defense against Assisting States* (2019).

to resort to force, making them more dependent on outside assistance. This, in turn, is reflected in the assisted non-State actors' independence and autonomy, and justifies the presumption of more independence and self-control for State actors. Through the provision of assistance to non-State actors, an assisting State may have more influence than on a State. Generally, assistance to other States has more a (possibly necessary) complementary and facilitating function, whereas if provided to non-State actors, it is necessary and enabling.

Second, armed non-State actors are typically unidimensional. As a group, they primarily pursue one purpose: the use of force against a specific actor. As such, the connection between the assistance and the use of force, as well as the assisting State's intentions are as a general rule well established. In contrast, the relation between an act of assistance and another State's use of force cannot necessarily be established and predetermined, but requires specific proof. A State may (lawfully) pursue many avenues.

Third, on that note such armed non-State actors may resort to a use of force more easily than States. Also for this reason, even minor assistance to non-State actors may have a greater, more incentivizing effect and profound impact. Moreover, a use of force by armed non-State actors on their own is typically less sustainable and less severe, and for this reason, bears less risk of international escalation than an inter-State violence. At the same time, as non-State actors may usually operate covertly from within the targeted State, they may effectively weaken the very essence of the targeted State, and hence may be more dangerous.[25]

Fourth, the difference is also reproduced on the normative level. Non-State actors cannot violate the rules of *ius contra bellum*. This not only excludes derivative responsibility of the assisting State. It also means that under international law there will be no actor that the targeted State may hold responsible for the use of force. In contrast, in case a State resorts to force, there is already and always someone who can be held responsible, with all its consequences.

Closely connected to this consideration, fifth, non-State actors are necessarily situated within other States, and unlike States, do not have their own territory under their sovereignty.[26] In case of a forcible response to a

25 See also Stephen M Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law', 136 *RdC* (1972) 456.

26 Even when the non-State actor control territory, a response by force will – legally – affect a third State.

non-State actor engaged in cross-border violence, the territorial State will almost always be necessarily implicated.[27] In contrast, if a State resorts to violence, the targeted State will have at least the theoretical possibility to direct the defense against this State's territory.[28] This again may impact the understanding of 'assistance' and justify different treatment.

Last but not least, it should not be forgotten that cooperation between States and non-State actors is less frequent and less beneficial than cooperation between States.[29] As such, strict rules on non-assistance factually have different impacts. In the interstate context, such rules impede in principle legal and endorsed cooperation among States, which can have legitimate applications. On the other hand, military relevant assistance to non-State actors has less impact on the international community's interactions.

This is also related to the fact that the relationship between States and non-State actors lacks reciprocity. Non-State actors usually offer nothing more than the use of force against the targeted State; the assistance is hence usually only limitedly reciprocal. It is not only clear for what the assistance is used, but it may serve no other purpose. In contrast, assistance to States is multidimensional. It may be provided as a *quid pro quo*, or for reasons other than the use of force. Hence, the relationship in interstate assistance is not necessarily as close as it is with non-State actors.

(b) The role of the recipient within the assisted actor?

The specific position of the recipient of assistance within the assisted State may be a further indicative factor for the nature and qualification of assistance. For example, whether the assistance is directed toward a civil branch of the State rather than the State's military, is a factor in assessing the proximity of assistance. In a similar manner, the location of assistance (at the site of fighting or elsewhere) may be taken into account.[30]

27 The only exception is if the non-State actor is operating from international areas, such as high seas.

28 In case the attacking State operates from the territory of another State, it remains to be seen however if a use of force against the attacking State's territory would not be ineffective and/or unproportionate.

29 Recall for such an argument in international practice e.g. Kenya's intervention about the unreasonableness to cover routine overflight permissions by Article 3(f) Aggression Definition.

30 Recall for example the US argument in the Russia-Georgia war 2008.

(2) Assistance – a quid pro quo?

Whether or not the assistance is provided as a *quid pro quo*, may also be factored in. To the extent that the assisting State provides assistance as part of its general trade relations, assistance is typically more remote than if it provides assistance to pursue its own strategic goals without direct compensation. Obviously, in considering this factor, it must be taken into account that in international relations States' conduct is almost always motivated by reciprocity, albeit to varying degrees.

2) Relevance of other legal concepts?

'Assistance' is defined and appraised in various other legal concepts and contexts, too. Frequently, scholars propose to transfer and apply the definitions of these other concepts to the *ius contra bellum*.

In the context of the *ius contra bellum*, the most prominent rules are those prohibiting 'assistance' to non-State actors.[31] Likewise, discussions occur regarding the extent to which assistance short of force to a State engaged in a civil war is prohibited.[32] In other areas of international law, assistance is prohibited.[33] International humanitarian law likewise addresses the role of assistance. There is an ongoing debate about when an assisting State becomes a party to an armed conflict.[34] There are rules determining when conduct qualifies as direct participation in hostilities.[35] It is

31 On those rules in detail see Claus Kreß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995); Schmitt, Wall, *HarvNatSecJ* (2014). For an (uncritical) application of these principles to interstate assistance e.g. Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016) 195-196; Oona A Hathaway and others, 'Yemen: Is the US Breaking the Law?', 10(1) *HarvNatSecJ* (2019) 61-62; Robert Chesney, 'U.S. Support for the Saudi Air Campaign in Yemen: Legal Issues', *Lawfare* (15 April 2015).

32 E.g. Luca Ferro, 'Western Gunrunners, (Middle-) Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?', 24(3) *JCSL* (2019) 511-513.

33 For an overview see Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011) 200-210; Lanovoy, *Complicity*, 186-193.

34 Hathaway and others, *HarvNatSecJ* (2019) 58; Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict', 97(900) *IRRC* (2015).

35 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 16. Proposing to apply these prin-

debated to what extent Common Article 1, which imposes an obligation to ensure respect for the Conventions, prohibits assistance.[36] The law of neutrality regulates assistance, too.[37] International criminal law has developed modes of liability and participation extensively.[38] Domestic law establishes principles governing assistance in both criminal and civil law contexts.[39] Moreover, there are closely related yet distinct concepts, such as the rule of non-recognition,[40] the sanctioning mechanisms by the Security Council,[41] or positive duties to provide assistance.[42] Last but not least, there are

ciples in the *ius contra bellum* see Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression. A Commentary* (2017), 447.

36 Verity Robson, 'The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions', 25(1) *JCSL* (2020); Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', 13(1) *CJIL* (2014) 28-31; Ferro, *JCSL* (2019) 513 et seq; Helmut Philipp Aust, 'Complicity in Violations of International Humanitarian Law' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015).

37 For a comparison between the neutrality and *ius contra bellum* rules with respect to non-State actors: Luca Ferro, Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties', 17(1) *CJIL* (2018). In fact, the law of neutrality is often applied in addition, yet autonomous from the rules governing the *ius contra bellum*. But they are two separate regimes. See e.g. in the Iraq 2003 war: Ireland, Germany and Italy. See also Michael Bothe, 'Der Irak-Krieg und das völkerrechtliche Gewaltverbot', 41(3) *AVR* (2003) 267-268.

38 Article 25 ICC-Statute; Alexander KA Greenawalt, 'Foreign Assistance Complicity', 54(3) *ColumJTransnatlL* (2015-2016); Miles Jackson, *Complicity in International Law* (2015) Chapters 3-5; Marina Aksenova, *Complicity in International Criminal Law* (2016).

39 For an argument that there is a general principle of international law regulating instigation Miles Jackson, 'State Instigation in International Law: A General Principle Transposed', 30(2) *EJIL* (2019).

40 Aust, *Complicity*, 326 et seq.

41 Frequently, sanctions by the Security Council are used as an argument to establish a general rule of non-assistance. As seen, sanctions regulate assistance, too. But they cannot but inform the understanding of States. In particular, it does not allow a conclusive conclusion on the scope of other rules of assistance, unless it can be said with certainty that the Security Council meant to (also) endorse and reiterate an already existing legal obligation, rather than to impose a new obligation. That the Security Council may do so is established practice.

42 E.g. duties to provide assistance to peace keeping. The content of such assistance duties does not conclusively define what assistance is prohibited. Yet, it may inform the definition of 'assistance.'

general rules on assistance in the Articles on State Responsibility and the Articles on the Responsibility of International Organizations.[43]

In international practice, States and other international actors referring to such concepts remain the rare exception. When States do so, notably, it generally serves to support the existence of a general rule rather than a specific application.[44] Given the different functions and purposes and contexts to which they apply, such concepts may not – without further thought – be applied to interstate assistance in establishing responsibility within the *ius contra bellum*. This does not mean that these concepts cannot apply similar standards, or more importantly, nonetheless be helpful and used as a source of inspiration.[45] Indeed, there may be considerable overlap. Yet, international practice is a reminder that such intra-international law analogies should be drawn judiciously, and only if the rules do not warrant any substantial distinctions.[46] Systemic integration and harmonization do

43 On those, see Chapter 6.I.

44 Recall for example for a reference to the law of neutrality: A/AC.91/4, 4 (Burundi); for assistance to non-State actors, see above, where States do not draw a line with respect to the application of the same rules, but distinguish in the application of the rules; for references to rules of complicity in domestic law: Budapest Articles; ILCYB 1949, SR.15, 119 para 78, "ancient principle" (Hudson); A/AC.134/SR.59 (1970), 67 (USA). The ILC was likewise reluctant to define aid and assistance in line with national complicity rules. This was the main reason why it steered clear of the terminology of 'complicity' (although it was not consistent, as it sometimes referred to complicity in its commentaries). On this see 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) 138; James Crawford, *State Responsibility: The General Part* (2013); Bernhard Graefrath, 'Complicity in the Law of International Responsibility', 29(2) *RBDI* (1996) 371 who all warn against drawing parallels to domestic law. Interesting is also Jackson, *EJIL* (2019) 412-413 who uses the domestic law to prove the existence of the rule, but does not justify the contours of the rule with domestic rules.

45 See also the principle of systematic interpretation as laid down in Article 31 III (c) VCLT. See also *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*], 217 para 419, 420 where the ICJ referred to Article 16 ARS in interpret "complicity" in the sense of Article III (e) Genocide Convention, claiming that although "not directly relevant to the present case it nevertheless merits consideration." Similarly John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57(1) *BYIL* (1987) 117.

46 Cf *Bosnia Genocide,* 217 para 420. Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations. An Appraisal of the 'Copy-Paste Approach'', 9(1) *IntlOrgLRev* (2012).

not absolve one from first determining the specific primary rule for the particular context.

### B. Which interstate assistance is prohibited how?

In 1987, John Quigley remarked in relation to programs of economic or military assistance that "while the contours and scope of the complicity liability of a donor State have yet to be formulated with precision in State practice, certain standards have emerged."[47] The present survey suggests that some 30 years later, international practice has not made much progress. The exact contours and scope of the regulation of assistance still await a structured, in-depth discussion and a formal clarification that allows for a comprehensive agreement among States. In abstract discussions on the principle of the use of force, interstate assistance has not featured prominently. While this suffices to identify States' agreement with respect to the basic dual regulation of interstate assistance, the exact scope remains underdeveloped. The general debates in the context of the development of Article 16 ARS may have contributed to clarity. Yet, first, these debates concerned a *general* rule of complicity. Second, since its formal acknowledgment in 2001, Article 16 ARS has played a remarkably limited role in *States'* (not scholars') public considerations within international conflict practice relating to the use of force. Clarification that allows for an unambiguous conclusion of an 'agreement' among States can only stem from a broad interstate discourse through the lens of the specificities of assistance to use of force. Marking the 75th anniversary of the UN Charter, it is hard to escape the impression that States' ambiguity and reluctance to precisely define the content of the rules are not undeliberate.

In the meantime, this should not suggest that the two-pronged regulation of interstate assistance, i.e., the prohibition of indirect use of force and the prohibition of participation, is an empty shell without normative value. Conflict practice shows that it is applied in practice. This practice also allows for further refinement of the scope; in application of the previously discussed distinguishing criteria, general standards may be deduced. Although, given the great diversity of what may be considered assistance, and the still minimal concerted efforts of States to define the rules of interstate assistance, it must also to be concluded that international practice defines the content of these norms with some contextualized flexibility.

47 Quigley, *BYIL* (1987) 108.

This is in particular true concerning the relationship between the act of assistance and the assisted use of force. International practice does not allow for the conclusion of an agreement beyond general standards. The structure and consequences of the classification, however, emerge rather clearly.

#### 1) Assistance under the prohibition to use of force

The prohibition to use force plays a key role in regulating interstate assistance.

##### a) Direct use of (own) force

International practice provides a clear picture of how the responsibility of the assisting State is not established. Providing assistance does not violate the prohibition to use force directly. Assistance is not described as 'force'. The assisting State is hence not using its own 'force'.

Through the provision of assistance, the assisted 'use of force' is also not *attributed* to the assisting State.[48] Assistance does not have the effect if considering the assisted use of force, as a legal fiction, to be the own *conduct* of the assisting State, although this might not be excluded under general rules of international law.[49]

This observation remains in particular also true when the assisting State is part of an international coalition using force. While assistance and combat operations are often considered together and described as "joint conduct", for the *establishment* of responsibility, States draw a strict line between different contributions and uses of force. It is further true for cases where an assisting State is essentially part of the military operation, e.g., by undertaking essential tasks that are *conditio sine qua non* for the use of force, in a division of labor.

In international practice, the assisted use of force committed by the assisted State is consistently treated as a separate act. Irrespective how close the relationship may be, the assisted act is always considered an independent *assisted* act, not the assisting State's own act. International

48 For the same conceptualization see Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18(4) *EJIL* (2007) 652.

49 On this Chapter 6.I.

practice thereby remains committed to the legal distinction between combat activities and preparatory acts. The responsibility is hence grounded in the assisting State's conduct, not in the attribution of the assisted act. Accordingly, the assisting State does not bear responsibility for a direct use of force.

b) Indirect use of force

But this does not mean that by providing assistance, a State may not violate the prohibition to use force. International practice confirms that the *use* of force is not limited to the use of one's *own force*. The conduct meeting the threshold of force does not necessarily need to be attributable to the State considered to be using that force. It does not necessarily have to be the *own conduct* of the State considered to use force. Instead, as a matter of principle the prohibition to use force also extends to an *indirect use* of force. Through providing assistance, the assisting State may *use* another State's use of force.

This broadening interpretation to cover certain forms of assistance, too, was primarily driven by the motivation to prevent the prohibition on directly using force from being circumvented through the involvement of a third actor. The interpretation mainly responded to a common trend of States substantially supporting and encouraging non-State actors inside and outside the targeted State, increasingly substituting classical use of force. This background set the tone for the scope. States sought to cover only cases in which the assisting State may be reasonably equated with a perpetrator using its own force.

International practice suggests that this interpretation also applies to the involvement of an assisting State in another *State's* use of force (1). While international practice clearly circumscribes the structure of the prohibition of indirect use of force (2), States take a flexible approach regarding the level of involvement by the assisting State that is required for a *use* of another State's use of force. As a rule, a *proximate* relationship between the act of assistance and the assisted use of force is required (3). On that basis, the provision of assistance is an independently wrongful conduct in its own right involving another State. The other State's use of force remains a distinct act, not attributed to the assisting State (4).

(1) Assisted use of force by a State

That a State may use force also indirectly is – as a matter of principle – well accepted in international practice. The fact that this interpretation has been developed and is applied in general abstract statements of the law primarily in the context of support to non-State actors, might be considered to shed some doubt whether the rule may also apply to case where the use of force is committed by another State. Not least, as seen above, there are substantial differences between States and non-State actors.

But not only the drafting history of the abstract declarations that recognize this interpretation suggests that States did not seek to exclude the application to States. States in their treaty practice[50] as well as in their behavior in concrete conflicts[51] confirm that the most famous application to the interstate context, Article 3(f) Aggression Definition, was no outlier.

(2) The assisted use of force

International practice follows along the lines of the general conceptualization of the prohibition to use force.

First, international practice suggests that the assisted use of force must actually take place.[52] The violation of the rule only occurs at the moment when the assisted use of force is actually performed. The qualification of assistance as a breach of the prohibition to use force is hence dependent on the action of the assisted actor. Assistance *per se* is not prohibited under the

50 Recall in particular the 2005 African Union Non-Aggression and Common Defense Pact or the Treaty of Brotherhood and Alliance between the Kingdom of Iraq and the Hashemite Kingdom of Transjordan.

51 States widely treat proximate assistance similar to a use of force. *Inter alia*, they send letters to the UN Security Council. They justify proximate assistance to in their view lawful use of force (recall UK and Germany in Fighting ISIS in Syria). They rely on a Security Council authorization rather than the Council's call for assistance. They invoke a State's invitation itself in addition to arguing that the assisted State is complying with international law. They protest against proximate assistance not only as 'complicity' but as an unlawful use of force. This would not be *necessary* for the conduct as such (e.g. refueling, gathering and sharing intelligence).

52 For a similar conclusion based on international practice Samuel G Kahn, 'Private Armed Groups and World Order', 1 *NYIL* (1970) 40-41.

prohibition to use force.[53] This requirement does not mean that the assisted actor must in fact make use of the assistance. This relates to a distinct question on the necessary nexus between the assisted use of force and the act of assistance that will be addressed below.

Second, the assisted use of force must meet, as a matter of *fact*, the threshold of the prohibition of a use or threat of force. The assisted conduct has to entail the defining elements of "force".[54] In this respect, it deserves specific mention that States also provide an independent justification for (proximate) assistance to use of force that has been conducted upon invitation.[55] Some considered such case to fall *qua definitionem* already outside the scope of the prohibited use of force rather than to be an external justification.[56] At least in the context of an indirect use of force, States hence seem to either follow the latter qualification that consensual use of force qualifies as *prima facie* wrongful use of force that is justified through consent. Or, in any event, it implies that structurally the assisted use of force is a question of fact, not of law.

53 This would distinguish the prohibition to use force from Article 6(3) ATT that, if it applied to use of force situations, prohibited already the "transfer", and from the Soering-scenario, see Chapter 1, II.B.

54 For a discussion of the meaning of 'force' under the prohibition to use force: Tom Ruys, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Uses of Force Excluded from UN Charter Article 2(4)?', 108(2) *AJIL* (2014); Olivier Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (2010). Note that this also embraces assistance to an indirect use of force by the assisted State (cf DRC and Sudan in *Armed Activities* case).

55 Recall e.g. Stanleyville 1964, Yemen 2015.

56 See for a discussion Federica I Paddeu, 'Military assistance on request and general reasons against force: consent as a defence to the prohibition of force', 7(2) *JUFIL* (2020); Jörg Kammerhofer, 'The Armed Activities Case and Non-State Actors in Self-Defence Law', 20(1) *LJIL* (2007) 93-94; Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force', 26(4) *EJIL* (2015) 980-981. On the ICJ see Claus Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2016) 577. *Armed Activities on the Territory of the Congo* (DRC v Uganda), Judgment, ICJ Rep 2005, 168, 223-224 para 148-149. Suggesting that a similar reading may also apply for self-defense: ARS Commentary, Article 21, 74, para 1 ("not even potentially"). For a recent account: Adil Ahmad Haque, 'The United Nations Charter at 75: Between Force and Self-Defense - Part One', *Just Security* (24 June 2020). See also discussions in the realm of the *Oil Platforms* Judgment, e.g. Jörg Kammerhofer, 'Oil's Well that Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case', 17(4) *LJIL* (2004) 700-701.

Third, for an indirect use of force it is not decisive whether the assisted use of force itself is wrongful. This follows already from the parallel emergence of the rule for non-State actors and States. For the former, this has been a necessary conceptualization, as non-State actors are not considered capable of violating the rules of the *ius contra bellum*. The abstract declarations of law affirm this conceptualization is not modified for interstate assistance.[57] States in concrete application of the rule in conflicts also systematically acknowledge this fact. It is no exception but in fact the general rule that States justify specific forms of assistance despite their claim that the assisted use of force likewise is in compliance with international law.[58]

### (3) The relationship between the act of assistance and the assisted use of force

By no means every act of assistance is considered an 'indirect use of force'. States impose a high standard. The relationship between the act(s) of assistance and the assisted use of force need not amount to 'control',[59] but must be sufficiently *proximate*. States define proximity based on the forementioned criteria. There is no clear-cut rule that allows for an absolute determination of when assistance qualifies as indirect use of force. The criteria are applied flexibly on a sliding scale. Yet, international practice allows for some general observations.

International practice indicates that the application of the interpretation is not limited to the scenarios described by Article 3(f) Aggression Definition. Scholarly assessments may often suggest otherwise, thus proving true those States who warned against an exemplification of aggression that may

57 It is true that Article 3(f) Aggression Definition refers to "aggression" rather than "act of armed force" "of such gravity to amount to the acts listed above" as in Article 3(g). Thereby, Article 3(f) describes the most likely situation, that the use of force was unlawful for both, the assisted and assisting State. There is nothing however that suggests that this reference was meant to render the illegality of the assisted use of force a precondition for the assisting State's responsibility.

58 Recall e.g. the practice on the military operations in Stanleyville, Iraq, Libya 1986 and 2011, Yemen, or Syria.

59 This would lead to attribution of conduct, as 'control' is the underlying theory of all grounds of attribution but for Article 11 ARS. As such, international practice is consequent in that it consistently treats assistance as a separate act, and does not accept responsibility for a direct use of force.

be perceived to exclude acts of aggression not explicitly mentioned.[60] But not only was Article 3(f) Aggression never intended to be exclusive. In international practice, Article 3(f) Aggression Definition is considered no more than an (important) example and an expression of a more general rule.[61] The great variety of assistance for which States have expressly submitted justifying letters to the UN Security Council illustrates this particularly well.[62] As a general rule, any type of assistance may qualify as indirect use of force. But it is not the type of assistance *per se* that is significant but rather the characteristics of a specific type of assistance in a particular situation.

Factually the type of assistance often circumscribes the characteristics of proximity. For example, typically, the isolated provision of overflight rights for the positioning of forces will usually not suffice to qualify as indirect use of force. This is not only because assistance consists of granting overflight. But by its nature, it is (temporally) more remote from the use of force. Likewise, its impact on the use of force is more limited and less direct. In contrast, placing armed forces at the (full) disposal of a State for a specific military operation is considered proximate. Again, it is not merely the form, but the close temporal connection and direct contribution to the use of force that matter. Moreover, the assisting State typically intends to assist a use of force and has knowledge about the engagement. On that note, the widely propagated distinction between lethal and non-lethal contributions likewise is an important indicative feature. But, again, one cannot conclude that the non-lethal nature of the contribution generally opposes the qualification as indirect use of force. The same is true for 'offensive' or 'defensive' contributions.

More crucial than the type of assistance is the degree of contribution and the impact of assistance on the use of force. Typically, assistance is not only a *conditio sine qua non* but *essential* and *defining* for the specific use

60 Israel put it particularly well A/C.6/SR.282, 176 para 33: "The fourth and last method was that of exemplification. That method was dangerous, both psychologically and logically, since it directed attention to certain acts which influenced man's thinking, and divided acts of aggression into two categories, those which were explicitly listed and those which were not, thus creating a certain hierarchy of acts of aggression and giving undue weight to one category to the detriment of the other."

61 Recall e.g. A/RES/498 (V) (1951) Korea, which classified "*direct* aid and assistance" as "aggression", emphasis added.

62 Just recall for example: Germany and UK on the fight against ISIL in Syria: reconnaissance, refueling; Italy in Libya 2011: airbase and refueling; Uganda in Iraq 2003: provision of troops; Norway in Korea: transport.

of force. As such, it usually meets qualitative and quantitative thresholds. The assistance may be described as a division of labor, as a principal contribution rather than a facilitation. This hence permits to also include by nature more remote forms of assistance.

As a general rule, international practice is hesitant to qualify omissions as 'indirect use of force'. Contributions that lack a strong subjective element share the same fate. Instead, assistance is typically considered as indirect use of force if it is provided with full *positive knowledge* about the future use and *full intention* to contribute to the specific use of force.[63] This is a crucial factor in explaining why most instances of weapon provisions are not described as indirect use of force. Not only are such provisions usually temporally remote. More importantly, States often do not possess specific knowledge regarding the specific use of force they might thus assist. Also, this requirement limits responsibility for an indirect use of force in case that the assisting State acts *ultra vires*. Moreover, typically, the assisting State fully identifies with the use of force, as is often shown by the fact that the assisting State shares the operation's objective and perceives the use of force not as an external operation, but as an own (joint) operation. As such, the assistance is specifically "directed" against the targeted State. For example, the fact that an assisting State is part of an *ad hoc* coalition may be an indicator.[64]

Particularly in abstract practice, subjective elements do not feature prominently. In particular, regulations for assistance to non-State actors allow for low subjective threshold. Likewise, in the Nicaragua decision the ICJ did not stipulate such a requirement. It is only included into considerations about aggression.[65] But this practice does not call into question the conclusions for two reasons. First, for the reasons discussed earlier, the

63 Reluctant with respect to due diligence obligations also Ruys, *Armed Attack*, 376; Kreß, *Gewaltverbot und Selbstverteidigung*, 348.

64 E.g. Libya 2011, Fight against ISIS in Iraq and Syria.

65 See on the controversies whether to include subjective elements into the concept of aggression: A/2638 (1953) para 66-68 (1953); A/2806 (1954) para 26; A/3574 (1957), 7 para 57; A/7620 (1969) para 11 (13 power draft), para 36-38; A/8019 (1970) para 86-98; A/AC.134/SR.68-69 (1970). In any event, under Article 2 Aggression Definition intent is an "other relevant circumstance" that may be considered by the Security Council in determining an act of aggression. See also Benjamin B Ferencz, 'A Proposed Definition of Aggression: By Compromise and Consensus', 22(3) *ICLQ* (1973) 423; McDougall, *Crime of Aggression*, 63-70; Michael Bothe, 'Die Erklärung der Generalversammlung der Vereinten Nationen uber die Definition der Aggression', 18 *GYIL* (1975) 129-130.

exact conditions for assistance to non-State actors may differ from those of interstate assistance. Second, the silence on subjective elements in cases of assistance to non-State actors appears to reflect the fact that such assistance to armed non-State actors is typically driven by the intention to foster the use of force against the targeted State.

At the same time, this practice reaffirms the notion that proximity is a fluid concept. Different criteria are factored in. An assistance type that is inherently remote may be counterbalanced if provided in significant quantities, in a specific situation closely related to the use of force, and with a strong subjective element. Conversely, in case of an essential and by nature proximate contribution the subjective element is less significant. It may also matter whether the contribution comes in isolation or rather is part of a bundle of assistance, as several acts of assistance are typically assessed in combination.

### (4) Legal consequences

The assisted use of force is not attributed to the assisting State. Neither does the assisting State bear vicarious responsibility for the assisted use of force.[66] Instead, the responsibility of an assisting State for breaching the prohibition of indirect use of force is *ancillary, but not derivative*. The responsibility of the assisting State hinges on an assisted act by another actor. The assisted act also defines the content of the indirect use of force. But the wrongfulness of assistance does not stem from its association with a *wrongful* (assisted) act. In other words, proximate assistance that qualifies as indirect use of force is an independently wrongful conduct which involves another State.[67] The other (assisted) State's conduct is considered as a question of fact.[68] The relevant wrong does not arise from a breach of the prohibition to use force by the assisted act. The wrong is the proximate contribution to a use of force by the assisting State, even if the use of force was lawful for the assisted State. The proximate contribution itself is

66 For the definition see Vaughan Lowe, 'Responsibility for the Conduct of Other States', 101(1) *JIntl&Dipl* (2002) 11 and Chapter 1, II.B.

67 Cf Second Report Crawford, 46 para 161 (d).

68 This however does not mean that the responsibility of the assisted State was excluded. Likewise, it means that the responsibility of the assisted State does not exclude the responsibility of an assisting State. Cf e.g. Article 3(f) Aggression Definition that refers to an assisted aggression.

considered a breach of the prohibition to use force, when it impacts the targeted State through the assisted use of force.

Accordingly, the prohibition to use force is subject to an expanded interpretation based on the principle that "a State cannot do through another what it cannot do by itself". An assisting State cannot provide proximate assistance for a use of force that it is not permitted to engage in itself.

This is not just of theoretical interest but may have practical implications. An act of assistance may be in violation of the prohibition to use force, even if the assisted use of force complies with the prohibition. To the extent that an assisting State cannot invoke a justification for its assistance, its assistance may be wrongful even though the assisted State can rely on a justification. Such cases remain rare in practice. In most cases the fact that the assisted State is justified implies that the assisting State is justified, too. Yet, particularly in cases of consensual use of force, or use of force authorized by the Security Council, such a scenario is not beyond reality, as the authorization may be deliberately limited *ratione personae* to specific States only.

States treat proximate assistance as equivalent to direct use of force. Such assistance is, *prima facie,* wrongful. The assisting State must hence provide its own justification, its own report to the Security Council, and conduct its own assessment. It cannot exclusively rely on the assisted State's narrative and cannot benefit from the legitimate presumption that other States comply with international law. It is not enough to simply claim that the assisted use of force is in accordance with international law. Uncertainty about the violator cannot serve as an excuse either. Accordingly, States widely provide justifications to the United Nations. In doing so, States indicate that the accepted trinity of justifications – authorization, invitation, and self-defense – applies to such contributions, too.[69]

Moreover, while the specific preconditions remain for further analysis, indirect use of force, especially proximate territorial assistance, opens doors to a response in self-defense if the assisted use of force qualifies as 'armed attack'[70] at least in narrow limits, confined in time, extent and purpose to

69 For example, for assistance qualifying as indirect use of force, States expressly invoke the Security Council authorization, instead of the (political) call to provide assistance.

70 Cf in particular Article 3(f) Aggression Definition, and incidents in which States responded or threatened to respond by force against assisting States (Cambodia, Israel in Syria, Soleimani, Iraqi responses to its neighboring States). Interesting (theoretical)

*specific* and proximate contributions to a use of force meeting the threshold under Article 51 UNC. Some practice indicates even that an *assisting State as such* may be targeted in self-defense.[71] The qualification as indirect use of force can be only a necessary prerequisite. In parallel to the context of non-State actors, it is to be expected that the extent to which assistance permits self-defense will be a matter of degree that State practice has to define.

Similarly, questions of criminal liability under national[72] or international criminal law may be on the agenda.[73] Last but not least, the qualification as an independent 'use of force' may allow for judicial proceedings, as it may provide additional grounds for arguments to escape the indispensable third-party rule.[74]

### c) A flexible interpretation within the UN Charter's boundaries

"We are not engaging in combat activities." This is what State officials like to stress when explaining military engagement to the public. It may bear political relevance. But legally, it does not preclude a State from being considered to *be using force* against another State.

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scenarios in view of a right of self-defense against an assisting State arise when the assisted State but not the assisting State can rely on a justification, and *vice versa*.

71 Such acts could be described as "indirect armed attack". In this direction: Article 3(f) Aggression Definition; Iraqi self-defense practice against its neighbors (Kuwait).

72 E.g. § 80 StGB, Claus Kress, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2(1) *JICJ* (2004) 248, 253.

73 Ibid 253-254. See the Crime of Aggression, Article 8 bis ICC-Statute, referencing Article 3(f) Aggression Definition.

74 The rule prevents a court to exercise jurisdiction if the very subject matter of the decision constituted the legal interest of the assisted State. In case of an indirect use of force, however, it is not the responsibility that needs to be determined, but the mere fact that the conduct by the assisted State took place suffices. Cf Christian Tomuschat, 'Article 36' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, 2019) para 21-25. For a detailed discussion Aust, *Complicity*, 296-311; Martins Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice', 4(2) *JIDS* (2013) 305 et seq; André Nollkaemper, 'Shifting Patterns in International Dispute Settlement Issues of Shared Responsibility before the International Court of Justice' in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law - Studies in Honour of Karel C. Wellens* (2012).

International practice suggests that interstate assistance may qualify as *indirect* use of force, in breach of the *prohibition* against the use of force. States interpret the prohibition to use force narrowly. Only acts of assistance with a proximate relationship to the use of force qualify as indirect use of force.[75]

Ian Brownlie was hence not mistaken when addressing questions of joint responsibility. He posited that "the supply of weapons, military aircraft, radar equipment and so forth would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility."[76]

In light of international practice, Brownlie's statement necessitates a twofold qualification. First, it does not clarify *what* States are jointly responsible for. In the latter cases, States will usually be jointly responsible, as both breach the prohibition to use force – yet not in the same manner. The recipient State, engaged in combat, *directly* uses force; the assisting State uses force *indirectly*. In the former cases, States may still be jointly responsible – yet not for a violation of the same norm, but in connection with the same conduct. Second, the distinction Brownlie makes is not as rigid as his example implies.[77]

The flexible, but narrow approach adopted by international practice seems to heed the word of caution issued by Roberto Ago in the context of discussing a general complicity norm in the law on State responsibility. Discussing whether and under what circumstances assistance may be treated equivalent to the assisted act, Ago cautioned: "In any case, it is necessary to guard against the danger of finally diminishing the gravity of a particularly serious internationally wrongful act by unduly enlarging the area in which the existence of such acts is recognized."[78] By adopting a rather narrow

75 In this respect Lanovoy, *Complicity*, 204's "fair [assumption] that complicity in the threat or use of force constitutes a threat or use of force in and of itself" does not accord with State practice.

76 Ian Brownlie, *System of the Law of Nations: State Responsibility Part 1* (1st edn, 1983) 191.

77 Note that Brownlie acknowledges that "the law is undeveloped in this context but the distinction which is to be sought is sufficiently clear".

78 Seventh Report Ago, 60 para 75.

approach that requires proximity, States ensure that the distinct nature and gravity of being qualified as 'use of force' is not diluted.[79]

Even more importantly, States honor the boundaries of treaty interpretation. Through the strict requirements the normative character of the prohibition to *use* force is preserved. The assisting State may be characterized as perpetrator of a use of force without depleting the term of its meaning. States interpret, rather than modify, the Charter in light of the challenges posed by proximate assistance.

One caveat is appropriate at this point. International practice and hence the respective preconditions are specific to interstate assistance qualifying as indirect use of force. As such, they are arguably indicative but not conclusive for the necessary prerequisites of direct use of force.[80] The fact that the act of force is not attributable to the State (and thus is not as proximate) could in theory justify a dissimilar treatment requiring different elements for a direct and an indirect use of force.

### 2) Assistance under a prohibition of participation in an unlawful use of force

International practice leaves little doubt that assistance is not only prohibited under the UN Charter to the extent that it qualifies as an indirect use of force. Instead, international practice has filled the legal limbo within the UN Charter with a separate, general prohibition to provide assistance to an unlawful use of force.

The prohibition of participation originates from the *principle* of non-use of force rather than the *prohibition* to use force, which itself is a sub-rule of the principle of non-use of force. At the same time, the rule has developed as a *corollary* to the prohibition to use force. It thus complements the prohibition to use force in a similar manner as the rule of non-recognition

79 In this light, the criticism of Jackson, *Complicity*, 143-144 in terms of fair labeling is less persuasive. Assistance under Article 3(f) Aggression definition describes in fact perpetration rather than participation.

80 E.g. the *de minimis* threshold debate or the condition of intention.

of territorial acquisition by force,[81] the prohibition of war propaganda,[82] the criminalization of aggression,[83] or the invalidity of treaties whose conclusion has been procured by a threat or use of force in violation of the principles of international law embodied in the UN Charter.[84] All these corollaries have in common that they depend on the permissibility of the use of force in view of the prohibition to use force.

a) Existence of the prohibition of participation

States do not maintain to have a right to provide assistance to a use of force in violation of international law. Assistance practice in application of the UN Charter unequivocally recognizes a prohibition of participation in an unlawful use of force. This prohibition is reflected throughout international treaty practice. States not only align their practice with such a prohibition but frequently recognize it in treaties that affirm and reiterate the UN Charter principles. The ILC recognized it openly in the Draft Declaration on Rights and Duties of States and implicitly in the context of the elaboration of the Articles on State Responsibility. Assisting States, targeted States and third States alike, as well as the UN General Assembly confirm and reiterate the existence of the rule through their practice in concrete conflicts. Of course, as conflict practice is rich and diverse, practice is not uniform. States disagree on the extent to which they provide support. Not all assistance that appears similar is treated alike. Yet when viewed holistically, it is fair to assume that States recognize a prohibition.

81 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, 136, 171 para 87; *East Timor (Portugal v Australia)*, Dissenting Opinion Skubiszewski, ICJ Rep 1995, 224 para 131.

82 Michael G Kearney, *The Prohibition of Propaganda for War in International Law* (2007); Eduardo Jiménez De Aréchaga, 'International Law in the Past Third of a Century', 159 *RdC* (1978) 94. For States viewing it as a corollary of the prohibition to use force see e.g. A/6799 (1967) para 63.

83 Claus Kreß, Stefan Barriga, *The Crime of Aggression: A Commentary* (2017). See already Friendly Relations Declaration; Article 5(2) Aggression Definition; Article 8bis ICC-Statute.

84 Article 52 VCLT. Michael Bothe, 'Consequences of the Prohibition of the Use of Force: Comments on Arts 49 and 70 of the ILC's 1966 Draft Articles on the Law of Treaties', 27 *ZaöRV* (1967); Serena Forlati, 'Coercion as a Ground Affecting the Validity of Peace Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (2011).

This clearly repudiates any possible doubts that the scarce reiteration of the only abstract resolution recognizing a prohibition of participation, the 1987-resolution, may have sparked. Rather, it confirms the prevailing sentiment expressed throughout the drafting of the 1987 resolution that – irrespective of the controversies that the declaration faced generally – the prohibition of participation is a well-established rule.

b) Contours and scope of the prohibition of participation

Like the prohibition of indirect use of force, agreement from international practice may be inferred with respect to the prohibition of participation in particular concerning its structural pillars (1) and (2). Regarding the required relationship, again, practice allows for the deduction of no more than general standards (3).

(1) Dependency on the occurrence of another State's use of force

Like the prohibition of indirect use of force, a breach of the prohibition of participation depends on the assisting State: the assisted use of force must be, in fact, performed. If the assisted State does not use force for whatever reason, the assisting State will not bear responsibility.

International practice does not establish a general prohibition on creating or increasing a risk for an unlawful use of force. This observation has not been beyond any doubt. Some noteworthy State practice may suggest a broader scope, according to which assistance that *would be* used in the commission of a use of force was prohibited. For example, the 1987 resolution ambiguously holds that States must not "assist other States to resort to the threat or use of force". Likewise, some treaties are phrased more broadly.[85] This practice remains however not only isolated but is often also

85 Recall for example: Article 5(6) Memorandum of Understanding on Non-aggression and Cooperation between Sudan and South Sudan: "which *may be* used in committing acts of aggression". Due diligence policies by which States commit themselves not to provide assistance in case of a substantial risk of an unlawful use of force may at first sight also point in that direction, e.g. 2008 EU Common Position defining common rules governing control of exports of military technology and equipment. It should be noted however that here States' *opinio iuris* that a violation of such norm will also lead to a responsibility for complicity cannot be established.

connected to the (more broadly understood) concept of aggression. In any event, this practice is too sparse to even speak of a trend. The universally agreed interpretation among States requires the commission of a use of force. *Legally motivated* protests, as well as justifications, are only brought forward to the extent the use of force has actually occurred. The prohibition is no obligation to take action to ensure that the use of force does not occur at all. It is a prohibition to participate.[86]

(2) Qualification of the assisted use of force

The prohibition of participation applies in case of any use of force, including indirect use of force. The assisted act need not have a specific nature, such as ,for example, qualifying as armed attack or act of aggression.

International practice however limits the prohibition of participation to cases of a use of force that is *wrongful*, i.e. in violation of the UNC.[87] Thus, assistance to a use of force is not *per se* prohibited. It is its relationship with the wrongful use of force by the assisted State that renders assistance wrongful. In contrast to the prohibition of indirect use of force, the prohibition of participation is not only dependent on the assisted conduct, but is also *derivative* in nature.

It is not necessary for the violation of international law by the assisted use of force to be authoritatively established. In particular, the prohibition does not depend on a determination by the Security Council, albeit it is not excluded that an authoritative determination by the Security Council on responsibilities may decisively influence the application of the norm in political practice. Accordingly, it remains for States to decide for themselves – within the boundaries of the law – on the legality of the assisted use of force and whether the prohibition is triggered. That the legality of a use of force may often be perceived differently, and that this concedes States substantial leeway in the application of the obligation is beyond doubt. Moreover, it presupposes that States have the necessary factual background to make an informed determination.

86 Note that in case a State provides assistance when there is a substantial risk that the assisted State will use force, this may qualify as indirect threat of force, see III.A.2.c.(1).

87 Recall Article 10 Draft Articles on Rights and Duties of States; 1987 Declaration, para 4. In international treaty practice, this is also the general assumption. States also justify assistance by the mere fact that the assisted act is lawful. Generally, States do not justify *any* assistance they provide.

In view of these challenges, it is noteworthy that assistance is not wrongful simply because it is assistance to a use of force, but because it is assistance to *wrongful* use of force. The prohibition, as applied in practice, accordingly stops short of a prohibition of participation in any use of force unless the assisted use of force is permissible. *Prima facie,* assistance remains permissible unless the use of force is wrongful. This has important implications in practice.

First, the assisting State benefits from the lawfulness of the use of force, irrespective of whether the justification for the use of force also extends to the assistance. Given the non-proximate nature of assistance, the targeted State does not require additional protection in cases that may be described as "unwanted assistance." This again may be relevant in cases of a limited *ratione personae* justification. For example, a targeted State invites the assisted State to use force, but expressly excludes (assisting) contribution of certain States.[88] The assisting State, although among those States expressly excluded, supports the use of force. Assuming that the consent to the assisted use of force is still valid,[89] the 'unwanted assistance' will not be wrongful under the prohibition of participation. This result is the product of seeking to balance the interests of all three States: the assisting, the assisted and the targeted State. The only non-proximate nature of assistance allows the assisting and assisted State's interest to prevail over the targeted State's interests. In fact, the targeted State is sufficiently protected by the fact that it can revoke its invitation at any time.

Second, the assisting State need not positively ascertain the legality of the assisted operation. In particular, the assisting State need not take the position or explain that the assisted use of force is lawful. It suffices to not be persuaded about the illegality of the use of force to not contradict the prohibition. As such, the prohibition of participation affirms States'

88 That this scenario is not beyond reality is vividly illustrated by discussions about contributions on international peace keeping. See e.g. for the discussions in the Suez Canal Crisis: Summary study of the experience derived from the establishment and operation of the Force: Report of the Secretary-General, A/3943 (9 October 1953) para 38; Derek W Bowett, George Paterson Barton, *United Nations Forces: A Legal Study of United Nations Practice* (1964) 396. See also the Korea Crisis 1950, where South Korea did not want Japanese technicians to be involved. They provided – secretly – non-proximate support, nonetheless.

89 It is a question of interpretation if the invitation shall be void if the condition (no support by specific States) is not fulfilled.

general entitlement to presume that another State acts in accordance with international law.[90]

This again indicates that the prohibition of participation does not oblige States to *avoid any risk of being implicated* in an unlawful use of force. States are prohibited to *participate* in unlawful use of force that is sufficiently defined. It can be questioned whether or not this approach adequately responds to the significance and entailing risks of interstate assistance for a use of force. In fact, it is increasingly prevalent practice to take precautionary measures in cases of (clear) risks of unlawful use of force. Likewise, States widely emphasize to assist *lawful* military operations. But while this practice is a valid tool to disclaim responsibility for participation, it cannot be determined with sufficient clarity that it is guided by a belief of necessity to do so. States suggest they also do not contradict the rule when refraining from an express appraisal of the assisted use of force as legal.[91] Similarly, charges against unlawful participation are usually built on the view that the assisted use of force is illegal.

(3) The relationship between assistance and use of force

States describe the relationship between the act of assistance and the use of force according to the abstract factors determined above. Again, in application, these factors are weighed flexibly on a sliding scale in the specific context. A certain degree of ambiguity is hence inherent to the exact contours of the necessary relationship between assistance and the use of force. This is in particular true for isolated acts of assistance. In practice, such acts are not assessed independently, but in the context of the assisting operation as a whole.

Generally, the prohibition of participation imposes less stringent requirements than for an indirect use of force. Assistance that is considered to fall under the prohibition of participation may be defined negatively in a twofold manner. It must neither be so proximate that it would be considered an indirect use of force, nor so remote that it would be considered mere

90 Recall e.g. Saudi-Arabia in No-Flight-Zones in Iraq. Note that this does not mean that the assisting State is free from responsibility if the assisted use of force later turns out to have been unlawful. The assisting State bears this risk, but only if it meets the other requirements, in particular knowledge about the circumstances rendering the assisted use of force unlawful, see below. On general international law see Lowe, *JIntl&Dipl* (2002) 10; Nolte, Aust, *ICLQ* (2009) 12.

91 Recall e.g. States in the Iraq war 2003.

cooperation. In assessing the factors, the following general standards may be deduced.

(a) Assistance through omissions

According to international practice, in line with Article 2 ARS and general conceptual considerations,[92] both an action and an omission may violate the prohibition of participation.[93] In case of the latter the assisting State's contribution may be more remote. But, State practice for assistance to the use of force does not apply (or confirm[94]) the ICJ's formula developed in absolute terms in the Bosnia Genocide case for the Genocide Convention, according to which "complicity results from commission", not from omission.[95] Throughout practice, assisting State's omissions are subject to claims of unlawful participation.[96] In particular, the failure to prevent the use of its territory (placed at the disposal of the assisted State) triggers debate over whether it amounts to unlawful participation.[97] Moreover, there is a remarkable pattern of States seeking to take advantage of the blurry line between actions and omissions. Frequently, contributions (in particular when temporally remote or of an ongoing nature)[98] are presented in the

92 Jackson, *Complicity*, 156.

93 For the terminology see Alexander AD Brown, 'To complicity… and beyond! Passive assistance and positive obligations in international law', 27 *HagueYIL* (2016) 136 distinguishing between omission (with a duty to act) and inaction (without a duty to act).

94 The ICJ's interpretation has been widely understood as a general position on complicity, despite the fact that the ICJ confined its findings to the Genocide convention, *Bosnia Genocide*, 220, para 429.

95 Ibid 223 para 432.

96 Recall for example discussions on Aggression Definition, where omissions and due diligence violations did not qualify as indirect aggression. But this did not exclude responsibility for participation.

97 See also claims about tolerating the use of force, i.e. despite knowing about the use of force making use of its territory the State does not prohibit and hinder it. The distinction between action and inaction is not always easy in such cases: Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (2020) 188.

98 E.g. provision of territory or the authorized but not yet delivered provision of weapons.

legal context as omissions in order to trivialize their impact.[99] While these contributions are often claimed not to lead to responsibility, that claim is not based on the reasoning that omissions *per se* cannot establish use of force.[100] At the same time, there is agreement among States that omissions may only lead to responsibility if the assisting State is obliged towards the targeted State[101] and capable to take action.[102]

Crucially, an omission may only lead to responsibility if the assisting State failed to comply with an obligation to act towards the targeted State that aimed at preventing the assisted use of force.

### (b) Objective factors

The fact that participation is a 'matter of substance and degree', as the Irish High Court aptly held in view of Ireland's contribution to the Iraq War 2003,[103] becomes particularly clear when attempting to define the objective contours of the prohibition of assistance. No type of assistance is generally excluded. For example, depending on its scope, even political or humanitarian support may be considered a relevant act of assistance. In application of the above-sketched general factors, practice indicates that the act of assistance must have a direct nexus to the specific use of force.

On the one hand, this will typically not be the case for what may be described as 'general cooperation' with the State using force, which remains

99 For example, States' argument of "only fulfilling existing treaty obligations" may be interpreted accordingly. The argument runs as follows: At the time States agreed to provide assistance by treaty, they did not have knowledge. The pertinent contribution to the use of force hence consists of no more than the omission to stop the contribution. These arguments are frequent in case of a territorial contribution or a contribution of facilities.

100 Instead, States either argue that they are not obliged to prevent action (e.g. because there existed no such obligations), or that they discharged due diligence obligations. States also deny knowledge about the specific use. States persistently protest against the use, claiming to be a victim themselves – thereby suggesting that they do not bear responsibility for assistance. On the other hand, 'omissions' are still subject to protest by other States.

101 Such duties depend on the specific case.

102 See e.g. statement in Aggression Definition, Ghana 1973; Abu Kamal Raid. For this reason, weak States with no army or lacking capacities to monitor and control their air space will typically not bear responsibility.

103 Irish High Court, *Edward Horgan v An Taoiseach and others*, 2003 No. 3739P (28 April 2003) 71.

tangential to the specific use of force. For example, merely maintaining diplomatic or conventional trade relations, which usually benefit the assisted *State* more generally, and not the specific act, will be excluded from the scope of the norm.[104] Exclusively humanitarian aid that is provided non-discriminately to another State's population will likewise not meet the required threshold. Crucially, however, it requires a flexible case-specific assessment in view of the nature, scope, and effects of assistance. For example, general cooperation that leads to a *de facto* dependence of the assisted State may call for a different assessment.[105] Likewise, food delivery to soldiers may amount to prohibited assistance.

On the other hand, the connection to the use of force however need not be as proximate as for an indirect use of force.[106] It cannot be inferred from practice that the contribution has to be essential, to have a particularly significant bearing on the assisted use of force, or to be 'conditio sine qua non'. At the same time, assistance without even a minor qualitative impact on the respective use of force will usually not be considered prohibited assistance.[107]

The condition of a direct nexus however must not be mistaken to require that the assisted State directly uses the assistance as provided for the use of force. International practice provides numerous examples to the contrary. For example, the delivery of armaments or the taking on of military tasks elsewhere may free up resources, troops, or assets necessary for the use of force, and thus may constitute assistance.[108] Likewise, overflight rights granted, but ultimately not used for airstrikes, can be considered assistance. They may affect the targeted State's defense, as it cannot be sure from where the attacks will be flown.

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104 Note that in these cases the subjective element will be weak, too. It is not excluded that a strong subjective element, in particular if based on intention, may justify considering objectively remote assistance as non-proximate assistance.

105 Cf for such scenarios Quigley, *BYIL* (1987) 120-121.

106 A proximate objective relationship to the assisted use of force that falls under an indirect use of force is not however excluded from the scope of the prohibition of participation. There may be various factors, such as the scale and degree of assistance, its intensity, its timing, or the specific recipient, that justify the inclusion also under the prohibition of participation.

107 For this it seems that the assistance must fulfill a quantitative criterion at least. Quigley, *BYIL* (1987) 120.

108 See also Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House Research Paper, Chatham House, 2016) 9 para 26. See e.g. Germany and other EU States for Mali to support France in Syria, Germany in Libya 2011. For another example, see Quigley, *BYIL* (1987) 122-123.

### (c) Subjective factors

Like with indirect use of force, the subjective attitude of the assisting State is of crucial importance. International practice is clear in that knowledge is an essential component. There is consistent agreement among States that, generally, without *knowledge* about the assisted wrongful use of force at the time of providing assistance, no responsibility may be established. For less proximate contributions to the use of force, in particular, States defend themselves by claiming not to have had the necessary knowledge, but that their contribution has been misused. This is especially the case when assisting States claim that their rights have been violated by the use of force, too. Accordingly, in cases of doubt, where uncertainty on the facts relevant to determine the unlawfulness of the assisted use of force remains, assistance is not prohibited.

It is well-established that in cases where the assisting State has positive knowledge, it may bear responsibility. But a lower threshold for knowledge is not unequivocally settled by international practice.

There is a trend in practice that may be read to suggest that the knowledge requirement is understood broadly. In line with a general trend of proceduralization of international law,[109] constructive knowledge about the assistance to the wrongful use of force might suffice. Accordingly, to the extent an assisting State *should have known*, it is considered by law as having knowledge. A State should have known when it failed to adequately exercise due diligence, including making inquiries, to foresee the unlawful use of force.[110]

In particular, with respect to territorial assistance, various States have based their protest against assisting States on the fact that territorial States should have foreseen the unlawful use of force. Similar claims have been

109 See also for other assistance regimes in which constructive knowledge is established, e.g. in human rights and international humanitarian law André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law', 31(1) *EJIL* (2020) 42-43 n 119-120 with further references; in the context of international organizations on the self-commitment of the UN: Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', 20(1) *JCSL* (2014). See also Pacholska, *Complicity*, for an "aggravated complicity rule" for assistance to the commission of genocide, crimes against humanity and war crimes.

110 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) 462.

made regarding the delivery of weapons.[111] Assisting States often did not reject such charges on legal grounds but engaged with the allegations on substance. For example, they invoked to have placed their assistance under conditions about its future use and to have relied on credible assurances by the assisted State.[112] They referenced previous assessment procedures, such as red card holders or due diligence procedures including end-user certificates. Similarly, persistent protest against the use of one's territory seemed to be partially motivated to avoid giving the impression of 'supporting' the use of force. Last but not least, it has been widespread treaty practice to include safeguards. States hence could be understood to discharge claims that they should have foreseen the unlawful use of force to which they were objectively contributing.

This practice is however not free from doubt. First, it is not settled that States thereby accept due diligence *obligations* to make enquiries about the use when providing assistance under general international law.[113] Second, in any event, this cannot be equated with a recognition of a constructive knowledge standard. In fact, international practice also allows for a different interpretation. States' due diligence might only serve the purpose to establish or deny positive knowledge. But it may not be taken out of a legal belief that without taking those measures they bore responsibility for a violation of the prohibition of participation. In other words, States did not incorporate possible due diligence obligations to make enquiries into the subjective element of the prohibition of participation.[114] The reason why States have been taking these measures would then be to (also) ensure compliance with the prohibition of participation, but not because they felt obliged to do so.[115]

Charges against assisting States based on the allegation that the assisted use of force was sufficiently foreseeable could be understood as evidence

111 E.g. USSR on US American weapons in the Osirak strikes.

112 Germany, Ramstein; Syria, Iraq: Abu Kamal incident.

113 See also Jackson, *Complicity*, 162; Moynihan, *ICLQ* (2018) 462. Additionally, even if there are specific due diligence obligations to make enquiries one may ask to what extent the targeted State may rely upon them.

114 Differently: Corten, *Le Droit Contre la Guerre*, who constructs the entire complicity norm as due diligence norm; Pacholska, *Complicity*, 164.

115 See also Lowe, *JIntl&Dipl* (2002) 14-15 making the argument that the prohibition of complicity (will) motivate States to make inquiries. The 'routine' of exercising due diligence is then however a consequence of the rule, not a precondition. On that basis it remains to be seen to what extent the failure to comply with due diligence also already constitutes a violation of the prohibition of participation.

for the assisting State's positive knowledge.[116] Accordingly, States may have interpreted these circumstances, e.g., previous patterns of violations, and further indicators about a planned use of force, as sufficient proof that the assisting State positively had knowledge, rather than making an argument for a lowered standard of knowledge.

Ambiguity hence remains in practice regarding whether the mere non-performance of due diligence would already result in a breach of the prohibition of participation – despite not actually having *positive* knowledge. In any event, international practice suggests that knowledge may be established through inference from a contributing State's lack of due diligence. In those cases, assisting States may be *prima facie* presumed to know. Notably, this trend is closely related to the objective as well as contextual elements of assistance. Primarily in cases of assistance proximate and direct to the use of force, such as territorial assistance, States refer to such standards.[117]

The assessed international practice does likewise not conclusively answer whether willful blindness leads to responsibility under a prohibition of participation. Willful blindness has been defined as a "deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality."[118]

On the one hand within the assessed practice, no charge against assistance has been based exclusively on willful blindness at the interstate level. On the other hand, this does not challenge the legitimacy of the theoretically sound interpretation of knowledge. Reports by international organs, in particular determinations by the Security Council, are commonly used to strengthen charges against assisting States.[119] In fact, States consistently claim to seek knowledge and assess the situation. States

116 E.g. USSR in Osirak incident.

117 E.g. Germany in the Ramstein saga limits its defense by invoking US insurances to allegations of German territory being "launching point" of armed drone operations, and drones being operated or commanded from Germany. It is noteworthy that due diligence measures are particularly strict for weapons, refueling, targeting intelligence.

118 Moynihan, *Aiding and Assisting*, 43; Jackson, *Complicity*. See also Helmut Philipp Aust, Prisca Feihle, 'Due Diligence in the History of the Codification of the Law of State Responsibility' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (2020) 56.

119 Albeit they are not directly used to establish knowledge. Recall e.g. Canada in Korea Crisis 1950.

thereby, arguably by way of precaution, counter any impression of deliberate avoidance of knowledge. This does not mean that States often refrain from taking a position, based on factual or legal impossibility to further determine the relevant facts. Also, States assert to have exercised all legally permissible measures.[120]

Aside from the threshold question, international practice defines the subjective element rather clearly. The assisting State must have knowledge of the specific circumstances relevant for determining the lawfulness of the use of force. It is not necessary for States to have detailed knowledge about the exact implementation of the use of force, as would be arguably necessary with respect to violations of international humanitarian law. Instead, it suffices to know the basic parameters relevant under the *ius contra bellum* of the specific operation. This includes especially circumstances relating to the justifications. Accordingly, and practically relevant, only in case the assisting State has knowledge that there is no justification, it may be responsible. If it does not have sufficient information to know, assistance remains permissible.

It is well established in international practice that the assisting State's knowledge at the time of the relevant act of assistance, not of the assisted use of force, is decisive.[121] The fact that a State subsequently learns about its contribution to a specific unlawful use of force is hence legally irrelevant.[122] Occasional disagreement about what qualifies as relevant act of assistance does not reflect disagreement on the relevant point in time.[123] This aspect is an essential limit to the legal accountability of assisting States. For ex-

120 This argument is in particular problematic when the legal impossibility is based on legal constrains to which the State has committed itself. This includes particularly scenarios in which a State places its territory at the disposal of another State, without effective policies to control the use. International practice suggests however that reasonable constraints are not sufficient to establish willful blindness.

121 E.g. German practice relating to Turkey's use of force against the Kurds; USA in the Osirak incident. See also ATT.

122 Later acquired knowledge about the use may only be relevant for an(other, yet distinct) act of assistance through an omission to revoke the previous contribution, depending in particular on a duty to take action. But it does not establish responsibility retroactively for already terminated acts of assistance.

123 E.g. for the provision of arms by private actors, some States argue that the relevant act of assistance is the *authorization* of the export. Others consider the *export* itself the act of assistance. Instances where the assisting State relies on "merely performing already agreed treaty provisions" point in a similar direction. Also abovementioned considerations on constructive knowledge accept this point in time as presumption.

ample, it allows for general international military *cooperation* as currently commonly practiced, freeing States from the risk of potential responsibility for their contributions.[124]

It is not sufficient if the assisting State knows about a general risk that some force might be used or foresees a general likelihood or possibility. Instead, it must be aware of the concrete materialization of a specific risk.[125] It further frees the State from the risk of responsibility in case of a misuse or excessive use.

In addition to knowledge about the assisted action, the assisting State must be aware of its contribution. This typically excludes, for example, scenarios in which the 'assisting' State's territory was clandestinely overflown or used for airstrikes,[126] or in which assistance has been clearly misused.

### (d) Intention

In most cases that fall within the prohibition of participation, the assisting State will have intended to contribute to and facilitate the assisted use of force.[127] Thereby, the assisting State will have intent in the sense that it knows that its conduct will contribute, and carries it out with the purpose, will, or desire to attain this result, albeit it may not be in common cause with the assisted State,[128] or guided by the same goals and motives.[129]

124 Note that for continuous assistance, States need to continuously assess the situation. Responsibility may however only be established for the specific act of assistance when the State has knowledge, not retroactively.

125 For example, general knowledge about a latent conflict that may (likely) escalate to a use of force does not suffice. Cf support to Turkey in view of its longstanding conflict with Kurds. Once a State has openly expressed its will to intervene (recall Turkey's Operation Peace Spring), or has engaged in open preparatory action, however, knowledge can be hardly denied.

126 E.g. Jordan in Osirak incident.

127 E.g. Germany providing munition to the coalition in Libya. States contributing to the fight against ISIS; the granting of specific overflight permissions.

128 For example, the assisting State may (politically) disapprove, but accept the use of force and the use of its contribution. European States in Iraq 2003 that still sought to support the US military operations.

129 In fact, assisting States will usually pursue political or economic benefits through assistance, thereby merely taking into account that they are contributing to a use of force. Similarly, Quigley, *BYIL* (1987) 123.

The assisting State's intention as necessary prerequisite for responsibility for non-proximate assistance under the prohibition of participation, however, is not established. It is common practice that States condition their assistance to specific lawful purposes and uses. But such practice cannot be unambiguously understood as support for an intention requirement. It is agreed that the circumstances to establish knowledge and intention are closely intertwined, in any event at the level of proof.[130] For this reason, some ascribe the controversies on the necessity of intention by the assisting State to bear only limited practical relevance. On a conceptual note, practice that may imply an intent requirement allows also for a reading in view of establishing or denying the necessary knowledge requirement.

International practice on the use of force concurs with the general view that States must not hide behind the wish not to support a specific unlawful use of force, despite having clear knowledge.[131] There is insufficient evidence in practice of isolated denials of the intention or wish to support a State's unlawful use of force, despite knowledge about (its contribution to) the unlawful use of force. More commonly, arguments relating to conditions of assistance are tailored towards the assisting State's knowledge about the assisted use of force. This is particularly noteworthy as the assertion of *deliberate* support is widely associated with proximate assistance, which is here qualified as indirect use of force.[132]

Accordingly, despite some rare voices calling in the abstract for direct intent,[133] in case of objectively non-remote assistance, international practice as it currently stands does not establish as always necessary a clear re-

130 In case the assisting State has actual or near-certain knowledge of the circumstances of the unlawful use of force, intention is widely assumed. On these views see Lowe, *JIntl&Dipl* (2002) 8; Aust, *Complicity*, 242; Jackson, *Complicity*, 159-160; Moynihan, *ICLQ* (2018) 469. It is true that similar inferences do not apply to a State that has the intention to assist but does not have knowledge. Yet, in such cases of "blank cheque support" the subjective element may also be accepted.

131 Pacholska, *Complicity*, 109 with further references.

132 In that sense practice considers intent as an "aggravating factor" – one of the three theoretical conceptions Lanovoy, *Complicity*, 237 proposes. The cases that the ILC and scholars identified as support for an intent requirement widely qualified as indirect use of force, rather than mere participation. Ibid 102 on Germany's support in Lebanon.

133 Most prominently, the USA expressly requires both (II.A.6.b): the assisting State's awareness about the unlawful use and its intent for the assistance to be so used. This position suggests that those elements are not merely redundant, with its own meaning. Two observations are in order, however. First, the USA in express terms refrained from a complete discussion of the legal framework. In particular, it did not

quirement of intent that substantially goes beyond the knowledge standard sketched above. It hence seems that States acknowledge the specific circumstances of contributing non-proximately, but notably also non-remotely to a use of force, that distinguishes it from "ordinary forms of cooperation" for which intent has been viewed as essential.[134]

(4) Legal consequences

The prohibition of participation establishes a negative duty. States are under the obligation not to provide assistance to a use of force in violation of the prohibition to use force. As such, the responsibility of the assisting State is derivative.

As a consequence, unlike in cases of indirect use of force, the assisting State may benefit from the lawfulness of the assisted force. Assisting States need not – and characteristically do not – provide a justification.[135] Even in cases where the use of force was unlawful when performed by the assisting State itself, the assisting State may not bear responsibility for its contribution.[136] The contribution itself is no violation of international law in need of justification.[137]

The derivative nature of responsibility further means that generally the assisting State will, *prima facie,* violate the prohibition of participation in case that the assisted use of force is wrongful. Assistance is *prima facie* prohibited irrespective of the fact that the assisting State might have performed the use of force itself in accordance with international law. Accordingly, the prohibition to participate may hence be in tension with the assisting State's right to use force. Scenarios are conceivable where the assisting State, but

specify the specific norms violated. Second, its considerations apply to any kind of military cooperation, including indirect use of force.

134 Aust, *Complicity*, 239.

135 Contributions to a use of force authorized by the Security Council illustrated this particularly vividly. The Security Council does not authorize assistance, but calls for it. The Security Council hence assumes that assistance does not require a justification. States follow that distinction. In contrast to States providing assistance qualifying as indirect use of force, *participating* States do not invoke the Security Council authorization. States draw the same line in light of use of force based on self-defense or invitation.

136 Accordingly, States do not further justify their contribution, but stress the lawfulness of the assisted use of force. E.g. Sweden in fight against ISIS.

137 See for further details III.A.2.b.(2).(b).

not the assisted State, may use force. For example, the assisting, but not the assisted State may rely on an invitation or an authorization by the Security Council.[138] The assisting State would have a right to use force against the targeted State, which it did not exercise, however. Instead, it supported another (the assisted) State that used force against the targeted State. A similar scenario is imaginable in the context of self-defense. The assisting, but not the assisted State, may have a right of self-defense against a targeted State. Instead of exercising the right of self-defense with its own forces, the assisting State might decide to support an already ongoing, but unlawful military operation by the assisted State against the targeted State.[139]

In these cases, in which the assisting States could legally perform the use of force themselves, it is not excluded however that the provision of assistance, while *prima facie* wrongful, may be justified. In light of the prohibition of indirect use of force, this observation is only consequent. States do not accept a broader responsibility for participation than for more proximate assistance qualifying as indirect use of force. But, as for indirect use of force, the burden of argument shifts to the assisting State.

138 The latter could concern an authorization limited *ratione personae*. As seen, it is not the Council's practice to authorize assistance, but the resort to force. The Council only calls for assistance to an authorized use of force.

139 Usually, in situations of collective self-defense the rights of the assisting and the assisted State to use force will be aligned. Two situations are conceivable. First, a State has a right of self-defense, but does not use force. Instead, it asks other States, in collective self-defense to use force, and provides assistance to this operation. Second, a State may provide assistance to a State using force upon its request. But there may be a situation of excessive collective self-defense. For example, hypothetically, to the extent Iraq is understood not to have called for an intervention against ISIS *in Syria*, despite it would have had the right to do so, it may be assisting an unlawful use of force that cannot be justified by collective self-defense. Similar questions may arise in case of cooperation in a military operation where States base their involvement on different justifications. A hypothetical version of French engagement in the fight against ISIS may illustrate this scenario. France may have its own right to individual self-defense against ISIS in light of the Paris terror attacks. France however does not want to engage in combat activities against ISIS in Syria. Instead, it provides support to other States that fights ISIS in Syria. Those States do not operate in defense of France (which also has not asked those States to defend itself), but on a different legal basis, e.g. in collective self-defense of Iraq or upon invitation of Assad. To the extent that the legal basis for those assisted States' intervention has a legal flaw, the assisting State provides assistance to a wrongful use of force which would be lawful if performed itself.

(a) Is participation only justified when the assisting State would have a right to use force?

The derivative nature of the prohibition begs the question if circumstances precluding the wrongfulness are limited to the situation where the assisting State might have performed the use of force itself? Given the less intrusive nature of participation, one may be inclined to think that the applicable justifications are not confined to the famous justification-trinity (consent, Security Council authorization and self-defense), but allow for the application of general circumstances precluding the wrongfulness that do *not* justify to resort to force itself.

While the assisting State contributes to a use of force, it does not commit a use of force that is only justified if international law recognizes a right to do so. This may open room for the argument that the targeted State may be required to tolerate the assisting State's *contribution* to the wrongful use of force, if the assisting State pursues legitimate goals. Old debates that are by now settled for the use of force may need to be revisited here.[140] While States have been cautious to expressly make such arguments, some explanations for assistance may point in these directions. Accordingly, in particular, this poses the question if the wrongfulness of the participation might be precluded by the plea of necessity (i) or as a countermeasure (ii).

(i) Participation due to necessity?

According to Article 25 ARS, a State may invoke necessity if it is the only way for the State to safeguard an essential interest against a grave and imminent peril, and the act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

In international practice, States do not expressly invoke necessity. In the rare cases that assisting States invoke a justification for non-proximate assistance (and it is necessary as they do not also argue that the assisted use of force is lawful), they rely on the justification trinity. Still, three

140 Clauß Kreß, 'On the Principle of Non-Use of Force in Current International Law', *Just Security* (30 September 2019). For a discussion see Corten, *Law against War*, 198-248 with further references. This is also connected to the question whether the prohibition of participation can be considered peremptory, cf Article 26 ARS.

arguments, in particular, might be understood as an implicit invocation of necessity.

First, States recur to the argument that they are executing obligations and commitments to provide assistance. Thereby they appear to argue that refraining from assistance would impair their essential interest in upholding their treaty commitments.[141] But irrespective of the fact that the application of necessity in these cases raises many difficult issues,[142] it is already questionable if a situation of necessity exists: The survey of treaty practice showed that the *obligations* to provide assistance and to continue cooperation are usually conditioned on lawful use of force. Other treaty obligations may require a systemic interpretation in view of the principle of non-use of force.[143] States' treaty commitments are hence not engaged.[144] Such arguments are hence better understood as assisting States' attempts to frame and 'diminish' their contribution as non-proximate or remote assistance.

Second, the political and economic costs of non-assistance enjoy popularity among States as argument against non-assistance. In most cases, so the common argument runs, another State will step in. States fear to lose political influence and economic revenues. Yet, while arguably not without political weight, again, in legal terms, it would already not meet the required threshold of necessity. In fact, as seen, international practice adds a more nuanced network of qualifications to such arguments.

The third scenario is more complex: an argument of necessity may be implied in the argument that assistance is necessary to mitigate violations of international law, in particular, to prevent breaches of international humanitarian law qualifying as war crimes, or to temper the intensity of a violation of the *ius contra bellum*.[145] So far, these arguments have been made in practice only in the context of potential responsibility for complicity in IHL violations, which are usually considered distinct from legality of the

141 Recall, for example, Greece in Iraq war 2003, when it emphasizes the importance to respect bilateral treaties also for a national interest.

142 For example, it is doubtful if these treaty commitments can be invoked *vis à vis* a third state, Kress, *JICJ* (2004) 251 n 22. Moreover, it is well arguable that assistance impaired an essential interest, the maintenance of peace, not only of the targeted State, but also of the international community.

143 Cf Article 31 III b VCLT.

144 In any event, Article 103 UNC would apply.

145 For a discussion of the problem in international criminal law: Miles Jackson, 'Virtuous Accomplices In International Criminal Law', 68(4) *ICLQ* (2019).

*ius contra bellum*.[146] In fact, in those cases, the assisting State viewed the assisted use of force to be in accordance with the *ius contra bellum*.

But, as the Kenyan assistance 'for exclusively humanitarian grounds' to Israel in the Entebbe incident shows, the argument within the context of the *ius contra bellum* is not preposterous.[147] The step towards a claim that targeting information, training, or precision-guided weapons are provided to an unlawful use of force to protect civilians or, more generally, to alleviate the impact of the unlawful use of force on the targeted State, is not far.

In application of the above criteria to the question of whether such assistance is prohibited, a line must be drawn between different types of mitigating assistance. This again requires a case-specific assessment. Exclusively 'humanitarian' assistance is widely considered to fall outside the scope of prohibited assistance *to the use of force*.[148] Other types of mitigating assistance will arguably fall *prima facie* under the prohibition, irrespective of mitigating effects, motives, or intentions.[149] The assisting State continues to (albeit more remotely) contribute to a wrongful use of force. It will then depend on whether the mitigating contribution can be justified. It is questionable if the 'mitigation' situation will be covered by a

146 For example, the US and the UK have made this argument with respect to their involvement in the Yemen conflict. See also Germany in Iraq 2003 for sharing intelligence by the secret service.

147 Cf also Germany that explains provision of arms to Kurdish fighters to enable them to prevent genocide of the Yezidis, Regierungspressekonferenz vom 31.03.2017, https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-31-maerz-849042.

148 Cf also the parallel exception accepted to the rule of non-recognition, *Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, 16, 56 para 125.

149 Assistance that seeks not to 'merely' mitigate but to ensure compliance with the *ius contra bellum* and the specific legal basis needs to be distinguished, and will arguably not be prohibited. For example, scenarios are conceivable where assistance is provided to ensure that the assisted use of force remains within the scope of an invitation or authorization or meets the proportionality requirement of self-defense. If the assisting State through its assistances reaches its goal, there will be no wrongful use of force. If assistance fails to render the use of force lawful, it must be carefully inquired if the assisting State has knowledge about the unlawful use of force. To the extent that the assisted State misuses assistance in its use of force that would be – due to the assistance – in accordance with international law, the assisting State arguably does not know about an unlawful use of force. It may be different if the assisted State fails to properly make use of the assistance. The mere fact that assistance will render a *future* use of force within an ongoing operation lawful, will be arguably prohibited.

right to resort to force against the targeted State. In particular, it is highly doubtful, although not entirely precluded, that the targeted State consents to the assistance to an unlawful use of force for the sake of its citizens at risk, or a less severe violation of the prohibition to use force. Then everything comes down to a justification by necessity.

As far as the present survey of practice allows for conclusions, international practice has not chosen this avenue in view of the *ius contra bellum*. It remains ambiguous why – because the conditions of necessity are not realized, because the application is excluded, or because there has not been a convenient opportunity to advance such a claim. It cannot be considered as settled that the prohibition of participation (without involvement of the Security Council) excludes the possibility of invoking necessity.[150]

(ii) Participation as a countermeasure?

Assistance could be sought to be justified as countermeasure, for example in response to serious violations of human rights or a use of force short of an armed attack. Irrespective of the controversial and potentially additional question of whether collective countermeasures are permissible (that would arise in the former scenario), the general application of countermeasures to justify participation cannot easily be negated.

It is accepted that countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.[151] The ILC in the commentary to the ARS further sets out that thereby "forcible countermeasures" and armed reprisals shall be excluded.[152] While the assisting State's 'countermeasure' would involve the use of force, the assisting State does not engage in it. One may fear that allowing the application of countermeasures may incentivize proxy responses to such measures, circumventing the prohibition of armed reprisals. Such 'proxy' attempts would however likely qualify as 'indirect use of force'. The argument hence does not apply to non-proximate *participation*. Accordingly, the well-established prohibition of forcible countermeasures[153] requires further

150 Article 25 (2) (a) ARS.
151 Article 50 (1) (a) ARS.
152 ILC ASR Commentary, Article 50, 132 para 4-5.
153 Forcible countermeasures are at odds with positive law, Federica I Paddeau, 'Countermeasures' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2015) para 43-44.

refining – does participation in a use of force, short of indirect use of force, qualify as a prohibited forcible countermeasure?

Again, States are reluctant to position themselves. To the author's knowledge, States have not invoked countermeasures to justify assistance, in any event not in explicit terms. This is remarkable in that countermeasures are not foreign to States' considerations with respect to assistance. States frequently suspend assistance as a countermeasure.[154]

(b) Self-defense and international criminal responsibility

To what extent permissible self-defense may justify implications for States other than the directly attacking ones is an unresolved question. In 2001, the ILC left "open all issues of the effect of action in self-defence vis-à-vis third States."[155] This is not the place, and it has not been the purpose of the present analysis, to resolve this question. In this light, the present analysis cannot provide a comprehensive picture of the permissibility of forceful responses in self-defense by the targeted State against States providing assistance to a use of force considered to trigger Article 51 UNC. Still, the survey of practice in the present format invites further thought.

International practice does not suggest that a response by force also targeting a participant in an armed attack is necessarily excluded. Not least, the participating State bears derivative responsibility for an armed attack. Yet, it is notable that situations in which States threaten or even exercise self-defense characteristically involve proximate assistance that would qualify as indirect use of force. This may find its reason often already in the very nature of non-proximate assistance, which for practical, political, and strategic reasons does not invite a response by force. Whether it also reflects a certain legal caution among States to invoke self-defense in such situations cannot be concluded with certainty.[156]

The legal framework governing assistance may not be irrelevant for self-defense. Responsibility for a contribution is widely invoked to justify the use of force in self-defense, yet notably primarily for proximate con-

154 See e.g. Falkland Conflict.

155 ILC ARS Commentary, Article 21, 75 para 5. For the debate in view of violations of the law of neutrality, James Upcher, *Neutrality in Contemporary International Law* (2020) 93-98.

156 Nußberger, Fischer, *Justifying Self-defense against Assisting States* (2019).

tributions.[157] Still, international practice seems to approach the question of self-defense not necessarily through the same standard relevant for responsibility for the armed attack, but through the lens of necessary and proportionate defense against the armed attack. A contribution may not be wrongful assistance under the regime governing assistance, as it is considered non-proximate in these terms. But it may still justify force in self-defense due to its close connection to the armed attack. It will require close scrutiny however with view to the necessity and proportionality of the use of force against the assisting State, too. These elements will not be and have not been easily established.[158]

Likewise, it merits further consideration whether criminal responsibility may be attached to participation.[159] Article 8bis ICC-Statute may suggest that it does not.

### (c) Relationship with duties to cooperate and assist

As a corollary of the principle of non-use of force that finds its basis in the UN Charter, the prohibition of participation enjoys the same nature as other obligations under the UN Charter. In particular, it enjoys the primacy afforded by Article 103 UNC. Ultimately, to the extent that opposing obligations to assist and cooperate[160] are not already aligned with the

157 Iraqi claims against Kuwait; Israel against Syria when attacking Iran. States reject responsibility to shield themselves from use of force in self-defense, e.g. Lebanon.

158 See in this direction efforts to apply the unable or unwilling doctrine to the interstate context, Patryk Labuda, 'The Killing of Soleimani, the Use of Force against Iraq and Overlooked Ius Ad Bellum Questions', *EJIL:Talk!* (13 January 2020). See also situations where a State that was considered occupied was used by a third State to launch attacks, e.g. Cambodia 1970. Not sufficient is in particular non-assistance to an operation in self-defense. States do not accept any territorial intrusion. Accordingly, it is common practice, for example, to ask for permission of overflight.

159 Arguably Article 8bis ICC-Statute is limited to indirect use of force, subject to the other necessary preconditions.

160 Such rights and obligations may derive from (bilateral or multilateral) mutual assistance treaties, many of which have been sketched above, general trade agreements, and customary international law, including the law of neutrality. Interesting are duties to cooperate arising from Security Council resolutions, e.g. cooperation on terrorism, e.g. S/RES/1373 (28 September 2001). On this Christine M Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (2008) 182. Arguably, by way of systemic integration, those obligations are to be interpreted in view of and in compliance with obligations under the UN Charter.

prohibition of participation, the prohibition of participation prevails in the event of a conflict of obligations.[161] As seen, States, both in abstract and in conflict practice, do not legally challenge this, even when invoking cooperation treaties.[162] Yet, also part of the equation is the fact that preexisting obligations are a crucial factor in considering the proximity and remoteness of assistance. The prohibition of participation provides room to embrace legitimate interests protected under (pre-existing) duties to cooperate.[163] Accordingly, the relationship between duties to cooperate and the prohibition to participate is a flexible one.

### c) A 'modifying' change of the UN Charter's paradigm?

International practice affirms what has been the gust of scholars and the ILC alike, albeit it has been rarely put into words.[164] Participation in an unlawful use of force is also prohibited under the Charter, even without the Security Council taking the stage.

The prohibition of participation walks the fine line between 'interpretation' and 'modification'. Two aspects give reason to ask if that line may have been overstepped. The recognition of a prohibition to assist a State unlawfully using force has the effect of *de facto* supporting the State targeted by that use of force. Put differently, the prohibition of participation

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Whether international law recognizes a prohibition of economic warfare that effectively entailed duty to (continue) cooperation is highly controversial. In any event, it would have to be understood in view of the regime on interstate assistance.

161 Similarly Olivier Corten, 'Quels droits et quels devoirs pour les Etats tiers?' in Karine Bannelier, Théodore Christakis and Pierre Klein (eds), *L'intervention en Irak et le droit international* (2004) 120-122; Nolte, Aust, *ICLQ* (2009) 4 who refer however to the prohibition to use force, not a prohibition of participation that may oppose obligations to cooperate.

162 Recall express invocations of Article 103 UNC e.g. A/C.6/34/SR.22 para 8, and 1987-resolution. Whether this can be understood to mean that the corollary can be considered a norm of *ius cogens* requires an independent investigation.

163 E.g. the authorization, rather the transfer of weapons. Similarly, arguments are made for overflight rights that are granted by treaties, when States point to the fact that no specific permission has been provided.

164 Hans Kelsen, 'The Draft Declaration on Rights and Duties of States', 44(2) *AJIL* (1950) 271 seeing the non-assistance obligation as "implied in the concept of international law"; Albrecht Randelzhofer, Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 211 para 23; Brownlie, *Use of Force*, 370.

could be perceived as 'duty of assistance through non-assistance'. Moreover, it deviates from the Charter's express rules that give the regulation of interstate assistance in the hands of the Security Council. This could give the impression of a change of paradigm within the Charter.[165]

But the prohibition of participation remains within the boundaries for authentic interpretation set by the (principle of non-use of force within the) Charter. As will be recalled, a rule on interstate assistance has not been excluded. Instead, the Charter acknowledged such a rule, but has been limited to expressing the rule only for cases in which the Security Council takes action. The narrow scope of the prohibition of participation that finds agreement in international practice further alleviates concerns. The prohibition of participation does not require full assistance to the targeted State. The mere denial of assistance to the State using force is too remote to qualify, in legal terms, as assistance to the targeted State. The prohibition of participation amounts to a duty of solidarity, but only a minimal indirect one. It requires a contribution to peace, not a contribution against unlawful use of force. In other words, the prohibition of participation is concerned with compliance with the prohibition to use force, not the defense of the targeted State.[166]

It cannot be denied that the prohibition of participation faces the structural challenges that were the reason for States to assign the regulation of interstate assistance to the Security Council only.[167] These practical challenges put the norm at risk of not being complied with, being perceived as ineffective, and ultimately weakening the principle of non-use of force. It is not claimed here that States' interests have substantially changed. On the contrary, the similarity in States' arguments over time is at times striking. Arguments that were advanced during the League of Nations are still made

165 Unlike assistance qualifying as indirect use of force, this form of (minimal) solidarity is not expressly required by the Charter. The prohibition to use force could likewise be understood as a minimal form of solidarity to the targeted State, i.e. not using force in support of a State unlawfully resorting to force. This is affirmed by the recognition of collective self-defense. The difference to the prohibition of participation is however that there is an express prohibition of such behavior; this duty of solidarity with the targeted State is hence chartered in the UN Charter.

166 On the general impact of complicity rules Lowe, *JIntl&Dipl* (2002) 14; Jackson, *ICLQ* (2019) 823-824.

167 Recall Chapter 3, II.

today. For example, States still suggest that if assistance is not provided by themselves, there will be another State profiting.[168]

Still, this does not render the fact that the above-sketched legal limits to assistance are a modification of the Charter regime. The prohibition of participation has characteristically been a practice-driven, pragmatic rule, being fleshed out by international practice. In view of this nature, States seem willing to accept the risks associated with a prohibition of participation, now. States generally are in favor of a regulatory regime on assistance, despite some being against its strict enforcement. This is also reflected in international practice. When political stakes are high, when alliance politics dominate State decisions, and when there is little political agreement on a conflict, the rule is under pressure. But the rule has its place in international practice. It provides a universally agreed language and a framework to discuss such scenarios. It requires States to take a legal position on interstate assistance. In particular, States cannot behave contradictorily. It denies assisting States in cases where States refrain from taking a position, the positive seal of approval and thus the legitimacy that international law has to offer. Accordingly, the prohibition of participation constitutes an interpretation of the Charter regime, not least in view of the contemporary Security Council practice, not a modification.

### 3) Norms that are not applied to interstate assistance to a use of force

Two norms, the prohibition of a threat of force (a), the prohibition of intervention (b), and the duty to respect the territorial inviolability (c) that technically could govern interstate assistance, play a limited role in international practice. Likewise, no general duty to ensure respect for the prohibition to use force has emerged in international practice (d).

#### a) Prohibition of a threat of force

The prohibition of a threat of force does not feature prominently in the regulatory framework governing assistance.

168 E.g. US President Donald Trump on the decision to continue the transfer of arms to Saudi-Arabia, fearing that otherwise Russia or China will take over the business. Julian Borger, 'Trump inflated importance of Saudi arms sales to US job market, report says', *Guardian* (20 November 2018).

Widely States feel threatened by an act of assistance, for example the sending of weapons. The act of assistance may even be qualified as a threat to peace.[169] But it is not equated to a prohibited conduct under the prohibition to threaten by force.[170] Instead, assistance widely prompts protest couched in political language, rather than the legal terms of Article 2(4) UNC. State practice, not least the wide practice of general military cooperation, underpins the structural obstacles identified in Chapter 3 to a qualification of the provision of assistance *per se* as a threat of force.

Any attempt to broaden the notion of a threat, and to qualify the conclusion of alliances or the provision of military bases, met with considerable opposition. This is the unsurprising, if not logical continuation of the general observation that the 'militarization', 'excessive level of armament' or acquisition of weapon systems (by the assisted State) do not qualify as breach of the prohibition of a threat of force, if the State does not actively attempt to intimidate through specific threats.[171] More fundamentally, it is due to its dependency on the assisted State's conduct that the *provision* of assistance *per se* is considered not to be directed against the targeted State. Instead, it is viewed to remain within the relationship between the assisting and the assisted State, and as such is at best conceived as creation of a general risk rather than a specific threat. The transformation of the general threat may only occur through the State actually in control of the assisted situation or action.

At the same time, this does not exclude that assistance may contribute to a threat of force. In that respect, it is noteworthy that the regulatory regime governing assistance maintains the synchronization and parallelism of the use and the threat of force. Both, the prohibition to threaten or use of force as well as the prohibition of participation also cover the case where the assisted act involves a *threat* rather than a *use* of force. In the former case, the assistance may hence even qualify as (indirect) threat of force. This parallelism has repeatedly been confirmed in the abstract.[172] In line with States' general reluctance toward expressly invoking the rule governing

169 Nikolas Stürchler, *The Threat of Force in International Law* (2007) 264.

170 Marco Roscini, 'Threats of Armed Force and Contemporary International Law', 54(2) *NILR* (2007) 231.

171 Stürchler, *Threat of Force*, 263-265; Corten, *Law against War*, 96. *Nicaragua*, 135, para 269; *Nuclear Weapons*, 246-247 para 48 (on the possession of nuclear weapons). See also e.g. S/2020/608 (29 June 2020) (Israel).

172 Cf Friendly Relations Declaration; Declaration on Enhancing Effectiveness; *Nicaragua*, 103 para 195.

the threat of force in conflict practice, this provision is only rarely applied in practice. All the more, the fact that some States honored the rule in justifying their involvement in the buildup to the Iraq war 2003 merits special mention.[173] Moreover, this may explain charges for a threat of force that are somewhat ambiguously directed against both the assisted and the assisting State.

This feature of international practice does not change the fact that assistance remains an involvement in another State's conduct, however, and hence remains dependent on the qualification of the assisted action. The act of assistance alone, without a thereby assisted act, does not qualify as a threat of force. Accordingly, the prohibition of a threat of force has only a limited role in the regulation of assistance to a use of force. Whether there is an (indirect) threat or participation in a threat crucially depends on whether the assisted State has credibly communicated the readiness to use force for which assistance was provided.[174]

### b) The non-intervention rule and assistance

International practice, most notably the (debates on the) Friendly Relations Declaration and the ICJ's Nicaragua decision, confirms that the provision of assistance may violate the rule of non-intervention.

In prohibiting assistance, the rule of non-intervention shares structural similarities to the conception of the prohibition of indirect use of force. Not the act of assistance itself is viewed as intervention. Instead, its relationship with another actor's coercion against the targeted State renders it an indirect intervention. This is reflected in State practice requiring that the assisted coercion has to actually take place. The responsibility is hence *accessory* in the sense that it depends on the assisted act. But responsibility is *not derivative*. The assistance does not derive its wrongfulness from the assisted use of force but is an independently wrongful conduct involving another State.[175]

173 See Iraq war assistance in the preparation stage. This also indicates unlike Roscini, *NILR* (2007) 230 suggests that the preparation of force may (if conducted publicly) also amount to a threat of force.

174 Mohamed Helal, 'On Coercion in International Law', 52(1) *NYUJIntlL&Pol* (2019) 61; Henderson, *Use of Force*, 30; Stürchler, *Threat of Force*, 259.

175 Cf also Second Report Crawford, 46 para 161 (d).

The rule of non-intervention differs from the prohibition of indirect use of force, however in two important aspects: First, it applies to cases where the assisted act amounts to coercion generally. It is not limited to the use of force. It accordingly also excludes a possible right of self-defense. Second, more remote connections to the assisted act suffice to establish responsibility. As such, the rule may cover acts of assistance to a use of force that do not already qualify as indirect use of force.

Similar to the prohibition of indirect use of force, the rule of non-intervention was developed in light of and applied to assistance *to armed activities by non-State actors*. Like for the prohibition of indirect use of force, this did not (conceptually) exclude however the application of the rule to assistance to *States*.

But – and this is also the reason why it is not necessary at the present stage to further contribute to clarifying the exact conditions under which an act of assistance may qualify as indirect intervention – the rule of non-intervention is not represented in State practice relating to *interstate* assistance to a use of force.[176] Instead, States measure such more remote assistance against the prohibition of participation.[177]

This allows for two observations that affirm the previous findings on the regulation of interstate assistance. First, States do not accept that non-proximate forms of assistance to a use of force lead to responsibility without an *expressly stipulated* subjective requirement.[178] Second, and more fundamentally, in the interstate context States appear not to accept an independent wrong of non-proximate assistance unless it derives from its relationship with a wrongful act. Non-proximate assistance to States themselves is not considered to violate the sovereignty of the targeted State. It derives its wrongfulness from the violation of sovereignty by the assisted State. To assess non-proximate interstate assistance, States factor in the

176 Recall expressly so: Germany on arms delivery: BT Drs 18/13704 (23 October 2017), question 19. See also Ferro, Verlinden, *CJIL* (2018) 35 para 46 "not applicable to international armed conflict".

177 The present observation is limited to interstate assistance to a *use of force*. It does not comment on interstate assistance to a *coercion*. Likewise, it does not comment on a specific due diligence obligation to prevent the use of force.

178 The rules on non-intervention usually do not mention a subjective requirement. This does not mean however that it is not required. In fact, the subjective requirement may not feature as prominently, as the supported non-State group is often not only already present within the territory of the targeted State, but also one-dimensional in its purpose. In fact, practice suggests that the rule is only violated to the extent that the assisting State has at least some knowledge about the assisted act.

judgment of international law with respect to the assisted use of force. To the extent that the assisted use of force is in accordance with international law, non-proximate assistance is not prohibited. In other words, for non-proximate interstate assistance to qualify as wrongful, it must meet an additional criterion: it must be contributing to a *wrongful* use of force – a condition which the rule of non-intervention does not require.

The different regulation of assistance to States and to non-State actors is due in part to the fact that under the current conceptualization of international law only interstate assistance allows to take into account the judgment of international law on the assisted use of force. Only the use of force in international relations *by States* is subject to legal regulation and may be expressly permitted.[179] The application of the rule of non-intervention to non-State actors was not only necessary to fill the gap for non-proximate assistance that did not qualify as indirect use of force. It also suggests that non-proximate assistance is subject to a stricter regime. The legitimacy of the cause for the violence by non-State actors is *prima facie* not relevant.[180] As such, the different regulation appears to also reflect a policy that State cooperation is generally beneficial and desired. In contrast, a State military cooperation with (foreign) armed non-State actors is from the outset conceived as problematic.

### c) The territorial inviolability and assistance

Unlike in the context of support to non-State actors or humanitarian aid to the civilian population, the duty to respect territorial inviolability does not play a crucial role in international practice in view of interstate assistance. International practice affirms that this prohibition applies irrespective of conduct by the assisted actor.[181] Already the *act* of assistance, whether or not a thereby assisted use of force takes place, may hence violate the territorial inviolability of a target State. In case of assistance to a use of force that also

179 Corten, *Law against War*, 127 et seq.

180 But note that there might be a right to support non-State actors, particularly peoples under colonial and racist regimes or other forms of alien domination. This would be however an exception to a general rule of non-support.

181 See lately Judge Yusuf, in view of the Friendly Relations Declaration: *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Declaration Judge Yusuf, ICJ Rep 2015, 665, 744-745 para 8. Assistance to armed force present on the territory of the targeted State will hence already violate

infringes upon territorial inviolability, States seem to conceive the assisting State's contribution to this interference to be already sufficiently captured by the accessory prohibitions of 'indirect use of force' and 'participation in a use of force'. A potential indirect violation of territorial inviolability is not specifically accentuated in practice.

### d) A general duty to ensure respect for the prohibition to use force under the UN Charter?

International practice does not establish a general rule according to which States undertake to ensure respect for the prohibition to use of force.

As such, the UN Charter does not recognize, first, a general duty for member States to take all reasonable measures to prevent an unlawful use of force. In fact, for most forms of assistance, even when States exercise due diligence, they are eager to emphasize that it is not due to a legal obligation that they take these measures. In general, if such obligations are recognized, they are typically recognized in the broader context of human rights, but not for an unlawful use of force.[182] This does not exclude that under general international law, there may be general due diligence obligations that impact specific contributions to a use of force.[183]

Second, States stop short of recognizing a general duty of solidarity that requires States to positively provide assistance to a wrongfully targeted State.[184] The prohibition of participation does not prohibit the failure of States to positively provide assistance to a targeted State.

## II. Regulation of interstate assistance dependent on UN action

Once the United Nations takes enforcement action, interstate assistance may be subject to twofold regulation. The Security Council may impose sanctions that also prohibit interstate assistance under Article 41 UNC (A). In addition, interstate assistance is subject to Article 2(5) UNC (C). Fur-

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the territorial inviolability of the targeted State, irrespective whether they use force or not.

182 E.g. war crimes, genocide, crimes against humanity, recall e.g. the Arms Trade Treaty.

183 For details see Chapter 6.

184 Recall e.g. 1987-Declaration.

thermore, UN action may not add to the regulation of interstate assistance. But it may influence general prohibitions of interstate assistance (B).

### A. Sanctions prohibit assistance

The Security Council widely takes measures that (also) prohibit assistance to a concrete and specific use of force. The Security Council's sanctions establish an independent and case-specifically tailored prohibition.

Often, sanctions imposed by the Security Council overlap with the rules of non-assistance in general international law. International practice confirms that the regimes are however not exclusive, albeit UN sanctions may dominate the discourse. They apply in parallel. The sanction regime – to the extent it is concerned with non-assistance – is however not a mere duplication of the non-assistance regime for the specific case, through which the Security Council lends its political authority to non-assistance and centers the focus of world attention on that contribution. It also does not only 'concretize' the prohibitions of assistance in the specific case, unambiguously emphasizing that they in fact capture a specific contribution to the use of force. In particular, the legal consequences differ. The above-sketched general rules on assistance are typically subject to unilateral enforcement without an authoritative judge. Sanctions are not only collectively decided obligations, but also benefit from the centralized, institutional monitoring and enforcement mechanisms in the UN system of collective security. For example, sanctions are widely complemented by reporting obligations about States' compliance and implementation of the sanctions. The Secretary General may be tasked with monitoring compliance. Special Sanctions Committees support, monitor or oversee the implementation of sanctions.[185]

Importantly, sanctions do not always concur with the prohibition of participation or of indirect use of force.

Not only may the regulation of assistance be specifically tailored and flexibly adapted to the situation. The Security Council may, and in practice does, impose more stringent regulations on interstate assistance. Assistance may be prohibited solely on objective terms, irrespective of a subjective element. States may bear strict obligations of prevention, irrespective of

185 For an overview see Sanctions and Other Committees, https://www.un.org/securitycouncil/content/repertoire/sanctions-and-other-committees.

the end-use.[186] This at the same time usually comes with a specific, and naturally more narrow definition of prohibited assistance. Moreover, the Security Council may also prohibit *remote* assistance that is not covered by prohibitions under general international law.

Sanctions need not and often do not depend on the assisted State and its conduct.[187] They need not be, and usually are neither derivative nor ancillary. The Security Council may impose measures that do not depend on the unlawfulness of the assisted use of force. International practice has repeatedly affirmed what is already conceptually invested in the Charter. The Security Council may prohibit any assistance, even if the assisted use of force would be lawful.[188]

Moreover, the Security Council may even impose measures that do not depend on another State's specific use of force at all. It may also extend to the preparation, and the creation of a general abstract risk. It may prohibit 'potential assistance', essentially general 'military cooperation' or preparatory acts. It may prohibit the buildup of military infrastructure in another State, which, as long as it is not yet used, is permissible.[189] Israel, in the context of advocating for a prolongation of the sanction regime against Iran, has illustrated this conceptualization of sanctions well. Israel warned that:

> "In light of all the Iranian regime's blatant violations of Security Council resolutions 2231 (2015) and 2140 (2014), it would be unthinkable and calamitous to allow the lifting of the arms embargo on 18 October. Iran *would be allowed* to scale up its military arsenal and to acquire a large variety of weapon systems, including items from the United Nations Register of Conventional Arms such as battle tanks, armoured combat vehicles, large-calibre artillery systems, warships, submarines, combat aircraft, attack helicopters and missile systems. *Iran would also be permitted to transfer weapons on a mass scale to rogue States* and terrorist

186 E.g. S/RES/1298 (17 May 2000) para 6 (Ethiopia-Eritrea); Boivin, *IRRC* (2005) 469.

187 See also Seventh Report Ago, 58 para 72.

188 See e.g. most recently sanctions against Libya: S/2020/269 (1 April 2020). In this light, Security Council practice, in particular sanctions, cannot be generally assumed to reflect practice relating to the prohibitions of assistance, unless it has been adopted on the assumption of or adopted to determine the wrongfulness of a use of force.

189 E.g. S/2018/445 (10 May 2018).

> organizations*, multiplying the existing threat it poses to its neighbours and to the entire region.*"[190]

The application of the potentially stringent sanctions to regulate interstate assistance always depends on the agreement within the Security Council. As such, sanctions can be a very powerful tool to regulate interstate assistance – not least because of the politicization of the UN mechanism, and the *possible* and authoritative clarity that political agreement can have.[191] Notably, interstate assistance will be subject to stringent non-assistance obligations when the case is clear enough to allow agreement within the Security Council to establish sanctions. This will usually – and somewhat paradoxically – be the cases where the general rules of non-assistance will also find acceptance, and application.

At the same time, it is the same politicization that renders sanctions in practice generally – even when they are taken – often ineffective or incomplete, leaving decisive loopholes.[192] This observation applies equally to sanctions regulating interstate assistance to a use of force. More worrying than this deplorable fact is, however, that the Security Council and its practice of sanctions limited in scope may give the impression that *any* non-sanctioned contribution to a use of force may remain permissible under international law.[193]

The present analysis has sought to show that this – at least legally – is not always the case. States may take advantage of the ambiguity that the Security Council often leaves behind. States may capitalize on the fact that no institutionalized, centralized enforcement regime is linked to the norms,[194] and that the lack of an authoritative judge allows for allegations and claims with respect to the preconditions (whether or not they are

190 S/2020/608 (29 June 2020), emphasis added.

191 This aspect also justifies sanctions that in content do not go beyond the general non-assistance regime.

192 See e.g. S/PV.8018 (2017), 9 (Ukraine).

193 See also the ATT that amplifies this impression. It should be noted that the Security Council only partly bears the blame for this impression. The Security Council does not need to reaffirm and flag general international law, but instead focuses on specific sanctions. But the practice of the Security Council by which it exactly engages in such behavior (also with respect to assistance, calling for and thus affirming compliance with non-assistance rules), indicates that the Security Council is aware of its political responsibility that it may be (deliberately) misunderstood. This renders it however primarily a political problem.

194 The Security Council that could also act upon assistance typically does not do so.

correct or not is difficult to assess). But States do not claim that assistance is not governed by international law, in an event to the extent it is not remote.

### B. Interaction of the UN and general rules on assistance

Even with measures short of sanctions, the Security Council may interact with the general regulation on assistance in two ways. First, the United Nations may address interstate assistance in a non-binding manner. As seen, this can either endorse the general framework governing assistance or be confined to a political call only.

Second, even in case the UN organ remains silent on interstate assistance *per se*, its determinations may clarify relevant preconditions.[195] For example, the Security Council may take a position on the lawfulness of a specific use of force. UN bodies, be it the Security Council or other bodies such as fact finding missions, may make determinations on the fact,[196] impacting States' subjective elements. Likewise, the UN may take a position about the lawfulness generally. Practically, such determinations will primarily be relevant in case of continuing military operations or with respect to future assistance.[197]

### C. Article 2(5) UN Charter

The independent non-assistance obligation under Article 2(5) UNC complements the regulatory regime governing assistance to a use of force. It only applies if the assisted State that uses force is subject to an enforcement action taken by the Security Council.

Article 2(5) UNC imposes a strict obligation of non-assistance in the sense that it, unlike the general prohibition of participation, does not stipulate a specific subjective threshold, or at least presumes that States have knowledge.[198] The obligation applies, however, only if the Security Council

195 The extent that States must take into account such determinations follows general rules.

196 Similarly Graefrath, *RBDI* (1996) 377.

197 Recall the Osirak incident where the UN only addressed future assistance. See also Korea 1950 for ongoing assistance.

198 For a comparison see Aust, *Article 2(5) UNC*, 249-250 para 29.

agrees to be taking action.[199] In practice, this 'filtering function' is likely the higher hurdle.

Article 2(5) UNC is not applied in practice to prohibit generally assistance to the use of force that induces the enforcement measure. Its scope is limited to assistance that specifically obstructs UN enforcement action itself. Accordingly, the scope of the enforcement action crucially defines the scope of the non-assistance obligation under Article 2(5) UNC. As such, States also remain cautious not to undermine the deliberate and carefully circumscribed balance of enforcement action chosen. They rather only foster compliance with already existing obligations under the enforcement action. Article 2(5) UNC thus remains true to the specific conceptualization of collective security in the Charter: there is no automatic 'excommunication', but an isolation of violators as agreed upon by the Security Council.

Nonetheless, Article 2(5) UNC and the general non-assistance regime may overlap to the extent that the assistance to the use of force also specifically obstructs the UN enforcement action.[200] This is only consequential. The prohibition of assistance by Article 2(5) UNC may not be linked to a use of force in violation of the prohibition to use force directly. But the enforcement action is. Assistance to an obstruction of the enforcement action may hence also be prohibited assistance to a use of force, and as such also foster the greater goal, international peace and security. Not any assistance to a use of force will, however, be also considered assistance to an obstruction of the enforcement action as prohibited under Article 2(5) UNC. In this respect, again, the scope of the specific enforcement action is determinative.

Article 2(5) UNC is a non-assistance norm specific to the UN system of collective security.[201] As such, it is not considered to preclude the existence of a general prohibition of assistance to a violation. To the contrary, frequent references to Article 2(5) UNC to substantiate the general non-assistance regime in international practice[202] affirm that Article 2(5) UNC is a specific application of a general(izable) idea: non-assistance to acts contrary to the spirit of the UN Charter.

199 Ibid 249-250, para 29.
200 See e.g. Korea 1950.
201 For a similar observation see Aust, *Article 2(5) UNC*, para 28.
202 Recall the 1949 Draft Declaration, 1987-declaration, or the ILC ARS Commentary to Article 16 ARS.

# 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

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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-

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

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.

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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

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.

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.

# 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).

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