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

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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]

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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]

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

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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

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]

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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

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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.