Chapter 5 The Regulatory Framework Governing Interstate Assistance as Elucidated by International Practice

Assistance matters. Assistance is influential. Assistance is political. And assistance is governed by the *ius contra bellum* specifically.

The mere length of the preceding, by no means comprehensive survey demonstrates the crucial role of interstate assistance in almost any use of force in international relations. Time and again, conflicts illustrate that even major powers like the United States crucially rely on contributions from other States for their military operations. Germany's extension of the mandate to continue aerial refueling of the coalition's aircraft in the fight against ISIL over Syria as the "refueling capacities could otherwise not be covered in their entirety," is only a most recent example illustrating the essentiality of assistance.[1]

Against this background, one might expect to call for strict regulation of assistance. All the more, States' almost nonchalant reluctance to engage in-depth with the legality of interstate assistance is striking.

States hardly specify the legal basis when providing assistance or protesting against assistance. In general debates on the principle of non-use of force, interstate assistance was widely neglected – in remarkable contrast to other corollaries of the principle of non-use of force, and most notably the support to non-State actors using force. Express abstract stipulations of a rule specifically tailored to interstate assistance are comparatively rare. The few express articulations of such rules receive only relatively little express reiteration and endorsements.[2] The rags-to-riches provision of Article 3(f) Aggression Definition, which had been included only due to Romania's persistence but now enjoys wide support, is the salient exception. In fact, debates at the UN level suggest that the discourse among States on interstate assistance is underdeveloped, to put it mildly. All this may generate the impression that States do not feel it necessary to establish a clear normative basis, let alone detailing the exact scope of prohibited interstate assistance.

1 BT Drs 19/17790 (11 March 2020), 6.

2 The 1987-Declaration has a little prominent footprint in subsequent international practice. The 1949 Draft Declaration on Rights and Duties of States likewise plays a relatively minor role, although it should not go unnoticed that Article 10 has been repeatedly endorsed on various occasions.

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The little express concretization of the regulation seems to reflect a second key feature that the survey of international practice brings to light. The decision on assistance is highly political and goes to the heart of interstate cooperation. In many cases, support to a use of force is as politicized as the resort to force itself. Each decision on whether or not to provide assistance, or whether or not and to what extent to continue relations with another State engaged in a use of force, has its own history. Each decision on whether or not to provide assistance has wide implications in an interdependent community of States. Often, political commitments and allegiances arising from long-standing political alliances and affiliations already preordain the decision on assistance. The decision to provide assistance to a use of force or not may decisively influence the relationship between States, forging new alliances or heralding the termination of old ones. A State's decision not to provide assistance may come with a high political price. Moreover, not only the States resorting to force are interested in and benefit from assistance. The decision on whether to provide assistance or not equips assisting States with not unsubstantial influence. This is widely reflected in the price assisted States are willing to pay for assistance.[3] Last but not least, the high political stakes associated with assistance are mirrored in some powerful States' policies of "leading from behind" or engaging in full-fledged proxy wars, which allow States in most cases to avoid the spotlight and scrutiny of the international community[4] and give them further arguments to disavow (full) responsibility. Assistance can be a powerful tool to reach goals while still purporting to have clean hands.

These are only some features that may contribute to States' apparent preference to leave the regulatory regime on interstate assistance beyond general standards in the vague, and to refrain from creating an unambiguous objective legal regulation that clearly circumscribes the parameters for the permissibility of assistance.

But, irrespective of the advantages and disadvantages of a legal regime stipulated in clear terms,[5] international reluctance to engage with legal

3 Recall e.g. the American economic promises when soliciting the participation of other States in the Iraq war 2003.

4 Obviously, there are exceptions, recall the British role in Stanleyville 1964 or Libya 1986.

5 This is not the place to do justice to the (political) question whether there should be an explicit regulation of the framework governing interstate assistance. The value of codification and expressly stipulated rules and interpretations has been discussed in general terms more comprehensively elsewhere e.g. Shabtai Rosenne, 'Codification

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rules must not be misunderstood to mean that interstate assistance is not governed by international law. Viewed in its entirety, international practice suggests a multifaceted framework of rules applying to interstate assistance.

The generation and development of Article 3(f) Aggression Definition, that although only added but for Romania's persistence was remarkably uncontentious, illustrates well States' general approach to interstate assistance. It is little controversial that interstate assistance does not take place in a legal vacuum. Despite a lack of open discourse and rare express stipulation, other abstract declarations defining the principles of international law affirm this conclusion. Several abstract declarations define rules for interstate assistance. And even when interstate assistance is not mentioned specifically, such as most famously by the Friendly Relations Declaration, States are open to applying some rules developed for support to non-State actors, as a matter of principle, to interstate assistance too.

It is true that some of the resolutions left only a relatively light footprint in international practice. But this cannot challenge the general regulation of interstate assistance. In fact, the lack of reiteration does not reflect States' doubts as to the rules applicable to interstate assistance, but can be traced back to the resolutions as a whole. For example, the 1987 declaration was a project highly controversial from the outset that resulted in a compromise that left all participating States discontent. Likewise, the 1949 ILC Draft Declaration was not outright rejected. It was rather felt that the time for such a codification was not yet ripe.

States' treaty practice and the provision of assistance in concrete conflict practice corroborate this conclusion. Despite the politically high stakes, over time States do not claim an unlimited right to provide assistance. They are careful to qualify their contribution, notably irrespective of the specific type of assistance, in various manners. There is a bouquet of possible arguments – ranging from the denial of knowledge of the assisted act, to diminishing the role of their assistance, or the claim that the assisted act is lawful, to an autonomous justification.

Revisited after 50 Years', 2(1) *MaxPlanckUNYB* (1998). Should debate on the wisdom of codification arise in this context, it might be worth drawing on arguments exchanged during the process of defining aggression. In any event, it should be considered that lacking transparency and a missing open discourse may give the impression of arbitrary practice that again may be understood as contestation of the general principle of non-use of force. Leaving the rules unuttered, underdeveloped and in the vague also may have the consequence that there is no common language for States to address interstate assistance.

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This does not mean that there is no practice that may suggest the opposite. But such practice has widely either been in denial of the contribution or attempted to be kept non-public or secret – and accordingly does not embrace a *legal* claim that such assistance is permitted under international law. Moreover, the fact that charges of complicity were and are often widely used as a political tool rather than couched in legal terms does not exclude that there may also be a legal regulation.[6]

Despite its importance, practice relating to interstate assistance is not prominent. This should not come as a surprise. The State resorting to force always stands at the center of attention – of the international community in debates in international fora or of scholarly assessments. Rightly so. But the present survey of State practice serves as reminder that behind the prominent practice relating to the use of force, there is a remarkably nuanced and widespread practice relating to interstate assistance. The rules governing assistance are grounded in 'unsung' but well-established international practice.

Before sketching the legal framework, one caveat is in order. Practice relating to interstate assistance is too rich to allow the present survey of practice to claim universality or comprehensiveness for each facet of the legal regulation. Given the fact that any remote form of State cooperation, in theory, may qualify as assistance, this would require to assess virtually any State's behavior towards the State using force in any international conflict. In fact, the field is by no means mined out. This book invites further research, in particular for the application of the regulatory regime to specific types of assistance.

Nonetheless, it is submitted that the present survey allows for an adequate and fair picture of international practice. It uncovers common ground among the parties to the UN Charter as to the interpretation of the provisions of the UN Charter applicable to interstate assistance. Likewise, a parallel customary rule of international law has developed. This can be said in particular for the general conception of the rules, which may be claimed to represent the *lex lata*. The survey draws upon examples from each time period. Obviously, for the interest in States' current understanding of the *lex lata* and due to the greater interpretative weight, the last twenty years of practice are featured prominently. Likewise, the survey is based on a reasonable representation of conflicts as well as of States throughout the conflicts. In particular, regional States providing territorial assistance that

6 Recall e.g. the many accusations between the United States and USSR in Cold war.

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have been widely ignored in previous assessments were included. Nonetheless, it is acknowledged that the analysis has an Anglo-American European-(German) spin, with in particular South American and African States being underrepresented. While this is openly admitted, this may be traced not only to language barriers, capacity limitations, and accessibility of practice, which as a matter of fact is better documented and reported for specific regions than for others. But it also reflects a policy of louder legal advocacy pursued by certain States, to which other States – for various reasons – do not always and only partially respond. It should be noted, however, that in particular statements by associations of States, such as the Group of 77, the Non-Aligned Movement, ASEAN, or the OIC, carried great weight in the assessment.

International practice suggests that the regulation of interstate assistance to another State's use of force under the UN Charter primarily rests on four normative pillars.

International practice affirms that the Security Council uses it's authorization under the UN Charter to impose legally binding obligations upon States to also regulate interstate assistance. As such, interstate assistance is not generally prohibited, but only through secondary obligations specific to a special situation. Article 2(5) UNC complements this assistance regime, yet as international practice shows, in a limited manner, and only indirectly with respect to the use of force.

Besides, practice indicates that interstate assistance is subject to regulation independent from UN action. Two norms stand at the center of the regulation of interstate assistance: First, the prohibition of indirect use of force as part of the prohibition to use force; second, the unwritten but implicit prohibition of participation. Other rules that in theory may also capture assistance to a use of force, such as the rule of non-intervention, are hardly applied in the interstate context. The same is true for the prohibition of a threat of force.

This legal regime, the rules independent (I) and dependent (II) on UN action, will be fleshed out in the following.

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I. Regulation of interstate assistance without UN action – duality in practice

International practice as a whole implies that two norms regulate interstate assistance when the UN has not taken action. First, the prohibition to use force is interpreted broadly to cover also some forms of interstate State assistance as an "indirect use of force". In this case, the assisting State may thus be described and treated as perpetrator of its own use of force. Second, practice recognizes a general prohibition of participation. The assisting State here qualifies as participant in another State's use of force.[7] Assistance that is not covered under that prohibition is only subject to regulation if the UN takes action.[8]

With respect to the two-pronged normative regulation, the surveyed subsequent practice demonstrates 'concordant, common, and consistent' agreement among UN members.

Both rules derive from the principle of non-use of force, laid down in Article 2(4) UNC. Both rules are hence obligations under the UN Charter, which benefit from Article 103 UNC in case of a conflict of obligations. Given the wide and universal acceptance, both rules have also emerged in parallel as rules of customary international law. Whether or not both rules are peremptory requires an independent assessment.[9]

Still, it is not without reason that States distinguish between the rules. Ultimately, the different content and scope of the rules reflect different consequences. Before detailing the conceptualization of both norms (B), the criteria which States use in practice to describe and ultimately qualify assistance to a use of force shall be identified in the abstract (A).

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7 Recall that 'participation' is used here not as the generic term that captures different forms of involvement. 'Participation' describes here a specific form of involvement in another State's act. The terminology is based on the one used in the discussion on the 1987 Declaration, the only general universal recognition of the rule. The survey of international practice indicates that there is no universal and consistent terminology to describe interstate assistance. Terms include i.a. 'assistance', 'support', 'participation', 'complicity', 'aid and assistance', 'perpetration', 'indirect use of force', and 'use of indirect force'.

8 See on this below under II.

9 There are good arguments for accepting that the prohibition to (indirectly) use force constitutes a norm of *ius cogens*. Cf Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, A/CN.4/727 (31 January 2019), 27-30 para 62-68.

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A. The distinguishing criteria in the abstract: proximity vs remoteness

Both norms apply to assistance to a *use of force*. Unlike, for example, the rule of non-intervention, which may be distinguished also through the assisted act ('coercion' rather than 'use of force'), the qualification of the assisted use of force does not matter. Even if assistance is provided to an armed attack or an act of aggression, both norms apply equally.

The key distinguishing criterion is hence based on the relationship between the act of assistance and the use of force. Ultimately, it is a question of degree. The ILC member Nikolai Ushakov's observation during the Commission's 1978 session in view of a general rule of complicity puts it well:

> "[P]articipation must be active and direct. It must not be too direct, however, for the participant then becomes a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity."[10]

Similarly, the act of assistance qualifies as "indirect use of force" leading to a perpetration of the assisted use of force if the relationship between the assisting and assisted act is *proximate*. In case the relationship can be described as *remote*, 'assistance' is not prohibited, unless the Security Council takes action. If the relationship is *neither proximate nor remote*, assistance is captured by the rule of non-participation.

International practice suggests that various factors determine the proximity or remoteness. Those factors need to be assessed and applied on a case-by-case basis. Given the wide diversity and uniqueness of the pertinent relationships, it is hardly possible to make conclusive and generalized statements regarding whether a specific form of assistance falls under a particular norm. For this reason, State practice relating to interstate assistance may appear arbitrary at first sight. Yet, the varying compositions of the factors justify different treatments while still complying with a general framework.

This approach in international practice also means that the determination of proximity or remoteness of assistance is a holistic assessment of various factors. In particular, focusing on only one factor, such as the type of assistance, is not adequate. The determination is a matter of degree, not

10 ILCYB 1978 vol I, 1519th meeting (18 July 1978) 239, para 11.

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merely the form of assistance.[11] Absolute statements about certain types of assistance to qualify under a specific norm do not accord with international practice.

At the same time, this approach does not exclude the possibility that there may be presumptions on how to qualify assistance. The factors mutually interact and influence each other. This allows for specific 'rules' qualifying a certain type of assistance under a specific norm. But it also means that such rules serve as no more than indicators, that under different circumstances also allow for different qualifications.

At first glance, this conclusion might generate opposition.[12] It appears to fundamentally contradict some of the most famous, widely cited, and accepted international practice. For example, the ICJ's renowned Nicaragua-formula or Article 3(f) Aggression Definition seem to make such absolute qualifications. But this would misconceive these practices, by taking them out of context, and artificially divide assisting contributions. For example, it is important to remember that the Nicaragua-formula was developed and applied in an individual decision, specifically tailored to the facts of the case. The ICJ's substantiation corroborates this conclusion. The ICJ based its conclusions on the Friendly Relations Declaration and the Aggression Definition. Both were however not meant as absolute rules but rather as illustrative examples for the specific application of general rules.[13]

As such, unlike widely understood, these instances do not stipulate a rigid formula. They are the result of weighing several relevant factors that lead to specific conclusions in[14] or for[15] a particular case. This does not mean that the formula may not adequately apply to most cases. But under different circumstances, allowing the use of one's territory, providing arms, logistical support, or funds, may lead to different legal qualifications.

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11 Similarly for other areas Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', 27(3) *EJIL* (2016) 824.

12 Just see for example: Michael N Schmitt, Andru E Wall, 'The International Law of Unconventional Statecraft', 5(2) *HarvNatSecJ* (2014); Christian Henderson, *The Use of Force and International Law* (2018), 60-62; Christian Henderson, 'The Provision of Arms and Non-Lethal Assistance to Governmental and Opposition Forces', 36(2) *UNSWLJ* (2013); Jonathan Howard, 'Sharing Intelligence with Foreign Partners for Lawful, Lethal Purposes', 226(1) *MilLRev* (2018) who focus on specific types of assistance when qualifying assistance.

13 Cf e.g. Article 2 Aggression Definition.

14 *Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [*Nicaragua*].

15 Article 3(f) Aggression Definition.

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For the entire assessment, it is crucial to carefully define the relevant act of assistance through the general rules of attribution.[16] The relevant relationship can only be defined on the basis of the pertinent conduct being attributable to the assisting State. This is relevant in particular if the direct contribution to the use of force comes from a third actor.[17]

After turning first to abstract factors according to which international practice distinguishes its assessment of assistance (1), the analysis will proceed to show that States do not necessarily align the evaluation of the factors with related, but distinct concepts concerning assistance (2).

1) Distinguishing factors

International practice takes into account various factors to describe the relationship between the act of assistance and the assisted use of force, and thus normatively evaluate assistance.

After describing abstract features according to which States distinguish different scenarios of interstate assistance (a), key factors in application of those criteria will be identified (b).

a) Assistance – how?

The key factor in determining how to qualify assistance relates to the role of the assisting State. What form of assistance does the assisting State provide (1, 2), and what is the assisting State's subjective attitude (3)?[18] It is crucial to note the lines between the criteria are not always clear-cut. They substantially influence each other. As such, the elements must not be viewed in isolation, but need to be seen holistically.

16 See also Chapter 1 II.A.2.

17 E.g., this is typically the case for arms sales that are licensed, but not conducted by States.

18 Similarly, Berenice Boutin, 'Responsibility in Connection with the Conduct of Military Partners', 56(1) *MLLWR* (2017-2018) 77-78 who identifies knowledge, capacity, proximity and diligence as key criteria.

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(1) Assistance – what is provided? The objective criteria

First and foremost, the type and content of assistance are decisive. It will predetermine various other factors. At the heart of differentiation between different forms is their (potential) contributory effect. Several aspects are relevant: How, and how closely and immediately, might assistance contribute to the assisted use of force? How can it be utilized? Where is the assisted act's place in the materialization of the assisted use of force? What is the exact function of the assistance in the military chain? Is assistance provided in the context of the use of force, in preparation for the use of force, or in immediate direction to combat operations?

Some forms of assistance, if used, are by their nature closely connected to a use of force (e.g. refueling, providing targeting information, supplying offensive weapons). For other forms, the connection to the use of force is not as strong. It ultimately depends on the possible use. For example, one may need to distinguish between the permission to use an assisting State's air space to position troops in a combat area, and the permission to use it as a launch base for air strikes. Dual use goods fall into the same category. Other forms of assistance, for example funds, are generally neutral toward a use of force by their nature.

Moreover, the assisting State may provide assistance to assistance, rather than to a use of force.

Another important indicator and factor is the temporal connection to the use of force. When is the assistance provided – before, during, or after (i.e. in the termination phase of) the lethal operation? Determinative is also by what means the assisting State provides the assistance. Do States provide assistance through military means and their own troops, or are they contributing through civilian means?

Second, the nature of the contributory act factors into the equation. If the assisting State's contribution is a positive action it is typically more proximate than an omission.

Third, the specificity of assistance is relevant. As such, it is taken into account whether the assisting States decides to actively participate in and specifically contributes to a use of force, or whether it provides assistance more generally in continuation or as part of normal interstate cooperation.

Fourth, the quantitative extent and intensity of the assistance, in terms of scope and duration, matter. It may make a difference if it is marginal, single, one-time, or a continuous and comprehensive assistance operation. In this respect it is interesting to note that the provision of assistance is not

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assessed act by act but is instead evaluated in terms of its contribution to a use of force 'as a whole'.

Fifth, the location where assistance is provided is significant. Assistance that is provided within the combat theater is usually more proximate than assistance that is provided elsewhere.

(2) The implication of assistance in the use of force

The implication of the act of assistance in the use of force is a key factor to consider. The extent of the contribution of the act of assistance needs to be assessed.

On that note, it may be asked whether, and more importantly to what extent the assistance *is causal* for the assisted use of force.[19] Is the assistance ultimately used by the assisted State, or does the assistance merely contribute by creating an option or increasing the risk?[20] Does the assistance not only *facilitate* but *enable* the assisted use of force? How actively does the assistance contribute to the military operation against the targeted State? Is the impact of assistance focused on general, albeit possibly war-sustaining activities, or does the assistance directly contribute to the assisted use of force? Would the core of the assisted operation be altered if the assistance were not provided? Is the specific State's contribution irreplaceable, or is it more general in nature?

The role the assisted State ascribes to assistance may be of indicative value in this respect. Assistance may warrant a different assessment if it is perceived as indispensable by the assisted State, e.g. because the assisting State is providing an essential capacity.

(3) The subjective attitude of the assisting State

Another significant factor in the qualification of assistance is the subjective attitude of the assisting State. In international practice, distinctions are drawn whether a State has knowledge of, first, the assisted act and, second,

19 Cf also John Gardner, 'Complicity and Causality', 1(2) *Criminal Law and Philosophy* (2007) 128 "the difference between principals and accomplices is a causal difference, i.e. a difference between two types of causal contributions, not a difference between a causal and a non-causal contribution".

20 This again is closely related to precisely defining what exactly constitutes the act of 'assistance'.

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its contribution to that act, and if so, what degree of knowledge (ranging from constructive knowledge, to positive knowledge, to certainty) the State has. Moreover, the assisting State's intentions may be relevant. The legal qualification may depend on whether the assistance is provided specifically with the purpose to contribute and facilitate the pertinent use of force, or whether it was provided for other reasons but has been used by the assisted State in that manner.

Moreover, the assisting State's diligence when providing assistance may factor into the equation.

Last but not least, it may be decisive how the assisting State identifies with the assisted use of force. Does the State consider itself part of a coalition, viewing the assisted use of force as its own, or does the State take a more distant position towards the operation, treating the assisted use of force clearly as another State's action? Does the assisting State consider itself part of the conflict? Does the assisting State benefit from the assisted act itself, or is its benefit confined to the (political or economic) gains that providing assistance brings to the relationship with the assisted State?

b) Key features in application of the distinguishing criteria

Ultimately, the legal qualification of assistance is a matter of balancing these factors.

In assessing the relationship between the act of assistance and the assisted use of force, and thereby assembling the distinguishing criteria to form a normative evaluation of the assisting contribution, international practice allows for a pre-assessment as it attaches great weight to the recipient actor (1) and the modalities of assistance (2).

(1) Assistance – to whom? The assisted actor

The recipient of assistance may be relevant in two ways: the nature of the assisted actor (a) and the specific position of the recipient of assistance within the organization of the assisted entity (b).

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(a) Nature of the assisted actor: State or non-State

Whenever States spell out rules on assistance in detail,[21] international practice expressly distinguishes whether the recipient of assistance is a State or a non-State actor.[22] Different forms of assistance are qualified differently depending on whom they are provided to. This suggests that the rules on non-State actors, while structurally similar and as a matter of principle applicable to interstate assistance, too, cannot be applied one-to-one to interstate assistance.

At first sight, one might question why the nature of the actor using force should make a difference. With new technologies, non-State actors may be as powerful and effective in using force as States. Some non-State actors and armed groups may have a state-like structure and organization when resorting to force. The so-called 'Islamic State', which controlled swathes of territory not only in Syria and Iraq, has recently illustrated this with appalling brutality.[23]

Nonetheless, following the general trend in State practice to deny such actors the seal of statehood – States also draw a line concerning under what circumstances an assisting State may be viewed as *perpetrator* of the assisted use of force. In doing so, States appear to take into account decisive differences between non-State actors and States.

Statehood is widely associated with features that non-State actors are generally not perceived to possess.[24]

First, armed non-State actors have fewer (internal and external) structural capacities. This has several implications. These actors are less likely to conduct a military operation self-sufficiently. It is more difficult for them to possess and acquire the necessary know-how and armaments

21 This observation is not invalidated by the fact that – in particular in treaty practice – States widely treat assistance to non-State actors and States alike. This has implications however only on the application of the relevant provision. It suggests that the concept may apply to both interstate assistance and assistance to non-State actors. Whenever the exact conditions are spelled out and whenever States apply the specific rules to both cases, States draw a line. Illustrative in this respect *i.a.* Aggression Definition, African treaty practice.

22 Recall most notably Article 3(f) and (g) Aggression Definition, AU Non-Aggression and Common Defense Pact 2005.

23 See also the concept of *de facto* regimes Jochen Abr Frowein, *Das de facto-Regime im Völkerrecht: eine Untersuchung zur Rechtsstellung" nichtankerkannter Staaten" und ähnlicher Gebilde* (1968).

24 See also Nußberger, Fischer, *Justifying Self-defense against Assisting States* (2019).

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to resort to force, making them more dependent on outside assistance. This, in turn, is reflected in the assisted non-State actors' independence and autonomy, and justifies the presumption of more independence and self-control for State actors. Through the provision of assistance to non-State actors, an assisting State may have more influence than on a State. Generally, assistance to other States has more a (possibly necessary) complementary and facilitating function, whereas if provided to non-State actors, it is necessary and enabling.

Second, armed non-State actors are typically unidimensional. As a group, they primarily pursue one purpose: the use of force against a specific actor. As such, the connection between the assistance and the use of force, as well as the assisting State's intentions are as a general rule well established. In contrast, the relation between an act of assistance and another State's use of force cannot necessarily be established and predetermined, but requires specific proof. A State may (lawfully) pursue many avenues.

Third, on that note such armed non-State actors may resort to a use of force more easily than States. Also for this reason, even minor assistance to non-State actors may have a greater, more incentivizing effect and profound impact. Moreover, a use of force by armed non-State actors on their own is typically less sustainable and less severe, and for this reason, bears less risk of international escalation than an inter-State violence. At the same time, as non-State actors may usually operate covertly from within the targeted State, they may effectively weaken the very essence of the targeted State, and hence may be more dangerous.[25]

Fourth, the difference is also reproduced on the normative level. Non-State actors cannot violate the rules of *ius contra bellum*. This not only excludes derivative responsibility of the assisting State. It also means that under international law there will be no actor that the targeted State may hold responsible for the use of force. In contrast, in case a State resorts to force, there is already and always someone who can be held responsible, with all its consequences.

Closely connected to this consideration, fifth, non-State actors are necessarily situated within other States, and unlike States, do not have their own territory under their sovereignty.[26] In case of a forcible response to a

25 See also Stephen M Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law', 136 *RdC* (1972) 456.

26 Even when the non-State actor control territory, a response by force will – legally – affect a third State.

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non-State actor engaged in cross-border violence, the territorial State will almost always be necessarily implicated.[27] In contrast, if a State resorts to violence, the targeted State will have at least the theoretical possibility to direct the defense against this State's territory.[28] This again may impact the understanding of 'assistance' and justify different treatment.

Last but not least, it should not be forgotten that cooperation between States and non-State actors is less frequent and less beneficial than cooperation between States.[29] As such, strict rules on non-assistance factually have different impacts. In the interstate context, such rules impede in principle legal and endorsed cooperation among States, which can have legitimate applications. On the other hand, military relevant assistance to non-State actors has less impact on the international community's interactions.

This is also related to the fact that the relationship between States and non-State actors lacks reciprocity. Non-State actors usually offer nothing more than the use of force against the targeted State; the assistance is hence usually only limitedly reciprocal. It is not only clear for what the assistance is used, but it may serve no other purpose. In contrast, assistance to States is multidimensional. It may be provided as a *quid pro quo*, or for reasons other than the use of force. Hence, the relationship in interstate assistance is not necessarily as close as it is with non-State actors.

(b) The role of the recipient within the assisted actor?

The specific position of the recipient of assistance within the assisted State may be a further indicative factor for the nature and qualification of assistance. For example, whether the assistance is directed toward a civil branch of the State rather than the State's military, is a factor in assessing the proximity of assistance. In a similar manner, the location of assistance (at the site of fighting or elsewhere) may be taken into account.[30]

27 The only exception is if the non-State actor is operating from international areas, such as high seas.

28 In case the attacking State operates from the territory of another State, it remains to be seen however if a use of force against the attacking State's territory would not be ineffective and/or unproportionate.

29 Recall for such an argument in international practice e.g. Kenya's intervention about the unreasonableness to cover routine overflight permissions by Article 3(f) Aggression Definition.

30 Recall for example the US argument in the Russia-Georgia war 2008.

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(2) Assistance – a quid pro quo?

Whether or not the assistance is provided as a *quid pro quo*, may also be factored in. To the extent that the assisting State provides assistance as part of its general trade relations, assistance is typically more remote than if it provides assistance to pursue its own strategic goals without direct compensation. Obviously, in considering this factor, it must be taken into account that in international relations States' conduct is almost always motivated by reciprocity, albeit to varying degrees.

2) Relevance of other legal concepts?

'Assistance' is defined and appraised in various other legal concepts and contexts, too. Frequently, scholars propose to transfer and apply the definitions of these other concepts to the *ius contra bellum*.

In the context of the *ius contra bellum*, the most prominent rules are those prohibiting 'assistance' to non-State actors.[31] Likewise, discussions occur regarding the extent to which assistance short of force to a State engaged in a civil war is prohibited.[32] In other areas of international law, assistance is prohibited.[33] International humanitarian law likewise addresses the role of assistance. There is an ongoing debate about when an assisting State becomes a party to an armed conflict.[34] There are rules determining when conduct qualifies as direct participation in hostilities.[35] It is

31 On those rules in detail see Claus Kreß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995); Schmitt, Wall, *HarvNatSecJ* (2014). For an (uncritical) application of these principles to interstate assistance e.g. Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016) 195-196; Oona A Hathaway and others, 'Yemen: Is the US Breaking the Law?', 10(1) *HarvNatSecJ* (2019) 61-62; Robert Chesney, 'U.S. Support for the Saudi Air Campaign in Yemen: Legal Issues', *Lawfare* (15 April 2015).

32 E.g. Luca Ferro, 'Western Gunrunners, (Middle-) Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?', 24(3) *JCSL* (2019) 511-513.

33 For an overview see Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011) 200-210; Lanovoy, *Complicity*, 186-193.

34 Hathaway and others, *HarvNatSecJ* (2019) 58; Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict', 97(900) *IRRC* (2015).

35 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 16. Proposing to apply these prin-

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debated to what extent Common Article 1, which imposes an obligation to ensure respect for the Conventions, prohibits assistance.[36] The law of neutrality regulates assistance, too.[37] International criminal law has developed modes of liability and participation extensively.[38] Domestic law establishes principles governing assistance in both criminal and civil law contexts.[39] Moreover, there are closely related yet distinct concepts, such as the rule of non-recognition,[40] the sanctioning mechanisms by the Security Council,[41] or positive duties to provide assistance.[42] Last but not least, there are

ciples in the *ius contra bellum* see Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression. A Commentary* (2017), 447.

36 Verity Robson, 'The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions', 25(1) *JCSL* (2020); Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', 13(1) *CJIL* (2014) 28-31; Ferro, *JCSL* (2019) 513 et seq; Helmut Philipp Aust, 'Complicity in Violations of International Humanitarian Law' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015).

37 For a comparison between the neutrality and *ius contra bellum* rules with respect to non-State actors: Luca Ferro, Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties', 17(1) *CJIL* (2018). In fact, the law of neutrality is often applied in addition, yet autonomous from the rules governing the *ius contra bellum*. But they are two separate regimes. See e.g. in the Iraq 2003 war: Ireland, Germany and Italy. See also Michael Bothe, 'Der Irak-Krieg und das völkerrechtliche Gewaltverbot', 41(3) *AVR* (2003) 267-268.

38 Article 25 ICC-Statute; Alexander KA Greenawalt, 'Foreign Assistance Complicity', 54(3) *ColumJTransnatlL* (2015-2016); Miles Jackson, *Complicity in International Law* (2015) Chapters 3-5; Marina Aksenova, *Complicity in International Criminal Law* (2016).

39 For an argument that there is a general principle of international law regulating instigation Miles Jackson, 'State Instigation in International Law: A General Principle Transposed', 30(2) *EJIL* (2019).

40 Aust, *Complicity*, 326 et seq.

41 Frequently, sanctions by the Security Council are used as an argument to establish a general rule of non-assistance. As seen, sanctions regulate assistance, too. But they cannot but inform the understanding of States. In particular, it does not allow a conclusive conclusion on the scope of other rules of assistance, unless it can be said with certainty that the Security Council meant to (also) endorse and reiterate an already existing legal obligation, rather than to impose a new obligation. That the Security Council may do so is established practice.

42 E.g. duties to provide assistance to peace keeping. The content of such assistance duties does not conclusively define what assistance is prohibited. Yet, it may inform the definition of 'assistance.'

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general rules on assistance in the Articles on State Responsibility and the Articles on the Responsibility of International Organizations.[43]

In international practice, States and other international actors referring to such concepts remain the rare exception. When States do so, notably, it generally serves to support the existence of a general rule rather than a specific application.[44] Given the different functions and purposes and contexts to which they apply, such concepts may not – without further thought – be applied to interstate assistance in establishing responsibility within the *ius contra bellum*. This does not mean that these concepts cannot apply similar standards, or more importantly, nonetheless be helpful and used as a source of inspiration.[45] Indeed, there may be considerable overlap. Yet, international practice is a reminder that such intra-international law analogies should be drawn judiciously, and only if the rules do not warrant any substantial distinctions.[46] Systemic integration and harmonization do

43 On those, see Chapter 6.I.

44 Recall for example for a reference to the law of neutrality: A/AC.91/4, 4 (Burundi); for assistance to non-State actors, see above, where States do not draw a line with respect to the application of the same rules, but distinguish in the application of the rules; for references to rules of complicity in domestic law: Budapest Articles; ILCYB 1949, SR.15, 119 para 78, "ancient principle" (Hudson); A/AC.134/SR.59 (1970), 67 (USA). The ILC was likewise reluctant to define aid and assistance in line with national complicity rules. This was the main reason why it steered clear of the terminology of 'complicity' (although it was not consistent, as it sometimes referred to complicity in its commentaries). On this see Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 138; James Crawford, *State Responsibility: The General Part* (2013); Bernhard Graefrath, 'Complicity in the Law of International Responsibility', 29(2) *RBDI* (1996) 371 who all warn against drawing parallels to domestic law. Interesting is also Jackson, *EJIL* (2019) 412-413 who uses the domestic law to prove the existence of the rule, but does not justify the contours of the rule with domestic rules.

45 See also the principle of systematic interpretation as laid down in Article 31 III (c) VCLT. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Rep 2007, 43 [*Bosnia Genocide*], 217 para 419, 420 where the ICJ referred to Article 16 ARS in interpret "complicity" in the sense of Article III (e) Genocide Convention, claiming that although "not directly relevant to the present case it nevertheless merits consideration." Similarly John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57(1) *BYIL* (1987) 117.

46 Cf *Bosnia Genocide,* 217 para 420. Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations. An Appraisal of the 'Copy-Paste Approach'', 9(1) *IntlOrgLRev* (2012).

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not absolve one from first determining the specific primary rule for the particular context.

B. Which interstate assistance is prohibited how?

In 1987, John Quigley remarked in relation to programs of economic or military assistance that "while the contours and scope of the complicity liability of a donor State have yet to be formulated with precision in State practice, certain standards have emerged."[47] The present survey suggests that some 30 years later, international practice has not made much progress. The exact contours and scope of the regulation of assistance still await a structured, in-depth discussion and a formal clarification that allows for a comprehensive agreement among States. In abstract discussions on the principle of the use of force, interstate assistance has not featured prominently. While this suffices to identify States' agreement with respect to the basic dual regulation of interstate assistance, the exact scope remains underdeveloped. The general debates in the context of the development of Article 16 ARS may have contributed to clarity. Yet, first, these debates concerned a *general* rule of complicity. Second, since its formal acknowledgment in 2001, Article 16 ARS has played a remarkably limited role in *States'* (not scholars') public considerations within international conflict practice relating to the use of force. Clarification that allows for an unambiguous conclusion of an 'agreement' among States can only stem from a broad interstate discourse through the lens of the specificities of assistance to use of force. Marking the 75th anniversary of the UN Charter, it is hard to escape the impression that States' ambiguity and reluctance to precisely define the content of the rules are not undeliberate.

In the meantime, this should not suggest that the two-pronged regulation of interstate assistance, i.e., the prohibition of indirect use of force and the prohibition of participation, is an empty shell without normative value. Conflict practice shows that it is applied in practice. This practice also allows for further refinement of the scope; in application of the previously discussed distinguishing criteria, general standards may be deduced. Although, given the great diversity of what may be considered assistance, and the still minimal concerted efforts of States to define the rules of interstate assistance, it must also to be concluded that international practice defines the content of these norms with some contextualized flexibility.

47 Quigley, *BYIL* (1987) 108.

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This is in particular true concerning the relationship between the act of assistance and the assisted use of force. International practice does not allow for the conclusion of an agreement beyond general standards. The structure and consequences of the classification, however, emerge rather clearly.

1) Assistance under the prohibition to use of force

The prohibition to use force plays a key role in regulating interstate assistance.

a) Direct use of (own) force

International practice provides a clear picture of how the responsibility of the assisting State is not established. Providing assistance does not violate the prohibition to use force directly. Assistance is not described as 'force'. The assisting State is hence not using its own 'force'.

Through the provision of assistance, the assisted 'use of force' is also not *attributed* to the assisting State.[48] Assistance does not have the effect if considering the assisted use of force, as a legal fiction, to be the own *conduct* of the assisting State, although this might not be excluded under general rules of international law.[49]

This observation remains in particular also true when the assisting State is part of an international coalition using force. While assistance and combat operations are often considered together and described as "joint conduct", for the *establishment* of responsibility, States draw a strict line between different contributions and uses of force. It is further true for cases where an assisting State is essentially part of the military operation, e.g., by undertaking essential tasks that are *conditio sine qua non* for the use of force, in a division of labor.

In international practice, the assisted use of force committed by the assisted State is consistently treated as a separate act. Irrespective how close the relationship may be, the assisted act is always considered an independent *assisted* act, not the assisting State's own act. International

48 For the same conceptualization see Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18(4) *EJIL* (2007) 652.

49 On this Chapter 6.I.

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practice thereby remains committed to the legal distinction between combat activities and preparatory acts. The responsibility is hence grounded in the assisting State's conduct, not in the attribution of the assisted act. Accordingly, the assisting State does not bear responsibility for a direct use of force.

b) Indirect use of force

But this does not mean that by providing assistance, a State may not violate the prohibition to use force. International practice confirms that the *use* of force is not limited to the use of one's *own force*. The conduct meeting the threshold of force does not necessarily need to be attributable to the State considered to be using that force. It does not necessarily have to be the *own conduct* of the State considered to use force. Instead, as a matter of principle the prohibition to use force also extends to an *indirect use* of force. Through providing assistance, the assisting State may *use* another State's use of force.

This broadening interpretation to cover certain forms of assistance, too, was primarily driven by the motivation to prevent the prohibition on directly using force from being circumvented through the involvement of a third actor. The interpretation mainly responded to a common trend of States substantially supporting and encouraging non-State actors inside and outside the targeted State, increasingly substituting classical use of force. This background set the tone for the scope. States sought to cover only cases in which the assisting State may be reasonably equated with a perpetrator using its own force.

International practice suggests that this interpretation also applies to the involvement of an assisting State in another *State's* use of force (1). While international practice clearly circumscribes the structure of the prohibition of indirect use of force (2), States take a flexible approach regarding the level of involvement by the assisting State that is required for a *use* of another State's use of force. As a rule, a *proximate* relationship between the act of assistance and the assisted use of force is required (3). On that basis, the provision of assistance is an independently wrongful conduct in its own right involving another State. The other State's use of force remains a distinct act, not attributed to the assisting State (4).

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(1) Assisted use of force by a State

That a State may use force also indirectly is – as a matter of principle – well accepted in international practice. The fact that this interpretation has been developed and is applied in general abstract statements of the law primarily in the context of support to non-State actors, might be considered to shed some doubt whether the rule may also apply to case where the use of force is committed by another State. Not least, as seen above, there are substantial differences between States and non-State actors.

But not only the drafting history of the abstract declarations that recognize this interpretation suggests that States did not seek to exclude the application to States. States in their treaty practice[50] as well as in their behavior in concrete conflicts[51] confirm that the most famous application to the interstate context, Article 3(f) Aggression Definition, was no outlier.

(2) The assisted use of force

International practice follows along the lines of the general conceptualization of the prohibition to use force.

First, international practice suggests that the assisted use of force must actually take place.[52] The violation of the rule only occurs at the moment when the assisted use of force is actually performed. The qualification of assistance as a breach of the prohibition to use force is hence dependent on the action of the assisted actor. Assistance *per se* is not prohibited under the

50 Recall in particular the 2005 African Union Non-Aggression and Common Defense Pact or the Treaty of Brotherhood and Alliance between the Kingdom of Iraq and the Hashemite Kingdom of Transjordan.

51 States widely treat proximate assistance similar to a use of force. *Inter alia*, they send letters to the UN Security Council. They justify proximate assistance to in their view lawful use of force (recall UK and Germany in Fighting ISIS in Syria). They rely on a Security Council authorization rather than the Council's call for assistance. They invoke a State's invitation itself in addition to arguing that the assisted State is complying with international law. They protest against proximate assistance not only as 'complicity' but as an unlawful use of force. This would not be *necessary* for the conduct as such (e.g. refueling, gathering and sharing intelligence).

52 For a similar conclusion based on international practice Samuel G Kahn, 'Private Armed Groups and World Order', 1 *NYIL* (1970) 40-41.

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prohibition to use force.[53] This requirement does not mean that the assisted actor must in fact make use of the assistance. This relates to a distinct question on the necessary nexus between the assisted use of force and the act of assistance that will be addressed below.

Second, the assisted use of force must meet, as a matter of *fact*, the threshold of the prohibition of a use or threat of force. The assisted conduct has to entail the defining elements of "force".[54] In this respect, it deserves specific mention that States also provide an independent justification for (proximate) assistance to use of force that has been conducted upon invitation.[55] Some considered such case to fall *qua definitionem* already outside the scope of the prohibited use of force rather than to be an external justification.[56] At least in the context of an indirect use of force, States hence seem to either follow the latter qualification that consensual use of force qualifies as *prima facie* wrongful use of force that is justified through consent. Or, in any event, it implies that structurally the assisted use of force is a question of fact, not of law.

53 This would distinguish the prohibition to use force from Article 6(3) ATT that, if it applied to use of force situations, prohibited already the "transfer", and from the Soering-scenario, see Chapter 1, II.B.

54 For a discussion of the meaning of 'force' under the prohibition to use force: Tom Ruys, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Uses of Force Excluded from UN Charter Article 2(4)?', 108(2) *AJIL* (2014); Olivier Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (2010). Note that this also embraces assistance to an indirect use of force by the assisted State (cf DRC and Sudan in *Armed Activities* case).

55 Recall e.g. Stanleyville 1964, Yemen 2015.

56 See for a discussion Federica I Paddeu, 'Military assistance on request and general reasons against force: consent as a defence to the prohibition of force', 7(2) *JUFIL* (2020); Jörg Kammerhofer, 'The Armed Activities Case and Non-State Actors in Self-Defence Law', 20(1) *LJIL* (2007) 93-94; Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force', 26(4) *EJIL* (2015) 980-981. On the ICJ see Claus Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2016) 577. *Armed Activities on the Territory of the Congo* (DRC v Uganda), Judgment, ICJ Rep 2005, 168, 223-224 para 148-149. Suggesting that a similar reading may also apply for self-defense: ARS Commentary, Article 21, 74, para 1 ("not even potentially"). For a recent account: Adil Ahmad Haque, 'The United Nations Charter at 75: Between Force and Self-Defense - Part One', *Just Security* (24 June 2020). See also discussions in the realm of the *Oil Platforms* Judgment, e.g. Jörg Kammerhofer, 'Oil's Well that Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case', 17(4) *LJIL* (2004) 700-701.

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Third, for an indirect use of force it is not decisive whether the assisted use of force itself is wrongful. This follows already from the parallel emergence of the rule for non-State actors and States. For the former, this has been a necessary conceptualization, as non-State actors are not considered capable of violating the rules of the *ius contra bellum*. The abstract declarations of law affirm this conceptualization is not modified for interstate assistance.[57] States in concrete application of the rule in conflicts also systematically acknowledge this fact. It is no exception but in fact the general rule that States justify specific forms of assistance despite their claim that the assisted use of force likewise is in compliance with international law.[58]

(3) The relationship between the act of assistance and the assisted use of force

By no means every act of assistance is considered an 'indirect use of force'. States impose a high standard. The relationship between the act(s) of assistance and the assisted use of force need not amount to 'control',[59] but must be sufficiently *proximate*. States define proximity based on the forementioned criteria. There is no clear-cut rule that allows for an absolute determination of when assistance qualifies as indirect use of force. The criteria are applied flexibly on a sliding scale. Yet, international practice allows for some general observations.

International practice indicates that the application of the interpretation is not limited to the scenarios described by Article 3(f) Aggression Definition. Scholarly assessments may often suggest otherwise, thus proving true those States who warned against an exemplification of aggression that may

57 It is true that Article 3(f) Aggression Definition refers to "aggression" rather than "act of armed force" "of such gravity to amount to the acts listed above" as in Article 3(g). Thereby, Article 3(f) describes the most likely situation, that the use of force was unlawful for both, the assisted and assisting State. There is nothing however that suggests that this reference was meant to render the illegality of the assisted use of force a precondition for the assisting State's responsibility.

58 Recall e.g. the practice on the military operations in Stanleyville, Iraq, Libya 1986 and 2011, Yemen, or Syria.

59 This would lead to attribution of conduct, as 'control' is the underlying theory of all grounds of attribution but for Article 11 ARS. As such, international practice is consequent in that it consistently treats assistance as a separate act, and does not accept responsibility for a direct use of force.

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be perceived to exclude acts of aggression not explicitly mentioned.[60] But not only was Article 3(f) Aggression never intended to be exclusive. In international practice, Article 3(f) Aggression Definition is considered no more than an (important) example and an expression of a more general rule.[61] The great variety of assistance for which States have expressly submitted justifying letters to the UN Security Council illustrates this particularly well.[62] As a general rule, any type of assistance may qualify as indirect use of force. But it is not the type of assistance *per se* that is significant but rather the characteristics of a specific type of assistance in a particular situation.

Factually the type of assistance often circumscribes the characteristics of proximity. For example, typically, the isolated provision of overflight rights for the positioning of forces will usually not suffice to qualify as indirect use of force. This is not only because assistance consists of granting overflight. But by its nature, it is (temporally) more remote from the use of force. Likewise, its impact on the use of force is more limited and less direct. In contrast, placing armed forces at the (full) disposal of a State for a specific military operation is considered proximate. Again, it is not merely the form, but the close temporal connection and direct contribution to the use of force that matter. Moreover, the assisting State typically intends to assist a use of force and has knowledge about the engagement. On that note, the widely propagated distinction between lethal and non-lethal contributions likewise is an important indicative feature. But, again, one cannot conclude that the non-lethal nature of the contribution generally opposes the qualification as indirect use of force. The same is true for 'offensive' or 'defensive' contributions.

More crucial than the type of assistance is the degree of contribution and the impact of assistance on the use of force. Typically, assistance is not only a *conditio sine qua non* but *essential* and *defining* for the specific use

60 Israel put it particularly well A/C.6/SR.282, 176 para 33: "The fourth and last method was that of exemplification. That method was dangerous, both psychologically and logically, since it directed attention to certain acts which influenced man's thinking, and divided acts of aggression into two categories, those which were explicitly listed and those which were not, thus creating a certain hierarchy of acts of aggression and giving undue weight to one category to the detriment of the other."

61 Recall e.g. A/RES/498 (V) (1951) Korea, which classified "*direct* aid and assistance" as "aggression", emphasis added.

62 Just recall for example: Germany and UK on the fight against ISIL in Syria: reconnaissance, refueling; Italy in Libya 2011: airbase and refueling; Uganda in Iraq 2003: provision of troops; Norway in Korea: transport.

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of force. As such, it usually meets qualitative and quantitative thresholds. The assistance may be described as a division of labor, as a principal contribution rather than a facilitation. This hence permits to also include by nature more remote forms of assistance.

As a general rule, international practice is hesitant to qualify omissions as 'indirect use of force'. Contributions that lack a strong subjective element share the same fate. Instead, assistance is typically considered as indirect use of force if it is provided with full *positive knowledge* about the future use and *full intention* to contribute to the specific use of force.[63] This is a crucial factor in explaining why most instances of weapon provisions are not described as indirect use of force. Not only are such provisions usually temporally remote. More importantly, States often do not possess specific knowledge regarding the specific use of force they might thus assist. Also, this requirement limits responsibility for an indirect use of force in case that the assisting State acts *ultra vires*. Moreover, typically, the assisting State fully identifies with the use of force, as is often shown by the fact that the assisting State shares the operation's objective and perceives the use of force not as an external operation, but as an own (joint) operation. As such, the assistance is specifically "directed" against the targeted State. For example, the fact that an assisting State is part of an *ad hoc* coalition may be an indicator.[64]

Particularly in abstract practice, subjective elements do not feature prominently. In particular, regulations for assistance to non-State actors allow for low subjective threshold. Likewise, in the Nicaragua decision the ICJ did not stipulate such a requirement. It is only included into considerations about aggression.[65] But this practice does not call into question the conclusions for two reasons. First, for the reasons discussed earlier, the

63 Reluctant with respect to due diligence obligations also Ruys, *Armed Attack*, 376; Kreß, *Gewaltverbot und Selbstverteidigung*, 348.

64 E.g. Libya 2011, Fight against ISIS in Iraq and Syria.

65 See on the controversies whether to include subjective elements into the concept of aggression: A/2638 (1953) para 66-68 (1953); A/2806 (1954) para 26; A/3574 (1957), 7 para 57; A/7620 (1969) para 11 (13 power draft), para 36-38; A/8019 (1970) para 86-98; A/AC.134/SR.68-69 (1970). In any event, under Article 2 Aggression Definition intent is an "other relevant circumstance" that may be considered by the Security Council in determining an act of aggression. See also Benjamin B Ferencz, 'A Proposed Definition of Aggression: By Compromise and Consensus', 22(3) *ICLQ* (1973) 423; McDougall, *Crime of Aggression*, 63-70; Michael Bothe, 'Die Erklärung der Generalversammlung der Vereinten Nationen uber die Definition der Aggression', 18 *GYIL* (1975) 129-130.

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exact conditions for assistance to non-State actors may differ from those of interstate assistance. Second, the silence on subjective elements in cases of assistance to non-State actors appears to reflect the fact that such assistance to armed non-State actors is typically driven by the intention to foster the use of force against the targeted State.

At the same time, this practice reaffirms the notion that proximity is a fluid concept. Different criteria are factored in. An assistance type that is inherently remote may be counterbalanced if provided in significant quantities, in a specific situation closely related to the use of force, and with a strong subjective element. Conversely, in case of an essential and by nature proximate contribution the subjective element is less significant. It may also matter whether the contribution comes in isolation or rather is part of a bundle of assistance, as several acts of assistance are typically assessed in combination.

(4) Legal consequences

The assisted use of force is not attributed to the assisting State. Neither does the assisting State bear vicarious responsibility for the assisted use of force.[66] Instead, the responsibility of an assisting State for breaching the prohibition of indirect use of force is *ancillary, but not derivative*. The responsibility of the assisting State hinges on an assisted act by another actor. The assisted act also defines the content of the indirect use of force. But the wrongfulness of assistance does not stem from its association with a *wrongful* (assisted) act. In other words, proximate assistance that qualifies as indirect use of force is an independently wrongful conduct which involves another State.[67] The other (assisted) State's conduct is considered as a question of fact.[68] The relevant wrong does not arise from a breach of the prohibition to use force by the assisted act. The wrong is the proximate contribution to a use of force by the assisting State, even if the use of force was lawful for the assisted State. The proximate contribution itself is

66 For the definition see Vaughan Lowe, 'Responsibility for the Conduct of Other States', 101(1) *JIntl&Dipl* (2002) 11 and Chapter 1, II.B.

67 Cf Second Report Crawford, 46 para 161 (d).

68 This however does not mean that the responsibility of the assisted State was excluded. Likewise, it means that the responsibility of the assisted State does not exclude the responsibility of an assisting State. Cf e.g. Article 3(f) Aggression Definition that refers to an assisted aggression.

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considered a breach of the prohibition to use force, when it impacts the targeted State through the assisted use of force.

Accordingly, the prohibition to use force is subject to an expanded interpretation based on the principle that "a State cannot do through another what it cannot do by itself". An assisting State cannot provide proximate assistance for a use of force that it is not permitted to engage in itself.

This is not just of theoretical interest but may have practical implications. An act of assistance may be in violation of the prohibition to use force, even if the assisted use of force complies with the prohibition. To the extent that an assisting State cannot invoke a justification for its assistance, its assistance may be wrongful even though the assisted State can rely on a justification. Such cases remain rare in practice. In most cases the fact that the assisted State is justified implies that the assisting State is justified, too. Yet, particularly in cases of consensual use of force, or use of force authorized by the Security Council, such a scenario is not beyond reality, as the authorization may be deliberately limited *ratione personae* to specific States only.

States treat proximate assistance as equivalent to direct use of force. Such assistance is, *prima facie,* wrongful. The assisting State must hence provide its own justification, its own report to the Security Council, and conduct its own assessment. It cannot exclusively rely on the assisted State's narrative and cannot benefit from the legitimate presumption that other States comply with international law. It is not enough to simply claim that the assisted use of force is in accordance with international law. Uncertainty about the violator cannot serve as an excuse either. Accordingly, States widely provide justifications to the United Nations. In doing so, States indicate that the accepted trinity of justifications – authorization, invitation, and self-defense – applies to such contributions, too.[69]

Moreover, while the specific preconditions remain for further analysis, indirect use of force, especially proximate territorial assistance, opens doors to a response in self-defense if the assisted use of force qualifies as 'armed attack'[70] at least in narrow limits, confined in time, extent and purpose to

69 For example, for assistance qualifying as indirect use of force, States expressly invoke the Security Council authorization, instead of the (political) call to provide assistance.

70 Cf in particular Article 3(f) Aggression Definition, and incidents in which States responded or threatened to respond by force against assisting States (Cambodia, Israel in Syria, Soleimani, Iraqi responses to its neighboring States). Interesting (theoretical)

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specific and proximate contributions to a use of force meeting the threshold under Article 51 UNC. Some practice indicates even that an *assisting State as such* may be targeted in self-defense.[71] The qualification as indirect use of force can be only a necessary prerequisite. In parallel to the context of non-State actors, it is to be expected that the extent to which assistance permits self-defense will be a matter of degree that State practice has to define.

Similarly, questions of criminal liability under national[72] or international criminal law may be on the agenda.[73] Last but not least, the qualification as an independent 'use of force' may allow for judicial proceedings, as it may provide additional grounds for arguments to escape the indispensable third-party rule.[74]

c) A flexible interpretation within the UN Charter's boundaries

"We are not engaging in combat activities." This is what State officials like to stress when explaining military engagement to the public. It may bear political relevance. But legally, it does not preclude a State from being considered to *be using force* against another State.

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scenarios in view of a right of self-defense against an assisting State arise when the assisted State but not the assisting State can rely on a justification, and *vice versa*.

71 Such acts could be described as "indirect armed attack". In this direction: Article 3(f) Aggression Definition; Iraqi self-defense practice against its neighbors (Kuwait).

72 E.g. § 80 StGB, Claus Kress, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2(1) *JICJ* (2004) 248, 253.

73 Ibid 253-254. See the Crime of Aggression, Article 8 bis ICC-Statute, referencing Article 3(f) Aggression Definition.

74 The rule prevents a court to exercise jurisdiction if the very subject matter of the decision constituted the legal interest of the assisted State. In case of an indirect use of force, however, it is not the responsibility that needs to be determined, but the mere fact that the conduct by the assisted State took place suffices. Cf Christian Tomuschat, 'Article 36' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, 2019) para 21-25. For a detailed discussion Aust, *Complicity*, 296-311; Martins Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice', 4(2) *JIDS* (2013) 305 et seq; André Nollkaemper, 'Shifting Patterns in International Dispute Settlement Issues of Shared Responsibility before the International Court of Justice' in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law - Studies in Honour of Karel C. Wellens* (2012).

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International practice suggests that interstate assistance may qualify as *indirect* use of force, in breach of the *prohibition* against the use of force. States interpret the prohibition to use force narrowly. Only acts of assistance with a proximate relationship to the use of force qualify as indirect use of force.[75]

Ian Brownlie was hence not mistaken when addressing questions of joint responsibility. He posited that "the supply of weapons, military aircraft, radar equipment and so forth would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility."[76]

In light of international practice, Brownlie's statement necessitates a twofold qualification. First, it does not clarify *what* States are jointly responsible for. In the latter cases, States will usually be jointly responsible, as both breach the prohibition to use force – yet not in the same manner. The recipient State, engaged in combat, *directly* uses force; the assisting State uses force *indirectly*. In the former cases, States may still be jointly responsible – yet not for a violation of the same norm, but in connection with the same conduct. Second, the distinction Brownlie makes is not as rigid as his example implies.[77]

The flexible, but narrow approach adopted by international practice seems to heed the word of caution issued by Roberto Ago in the context of discussing a general complicity norm in the law on State responsibility. Discussing whether and under what circumstances assistance may be treated equivalent to the assisted act, Ago cautioned: "In any case, it is necessary to guard against the danger of finally diminishing the gravity of a particularly serious internationally wrongful act by unduly enlarging the area in which the existence of such acts is recognized."[78] By adopting a rather narrow

75 In this respect Lanovoy, *Complicity*, 204's "fair [assumption] that complicity in the threat or use of force constitutes a threat or use of force in and of itself" does not accord with State practice.

76 Ian Brownlie, *System of the Law of Nations: State Responsibility Part 1* (1st edn, 1983) 191.

77 Note that Brownlie acknowledges that "the law is undeveloped in this context but the distinction which is to be sought is sufficiently clear".

78 Seventh Report Ago, 60 para 75.

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approach that requires proximity, States ensure that the distinct nature and gravity of being qualified as 'use of force' is not diluted.[79]

Even more importantly, States honor the boundaries of treaty interpretation. Through the strict requirements the normative character of the prohibition to *use* force is preserved. The assisting State may be characterized as perpetrator of a use of force without depleting the term of its meaning. States interpret, rather than modify, the Charter in light of the challenges posed by proximate assistance.

One caveat is appropriate at this point. International practice and hence the respective preconditions are specific to interstate assistance qualifying as indirect use of force. As such, they are arguably indicative but not conclusive for the necessary prerequisites of direct use of force.[80] The fact that the act of force is not attributable to the State (and thus is not as proximate) could in theory justify a dissimilar treatment requiring different elements for a direct and an indirect use of force.

2) Assistance under a prohibition of participation in an unlawful use of force

International practice leaves little doubt that assistance is not only prohibited under the UN Charter to the extent that it qualifies as an indirect use of force. Instead, international practice has filled the legal limbo within the UN Charter with a separate, general prohibition to provide assistance to an unlawful use of force.

The prohibition of participation originates from the *principle* of non-use of force rather than the *prohibition* to use force, which itself is a sub-rule of the principle of non-use of force. At the same time, the rule has developed as a *corollary* to the prohibition to use force. It thus complements the prohibition to use force in a similar manner as the rule of non-recognition

79 In this light, the criticism of Jackson, *Complicity*, 143-144 in terms of fair labeling is less persuasive. Assistance under Article 3(f) Aggression definition describes in fact perpetration rather than participation.

80 E.g. the *de minimis* threshold debate or the condition of intention.

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of territorial acquisition by force,[81] the prohibition of war propaganda,[82] the criminalization of aggression,[83] or the invalidity of treaties whose conclusion has been procured by a threat or use of force in violation of the principles of international law embodied in the UN Charter.[84] All these corollaries have in common that they depend on the permissibility of the use of force in view of the prohibition to use force.

a) Existence of the prohibition of participation

States do not maintain to have a right to provide assistance to a use of force in violation of international law. Assistance practice in application of the UN Charter unequivocally recognizes a prohibition of participation in an unlawful use of force. This prohibition is reflected throughout international treaty practice. States not only align their practice with such a prohibition but frequently recognize it in treaties that affirm and reiterate the UN Charter principles. The ILC recognized it openly in the Draft Declaration on Rights and Duties of States and implicitly in the context of the elaboration of the Articles on State Responsibility. Assisting States, targeted States and third States alike, as well as the UN General Assembly confirm and reiterate the existence of the rule through their practice in concrete conflicts. Of course, as conflict practice is rich and diverse, practice is not uniform. States disagree on the extent to which they provide support. Not all assistance that appears similar is treated alike. Yet when viewed holistically, it is fair to assume that States recognize a prohibition.

81 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, 136, 171 para 87; *East Timor (Portugal v Australia)*, Dissenting Opinion Skubiszewski, ICJ Rep 1995, 224 para 131.

82 Michael G Kearney, *The Prohibition of Propaganda for War in International Law* (2007); Eduardo Jiménez De Aréchaga, 'International Law in the Past Third of a Century', 159 *RdC* (1978) 94. For States viewing it as a corollary of the prohibition to use force see e.g. A/6799 (1967) para 63.

83 Claus Kreß, Stefan Barriga, *The Crime of Aggression: A Commentary* (2017). See already Friendly Relations Declaration; Article 5(2) Aggression Definition; Article 8bis ICC-Statute.

84 Article 52 VCLT. Michael Bothe, 'Consequences of the Prohibition of the Use of Force: Comments on Arts 49 and 70 of the ILC's 1966 Draft Articles on the Law of Treaties', 27 *ZaöRV* (1967); Serena Forlati, 'Coercion as a Ground Affecting the Validity of Peace Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (2011).

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This clearly repudiates any possible doubts that the scarce reiteration of the only abstract resolution recognizing a prohibition of participation, the 1987-resolution, may have sparked. Rather, it confirms the prevailing sentiment expressed throughout the drafting of the 1987 resolution that – irrespective of the controversies that the declaration faced generally – the prohibition of participation is a well-established rule.

b) Contours and scope of the prohibition of participation

Like the prohibition of indirect use of force, agreement from international practice may be inferred with respect to the prohibition of participation in particular concerning its structural pillars (1) and (2). Regarding the required relationship, again, practice allows for the deduction of no more than general standards (3).

(1) Dependency on the occurrence of another State's use of force

Like the prohibition of indirect use of force, a breach of the prohibition of participation depends on the assisting State: the assisted use of force must be, in fact, performed. If the assisted State does not use force for whatever reason, the assisting State will not bear responsibility.

International practice does not establish a general prohibition on creating or increasing a risk for an unlawful use of force. This observation has not been beyond any doubt. Some noteworthy State practice may suggest a broader scope, according to which assistance that *would be* used in the commission of a use of force was prohibited. For example, the 1987 resolution ambiguously holds that States must not "assist other States to resort to the threat or use of force". Likewise, some treaties are phrased more broadly.[85] This practice remains however not only isolated but is often also

85 Recall for example: Article 5(6) Memorandum of Understanding on Non-aggression and Cooperation between Sudan and South Sudan: "which *may be* used in committing acts of aggression". Due diligence policies by which States commit themselves not to provide assistance in case of a substantial risk of an unlawful use of force may at first sight also point in that direction, e.g. 2008 EU Common Position defining common rules governing control of exports of military technology and equipment. It should be noted however that here States' *opinio iuris* that a violation of such norm will also lead to a responsibility for complicity cannot be established.

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connected to the (more broadly understood) concept of aggression. In any event, this practice is too sparse to even speak of a trend. The universally agreed interpretation among States requires the commission of a use of force. *Legally motivated* protests, as well as justifications, are only brought forward to the extent the use of force has actually occurred. The prohibition is no obligation to take action to ensure that the use of force does not occur at all. It is a prohibition to participate.[86]

(2) Qualification of the assisted use of force

The prohibition of participation applies in case of any use of force, including indirect use of force. The assisted act need not have a specific nature, such as ,for example, qualifying as armed attack or act of aggression.

International practice however limits the prohibition of participation to cases of a use of force that is *wrongful*, i.e. in violation of the UNC.[87] Thus, assistance to a use of force is not *per se* prohibited. It is its relationship with the wrongful use of force by the assisted State that renders assistance wrongful. In contrast to the prohibition of indirect use of force, the prohibition of participation is not only dependent on the assisted conduct, but is also *derivative* in nature.

It is not necessary for the violation of international law by the assisted use of force to be authoritatively established. In particular, the prohibition does not depend on a determination by the Security Council, albeit it is not excluded that an authoritative determination by the Security Council on responsibilities may decisively influence the application of the norm in political practice. Accordingly, it remains for States to decide for themselves – within the boundaries of the law – on the legality of the assisted use of force and whether the prohibition is triggered. That the legality of a use of force may often be perceived differently, and that this concedes States substantial leeway in the application of the obligation is beyond doubt. Moreover, it presupposes that States have the necessary factual background to make an informed determination.

86 Note that in case a State provides assistance when there is a substantial risk that the assisted State will use force, this may qualify as indirect threat of force, see III.A.2.c.(1).

87 Recall Article 10 Draft Articles on Rights and Duties of States; 1987 Declaration, para 4. In international treaty practice, this is also the general assumption. States also justify assistance by the mere fact that the assisted act is lawful. Generally, States do not justify *any* assistance they provide.

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In view of these challenges, it is noteworthy that assistance is not wrongful simply because it is assistance to a use of force, but because it is assistance to *wrongful* use of force. The prohibition, as applied in practice, accordingly stops short of a prohibition of participation in any use of force unless the assisted use of force is permissible. *Prima facie,* assistance remains permissible unless the use of force is wrongful. This has important implications in practice.

First, the assisting State benefits from the lawfulness of the use of force, irrespective of whether the justification for the use of force also extends to the assistance. Given the non-proximate nature of assistance, the targeted State does not require additional protection in cases that may be described as "unwanted assistance." This again may be relevant in cases of a limited *ratione personae* justification. For example, a targeted State invites the assisted State to use force, but expressly excludes (assisting) contribution of certain States.[88] The assisting State, although among those States expressly excluded, supports the use of force. Assuming that the consent to the assisted use of force is still valid,[89] the 'unwanted assistance' will not be wrongful under the prohibition of participation. This result is the product of seeking to balance the interests of all three States: the assisting, the assisted and the targeted State. The only non-proximate nature of assistance allows the assisting and assisted State's interest to prevail over the targeted State's interests. In fact, the targeted State is sufficiently protected by the fact that it can revoke its invitation at any time.

Second, the assisting State need not positively ascertain the legality of the assisted operation. In particular, the assisting State need not take the position or explain that the assisted use of force is lawful. It suffices to not be persuaded about the illegality of the use of force to not contradict the prohibition. As such, the prohibition of participation affirms States'

88 That this scenario is not beyond reality is vividly illustrated by discussions about contributions on international peace keeping. See e.g. for the discussions in the Suez Canal Crisis: Summary study of the experience derived from the establishment and operation of the Force: Report of the Secretary-General, A/3943 (9 October 1953) para 38; Derek W Bowett, George Paterson Barton, *United Nations Forces: A Legal Study of United Nations Practice* (1964) 396. See also the Korea Crisis 1950, where South Korea did not want Japanese technicians to be involved. They provided – secretly – non-proximate support, nonetheless.

89 It is a question of interpretation if the invitation shall be void if the condition (no support by specific States) is not fulfilled.

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general entitlement to presume that another State acts in accordance with international law.[90]

This again indicates that the prohibition of participation does not oblige States to *avoid any risk of being implicated* in an unlawful use of force. States are prohibited to *participate* in unlawful use of force that is sufficiently defined. It can be questioned whether or not this approach adequately responds to the significance and entailing risks of interstate assistance for a use of force. In fact, it is increasingly prevalent practice to take precautionary measures in cases of (clear) risks of unlawful use of force. Likewise, States widely emphasize to assist *lawful* military operations. But while this practice is a valid tool to disclaim responsibility for participation, it cannot be determined with sufficient clarity that it is guided by a belief of necessity to do so. States suggest they also do not contradict the rule when refraining from an express appraisal of the assisted use of force as legal.[91] Similarly, charges against unlawful participation are usually built on the view that the assisted use of force is illegal.

(3) The relationship between assistance and use of force

States describe the relationship between the act of assistance and the use of force according to the abstract factors determined above. Again, in application, these factors are weighed flexibly on a sliding scale in the specific context. A certain degree of ambiguity is hence inherent to the exact contours of the necessary relationship between assistance and the use of force. This is in particular true for isolated acts of assistance. In practice, such acts are not assessed independently, but in the context of the assisting operation as a whole.

Generally, the prohibition of participation imposes less stringent requirements than for an indirect use of force. Assistance that is considered to fall under the prohibition of participation may be defined negatively in a twofold manner. It must neither be so proximate that it would be considered an indirect use of force, nor so remote that it would be considered mere

90 Recall e.g. Saudi-Arabia in No-Flight-Zones in Iraq. Note that this does not mean that the assisting State is free from responsibility if the assisted use of force later turns out to have been unlawful. The assisting State bears this risk, but only if it meets the other requirements, in particular knowledge about the circumstances rendering the assisted use of force unlawful, see below. On general international law see Lowe, *JIntl&Dipl* (2002) 10; Nolte, Aust, *ICLQ* (2009) 12.

91 Recall e.g. States in the Iraq war 2003.

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cooperation. In assessing the factors, the following general standards may be deduced.

(a) Assistance through omissions

According to international practice, in line with Article 2 ARS and general conceptual considerations,[92] both an action and an omission may violate the prohibition of participation.[93] In case of the latter the assisting State's contribution may be more remote. But, State practice for assistance to the use of force does not apply (or confirm[94]) the ICJ's formula developed in absolute terms in the Bosnia Genocide case for the Genocide Convention, according to which "complicity results from commission", not from omission.[95] Throughout practice, assisting State's omissions are subject to claims of unlawful participation.[96] In particular, the failure to prevent the use of its territory (placed at the disposal of the assisted State) triggers debate over whether it amounts to unlawful participation.[97] Moreover, there is a remarkable pattern of States seeking to take advantage of the blurry line between actions and omissions. Frequently, contributions (in particular when temporally remote or of an ongoing nature)[98] are presented in the

92 Jackson, *Complicity*, 156.

93 For the terminology see Alexander AD Brown, 'To complicity… and beyond! Passive assistance and positive obligations in international law', 27 *HagueYIL* (2016) 136 distinguishing between omission (with a duty to act) and inaction (without a duty to act).

94 The ICJ's interpretation has been widely understood as a general position on complicity, despite the fact that the ICJ confined its findings to the Genocide convention, *Bosnia Genocide*, 220, para 429.

95 Ibid 223 para 432.

96 Recall for example discussions on Aggression Definition, where omissions and due diligence violations did not qualify as indirect aggression. But this did not exclude responsibility for participation.

97 See also claims about tolerating the use of force, i.e. despite knowing about the use of force making use of its territory the State does not prohibit and hinder it. The distinction between action and inaction is not always easy in such cases: Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (2020) 188.

98 E.g. provision of territory or the authorized but not yet delivered provision of weapons.

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legal context as omissions in order to trivialize their impact.[99] While these contributions are often claimed not to lead to responsibility, that claim is not based on the reasoning that omissions *per se* cannot establish use of force.[100] At the same time, there is agreement among States that omissions may only lead to responsibility if the assisting State is obliged towards the targeted State[101] and capable to take action.[102]

Crucially, an omission may only lead to responsibility if the assisting State failed to comply with an obligation to act towards the targeted State that aimed at preventing the assisted use of force.

(b) Objective factors

The fact that participation is a 'matter of substance and degree', as the Irish High Court aptly held in view of Ireland's contribution to the Iraq War 2003,[103] becomes particularly clear when attempting to define the objective contours of the prohibition of assistance. No type of assistance is generally excluded. For example, depending on its scope, even political or humanitarian support may be considered a relevant act of assistance. In application of the above-sketched general factors, practice indicates that the act of assistance must have a direct nexus to the specific use of force.

On the one hand, this will typically not be the case for what may be described as 'general cooperation' with the State using force, which remains

99 For example, States' argument of "only fulfilling existing treaty obligations" may be interpreted accordingly. The argument runs as follows: At the time States agreed to provide assistance by treaty, they did not have knowledge. The pertinent contribution to the use of force hence consists of no more than the omission to stop the contribution. These arguments are frequent in case of a territorial contribution or a contribution of facilities.

100 Instead, States either argue that they are not obliged to prevent action (e.g. because there existed no such obligations), or that they discharged due diligence obligations. States also deny knowledge about the specific use. States persistently protest against the use, claiming to be a victim themselves – thereby suggesting that they do not bear responsibility for assistance. On the other hand, 'omissions' are still subject to protest by other States.

101 Such duties depend on the specific case.

102 See e.g. statement in Aggression Definition, Ghana 1973; Abu Kamal Raid. For this reason, weak States with no army or lacking capacities to monitor and control their air space will typically not bear responsibility.

103 Irish High Court, *Edward Horgan v An Taoiseach and others*, 2003 No. 3739P (28 April 2003) 71.

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tangential to the specific use of force. For example, merely maintaining diplomatic or conventional trade relations, which usually benefit the assisted *State* more generally, and not the specific act, will be excluded from the scope of the norm.[104] Exclusively humanitarian aid that is provided non-discriminately to another State's population will likewise not meet the required threshold. Crucially, however, it requires a flexible case-specific assessment in view of the nature, scope, and effects of assistance. For example, general cooperation that leads to a *de facto* dependence of the assisted State may call for a different assessment.[105] Likewise, food delivery to soldiers may amount to prohibited assistance.

On the other hand, the connection to the use of force however need not be as proximate as for an indirect use of force.[106] It cannot be inferred from practice that the contribution has to be essential, to have a particularly significant bearing on the assisted use of force, or to be 'conditio sine qua non'. At the same time, assistance without even a minor qualitative impact on the respective use of force will usually not be considered prohibited assistance.[107]

The condition of a direct nexus however must not be mistaken to require that the assisted State directly uses the assistance as provided for the use of force. International practice provides numerous examples to the contrary. For example, the delivery of armaments or the taking on of military tasks elsewhere may free up resources, troops, or assets necessary for the use of force, and thus may constitute assistance.[108] Likewise, overflight rights granted, but ultimately not used for airstrikes, can be considered assistance. They may affect the targeted State's defense, as it cannot be sure from where the attacks will be flown.

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104 Note that in these cases the subjective element will be weak, too. It is not excluded that a strong subjective element, in particular if based on intention, may justify considering objectively remote assistance as non-proximate assistance.

105 Cf for such scenarios Quigley, *BYIL* (1987) 120-121.

106 A proximate objective relationship to the assisted use of force that falls under an indirect use of force is not however excluded from the scope of the prohibition of participation. There may be various factors, such as the scale and degree of assistance, its intensity, its timing, or the specific recipient, that justify the inclusion also under the prohibition of participation.

107 For this it seems that the assistance must fulfill a quantitative criterion at least. Quigley, *BYIL* (1987) 120.

108 See also Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House Research Paper, Chatham House, 2016) 9 para 26. See e.g. Germany and other EU States for Mali to support France in Syria, Germany in Libya 2011. For another example, see Quigley, *BYIL* (1987) 122-123.

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(c) Subjective factors

Like with indirect use of force, the subjective attitude of the assisting State is of crucial importance. International practice is clear in that knowledge is an essential component. There is consistent agreement among States that, generally, without *knowledge* about the assisted wrongful use of force at the time of providing assistance, no responsibility may be established. For less proximate contributions to the use of force, in particular, States defend themselves by claiming not to have had the necessary knowledge, but that their contribution has been misused. This is especially the case when assisting States claim that their rights have been violated by the use of force, too. Accordingly, in cases of doubt, where uncertainty on the facts relevant to determine the unlawfulness of the assisted use of force remains, assistance is not prohibited.

It is well-established that in cases where the assisting State has positive knowledge, it may bear responsibility. But a lower threshold for knowledge is not unequivocally settled by international practice.

There is a trend in practice that may be read to suggest that the knowledge requirement is understood broadly. In line with a general trend of proceduralization of international law,[109] constructive knowledge about the assistance to the wrongful use of force might suffice. Accordingly, to the extent an assisting State *should have known*, it is considered by law as having knowledge. A State should have known when it failed to adequately exercise due diligence, including making inquiries, to foresee the unlawful use of force.[110]

In particular, with respect to territorial assistance, various States have based their protest against assisting States on the fact that territorial States should have foreseen the unlawful use of force. Similar claims have been

109 See also for other assistance regimes in which constructive knowledge is established, e.g. in human rights and international humanitarian law André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law', 31(1) *EJIL* (2020) 42-43 n 119-120 with further references; in the context of international organizations on the self-commitment of the UN: Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', 20(1) *JCSL* (2014). See also Pacholska, *Complicity*, for an "aggravated complicity rule" for assistance to the commission of genocide, crimes against humanity and war crimes.

110 Harriet Moynihan, 'Aiding and Assisting: the Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility', 67(2) *ICLQ* (2018) 462.

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made regarding the delivery of weapons.[111] Assisting States often did not reject such charges on legal grounds but engaged with the allegations on substance. For example, they invoked to have placed their assistance under conditions about its future use and to have relied on credible assurances by the assisted State.[112] They referenced previous assessment procedures, such as red card holders or due diligence procedures including end-user certificates. Similarly, persistent protest against the use of one's territory seemed to be partially motivated to avoid giving the impression of 'supporting' the use of force. Last but not least, it has been widespread treaty practice to include safeguards. States hence could be understood to discharge claims that they should have foreseen the unlawful use of force to which they were objectively contributing.

This practice is however not free from doubt. First, it is not settled that States thereby accept due diligence *obligations* to make enquiries about the use when providing assistance under general international law.[113] Second, in any event, this cannot be equated with a recognition of a constructive knowledge standard. In fact, international practice also allows for a different interpretation. States' due diligence might only serve the purpose to establish or deny positive knowledge. But it may not be taken out of a legal belief that without taking those measures they bore responsibility for a violation of the prohibition of participation. In other words, States did not incorporate possible due diligence obligations to make enquiries into the subjective element of the prohibition of participation.[114] The reason why States have been taking these measures would then be to (also) ensure compliance with the prohibition of participation, but not because they felt obliged to do so.[115]

Charges against assisting States based on the allegation that the assisted use of force was sufficiently foreseeable could be understood as evidence

111 E.g. USSR on US American weapons in the Osirak strikes.

112 Germany, Ramstein; Syria, Iraq: Abu Kamal incident.

113 See also Jackson, *Complicity*, 162; Moynihan, *ICLQ* (2018) 462. Additionally, even if there are specific due diligence obligations to make enquiries one may ask to what extent the targeted State may rely upon them.

114 Differently: Corten, *Le Droit Contre la Guerre*, who constructs the entire complicity norm as due diligence norm; Pacholska, *Complicity*, 164.

115 See also Lowe, *JIntl&Dipl* (2002) 14-15 making the argument that the prohibition of complicity (will) motivate States to make inquiries. The 'routine' of exercising due diligence is then however a consequence of the rule, not a precondition. On that basis it remains to be seen to what extent the failure to comply with due diligence also already constitutes a violation of the prohibition of participation.

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for the assisting State's positive knowledge.[116] Accordingly, States may have interpreted these circumstances, e.g., previous patterns of violations, and further indicators about a planned use of force, as sufficient proof that the assisting State positively had knowledge, rather than making an argument for a lowered standard of knowledge.

Ambiguity hence remains in practice regarding whether the mere non-performance of due diligence would already result in a breach of the prohibition of participation – despite not actually having *positive* knowledge. In any event, international practice suggests that knowledge may be established through inference from a contributing State's lack of due diligence. In those cases, assisting States may be *prima facie* presumed to know. Notably, this trend is closely related to the objective as well as contextual elements of assistance. Primarily in cases of assistance proximate and direct to the use of force, such as territorial assistance, States refer to such standards.[117]

The assessed international practice does likewise not conclusively answer whether willful blindness leads to responsibility under a prohibition of participation. Willful blindness has been defined as a "deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality."[118]

On the one hand within the assessed practice, no charge against assistance has been based exclusively on willful blindness at the interstate level. On the other hand, this does not challenge the legitimacy of the theoretically sound interpretation of knowledge. Reports by international organs, in particular determinations by the Security Council, are commonly used to strengthen charges against assisting States.[119] In fact, States consistently claim to seek knowledge and assess the situation. States

116 E.g. USSR in Osirak incident.

117 E.g. Germany in the Ramstein saga limits its defense by invoking US insurances to allegations of German territory being "launching point" of armed drone operations, and drones being operated or commanded from Germany. It is noteworthy that due diligence measures are particularly strict for weapons, refueling, targeting intelligence.

118 Moynihan, *Aiding and Assisting*, 43; Jackson, *Complicity*. See also Helmut Philipp Aust, Prisca Feihle, 'Due Diligence in the History of the Codification of the Law of State Responsibility' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (2020) 56.

119 Albeit they are not directly used to establish knowledge. Recall e.g. Canada in Korea Crisis 1950.

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thereby, arguably by way of precaution, counter any impression of deliberate avoidance of knowledge. This does not mean that States often refrain from taking a position, based on factual or legal impossibility to further determine the relevant facts. Also, States assert to have exercised all legally permissible measures.[120]

Aside from the threshold question, international practice defines the subjective element rather clearly. The assisting State must have knowledge of the specific circumstances relevant for determining the lawfulness of the use of force. It is not necessary for States to have detailed knowledge about the exact implementation of the use of force, as would be arguably necessary with respect to violations of international humanitarian law. Instead, it suffices to know the basic parameters relevant under the *ius contra bellum* of the specific operation. This includes especially circumstances relating to the justifications. Accordingly, and practically relevant, only in case the assisting State has knowledge that there is no justification, it may be responsible. If it does not have sufficient information to know, assistance remains permissible.

It is well established in international practice that the assisting State's knowledge at the time of the relevant act of assistance, not of the assisted use of force, is decisive.[121] The fact that a State subsequently learns about its contribution to a specific unlawful use of force is hence legally irrelevant.[122] Occasional disagreement about what qualifies as relevant act of assistance does not reflect disagreement on the relevant point in time.[123] This aspect is an essential limit to the legal accountability of assisting States. For ex-

120 This argument is in particular problematic when the legal impossibility is based on legal constrains to which the State has committed itself. This includes particularly scenarios in which a State places its territory at the disposal of another State, without effective policies to control the use. International practice suggests however that reasonable constraints are not sufficient to establish willful blindness.

121 E.g. German practice relating to Turkey's use of force against the Kurds; USA in the Osirak incident. See also ATT.

122 Later acquired knowledge about the use may only be relevant for an(other, yet distinct) act of assistance through an omission to revoke the previous contribution, depending in particular on a duty to take action. But it does not establish responsibility retroactively for already terminated acts of assistance.

123 E.g. for the provision of arms by private actors, some States argue that the relevant act of assistance is the *authorization* of the export. Others consider the *export* itself the act of assistance. Instances where the assisting State relies on "merely performing already agreed treaty provisions" point in a similar direction. Also abovementioned considerations on constructive knowledge accept this point in time as presumption.

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ample, it allows for general international military *cooperation* as currently commonly practiced, freeing States from the risk of potential responsibility for their contributions.[124]

It is not sufficient if the assisting State knows about a general risk that some force might be used or foresees a general likelihood or possibility. Instead, it must be aware of the concrete materialization of a specific risk.[125] It further frees the State from the risk of responsibility in case of a misuse or excessive use.

In addition to knowledge about the assisted action, the assisting State must be aware of its contribution. This typically excludes, for example, scenarios in which the 'assisting' State's territory was clandestinely overflown or used for airstrikes,[126] or in which assistance has been clearly misused.

(d) Intention

In most cases that fall within the prohibition of participation, the assisting State will have intended to contribute to and facilitate the assisted use of force.[127] Thereby, the assisting State will have intent in the sense that it knows that its conduct will contribute, and carries it out with the purpose, will, or desire to attain this result, albeit it may not be in common cause with the assisted State,[128] or guided by the same goals and motives.[129]

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124 Note that for continuous assistance, States need to continuously assess the situation. Responsibility may however only be established for the specific act of assistance when the State has knowledge, not retroactively.

125 For example, general knowledge about a latent conflict that may (likely) escalate to a use of force does not suffice. Cf support to Turkey in view of its longstanding conflict with Kurds. Once a State has openly expressed its will to intervene (recall Turkey's Operation Peace Spring), or has engaged in open preparatory action, however, knowledge can be hardly denied.

126 E.g. Jordan in Osirak incident.

127 E.g. Germany providing munition to the coalition in Libya. States contributing to the fight against ISIS; the granting of specific overflight permissions.

128 For example, the assisting State may (politically) disapprove, but accept the use of force and the use of its contribution. European States in Iraq 2003 that still sought to support the US military operations.

129 In fact, assisting States will usually pursue political or economic benefits through assistance, thereby merely taking into account that they are contributing to a use of force. Similarly, Quigley, *BYIL* (1987) 123.

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The assisting State's intention as necessary prerequisite for responsibility for non-proximate assistance under the prohibition of participation, however, is not established. It is common practice that States condition their assistance to specific lawful purposes and uses. But such practice cannot be unambiguously understood as support for an intention requirement. It is agreed that the circumstances to establish knowledge and intention are closely intertwined, in any event at the level of proof.[130] For this reason, some ascribe the controversies on the necessity of intention by the assisting State to bear only limited practical relevance. On a conceptual note, practice that may imply an intent requirement allows also for a reading in view of establishing or denying the necessary knowledge requirement.

International practice on the use of force concurs with the general view that States must not hide behind the wish not to support a specific unlawful use of force, despite having clear knowledge.[131] There is insufficient evidence in practice of isolated denials of the intention or wish to support a State's unlawful use of force, despite knowledge about (its contribution to) the unlawful use of force. More commonly, arguments relating to conditions of assistance are tailored towards the assisting State's knowledge about the assisted use of force. This is particularly noteworthy as the assertion of *deliberate* support is widely associated with proximate assistance, which is here qualified as indirect use of force.[132]

Accordingly, despite some rare voices calling in the abstract for direct intent,[133] in case of objectively non-remote assistance, international practice as it currently stands does not establish as always necessary a clear re-

130 In case the assisting State has actual or near-certain knowledge of the circumstances of the unlawful use of force, intention is widely assumed. On these views see Lowe, *JIntl&Dipl* (2002) 8; Aust, *Complicity*, 242; Jackson, *Complicity*, 159-160; Moynihan, *ICLQ* (2018) 469. It is true that similar inferences do not apply to a State that has the intention to assist but does not have knowledge. Yet, in such cases of "blank cheque support" the subjective element may also be accepted.

131 Pacholska, *Complicity*, 109 with further references.

132 In that sense practice considers intent as an "aggravating factor" – one of the three theoretical conceptions Lanovoy, *Complicity*, 237 proposes. The cases that the ILC and scholars identified as support for an intent requirement widely qualified as indirect use of force, rather than mere participation. Ibid 102 on Germany's support in Lebanon.

133 Most prominently, the USA expressly requires both (II.A.6.b): the assisting State's awareness about the unlawful use and its intent for the assistance to be so used. This position suggests that those elements are not merely redundant, with its own meaning. Two observations are in order, however. First, the USA in express terms refrained from a complete discussion of the legal framework. In particular, it did not

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quirement of intent that substantially goes beyond the knowledge standard sketched above. It hence seems that States acknowledge the specific circumstances of contributing non-proximately, but notably also non-remotely to a use of force, that distinguishes it from "ordinary forms of cooperation" for which intent has been viewed as essential.[134]

(4) Legal consequences

The prohibition of participation establishes a negative duty. States are under the obligation not to provide assistance to a use of force in violation of the prohibition to use force. As such, the responsibility of the assisting State is derivative.

As a consequence, unlike in cases of indirect use of force, the assisting State may benefit from the lawfulness of the assisted force. Assisting States need not – and characteristically do not – provide a justification.[135] Even in cases where the use of force was unlawful when performed by the assisting State itself, the assisting State may not bear responsibility for its contribution.[136] The contribution itself is no violation of international law in need of justification.[137]

The derivative nature of responsibility further means that generally the assisting State will, *prima facie,* violate the prohibition of participation in case that the assisted use of force is wrongful. Assistance is *prima facie* prohibited irrespective of the fact that the assisting State might have performed the use of force itself in accordance with international law. Accordingly, the prohibition to participate may hence be in tension with the assisting State's right to use force. Scenarios are conceivable where the assisting State, but

specify the specific norms violated. Second, its considerations apply to any kind of military cooperation, including indirect use of force.

134 Aust, *Complicity*, 239.

135 Contributions to a use of force authorized by the Security Council illustrated this particularly vividly. The Security Council does not authorize assistance, but calls for it. The Security Council hence assumes that assistance does not require a justification. States follow that distinction. In contrast to States providing assistance qualifying as indirect use of force, *participating* States do not invoke the Security Council authorization. States draw the same line in light of use of force based on self-defense or invitation.

136 Accordingly, States do not further justify their contribution, but stress the lawfulness of the assisted use of force. E.g. Sweden in fight against ISIS.

137 See for further details III.A.2.b.(2).(b).

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not the assisted State, may use force. For example, the assisting, but not the assisted State may rely on an invitation or an authorization by the Security Council.[138] The assisting State would have a right to use force against the targeted State, which it did not exercise, however. Instead, it supported another (the assisted) State that used force against the targeted State. A similar scenario is imaginable in the context of self-defense. The assisting, but not the assisted State, may have a right of self-defense against a targeted State. Instead of exercising the right of self-defense with its own forces, the assisting State might decide to support an already ongoing, but unlawful military operation by the assisted State against the targeted State.[139]

In these cases, in which the assisting States could legally perform the use of force themselves, it is not excluded however that the provision of assistance, while *prima facie* wrongful, may be justified. In light of the prohibition of indirect use of force, this observation is only consequent. States do not accept a broader responsibility for participation than for more proximate assistance qualifying as indirect use of force. But, as for indirect use of force, the burden of argument shifts to the assisting State.

138 The latter could concern an authorization limited *ratione personae*. As seen, it is not the Council's practice to authorize assistance, but the resort to force. The Council only calls for assistance to an authorized use of force.

139 Usually, in situations of collective self-defense the rights of the assisting and the assisted State to use force will be aligned. Two situations are conceivable. First, a State has a right of self-defense, but does not use force. Instead, it asks other States, in collective self-defense to use force, and provides assistance to this operation. Second, a State may provide assistance to a State using force upon its request. But there may be a situation of excessive collective self-defense. For example, hypothetically, to the extent Iraq is understood not to have called for an intervention against ISIS *in Syria*, despite it would have had the right to do so, it may be assisting an unlawful use of force that cannot be justified by collective self-defense. Similar questions may arise in case of cooperation in a military operation where States base their involvement on different justifications. A hypothetical version of French engagement in the fight against ISIS may illustrate this scenario. France may have its own right to individual self-defense against ISIS in light of the Paris terror attacks. France however does not want to engage in combat activities against ISIS in Syria. Instead, it provides support to other States that fights ISIS in Syria. Those States do not operate in defense of France (which also has not asked those States to defend itself), but on a different legal basis, e.g. in collective self-defense of Iraq or upon invitation of Assad. To the extent that the legal basis for those assisted States' intervention has a legal flaw, the assisting State provides assistance to a wrongful use of force which would be lawful if performed itself.

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(a) Is participation only justified when the assisting State would have a right to use force?

The derivative nature of the prohibition begs the question if circumstances precluding the wrongfulness are limited to the situation where the assisting State might have performed the use of force itself? Given the less intrusive nature of participation, one may be inclined to think that the applicable justifications are not confined to the famous justification-trinity (consent, Security Council authorization and self-defense), but allow for the application of general circumstances precluding the wrongfulness that do *not* justify to resort to force itself.

While the assisting State contributes to a use of force, it does not commit a use of force that is only justified if international law recognizes a right to do so. This may open room for the argument that the targeted State may be required to tolerate the assisting State's *contribution* to the wrongful use of force, if the assisting State pursues legitimate goals. Old debates that are by now settled for the use of force may need to be revisited here.[140] While States have been cautious to expressly make such arguments, some explanations for assistance may point in these directions. Accordingly, in particular, this poses the question if the wrongfulness of the participation might be precluded by the plea of necessity (i) or as a countermeasure (ii).

(i) Participation due to necessity?

According to Article 25 ARS, a State may invoke necessity if it is the only way for the State to safeguard an essential interest against a grave and imminent peril, and the act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

In international practice, States do not expressly invoke necessity. In the rare cases that assisting States invoke a justification for non-proximate assistance (and it is necessary as they do not also argue that the assisted use of force is lawful), they rely on the justification trinity. Still, three

140 Clauß Kreß, 'On the Principle of Non-Use of Force in Current International Law', *Just Security* (30 September 2019). For a discussion see Corten, *Law against War*, 198-248 with further references. This is also connected to the question whether the prohibition of participation can be considered peremptory, cf Article 26 ARS.

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arguments, in particular, might be understood as an implicit invocation of necessity.

First, States recur to the argument that they are executing obligations and commitments to provide assistance. Thereby they appear to argue that refraining from assistance would impair their essential interest in upholding their treaty commitments.[141] But irrespective of the fact that the application of necessity in these cases raises many difficult issues,[142] it is already questionable if a situation of necessity exists: The survey of treaty practice showed that the *obligations* to provide assistance and to continue cooperation are usually conditioned on lawful use of force. Other treaty obligations may require a systemic interpretation in view of the principle of non-use of force.[143] States' treaty commitments are hence not engaged.[144] Such arguments are hence better understood as assisting States' attempts to frame and 'diminish' their contribution as non-proximate or remote assistance.

Second, the political and economic costs of non-assistance enjoy popularity among States as argument against non-assistance. In most cases, so the common argument runs, another State will step in. States fear to lose political influence and economic revenues. Yet, while arguably not without political weight, again, in legal terms, it would already not meet the required threshold of necessity. In fact, as seen, international practice adds a more nuanced network of qualifications to such arguments.

The third scenario is more complex: an argument of necessity may be implied in the argument that assistance is necessary to mitigate violations of international law, in particular, to prevent breaches of international humanitarian law qualifying as war crimes, or to temper the intensity of a violation of the *ius contra bellum*.[145] So far, these arguments have been made in practice only in the context of potential responsibility for complicity in IHL violations, which are usually considered distinct from legality of the

141 Recall, for example, Greece in Iraq war 2003, when it emphasizes the importance to respect bilateral treaties also for a national interest.

142 For example, it is doubtful if these treaty commitments can be invoked *vis à vis* a third state, Kress, *JICJ* (2004) 251 n 22. Moreover, it is well arguable that assistance impaired an essential interest, the maintenance of peace, not only of the targeted State, but also of the international community.

143 Cf Article 31 III b VCLT.

144 In any event, Article 103 UNC would apply.

145 For a discussion of the problem in international criminal law: Miles Jackson, 'Virtuous Accomplices In International Criminal Law', 68(4) *ICLQ* (2019).

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ius contra bellum.[146] In fact, in those cases, the assisting State viewed the assisted use of force to be in accordance with the *ius contra bellum*.

But, as the Kenyan assistance 'for exclusively humanitarian grounds' to Israel in the Entebbe incident shows, the argument within the context of the *ius contra bellum* is not preposterous.[147] The step towards a claim that targeting information, training, or precision-guided weapons are provided to an unlawful use of force to protect civilians or, more generally, to alleviate the impact of the unlawful use of force on the targeted State, is not far.

In application of the above criteria to the question of whether such assistance is prohibited, a line must be drawn between different types of mitigating assistance. This again requires a case-specific assessment. Exclusively 'humanitarian' assistance is widely considered to fall outside the scope of prohibited assistance *to the use of force*.[148] Other types of mitigating assistance will arguably fall *prima facie* under the prohibition, irrespective of mitigating effects, motives, or intentions.[149] The assisting State continues to (albeit more remotely) contribute to a wrongful use of force. It will then depend on whether the mitigating contribution can be justified. It is questionable if the 'mitigation' situation will be covered by a

146 For example, the US and the UK have made this argument with respect to their involvement in the Yemen conflict. See also Germany in Iraq 2003 for sharing intelligence by the secret service.

147 Cf also Germany that explains provision of arms to Kurdish fighters to enable them to prevent genocide of the Yezidis, Regierungspressekonferenz vom 31.03.2017, https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-31-maerz-849042.

148 Cf also the parallel exception accepted to the rule of non-recognition, *Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, 16, 56 para 125.

149 Assistance that seeks not to 'merely' mitigate but to ensure compliance with the *ius contra bellum* and the specific legal basis needs to be distinguished, and will arguably not be prohibited. For example, scenarios are conceivable where assistance is provided to ensure that the assisted use of force remains within the scope of an invitation or authorization or meets the proportionality requirement of self-defense. If the assisting State through its assistances reaches its goal, there will be no wrongful use of force. If assistance fails to render the use of force lawful, it must be carefully inquired if the assisting State has knowledge about the unlawful use of force. To the extent that the assisted State misuses assistance in its use of force that would be – due to the assistance – in accordance with international law, the assisting State arguably does not know about an unlawful use of force. It may be different if the assisted State fails to properly make use of the assistance. The mere fact that assistance will render a *future* use of force within an ongoing operation lawful, will be arguably prohibited.

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right to resort to force against the targeted State. In particular, it is highly doubtful, although not entirely precluded, that the targeted State consents to the assistance to an unlawful use of force for the sake of its citizens at risk, or a less severe violation of the prohibition to use force. Then everything comes down to a justification by necessity.

As far as the present survey of practice allows for conclusions, international practice has not chosen this avenue in view of the *ius contra bellum*. It remains ambiguous why – because the conditions of necessity are not realized, because the application is excluded, or because there has not been a convenient opportunity to advance such a claim. It cannot be considered as settled that the prohibition of participation (without involvement of the Security Council) excludes the possibility of invoking necessity.[150]

(ii) Participation as a countermeasure?

Assistance could be sought to be justified as countermeasure, for example in response to serious violations of human rights or a use of force short of an armed attack. Irrespective of the controversial and potentially additional question of whether collective countermeasures are permissible (that would arise in the former scenario), the general application of countermeasures to justify participation cannot easily be negated.

It is accepted that countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.[151] The ILC in the commentary to the ARS further sets out that thereby "forcible countermeasures" and armed reprisals shall be excluded.[152] While the assisting State's 'countermeasure' would involve the use of force, the assisting State does not engage in it. One may fear that allowing the application of countermeasures may incentivize proxy responses to such measures, circumventing the prohibition of armed reprisals. Such 'proxy' attempts would however likely qualify as 'indirect use of force'. The argument hence does not apply to non-proximate *participation*. Accordingly, the well-established prohibition of forcible countermeasures[153] requires further

150 Article 25 (2) (a) ARS.
151 Article 50 (1) (a) ARS.
152 ILC ASR Commentary, Article 50, 132 para 4-5.
153 Forcible countermeasures are at odds with positive law, Federica I Paddeau, 'Countermeasures' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2015) para 43-44.

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refining – does participation in a use of force, short of indirect use of force, qualify as a prohibited forcible countermeasure?

Again, States are reluctant to position themselves. To the author's knowledge, States have not invoked countermeasures to justify assistance, in any event not in explicit terms. This is remarkable in that countermeasures are not foreign to States' considerations with respect to assistance. States frequently suspend assistance as a countermeasure.[154]

(b) Self-defense and international criminal responsibility

To what extent permissible self-defense may justify implications for States other than the directly attacking ones is an unresolved question. In 2001, the ILC left "open all issues of the effect of action in self-defence vis-à-vis third States."[155] This is not the place, and it has not been the purpose of the present analysis, to resolve this question. In this light, the present analysis cannot provide a comprehensive picture of the permissibility of forceful responses in self-defense by the targeted State against States providing assistance to a use of force considered to trigger Article 51 UNC. Still, the survey of practice in the present format invites further thought.

International practice does not suggest that a response by force also targeting a participant in an armed attack is necessarily excluded. Not least, the participating State bears derivative responsibility for an armed attack. Yet, it is notable that situations in which States threaten or even exercise self-defense characteristically involve proximate assistance that would qualify as indirect use of force. This may find its reason often already in the very nature of non-proximate assistance, which for practical, political, and strategic reasons does not invite a response by force. Whether it also reflects a certain legal caution among States to invoke self-defense in such situations cannot be concluded with certainty.[156]

The legal framework governing assistance may not be irrelevant for self-defense. Responsibility for a contribution is widely invoked to justify the use of force in self-defense, yet notably primarily for proximate con-

154 See e.g. Falkland Conflict.

155 ILC ARS Commentary, Article 21, 75 para 5. For the debate in view of violations of the law of neutrality, James Upcher, *Neutrality in Contemporary International Law* (2020) 93-98.

156 Nußberger, Fischer, *Justifying Self-defense against Assisting States* (2019).

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tributions.[157] Still, international practice seems to approach the question of self-defense not necessarily through the same standard relevant for responsibility for the armed attack, but through the lens of necessary and proportionate defense against the armed attack. A contribution may not be wrongful assistance under the regime governing assistance, as it is considered non-proximate in these terms. But it may still justify force in self-defense due to its close connection to the armed attack. It will require close scrutiny however with view to the necessity and proportionality of the use of force against the assisting State, too. These elements will not be and have not been easily established.[158]

Likewise, it merits further consideration whether criminal responsibility may be attached to participation.[159] Article 8bis ICC-Statute may suggest that it does not.

(c) Relationship with duties to cooperate and assist

As a corollary of the principle of non-use of force that finds its basis in the UN Charter, the prohibition of participation enjoys the same nature as other obligations under the UN Charter. In particular, it enjoys the primacy afforded by Article 103 UNC. Ultimately, to the extent that opposing obligations to assist and cooperate[160] are not already aligned with the

157 Iraqi claims against Kuwait; Israel against Syria when attacking Iran. States reject responsibility to shield themselves from use of force in self-defense, e.g. Lebanon.

158 See in this direction efforts to apply the unable or unwilling doctrine to the interstate context, Patryk Labuda, 'The Killing of Soleimani, the Use of Force against Iraq and Overlooked Ius Ad Bellum Questions', *EJIL:Talk!* (13 January 2020). See also situations where a State that was considered occupied was used by a third State to launch attacks, e.g. Cambodia 1970. Not sufficient is in particular non-assistance to an operation in self-defense. States do not accept any territorial intrusion. Accordingly, it is common practice, for example, to ask for permission of overflight.

159 Arguably Article 8bis ICC-Statute is limited to indirect use of force, subject to the other necessary preconditions.

160 Such rights and obligations may derive from (bilateral or multilateral) mutual assistance treaties, many of which have been sketched above, general trade agreements, and customary international law, including the law of neutrality. Interesting are duties to cooperate arising from Security Council resolutions, e.g. cooperation on terrorism, e.g. S/RES/1373 (28 September 2001). On this Christine M Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (2008) 182. Arguably, by way of systemic integration, those obligations are to be interpreted in view of and in compliance with obligations under the UN Charter.

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prohibition of participation, the prohibition of participation prevails in the event of a conflict of obligations.[161] As seen, States, both in abstract and in conflict practice, do not legally challenge this, even when invoking cooperation treaties.[162] Yet, also part of the equation is the fact that preexisting obligations are a crucial factor in considering the proximity and remoteness of assistance. The prohibition of participation provides room to embrace legitimate interests protected under (pre-existing) duties to cooperate.[163] Accordingly, the relationship between duties to cooperate and the prohibition to participate is a flexible one.

c) A 'modifying' change of the UN Charter's paradigm?

International practice affirms what has been the gust of scholars and the ILC alike, albeit it has been rarely put into words.[164] Participation in an unlawful use of force is also prohibited under the Charter, even without the Security Council taking the stage.

The prohibition of participation walks the fine line between 'interpretation' and 'modification'. Two aspects give reason to ask if that line may have been overstepped. The recognition of a prohibition to assist a State unlawfully using force has the effect of *de facto* supporting the State targeted by that use of force. Put differently, the prohibition of participation

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Whether international law recognizes a prohibition of economic warfare that effectively entailed duty to (continue) cooperation is highly controversial. In any event, it would have to be understood in view of the regime on interstate assistance.

161 Similarly Olivier Corten, 'Quels droits et quels devoirs pour les Etats tiers?' in Karine Bannelier, Théodore Christakis and Pierre Klein (eds), *L'intervention en Irak et le droit international* (2004) 120-122; Nolte, Aust, *ICLQ* (2009) 4 who refer however to the prohibition to use force, not a prohibition of participation that may oppose obligations to cooperate.

162 Recall express invocations of Article 103 UNC e.g. A/C.6/34/SR.22 para 8, and 1987-resolution. Whether this can be understood to mean that the corollary can be considered a norm of *ius cogens* requires an independent investigation.

163 E.g. the authorization, rather the transfer of weapons. Similarly, arguments are made for overflight rights that are granted by treaties, when States point to the fact that no specific permission has been provided.

164 Hans Kelsen, 'The Draft Declaration on Rights and Duties of States', 44(2) *AJIL* (1950) 271 seeing the non-assistance obligation as "implied in the concept of international law"; Albrecht Randelzhofer, Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 211 para 23; Brownlie, *Use of Force*, 370.

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could be perceived as 'duty of assistance through non-assistance'. Moreover, it deviates from the Charter's express rules that give the regulation of interstate assistance in the hands of the Security Council. This could give the impression of a change of paradigm within the Charter.[165]

But the prohibition of participation remains within the boundaries for authentic interpretation set by the (principle of non-use of force within the) Charter. As will be recalled, a rule on interstate assistance has not been excluded. Instead, the Charter acknowledged such a rule, but has been limited to expressing the rule only for cases in which the Security Council takes action. The narrow scope of the prohibition of participation that finds agreement in international practice further alleviates concerns. The prohibition of participation does not require full assistance to the targeted State. The mere denial of assistance to the State using force is too remote to qualify, in legal terms, as assistance to the targeted State. The prohibition of participation amounts to a duty of solidarity, but only a minimal indirect one. It requires a contribution to peace, not a contribution against unlawful use of force. In other words, the prohibition of participation is concerned with compliance with the prohibition to use force, not the defense of the targeted State.[166]

It cannot be denied that the prohibition of participation faces the structural challenges that were the reason for States to assign the regulation of interstate assistance to the Security Council only.[167] These practical challenges put the norm at risk of not being complied with, being perceived as ineffective, and ultimately weakening the principle of non-use of force. It is not claimed here that States' interests have substantially changed. On the contrary, the similarity in States' arguments over time is at times striking. Arguments that were advanced during the League of Nations are still made

165 Unlike assistance qualifying as indirect use of force, this form of (minimal) solidarity is not expressly required by the Charter. The prohibition to use force could likewise be understood as a minimal form of solidarity to the targeted State, i.e. not using force in support of a State unlawfully resorting to force. This is affirmed by the recognition of collective self-defense. The difference to the prohibition of participation is however that there is an express prohibition of such behavior; this duty of solidarity with the targeted State is hence chartered in the UN Charter.

166 On the general impact of complicity rules Lowe, *JIntl&Dipl* (2002) 14; Jackson, *ICLQ* (2019) 823-824.

167 Recall Chapter 3, II.

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today. For example, States still suggest that if assistance is not provided by themselves, there will be another State profiting.[168]

Still, this does not render the fact that the above-sketched legal limits to assistance are a modification of the Charter regime. The prohibition of participation has characteristically been a practice-driven, pragmatic rule, being fleshed out by international practice. In view of this nature, States seem willing to accept the risks associated with a prohibition of participation, now. States generally are in favor of a regulatory regime on assistance, despite some being against its strict enforcement. This is also reflected in international practice. When political stakes are high, when alliance politics dominate State decisions, and when there is little political agreement on a conflict, the rule is under pressure. But the rule has its place in international practice. It provides a universally agreed language and a framework to discuss such scenarios. It requires States to take a legal position on interstate assistance. In particular, States cannot behave contradictorily. It denies assisting States in cases where States refrain from taking a position, the positive seal of approval and thus the legitimacy that international law has to offer. Accordingly, the prohibition of participation constitutes an interpretation of the Charter regime, not least in view of the contemporary Security Council practice, not a modification.

3) Norms that are not applied to interstate assistance to a use of force

Two norms, the prohibition of a threat of force (a), the prohibition of intervention (b), and the duty to respect the territorial inviolability (c) that technically could govern interstate assistance, play a limited role in international practice. Likewise, no general duty to ensure respect for the prohibition to use force has emerged in international practice (d).

a) Prohibition of a threat of force

The prohibition of a threat of force does not feature prominently in the regulatory framework governing assistance.

168 E.g. US President Donald Trump on the decision to continue the transfer of arms to Saudi-Arabia, fearing that otherwise Russia or China will take over the business. Julian Borger, 'Trump inflated importance of Saudi arms sales to US job market, report says', *Guardian* (20 November 2018).

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Widely States feel threatened by an act of assistance, for example the sending of weapons. The act of assistance may even be qualified as a threat to peace.[169] But it is not equated to a prohibited conduct under the prohibition to threaten by force.[170] Instead, assistance widely prompts protest couched in political language, rather than the legal terms of Article 2(4) UNC. State practice, not least the wide practice of general military cooperation, underpins the structural obstacles identified in Chapter 3 to a qualification of the provision of assistance *per se* as a threat of force.

Any attempt to broaden the notion of a threat, and to qualify the conclusion of alliances or the provision of military bases, met with considerable opposition. This is the unsurprising, if not logical continuation of the general observation that the 'militarization', 'excessive level of armament' or acquisition of weapon systems (by the assisted State) do not qualify as breach of the prohibition of a threat of force, if the State does not actively attempt to intimidate through specific threats.[171] More fundamentally, it is due to its dependency on the assisted State's conduct that the *provision* of assistance *per se* is considered not to be directed against the targeted State. Instead, it is viewed to remain within the relationship between the assisting and the assisted State, and as such is at best conceived as creation of a general risk rather than a specific threat. The transformation of the general threat may only occur through the State actually in control of the assisted situation or action.

At the same time, this does not exclude that assistance may contribute to a threat of force. In that respect, it is noteworthy that the regulatory regime governing assistance maintains the synchronization and parallelism of the use and the threat of force. Both, the prohibition to threaten or use of force as well as the prohibition of participation also cover the case where the assisted act involves a *threat* rather than a *use* of force. In the former case, the assistance may hence even qualify as (indirect) threat of force. This parallelism has repeatedly been confirmed in the abstract.[172] In line with States' general reluctance toward expressly invoking the rule governing

169 Nikolas Stürchler, *The Threat of Force in International Law* (2007) 264.

170 Marco Roscini, 'Threats of Armed Force and Contemporary International Law', 54(2) *NILR* (2007) 231.

171 Stürchler, *Threat of Force*, 263-265; Corten, *Law against War*, 96. *Nicaragua*, 135, para 269; *Nuclear Weapons*, 246-247 para 48 (on the possession of nuclear weapons). See also e.g. S/2020/608 (29 June 2020) (Israel).

172 Cf Friendly Relations Declaration; Declaration on Enhancing Effectiveness; *Nicaragua*, 103 para 195.

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the threat of force in conflict practice, this provision is only rarely applied in practice. All the more, the fact that some States honored the rule in justifying their involvement in the buildup to the Iraq war 2003 merits special mention.[173] Moreover, this may explain charges for a threat of force that are somewhat ambiguously directed against both the assisted and the assisting State.

This feature of international practice does not change the fact that assistance remains an involvement in another State's conduct, however, and hence remains dependent on the qualification of the assisted action. The act of assistance alone, without a thereby assisted act, does not qualify as a threat of force. Accordingly, the prohibition of a threat of force has only a limited role in the regulation of assistance to a use of force. Whether there is an (indirect) threat or participation in a threat crucially depends on whether the assisted State has credibly communicated the readiness to use force for which assistance was provided.[174]

b) The non-intervention rule and assistance

International practice, most notably the (debates on the) Friendly Relations Declaration and the ICJ's Nicaragua decision, confirms that the provision of assistance may violate the rule of non-intervention.

In prohibiting assistance, the rule of non-intervention shares structural similarities to the conception of the prohibition of indirect use of force. Not the act of assistance itself is viewed as intervention. Instead, its relationship with another actor's coercion against the targeted State renders it an indirect intervention. This is reflected in State practice requiring that the assisted coercion has to actually take place. The responsibility is hence *accessory* in the sense that it depends on the assisted act. But responsibility is *not derivative*. The assistance does not derive its wrongfulness from the assisted use of force but is an independently wrongful conduct involving another State.[175]

173 See Iraq war assistance in the preparation stage. This also indicates unlike Roscini, *NILR* (2007) 230 suggests that the preparation of force may (if conducted publicly) also amount to a threat of force.

174 Mohamed Helal, 'On Coercion in International Law', 52(1) *NYUJIntlL&Pol* (2019) 61; Henderson, *Use of Force*, 30; Stürchler, *Threat of Force*, 259.

175 Cf also Second Report Crawford, 46 para 161 (d).

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The rule of non-intervention differs from the prohibition of indirect use of force, however in two important aspects: First, it applies to cases where the assisted act amounts to coercion generally. It is not limited to the use of force. It accordingly also excludes a possible right of self-defense. Second, more remote connections to the assisted act suffice to establish responsibility. As such, the rule may cover acts of assistance to a use of force that do not already qualify as indirect use of force.

Similar to the prohibition of indirect use of force, the rule of non-intervention was developed in light of and applied to assistance *to armed activities by non-State actors*. Like for the prohibition of indirect use of force, this did not (conceptually) exclude however the application of the rule to assistance to *States*.

But – and this is also the reason why it is not necessary at the present stage to further contribute to clarifying the exact conditions under which an act of assistance may qualify as indirect intervention – the rule of non-intervention is not represented in State practice relating to *interstate* assistance to a use of force.[176] Instead, States measure such more remote assistance against the prohibition of participation.[177]

This allows for two observations that affirm the previous findings on the regulation of interstate assistance. First, States do not accept that non-proximate forms of assistance to a use of force lead to responsibility without an *expressly stipulated* subjective requirement.[178] Second, and more fundamentally, in the interstate context States appear not to accept an independent wrong of non-proximate assistance unless it derives from its relationship with a wrongful act. Non-proximate assistance to States themselves is not considered to violate the sovereignty of the targeted State. It derives its wrongfulness from the violation of sovereignty by the assisted State. To assess non-proximate interstate assistance, States factor in the

176 Recall expressly so: Germany on arms delivery: BT Drs 18/13704 (23 October 2017), question 19. See also Ferro, Verlinden, *CJIL* (2018) 35 para 46 "not applicable to international armed conflict".

177 The present observation is limited to interstate assistance to a *use of force*. It does not comment on interstate assistance to a *coercion*. Likewise, it does not comment on a specific due diligence obligation to prevent the use of force.

178 The rules on non-intervention usually do not mention a subjective requirement. This does not mean however that it is not required. In fact, the subjective requirement may not feature as prominently, as the supported non-State group is often not only already present within the territory of the targeted State, but also one-dimensional in its purpose. In fact, practice suggests that the rule is only violated to the extent that the assisting State has at least some knowledge about the assisted act.

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judgment of international law with respect to the assisted use of force. To the extent that the assisted use of force is in accordance with international law, non-proximate assistance is not prohibited. In other words, for non-proximate interstate assistance to qualify as wrongful, it must meet an additional criterion: it must be contributing to a *wrongful* use of force – a condition which the rule of non-intervention does not require.

The different regulation of assistance to States and to non-State actors is due in part to the fact that under the current conceptualization of international law only interstate assistance allows to take into account the judgment of international law on the assisted use of force. Only the use of force in international relations *by States* is subject to legal regulation and may be expressly permitted.[179] The application of the rule of non-intervention to non-State actors was not only necessary to fill the gap for non-proximate assistance that did not qualify as indirect use of force. It also suggests that non-proximate assistance is subject to a stricter regime. The legitimacy of the cause for the violence by non-State actors is *prima facie* not relevant.[180] As such, the different regulation appears to also reflect a policy that State cooperation is generally beneficial and desired. In contrast, a State military cooperation with (foreign) armed non-State actors is from the outset conceived as problematic.

c) The territorial inviolability and assistance

Unlike in the context of support to non-State actors or humanitarian aid to the civilian population, the duty to respect territorial inviolability does not play a crucial role in international practice in view of interstate assistance. International practice affirms that this prohibition applies irrespective of conduct by the assisted actor.[181] Already the *act* of assistance, whether or not a thereby assisted use of force takes place, may hence violate the territorial inviolability of a target State. In case of assistance to a use of force that also

179 Corten, *Law against War*, 127 et seq.

180 But note that there might be a right to support non-State actors, particularly peoples under colonial and racist regimes or other forms of alien domination. This would be however an exception to a general rule of non-support.

181 See lately Judge Yusuf, in view of the Friendly Relations Declaration: *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Declaration Judge Yusuf, ICJ Rep 2015, 665, 744-745 para 8. Assistance to armed force present on the territory of the targeted State will hence already violate

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infringes upon territorial inviolability, States seem to conceive the assisting State's contribution to this interference to be already sufficiently captured by the accessory prohibitions of 'indirect use of force' and 'participation in a use of force'. A potential indirect violation of territorial inviolability is not specifically accentuated in practice.

d) A general duty to ensure respect for the prohibition to use force under the UN Charter?

International practice does not establish a general rule according to which States undertake to ensure respect for the prohibition to use of force.

As such, the UN Charter does not recognize, first, a general duty for member States to take all reasonable measures to prevent an unlawful use of force. In fact, for most forms of assistance, even when States exercise due diligence, they are eager to emphasize that it is not due to a legal obligation that they take these measures. In general, if such obligations are recognized, they are typically recognized in the broader context of human rights, but not for an unlawful use of force.[182] This does not exclude that under general international law, there may be general due diligence obligations that impact specific contributions to a use of force.[183]

Second, States stop short of recognizing a general duty of solidarity that requires States to positively provide assistance to a wrongfully targeted State.[184] The prohibition of participation does not prohibit the failure of States to positively provide assistance to a targeted State.

II. Regulation of interstate assistance dependent on UN action

Once the United Nations takes enforcement action, interstate assistance may be subject to twofold regulation. The Security Council may impose sanctions that also prohibit interstate assistance under Article 41 UNC (A). In addition, interstate assistance is subject to Article 2(5) UNC (C). Fur-

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the territorial inviolability of the targeted State, irrespective whether they use force or not.

182 E.g. war crimes, genocide, crimes against humanity, recall e.g. the Arms Trade Treaty.

183 For details see Chapter 6.

184 Recall e.g. 1987-Declaration.

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thermore, UN action may not add to the regulation of interstate assistance. But it may influence general prohibitions of interstate assistance (B).

A. Sanctions prohibit assistance

The Security Council widely takes measures that (also) prohibit assistance to a concrete and specific use of force. The Security Council's sanctions establish an independent and case-specifically tailored prohibition.

Often, sanctions imposed by the Security Council overlap with the rules of non-assistance in general international law. International practice confirms that the regimes are however not exclusive, albeit UN sanctions may dominate the discourse. They apply in parallel. The sanction regime – to the extent it is concerned with non-assistance – is however not a mere duplication of the non-assistance regime for the specific case, through which the Security Council lends its political authority to non-assistance and centers the focus of world attention on that contribution. It also does not only 'concretize' the prohibitions of assistance in the specific case, unambiguously emphasizing that they in fact capture a specific contribution to the use of force. In particular, the legal consequences differ. The above-sketched general rules on assistance are typically subject to unilateral enforcement without an authoritative judge. Sanctions are not only collectively decided obligations, but also benefit from the centralized, institutional monitoring and enforcement mechanisms in the UN system of collective security. For example, sanctions are widely complemented by reporting obligations about States' compliance and implementation of the sanctions. The Secretary General may be tasked with monitoring compliance. Special Sanctions Committees support, monitor or oversee the implementation of sanctions.[185]

Importantly, sanctions do not always concur with the prohibition of participation or of indirect use of force.

Not only may the regulation of assistance be specifically tailored and flexibly adapted to the situation. The Security Council may, and in practice does, impose more stringent regulations on interstate assistance. Assistance may be prohibited solely on objective terms, irrespective of a subjective element. States may bear strict obligations of prevention, irrespective of

185 For an overview see Sanctions and Other Committees, https://www.un.org/securitycouncil/content/repertoire/sanctions-and-other-committees.

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the end-use.[186] This at the same time usually comes with a specific, and naturally more narrow definition of prohibited assistance. Moreover, the Security Council may also prohibit *remote* assistance that is not covered by prohibitions under general international law.

Sanctions need not and often do not depend on the assisted State and its conduct.[187] They need not be, and usually are neither derivative nor ancillary. The Security Council may impose measures that do not depend on the unlawfulness of the assisted use of force. International practice has repeatedly affirmed what is already conceptually invested in the Charter. The Security Council may prohibit any assistance, even if the assisted use of force would be lawful.[188]

Moreover, the Security Council may even impose measures that do not depend on another State's specific use of force at all. It may also extend to the preparation, and the creation of a general abstract risk. It may prohibit 'potential assistance', essentially general 'military cooperation' or preparatory acts. It may prohibit the buildup of military infrastructure in another State, which, as long as it is not yet used, is permissible.[189] Israel, in the context of advocating for a prolongation of the sanction regime against Iran, has illustrated this conceptualization of sanctions well. Israel warned that:

> "In light of all the Iranian regime's blatant violations of Security Council resolutions 2231 (2015) and 2140 (2014), it would be unthinkable and calamitous to allow the lifting of the arms embargo on 18 October. Iran *would be allowed* to scale up its military arsenal and to acquire a large variety of weapon systems, including items from the United Nations Register of Conventional Arms such as battle tanks, armoured combat vehicles, large-calibre artillery systems, warships, submarines, combat aircraft, attack helicopters and missile systems. *Iran would also be permitted to transfer weapons on a mass scale to rogue States* and terrorist

186 E.g. S/RES/1298 (17 May 2000) para 6 (Ethiopia-Eritrea); Boivin, *IRRC* (2005) 469.

187 See also Seventh Report Ago, 58 para 72.

188 See e.g. most recently sanctions against Libya: S/2020/269 (1 April 2020). In this light, Security Council practice, in particular sanctions, cannot be generally assumed to reflect practice relating to the prohibitions of assistance, unless it has been adopted on the assumption of or adopted to determine the wrongfulness of a use of force.

189 E.g. S/2018/445 (10 May 2018).

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> organizations, *multiplying the existing threat it poses to its neighbours and to the entire region.*"[190]

The application of the potentially stringent sanctions to regulate interstate assistance always depends on the agreement within the Security Council. As such, sanctions can be a very powerful tool to regulate interstate assistance – not least because of the politicization of the UN mechanism, and the *possible* and authoritative clarity that political agreement can have.[191] Notably, interstate assistance will be subject to stringent non-assistance obligations when the case is clear enough to allow agreement within the Security Council to establish sanctions. This will usually – and somewhat paradoxically – be the cases where the general rules of non-assistance will also find acceptance, and application.

At the same time, it is the same politicization that renders sanctions in practice generally – even when they are taken – often ineffective or incomplete, leaving decisive loopholes.[192] This observation applies equally to sanctions regulating interstate assistance to a use of force. More worrying than this deplorable fact is, however, that the Security Council and its practice of sanctions limited in scope may give the impression that *any* non-sanctioned contribution to a use of force may remain permissible under international law.[193]

The present analysis has sought to show that this – at least legally – is not always the case. States may take advantage of the ambiguity that the Security Council often leaves behind. States may capitalize on the fact that no institutionalized, centralized enforcement regime is linked to the norms,[194] and that the lack of an authoritative judge allows for allegations and claims with respect to the preconditions (whether or not they are

190 S/2020/608 (29 June 2020), emphasis added.

191 This aspect also justifies sanctions that in content do not go beyond the general non-assistance regime.

192 See e.g. S/PV.8018 (2017), 9 (Ukraine).

193 See also the ATT that amplifies this impression. It should be noted that the Security Council only partly bears the blame for this impression. The Security Council does not need to reaffirm and flag general international law, but instead focuses on specific sanctions. But the practice of the Security Council by which it exactly engages in such behavior (also with respect to assistance, calling for and thus affirming compliance with non-assistance rules), indicates that the Security Council is aware of its political responsibility that it may be (deliberately) misunderstood. This renders it however primarily a political problem.

194 The Security Council that could also act upon assistance typically does not do so.

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correct or not is difficult to assess). But States do not claim that assistance is not governed by international law, in an event to the extent it is not remote.

B. Interaction of the UN and general rules on assistance

Even with measures short of sanctions, the Security Council may interact with the general regulation on assistance in two ways. First, the United Nations may address interstate assistance in a non-binding manner. As seen, this can either endorse the general framework governing assistance or be confined to a political call only.

Second, even in case the UN organ remains silent on interstate assistance *per se*, its determinations may clarify relevant preconditions.[195] For example, the Security Council may take a position on the lawfulness of a specific use of force. UN bodies, be it the Security Council or other bodies such as fact finding missions, may make determinations on the fact,[196] impacting States' subjective elements. Likewise, the UN may take a position about the lawfulness generally. Practically, such determinations will primarily be relevant in case of continuing military operations or with respect to future assistance.[197]

C. Article 2(5) UN Charter

The independent non-assistance obligation under Article 2(5) UNC complements the regulatory regime governing assistance to a use of force. It only applies if the assisted State that uses force is subject to an enforcement action taken by the Security Council.

Article 2(5) UNC imposes a strict obligation of non-assistance in the sense that it, unlike the general prohibition of participation, does not stipulate a specific subjective threshold, or at least presumes that States have knowledge.[198] The obligation applies, however, only if the Security Council

195 The extent that States must take into account such determinations follows general rules.

196 Similarly Graefrath, *RBDI* (1996) 377.

197 Recall the Osirak incident where the UN only addressed future assistance. See also Korea 1950 for ongoing assistance.

198 For a comparison see Aust, *Article 2(5) UNC*, 249-250 para 29.

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agrees to be taking action.[199] In practice, this 'filtering function' is likely the higher hurdle.

Article 2(5) UNC is not applied in practice to prohibit generally assistance to the use of force that induces the enforcement measure. Its scope is limited to assistance that specifically obstructs UN enforcement action itself. Accordingly, the scope of the enforcement action crucially defines the scope of the non-assistance obligation under Article 2(5) UNC. As such, States also remain cautious not to undermine the deliberate and carefully circumscribed balance of enforcement action chosen. They rather only foster compliance with already existing obligations under the enforcement action. Article 2(5) UNC thus remains true to the specific conceptualization of collective security in the Charter: there is no automatic 'excommunication', but an isolation of violators as agreed upon by the Security Council.

Nonetheless, Article 2(5) UNC and the general non-assistance regime may overlap to the extent that the assistance to the use of force also specifically obstructs the UN enforcement action.[200] This is only consequential. The prohibition of assistance by Article 2(5) UNC may not be linked to a use of force in violation of the prohibition to use force directly. But the enforcement action is. Assistance to an obstruction of the enforcement action may hence also be prohibited assistance to a use of force, and as such also foster the greater goal, international peace and security. Not any assistance to a use of force will, however, be also considered assistance to an obstruction of the enforcement action as prohibited under Article 2(5) UNC. In this respect, again, the scope of the specific enforcement action is determinative.

Article 2(5) UNC is a non-assistance norm specific to the UN system of collective security.[201] As such, it is not considered to preclude the existence of a general prohibition of assistance to a violation. To the contrary, frequent references to Article 2(5) UNC to substantiate the general non-assistance regime in international practice[202] affirm that Article 2(5) UNC is a specific application of a general(izable) idea: non-assistance to acts contrary to the spirit of the UN Charter.

199 Ibid 249-250, para 29.
200 See e.g. Korea 1950.
201 For a similar observation see Aust, *Article 2(5) UNC*, para 28.
202 Recall the 1949 Draft Declaration, 1987-declaration, or the ILC ARS Commentary to Article 16 ARS.

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