

“Are we at war?”
State support to parties in armed conflict: consequences under *jus in bello*, *jus ad bellum* and neutrality law

Nele Verlinden

November 2019

Thesis submitted with a view to obtaining the degree of Doctor in Laws at the Faculty of Law of the Katholieke Universiteit Leuven.

Supervisors:

Prof. Jan Wouters and Prof. Tom Ruys

Voor moeke

Acknowledgments

This PhD dissertation would not have been possible without the support of many. First and foremost, I am very grateful to my supervisor Prof. Jan Wouters, who kindly offered me the opportunity to be part of the wonderful team of researchers at the Leuven Centre for Global Governance Studies and the International Law Institute (KU Leuven). His advice and encouragement contributed to the successful completion of this study. The occasional collaboration on academic and non-academic publications broadened my horizons. I am equally thankful to my co-supervisor Prof. Tom Ruys. While I was based at the University of Leuven, Prof. Ruys regularly invited me to join the activities of the newly established Rolin-Jaequemyns International Law Institute at the University of Ghent. His detailed and critical comments on earlier drafts of this study were very much appreciated. The fruitful cooperation when writing the Digest of State Practice for the Journal on the Use of Force and International Law was a welcome distraction from the work for my PhD.

During my research I received useful feedback from my supervisory committee, which, besides my supervisors, consisted of Prof. Marco Sassòli and Prof. Wolff Heintschel von Heinegg. They both undertook the effort to travel to Leuven for my doctoral seminars, while also providing detailed comments on the various chapters based on their own expertise.

In addition, I would like to express my sincere gratitude to the members of the jury (Prof. Jan Wouters, Prof. Tom Ruys, Prof. Letizia Paoli, Prof. Gleider Hernández, Prof. Marco Sassòli and Prof. Nina Jørgensen) and to the president of the jury, Prof. Em. Jacques Herbots. I feel honoured that they took the time to critically read this dissertation.

Throughout this study, I had the opportunity to receive feedback from a number of persons working in practice. I would like to thank in particular Tristan Ferraro, Jean-Marie Henckaerts, Bruno Demeyere and Lindsey Cameron (International Committee of the Red Cross), Alfons Vanheusden and Chris de Cock (Belgian Ministry of Defense) and Steven Hill (NATO).

I also had the pleasure to conduct part of the research as a visiting researcher abroad. I notably received very useful advice and encouragement from Dr. Erik Koppe (Leiden University), Prof. Anne Orford and Marnie Lloyd (University of Melbourne) and Prof. Anders Henriksen (University of Copenhagen).

A researcher is helpless without a good librarian. I am very grateful to Christoph Malliet, not only for his unparallelled humour but also for always positively answering my suggestions to buy new books for the library collection of the KU Leuven Law Faculty. I am also indebted to the librarians of the ICRC library in Geneva and the Dag Hammarskjöld library in New York, who swiftly replied to my requests.

I cannot imagine how these five years would have been without the many wonderful colleagues at the Leuven Centre for Global Governance Studies. I am so grateful to my office mates (Samuel, Hendrik, Evelien, Linda, Kenneth) for the interesting discussions and uncountable joyful moments, as well as to Ines, Marta, Nils, Thomas, Viktorija, Sanderijn, Hilde, Katrien and many others for sharing lunch breaks and after work drinks. In addition, I am much obliged to Dr. Luca Ferro from the University of Ghent, with whom I share an obsession for footnotes and an interest in the principle of non-intervention.

Every colleague at the Leuven Centre for Global Governance Studies will recognize that the beating heart of the Centre can be found in the secretariat: thanks to Kathleen, Kevin and previously Thomas, Sara, Sarah and Dominique, the activities of the Centre (including the doctoral seminars held in the framework of this study) run smoothly. My warm thanks to all of them, not in the least for the daily chat when passing by their office.

Lastly, I would like to thank my friends and family for not understanding what my research is about, thus reminding me that the world is more than armed conflicts and international law: vake and Leen, my brother and sisters and their partners, my family in law, Maai and Nathan, Jeroen and Eline, Jeroen, Yana, the law girls, the KLJ girls, and many others. I would like to express my most loving gratitude to my husband Willem, for his invaluable help with the footnotes and his ever-present encouragement and support, and to our two girls Iza and Riene, who make me smile every day.

Nele Verlinden

Brussels, 23 October 2019

Contents

Acknowledgments i
Contents iii
Abbreviations ix
Introduction 1
1. Establishing the context and relevance of the topic 1
2. Research questions 3
3. Defining 'supportive acts' for the purpose of this study 6
4. Research design 10
4.1. Methodology 10
4.2. Research methods 11
5. Structure 16
Chapter 1. Supportive acts and State responsibility 19
1. The importance of attribution 21
2. State responsibility for aiding or assisting another State 25
2.1. The meaning of 'aid and assistance' 27
2.2. The subjective element 30
2.3. Double wrongfulness 32
3. State responsibility for supporting an armed group 33
3.1. 1986: The *Nicaragua* case 33
3.2. 2001: Article 8 ARSIWA 36
3.3. 2007: The *Bosnian Genocide* case 38
4. State support and the obligation of due diligence 40
5. Conclusion 42
Chapter 2. *Jus in bello* versus *jus ad bellum* 43
1. Origins of *jus in bello* and *jus ad bellum* 43
2. Separation between *jus ad bellum* and *jus in bello* 47
2.1. Consequences of the separation 47
2.2. Acceptance of the separation 50
2.3. Challenges to the separation 53
3. Common features 57
4. Differences 59
5. The law of neutrality 63

Chapter 3. Supportive acts under *jus in bello* 69
1. Problem statement 69
2. The (relative) importance of becoming party to an existing armed conflict 70
2.1. IHL applies to parties to armed conflict 71
2.2. State Responsibility for IHL violations: is being a party required? 75
2.3. Criminal law consequences 82
2.4. Section conclusion: mixed importance of being a party to an armed conflict 84
3. Brief overview: establishing the existence of an armed conflict 85
3.1. Establishing the existence of an international armed conflict 92
3.2. Establishing the existence of a non-international armed conflict 98
3.3. Section conclusion: supportive acts generally do not 'establish' an armed conflict 102
4. Assessing State support to parties to a pre-existing armed conflict 103
4.1. Support amounting to control 105
4.1.1. 'Control' over an armed group 105
A. 'Belonging to' 105
B. Overall control turns a NIAC into an IAC 107
C. Effective versus overall control: do they offer a solution to the same problem? 112
4.1.2. Control over a State 116
4.2. Support not amounting to control: the support-based approach 117
4.2.1. DPH as a tool to determine whether a civilian may be attacked 119
A. The ICRC interpretation of 'direct participation in hostilities' and 'continuous combat function' 120
B. Direct participation in hostilities in State practice 124
B.1. Military Manuals 124
B.2. State Reports prepared for the Customary Law Study 133
B.3. Domestic case-law on the notion of DPH 134
C. Intermediate conclusion: the disputed concept of DPH 136
4.2.2. From micro to macro: the support-based approach 137
A. The support-based approach as introduced by the ICRC 137
B. Analysing the scope of the support-based approach 140
B.1. Material scope of the support-based approach 140
B.2. Personal scope of the support-based approach 142
B.3. Geographical scope of the support-based approach 154
B.4. Temporal scope of the support-based approach 155

B.5. Overview: the support-based approach + ... 157
C. General concerns regarding SBA(+) as a tool for assessing supportive acts ... 159
C.1. Increase of deadly violence ... 160
C.2. Lack of an explicit legal basis ... 162
C.3. Practical concerns ... 163
D. The four categories of supportive acts and the support-based approach(+) ... 164
E. The SBA(+) applied: the Danish contribution to the coalition against ISIS ... 166
4.2.3. Intermediate conclusion: the support-based approach(+) ... 172
4.3. Section conclusion: from control towards support ... 173
5. Conclusion: supportive acts under *jus in bello* ... 174
Chapter 4. Supportive acts under *jus ad bellum* ... 177
1. Problem statement ... 177
2. The consequences of reaching *jus ad bellum* thresholds ... 178
2.1. React with force ... 179
2.2. Violation of a *jus cogens* norm ... 181
2.3. Criminal prosecution for the crime of aggression ... 185
2.4. Intermediate conclusion ... 187
3. Thresholds ... 188
3.1. Use of force ... 188
3.1.1. The threshold for a direct use of force ... 190
3.1.2. Recent examples of (no) 'use of force' identifications ... 193
3.2. Armed attack ... 198
3.2.1. The threshold for a direct 'armed attack' ... 198
3.2.2. The Definition of Aggression as basis for 'armed attack' ... 203
3.2.3. Recent examples of 'armed attack' identifications ... 210
3.3. Principle of non-intervention ... 212
3.3.1. The threshold for the principle of non-intervention ... 212
3.3.2. Recent examples of (non-)violations of the principle of non-intervention ... 220
3.4. Intermediate conclusion ... 221
4. Supportive acts and *jus ad bellum* thresholds ... 223
4.1. Indirect use of force or armed attack ... 223
4.1.1. Support in the form of control ... 224
A. Controlling armed groups: a false indirect character ... 224
B. Controlling another State: a rare occurrence ... 227
4.1.2. Allowing territory to be used: a special category of support ... 229

A. Allowing territory to be used by States 230
B. Allowing territory to be used by armed groups 241
C. Overview: 'allowing territory to be used' as a basis for self-defence 247
4.1.3. Logistical support, providing intelligence and training 248
A. Delivery of weapons, training, intelligence, … to armed groups: possible indirect character sensu stricto 248
A.1. The Nicaragua approach 248
A.2. The Bethlehem Principles: introducing a support-based approach in the jus ad bellum? 253
B. Delivery of weapons, training, intelligence…to States: no indirect character 257
4.2. Accumulation of events 263
4.3. Intermediate conclusion 267
5. Conclusion 269
Chapter 5. Supportive acts and the law of neutrality 273
1. Preliminary question: when does the law of neutrality apply? 274
2. Neutral rights and duties 280
2.1. Duty of non-participation in hostilities 280
2.2. Prohibition of assistance and duty of impartiality 281
2.3. Inviolability of neutral territory 285
2.4. Intermediate conclusion 289
3. Consequences of violating neutral duties 290
3.1. State responsibility: countermeasures as a contested consequence 290
3.2. *Jus in bello* consequence: party to a conflict or contested non-belligerency? 300
3.2.1. Non-belligerency as an intermediate status? 300
3.2.2. Neutral State becoming party to an international armed conflict 304
3.3. *Jus ad bellum* consequence: no longer a basis for a lawful use of force? 310
3.4. Intermediate conclusion 319
4. Conclusion 321
Conclusion: Are we at war? State support to parties in armed conflict: consequences under *jus in bello, jus ad bellum* and neutrality law 323
1. Consequences of meeting *jus in bello, jus ad bellum* and neutrality law thresholds 324
2. Overview: supportive acts under *jus in bello, jus ad bellum* and neutrality law 325
2.1. Allowing territory to be used 325
2.2. Providing logistical support 326
2.3. Training 327
2.4. Crucial intelligence sharing 328

3. Evaluation of the research hypotheses 328
4. Recommendations to support-providing States 330
Bibliography 333
1. Treaties 333
2. Travaux Préparatoires 334
3. Case-law 335
3.1. International case-law 335
3.2. Domestic case-law 338
4. International practice 340
4.1. United Nations 340
4.2. European Union 342
5. State practice 343
5.1. Military Manuals 343
5.2. Letters sent to the United Nations 343
5.3. Other State practice 345
5.4. Reports of State practice 349
6. Doctrine 350
6.1. Books 350
6.2. Book chapters 354
6.3. Journal articles 358
6.4. Papers 366
6.5. Blog posts 367
7. Media articles 368
8. Websites/Databases 370
9. Other materials 370

Abbreviations

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
ARIO	ILC Draft Articles on the Responsibility for International Organizations
ARSIWA	ILC Articles on the Responsibility of States for Internationally Wrongful Acts
ATT	Arms Trade Treaty
AU	African Union
Bethlehem Principles	Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors
CA 1	Common Article 1 of the Geneva Conventions
CIHL Study	Customary International Humanitarian Law Study by the ICRC
DPH	Direct Participation in the Hostilities
DRC	Democratic Republic of the Congo
ECtHR	European Court of Human Rights
EU	European Union
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC II	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC III	Geneva Convention (III) relative to the Treatment of Prisoners of War
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
GCs	Geneva Conventions of 1949
HC V	Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land
HC XIII	Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War
Helsinki Principles	Helsinki Principles on the Law of Maritime Neutrality

HPCR Manual	Manual on International Law Applicable to Air and Missile Warfare developed by the Program on Humanitarian Policy and Conflict Research at Harvard University
HRAW	the Hague Rules on Air Warfare
ICC	International Criminal Court
ICC Statute	*See also* 'Rome Statute': Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDI	Institut de Droit International
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
IS/ISIS/ISIL	Islamic State
ISAF	International Security Assistance Force (Afghanistan)
JNA	Yugoslav People's Army
PoW	Prisoner of War
NATO	North Atlantic Treaty Organization
Rome Statute	*See also* 'ICC Statute': Rome Statute of the International Criminal Court
San Remo Manual	San Remo Manual on International Law Applicable to Armed Conflicts at Sea
SBA/SBA(+)	Support-based approach/ Expanded version of the support-based approach
Tallinn 2.0 Manual	Tallinn 2.0 Manual on the International Law Applicable to Cyber Operations
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
VCLT	Vienna Convention on the Law of Treaties
VRS	Bosnian Serb Army

Introduction

1. Establishing the context and relevance of the topic

Fighting wars is intrinsically connected with the existence of humanity. Wars have been fought between tribes, churches, feudal barons, free cities and private individuals.[1] Since the Peace of Westphalia in 1648, and certainly by the 19th century, wars have been predominantly fought by States, with governments who decided to go to war, armies fighting the war and the population of the involved States left aside as much as possible. Even though civil wars still occurred until the end of the Second World War – think of the American Civil War or the Spanish Civil War –, war was a fairly simple situation between States.

The Second World War was immediately followed by some significant changes to the international legal framework applicable to situations of war. The notion of 'war' was replaced by other notions, such as 'use of force' and 'armed attack' in the *jus ad bellum* context, or 'armed conflict' in the *jus in bello* context.[2] In addition, during the Cold War, participation in 'war' became more complex. As internal armed conflicts became more common, external influence in such conflicts gained importance. The so-called proxy-wars of the Cold War period challenged the entire international legal framework, leading to interesting cases such as the 1986 *Nicaragua* decision of the ICJ.[3]

In today's post-Cold War world[4], a new era in which we see a plethora of terrorist groups on the one hand, and ever-more sophisticated military technology on the other, the old notion of 'war' seems even further away. This dissertation starts from the observation that States generally avoid being dragged into a 'war', but that they nevertheless wish to influence the outcome of an armed conflict without being involved therein – in other words, influence with a minimum risk of loss of military personnel. Indeed, with a civil society voicing strongly against 'body bags' returning from the battlefield, there are not many politicians who can openly advocate for participating in a conflict outside the State's own territory without being seriously challenged by the public opinion. Nonetheless, the political desire to steer armed conflicts on another State's territory in a certain direction did not vanish. This desire can flow from a political need, but also from economic interests or security concerns. Consequently, States have sought to find other, non-lethal ways to assist parties to armed conflicts. Cautious however for possible links in terms of responsibility, they try to avoid being labelled as having

[1] Luc Reydams and Jan Wouters, 'A la guerre comme à la guerre', in Jan Wouters, Philip De Man and Nele Verlinden (eds.), *Armed Conflicts and the Law*, International Law Series 17 (Antwerp: Intersentia, 2016), 4.
[2] On this point, see more specifically *infra* Chapter 2.
[3] This case has set the baseline for assessing the degree of control exercised by a State over a non-State armed group involved in an armed conflict: Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports 14 (ICJ, 27 June 1986).
[4] Yet, recently we can observe a 'revival' of the cold war set-up, especially in the context of the Venezuelan political crisis: see Will Gore, 'Opinion: Venezuela's crisis suggests Cold War alliances and strategies are being renewed', *The Independent*, 28 January 2019, https://www.independent.co.uk/voices/venezuela-crisis-us-russia-nicolas-maduro-juan-guaido-cold-war-a8750341.html.

a certain degree of control over the party they are supporting.[5] In essence, the experience of the proxy-wars during the Cold War (and the international legal debate on attributing acts of armed groups to States based on a 'control' criterion) has increased the need for more subtle forms of assistance, such as the provision of crucial intelligence information, authorizing overflights or allowing part of the territory to be used for military purposes, weapon supply or concrete operational training. In addition, the wide availability of modern technologies has made more subtle forms of assistance also possible in practice, such as the sharing of GPS coordinates of specific targets, or the refuelling of fighter jets in the air (so called 'air-to-air refuelling'). But what are the international legal consequences of such more subtle forms of non-lethal assistance? The general rule on complicity for States that aid or assist other States in the commission of an internationally wrongful act has received increased attention in recent scholarship.[6] However, as one of the authors notes, aid and assistance in the field of the use of force and international humanitarian law 'could very well warrant in-depth treatments of their own'.[7]

The international legal consequences of war are governed by various subfields of international law: the *jus ad bellum* aims at ensuring international peace and security and determines the exceptional circumstances in which States may lawfully use force against each other, whereas the *jus in bello* aims at protecting the victims of armed conflict and prescribes the rules to be respected by all parties involved in such conflict. To these main two subfields of law related to 'war', the law of neutrality can be added: squashed somewhere in between the *jus ad bellum* and the *jus in bello*, its rules determine how third neutral States should behave *vis-à-vis* belligerent States.

The existence of multiple fields of international law governing the use of force can be confusing for States. It is often unclear for governments which rules come into play when they decide to get involved in a particular conflict – or when they try to avoid such involvement. Yet, the stakes may be high. Populations become increasingly aware of the risks of being embroiled in a military campaign, even if that campaign takes place thousands of kilometres away. Terrorist attacks in Europe have shown the vulnerability of Western States. Governments are increasingly challenged in parliament: they have to explain why they are undertaking a certain action or why they refrain from acting in relation to a particular conflict.[8] Clarifying the legal

[5] On this point, see more specifically *infra* Chapter 1, Section 3.

[6] See for examples the following monographs: Helmut Philip Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); Miles Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015); Vladyslav Lanovoy, *Complicity and its limits in the law of international responsibility*, vol. 59, Studies in International Law (Oxford/Portland: Hart Publishing, 2016).

[7] Aust, *Complicity and the Law of State Responsibility*, 379. Aust also mentions human rights law, but this subfield of international law will not be discussed here.

[8] See for instance X, 'US lawmakers vote to end US support for war in Yemen', *The Guardian*, 14 February 2019, https://www.theguardian.com/us-news/2019/feb/13/us-congress-house-yemen-war-trump-saudi-arabia; Claire Mills, Parliamentary approval for military action, Briefing Paper CBP 7166 (House of Commons Library, 5 August 2018) (summarizing the practice on parliamentary oversight in the UK); Bert Koenders, Kamerbrief inzake nader advies extern volkenrechtelijke adviseur geweldgebruik tegen ISIS in Syrië, MinBuza-2015.333470, 26 June 2015 (advising the Dutch government on the use of force against ISIS under international law). For a useful overview

consequences of supportive acts to parties in armed conflict, as this study will do, has two main advantages: it allows States to make a proper assessment of planned supportive acts, taking into account the possible legal (such as *post facto* lawsuits undertaken by victims of armed conflict)[9] and factual risks (such as the return of body bags), and it can enhance the democratic oversight over a government's actions.

2. Research questions

The overall aim of this dissertation is to *identify in a comprehensive manner the possible legal consequences in the fields of jus in bello, jus ad bellum and neutrality law of State support to a party to an existing armed conflict*. To that end, this study seeks to *clarify* the current status of the law as far as possible, by taking into account the various positions that still remain on an important number of highly debated issues (the threshold for an armed attack, to name just one), rather than claiming to identify the exact status of customary international law on all the relevant issues in the three mentioned subfields of international law. The adjective 'possible' before the noun 'consequences' is thus deliberately chosen: it allows for a conclusion that can serve as a guidance for States when they have to decide which type of support they want to provide to a party in an armed conflict.

Based on the research aim identified above, the **central research question** of this study can therefore be formulated as follows:

- What are the possible consequences under *jus in bello, jus ad bellum* and neutrality law of State support to a party to an armed conflict?

In order to answer the main research question, three sets of two sub-questions will be addressed, each set focusing on one of the three fields of international law referred to in the main research question: *jus in bello, jus ad bellum* and neutrality law. Within each set of questions, one question aims at identifying the applicable thresholds to assess supportive acts, whereas the other question focuses on the consequences attached to crossing those thresholds. The sub-questions can be formulated as follows:

1) *Jus in bello*:
    a) When does a State supporting a party to an armed conflict become party to that conflict itself?
    b) What are the consequences of becoming a party to an armed conflict?

of governments being challenged in parliament regarding the fight against ISIS, see Tom Ruys, Luca Ferro and Tim Haesebrouck, 'Parliamentary war powers and the role of international law in foreign troop deployment decisions: The US-led coalition against "Islamic State" in Iraq and Syria', *International Journal of Constitutional Law* 17, no. 1 (2019): 118–50.

[9] See for instance the *Ramstein* case in Germany, in which family members of victims of a US drone strike in Yemen challenged the role of the German State because the airbase at Ramstein hosts a satellite relay station and personnel that are crucial for the drone operations in Yemen. See Judgment from 19 March 2019, 4 A 1361/15, Oberverwaltungsgericht NRW, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00

2) *Jus ad bellum*:
    c) When does a State supporting an armed attack, a use of force or a violation of the principle of non-intervention commit either of these acts itself?
    d) What are the consequences of crossing *jus ad bellum* thresholds?
3) Neutrality law:
    e) When does a neutral State breaching neutrality law become party to an armed conflict?
    f) What are the consequences of violating the law of neutrality?

The dissertation departs from **three hypotheses.** The first hypothesis is that *a State can become party to an armed conflict by doing less than providing kinetic assistance to parties to an armed conflict.* What is meant by 'kinetic assistance' for the purposes of this study is addressed in the following Section. The second hypothesis is that *assisting another State in the commission of an armed attack or a use of force may have the same consequences as carrying out those acts as a main actor.* A third hypothesis is that *each form of supporting parties to an armed conflict has its specific international legal consequences*.

The scope of this work is limited in four ways.

First, this dissertation focuses on support provided by States to parties to an armed conflict and the international legal consequences for the supporting State in three subfields of international law (*jus in bello, jus ad bellum* and neutrality law), but not in others. For instance, prosecution for the commission of international crimes is one of the possible international legal consequences for any actor acting at the international scene. International criminal law is a body of international law focusing on the prosecution of individuals, as opposed to States.[10] Individual criminal prosecution will however fall beyond the scope of this work. Under international law, there is no such concept as 'international State crimes', even though this has for a long time been advocated for by various scholars.[11] The final version of the ILC's ARSIWA stepped away from the notion of 'State crimes', instead focusing entirely on the issue

[10] This does not mean that the same underlying act can trigger both the criminal responsibility of an individual and the international responsibility of a State. For instance, while the crime of genocide is included in Article 6 of the Rome Statute, the ICJ held in the Bosnian Genocide case that

> [u]nder Article I [of the Genocide Convention] the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not expressis verbis require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described.

See Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports 43 (ICJ, 26 February 2007), para. 166.

[11] The concept of 'international crime of a State' was also included in draft Article 19 of the ARSIWA, before being deleted thereof. See Joseph H. H. Weiler and Antonio Cassese, *International crimes of state: a critical analysis of the ILC's draft article 19 on state responsibility* (Berlin: de Gruyter, 1989); Alain Pellet, 'Can a State commit a crime? Definitely, yes!', *European Journal of International Law* 10, no. 2 (1999): 425–434. For a general study of the matter of State crimes, see Nina H.B. Jørgensen, *The responsibility of states for international crimes* (Oxford: Oxford University Press, 2000).

of State responsibility for 'internationally wrongful acts'. The exclusion of individual criminal prosecution from the scope of this study also explains why no separate attention is devoted to the recently activated crime of aggression under the Rome Statute. The underlying acts of aggression, and the important Definition of Aggression formulated by the General Assembly, are however extensively referred to when searching for the scope of 'armed attack' in Chapter 4 of this Study.

Second, Chapter 3 of this study deals with the *jus in bello* aspects of support to parties to armed conflict situations that involve actual hostilities. For that reason, and also because of its particular separate legal framework, support in light of the law of occupation will not be considered. In addition, no specific attention will be given to conflicts that would be classified under Article 1(4) AP I: some wars in exercise of the right of self-determination can, under certain conditions, be considered as international armed conflicts.[12] While it is of course likely that a people fights for its self-determination with the support of another State, Article 1(4) AP I has thus far only become operational for one conflict situation.[13] Due to the limited practical relevance of Article 1(4) AP I, supportive acts to peoples involved in a struggle for self-determination will be approached from a NIAC-perspective (which is the most likely legal qualification of the armed conflict in question).

Third, this study will not deal with the sharing of responsibility in the framework of international organizations or even bilateral agreements. The main reason for this exclusion is a general principle of international law: *pacta tertiis nec nocent nec prosunt* (a treaty binds only the parties and does not create obligations for third States). In other words, this study will look at the international legal consequences of supportive acts under *jus in bello*, *jus ad bellum* and neutrality law regardless the underlying agreement for such support. A third (mostly enemy)

---

[12] Article 1(4) AP I determines that international armed conflicts

> include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Article 1(4) can only produce legal effects insofar as (i) the State against which a fight for self-determination takes place is party to AP I and (ii) the people in question has issued a declaration to be bound by the IHL rules of international armed conflict in accordance with Article 96(3) of the Protocol.

Article 96(3) AP I reads:

> 3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
>
> (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
>
> (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

[13] Namely the struggle for self-determination of the people of Western Sahara, see Polisario Front, Declaration under Article 96(3) AP I, 21 June 2015, http://theirwords.org/media/transfer/doc/declarationofficielle_polisariofront_2015-f426d1a96a4465affd1f87e794374b06.pdf.

State has no interest in knowing the multilateral or bilateral (often also political) basis on which such supportive acts are built.[14] Indeed, from a Western-European perspective it seems tempting to consider that all forms of military cooperation take place in the framework of an international (or regional) organization (for instance NATO, or the EU). Such a perception does not reflect reality. One only needs to look at the different forms of cooperation between actors involved in the Syrian conflict (including the Syrian government, Russia, Iran, Hezbollah, …) to know that a great number of supportive acts actually take place outside the context of an international organization. A detailed analysis of the way in which responsibility is shared (or not) between an international organization and (one of) its member States would thus only concern a limited number of supportive acts in practice. In addition, looking into the question of the potential responsibility of international organizations would also open too many doors and lead to a whole new dissertation topic. Others have described the questions at stake.[15]

Fourth, this dissertation focuses primarily on support provided by States. Of course, during armed conflict, parties are supported not only by States, but also by other armed groups or by private companies. Both the discussion on the responsibility of private companies and on the responsibility of armed groups are fascinating and contemporary relevant legal questions, which would nevertheless lead us too far from the main topic of this dissertation. However, on some occasions, the analysis will also be applicable by analogy to support provided by armed groups.[16] In such cases, armed groups will be mentioned, without however forming the main focus of the analysis.

3. Defining 'supportive acts' for the purpose of this study

As this study aims at clarifying the possible international legal consequences of State support to parties in an existing armed conflict, the notion of 'support' merits a detailed description from the outset.

[14] From a victim's perspective, it should be acknowledged that the question on how responsibility is shared between an international organization and its members States may become highly relevant. This has been illustrated, for instance, by the well-known Srebrenica case-law concerning the responsibility of Dutch troops under the command of a UN peacekeeping force in the genocide against Bosnian men in Srebrenica. In the *Nuhanović* case, for instance, the Supreme Court of the Netherlands decided that conduct can be attributed to both the UN and a member State, because of the Netherlands' effective control over the conduct of the troops in question. See The Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović, Judgment, No. 12/03324 (Supreme Court of the Netherlands, 6 September 2013), para. 3.6.1.ff.

[15] See *inter alia*: Frederik Naert, *International law aspects of the EU's security and defence policy, with a particular focus on the law of armed conflict and human rights* (Antwerp: Intersentia, 2010); Marten Zwanenburg, *Accountability of peace support operations*, International Humanitarian Law Series, Vol. 9 (Leiden: Martinus Nijhoff Publishers, 2005); Marten Zwanenburg, 'International humanitarian law interoperability in multinational operations', *International Review of the Red Cross* 95, no. 891–892 (2013): 681–705; Ray Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules apply to Peacekeepers?', *Criminal Law Forum* 14, no. 2 (2003): 153–194; Nachama Rosen, 'How are Multinational NATO Operations Responsible for International Humanitarian Law Violations?', *The Fletcher Forum of World Affairs* 37, no. 3 (2013): 163–175.

[16] See for example *infra* Chapter 3, Section 4.2.2, sub-Section B.2.

Importantly, this study uses 'support' and 'supportive acts' interchangeably. In common language, 'to support' has multiple meanings, of which the most relevant for the purpose of this study are 'to assist, help', and even 'to pay the costs of'.[17] There is no international legal definition of support, nor of any of its synonyms (assist, help,…). Support to parties to an armed conflict can encompass a wide variety of actions (or even omissions), and logically not all of them will necessarily trigger the same consequences. Sending arms to a fighting party in a non-international armed conflict may have different consequences than granting overflight rights to a belligerent involved in an international armed conflict; providing training to rebels might not trigger the same effects as sharing crucial intelligence information with an allied State; and providing economic support cannot be compared with sending troops on the ground to join the fight. In order to understand the broad scope of supportive acts that will be covered in this study, and the way in which the legal consequences of support can be determined, the following parameters will serve as a useful starting point: the actors, the context and the type of support.

As for the actors, this study will primarily focus on States as support-providers. Nevertheless, some of the legal consequences identified (in particular for the *jus in bello* consequences, where the principle of equality of belligerents plays a role), will also apply to armed groups as support-providers. Support provided by individuals or private entities that do not constitute an armed group falls outside the scope of this study. On the receiving side, consequences may differ drastically depending on whether the receiver is a State or an armed group. Both scenarios will thus each time be taken into account.

As for the context, consequences of supportive acts may differ depending on whether the ongoing armed conflict is an international armed conflict or a non-international armed conflict. Similarly, supportive acts may be permissible or not if they happen in reaction to or in absence of a prior armed attack. In addition, in case the UNSC has taken binding measures, the possibility of States to act freely *vis-à-vis* a party to an armed conflict may be drastically reduced.

Lastly, and obviously, the type of support provided will greatly influence the consequences it triggers. Taking into account the possibilities offered by technological advancement and global cooperation, the variety of supportive acts in times of armed conflict is nearly endless. In order to maintain the general theoretical and practical value of the outcome of this study, its scope will not be limited to a number of very specific supportive acts. Instead, I suggest to delineate 'support' by defining its upper and lower limits for the purpose of this study, as well as by clarifying the intentional element. These boundaries should be considered as indicative for the scope of this study, but not as a strict delineation of the latter. Indeed, in some instances, the conclusions may even be valid for a broader range of supportive acts than the one identified below.

[17] Merriam-Webster Dictionary online, https://www.merriam-webster.com/dictionary/support.

For the material element of supportive acts, I suggest to set as an upper limit, the support that does *not* amount to the involvement in hostilities or capture of enemy forces, nor in the unconsented presence of armed forces on the territory of another State. One could also refer to this first element of the upper limit (the absence of involvement in hostilities) as 'non-kinetic'.[18] The reason why I exclude these types of support from the scope of the study is because the legal consequences they trigger have been studied before and are (to a certain extent) well-established.

As a lower limit, this study will look at supportive acts that are connected to a concrete armed conflict, or at least to a concrete use of force by another entity that would trigger such an armed conflict. While most supportive acts would obviously contain an active element, this is not necessarily the case: the decision not to suspend or limit ongoing cooperation agreements, for instance to allow for the continued use of a military base on the territory, would also be considered as a 'supportive act'. In contrast, mere encouragement would not be enough to be considered as a 'supportive act' in the framework of this study.[19] Similarly, expressing political support without attaching any 'physical' consequences to that expression also falls outside the scope of this study.

Throughout this study it will be assumed that the support-provider knowingly undertakes the action to support another entity. While perhaps this intentional element seems at first sight superfluous when dealing with the acts of a State, one can imagine that a State's territory is being used by a belligerent without the knowledge of the territorial State. Such scenarios, while they may be discussed on the side, will not be considered as 'support' for the purpose of this study. It cannot be assumed, however, that the support-providing State always exactly knows what is going to happen with the support provided. While it will thus be taken as a starting point that all supportive acts studied in this dissertation are committed with the knowledge and intention to *generally* support the receiving entity, this does not necessarily mean that all support is provided with the specific intention to aid or assist in the commission of a certain (wrongful) act, for instance the commission of a war crime. This certainly applies to violations of *jus in bello*. Regarding *jus ad bellum* violations, however, it is much harder to imagine that

[18] Non-kinetic does not necessarily mean the same as 'non-lethal'. The latter term is often referred to in order to point at the provision of military material that is all but weapons, such as defensive material, jeeps, etc… See for instance Henderson, who describes the notion 'non-lethal assistance' as 'equipment that while not having the primary aim of taking life nonetheless is provided with the aim of assisting the party concerned to prevail in an armed conflict, or at least to possess some (or better) capabilities to defend itself.' Christian Henderson, 'The Provision of Arms and "Non-Lethal" Assistance to Governmental and Opposition Forces', *University of New South Wales Law Journal* 36, no. 2 (2013): 649. Occasionally the term is also used in a much broader way, where it would also encompass assistance that is traditionally seen as humanitarian assistance, such as food and medicines. Discussing non-lethal assistance provided to Syrian rebels, Ruys notes for instance that '[i]ndividual EU Member States, such as the UK, have, however, provided rebel forces with "non-lethal" aid, which apparently includes not only food rations and medicines, but also body armour and armoured vehicles ("to help opposition figures move around more freely").' Tom Ruys, 'Of Arms, Funding and "Non-lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', *Chinese Journal of International Law* 13, no. 1 (2014): 15.

[19] This has an impact on the scope of Article 1 GCs, which according to the ICJ includes encouragement (see *infra* note 361).

a supporting State does not provide the support with the knowledge or intention to support an armed attack or an unlawful use of force. Nevertheless, it cannot be excluded that State A allows an attacked State B to make use of its territory for a reaction in self-defence against State C, and that that reaction turns out to be so disproportionate that the self-defence actually becomes an armed attack itself. In such a scenario, while the support was knowingly provided in general to State B, it cannot be assumed that State A knew or had the intention to support a disproportionate act of self-defence.

To summarize, by way of example (and certainly not exhaustively), the following supportive acts are included in this study:

- Allowing territory to be used by troops to carry out attacks
- Allowing troops to cross over territory
- Allowing overflights
- Allowing military bases on territory if they are used in the context of a concrete conflict
- Providing weapons in the context of an armed conflict
- Providing military equipment (offensive and defensive) in the context of an armed conflict
- Training troops/fighters in the context of an armed conflict
- Sharing intelligence in the context of an armed conflict

Note that the phrase 'in the context of an armed conflict' may point both at an ongoing armed conflict, as well as an armed conflict that is about to erupt with the support of the supporting State (for instance, when a State allows another State to pass through its territory in order to conduct an armed attack against a third State, thus starting an international armed conflict).

In contrast, the following acts will <u>not</u> be considered:

- Sending of troops to the conflict
- Launching of missiles
- Operating drones
- The supply of weapons *in tempore non suspecto*
- The training of troops *in tempore non suspecto*
- Providing general training (e.g. on IHL principles) to troops with no link to a specific ongoing conflict
- Purely humanitarian support

Roughly, the above listed examples of supportive acts can be clustered into four simplified categories: (1) territorial disposal, (2) logistical support, (3) training and (4) intelligence sharing. Category 2 is the broadest category: it encompasses the transport of troops, the refuelling of fighter jets, as well as the supply of military equipment, including but certainly not limited to weapons. These four categories will be referred to throughout the study, as they allow for drawing conclusions in a more comprehensive manner.

4. Research design

4.1. Methodology

Throughout this study, a positivist stance on international law is taken. Legal positivism considers law as 'created and laid down ('posited') by human beings'[20], whereby 'the validity of a rule of law lies in its formal legal status, not its relation to morality or other external validating factors.'[21] Translated to the international level, this results in a conception of law that is in essence a product created by States[22], occasionally supplemented by other actors such as international organizations.[23] The starting point of the research conducted in order to clarify the *jus in bello, jus ad bellum* and neutrality law consequences of supportive acts will thus be analytical, focusing on what the various legal instruments determine, how the States commented on those instruments (both before and after the conclusion of a treaty or other text) and how the various norms are applied in practice. The general rules on the interpretation of treaties, as laid down by the Vienna Convention on the Law of Treaties[24], will serve as a basis for the analysis in this study.

In addition to the (by some labelled 'conservative')[25] positivist approach, this dissertation puts forward a number of critical observations and innovative ideas, thus occasionally adding some *lex ferenda* to the *lex lata*. Legal positivism indeed does not exclude statements on what the law ought to be: 'it is a prequel to, rather than a substitute for, the making of [such] statements'.[26] For instance, this study explores how the existing legal framework to identify parties to an armed conflict can be broadly interpreted, taking the support-based approach as developed by

---

[20] Robert Cryer et al., *Research Methodologies in EU and International Law* (Oxford: Hart Publishing, 2011), 37.
[21] *Ibid.*
[22] 'The main characteristic of the classic view [on positivism] is the association of law with an emanation of state will (voluntarism).' See Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', *American Journal of International Law* 93, no. 2 (1999): 303.
[23] On the role of international organizations in the formation of custom, for instance, the ILC has held that

> [t]he practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (*a*) whose subject matter falls within the mandate of the organizations, and/or (*b*) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties). [...]
>
> [T]he practice of international organizations when concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping) […] may contribute to the formation, or expression, of rules of customary international law in those areas.

ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10' (to appear in the *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two), 131. Paulus and Simma also argue that a 'modern positivism' should take into account the political reality, such as the growing importance of intergovernmental organizations and non-governmental organizations. Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts', 306.
[24] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, in particular Articles 31 and 32.
[25] Paulus and Simma wonder for instance whether 'positivism [does] not represent old-fashioned, conservative, continental European nineteenth-century views – naive ideas of dead white males on the possibility of objectivity in law and morals?' Nevertheless, they also admit that 'for better or for worse, [they] indeed emply the tools developed by the "positivist" tradition.' Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts', 302.
[26] Cryer et al., *Research Methodologies in EU and International Law*, 38.

the International Committee of the Red Cross (ICRC) as a starting point for further innovation of the law. It also questions the legal validity of certain neutrality law concepts that are seemingly taken for granted in a wide range of domestic military manuals.

Yet, an author should be aware of his or her own vision of how the international world is or should be, as well as of the same (or different) presumptions underlying writings by others. In this regard, Paulus and Simma hold for instance that '[i]f we take the critique of positivism [expressed for instance by defenders of the New Haven school, the law and economics and international relations theory, or feminist approaches to international law] as a call for self-consciousness of one's own political, economic, religious, ehtical, male or other bias, we do not object.'[27] The nature of the topic of this study (namely the subtle difference between war and peace) logically entails a wide variety of opinions and interests to be taken into account. In identifying the various positions that can be found in literature and State practice on the possible consequences of support to a party to an armed conflict, the interest underlying one position or another will be clarified.[28] For instance, a recurrent dilemma in the *jus ad bellum* Chapter (Chapter 4) is the conflict between collective security interests, as defended by the UN Charter, and national security interests, as often defended by States. I see the UN Charter as a State-created product reflecting a higher common interest of international peace. Similarly, for the *jus in bello* consequences of supportive acts, I consider the Geneva Conventions as a State-made product defending a higher interest, namely the protection of victims of armed conflict. Both interests – peace and the protection of victims of armed conflict – are since the end of WWII reflected in international legal instruments. When identifying the scope of those instruments (in order to assess supportive acts in light of the legal framework they propose), the interest underlying their existence should not be neglected.

4.2. Research methods

The predominant method used for this study is qualitative, doctrinal desk research.[29] The main sources used are considerably different for each Chapter, as indicated below.[30] The hierarchy of norms in international law is taken into account, as well as the context and origins of the important treaties. For the latter purpose, the *travaux préparatoires* and available commentaries

[27] Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts', 307.
[28] Again according to Simma and Paulus, 'the lawyer's role is not to facilitate the decision maker's dilemma between law and politics (and, occasionally, between law and morals), but to *clarify* the legal side of things.' *Ibid.* [emphasis added].
[29] Mike McConville and Wing Hong Chui (eds.), *Research methods for law*, Research Methods for the Arts and Humanities (Edinburgh: Edinburgh University Press, 2007), 18–19.
[30] Article 38(1) of the ICJ Statute determines the sources of international law that may be used by the Court:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

to those treaties have been consulted. As the aim of this study is to identify the *possible* consequences of supportive acts under *jus in bello, jus ad bellum* and neutrality law, various (doctrinal) positions on those possible consequences are considered.

Importantly, as already indicated, this study does not seek to identify the current status of customary international law in the *jus in bello, jus ad bellum* and neutrality law. Given the broad normative scope covered by this study, a search for customary law on all the contentious points would easily override the boundaries of a single dissertation. In addition, and more importantly, the often secret or at least hidden character of support provided by States in the context of armed conflicts poses a threefold difficulty with regard to the identification of customary law: first, the collection of State practice[31] for the purpose of identifying customary law is particularly difficult, as States wish to hide their supportive actions, or at least often refuse to acknowledge their existence or scope.[32] A second and related difficulty is that the general State practice which is required for customary law needs to be known to States, so as to allow them to react to the practice generated by a particular State.[33] Absence any clarity about the supportive acts undertaken in a particular conflict, third States are prevented from expressing their desired reaction to it. This does not necessarily mean that the practice should be publically available to the entire world, or even to all States. Indeed, the ILC holds in its 2018 Commentaries to the Draft Conclusions on the Identification of Customary International Law that '[i]n order to contribute to the formation and identification of rules of customary international law, practice must be known to other States (whether or not it is publicly available).'[34] In this regard, the International Law Association already noted in 2000 that 'a secret physical act (e.g. secretly "bugging" diplomatic premises) is probably not an example of the objective element [of customary law]. And if the act is discovered, it probably does not

[31] The formation of customary law is based on two constitutive elements: State practice and *opinio juris*. See North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgment, 1969 ICJ Reports 3 (ICJ, 20 February 1969), para. 77; ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10' (to appear in the *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two), 124.

[32] This is illustrated by the interesting attempt to obtain concrete answers by States on questions related to conflict classification undertaken by Mačák: he sent a questionnaire to 163 diplomatic and consular missions based in the UK, and out of the 33 responses received, only 11 contained 'substantial or otherwise relevant answers'. Kubo Mačák, *Internationalized armed conflicts in international law*, Oxford Monographs in International Humanitarian and Criminal Law (Oxford: Oxford University Press, 2018), 8.

[33] In similar vein, see the remark by Henckaerts and Doswald-Beck in the introduction of the ICRC Customary Law Study:

> Acts do not contribute to the formation of customary international law if they are never disclosed. This is so as long as such acts are not known to other States and, consequently, do not give them an opportunity, if they so wished, to react to them. In order to count, practice has to be public or communicated to some extent. This does not necessarily mean that the practice has to be published or communicated to the whole world, but at least it should be communicated to one other State or relevant international organisation, including the ICRC. [footnotes omitted]

Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law*, vol. 1 (Cambridge: Cambridge University Press, 2005), xl.

[34] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10' (to appear in the *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two), 133.

count as State practice unless the State tries to assert that its conduct was legally justified.'[35] Thirdly, even if a certain supportive practice is known to the public (be it because the support was revealed by NGOs, made public by the media or even if the State itself has acknowledged to provide support), very often the supporting State will not make any public statements on the legal validity of the supportive act in question. There is thus often also a lack of *opinio juris*, the second constituting element of customary law.

For these reasons, the examples referred to in this study are more illustrative than indicative of custom. In addition to the specific sources for practical examples mentioned for each separate Chapter below, illustrations of supportive acts and (legal) responses thereto were retrieved from a key-word search[36] in the digests of State practice of a number of States that were publically available and accessible in either English or French: the United States (1990-2015), Netherlands (2000-2010), the United Kingdom (2000-2009) and France (2000-2013).[37]

The research for this study benefited from research stays at the Max Planck Institute for Comparative and Public International Law (Heidelberg), the Grotius Centre for International Legal Studies (Leiden Law School), the Laureate Program on International Law (Melbourne Law School) and the Centre for International Law, Conflict and Crisis of Copenhagen University, as well as from multiple visits to the libraries of the ICRC and the Graduate Institute of International and Development Studies in Geneva. In order to gain insight in the military operational aspects of supportive acts, three semi-structured interviews were conducted with members of the Belgian armed forces in the spring of 2016. In addition, a number of informal interviews were held with legal advisors from the ICRC, NATO and the Belgian Ministry of Justice throughout the period 2014-2019.

As mentioned above, the sources consulted for this study are considerably different for each Chapter. Chapter 1, which explains in a descriptive and summarizing manner how the law of

---

[35] ILA, Committee on the Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation of General Customary International Law', *International Law Association Reports of Conferences* 69 (2000): 726.

[36] The key-words included: neutral; neutrality; non-belligerent; non-belligerency; use of force; armed attack: aggression; self-defense; self-defence; unable; unwilling; accumulation; accumulate; non-international armed conflict; international armed conflict; armed conflict; support-based approach; common article 1; overflight; military base; intelligence; arms; weapons; training; support; aid; assistance; *jus in bello*; *jus ad bellum*.

[37] See, respectively:

- 'Digest of United States Practice in International Law', published in print by the International Law Institute for the years covering 1990-2003, by Oxford University Press and the International Law Institute covering 2004-2010 and published online by the Office of the Legal Advisor, Department of State, for the years covering 2011-2015;
- 'Netherlands State Practice for the Parliamentary Year X-Y' and 'Netherlands Judicial Decisions Involving Questions of Public International Law', both published in the *Netherlands Yearbook of International Law* 2000-2010;
- 'United Kingdom Materials on International Law' and 'Decisions of British Courts Involving Questions of Public International Law or Private International Law. A. Public International Law', both published in the *British Yearbook of International Law* 2001-2010;
- 'Pratique française du droit international' and 'Jurisprudence française relative au droit international', both published in the *Annuaire français de droit international* 2001-2013.

References to the concrete publications are provided jointly with the examples given throughout this study.

State responsibility relates to supportive acts and the further analysis of this study, starts from the Articles on the Responsibility of States for Internationally Wrongful Acts, as developed and commented upon by the International Law Commission. In addition to that legal instrument, case-law of the International Court of Justice dealing with the link between States and individuals is considered, together with a wide variety of doctrinal sources on the matter.

Chapter 2 presents to the reader the three subfields of international law under which supportive acts will be assessed throughout the study: *jus in bello, jus ad bellum* and neutrality law. It is descriptive, primarily based on doctrinal sources, fed with examples of the *jus ad bellum/jus in bello* distinction in treaty provisions and case-law. The Chapter is also comparative, as the similarities and differences between *jus in bello* and *jus ad bellum* will be highlighted. Lastly, to a certain extent the Chapter is theory building, as the last Section aims at offering an overview of the potential relationship between neutrality on the one hand and *jus in bello* and *jus ad bellum* on the other.

Chapters 3 to 5 contain the core of this study: each of them analyses whether the four categories of supportive acts identified for this study would trigger the consequences specific to their own legal framework, and if not, whether any alternative venues would nevertheless lead to the same result. The Chapters are thus both descriptive and classifying in nature: they describe the applicable thresholds and consequences and the debates surrounding these issues, while they also aim at positioning the various categories of supportive acts within this existing framework. In addition, each of the Chapters also contain a theory building aspect: by starting from the observation that the available frameworks do not offer all answers, the Chapters try to construct a theory in order to fit supportive acts within the system, thereby clearly taking into account the advantages and disadvantages that come with the proposed solutions.

Chapter 3 uses the 1949 Geneva Conventions and the 1979 Additional Protocols thereto as primary source. The analysis of these treaties is supplemented by their respective *travaux préparatoires* and the available (old and new) commentaries. As for the new commentaries, it should be noted that at the time of writing of this study, the ICRC had only published its updated commentary on Geneva Conventions I and II – the others still being in the pipeline and thus unfortunately not (yet) publically available. In addition, the case-law of the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice plays a crucial role in identifying the threshold for becoming party to an armed conflict. In order to feed this Chapter with practical examples, (hidden) conflict classifications have been taken from an analysis of the annual reports of the ICRC (2000-2017) and of the letters sent by States to the Security Council in the period 2000-2016. In the Section dealing with alternative ways to assess supportive acts, the support-based approach developed by the ICRC forms the starting point of the analysis. This approach is taken from a doctrinal article published by Ferraro in the International Review of the Red Cross, which has subsequently been officially endorsed by the ICRC. Examples of domestic definitions of ‘direct participation in hostilities’ are taken from

the excerpts of military manuals available in the online Customary IHL database.[38] This part of the Chapter is both evaluative and theory building in nature: it critically addresses the (potential) problems related to the approach as proposed by the ICRC, while also suggesting an expansion of the approach. This Chapter concludes with a Section that illustrates how the support-based approach can be applied to the Danish contribution to the international military operation against ISIS. The sources used for this analysis are the official governmental proposals submitted to the Danish parliament in this regard.

Chapter 4 starts from the UN Charter as the primary source for the *jus ad bellum* framework. In addition, two General Assembly Resolutions (the Friendly Relations Declaration and the Definition of Aggression) form important sources for identifying the scope of *jus ad bellum* thresholds. An analysis of these instruments and their drafting process is supplemented with the case-law of the ICJ on various *jus ad bellum* matters. In addition, various positions in doctrine and arguments in favour or against each of them are outlined. In order to feed this Chapter with practical examples, use of force or armed attack illustrations were taken from the Digest of State Practice (2014-2018) as published biannually in the *Journal on the Use of Force and International Law*.

Chapter 5 is the last core Chapter of this study. It deals with the consequences of supportive acts under the law of neutrality. The main legal instruments for this analysis are Hague Conventions V and XIII of 1907, together with relevant parts in the Geneva Conventions and the UN Charter. In addition to those treaties, military manuals form a crucial source for this Chapter.[39] In particular, manuals from the following States have been analysed: US, UK, Denmark, Germany Mexico, Spain, Australia, Canada, Norway, Sweden and Peru. These manuals were chosen because of their public availability online. Translations were made by the author, occasionally with the help of Google Translate. In addition to the domestic military manuals, three doctrinal manuals were added as sources for the analysis: the Tallinn 2.0 Manual, the San Remo Manual and the HPCR Manual.[40] These latter three manuals do not form 'State' practice but offer interesting and contemporary views on the current status of neutrality

[38] The role of military manuals in the formation of customary law is not entirely clear. The ILC mentions military manuals as a possible expression of *opinio juris* (see ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10' (to appear in the *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two), 141), whereas the ICRC Customary Law Study treated military manuals as 'verbal acts' constituting State practice (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 1:xxxviii). Of course, these positions only concern the military manuals as developed by States, not the doctrinal manuals that have been developed by expert groups (such as the HPCR Manual, the San Remo Manual or the Tallinn 2.0 Manual). Any reference to the latter type of manuals in the analysis of this study should be considered as a discussion of doctrinal sources.

[39] Taking into account the remark in the previous footnote.

[40] Michael N. Schmitt and NATO Cooperative Cyber Defence Centre of Excellence (eds.), *Tallinn manual 2.0 on the international law applicable to cyber operations*, 2nd ed. (Cambridge: Cambridge University Press, 2017); Louise Doswald-Beck and International Institute of Humanitarian Law (eds.), *San Remo manual on international law applicable to armed conflicts at sea* (Cambridge: Cambridge University Press, 1995); Program on Humanitarian Policy and Conflict Research Harvard University, *HPCR manual on international law applicable to air and missile warfare* (Cambridge, Massachusetts: Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), 2009).

law. In addition to the military manuals, some of the limited examples of practice relating to neutrality law are highlighted. Based on the analysis of military manuals and practice, this Chapter critically analyses some of the theoretical positions on neutrality law that are often advanced in doctrine. In addition, this Chapter is theory building because it submits that the law of neutrality should be seen as a hybrid subfield of international law, subject to the two other subfields discussed in the previous Chapters.

The last Chapter forms the conclusion of this study. It builds on the analysis made in all the previous Chapters, especially in core Chapters 3, 4 and 5. It provides a comprehensive overview of the possible consequences of supportive acts under *jus in bello*, *jus ad bellum* and neutrality law. It is evaluative, as it aims at classifying the four categories of supportive acts (allowing territory to be used/logistical support/training/crucial intelligence sharing) within the existing (and often) limited legal frameworks of the three studied subfields of international law. This conclusive Chapter is also comparative, as it holds the various categories of support and their impact within one legal subfield against the consequences in the other subfields. Lastly, this Chapter is normative, as it formulates recommendations for States that plan to support parties to armed conflicts in the future.

5. Structure

As indicated in the previous Section, this study consists of an Introduction, five Chapters and a Conclusion. The current Section sets out their structure in more detail. In addition to the Introduction, the first two Chapters jointly serve as a general preparation for the core analysis conducted in Chapters 3 to 5. Those Chapters answer (part of) the research (sub-)question(s) formulated for this study, before concluding.

The present Introduction explains the context and the legal problem surrounding supportive acts in times of armed conflict. It defines the main research question, the sub-questions and the research hypotheses. It furthermore explains how the scope of the research is limited and clarifies what is to be understood by 'supportive acts' for the purpose of this study. It outlines the research methods that have been used for conducting this study, together with providing an overview of the main sources that were consulted.

Chapter 1 briefly sets a baseline for the rest of this study by explaining how supportive acts can lead to international responsibility of the supporting State. Section 1 explains the importance of attribution and the various ways wrongful conduct can be attributed to a State. Section 2 discusses the issue of complicity under international law, by focusing on the rule of State responsibility for aiding and assisting another State in the commission of a wrongful act. Section 3 deals with the scenario whereby a State is held responsible for the conduct of an armed group, and focuses on the different positions advanced in international case-law on the

matter. Section 4 ends the Chapter by briefly tackling the issue of due diligence in light of supportive acts.

Chapter 2 introduces the three subfields of international law under which supportive acts will be assessed. Section 1 discusses the origins of *jus in bello* and *jus ad bellum*, covering both the adoption of their main legal instruments as well as the origins of the Latin notions. Section 2 deals with the separation between *jus in bello* and *jus ad bellum* from three different perspectives: first, the consequences of the dichotomy are outlined, followed by a brief overview of practice clearly accepting the distinction and highlighting nevertheless some challenges to it. Section 3 sketches the similarities between these two fields of international law, whereas Section 4 stresses important differences between them. Section 5 concludes this Chapter by explaining the origins of the law of neutrality and by discussing how this specific subfield of international law can be positioned within the dichotomy between the *jus in bello* and the *jus ad bellum*.

Chapter 3 deals with supportive acts in light of *jus in bello*. Section 1 recalls the two sub-questions relevant for this Chapter: (a) when does a State supporting a party to an armed conflict become party to that conflict itself; and (b) what are the consequences of becoming a party to an armed conflict? In answering these questions, this Chapter tackles the first research hypothesis: *a State can become party to an armed conflict by doing less than providing kinetic assistance to parties to an armed conflict.* Section 2 provides the answers to sub-question (b): while becoming party to an armed conflict may trigger IHL applicability, no such status is required for State responsibility or criminal law consequences. Section 3 continues the Chapter by sketching a brief overview of the traditional rules classifying armed conflicts and identifying parties thereto. It is established that supportive acts do not fall within this traditional classification system. Subsequently, Section 4 answers sub-question (a) by outlining the various alternative ways to assess support to parties to armed conflict. A distinction is made between support that amounts to control over the receiving party (Section 4.1), and support that does not amount to such control (Section 4.2). Under the latter scenario, the support-based approach as introduced by the ICRC is critically analysed and an expansion of it is suggested. Section 5 concludes with an overview of possible *jus in bello* consequences of each of the four types of support identified for this study.

Chapter 4 deals with supportive acts in light of *jus ad bellum*. It thereby follows a similar structure as the previous Chapter. It uses the second hypothesis as a starting point: *assisting another State in the commission of an armed attack or a use of force may have the same consequences as carrying out those acts as a main actor.* Section 1 recalls the two sub-questions dealt with in this Chapter: (c) when does a State supporting an armed attack, a use of force or a violation of the principle of non-intervention commit either of these acts itself; and (d) what are the consequences of crossing *jus ad bellum* thresholds? Section 2 provides an overview of the potential consequences linked to the various *jus ad bellum* thresholds: a lawful reaction with force, reactions to a violation of a *jus cogens* norm, and criminal prosecution. Section 3

subsequently focuses on the use of force, armed attack and the principle of non-intervention. For each of these *jus ad bellum* concepts, the different views regarding their exact threshold, and the consequences of such positions, are explained. Section 4 searches for alternative ways for supportive acts to meet the given *jus ad bellum* thresholds. A distinction is thereby made between support that is provided to States or to armed groups. In conclusion, Section 5 provides a comprehensive overview of the four categories of support identified for this study and how and when they would trigger the *jus ad bellum* consequences discussed in this Chapter.

Chapter 5 focuses on supportive acts in light of the law of neutrality. It thereby answers sub-question (e) when does a neutral State breaching neutrality law become party to an armed conflict?; and (f) what are the consequences of violating the law of neutrality? The first Section clarifies the important preliminary issue of the application of neutrality law. This Section is followed by a brief overview in Section 2 of the neutral rights and duties that are relevant for a discussion on supportive acts. Section 3 forms the core of this Chapter: it deals with the consequences of neutral violations. First, the contested possibility of countermeasures is dealt with (Section 3.1). Subsequently, the question is raised whether and when violations of neutral duties render a neutral State party to an armed conflict (Section 3.2). Lastly, the possibility of a reaction by force against a neutral State that violates its duties is discussed (Section 3.3). The concluding Section provides an overview of the consequences of supportive acts in light of the law of neutrality, taking into account the complex relationship of this body of law with the *jus in bello* and *jus ad bellum* framework.

The Conclusion takes the four categories of support as a starting point (allowing territory to be used/logistical support/ training /crucial intelligence sharing), rather than merely repeating the conclusions of each Chapter. For each category, it lists the possible consequences under *jus in bello*, *jus ad bellum* and neutrality law, thereby answering the main research question of this study. Subsequently, the research hypotheses of this study are (partially) confirmed. The Conclusion ends by formulating a number of recommendations to States that are planning to undertake supportive acts in times of armed conflict.

Chapter 1. Supportive acts and State responsibility

As outlined in the Introduction, this study focuses on the consequences of certain forms of supportive acts under three specific subfields of international law: the *jus in bello,* the *jus ad bellum* and the law of neutrality. It is not a study on the law of State responsibility. Nevertheless, the possible responsibility of a State is one of the most obvious consequences triggered by supportive acts – assuming, of course, that the support was provided to a *wrongful* act.[41] While this study is not limited to an analysis of support to wrongful acts, on multiple occasions, it will rely on principles of the law of State responsibility in order to identify potential consequences under *jus in bello, jus ad bellum* and neutrality law. For that reason, before embarking on the investigation into the legal consequences of support in the three mentioned fields, it is important to briefly outline the possible ways for support to trigger the responsibility of the supporting State – regardless the (additional) consequences under *jus in bello, jus ad bellum* and neutrality law.

State responsibility is the focus of this Chapter. It will rely primarily on the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). While these articles have not been accepted as a treaty by the international community, they have been endorsed by the UNGA[42] and can thus be considered as an authoritative source for the law of State responsibility. In addition, attention will be devoted to the concept of due diligence. While absent in the ARSIWA, due diligence forms a crucial potential trigger of responsibility on the basis of supportive acts, often filling a gap that would remain if solely the rules included in the ARSIWA would apply.

This Chapter will only focus on the scenarios whereby support is provided to another actor that commits an internationally wrongful act, more specifically on the question whether the supportive act also triggers international responsibility. It is important to note that a State that provides support to another State, for instance during an armed conflict, does not necessarily support a wrongful act. It is thus crucial to distinguish the analysis done in this Chapter from the analysis of the legal consequences of support under *jus in bello, jus ad bellum* and neutrality law. While there may be some overlap (for instance, supporting an armed attack can trigger both State responsibility but may also trigger specific consequences (a reaction in self-defence) under *jus ad bellum*), this distinction should be kept in mind throughout the study.

[41] Of course, some forms of support can also be unlawful (and thus trigger State responsibility) independently of a wrongful act by other States. See for instance the provisions of the Arms Trade Treaty, in particular Articles 6 and 7 (Arms Trade Treaty, 2 April 2013, (2013) 52 ILM 988).

[42] UNGA Res. 62/61, Responsibility of States for internationally wrongful acts, UN Doc. A/RES/62/61 (6 December 2007); UNGA Res. 65/19, Responsibility of States for internationally wrongful acts, UN Doc. A/RES/65/19 (6 December 2010), 1.

The supportive acts identified in the Introduction (roughly summarized as (i) allowing territory to be used, (ii) providing logistical support including weapon supply, (iii) training and (iv) crucial intelligence sharing) can be provided by a State to another State, by a State to an armed group, or by an armed group to a State or another armed group. As the law on State responsibility is inherently focused on the possible responsibility of States, only support provided by States will be considered in this Chapter. The current status of international law does not provide for general rules on the international responsibility of armed groups. While such form of responsibility would be desirable at some levels, it is not the purpose of this study to develop this possibility further.

By way of introduction, Section 1 briefly presents the various provisions dealing with the question of attribution under the ARSIWA. Section 2 focuses on possible State responsibility for supporting other States in the commission of wrongful acts by fleshing out the complicity rule enshrined in Article 16 ARSIWA. Section 3 concentrates on support provided to armed groups, dealing especially with the attribution rule of Article 8 ARSIWA and the ICJ case-law on that issue. Finally, Section 4 deals with the concept of due diligence as a possible way to assess supportive acts, before concluding in Section 5.

By way of preliminary remark, before outlining the rules of the ARSIWA, a general question to be asked is how those general rules relate to the specific regimes of international law that will be dealt with in the next Chapters: that of *jus in bello, jus ad bellum* and neutrality law. In general, the ARSIWA are considered to be secondary norms, as opposed to the primary norms under the three regimes mentioned. Secondary norms help to determine who bears responsibility for the violation of a primary norm, and how States can respond to such a violation.[43] While ARSIWA lays down the general rules on State responsibility, they do not exclude that more specific rules apply in certain circumstances. This possibility is explicitly mentioned in Article 55 ARSIWA, which reads

> Article 55. *Lex specialis*
>
> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

The ILC Commentary specifies that for this rule to apply, there must be actual inconsistency between an external rule and a provision of the ARSIWA, or the special rule must intentionally exclude the application of the general ARSIWA.[44] This is of particular relevance when dealing with aid and assistance provided by a State to another State in the commission of an

[43] Antonio Cassese, *International law*, 2nd ed. (Oxford: Oxford University Press, 2005), 244. However, this distinction is not without criticism. Bodansky and Crook, for instance, have argued that 'the distinction has proved elusive and in any event is unnecessary'. Daniel Bodansky and John R. Crook, 'Symposium: The ILC's State Responsibility Articles: Introduction and Overview', *American Journal of International Law* 96 (2002): 780.
[44] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', *Yearbook of the International Law Commission* II, no. 2 (2001): 140.

internationally wrongful act. While Article 16 ARSIWA provides for the *lex generalis* in this regard, both *jus in bello* and *jus ad bellum* have more specific rules dealing with supportive acts.[45] Under *jus in bello*, common Article 1 to the Geneva Conventions imposes upon States the obligation to respect and ensure respect for the Conventions, which includes the negative obligation not to aid or assist any IHL violations. Under *jus ad bellum*, Article 3(f) of the UNGA Definition of Aggression serves as a specific rule prohibiting States from allowing their territory to be used by other States for acts of aggression. These scope of these special rules and their relationship with the general complicity rule of 16 ARSIWA will be analysed when dealing with the *jus in bello* and *jus ad bellum* in Chapters 3 and 4.

1. The importance of attribution

The starting point of the ARSIWA is that a State incurs international responsibility if an internationally wrongful act can be attributed to it (see Articles 1 and 2 ARSIWA). The rules to attribute conduct to a State are described in Chapter II of ARSIWA, encompassing Articles 4 to 11.

The basic idea of attribution is that of 'organic attribution', leaving it up to the internal laws of a State to define who is a State organ or not (Art. 4 ARSIWA). State organs defined as such by domestic laws are called *de jure* organs. Article 5 ARSIWA foresees attribution in case a person is not officially considered to be an agent under domestic law, but nevertheless carries out 'elements of governmental authority' at the moment when the wrongful act is committed. This provision has become particularly relevant in a time where many public tasks are privatized. A State cannot outsource its international responsibility by transferring tasks to private persons[46], and this Article aims at preventing such circumvention.

Article 6 ARSIWA deals with the scenario that an organ of a State is placed at the disposal of another State.[47] Putting personnel at the disposal of another State can be seen as a form of 'support'. In such case, Article 6 determines that the wrongful acts committed by the organ would be attributed to the latter State:

[45] Aust, *Complicity and the Law of State Responsibility*, 379ff.

[46] See, for example, Robert W. Gauthier v. Canada, UN Doc. CCPR/C/65/D/633/1995 (Human Rights Committee, 1999), para. 13.6. See also Cedric Ryngaert, 'State-Responsibility and Non-State Actors', in Math Noortmann, August Reinisch and Cedric Ryngaert (eds.), *Non-State Actors in International Law* (London: Hart Publishing, 2015), 165.

[47] Note that a similar (yet slightly different) provision focusing on troops put at the disposal of an international organization is contained in Article 7 ARIO:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct. [emphasis added]

For the reasons outlined in the Introduction, Section 2, the question on how responsibility is to be shared between an international organization and its member States falls outside the scope of this study.

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

In order for Article 6 ARSIWA to come into play, the ILC Commentary explains that the 'loaned' organ must act under the 'exclusive direction and control' of the receiving State, rather than 'on instructions from the sending State'.[48] Even though the ILC rightfully excludes 'ordinary situations of inter-State cooperation'[49] from the scope of Article 6, the distinction between acts under the 'exclusive direction and control' of the receiving State on the one hand and acts still committed 'on instructions from the sending State' on the other, remains somewhat simplistic, neglecting the grey zone in between. Situations whereby military personnel is 'loaned' to another State are not uncommon in this era of multinational cooperation. Labelled 'embedded personnel', 'loaned personnel' or 'third country deployments', these forces are temporarily transferred from their own State to another State in order to operate within the military forces of the latter. Embedding has a number of advantages: the sending State gains direct expertise of key capabilities and equipment, it contributes positively to defense relationships with allies and it contributes to the sending state's military capability.[50] Indeed, even though embedded personnel functions under the authority of the host State, their nation State will keep ultimate control. In military terms, troop-contributing countries will never transfer the full command to a receiving State or organization. Generally, only operational control is transferred, at most operational command.[51] Sending States retain the criminal jurisdiction and military disciplinary authority over their embedded personnel. No sovereign State would freely hand over the entire command and control of its troops to another State.[52] Consequently, if the ILC's interpretation, namely that the loaning State must exercise exclusive authority and control over the personnel, is followed, then Article 6 loses its practical relevance. In addition, it remains unclear whether an attribution under Article 6 would absolve the State

[48] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 44.
[49] *Ibid.*
[50] See UK, Written Statement by Earl Howe, Minister of State (Ministry of Defence), HLWS139, 20 July 2015, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2015-07-20/HLWS139/.
[51] For a definition of these notions, see Blaise Cathcart, 'Command and control in military operations', in Terry D. Gill and Dieter Fleck (eds.), *The handbook of the international law of military operations*, 1st ed. (Oxford: Oxford University Press, 2010), 235–44.
[52] Nor to an international organization. See for instance Terry D. Gill and Dieter Fleck (eds.), *The handbook of the international law of military operations*, 1st ed. (Oxford: Oxford University Press, 2010), para. 15.01: 'Generally, in multinational and coalition force operations, […] command authority […] over military members and units will be assigned from Sending States or troop contributing countries (TCCS) to a multinational allied or coalition force. However, Sending States or TCCs will normally retain full command over their units and members when they are assigned to a coalition or allied force.' On this issue more generally, see Terry D. Gill et al. (eds.), *Leuven manual on the international law applicable to peace operations* (Cambridge: Cambridge University Press, 2018). By way of example, back in 1969 the House of Lords observed the following on the legal status of UK forces operating in the UN peacekeeping mission in Cyprus: 'From the documents it appears further that though national contingents were under the authority of the United Nations and subject to the instructions of the Commander the troops as members of the Force remained in their national service. The British Forces continued, therefore, to be soldiers of Her Majesty.' See Nissan v. Attorney General, No. [1970] AC 179, [1969] UKHL 3 (House of Lords, 2 November 1969), para. 204.

that puts its personnel at the disposal of another State from any responsibility. According to Aust, this is in theory what Article 6 envisages.[53] Nevertheless, the ILC does not deal with the question. It is moreover conceivable that putting personnel at the disposal of another State could be regarded as a form of 'aid and assistance' under Article 16 ARSIWA.[54] In the context of cooperation under the auspices of the United Nations, the European Court of Human Rights took a restrictive view by deciding in the *Behrami* case that the acts by troop contributing countries' personnel could only be attributed to the UN.[55] It is however highly disputable whether the ECHR's decision reflects customary law.[56] In the more recent *Nuhanović* case, the Duth Supreme Court ruled that shared responsibility between a troop-contributing State and the UN is indeed possible.[57] In my view, such a shared responsibility should also be possible when the cooperation occurs outside the context of an international organization: the receiving State can be held responsible on the basis of Article 6, whereas the State or origin can incur responsibility on the basis of having provided 'aid and assistance'[58], as will be discussed below in Section 4.

Article 7 ARSIWA is an explanatory note to the previous provisions. It prescribes that acts of State organs or entities empowered with governmental authorities are attributed to the State even if they exceed the instructions given by the State, on the conditions that the acts were committed in the capacity as an organ. For example, when Mexican soldiers killed a French national because he had refused to respond to their demand for money, the tribunal decided that the acts of the Mexicans were attributable to Mexico. For such attribution of *ultra vires* acts by State organs, it is nevertheless necessary that the individuals acted at least under the colour of authority, seemingly representing the State.[59] If a certain act is however too remote from the normal mandate of a State organ, the act can only be attributed to the State by relying on other provisions of the ARSIWA.

---

[53] Aust, *Complicity and the Law of State Responsibility*, 233.
[54] *Ibid.*, 223.
[55] Case of Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision as to the Admissibility, No. 7414/01 and 78166/01 (ECtHR (Grand Chamber), 5 February 2007), paras 151–152. The Court's reasoning was based *inter alia* on both Article 6 ARSIWA and on its mirror in the Draft Articles on the Responsibility of International Organizations, Article 5. See *ibid.*, paras 30–34.
[56] For some examples of criticism, see Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', *European Journal of International Law* 19, no. 3 (2008): 509–31; Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases', *Human Rights Law Review* 8, no. 1 (2008): 164ff.
[57] The Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović, Judgment, para. 3.6.1.
[58] In similar vein, see Dapo Akande, 'Embedded Troops and the Use of Force in Syria: International and Domestic Law Questions', *EJIL: Talk!*, 9 November 2015, http://www.ejiltalk.org/embedded-troops-and-the-use-of-force-in-syria-international-and-domestic-law-questions/. See also James Crawford, *The International Law Commission's articles on state responsibility: introduction, text and commentaries* (Cambridge: Cambridge University Press, 2002), 103: 'Situations can also arise where the organ of one State acts on the joint instructions of its own and another state […] in these cases, the conduct in question is attributable to both States.'
[59] Estate of Jean-Baptiste Caire (France) v. United Mexican States, V RIAA 516–34 (1929), 530: '[I]l faut qu'ils aient agi au moins apparemment comme des fonctionnaires ou organes compétents, ou que, en agissant, ils aient usé de pouvoirs ou de moyens propres à leur qualité officielle.'

Articles 8 to 11 foresee 'additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law.'[60] Apart from Article 8, which will be discussed at length in Section 3, Article 9 ARSIWA foresees attribution to a State in case a person 'is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.'[61] Article 10 ARSIWA prescribes responsibility for an insurrectional movement that successfully seizes the power of a State. If so, the acts committed by the movement, even before seizing power, will be attributed to the State which has fallen under its control. This provision encourages insurrectional movements to abide by international law even before they have met their political goals. Lastly, Article 11 ARSIWA foresees in the possibility that a State, even though a certain act is not attributable to it on the basis of all the preceding Articles, nevertheless adopts an act as if it were its own act, thereby endorsing the potential responsibility linked to the act in question.[62]

In addition to the general rules on the attribution of wrongful conduct to a State, the ARSIWA define three scenarios in which a State can be held responsible because of the wrongful conduct of another State. A first scenario is that of complicity, enshrined in Article 16, which will be discussed in more detail below.[63] The two other scenarios are much less relevant, yet for the sake of completeness deserve to be mentioned here.

Article 17 stipulates that '[a] State which directs and controls another State in the commission of an internationally wrongful the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.' Even though this provision primarily focuses on situations whereby the direction and control flows from an instance outside the will of the controlled State, such as foreign occupation[64], it also covers situations whereby the direction and control is exercised with the consent of the controlled State (for instance, based on a treaty).[65] Importantly, the ILC Commentary to Article 17 notes that being 'directed' or 'controlled' does not constitute a valid excuse for the State committing a wrongful act. Thus, both the directing/controlling and the directed/controlled State can be held

[60] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 39.
[61] The difference with Article 5 ARSIWA is that there is simply no (functioning) authority present who could mandate a person with governmental tasks. Article 9 could be for instance relevant in the case of failed States, however, the ILC commentary acknowledges that its applicability will indeed be 'exceptional'. See *ibid.*, 49.
[62] For instance, the government of Iran explicitely endorsed the hostage taking of American embassy personnel by Iranian students and protesters in 1980, thereby turning it into an act of the State: see Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 1980 ICJ Reports 3 (ICJ, 24 May 1980), paras 69–74.
[63] See Section 2.
[64] One historical example in the military field is the Italian police in Rome during World War II, who was generally acknowledged to operate under the control of the Occupying Power. See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 68.
[65] See the ILC Commentary, which says that 'instances exist or can be envisaged where one State exercised the power to direct and control the activities of another State, whether by treaty or as a result of military occupation or for some other reason.' *Ibid.* If voluntarily, the scope of this article seems to overlap with Article 6.

responsible for the wrongful conduct. Only if the directed/controlled State can rely on a 'circumstance precluding wrongfulness', its responsibility can be precluded.[66] A State that willingly puts its organs under the direction and control of another State can in addition be considered as 'supporting' the latter State in its plans to commit a wrongful act.

If a State coerces another State to commit an internationally wrongful act, it can be held responsible for that acts towards third States (Article 18 ARSIWA).[67] Contrary to the previous Article, in this scenario the responsibility of the coerced State *vis-à-vis* the injured State will mostly be precluded on the basis of *force majeure* (Article 18 ARSIWA).[68] Interestingly, successful coercion will by itself easily amount to an unlawful threat or use of force, as discussed in Chapter 4.[69]

These two provisions are fundamentally different from Article 16 ARSIWA on complicity: while under Articles 17 and 18 ARSIWA, the controlling State at hand becomes responsible for the international wrongful act in question, under the latter provision, the aiding or assisting State does not become responsible for the wrongful act, but merely for its complicit contribution to that act. After this general overview of attribution under the law of State responsibility, I will now turn to the crucial complicity rule laid down in Article 16 ARSIWA.

2. State responsibility for aiding or assisting another State

A general complicity rule of international law is enshrined in Article 16 ARSIWA. Even though this Article does not explicitly refer to 'complicity', it does contain the rule that allocates responsibility to what could be called a 'complicit' State. In what follows, I will therefore regularly refer to the complicity rule of the ARSIWA, rather than using the longer phrase 'aiding or assisting'. Article 16 provides that

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

Articles 14 and 58 of the Draft Articles on the Responsibility of International Organizations (ARIO) contain similar provisions that apply to the aiding or assistance of a wrongful act

[66] *Ibid.*, 69.
[67] *Article 18 Coercion of another State:* A State which coerces another State to commit an act is internationally responsible for that act if:
(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
(b) the coercing State does so with knowledge of the circumstances of the act.
[68] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 70.
[69] *Ibid.*

committed by another international organization or a State.[70] Yet, for the reasons outlined in the Introduction, those scenarios will not be further developed here.

In case of complicity, the supporting State is only responsible 'to the extent that its own conduct has caused or contributed to the internationally wrongful act'.[71] Complicity should therefore be distinguished from 'co-perpetration' or 'co-participation' in an internationally wrongful act.[72]

An important and obvious limitation of the complicity rule in Article 16 is that it only applies to State support provided to *other States*. Indeed, the phrase 'a State which aids or assists another State in the commission of an internationally wrongful act' leaves no doubt on the entities subject to this rule: complicity according to Art. 16 ARSIWA is exclusively a matter of States. Still, the ICJ has held in the *Bosnian genocide* case that even though Article 16 'concerns a situation characterized by a relationship between two States [and] is not directly relevant to the present case [of evaluating the collaboration between the Republika Srpska and Serbia], it nevertheless merits consideration'.[73] Yet, this statement should be understood in the particular context of the Genocide Convention. As Jackson correctly notes, '[i]f genocide were not recognized to be internationally wrongful without reference to the status of the principal perpetrator, it would be impossible to express a state's responsibility for participation in the conduct of non-state actors in terms of complicity'.[74] Still, the idea of applying a general complicity rule to aid and assistance provided to non-State actors gains growing acceptance in doctrine[75], and in (thus far) limited State practice.[76] Nevertheless, *de lege lata*, the complicity rule of Article ARSIWA remains limited to inter-State relationships. The International Law

[70] In addition, Article 7 ARIO deals with the conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization, whereas Article 48 ARIO concerns the responsibility of an international organization and one or more States or international organizations. For an application of these provisions, concluding that conduct by peacekeeping troops may be attributed to both the UN and the Netherlands, see The Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović, Judgment.

[71] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 66.

[72] *Ibid.* Co-perpetration is not a notion explained in the ARSIWA, but by analogy with criminal law, it means that a single wrongful act can be committed by more than one State at the time. Those two (or more) States would then all be considered 'co-perpetrators'. The ILC merely notes in its commentary that '[t]he State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term 'by the latter' in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State.' *Ibid.*

[73] Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, para. 420.

[74] Jackson, *Complicity in International Law*, 214.

[75] *Ibid.*, 214–16. See however also Aust, who notes that 'obligations of prevention such as Article I of the 1948 Genocide Convention […] may be functional equivalents to the rules on complicity. Although they approach the role of helping States in a different way to Article 16 ARS, in terms of substance they allow complicit States to be held responsible, albeit under a different heading.' Aust, *Complicity and the Law of State Responsibility*, 9.

[76] See the Austrian suggestion of complicity for providing weapons to Syrian opposition groups in the context of the Syrian conflict: Austria, 'The Austrian position on arms embargo in Syria - official document dated 13.05.2013', *The Guardian*, 15 May 2013, http://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf.

Commission was in 2001 not (yet) ready to accept the expansion of the rule to State-armed group aid and assistance, otherwise it would have formulated Article 16 in a broader way.

The exact scope of Article 16 remains subject to debate and has received increased attention in recent scholarship.[77] There are three conditions within Article 16 ARSIWA that lead to discussion. First, the exact meaning of 'aid or assistance' is disputed. Second, it remains unclear what kind of knowledge is required by the phrase 'knowledge of the circumstances'. Third, the correct interpretation of the requirement that the act has to be internationally wrongful if committed by the aiding or assisting State has not yet been established.

2.1. The meaning of 'aid and assistance'

The ILC lists in its commentary various abstract examples of aid or assistance.[78] Some examples are general, such as 'providing an essential facility' or 'financing the activity'. Other examples are more specific, such as 'providing means for closing an international waterway', 'facilitating the abduction of persons on foreign soil', or 'assisting in the destruction of property belonging to nationals of a third country'. This list shows that the acts underlying complicity can be very broad. According to Jackson, 'there is no principled reason for limiting the kind of aid or assistance that might implicate Article 16'.[79] The ILC commentary does not explain what exactly the distinction between 'aid' and 'assistance' would be. Nor has a difference between the terms emerged from international practice.[80] In absence of a clear definition of 'aid or assistance', three elements of delineation can nevertheless be noted.

First, what is clearly *not* covered by Article 16 are forms of complicity other than aid or assistance, such as inducing, instigating or abetting the commission of an internationally wrongful act.[81] According to the ILC Commentary, 'incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State'.[82] On this point, the scope of Article 16 ARSIWA is more limited than common Article 1 of the Geneva Conventions, which according to the ICJ also prevents States from 'encouraging' violations of the Conventions.[83] Hence, unless a specific treaty regime foresees

[77] See for instance the works of Aust, Jackson and Lanovoy, cited in note 6.
[78] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 66. Extensively on this issue, see Aust, *Complicity and the Law of State Responsibility*, 195–230.
[79] Jackson, *Complicity in International Law*, 154.
[80] Aust, *Complicity and the Law of State Responsibility*, 197. Aust provides a useful overview of State's interpretation of the meaning of 'aid or assistance' in various treaty texts, such as Article 1(1)(c) of the Ottawa Convention, Article 1(c) of the Cluster Munitions Convention and Article I of the Nuclear Non-Proliferation Treaty. He concludes that 'it does not appear possible to provide abstract and normative criteria of what could constitute complicity in each and every conceivable situation.' See *ibid.*, 200–210.
[81] Moral support is potentially covered by Article 11 ARSIWA, discussed above. While this provision generally applies with respect to individuals, it arguably also applies to a State that acknowledges and adopts the conduct of another State. In this regard, see Aust, *Complicity and the Law of State Responsibility*, 221–22.
[82] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 65.
[83] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 220:

in complicity by way of incitement, Article 16 ARSIWA excludes such forms of support for the establishment of State responsibility. This exclusion has been criticized by some authors,[84] but is generally understood as a desirable limitation in order not to hamper international cooperation.

A second limitation can be found in the ILC's commentary to Article 16. At first sight, the notion of 'aid and assistance' leaves open the requisite connection between the provided aid and assistance and the actual wrongful act. In its Commentary to Article 16, the ILC acknowledged that '[t]here is *no requirement* that the aid or assistance should have been *essential* to the performance of the internationally wrongful act'[85], but nevertheless added that 'it is sufficient if [the aid or assistance] contributed *significantly* to [the wrongful] act.'[86] Confusingly, it then noted that the assistance 'may have been only an *incidental* factor in the commission of the primary act'.[87] This allowance of 'incidental' assistance seems to be in contradiction with the earlier mentioned criterion of 'significant contribution'. According to Aust, the 'somewhat unclear and unsatisfying state of the law' regarding the causality requirement under Article 16 mirrors the 'intermediate state of development of the international legal system'.[88] On the required causal link, Jackson convincingly argues that requiring a nexus beyond an incidental contribution 'serves the interests of international cooperation'.[89] 'Material facilitation', he continues, 'is a standard that catches conduct with a sufficient link to another state's wrongdoing while excluding the incidental relationships that arise from virtually every state interaction.'[90]

In agreement with Jackson, this study will consider that Article 16 ARSIWA covers all supportive acts which contribute significantly to the commission of an internationally wrongful act. This does not mean that the support is a *conditio sine qua non* for the wrongful act. Thus, all of the four categories of support identified for this study in the Introduction potentially fall within the ambit of this complicity rule: depending on the context, allowing territory to be used, providing logistical assistance, training troops and sharing intelligence information can all contribute significantly to the commission of an internationally wrongful act. With regard to the 2003 invasion of Iraq, for instance, Aust notes that the granting of overflight rights by

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances" […]. The United States is thus under *an obligation not to encourage* persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions […]. [emphasis added]

[84] Jackson argues that 'just as a state should not help another state to do what it cannot do itself, so a state should not instigate another state to breach an obligation by which it is also bound.' Jackson, *Complicity in International Law*, 155.
[85] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 66 [emphasis added].
[86] *Ibid.* [emphasis added].
[87] *Ibid.*, 67 [emphasis added].
[88] Aust, *Complicity and the Law of State Responsibility*, 219.
[89] Jackson, *Complicity in International Law*, 158.
[90] *Ibid.*

Germany to the US 'greatly facilitated the carrying out of the attacks', especially because without them, 'the US would have had to limit itself to using its aircraft carriers which would have greatly diminished its potential to carry out widespread attacks in a timely manner'.[91] Granting overflight rights, which for the purpose of this study falls within the support category of 'allowing territory to be used', can thus definitely be considered as a form of 'aid and assistance' triggering complicit State responsibility.

Third, according to the ICJ in the *Bosnian Genocide* case, complicity by way of omission cannot lead to State responsibility. In the judgment, the ICJ ruled that 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators.' At first sight it indeed seems logic to reserve complicit acts to positive acts, since omissions could arguably already be considered violations of a due diligence obligation (see *infra* Section 4). Nevertheless, Article 16 ARSIWA is silent on this particular point. According to Jackson, if a State knowingly refuses to act, it can be considered responsible not only because of a due diligence violation, but even because of complicit omission. The example Jackson uses is the case of a State which knowingly does not take additional safety measures to protect a visiting head of another State, while it was well aware of threats raised against the head of State. In case the head of State is murdered, the hosting State violated its due diligence obligation to avoid any attack, but according to the ICJ it will not be complicit to the murder.[92] Similarly, Aust argues that a State that does not protest or take measures against the use of its airspace to attack a third State conceivably can be categorized as to 'aid or assist' in the commission of a wrongful act.[93] While I finds Aust's and Jackson's examples convincing, the ICJ clearly does not agree.[94] For the purpose of this study, it is important to note that three out of the four categories of supportive acts do not pose any particular issues with regard to omissions: it is indeed impossible to provide logistic support by omission, to train troops by omission, or to share crucial intelligence information by omission. The matter is only potentially relevant for the remaining category of supportive acts: allowing territory to be used. If a State wilfully agrees that a State or an armed group uses its territory to commit an armed attack, it is in my view not a question of omission: the agreement of the State is an act as such. If, however, a State merely condones the use of its territory without explicitly giving approval, then the inclusion of omissions in the scope of Article 16 ARSIWA becomes important. While I would agree with

[91] Aust, *Complicity and the Law of State Responsibility*, 216.
[92] Jackson, *Complicity in International Law*, 156–57.
[93] Aust, *Complicity and the Law of State Responsibility*, 227–28.
[94] See Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, 432:

> In the first place, […] complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

including such a condonance in the realm of Article 16, the ICJ would not accept such a conclusion. In any case, as mentioned earlier already, excluding omissions from the scope of Article 16 ARSIWA does not exclude State responsibility as a whole: the responsibility of the condoning State may still be triggered on the basis of an obligation of due diligence, discussed in more detail in Section 4.

In sum, with the possible exception of one particular scenario falling under 'allowing territory to be used', all of the four categories of supportive acts identified in the Introduction can be considered as a form of 'aid and assistance' leading to responsibility as an accomplice if a wrongful act is committed by the supported State. Whether the material act of supporting the commission of a wrongful act will lead to State responsibility, will however also depend on the knowledge or intention the act was committed with.

2.2. The subjective element

While the text of Article 16 ARISWA requires 'knowledge of the circumstances', thus definitely excluding strict liability, it does not explicitly require an intent of the assisting State. Contrary to the text of Article 16, the ILC commentary to Article 16 does suggest a condition of intent, when it requires that assistance should be given 'with *a view to* facilitating' the wrongful act [emphasis added].[95] There is thus a clear ambiguity between the ARISWA itself (requiring knowledge) and the ILC commentary (requiring wrongful intent). The absence of a clear stance on the intentional element within the provision of complicity can be explained by the divergence of opinions by experts in the International Law Commission and by the governmental comments on the drafts of the ARSIWA.[96] It has been argued[97] that the ICJ adopted the ILC Commentary approach in the *Genocide Convention* case, when it applied Article 16 by analogy. The Court held that

> [t]here is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of the principal perpetrator.[98]

Contrary to Aust, I do not read into the above-quoted paragraph the confirmation that the ICJ indeed adopts the approach suggested by the ILC; rather, the Court stressed that complicity to genocide requires at least an awareness of the specific genocidal intent. There is no indication that such an awareness would be required for complicity in general. Thus, whether or not an

[95] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 66.
[96] For a summary of both, see Aust, *Complicity and the Law of State Responsibility*, 232–34.
[97] Helmut Aust, 'Complicity in Violations of International Humanitarian Law' (SSRN Scholarly Paper, 20 December 2011), 8, http://papers.ssrn.com/abstract=2136885.
[98] Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, para. 421 [emphasis added].

intent is required under Article 16 remains subject to scholarly debate.[99] An argument often used in favour of adding an intent requirement is that otherwise the scope of Article 16 would become too broad, which would negatively impact States' willingness to cooperate.[100] On the other hand, one could also argue that such a possible impact is a positive effect: it renders States more vigilant and cautious when starting partnerships with other States. In addition, it is true that imposing an intent requirement may render Article 16 useless, as no State will admit it shared an intent to commit a wrongful act. Because of this difficulty to prove the intent of a State, several authors have concluded that the standard of intent is unworkable.[101]

There are thus reasonable arguments in favour of including or not including an intent requirement for State responsibility on the basis of complicity under Article 16 ARSIWA. Nonetheless, as Jackson and Goodman argue, perhaps the two positions differ less strongly than what appears at first sight: '[e]ven if intent were required, if the assisting State's knowledge of the circumstances approaches something close to *practical certainty* that the principal wrong will occur, it may be possible to make an inference of intent.'[102] Similarly, I share the view of Moynihan, who holds that ''[i]ntent' does not require the assisting State to desire that the unlawful conduct be committed, or to be in common cause with the principal. Knowledge or *virtual certainty* that the recipient State will use the assistance unlawfully is capable of satisfying the intent element under Article 16, whatever the assisting State's desire or purpose.'[103] While ideally the starting point should be that a State can trust other States for not

[99] In favour of 'wrongful intent': Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', *International & Comparative Law Quarterly* 58, no. 1 (January 2009): 14–15. Jørgensen even argues that, at least in the context of the Arms Trade Treaty, 'specific direction' would be required: see Nina H. B. Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty', *American Journal of International Law* 108, no. 4: 725. For authors not in favour of an intent requirement, see for instance Jackson, *Complicity in International Law*, 161. By way of example, the US position clearly favours the former position. See The White House US, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (Washington, December 2016), 16:

> The United States has taken the position that a State incurs responsibility under international law for aiding or assisting another State in the commission of an internationally wrongful act when: (1) the act would be internationally wrongful if committed by the supporting State; (2) the supporting State is both aware that its assistance will be used for an unlawful purpose and intends its assistance to be so used; and (3) the assistance is clearly and unequivocally connected to the subsequent wrongful act.

[100] Aust, *Complicity and the Law of State Responsibility*, 240; Nolte and Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', 12.

[101] See for instance John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', *British Yearbook of International Law* 57, no. 1 (1987): 111; Bernhard Graefrath, 'Complicity in the Law of International Responsibility', *Revue Belge de Droit International* 29 (1996): 375, and authors cited in Nolte and Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', n. 68.

[102] Ryan Goodman and Miles Jackson, 'State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)', *Just Security*, 31 August 2016, https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen/.

[103] Emphasis added. See Harriet Moynihan, 'Aiding and assisting: the mental element under Article 16 of the International Law Commission's Articles on State Responsibility', *International & Comparative Law Quarterly* 67, no. 2 (April 2018): 471.

committing any wrongful acts, the reality unfortunately often proves to be different. It is therefore in the interest of States to mitigate the risks attached to their assistance.[104]

The four types of support identified for this study potentially fulfil the subjective requirement of Article 16 ARSIWA. Whether they actually do, depends on the context, though it may be very hard to prove in practice.

2.3. Double wrongfulness

A State can only be held responsible for aiding or assisting another State in a wrongful act if the conduct would be internationally wrongful if committed by the supporting State. This requirement, imposed by point (b) of Article 16, is the reflection of the *pacta tertiis* rule in international law: a treaty does not create rights or obligations for a third State without its consent.[105] Thus, a State cannot be held responsible for having assisted in an act which, if it would have committed the act itself, would not have been a violation of its obligations. If the wrongful act is a violation of a customary norm, this rule will not pose any problems.[106] If however the rule violated is one flowing from a treaty, point (b) could indeed prevent a State from being held responsible as an accomplice. Given the importance of the *pacta tertiis* rule in international law, this seems to be a rightful limitation to the complicity rule enshrined in Article 16. However, as noted by Aust, Article 16(b) poses more problems than appears at first sight.[107] Notably, the question arises, for instance, whether the accomplice State should be bound by the same treaty (e.g. the European Convention on Human Rights) or rather by the same norm (e.g. the prohibition of torture). The state of the law is unsatisfactory on this point.

For the purpose of this study, however, Article 16(b) poses less problems. In the *jus in bello*, the Geneva Conventions are universally ratified, and a great bulk of the IHL rules are considered to be of customary nature.[108] In addition, the UN Charter is nearly universally ratified, and the prohibition on the use of force and the principle of non-intervention are equally considered customary rules.[109] Thus, we can safely assume that point (b) is fulfilled when dealing with supportive acts throughout this study.

[104] The Chatham House has formulated some useful guidelines in this regard, see Harriet Moynihan, Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism (Chatham House, 2016), https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism, 37 ff.
[105] See Article 34 of the Vienna Convention on the Law of Treaties, 23 May 1969, 155 UNTS 331.
[106] Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism', para. 29.
[107] Aust, *Complicity and the Law of State Responsibility*, 249–65.
[108] See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*.
[109] See *infra* Chapter 4.

3. State responsibility for supporting an armed group

As explained in Section 1, the cardinal principle underlying the system of State responsibility is that a State cannot be responsible for acts committed by private persons or non-State actors.[110] The principle was even considered so important that the ILC initially wanted to include an article in the ARSIWA which would read: 'The conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of international law'.[111] While the final ARSIWA contain a variety of exceptions to this principle (such as the *a posteriori* endorsement by a State (Article 11) or the attribution in case of a successful insurrection movement (Article 10), Article 8 ARSIWA foresees in a specific form of attribution which is particularly relevant in light of this study: it links acts of private persons (or a private group) to the responsibility of a State under certain conditions. Instead of immediately scrutinizing Article 8, however, I will first look at the ICJ case-law that dealt with this topic preceding the adoption of the ARSIWA in 2001. By following a chronological order, it becomes easier to understand some of the difficulties that are still related to the scope of Article 8 ARSIWA.

3.1. 1986: The *Nicaragua* case

In the famous *Nicaragua* case, the ICJ had to decide, *inter alia*, whether the US could be held responsible for violations of international humanitarian law by the contras, an armed group that was fighting the newly installed government of Nicaragua and which received support of the US.[112] First, the Court determined that, despite the US support, the contras were not organs of the US:

> What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee, [….] was that the contras "constitute[d] an independent force" and that the "only element of control that could be exercised by the United States" was "cessation of aid". Paradoxically this assessment serves to underline, *a contrario*, the potential for control inherent in the degree of the contras' dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States,

[110] 'To hold otherwise would collapse the distinction between the public and the private spheres, and invite — or even require — states to strictly police the behaviour of their citizens (individuals or entities) in order to prevent the international responsibility of the state from being (objectively) engaged.' See Ryngaert, 'State-Responsibility and Non-State Actors', 163.

[111] Roberto Ago, 'State Responsibility', *Yearbook of the International Law Commission* II (1972): para. 146.

[112] The 'contras' is 'a term employed to describe those fighting against the present Nicaraguan Government.' Originally consisting of various movements, they 'subsequently became organized into two main groups: the Fuerza Democratica Nicaragüense (FDN) and the Alianza Revolucionaria Democratica (ARDE).' See Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 20.

> there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.
>
> […] In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. […] The Court […] is […] unable to determine that the contra force may be equated for legal purposes with the forces of the United States.[113]

After having ruled out the possibility that the contras would be considered as acting on behalf of the US because of their complete dependency of that State, the ICJ additionally found that

> [the] United States' participation, even if preponderant or decisive, in the *financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation*, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States *directed or enforced* the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed. [emphasis added][114]

Thus, according to the Court, an effective control by the US over the acts committed by the contras was needed for the US to bear responsibility for those acts. While the Court does not explicitly state what exactly the concept of 'effective control' means, it seems to explain the concept as 'direction or enforcement' of the acts. Clearly, in the opinion of the Court, financing, organizing, training, supplying and equipping of the contras and helping them with the target selection as well as with the planning of the operation, is insufficient to meet this threshold.[115] Hence, the ICJ concluded that the violations of IHL, committed by the contras, could not be attributed to the US in terms of State Responsibility.

If we transpose this to the categories of support studied in this dissertation, the ICJ is of the opinion that at least three of the categories[116] (logistical support[117], training and intelligence

[113] *Ibid.*, paras 109–110.
[114] *Ibid.*, para. 115.
[115] In contrast, the actions of the 'Unilaterally Controlled Latino Assets' (UCLAs) during the conflict in Nicaragua were attributable to the US, since agents of the US 'participated in the planning, direction, support and execution of the operations.' *Ibid.*, para. 86.
[116] On 'allowing territory to be used', no statement can be found in the *Nicaragua* case.
[117] As the category of 'logistical support' covers a broad range of acts, some nuance is warranted. The Court would not consider the supplying and equipping of an armed group to be sufficient in order to establish contribution. It is not excluded, however, that an act such as air refueling would meet the required threshold.

sharing[118], if offered to armed groups) would not lead to attribution of the acts of the armed group to the State. Clearly, this threshold is 'rather stringent'.[119] As Hessbruegge reformulated the judgment of the ICJ, '[t]here is only a principal-agent relationship allowing for attribution if the controlling principle micromanages the conduct of the individual agents.'[120] In similar vein, but focusing specifically on the context of terrorism, Trapp has argued that the effective control test is 'unsuited'.[121]

In fact, the ICJ introduced two tests in the paragraphs quoted above: a first one of 'complete dependence' of a group *vis-à-vis* a State, and a second one of 'effective control' of a State over the actions of the members of that group.[122] True, the distillation of this two-pronged test from the *Nicaragua* judgment is not that obvious. Thus, I agree with the criticism formulated by the ICTY Appeals Chamber in the *Tadić* case, when it noted that

> it is unclear whether the Court [in the Nicaragua judgment] is propounding "effective control" as an alternative test to that of "dependence and control" set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. [123]

Nevertheless, despite the ICTY's conviction that the ICJ has spelled out at length the criteria for one single test, the better reading of the *Nicaragua* case would be that according to the ICJ there are indeed two ways of attributing individual conduct to a State. This position seems to be confirmed by the ARSIWA developed by the International Law Commission, to which I will turn to in the next Section. What can be concluded thus far, is that by introducing a two-pronged test consisting of a 'complete dependency' or an 'effective control' over armed groups, the ICJ has set the bar for attribution remarkably high.

---

[118] This would be covered by the phrase 'helping them with the target selection as well as with the planning of the operation' in the judgment.

[119] Ryngaert, 'State-Responsibility and Non-State Actors', 169.

[120] Jan Arno Hessbruegge, 'The historical development of the doctrines of attribution and due diligence in international law', *New York University Journal of International Law and Politics* 36, no. 2 & 3 (2004): 273. In similar vein, Becker notes that 'the bond between the State and non-State actors must be shown to be so substantial and pervasive that it is virtually indistinguishable from the legal relationship between a State and its own officials.' Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006), 69.

[121] Kimberley Trapp, *State Responsibility for International Terrorism* (Oxford: Oxford University Press, 2011), 44.

[122] See for instance Milanović, arguing that the complete dependence and the effective control tests are the only correct tests for the purposes of State Responsibility. See Marko Milanović, 'State Responsibility for Genocide', *European Journal of International Law* 17, no. 3 (2006): 587–88. See also, for example, Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities', *International & Comparative Law Quarterly* 58, no. 03 (July 2009): 493–517; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 59–60.

[123] Prosecutor v. Dusko Tadić, Judgment, No. IT-94-1-A (ICTY, Appeals Chamber, 15 July 1999), para. 112. As will be discussed at length in Chapter 3, the ICTY added that 'the Appeals Chamber believes that the latter is the correct interpretation.' See *ibid.*

3.2. 2001: Article 8 ARSIWA

The ARSIWA, whose drafting process was already ongoing at the time of the *Nicaragua* judgment, contain at least two tests for attributing the behavior of armed groups to a State: one in Article 4 ('organic attribution', see *supra* Section 1) and another in Article 8 ARSIWA. According to some authors[124], the Article 4 test corresponds to the 'complete dependence and control test' as outlined by the ICJ, whereas for Article 8, the criterion of effective control should be used.[125] Remarkably, however, neither the 'complete dependence and control test', nor the effective control test have been explicitly included into the ARSIWA. Article 8 ARSIWA states that

> [t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on *the instructions of, or under the direction or control* of, that State in carrying out the conduct. [emphasis added]

The ILC commentary to this article specifies that it deals with two circumstances: a first situation involving private persons acting under the instructions of a State while committing an internationally wrongful act, and a second, 'more general' situation whereby persons act under a State's direction or control.[126] The ILC adds in its commentary that for the second scenario, 'direction and control' is needed over a 'specific operation' and that 'a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.'[127] With regard to the precise degree of control, the ILC merely mentions the ICJ's decision in *Nicaragua*, without however explicitly determining that effective control is the applicable standard. The ILC notes in its commentary that '[i]n any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.'[128] Therefore, Article 8 ARSIWA is not conclusive as to which degree of control is required.[129]

---

[124] Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', 59.

[125] According to Schmitt, Article 8 ARSIWA reflects the ICJ's decision in *Nicaragua* on effective control. See Michael N. Schmitt, 'Legitimacy versus legality redux: arming the Syrian rebels', *Journal of National Security Law & Policy* 7, no. 1 (2014): 146–47.

[126] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 47. Remarkably, however, also in its commentary to Art. 8, the ILC says that the three criteria of 'instructions, directions or control' are disjunctive, and that it is 'sufficient to establish any one of them'. See *Ibid.*, 48. See however the opposing view by Kaufman, who states that 'although the courts have not expressly connected these three factors [of instructions, directions or control] together, it is clear from the decisions as a whole that all three of these requirements must be met for liability to attach.' Dayna L. Kaufman, 'Don't Do What I Say, Do What I Mean: Assessing a State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State', *Fordham Law Review* 70 (2001–2002): 2642.

[127] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 47–48.

[128] *Ibid.*, 48.

[129] Michal Kowalski, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard', *Polish Yearbook of International Law* 30 (2010): 113; André J. J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', *British Year Book of International Law* 72, no. 1 (2002): 290. Nollkaemper considers that the effective control test and the test under Article 8 are the same: see Andre Nollkaemper, 'Attribution of forcible acts to States: connections between the law on the use of force and the law of State responsibility', in Niels Blokker

This vague wording leaves the door open for different interpretations.[130] In addition, some authors have criticized the ILC and the ICJ for relying on each other in a circular way[131] and deriving rules of 'customary law' from each other's decisions or commentary, without however providing the necessary justification.[132]

The strongest criticism however was expressed by the International Criminal Tribunal for the former Yugoslavia, in the already mentioned *Tadić* case. While I will come back to this case at length in Chapter 3, when dealing with the identification of parties to an armed conflict, it is important here to explain the ICTY's views on the effective control criterion advanced by the ICJ *Nicaragua* case. In the *Tadić* case, the ICTY was faced with a set of facts similar to that of the *Nicaragua* case: the Tribunal had to decide whether the context in which the crimes allegedly committed by Tadić, a leader of the Bosnian Serbs fighting in Bosnia, took place, was an international or a non-international armed conflict. More precisely, it had to assess whether the link between the Bosnian Serbs, an armed group, and Serbia, a State, was sufficiently close to consider that the non-international armed conflict between the Bosnian Serbs and Bosnia was actually an international armed conflict between Serbia and Bosnia. Importantly, the ICTY found that the question underlying the issue of State responsibility and that of conflict classification was one single legal problem, and it thus determined that the criterion used for both assessments should be the same.[133] Subsequently, in its search for an appropriate criterion, the ICTY dismissed the *Nicaragua* criterion of effective control because (1) such a test was not consistent with the 'logic of the law of State responsibility' and (2) the test was at 'at variance with judicial and State practice'.[134] Instead, the ICTY proposed an overall control test:

> 131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only

---

and Nico Schrijver (eds.), *The Security Council and the use of force: theory and reality--a need for change?*, Legal Aspects of International Organization (Leiden: Martinus Nijhoff Publishers, 2005), 158.

[130] Olivier De Frouville, 'Attribution of conduct to the State: private individuals', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The law of international responsibility* (Oxford: Oxford University Press, 2010), 271.

[131] See Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law* 18, no. 4 (2007): 651, stating that:

> [t]he Court's basic assumption, that Article 8 of the ILC Articles reflects customary law, is undemonstrated, being simply predicated on the authority of the Court itself (the *Nicaragua* precedent), as well as the authority of the ILC. The logical sequences of propositions in which the Court's holding is grounded could perhaps be set out as follows: (1) The Court in *Nicaragua* enunciated the test [as an apodictic truth in the Kantian sense, namely as enouncing an absolute and necessary truth] (2) the ILC upheld the same test (based only on *Nicaragua*); (3) hence the test is valid and reflects customary international law.

Kaufman also notes that '[a]lthough the Commentary to the Articles on State Responsibility implies that Article 8 was developed in correlation with the decisions of the ICJ and other courts, this implication is not entirely true. A comparison of these standards reveals that the Articles establish a more lenient standard for imposing liability on a State than that developed by the courts.' See Kaufman, 'Don't Do What I Say, Do What I Mean: Assessing a State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State', 2642.

[132] Kowalski, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard', 114.

[133] Prosecutor v. Dusko Tadić, Judgment, ICTY, Appeals Chamber, 15 July 1999, para. 104.

[134] *Ibid.*, paras 116–145.

> then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[135]

Thus, according to the ICTY, a State can incur State responsibility if it is involved in the coordination and planning of acts committed by an armed group. The ICTY identified such a relationship as 'overall control' by the State over the armed group. The 1999 *Tadić* Appeals Judgment has been repeatedly confirmed in subsequent ICTY case-law[136], as well as in case-law of the International Criminal Court[137] and reports of UN bodies.[138]

Applied to the four categories of support identified for the purpose of this study, the criterion of 'direction and control' enshrined in Article 8 ARSIWA does not seem to allow for attribution based purely on one of the categories of support. The overall control criterion, proposed as an alternative to the ICJ case-law, offers very few insight for the wide variety of supportive acts studied. Notably, according to the ICTY, 'training' or 'equipping' (a supportive act that would fall in the category of 'logistic support') would not be sufficient to establish attribution between the armed group's conduct and a State, whereas 'helping in the general planning of its military activity' would be. The category of 'crucial intelligence sharing' could fall under this phrase, even though one may question whether that is indeed what the ICTY envisaged.[139] On 'allowing territory to be used', the ICTY's judgment does not seem to offer a particular position.

Both the *Nicaragua* case before the ICJ and the *Tadić* case before the ICTY predate the ARSIWA. In its commentary to Article 8, the ILC did not explicitly argue in favour of the ICJ's effective control or the ICTY's overall control criterion. It merely noted that '[in] any event it is a matter of appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such extent that the conduct controlled should be attributed to it.'[140]

3.3. 2007: The *Bosnian Genocide* case

Despite the strong resistance towards the effective control criterion in the ICTY case-law, in 2007 the ICJ confirmed its own effective control-criterion in the *Bosnian Genocide* Judgment,

---

[135] *Ibid.*, para. 131.
[136] See e.g. Prosecutor v. Zlatko Aleksovski, Judgment, No. IT-95-14/1-A (ICTY, Appeals Chamber, 24 March 2000), paras 144–146; Prosecutor v. Delacići et al. (Čelebići), Judgment, No. IT-96-21-A (ICTY, Appeals Chamber, 20 February 2001), para. 47.
[137] Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, No. ICC-01/04-01/06 (ICC, Pre-Trial Chamber, 7 February 2007), para. 211; Prosecutor v. Thomas Lubanga Dyilo, Judgment, No. ICC-01/04-01/06 (ICC, Trial Chamber, 14 March 2012), para. 541.
[138] See for instance Report of the working group on arbitrary detention 2000, UN Doc. A/CN.4/2000/4, 28 December 1999, paras 14 and 15.
[139] See also Chapter 3, Section 4.1.1.B.
[140] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 48.

where it held that the acts of those that committed the genocide in Srebrenica could not be attributed to Serbia because of a lack of effective control.[141] The Court moreover made it clear – contrary to the ILC's hesitation to explicitly choose a side – that the standard of Article 8 ARSIWA must be 'understood in the light of the Court's jurisprudence on the subject, particularly [its decision in the *Nicaragua* case], rendering 'effective control' the exclusive standard of control under Article 8.'[142]

While the ICJ ruled out overall control as an appropriate criterion for State responsibility, it nevertheless considered that the issues of State responsibility and conflict classification did not necessarily boil down to the same legal question, thereby leaving the door open for an overall control criterion when classifying a conflict.[143] The contradicting case-law of the ICJ and the ICTY has been labelled by one author as one of the 'major examples of fragmentation of international law'.[144]

In sum, as already highlighted in the analysis above, it is clear from the foregoing that neither training, weapon/logistic supply, providing intelligence to be used would be sufficient to attribute acts of an armed group to a State in the ICJ's view. No specific reference was made to the category of 'allowing territory to be used'. As to the ICTY's view, the conclusion is somewhat more ambivalent. In essence, the Tribunal requires proof of 'coordinating or helping in the general planning of its military activity' for its overall control criterion. Especially the 'helping in the general planning' of military activity could encompass a broad range of supportive acts. Nevertheless, the ICTY has also specified that 'equipping and financing' an armed group would not be sufficient.

In the absence of support meeting the requisite threshold – whether it is that of the Article 8, the ICJ or the ICTY – of attribution, a potential responsibility gap occurs. What if armed groups, supported by a State, commit violations of international law? The individual members of an armed group could of course be prosecuted for potential domestic or international crimes they committed. Nevertheless, to date, there is no system of non-State actor responsibility equivalent to that of State responsibility, even though some authors have proposed it.[145] In addition, despite

[141] The Court did however find that Serbia was responsible for violating the primary obligations to prevent and punish genocide. See Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, paras 428–450. According to Ryngaert, the ICJ failed to accept the overall control standard, 'possibly on the ground that an overall control standard may collapse the distinction between the private and the public sphere.' Ryngaert, 'State-Responsibility and Non-State Actors', 173.

[142] Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, para. 400.

[143] This is indeed the position that I also defend in Chapter 3, Section 4.1.1.

[144] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the Internatioanl Law Commission. Finalized by Martti Koskenniemi', UN Doc. A/CN.4/L.682, 13 April 2006, paras 49-50. According to Del Mar, however, the label of 'fragmentation' for describing this issue is a misconception. See Katherine Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', *European Journal of International Law* 21, no. 1 (1 February 2010): 108.

[145] Ryngaert, 'State-Responsibility and Non-State Actors', 173.

the suggestion of the ICJ in the *Bosnian genocide* case[146], there is thus far no provision equivalent to Article 16, which would foresee in the responsibility of a State if it aids or assist the wrongful conduct of an armed group. Here too, scholars have made proposals to expand the law of State responsibility in this regard.[147] Yet, the current state of the law does not support such basis for State responsibility. The remaining option is then to hold the involved State responsible through a due diligence obligation, as discussed in the following Section.

4. State support and the obligation of due diligence

Supporting parties to an armed conflict, besides potentially leading to a form of responsibility based on complicity (Section 2) or attribution on the basis of control over an armed group (Section 3), may additionally trigger a State's responsibility on the basis of a violation of its due diligence obligation.[148] This is of particular relevance in case the conditions for other types of responsibility are not met.

Due diligence is not a rule of attribution, but a separate source for possible State responsibility which flows from the primary norms it is connected to.[149] It is not included in the Articles on the Responsibility of States for Internationally Wrongful Acts, even though its possible inclusion has been discussed at various occasions during the drafting process.[150] The decision of Rapporteur Roberto Ago to focus on secondary norms rather than on primary norms of international law, gradually pushed the rule of due diligence out of the scope of the ARSIWA.[151]

The foundations for due diligence in international law were laid by Grotius, who considered that a sovereign could become complicit in crimes committed by individuals under its rule through *patientia* (a failure to prevent) and *receptus* (a failure to punish or extradite).[152] The first manifestation of due diligence in an international case was in the 1872 *Alabama Arbitral Award*, concerning a dispute between the US and Britain. According to the US, Great-Britain had failed to observe its neutral duties during the American Civil War by allowing a private

[146] As discussed *supra*, see the introductory paragraphs of Section 2.
[147] Jackson, *Complicity in International Law*, 214–16.
[148] On the relationship between due diligence and other forms of responsibility for wrongful acts by others, see Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', *German Yearbook of International Law* 60 (2017): 667–708.
[149] See note 157. Some claim that due diligence forms a general principle of international law, on the basis of which States may incur responsibility *vis-à-vis* other States. See Joanna Kulesza, *Due diligence in international law*, Queen Mary Studies of International Law 26 (Leiden: Brill, 2016), 19. Note that Kulesza thus argues that due diligence forms a 'general principle of international law recognized by civilized nations' in the sense of Article 38, rather than 'merely' a general principle of law known to domestic legal systems. In similar vein, see Timo Koivurova, 'Due Diligence', *Max Planck Encyclopedia of Public International Law*, 2010, para. 2.
[150] For instance, in the report of the ILC's 2565th to 2611th meetings in 1999, the notion of 'due diligence' is still mentioned 76 times. See ILC, 'Summary records of the meetings of the fifty-first session 3 May-23 July 1999, UN Doc. A/CN.4/SER.A/1999', *Yearbook of the International Law Commission* I (1999): 1–318.
[151] For an overview of the position of due diligence *vis-à-vis* the draft ARSIWA, see Koivurova, 'Due Diligence', paras 5–8.
[152] On the history of due diligence, see further Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law'.

company to construct and arm a ship (the 'Alabama') in UK waters before it went to participate in the conflict. According to the award, due diligence 'ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.'[153] Due diligence also appeared in ICJ case-law, notably in the *Tehran Hostages* case and in the *Nicaragua* case. In the former, the ICJ held that

> the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission [in Tehran] against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion.[154]

In the *Nicaragua* case, the ICJ had to consider whether Nicaragua, by not stopping arms traffic to the opposition in El Salvador, had violated its due diligence obligation. The Court decided that

> it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of [Honduras, El Salvador and the United States].[155]

Due diligence is thus in essence a flexible standard[156]: to act diligently depends on circumstantial elements, such as the capacity of a State to influence those committing harmful acts. What is considered as 'diligent' will also depend on the specific field of law in which this principle can be found. There are multiple examples of primary due diligence obligations codified in specific international law treaties[157], yet, for the purpose of this dissertation, common Article 1 GCs is particularly relevant. This provision will be considered more closely in Chapter 3 below.[158]

What are the consequences for a State when it violates its due diligence obligation? Those consequences may be identified by a specific treaty, but in general violating the principle of

---

[153] US, Alabama claims of the United States of America against Great Britain Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, XXIX Reports of International Arbitral Awards 125–34 (1872), 129.

[154] Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 1980 ICJ Reports, para. 63.

[155] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 157.

[156] As noted by Shaw, 'it is rather less clear what is actually meant by due diligence. […] The test of due diligence undoubtedly imports an element of flexibility into the equation and must be tested in light of the circumstances of the case in question.' Malcolm N. Shaw, *International law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 855.

[157] Notably in environmental law, law of the sea and diplomatic relations. For an early example of due diligence in the sphere of environmental law, see the Trail Smelter Arbitral Award, which held that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.' This manifestation of due diligence was linked to transboundary air pollution emanating from a Canadian smelter (located in Trail, British Columbia) that harmed timber and agricultural interests across the border in the US. See Trail Smelter Case (Decision of 11 March 1941) (United States v. Canada), 3 UNRIAA 1938 (1941), 1965. For a further analysis of due diligence in treaty regimes, see Kulesza, *Due Diligence in International Law*, 221ff.

[158] See Chapter 3, Section 2.2.

due diligence triggers the same consequences as violating a primary norm of international law: the secondary rules, namely those on State responsibility discussed above, will determine the consequences of the violation.

5. Conclusion

This brief overview of the general principles of State responsibility related to supportive acts allows us to make the following observations:

First, it should be noted that a specific provision deals with support provided by a State to another State: Article 16 ARSIWA determines that States can be held responsible for aiding and assisting a State in the commission of a wrongful act. While some of the requirements of this provision still remain subject to debate, it has been argued that the four categories of support identified for the purpose of this study all potentially lead to responsibility under this provision.

Second, a provision analogous to Article 16 is thus far absent for the scenario whereby support is not provided to a State, but to an armed group. Under the ARSIWA, a State can only be held responsible for the acts of an armed group insofar the armed group acts under the instructions, direction or control of the State. We have seen that both before and after the adoption of the ARSIWA, the ICJ confirmed a high threshold for such attribution, yet contributed to the confusion by using another term for it, namely that of 'effective control'. In addition, the debate has been complicated by the ICTY-case law on overall control. In general, however, while the four types of support may be indicative of such control, they would not as such be sufficient.

Third, we noted that even in absence of 'aid or assistance' to another State or 'instructions, direction or control' over an armed group, a State can still incur responsibility if it failed to exercise due diligence in a particular situation. The advantage of the due diligence standard is that it is not limited to support provided by a State to a State. While the assessment of the due diligence standard is flexible and will depend on the specific circumstances of a case, the four types of support (if provided to an entity committing a wrongful act) could all be an indication that a due diligence standard was not met.

While the analysis of this Chapter is indispensable in order to understand some of the concepts that will be used in the following Chapters (especially in Chapters 3 and 4), it needs to be recalled that this study is not about State responsibility for supportive acts. The ARSIWA, supplemented with the standard of due diligence, establish the responsibility of a State – nothing less, but definitely nothing more. Throughout this study, it is important to keep in mind that State responsibility for an internationally wrongful act does not necessarily bring about other consequences, specific to certain subfields of international law. Responsibility is only triggered in case of a wrongful act that can be attributed to a State. Other consequences, such as becoming party to an armed conflict, or becoming entitled to respond in self-defense, may require different thresholds to be met.

Chapter 2. *Jus in bello* versus *jus ad bellum*

This study assesses support to parties to an armed conflict under *jus in bello*, *jus ad bellum* and neutrality law, thereby focusing on the different thresholds that each of these bodies of law use. Such an analysis will be done in Chapters 3 to 5. Before turning to the core of this study, however, this Chapter will introduce a key distinction within the legal analytical framework of this study: the distinction between *jus in bello* and *jus ad bellum*.

After discussing the origins of respectively the two the bodies of law and the Latin notions used to refer to them, this Chapter will set the semantic baseline for the rest of this study by defining *jus in bello* and *jus ad bellum* (Section 1). Subsequently, the main principles governing their separation will be outlined, followed by a discussion of the reasons why the separation is widely accepted, but nevertheless challenged in some regards (Section 2). Even though the two bodies install separate legal frameworks, they do have a range of common features (Section 3) and inevitably there are some points of convergence (Section 4), which do not, however, challenge the fundamental dichotomy. The last Section of this Chapter will touch upon the unclear position that the law of neutrality takes with regard to the *jus in bello*/*jus ad bellum* distinction (Section 5), an issue that will be further developed when dealing with neutrality law in Chapter 5.

1. Origins of *jus in bello* and *jus ad bellum*

The now commonly referred to opposition between *jus in bello* and *jus ad bellum* in international law has a twofold origin. On the one hand, the bodies of law underlying both *jus in bello* and *jus ad bellum* have a history of more than 100 years, even though they evolved separately and at a different pace. On the other hand, the notions of '*jus ad bellum*' and '*jus in bello*' themselves are, contrary to what the use of Latin words might suggest, relatively recent.

Jus ad bellum, as we would describe it today, is the collection of rules governing the use of force between States, essentially outlawing use of force in Art. 2(4) UN Charter[159] with only allowing a few exceptions (self-defence in accordance with Article 51 UN Charter and an authorization by the UNSC to use force in accordance with Chapter VII of the UN Charter). Before the adoption of the UN Charter in 1945, only the Pact of Paris of 1928 included a 'condemnation' on the use of force.[160] The Covenant of the League of Nations of 1919 had

[159] Hence the more accurate but less frequently used notion of '*jus contra bellum*'. See, for example Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010).
[160] General Treaty for the Renunciation of War as an Instrument of National Policy of 27 August 1928, 94 LNTS 57 (also referred to as 'Kellogg-Briand Pact' or 'Briand-Kellogg Pact'):

restricted, but not prohibited force between States.[161] The Pact of Paris did not foresee any exceptions, but States made it clear in various reservations that force in self-defence would still be allowed.[162]

The contemporary *jus ad bellum* rules hence only came into being as of 1928, and the current rules only exist as of 1945. It would however be wrong to state that 'going to war' was entirely unregulated before 1945 or 1928. Until the 17th century, waging war was, for the powers of the time, an accepted way to act as long as their war was 'just', meaning that a 'just cause' had to be pursued: the war had to be a reaction against a delict committed by another State.[163] After the peace of Westphalia in 1648 (which installed the nation States as we know them now), this '*bellum justum* theory' gradually lost importance and States began to consider war as 'the continuation of politics by other means'.[164] International law did not prohibit the States' right to go to war.

Jus in bello evolved in the period that States considered waging war as an extension of their sovereignty. This body of law aimed (and still aims) at reducing the suffering of victims of armed conflict. While customary rules already had a limited effect on the use of force during war for ages, the codification of *jus in bello* did not start until 1864, when the first Geneva Convention was adopted.[165] The first Convention was followed by a number of Hague Conventions regulating means and methods of warfare in 1907[166], the Geneva Gas Protocol in

---

> *Article I.* The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
> *Article II.* The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

[161] Covenant of the League of Nations, 28 April 1919, 225 CTS 195. Article 12 of the Covenant reads:

> The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

[162] See for instance reservations made by France, Germany, Great-Britain, Japan, South-Africa and the US as cited by Quincy Wright, 'The Meaning of the Pact of Paris', *American Journal of International Law* 27 (1933): 42–43.

[163] Theologians, philosophers and jurists of the time could however not agree on an exhaustive list of conditions for a just war, making the *bellum justum* theory less effective. See Dinstein, giving an overview of conditions and 'just causes' proposed by, for example, Thomas Aquinas (*auctoritas principis*, *causa justa* and intention *recta*), Ayala (directing arms against whomever abjures the sovereignty of the prince), Victoria (violation of fundamental right to travel freely and propagate Christianity), Suarez (a grave injury to one's honour or reputation) and Textor (refusal of a passage of troops *en route* to war). Dinstein concludes that '[t]he postulate that the two opposing sides in war may simultaneously rely on the justice of their clashing causes, and that they will be equally rights, brought the just war doctrine in international law to a *cul de sac*'. Yoram Dinstein, *War, aggression and self-defence*, 5th ed. (Cambridge: Cambridge University Press, 2011), 65–69. For a very interesting overview of the just causes mentioned in over 300 'war manifestos', see Oona A. Hathaway et al., 'War Manifestos', *University of Chicago Law Review*, no. 85 (2018): 1139–1225.

[164] Carl von Clausewitz, *Vom Kriege* (Hamburg: Nikol, 2008), book 1, Chapter 1, Section 24.

[165] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, 129 CTS 361.

[166] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 205 CTS 277; Hague Convention (V)

1925[167] and two Geneva Conventions updating the protecting of wounded and sick soldiers and introducing protective rules for prisoners of war in 1929.[168] Hence, by the time the UN Charter introduced the contemporary *jus ad bellum* rules in 1945, the *jus in bello* rules were already quite elaborate – and they were at the verge of expansion shortly thereafter, with the adoption of the 1949 Geneva Conventions.

Nowadays, international lawyers take the *jus in bello*/*jus ad bellum* distinction for granted.[169] Remarkably, however, when contemporary international lawyers refer to the League of Nations, the Briand-Kellogg Pact, the early Geneva Conventions or Hague Regulations in *jus ad bellum*/*jus in bello* terms, they often do not realize that, when those instruments were adopted, those Latin notions did not yet exist. Indeed, 'it is extremely hard to find the terms *jus ad bellum* and *jus in bello* used before 1930.'[170] Only in the 30s the terms started being used, primarily by the School of Vienna (with writings by for example Kunz[171] or Verdross[172]). Guggenheim explicitly mentioned that '*Kriegsrecht*' (the law of war) does not make a distinction between the aggressor State and the victim of aggression. In doing so, he used the label *'jus in bello'* for *Kriegsrecht*.[173] Grob explained in 1949 that *jus in bello* answers the question what conduct is to be observed in war, whereas *jus ad bellum* answers the question under what conditions a State can resort to war.[174] The opposition of *jus in bello* and *jus ad bellum* has gained widespread recognition since. Especially in the recent decade, writings on

---

respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, 205 CTS 299; Hague Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 18 October 1907, 205 CTS 305; Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 18 October 1907, 205 CTS 319; Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, 205 CTS 331; Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, 18 October 1907, 205 CTS 345; Hague Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 18 October 1907, 205 CTS 367; Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 205 CTS 395; Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907, 205 CTS 403.

[167] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 LNTS 65.

[168] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, 118 LNTS 303; Geneva Convention relative to the Treatment of Prisoners of War , 27 July 1929, 118 LNTS 343.

[169] For a recent analysis trying to challenge this widely accepted distinction, see Federica D'Allessandra and Robert Heinsch, 'Rethinking the Relationship Between Jus in Bello and Jus ad Bellum: A Dialogue Between Authors', in Leila Nadya Sadat (ed.), *Seeking accountability for the unlawful use of force* (Cambridge: Cambridge University Press, 2018), 453–92.

[170] Robert Kolb, 'Origin of the twin terms jus ad bellum/jus in bello', *International Review of the Red Cross* 37, no. 320 (1997).

[171] Joseph Kunz, 'Plus de lois de guerre?', *Revue générale de droit international public* 41 (1934): 22.

[172] Verdross used the notion *jus in bello* when discussing Kriegsrecht. See Alfred Verdross, *Völkerrecht* (Berlin: Julius Springer, 1937), 289.

[173] Paul Guggenheim, *Lehrbuch des Völkerrechts: unter Berücksichtigung der internationalen und schweizerischen Praxis*, vol. II (Basel: Verlag für Recht und Gesellschaft, 1951), 778. Contrary to what Kolb claims (namely that Guggenheim was the first to make the terminological distinction between *jus in bello* and *jus ad bellum*), I could not find a reference to *jus ad bellum* in Guggenheim's treatise. See Kolb, 'Origin of the Twin Terms Jus Ad Bellum/Jus in Bello'.

[174] Fritz Grob, *The Relativity of War and Peace: A Study in Law, History, and Politics* (New Haven: Yale University Press, 1949), 161.

'*jus in bello*' and '*jus ad bellum*' became very popular: scholars have relied on the dichotomy to carry out different case studies[175] or to question or defend the dichotomy as a whole.[176] To my knowledge, Okimoto is the only scholar so far to have devoted an entire book to the *jus ad bellum*/*jus in bello* relationship.[177] Remarkably, however, even though the ICJ had to deal with *jus in bello*/*jus ad bellum* related issues on several occasions, it has only rarely explicitly referred to the notions as such.[178]

As the dichotomy between *jus in bello* and *jus ad bellum* forms the core basis for this study, it should be made clear at the outset what exactly is meant when using the notions in the following

[175] See *inter alia*: Vaios Koutroulis, 'The Fight Against the Islamic State and Jus in Bello', *Leiden Journal of International Law* 29, no. 03 (2016): 827–852; Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus Contra Bellum and Jus in Bello,', *Journal of Conflict and Security Law* 18, no. 1 (2013): 59–93; Steven R. Ratner, 'Jus Ad Bellum and Jus in Bello after September 11', *American Journal of International Law* 96 (2002): 905–21; Sharon Weill and Valentina Azarova, 'The 2014 Gaza War: Reflections on Jus Ad Bellum, Jus in Bello, and Accountability', in Annyssa Bellal (ed.), *The War Report: Armed Conflict in 2014* (Oxford: Oxford University Press, 2016), 360–87; Giorgio Gaja, 'Combating Terrorism: Issues of Jus Ad Bellum and Jus in Bello: The Case of Afghanistan' in Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), *Anti-Terrorist Measures and Human Rights* (Leiden: Nijhoff, 2004), 161–70; Andreas Zimmermann, 'The Second Libanon War: Jus Ad Bellum, Jus in Bello and the Issue of Proportionality', *Max Planck Yearbook of United Nations Law*, 2007, 99–141; Dino Kritsiotis, 'On the Jus Ad Bellum and Jus in Bello of Operation Enduring Freedom', *American Society of International Law Proceedings* 96 (2002): 35–41; Enzo Cannizzarno, 'Contexutalizing Proportionality: Jus Ad Bellum and Jus in Bello in the Lebanese War', *International Review of the Red Cross* 88, no. 864 (2006): 779–92; Solon Solomon, 'The Great Oxymoron: Jus in Bello Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures towards Gaza as a Case Study', *Chinese Journal of International Law* 9 (2010): 501–36; Falko Dittmar, *Angriffe auf Computernetzwerke: ius ad bellum und ius in bello*, Schriften Zum Völkerrecht 159 (Berlin: Duncker & Humblot, 2005), 318 p.

[176] Jasmine Moussa, 'Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law', *International Review of the Red Cross* 90, no. 872 (2008): 963–990; Inger Österdahl, 'Dangerous Liaison: The Disappearing Dichotomy between Jus ad Bellum and in Bello International Humanitarian Law - Celebrating the 60th Anniversary of the Geneva Conventions', *Nordic Journal of International Law* 78 (2009): 553–66; Marco Sassòli, 'Ius Ad Bellum and Ius in Bello the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?', in Michael Schmitt and Jelena Peijic (eds.), *International Law and Armed Conflict : Exploring the Faultlines. Essays in Honour of Yoram Dinstein*, vol. 15, International Humanitarian Law Series (Leiden: Martinus Nijhoff Publishers, 2007), 241–64; Carsten Stahn, '"Jus ad Bellum", "Jus in Bello"... "Jus post Bellum?" - Rethinking the Conception of the Law of Armed Force', in Charlotte Ku and Paul F. Diehl (eds.), *International Law Classic and Contemporary Readings*, 3rd ed. (Colorado: Lienne Rynner Publishers, 2009), 247–68; Alexander Orakhelashvili, 'Overlap and Convergence: The Interaction between Jus ad Bellum and Jus in Bello', *Journal of Conflict & Security Law* 12 (2007): 157-196; Serena Sharma, 'Reconsidering the Jus ad Bellum/Jus in Bello distinction', in Carsten Stahn and Jan Kleffner (eds.), *Jus Post Bellum. Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser Press, 2008), 9–30; Robert D. Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War', *Yale Journal of International Law* 34 (2009): 47–112; Steve Viner, 'The Moral Foundations of the "jus ad bellum/jus in bello" distinction', in Fritz Allhoff, Nicholas G. Evans and Adam Henschke (eds.), *Routledge Handbook of Ethics and War* (London: Routledge, 2013), 49–62; Christopher Greenwood, 'The Relationship between ius ad bellum and ius in bello', *Review of International Studies* 9, no. 4 (1983): 221–34; ASIL, 'The Relationship between Jus ad Bellum and Jus in Bello: Past, Present, Future Panel Discussion', *American Society of International Law Proceedings* 100 (2006): 109–24; Eyal Benvenisti, 'Rethinking the Divide Between Jus Ad Bellum and Jus In Bello in Warfare Against Nonstate Actors', *Yale Journal of International Law* 34, no. 2 (2009): 541–48.

[177] Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Oxford: Hart, 2011).

[178] See for instance Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 ICJ Reports 168 (ICJ, 19 December 2005), paras 173 and 245, (referring *to jus in bello* only), and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports 226 (ICJ, 8 July 1996), para. 86 (citing the UK which refers to *jus in bello*).

Chapters. *Jus ad bellum* rules govern the acceptability of the use of force between States. They are primarily enshrined in the UN Charter, but also elaborated upon in a few other instruments, such as the UNGA Friendly Relations Declaration[179] and additionally in some customary rules (such as the 'Caroline' principles of necessity and proportionality in self-defence[180]). This study will only consider international rules as part of *jus ad bellum*, leaving out domestic limitations on the use of force.[181] As explained in the Introduction, this limitation does not mean that I will only discuss support in the context of international armed conflicts. For instance, the *jus ad bellum* prohibition on the use of force may be relevant for support to other States, but also to armed groups involved in a non-international armed conflict.

For the purpose of this study, *jus in bello* will be considered as a synonym for international humanitarian law, which on its turn will be considered a synonym for the laws of war, or the law of armed conflict (LOAC).[182] *Jus in bello*, or IHL, encompasses both the old 'Hague law' (the rules related to the conduct of hostilities) and the 'Geneva law' (the rules related to protection of persons in the power of an enemy). *Jus in bello* also covers (parts of) the law of neutrality, which causes some problems from the perspective of the distinction between *jus in bello* and *jus ad bellum*, as will be discussed below.

Now that both the origins and the meaning of the notions have been clarified, it is time to turn to the principles governing their interaction.

2. Separation between *jus ad bellum* and *jus in bello*

2.1. Consequences of the separation

The dichotomy between *jus in bello* and *jus ad bellum* impacts their relationship in various ways. First, *jus in bello* rules will apply equally to the belligerents, regardless whether one (or more) of them has violated *jus ad bellum* rules. Thus, an aggressor has to comply with IHL rules, just as the victim of aggression. Protection under IHL cannot be denied to belligerents who violated the prohibition on the use of force. This principle of equal application of IHL to

[179] UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).
[180] 'Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline. Letter No. 2 Mr. Webster to Mr. Fox, 24 April 1841', *British and Foreign State Papers* 29 (1840–1841): 1126–42.
[181] In contrast, see for example Bugnion, who includes domestic limitations in the definition of *jus ad bellum*: François Bugnion, 'Jus ad Bellum, Jus in Bello and Non-International Armed Conflict', *Yearbook of International Humanitarian Law* 6 (2003): 168.
[182] This is generally the way in which *jus in bello* is understood. Nevertheless, Goodman adopts a much broader understanding of *jus in bello*, including both international humanitarian law and international human rights law. See Ryan Goodman, 'Controlling the recourse to war by modifying jus in bello', *Yearbook of International Humanitarian Law* 12 (2009): 56.

all parties to the conflict has been labelled as an 'absolute dogma'[183], which is surprising if one takes into account the other internationally recognized legal principle of '*iniuria jus non oritur*'. The latter principle means that facts flowing from wrongful conduct cannot determine what the law is.[184] On the basis of *iniuria jus non oritur*, the equal application of IHL was openly contested in the past by the USSR[185] and Vietnam. The latter argued during the negotiations for the Additional Protocols that a victim of aggression should be relieved from IHL obligations, whereas the aggressor should be bound by them.[186] Vietnam also defended its position in practice for a while (for example, by rebuffing all ICRC requests to bring aid to American prisoners of war during the Vietnam War, arguing that the prisoners did not deserve protection as the US started the war)[187], but eventually it nevertheless adjusted its practice.[188]

Second, hostilities have to comply with both the rules of *jus ad bellum* and the rules of *jus in bello*. The two bodies of law thus apply simultaneously[189], potentially leading to a double illegality. If an attack is legal under *jus ad bellum*, this does not exempt the attacker from complying with *jus in bello* obligations – and *vice-versa*. This means that an attack, even if it occurs during an ongoing armed conflict, has to be carried out in conformity with the rules of *jus in bello* and *jus ad bellum*. A minority of scholars argues that the *jus ad bellum* criteria only need to be fulfilled at the beginning of a conflict, and not for the uses of force during the conflict. For instance, during the drafting of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, '[t]he *majority* of experts argued that the restraints in the law of self-defence applied in addition to those of humanitarian law, and this is therefore what is written

---

[183] Louise Doswald-Beck, 'International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons', *International Review of the Red Cross* 37, no. 316 (1997): 53.

[184] Shaw, *International Law*, 105. For an application of this principle, see Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 ICJ Reports 7 (ICJ, 25 September 1997), para. 133.

[185] 'The theory that the victim of aggression was not bound by humanitarian law constituted the official doctrine of the Soviet state, it being understood that from the Marxist-Leninist viewpoint aggression was by definition an attribute of capitalist states.' Bugnion, 'Jus Ad Bellum, Jus in Bello and Non-International Armed Conflict', 173. See Bugnion's footnotes 25 and 26 for further references.

[186] Vietnam argued that

> [t]his watertight separation between jus ad bellum and jus in bello was possible within the framework of the law of The Hague of 1899 and 1907 under which war was regarded as admissible in international relations, but it has become a flagrant anomaly now that the war of aggression is deemed to be "the ultimate international crime, since under modern international law the only permissible wars are those of legitimate self-defence as established by the United Nations Charter. […] The humanitarian provisions of the four Conventions put war criminals and their victims on an equal footing. Moreover, in certain cases they afford the guilty more privileged treatment than their victims […] justice requires that there should be no possibility of equal treatment for war criminals and for their victims. This is a question of ordinary human common sense.

See Switzerland, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva 1974-1977), Vol. IV (Federal Political Department, 1978), 177–78.

[187] See for instance Paul de La Pradelle, 'Le Nord-Vietnam et les Conventions humanitaires de Genève', *Revue générale de droit international public* 75, no. 2 (1971): 1–20.

[188] More specifically in the Sino-Vietnamese conflict of 1979, Vietnam changed its point of view. See references to archival documents of the ICRC, cited in Bugnion, 'Jus Ad Bellum, Jus in Bello and Non-International Armed Conflict', 175. Unfortunately, these archival documents are not (yet) open to the public.

[189] Greenwood, 'The Relationship between Ius Ad Bellum and Ius in Bello', 223.

in the Manual, whereas *others* argued *that once the necessity for self-defence had arisen, the only restraints* were those contained in humanitarian law.'[190]

Third, using *jus in bello* to interpret *jus ad bellum* rules (or the other way around) is generally not accepted.[191] Given the sometimes seemingly overlapping concepts (such as the criterion of proportionality), there indeed exists a risk of confusing *jus in bello* with *jus ad bellum* requirements. Certainly in cases whereby the concepts are the same, one should be cautious of not using the meaning of a concept under one body of law to explain the concept under the other body. For instance, the requirement of proportionality[192] is a condition which appears both in *jus ad bellum* and *jus in bello*: in the former, it is a customary law condition which has to be fulfilled by any act in self-defence (meaning that the force used must be in balance with the armed attack[193] and may not be more than necessary to put an end to the armed attack[194])[195], while in the latter it is both a codified and customary law rule which requires that the expected civilian damages or losses would not be excessive to the anticipate military advantage (Art. 57 AP I). While the first scenario deals with proportionality at the macro-level of States, the second scenario deals with proportionality at the micro-level of individuals. As the same concept is used in two different subfields of international law and directed towards two entirely different actors (macro versus micro), respecting the difference between the two meanings of proportionality is of crucial importance. Similarly, the concept of necessity[196] serves as a customary law condition for acts in self-defence under *jus ad bellum*[197], while on various occasions it is a basis for an exception to a protective IHL rule under *jus in bello*.[198] Nevertheless, borrowing interpretations from one body of law to be used in the other body is not always harmful. Article 31(3)(c) of the Vienna Convention on the Law of Treaties lists '[a]ny relevant rules of international law applicable in the relations between the parties'[199] as an element to be taken into account, together with the context, when interpreting rules of

[190] Emphasis added. See Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', 53.
[191] Benvenisti argues however that this is no longer tenable in case of warfare against non-state actors, see Benvenisti, 'Rethinking the Divide Between Jus Ad Bellum and Jus In Bello in Warfare Against Nonstate Actors', 544–47.
[192] Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello*, 59–80.
[193] No symmetry between the means and methods used in the armed attack and in the attack in self-defence is required. See Dissenting Opinion of Judge Higgins, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports, 5.
[194] Nevertheless, it is also argued that a reaction is self-defence could go further than merely stopping the armed attack, for instance to deter future attacks. See Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello*, 61–62.
[195] For a short summary and further references, see Georg Nolte and Albrecht Randelzhofer, 'Article 51', *The Charter of the United Nations: A Commentary*, 3rd ed., vol. II (Oxford: Oxford University Press, 2012), 1425–27.
[196] Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello*, 93–99.
[197] Nolte and Randelzhofer, 'Article 51', 1425–27. For both the concepts of necessity and proportionality, Randelzhofer and Nolte note however that 'a partial overlap between the *ius ad bellum* and the *ius in bello* aspects of the principles of necessity and proportionality in certain situations is not necessarily an indication of a substantive difference between those principles, but rather the result of their application in situations where permissible aims and the means to pursue them overlap.' *Ibid.*, 1427.
[198] See, for instance, Article 33 GC I or Article 71(3) AP I.
[199] Vienna Convention on the Law of Treaties, 23 May 1969, 155 UNTS 331.

international law. For instance, in recent years the UNSC has provided States with a mandate to use force to protect civilians.[200] Since *jus ad bellum* nowhere defines the concept of civilians, it is interpreted in the meaning of IHL[201] – namely those who do not take a direct part in the hostilities.[202]

2.2. Acceptance of the separation

The strict separation between *jus ad bellum* and *jus in bello* is generally accepted in IHL treaties, in State practice, in case-law and by international legal scholars.[203]

IHL treaties explicitly declare to be applicable 'in all circumstances'[204], hence implying that a possible violation of *jus ad bellum* rules does not influence IHL application. In addition, the preamble of AP I expresses that 'nothing in [the Protocol or the Geneva Conventions] can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations'. It also reaffirms that '[its provisions] must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.' Art 3(2) AP II moreover states that

> [n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

---

[200] For example: UNSC Res. 1973, UN Doc. S/RES/1973 (17 March 2011), para. 4 (allowing States to use all necessary means against Libya) and UNSC Res. 2100, UN Doc. S/RES/2100 (25 April 2013), para. 16(c) (establishing the MINUSMA peacekeeping force in Mali and granting it a mandate to protect civilians).

[201] Keiichiro Okimoto, 'The relationship between jus ad bellum and jus in bello', in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 1222–23. On this particular issue in relation to the 2011 international operation against Libya, see Julian M. Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus in Bello and the Jus ad Bellum', *Journal of Conflict and Security Law* 17, no. 1 (2012): 117–46.

[202] See Art. 50 and 51 AP I, Art. 13 AP II and customary IHL Rules 5 and 6.

[203] Lubell notes that 'there are strong grounds for maintaining the separation between the *ius ad bellum* and the *ius in bello*.' Noam Lubell, *Extraterritorial use of force against non-state actors* (Oxford: Oxford University Press, 2010), 91. Carron writes that 'the crucial and strict separation between those two sets of norms should be respected'. Djemila Carron, 'Transnational Armed Conflicts', *Journal of International Humanitarian Legal Studies* 7, no. 1 (2016): 17. See also the scholars cited in notes 175, 176 and 177, with a few exceptions, such as Sloane, Sharma and Orakhelashvili. Sloane argues that '[d]espite its widespread acceptance, the axiom […] is logically questionable, undertheorized, and at times disregarded or misapplied in practice – with troubling consequences for the policies that underwrite these components of the contemporary law of war.' Sloane, 'The Cost of Conflation', 50. Sharma objects the 'distinction's inherently juristic orientation, which has come largely at the expense of moral considerations' and challenges the 'checklist approach' flowing from the distinction, together with its 'incapacity to interpret certain just war criteria'. See Sharma, 'Reconsidering the Jus Ad Bellum/Jus in Bello Distinction', 19 and 24–25. Orakhelashvili argues that proponents of the separation between the two bodies of law 'fail to explain why [the principle of *ex injuria jus non oritur*] applies to some fields that relate to the exercise of belligerent rights by, and entail the relevant rights for the state, but not others.' See Orakhelashvili, 'Overlap and Convergence', 163.

[204] See common Art. 1 GCs.

International case law generally makes the distinction between *jus in bello* and *jus ad bellum*.[205] For instance, the ICTY correctly observes in the *Kordić* case that

> [t]he unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a "just cause". Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent) in relation to the crimes under the International Tribunal's jurisdiction.[206]

Similarly, the Appeals Chamber of the Special Court for Sierra Leone corrected a judgment of the Trial Chamber which had accepted mitigating factors for war crimes on the basis of the 'legitimate cause' of the fighting force.[207] The Appeals Chamber stressed that

> [i]nternational humanitarian law specifically removes a party's political motive and the "justness" of a party's cause from consideration; The basic distinction and historical separation between jus ad bellum and jus in bello underlines the desire of States to see that the protections afforded by jus in bello (i.e., international humanitarian law) are "fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts." The political motivations of a combatant do not alter the demands on that combatant to ensure their conduct complies with the law.[208]

On some occasions, courts or tribunals nevertheless find it difficult to draw a clear line between *jus ad bellum* and *jus in bello* considerations. The most famous example of such conflation in international case-law is the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where the Court ruled that

> [i]n view of the present state of international law viewed *as a whole*, […] the Court is led to observe that it cannot reach a definite conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.[209] [emphasis added]

---

[205] See Moussa, who notes that '[t]he jurisprudence of international courts has, by and large, affirmed the distinction between jus ad bellum and jus in bello.' See Moussa, 'Can Jus Ad Bellum Override Jus in Bello?', 981.
[206] Prosecutor v. Kordić and Ćerkez, Judgment, No. IT-95-14/2-A (ICTY, Appeals Chamber, 17 December 2004), para. 1082.
[207] Prosecutor v. Fofana and Kondewa, Judgment, No. SCSL-04-14-T (SCSL, Trial Chamber, 10 September 2007), para. 83:

> [T]he CDF/Kamajors was a fighting force that was mobilised and was implicated in the conflict in Sierra Leone to support a legitimate cause which, as we have already seen, was to restore the democratically elected Government of President Kabbah which had been illegally ousted through a Coup d'Etat orchestrated and carried out on the 25th of May 1997, by a wing of the Sierra Leone Armed Forces that later constituted a baptised itself as the Armed Forces Revolutionary Council (AFRC).

[208] Prosecutor v. Fofana and Kondewa, Judgment, No. SCSL-04-14-A (SCSL, Appeals Chamber, 28 May 2008), para. 530.
[209] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports, para. 97.

In this paragraph, the Court links a *jus ad bellum* justification for the use of force (namely the use of force in self-defence) to the issue whether under international law as a whole (hence also including *jus in bello*) does or does not prohibit the use of nuclear weapons – and the Court seemingly is of the opinion that it does not. In other words, if the survival of a State is in danger, it would be allowed to use a weapon that would otherwise violate IHL (and most importantly, its enemy would *not* be allowed to do so, creating an unequal treatment between parties to an armed conflict). Not surprisingly, this conflation was one (of the multiple) point(s) on which the Advisory Opinion was heavily criticized in legal doctrine.[210] This criticism confirms the crucial importance of the *jus in bello/jus ad bellum* dichotomy.

Generally, States also correctly distinguish between *jus ad bellum* and *jus in bello*. The US Department of Defense Law of War Manual warns for instance that '[c]onflating jus in bello and jus ad bellum risks misunderstanding and misapplying these concepts'.[211] Similarly, the UK Government stressed in its policy regarding the use of armed drones that 'the legal basis of the [UK's] Government's policy appears to be that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War'.[212] In a letter addressed to the UN Secretary-General, Azerbaijan explains that the law that applies during conflict 'is divided into *jus ad bellum* pertaining to the legality of war (as well as cognate issues) and *jus in bello* regulating the means and methods of warfare (otherwise known as international humanitarian law (IHL))'.[213] These examples show that the dichotomy is not merely academic or theoretical, but is considered so important that States explicitly refer to it in their practice.

In sum, despite some occasional misconceptions, in general the distinction between *jus ad bellum* and *jus in bello* has been widely acknowledged and used by doctrine, case-law and in State practice.

---

[210] See for instance Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', 53–54; Éric David, 'L'avis de la Cour internationale de Justice sur la licéité de l'emploi des armes nucléaires', *International Review of the Red Cross* 79, no. 823 (1997): para. 15; Yoram Dinstein, 'The laws of air, missile and nuclear warfare', *Israel Yearbook on Human Rights* 27 (1997): 12–13.

[211] US, Department of Defense Law of War Manual, 2016, para. 3.5.1.

[212] House of Lords, House of Commons, Joint Committee on Human Rights, 'The Government's policy on the use of drones for targeted killing', 27 April 2016, 43. This has not always been the position of the UK. During the Falkland/Maldives conflict, the UK justified a so-called 'total exclusion zone' on the basis of its right to self-defence under Article 51 of the UN Charter, while it simultaneously declared that all Argentinian vessels entering that zone (whether civilian or military) would be considered hostile and thus be targeted. See the extract of a message sent by the British government to the Argentinian government on 23 April 1982, quoted in Margareth Tatcher, Letter to George Foulkes MP (General Belgrano), 25 October 1984, 65/786-89, Hansard HC. On this British claim, see i.e. Wolff Heintschel von Heinegg, 'Blockades and Interdictions', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 928–29, and the accompanying footnotes.

[213] Report on the Legal Consequences of the Armed Aggression by the Republic of Armenia against the Republic of Azerbaijan, Letter dated 22 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General (annex), UN Doc. A/63/662-S/2008/812, 24 December 2008, para. 3.

2.3. Challenges to the separation

While – despite a few critical voices and occasional conflations – the separation between *jus in bello* and *jus ad bellum* is widely accepted in State practice and by academics, the distinction is being challenged in various ways. First, the law itself foresees in a limited interaction between *jus in bello* and *jus ad bellum*. Second, as illustrated below, the compliance with IHL rules has been introduced by some as an additional criterion for actions in self-defence under *jus ad bellum*. Third, the concepts of humanitarian intervention or 'responsibility to protect' use *jus in bello* arguments to expand *jus ad bellum* rules. Lastly, the increased amount of hybrid conflicts has challenged some of the principles which flow from the distinction between *jus ad bellum* and *jus in bello*.

First, it is often forgotten that IHL and other treaties themselves provide some limited interaction between both bodies of law. For instance, Article 89 AP I provides that

> [i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

While this provision does not mention the use of force *per se*, the commentary explains that this provision could refer to UN action which consists of 'suing an appeal to respect humanitarian law, just as well as, for example, setting up enquiries on compliance with the Conventions and the Protocol and even, where appropriate, of coercive actions which may include the use of armed force.'[214] The commentary continues, however, by stressing that the Protocol 'does not authorize any threat or use of force inconsistent with the United Nations Charter'[215], hence reinforcing the separation between *jus in bello* and *jus ad bellum*.

Another IHL provision that makes a link with *jus ad bellum* is Article 1(4) AP I, which states the following:

> The situations [governed by this Protocol] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Remarkably, this provision links the application of IHL rules with the motive behind the armed conflict waged by a people against its government. While such a conflict would normally be classified as a NIAC (since there is no opposition between two or more States), the fact that the fight is carried out against colonial domination, alien occupation or racist regimes, turns the

[214] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva/Norwell: International Committee of the Red Cross/Martinus Nijhoff Publishers, 1987), para. 3597.
[215] *Ibid.*, para. 3598.

conflict into an international one. This article recognizes the right of self-determination of peoples. That right as such does not form part of what we would generally understand as '*jus ad bellum*', but the fact that the political motive of the conflict influences the classification of the conflict is in itself contrary to the rule that IHL applies regardless the origins or causes of the conflict. Article 1(4) AP I is one of the reasons why some States to date refuse to ratify AP I.[216] Nevertheless, the 174 States who have ratified AP I do not seem to consider the link between *jus in bello* and *jus ad bellum* to be problematic.

A more problematic point of interaction included in the law comes from an instrument outside the bulk of IHL treaties: the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Protocol.[217] These two instruments aim to protect UN personnel by rendering attacks on them illegal under international law. While the purpose of these conventions is understandable, it has perverse effects: in an era where UN troops are more and more becoming involved in actual hostilities and becoming party to an armed conflict, *jus in bello* should apply to them in the same way as to the opponent party.[218] Combatants are lawful targets under IHL, if UN troop members are combatants, targeting them should be lawful as well. The 1994 Convention therefore forms a threat to the basic principle of equal application of *jus in bello* to all parties.[219] This threat should not be overestimated. Fortunately, the impact of the 1994 Convention is rather limited, as many States on whose territory a UN peacekeeping operation takes place are not party to it.[220] In addition, the Convention itself contains a provision safeguarding the respect for IHL.[221] Lastly, the corresponding crime included in the Rome Statute[222] only labels targeting of UN peacekeepers who are 'entitled to protection given to

[216] Nigel D. White and Christian Henderson (eds.), *Research handbook on international conflict and security law: jus ad bellum, jus in bello and jus post bellum*, Research Handbooks in International Law (Cheltenham, UK: Edward Elgar, 2013), 298. US President Ronald Reagan noted for example that 'Protocol I is fundamentally and irreconcilably flawed. […] One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict.' See Ronald Reagan, 'Message to the Congress Transmitting a Protocol to the 1949 Geneva Conventions - January 29, 1987', *Public Papers of the Presidents of the United States*, no. Book I (1987): 88–89.

[217] Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363; Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, 8 December 2005, 2689 UNTS 59.

[218] For more detailed criticism, see *inter alia* Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello*, 221–25; Zwanenburg, *Accountability of Peace Support Operations*, 168–71.

[219] Despite the fact that a non-State armed group and a State are or can be very different in nature, the equality of belligerents principle applies to both situations of IAC and NIAC. It is crucial for the purpose of IHL that this equality is respected, including in NIAC situations. For instance, under IHL, a fighter of a non-State armed group is allowed to target military objectives, as much as a member of the armed forces of a State is. See also Tristan Ferraro, 'The applicability and application of international humanitarian law to multinational forces', *International Review of the Red Cross* 95, no. 891–892 (2013): 570–72.

[220] Dieter Fleck, 'The legal status of personnel involved in United Nations peace operations', *International Review of the Red Cross* 95, no. 891–892 (2013): 627.

[221] Article 20(a) of the 1994 Convention reads: 'Nothing in this Convention shall affect: (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.'

[222] See Article 8(2)(b)(iii) and (e)(iii) Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, 2187 UNTS 90.

civilians [under IHL]' as a war crime, leaving open the possibility to target UN personnel whose mission has become party to the armed conflict.

Second, in recent decades a limited number of States and scholars defended a new basis for the use of force under *jus ad bellum*: humanitarian intervention. This basis was used for the Kosovo campaign in 1999 and, more recently, it was the UK's justification to respond against the use of chemical weapons by the Assad regime in Syria.[223] Humanitarian intervention mixes *jus ad bellum* and *jus in bello* in two ways: on the one hand, the violation of IHL (and human rights) norms are used to argue that an intervention is necessary and lawful. *Jus ad bellum* is thus expanded by using *jus in bello* arguments, an interpretation which goes against the letter of the UN Charter (which only foresees two exceptions to the general prohibition on the use of force). In addition, by using *jus in bello* arguments to justify an intervention in another State, the power of the UNSC to authorize such force in accordance with Chapter VII is circumvented. For these reasons, the concept of humanitarian intervention remains contested to date. On the other hand, the Independent International Kosovo Commission, which had to review the NATO intervention of 1999, included in its well-intended policy recommendations that in cases of humanitarian intervention '[t]here must be even stricter adherence to [*jus in bello* rules] than in standard military operations.'[224] Even if such a strict adherence is arguably imposed in order to increase the legitimacy of (highly contested) humanitarian interventions, imposing a higher standard for IHL compliance on one side of the conflict neglects the fundamental principle underlying the distinction between *jus ad bellum* and *jus in bello*: namely that *jus in bello* applies equally to all parties. Equally problematic was the report of the International Commission on Intervention and State Sovereignty, which, in proposing the 'Responsibility to Protect' regime as a successor to the contested humanitarian intervention argument, also stated that '[i]t should go without saying that all the rules of [IHL] should be strictly observed in [R2P] situations. [An] argument can be made that even higher standards [of IHL] should apply.'[225] While applying an 'even higher standard' of IHL rules is not necessarily bad for the victims of armed conflict,[226] imposing such a standard as a general rule in cases of R2P or humanitarian intervention is not in accordance with the separation of *jus in bello* and *jus ad bellum*.

Third, *jus in bello* compliance is often cited as a requirement when assessing the proportionality criterion of self-defence actions under *jus ad bellum*. In order for such actions to be lawful, Article 51 UN Charter imposes three conditions: first, there must be an armed attack, second, the self-defence actions must be reported to the UNSC and third, a State can only act in self-

[223] UK, Chemical weapon use by Syrian regime: UK government legal position, 23 August 2013, https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.
[224] Independent International Commission on Kosovo, *The Kosovo report: conflict, international response, lessons learned* (Oxford/New York: Oxford University Press, 2000), 294.
[225] International Commission on Intervention and State Sovereignty, *The responsibility to protect: report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), 37.
[226] Goodman, 'Controlling the Recourse to War by Modifying Jus in Bello', 62.

defence until the UNSC has taken measures itself. Customary law imposes two additional criteria, namely necessity and proportionality. In the *Nuclear Weapons Advisory Opinion*, the ICJ has determined that '[a] use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.'[227] Often scholars read in this passage that the ICJ imposes IHL compliance as an additional criterion for lawful self-defence actions under *jus ad bellum*.[228] I do not agree with such an interpretation. True, in order for an attack to be lawful, both *jus ad bellum* and (if an armed conflict exists) IHL will have to be complied with.[229] Compliance with the criteria for self-defence does not rule out a violation of IHL. This is, in my view, also what can be read in the ICJ's Opinion. In addition, the separation between *jus in bello* and *jus ad bellum* would not allow for an interpretation which submits compliance with the latter to the compliance with the former.[230]

Lastly, the nowadays very frequent form of asymmetric conflicts, whereby one or multiple States fight armed (terrorist) group(s) has somewhat brought to life again the *bellum justum* argument. Indeed, as many terrorist groups conduct a war without taking into account the law of war, States are willing to ignore IHL obligations *vis-à-vis* these terrorist groups.[231] This argument is very similar to the one that an aggressor State cannot benefit from belligerent rights – subjecting *jus in bello* application to a *jus ad bellum* determination. However, as Bugnion notes, '[i]t is impossible to demand that an adversary respect the laws and customs of war while at the same time declaring that every one of its acts will be treated as a war crime because of the mere fact that the act was carried out in the context of a war of aggression.'[232] Applied by analogy to a conflict which involves terrorist groups, the proposition that a State would not be bound by IHL because its adversary is a terrorist group is dangerous. Indeed, 'the result will be a reciprocal failure to ensure respect for the rules of [IHL].'[233] The impact of terrorism on the long-standing separation between *jus in bello* and *jus ad bellum* may however not be as dramatic as is seems. Indeed, Sassòli argues that '[i]t is not the "war on terror" that demonstrates that the

[227] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports, para. 42.
[228] See *inter alia* Okimoto, 'The Relationship between Jus Ad Bellum and Jus in Bello', 1215.
[229] This is for instance also Moussa's opinion, see Jasmine Moussa, 'Nuclear Weapons and the Separation of Jus ad Bellum and Jus in Bello', in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear weapons under international law* (Cambridge: Cambridge University Press, 2014), 69.
[230] Nevertheless, some States seem to agree with the interpretation that IHL compliance is a condition for lawful self-defence actions. See Nuclear Weapons Advisory Opinion, Public Sitting, Verbatim Record, Oral Statements of the Islamic Republic of Iran (ICJ, 6 November 1995), para. 45: 'The rights to self-defence is limited by the general principles of necessity and proportionality as well as those of international humanitarian law […]'. See also Wall Advisory Opinion, Written Statement of Malaysia (ICJ, 30 January 2004), para. 150: 'Furthermore, it is widely acknowledged that a lawful exercise of the right to self-defence requires observance of the principles and rules of international humanitarian law.' It should be noted however that the vast majority of the other States making statement in those cases did not mention such an interpretation.
[231] As Moussa puts it, '[i]nternational practice indicates that states remain reluctant to extend the so-called 'privileges' of belligerency to non-state actors, adopting instead a 'just war' model to defend their violations of jus in bello.' She subsequently refers to examples of incommunicado detention in Iraq or house demolitions in Israel. See Moussa, 'Can Jus Ad Bellum Override Jus in Bello?', 988.
[232] François Bugnion, 'Guerre juste, guerre d'agression et le droit international humanitaire', *International Review of the Red Cross* 84, no. 847 (2002): 538.
[233] Moussa, 'Can Jus Ad Bellum Override Jus in Bello?', 989.

separation between *ius ad bellum* and *ius in bello* is erroneous. It is rather the equality of the belligerents before IHL, resulting from that separation which constitutes an additional argument that the entire "war on terror" should not be labeled as "war".'[234]

3. Common features

Despite the 'absolute dogma' that *jus in bello* and *jus ad bellum* are two separate bodies of law, they do have a few important common features.

A first and general common feature is that both *jus in bello* and *jus ad bellum* are bodies of international law. As such, from a methodological perspective, it is important to note that they share many features: the rules they provide can be found in treaties and customary law, and occasionally also in principles of general international law. If the wording of a rule is unclear, the interpretative rules enshrined in the Vienna Convention on the Law of Treaties (VCLT) should be followed.[235] State practice can help to clarify a certain rule, or when the practice is consistent and joined by a clear *opinio juris,* a new customary rule can emerge.[236] Many of the codified *jus in bello* rules that apply in situations of international armed conflict have become customary rules which also apply during non-international armed conflicts.[237] In *jus ad bellum*, there is still debate about whether or not a newly emerged customary rule would allow self-defence against an armed attack by non-State actors.[238] In addition, for both bodies of law, case-law of international tribunals can help to interpret the meaning or scope of some rules. For instance regarding *jus in bello,* the ICTY has determined that war crimes can also be committed in NIAC situations.[239] Regarding *jus ad bellum*, the ICJ has said that 'arming and training' rebels constitutes a violation of the prohibition on the use of force.[240]

A direct consequence of the fact that *jus in bello* and *jus ad bellum* are both bodies of international law, is that a hierarchy of norms should be respected when the norms conflict. Two things should be noted here. First, the UN Charter has a special value within the hierarchy of norms. Art. 103 UN Charter explains that '[i]n the event of a conflict between the obligations

[234] Sassòli, 'Ius Ad Bellum and Ius in Bello the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare', 261.
[235] Most of the important *jus in bello* and *jus ad bellum* treaties (the GCs and the UN Charter respectively) predate the entry into force of the VCLT on 27 January 1980. Nevertheless, its provisions on the interpretation of the law of treaties will apply by way of custom, see Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 ICJ Reports, para. 46.
[236] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgment, 1969 ICJ Reports, para. 77.
[237] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*.
[238] See *inter alia* Christian Tams, 'The use of force against terrorists', *European Journal of International Law* 20, no. 2 (2009): 359–97; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010), 419–510.
[239] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY, Appeals Chamber, 2 October 1995), para. 137.
[240] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 228.

[under the Charter] and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'[241] Nevertheless, the UNSC is obliged to 'act in accordance with the Purposes and Principles of the UN' (Article 24 UN Charter), which in practice also includes IHL rules of a humanitarian character.[242] However, on some occasions UNSC Resolutions have allowed States to go beyond what they were entitled to do under *jus in bello*.[243] A second observation relating to the common feature of being both subfields of international law, is that a particular type of norms is considered to stand above all others: the *jus cogens* norms. A *jus cogens* norm is a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' (Article 53 VCLT). Following Article 41 of the ARSIWA, States are under the obligation to 'cooperate and bring to and end' serious breaches of *jus cogens* norms, as well as under the prohibition to 'recognize as lawful a situation created by a serious breach [...], nor render aid or assistance in maintaining that situation.' While the exact scope and meaning of these rules are still unclear, they will nevertheless have to be taken into account throughout this study. Indeed, for example, the prohibition to use force was identified as 'conspicuous example' of a *jus cogens* norm by the ILC.[244] A third observation, in part linked to the previous one, relates to the impossibility to set aside certain *jus ad bellum* or *jus in bello* norms by countermeasures. Article 50 of the ARSIWA stipulates that

> [c]ountermeasures shall not affect:
>
> (*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; […]
>
> (*c*) obligations of a humanitarian character prohibiting reprisals;
>
> (*d*) other obligations under peremptory norms of general international law.

[241] This raises the question whether a UNSC Resolution *authorizing* military action could set aside IHL rules which would normally apply to such action. On this issue in more detail, see Chapter 5, Section 3.1.

[242] Art. 1(3) UN Charter lists among the purposes of the UN: 'To achieve international co-operation in solving international problems of an economic, social, cultural, *or humanitarian character*, and in promoting and encouraging respect for human rights and for fundamental freedoms for all' [emphasis added]. See Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello*, 127.

[243] This problem occurred during the occupation of Iraq, whereby some UNSC Resolutions allowed the Occupying Powers to go beyond restrictions flowing from the law of occupation. See UNSC Res. 1483, UN Doc. S/RES/1483 (22 May 2003) (especially paras 4 and 8) and UNSC Res. 1511, UN Doc. S/RES/1511 (16 October 2003). Further on this, see for instance: Marten Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation', *International Review of the Red Cross* 86, no. 856 (2004): 745–69.

[244] ILC, 'Document A/6309/Rev.l: Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session', *Yearbook of the International Law Commission* 67, no. II (1966): 247. A minority of authors would consider only the prohibition of aggression as a *jus cogens* norm, see for example Steven R. Ratner, 'Jus Ad Bellum and Jus in Bello after September 11', *American Journal of International Law* 96 (2002): 914; James A. Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', *Michigan Journal of International Law* 32, no. 2 (2011): 215–57.

While littera (a) clearly refers to the core *jus ad bellum* rule enshrined in Article 2(4) of the UN Charter[245], both litteras (c) and (d) cover to a certain extent *jus in bello* rules.[246] Both subfields of international law are thus considered of sufficient special value in order to (at least partially) safeguard them from deviations based on countermeasures.

As sub-categories of international law, *jus in bello* and *jus ad bellum* also suffer from the same difficulties as other international law bodies: the law is created by States and therefore inherently connected to the politics of the States. The lack of clarity in certain areas, the lack of advancement of the law, the existence of a 'legal gap': often these difficulties can be explained by (some) States' unawareness of a problem or their unwillingness to develop the law further. Inevitably this leads to a dichotomy between the *lex lata*, the law as it stands, and the *lex ferenda*, the law as it preferably should be (depending, obviously, on who you ask). From a realistic political perspective, some of the theoretical proposals made in this study might therefore *ab initio* be destined to fail. Such an observation should nevertheless not hamper us from creatively approaching the existing law, trying to find solutions while also critically evaluating them.

A final common feature is that both *jus in bello* and *jus ad bellum*, logically, in some way concern armed conflict situations or at least the use of force. Often (but not always) the same set of facts will have to be analysed from a *jus in bello* and *jus ad bellum* perspective. Factual situations, certainly if they have to be assessed in light of various legal thresholds, are difficult to fully grasp and understand. *Jus in bello* and *jus ad bellum* are therefore often faced with factually complex situations, which can also evolve quickly over time (who supports precisely whom, has consent been given or not, who started first,…). Precisely because these two legal frameworks rely on similar factual circumstances as starting point of their analysis, it is useful to challenge the differences in their legal conclusions. Even if different legal outcomes can be justified, it is still useful to question how the interaction between *jus in bello* and *jus ad bellum* can best serve to reach the respective goals of both bodies of law. Those goals are, indeed, very different.

4. Differences

Jus in bello and *jus ad bellum* are two distinct bodies of law, with a number of important differences.[247]

[245] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 132.
[246] *Ibid.*, 132–33.
[247] See for example Ratner, according to which the different reactions towards US action in Afghanistan can be explained through the different characteristics of *jus in bello/jus ad bellum*: Ratner, 'Jus Ad Bellum and Jus in Bello after September 11'.

A first difference is the underlying purpose of the two bodies of law.[248] *Jus ad bellum* aims at ensuring peaceful relations between States. Its starting point is that the use of force between States should be reduced to a minimum, preferably entirely abandoned. *Jus in bello* aims at reducing the suffering of victims of armed conflict. Its starting point is that armed conflicts still exist, despite the clear prohibition to use force.

A second difference is the degree of elaboration of the codified rules. While there is a vast amount of IHL rules, often very detailed, on a wide range of issues (and both in codified and in customary form), the amount of *jus ad bellum* rules is more limited. The most important rules are enshrined in the UN Charter (the prohibition in the use of force in Article 2(4) and the right to self-defence in case of an armed attack in Article 51). In addition, some concepts have been further defined and clarified in UNGA resolutions – such as the Definition of Aggression in UNGA Resolution 3314 and more detailed explanations on the prohibition on the use of force and the non-intervention principle in the Friendly Relations Declaration.[249] Still, according to Ratner, *jus ad bellum* is 'rather underdeveloped'.[250] He further notes that the 'imprecision' of the UN Charter may strengthen *jus ad bellum* because it gives room for – in Osterdahls wording – 'fancier' interpretations[251], in contrast with the precise *jus in bello* rules which in most instances do not leave much discretion.[252]

As third difference we can note the scope of application of both fields of international law.

Ratione materiae, jus ad bellum concerns inter-State violence and does not pronounce itself on the legality of intra-State violence.[253] *Jus in bello*, on the other hand, is broader in scope, as it contains rules applicable in international as well as in non-international armed conflicts (IACs and NIACs, respectively).

Ratione temporis, jus ad bellum and *jus in bello* also differ. A rough translation of the Latin terms might suggest that the former body of law applies until a State has taken the decision to go to war (in respect or in violation of *jus ad bellum*), whereas the former body of law would then start applying during the actual conflict.[254] The reality is more complex. Indeed, *jus ad*

[248] Compare for instance the respective preambles of the UN Charter and of the 1949 Geneva Conventions.
[249] See the first principle of the UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).
[250] Ratner, 'Jus Ad Bellum and Jus in Bello after September 11', 915.
[251] Österdahl, 'Dangerous Liaison', 561.
[252] Ratner, 'Jus Ad Bellum and Jus in Bello after September 11', 915. Obviously, *jus in bello* rules, and especially the conduct of hostilities rules, do leave room for States to assess their obligations based on the facts on the ground, for instance the security situation. This discretion is the result of the balance IHL tries to achieve between humanity on the one hand and military necessity on the other.
[253] This should of course be nuanced if one includes the possibility of the UNSC to act under Chapter VII of the UN Charter in the *jus ad bellum* framework. According to Art. 39 UN Charter, the UNSC can take all necessary measures in case of a threat to peace, a breach of the peace and an act of aggression. While the two latter scenarios will concern situations of IAC, the former might concern a situation of NIAC or even no armed conflict at all. For an excellent overview of various UNSC Resolutions in each of the three scenarios, see Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello*, 129–37.
[254] Greenwood, 'The Relationship between Ius Ad Bellum and Ius in Bello', 221.

bellum does not have a specific trigger point for application[255] – its rules apply at all times to the relationship between States, obviously in time of peace but also when an armed conflict is already ongoing[256] – whereas *jus in bello* rules are subject to various trigger points (as different thresholds exists for IACs and NIACs), excluding IHL application in times of peace or during internal disturbances. There are nevertheless two exceptions to the latter observation. First, some IHL obligations should also be observed during peacetime (such as the obligation to disseminate IHL rules, common Articles 47/48/127/144 GCs, or to enact penal legislation for the punishment of IHL violations, common Articles 49/20/129/146 GCs). In addition, a limited number of IHL provisions, primarily linked to the protection of prisoners of war, continue to apply even after the armed conflict situation has ended.[257]

Ratione personae the two bodies of law impose both obligations on States, while at the same time individuals can be criminally prosecuted for more serious violations (nowadays: aggression in the case of *jus ad bellum*, war crimes in the case of *jus in bello*). Nevertheless, the personal scope of the two is not exactly similar. As Sloane puts it, 'the *ad bellum* operates in principally at the level of polities (often, but not always today, states); the *in bello* operates principally at the level of individuals'.[258]

Lastly, *ratione loci* the two bodies are distinct only to a certain extent. While the geographical scope of *jus ad bellum* rules is difficult to define in general[259], for *jus in bello* rules, the law of IAC applies on the entire territory of the fighting party States[260], whereas the IHL rules applicable in NIAC apply to the entire territory of the State concerned.[261] While this seems straightforward, the geographical scope of IHL rules still remains subject to debate, especially in the context of armed conflicts involving international organizations or involving drone operations.[262]

---

[255] This does not mean there are no thresholds under the UN Charter. On the contrary, many different thresholds are included, such as the use of force (Art. 2(4)), a threat to peace, a breach of the peace, an act of aggression (all included in Art. 39) and an armed attack (Art. 51).

[256] See however Österdahl, who argues that 'the phase in which *jus in bello* applies tends to be much longer than the phase in which the *jus ad bellum* is relevant – solely the initiation of the war.' Österdahl, 'Dangerous Liaison', 560.

[257] See for instance Art. 3(b) AP I and Art. 5 AP II.

[258] Sloane, 'The Cost of Conflation', 53–54.

[259] Indeed, while a threat to peace can be caused by a disease (as was determined during the Ebola crisis, see UNSC Res. 2217, UN Doc. S/RES/2217 (18 September 2014)), which inevitably ignores borders, the requirement of armed attack would *prima facie* require a crossing of borders – even though attacks against external manifestations of a State are arguably also included. See Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 199–213.

[260] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.

[261] *Ibid.*, confirmed in Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T (ICTR, Trial Chamber, 2 September 1998), para. 635.

[262] See, for instance: Vaios Koutroulis, 'International organisations involved in armed conflict: material and geographical scope of application of international humanitarian law', *International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. Proceedings of the 12th Bruges Colloquium, 20-21 October 2011* 42 (2012): 36–40; Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', *Journal of International Criminal Justice* 11, no. 1 (2013): 65–88; Jennifer C. Daskal, 'The geography of the battlefield: a framework for detention and targeting outside the "hot" conflict zone', *University of Pennsylvania Law Review* 161, no. 5 (2013): 1165–1234; Katja Schöberl, 'The Geographical Scope of Application of the Conventions', in Andrew Clapham, Paola Gaeta and

A fourth difference relates to the consequences of violations of *jus in bello* and *jus ad bellum*, in particular with regard to international criminal law. While a crime against peace was already included in the Nuremberg Principles to prosecute the Nazis after WWII, it took over 60 years to find an agreement on the crime of aggression, now included in the Rome Statute.[263] The crime of aggression can only be committed by high-ranked State officials, as it requires an official decision to commit the act.[264] War crimes, on the other hand, can be committed by all ranks, even by civilians.[265] While from a *jus ad bellum* perspective international criminal law only criminalizes aggression, and no other violations of the prohibition to use force, it criminalizes a wide range of war crimes – which nevertheless always have to be either grave breaches or serious violations of IHL. With regard to State responsibility consequences, the regimes of *jus ad bellum* and *jus in bello* are also somewhat different. *Jus ad bellum* foresees lawful ways to respond to breaches, such as the use of force in self-defence against an armed attack in accordance with Article 51 UN Charter. In that sense, *jus ad bellum* can be said to be a combination of both primary and secondary rules. *Jus in bello*, on the other hand, does not foresee a mechanism of lawful reactions to violations by the enemy – with the minor exception of reprisals under very stringent conditions.[266] Common Article 1 GCs does foresee in the general obligation to all States to respect and *ensure respect* for the Conventions, but the exact scope of this obligation is still subject to debate.[267]

Lastly, a fifth difference becomes clear if one looks at the body that supervises the respect for *jus in bello* and *jus ad bellum*. Concerning the latter field, the UN Security Council serves as the guardian of international peace and security, and can intervene with binding decisions if necessary. It can condemn and identify aggressors and authorize the use of force under Chapter VII of the Charter. In theory, therefore, *jus ad bellum* rules have a very strong 'policing body'. In practice, however, the UNSC often remains silent when faced with (possible) violations of the UN Charter, thereby leaving States in uncertainty as to the possible (un)lawfulness of their

Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 67–83; Katja Schöberl, 'Boundaries of the battlefield: the geographical scope of the laws of war', in Steven J. Barela (ed.), *Legitimacy and drones: investigating the legality, morality and efficacy of UCAVs* (Farnham/Burlington: Ashgate, 2015), 71–89. According to Lubell, 'there are arguments supporting the possibility of Common Article 3 applying to extraterritorial operations, based on a textual reading and on a contextual approach that considers the reasoning and objective of the article'. See Lubell, *Extraterritorial Use of Force against Non-State Actors*, 101.

[263] Art. 8bis ICC Statute.

[264] See Art. 8bis ICC Statute, which requires the act be committed 'by a person in a position effectively to exercise control over or to direct the political or military action of a State'.

[265] See Knut Dörmann, *Elements of war crimes under the Rome Statute of the International Criminal Court: sources and commentary* (Cambridge/New York: Cambridge University Press, 2003), 34–37 and 391–93.

[266] The commentary to Rule 145 CIHL on reprisals summarizes the five conditions as follows: (i) the purpose of the reprisal can only be inducing the adversary, who has committed a serious IHL violation, to comply with the law; (ii) the reprisals may only be used as a means of last resort; (iii) they must be proportionate to the violation it aims to stop; (iv) the decision to take reprisals must be taken at the highest level of government and (v) the reprisal must cease as soon as the adversary complies with the law. See ICRC Customary IHL Database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home. Reprisals against civilians are forbidden.

[267] On this provision in more detail, see Chapter 3, Section 2.2 below.

collective response to force.[268] This reluctance to act is due to the political character of the UNSC, which consist of 15 Members, five of which have a veto right as permanent member. For *jus in bello*, the picture is entirely different. While the UNSC also responds to violations of *jus in bello*, rightfully considering them as a potential disturbing factor of international peace and security[269], the Geneva Conventions have given an explicit mandate to the International Committee of the Red Cross to guard the respect for IHL rules. The ICRC is an impartial, independent, neutral and humanitarian body and as such it will not be influenced by political motives to decide whether it takes action or not. In contrast to the UNSC, the ICRC cannot take 'binding decisions' that would have to be followed by States. Instead, its action remains highly dependent on the goodwill of the parties to the conflict. The ICRC also works on a confidential basis, which means that its (legal) analysis of certain conflict situations will often not be shared with the public. Thus, while the effective enforcement of respect for *jus ad bellum* rules depends on the political willingness of a few States (primarily the five permanent members of the UNSC), the respect for *jus in bello* rules can be encouraged by the ICRC but ultimately depends on the willingness of the parties involved in the conflict.

5. The law of neutrality[270]

As a consequence of the separation between *jus ad bellum* and *jus in bello*, a use of force by a State in violation or respect of the UN Charter, or the fact that use of force has been authorized by the UNSC, does not impact the possible applicability of *jus in bello* to the conflict. States cannot hide behind a lawful or unlawful use of force to deny the applicability of *jus in bello* to their own actions towards the enemy. While this consequence is obvious with regard to most of *jus in bello* rules, it should be more nuanced with regard to neutrality law.

Many scholars writing on the *jus in bello*/*jus ad bellum* distinction either do not mention neutrality law[271] or they do mention it, without discussing its position within the dichotomy.[272] Nevertheless, the law of neutrality is traditionally seen as being part of international humanitarian law or *jus in bello*. This inclusion can be observed when examining military

[268] For instance, it is unclear to what extent the law of neutrality is set aside when States act in collective self-defence against an aggressor that has not been identified as such by the UNSC. For a discussion in more detail, see *infra* Chapter 5, Section 3.1.

[269] See for instance the UNSC Resolutions concerning the conflicts in Yugoslavia and Rwanda, respectively: UNSC Res. 827, UN Doc. S/RES/827 (25 May 1993); UNSC Res. 955, UN Doc. S/RES/955 (8 November 1994).

[270] The following paragraphs are partially based on Nele Verlinden, 'The Law of Neutrality', in Jan Wouters, Philip De Man and Nele Verlinden (eds.), *Armed Conflicts and the Law*, International Law Series 17 (Antwerp: Intersentia, 2016), 75–106.

[271] Among the rare authors who do are: Orakhelashvili, 'Overlap and Convergence', 185–93; Moussa, 'Can Jus Ad Bellum Override Jus in Bello?', 968; Greenwood, 'The Relationship between Ius Ad Bellum and Ius in Bello', 230.

[272] See for example Stahn, who explicitly includes neutrality law in his definition of *jus in bello*, without however giving further attention to it: Stahn, '"Jus Ad Bellum", "Jus in Bello"... "Jus Post Bellum?" - Rethinking the Conception of the Law of Armed Force', 250.

manuals of States, in which neutrality law often receives a separate chapter[273] or doctrinal works related to neutrality law.[274] This is of course not surprising, as neutrality law was codified at a conference which also resulted in the codification of (other) humanitarian law rules: the 1907 Hague Peace Conference. Neutrality law moreover reappeared as a subfield of *jus in bello* in both the Geneva Conventions as well as the Additional Protocols, which reaffirm certain neutral rights and obligations.[275]

While the notion of 'neutrality' was already known at the time of Grotius (he referred to the Latin concept of '*jus neutralitatis*'[276]), the law of neutrality was developed as custom in the course of the 18th century[277], and subsequently codified in the second half of the 19th and the beginning of the 20th century.[278] The Second Hague Conference of 1907 concluded two broad treaties covering the law of neutrality: Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in War on Land ('HC V') and Hague Convention XIII respecting the Rights and Duties of Neutral Powers in Naval War ('HC XIII')[279] list rules applicable to neutral powers and belligerent powers in respectively warfare on land and at sea.[280] There has

[273] For recent examples, see for instance the chapter on neutrality law in the following manuals: US, DoD Law of War Manual, chap. XV; Germany, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch –, ZDv15/2, DSK AV230100262, May 2013, chap. 12.

[274] See for instance Okimoto, who writes that '*jus in bello* provides rules dealing with various aspects of the conduct during armed conflict, in particular on how to protect persons outside the combat […], what means and methods of warfare may or may not be used, *and the rights and obligations of neutral states*.' [emphasis added] Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello*, 8. The law of neutrality is dealt with in separate chapters in handbooks on the law of war, such as Michael Bothe, 'The law of neutrality', in Dieter Fleck (ed.), *The handbook of international humanitarian law*, 3rd ed. (Oxford: Oxford University Press, 2013), 549–80; Paul Seger, 'The Law of Neutrality', in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014), 248–70; Elizabeth Chadwick, 'Neutrality revisited', in Liivoja Rain and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (London: Routledge, Taylor & Francis Group, 2016), 455–74. See also the Tallinn Manual 2.0, which deals with neutrality law under part IV on 'the law of cyber armed conflict'.

[275] See for instance Article 4 GC IV and Article 47 AP I.

[276] Hugo Grotius, *Hugonis Grotii ... Epistolae quotquot reperiri potuerunt: in quibus praeter hactenus editas plurimae theologici iuridici philologici historici & politici argumenti occurrunt* (Wolfgang, 1687), 136.

[277] Some authors however position the development of neutrality law much earlier. See for example Stephen C. Neff, *The rights and duties of neutrals: a general history*, Melland Schill Studies in International Law (Manchester/New York: Manchester University Press/Juris Publishing, 2000), 7–26.

[278] Decades before, in 1780 and in 1800, smaller European Powers had concluded, at the initiative of Russia, the First and Second Armed Neutrality. They were leagues of neutral States, which had all unilaterally declared to follow some neutral principles with regard to sea warfare. See Hersch Lauterpacht, *Oppenheim's International law: a treatise. Disputes, war and neutrality*, 7th ed., vol. 2 (London: Longmans, 1952), paras 289–290. The first multilateral legal instrument codifying the law of neutrality – albeit only partially – was the 1856 Paris Declaration Respecting Maritime Law, which abolished privateering and incorporated the rule 'free ship, free goods' into international law (Paris Declaration Respecting Maritime Law, 16 April 1856, 115 CTS 1). Basic concepts of neutrality law – the rights and obligations of neutrals with regard to vessels – were also laid down in the arbitral award rendered on 1872, solving the Alabama dispute between the US and Great-Britain. See US, Alabama claims of the United States of America against Great Britain Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, XXIX Reports of International Arbitral Awards.

[279] Hague Convention (V) Respecting the Rights and Duties of Neutral powers and Persons in Case of War on Land of 18 October 1907; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War of 18 October 1907.

[280] There is no equivalent Hague Convention which establishes the rules of neutrality during aerial warfare. The Declaration concerning the laws of naval war (London Declaration), 26 February 1909, 208 CTS 338; the Hague Rules on Air Warfare, Drafted by a Commission of Jurists, The Hague, December 1922-February 1923,

not been a more recent treaty updating the rules of the law of neutrality. When States negotiated the Geneva Conventions of 1949 ('GCs')[281], which would replace a substantial part of the old Hague law, they did not feel mandated to discuss or interpret the law of neutrality. As a result, the Geneva Conventions of 1949 recognized the existence of neutrality in, for example, Article 5 GC II and Article 4 GC IV, whereas the First Additional Protocol of 1977[282] refers to neutrality in its Articles 2 and 19. While both treaties offer the possibility to belligerents to confer certain tasks to neutral States (or 'Powers'), they – with some minor exceptions[283] – do not change the duties under the law of neutrality as codified in 1907. The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea[284] and the 1998 Helsinki Principles on the Law of Maritime Neutrality[285] of the International Law Association also contain rights and duties for neutral States, but they remain non-binding instruments.

Nevertheless, if one looks at the general overview of *jus in bello* and *jus ad bellum* provided in this Chapter, one may question whether the law of neutrality really (exclusively) forms part of *jus in bello*. An important first observation is that neutrality law predates the dichotomy between *jus in bello* and *jus ad bellum*. This is illustrated by the fact that the Hague Peace Conferences that gave rise to codified neutrality law did not exclusively focus on the development of *jus in bello* rules. Some early traces of the modern *jus ad bellum* can be found in a few treaties concludes at both the 1899 and the 1907 Hague Peace Conferences[286], even though none of these treaties included a general prohibition of the use of force. It is thus not surprising that the position of neutrality law within the contemporary binary setting remains

Parliamentary Papers, Cmd. 2201, Miscellaneaous No. 14 (1924); or – despite to what its name suggests – the Havana Convention on Maritime Neutrality, 20 February 1928, 135 LNTS 187, would have partially filled this lacuna, but all three instruments remained unratified. Nevertheless, an analogy of the rules of HC V to neutrality in air warfare has been argued (see for instance Jean Monnier, 'Développement du droit international humanitaire et droit de la neutralité', *Quatre études du droit international humanitaire: études présentées à la dixième Table Ronde de l'Institut international de droit humanitaire, San Remo, septembre 1984* (Genève: Institut Henry-Dunant, 1985), 9), and in 2009 a non-binding HPCR Manual on International Law applicable to Air and Missile Warfare was developed, which includes a part on neutrality in its Section X (Program on Humanitarian Policy and Conflict Research Harvard University, *HPCR manual on international law applicable to air and missile warfare* (Cambridge, Massachusetts: Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), 2009).)

[281] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

[282] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977, 1125 UNTS 3.

[283] See for instance on the insertion of Article 4 GC I, ICRC (ed.), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: Cambridge University Press, 2016), paras 914–915.

[284] Louise Doswald-Beck and International Institute of Humanitarian Law (eds.), *San Remo manual on international law applicable to armed conflicts at sea* (Cambridge: Cambridge University Press, 1995).

[285] ILA, Committee on Maritime Neutrality, 'Helsinki Principles on the Law of Maritime Neutrality', *International Law Association Reports of Conferences* 68 (1998): 496-521.

[286] See Hague Convention (I) for the Pacific Settlement of International Disputes, 29 July 1899, 91 BFSP 970; Hague Convention (I) for the Pacific Settlement of International Disputes, 18 October 1907, 100 BFSP 298; Hague Convention (II) Respecting the Limitation of the Employment of Force for Recovery of Contract Debts, 18 October 1907, 205 CTS 250; Hague Convention (III) relative to the Opening of Hostilities, 18 october 1907, 205 CTS 263.

ambiguous. In addition, the purpose of neutral rules and obligations is only partially the reduction of suffering of victims of armed conflict.[287] Another objective of neutrality law is to precisely avoid the involvement of third States in that conflict – and thereby prevent additional potential suffering of victims.[288] The goal of neutrality law is therefore at least as much connected to the underlying idea of *jus ad bellum*, which is ensuring international peace and security, as to the spirit of *jus in bello*. Third, when looking at the material scope of neutrality law, we can observe that it only applies to situations of international armed conflict.[289] Leaving aside for a moment the precise threshold and the question whether neutrality law applies to all IACs or only to some[290], it undeniably does not apply to NIAC situations. Similarly, the prohibition on the use of force as enshrined in *jus ad bellum* also does not concern force within a single State. Even the principle of non-intervention, which protects States from the interference in their domestic affairs by third States, including in time of civil war, in essence regulates the relationship between at least two States. Therefore, the modus of operation, namely between States, is a feature that neutrality law shares with the *jus ad bellum* (as opposed to purely IHL rules, which can also operate between a State and an armed group, or between armed groups).

There are four possible ways to position neutrality law in the *jus in bello*/*jus ad bellum* dichotomy. Either one takes the view that neutrality law forms part of *jus in bello*, as often assumed in writings on IHL or neutrality law in general. However, this option sets aside the close resemblance with *jus ad bellum*, especially of those neutrality rules affecting a neutral State's possibility to provide support. The counterpart of this option, considering the law of neutrality as exclusively part of *jus ad bellum*, is not a realistic alternative, as it would flagrantly deny the simple fact that many of the neutrality rules are included in *jus in bello* treaties. However, a second possibility that takes the characteristics of neutrality more into account would be to make a distinction between '*jus in bello sensu lato*'[291], including the law of

[287] See also Greenwood, who notes that 'international humanitarian law thus includes most of what used to be known as the laws of war, although strictly speaking some parts of those laws, such as the law of neutrality, are not included since their primary purpose is not humanitarian.' Christopher Greenwood, 'Historical Development and Legal Basis', in Dieter Fleck (ed.), *The handbook of international humanitarian law*, 2nd ed. (New York: Oxford University Press, 2008), 11.

[288] In this regard, see the 2016 ICRC Commentary to GC I, which notes that 'international law applicable to international armed conflicts […] is composed of both international humanitarian law and the law of neutrality. These are separate yet complementary legal frameworks, in that the law of neutrality, at least in part, has the same object and purpose as international humanitarian law of mitigating and containing the adverse effects of an international armed conflict.' ICRC, *Commentary on the First Geneva Convention*, para. 908.

[289] Or to conflicts whereby a non-State actor is recognized as a 'belligerent', turning the conflict into an international armed conflict. See Chapter 5, Section 1, in particular footnotes 1173-1175.

[290] See Chapter 5, Section 1.

[291] It is, I believe, in this sense that the term *jus in bello* is used by Carron, who writes the following:

> Quant à l'expression « *ius in bello* », nous l'utiliserons de deux manières: premièrement pour se référer au pendant du *ius ad bellum*, deuxièmement pour traiter du corps de normes qui s'applique en temps de conflit armé et qui comprend également des règles ne s'attachant pas directement à régir les hostilités et à protéger certaines catégories de personnes lors de ces violences. Dans cette seconde optique, le *ius in bello* couvre donc l'ensemble des dispositions entrant en jeu en temps de CAI, comme le DCA mais aussi le droit de la neutralité et d'autres règles encore. [footnotes omitted]

Djemila Carron, 'L'acte déclencheur d'un conflit armé international' (Université de Genève, 2015), 10.

neutrality, and '*jus in bello sensu stricto*', encompassing IHL rules without neutrality law. The former notion would then merely refer to all the rules that apply during armed conflict, whereas the latter notion would refer to rules of humanitarian character that apply during armed conflict. This option has the advantage that some of the consequences that are attached to humanitarian rules (such as the impossibility to rely on self-defence as a circumstance precluding wrongfulness) would not impact neutrality law. However, given the intrinsic humanitarian character of at least some neutrality rules, this option is rather artificial. A third possibility would be to consider neutrality law as a legal category separate from both *jus in bello* and *jus ad bellum*. Such a *sui generis* category, which perhaps for semantic consistency could be labelled '*jus neutralitatis*', would have the advantage that it is not faced with the theoretically important separation between *jus in bello* and *jus ad bellum.* Additionally, the special value sometimes given under international law to *jus in bello* rules would not be applicable to it.[292] A last possibility is a combination of the first and the third option: some rules of the law of neutrality would be considered fully as *jus in bello* rules, whereas other rules may have a *jus ad bellum* or a *sui generis* character.[293] This option will be referred to as the 'hybrid' option and will be defended as the best suited approach in order to assess the value of neutrality law within the existing framework of the contemporary dichotomy between *jus in bello* and *jus ad bellum*.

[292] For instance, the commentary to Article 21 ARSIWA – dealing with self-defence as a circumstance precluding wrongfulness – excludes IHL (*jus in bello*) from its scope of application. See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 74.

[293] This is an option that seems to be (at least partially) suggested by the 2016 ICRC Commentary to GC I, which notes that

> [Article 4 GC I] is] a provision dealing solely with obligations of a humanitarian nature. Thus, the scope of application of Article 4 includes, but is not limited to, States considering themselves permanently neutral, States proclaiming themselves non-belligerent, and States serving as Protecting Powers within the framework of Article 8. The same holds true if the UN Security Council has taken binding preventive or enforcement measures, such as sanctions or the authorization of the use of force, against a particular State under Chapter VII of the UN Charter. The exercise of these measures may lead to, or occur in the context of, a situation which qualifies as an international armed conflict. *Irrespective of whether the law of neutrality needs to be complied with in these circumstances, Article 4 binds all States which are not Parties to that international armed conflict*. [emphasis added]

ICRC, *Commentary on the First Geneva Convention*, para. 918. The Commentary thus seems to admit that at least part of neutrality law applies under all circumstances, even if the UNSC has taken binding enforcement measures such as sanctions. Further on this point, see Chapter 5, Section 3.1.

Chapter 3. Supportive acts under *jus in bello*

1. Problem statement

Jus in bello or international humanitarian law ('IHL'), in Anglophone literature and practice often referred to as 'the law of armed conflict', governs the acts of parties to armed conflict in order to protect victims of such conflict. In doing so, *jus in bello* recognizes the military necessity that arises whenever a State or another entity is involved in a conflict, but it limits the freedom of fighting parties so as to ensure protection for those not or no longer involved in the fighting. IHL applies whenever an armed conflict exists. Inevitably, an armed conflict can only exist if there are two or more *parties* to a conflict. Often nowadays, the parties to an armed conflict do not act alone. The global context, shared interests and partnerships frequently lead to forms of cooperation between States, between a State and a particular (armed) group or even between armed groups. This support can take a wide range of different forms. Not all kinds of support will have as a consequences that the support-provider becomes party to the ongoing armed conflict. For instance, Greenwood noted in 1995:

> Support for a third party's acts of war shall generally be rated as an act of war of the supporting state if it is directly related, i.e. closely related in space and time, to measures harmful to the adversary. Co-operation in arms production or other activities to support the armed forces will not suffice. A State not originally party to an armed conflict will only commit an act of war, and thus risk making itself a party to the conflict, by giving direct support to the military operations of one of the belligerents. Financial, political, and intelligence support will not have such an effect.[294]

Whether this statement is still correct, will be explored in this Chapter. It focuses on supportive acts provided by a State to an entity (a State or an armed group) that is party to an existing armed conflict (international or non-international). The underlying research hypothesis is that *a State can become party to an armed conflict by doing less than providing kinetic assistance to parties to an armed conflict.* This Chapter investigates whether such support could lead to the conclusion that the supporting State also becomes party to the conflict. More specifically, this Chapter aims at answering the following research questions:

a) When does a State supporting a party to an armed conflict become party to that conflict itself?
b) What are the consequences of becoming a party to an armed conflict?

These questions will be answered in reverse order, as the answer to the latter justifies the search for an answer to the former. Thus, the following Section answers sub-question b by providing an overview of the consequences of being a party to an armed conflict (Section 2).

[294] Christopher Greenwood, 'Scope of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), 50.

Subsequently, Section 3 identifies the conditions that are used to assess the existence of an armed conflict in the first place. The Chapter then continues by exploring whether any alternative thresholds could be applied in order to assess whether and when a supporting State becomes party to the pre-existing armed conflict (Section 4), before concluding (Section 5).

2. The (relative) importance of becoming party to an existing armed conflict

The concept of 'party/parties to the conflict' appears 188 times in the Geneva Conventions, 133 times in the First Additional Protocol and once in the Third Additional Protocol[295], resulting in 322 references in total.[296] Despite being nowhere defined in the law, the concept has important international legal consequences attached to it, ranging from the applicability of International Humanitarian Law to potential effect on treaties, trade and contracts.[297] Under domestic law, a status of 'party to armed conflict' may affect the decision to grant export licenses for military material, or it may impact the procedure that needs to be followed in order to obtain democratic approval for military missions abroad.[298] The following Section focuses on the IHL consequences of becoming a party to an armed conflict, supplemented with the (closely related) criminal law consequences of such a status. Nevertheless, in light of both IHL and International Criminal Law, the importance of the notion 'party' should not be overestimated.

---

[295] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III), 8 December 2005, 2404 UNTS 261.

[296] More specifically, 'party to the conflict' or 'parties to the conflict' appears 43 times in GC I, 50 times in GC II, 41 times in GC III, 54 times in GC IV, 133 times in AP I and once in AP III. The concept of 'parties to the conflict' was initially also contained in the ICRC draft for AP II (see Switzerland, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva 1974-1977), Vol. I (Federal Political Department, 1978), 33ff.). However, in the last phase of the Diplomatic Conference leading to the Protocols, the concept 'parties to the conflict' was completely deleted from Protocol II, as it made 'appear that the two sides were on the same level or had equal rights'. See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff Publishers, 1982), 606.

[297] For a short but clear overview dealing with the broader legal consequences of the historical status of war and of the contemporary concept of armed conflict, see Marina Macini, 'The Effects of a State of War or Armed Conflict', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 988–1013. See also the remark by the International Law Association:

> The accurate identification of a situation of armed conflict has significant and wide-ranging implications for the discipline of international law. Armed conflict may have an impact on treaty obligations; on U.N. operations: on asylum rights and duties, on arms control obligations, and on the law of neutrality, amongst others. Perhaps most importantly states may only claim belligerent rights during and armed conflict. To claim such rights outside situations of armed conflict risks violating fundamental human rights that prevail in non-armed conflict situations, i.e., in situations of peace.

See ILA, Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law', *International Law Association Reports of Conferences* 74 (2010): 713.

[298] See also *infra* note 658.

2.1. IHL applies to parties to armed conflict

A first, general consequence of being a party to an armed conflict, is that international humanitarian law becomes applicable to the party. This is the most crucial consequence of becoming a party to an armed conflict, especially since the paradigm for the State's operations against its adversary shifts from human rights law to humanitarian law (alongside human rights law).[299] Both the ICRC and the UN Security Council regularly call upon 'all parties to the conflict' to respect IHL.[300] In order to trigger IHL applicability, it is not sufficient to merely operate within the context of an armed conflict. At the macro-level of States, IHL applicability is triggered by becoming party to an armed conflict, whereas at the micro-level of individuals, IHL may apply as soon as an act with a nexus to the armed conflict is committed.[301] In this regard, the EU has for example declared that '[r]espect for International Humanitarian Law is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict *to which the forces are party*'[302] [emphasis added]. Many peacekeeping missions are operating in the context of an armed conflict without being involved therein, hence they are not parties to the conflict. This of course raises the important question whether any use of force by peacekeepers makes the mission or the contributing States party to the conflict. While sporadic force in self-defence arguably does not change the status of a peacekeeping mission, recurrent force (even in self-defence) and certainly offensive force would make such a mission party to the conflict.[303]

It should be stressed that IHL foresees rights for and imposes obligations on parties to the conflict in provisions that are not necessarily linked to hostile operations. Besides the wide variety of obligations applicable to detention or situations of occupation[304], there is also a range of rights or obligations which are triggered for all parties to the conflict in general, regardless the action they undertake. Precisely these rules could be relevant for those parties to the conflict

[299] While IHL also becomes applicable to armed groups who become a party to the conflict, only a minority of scholars considers that armed groups are bound by human rights law. In this regard, see Andrew Clapham, *Human rights obligations of non-state actors* (Oxford: Oxford University Press, 2006).
[300] See for example: ICRC, 'South Sudan: Attacks against civilians must end, News Release', 22 December 2013, https://www.icrc.org/eng/resources/documents/news-release/2013/12-22-south-sudan-attacks-against-civilans.htm; ICRC, 'Syria: ICRC urges full respect for international humanitarian law, News Release', 8 April 2012, https://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-07-31.htm; UNSC Res. 2227, UN Doc. S/RES/2227 (29 June 2015), 3-4/11; UNSC Res. 2139, UN Doc. S/RES/2139 (22 February 2014).
[301] The question which criteria define whether other not an individual act has a nexus with the armed conflict is subject to debate. See for instance Antonio Cassese, 'The Nexus Requirement for War Crimes', *Journal of International Criminal Justice* 10, no. 5 (2012): 1395–1417.
[302] Ministerio de Defensa Spain, Salamanca Presidency Declaration, International Humanitarian Law European Seminar, Salamanca, 22-24 April 2002, DIH/Rev.01.Corr1, 2002, 3 (on file with the author).
[303] On this topic, see Ola Engdahl, 'The Status of Peace Operation Personnel Under International Humanitarian Law', *Yearbook of International Humanitarian Law* 11 (2008): 109–138. An additional question is whether the UN or the contributing State, or both, become party to the conflict: 'Once multinational forces have become involved in an international armed conflict, it is important to identify who among the participants in a multinational operation should be considered a Party to the conflict. Depending on the circumstances, the Party or Parties to the conflict may be the troop-contributing countries, the international organization under whose command and control the multinational forces operate, or both.' ICRC, *Commentary on the First Geneva Convention*, para. 248.
[304] See GC III (prisoners of war) and GC IV (civilians).

that do not themselves carry out kinetic operations or that do not come in direct contact with civilians through detention or occupation. Some of those provisions are common to the four Geneva Conventions, such as the possibility of each party to request an enquiry concerning an alleged violation of the Conventions (Article 52 GC I, Article 53 GC II, Article 132 GC III and Article 149 GC IV). Articles 9/9/9/10 GCs require the consent of parties to the conflict for humanitarian activities by the ICRC or other impartial humanitarian organizations. Logically, for the ICRC, but also for other humanitarian organizations, it is important and useful to identify which States (and other entities) are party to a particular armed conflict. It is therefore not surprising that the ICRC proposed the so-called 'support-based approach' as a new way to assess whether supporting States can be considered party to an ongoing non-international armed conflict, as will be discussed in more detail below.[305]

Other rules are more specific, such as the rule according to which parties to an IAC have to ensure correspondence between family members (Article 25 GC IV) and to facilitate the re-establishment of family links (Article 26 GC IV).[306] Equally applicable to all parties to the conflict is the obligation to establish, upon the outbreak of a conflict, an Information Bureau that receives and transmits information on possible protected persons in the power of the party (Article 136 GC IV). These provisions are a useful legal basis for humanitarian organizations, such as the ICRC, to refer to in their dialogue with the parties to an armed conflict. A last example that deserves to be mentioned is the obligation for all parties to take precautions against the effects of attacks (Article 58 AP I). This obligation applies regardless whether the party carries out attacks itself.

A second important consequence of being a 'party to the conflict' relates to the personal protection of the individuals operating on behalf of that party during the conduct of hostilities. IHL allows the targeting of combatants. Combatant status is well-defined in Article 4 GC III and Article 43 AP I and one of the conditions is that the individual 'belongs to a party to the conflict'. While in most instances the individual will be perfectly aware of the fact that he or she would be a lawful target under IHL, this might not always be the case. Consider, for instance, the planned EU military mission to neighbouring countries of Libya during the Libyan conflict of 2011.[307] Some EU Members States were at that time also involved in the NATO operation against Gaddafi, an armed conflict to which they were party.[308] If those EU Member States would have sent armed forces to neighbouring States of Libya, albeit in the framework of a separate military operation, they could potentially have been targeted by Gaddafi troops.

[305] See *infra* Chapter 3, Section 4.2.2.
[306] Under AP I, however, this obligation no longer only concerns parties to the conflict, but all 'High Contracting Parties and parties to the conflict' (Art. 74 AP I).
[307] EU, Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya), Preamble, 4 January 2011, para. 6: 'Close coordination and consultation is taking place with the Governments of Egypt and Tunisia in order to ensure their authorisation for a possible Union military presence in their respective countries.'
[308] Marko Milanović, 'How to Qualify the Armed Conflict in Libya?', *EJIL: Talk!*, 1 September 2011, https://www.ejiltalk.org/how-to-qualify-the-armed-conflict-in-libya/. See also note 556.

In other words, '[o]nce you are clearly part of [a] military component, there is a reasonable and reliable presumption that in the future you will be involved in combat operations. On this basis you are a legitimate target and your status as a legitimate target clearly applies […] irrespective of the function you perform.'[309] Consequently, if troops of a party to an armed conflict form legitimate targets, then attacking those troops can, in normal circumstances, not be a war crime.[310] However logic this consequence may seem, for the United Nations it has long time been (and probably still is) highly problematic. Indeed, attacking peacekeeping troops is prohibited under international law.[311] Historically such a prohibition is correct, as peacekeepers were not or never intended to become active parties in an ongoing armed conflict. Gradually, however, UN peacekeeping missions have received more robust mandates, allowing them not only to use force in self-defence but also to defend their mandate, practically drawing them into the ongoing conflict as one of the parties.[312] Such an evolution, which is evident from for instance the MONUSCO mission in the Democratic Republic of Congo[313], questions the long-standing idea that peacekeepers cannot be attacked.[314] Indeed, international humanitarian law allows parties to an armed conflict to attack each other's military targets, even if they consist of peacekeepers. While the UNSC used to condemn such attacks as 'war crimes'[315], recent practice by the UN Secretary-General responding to yet another attack on MONUSCO troops may suggest a shift: the war crime language was abandoned.[316] This would bring the UN's point of view more in line with the logic of IHL.[317] In any case, as the few examples provided here

[309] See remarks by Ferraro in ASIL, 'Peace Forces at War: Implications under International Humanitarian Law', *American Society of International Law Proceedings* 108 (2014): 161.

[310] Except, for instance, if for the attack unlawful weapons such as chemical weapons would be used.

[311] See Article 7(1) of the UN Convention on the Safety of UN and Associated Personnel (1994): 'United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.'

[312] In this regard, referring to the UN Capstone doctrine, Engdahl notes for instance that 'the classic divide between 'peacekeeping' and 'peace enforcement' has become blurred.' See Eric David and Ola Engdahl, 'How does the involvement of a multinational peacekeeping force affect the classification of a situation?', *International Review of the Red Cross*, no. 891 (2013): 668.

[313] Marie O'Reilly, 'In Congo, UN Peacekeepers Are Becoming Party to the Conflict: Interview with Arthur Boutellis', *IPI Global Observatory*, 29 August 2013, https://theglobalobservatory.org/2013/08/interview-with-arthur-boutellis/.

[314] See e.g. Tomas Macura, 'Accountability and Protection of UN Peacekeepers in Light of MONUSCO', *Die Friedens-Warte* 88, no. 3/4 (2013): 143–56.

[315] See for instance the passage of the UNSC Press Release referring to the November 2018 attacks:

> The members of the Security Council strongly condemned the killing of six Malawian and one Tanzanian peacekeepers of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), as well as at least 12 members of the Forces Armées de la République Démocratique du Congo (FARDC) in Beni territory, North Kivu, while carrying out joint operations against the Allied Democratic Forces (ADF). […] The members of the Security Council underlined that deliberate attacks targeting peacekeepers may constitute war crimes under international law.

UNSC, Security Council Press Statement on Attack against Multidimensional Integrated Stabilization Mission in Central African Republic, Press Release, UN Doc. SC/13588-PKO/759, 18 November 2018.

[316] UN Secretary-General, Secretary-General Condemns Killing of Peacekeepers in Democratic Republic Of Congo, Tells Armed Groups to Stop Hostilities, Disarm Immediately, Press Release, UN Doc. SG/SM/19345-PKO/756, 15 November 2018.

[317] On this, see also Mona Ali Khalil, 'When Is an Attack on UN Peacekeepers a War Crime and When Is It Not?', *PassBlue*, 30 November 2018, https://www.passblue.com/2018/11/30/when-is-an-attack-on-un-peacekeepers-a-war-crime-and-when-is-it-not/.

illustrate, being a party to an armed conflict may change the willingness of States to participate in (international) military operations, since their armed forces can be at risk of attacks.[318]

A third consequence is the geographical scope of applicability of international humanitarian law. While still being a highly disputed matter of IHL application[319], in short, IHL is considered to apply in the whole territory of the State in which a NIAC takes place or on the whole territory of the parties of an IAC. [320] In practical terms, this means for example that any military objective located on the territory of a party to the IAC may be lawfully attacked under *jus in bello*.[321] Therefore, if a State supporting a party to an armed conflict becomes party to that conflict itself, it potentially opens its entire territory to the risks of hostilities. Yet, this potential danger should – in theory – not be over-estimated. Indeed, *jus in bello* is not an accepted legal basis for the use of force under international law. Parties to an armed conflict would, even though they could under *jus in bello* attack military targets of a supporting State, still need a legal basis under *jus ad bellum* for their actions – at least insofar as the attack involves the use of force by one State against or on the territory of another State without the latter's consent. In other words, while under IHL it is *authorized* (or, as Sassòli puts it, 'a strong permission' exists)[322] to target combatants or military objectives[323], IHL does not provide a State the *right* to do so: that legal

[318] This equally goes for the UN when deciding on sending peacekeeping missions to a certain context: 'As peacekeeping operations are often tasked with multi-dimensional mandates involving a range of responsibilities, the loss of protected status may conceivably compromise their ability to undertake their mandates. In light of these considerations, it is submitted that when mandating UN operations with enforcement tasks, the UN Security Council may wish to consider the full implications of its peacekeeping operations becoming subject to the application of IHL.' See Katarina Grenfell, 'Perspective on the applicability and application of international humanitarian law: the UN context', *International Review of the Red Cross*, no. 891 (2013): 651–52.

[319] See also note 262.

[320] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70. See however for much more nuance: Schöberl, 'The Geographical Scope of Application of the Conventions'.

[321] This does exclude not the possible conclusion that an attack would be unlawful under *jus ad bellum* because it did not respect the principle of proportionality that would arguably restrict the geographical scope of actions in self-defence. In this regard, see Christopher Greenwood, 'Self-defence and the conduct of international armed conflict', in Yoram Dinstein and Mala Tabory (eds.), *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff Publishers, 1989), 278.

[322] Sassòli holds that 'IHL does not confer States the right to adopt certain conduct. […] IHL, however, contains some strong permissions that – without prejudice to *jus ad bellum* – explicitly or implicitly permit in cases of armed conflict certain conduct that is normally prohibited.' See Marco Sassòli, *International humanitarian law: rules, controversies, and solutions to problems arising in warfare*, Principles of International Law (Cheltenham, UK/Northampton, MA: Edward Elgar Publishing, 2019), 486.

[323] Recently, there has been an interesting debate among scholars as to whether IHL entitles soldiers to kill enemies. Pearlstein holds that 'under the law of armed conflict (LOAC), a state party can use force anytime against any member of an opposing force. In armed conflict, and in no other circumstance, killing is lawful as a first resort.' (Deborah Pearlstein, 'The NIAC Threshold', *Opino Juris*, 10 April 2016, http://opiniojuris.org/2016/10/04/the-niac-threshold/). Kels agrees with this point of view, as he writes that 'IHL provides the legal framework for status-based targeting in armed conflict, not necessarily because it grants the power to kill, but because it removes the presumption that killing is unlawful in virtually all bases besides self-defense.' (Charles Kels, 'Contextualizing the Debate on First Strikes', *Opinio Juris*, 12 February 2016, http://opiniojuris.org/2016/12/02/32907/). On the other hand, Haque defends the position that IHL does not authorize, hence it does not provide for an authorization to kill. See Adil Ahmad Haque, 'Triggers and Thresholds of Non-International Armed Conflict', *Just Security*, 29 September 2016, https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/; Adil Ahmad Haque, 'Human Rights in Armed Conflict, Part II', *Just Security*, 23 November 2016, https://www.justsecurity.org/34815/human-rights-armed-conflict-part-ii/. I believe that Haque's argument relies too heavily on a broad interpretation of the ICRC Commentary to Article 57(5) AP I. That provision confirms that the provision on precautions in attack may not 'be construed as authorizing any attacks against the civilian

basis has to be derived from a different field of law, namely *jus ad bellum* when it concerns an international armed conflict, and a combination of domestic law and *jus ad bellum* when it concerns a non-international armed conflict.[324] That being said, in reality we can observe that States often get involved in conflicts in ways that are not in accordance with the *jus ad bellum* restrictions. In those cases, the military targets located on the territory of parties to the conflict will be lawful targets under IHL. While the geographical distance between the original battlefield and the territory of some State parties to the armed conflict will considerably reduce the risk of an attack in practice, there is nevertheless a real possibility that becoming party to an armed conflict exposes the military targets on your territory to attacks by the enemy force.[325]

A fifth consequence of becoming party to an armed conflict concerns the position under international law of third States *vis-à-vis* parties to the conflict. In situations of international armed conflict, the position of third States is regulated by the law of neutrality, which imposes obligations and restrictions on both the parties to the conflict and on third States in their behavior with parties to the conflict. For instance, Article 1 of Hague Convention V imposes that the territory of neutral States shall not be violated, whereas Article 6 of Hague Convention XIII prohibits neutral States from supplying the parties with war material.[326] In situations of non-international armed conflict, the law of neutrality does not apply, but the principle of non-intervention refrains somewhat the possibilities of third States to assist parties to the NIAC. Indeed, according to this customary rule of international law[327], third States are prohibited from intervening in the internal affairs (including in the case of a non-international armed conflict) of a State. Whether or not this principle equally prevents an intervention in favour of either side of the NIAC, is subject to debate.[328]

2.2. State Responsibility for IHL violations: is being a party required?

As IHL is a body of international law, IHL violations are internationally wrongful acts for which States can incur responsibility under the general rules of State responsibility.[329] Obviously, States are most likely to commit IHL violations when their organs (the State armed forces) are

population, civilians and civilian objects'. The Commentary notes that '[t]he law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things.' See Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 2238. This statement is to be read in solely in the context of Article 57(5) AP I, and cannot be generalized towards the entire framework for attacks under IHL.

[324] Especially in case of a NIAC involving external parties, the *jus ad bellum* still plays a role: the host State will have to consent with an intervention by a third State for that intervention to be lawful.

[325] In addition, if the enemy force does already not feel restricted by the *jus ad bellum* rules, there is also a chance that it will violate *jus in bello* rules, thus attacking not only the military targets but also civilian targets. On this possible 'trigger happy' effect, see *infra* Section 4.2.2, sub-Section C.1.

[326] The law of neutrality will be dealt with in detail in Chapter 5.

[327] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 202. See also Bothe, 'The Law of Neutrality', 557.

[328] The principle of non-intervention will be dealt with in more detail in Chapter 4, Section 3.3.

[329] As discussed *supra*, see Chapter 1.

involved in hostilities, or when they have to deal with persons in detention. In other words, State responsibility for IHL violations will most often occur when the wrongdoing State is a party to the ongoing armed conflict. But does this mean that being a party to an armed conflict is a *prerequisite* for incurring State responsibility for providing support to an IHL violation? The short answer is no, as will be explained below. The opposite question, namely whether responsibility for IHL violations means that a State becomes party to an armed conflict, is more difficult to answer and will be dealt with in the next Section.

States can incur responsibility for IHL violations in a number of ways. First and obviously, a State is responsible for any IHL violation committed by one of its organs during an ongoing armed conflict. Second, States are responsible not only for the acts of their own State organs, but also if a wrongful act can be attributed to them.[330] Such attribution can be established on the basis of a combination of supportive acts, leading to effective control over the violations in question (or, in the words of the ARSIWA, to 'instructions, direction or control').[331] Third, a State can be held responsible for aiding and assisting another State in the commission of an internationally wrongful act. This complicity rule is enshrined in Article 16 ARSIWA and requires that the supporting State does not only know that the receiving State will commit an IHL violation, but arguably also that it intends to assist in that violation.[332] In addition, *jus in bello* foresees in a special obligation for States in Common Article 1 to the Geneva Conventions[333], which reads:

> The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Similar rules can be found in Article 1(1) AP I and Article 1(1) AP III, as well as in Rule 144 of the Customary Law Study.[334]

By asking States to 'respect' the Convention, Common Article 1 ('CA 1') obviously confirms the general rule of *pacta sunt servanda,* requiring States to apply the treaties to which they are parties in good faith.[335] Far more interesting for the purposes of this study is the additional layer of obligations[336] added by the phrase 'to ensure respect'. Despite being widely accepted by State

---

[330] For a discussion of the general attribution rules under the law of State responsibility, see *supra* Chapter 1 Section 1.

[331] For a discussion on whether such attribution threshold is also to be used for establishing whether the supportive State becomes party to the ongoing NIAC, changing the classification of that conflict, see below Section 4.1.1.

[332] For a short discussion of the subjective element of Article 16 ARSIWA, see *supra* Chapter 1 Section 2.2.

[333] According to Aust, 'for those cases in which assistance to violations of international humanitarian law is at stake, it is very possible to construe article 16 ARS as the *lex generalis* and Common Article 1 as *lex specialis'*. Aust, *Complicity and the Law of State Responsibility*, 388–89.

[334] The formulation of Rule 144 CIHL is different from the one used in Article 1 GCs. It reads: 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.' The commentary explains that this customary rule applies to both IACs and NIACs.

[335] See Article 26 VCLT.

[336] The ICJ explicitly stated that the wording 'to undertake' is to be understood as 'to accept an obligation. […] It is not merely hortatory or purposive.' See Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports,

practice and doctrine, the exact meaning of this phrase remains contested. States clearly have to ensure respect for the Conventions both in peacetime and in time of conflict, and in the latter situation regardless whether they are involved in the conflict or not.[337] While it is fairly undisputed[338] that the phrase obliges State to ensure that IHL is respected by their own forces and population[339], the crucial question in this study is whether States that support parties to an armed conflict violate their obligation to 'ensure respect' in case the party they support commits violations of IHL. In other words, it is not entirely clear to what extent CA 1 requires States to ensure that others respect IHL. This brings us immediately to the so-called 'external compliance dimension' of CA 1.

The drafting history of CA 1 does not provide for an outspoken acceptance of the external compliance dimension of CA 1. While the ICRC consistently made clear that this provision meant that States 'should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied'[340], Norway and the United States indicated that they saw CA 1 only as an obligation to ensure respect for the law by their own respective populations.[341] In similar vein, in Canada, the Canadian Federal Court decided in 2017 that 'common Article 1 of the Conventions does not impose on the State Parties in the taking of any specific measure in response to a violation of international humanitarian law by another state'.[342] Nevertheless, despite some limited State practice to the contrary, a dynamic interpretation of this provision allows the conclusion today that CA 1 does indeed impose a duty on States not only to ensure respect for the Convention by its own population, but also by

---

162. It is widely recognized that Article 1 contains a legal obligation, as opposed to merely a moral one. The latter view is only defended by a small minority, see e.g. Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', *European Journal Of International Law* 21, no. 1 (2010): 125–171.

[337] This is one of the meanings of the phrase 'in all circumstances'. Two other important meanings are that CA 1 applies also in case of a non-international armed conflict and that the responsibility for IHL violations does not depend on the (il)legality of an act under *jus ad bellum* (see Chapter 2 on this point). See however the recent *Turp* case before the Canadian Federal Court, dealing with the export of light armoured vehicles to Saudi Arabia, to be used in the conflict in Yemen. The Court held that '[a]s Canada is not involved in the conflict in Yemen and it is a non-international armed conflict, […] Article 1 does not apply.' Daniel Turp v. the Minister of Foreign Affairs, No. T-462-16 (Canada, Federal Court, 24 January 2017), para. 73. In my view, the Court misinterpreted the wording by Maya Brehm, to which it refers in paragraph 70 of the judgment. Brehm holds that

> because it cannot be presumed that otherwise legal arms are likely to be employed in contravention of humanitarian law in a future armed conflict, transfer limitations based on states' duty to ensure respect for humanitarian law only apply in relation to states that are already involved in an armed conflict.

Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', *Journal of Conflict and Security Law* 12, no. 3 (2007): 377. Brehm clearly wants to stress here that one cannot be obliged to foresee that a State to which arms are exported may become involved in an armed conflict in the future. The obligation to prevent IHL violations being committed with exported weapons thus, according to Brehm, only requires vigilance if the receiving State is already involved in an armed conflict. The Court wrongly derived from this wording that CA 1 only applies if the exporting State itself is a party to an armed conflict.

[338] Except of course by those few who are of the opinion that Article 1 does not reflect a legal obligation.

[339] ICRC, *Commentary on the First Geneva Convention*, paras 143–152.

[340] Switzerland, Final Record of the Diplomatic Conference of Geneva, Vol. II-B (Federal Political Department, 1949), 53.

[341] The Norwegian delegate 'considered that the object of this Article was to ensure respect of the Conventions by the population as a whole.' The American delegate took the same position. So did, arguably, the French delegation when it noted that 'the term "ensure respect" had the same purpose as the expression "in the name of their peoples", which had been deleted in Stockholm.' See *ibid.*

[342] Daniel Turp v. the Minister of Foreign Affairs, para. 74.

other States.[343] Such has been the interpretation, not only for instance in 1968 by the Teheran Conference on Human Rights[344], in 1990 by the UN Security Council[345] and in 2003 by the UN General Assembly[346], but even by the ICJ, both already in the 1986 *Nicaragua* case[347] and in the 2004 *Wall* Advisory Opinion.[348] It is therefore safe to conclude that CA 1 does indeed impose a duty on States to ensure respect by others, even more so if the State is supporting the 'other' in its actions.[349]

The duty to ensure respect entails a positive and a negative obligation. At both levels, supportive acts play a potential role. The positive obligation means that States should take appropriate measures to prevent and bring to an end IHL violations, including if committed by others. This is an obligation of means, and the reasonable measures demanded from the State depend on the circumstances. The ICJ described a similar due diligence obligation in relation to the duty to prevent genocide as follows:

> [I]t is clear that the obligation in question is one of conduct and not one of result, […] the obligation of States parties is rather to employ all means reasonably available to them […]. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the

[343] Robin Geiss, 'The Obligation to Respect and Ensure Respect for the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions. A commentary* (Oxford: Oxford University Press, 2015), 120–23.

[344] International Conference on Human Rights, Teheran, Res. XXIII on the protection of human rights in armed conflict, UN Doc. A/CONF.32/41, 12 May 1968, para. 9 of the preamble: 'Noting that States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.' The resolution was adopted by 67 votes against none, with two abstentions. See Summary record of the twenty-fifth meeting of the International Conference on Human Rights, UN Doc. A/CONF.32/SR.25, 12 May 1968, 148. Note that the documents refers to 'Resolution XV', which was the original number of Resolution XXIII on the protection of human rights in armed conflict. See International Conference on Human Rights, Report of the Second Committee, UN Doc. A/CONF.32/34, 9 May 1968.

[345] UNSC Res. 681, UN Doc. S/RES/681 (20 December 1990), para. 5.

[346] UNGA Res. 58/97, Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the other occupied Arab territories, UN Doc. A/RES/58/97 (17 December 2003), para. 3.

[347] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 220.

[348] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Reports 136 (ICJ, 9 July 2004), para. 158.

[349] See for instance also the EU Statement to the UNSC with regard to the humanitarian situation in Syria:

> The lack of respect for international humanitarian law and human rights is appalling and concerns us all […] Common article 1 of the Geneva Conventions clearly requires that all the contracting Parties, and I quote, "undertake to respect and to ensure respect" for the conventions "in all circumstances". Thus, it is a collective obligation on all of us not only to respect but also to ensure that the parties to the conflict respect their humanitarian obligations.

Quoted in Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations', *International Review of the Red Cross* 96, no. 895/6 (2014): 721–22 [original source seems to be no longer available online]. For more examples of State practice, see *ibid.*, 716–22.

> State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.[350]

Surely, if a State is providing various types of support to a given party (weapon supply, training, etc….), it is likely 'placed in a unique position to influence the behavior of those forces'.[351] Depending on the type of support that is provided, the possible influence on a party to the conflict may be different. For instance, when a State trains the forces of an armed group, it has a considerable impact on how that armed group understands the basic principles of the conduct of hostilities defined by IHL. If a State delivers weapons to a State known for committing atrocities against civilians, it may impact the halt of those atrocities by stopping the weapon deliveries. The supportive acts could thus play a role in assessing whether a State fulfils its positive obligation of means under CA 1. A different question relates to what exactly can be expected from States if they are under an obligation to take appropriate measures against IHL violations. More specifically, the tricky question is whether or not non-forcible countermeasures may be taken in order to respond to IHL violations. That question falls beyond the scope of this study, but it is definitely an area where the law is still in progress.[352]

Supportive acts also play another role in the application of CA 1. Indeed, the negative obligation enshrined in that article demands States, by obligation of result, not to encourage, aid or assist in violating the Conventions.[353] This negative obligation seems at first sight similar to Article 16 ARSIWA, defining a complicity rule under the general law of State responsibility. Yet, the two provisions are different at three levels.

First, Article 16 ARSIWA only functions between two States: a State can only be held responsible for aid or assistance provided to another State that committed an internationally wrongful act.[354] Common Article 1, on the other hand, does not limit itself to prohibiting support to States that violate the Conventions. Indeed, the negative obligation that can be derived from the text of Article 1 includes the prohibition to assist not only States[355], but also

---

[350] Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, para. 430.
[351] ICRC, *Commentary on the First Geneva Convention*, 53.
[352] On specifically this issue, see Article 54 ARSIWA and the doctrinal debate reflected in, for instance, Marco Sassòli, 'State responsibility for violations of international humanitarian law', *International review of the Red Cross* 84, no. 846 (2002): 421–32; Geiss, 'The Obligation to Respect and Ensure Respect for the Conventions', 127–30; Andrea Breslin, 'A Reflection on the Legal Obligation for Third States to Ensure Respect for IHL', *Journal of Conflict and Security Law* 22, no. 1 (2017): 20–24.
[353] Technically this obligation could also be derived from the obligation to 'respect', rather as to consider it a negative obligation under 'ensure to respect'. For a discussion, see Geiss, 'The Obligation to Respect and Ensure Respect for the Conventions', para. 37.
[354] This does not exclude that an analogous complicity rule applicable to armed groups would flow from other sources, such as the Genocide Convention. In this regards, see the Bosnian genocide case and the suggestion for a new rule made by Jackson, while also considering the critical remark by Aust (*supra* notes 73-75). Yet, Article 16 ARSIWA is thus far still limited to aid and assistance provided by and to States.
[355] Which is unanimously accepted, see for instance Luigi Condorelli and Laurence Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des Etats "de respecter et faire respecter le droit international humanitaire en toutes circonstances"', in Christophe Swinarski (ed.), *Etudes et essais sur le droit international*

armed groups[356] (and even international organizations)[357] from committing IHL violations. The 'responsibility gap' created by Article 16 ARSIWA is thus, at least what violations of IHL concerns, solved by common Article 1 GCs and its customary equivalent.

A second difference between Article 16 ARSIWA and common Article 1 relates to the subjective element. The 2016 ICRC Commentary notes that, contrary to Article 16 ARSIWA, Article 1 does not require an 'intent'.[358] It thereby in essence takes over the position advanced by Sassòli, who had earlier argued with regard to weapon supply to a State that commits IHL violations, that 'once the violations are known, ongoing assistance is necessarily given with a view to facilitating further violations'.[359] This argument could of course also be made in general with regard to the complicity requirement of Article 16 ARSIWA. As explained in Chapter 1, and contrary to what is suggested in the ICRC Commentary, there is no general agreement on the fault requirement enshrined in Article 16 ARSIWA.[360] While a strict subjective element requiring intent would alleviate the concern not to hamper international cooperation, a less strict requirement of knowledge would render the scope of the article as wide as possible. The former concern plays less in relation to the humanitarian objective pursued by the Geneva Conventions. Thus, while a State would only be responsible for the aid and assistance it knowingly and (according to a strong current of scholarship) willingly provided to another State in the commission of an internationally wrongful act, States are responsible under common Article 1 if they knowingly assist the commission of an IHL violation, regardless whether they intend to do so or not.

A third difference concerns the type of support that is prohibited. While Article 1 GCs itself is silent in this regard, the ICJ has interpreted this provision in the *Nicaragua* case in the following terms:

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances" […]. The United States is thus under *an obligation not to encourage*

humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet (Genève/La Haye: CICR/Martinus Nijhoff Publishers, 1984), 26ff; Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 421.

[356] Who are addressees of the Geneva Conventions in the sense that they are bound by common Article 3. See Geiss, 'The Obligation to Respect and Ensure Respect for the Conventions', para. 27.

[357] Assisting wrongful acts committed by international organizations would not be covered by Article 1 GCs, as such organizations cannot be party to the Conventions. Nevertheless, the customary version of CA1 (Rule 144 CIHL) definitely also applies to assistance provided to IOs. See ICRC, *Commentary on the First Geneva Convention*, paras 138–142; Geiss, 'The Obligation to Respect and Ensure Respect for the Conventions', para. 27.

[358] 'The subjective element of 'intent' is unnecessary, however, for the purposes of common Article 1.' See ICRC, *Commentary on the First Geneva Convention*, para. 159.

[359] Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 413.

[360] While the text of the provision suggest that the complicity State should share the intent of the principal actor, the ILC Commentary to Article 16 puts forward a less strict requirement: the mere knowledge of a wrongful act would be sufficient to trigger responsibility. See Chapter 1, Section 2.2.

> persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions […].[361]

The inclusion of the prohibition to 'encourage' IHL violations within the scope of CA 1 was subsequently endorsed by the State parties to the Geneva Conventions at the 30th International Conference of the Red Cross and the Red Crescent.[362] This again goes beyond the scope of Article 16 ARSIWA, which only accords responsibility to supporting States in case they aided or assisted in the commission of an internationally wrongful act. Other forms of support, such as 'inducing, instigating or abetting' are excluded from its scope.[363] The 2016 ICRC Commentary confirms the ICJ's judgment by stating that according CA 1 to States 'may neither encourage, nor aid or assist in violations of the Conventions'.[364]

If we look at the forms of support investigated in this study, this broader material scope is perhaps not that important: most of the identified supportive acts, such as the provision of weapons, crucial intelligence information or specific training will classify as 'aid and assistance', assuming of course that the State knows (or, as has been argued, should have known) that it was aiding the commission of an IHL violation. Less evident is the conclusion that the supportive act of 'allowing territory to be used' would be contrary to CA 1. Here again the degree of the knowledge becomes important: the more specific the knowledge the supporting State had about what was going to happen if it allowed its territory to be used by a party to the armed conflict, the more careful it should be in order to comply with its obligation to ensure respect for IHL. Intent, while not a requisite for CA1 responsibility, can therefore be a clear indication of sufficient knowledge. In other words, when a supporting State has expressed to share the intent to violate IHL with the party to an armed conflict, then the supportive act may seem as loosely connected with the violation, it will still trigger responsibility of the supporting State under CA 1.

In sum, for the purposes of this study, it is important to note that States do not necessarily need to be parties to an armed conflict in order to incur responsibility for IHL violations. This is of particular relevance for States supporting parties to an armed conflict, as they are under the obligation not only to respect, but also to ensure respect for IHL by the party they support. Moreover, the obligation enshrined in common Article 1 is broader than the more limited basis for responsibility in the complicity rule of Article 16 ARSIWA: it covers supportive acts to any party to the armed conflict, it does not require an intent by the supporting State and it also prohibits the encouragement of IHL violations. While the latter is of less importance in the

[361] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 220 [emphasis added].
[362] International Conference of the Red Cross and Red Crescent, Geneva, Resolution 3: Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, 2007, para. 2.
[363] Jackson, *Complicity in International Law*, 154.
[364] ICRC, *Commentary on the First Geneva Convention*, para. 154.

framework of this study, the former two differences clearly add another layer of possible international legal consequences to the supportive acts covered here.

2.3. Criminal law consequences

Thus far we have approached the consequences of becoming a party to an armed conflict purely from within the IHL framework, by either focusing on certain rules that will apply to the parties, or by explaining how responsibility for IHL violations may or may not depend on the fact whether a State is party to a conflict. Strongly linked to the consequences within the IHL framework, are the potential criminal law consequences attached to being a party to an armed conflict, both under international law as well as under domestic law.

War crimes are serious violations of international humanitarian law and require a nexus with an armed conflict.[365] Establishing such nexus has been one of the great challenges the *ad hoc* tribunals and the International Criminal Court were faced with since the flourishment of international criminal law in the 90s.[366] While a debate on the nexus would take us too far away from the focus of this study, such nexus will depend greatly on whether or not the perpetrator of the crime is an individual (civilian or military) belonging to a party to the armed conflict.[367]

[365] This nexus is not explicitly mentioned in Article 8 of the Rome Statute dealing with war crimes, but is added in the following wording to the list of elements of crimes as penultimate requirement for each specific war crime: 'the conduct took place in the context of and was associated with an international armed conflict'. See ICC, Elements of Crimes, ICC-PIDS-LT-03-002/11_Eng, 2011. See also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, No. ICC-01/04-01/07-717 (ICC, Pre-Trial Chamber, 30 September 2008), para. 380:

> The Chamber has defined that a crime has taken place in the context of, or in association with an armed conflict where 'the alleged crimes were closely related to the hostilities.' This means that the armed conflict 'must play a substantial role in the perpetrator's decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed.' It is not necessary, however, for the armed conflict to have been regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle.

[366] See for instance Larissa Van den Herik and Elies Van Sliedregt, 'Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes', *Leiden Journal of International Law* 17, no. 3 (2004): 537–57; Cassese, 'The Nexus Requirement for War Crimes'.

[367] See for instance the (negative) criteria advanced in the case-law: Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70; Prosecutor v. Mitar Vasiljevic, Judgment, No. IT-98-32 (ICTY, 29 November 2002), para. 25; Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic, Judgment, No. IT-96-23 & 23/1 (ICTY, Appeals Chamber, 12 June 2002), para. 59; Prosecutor v. Jean-Paul Akayesu, Judgment, No. ICTR-96-4 (ICTR, Appeals Chamber, 1 June 2001), para. 443; Prosecutor v. Mucić et al., Judgment, No. IT-96-21-T (ICTY, Trial Chamber, 16 November 1998), paras 194–195; Prosecutor v. Mrksic et al., Judgment, No. IT-95-13/1 (ICTY, Trial Chamber, 27 September 2007), para. 424; Prosecutor v. Théoneste Bagosora et al., Judgment and Sentence, No. ICTR-98-41 (ICTR, Trial Chamber, 18 December 2008), paras 2232, 2234–2236; Prosecutor v. Nyiramasuhuko et al. ('Butare'), Judgment and Sentence, No. ICTR-98-42 (ICTR, Trial Chamber, 24 June 2011), paras 6153–6154; Prosecutor v. Ephrem Setako, Judgment, No. ICTR-04-81 (ICTR, Appeals Chamber, 28 September 2011), paras 250–251.

Being a party to an armed conflict therefore is, while not a *conditio sine qua non*, indicative for establishing the existence of a war crime.[368]

At the domestic level, whether or not a State or an armed group is a 'party to an armed conflict' may impact the prosecution (or escape from prosecution) for certain crimes. In Belgium, for instance, the prosecution for terrorist acts is excluded when the so-called 'savings clause' applies. Article 141bis of the Belgian Penal Code determines that the entire Title I*ter* on terrorist crimes does not apply to

> acts of armed forces during armed conflict as defined in and subjected to international humanitarian law, neither to acts of armed forces of a State in the framework of the execution of their official tasks, insofar those facts are subject to other provisions of international law.[369]

In assessing whether or not a certain (terrorist) act could be considered an act of an armed force during armed conflict, Belgian Courts have attempted to clarify whether a certain group was an armed group involved in an armed conflict. While most of this case-law thus far has been rather unsatisfactory at the level of the IHL analysis[370] (Jabhat al-Nusra, for instance, was found by both the first instance and appeals court not to be an armed group involved in the armed conflict in Syria)[371], this savings clause and the case-law on it shows that being a party to an armed conflict may have important consequences at the domestic level.[372]

---

[368] See also Cassese, who notes that '[w]hen the perpetrator and/or the victim are related or linked to one of the parties to the conflict, it is obviously easier to establish the nexus, but this is not a necessary requirement.' Cassese, 'The Nexus Requirement for War Crimes', 1404.

[369] This clause first appeared in Article 19(2) UN Convention for the Surpression of Terrorist Bombings, 15 December 1997, 2149 UNTS 256. The Belgian provision is clearly inspired by the European Framework Decision of 13 June 2002 on combating terrorism, Pub. L. No. 2002/475/JHA, OJ L 164 3 (2002), para. 11, which reads:

> (11) Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.

Van Poecke notes that '[t]his lack of implementation [notably only by Belgium and Ireland] is explained by the prevailing view that the clause merely excludes certain acts from the scope of application of the respective instruments, but that it does not prohibit states from including these acts within the scope of their criminal legislation concerning terrorist offences.' Thomas Van Poecke, 'The IHL Exclusion Clause, and why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences', *EJIL: Talk!*, 20 March 2019, https://www.ejiltalk.org/the-ihl-exclusion-clause-and-why-belgian-courts-refuse-to-convict-pkk-members-for-terrorist-offences/.

[370] For a critical assessment of the Belgian case-law thus far, see Jan Wouters and Thomas Van Poecke, 'Van strijdkrachten, terroristen en het Belgisch strafrecht', *Rechtskundig Weekblad* 2017–2018, no. 41 (2018): 1611–1621 [in Dutch].

[371] See Prosecutor v. B.F. et al., Judgment, No. FD35.98.47-12-AN35.F1.1809-12 (Antwerp, Court of First Instance, 11 February 2015), 35–36; Court of Appeals, Antwerp 27 January 2016, (not published, on file with the author), F°54. Cassation against the Appeals decision was rejected by the Court of Cassation, Judgment of 24 May 2016, AR P.16.0244.N, 2016 Arr.Cass. 1179. It should be noted however that the quality of the judgments has slightly improved, for instance by acknowledging that the PKK is involved in a NIAC with Turkey: see PKK Case, Judgment No. 2019/939 (Court of Appeals Brussels, Kamer van Inbeschuldigingsstelling, 8 March 2019). Yet, problems remain, for instance by holding that 'intensity' and 'organization' are not cumulative conditions for the existence of a NIAC: see *ibid.*, 22.

[372] On this topic, see for instance Van Poecke, 'The IHL Exclusion Clause, and Why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences'.

The impact of being party to an armed conflict is not limited to the crime of terrorism. For instance, the prosecution for the crime of treason may equally depend on whether the national State was involved in an armed conflict. In Denmark, the phenomenon of 'foreign fighters' joining the fight of IS in Syria has been dealt with under the heading of 'treason'. Individuals may be prosecuted if they joined a party to a conflict in which Denmark is one of the opposing parties. The recent section 101a of the Danish Penal Code reads:

> A person who has Danish citizenship or domicile in the Danish state and who, in an armed conflict in which the Danish state is a party, is affiliated with an armed force for a party fighting against the Danish state is punished by prison for 10 years.[373]

Thus, for the crime of treason it is crucial to determine whether or not Denmark was a party to an armed conflict.[374] A correct classification of the parties to an armed conflict therefore potentially has far-reaching consequences for prosecuted individuals. In addition, a judgment by a domestic court arguably also should be in line with the actual rules under which troops are operating: a State cannot consider a certain group not to be involved in an armed conflict for the purpose of prosecuting its members, while on the other hand it would consider the same group as party to an armed conflict for targeting purposes under IHL.

2.4. Section conclusion: mixed importance of being a party to an armed conflict

This short overview of the consequences that flow from a status as party to an armed conflict, allows us to draw the following conclusions:

First, the applicability of IHL to an entity (a State or an armed group) greatly depends on whether that entity is party to an armed conflict. While there are some exceptions relating to the temporal scope of IHL, IHL rules will only be applicable to the entity that has become party to a conflict. This does not mean, however, that individuals are not bound by IHL when they operate in the context of an armed conflict. The micro- and the macro-level are operating separately, even though in practice (and ideally) of course the two merge together.

Second, in order to incur international responsibility for IHL violations, it is theoretically not necessary that a State is a party to an armed conflict. While the scope of the complicity rule of Article 16 ARSIWA is rather limited, common Article 1 GCs requires additional efforts from States in order to ensure respect for IHL – whether those States are party to the conflict or not. For State responsibility, being a party to an armed conflict is thus not paramount.

Third, from an international criminal law perspective, the same conclusion can be made as for the international law on State responsibility: being a party to a conflict is not a requisite

[373] LBK nr. 977 (Danish Criminal Code) (2017), sec. 101a [own translation].
[374] On this topic, see also (in Danish): Anders Henriksen, 'Kriminalisering af deltagelse i konflikter i udlandet og Danmarks status af part i en væbnet konflikt', *Ugeskrift for Retsvaesen* 2015, no. 40 (2015): 342–46.

condition to establish that a war crime was committed, but it is a very useful indication for the nexus requirement. In contrast, for some domestic crimes, which sometimes find their origin in international legal instruments, the label of 'party to an armed conflict' may have a decisive impact.

In sum, even though being party to an armed conflict is not always a prerequisite to trigger certain consequences linked to IHL, it remains nevertheless an important step in identifying the applicable legal framework. Assessing who is party to an armed conflict is not an obvious task. It therefore merits further analysis, which will start by identifying the 'classic' criteria to establish the existence of an armed conflict and the parties thereto.

3. Brief overview: establishing the existence of an armed conflict

As the IHL treaties do not provide for a definition of the concept 'parties to the conflict', a definition can be sought by using the interpretive techniques enshrined in the Vienna Convention on the Law of Treaties (VCLT).[375] According to Article 31 VCLT, an interpretation starts with the ordinary meaning of words, 'in their context and in light of [the] object and purpose [of the treaty]'. As a preliminary note, it should be mentioned that it is unclear why IHL treaties use the concept of 'parties to the conflict' rather than 'parties to the armed conflict'. The most logic reason for this is that the former is shorter than the latter, and that the negotiators assumed it would be clear that 'the conflict' meant 'the armed conflict'.

According to the Oxford English Dictionary, a 'party' is 'as side in a battle', or 'an enemy or opposing force'. While the reference to 'battle' might still suggest that one can only become a 'party' if involved in actual hostilities, the wording 'enemy or opposing force' does not seem to require such active involvement. This definition thus does not help us much further, as merely choosing a side in an armed conflict may imply a political preference as to the outcome of the conflict, without any assistance to the parties involved. Indeed, even neutral States are allowed to have preference for one side of a conflict, as long as they remain neutral in their behavior *vis-à-vis* the parties.[376] The 'ordinary meaning' of the word 'party' therefore leaves open too many possible interpretations.

Subsequent State practice is also one of the sources for the interpretation of treaties (Article 31 (3)(b) VCLT). It is however difficult to obtain a clear overview of State practice regarding the concept 'party to the conflict', as the opinion of States regarding their own position *vis-à-vis* an armed conflict often remains a secret if there is no clear, kinetic involvement of a State. The UK LOAC Manual is telling in this regard, when it notes that 'States have been, and always

[375] On the application of the VCLT to treaties adopted after its entry into force, see *supra* note 235.
[376] Robert W. Tucker, *The Law of War and Neutrality at Sea* (Washington: The Lawbook Exchange, 2005), 205.

will be, reluctant to admit that a state of armed conflict exists.'[377] There is no standard procedure, contrary to for instance the requirement to notify operations in self-defence to the Security Council, for States to follow when they become a party to an armed conflict.

Nevertheless, indications of such assessments can occasionally be found. For instance, an analysis of State practice of statements to the UN Security Council in the period 2000-2016 reveals a number of explicit recognitions of involvement in armed conflicts. The 2005 Report of the International Commission of Inquiry on Darfur clearly states that '[a]ll the parties to the conflict – the Government of the Sudan, [the Sudan Liberation Movement/Army] and [the Justice and Equality Movement] – have recognized that this is an internal armed conflict.'[378] Similarly, Azerbaijan regularly addresses a letter to the UN Secretary-General stating that part of its territory in under occupation by Armenia,[379] and Ukraine acknowledged it is involved in an international armed conflict with Russia.[380]

Another possible location where explicit conflict classifications can be found is national case-law: even though the judiciary does not always follow the opinion advanced by the government, case-law is part of State practice.[381] Thus, in a decision of 2006, the Dutch Supreme Court identified the 2003 conflict in Iraq as an IAC between Iraq and the US.[382] Similarly, the Dutch Supreme Court ruled in 2008 that the conflict between the Afghan regime in Kabul and the Mujaheddin in 1980 was a non-international armed conflict, even though the latter were 'to some extent backed by Russian advisers and army units'.[383] In 2002, the US District Court for the Central District of California labelled the conflict in Papua New Guinea as a non-international armed conflict.[384] In the context of the *American Civil Liberties Union v. Department of Defense* case in 2005, the US Government set forth the view that the conflict

[377] United Kingdom, Ministry of Defence, *The joint service manual of the law of armed conflict*, JSP 383 (Swindon: The Joint Doctrine and Concepts Centre, 2004), para. 15.3.1.
[378] Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc. S/2005/60, 2 January 2005, para. 76.
[379] Letter dated 8 October 2007 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/62/491-S/2007/615, 23 October 2007; Letter dated 23 January 2009 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/63/692-S/2009/51, 27 January 2009; Letter dated 30 April 2012 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/66/787–S/2012/289, 12 March 2012; Letter dated 15 August 2016 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/70/1016-S/2016/711, 16 August 2016.
[380] Letter dated 14 December 2016 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, UN Doc. A/71/692-S/2016/1056, 16 December 2016.
[381] See Draft Conclusion 6 of the ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10' (to appear in the *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two), 150.
[382] Netherlands, Supreme Court, 5 September 2006 LJN No. AY3440, RvdW (2006) No. 801, NJ (2007) No. 11, para. 53.
[383] H. Hesam v. Public Prosecutor, Supreme Court, 8 July 2008, LJN No. BC7418 , English translation in LJN No. BG1476, para. 5.3.
[384] *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), p. 1142.

between the US and Iraq was an international armed conflict.[385] By way of last example, the Brussels Court of Appeals recently classified the conflict between the PKK and Turkey as a non-international armed conflict.[386]

Such explicit recognitions remain nevertheless rare. Primarily for political reasons, States often wish to deny the existence of a non-international armed conflict on their territory. For instance, Syria declared in 2014 to the UN Security Council that '[i]t should be recalled that any cooperation with the Special Representative of the Secretary-General for Children and Armed Conflict does not mean that we accept the designation of the events in Syria as a non-international armed conflict. […] Syria […] rejects the designation of the Syrian Government as a party to the conflict.'[387] While States are already reluctant to admit that *prima facie* an armed conflict exists[388], there is even more hesitance to admit that assistance to a party to an armed conflict results in becoming party to the conflict themselves. This makes it very difficult to analyse whether or not States actually consider that providing support to a party to and existing armed conflict could render them party to that conflict.

In addition to a lack of consistent reporting in State practice, there is 'no central authority under international law to identify or classify a situation as an armed conflict'[389], and thus, logically, to identify the parties to such conflict. The absence of such an overarching and authoritative international body makes an analysis of practice even more difficult. Obviously a classification of a given conflict is often made by inquiry commissions or monitoring groups mandated by the UN or regional organizations and can be found in their reports. For instance, the Panel of Experts on the Sudan classified the Darfur situation as a non-international armed conflict in 2006[390], whereas it labelled the situation in 2007 as '"mixed" conflict, involving elements of non-international and international armed conflict'[391], before classifying it again as a NIAC in 2009.[392] The Independent Fact-Finding Committee on Gaza classified the 2008-2009 conflict

[385] See extracts in Sally J. Cummins (ed.), *Digest of United States practice in international law: 2005* (Cary, NC: Oxford University Press/International Law Institute, 2007), 1027.
[386] PKK Case, Judgment No. 2019/939, 25–26. For more problematic judgments in light of *jus in bello* classification, see however the other cases referred to *supra* in note 371.
[387] Letter dated 6 February 2014 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/245, 4 July 2014, 3/13.
[388] For a contrary example, see for François Hollande's rhetoric after the Paris attacks on 13 November 2015, stating that the attacks were '*un acte de guerre*' and that France entered at war with ISIS. As Rodenhäuser notes, 'Political rhetoric aside, what he probably meant is that he considers France to be engaged in an armed conflict with *[ISIS]'.* See Tilman Rodenhäuser, 'Self-defense Operations Against Armed Groups and the Jus in Bello', *EJIL: Talk!*, 16 December 2015, http://www.ejiltalk.org/self-defense-operations-against-armed-groups-and-the-jus-in-bello/.
[389] ICRC, *Commentary on the First Geneva Convention*, 78.
[390] Report of the Panel of Experts established pursuant to paragraph 3 of resolution 1591 (2005) concerning the Sudan, UN Doc. S/2006/65, 30 January 2006, para. 172.
[391] Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan prepared in accordance with paragraph 2 of resolution 1713 (2006), UN Doc. S/2007/584, 10 March 2007, para. 224.
[392] Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan, UN Doc. S/2009/562, 29 October 2009, para. 221. The NIAC classification was still valid, according to the expert panel, in 2013 and 2014: Report of the Panel of Experts on the Sudan established pursuant to resolution 1591 (2005) , UN

with Israel as an international armed conflict.[393] Sometimes these reports even mention the specific starting date of a conflict, such as the International Commission of Inquiry on the Central African Republic, which was 'of the view that there has been a non-international armed conflict [in the CAR] since at least 1 January 2013'.[394] The Monitoring Group on Somalia and Eritrea even stated in its 2016 Report that the 'strategic partners' of the African Union Mission in Somalia (AMISOM), which primarily carried out aerial attacks against Al Shabaab, were bound by the IHL rules applicable in a NIAC.[395]

The International Committee of the Red Cross identifies internally the existence of armed conflicts and the parties thereto, and communicates a '*rappel du droit*' – a brief statement of the applicable law – to all the parties of an armed conflict.[396] Even though the ICRC does not explicitly announce new conflict classifications in a centralized and publically available database, one can imply (sometimes even explicitly) conflict classifications made by the ICRC from its press releases or annual reports. For instance, the conflicts in Syria and Ukraine were classified as NIACs in two press releases.[397] The Annual Reports of the ICRC reveal the classification the organization has made of quite a number of conflicts.[398] For instance, the Annual Report of 2014 reveals that the ICRC considered there was a non-international armed conflict in Peru between 1980 and 2000.[399] Likewise, the 2000 Annual Report mentions a classification of the international armed conflict between Ethiopia and Eritrea[400] and of a non-international armed conflict in Chad.[401] Other examples of ICRC conflict classifications found in the Annual Reports covering the period 2000-2016 include the classification of armed

Doc. S/2013/79, 2 December 2013, para. 86; Report of the Panel of Experts on the Sudan established pursuant to resolution 1591 (2005), UN Doc. S/2014/87, 2 November 2014, para. 79.

[393] Annex to the letter dated 1 October 2009 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council Report of the Independent Fact-Finding Committee on Gaza , UN Doc. S/2009/537, 14 October 2009, para. 442.

[394] Preliminary report of the International Commission of Inquiry on the Central African Republic, submitted pursuant to Security Council resolution 2127 (2013), UN Doc. S/2014/373, 26 June 2014, para. 52.

[395] Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2244 (2015): Somalia, UN Doc. S/2016/919, 31 October 2016, 68.

[396] This task is inherent in the role of the ICRC as mandated to it by Article 5 of the Statutes of the International Red Cross and Red Crescent Movement (1986).

[397] ICRC, 'Syria: ICRC urges full respect for international humanitarian law, News Release', 8 April 2012, https://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-07-31.htm; ICRC, 'Ukraine: ICRC calls on all sides to respect international humanitarian law - New Release 14/125', 23 July 2014, https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm.

[398] Of course, these Annual Reports are drafted to inform the donors and general public on the yearly activities of the organization, rather than to report on the legal decisions made by the organization.

[399] ICRC, 'Annual Report 2014', May 2015, 439.

[400] ICRC, 'Annual Report 2000', June 2001, 15. See also ICRC, 'Annual Report 2005', May 2006, 79 and 83; ICRC, 'Annual Report 2006', May 2007, 96 and 101; ICRC, 'Annual Report 2007', May 2008, 100 and 105; ICRC, 'Annual Report 2008', May 2009, 103; ICRC, 'Annual Report 2009', May 2010, 125; ICRC, 'Annual Report 2010', May 2011, 137 and 143; ICRC, 'Annual Report 2011', May 2012, 115 and 119; ICRC, 'Annual Report 2015', May 2016, 139.

[401] ICRC, 'Annual Report 2000', 67. There was a new NIAC classification in 2006: ICRC, 'Annual Report 2006', 82, including the recognition of the conflict classification by the government. See also ICRC, 'Annual Report 2008', 89; ICRC, 'Annual Report 2009', 115.

conflicts in the Former Republic of Yugoslavia[402] (IAC and NIAC), Iraq[403] (IAC in 2003, followed by an IAC and NIAC), Indonesia (NIAC)[404], Darfur (NIAC)[405], Colombia[406] (NIAC, with a spill-over to Peru in 2012[407] and to Ecuador in 2014[408]), Uganda[409] (NIAC), Eritrea[410] (NIAC), Mozambique[411] (NIAC that ended in 1992), Central African Republic[412] (NIAC), Burundi[413] (NIAC), Guatemala[414] (NIAC), Russia and Georgia[415] (IAC), Djibouti and Eritrea[416] (IAC), Ethiopia[417] (NIAC), the Democratic Republic of Congo[418] (NIAC), Niger[419] (NIAC), Sudan (NIAC in Darfur[420], NIAC as of December 2013[421]), Afghanistan[422] (NIAC), Libya[423]

[402] ICRC, 'Annual Report 2001', June 2002, 278.
[403] ICRC, 'Annual Report 2003', June 2004, 263. For the classification of two parallel conflicts, see ICRC, 'Annual Report 2005', 308; ICRC, 'Annual Report 2006', 321. As of 2007, no more reference is made to an IAC: see ICRC, 'Annual Report 2007', 336; ICRC, 'Annual Report 2009', 361.
[404] ICRC, 'Annual Report 2003', 141. See also ICRC, 'Annual Report 2005', 163; ICRC, 'Annual Report 2004', June 2005, 148; ICRC, 'Annual Report 2006', 181.
[405] ICRC, 'Annual Report 2004', 4. Taking into account that 'intensity' is one of the requirements to assess the existence of a NIAC, it is remarkable that the Report notes that '[t]he armed conflict in Darfur was sadly typical of the most recent and contemporary non-international armed conflicts: the *low intensity* of the fighting and the high intensity of the suffering endured by the civilian population as a consequence of disregard for the most basic rules and principles of international humanitarian law.' [emphasis added]
[406] ICRC, 'Annual Report 2005', 264. The Annual Report also mentions that the Colombian government responded to the notification of the ICRC's classification by recognizing the applicability of IHL to the Colombian situation. See also ICRC, 'Annual Report 2006', 281; ICRC, 'Annual Report 2009', 309; ICRC, 'Annual Report 2015', 272.
[407] ICRC, 'Annual Report 2012', May 2013, 287.
[408] ICRC, 'Annual Report 2014', 439.
[409] ICRC, 'Annual Report 2007', 143; ICRC, 'Annual Report 2010', 183; ICRC, 'Annual Report 2015', 221. When the Uganda People's Defence Force (UPDF) launched a military campaign against LRA bases in the north-eastern region of the Democratic Republic of the Congo in 2008, the Annual Report mentioned that they were supported by military forces from the DRC and Southern Sudan, but did not explicitly classify this situation. See ICRC, 'Annual Report 2008', 143.
[410] ICRC, 'Annual Report 2006', 102.
[411] *Ibid.*, 155.
[412] ICRC, 'Annual Report 2007', 174; ICRC, 'Annual Report 2008', 85; ICRC, 'Annual Report 2009', 110; ICRC, 'Annual Report 2011', 99. In 2012, the ICRC shared its classification of a new NIAC in the CAR with the government. See ICRC, 'Annual Report 2012', 111.
[413] ICRC, 'Annual Report 2007', 80; ICRC, 'Annual Report 2008', 80.
[414] ICRC, 'Annual Report 2007', 310; ICRC, 'Annual Report 2008', 314; ICRC, 'Annual Report 2009', 333; ICRC, 'Annual Report 2010', 395.
[415] ICRC, 'Annual Report 2008', 264.
[416] *Ibid.*, 106.
[417] *Ibid.*, 108; ICRC, 'Annual Report 2009', 130; ICRC, 'Annual Report 2010', 142; ICRC, 'Annual Report 2011', 119; ICRC, 'Annual Report 2012', 132.
[418] ICRC, 'Annual Report 2008', 99.
[419] *Ibid.*, 158.
[420] ICRC, 'Annual Report 2010', 177; ICRC, 'Annual Report 2011', 155.
[421] ICRC, 'Annual Report 2015', 208.
[422] ICRC, 'Annual Report 2010', 360. Here the ICRC explicitly acknowledged that UK armed forces were engaged in a NIAC in Afghanistan. On the change in classification of the conflict in Afghanistan, see also ICRC, Letter of Philip Spoerri, Legal Advisor, to the UK House of Commons (Select Committee on international Development), 20 December 2002, https://publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm.
[423] ICRC, 'Annual Report 2011', 137 and 140. The report remained vague as to the classification of the conflict involving the international coalition following UNSC Resolution 1973.

(NIAC/IAC), Sudan and South Sudan[424] (IAC), Syria[425] (NIAC), and the Israeli occupation of Syrian Golan Heights[426].

It is thus incorrect to state that the ICRC rarely shares its conflict classifications with the world.[427] It does, however, carefully avoid to pronounce on more controversial classification issues (such as the exact moment on which the IAC by the coalition forces against Libya turned into a NIAC), and it often avoids identifying the exact parties to the conflicts. Important for this study is the observation that none of the classifications that could be found in the above analysis of the 2000-2016 ICRC Annual Reports dealt with identifying a State that was merely providing support to a party as an actual party to an armed conflict. One recent exception forms an ICRC web article on the classification of the armed conflicts in Colombia. The article explains:

> Currently, the ICRC considers that at least five non-international conflicts are taking place in Colombia: four between the Colombian government and the ELN, the EPL, the Autodefensas Gaitanistas de Colombia (Gaitanist Self-Defence of Colombia, AGC) and elements of the former Bloque Oriental (Eastern Bloc) of the FARC-EP that have not accepted the peace process. There is also a fifth non-international armed conflict, involving the ELN and the EPL, centred on the Catatumbo region.
>
> But what about the other armed groups that claim the legacy of the FARC-EP? Everything depends on the extent to which certain groups are truly linked (through hierarchical relationships or *via certain types of cooperation*) with the former 1st, 7th and 40th "Frentes" or fronts of FARC-EP, which have not accepted the peace process, *and which the ICRC has classified as parties to a conflict* (a Frente consists of a few hundred persons). In such a case, one could say that these new groups were also parties to the non-international armed conflicts mentioned above, and that it was therefore permissible under IHL to use force against them.[428] [emphasis added]

This online information brief on Colombia arguably is the first publically available application by the ICRC of its recently introduced support-based approach, which will be extensively dealt with below.[429] It remains to be seen whether or not similar public statements on other conflicts will follow in the future.

In addition to the ordinary meaning of the words, a treaty's object and purpose and the subsequent practice, Article 32 VLCT advances the *travaux préparatoires* as supplementary means of treaty interpretation. At the XVIIth International Red Cross Conference in 1948, the

---

[424] ICRC, 'Annual Report 2012', 169; ICRC, 'Annual Report 2014', 202.
[425] ICRC, 'Annual Report 2012', 443.
[426] *Ibid.*
[427] As was noted also, for instance, by the International Commission of Inquiry on the Central African Republic, see The International Commission of Inquiry on the Central African Republic: Final Report, UN Doc. S/2014/928, 22 December 2014, paras 89–91.
[428] ICRC, 'Colombia: Five armed conflicts – what's happening?', 30 January 2019, https://www.icrc.org/en/document/colombia-five-armed-conflicts-whats-happening.
[429] For a discussion of what this statement tells us about the ICRC's position on the support-based approach, see *infra* Section 4.2.2, sub-Section B.2.

notion of 'belligerents' was still used instead of 'parties to the conflict.[430] The 1948 ICRC Draft Geneva Conventions I, II and III contained in their general provisions the concept 'parties to the conflict' (for example in the articles relating to special agreements and the procedure of conciliation, and in Article 3 Draft GC III on the definition of a prisoner of war), but the rest of the drafts still referred to 'belligerents'.[431] In contrast, Draft Geneva Convention IV already systematically used the notion 'parties to the conflict' instead of 'belligerents'. This discrepancy in wording between the Draft GC I, II and III and Draft GC IV was *inter alia* noted by the Belgian delegate during the negotiations, who pointed at Articles 15/19 GC I and II and Article 15 GC IV specifically.[432] The UK delegate's preference was to change everything to 'belligerents', but the matter was referred to the Drafting Committee.[433] That Committee changed the word 'belligerent' almost everywhere in the Conventions[434] into 'party to the conflict'. Some attempts to stop these changes were made during the negotiations. For example during the discussions regarding draft Article 3 GC III, a proposal was made to change 'parties to the conflict' back to 'adverse belligerent', as that was the language used in the Hague Rules of 1907.[435] This proposal was rejected since 'the conditions of war had changed since 1907 and [since] there was no need to retain an obsolete terminology.'[436] The Guidance for the Red Cross Societies, which was drafted after the adoption of the Geneva Conventions, explains the change in wording because

> [t]he term" belligerent" means" legally at war", in speaking of a nation. But the four Conventions henceforth *apply* also when a state of war is not recognised (Article 2), and, at least for certain provisions, where the conflict is not international (Article 3). Therefore the term "belligerent" does not, because of its limitative sense, cover all possible cases, and it had to be replaced by a more general expression.[437]

While the *travaux préparatoires* show us that the negotiators found that 'parties to the conflict' was more apt language than 'belligerents' to describe the 'changed conditions of war', this *rationale* for updating the GCs' language does not help us in identifying the specific threshold for determining when an entity becomes party to a conflict. In absence of guidance from IHL

---

[430] ICRC, Report of the XVIIth International Red Cross Conference, Stockholm, 1948, 113 p.
[431] Switzerland, Final Record of the Diplomatic Conference of Geneva, Vol. I (Federal Political Department, 1949), 47–48 (Art. 4 (Special agreements), 6 (Protecting Powers), 7 (Activities of the ICRC), 8 (substitutes for protecting powers) and 9 (conciliation procedures) of Draft GC I), 61-61 (Art. 5 (special agreements), 7 (Protecting Powers), 8 (Activities of the ICRC), 9 (substitutes for protecting powers) and 10 (conciliation procedures) of Draft GC II), 73-74 (Art. 3 (prisoners of war), Art. 5 (special agreements), 7 (Protecting Powers), 8 (Activities of the ICRC), 9 (substitutes for protecting powers) and 10 (conciliation procedures) of Draft GC III). Compare with *ibid.*, 113–39 (Draft GC IV).
[432] Switzerland, 'Final Record of the Diplomatic Conference of Geneva, Vol. II-B', 138.
[433] *Ibid.*
[434] There are still some exceptions. For example, Arts. 14, 16, 17 GC II use the concept 'belligerent': it seems that for these articles there is no equivalent in the other GCs, hence the drafter probably forgot to adjust the language when adjusting everything in accordance with the new terminology.
[435] Switzerland, Final Record of the Diplomatic Conference of Geneva, Vol. II-A (Federal Political Department, 1949), 477–78.
[436] *Ibid.*, 478.
[437] ICRC, The Geneva Conventions of August 12, 1949. Analysis for the Use of Red Cross Societies, Vol. I, 1950, 7.

treaties – even after having relied on the treaty interpretation rules – various approaches can be taken. A first, traditional approach, is to rely on the definitions of armed conflict as provided by the treaties and as interpreted by case-law in order to identify when an entity becomes party to armed conflict (Sections 3.1 and 3.2). However, in times of intense cooperation, modern technology and ever complex networks behind the actual parties of an armed conflict, it is useful to look at alternative ways to interpret the notion of 'parties' to a contemporary armed conflict (Section 4).

Even though IHL is a body of international law that only applies during situations of armed conflict, remarkably so, it does not define the notion of 'armed conflict'.[438] An attempt of a general definition has been provided by the ICTY, which held in the *Tadić* case that an armed conflict exists 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' [439] Under IHL indeed only two types of armed conflict exist: international armed conflicts (IACs) and non-international armed conflicts (NIACs). The following Sections address how the existence of those two types of armed conflict is to be established.

3.1. Establishing the existence of an international armed conflict

Article 2 common to the Geneva Conventions outlines the scope of application of the Conventions, by identifying three different situations that all amount to what is generally called 'international armed conflicts': declared war, any other conflict between two or more High Contracting Parties and occupation.[440] Article 1 of AP I, besides confirming the scope of application provided in Article 2 GCs[441], has added a fourth possibility to that list: the fight of peoples against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination.[442] The latter possibility has only very limited

[438] As noted by the International Law Association,

> [t]he accurate identification of a situation of armed conflict has significant and wide-ranging implications for the discipline of international law. Armed conflict may have an impact on treaty obligations; on U.N. operations: on asylum rights and duties, on arms control obligations, and on the law of neutrality, amongst others. Perhaps most importantly states may only claim belligerent rights during and armed conflict. To claim such rights outside situations of armed conflict risks violating fundamental human rights that prevail in non-armed conflict situations, i.e., in situations of peace.

See ILA, Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law', 713.

[439] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.

[440] Article 2 GCs reads:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. […]

[441] See Article 1(3) AP I.

[442] Article 1(4) AP I reads:

> The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles

practical relevance and will therefore not be dealt with in this study.[443] In addition, the establishment of a situation of occupation forms an entire subfield of IHL on its own and it is not the aspiration of this study to contribute to that discussion.[444] In contrast, the two remaining options, of declared war and especially that of 'any other conflict between High Contracting Parties', will form the basis to answer the question whether supportive acts render a State party to an international armed conflict.

The first situation of international armed conflict to which the Conventions apply is that of 'declared war', a notion that is 'imbued with formalism and subjectivity'.[445] A state of war is triggered by at least one unilateral declaration of war by the involved States, even if no actual hostilities takes place between them.[446] Such a situation occurred, for instance, when Latin American States declared war with the Axis Powers in spite of not being involved in fighting with them.[447] After WWII and the inclusion of the prohibition on the use of force in the UN Charter[448], the concept of declared war entered in a 'progressive decline'.[449] For the purpose of this study, the concept of declared war is only relevant in case supporting States explicitly declare war with the enemy of the belligerent they are supporting. In such scenario, the form of support (training, weapon supply, target identification,…) would not matter, as a mere declaration of war suffices to trigger the application of the Geneva Conventions.[450] Such a scenario is however very unlikely.

Much more relevant for this study is the second scenario for international armed conflict, defined by Article 2 GCs as 'any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not declared between them'. The 'main added value of the concept of armed conflict', the Commentary to Article 2 notes, 'is to base the application of the Geneva Conventions on objective and factual criteria'[451], as opposed to the subjective notion of 'state of war'. The ICTY has provided the reference for the

---

of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nation.

[443] On wars of self-determination, see for example Marco Sassòli, 'The Concept and the Beginning of Occupation', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 19–21.

[444] For more information on situations of occupation, see for example Sassòli, 'The Concept and the Beginning of Occupation'.

[445] ICRC, *Commentary on the First Geneva Convention*, 73.

[446] *Ibid.*, para. 206.

[447] *Ibid.*, 74; Dinstein, *War, Aggression and Self-Defence*, 2011, 9.

[448] See *infra* Chapter 4, Section 3.1.

[449] ICRC, *Commentary on the First Geneva Convention*, 75. For some 'modern' examples, see Christopher Greenwood, 'The concept of war in modern international law', *International & Comparative Law Quarterly* 36, no. 2 (April 1987): 290–94, who finds indications of a continued relevance of the concept by reference to e.g. the Arab States and Israel, to India and Pakistan and to the Falklands War.

[450] As the Commentary notes, '[m]aintaining the notion of declared war also serves a humanitarian purpose insofar as it makes it possible – even if States have not yet engaged in open hostilities – for enemy nationals who find themselves in the territory of the opposing Party to benefit from the protection conferred by humanitarian law should they be exposed to the adverse effects of a declaration of war and its correlative bellicose rhetoric and atmosphere.' See 'ICRC, *Commentary on the First Geneva Convention*, para. 208.

[451] *Ibid.*, 76.

contemporary definition of an international armed conflict in the *Tadić* case, when it held that 'an armed conflict exists whenever there is a resort to armed force between States'.[452]

While the Tadić definition is widely accepted in doctrine and practice[453], the crux of the question is what is to be considered as 'armed force between States'.[454] The 1958 Commentary to Article 2 of GC IV too narrowly explained this notion by requiring the 'intervention of the members of the armed forces'[455]. It is generally acknowledged that the unilateral resort to force by a State against another, even in the absence of a reaction by the latter, also triggers an IAC: the invasion by armed forces into the territory of another State, without an armed encounter with the State's population, infrastructure or armed forces[456], would still classify as an IAC.[457] Even an 'armed confrontation' does not always seem to be necessary, as 'the declaration, establishment and enforcement of an effective naval or air blockade' may be sufficient to trigger an IAC.[458] For an international armed conflict to come into existence it thus seems that the 'involvement of the armed forces of at least one State' is required, or more broadly, the involvement of State agencies with the same characteristics, such as paramilitary personnel or board guards.[459] On the way in which the armed forces of a State should be 'involved', the 2016 ICRC Commentary to Article 2 notes that

> armed conflict presumes the deployment of military means in order to overcome the enemy or force into submission, to eradicate the threat it represents or to force it to change its course of action.[460]

If 'resort to armed force' requires the 'deployment of military means', then the relevant question is what should be understood as such. Indeed, 'deployment' is merely a synonym of 'use', and military means can theoretically be any action undertaken by the military of a State. The 1958

---

[452] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.
[453] Nearly the same definition is for instance also included in Article 2(b) of the ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, Report of the International Law Commission on Its Sixty-Third Session (26 April - June and 4 July - 12 August 2011), UN Doc. A/66/10, 2011, 110.
[454] The question whether an entity can be considered a State and who is entitled to represent it is also important, but less relevant in the framework of this study. See however ICRC, *Commentary on the First Geneva Convention*, paras 231–235.
[455] See Jean S. Pictet et al., *The Geneva Conventions of 12 August 1949. IV: Geneva Convention IV relative to the protection of civilian persons in time of war: commentary* (Geneva: ICRC, 1958), 20, and the criticism expressed in the 2016 Commentary: ICRC, *Commentary on the First Geneva Convention*, 81.
[456] A strong minority of doctrine holds however that if armed forces intervene in another territory in order to attack an armed group, and if they solely target that armed group without targeting the State's infrastructure or population, that in such case the attacking Stating is only involved in a NIAC with the armed group and not (in parallel) in an IAC with the territorial State. See Lubell, *Extraterritorial Use of Force against Non-State Actors*, 92ff; Claus Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', *Journal of Conflict and Security Law* 15 (2010): 255–67; Carron, 'L'acte Déclencheur d'un Conflit Armé International', 402–25. The latter takes the 'identity position' and argues that a conflict should be classified based on the identity of the target of an attack, *in casu* an armed group. For a rejoinder of this position by Marco Sassòli, see ICRC and College of Europe, 'Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law. 17th Bruges Colloquium, 20-21 October 2016', Collegium, 2017, 51.
[457] ICRC, *Commentary on the First Geneva Convention*, 81. This position is labeled by Carron as the 'consent position', see Carron, 'Transnational Armed Conflicts', 12.
[458] ICRC, *Commentary on the First Geneva Convention*, para. 223.
[459] *Ibid.*, 82.
[460] *Ibid.*

Pictet Commentary famously noted that 'it makes no difference how long the conflict lasts, or how much slaughter takes place'[461] and that 'it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of GC III]'[462]. Pictet thus dismissed the idea that a certain level of intense fighting was necessary before the IHL rules applicable in situations of international armed conflict would become operational. There are two main reasons to reject the requirement of an intensity threshold[463]: first, allowing IHL to be applicable as soon as hostilities arise or when someone is captured serves the humanitarian purpose of the treaties. Second, IHL application from the very start of hostilities is preferable as domestic law and human rights law is ill-suited to the hostile encounters between two or more States. This conception of an IAC is well-accepted in State practice, by international bodies and in international jurisprudence[464], and by the vast majority of doctrine. However, it is also generally agreed that low-intensity acts do not bring about the existence of an IAC if they were unintended.[465] Therefore, such acts can only trigger the application of IHL if they are committed with a belligerent intent.[466] This criterion avoids that shots by coincidence or an individual act of a soldier would trigger the applicability of IHL and create a situation of international armed conflict between the States involved. Nevertheless, if one single shot was intentionally shot, it would be sufficient to trigger an international armed conflict between the two involved States.

There are a few alternative views though. First, a minority of doctrine (including the International Law Association) holds that an intensity threshold for the existence of an IAC should be used.[467] The International Law Association came to this conclusion after analysing State practice, observing that there are many examples of (short) intense hostile encounters where no classification of IAC was used.[468] O'Connell argues that there is very few State practice accepting the existence of an IAC in the absence of intense fighting.[469] This view should

[461] Pictet et al., *The Geneva Conventions of 12 August 1949. IV*, 20.
[462] Jean de Preux et al., *The Geneva Conventions of 12 August 1949. III: Geneva Convention III relative to the treatment of prisoners of war: commentary*, A.P. de Heney (trans.), (Geneva: ICRC, 1960), 23.
[463] ICRC, *Commentary on the First Geneva Convention*, 86–87.
[464] See for instance Prosecutor v. Mucić et al., Judgment, para. 208.
[465] Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', 41. See also United Kingdom, Ministry of Defence, *The joint service manual of the law of armed conflict*, para. 3.3.1.
[466] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 576. See however Clapham, who argues that '[t]he use of force or border incursion must be intentional rather than accidental, but there is no longer support for the idea that one needs a belligerent intent to go to war.' Andrew Clapham, 'The Concept of International Armed Conflict', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 12.
[467] ILA, Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law', 713. See also Mary Ellen O'Connell, 'Saving lives through a definition of international armed conflict', *Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities. Proceedings of the 10th Bruges Colloquium 22-23 October 2009* 40 (2010): 25–26. Macini even labels this position as 'a widely held view', even though she only refers to the ILA report. Macini, 'The Effects of a State of War or Armed Conflict', 999. Countering this view is Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', 41.
[468] ILA, Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law'.
[469] '[O]nly a single case in which IHL was invoked in an incident where the armed forces of two States party to the Geneva Convention [sic] were engaged but no fighting took place. In 1983 and American pilot was shot down by Syria and held for about a month. An official U.S. spokesperson said the pilot should be held as a prisoner of

be rejected for the two reasons mentioned above. Second, some have argued that for a particular type of armed conflict, namely multinational operations under UN control[470], or even simply on the basis of a UN mandate[471], IHL should only govern the actions of those forces when a certain intensity threshold is met.[472] Such a position does not find support in practice and *opinio juris*[473] and would not respect the fundamental distinction between *jus in bello* and *jus ad bellum* and should therefore be rejected. The present author joins the ICRC's position that the general, classic criteria of IHL applicability apply to all types of military operations, regardless whether such operations occur in the framework of a peacekeeping of peace-enforcement mandate.[474] In case the multinational operation is organized in the framework of an international organization, it depends on the circumstances of each specific operation whether the international organization or the troop-contributing countries should be considered parties to the IAC, or both.[475]

Does the absence of an intensity threshold for IACs mean that the supportive acts under investigation in this study – (i) allowing territory to be used, (ii) logistical support, (iii) training and (iv) crucial intelligence sharing – automatically amount to a 'resort to force' and trigger an IAC? Even with the absence of an intensity threshold, that would be an unlikely conclusion. The discussion on the intensity threshold focuses solely on the question whether any armed *resort to force* between two States leads to an IAC: the absence of an intensity requirement does

---

war.' See O'Connell, 'Saving Lives through a Definition of International Armed Conflict', 26. Similarly, Greenwood noted in 1995 that 'many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts' and that it 'may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply'. Greenwood, 'Scope of International Humanitarian Law', 42.

[470] See the position by the Norwegian Prime Minister during a parliamentary debate on Operation Unified Protection by NATO forces in Libya, cited by Ola Engdahl, 'Multinational peace operations forces involved in armed conflict: who are the parties?', in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: Cambridge University Press, 2013), 259.

[471] See for instance the UK LOAC Manual, which states that

> [a Peace Support Operation] force can become party to an armed conflict, and thus subject to the law of armed conflict: a. where it was mandated from the outset to engage in hostilities with opposing armed forces as part of its mission (which will be the case, for example, with certain types of enforcement action *under Chapter VII of the United Nations Charter*); and b. where its personnel, though not originally charged with such a task, become involved in hostilities as combatants (whether as a result of their own initiative or because they are attacked by other forces) to such a degree that an armed conflict comes into being between the PSO force. [emphasis added]

United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, para. 15.4.

[472] Christopher Greenwood, 'International humanitarian law and United Nations military operations', *Yearbook of International Humanitarian Law* 1 (1998): 24: 'It seems, therefore, that there is a tendency to treat the threshold for determining whether a force has become party to an armed conflict as being somewhat higher in the case of United Nations and associated forces engaged in a mission which has a primarily peace-keeping or humanitarian character than in the normal case of conflicts between states.'

[473] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 582.

[474] ICRC, International humanitarian law and the challenges of contemporary armed conflicts. Report for the 32nd International Conference of the Red Cross and the Red Crescent, 2015, 22.

[475] See ICRC, *Commentary on the First Geneva Convention*, 90: 'When multinational operations are conducted by States not subject to the command and control of an international organization, the individual States participating in military operations against another State(s) should be considered as Parties to the international armed conflict.'

not mean that any other situation apart from forcible confrontations could lead to IACs. Therefore, the supportive acts mentioned would under the classic approach of IACs arguably only result in becoming party to the conflict if the support is conducted on the territory of the adversary without the latter's consent. Indeed, according to the most recent position of the ICRC on the matter, the mere presence of armed forces on the territory of another State, if not consented to by the latter, constitutes an international armed conflict.[476] Thus, if for instance intelligence is collected through a military unit on the ground, whose presence has not been approved by the territorial State, the State that collects (and shares) the intelligence could be assumed to be involved in an international armed conflict with the territorial State. This equally goes for unconsented presence against the background of an ongoing NIAC: if armed forces are conducting activities in support of an armed group, on the territory of another State without the latter's consent, then an IAC can arguably be said to exist in parallel with the ongoing NIAC. It should be stressed though that not all supportive acts require the presence of armed forces in the territory of a State party to an armed conflict: allowing territory to be used, for instance, does not even imply a deployment of forces; or intelligence sharing can be preceded by a collection of information through satellite images or a network of informants.

Lastly, it should be noted that neither common Article 2 GCs nor Article 1 AP I refers to the law of neutrality as a potential basis to identify the existence of an international armed conflict. This is an important observation to keep in mind when the consequences of supportive acts under the law of neutrality are discussed in Chapter 5.[477]

In sum, under the classic criteria that are used to establish the existence of an international armed conflict, despite the absence of an intensity criterion, supportive acts would not automatically lead to the conclusion that a State becomes party to the ongoing IAC. This could only be the case if the support involves the unwanted presence on another State's territory and

[476] *Ibid*., 95. For a rejoinder, see Dapo Akande, 'When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?', *EJIL: Talk!*, 18 October 2016, http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/. For the opposing view, see however e.g. Carron's identity position: Carron, 'L'acte Déclencheur d'un Conflit Armé International', 402–25, and a rejoinder thereof by Sassòli: Sassòli, *International Humanitarian Law*, 170–72. While in my view the ICRC position is the correct approach in light of the logic of IHL, there is thus far not much State practice available confirming that position. The ICRC commentary refers for instance to the Report of the Commission of Inquiry on Lebanon, which qualifies the situation between Israel and Lebanon in 2006 as an international armed conflict, while the Lebanese armed forces did not actively participate in the conflict. See ICRC, *Commentary on the First Geneva Convention*, para. 261. However, the Commentary fails to appreciate the fact that the same report clearly mentions that '[f]or its part, IDF attacked the Lebanese Armed Forces and its assets (e.g. military airport at Qliat in northern Lebanon, all radar installations along the Lebanese coast, and the army barracks at Djamhour, 100 kilometres from the southern border with Israel)', thus making it an unsuitable example in support of this theory. See UN Commission of Inquiry on Lebanon, Report of the Commission of Enquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, para. 53. The lack of clear State acceptance can perhaps be explained because of the fact that States rightfully focus on the conflict that forms the core of their military operations, namely the parallel NIAC with the armed group.

[477] See more specifically Chapter 5, Section 3.2.2.

if it is accepted that such mere presence triggers an IAC. Whether or not any innovative approaches would allow for a different conclusion is discussed in Section 4.

3.2. Establishing the existence of a non-international armed conflict

In contrast to the very low threshold for an IAC to come into existence, for a NIAC to be triggered, a higher threshold is set. No threshold is however mentioned in Article 3 GCs, which merely refers to 'an armed conflict which is not of an international character'. Faced with this lack of definition, the ICTY has defined a NIAC on the basis of State practice as a situation 'whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'[478] In subsequent case-law, the ICTY explained that rather than 'protracted' violence, 'intense' violence was needed[479]. As a result, the two contemporary constitutive elements for a NIAC are generally considered to be (i) organization and (ii) intensity. The 2016 Commentary to common Article 3 confirms the authority of these criteria.[480]

First, a NIAC can only exist if there is an armed group that is sufficiently organized, with a command structure. The motivation of the group in question is not important.[481] Factors indicating the fulfilment of this criterion are

> existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.[482]

Whether or not an armed group is sufficiently organized is a factual question that should be assessed on a case-by-case basis. In this study, we will assume that the armed groups who

[478] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.
[479] Prosecutor v. Ramush Haradinaj et al, Judgment, No. IT-04-84-T (ICTY, Trial Chamber, 3 April 2008), para. 49.
[480] ICRC, *Commentary on the First Geneva Convention*, paras 422–437. The previous commentary to Article 3 still seemed to define a higher threshold, based on 'convenient criteria' raised during the negotiations of the Geneva Conventions. See references in *ibid.*, para. 420. Therefore, Cullen rightfully notes that 'it needs to be recognised that the contemporary threshold for the application of international humanitarian law is lower than that which was assumed during the drafting of common Article 3'. See Anthony Cullen, *The concept of non-international armed conflict in international humanitarian law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2010), 158. For a rare voice disagreeing with the criteria identified by the ICTY, see Haque, 'Triggers and Thresholds of Non-International Armed Conflict'.
[481] See however Crawford, who submits that 'for policy reasons, in the case of organized crime groups [such as the drug cartels in Mexico], the motives of the parties should be taken into consideration if IHL is to be the *lex specialis*.' Emily Crawford, *Identifying the enemy: civilian participation in armed conflict* (New York: Oxford University Press, 2015), 186.
[482] Prosecutor v. Ramush Haradinaj et al, Judgment, para. 60.

provide and receive support from or to a State or another armed group are sufficiently organized. This assumption allows us to focus on the type of support provided, rather than on the organized nature of the armed group. Nevertheless, if an armed group is insufficiently organized, it cannot become party to an ongoing armed conflict.

The second criterion is much more relevant for the analysis of supportive acts: the fighting between a State and an armed group, or between armed groups, must be sufficiently intense.[483] According to international case-law, a number of factors can be taken into account, such as

> the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed […] the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.[484]

Isolated violent acts would however not trigger the existence of a NIAC. Article 1 of AP II identifies the lower limit of non-international armed conflict by providing that the Protocol 'shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.' While dealing with the material scope of AP II specifically, this lower limit is considered to be equally valid for the material scope of IHL applicable to NIACs governed solely by common Article 3.[485] Such an exclusion would however not rule out the consideration of a combination of isolated violent acts over time. In practice, the border between what is 'isolated' and what is part of a pattern of sufficiently intense violence is however difficult to make. The application of an 'accumulation of events' theory to acts that occur during a certain passage of time should thus not *prima facie* be excluded when classifying NIACs.[486]

---

[483] Even though initially the ICTY used the word 'protracted', in the *Tadić* case, it has subsequently and consistently changed its wording into 'intensity'.

[484] Prosecutor v. Boškoski, Judgment, No. IT-04-82-T (ICTY, Trial Chamber, 10 July 2008), para. 177 (summarizing its previous case-law).

[485] ICRC, *Commentary on the First Geneva Convention*, 141.

[486] The accumulation of events theory is often referred to in the context of the *jus ad bellum*, when an assessment has to be made whether or not certain acts meet the threshold of an armed attack. While relatively well accepted, the theory does not come without problems: as indicated here, the question remains when enough 'intensity' is accumulated, and over which period of time acts may be assessed. See Chapter 4, Section 4.2.

Conversely, it is much less convincing to apply the same accumulation of events from a geographical perspective: some have argued that various isolated acts carried out by an armed group in geographically disparate locations would, if considered cumulatively, amount to the intensity requirement of a NIAC. Also dubbed 'global NIAC' or 'transnational NIAC', this argument was raised for instance by the US in order to explain their position on the global war on terror against Al Qaeda, the Taliban and its associated forces.[487] If correct, this position would allow for an application of the IHL paradigm to any attack against Al Qaeda, the Taliban or its associated forces wherever they are located on the globe. This approach is to be rejected[488], as it would considerably lower the protection of the civilian population of the States concerned: they would possibly become 'collateral damage' of what would be assessed as potentially lawful acts under IHL. The better view, therefore, is that a case-by-case evaluation should be made in order to assess whether geographically disparate violent acts can jointly trigger a non-international armed-conflict.[489]

It is also debatable whether an isolated, yet high intensity act, triggers the existence of a NIAC. According to Rodenhäuser, 'even intense isolated acts of violence, such as aerial bombardments or a terrorist attack, can barely trigger a NIAC instantly. […] Concretely, Belgium could not launch airstrikes against an armed group based in infamous Molenbeek if that group succeeded in launching one attack in Brussels'.[490] Written *in tempore non suspecto*, this statement became highly relevant after the Brussels attacks on 22 March 2016. In the same line goes the observation made by Lubell on a UK drone strike carried out in 2015 against an ISIS individual in Syria, disconnected from the coalition operation against ISIS. According to Lubell, 'it is hard to see how [a single airstrike not connected to an ongoing NIAC] would pass the intensity threshold to be considered a separate armed conflict.'[491] While these observations may be correct if the State (*in casu* Belgium and the UK, respectively) is not yet involved in a NIAC with ISIS, when it is, the above scenarios relate more to the question of the geographical scope of IHL than to the threshold of intensity for a NIAC. Important to note here is however that the above scenarios do not concern the question whether (low-intensity) support provided to a party to a NIAC renders the supporting State party to that NIAC as well. Rather, they deal with the question whether a separate NIAC as such can be triggered by intense sporadic violence. To

[487] Note that the notion 'war on terror', introduced by President Bush in after the 9/11 attacks, was abandoned by President Obama. Yet, the underlying idea did not change. See e.g. Oliver Burkeman, 'Obama administration to end use of term "war on terror"', *The Guardian*, 25 March 2009, https://www.theguardian.com/world/2009/mar/25/obama-war-terror-overseas-contingency-operations; Jessica Stern, 'Obama and Terrorism', *Foreign Affairs*, 1 October 2015, https://www.foreignaffairs.com/articles/obama-and-terrorism.

[488] For a critical analysis of this approach, see Lubell, *Extraterritorial Use of Force against Non-State Actors*, 112ff. Lubell highlights for example that a significant 'query that arises […] is whether they can all in fact be attributed to a single organization.' *Ibid.*, 117.

[489] ICRC, *Commentary on the First Geneva Convention*, paras 478–482.

[490] Rodenhäuser, 'Self-Defense Operations Against Armed Groups and the Jus in Bello'.

[491] Noam Lubell, 'The Legal Questions About the UK's Drone Strike in Syria', *Just Security*, 9 October 2015, https://www.justsecurity.org/25951/legal-questions-uks-targeted-killing-syria/.

the latter question, the answers seems to be no. The former question will be dealt with under Section 4.

If a situation fulfils the two above-described criteria of intensity and organization, it is a NIAC to which Article 3 GCs is applicable. In addition, the conflict could possibly also be governed by Additional Protocol II, but only if a number of specific criteria are fulfilled. The conflict must

> take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[492]

Clearly, the combination of these conditions for AP II to become applicable is more rigorous than the criteria of intensity and organization for Art. 3 GCs. Especially the criteria related to the capacity of the armed group (a responsible command, control over a territory and ability to carry out sustained and concerted military operations,…) are stricter than the 'mere' organization criterion under Article 3. Others have described and discussed in detail the various conditions for the applicability of AP II[493], but for the purpose of this study, one important difference with Article 3 GCs should be stressed: only NIACs between a State on the one hand and an armed group on the other can fall within the scope of AP II. Thus, while a NIAC generally does not require the involvement of a State as one of the parties to a conflict, a NIAC covered by AP II will always have a State on one side of the conflict.

To complete the picture, it should be noted that in addition to the ICTY definition of a NIAC falling under Article 3 GCs, and the definition included in Article 1 AP II, the Rome Statute of the International Criminal Court added yet a slightly differently formulated definition of a NIAC. To be precise, Article 8 of the Rome Statute offers two definitions of a NIAC. On the one hand, it joins the wording of Article 3 GCs with that of Article 1(2) AP II by defining in Article 8(2)(d) that the crimes in littera (c) apply to

> armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

In addition, Article 8(2)(f) repeats the above phrase and furthermore specifies that the crimes listed in littera (e) apply to

> armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

[492] Art. 1(1) AP II.
[493] See for example Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, 102ff. See also Bothe, Partsch, and Solf, *New Rules for Victims of Armed Conflicts*, paras 4458–4470.

This provision has led some to conclude that a third category of NIACs exists for which 'protracted armed conflict' is needed.[494] In practice, the ICC does not seem to be endorsing a third category of NIACs, neither does it make a distinction between NIACs under littera (c) or (e). The Court applies the criteria of organization and protracted violence and for the latter it uses similar indicators as the ones proposed by the ICTY for the assessment of the intensity threshold.[495]

In sum, a non-international armed conflict is established when two conditions are fulfilled (i) sufficiently organized parties who (ii) are involved in sufficiently intense fighting. In addition, the rules included in Additional Protocol II only apply to those NIACs where an armed group controls a part of the territory that enables them to carry out sustained and concerted military operations against a State that is party to the Protocol.

3.3. Section conclusion: supportive acts generally do not 'establish' an armed conflict

Regardless the type of conflict, in reality parties on both sides will often not be capable of fighting without some degree of support by a third State. Military cooperation among States is a very common practice. Armed groups functioning totally independently from any State support are rare.[496]

Under *jus in bello*, supportive acts do not constitute a 'resort to force' between two or more States, because of the absence of 'force' between those two States.[497] While the threshold for an IAC to come into existence is low (a single shot would suffice), there is nevertheless still need for 'force' between States. As outlined above, such force can take the form of actual shooting, of the detention of a soldier of the other State or of forcibly entering a territory (which arguably also includes the mere entry in another State's territory without the latter's consent).

---

[494] See e.g. Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How does law protect in war?*, 3rd ed. (Geneva: International Committee of the Red Cross, 2011), 123.

[495] Prosecutor v. Thomas Lubanga Dyilo, Judgment, ICC, Trial Chamber, 14 March 2012, paras 534–538; Prosecutor v. Germain Katanga, Judgment, No. ICC-01/04-01/07 (ICC, Trial Chamber, 7 March 2014), paras 1183–1187.

[496] Some armed groups are capable of organizing their own financing, albeit not always in a legal way. The FARC in Colombia, for example, ensured its financing by kidnappings and strong links with the drugs industry. See Felicity Szesnat and Annie R. Bird, 'Colombia', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 207. Perhaps at the peak of its 'success', ISIS came close to an 'independent' armed group. Nevertheless, ISIS allegedly still traded oil with Turkey in order to fund its activities. See Tom Brooks-Pollock, 'Russia unveils "proof" Turkey's Erdogan is smuggling Isis oil across border from Syria', *Independent*, 12 April 2015, https://www.independent.co.uk/news/world/europe/russia-releases-proof-turkey-is-smuggling-isis-oil-over-its-border-a6757651.html.

[497] This conclusion regarding the 'resort to force' under *jus in bello* should not be confused with the analysis regarding the unlawful 'use of force' under *jus ad bellum*, which can be committed if a State provides certain types of support to an armed group (see *infra* Chapter 4, Section 4.1.3.A). Thus, keeping in mind the crucial separation between *jus in bello* and *jus ad bellum*, it is envisageable that a State commits an unlawful use of force *vis-à-vis* another State by supporting an armed group, while not becoming party to an international armed conflict with the latter for the purpose of *jus in bello*.

The supportive acts studied here do not involve a resort to force required for the establishment of an IAC, provided of course they do not imply the unconsented entry of military personnel in the territory of the 'enemy State'.

If the supportive acts considered here do not fulfil the low threshold for the establishment of an IAC, then *a fortiori* they are unlikely to meet the intensity threshold required to establish a non-international armed conflict. As discussed above, that NIAC threshold does not only require hostilities between a government and a sufficiently organized armed group or between such armed groups, it also imposes a criterion of intensity of those hostilities. Mere violent clashes would not suffice. This intensity criterion excludes supportive acts from directly establishing a non-international armed conflict between the supporting party and the enemy party, in addition to the conflict that already existed. It should be noted, however, that the ICRC's reasoning with regard to the establishment of an IAC on the basis of unconsented presence on another State's territory equally applies in case support is provided in the context of a NIAC. Regardless the classification of the ongoing armed conflict, and regardless even of the type of support provided to a party thereto, if the support involves the unconsented entry by the supporting State in the territory of a party to the conflict, an additional international armed conflict is established.[498]

In the Section that follows, I will explore whether there are ways different than the 'classic' criteria discussed above to assess whether supportive acts could turn a support-providing State into a party to an armed conflict. First, I will look at the scenario in which a State provides that much support to a party to a conflict that it actually controls what that party does. Second, the scenario whereby the support does not amount to a certain degree of control will be investigated. The starting point for the latter analysis will be the similarity between the micro-question on direct participation in hostilities by an individual and the macro-question of being considered party to an armed conflict through supportive acts.

4. Assessing State support to parties to a pre-existing armed conflict

In what follows, I will investigate whether a State, by providing support to a party to an armed conflict, also becomes party to an armed conflict. As explained in the introductory Chapter, this study focuses on a number of specific categories of supportive acts, which are nevertheless still broad enough to cover numerous different kinds of support.[499] To recall, for instance, support in the form of sending armed forces to join the fighting is excluded from this study. Likewise, aerial combat support to a party fighting on the ground will not be considered either. The reason for this exclusion is because it is not doubted that such 'lethal' or 'kinetic' support would render the supporting State party to an armed conflict. The only controversy that exists with regard to that kind of support is to which type of conflict – an IAC or a NIAC – the supporting (or rather:

[498] See however note 456 for dissenting opinions.
[499] See the Introduction, Section 3.

intervening) State becomes a party. Before continuing, the following paragraph will briefly touch upon that debate.

When a third State provides lethal assistance to a party involved in an IAC, the logic and undisputed conclusion is that that third State becomes involved in the pre-existing IAC as well. Thus, when the US joined the allied Powers in their fight against the German Reich during WWII, by sending troops to Normandy, the US became party to the pre-existing IAC. Trickier is the question whether third-State lethal support to a party involved in a NIAC renders that State party to a NIAC or and IAC. While in the past a small minority has argued that any third State involvement in a NIAC (including by multinational organizations) would internationalize the entire conflict[500], the better view is that a distinction should be made on the basis of the party that is supported.[501] If the lethal third-State support is provided to a State involved in a NIAC against an armed group, the third State will become party to that pre-existing NIAC – assuming, of course, that the level of intensity is met. If, conversely, the lethal support is provided to the armed group, then the third State will become involved in an IAC with the State on whose territory the NIAC is taking place, in parallel with the still ongoing NIAC between the armed group and the territorial State – again assuming the intensity criterion is met. Only if the lethal support is combined with a sufficient form of control over the armed group, the result will be different.[502] If both parties to the NIAC receive lethal third-State support, the classification of the various parallel conflicts depends on the involvement of the parties therein. As such, one overall conflict situation can thus be constituted of a variety of legal conflict classifications. While such approach may be theoretically the correct one, in practice it may cause difficulties when the exact legal regime applicable, for instance to detainees, has to be established.[503] Such a decision needs to be made based on each specific circumstances of the case.

Having clarified this, I will now turn to the situation whereby it is not clear that the support provided by a third State would automatically meet the required thresholds under the classic classification rules.

---

[500] See Eric David, *Principes de droit des conflits armés*, 5th ed. (Bruxelles: Bruylant, 2012), 178. Remarkably, such an overall 'internationalization' was also proposed by the ICRC to the 1971 Conference of Government Experts, which nevertheless rejected it, *inter alia* based on the argument that such an approach would encourage armed groups to seek third-State assistance. See ICRC, 'Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Report on the Work of the Conference' (Geneva, 1971), 50–52. For a detailed analysis of the various theories on the internationalization of armed conflicts, see Mačák, *Internationalized Armed Conflicts*.

[501] This is also the view currently defended by the ICRC and the majority of doctrine. See ICRC, *Commentary on the First Geneva Convention*, 147. The ICJ has implicitly accepted this approach in Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, 219, by holding that '[t]he conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.'

[502] As discussed below, see Section 4.1.

[503] Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', *International Review of the Red Cross*, no. 873 (2009): 86.

4.1. Support amounting to control

4.1.1. 'Control' over an armed group

If an armed group is embroiled in an armed conflict, it frequently occurs that it is supported by a third State. In some cases, that supporting State even has such strong ties with the armed group, that it is in fact the State itself that is involved in the armed conflict. As discussed in Chapter 1, there are a number of ways in which acts of an armed group could be attributed to a State. To recall, if members of an armed group can be considered *de facto* organs of a State because of their complete dependency from that State, then their acts (including wrongful acts) will be attributed to the State. Similarly, operations by an armed group committed under the instructions, direction or control by a State, will be attributed to the latter (Article 8 ARSIWA). The ICJ has formulated for the latter scenario the 'effective control' threshold, requiring effective control by the State over each specific act for which responsibility has to be attributed.

There is no question that, if acts by an armed group can be attributed to a State under the above summarized principles of the law of State responsibility, such link also has its effects from a *jus in bello* perspective: if committed by an armed group versus a State, those acts, committed by an armed group but under complete dependency or effective control by a State, will be considered to having taken place in the context of an international armed conflict, involving two States.[504] The remaining question is, however, whether under the *jus in bello* other criteria exist for linking acts of an armed group to a State. Or, taking into account the purpose of this study, whether forms of support not amounting to complete dependency or effective control would still have the effect of rendering the supporting State party to the (reclassified) armed conflict.

A. 'Belonging to'

The Geneva Conventions contain a specific provision that deals with the linkage between armed groups and States. Article 4(A)(2) GC III reads:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging to a Party to the conflict* and operating in or outside their own territory, even if this territory is occupied, provided that such militias or

[504] If however the original NIAC involves two armed groups fighting each other, one of which is supported and 'controlled' by a State, this would not change the nature of the original NIAC. It becomes more complicated if the supporting and controlling State is not the territorial State on which the NIAC takes place. Indeed, if a third State controls an armed group which is fighting another armed group, and if this support occurs without consent of the State 'hosting' the NIAC, this might lead to a situation of mixed conflict, whereby a NIAC and IAC co-exist.

> volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
> (a) that of having a fixed distinctive sign recognizable at a distance;
> (b) that of carrying arms openly;
> (c) that of conducting their operations in accordance with the laws and customs of war.

Article 4 defines which individuals should be considered 'prisoners of war' and receive the according treatment under the Third Geneva Convention. Besides regular members of armed forces that end up in the hands of the enemy (Article 4(A)(1) GC III), prisoner of war status is also granted to certain militias if they fulfil the above mentioned conditions.[505] One of the conditions, even though seemingly not listed as such, is that the group of which they are part should 'belong to a party to the conflict'. 'Conflict' in this sentence has to be understood as 'international armed conflict', since the Geneva Conventions predominantly apply to such type of conflicts.[506] Logically, a 'party to the conflict' can therefore only refer to a State. Consequently, if an armed group 'belongs to' a State, and if a member of that group fulfils criteria (a) to (d), then that member is considered a prisoner of war and becomes entitled to receive protection accordingly.[507]

However, the exact degree of control necessary for this to happen is highly disputed. The commentary to Art. 4 GC III seems to be quite permissively stating that

> [i]t is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power.[508]

Hence, a factual assessment of the relationship between the armed group and the supporting State is necessary. A formal relationship can be indicative, but will not be sufficient. However, the Pictet commentary remains silent as to how close this *de facto* relationship should be. The 2015 Commentary to the Geneva Conventions by the Geneva Academy notes that '[m]erely providing supplies or other logistical support does not seem sufficient to establish that an

[505] In addition, prisoner of war status is granted to a couple of other minor categories, such as the armed forces of a States whose government is not recognized (Article 4(A)(3) GC III) and the rare case of *levée en masse* (Article 4(A)(6) GC III).
[506] Except for, of course, common Article 3 GCs.
[507] Prisoners of war may not be punished for their mere participation in the hostilities. An elaborate framework regulating the treatment of prisoners of war during captivity can be found in the Third Geneva Convention.
[508] de Preux et al., *The Geneva Conventions of 12 August 1949. III*, 57. Note that a new, updated version of the ICRC Commentary to the Third Geneva Convention is on its way, and will probably be published by the time you are reading this.

organized armed group belongs to a State for the purpose of Article 4(A)(2)'.[509] Because of the absence of a clear threshold, however, the Commentary adds that 'belonging to a party to the conflict' is perhaps the least appreciated condition of Article 4(A)(2) [GC III].'[510]

While Article 4(A)(2) GC III undoubtedly may be used to grant members of an armed group a prisoner of war status if they belong to a State involved in an armed conflict, it is questionable whether the opposite reasoning is also valid. In other words: if members of an armed group 'belong to' a State, can that State be considered a 'party to the conflict'? Despite the fact that Article 4(A)(2) clearly was not designed for conflict classification purposes[511], the ICTY answered the question affirmatively when it developed its overall control criterion in the famous *Tadić* case.[512]

B. Overall control turns a NIAC into an IAC

In the *Tadić* case, the ICTY had to decide whether the context in which the crimes of which Tadić (a leader of the Bosnian Serbs fighting in Bosnia) was accused took place, was an international or a non-international armed conflict. For crimes committed before 19 May 1992, this question was fairly easy to answer: to that date, armed forces of the Federal Republic of Yugoslavia (which was at that time more or less reduced to the territory currently covering Serbia), called the Yugoslav People's Army or 'JNA', were fighting against Bosnian armed forces on the newly independent territory of Bosnia and Herzegovina. As the conflict was a 'resort to force' between two States, it was rightly classified by the ICTY as an international armed conflict.[513] As of 19 May 1992, however, the situation shifted. On that date, the JNA formally ceased to exist: it was divided into the official army of the Former Republic of Yugoslavia, on the one hand, and the Bosnian Serb Army (abbreviated as 'VRS')[514] on the other. The fighting between the VRS and the Bosnian armed forces continued. The Bosnian Serb Army formally did not constitute the armed force of a State. It was the armed force of the self-proclaimed secessionist Serb Republic within Bosnia and Herzegovina. Yet, the VRS, having only recently separated from the former Yugoslav People's Army, still had strong links

[509] Sean Watts, 'Who Is a Prisoner of War?', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 898.
[510] *Ibid.*, 896.
[511] 'It would have been difficult in 1949 to imagine the requirements contained in Article 4 being used in any way other than for the purpose of classifying individuals in the context of international armed conflicts.' See Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', 114.
[512] 'It is clear that [Article 4 GC III] is primarily directed toward establishing the requirements for the status of lawful combatants. Nevertheless, one of its logical consequences is that if, in an armed conflict, paramilitary units "belong" to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as "grave breaches".' Prosecutor v. Dusko Tadić, Judgment, ICTY, Appeals Chamber, 15 July 1999, para. 92.
[513] Prosecutor v. Dusko Tadić, Judgment, No. IT-94-1-T (ICTY, Trial Chamber, 7 May 1997), para. 569.
[514] This refers to 'Army of the Republika Srpska'. The ICTY notes that '[t]he territory controlled by the Bosnian Serb forces was known initially as the "Serbian Republic of Bosnia and Herzegovina" and renamed Republika Srpska on 10 January 1992.' See *ibid.*, para. 564.

with the Federal Republic of Yugoslavia. Against this factual background, the question arose before the Tribunal whether the fighting between the Bosnian forces and the VRS could constitute an international armed conflict. A number of crucial factual elements were to be taken into account by the Tribunal: the VRS was created with the support of the Federal Republic of Yugoslavia and its Yugoslav People's Army; the VRS and the Federal Republic of Yugoslavia shared the same goals, namely the creation of a Greater Serbia; the Federal Republic of Yugoslavia paid salaries of the VRS and appointed commanders prior to its own withdrawal from Bosnian territory; and its army also planned and coordinated the operations that were carried out by the VRS.[515]

The Trial Chamber of the ICTY used the ICJ's effective control test[516] and decided that the conflict between Bosnia and the Bosnian Serbs of the VRS remained of a non-international nature.[517] As to the financing of the VRS by the FYI, for instance, the ICTY noted that it established 'nothing more than the potential for control inherent in the relationship of dependency which such financing produced'.[518] In a dissenting opinion, Judge McDonald strongly criticized the Tribunal's judgment because it had misread the ICJ *Nicaragua* judgment. Judge McDonald argued that the ICJ had introduced in fact two tests in the *Nicaragua* case: complete dependence on the one hand and effective control on the other hand[519]. He rejected the relevance of the *Nicaragua* test in this case, arguing instead that '[t]he key issue here is whether the VRS was indeed dependent on and controlled by the Federal Republic of Yugoslavia (Serbia and Montenegro). As noted above, the evidence is more than sufficient to make such a determination.'[520]

The Appeals Judgment did not follow Trial Chamber[521], nor did it agree with the dissenting opinion of Judge McDonald. The Appeals Chamber decided that the conflict could be classified as international, since the conduct of the Bosnian Serbs was attributable to the FRY. The ICTY based this attribution upon the overall control that the FRY had over the Bosnian Serbs. According to the ICTY, the ICJ was wrong in applying an 'effective control test' in the *Nicaragua* case, because (1) such a test was not consistent with the 'logic of the law of State

[515] Prosecutor v. Dusko Tadić, Judgment, ICTY, Appeals Chamber, 15 July 1999, para. 150 and footnote 180, citing Judge McDonald's Separate and Dissenting Opinion to the Trial Judgment.
[516] As discussed in Chapter 1, see Section 3.1.
[517] Prosecutor v. Dusko Tadić, Judgment, ICTY, Trial Chamber, 7 May 1997, paras 584–607.
[518] *Ibid.*, para. 602.
[519] Prosecutor v. Dusko Tadić, Judgment, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, No. IT-94-1-T (ICTY, Trial Chamber, 7 May 1997). The recent ICRC Commentary also reads into the ICJ *Nicaragua* judgment two different tests, see ICRC, *Commentary on the First Geneva Convention*, para. 407.
[520] Prosecutor v. Dusko Tadić, Judgment, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, ICTY, Trial Chamber, 7 May 1997, 299.
[521] For a detailed overview of the various Tadić cases and other ICTY cases running simultaneously, see Christine Byron, 'Armed Conflicts: International or Non-International?', *Journal of Conflict and Security Law* 6, no. 1 (2001): 66–79.

responsibility' and (2) the test was at 'at variance with judicial and State practice'.[522] It therefore concluded that

> the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.[523] [emphasis added]

The notion of overall control is not as such included in an instrument of international law. In the *Rajic* case, which came before the Tribunal simultaneously with the *Tadić* case, the Trial Chamber had already come to the conclusion that the test of the *Nicaragua* case was not appropriate in order to assess whether a conflict was international or not. Indeed, in that case, the Trial Chamber decided that the agency test to be used in order to determine whether the Bosnian Croats were in fact agents of Croatia, was one of 'general political and military control'.[524]

Importantly, however, the Appeals Chamber in *Tadić* did not fully reject the effective control criterion as developed by the ICJ. It wished to make a distinction between attribution of acts of an individual *versus* attribution of acts of a group. It therefore stated that

> [o]ne should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels.

---

[522] Prosecutor v. Dusko Tadić, Judgment, ICTY, Appeals Chamber, 15 July 1999, paras 116–145.

[523] *Ibid.*, para. 145.

[524] Prosecutor v. Rajić, Review of the Indictment Pursuant to Rule 61, No. IT-95-12-R61 (ICTY, Trial Chamber, 13 September 1994), paras 25 and 26:

> 25. The Trial Chamber deems it necessary to emphasize that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras.* In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the "general control by the United States over a force with a high degree of dependency on the United States" was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. ¶ 115. In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.
>
> 26. The evidence submitted in this case establishes reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1993. It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats.

> Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.[525]

The consequence of the overall control criterion is that once the Tribunal has established such a control by a State over an armed group, no further analysis is required into the specific acts of the individual members of the group. In contrast, if the threshold of overall control is not met, the Tribunal would have had to investigate the specific act in question.[526] The Court thus did not entirely reject the effective control criterion as developed by the ICJ, but said it only had to apply in second instance, if the overall control over a group could not be established.

The ICTY defended its overall criterion as being more realistic, as opposed to the very restrictive criterion of effective control. This decision has been confirmed on various occasions in subsequent case-law by the ICTY, it has been taken over in the case-law of the International Criminal Court[527] and it was used in some UN reports.[528] Scholars refer to the overall control test when they classify an armed conflict.[529] The overall control criterion has also been accepted by the group of Experts authoring the Tallinn 2.0 Manual as the appropriate threshold to assess whether control over an armed group in the context of cyber warfare triggers an international armed conflict.[530] Importantly, the recent ICRC Commentary to the First Geneva Convention accepted the overall control criterion as the appropriate tool for conflict classification, to the detriment of the 'effective control' criterion.[531]

---

[525] Prosecutor v. Dusko Tadić, Judgment, ICTY, Appeals Chamber, 15 July 1999, para. 121.
[526] James Crawford, *State responsibility: the general part* (Cambridge: Cambridge University Press, 2013), 152.
[527] Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, paras 210–211; Prosecutor v. Thomas Lubanga Dyilo, Judgment, ICC, Trial Chamber, 14 March 2012, para. 541.
[528] See, for example, 'Report of the Working Group on Arbitrary Detention 2000, UN Doc. A/CN.4/2000/4', 12.
[529] See, for example, Louise Arimatsu, 'The Democratic Republic of the Congo 1993-2010', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 177–78; Michael Schmitt and Jeffrey Biller, 'The NotPetya Cyber Operation as a Case Study of International Law', *EJIL: Talk!*, 7 November 2017, https://www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/. On the situation of the conflict in Syria in 2013, various experts noted that: 'Despite the level of political and material support that both the opposition groups in Syria and the FSA have been able to secure from other states, the legal experts were of the opinion that the armed conflict – at least until March 2013 – remained non-international in character since there was inadequate evidence to suggest that any of the anti-Assad armed groups were under the overall control of another state.' See Louise Arimatsu and Mohbuba Choudhury, 'International Law PP 2014/01: The Legal Classification of the Conflicts in Syria, Yemen and Libya' (Chatham House, 2014), 16.
[530] Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 380–82.
[531] ICRC, *Commentary on the First Geneva Convention*, para. 271.

Nevertheless, the concept of 'overall control' has not been unanimously welcomed.[532] Many authors have on the one hand criticized the ICTY for being too flexible[533] and for misinterpreting the rules of customary international law.[534] On the other hand, some have criticized the ICTY for having misused the 'belonging test' of Art. 4 GC III in order to impose more restrictive criteria.[535] Others have pointed at the illogical effect of the test, because it relies too heavily on the degree of organization of an armed group, an aspect which could too easily be circumvented.[536]

Perhaps more important than the observation that 'overall control' is not unanimously accepted as the correct criterion for conflict classification, is the conclusion we can draw if we apply the overall criterion to the four categories of supportive acts. As already highlighted in Chapter 1, the overall criterion offers only limited conclusive insight into the wide variety of supportive acts studied here. Notably, according to the ICTY, 'training' or 'equipping' (a supportive act that would fall in the category of 'logistic support') would not be sufficient to establish attribution between the armed group's conduct and a State, whereas 'helping in the general planning of its military activity' would be. The category of crucial intelligence sharing arguably falls under this latter phrase. This would mean that this type of support could render a State party to the ongoing armed conflict, simultaneously turning the NIAC into an IAC. It is doubtful whether the ICTY intended such a conclusion solely on the basis of one single supportive act (intelligence sharing). It seems more logic that a more elaborate involvement in the general planning of the operations, leading to an overall control over the armed group, would trigger such a far-reaching consequence. Lastly, on the first category of supportive acts identified for

[532] In his separate opinion to the *Tadić* Appeals Judgment, Judge Shahabuddeen proposed yet another test in order to determine whether a conflict is international or non-international in nature: according to the Judge, the question should be asked whether the third State can be said to have used 'force' against another State. See Prosecutor v. Dusko Tadić, Judgment, Separate Opinion of Judge Shahabuddeen, No. IT-94-1-A (ICTY, Appeals Chamber, 15 July 1999), paras 7 and 14.This proposal is problematic in two ways. Remarkably it uses a notion of *jus ad bellum* (the use of force) in order to decide which rules under *jus in bello* would be applicable to a certain conflict situation. This reasoning goes against the separation between *jus ad bellum* and *jus in bello*, as highlighted in Chapter 2. In addition, this theory seems to overlook the fact that the use of force would not per se change the character of the ongoing NIAC into an IAC, but it would rather add an additional IAC to the existing NIAC, hence creating a situation of mixed conflict. Nevertheless, some authors seem to follow Judge Shahabuddeen's reasoning. See for instance Becker, *Terrorism and the State*, 70.

[533] Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities', 507. According to Talmon, 'the Appeals Chamber has stretched too far, almost to breaking point, the connection which must exist between the State and its organs, either *de facto* or *de jure*'.

[534] *Ibid.*

[535] Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', 108. According to Akande, Del Mar would be one of the few authors who argues that the lower threshold of '*de facto* relationship' should be used to decide upon the internationalization of a NIAC, but it seems that perhaps Akande might have misread Del Mar's argument. She only highlighted the fact that the test of Art. 4 GC III, which decides whether an individual is a prisoner of war, has a lower threshold than what the ICTY appears to argue in the *Tadić* judgment. See Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', 60–61.

[536] See Kaufman, 'Don't Do What I Say, Do What I Mean: Assessing a State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State', 2651. Kaufman notes that '[the criterion of overall control] would merely encourage a State to suppress any evidence of the group's organization, or simply to work with disorganized mobs or single individuals to escape liability for the acts of the group.'

this study, 'allowing territory to be used', the ICTY's judgment does not seem to offer a particular position.

C. Effective versus overall control: do they offer a solution to the same problem?

The disagreement between the ICJ (with its *Nicaragua* case in 1986) and the ICTY (with its *Tadić* Appeals case in 1999) on how to assess the relationship between individuals and a State has already governed many years of scholarly debate.[537] As aptly put by one scholar, '[w]hat the eye of the scholar has beheld has been coloured by the purpose for which the specimen on the slide has been examined, and the relationship has consequently been described in a number of different ways.'[538]

In 2007, the ICJ had again an opportunity to decide upon a similar legal question: in the *Bosnian Genocide* case, the Court had to decide whether Serbia could be held responsible for genocide of the Bosnian population during the Yugoslav war. The ICJ thus had to assess the exact same relationship between the Bosnian Serbs and Serbia, as the ICTY had to do in the above-discussed *Tadić* case. Contrary to the ICTY, however, the ICJ decided that the acts of those that committed the genocide in Srebrenica could *not* be attributed to Serbia, because of a lack of effective control.[539] In its judgment, the ICJ explained that the issues of State responsibility and conflict classification are 'very different in nature', observing that

> the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[540]

Authors like Milanović agree with this conclusion, stating that 'the issue of the qualification of the legal nature of an armed conflict is solely one for international humanitarian law, and has

---

[537] As if this debate is not already complicated enough, the ECtHR added to the complexity by using the notion 'overall effective control'. See for example Case of Loizidou v. Turkey (Merits), Judgment, No. 15318/89 (ECtHR, 18 December 1996), para. 56. Even though the ECtHR argued its decision was 'in conformity with the relevant principles of international law governing State responsibility' (*ibid.*, para. 52.), it seems that the context in which this decision was rendered did not involve a conflict classification or attribution under the regime of State responsibility, but it was rather an issue of delimiting the geographical scope of the ECHR. See also Milanović, 'State Responsibility for Genocide', 586; Ryngaert, 'State-Responsibility and Non-State Actors', 169.

[538] Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', 105. This is visible in Trapp's analysis of attribution in the context of terrorism: she argues that State sponsorship of terrorism will never meet the effective control test, and pleas for an overall control test in order to attribute the responsibility to the sponsoring State. See Trapp, *State Responsibility for International Terrorism*, 2011, 42–45.

[539] The Court did however find that Serbia was responsible for violating the primary obligations to prevent and punish genocide. See Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, paras 428–450. According to Ryngaert, the ICJ failed to accept the overall control standard, 'possibly on the ground that an overall control standard may collapse the distinction between the private and the public sphere.' Ryngaert, 'State-Responsibility and Non-State Actors', 173.

[540] Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports, para. 405.

nothing to do with the law of state responsibility, even though the factual patterns on which these branches of law operate might be very similar.'[541] The contradicting view is of course defended by the ICTY, which said to have based its analysis of the overall control criterion upon the principles of State responsibility, in absence of more specific rules under IHL (see *supra*). Nevertheless, the ICTY also acknowledged that

> [t]he degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.[542]

However, the ICTY wanted to point out here that a different threshold is needed when analysing acts committed by a single individual versus acts committed by members of an 'organized and hierarchically structured group'[543], as outlined above. Despite arguing that different criteria should apply depending on the specific facts of the situation, the ICTY does not argue that different criteria should apply depending on the legal question asked: the issue of attribution for State responsibility and the issue of conflict classification are considered to cover the same legal question. Several authors agree with this position.[544] This is also the position taken by the ICRC in the 2016 Commentary, which states that 'the test that is used must avoid a situation where some acts are governed by the law of international armed conflict but cannot be attributed to a State.'[545] The Commentary further explains that

> [i]n order to *classify a situation under humanitarian law* involving a close relationship, if not a relationship of subordination, between an organized armed group and a third State, the *overall control test is appropriate* because the notion of overall control better reflects the real relationship between the armed group and the third State, *including for the purpose of attribution*.[546] [emphasis added]

In sum, according to the ICRC, overall control is the appropriate criterion to assess whether or not the link between a State and an armed group internationalizes a non-international armed conflict. In addition, the same criterion would be applicable to attribute acts of the non-State actor to the State. The two mains reason in favour of this position are that (i) overall control, once established, allows for a clarity with regard to the legal framework in order to ensure protection of victims of IHL and (ii) by applying it both for IHL classification and State

---

[541] Milanović, 'State Responsibility for Genocide', 587. In agreement, see Sassòli, 'The Concept and the Beginning of Occupation', 17–19.
[542] Prosecutor v. Dusko Tadić, Judgment, ICTY, Appeals Chamber, 15 July 1999, para. 117.
[543] *Ibid.*, para. 120.
[544] Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 408; Eric David, *Principes de droit des conflits armés*, 3rd ed. (Bruxelles: Bruylant, 2002), 423; Robert Heinsch, 'Conflict Classification in Ukraine: The Return of the "Proxy War"?', *International Law Studies* 91, no. 1 (2015): 344–45. According to Heinsch, 'it is difficult to understand why in different areas of law (State responsibility and classification of armed conflicts when determining individual criminal responsibility) there should be different requirements for the control exercised by the third State. […] The argument that the two judicial institutions – the ICJ and the ICTY – deal with different kinds of responsibility seems to be rather a fig leaf in order to avoid taking a clear positions.'
[545] ICRC, *Commentary on the First Geneva Convention*, para. 409.
[546] *Ibid.*

responsibility purposes, consistency is ensured: each State that is considered party to an armed conflict can potentially be held responsible for the acts leading to that classification. Indeed, if two different criteria would apply, one could question whether it is 'possible to regard a state as a party to an armed conflict although no acts of the persons involved in the fighting are attributable to it.'[547]

Against this view can be held that the 'responsibility gap' that is seemingly created by applying two different thresholds can be filled by relying on a State's due diligence obligation. Indeed, even if a State does not exercise effective control over the acts of an armed group, it can still be held responsible for lacking to prevent or punish acts committed by that group. This due diligence obligation flows from Article 1 Geneva Conventions, in addition to some more specific IHL provisions.[548] In addition, it has been argued by some that separate criteria for attributing acts by individuals to a State also exist in other fields of law, such as in *jus ad bellum*.[549] According to Cortén, for example, 'to settle this issue of the attribution of acts by private groups to a State [in order to determine whether an armed attack occurred], the reference instrument remains Art. 3(g) of the definition of aggression. Recent practice, including after 9/11, has not called into question the relevance of this provision.'[550]

It is submitted here that the questions of State responsibility and conflict classification are indeed two separate legal issues that merit distinct answers. As already argued in Chapter 1, for a State to bear responsibility for an act by an armed group, effective control would be necessary over the specific wrongful act in question. The remaining question is then what the appropriate criterion is to be used for conflict classification purposes. After all, the Pictet commentary to Art. 4 GC III says that a *de facto* relationship suffices in order to establish a link between a State and members of an armed group.[551] Nevertheless, as Del Mar correctly argues, the purpose of Article 4 is to define the scope of the protected prisoner of war status, not to classify conflicts. According to her, it is therefore also acceptable that two different criteria would exist: a very low threshold for identifying prisoners of war ('*de facto* link') and a higher (but not too high)

---

[547] Marina Spinedi, 'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia', *Journal of International Criminal Justice* 5, no. 4 (2007): 832.

[548] Such as Article 91 AP I, which specifies that '[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

[549] Kress holds for instance that '[i]t is controversial whether or not the test of overall control forms part of the applicable customary international law on attribution. If this question is answered in the negative in line with the ICJ's case law, the substantial involvement-limb of article 3(g) of the Annex to 1974 GA Resolution 3314 should perhaps best be considered as the articulation of a *lex specialis* on attribution in the legal context of the prohibition of the use of force.' [footnotes omitted] See Claus Kress, 'The State Conduct Element', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 449. See also *infra* note 977.

[550] Corten, *The Law Against War*, 468. Article 3(g) of the Definition of Aggression qualifies as an act of aggression '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.' According to Ryngaert, however, Article 3(g) 'is not a rule of attribution'. See Ryngaert, 'State-Responsibility and Non-State Actors', 171. See also Chapter 4, Section 4.1.2.A, where I argue that the littera of Article 3 of the Definition of Aggression are separate forms of an 'armed attack'.

[551] See *supra* Section 4.1.1.A.

threshold for making a State party to a conflict based on its overall control over an armed group. At first sight, such a reasoning seems counterintuitive. How can a person enjoy prisoner of war status if the State to which he or she merely '*de facto*' belongs is not considered party to an international armed conflict, because of the lack of overall control? In order to address this concern, it is important to remember the order in which the legal questions should be solved. After all, granting an individual a PoW status is only possible during an international armed conflict. The first question should therefore be which type of conflict we are dealing with, and who the parties to that conflict are. If an armed group is fighting State A with the support of a third State B, the question should be whether that third State exercises overall control over the armed group. If so, the conflict can be classified as an IAC between State A and State B. Similarly, if an armed group X is fighting and armed group Y with the support of State C, overall control by C over X would result in a non-international armed conflict between C and armed group Y. Only in the first scenario (of an international armed conflict), the question of whether members of the armed group *de facto* belong to State B can be asked. If they do, based on the fulfilment of the four criteria listed in Article 4(A)(2) and a *de facto* link with B, they are entitled to receive a prisoner of war status if captured by State A. This means that, logically, members of armed group X who have the same *de facto* link with State C cannot receive prisoner of war status if captured by armed group Y, simply because the conflict they are involved in remains non-international in nature.

Despite the interesting legal debate among scholars and between two international courts, the relevance of the legal discussion on overall versus effective control can be questioned since, '[f]or all the academic debate, there may be less of a practical difference between the two cases than is often admitted.'[552] In addition, regardless the type of test relying on the factual degree of control by a State over an armed group, one main practical difficulty will occur: a State will always try to hide its link or its support to the armed group, thereby making a full-fledged assessment extremely difficult.[553] Since States try to avoid being in control of an armed group (as they know very well that this would render them a party to an armed conflict), the question dealt with further on in this study becomes even more relevant: can a supporting State, in absence of control over an armed group, nevertheless be considered as a party to an armed conflict? This question will be dealt with in Section 4.2. First, we look at the scenario whereby a third State exercises control over another State, which is party to an armed conflict.

[552] Becker, *Terrorism and the State*, 71.
[553] The Prosecutor of the ICC is currently still considering whether Russia has or had overall control over the pro-Russian rebels in Ukraine, which would change the nature of the conflict from non-international to international. The most recent report mentions that for now, the prosecutor focuses on both scenarios. See Office of the Prosecutor ICC, Report on Preliminary Examination Activities 2018, 5 December 2018, para. 73.

4.1.2. Control over a State

Importantly, none of the four categories of support identified for this study implies control by a State over another State. As indicated in the Introduction, it is assumed that all types of supportive acts (allowing territory to be used, providing logistic support including arms supplies, sharing crucial intelligence information and training) happen on a voluntary basis. For that reason, the scenario discussed under this Section is less relevant. Nevertheless, for the sake of completeness, the implications of control by a State over another State for the purpose of conflict classification will be briefly dealt with here.

As discussed in Chapter 1[554], a State can be held responsible for the acts of another State if the former exercised control or direction over the latter (Article 17 ARSIWA). Similarly, if the organ of the latter State was voluntarily put under the 'exclusive direction and control' of the former, Article 6 ARSIWA allocates responsibility to the controlling State. While control undoubtedly triggers State responsibility, the question here is whether such control would also render a controlling State party to an armed conflict.

Contrary to what is the case for control over armed groups, this issue has not been dealt with in jurisprudence. This is not surprising, as the stake is entirely different than what has been discussed in the previous Section: control by a State over another State cannot shift the nature of an armed conflict, because the character of the actor ('a State') will not change – regardless which State bears responsibility for the acts committed. Rather than being a question of conflict classification, the question is thus which State – the controlling State or the controlled State, or both – can be considered as party to the ongoing (international or non-international) armed conflict.

In practice, even if so-called embedded personnel (voluntarily put at the disposal of another State) has to operate in the context of an armed conflict, the control over that organ will always remain shared: the receiving State exercises the operational control, whereas the sending State retains the criminal jurisdiction and military disciplinary authority. It thus seems that both States would become party to the ongoing armed conflict – depending, of course, the precise activity of the personnel concerned. Lacking any other criterion to specifically deal with this issue, in order to assess control by a State over another State, it is thus submitted that the rules of State responsibility should be applied by analogy for conflict classification purposes. This means indeed that States that have personnel embedded in the armed forces of another State, can be involved in an armed conflict even though their own armed forces (as a whole) are not. To recall, however, the supportive acts scrutinized in this thesis do not imply the control by a State over another State. Instead, forms of intense cooperation between two States or between a State and an armed group without control are much more relevant. This is what I will turn to now.

[554] See Chapter 1, Section 1.

4.2. Support not amounting to control: the support-based approach

The control criteria are only helpful insofar the supportive acts can lead to the conclusion that a requisite control over an armed group is exercised. The scope of application of the two control criteria is limited in two ways: first, the requisite degree of control is generally very high (even if one applies the more lenient 'overall control' criterion of the ICTY) and will rarely be met by one single type of supportive act. Second, and more importantly, the criteria of effective or overall control can only be applied in the relationship between a State and a non-State actor. They are not helpful to assess the relationship between two States. Support between two States, however, often takes the form of 'non-lethal' support. Indeed, as the ICRC for instance observes

> multinational forces are increasingly intervening in support of governmental forces already involved in a pre-existing NIAC. This support is not necessarily made of kinetic operations, but takes the form of logistical support, intelligence activities for the benefit of the territorial State, or participation in the planning and coordination of military operations carried out by the supported State.[555]

As explained in the Introduction, it is not the purpose of this study to investigate the relationship between the responsibility of an international organization initiating a multinational operation and that of the troop contributing countries participating in that operation. While the supportive acts discussed in this study often occur within the framework of an international organization, I will deal here with the question whether supportive acts can render a State party to an existing conflict *regardless* whether the support is provided bilaterally or as part of an operation led or mandated by an international organization, possibly involving multiple supporting States.

If the supporting State does not have sufficient control over the armed group or the State (the 'support-receiver'), the State could still become party to an armed conflict by way of its support. In this scenario, the State does not become party through the behavior of a party to the conflict, but through its own acts. The clearest example of this is of course if the State intervenes, alongside the party, with 'boots on the ground' in the State where the conflict takes place. But even without 'boots on the ground', such a scenario could occur. Take for example the conflict in Libya in 2011, whereby NATO-coordinated forces intervened with air strikes alongside the armed groups opposing Gaddafi. While the armed conflict between Gaddafi and the opposition remained non-international in nature, the fact that Western State were bombing Libyan territory against the will of Gaddafi showed the existence of a parallel IAC, at least if the position advanced by the 2016 ICRC Commentary is followed.[556] Even though some have argued that

[555] See the presentation by Tristan Ferraro, Legal Advisor to the ICRC in ASIL, 'Peace Forces at War: Implications under International Humanitarian Law', 150.

[556] On this particular point, see *supra* Section 3.1 and in particular note 476. On the classification of the 2011 Libya conflict, see extensively Arimatsu and Choudhury, 'International Law PP 2014/01: The Legal Classification of the Conflicts in Syria, Yemen and Libya', 34–41 (classification made by Sir Richard Dalton (former UK ambassador to Libya).

such an intervention would turn the entire situation into an IAC[557], the prevailing view is that a situation of 'mixed conflict' is created: the NIAC between the armed group and the State keeps on existing, while a new conflict occurs, namely an IAC between the intervening State and the host State.[558] This was the approach taken by the ICJ in the *Nicaragua* case[559], but also by the ICTY.[560]

There are of course forms of support other than intervention by 'boots on the ground' or aerial bombardments. Such forms of support often will not as such reach the traditional threshold to trigger an armed conflict (as discussed for IACs and NIACs respectively in Section 3.1 and Section 3.2). The current Section explores whether such acts of support could render a State party to an ongoing armed conflict, despite the fact that the support *per se* might not be sufficient to trigger an armed conflict under the traditional criteria. Somewhat unexpectedly perhaps, the starting point for this exploration is the micro-level of individuals and the rules on their targetability under IHL.

First, the concept of direct participation in hostilities will be explained, both its origins and the criteria for assessment, thereby focusing on the ICRC Interpretive Guidance on the notion (Section 4.2.1). Secondly, the support-based approach as developed by Ferraro and endorsed by the ICRC will be outlined, in order to show how the DPH ideas are lifted from a micro-level of individuals towards a macro-level of States (Section 4.2.2.A). Third, I will raise some concerns related to the support-based approach: one set of concerns is linked to the specific conditions for the application of this new approach (Section 4.2.2.B), and another set of concerns questions the concept of support-based approach as a whole (Section 4.2.2.C). After concluding on the theoretical part (Section 4.2.2.D), I illustrate a possible application of the

[557] Regarding the conflict in Yugoslavia, for example, a number of scholars argued that the conflict should be considered as a whole, thus resulting in a situation of IAC: see James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', *American Journal of International Law* 87 (1993): 647. See also Meron, who accuses the ICTY of creating 'a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or noninternational.' Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', *American Journal of International Law* 92, no. 2 (1998): 238. The idea that a foreign intervention turns a conflict as a whole into an IAC was also the position defended by the ICRC at the start of the negotiations on the Additional Protocols in 1971. See ICRC, 'Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. I', 1971, 50. This position was rejected *inter alia* because 'all that would be needed to legitimize the activities of the rebels and to qualify them as prisoners of war, should they be taken, would be a perfect synchronization of the activities of the foreign State with those of the rebel movement or even simply the despatch [sic] of a small detachment of its troops over the border.' *Ibid.*, 51. The ICRC now defends the differentiated approach. See ICRC, *Commentary on the First Geneva Convention*, para. 404.

[558] This was what happened in Yugoslavia in the 90s, but also in Libya in 2011 (before the fall of Gaddafi).

[559] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 219.

[560] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 77. Remarkably, however, the ICTY suggested in its Appeals Judgment in 1999 that the intervention of State forces would also turn a NIAC into an IAC: 'In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.' Prosecutor v. Dusko Tadić, Judgment, ICTY, Appeals Chamber, 15 July 1999, para. 84.

support-based approach by reference to the Danish contribution to the coalition against ISIS (Section 4.2.2.E).

4.2.1. DPH as a tool to determine whether a civilian may be attacked

The concept of direct participation in hostilities has evolved from Article 3 GCs, which applies to persons 'taking no *active* part in the hostilities'. The notion of *direct* participation in hostilities[561] now appears in Article 51(3) AP I, which stipulates that

> [c]ivilians shall not enjoy the protection afforded by this Section, unless and for such time as they take a direct part in the hostilities.

An equivalent of this rule for situations of NIAC can be found in Article 13(3) AP II. In addition, the rule has been generally recognized as a rule of customary IHL applicable to both IACs and NIACs.[562] The notion of 'direct participation in hostilities' also appears in other IHL provisions, such as Article 43(2) AP I, indicating that combatants have the right to participate directly in hostilities, or Article 47(2) AP I, as part of the definition of a mercenary. As mentioned, Common Article 3 GCs provides protection to 'persons taking no *active* part in the hostilities'. Despite the different wording used ('direct' *versus* 'active' participation), the two notions are generally understood as referring to the same concept.[563] Such a view is also supported by the fact that the French translation of common Article 3 uses the word 'direct'.[564]

The notion of 'direct participation in hostilities' has not been defined in IHL treaties, while the ICRC Commentary to AP I only provides limited guidance. It clarifies that '[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.'[565] In addition, the Commentary importantly underlines that the use of a weapon is not a necessary prerequisite for an act of DPH.[566] On the meaning of the requirement of 'direct' participation, the Commentary somewhat repetitively states that it 'means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.'[567] Apart from these

---

[561] The French language versions of Art. 3 GCs and Art. 51(3) AP I use twice '*participation directe*'. It has also been confirmed in international jurisprudence that there is no difference between 'direct' or 'active' participation in hostilities. Prosecutor v. Akayesu, Judgment, para. 629. This was also the prevailing view of the experts when discussing the Interpretive Guidance. See Nils Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (Geneva: ICRC, 2009), 43.
[562] Rule 6 CIHL Study: Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.
[563] See for instance Prosecutor v. Akayesu, Judgment, para. 629: 'These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous'. See also US, DoD Law of War Manual, 227: '[There] seems to be little value in distinguishing between the two terms for the purpose of applying this legal rule.'
[564] 'Les personnes qui ne participent pas directement aux hostilités […].'
[565] Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 1942.
[566] *Ibid.*, para. 1943.
[567] *Ibid.*, 1944.

clarifications and stressing that direct participation in hostilities should be distinguished from a participation in the war effort by the population as a whole[568], there is no further guidance on the notion of DPH to be found in the 1987 ICRC Commentary.[569] It is uncontested that when a civilian uses arms against the parties of the armed conflict – albeit not in self-defense –, he or she is directly participating in hostilities. There are however many other types of actions, including possibly the supportive acts under investigation in this study, that could be considered to fall under this concept. The most detailed attempt to delineate the scope of DPH was undertaken by the ICRC, when it published its Interpretive Guidance on the Notion of Direct Participation of Hostilities under International Humanitarian Law (see sub-Section 4.2.1.A). Nevertheless, State practice from before and after the publication of the ICRC Guidance does not entirely reflect the guiding principles as developed in the Guidance (see sub-Section B).

A. The ICRC interpretation of 'direct participation in hostilities' and 'continuous combat function'

Because of the importance of the notion of direct participation in the hostilities ('DPH') on the one hand and the lack of a clear definition on the other, the ICRC, together with the TMC Asser Institute, decided to initiate an expert consultation process in order to develop a Guidance on Direct Participation in Hostilities. A group of approximately 50 experts from academic, military, governmental and nongovernmental circles was created and met five times between 2003 and 2008.[570] The consultation process led in 2009 to the publication, by the ICRC, of the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.[571]

The Guidance defines three criteria to be fulfilled in order for acts of individuals to be considered as an act of direct participation in hostilities[572]:

> In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:
>
> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

[568] *Ibid.*, 1945.
[569] Note that a newly updated commentary on AP I by the ICRC is to be expected in the near future.
[570] Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 9.
[571] Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.
[572] *Ibid.*, 16.

> 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
>
> 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

Importantly, the Guidance also considers '[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution' as forming an integral part of DPH-acts.[573]

The Guidance clarifies in a more or less detailed way what the three criteria entail, and thereby uses (sometimes controversial) examples that were raised during the expert meetings.

The first criterion is that a necessary threshold of harm has to be inflicted by the act of the civilian. According to the Guidance, this threshold can be reached 'by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack.'[574] It is sufficient that the act will likely cause the harm, the actual materialization of it is not required. If the act causes harm of a military nature, the quantitative gravity is not important: any act adversely affecting the military operations would be sufficient.[575] Less obvious acts, such as denying the enemy the use of certain objects or territory[576], or transmitting tactical information for an attack, are also considered reaching the necessary threshold of harm.[577] Acts causing harm to protected civilian objects or to civilians, however, will only reach the necessary threshold if they cause death, injury or destruction.[578]

The second criterion requires a direct causal link between the act (or the operations of which it forms part) and the harm.[579] Here, the Interpretive Guidance itself makes a link with the macro-level of States, by stating that

> the distinction between a person's direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.[580]

---

[573] *Ibid.*, 17.
[574] *Ibid.*, 47.
[575] *Ibid.*
[576] This is particularly interesting as the reverse act, 'allowing territory to be used', does not seem to be discussed in the Guidance. As I will argue below, it is not excluded that such an act would qualify as an act of DPH, and consequently, that it serves as a basis for the application of the support-based approach. See *infra* Section 4.2.2.D.
[577] Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 48.
[578] *Ibid.*, 49.
[579] See for instance also Crawford, who writes that 'if in light of circumstances ruling at the time, a person appears to be taking a direct part in hostilities, and that their actions are more than indirect (i.e., political support, provision of basic sustenance such as food or water) but are likely to cause actual harm to an enemy, one could feasibly maintain a charge of DPH.' Crawford, *Identifying the Enemy*, 91.
[580] Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 51.

Acts forming part of the general war effort (which are all activities contributing to the defeat of the adversary) or of the war sustaining activities (which include even broader activities, such as political propaganda) are not sufficiently closely linked to the harm to fulfil this requirement.[581] They merely build up the capacity to cause the harm, rather than directly inflicting it.[582] In contrast, acts which cause the harm within one causal step have a sufficient causal link. According to the Guidance, providing fuel is not sufficiently close[583], however, as will be discussed further, providing fuel in an air refuel operation which forms part of a military operation would arguably be of sufficient direct causality. The fact that an act is indispensable for the infliction of the harm does not necessarily mean that the criterion of direct causation is fulfilled.[584] Temporal and geographical proximity can be indicative for a causal link, but may not be confused with it.[585]

Even though one causal step is required, direct causation will also be accepted if the act forms part of a broader coordinated military operation, which inflicts the necessary degree of harm. The personnel needed in order to operate an unmanned air vehicle during an attack would therefore all fulfil the causality criterion. Examples of such specific acts that only reach the direct causation because they form part of a coordinated military operation are, *inter alia*, 'the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation.'[586]

The third criterion is that of the belligerent nexus. Indeed, not every act directly causing the necessary threshold of harm will constitute an act of direct participation in hostilities. The act 'must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.'[587] Belligerent nexus relates to the objective purpose of the act, and not to the subjective intent of the person that is carrying it out.[588] This should however be nuanced for cases where the person carrying out the act is totally unaware of the role he or she is playing in the conduct of hostilities.[589] Precisely because of this third criterion of belligerent nexus, certain categories of acts will not constitute direct participation in hostilities, such as for example individual self-defence or the commission of violent crimes by civilians during an armed conflict.[590]

If the three criteria are met, a civilian is directly participating in hostilities and can be lawfully attacked under IHL. There is, however, a second scenario described by the Interpretive

[581] *Ibid.*
[582] *Ibid.*, 52.
[583] *Ibid.*, 53.
[584] *Ibid.*, 54.
[585] *Ibid.*, 55.
[586] *Ibid.*
[587] *Ibid.*, 58.
[588] *Ibid.*, 59.
[589] *Ibid.*, 60.
[590] *Ibid.*, 61–63.

Guidance that foresees in the possibility to attack persons who do not form part of the armed forces of a State. Indeed, if a person is a member of an organized armed group and has a continuous function to directly participate in hostilities ('continuous combat function'), the person will no longer be considered a civilian and may hence be attacked, even if at the precise moment of the attack he is not carrying out an act of direct participation in hostilities.[591] In contrast, persons 'who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities'[592] cannot be considered a 'member of an organized group' and hence cannot be attacked. Furthermore, the definition of membership on the basis of a so-called 'continuous combat function' is, according to the ICRC, customary law.

The Interpretive Guidance received criticism from various sides: some advocated for a more permissive targeting regime[593], while others argued that the Guidance was already too permissive and that a more protective interpretation should be given to the law.[594] Nevertheless, the Interpretive Guidance has also already been referred to by both national[595] and international[596] jurisprudence. While the ICRC acknowledged that there was disagreement on some points during the expert meetings leading to the publication of the Guidance[597], it nevertheless stressed that the core part of the Guidance, namely the three defining elements of 'direct participation in hostilities' as discussed above, were 'far less controversial'.[598] However, as the next sub-Section shows, at the level of States the divergence of views remains: some States apply a very restrictive position, considering DPH to cover only the actual participation in a fight, while others lean more towards the ICRC Interpretive Guidance or go beyond it and consider a wide range of activities as acts of DPH.

---

[591] *Ibid.*, 33. This issue is one of the most contested parts of the Interpretive Guidance. See, for example, Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance', *New York University Journal of International Law and Politics* 42 (2009–2010): 693–95; William H. Boothby, 'And for Such Time as: The Time Dimension to Direct Participation in Hostilities', *New York University Journal of International Law and Politics* 42, no. 3 (2010): 757.

[592] Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 34.

[593] See Boothby, 'And for Such Time As'; W. Hays Parks, 'Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect', *New York University Journal of International Law and Politics* 42 (2009–2010): 769; Michael N. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', *New York University Journal of International Law and Politics* 42 (2009–2010): 697–739; Watkin, 'Opportunity Lost'.

[594] Nils Melzer, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities', *Journal of international law and politics*, no. 3 (2010): 835.

[595] Judgment from 19 March 2019, 4 A 1361/15, Oberverwaltungsgericht NRW, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00, paras 398ff. See also note 641.

[596] Prosecutor v. Callixte Mbarushimana, Decision on the confirmation of charges, No. ICC-01/04-01/10 (ICC, Pre-Trial Chamber, 16 December 2011), para. 148; Prosecutor v. Thomas Lubanga Dyilo, Judgment, No. ICC-01/04-01/06 A 5 (ICC, Appeals Chamber, 1 December 2014), para. 324.

[597] According to some of the participating experts, the expert consultation rounds organized by the ICRC and the Asser Institute failed and the ICRC subsequently published the Guidance 'on its own initiative'. See William H. Boothby and Wolff Heintschel von Heinegg, *The law of war: a detailed assessment of the US Department of Defense law of war manual* (Cambridge: Cambridge University Press, 2018), 127.

[598] Melzer, 'Keeping the Balance between Military Necessity and Humanity', 834.

B. Direct participation in hostilities in State practice

B.1. Military Manuals

While a significant number of military manuals refers to the notion of 'direct participation in hostilities' as the criterion to deviate from the general rule of protection for civilians, it should be noted that a vast majority of the States does not expand on this notion in its military manuals.[599] Military manuals reflect a wide variety of positions on what constitutes 'direct participation in hostilities', ranging on a scale from broadly interpreting it as a synonym of contribution to the general war effort to a very strict interpretation as actual participation in the fighting. Before providing an overview of the variety of positions included in military manuals, a word of caution is appropriate here. The fact that a State defends a broad or strict view of the notion of direct participation in hostilities in its military manual does not necessarily mean it actually applies that view in practice on the battlefield. While ideally military manuals set the legal benchmark for practical application, in reality a divergence between what is said and what is done is not rare. Nevertheless, the manuals have their value in the sense that they unquestionably reflect State practice and/or *opinio juris*.[600]

The following paragraphs provide a useful overview of the passages of military manuals that deal with the notion of direct participation in the hostilities in general or that provide examples of what such DPH could constitute of. The references are summarized in a schematic overview below.

A broad understanding of what constitutes direct participation in hostilities can be found, for instance, in the Indian Army Training Note which includes in the notion of DPH any act that contributes directly towards furtherance of the war effort. In doing so, it makes a link between the macro-level of States and the micro-level of individuals:

> War is an act of extreme violence between two nations and not between people individually. The implications, therefore, are that, so long as an individual, may it be a soldier or a civilian, is *directly contributing towards furtherance of the war effort*, he is deemed to be at war.

[599] In what follows, many of the references to the relevant paragraphs in the military manuals have been taken from the ICRC Customary Law Practice database, available at https://ihl-databases.icrc.org/applic/ihl/ihl-search.nsf/content.xsp?key=intro. The references in the database were supplemented with more recent military manuals that are publically available online. Due to the absence (in many cases) of a publically available copy of the military manuals included in the database, in addition to the lack (in most cases) of official English translations of those manuals, the references of the database could not always be double-checked. See the Introduction, Section 4.2 for an overview of the manuals that were directly consulted.

[600] The ICRC Customary IHL Study mentions military manuals as an example of 'verbal acts' of State practice and indicates that '[it] is in fact often difficult or even impossible to disentangle [state practice and *opinio juris*] […] verbal acts count as State practice and often reflect the legal conviction of the State involved at the same time.' See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 1:xxxii and xl. See also *supra* note 38.

> However, when he is not so employed, he is to be treated as a normal human being and must be afforded all protection and care due to him.[601]

A more restrictive view can be found in the UK LOAC Manual, which defines that '[t]aking a direct part in hostilities is more narrowly construed than simply making a contribution to the war effort.'[602] The LOAC Manual further specifies that '[c]ivilians manning an anti-aircraft gun or engaging in sabotage of military installations are doing so. Civilians working in military vehicle maintenance depots or munitions factories or driving military transport vehicles are not'.[603]

A similar position is defended by the Dutch Military Manual, which stipulates that

> "direct participation in hostilities" comprises more than participation in battle. It also covers more direct support of military operations. There are criteria for assessing whether direct participation in hostilities is taking place. Important factors here are the nature and place of the activities to be performed. [604]

The manual unfortunately does not seem to expand on the 'criteria for assessing whether direct participation in hostilities is taking place'. It does mention that 'actions such as manufacturing and transporting military materiel in the rear area certainly do not constitute direct participation in hostilities.'[605] In similar vein, the Australian LOAC Manual defines that '[c]ivilians bearing arms and taking part in military operations are clearly taking part in hostilities; civilians working in a store on a military air base may not necessarily be taking such a direct part.'[606] While the above quoted manuals include negative examples of supportive acts that do not constitute direct participation in hostilities, the Ecuadorian Military Manual usefully provides positive examples of supportive acts that it considers to classify as DPH:

> Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure or capture enemy personnel or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as guards, intelligence agents or lookouts on behalf of military forces may be attacked.[607]

The Canadian Military Manual includes moments where someone does not or no longer pose a threat in its understanding of DPH, by stating that '[i]n terms of use of force, an essential feature of the [law of armed conflict] is that it allows for the deliberate use of deadly force against

---

[601] India, Army Training Note, Chief of Staff, Army Training Command, Ministry of Defence, Government of India, 1995, 3/7, para. 14.
[602] United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, as amended by Amendment 3, Ministry of Defence, September 2010, para. 2.5.2.
[603] United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, para. 5.3.3.
[604] Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, para. 0312.
[605] *Ibid.*, para. 0520.
[606] Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 5 November 2006, para. 5.36.
[607] Ecuador, Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques, Academia de Guerra Naval, 1989, para. 11.3.

individuals directly participating in hostilities (during international or non-international armed conflicts), *whether or not they are presenting a threat at the moment*.'[608] This view might at first sight seem counterintuitive – how can attacking a civilian not posing a threat be lawful under IHL? –, but this position corresponds with the idea that direct participation in hostilities includes acts which are sufficiently closely linked with the fighting, without involving threats or fighting itself.

The recent Danish Military Manual explicitly copies the three criteria of the ICRC Guidance.[609] It moreover lists, for each criteria, a number of examples of acts that do and do not fulfil the specific requirement. For instance, the Manual notes that '[f]inancial support to the adversary or other similar support in the form of other such supplies as fuel, electricity, or building materials'[610] does not have a sufficiently direct causal link with the hostilities, nor does 'general recruitment and training of personnel'.[611] On the other hand, 'providing input for tactical targeting' would constitute an act of DPH, at least insofar as the input contributes to 'specific attacks'.[612] Similar to the ICRC Interpetive Guidance, the Danish military manual specifies that the temporal scope of the loss of protection would also extend to 'preparations for the direct participation and the trip to and from the place of launching an attack, if this constitutes the direct support'.[613] The Danish Manual is also in line with the ICRC Guidance when it defines the notion of 'continuous combat function' as follows:

> In the event that a person takes a part on a more continuous basis in the activities of the organised armed group and frequently performs tasks that, viewed separately, constitute direct participation in hostilities, that person will lose protection as a civilian during the period from first participation until an active indication of leaving the group.[614]

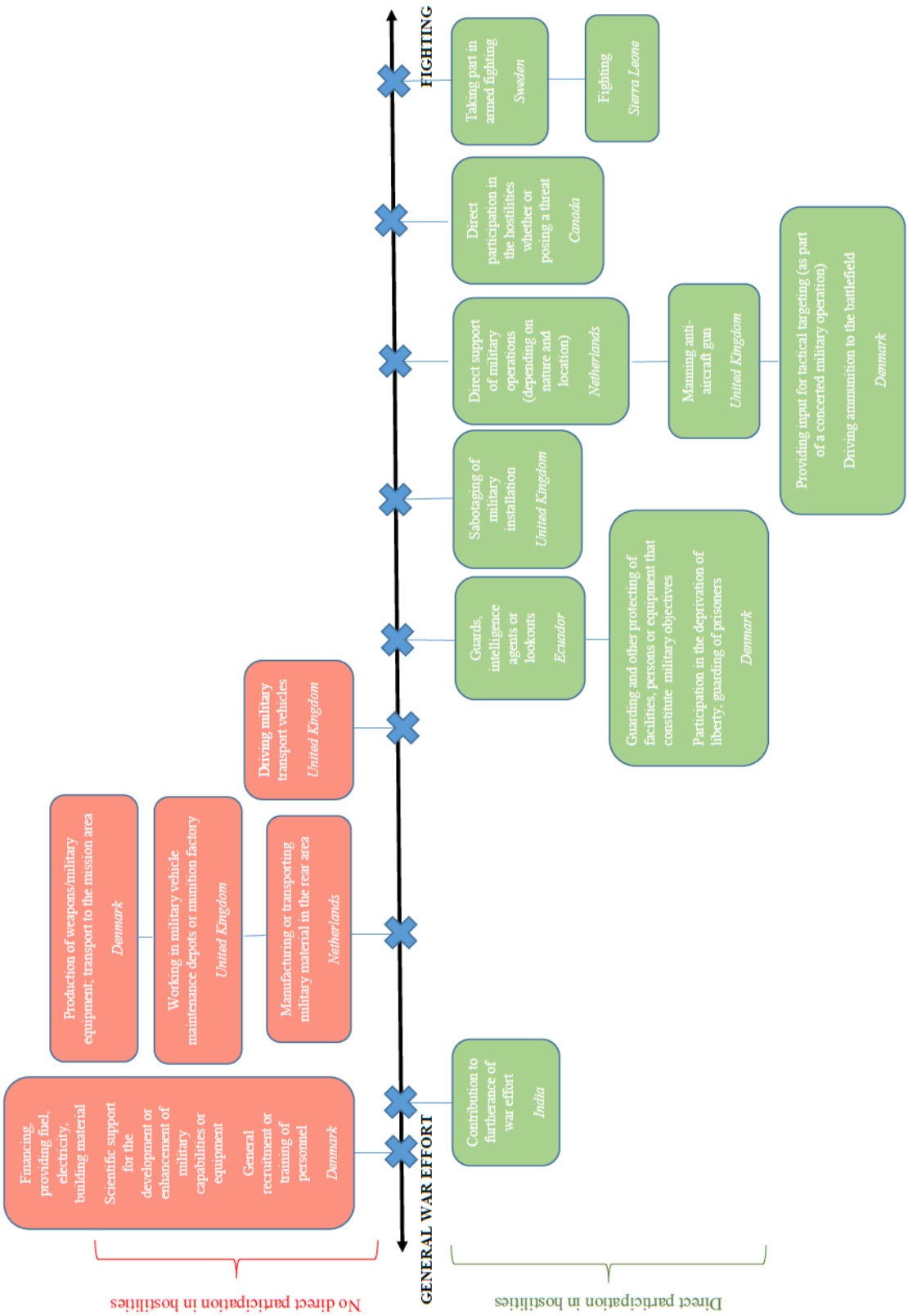
While the views defended in the manuals of the UK, the Netherlands, Australia, Denmark, Ecuador and Canada are mostly in line with the position taken in the ICRC Interpretive Guidance, the same cannot be said of the military manual of Sierra Leone and Sweden. Even though not explicitly mentioning DPH, the LOAC Instructor Manual of Sierra Leone advances a restrictive view, by stating that 'civilians and the civilian population' may not be attacked 'unless they are fighting'.[615] Similarly, the Swedish IHL manual stipulates that '[p]rotection for civilians does not apply under all circumstances – exceptions are made for the time when

[608] Canada, Use of Force for CF Operations, Canadian Forces Joint Publication, Chief of the Defence Staff, B-GJ-005-501/FP-001, August 2008, para. 104.6 [emphasis added].
[609] Denmark, Ministry of Defense, Military Manual on international law relevant to Danish armed forces in international operations, 2016/2019, 168–69. So does the Norwegian Manual (without however explicitly referring to the ICRC Guidance), unfortunately only available in Norwegian: see Norway, Forsvaret, Manual i krigens folkerett, Forsvarssjefen, 2013, para. 3.24ff.
[610] Denmark, Ministry of Defense, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, 170.
[611] *Ibid.*
[612] *Ibid.*
[613] *Ibid.*, 172.
[614] *Ibid.*, 182.
[615] Sierra Leone, The Law of Armed Conflict. Instructor Manual for the Republic of Sierra Leone Armed Forces (RSLAF), Armed Forces Education Centre, September 2007, 29.

civilians take direct part in hostilities, which is equivalent to their taking part in armed fighting.'[616]

The references to military manuals thus far can be summarized in the following schematic overview:

[616] Sweden, International Humanitarian Law in Armed Conflict, with reference to the Swedish Total Defence System, Swedish Ministry of Defence, January 1991, 43.


No direct participation in hostilities
Financing, providing fuel, electricity, building material
Scientific support for the development or enhancement of military capabilities or equipment
General recruitment or training of personnel
Denmark
Production of weapons/military equipment; transport to the mission area
Denmark
Working in military vehicle maintenance depots or munition factory
United Kingdom
Manufacturing or transporting military material in the rear area
Netherlands
Driving military transport vehicles
United Kingdom
GENERAL WAR EFFORT
Contribution to furtherance of war effort
India
Guards, intelligence agents or lookouts
Ecuador
Sabotaging of military installation
United Kingdom
Direct support of military operations (depending on nature and location)
Netherlands
Direct participation in the hostilities whether or posing a threat
Canada
Taking part in armed fighting
Sweden
FIGHTING
Fighting
Sierra Leone
Guarding and other protecting of facilities, persons or equipment that constitute military objectives
Participation in the deprivation of liberty, guarding of prisoners
Denmark
Manning anti-aircraft gun
United Kingdom
Providing input for tactical targeting (as part of a concerted military operation)
Driving ammunition to the battlefield
Denmark
Direct participation in hostilities

It should be noted that, with the exception of the UK LOAC Manual and the Danish Military Manual[617], all the above-mentioned military manuals were published *before* the publication of the ICRC Interpretive Guidance. It is therefore logic that they do not refer to the same criteria as identified in the Guidance. It is remarkable, and important, to note also that contrary to the Danish Military Manual, the new edition of the UK LOAC Manual (2010) does *not* take over the Guidance criteria, even though its view on DPH leans closely towards that defined by the ICRC expert consultation. In fact, with the exception of the Danish Manual that does mention a number of concrete examples of DPH[618], none of the other above-mentioned manuals provides a detailed list of criteria to assess whether or not a civilian takes directly part in the hostilities. The only military manual that actually does include such a list, is the recent US Military Manual.[619] Because of its level of detail, this manual deserves a closer look.

In June 2015, the US published its new Department of Defense Law of War Manual, which was updated shortly after in December 2016. This DoD Law of War Manual, written after the publication of the ICRC Interpretive Guidance, provides interesting insight in the way in which the US armed forces interpret the notion of direct participation in hostilities and consequently define the scope of legitimate military targets during armed conflict.

Part 5.8 of the Manual on the concept of direct participation in hostilities starts with the confirmation that the United States 'supports the customary principle on which Article 51(3) AP I is based.'[620] The Manual nevertheless rejects significant parts of the ICRC's Interpretive Guidance as an accurate reflection of the customary law.[621]

In its crucial paragraph 5.8.3., the Manual recognizes that the determination of an act by a civilian constitutes a direct participation in the hostilities depends on the context. It then provides a list of considerations which 'may be relevant' when making the assessment[622]:

- the degree to which the act causes harm to the opposing party's persons or objects, such as
    - whether the act is the proximate or "but for" cause of death, injury, or damage to persons or objects belonging to the opposing party; or
    - the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party;
- the degree to which the act is connected to the hostilities, such as

[617] And the Norwegian Manual, from which I did not quote as it is only available in Norwegian. See however Norway, Forsvaret, Manual i Krigens Folkerett, para. 3.24ff.
[618] The Norwegian Manual also lists (in Norwegian) a number of examples of acts it does or does not consider to be acts of DPH, see *ibid.*
[619] The previous US Manual already provided some guidance, for instance by defining that '[s]ome examples [of DPH] include taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property. Also, civilians serving as lookouts or guards, or intelligence agents for military forces may be considered to be directly participating in hostilities.' See United States, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, para. 8.2.2.
[620] US, DoD Law of War Manual, para. 5.8.1.2.
[621] *Ibid.*
[622] *Ibid.*, 230–31.

    - the degree to which the act is temporally or geographically near the fighting; or
    - the degree to which the act is connected to military operations;
- the specific purpose underlying the act, such as
    - whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party;
- the military significance of the activity to the party's war effort, such as
    - the degree to which the act contributes to a party's military action against the opposing party;
    - whether the act is of comparable or greater value to a party's war effort than acts that are commonly regarded as taking a direct part in hostilities;
    - whether the act poses a significant threat to the opposing party;
- the degree to which the activity is viewed inherently or traditionally as a military one, such as
    - whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions); or
    - whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.

It is obvious that there is a significant degree of overlap between the US' and the ICRC's interpretation of DPH: the first main bullet point, for instance, would be labelled 'threshold of harm' in the ICRC Interpretive Guidance. Similarly, the second main bullet point could be read as the US version of 'direct causation', while the third main bullet point reflects the ICRC's idea of 'belligerent nexus'. Nevertheless, in essence, the US Manual is more flexible and open to include supportive acts in the scope of DPH. For instance, the Manual states that 'in some contexts, training and logistical support may be viewed as taking a direct part in hostilities, while in other contexts it might not'.[623] Among the (non-exhaustive list) of examples of DPH acts, the manual lists the following supportive acts[624]:

- *planning* […] a combat operation against the opposing party, even if that person does not personally use weapons or otherwise employ destructive force in connection with the operations
- *providing or relaying information of immediate use* in combat operations, such as
  o acting as an artillery spotter or member of a ground observer corps or otherwise relaying information to be used to direct an airstrike, mortar attack, or ambush; and
  o acting as a guide or lookout for combatants conducting military operations;
- *supplying weapons and ammunition*, whether to conventional armed forces or non-state armed groups, or assembling weapons (such as improvised explosive devices) in *close geographic or temporal proximity* to their use, such as
  o delivering ammunition to the front lines; or

[623] *Ibid.*, 229, citing Kenneth Watkin, who argues that '[t]he person who is key in planning and facilitating [IED and suicide bomber attacks] must be a valid target as a direct participant in the hostilities.'
[624] *Ibid.*, 5.8.3.1. Boothby and Heintschel von Heinegg argue that this list seems to be 'non-controversial'. Boothby and Heintschel von Heinegg, *The Law of War*, 129. While this is true for many of the examples, I would disagree that the entire list is non-controversial.

o outfitting and preparing a suicide bomber to conduct an attack.

This list of examples is remarkably different from the US government position back in 2000, when the US President held that

> [t]he United States understands the phrase "direct part in hostilities" to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct casual [sic] relationship between the activity engaged in and the harm done to the enemy. The phrase "direct participation in hostilities" does not mean indirect participation in hostilities, such as *gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment*.[625]

In addition to the slightly more flexible approach towards the notion of direct participation in hostilities, the most significant difference between the ICRC Interpretive Guidance and the current US DoD Manual lies perhaps not in the concept of direct participation in hostilities, but in that of 'continuous combat function'. As explained above, the ICRC Guidance accepts the targeting of members of an armed group even in case they do not directly participate in hostilities, on the basis of their 'continuous combat function'. Only the members of an armed group with such a function within the group may be targeted at all times, similar to a combatant during an international armed conflict. A similar yet broader concept was included in the US Manual, which deals with belonging to an enemy group as a 'separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities'.[626] The US thus does not apply the notion of direct participation in hostilities to members of an armed group in a non-international armed conflict, as they are considered 'combatants' and thus targetable at all times.[627] Such a membership status may be derived from the type of support provided to the armed group in question. Paragraph 5.7.3 explains that, besides formal membership (which can be shown on the basis of, for instance, an oath of loyalty), functional membership to an armed group would also be sufficient for possible targeting. Such functional membership can *inter alia* consist of 'performing tasks on behalf of the group similar to those provided in a combat, *combat support,* or *combat service support* role in the armed forces of a State.'[628] Thus, supportive acts are not only important in light of a possible qualification as an act of DPH, but, according to the US, also in light of a possible determination of membership of an armed group, equally leading to targetability.

---

[625] US, Message from the President of the United States Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37, 25 July 2000, VII [emphasis added].
[626] US, DoD Law of War Manual, para. 5.8.2.1.
[627] As also highlighted by Boothby and Heintschel von Heinegg, *The Law of War*, 128.
[628] US, DoD Law of War Manual, 5.7.3.2 [emphasis added]. In similar vein, US Judge Advocate Krebsbach has argued that the preferred approach to determine whether or not an individual may be targeted is 'whether he performs functions for [the armed] group, either formally or on a continuous basis, that would ordinarily be associated with functions performed by a member of a State armed force'. Ryan T. Krebsbach, 'Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities Notes', *Journal of National Security Law and Policy* 9 (2017): 126.

Importantly, except for the US Manual and the Danish Manual, none of the military manuals quoted above refers to the notion of 'continuous combat function'.[629] This does not mean that States do not agree with that part of the ICRC Interpretive Guidance. While the notion of continuous combat function remains contested, some States have in their practice shown that they agree with the ICRC's views. The German Federal Government, when answering a question in the Bundestag, wrote for instance that

> members of the opposing armed forces (combatants) in international armed conflict and, in non-international armed conflict, members of organized armed groups exercising a continuous combat function may be lawfully targeted at all times as enemy fighters under international humanitarian law, including with the use of lethal force.[630]

In similar vein, the North Rhine-Westphalia Higher Administrative Court held in the *Ramstein* case that

> [s]ince unlike soldiers from state armed forces, combatants from a non-state conflict party are not necessarily visibly recognizable by uniform or national emblem and typically become members of the conflict party not through a formal act, but on the basis of actual affiliation, a distinction must be made between them and civilians on the basis of actual functional aspects. Correspondingly, a person can be seen as a member of such a group if their continued or continuous function lies in the direct participation in hostilities ("continuous combat function")[631]

Similarly, the Swiss Federal Council wrote in its Report on IHL and Current Armed Conflict of September 2010 that

> in order to avoid any ambiguity, the ICRC recently published a study on the concept of "direct participation in hostilities", which indicates that members of organized armed groups assuming a […] "*continuous combat function*" […] lose their protection for the duration of their activities.[632]

[629] See also Norway, Forsvaret, Manual i Krigens Folkerett, para. 3.38.
[630] Germany, Lower House of Federal Parliament (Bundestag), Reply by the Federal Government to the Minor Interpellation by Members Jerzy Montag, Hans-Christian Ströbele, Omit Nouripour, further Members and the Parliamentary Group BÜNDNIS 90/DIE GRÜNEN, BT-Drs. 17/3916, 23 November 2010, 6.
[631] Including a reference to the ICRC Interpretive Guidance. See Judgment from 19 March 2019, 4 A 1361/15, Oberverwaltungsgericht NRW, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00, para. 388 [English translation of the oral pronouncement of the judgment provivided by the European Centre for Constitutional and Human Rights (ECCHR), see https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf].
[632] Switzerland, Federal Council, Report on IHL and Current Armed Conflicts, 17 September 2010, 14 [as included in the ICRC Customary Law Practice Database, Practice for Rule 6].

B.2. State Reports prepared for the Customary Law Study

The Customary Law Study also used reports drafted by national experts in order to obtain a view of the state practice and *opinio juris* of a selected number of States.[633] These reports, partially based on questionnaires with governmental or military personnel, provide useful insight into the interpretation of 'direct participation in hostilities', especially for those States that do not have a military manual available. While the authoritative value of these reports is obviously less than that of the military manuals quoted above, they do confirm the above conclusions, namely that the States' interpretations of which supportive acts should be included in the concept of DPH vary significantly. According to the Zimbabwe State Report, for instance, directly participating in hostilities 'may include giving logistical and/or intelligence support. A lot, however, will depend on the degree of involvement.'[634] The Rwandan report makes a distinction between civilians supporting armed forces in an international and a non-international armed conflict: 'unarmed civilians who follow their armed forces during an international armed conflict in order to provide them with food, transport munitions or carry messages, for example, lose their status as civilians. In the context of an internal armed conflict, however, unarmed civilians who collaborate with one of the parties to the conflict always remain civilians.'[635] The distinction is justified, according to the report, because civilians in a NIAC are 'forced to cooperate with the party that holds them in its power'.[636] According to the Philippines report, civilians operating as 'spies, couriers or lookouts' for insurgents lose their protection against attack.[637] The Malaysian report is more lenient, by stating that '[p]ersons who merely provided support to the enemy, […] for example those who supplied it with weapons, food or medicine' do not actively participate in the hostilities.'[638] With reference to provisions in Chilean domestic law, the report on Chile states that the country takes a 'very broad view of what acts are considered to constitute support to military action and thus lead to the loss of civilian status'.[639] The Iraqi report mentions a more careful approach, by indicating that the scenario whereby civilians lose protection from attack if they directly serve the armed force should be interpreted restrictively in order to avoid abuse by the parties.[640]

With a few exceptions (notably the US Manual and to some extent the Danish Manual), both the military manuals and State reports do not provide detailed information on the assessment

[633] '9 in Africa, 15 in Asia, 11 in Europe, 11 in the Americas and 1 in Australasia'. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 1:xlv. These reports can be consulted in the ICRC Library at the ICRC Headquarters in Geneva.
[634] Joel Zowa (ed.), Report on the practice of Zimbabwe, 1998, chap. 1.2.
[635] Responses by Rwandan army officers to a questionnaire, see Félécité Karomba (ed.), Report on the practice of Rwanda, 1997, chap. 1.2.
[636] Responses by Rwandan army officers to a questionnaire, see *ibid.*
[637] Alberto Muyot (ed.), Report on the practice of the Philippines, 1997, chap. 1.2.
[638] Nurhalida binti Mohamed Khalil (ed.), Report on the practice of Malaysia, 1997, chap. 1.2.
[639] Hernán Salinas Burgos (ed.), Report on the practice of Chile, 1998, chap. 1.2.
[640] Mohammed Abdallah Al Douri (ed.), Report on the practice of Iraq, 1998, chap. 1.2.

criteria for direct participation in hostilities. For that reason, they are only of limited help when trying to identify which supportive acts are considered as a direct participation in hostilities.

B.3. Domestic case-law on the notion of DPH

Somewhat more useful is the (limited) national case-law specifying which acts should be considered as direct participation in hostilities. In Germany, for instance, the Federal Prosecutor General had to deal with the question whether war crimes or other German domestic crimes had been committed during a German airstrike against two fuel tankers stolen by the Taliban. The tankers were originally destined towards the International Security Assistance Force (ISAF) in Afghanistan, when they were stolen by Taliban forces near Kunduz. On their route, the tankers got stuck on a sandbank. Some civilians came to help to release the tankers from the sand, while others seized the occasion to try to steal fuel for their personal profit. The attack resulted in a number of civilian dead. When assessing whether the bombing constituted a crime, the Federal Prosecutor General had to decide whether the civilian victims were directly participating in hostilities or not. In a decision that clearly relied on the ICRC Interpretive Guidance criteria, it was held that

> [h]ostilities are thus not only understood in the narrow sense as armed acts of destroying personnel and equipment of the adverse forces […] Rather, the term also comprises all acts which negatively affect the military capacities and operations of a party to the conflict, with a direct causal link between the act and the disadvantage caused and an objective link (belligerent nexus) between the damage caused to the adversary and the advantage for the opposing party being required […] Consequently, acts of sabotage, the disruption of the enemy's logistics and communications are covered […], whereas the general disruption of a the civilian infrastructure of the country in which the armed conflict is taking place, even if negatively affecting the enemy forces, is not.
>
> […] Regarding the civilians who were supporting the Taliban, it must be taken into account that the abduction of the two fuel tankers which had been designated for ISAF forces in principle constitutes causing damage to the military capacities as comprised in the notion of hostilities. The requirement of a nexus […] between the damage and the advantage for the other party to the conflict was also fulfilled. However, the requirement of direct causality between the act and the damage was not fulfilled […].
>
> […] Regarding the loss of fuel, the proximity to the party to the conflict and the use in armed conflict is decisive. In the present case, the fuel was intended for the ISAF forces, but was still in the possession of a private logistics company and was located far away from the point of destination. The *necessary relationship of proximity is therefore not fulfilled*.
>
> The *requirement of strengthening a party to the conflict with the consequence of directly harming the adverse party* is not fulfilled in the present case either. The situation corresponds to a general strengthening of the resources of one party without direct relation to the hostilities,

> as is the case with supporting the Taliban by financial donations […] or by smuggling weapons and ammunition across the border […]. If the strengthening of military capacities directly resulted in concrete military operations, for example by transporting weapons directly to an area where they will be used […], the assessment would be different.[641]

The Federal prosecutor General dismissed the case.[642] Civil lawsuits requiring compensation from the German government were rejected by the Court of first instance in Bonn, the Court of appeals in Köln and the Bundesgerichtshof.[643] This German case reflects a restrictive view, in line with the ICRC Guidance, namely that supportive acts can only be considered direct participation in hostilities insofar there is a causal link and a sufficient proximity between the support and the damage to the enemy.

A somewhat broader interpretation of DPH can be found in the judgment that the Israeli High Court of Justice held in the *Public Committee Against Torture in Israel* case, where it decided that for some acts (including collecting intelligence, transporting combatants to the battlefield, providing service to weapon operation) the distance to the battlefield did not matter: they were to be considered a direct participation in the hostilities. Other supportive acts, including logistical support, would however not qualify as such:

> [T]he following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities […], or beyond those issues […]; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, *be the distance from the battlefield as it may*. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities […]. However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who *aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid.* The same is the case regarding a person who distributes propaganda supporting those unlawful combatants. If such persons are injured, the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage.[644]

The two above examples show that, similar to the divergence in the military manuals, in national case law the views on the exact criteria for acts of direct participation in hostilities differ.

---

[641] Investigation proceedings against Colonel (Oberst) Klein and Staff Sergeant (Hauptfeldwebel) W. based on the suspicion of a criminal offence having been committed in violation of the Code of Crimes Against International Law (Völkerstrafgesetzbuch, VStGB) along with other offences, No. 3 BJs 6/10-4 (The Public Prosecutor General of the German Federal Court of Justice (Bundesgerichtshof), 16 October 2010), 51–52 [emphasis added].
[642] *Ibid.*, 1.
[643] 1 O 460/11 (Landesgerichts Bonn, 12 November 2013); I-7 U 4/14 (Oberlandesgerichts Köln, 30 April 2015); III ZR 140/15 (Bundesgerichtshof, 10 June 2016).
[644] Public Committee Against Torture v. Government, 2006(2) Israel Law Reports 459 (Israel High Court of Justice, 2006), para. 35 [emphasis added].

C. Intermediate conclusion: the disputed concept of DPH

The concept of direct participation lies at the heart of the IHL rules on the conduct of hostilities. It is an essential element in the application of the crucial rule of distinction between military objectives and civilian targets, applied at the micro-level of individuals, who might be conducting supportive acts rather than actually engaging in the fighting. Despite its importance, however, thus far no clear and unanimous interpretation of the concept has emerged. In absence of sufficiently clear State practice, the ICRC has developed its own interpretation based on an intense consultation of experts. Despite of what the ICRC perhaps had hoped, its Interpretive Guidance has not ended the discussion. Recent State practice, in particular that of the US, shows that at least some States are in favour of a more lenient interpretation of DPH. In addition, some States seem to broaden the concept of 'combatant' to 'membership of armed groups', thereby circumventing the limitations of 'direct participation in hostilities' and considering individuals who support armed groups as targetable members of such groups.

Ultimately, a State's position on what exactly constitutes an act of DPH will have a tremendous impact on the categories of persons that enjoy or lose protection against attack during an armed conflict. If we would consider the four categories of supportive acts scrutinized in this study at the micro-level of individuals, the conclusion would be that there is no unanimous position on whether or not those acts are forms of direct participation in hostilities: providing crucial intelligence information would for instance be considered as an act of DPH under the ICRC Guidance, whereas it would not be according to the Military Manual of Sweden or Sierra Leone. The category of 'logistic support' would necessitate a further division according to the specific forms of support: transport of troops to the battlefield would be considered as an act of DPH according to the ICRC, while transport to military barracks would not. Even for the category of 'training' it is impossible to draw conclusions, as much will depend on the exact link between the training activity and ongoing hostilities (at least for the purpose of the ICRC Guidance), whereas for some States training would be considered as part of the general war effort leading to a loss of protection (e.g. Military Manual of India). Lastly, the category of 'allowing territory to be used' is somewhat less evidently transposable to the micro-level: individuals do not have a 'territory', they at most have a piece of land or a house under their property. None of the military manuals discussed or the ICRC Interpetive Guidance mention the example of 'allowing property to be used' as an act of DPH.[645] From a conduct of hostilities perspective, classifying such a supportive act as DPH seems less necessary, as the property itself becomes a lawful military target because of its military use.[646]

[645] However, a denial of property or territory to be used is an act that would meet the necessary 'threshold of harm' according to the ICRC Guidance. See Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 48, and *supra* note 576.

[646] Military objectives are defined by Article 52(2) AP I as 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.' The question of course

Taking into account the disparity of approaches regarding the concept of DPH, we will now investigate whether or not it would be useful to lift the concept of DPH from the micro-level of individuals to the macro-level of States in order to assess the macro-consequences of support to parties to an armed conflict.

4.2.2. From micro to macro: the support-based approach

The concept of direct participation in hostilities operates at the micro-level of individuals: if an individual directly participates in the ongoing hostilities of the parties to the conflict, then he or she loses his or her protection and may be targeted. It is not difficult to make the link between the micro-level of individuals and the macro-level of States: if a State supports the hostilities of parties to an armed conflict in the same way a civilian supports the hostilities, what are the consequences for the State? After all, a State always acts through its State organs, which are individuals. This link between the micro-level of individuals and the macro-level of States was already highlighted by the Interpretive Guidance, which mentions that

> the distinction between a person's direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.[647]

The core question in this sub-Section is: which types of support to a party to an armed conflict render the supporting State party to that conflict itself? As a starting point to answer this question, I will outline the support-based approach that was recently developed by the ICRC.

A. The support-based approach as introduced by the ICRC

The support-based approach (SBA) was first introduced by Tristan Ferraro, legal advisor to the ICRC, before being endorsed as the official ICRC position.[648] The SBA was developed by the ICRC to address some concerns on IHL applicability in the context of multinational operations. Indeed, in the context of the conflict in Afghanistan and the International Security Assistance Force (ISAF), for instance, some of the States involved in Afghanistan acknowledged that they were party to a NIAC, while other (and in particular European) States did not see themselves

remains whether, if the ownder of the property is affected by an attack, he or she should be taken into account as 'collateral damage'.

[647] Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 51.

[648] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces'; ICRC, 'IHL Challenges Report', 22–23.

as party to a conflict, since their support to ISAF was short of front-line engagement.[649] Despite this denial, those States did have rules of engagement which were based upon IHL paradigms for the conduct of hostilities. Faced with this contradiction, the ICRC tried to look for a way to complement the classic criteria of IHL applicability in order to convince the ISAF-involved States that they were indeed parties to a NIAC.[650] This led to the support-based approach applicable to multinational operations.

The support-based approach was introduced to the general public in two articles written by Ferraro in the International Review of the Red Cross, in 2013 and 2015 respectively.[651] The approach was subsequently presented as an official ICRC position in the 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' Report, prepared for the 32nd International Conference of the Red Cross and Red Crescent, 8-10 December 2015[652] and has been further confirmed at the Bruges Colloquium of 2018. Thus far, to my knowledge, no other official ICRC publication deals with the matter of the support-based approach, even though this will change with the publication of the 2019 Challenges Report that will come out in the autumn of 2019.

In the original article of 2013, as well as in the Challenges Report, the support-based approach is presented as an alternative way to assess the role of States involved in 'peace operations'.[653] Such multinational operations, or 'peace operations', are defined in Ferraro's article as covering

> both peacekeeping and peace-enforcement operations conducted by international organisations, regional organisations or coalitions of states acting on behalf of the international community in pursuance of a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter.[654]

Under the support-based approach, it is submitted by the ICRC that IHL applies to such multinational forces when the following conditions are met:

1. There is a pre-existing NIAC ongoing in the territory where multinational forces intervene;
2. Actions related to the conduct of hostilities are undertaken by multinational forces in the context of that pre-existing conflict;

---

[649] Germany for example initially denied it was party to an armed conflict. The position of Sweden was unclear. See more in detail Engdahl, 'Multinational Peace Operations Forces Involved in Armed Conflict: Who Are the Parties?', 235–237.

[650] ASIL, 'Peace Forces at War: Implications under International Humanitarian Law', 159.

[651] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces'; 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', *International Review of the Red Cross* 97, no. 900 (2015): 1227–52.

[652] ICRC, 'IHL Challenges Report', 22–23. The approach has also been the topic of a roundtable at Chatham House, see Chatham House, 'The Applicability of International Humanitarian Law to Multinational Forces: Discussion Summary', International Law Programme, 20 November 2014.

[653] While these two documents do not explicitly restrict the support-based approach to these scenarios, they also do not discuss the possibility of a broader scope of application.

[654] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 562.

3. The multinational forces' military operations are carried out in support of a party to that pre-existing conflict;
4. The action in question is undertaken pursuant to an official decision by the TCC or international organisation in question to support a party involved in that pre-existing conflict.[655]

All four conditions must be fulfilled in order to render IHL applicable to the multinational forces' action in the context of a pre-existing NIAC.[656] The first, third and fourth condition are pretty straightforward: SBA can only be applied to assess supportive acts to a party of an armed conflict that already exists – it can, *a contrario*, not be used to assess whether an armed conflict erupts out of a situation of peace. Furthermore, the consequences of the SBA (that the supporting force becomes party to the pre-existing NIAC) can only derive out of official acts, taken with the full permission of the competent authority.[657] The way in which this official decision is to be made depends on the domestic system of each State, and may require in some systems the approval by the parliament.[658] This latter condition does however not exclude that some support is undertaken secretly, without knowledge of the general public. As long as the support is the result of an official decision, not launched upon the initiative of an individual without the approval of the government, this condition is fulfilled.

---

[655] *Ibid.*, 584. Note that in Ferraro's 2015 article, the conditions are worded in a slightly different manner:

> In the ICRC's view, a third power supporting one of the belligerents can be regarded as a party to the pre-existing NIAC when the following conditions are met:
> (1) there is a pre-existing NIAC taking place on the territory where the third power intervenes;
> (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict;
> (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and
> (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.

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', 1231.

[656] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 584.

[657] Of course, *ultra vires* actions can make a State responsible for an international wrongful act. Article 7 ARSIWA considers that an *ultra vires* act is normally an act committed in the official capacity of a State organ. Such actions should not however define the status of a State *vis-à-vis* an armed conflict. (*Ibid.*, 587.) That being said, if the *ultra vires act* is too far removed from the official function of that organ, than it is to be considered an act in the private capacity of the organ, thus not attributable to the State. In this regard, see Kimberly Trapp, *State Responsibility for International Terrorism*, Audiovisual Library of International Law, Lecture Series, 2016, http://legal.un.org/avl/ls/Trapp_S.html#.

[658] On this topic, see for instance the interesting analysis by Anne Peters, discussing the interplay between the German Constitution and various decisions of the German Constitutional Court: Anne Peters, 'Between Military Deployment and Democracy: Use of Force Under the German Constitution', Research Paper (Heidelberg: Max Planck Institute for Comparative Public & International Law (MPIL), 2 May 2018), https://papers.ssrn.com/abstract=3172049. For an analysis of the parliamentary approval system in Canada, see Michael Dewing and Carinne McDonals, International Deployment of Canadian Forces: Parliament's Approval (Parliamentary Information and Research Service, 2006); in France, see Amandine Blandin, 'Article 35 de la Constitution: état de l'information du Parlement sur les interventions militaires à l'étranger', *Revue française de droit constitutionnel*, no. 105 (2016): 3–36; in the UK, see Mills, 'Parliamentary Approval for Military Action, Briefing Paper CBP 7166'. For an analysis of the parliamentary war powers in the countries that contributed to the US-led coalition against ISIS, including Belgium, see Ruys, Ferro, and Haesebrouck, 'Parliamentary War Powers and the Role of International Law in Foreign Troop Deployment Decisions'.

B. Analysing the scope of the support-based approach

At first sight, the support-based approach seems a useful tool to prevent States from too easily denying their crucial role in armed conflict: by considering, under certain circumstances, their supportive acts as sufficient to render them party to the armed conflict, States can no longer hide behind a lack of troops on the ground or troops involved in actual fighting in order to take up their responsibilities as a party to an armed conflict. Nevertheless, the support-based approach as currently advanced by the ICRC raises a number of concerns.

The support-based approach was only fairly recently proposed and has not yet been scrutinized often by scholars, neither have there been publically available official State responses to it. The ICRC claims that it now uses the support-based approach on a daily basis when making legal assessments of situations linked to concrete armed conflicts.[659] The *rappel de droits* sent by the ICRC to the relevant parties to an armed conflict fall under the strict confidentiality rule of the organization, and can thus not be consulted in order to estimate how the support-based approach is applied in practice and whether it is accepted by the parties concerned.

The absence of explicit State practice linked to the support-based approach does not mean that the approach is widely accepted, nor that it is fully rejected. Rather, future publically available State practice will be the real litmus test for the SBA. Meanwhile, some important concerns can be formulated and addressed.

A first set of concerns, outlined in the sub-Sections B.1 to B.5 below, is linked to the conditions formulated for the application of the support-based approach. A second set of concerns is linked to the overall concept of support-based approach and its *raison d'être* (Section C). Paradoxically, while in order to address the condition-specific concerns a broadening of the scope of the support-based approach would be necessary, such broadened scope comes with a broader basis for the general concerns.

B.1. Material scope of the support-based approach

For its material scope, the support-based approach shows a clear similarity with the concept of direct participation in hostilities. The second condition of the support-based approach requires that a multinational force undertakes 'actions related to the conduct of hostilities […] in the context of [the] pre-existing conflict'. Taken together with the requirement that the actions should be undertaken 'in support of' a party to the conflict (3rd requirement), the support-based approach is clearly based on ideas similar to those underpinning the concept of DPH and continuous combat function discussed above.

[659] See the contribution by Ferraro in ICRC and College of Europe, 'Proceedings of the Bruges Colloquium: Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts. 18-19 Oct 2018', forthcoming 2019.

The link between the SBA and DPH is explicitly acknowledged by Ferraro. The criterion of 'in the context of', included in condition 2, is explained by making reference to the DPH criterion of direct causation.[660] Ferraro notes that a general contribution to the war effort would be insufficient, 'as it amounts to no more than loose, indirect involvement in the pre-existing armed conflict.'[661] Instead, acts which directly damage the opposing party would be included in the second criterion. However, Ferraro argues, 'it is not necessary for the action carried out by the multinational forces per se to cause direct harm to the opposing party.' Direct support also includes acts which, in conjunction with other acts, have a negative impact on the enemy. In other words, the acts all together have to form a coordinated military operation which directly inflicts harm on the opposing party.[662] This wording is quite similar to the commentary attached to the criterion of 'direct causation' in the ICRC Interpretive Guidance (see *supra* Section 4.2.1.A). Concrete examples of this criterion if applied to the macro-level of States are also provided by Ferraro: transport the supported party's armed forces to the front-line or carrying out air-refuelling to a fighter jet that is involved in an operation.[663] Such supportive acts would, at the micro-level of individuals, also qualify as acts of DPH – at least according to the ICRC Interpretive Guidance, and certainly according to the US Military Manual.[664]

Another element of similarity of the support-based approach with the notion of DPH is the requirement of a belligerent nexus. Indeed, as Ferraro described, the operations of the multinational force have to be carried out 'in support of a party to the conflict', hence meaning that the goal they pursue must be damaging the opposite party to the conflict. If the supporting State merely shares the same political goal (for example, to stop the actions of IS on Iraqi and Syrian territory), this does not necessarily mean that the assistance is provided in support of a party to the conflict.[665] Indeed, the 'key issue' here is whether an action can 'reasonably be interpreted' as 'designed to support a party' to the pre-existing NIAC.[666] This language, again, is very similar to the language used by the Interpretive Guidance in order to explain the third DPH criterion of belligerent nexus.

If States are willing to accept a support-based approach, one should be cautious for the fact that States might want to transpose their own vision of what constitutes direct participation in hostilities from the micro-level to the macro-level. Thus, the US, for example, would consider the involvement in the 'planning' of a combat operation as an act that is sufficiently linked to the hostilities, thus rendering the State involved in the 'planning' party to the existing non-international armed conflict. In addition, States might confuse their understanding of targetability with the conditions formulated for the support-based approach. Again, the US would consider that a member of an armed group may be targeted, even if its membership is

[660] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 585.
[661] *Ibid.*
[662] *Ibid.*
[663] *Ibid.*, 585–86.
[664] For positions by other States, see the overview provided *supra* in sub-Section B.1.
[665] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 586.
[666] *Ibid.*

purely functional, based upon the 'combat service support' provided to the armed group. If a State would provide such support to another State involved in a NIAC, then the US might use the support-based approach to argue that the supporting State has become party to the NIAC – whereas this is not necessarily the result envisaged by the ICRC. To some extent, this concern is accommodated by the requirement under condition 2 of the support-based approach that the actions should be 'related to the conduct of hostilities'. Nevertheless, as illustrated above, some States already have a very broad understanding of what 'direct participation in hostilities' is. Arguably, 'related to the hostilities' goes even further than the notion of DPH. The danger thus consists of basing a status as party to an armed conflict on a reasoning on which no consensus exists at the micro-level of individuals – thus no consensus will exist on the macro-level of States either.

B.2. Personal scope of the support-based approach

The personal scope of the SBA as proposed by the ICRC in Ferraro's article of 2013 and in the Challenges Report of the 2015 was limited in three ways. First, it was only proposed in order to assess State support to addressees that are other States, provided in the framework of a 'multinational force'. State support outside such multinational force, or support to armed groups did not seem to fall within the scope of the SBA.[667] Second, SBA was only applied to *support provided by* States. Here too, support provided by armed groups was not considered. And third, SBA was only referred to in the context of parties to non-international armed conflicts. Indeed, so far the ICRC has not referred to SBA when looking at international armed conflicts. The first limitation was to some extent left out of the conditions of the support-based approach in the 2015 article by Ferraro, but the two other limitations have thus far not been addressed.[668]

While all three limitations might be understandable from an ICRC point of view – whose concern probably was to be able to engage in a dialogue with States as 'parties to the conflict'[669] – from a legal perspective, it is submitted here that if the support-based approach is to be used as the new method to assess supportive acts, its scope should be expanded for it to be in conformity with two of the basic ideas underlying IHL: that of the distinction between *jus in bello* and *jus ad bellum* on the one hand, and the equality of belligerents rule on the other. Such an expanded scope would however make the support-based approach even more subject to general criticism than it is already now in its (as submitted here) incomplete form.

[667] While both texts do not explicitly exclude a broader application of the support-based approach, they do not mention that option either.
[668] It seems however that the ICRC has also changed its position regarding the second limitation, as discussed *infra*. There are however not yet any official ICRC publications available to confirm this change of position.
[669] Under the Geneva Conventions, parties to an international armed conflict have to allow the ICRC access to the prisoners of war. In non-international armed conflicts, the ICRC can offer its services. See Articles 126 GC III, Article 76(6) and 143 GC IV, common Article 3 GCs and Rule 124 of the CIHL Study.

The ‘problem’ which SBA was designed for, was not so much the fact that multinational operations provide support to a State in the context of a NIAC, but it was rather the nature of that support and the denial of becoming party to a conflict attached to it. If one accepts that the nature of the support, namely non-lethal support of a certain kind, justifies why a support-based approach would be taken, rather than applying the ‘classic’ IHL criteria, then it is easier to understand why in my opinion the SBA cannot be limited in the three ways explained above.

First, it is interesting to note that the support-based approach was initially developed to assess the role of States participating in a multinational force – be it a force under UN command, under NATO command, or even merely with a UN mandate. As Ferraro’s definition of a multinational force indicates, the force (constituted of multiple troop-contributing States) has to act ‘on behalf of the international community in pursuance of a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter.’[670] This requirement is not listed as one of the four conditions of the support-based approach, but posed an important, yet problematic additional criterion for the application of this new approach, at least in the version it was initially introduced. By limiting the support-based approach to cooperation of States in the framework of a ‘multinational force’ acting on behalf of the international community in pursuance of a UN Security Council resolution, the first verison of the support-based approach ignored the crucial distinction between the *jus in bello* and the *jus ad bellum*. While often cooperation between States will indeed occur pursuing a UNSC Resolution, it is perfectly lawful for State to assist each other, for instance, in collective self-defence in absence of any UNSC Resolution. More importantly, the question whether or not the cooperation between the States is lawful under *jus ad bellum* should not be an issue at all when determining whether States, by their support, become a party to an armed conflict. As explained in Chapter 2, the distinction between *jus in bello* and *jus ad bellum* is situated precisely in the fact that *jus ad bellum* considerations should not impact *jus in bello* application. Therefore, the support-based approach had to be expanded so as to potentially apply to all circumstances under which States cooperate – regardless whether the support is provided in the framework of a force created after a UNSC resolution, upon request of an attacked State or even upon the initiative of any State looking for support in its military aspirations. Ferraro seems to have acknowledged the need for this expansion in a Chatham House discussion of the support-based approach.[671] Indeed, in his 2015 article in the International Review of the Red Cross, such a limitation was rightfully deleted from the conditions for the support-based approach.[672]

Equally problematic is the presumption behind the requirement of a ‘multinational force’. The support-based approach was written for a situation whereby States are cooperating under some

[670] Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’, 562.
[671] Chatham House, ‘The Applicability of International Humanitarian Law to Multinational Forces: Discussion Summary’, 2.
[672] The wording ‘multinational operation’ is left out of the conditions for the SBA and instead replaced by ‘the intervening power’. See 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’, 1231.

form of centralized command. That command can be a UN Command, or a NATO command, or a command linked to the EU, the AU, etc. The ways in which military commands are shared or centralized are numerous and may differ on a case-by-case basis. It is not the purpose of this study to explore the various forms of shared command and their legal consequences. Rather, it is sufficient to note here that some degree of centralized command is presumed in the requirement of 'multinational force', to which the support-based approach would apply. This would exclude the mere *ad hoc* cooperation between States, such as air-refuelling linked to a specific armed conflict, but outside the context of a specially created 'force'. It is submitted here, however, that the support-based approach could still apply to those looser forms of inter-State cooperation. What matters is the nature of the support provided. As discussed above, the type of support that would give rise to an application of the support-based approach already encompasses a sufficiently close link of cooperation between the two States at hand, regardless how the command is centralized or shared. Therefore, in my opinion, the support-based approach should not be limited to multinational forces under a UN-mandate, nor to cooperation under a centralized command. It should be available to all forms of cooperation between States.[673] Whether or not the support in question renders a State party to the ongoing armed conflict depends on the nature of the support, not on the way the two cooperating States decided to structure their military command. Again, the more recent article by Ferraro seems to acknowledge this concern, by formulating the support-based approach as applying to support by 'powers' in the context of a non-international armed conflict.[674] It remains to be seen whether this language will be also adopted by the ICRC in the 2019 Challenges Report.

While broadening the support-based approach to cooperation between States regardless whether they do so with a UNSC mandate would accommodate the approach with the crucial distinction between *jus in bello* and *jus ad bellum*, the fact that the support-based approach is limited to support provided *by* and *to* States remains problematic for a different reason: the equality of belligerents under IHL. This equality of belligerents flows *inter alia* from the crucial distinction between *jus in bello* and *jus ad bellum*, and requires that IHL is applied equally to both sides of the conflict.[675] Even in situations of non-international armed conflict, where often one side of the conflict is formed by the government and the opposite side constitutes an armed group, the principle of equality of belligerent plays its role.[676] Thus, it is submitted here that the same set of rules should apply to determine whether a State becomes party to a pre-existing NIAC as to whether an armed group becomes party to a pre-existing NIAC. Interestingly, as

[673] For a contrary position, see Sassòli, who writes that '[f]or contributing States [in peacekeeping missions] and the UN supporting the armed forces of a host State, the support-based approach may be relevant for determining whether they are a party to an armed conflict. Beyond that, in my opinion, party to a conflict status must be determined, as always, according to the facts on the ground using the usual criteria' [footnote omitted]. Sassòli, *International Humanitarian Law*, 471.

[674] 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', 1231.

[675] See *supra* Chapter 2, Section 2.1.

[676] For instance, IHL does not prohibit members of an armed group from attacking military objectives, just as it does not prohibit armed forces from doing so.

discussed below, the ICRC seems to have adapted its position (at least partially) in order to accommodate the equality of belligerents concern.

From a traditional point of view, the criteria of organization and intensity would determine whether a third armed group has become party to the NIAC or not (see *supra* Section 3.2). If State A is in a NIAC with armed group X, and armed group Y 'strongly' supports X without however entering in armed confrontation with A, the *traditional approach* would not consider that Y is a party to the NIAC. One could wonder why, if the criterion of intensity is not to be interpreted too strictly when deciding whether a State becomes party to a pre-existing NIAC, the same *progressive approach* cannot be used for third armed groups who become party to the NIAC. Hence, if the fulfilment of the intensity criterion is not necessary for supporting third States, it should not be necessary for supporting armed groups either.[677] Of course, no such leeway would possible with regard to the criterion of organization, as organization is a condition for the existence of an armed group as such. Therefore, supposing an armed group is sufficiently organized, there is no reason why its support to another armed group involved in a NIAC should be assessed differently than State support to a State involved in the same NIAC. For some forms of support, such as air-to-air refuelling, this scenario might seem unrealistic. After all, armed groups generally have less means available to engage in armed conflict, let alone to assist other armed groups in doing so. Nevertheless, armed groups become more and more professional as well. It is to be expected that their cooperation, just as inter-State cooperation, will only increase in the future.

It is important to note, however, that the above plea for broadening the scope of the support-based approach should not have an impact on the targetability of the individual members of an armed group. As was already indicated above[678], the question whether a member of an armed group may be targeted depends on (i) whether he or she is directly participating in the hostilities or (ii) whether he or she has a continuous combat function. The question is whether a supportive act that could lead to the application of the support-based approach between armed groups would also lead to the targetability of the individual conducting the supportive act. Given the necessary link between the supportive act and the ongoing hostilities conducted by the supported group, this will indeed be the case, but only for the time the individual commits the supportive act. Take for instance the scenario whereby armed group X is providing crucial targeting information to armed group Y, which is involved in a NIAC with State A. If one would apply an expanded version of the support-based approach, group X can be considered a party to the ongoing NIAC on the basis of crucial intelligence information linked to a specific attack. The member of armed group X who gave that information, let us call him Ralph, could be seen as having committed an act of direct participation in hostilities, based on the criteria

[677] Of course, the fourth condition of the support-based approach (requiring the supportive action to be subsequent to an official decision) should be assessed taking into account the organization of the armed group in question.
[678] See Section 4.2.1. See also Section 4.2.2, sub-Section C.1, which deals with the increase of deadly violence as a general concern linked to the SBA(+).

outlined above.[679] Ralph could only be attacked during his act of direct participation in hostilities. While his act may be finished, armed group X remains party to the ongoing armed conflict until there is a lasting halt in the supportive acts (on the temporal scope of the support-based approach, see sub-Section B.4 *infra*). In sum, while it is submitted here that at a macro-level of parties to armed conflict, the support-based approach should be made applicable to inter-armed group support, this should not influence the micro-level of individuals and their risk to be targeted.

Despite the absence of a clear reference to the potential application of the support-based approach to cooperation between armed groups, the ICRC in practice does seem to expand the criteria as submitted here. This can be observed from the following already quoted ICRC statement concerning the conflict classification of the various ongoing armed conflicts in Colombia:

> Currently, the ICRC considers that at least five non-international conflicts are taking place in Colombia: four between the Colombian government and the ELN, the EPL, the Autodefensas Gaitanistas de Colombia (Gaitanist Self-Defence of Colombia, AGC) and elements of the former Bloque Oriental (Eastern Bloc) of the FARC-EP that have not accepted the peace process. There is also a fifth non-international armed conflict, involving the ELN and the EPL, centred on the Catatumbo region.
>
> But what about the other armed groups that claim the legacy of the FARC-EP? Everything depends on the extent to which certain groups are truly linked (through hierarchical relationships or *via certain types of cooperation*) with the former 1st, 7th and 40th "Frentes" or fronts of FARC-EP, which have not accepted the peace process, *and which the ICRC has classified as parties to a conflict* (a Frente consists of a few hundred persons). In such a case, one could say that these new groups were also parties to the non-international armed conflicts mentioned above, and that it was therefore permissible under IHL to use force against them.[680]

The second paragraph clearly illustrates that the ICRC is prepared to apply an expanded version of the support-based approach – without however explicitly referring to it – to armed groups that are linked 'via certain types of cooperation'. This position was also confirmed in a presentation given by Ferraro at the 2018 Bruges Colloquium.[681] This evolution is to be welcomed. However, thus far, an official publication reflecting this position is still lacking. It may perhaps be expected in the upcoming 2019 Challenges Report that will be prepared for the 33rd Conference of the Red Cross and the Red Crescent.[682] However, such a modification of the support-based approach still only addresses a part of the legal problem, as it would remain

[679] See Section 4.2.1.A.
[680] ICRC, 'Colombia'.
[681] See Ferraro's contribution in ICRC and College of Europe, 'Proceedings of the Bruges Colloquium: Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts. 18-19 Oct 2018'.
[682] To be held in Geneva from 9 to 12 December 2019, see http://rcrcconference.org.

limited to support provided by and to armed groups, and not expand to what I will call below 'cross-party' support'.[683]

Indeed, while based on the equality of belligerents rule, armed group support to armed groups should be assessed in the same way as State support to States, the question can be asked whether the same reasoning should apply to forms of 'cross-party support': State support to an armed group or, less likely perhaps, armed group support to a State. One argument in favour of expanding the support-based approach even to those kinds of cross-party acts of support is that the role of parties involved in a non-international armed conflict may shift while the conflict is ongoing. Thus, as happened in Libya during the fight against Gaddafi in 2011[684], the armed group may take over the power and become the 'armed forces of a State', while the government forces would turn into an 'armed group' involved in an armed conflict. Imagine that the European States would not have become involved in the Libya conflict by sending fighter jets, but that they nevertheless would have provided crucial and hostilities-specific support to the armed opposition. Such support would fall outside the scope of the support-based approach, as it is not provided by a State to a State. As a consequence, the European States would not have been considered party to the pre-existing NIAC in Libya. From the moment, however, that the armed opposition has taken control over the government, thus factually becoming the Libyan 'State', the support provided by the European States could be assessed under the support-based approach. While in practice the European supportive acts have not changed in nature, just because of a shift in the ongoing NIAC, European States would suddenly be regarded as parties to the conflict. That is, at least, the illogical consequence of the support-based approach in its current form, limited to State support to States only.

Whether the above 'changing nature of parties' scenario is a sufficient argument to broaden the support-based approach and apply it to support provided by a State to an armed group is yet another question. After all, exceptional circumstances should not dictate how general rules should be shaped. General rules and principles should be created to cover the vast majority of cases, which *in casu* will be that governmental forces remain in place and that an armed group remains an armed group. To recall, in order to assess the consequences of support provided by a State to an armed group, an alternative method is already available: as discussed in Section 4.1.1, it is agreed that if an armed group operates under the control of a State, the State becomes party to a pre-existing armed conflict. The nature of that conflict might even change, depending on who the adversary is.[685] As outlined above, the majority view, including the one subscribed

[683] The newly formulated conditions for the support-based approach in the 2015 Ferraro article seem to leave open the option that the SBA would apply to support provided by a State to an armed group involved in a NIAC, yet, the article only addresses this relationship in terms of potential control by the State over the non-State actor or in terms of a 'parallel armed conflict' that emerges. See 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'.
[684] For an overview of the conflict in Libya, see Kubo Mačák and Noam Zamir, 'The Applicability of International Humanitarian Law to the Conflict in Libya', *International Community Law Review* 14, no. 4 (2012): 403–36.
[685] If the adversary is a State, the conflict shifts from a NIAC to an IAC. If the adversary is an armed group, the conflict remains a NIAC – setting aside of course the possibility of a parallel IAC because of the unwanted presence of State-controlled troops on a third State's territory.

by myself, is that overall control by a State over an armed group would be sufficient to conclude that the controlling State has become party to an armed conflict. Overall control, while imposing a lower threshold than 'effective control', still sets the bar much higher than what the support-based approach would require if applied to such a situation. Consider the scenario whereby armed group X and State A are involved in a non-international armed conflict and a third State B provides crucial intelligence information to armed group X regarding the location of a military target of State A. Such a supportive act could be an indicative element, but would as such not suffice for establishing an 'overall control' by the State over the armed group. The support would however be an action 'related to the conduct of hostilities […] in the context of [the] pre-existing conflict' and 'carried out in support of a party to that pre-existing conflict' (conditions 2 and 3 of the support-based approach).

It is submitted here that the already existing criterion of 'overall control' should not jeopardize the expansion of a support-based approach. The two techniques can, under certain circumstances, co-exist alongside each other. Their effect on the parties concerned is different. By exercising overall control over an armed group, a State 'absorbs' the armed group – as far as conflict classification concerns.[686] The armed group no longer constitutes a separate party to an armed conflict, as its acts are considered to be acts of the State party to the armed conflict. This is not the effect envisaged by the support-based approach: its application would keep the status of an armed group as party to an ongoing conflict intact, all it would do is adding another party (the supporting State) to that pre-existing armed conflict. Take for instance the scenario whereby armed group X is involved in an armed conflict with armed group Y and State A offers concrete targeting information to armed group X. This act alone would not be considered as overall control by A over X, but it would, under an expanded version of the support-based approach, render State A party to the pre-existing non-international armed conflict between X and Y.

The problem of the above argument is that it only works for support provided by a State to an armed group involved in a conflict with another armed group. If the pre-existing armed conflict is one between an armed group and a State, the situation is somewhat different. In order to understand why, it is important to recall here the reason why the ICTY has developed the overall control theory: in order to assess whether a conflict, at first sight non-international in nature, was internationalized because of the strong linkage between an armed group (the Bosnian Serbs) and a State (Serbia). The adversary State faces another State in the form of a puppet armed group, thus the armed conflict is considered international in nature. It is precisely the classification of the conflict that poses a problem when we would apply a support-based approach to the situation of State support to an armed group involved in a NIAC with a State. Consider, again, armed group X, this time involved in an armed conflict with State B. State A provides X with crucial targeting information. This act would not be sufficient to determine

[686] As argued in Chapter 1, Section 3, for the purpose of State responsibility, a higher degree of control would be required.

that A carries out overall control over X. If we would apply the support-based approach to this scenario, we could conclude that State A becomes party to the pre-existing NIAC between armed group X and State B. The problem lies in the fact that if two States are involved in an armed conflict, the conclusion should be that the conflict is international in nature. Thus, theoretically it is impossible to consider that State A and State B are involved in a non-international armed conflict *against each other*.

Does the above conundrum exclude an expansion of the support-based approach as a whole? In my view, that would be a too drastic conclusion. The scenario as outlined above simply would not be suitable for an application of the support-based approach, even if its scope would be expanded. The reason lies in the first condition for the application of the approach: that a pre-existing conflict is ongoing. In my view, this condition should be understood as the requirement that an armed conflict is ongoing to which the supporting entity can theoretically become a party. In our example, State A cannot become party to an IAC because there is no IAC ongoing at the moment of its support. The only conflict that is ongoing is a NIAC between State B and armed group X. The support-based approach only allows an entity to become party to a conflict that already exists. This is an essential criterion, as the prerequisite conditions for a conflict have to be fulfilled already at the time the support takes place. The conundrum is this not really a conundrum: the support-based approach will not apply in this scenario – not because it leads to impossible results, but simply because one of its conditions can never be fulfilled.

The same argument can be used for the other type of cross-party support: that of an armed group to a State. While this scenario perhaps seems less evident, it cannot be excluded that an armed group carries out supportive acts, such as providing crucial intelligence information to a State for a concrete targeting operation. Imagine State A is involved in an armed conflict with armed group X. Imagine that armed group Y provides support to State A, the type of support that would give rise to an application of the support-based approach. The conclusion would be that armed group Y has become party to a non-international armed conflict, *in casu* with armed group X. An example of such scenario is the support provided by the Lebanese Hezbollah (an armed group) to the Syrian regime of Assad (a State) in the latter's fight against anti-governmental rebel groups and ISIS.[687] There is no problem of classification thus far. If, however, State A is involved in an *international armed conflict* with State B, the situation again 'blocks' at the level of conflict classification. Armed group Y cannot, through its support, become party to an international conflict with State B. An armed group versus a State can only result in a non-international armed conflict. Here again, the application of the support-based approach will simply not be at stake: there is no non-international armed conflict ongoing at

[687] For an overview of the extensive support provided by Hezbollah to Syria, including training and sophisticated weapon systems, see for instance Seth G. Jones and Maxwell B. Markusen, 'The Escalating Conflict with Hezbollah in Syria' (CSIS Briefs, 20 June 2018), https://www.csis.org/analysis/escalating-conflict-hezbollah-syria.

the moment of the supportive acts. Thus, the first condition of the support-based approach is not fulfilled.

Given the above analysis, it is submitted here that the scope of the support-based approach can safely be broadened to include cross-party support. In some cases, however, the support-based approach will fail to apply because the first requirement will not be fulfilled: that of a pre-existing armed conflict.

Lastly, we should explore an issue that has already been implicitly dealt with in the previous paragraphs: whether a support-based approach can be used to assess when a State becomes party to a pre-existing international armed conflict. As outlined above, the SBA was developed for situations of NIACs only. By relying on a certain type of support, the 'intensity' requirement to become involved in such a non-international armed conflict is dropped. Could the same reason apply to international armed conflicts? Two arguments can be raised in favour of such an expansion.

First, the traditional understanding of 'resort to armed force' between two or more States is already very broad: no hostilities *per se* are required, the capture of a soldier would suffice as well.[688] The recent ICRC Commentary even takes the (not yet unanimously accepted) view that the mere unwanted presence of armed forces on another State's territory constitutes an international armed conflict.[689] Given that the support-based approach was originally designed to 'circumvent' the intensity criterion necessary for the existence of a NIAC – a criterion which clearly sets a higher threshold than the mere 'resort to armed force' –, *a fortiori* it should be possible to use the support-based approach to circumvent the low threshold for international armed conflicts. This becomes even more apparent if one considers one of the rationales behind the intensity requirement to establish a NIAC: by setting the bar for IHL application relatively high, States are encouraged to solve internal tension and violence through the law enforcement paradigm. While this was of course not the first concern of States when the rules of IHL were developed, with the evolution of human rights law and the enhanced protection of individuals under human rights law, it turns out to be favourable for individuals if a situation of domestic violent tension does not immediately turn into a NIAC. Such considerations are less present when we are dealing with international armed conflicts. While of course in such situations human rights also play their role – subject to the important preliminary question of jurisdiction – IHL allows for an immediate and undisputed protection of the victims of an armed conflict that erupts between two States. The fact that the bar for IACs is set relatively low does not

[688] de Preux et al., *The Geneva Conventions of 12 August 1949. III*, 23. See also Vité, 'Typology of Armed Conflicts in International Humanitarian Law', 72, who notes that 'it is […] not necessary for the conflict to extend over time or for it to create a certain number of victims'.

[689] ICRC, *Commentary on the First Geneva Convention*, 95. For the opposing view, see however e.g. Carron's identity position: Carron, 'L'acte Déclencheur d'un Conflit Armé International', 402–25, and Sassòli's rejoinder: Sassòli, *International Humanitarian Law*, 170–72.

deprive persons from a protection, it rather ensures further protection (at least for civilians) against the violence used by a foreign State.

A second reason to expand the support-based approach to situations of international armed conflict is that reserving the support-based approach to NIACs could lead to strange results in case the nature of a conflict shifts as the conflict is ongoing. Consider, for example, a NIAC between State A and armed group X. State B provides such a support to State A which, according to the support-based approach, would render B party to the NIAC as well. Imagine that the armed group takes control over part of the territory and declares itself independent from State A, and that this 'new State' is widely accepted by the international community. In such case we would conclude that the armed conflict has become international in nature. But if we only apply the support-based approach to NIAC-situations, State B would change from being a party to the NIAC to being no party to a conflict at all.

However, against the latter argument we can hold that exceptional cases should not determine the scope of a general rule. Thus, the fact that in theory a non-State armed group could become an independent State in the course of an armed conflict should not define in general whether or not supporting such actor renders a State party to the existing conflict. While this is of course a valid argument, it does in my view not override the two main arguments in favour of an expansion of the support-based approach.

Seemingly more problematic is that lowering the threshold for involvement in an IAC at first sight potentially conflicts with a different set of rules: those of neutrality law. As will be explained in more detail in Chapter 5, when an international armed conflict is ongoing, the States not involved in the conflict are bound by the law of neutrality.[690] This old set of rules, besides ensuring protection for neutral nationals and by neutral Powers, prohibits the assistance of belligerent States by neutral States. Under traditional neutrality law, when a neutral State seriously violated its neutral duties, it would become a belligerent State. Conversely, for instance, when a neutral State takes actions against a belligerent that makes unlawful use of the neutral territory, the neutral State would safeguard its status as a neutral. How do these traditional consequences under neutrality law relate to the contemporary understanding of international armed conflict, and potentially, to an expanded version of the support-based approach?

First, it should be noted that the scope of application of the Geneva Conventions (and thus of international armed conflicts) is determined by common Article 2 GCs.[691] Since 1949, therefore, the existence of an international armed conflict (and of the parties thereto) depends on whether one of the scenarios outlined in common article 2 GCs, later supplemented with Article 1 AP I, is fulfilled. It does not depend on any other (political) considerations, or on another set of rules flowing from a different body of law, such as the law of neutrality. Second,

[690] See Chapter 5, Section 1.
[691] Except for common Article 3 GCs which applies to NIACs.

as will be developed in Chapter 5, the application of some neutral obligations may be influenced by a UNSC Resolution. Notably, the application of the neutral duty to refrain from assistance to a belligerent may be temporarily suspended. If precisely the (serious) violation of such a duty by a neutral State that would determine whether the State concerned becomes a belligerent, the core distinction between *jus in bello* and *jus ad bellum* would be seriously jeopardized. For that reason, neutrality law can no longer serve as a basis to determine which neutral States become belligerents. Consequently, neutrality law cannot serve as an impediment to the expansion of the support-based approach to international armed conflicts.

For the reasons outlined above, I suggest to broaden the scope of the current support-based approach in order to encompass support provided by and to various sorts of parties – whether the ongoing conflict is international or non-international in nature. This expanded version of the support-based approach can be named 'support-based approach +'. To visualize what this would mean, consider the scheme below, which shows how the current support-based approach relates to the traditional approach of determining who is party to an armed conflict:

Support-based approach					
	Pre-existing IAC	Pre-existing NIAC			
Support provided by a	**State**	**State**		**Armed group**	
Support provided to a	**State**	**State**	**Armed group**	**State**	**Armed group**
Traditional approach	'resort to armed force'	Intensity (& organization)	Overall control	Intensity (& organization)	Intensity (& organization)
Contemporary approach	/	Support-based approach	/	/	*Support-based approach (yet to be confirmed in official ICRC document)*

Note that the use of '/' merely indicates that supportive acts are not considered under any alternative approach than the traditional one[692] (and will, under the traditional IHL criteria, in most cases not lead to the conclusion that the supportive State becomes a party to an ongoing armed conflict). As a consequence, the supporting entity will not become a party to the ongoing armed conflict – unless through other venues, such as overall control.

Consider now how the expanded version of the support-based approach would fit in the scheme:

[692] As discussed in Sections 3.1 and 3.2.

Support-based approach +					
	Pre-existing IAC	Pre-existing NIAC			
Support provided by a	**State**	**State**		**Armed group**	
Support provided to a	**State**	**State**	**Armed group**	**State**	**Armed group**
Traditional approach	'resort to armed force'	Intensity (& organization)	Overall control	Intensity (& organization)	Intensity (& organization)
Contemporary approach: expanded version	*Support-based approach +*	Support-based approach	*Support-based approach +*	*Support-based approach +*	*Support-based approach*

The conditions of the SBA as formulated by the ICRC would have to be adjusted in order to grasp the broader scope of SBA+. As a reminder, the original SBA-conditions were the following[693]:

> Under the support-based approach, it is submitted that IHL applies to multinational forces when the following conditions are met:
>
> 1. There is a pre-existing NIAC ongoing in the territory where multinational forces intervene;
> 2. Actions related to the conduct of hostilities are undertaken by multinational forces in the context of that pre-existing conflict;
> 3. The multinational forces' military operations are carried out in support of a party to that pre-existing conflict;
> 4. The action in question is undertaken pursuant to an official decision by the TCC or international organisation in question to support a party involved in that pre-existing conflict.
>
> All four conditions must be fulfilled in order to render IHL applicable to the multinational forces' action in the context of a pre-existing NIAC. [694]

The reformulated conditions, with an expanded personal scope, would (for now at least)[695] read as follows:

> Under the support-based approach +, it is submitted that IHL applies to States, international organizations or armed groups (the 'supporting entity') when the following conditions are met:
>
> 1. There is a pre-existing armed conflict ongoing in the territory when the supporting entity intervenes;
> 2. Actions related to the conduct of hostilities are undertaken by the supporting entity in the context of the pre-existing conflict;
> 3. The supporting entity's operations are carried out in support of a party to that pre-existing conflict;

[693] While Ferraro has already adjusted to some extent these 2013 criteria in his 2015 article, I takes these criteria as a basis since the ICRC Challenges Report of 2015 also still mentions them.
[694] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 584.
[695] See the additional (minor) changes proposed in the following sub-Sections.

4. The action in question is undertaken pursuant to an official decision by the supporting entity in question to support a party involved in that pre-existing conflict.

All four conditions must be fulfilled in order to render IHL applicable to the supporting entity's action in the context of the pre-existing armed conflict.

Thus far, I have argued that the personal scope of the support-based approach should be expanded. There is however also a geographical limitation that deserves further attention.

B.3. Geographical scope of the support-based approach

The first condition of the support-based approach seems to suggest a geographical limitation. It requires that there 'is a pre-existing NIAC ongoing *in the territory* where multinational forces *intervene*.'[696] The support-based approach, in its original form, thus at least creates the impression to be limited to support provided by forces *already present* on the territory of the State in which a NIAC takes place.

It is submitted here that such a geographical requirement would unnecessarily limit the application of the support-based approach. Take for instance the air-to-air refuelling of fighter jets, a type of supportive act which would undoubtedly trigger the application of the support-based approach[697]: it should not make a difference whether the air-to-air refuelling occurred in the airspace of the State on whose territory a NIAC is ongoing, or elsewhere: what matters is the nature of the supporting act, rather than its location. Similarly, providing crucial intelligence information which can be immediately used for targeting purposes[698], again a supportive act that would fall within the material scope of the support-based approach, does not always require the presence of troops on the ground. Intelligence information can be obtained and transmitted through other means, such as via satellites or the internet. In sum, a support-based approach should focus on the type of support provided, not on the location of the supporting State's forces. The first condition of the support-based approach should thus be reformulated as follows:

> Under the support-based approach +, it is submitted that IHL applies to States, international organizations or armed groups (the 'supporting entity') when the following conditions are met:
>
> 1. There is a pre-existing armed conflict ongoing ~~in the territory~~ when the supporting entity intervenes;
> […]

[696] Emphasis added.
[697] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 585–86.
[698] *Ibid.*, 586.

The wording ‘intervenes’ should thus not be understood literally, but rather as ‘becoming involved through support’.

Once a State becomes party to an armed conflict on the basis of the support-based approach, the rules of international humanitarian law will be applicable to it. The question of the geographical scope of application of IHL is a highly contested issue, a detailed assessment of which falls beyond the scope of this study.[699] Nevertheless, the geographical scope of an armed conflict will have a considerable impact on the acceptation of the support-based approach by States. The broader the geographical scope of IHL, the less inclined States will be to accept the support-based approach and/or the expanded version outlined above. Importantly, however, the fact that the territory of a supporting State may become subject to IHL does not mean that the supporting State may be lawfully targeted under *jus ad bellum*. Both regimes apply separately.

B.4. Temporal scope of the support-based approach

Reliance upon the support-based approach to assess whether an entity becomes party to a pre-existing conflict is not limited to situations whereby an armed conflict is already ongoing for a long time. The support of the third entity can occur already from the beginning of an armed conflict. What is important is that the criteria for the (pre-)existence of an armed conflict are fulfilled, whether it is an IAC or a NIAC. Once an armed conflict exists, third-entity support to parties to the conflict can be assessed in the framework as discussed here. The temporal aspect indicated by the prefix ‘pre’ of a ‘pre-existing armed conflict’ should thus not impose limitations on the use of SBA nor SBA+. It merely indicates that a conflict is existing at the time the support is provided. This is also the view of the ICRC.

While under the support-based approach a State or an armed group will become party to a pre-existing conflict as soon as a certain support to the hostilities is provided, it is less clear whether the qualification as party to the conflict ends together with the support or instead together with the original armed conflict. In other words, does an entity, once it has become party to an armed conflict on the basis of the support-based approach, remain party to that conflict until the conflict ends or, conversely, does it cease to be a party to the conflict if the support is no longer provided?

The latter view would be based on the similarity between the support-based approach at macro-level and the notion of direct participation in hostilities at micro-level. Direct participation in hostilities only removes the protection of a civilian as long as the civilian directly participates

[699] See for instance the case-law in Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70. See also Schöberl, ‘The Geographical Scope of Application of the Conventions’. For a detailed discussion of different scenarios of NIACs and the ICRC’s position on the geographical scope of application, see ICRC, *Commentary on the First Geneva Convention*, paras 452–482. See also the references in note 262.

in hostilities. Also dubbed the 'revolving door theory'[700], this reasoning has the effect that a civilian can lose its protection and regain it quite quickly, respectively by merely actively participating or ceasing such a participation. Transposed to the level of supporting States or supporting armed groups, this would mean that the support-provider is faced with an off-on situation of armed conflict, depending on whether at a certain moment support is provided. This would undesirably result in a lack of clarity about for the parties to a given conflict[701], including the consequences attached to such status.[702] It would also not be feasible in practice, as for some support it is difficult to determine the start and end point of the support provided. Take for instance crucial intelligence information: does the supportive act start when the intelligence is gathered, when the intelligence is shared with a party to the conflict, or when that party actually uses the intelligence information for targeting purposes? And does it end when an attack has been carried out on the basis of the provided info? While at a micro-level of individuals the revolving door theory ensures the protection of civilians in accordance with the cardinal rule that civilians may only be attacked at the time of their direct participation in hostilities, the theory would not be practical at the macro-level of States or armed groups.

The former view, that States or armed groups that have supported a party to an armed conflict remain party to that conflict until the conflict ends, it not necessarily desirable either. While such position would have the benefit of clarity, one can question whether such an expanded temporal scope is commensurate with the actual involvement of the supporting State. For example, if a State has provided air-to-air refuelling service at the start of a conflict, under the support-based approach it would be considered as a party to that conflict. But if the conflict lasts for four years, without any further involvement by that State, it would – given the consequences attached to the status of party to a conflict – be unreasonable to consider the State as a party to the ongoing conflict.

The better view therefore lies in between the two options outlined above: an entity that has become party to an armed conflict ceases to be so once it has *permanently* ended its support to one of the parties to the conflict. For the original support-based approach, Ferraro argues that only a 'lasting disengagement from the collective conduct of hostilities', or, put differently, a 'prolonged cessation of the support previously given to one of the belligerents engaged in the pre-existing conflict' would end the multinational force's status as party to an armed conflict.[703]

[700] See for instance Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 70.
[701] See Prosecutor v. Gotovina et al., Judgment, No. IT-06-90-T (ICTY, Trial Chamber, 15 April 2011), para. 1694: 'Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.'
[702] For a discussion of the consequences attached to the status of party to an armed conflict, see *supra* Section 2.
[703] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 607.

The criterion of 'prolonged cessation' of support clearly draws from the threshold that is generally used to assess whether a non-international conflict has ended. While common Article 3 GCs is silent on this issue, the ICRC Commentary states that

> a lasting cessation of armed confrontations without real risk of resumption will undoubtedly constitute the end of a non-international armed conflict […]. [A] temporary lull in the armed confrontations must not be taken as automatically ending the non-international armed conflict. The intensity of a conflict might 'oscillate', but, without more, periods of calm while the Parties to the conflict continue to exist are not sufficient to conclude that a conflict has come to an end.[704]

As for the end of international armed conflicts, Article 6(2) GC IV defines that the Convention ceases to apply 'after the general close of military operations'. Similar language can be found in Article 3(b) AP I.[705] 'The determination that an international armed conflict has ended', the ICRC Commentary argues, 'is not based on the existence of a peace agreement, but rather on an appreciation of the facts on the ground'. The ICTY has noted in the *Gotovina* case that in order to determine whether the IAC has ended,

> the Trial Chamber will consider whether […] the international armed conflict had found a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict. It will consider in particular whether there was a general close of military operations.

It is thus submitted here that, in line with what is proposed by Ferraro as an indicator for the end of the application of the support-based approach, a *prolonged cessation of supportive acts* is necessary to determine that the support-provided no longer constitutes one of the parties to an armed conflict. The same criterion should thus be used for support to a party involved in an international or a non-international armed conflict. Important thereby is that it is not necessary for the underlying armed conflict to have ended.

B.5. Overview: the support-based approach +

As outlined above, an expansion of the original support-based approach is necessary for various reasons: in order to respect the distinction between *jus ad bellum* and *jus in bellum*, in order to respect the principle of equality of belligerents, in order to take into account the 'changing nature of parties'-scenario and, lastly, in order to take into account the modern techniques allowing supportive acts without physical presence in the territory where the armed conflict takes place. While some aspects of these concerns have been addressed in the 2015 Ferraro article and are expected to be addressed in the 2019 ICRC Challenges Report, the ICRC's

[704] ICRC, *Commentary on the First Geneva Convention*, paras 491–492.
[705] On the end of armed conflicts, see also Julia Grignon, *L'applicabilité temporelle du droit international humanitaire* (Genève: Schulthess, 2014); Marko Milanović, 'The end of application of international humanitarian law', *International Review of the Red Cross* 96, no. 893 (2014): 163–88.

understanding of the support-based approach remains too limited. The expansions of the personal and geographical scope result in the following reformulated conditions of a 'support-based approach +':

> Under the support-based approach +, it is submitted that IHL applies to States, international organizations or armed groups (the 'supporting entity') when the following conditions are met:
>
> 1. There is a pre-existing armed conflict ongoing when the supporting entity intervenes;
> 2. Actions related to the conduct of hostilities are undertaken by the supporting entity in the context of the pre-existing conflict;
> 3. The supporting entity's operations are carried out in support of a party to that pre-existing armed conflict;
> 4. The action in question is undertaken pursuant to an official decision by the supporting entity in question to support a party involved in that pre-existing conflict.
>
> All four conditions must be fulfilled in order to render IHL applicable to the supporting entity's action in the context of the pre-existing armed conflict.

In practice, the support-based approach+ can only be applied in the following six scenarios:

- State provides support to State involved in a NIAC with an armed group (scenario 1)
- State provides support to armed group involved in a NIAC with an armed group (scenario 2)
- State provides support to State involved in an IAC with a State (scenario 3)
- Armed group provides support to armed group involved in a NIAC with a State (scenario 4)
- Armed group provides support to armed group involved in a NIAC with an armed group (scenario 5)
- Armed group provides support to a State involved in a NIAC with an armed group (scenario 6)

This means that the conditions for a SBA+ will never be fulfilled for the following scenarios:

- State provides support to armed group involved in a NIAC with a State (scenario 7)
- Armed group provides support to a State involved in an IAC with a State (scenario 8)

Of course, the exclusion of scenarios 7 and 8 does not mean that such type of support does not or cannot occur in practice. The contrary is true: multiple States have, for instance, provided the armed groups fighting Assad in Syria with weapons and training, sometimes support has amounted to very strong cooperation. In those instances, however, the support-based approach + as theoretical approach to define the parties to the ongoing armed conflict cannot apply. This does not mean that the States involved cannot be considered parties to a conflict through other ways, such as on the basis of overall control over a certain group or because of their unconsented presence on another State's territory. Those options remain also open for scenarios 1 to 6, in addition to, as submitted here, the support-based approach(+).

In what follows, I will refer to the 'support-based approach(+)' when I mean to refer to both the ICRC's initial idea of support-based approach and the expanded version as suggested in this

study.[706] When simply referring to the original (and limited) version of the support-based approach, I will simply continue to use 'support-based approach'.

C. General concerns regarding SBA(+) as a tool for assessing supportive acts

Since States are generally reluctant to explicitly acknowledge that they are party to an armed conflict, it is to be expected that they will be even more hesitant to publically recognize that certain supportive acts would render them party to an ongoing armed conflict on the basis of the support-based approach(+).[707] Yet, this approach forms a legal answer to a factual reality and therefore merits to be seriously considered by States involved in supportive acts during armed conflicts. It is, for instance, not excluded that a court would consider a State to have become party to a conflict on the basis of its support.[708] Neither can it be ruled out that an enemy actor (a State or a non-State actor) considers a supporting State as party to an armed conflict, and thus its military objectives (and potentially its territory) as lawful targets under IHL. Perhaps States will indeed be more likely to refer to the approach when they classify the acts of other States, especially enemy States. Given the equality of belligerents rule under IHL, States will in that case however have to acknowledge that the criteria for becoming party to an armed conflict apply in the same way to their enemies as to themselves. It remains to be seen whether the support-based approach(+) will be adopted by State practice. Meanwhile, some concerns that have been raised *vis-à-vis* the support-based approach can already be addressed.

---

[706] Abbreviated as 'SBA(+)'.

[707] For instance, UK Secretary of State for Foreign and Commonwealth Affairs Boris Johnson denied that the British provision of 'information, advice and assistance' to Saudia Arabia in order to respond to missiles launched by Houthi rebels would render the UK party to the conflict in Yemen:

> Saudi Arabia continues to be the subject of regular missile attacks from the Houthis in Yemen. […] The UK supports the legitimate right of Saudi Arabia to respond to this critical threat. The UK has a national interest in stopping Houthi missile attacks that serve only to escalate the conflict and worsen the humanitarian situation.
>
> The United Kingdom remains committed to supporting the legitimate security needs of Saudi Arabia and guarding against the danger of regional escalation. The UK has now agreed to work with the Saudis to *mitigate the threat from these missiles*. This will *involve UK personnel providing information, advice and assistance limited to this particular objective*. To be clear, the UK is not a member of the Saudi-Led Coalition. We do not have any role in setting Coalition policy, or in executing air strikes. [emphasis added]

See Boris Johnson, Saudi Arabia: Written statement - HCWS716 (UK Parliament, House of Commons), accessed 8 May 2019, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-05-23/HCWS716/. Based on the UK's insistance on the fact that the 'information, advice and assistance' is provided to 'mitigate the threat from these missiles', one could *a contrario* argue that the UK would consider itself party to the coalition if the same supportive acts would be provided with another aim – which would at least in part be an acceptance of the support-based approach.

[708] As the District Court of Rotterdam did with regard to Dutch support to Operation Enduring Freedom, see below note 715.

C.1. Increase of deadly violence

A major concern raised with regard to the support-based approach (and inevitably also to its expanded '+' version) is that, by lowering the threshold for becoming party to an armed conflict, it would serve as a catalyst for the armed forces to become 'trigger happy', thus increasing the chance that tension escalates into full-fledged armed conflicts. Zwanenburg, for example, notes that the SBA sets a 'very low threshold for becoming a party' and questions whether this is desirable. After all, when IHL becomes applicable, Zwanenburg continues, 'the parties to the conflict have far-reaching powers that they did not have before – notably the right to kill enemy fighters'.[709] A similar concern was raised by the Head of the UN Office of the Legal Counsel Peacekeeping Team, Mona Khalil, who warned 'those who are too quick to invoke IHL not to be 'trigger happy''.[710] More generally linked to a low threshold for IHL application, Clapham raised the following concern

> [t]he humanitarian imperative pulls us towards adopting a low threshold of violence for ensuring the humanitarian protection of the Geneva Conventions. But there is a risk that this low threshold gets misapplied to determine the existence of a right to use force in self-defence, or the application of a wider law of armed conflict, thus escalating the violence and putting even more people at risk.[711]

The concern advanced by some is thus two-fold: on the one hand, a low threshold of IHL would give rise to a circumvention of the prohibition of the use of force as enshrined in the UN Charter, resulting in more conflicts and hampering the strive for international peace and stability. On the other hand, a lower threshold would allow – or even encourage – armed forces to attack persons which they would otherwise not be able to attack. The validity of both concerns will be addressed below.

By way of preliminary remark, it is important to highlight that while the support-based approach indeed provides for a low threshold, it is not correct to State that it would lower the threshold of IHL applicability in general. Indeed, the first and very important condition for the SBA(+)'s applicability is that there already is an armed conflict ongoing for which the classic NIAC- or IAC-threshold has been fulfilled. Hence, whether that ongoing armed conflict is international or non-international in nature, the threshold for the existence of that conflict has already been met.

The fact that States indeed might try to use IHL applicability through the support-based approach as a justification for their acts under *jus ad bellum*, is not a problem caused by the approach itself, but rather by the disrespect of those State for the clear distinction between *jus in bello* and *jus ad bellum*. It is up to States to make sure that whatever military action they undertake complies with both subfields of international law. Thus, even if the armed forces of

[709] See comments raised by Marten Zwanenburg in ASIL, 'Peace Forces at War: Implications under International Humanitarian Law', 152.
[710] *Ibid.*, 158.
[711] Clapham, 'The Concept of International Armed Conflict', 25.

a State would become legitimate targets under *jus in bello* on the basis of the support-based approach, this does not neutralize the restrictions imposed by the *jus ad bellum*. Targetability under *jus in bello* does not presume legitimate targetability under the *jus ad bellum*. The first concern can therefore be dismissed – at least from a theoretical perspective.

The second concern is more justified, although only to some extent. Becoming party to an armed conflict indeed triggers the overall applicability of the IHL framework. In concrete terms, this means that under IHL, States may lawfully target military objectives or combatants of the adverse party. In reverse, their military objectives and armed forces become lawful targets under IHL. However, such a consequence does not necessarily lead the armed forces to being 'trigger happy', as if they received a green light to attack all individual members of a party to an armed conflict in all circumstances. The 'trigger happy' concern will be addressed for each of the scenarios identified in the previous sub-Section.[712]

If a State becomes party to an armed conflict, its armed forces become lawful military targets. In case of an international armed conflict, the potential targeting of the armed forces is the consequence of the existence of a combatant status. If a State would become party to an international armed conflict on the basis of the support-based approach(+) (scenario 3), this would indeed mean that IHL allows for the targeting of all its members of the armed forces. Importantly, however, the fear for such a 'trigger happy' effect can be accommodated by the fact that the *jus ad bellum* remains in place. The prohibition on the use of force will indeed serve as a first firewall against unnecessary inter-State violence. Thus, if the support provided does not amount to an armed attack, the supporting State cannot be attacked in self-defence (even though its armed forces may be military targets under *jus in bello*). The question whether or not certain types of support amount to an armed attack will be dealt with in Chapter 4.

Contrary to scenario 3 discussed above, if a State becomes party to a non-international armed conflict on the basis of the support-based approach(+) (scenarios 1 and 2), there are no *jus ad bellum* rules that would limit the potential use of force against its armed forces. In theory, therefore, the adversary armed group could lawfully target all members of the armed forces of the supporting State – at least lawfully under *jus in bello*. That is a risk the supporting State needs to take into account when deciding to provide certain types of support. This does not exclude, however, that under domestic law such attacks would be punished. Indeed, *jus in bello* does not prohibit domestic laws from punishing the acts of members of an armed group. That being said, a domestic legal prohibition will perhaps not stop armed groups from attacking the armed forces of a supporting State. In practice, however, such attacks may prove to be rather

[712] To recall:
- State provides support to State involved in a NIAC with an armed group (scenario 1)
- State provides support to armed group involved in a NIAC with an armed group (scenario 2)
- State provides support to State involved in an IAC with a State (scenario 3)
- Armed group provides support to armed group involved in a NIAC with a State (scenario 4)
- Armed group provides support to armed group involved in a NIAC with an armed group (scenario 5)
- Armed group provides support to a State involved in a NIAC with an armed group (scenario 6)

difficult: if a State has become party to an armed conflict through its crucial yet remote support to one of the parties, the geographical distance between the armed group and the supporting State may be so significant that the actual risk of attacks is minimal. Nevertheless, we have seen in recent years that attacks are not to be excluded. The concern of a 'trigger happy' effect therefore is not without merit for scenarios 1 and 2. Yet, rather than an argument against the support-based approach, the concern should be a warning to States considering to provide support to parties in an ongoing armed conflict.

Scenarios 4 to 6 (armed group providing support to either a State or armed group involved in a NIAC with an armed group, or to an armed group involved in a NIAC with a State) do not create a blank cheque for violence either: as submitted earlier, once an armed group has become party to an armed conflict on the basis of the support-based approach(+), the question whether its individual members may be targeted should be solved in accordance with the general rules on the conduct of hostilities. Thus, the adversary State or armed group may only attack members of the armed group that are directly participating in hostilities or that have a continuous combat function. In practice, only the first basis will be of relevance. Indeed, if an armed group has become party to an armed conflict merely on the basis of the support-based approach(+), it means that it was not involved in intense fighting with an adversary. Rather, it supplied crucial support to a party to the pre-existing NIAC, in the form of, for instance, crucial targeting intelligence information sharing. Logically, none of its members was actively engaged in combat and therefore, no member can be said to have a 'continuous combat function'. The only way in which they could become lawful targets is by arguing that their supportive act can be considered as a direct participation in the hostilities. As discussed *supra*, the acts that at the macro-level would lead to an application of the SBA(+), would at the micro-level of individuals qualify as direct participation in hostilities. Members of the armed group who do not actively participate in hostilities cannot be targeted. Thus, in sum, the support-based approach does not lead to a 'trigger happy' effect in these cases.

C.2. Lack of an explicit legal basis

A second general concern is that the ICRC, and *a fortiori* the present author, by advancing a support-based approach(+), would invent new rules that do not find a legal basis in international treaty or customary law. Such a concern is only true insofar it refers to the absence of an explicit provision in the IHL treaties that would introduce a support-based approach. However, it should be acknowledged that even the traditional criteria to identify parties to an armed conflict are either not explicitly enshrined in the codified law (such as the intensity and organization criterion of common Article 3 GCs) or still leave room for various interpretations (such as the criterion of 'resort to armed force between two or more States' of common Article 2 GCs).

Ferraro therefore considers that the support-based approach is sufficiently grounded in existing IHL logic and principles.[713]

In addition, as the SBA(+) is somewhat based upon an analogy between the concept of direct participation in hostilities (at the micro-level of individuals) and the question of becoming party to an armed conflict (at the macro-level of State), there might be the risk of applying rules to contexts they were not designed for. While States do have 'legal personality' under international law, it is true that they cannot be fully equated with private persons. However, under international law, analogous systems do already exist between the inter-State and the inter-individual level: think of the similarities between international criminal law, which regulates the individual criminal liability of persons for international crimes, and the system of State responsibility, which regulates the responsibility of States for internationally wrongful acts that can be imputed to them. The concept of complicity, for instance, existed already in criminal law before it was introduced as Article 16 ARSIWA in the law of State responsibility.[714] While obviously criminal complicity and 'aiding and assisting' wrongful acts are not entirely similar, they do have many common features. In addition, the analogy between the concept of direct participation and the support-based approach(+) is also limited: regarding the temporal scope, for instance, the two concepts vary significantly.

In sum, while it is true that there is no explicit legal basis for the support-based approach(+) as such, it falls under a 'progressive interpretation' of the existing legal framework, advanced by the ICRC as guardian of IHL and supplemented by myself in this thesis. Again, it remains to be seen how State practice will respond to such progressive criteria for IHL applicability.

C.3. Practical concerns

Finally, but not less importantly, the factual assessment of the kind of support offered by a State to parties to an armed conflict remains very difficult. States are not very communicative on the precise scope of their involvement in military actions by a party to an armed conflict, making it very cumbersome to assess, in particular, the second and fourth condition of the SBA(+). Nevertheless, such a factual assessment is equally difficult when analysing other criteria of IHL

[713] Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 584:

> It is important to underline that such an approach complements, but does not replace, the determination of IHL applicability on the basis of the classic criteria discussed above. It simply establishes a link between IHL and certain types of action undertaken by multinational forces in support of a party to a pre-existing NIAC, and it draws the legal consequences of this connection in terms of IHL applicability. This approach also makes it possible to avoid an illogical situation where multinational forces making an effective and significant contribution to military operations and participating in the collective conduct of hostilities in a pre-existing NIAC would not be considered belligerents and could still claim protection against direct attacks. This support-based approach *is therefore consistent with IHL logic and in line with the imperative of not blurring the distinction* between combatants (in the technical meaning of the term) and civilians not directly participating in hostilities. [emphasis added]

[714] See for instance Article 25(3)(c) ICC Statute.

applicability, such as the degree of organization of an armed group, or whether a State exercises effective or overall control over an armed group. Indeed, since the application of IHL depends upon the 'facts on the ground', any theory that tries to determine whether IHL is applicable inherently suffers from this drawback.

D. The four categories of supportive acts and the support-based approach(+)

Despite the general concerns addressed above, it is submitted here that the support-based approach, and more precisely the expanded version of that approach, merits its place in international humanitarian law as a tool to assess the consequences of support to parties already involved in an armed conflict. It serves factual scenarios that thus far were not dealt with under the traditional *jus in bello* framework. I have argued above why I believe the support-based approach, as developed by the ICRC, should be expanded so that it encompasses not only State-to-State support in the context of non-international armed conflict, but also armed group-to-armed group support and even (some forms of) cross-party support, in the context of both non-international and international armed conflict. This plea for expansion does not mean, however, that I believe that all forms of support are suitable for an application of the support-based approach(+). In order to illustrate this, I will now turn back to the four categories of support that have been identified at the start of this study and discuss their potential effect in light of the SBA(+).

The category of 'logistical support' is the broadest category identified for this study. Because of that wide scope, a uniform conclusion cannot be drawn for this category. It encompasses for instance the supply of weapons, the transport of troops to an area of conflict and to the battlefield, the supply of other military equipment, the air-to-air refuelling of fighter jets, etc. For this category, the parallel with the notion of direct participation in the hostilities is key: if a supportive act is considered an act of DPH at the micro-level, then it is also suitable for application under the SBA(+) at the macro-level. Take, for instance, the transport of troops to the battlefield. If a State contributes to an international coalition by sending C-130 airplanes that are used to bring troops to the place from where they will carry out hostile operations, then such a State, in application of the SBA(+), can be considered as a party to the armed conflict. An example in favour of such a conclusion can be found in a judgment by the District Court of Rotterdam, in the Netherlands. The Court had to decide from which moment the Netherlands became a party in Operation Enduring Freedom launched by the US against Afghanistan after the attacks of 9/11. The Court held that

> [i]t is not clear at what moment the Netherlands actually became involved as a military party in Operation Enduring Freedom. The District Court considers that this moment should be determined not so much by reference to how Dutch ministers have described certain contributions of the Netherlands to Operation Enduring Freedom as by an assessment of the actual (combat) operations of the Dutch Armed Forces, taking into account the nature and scope

> of these operations and their object. The District Court also refers in this connection to the positions taken in the literature [reference omitted].
>
> After providing an accurate analysis of the Dutch contributions to Operation Enduring Freedom, expert witness Gill concludes that *the deployment of a C-130 military transport aircraft in early April 2002 may perhaps be seen as the start of the Netherlands' military involvement*, but that in any event the operational deployment of F-16 fighter aircraft from 1 October 2002 is certainly evidence of such involvement. The *District Court endorses this conclusion* and agrees with the expert witness that the involvement of the Netherlands in the armed conflict as referred to in Article 107a of the Criminal Code did not start until April 2002 at the earliest.[715]

Thus, the Court acknowledges that the deployment of C310-planes (which, according to the Dutch Ministry of Defence were used for tactical air transport, meaning transport to the battlefield)[716] could constitute the start of the Dutch involvement as a party to the armed conflict. Without referring to the support-based approach (the decision moreover predates the ICRC's proposal), the Court applied here the support-based approach to the category of logistic support. It even applied the SBA(+), because Operation Enduring Freedom arguably was an international armed conflict before the instalment of the transitional government in Iraq.[717] Unfortunately, no similar examples of other domestic case-law dealing with the transport of troops were found.

The category of 'training' is somewhat less suitable for an application under the SBA(+). The majority of forms of training will not have sufficient connection with concrete hostilities. This is especially the case if the training is provided at a distance from where the actual hostilities take place: in a training centre outside the State involved in a conflict, or in a safe area of that State. Nevertheless, geographical distance from the battlefield does not exclude training as an act of DPH/SBA(+), as some forms of training may actually be the concrete preparation of one very precise hostile action. Other forms of training that are more likely to qualify as DPH/SBA(+) are mentoring, whereby often a soldier of the training armed forces joins the troops on the battlefield in order to provide advice during the operations. It is not always clear from information that is publicly available which form of training is provided, and how closely the training is connected to the actual ongoing hostilities.

Intelligence sharing is a paradoxical category of support: on the one hand, it is undisputed that providing crucial intelligence information for targeting purposes forms an act of DPH (and thus SBA(+)), as it is sufficiently closely linked to the hostilities. On the other hand, because of the

---

[715] OM v. Y, No. AF9546 (District Court of Rotterdam, 6 May 2003). No paragraph numbers in the judgment. English translation was taken from L. a. N. M. Barnhoorn, 'Netherlands Judicial Decisions Involving Questions of Public International Law, 2007–2008', *Netherlands Yearbook of International Law* 40 (2009): 478.

[716] Ministry of Defence Netherlands, 'Het Nederlandse aandeel in operatie Enduring Freedom in Afghanistan', 12 January 2016, https://www.defensie.nl/onderwerpen/historische-missies/missie-overzicht/2001/enduring-freedom/nederlands-aandeel.

[717] On the (disputed) classification of the conflict in Afghanistan, see Hampson Françoise J., 'Afghanistan 2001-2010', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 242–79, who lists both the classification as acknowledged by the parties involved, as well as the opinion of other actors and scholars.

secret nature of intelligence, it is very hard, or even impossible, to properly assess the role and impact of the intelligence that was provided. Therefore, while this form of support is among the most 'evident' (and widely practiced) examples that could potentially trigger an application of the SBA(+), in practice it will be one of the most difficult to apply.

Lastly, the category of 'territorial disposal' is the most difficult to assess under the SBA(+), as it is a form of support that is rarely discussed when dealing with acts of direct participation in hostilities. As mentioned above, when an individual puts its property at the disposal of the hostilities, then the property itself will easily be considered as a lawful military target. Whether or not the decision to grant permission to armed forces to make military use of the property constitutes an act that is sufficiently linked to the hostilities is another question, but in my view such a conclusion should – in theory – certainly not be excluded. Transposed to the macro-level of States, we can first observe that there is still a variety of supportive acts encompassed in the category of 'territorial disposal'. A State can for instance grant the permission for a single overflight or passing of troops through its territory. It can also allow one of the fighting parties to construct a military camp on its territory, where troops can be trained or where hostilities can be prepared. The impact of the territorial disposal will thus greatly depend on what the territory is used for: if a permission to fly through the territory is granted to military airplanes on their way to a base (for instance, C-130 planes transporting troops and military material), such a supportive act is in my view not sufficiently closely related to specific hostilities in order to render the territorial State a party to the armed conflict on the basis of the SBA(+). If, on the other hand, a State allows for foreign forces to make use of its territory in order to launch attacks from it towards their adversary, then it could be argued that such a supporting act renders the involved State party to the ongoing armed conflict. In any case, it is important to keep in mind that whatever the conclusion under the SBA(+), the military base or the launching platform itself will constitute a lawful military target under IHL.

E. The SBA(+) applied: the Danish contribution to the coalition against ISIS

In order to illustrate the potential impact of the SBA(+) approach, I will use the statements of the Danish Government submitted to the Danish Parliament in the context of the State's contribution to the coalition against ISIS.

In June 2014, significant parts of Syria and Iraq were controlled by ISIL/IS/Islamic State. The group also took control over Mosul, the second largest city in Iraq. The leader of the group, Abu Bakr al-Baghdadi, declared on 29 June that the territory under its control was an Islamic caliphate called 'Islamic State'. In response to the swift rise of ISIL/IS, the Iraqi government issued a general appeal to the international community for assistance in the fight against ISIL

in a letter to the Security Council[718]. When IS also took control over the territory of the Yezidis, a Christian minority in Iraq, the US started targeting IS fighters on 8 August.[719] After the initial attacks in response to the humanitarian urgency, the US asked its allies for assistance in order to form a broad coalition against IS.[720] The Danish Government positively responded to this request, by providing various forms of support over a considerable amount of time. Before going further into the specific supportive acts, it needs to be verified whether the (other) conditions for the SBA(+) are fulfilled in this case.

1. There is a pre-existing armed conflict ongoing when the supporting entity intervenes;

This condition is clearly met. The conflict with ISIL/ISIS/IS has been widely acknowledged as a non-international armed conflict.[721] The fact that the international coalition against ISIS also operates on Syrian territory without Syrian consent has additionally led to the conclusion (albeit not unanimously endorsed) that there is also a parallel international armed conflict between the coalition and Syria. As argued above, this does not impact the potential application of the expanded version of the SBA, as it encompasses supportive acts in both IAC and NIAC situations.

2. Actions related to the conduct of hostilities are undertaken by the supporting entity in the context of the pre-existing conflict;

Denmark clearly undertakes the supportive acts in the framework of the international coalition against ISIS which takes place in the context of the NIAC as described above. On the first part of this condition (actions related to the conduct of hostilities), see the analysis below.

3. The supporting entity's operations are carried out in support of a party to that pre-existing armed conflict;

Denmark clearly provides the support to the international coalition upon the request of the United States, a party to the pre-existing armed conflict.

4. The action in question is undertaken pursuant to an official decision by the supporting entity in question to support a party involved in that pre-existing conflict.

The official character of the Danish contribution flows from the references to the Governmental statements and decisions of the Parliament cited below. Even if such statements would not be publically available, this would not exclude the application of the SBA(+): the fourth condition

[718] Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/2014/440, 25 June 2014.
[719] Mark Felsenthal and Patricia Zengerle, 'Obama says ending Iraq crisis could be "long-term project"', *Reuters*, 9 August 2014, https://www.reuters.com/article/us-iraq-crisis-usa-obama-idUSKBN0G90GL20140809.
[720] The White House US, Statement by the President on ISIL, 9 October 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1.
[721] The first airstrikes against ISIS in Iraq were conducted on 8 August 2014. The first strikes against ISIS on Syrian territory were conducted on 23 September 2014. See the entry for the United States of America in Geneva Academy, 'RULAC Database', www.rulac.org.

merely requires the action to be understaken pursuant to an 'official decision', which does not imply that such a decision needs to be made public.

While most of the conditions for an application of the SBA(+) are fulfilled, Denmark can only be considered a party to the ongoing armed conflict insofar its support is 'related to the conduct of hostilities'. The precise scope of support is not always easy to verify. For that reason, the statements by the Danish Government to Parliament in order to justify support for the coalition are particularly helpful. They also illustrate an evolution in the supportive acts, and they are an indication of the shifting position as to the legal status of Denmark towards the conflict.

On 25 August 2014, Danish Minister of Foreign Affairs Martin Lidegaard requested the support from the Danish parliament, the Folketing, for a Danish contribution to the coalition against IS. The contribution would consist of a C-130J transport aircraft and the necessary personnel.[722] The tasks of this aircraft would be

> the transportation of personnel, weapons, ammunition, supplies and supplies to Iraqi and Kurdish forces, as well as other collaborators.[723]

Importantly, the Minister implicitly stated that the transport would potentially involve transportation to a battlefield, by clarifying that

> [i]t is expected that the transport task will primarily take place from European countries to destinations, including in Iraq. It would thus appear that Danish personnel will be in Iraqi territory. In addition, there may be flights internally in Iraq. However, it can not [sic] be ruled out that there is also a need to travel to other countries.[724]

In addition to the aircraft itself,

> the Danish contribution is expected to cover up to approx. 55 people incl. logistics teams and liaison officers and, if necessary, a small number of additional security personnel to ensure safety close to the plane.[725]

It is not specified what exactly the function of the 'logistics team' would be. The Minister clearly ruled out the possibility to use offensive force:

> In addition to self-defense, the Danish contribution will not be authorized for power use. The Danish C-130J transport aircraft is not armed, but is equipped with electronic systems for self-defense. The Danish personnel will bring small arms to self-defense.[726]

In its proposal, the Minister does not pronounce on the potential Danish status as a party to the conflict resulting from the assistance with the C-130J aircraft. The proposal states rather

[722] Martin Lidegaard, 'B 122 Proposal for a parliamentary resolution on Danish military contribution in support of efforts in Iraq', Pub. L. No. B 122, 2013–2014 (2014).
[723] *Ibid.*
[724] *Ibid.*
[725] *Ibid.*
[726] *Ibid.*

generally that the Danish contribution would be 'subject to international law, including humanitarian law.'[727] Under the SBA(+), however, at least the transportation of troops to the battlefield could be considered as rendering Denmark party to the conflict. As argued above, this conclusion would be warranted for the transportation of the armed forces of Iraq (a State) and of Kurdish fighters (an armed group) – the latter being an example of what I have referred to as cross-party support.

On September 25, a month after the first Danish contribution, the United States requested further Danish contributions to the International coalition's efforts against ISIL with reference to military urgent needs. In his proposal to the Folketing, Minister Lidegaard explained that

> [t]he military contribution consists of three parts: A F-16 combat fly contribution, which will comprise up to a total of approx. 140 people. A staff contribution consisting of up to approx. 20 people. And finally a capacity-building contribution, incl. a logistics contribution, which is expected to cover up to a total of approx. 120 people.
>
> […] The Danish aircraft will be able to be deployed in the full range of air operations within Iraqi territory, which may involve both information retrieval and offensive air operations. […]
>
> Furthermore, the Danish contribution will consist of a staff contribution of up to approx. 20 people who will be included in the coalition's headquarters in and outside the region, including possibly in Iraq. [They will] contribute to the planning and implementation of military operations in Iraq.
>
> The Danish military contribution will also consist of capacity building contributions for capacity building (counselling, training and education, etc.) of Iraqi and Kurdish security forces expected in the region, including in Iraq. […] In connection with capacity building contributions, there will be a need for logistics contribution. Capacity building contribution incl. the logistical contribution is expected to cover up to a total of approx. 120 people depending on tasks etc.[728]

Thus, contrary to the Danish contribution approved in August, as of September 2014 Denmark sent (i) combat aircraft; (ii) staff involved in the planning and implementation of military operations (iii) capacity building contribution and (iv) logistical help to support the foregoing. Similar to the previous proposal, this proposal generally mentions that the Danish contribution would be 'subject to international law, including humanitarian law'.[729] Contrary to the August proposal, however, the September proposal adds that

> [i]n the Government's view, insertion of Danish F-16 aircraft into offensive air operations against ISIL targets in Iraq means that Denmark will join Iraq with the other military-active coalition countries in the armed conflict against ISIL in Iraq.[730]

[727] *Ibid.*
[728] Lidegaard, Martin, 'B 123 Proposal for a parliamentary resolution on additional Danish military contribution in support of action against ISIL', Pub. L. No. B 123, 2013–2014 (2014).
[729] *Ibid.*
[730] *Ibid.*

This is of course not surprising: if a State joins a coalition by sending and operating fighter jets, there is no question that the State becomes involved in the armed conflict. There is thus no need to apply the SBA(+). That being said, however, some of the supportive acts would clearly meet the requirements of the SBA(+) (for instance: staff involved in the planning of military operations).

On 8 October 2015, in a period when the Danish F-16 temporarily retired from the mission, Denmark added yet another form of support to the coalition against IS. In its proposal to the Folketing, the new Danish Minister of Foreign Affairs, Kristian Jensen, requested approval for a

> Danish military contribution consisting of a radar capacity and associated personnel, including technical and operational, which will contribute to the coalition's air operations as described above. The aerial image from the Danish radar will not be used to find and identify targets on the ground.[731]

Especially the latter sentence is interesting. Why would a government find it important to specify that its contribution in the form of a radar will not 'be used to find and identify targets on the ground'? Such an exclusion is even more remarkable if one takes into consideration that the government had previously stated that Denmark had become a party to the armed conflict with IS, while such claim is not repeated in the proposal for a radar contribution. Instead, the proposal again states in a general way that the Danish contribution is subject to international law, including humanitarian law. Could this mean that Denmark only considers itself party to an armed conflict when it operates fighter jets in that conflict, regardless the fact that it also contributes with transport aircraft, capacity building and staff involved in the planning of military operations? Such a position would not be in line with a support-based approach.

In addition, based on a combination of the phrase specifying that the radar 'will not be used to find and identify targets on the ground' and the absence of the acknowledgement that Denmark is party to the conflict, does this signify that Denmark would consider itself party to the conflict if the radar was used for target identification? Such a conclusion would be partially in line with the support-based approach: target identification is arguably an act directly contributing to the hostilities.

In 2016, the Danish government again proposed an additional Danish contribution to the coalition against IS. This time, the request encompassed a combination of the support previously given:

> an F-16 combat flight grant, a force grant comprising special operations forces and a C-130J transport flight grant. In addition, in connection with the establishment and repatriation of contributions in the region, there will be a need for temporary expulsion of additional persons

[731] Kristian Jensen, 'B 8 Proposal for a parliamentary resolution on the sending of a supplementary Danish military contribution in support of the action against ISIL', Pub. L. No. B 8, 2015–2016 (2015).

> for unpacking, setup and preparation as well as removal of facilities, etc., including the establishment of communication links.[732]

Not surprisingly, the government stressed in this proposal that

> The character and extent of Denmark's total active military participation in the international coalition in support of Iraq means that Denmark remains a party to the armed conflict against ISIL.[733]

While this statement if not surprising if one considers the contribution with fighter jets, it is remarkable that the Government highlights that Denmark 'remains' party to the conflict. Can we infer from this statement that Denmark has never considered that its status as party to the conflict was interrupted, even when its F16s were no longer operating in Syria and Iraq? Can we consequently conclude that the Danish position was more in line with the SBA(+) than we could derive from the previous contribution? While these observations remain purely speculative, it is interesting to note the subtle change in wording used by the Government.

In January 2017 Denmark decided to send a frigate to the American air craft carrier group (the so-called 'Hangar Ship Group'). Importantly, the government precisely specifies the agreed tasks of the frigate:

> During the voyage with the American aircraft carrier group, the tasks of the frigate will consist of contributions to the overall defense of the group, as well as possible coordination and control of air traffic in the airspace around the aircraft carrier group.
>
> […] If a concrete threat to the aircraft carrier group is detected, the Danish frigate will be able to use the power to defend the entire aircraft carrier group. The task of the Danish contribution will *thus not include the implementation of own offensive operations*.[734]

Apart from the standard clause that IHL applies, no mentioning is made of Denmark as party to the conflict. Towards the end of 2017, the new Danish Minister of Foreign Affairs Anders Samuelsen announced an increase of the security and guarding allowance with approximately 30 persons in order to protect the Al Asad Air Base in Iraq, from where the coalition against IS primarily operates, as well as the sending of a Danish C-130J transport aircraft, including the necessary personnel. Somewhat hidden in the proposal is the declaration that '[c]ybercapacities may also be included in the Danish military contribution.'[735] No further specifications as regards these cybercapacities are mentioned in the proposal. The Minister ends his proposal again with the statement that the 'character and extent of Denmark's total active military

[732] Jensen, Kristian, 'B 108 Proposal for a parliamentary resolution on the sending of additional Danish military contributions in support of the efforts against ISIL in Iraq and Syria', Pub. L. No. B 108, 2015–2016 (2016).
[733] *Ibid.*
[734] Anders Samuelsen, 'B 56 Proposal for a parliamentary resolution on Danish military contribution to the US aircraft carrier group, including in support of the international coalition's efforts against ISIL in Iraq and Syria and promoting maritime security', Pub. L. No. B 56, 2016–2017 (2017) [emphasis added].
[735] Samuelsen Anders, 'B 50 Proposal for a parliamentary resolution on the sending of additional Danish military contributions in support of the efforts against ISIL in Iraq and Syria', Pub. L. No. B 50, 2017–2018 (2017).

participation […] means that Denmark remains a party to the armed conflict'. This is again remarkable, as the deployment of the F-16s fighter jets ended in December 2016.

What do we learn from this overview? The position of the Danish government regarding the effect of various supportive acts is at least ambiguous. On the one hand, each proposal for contribution mentions that Denmark is subject to humanitarian law. On the other hand, we can observe that only when Denmark decided to contribute F-16s to the coalition, the government explicitly stated that it considered Denmark to be involved in an armed conflict. That classification has subsequently disappeared in the subsequent proposal, which only concerned a radar (explicitly not for target identification). Yet, in the following proposal, which again concerns F-16s, the Government states that Denmark 'remains' party to the conflict. Such wording could point at an application of the support-based approach(+) – be it not explicitly, but at least it illustrates an implicit acceptance of ideas that underpin the SBA.

4.2.3. Intermediate conclusion: the support-based approach(+)

The support-based approach was advanced by the ICRC as an alternative approach which, under certain conditions, could render a supporting State party to an ongoing NIAC. It is submitted here that the support-based approach, in its original form, fails to take into account two basic rules underlying IHL (the distinction between *jus in bello* and *jus ad bellum* and the equality of belligerents) and some possible factual changes as to the nature of parties of armed conflict. I have therefore argued that the scope of the support-based approach should be broadened at various levels: the support-based approach(+) should apply in both non-international and international armed conflicts, to supportive acts by and in favour of both States and armed groups. Its application should not be limited to multinational operations mandated by the UN, nor should it be limited to support provided in the territory of an entity that is already party to an ongoing conflict. It seems that the ICRC is to some extent changing its position with regard to the scope of the SBA as it was originally introduced (for instance by applying it also to armed group-to-armed group support), yet an official confirmation of this shift has not yet been published. Nevertheless, even an expanded version of the support-based approach suffers from one main weakness: because of its similarity with the concept of direct participation in hostilities at the micro-level of individuals, the support-based approach potentially opens the door for very broad interpretations at the macro-level. Every type of support should therefore be analysed on a case-by-case basis: a cautious interpretation of the notion of DPH, as advanced by the ICRC Interpretive Guidance, should equally be used when applying the SBA(+).

4.3. Section conclusion: from control towards support

The previous Section concluded that the supportive acts identified for this study do not meet the traditional thresholds in order to establish an armed conflict. This Section has explored the alternative manners in which supportive acts could nevertheless render the supporting entity party to an ongoing conflict.

A first alternative, discussed in Section 4.1, was to look at whether the supporting entity carries out control over the party to the armed conflict. If that is the case, it is generally accepted that the controlling State becomes party to the ongoing armed conflict. The debate remains however which degree of control would be required to trigger such a consequence: overall control as proposed by the ICTY, effective control as proposed by the ICJ, or a mere *de facto* relationship on the basis of Article 4 GC III? It has been submitted that the criterion of overall control is the best suited for conflict classification purposes. Yet, it is unclear whether the ICTY, even though it declared that 'helping in the general planning of its military activity' would amount to overall control over an armed group, really intended a supportive act such as 'intelligence sharing' to trigger such a far-reaching result. The better view is therefore that the four categories of supportive acts can each be serious indications of overall control, but do not meet the requisite threshold themselves in order for the supporting State to become party to the ongoing conflict. At most, a strong combination of multiple forms of supportive acts could jointly constitute a situation of overall control over an armed group.

A second alternative, discussed in Section 4.2, started from a parallel between the concept of direct participation in the hostilities at the micro-level of individuals and the support to parties to armed conflict at the macro-level of States. The support-based approach as advanced by the ICRC entails that a number of the supportive acts identified for this study would render the supporting State party to an existing non-international armed conflict. I have argued that this approach should be expanded because of a number of arguments: the equality of belligerents under IHL, the crucial distinction between *jus in bello* and *jus ad bellum*, the potential shift of power during armed conflicts and the geographically unlimited nature of contemporary forms of support. Nevertheless, an expanded support-based approach should also be applied with care, as an analysis of the ICRC Interpretive Guidance on the Notion of Direct Participation in the Hostilities and the available Military Manuals, together with other State practice, revealed that there is thus far no unanimously accepted understanding of direct participation in hostilities. In addition, not all supportive acts are susceptible of rendering the State party to an armed conflict: all depends on the actual close relationship between ongoing hostilities and the support provided. Lastly, it should be noted that it is far from certain whether the support-based approach as developed by the ICRC (and logically also its expanded version as suggested here) will become widely accepted in State practice.

5. Conclusion: supportive acts under *jus in bello*

This Chapter aimed at answering two research questions:

a) When does a State supporting a party to an armed conflict become party to that conflict itself?
b) What are the consequences of becoming a party to an armed conflict?

The Chapter started with an exploration of the possible consequences of becoming party to an armed conflict (sub-question b). I have concluded that the question of 'becoming party to an armed conflict' is less crucial than one would think at first sight. Notably, for triggering the responsibility of a State, being a 'party' to an armed conflict is not required. Similarly, for individual criminal responsibility (at least for war crimes), no such status is necessary. Nevertheless, being a party to an armed conflict remains important at various other levels concerning IHL applicability, such as detention or targetability, as well as a potential broadening of the geographical scope of the conflict. Being party to an armed conflict moreover impacts a State's ability to 'ensure respect' of IHL by other parties to the conflict, an obligation specific to the framework of *jus in bello*.

In order to answer the first sub-question, this Chapter briefly outlined the traditional criteria that are used under *jus in bello* in order to classify a situation as an international or a non-international armed conflict. It was concluded that the supportive acts of allowing territory to be used, logistic support (including weapon deliveries), training and sharing crucial intelligence information do not fulfil the classic criteria for the establishment of an IAC or a NIAC. The only exception to this conclusion would be if the supportive acts entail the unwanted presence of troops on the territory of another State, which arguably automatically constitutes an international armed conflict.

The four categories of supportive acts, if provided to an armed group, are however a strong indication of an overall control over that group, which would lead to an internationalization of an ongoing NIAC. Yet, often no control is exercised over the support-receiving armed group or State. This Chapter discussed the support-based approach as proposed by the ICRC as a possible alternative way to conclude that a State has become party to an ongoing armed conflict. I have submitted that this approach, despite some general concerns, should be broadened in scope so that it covers not only State-to-State support in situations of NIAC, but also armed group-to-armed group support or even cross-party support both in situations of IAC and NIAC. Whether or not the supportive acts in question would then fall under the SBA depends on the sufficiently close relationship between the supportive acts and the ongoing hostilities. Caution is warranted though: the support-based approach should not become a synonym for the macro-application of any domestic understanding of direct participation in hostilities or continuous combat function at the micro-level. Only if those two micro-concepts are understood in a fairly restricted way – such by as the ICRC Interpretive Guidance – a link can be made to the macro-level of States parties to armed conflicts.

In conclusion, as shown, the first research hypothesis can be confirmed: a State can become party to an armed conflict by doing less than providing kinetic assistance to parties to an armed conflict. This is certainly the case if the support provided amounts to sufficient control by the State over an armed group. In addition, the hypothesis can be confirmed if one accepts, as submitted in this Chapter, the support-based approach(+) as an alternative way to assess supportive acts in light of conflict classification.

Chapter 4. Supportive acts under *jus ad bellum*

1. Problem statement

This Chapter considers State support to parties involved in the use of force in light of the *jus ad bellum*. As explained in Chapter 2, *jus ad bellum* is the combination of rules that seek to regulate the recourse to the use of force by States in order to ensure international peace and security. The legal basis for *jus ad bellum* can be found in Articles 2(4) and 51 of the UN Charter, occasionally complemented with customary law. Two important General Assembly Resolutions have clarified some aspects of *jus ad bellum* rules: the Friendly Relations Declaration of 1970[736] and the Definition of Aggression of 1974[737].

Similar to the previous Chapter, the supportive acts envisaged here cover a broad range of possible forms of support: imagine, as a starting point, State A that bombards State B, without any particular reason, clearly violating the prohibition on the use of force as enshrined in the UN Charter. Imagine now that the fighter jets from A departed not from its own territory, but from the territory of State C. Imagine that the fighter jets, while flying towards their target, have been refuelled by air-to-air refuelling planes of State D. Imagine that the pilot of State A has been trained for this mission by State E. Imagine that he received the intelligence for his target from State F. Imagine that, on his way to his target in B, he flies, with permission, through the territory of State G. Nevertheless, in the end, it is the pilot of State A that drops the bomb on B. While it is unequivocally clear that the bombing by A constitutes an armed attack against B, entitling B to respond in self-defence, this Chapter places the supportive actions of States C, D, E, F and G within the framework of *jus ad bellum*. The same categories of support as identified in the beginning of this study will be used in order to guide the analysis: (i) territorial disposal, (ii) logistic support, (iii) training and (iv) crucial intelligence sharing.

Rather than determining one single threshold as the only valid threshold for the existence of use of force, armed attack or breach of the non-intervention principle respectively, this Chapter will give an overview of the different possible interpretations and thresholds as can be derived from the *travaux préparatoires* of the UN Charter and UNGA Resolutions 2625 and 3314, and as advanced by case-law, State practice and doctrine (including the Resolutions of the *Institut de Droit International*). For the reasons outlined in the Introduction, it is not the purpose of this Chapter to determine the current status of the customary *jus ad bellum* based on a thorough analysis of State practice and *opinio juris* related to all the contentious points that will be addressed.[738] Rather, this Chapter aims at assessing if and how supportive acts would fit within the spectrum of the various thresholds under the *jus ad bellum*, thereby relying on different

[736] UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).
[737] UNGA Res. 3314 (XXIX), Definition of Aggression, UN Doc. A/RES/3314(X) (14 December 1974).
[738] See *supra* the Introduction, Section 4.2.

theories that have been defended by scholars, States and in case-law. In doing so, this Chapter seeks to answer the following research questions:

a) When does a State supporting an armed attack, a use of force or a violation of the principle of non-intervention commit either of these acts itself?
b) What are the consequences of crossing *jus ad bellum* thresholds?

As for the Chapter on *jus in bello*, the answer to the second sub-question explains the importance of the first sub-question. The following Section will therefore clarify the consequences of reaching *jus ad bellum* thresholds (Section 2). Subsequently, Section 3 will identify how those thresholds have been traditionally understood, whereas Section 4 will investigate whether or not supportive acts could, through alternative ways, be considered to reach the given thresholds.

2. The consequences of reaching *jus ad bellum* thresholds

This Section discusses the consequences under international law of reaching a *jus ad bellum* threshold. Potential consequences under domestic law are not dealt with.[739] Contemporary *jus ad bellum* prohibits the use of force between States and regulates the exceptions to that prohibition. The two cardinal rules in this regard are Article 2(4) and Article 51 of the UN Charter. The former contains the prohibition on the use of force, the latter allows States to act in self-defence against an armed attack. In addition, the principle of non-intervention prevents States from intervening in the domestic affairs of other sovereign States. The different views on the thresholds for 'use of force', 'armed attack' and 'non-intervention' will be explained in detail in Section 3. For now, it is sufficient to understand that the law uses different concepts, hence suggesting that there are different thresholds.[740] There is thus, arguably, no one-on-one relationship between a violation of the prohibition on the use of force and the possibility to act in self-defence. Logically, their consequences should be different as well. Compared with the use of force or and armed attack, violating the principle of non-intervention triggers the least far-reaching consequences under international law.

[739] For instance, the Danish Constitution requires parliamentary approval for the use of force against a foreign State, except in case of self-defence against an armed attack (Article 19(2) of the 'Constitutional Act of Denmark' (1953).) In addition to the variety of consequences in each separate domestic system, the domestic definitions of the *jus ad bellum* concepts itself may differ from those in international law. See for instance the different use of the concept of 'self-defence' under US domestic law and international law, as meticulously described by Pothelet: Elvina Pothelet, 'U.S. Military's "Collective Self-Defense" of Non-State Partner Forces: What Does International Law Say?', *Just Security*, 26 October 2018, https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/.
[740] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 148.

2.1. React with force

The most evident consequence of a *jus ad bellum* threshold is triggered by Article 51 UN Charter. This provision does not only identify a threshold ('armed attack') but also prescribes what the consequence of reaching that threshold is ('self-defence'). A wide range of literature exists on the exact scope and nature of actions in self-defence.[741] It is undisputed that self-defence actions are not unregulated. They need to comply with certain conditions. Article 51 encompasses two procedural restrictions: first, it obliges a State acting in self-defence to report its actions to the UNSC[742]; and second, it clarifies that a State can only act in self-defence until the UNSC has 'taken the necessary measures to ensure international peace and security'. In addition to these two procedural conditions, self-defence actions have to comply with two important conditions which are not explicitly included in Article 51 but have been developed in customary law[743]: necessity and proportionality.[744] A narrow view of these conditions allows only for a reaction in self-defence in order to repel an armed attack, while a wider view also includes a preventive function.[745] As for the proportionality test, one view requires the reaction not to be disproportionate towards the armed attack, while another view requires a balance

[741] See, for instance: Corten, *The Law Against War*; Dinstein, *War, Aggression and Self-Defence*, 2011; Christine D. Gray, *International law and the use of force*, 3rd ed., Foundations of Public International Law (Oxford: Oxford University Press, 2008); James A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart Publishing, 2009); Ruys, *'Armed Attack' and Article 51 of the UN Charter*.

[742] A failure to comply with this reporting requirement would however not invalidate the self-defence action presuming the other conditions are fulfilled. Yet, as the ICJ noted, 'for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.' Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 200. On this topic extensively, see James A. Green, 'The Article 51 Reporting Requirement for Self-Defense Actions', *Virginia Journal of International Law* 55 (2014–2015): 563–624.

[743] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, paras 194 and 237; Case concerning oil platforms (Islamic Republic of Iran v. United States of America), 2003 ICJ Reports 161 (ICJ, 6 November 2003), paras 51, 73–77; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports, para. 41ff.

[744] On the principles of necessity and proportionality, see for instance Judith Gail Gardam, *Necessity, proportionality, and the use of force by states*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2004); Gray, *International Law and the Use of Force*, 148ff; Green, *The International Court of Justice and Self-Defence in International Law*, 63ff. These two conditions can be traced back to the British attack on the Caroline ship, which was used by American nationals to help Canadian rebels in their fight for independence. In what became later known as the Caroline doctrine, US Secretary of State Daniel Webster wrote to his British counterpart that attacking the Caroline ship would only be allowed if Britain could 'show a necessity of self-defence, instance, overwhelming, leaving no choice of means, and no moment for deliberation.' See 'Correspondence between Great Britain and the United States, Respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline. Letter No. 2 Mr. Webster to Mr. Fox, 24 April 1841', 1137–38. Even though arguably the Caroline case was not an instance of self-defence between two States, the Webster-formulation is often referred to as definition of the condition of necessity for self-defence. For a revisit of the Caroline case, see Green, *The International Court of Justice and Self-Defence in International Law*, 64ff.

[745] ILA, Committee on the Use of Force, 'Final Report on Aggression and the Use of Force' (Sydney, 2018), 11.

between the action in self-defence and the legitimate aim pursued.[746] Some argue that to these two conditions, a third one of 'immediacy' should be added.[747]

Different than Article 51, which contains a right, Article 2(4) UN Charter only prescribes a rule (a prohibition, to be precise), without explicitly indicating the possible consequences of a violation. A victim of a use of force therefore has to turn to the general means offered by international law to respond to violations of legal obligations. Indeed, the ARSIWA determine that 'every internationally wrongful act of a State entails the international responsibility of that State.'[748] The injured State can ask for restitution, compensation or satisfaction (Articles 34-37 ARSIWA). It can also take countermeasures against the State that committed force (Articles 49-54 ARSIWA). Such countermeasures have to be 'commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act' (Article 51 ARSIWA). Crucially, however, the victim of a use of force cannot use force by way of countermeasure. Indeed, this possibility is explicitly ruled out by Article 50(1)(a) ARSIWA: 'Countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'. In 1970, the UN General Assembly had already affirmed that 'States have a duty to refrain from acts of reprisal involving the use of force.'[749]

The above exclusion of forcible countermeasures outside the permitted forcible reaction in case of self-defence thus leads to the conclusion that a State can be victim of a use of force without having the possibility to use force in return. Of course, this situation will only occur if the use of force falls below the threshold of an armed attack (as discussed below), which in practice will be a very low intensity use of force. Nevertheless, it might seem unjust to the victim of a use of force that the UN Charter prohibits it from reacting in the same way. It is perhaps this feeling of injustice that explains why the ICJ in the *Nicaragua* case seems to leave the door open for forcible countermeasures by the direct victim of a use of force. In its judgment, the Court only explicitly excludes forcible countermeasures by third States, not by victim States:

> While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot […] produce any entitlement to take collective countermeasures involving the use of force. The acts of which Nicaragua is accused […] could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify

[746] *Ibid.*, 12.
[747] According to Dinstein, 'customary law fully confirms its existence' as a third condition. Immediacy signifies, he continues, 'that there must not be an undue time-lag between the armed attack and the exercise of self-defense in response.' Dinstein, *War, Aggression and Self-Defence*, 2011, paras 608 and 615.
[748] Art. 1 ARSIWA.
[749] UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).

> counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[750]

By distinguishing between the 'third State' US (for which the Court explicitly rules out the possibility of using forcible countermeasures) and the 'victim States' El Salvador, Honduras and Costa Rica (on which the Court remains silent), the ICJ at least creates the impression that the latter three States would be entitled to use proportionate *forcible* countermeasures. As Ruys notes, 'it is rather flabbergasting that the Court flags a crucial potential gap in the rules on the use of force […] without providing any further guidance or supporting arguments.'[751] The Court did not provide any new insights in this regard in the *Oil Platforms* case.[752] Judge Simma however argued in his individual opinion to the *Oil Platforms* judgment that 'proportionate defensive measures' by the victim State would be allowed in reaction against a 'lower level of military action' (meaning the use of force below the threshold of an armed attack).[753] This possibility, according to Simma, would only arise for the direct victim of the use of force, and not for third States.[754] From Simma's perspective, the prohibition enclosed in Article 50(1)(a) ARSIWA would not reflect *lege lata* but illustrates a more progressive standpoint of the International Law Commission. Nevertheless, the possibility of forcible countermeasures has been rejected by the majority of doctrine[755] and was ruled out in the *Guyana v. Suriname* arbitral award.[756] In my view, Simma's attempt to reintroduce forcible countermeasures as a lawful basis for the use of (limited) force would open a Pandora box, triggering the decline of the post WWII collective security system. Green correctly warns that '[the] novel nature of forcible countermeasures means that there is not a legal framework for their operation, and the ICJ does not provide one. Thus, poorly defined, they are open to abuse.'[757]

2.2. Violation of a *jus cogens* norm

Having ruled out the possibility of forcible countermeasures, what then remains as a consequence of reaching the use of force threshold of Article 2(4)? Reaching the threshold

---

[750] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 249.
[751] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 141.
[752] Green, *The International Court of Justice and Self-Defence in International Law*, 55. This case did however confirm the distinction between the 'most grave' and 'less grave' uses of force. See Section 3.1 below.
[753] Case concerning oil platforms (Islamic Republic of Iran v. United States of America), Separate Opinion of Judge Simma, 2003 ICJ Reports 324 (ICJ, 6 November 2003), para. 12.
[754] *Ibid.*, para. 13.
[755] Dinstein, *War, Aggression and Self-Defence*, 2011, 209, 254; John Lawrence Hargrove, 'The Nicaragua Judgment and the Future of the Law of Force and Self-Defense', *American Journal of International Law* 81, no. 1 (1987): 140ff; Josef Mrazek, 'Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law', *Canadian Yearbook of International Law* 27 (1989): 90; Olivier Corten, 'Judge Simma's Seperate Opinion in the Oil Platforms Case', in Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 847–51.
[756] Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname (Guyana v. Suriname), XXX Reports of International Arbitral Awards 1–144 (Permanent Court of Arbitration, 2007), para. 446.
[757] Green, *The International Court of Justice and Self-Defence in International Law*, 60.

would be a breach of an international norm, creating the possibility for the victim State to ask for reparations.[758] But Article 2(4) is not just any international norm. It has a more fundamental character, as it is the core rule of the current collective security system. Therefore, Article 2(4) is generally considered to be a *jus cogens* norm. This has been confirmed by the ILC[759], the ICJ[760], by numerous States[761] and authors.[762] A *jus cogens* norm 'is a norm that enjoys higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules'[763] and breaching it has specific consequences.[764] If State A supports State B in violating the prohibition on the use of force versus State C, the question asked in this study is whether State A can also be considered to have violated Article 2(4) UN Charter. It should be noted, however, that regardless the answer to that question, the support provided by State A will be unlawful, simply because State A is supporting a violation of international law, even of a *jus cogens* norm, by State B. The difference that a separate qualification as a violation of the prohibition of the use of force can make, however, lies in the additional consequences attached to violations of *jus cogens* norms.

First, when a *serious* breach of a *jus cogens* (or peremptory) norm is committed, Article 41 ARSIWA stipulates that all States 'shall cooperate to bring [the breach] to an end through lawful means' and no State 'shall recognize as lawful a situation created by a serious breach […] nor render aid or assistance in maintaining that situation.' Article 40 ARSIWA specifies that '[a] breach […] is serious if it involves a gross *or* systematic failure by the responsible

[758] The same possibility of course exists for victims of an armed attack, in addition to their right to act in self-defence in accordance with Article 51 UN Charter.
[759] ILC, 'Draft Articles on the Law of Treaties with Commentaries', *Yearbook of the International Law Commission* 2 (1966): 247.
[760] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 190. The ICJ called the prohibition on the use of force a 'fundamental or cardinal principle' of international law and subsequently cited the International Law Commission, Nicaragua and the US, which all had referred to Art. 2(4) as *'jus cogens'*.
[761] See the references to the *travaux préparatoires* of the Vienna Convention on the Law of Treaties, cited by the ILC: ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', n. 644.
[762] *Inter alia*: Corten, *The Law Against War*, 200–213; Dinstein, *War, Aggression and Self-Defence*, 2011, 104–9; Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', *European Journal of International Law* 16, no. 1 (2005): 63–64; André J. J. de Hoogh, 'Jus Cogens and the Use of Armed Force', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 1164. For a minority view considering only the narrower prohibition of aggression, and not the prohibition on the use of force as *jus cogens*, see Lauri Hannikainen, *Peremptory norms (jus cogens) in international law: historical development, criteria, present status* (Helsinki: Finnish Lawyers Publishing Co, 1988), 326–56. See also Green, who argues that Article 2(4) cannot be a *jus cogens* norm because (i) it includes a prohibition on the threat to the use of force, (ii) there are exceptions to the prohibition and (iii) there is not sufficient State practice indicating this peremptory character. See Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force'.
[763] Prosecutor v. Furundžija, Judgment, No. IT-95-17/1-T (ICTY, Trial Chamber, 10 December 1998), para. 153.
[764] The mere fact that the prohibition on the use of force is a *jus cogens* norm already has the specific consequence that no derogation from it is possible, neither by a treaty nor by customary law. This consequence is triggered regardless whether force is committed. On the impossibility to derogate, see Dinstein, *War, Aggression and Self-Defence*, 2011, 105–7.

State to fulfil the obligation' [emphasis added]. The ILC Commentary to that provision explains that

> [t]o be regarded as systematic, a violation would have to be carried out in an *organized and deliberate way*. In contrast, the term "gross" refers to the *intensity* of the violation or its *effects*; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. […] Factors which may establish the seriousness of a violation would include the *intent to violate the norm*; the *scope and number of individual violations*; and the *gravity of their consequences* for the victims.[765]

While the ILC did not want to link the consequences stipulated in Article 41 ARSIWA to any violation of a *jus cogens* norm, it remains unclear when exactly a violation can be considered serious enough.[766] It is difficult to imagine that an armed attack would not constitute in and of itself a serious violation of a *jus cogens* norm, especially if one takes into account that the ILC was of the view that 'some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.'[767] If one accepts that there are different thresholds for a use of force and an armed attack (as will be considered below, see Section 3), then it could be envisageable that a particular unlawful use of force is not a 'serious breach' of a peremptory norm. Yet, the reference to 'gross or systematic failure', in combination with the definition of 'systematic' as 'organized and deliberate', still seems to set the bar for the serious nature of a violation pretty low. For instance, if a State has provided weapons to an armed group based on another State's territory, and it has done so deliberately and in an organized way, this would still amount to a serious violation of Article 2(4) UN Charter.[768] Nevertheless, theoretically it should be acknowledged that the consequences outlined in Article 41 ARSIWA do not automatically apply to *any* violation of the prohibition on the use of force.

Yet, if a serious violation of a *jus cogens* norm is committed, Article 41 ARSIWA imposes a threefold obligation on other States. While the duty of non-recognition is straightforward, the scope of the two other consequences (cooperate to bring to and end and not rendering aid or assistance to maintain the situation) is more disputed. The obligation to cooperate is 'less settled in international law than its partner obligations of non-recognition and non-assistance'.[769] The

---

[765] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 113.
[766] In addition, it also seems that the parameter of seriousness 'may represent an obstacle for the application of the aggravated regime when a multiplicity of actors is involved at different levels. […] As possible solution is to attribute condct for serious breaches in light of harmful outcomes'. See Eric Wyler and Léon Castellanos-Jankiewicz, 'Serious breaches of peremptory norms', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibilty in International Law* (Cambridge: Cambridge University Press, 2014), 291.
[767] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 113. While this statement relates to aggression rather than to armed attack, it will be argued below that there is a far-reaching overlap between the two concepts. See *infra* Section 3.2.2.
[768] On the qualification of weapon deliveries to armed groups as a violation of the prohibition on the use of force, see *infra* Section 4.1.3, sub-Section A.1.
[769] Nina H.B. Jørgensen, 'The obligation of cooperation', in Crawford, James, Pellet, Alain and Olleson, Simon (eds.), *The law of international responsibility*, Oxford Commentaries on International Law (New York: Oxford University Press, 2010), 696.

ILC had already noted in its commentary to the provision that '[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law'.[770] With regard to the duty not to render aid or assistance in maintaining a serious breach of *jus cogens*, 'aid and assistance' should be understood in the same way as the requirements for complicity under Article 16 ARSIWA.[771]

In addition, in accordance with Article 26 ARSIWA, the so-called 'grounds precluding wrongfulness' cannot be invoked to justify any (as opposed to 'serious') breach of a peremptory norm.[772] This means that, if a State uses force, it cannot rely on force majeure[773], distress[774] or necessity[775] in order to justify its acts. One important ground for precluding the wrongfulness of certain acts is 'self-defence'. This ground was added to the list of the ARSIWA in order to ensure that States, if they are entitled to use force in self-defence in accordance with Article 51 of the UN Charter, cannot be accused of internationally wrongful acts that occur precisely because of that use of force.[776] For instance, if State A is attacked by State B, A may use force in self-defence against B. A troops invade B in order to stop the attack by B. By doing so, A technically breaches the sovereignty and territorial independence of B. This breach is however justified by the fact that A relies on self-defence. However, such an effect cannot be triggered if a State uses force that responds to a mere use of force (not to an armed attack). While such use of force is *in se* already unlawful, it will also not justify the possible commission of other internationally wrongful acts (such as the violation of territorial integrity).[777]

---

[770] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 114.
[771] *Ibid.*, 115. See *supra* Chapter 1, Section 2.
[772] For an analysis of this rule both in principle and in practice, see Corten, *The Law Against War*, chap. 4.
[773] Article 23 ARSIWA.
[774] Article 24 ARSIWA.
[775] Article 25 ARSIWA. Based on the observations made by Special Rapporteur Ago, several authors have argued that a 'state of necessity' would justify certain limited breaches of Article 2(4). Ago noted that a state of necessity can certainly not preclude the wrongfulness of a 'use of force constituting an act of aggression', but wondered whether it could preclude the wrongfulness of 'an assault which proved […] less serious'. See Roberto Ago, 'Addendum to the eight report on State responsiblity', *Yearbook of the International Law Commission* II, no. 1 (1980): 39. Even though the ILC eventually took no position on this point, several authors have argued that 'state of necessity' could preclude the wrongfulness of limited uses of force (see for instance Tarcisio Gazzini, *The changing rules on the use of force in international law*, Melland Schill Studies in International Law (Huntingdon: Manchester University Press, 2005), 204ff; Christakis, Théodore, 'Vers une reconnaissance de la notion de guerre préventive?', in Karine Bannelier et al. (eds.), *L'intervention en irak et le droit international* (Paris: Editions Pédone, 2004), 31–41.) This view has been extensively criticized by Corten (*inter alia* because there is no State practice supporting this view), see Olivier Corten, 'Etat de nécessité et opérations militaires ciblées', in Cherif Bassiouni et al. (eds.), *The Global Community: Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo* (Oxford: Oxford University Press, 2013), 293–332.
[776] See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 74: 'Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision.'
[777] On the scope of self-defence as a circumstance precluding wrongfulness, see Federica Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility', *British Yearbook of International Law* 85 (2015): 90–132; Federica Paddeu, *Justification and excuse in international law: concept and theory of general defences*, Cambridge Studies in International and Comparative Law 130 (Cambridge/New York: Cambridge University Press, 2018), 175ff.

Lastly, a State violating a *jus cogens* norm may expect countermeasures taken against it not only by the directly affected State, but possibly also by third States. Article 48 ARSIWA, dealing with obligations owed to a group of States or to the 'international community as a whole', clearly foresees the possibility for non-injured States to invoke responsibility and to claim cessation, assurances and guarantees of non-repetition, as well as reparation by the responsible State. Whether a third non-injured State is also entitled to take countermeasures if an *erga omnes* norm, 'owed to the international community as a whole', is violated, is deliberately left open. While the ILC Commentary admits that 'at present, there appears to be no clearly recognized entitlement of [all States] to take countermeasures in the collective interest'[778], such a consequence cannot be excluded to develop in the future.[779]

State actions which fall beneath the use of force threshold can violate the obligation to respect the territorial sovereignty of every State, by the ICJ labelled as 'an essential foundation of international relations'[780], or the customary obligation of non-intervention.[781] Contrary to the prohibition on the use of force, however, neither the principle of non-intervention nor the duty to respect the territorial sovereignty is considered a peremptory norm.[782] Therefore, an *a contrario* reading of Article 26 ARSIWA tells us that States that have violated these obligations can rely on circumstances precluding wrongfulness to justify their acts. In addition, serious breaches of these principles will not trigger the obligation for other States to 'cooperate or bring to an end' and to refrain from recognizing the situation resulting from the breach as lawful or from rendering 'aid or assistance in maintaining that situation' (Article 41 ARSIWA). In sum, when actions do not reach the threshold of the use of force, they may still be unlawful under international law, triggering the general consequences as prescribed by the ARSIWA.

2.3. Criminal prosecution for the crime of aggression

Even though this dissertation focuses on the consequences States are (potentially) subject to when carrying out supportive acts, it should be noted here that as of 17 July 2018[783], State leaders can be prosecuted for having committed the crime of aggression. Art. 8bis ICC Statute reads:

---

[778] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 139.
[779] On this topic, see the works of Tams and Dawidowicz: Christian Tams, *Enforcing obligations erga omnes in international law*, Cambridge Studies in International and Comparative Law 44 (Cambridge: Cambridge University Press, 2005); Martin Dawidowicz, *Third-party countermeasures in international law*, Cambridge Studies in International and Comparative Law 131 (Cambridge: Cambridge University Press, 2017).
[780] Case concerning the Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, 1949 ICJ Reports 4 (ICJ, 9 April 1949), 35.
[781] For a more detailed analysis of the scope of the principle of non-intervention, see below Section 3.3.
[782] Both were absent in the ILC's list of *jus cogens* norms, see ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 85. See also Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention', *Leiden Journal of International Law* 22, no. 2 (2009): 358–59.
[783] See Assembly of State Parties ICC, Activation of the jurisdiction of the Court over the crime of aggression, Resolution ICC-ASP/16/Res.5, 14 December 2017.

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: […]

Article 8bis continues by copying the list of aggressive acts enshrined in the UNGA Resolution 3314 on the Definition of Aggression.[784] As that list is generally used as the starting point to describe the scope of acts that constitute 'armed attacks' under Article 51 of the UN Charter[785], one of the important consequences of committing an armed attack – besides a possible reaction in self-defence – is the potential prosecution for the crime of aggression.[786] Such prosecution is of course subject two conditions: first, the ICC must have jurisdiction over the act in question[787] and, second, the additional requirements as set out in Article 8bis have to be fulfilled. It should thus be kept in mind that supportive acts, if they are capable of crossing the threshold of a use of force or an armed attack, they would potentially also constitute the material element for the crime of aggression. They would, however, still have to cross the additional thresholds identified by Article 8bis ICC Statute. A close reading of this Article reveals a complicated set of thresholds to be crossed: 'For the purpose of this Statute, 'crime of aggression' means […] an act of aggression which, by its *character, gravity and scale*, constitutes a *manifest violation* of the Charter of the United Nations.'[788] In addition, Understanding 6 explains that the 'act of aggression' itself is also subject to an inherent gravity threshold by stating that 'aggression is

[784] More precisely in Article 3 of the Definition.
[785] See Section 3.2.2.
[786] In this regard, see Akande and Tzanakopoulos, who argue that '[the] combination of the ICJ's introduction of a distinction between a mere 'use of force' and an 'armed attack', along with the Court's implicit and explicit references to the 1974 GA Resolution 3314, do create the impression that the two concepts, i.e. 'aggression' and 'armed attack' are quite closely related, if not one and the same.' Dapo Akande and Antonios Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 224–25.
[787] This is a complicated issue, which depends on whether the aggressor and/or victim State are party to the ICC Statute and ratified the Kampala amendments or whether there has been a Security Council referral. See Niels Blokker and Stefan Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 646–51; Stefan Barriga and Niels Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 621–45; Stefan Barriga and Niels Blokker, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and Proprio Motu Investigations', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 652–74. Note that, even if the ICC does not have jurisdiction, domestic prosecution of the crime of aggression would be possible if the (competent) prosecuting State has criminalized aggression in its domestic system – notwithstanding the rules on immunities.
[788] On the various thresholds included in this provision, see Kress, 'The State Conduct Element', 507ff.

the most serious and dangerous form of the illegal use of force'.[789] Taking into account this double gravity threshold (enshrined in Article 8bis(1) and Understanding 6), it is therefore rather unlikely that a State leader, having merely 'supported' an act of aggression by another State, would have committed a 'crime of aggression' as defined in Article 8bis ICC Statute. Nevertheless, it is important to understand that criminal prosecution for acts supporting aggression cannot theoretically be excluded, and may even become reality if multiple forms of support are combined so that their 'gravity' increases.

2.4. Intermediate conclusion

The international legal consequences of *jus ad bellum* thresholds vary enormously: depending on which threshold is reached, force against States is allowed, a *jus cogens* norm is breached or potentially an international crime is committed.

Out of the three *jus ad bellum* thresholds that are discussed in this Chapter, only one triggers the consequence that force may lawfully be used: when an armed attack is committed, a forcible reaction in self-defence is permitted. No such reaction is admitted under international law against a (mere) violation of the use of force or if the principle of non-intervention is not respected – even though in the former case a small minority of scholars argues that 'forcible countermeasures' would still be allowed.

The prohibition on the use of force constitutes a *jus cogens* norm. If seriously violated, other States have the obligation not to recognize the unlawful situation that was created and they (arguably, but not uncontestably) have a duty to cooperate to bring the violation to an end. States that committed a violation of the prohibition on the use of force can moreover not rely on grounds to preclude the wrongfulness of their action. Lastly, countermeasures taken by third States cannot be excluded, even though the law is far from being settled on that matter. Importantly, all of these consequences are not triggered by a mere violation of the principle of non-intervention, as that is not a recognized *jus cogens* norm. A violation of the principle of non-intervention does however trigger the regular consequences for wrongful acts under international law.

Lastly, only recently the international crime of aggression was added to the Rome Statue of the International Criminal Court. Depending on the jurisdiction of the Court in a particular case, leaders of States that have committed an act of aggression can now be prosecuted. While there are additional requirements that set the bar for such a prosecution very high, armed attacks will lie at the basis of the crime of aggression. International criminal prosecution is thus a potential

[789] The full version of this understanding reads: 'It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.' See Annex III of the ICC Review Conference, 13th Plenary Meeting, RC/Res.6, 6 November 2010. For an analysis, see Kress, 'The State Conduct Element', 426ff.

(and not automatic) consequence that is preserved for the threshold of armed attack. No such consequences will be triggered for a mere use of force or a violation of the principle of non-intervention.

For the sake of completeness, it should be repeated that complicity in a violation of an international norm (following Article 16 ARSIWA) should not be equated with a violation of that norm.[790] Applied to the *jus ad bellum* framework, this means for instance that complicity in an armed attack, or complicity in a violation of the use of force, does not necessarily respectively trigger a right to self-defense or the consequences of a *jus cogens* violation *vis-à-vis* the complicit State. This conclusion may of course be different if the core rule itself stipulates that certain consequences are also triggered for complicit States, as will be discussed below.

Having clarified the consequences of reaching *jus ad bellum* thresholds, I will now turn to those thresholds themselves, and identify the criteria that need to be assessed in order to verify whether a threshold is met.

3. Thresholds

The previous Section focused on the consequences for reaching the threshold of Article 2(4) (use of force) and Article 51 UN Charter (armed attack) and for violating the principle of non-intervention. The current Section discusses the question *when* these thresholds are reached, in order to assess whether States merely carrying out supportive acts are likely to meet them.

3.1. Use of force

Article 2(4) UN Charter reads:

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

The ICJ identified this provision as a customary norm in its *Nicaragua* judgment of 1986.[791] As already highlighted in Section 2.2, generally the prohibition enshrined in Article 2(4) is also identified as a *jus cogens* norm.[792] The prohibition forms the cornerstone of the collective security system, but despite its crucial importance, its exact scope has not been defined beyond doubt by State practice or legal doctrine.

[790] See Chapter 1, Section 2.
[791] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, paras 186–191; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Reports, para. 87.
[792] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 190. On the consequences of *jus cogens*, see *supra* Section 2.2.

Textually, the provision clearly prohibits both the use and the threat of force.[793] It does so for force used or threatened 'against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations.' The dominant view in doctrine is that this phrase does not aim at restricting the scope of the provision.[794] It finds support in the fact that the references to 'territorial integrity' and 'political independence' were proposed by smaller States, who wished to emphasize that the use of force against them was prohibited – rather than restricting the scope of the prohibition.[795] If one adds the overall goal of the collective security system, peace in international relations, it would not be in line with the spirit of the Charter to consider this phrase as a restriction on the prohibition of the use of force.[796]

In what follows, I will explore whether there is a threshold for a direct use of force. With 'direct use of force' I mean force that does not depend on the additional use of force by another party. Whether support to a use of force can qualify as an indirect use of force will be dealt with under Section 4. In that Section, the various forms of supportive acts will be analysed separately. For now, it is important to investigate whether there is a threshold for the use of force that is directly

[793] For a recent example of a threat of force, see the discourse by US President Trump towards North Korea, warning that North Korea would be met with 'fire and fury' if it threatened the US. For references to the tweets by Trump and a legal analysis of the reciprocal threats, see Mohammed Helal, 'Of Fire and Fury: The Threat of Force and the Korean Missile Crisis - Opinio Juris', *Opinio Juris*, 30 August 2017, http://opiniojuris.org/2017/08/30/of-fire-and-fury-the-threat-of-force-and-the-korean-missile-crisis/. Even though threats occur fairly often, State practice rarely refers to Article 2(4) in this regard (Corten, *The Law Against War*, 93.) For two recent exceptions, see Lebanon, which labelled a statement by the Israeli Minister of Education as 'a flagrant violation of Article 2, paragraph 4, of the Charter of the United Nations' (Identical letters dated 16 March 2017 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/71/846–S/2017/228, 21 March 2017) and Iran, which responded to a threat expressed by the Israeli Minister of Intelligence by stating that Israel's 'recurring threats to act militarily against Iran's peaceful nuclear programme is a flagrant violation of the fundamental principles of international law and Article 2 (4) of the Charter of the United Nations.' In addition, in the same letter Iran responded to accusations by Saudi-Arabia for having delivered a missile to the Houthi rebels which was subsequently launched towards Riyadh by claiming that it 'categorically rejects such baseless and unfounded accusations and considers them destructive, provocative and a 'threat to use of force' against a United Nations Member State in clear defiance of Article 2 (4) of the Charter of the United Nations.' (Letter dated 7 November 2017 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2017/936, 11 July 2017).

[794] See for instance Verdross and Simma, who refer to this phrase as a '*zusätzliche Garantie*' [an additional warrant] in prohibiting the use of force. Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin: Duncker & Humblot, 1984), para. 469. According to Lauterpacht, '[the] prohibition of paragraph 4 is absolute, except with regard to the use of force in fulfilment of the obligations to give effect to the Charter or in pursuance of action in self-defence […]'. Lauterpacht, *Oppenheim's International Law*, 2:154. For more references taking this majority stance, see Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)', *The Charter of the United Nations: A Commentary*, 3rd ed., vol. I (Oxford: Oxford University Press, 2012), n. 79. A minority of authors defends the view that force is only prohibited if committed against the territorial integrity or political independence of a State. See Derek Bowett, *Self-defence in international law* (Clark, NJ: Lawbook Exchange (original work published in 1958), 2009), 152; Julius Stone, *Aggression and world order: a critique of United Nations theories of aggression*, Foundations of the Laws of War (Clark, N.J: Lawbook Exchange, 2006), 43.

[795] Ian Brownlie, *International law and the use of force by states* (Oxford: Clarendon Press/Oxford University Press, 1963), 267.

[796] Nevertheless, a minority of authors defends this position, see Julius Stone, *Aggression and the world order*, The Library of World Affairs 39 (London: Stephens, 1958), 43; Bowett, *Self-Defence in International Law*, 152.

committed: the lower the threshold for a direct use of force, the more likely that supportive acts can qualify as a use of force as well.

3.1.1. The threshold for a direct use of force

What is the threshold that determines whether an action is considered as an unlawful use of force? Article 2(4) is not helpful in this regard. Clearly, if force is used at a large scale, no one will contest that the situation falls within the ambit of Article 2(4). But this 'we know it when we see it'-argument cannot be used for all possible instances of use of force. Force is broader than 'war', which was first restricted by the Covenant of the League of Nations of 1919 and later became (and technically still is) prohibited by the Briand-Kellogg Pact of 1928.[797] 'Force' therefore includes both 'war' and 'measures short of war', defined by Corten as 'limited and circumscribed military operations or targeted armed reprisals'.[798] Such a broad conception of the prohibition of force corresponded to the overall goal the founding States of the United Nations had in mind after WWII: 'peace'. Nevertheless, as the use of force is prohibited (and therefore constitutes a limitation of a State's right), it should also have a clear scope. This lower limit of the prohibition on the use of force determines for States which actions they are still entitled to take (for instance to ensure compliance with international law by other States), and which actions are prohibited and can trigger serious consequences, such as a reaction in self-defence by an affected State.

In identifying the threshold for the use of force, a first question that should be asked is whether force means only 'armed force' or can also encompass other types of force, such as economic pressure or physical non-armed force. This issue has already led to – in the words of Dinstein – 'acronimous' debates. As to economic force, the *travaux préparatoires* of the UN Charter seem to exclude this possibility – a proposal to outlaw economic force was rejected during the UN Charter negotiations.[799] Force that is physical but not armed (such as the expulsion of populations or the intentional spreading of fire across the frontier) is only accepted by very few authors as falling within the ambit of Article 2(4).[800] Regardless of the debate, generally force is understood to cover 'armed force'.[801] It must denote violence.[802] This interpretation moreover

[797] See Article 12 of the Covenant of the League of Nations, 28 April 1919, 225 CTS 195. See also note 160.
[798] Corten, *The Law Against War*, 51.
[799] Documents of the United Nations Conference on International Organization, San Francisco, Vol. VI (1945), 334 and 609.
[800] Randelzhofer and Dörr, 'Article 2(4)', 210.
[801] *Ibid.*, 209.
[802] Dinstein, *War, Aggression and Self-Defence*, 2011, 88. Whether the act itself or rather the result of the act must be violent, is another issue which will not be dealt with here. It is however crucial in light of the cyber-debate, as illustrated by the Tallinn Manual (Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. For a very sharp analysis of the Tallinn Manual, see Lianne J. M. Boer, 'Restating the Law "As It Is"': On the Tallinn Manual and the Use of Force in Cyberspace', *Amsterdam Law Forum* 5, no. 3 (2013): 4–18.

corresponds with the ordinary meaning of 'force' and rightly leaves the possibility to States to ensure compliance with international law in a system where central mechanisms are failing.[803]

Even if we accept that the prohibition of force is to be understood as covering only armed force, the problem is merely shifted to the question on the threshold for 'armed force'. Essentially, the fog around the lower limit of the prohibition on the use of force consists of two problems. First, if a State uses no or very limited armed force (for instance, violent low-scale confrontations at the border), is Article 2(4) violated? Second, can a State *indirectly* violate Article 2(4) by supporting actions carried out by other actors? The latter question will be dealt with together with the issue of indirect armed attacks below (see Section 4.1). It is however important to note here that precisely the combination of these two questions is highly relevant for this study. Indeed, the type of supportive acts analysed is non-lethal (providing intelligence, training, allowing territory to be used,…) and will therefore never amount to a clear-cut example of use of force. This does not exclude that the 'threshold' for the use of force – if there is any – can be reached through alternative approaches of the threshold at hand.

The question should thus be answered whether situations whereby no or very limited force is used nevertheless fall within the scope of the prohibition on the use of force. In its case-law, the ICJ has not provided a general definition of the use of force. It has, however, on several occasions, given some indications of acts which should either be excluded or included in the scope of Article 2(4). Thus, the ICJ allegedly pointed at a minimum threshold for the use of force by *not* considering minesweeping activities by the UK in Albanian waters as 'a demonstration of force'.[804] Furthermore, as will be discussed in Section 4.1.2.A, the ICJ has indicated that certain forms of assistance to rebels amount to violations of Article 2(4). When it comes to possible acts that *directly* violate Article 2(4), one cannot derive from the ICJ case-law a general gravity requirement for the use of force, similar to the gravity requirement identified for an armed attack (see *infra* 3.2). Nevertheless, even though the ICJ 'does not render unequivocal support to the existence of a gravity threshold'[805], the majority view seems to be that armed force needs to reach a certain minimum threshold.[806] According to the Independent International Fact-Finding Mission on the Conflict in Georgia, 'the prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity'.[807] Without determining what exactly this threshold was, the Commission did clarify that 'only very small incidents lie below this threshold, for instance the targeted killing of single individuals, forcible

[803] Randelzhofer and Dörr, 'Article 2(4)', 209.
[804] Case concerning the Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, 1949 ICJ Reports, 35. This reading is however contested by Ruys, who notes that 'one should probably refrain from reading too much into the Corfu Channel judgment'. Tom Ruys, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)', *American Journal of International Law* 108, no. 2 (2014): 167.
[805] Ruys, 'Meaning of Force and the Boundaries of the Jus Ad Bellum', 167.
[806] See note 810ff.
[807] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II, September 2009, 242, http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf.

abductions of individual persons, or the interception of a single aircraft'.[808] In addition, the Tallinn Manual acknowledges a gravity threshold when it stipulates in its Rule 69 that '[a] cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force.'[809]

Authors defending a gravity threshold for Article 2(4)[810] primarily refer to State practice which treats actions of law enforcement different from (more serious) violations of the prohibition on the use of force.[811] In addition, a teleological argument can be raised: there must be a threshold for the use of force which is not too low, as otherwise there would be no difference between the prohibition on the use of force and the principle of non-intervention.[812] This difference certainly matters from a theoretical perspective, as the principle of non-intervention is generally not recognized as a *jus cogens* norm[813], therefore its violation does not trigger the consequences as described in Section 2.2. In practice, however, one can wonder whether the breach of a *jus cogens* norm really triggers different behavior among States. The importance of the distinction between merely violating the principle of non-intervention and an unlawful use of force is therefore primarily symbolic or political, rather than legal.

A minority of authors is not convinced that State practice on Article 2(4) reveals the requirement of a minimum amount of force. Ruys argues that 'a *de minimis* threshold […] is not supported by state practice and must be dismissed'.[814] He stresses that 'any deliberate projection of force on another State's territory will normally trigger article 2(4).'[815] In similar vein, Randelzhofer and Dörr suggest that crossing a border without the consent of the affected State is sufficient to trigger Article 2(4). [816] According to Carron, too much weight is given to

[808] *Ibid.*
[809] Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 330.
[810] A strong supporter of the *de minimis* threshold is O'Connell, according to whom 'the conclusion about minimal uses of force falling outside the scope of Article 2(4) is based on observation of state practice, the implications of certain judgments of the ICJ and commentary'. She nevertheless admits that 'there is no express authority on the point.' See Mary Ellen O'Connell, 'The prohibition of the use of force', in Nigel White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham: Edward Elgar Publishing, 2013), 102.
[811] In this regard, see Corten, who conducted an extensive analysis of State practice and concluded that unlawful uses of force can be distinguished from lawful acts of law enforcement on the basis of their gravity and the intent of the actor. See Corten, *The Law Against War*, 51–92. He mentions for instance the arrest of Eichman by Israeli forces on Argentinian territory, which was considered by the Security Council and Argentina as a clear breach of the sovereignty of the latter, but not referred to as a violation of the prohibition on the use of force. See UNSC Res. 138, UN Doc. S/RES/138 (23 June 1960), para. 1; Letter dated 15 June 1960 from the Permanent Representative of Argentina addressed to the President of the Security Council, UN Doc. S/4336, 15 June 1960.
[812] See Robert Kolb, *Ius contra bellum: le droit international relatif au maintien de la paix; précis*, 2. éd., Collection de droit international public (Bâle: Helbing Lichtenhahn, 2009), 245.
[813] See Jamnejad and Wood, 'The Principle of Non-Intervention', 357. For the contrary view, see Samantha Besson, 'Sovereignty', *Max Planck Encyclopedia of Public International Law*, 2011, para. 89.
[814] Ruys, 'Meaning of Force and the Boundaries of the Jus Ad Bellum', 209.
[815] *Ibid.*, 160.
[816] See for instance Randelzhofer and Dörr, according to whom 'an incursion into the territory of another State constitutes an infringement of Art. 2(4), even if it is not intended to deprive that State of part of its territory […]'. Randelzhofer and Dörr, 'Article 2(4)', 216. Others are more cautious: Van Steenberghe excludes overflight

the ‘gravity’ criterion. She argues that any use of force which aims at forcing the free will of the other State falls within the ambit of Article 2(4).[817]

In conclusion, it remains unclear whether or not Article 2(4) requires a certain gravity. The wording of Article 2(4) does not provide any guidance in this regard. While the ICJ case-law does not give any conclusive answer either, it seems that the majority of doctrine argues in favour of such a gravity threshold. The examples of recent State practice regarding the use of force listed below illustrate the divergence in opinion.

In any case, we should recall that in this study we are focusing on acts supporting a use of force rather than the direct use of force itself. If one accepts a gravity threshold for the use of force, then it would be logic to hold supportive acts against the same gravity threshold. If one accepts that no gravity is required for the use of force, the more acceptable it becomes to consider supportive acts as constituting uses of force themselves. This will be dealt with in Section 4.

3.1.2. Recent examples of (no) ‘use of force’ identifications

An overview of State practice from 2014 to 2018 identifying uses of force (or the absence of such identification) confirms the lack of a clear threshold for Article 2(4) UN Charter.[818]

In the spring of 2014, Russia intervened in Ukraine by joining (and supporting) the pro-Russian forces who entered into a conflict with the Ukrainian government and by annexing Crimea. In response to the Russian actions, Ukraine held that ‘the Russian Federation [had] brutally violated the basic principles of the Charter of the United Nations, obliging all members […] to refrain from the threat or use of force’.[819] When in August 2014 several Russian convoys entered Ukraine[820], Ukraine declared in a Security Council meeting that ‘Russia ha[d] launched a direct military invasion of Ukraine with its regular armed forces. Last night [on 27 August], two military convoys crossed the Ukrainian State border […] with seven tanks, one BMP-2 and a truck with soldiers […]’.[821] During the same debate various States condemned the Russian actions, Lithuania did so by explicitly referring to the use of force. Its representative stated that

without authorization from the scope of Article 2(4). See Raphaël Van Steenberghe, *La légitime défense en droit international public*, Droit international (Bruxelles: Larcier, 2012), 202–3.

[817] Carron, ‘L’acte Déclencheur d’un Conflit Armé International’, 230.

[818] The following overview is based on the recent State practice identified in the bi-annual Digest of State Practice that is included in the Journal on the Use of Force in International Law. For recent examples of ‘threats of use of force’, see note 793.

[819] UNSC Verbatim Record, UN Doc S/PV.7124, 1 March 2014, 3/7. For similar considerations by other States, see Tom Ruys and Nele Verlinden, ‘Digest of State Practice 1 January – 30 June 2014’, *Journal on the Use of Force and International Law* 1, no. 2 (2014): 330ff.

[820] According to Russia the convoys constituted humanitarian assistance, for a summary of the facts and an overview of the positions see Tom Ruys and Nele Verlinden, ‘Digest of State Practice 1 July – 31 December 2014’, *Journal on the Use of Force and International Law* 2, no. 1 (2015): 124ff.

[821] UNSC Verbatim Record, UN Doc S/PV.7253, 28 August 2014, 15/16.

'[s]uch actions by the Russian Federation are in gross violation of the Charter of the United Nations, in particular Article 2, paragraph 4'.[822]

On 26 May 2014, a Vietnamese fishing vessel sunk after a collusion with a Chinese fishing vessel in the vicinity of the Paracel Island. That island group is occupied by the People's Republic of China, but also claimed by Vietnam. Insisting that the Vietnamese vessel was deliberately rammed by the Chinese vessel, the Vietnamese government accused China because it 'violated international law concerning the prohibition on the threat or use of force'.[823]

Still in the course of 2014, a Houthi rebel movement launched an offensive in Yemen, taking control over vast parts of the Yemen territory and capturing the ruling government or causing its members to flee from the capital. In response to the Houthi offensive (which was allegedly strongly supported by Iran), ruling president Hadi called the Gulf Cooperation Council for help. A multinational operation directed against the Houthis was launched in the spring of 2015. Despite the agreement of President Hadi for this operation (dubbed 'Operation Decisive Storm'), Iran claimed that the intervention was 'in flagrant defiance of the most basic principles of international law, flouting the purposes and principles of the Charter of the United Nations, in particular the obligation to refrain from the threat or use of force.'[824]

When in April 2016 a violent clash occurred between the armed forces of Armenia and Azerbaijan, followed in the months thereafter by numerous minor violations of the disputed border line between the two States, Russia, France and the United States issued a joint statement in which they expressed **'**concern over continuing armed incidents, including reports on the use of heavy weapons, and strongly condemn the use of force or the threat of the use of force'.[825]

In a December 2016 case before the Permanent Court of Arbitration between the Philippines and China on the South China Sea, the following Chinese position was quoted: 'DG Deng also referred to Article 2.4 of the United Nations Charter, saying that on 10 April, the Philippines used a warship to harass unarmed Chinese fishermen. This is a sign of the use of force.'[826]

On 4 March 2018, a former Russian spy who defected to the United Kingdom was found unconscious together with his daughter in the streets of Salisbury (UK). Investigators concluded that the two had been poisoned by a chemical agent called Novichok, a product developed by

[822] *Ibid.*, 3/16.
[823] Vietnam, Statement by Mr Tran Duy Hai, Deputy Chairman of the National Boundary Committee, Ministry of Foreign Affairs of Viet Nam at the International Press Conference on Developments in the East Sea, 16 June 2014, http://www.quangngai.gov.vn/dofa/Pages/qnp-contentsoftheinternationalpressconference-qnpnd-102-qnpnc-23-qnpsite-1.html.
[824] Annex to the letter dated 17 April 2015 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/2015/263, 17 April 2015, 2/2.
[825] OSCE, Joint Statement by the Head of Delegation of the OSCE Minsk Group Co-Chair Countries, 12 August 2016, https://www.osce.org/mg/287531.
[826] Award in the matter of the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China), No. 2013–19 (Permanent Court of Arbitration, 7 December 2016), para. 790.

Russia. The victims were hospitalized but survived the – probable – attempt of murder.[827] Investigations also revealed that the Skripals were brought in contact with the Novichok chemical by two Russian military intelligence officers.[828] Russia denied all accusations.[829] In a statement before the House of Lords on 12 March, British Prime Minister May requested an explanation from Moscow and demanded full cooperation with the investigations. May added that '[s]hould there be no credible response, we will conclude that this action amounts to an unlawful use of force by the Russian State against the United Kingdom'.[830] May repeated the same qualification in the House of Lords two days later, when she held that 'there is no alternative conclusion other than that the Russian State was culpable for the attempted murder of Mr Skripal and his daughter – and for threatening the lives of other British citizens in Salisbury […]. This represents an unlawful use of force by the Russian State against the United Kingdom.'[831] On the same day, the British representative in the Security Council even went slightly further, by arguing that '[i]t was an unlawful use of force and a violation of Article 2 of the Charter of the United Nations – the basis of the international legal order […]. This was an attack on United Kingdom soil.'[832] While the other members of the Security Council generally articulated their solidarity with the UK[833], none of them explicitly repeated the language on the use of force. The attack was moreover condemned by the members of NATO, by the European Council and by the G7 – albeit again without reference to Article 2(4) UN

[827] Unfortunately, a few months later, a woman died after using a perfume bottle that her partner had found in the streets of Amesbury, near Salisbury. The bottle contained the same nerve agent that was used against the Skripals. See Lizzie Dearden, 'Novichok victim Charlie Rowley accidentally picked up nerve agent in "cosmetic bottle" as present for Dawn Sturgess', *Independent*, 24 July 2018, https://www.independent.co.uk/news/uk/crime/novichok-attack-charlie-rowley-perfume-bottle-dawn-sturgess-amesbury-dead-nerve-agent-a8461616.html.

[828] Danny Boyle and Martin Evans, 'Salisbury poisoning: Two men charged over Novichok attack are "Russian military intelligence officers"', *The Telegraph*, 9 May 2018, https://www.telegraph.co.uk/news/2018/09/05/salisbury-poisoning-two-russians-charged-conspiracy-murder-novichok/; Ellen Barry and Richard Pérez-Peña, 'Britain Blames Moscow for Poisoning of Former Russian Spy', *The New York Times*, 29 March 2018, https://www.nytimes.com/2018/03/12/world/europe/uk-russia-spy-poisoning.html.

[829] UNSC Verbatim Record, UN Doc. S/PV.8203, 14 March 2018, 10/12.

[830] UK, Prime Minister's Office, Oral statement to Parliament: PM Commons statement on Salisbury incident, 3 December 2018, https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-12-march-2018.

[831] UK, Prime Minister's Office, Oral statement to Parliament: PM Commons Statement on Salisbury incident response, 14 March 2018, https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-response-14-march-2018.

[832] UNSC Verbatim Record, UN Doc. S/PV.8203, 14 March 2018, 2/12.

[833] See statements by various States in UNSC Verbatim Record, UN Doc. S/PV.8203, 14 March 2018. Some agreed with the UK's accusations of the Russian involvement (see e.g. the US (4/12) and France (4/12)), while others were more cautious (e.g. Kazakhstan (7/12)).

Charter.[834] In response to the Salisbury poisoning, multiple States expelled Russian diplomats from their territory.[835]

Commenting on this case, Ruys noted that 'even those favoring the [gravity criterion] must acknowledge that the speech by Theresa May constitutes an important fragment of State practice contradicting the existence of any gravity threshold.'[836] While this is undoubtedly true with regard to the UK's position, it is questionable whether the absence of an explicit reference to Article 2(4) in the statements of the other States would support the *de minimis* argument. One might as well read into the lack of condemnation in terms of use of force the idea that all States but the UK consider the Skripal incident as below the use of force threshold. The sanctions taken against Russia by expelling its diplomats might as well be in response to another violation of international law, such as an intervention in the UK's sovereignty or the use of chemical weapons. The Skripal case, while to be taken into account for the *de minimis* debate, does not provide for a conclusive answer.

In addition to the scenarios whereby the (as such identified) use of force concerned a physical act, in the recent decade States and scholars have debated on the question whether or not cyber activities could also qualify as a violation of Article 2(4). The most recent US Law of War Manual, published in 2016, holds that in certain circumstances cyber operations may violate the prohibition on the use of force. For instance, 'if cyber operations cause effects that, if caused by traditional physical means, would be regarded as a use of force under *jus ad bellum*, then such cyber operations would likely also be regarded as a use of force.'[837] To illustrate this, the Manual cites the following examples: (1) trigger a nuclear plant meltdown; (2) open a dam above a populated area, causing destruction; or (3) disable air traffic control services, resulting in airplane crashes' and operations that 'cripple a military's logistics systems, and thus its ability to conduct and sustain military operations'.[838] Yet, despite this theoretical acceptance of cyber use of force, no such denomination was used in recent State practice, as the following examples illustrate.

On 23 December 2015, following a hacking of Ukraine's energy company Prikarpattiaoblenergo, a significant number of people in western Ukraine was left without electricity during six hours. According to the Ukrainian government, Russia was to be blamed

[834] NATO, Statement by the North Atlantic Council on the Use of a Nerve Agent in Salisbury, 14 March 2018, https://www.nato.int/cps/en/natohq/news_152787.htm; UK, Foreign & Commonwealth Office, Press Release: G7 Foreign Ministers' Statement on the Salisbury Attack, 17 April 2018, https://www.gov.uk/government/news/g7-foreign-ministers-statement-on-the-salisbury-attack; European Council, Conclusions on the Salisbury Attack, Conclusion 163/18, 22 March 2018, https://www.consilium.europa.eu/en/press/press-releases/2018/03/22/european-council-conclusions-on-the-salisbury-attack/pdf.

[835] X, 'Spy poisoning: Russia escalates spy row with new expulsions', *BBC News*, 31 March 2018, https://www.bbc.com/news/world-europe-43596812.

[836] Tom Ruys, '"License to Kill" in Salisbury: State-sponsored assassinations and the jus ad bellum', *Just Security*, 15 March 2018, https://www.justsecurity.org/53924/license-kill-salisbury-state-sponsored-assassinations-jus-ad-bellum/.

[837] US, DoD Law of War Manual, para. 16.3.1.

[838] *Ibid.*, 16.3.1.

for the attack.[839] Despite the physical effect of the hacking, no 'use of force' language was used.[840]

In the summer of 2016, a hacking operation allegedly orchestrated by Russia attempted to influence the US Presidential elections by releasing thousands of e-mails from key figures of the Democratic National Committee.[841] The US formally accused Russia of the election interference, but did not label it as a 'use of force'.[842]

On 12 May 2017, the UK's National Health Service and Spain's Telefónica, together with organizations around the world, were the target of a cyberattack. Malicious software called 'WannaCry' disrupted the functioning of the said governmental institutions. A month later, on 27 June of the same year, a similar attack with so-called 'NotPetya' malware affected a significant number of organizations, primarily within Ukraine, but also in Europe and beyond. Despite the conclusions by NATO's Cooperative Cyber Defence Center of Excellence that the malware could most likely be attributed to a State, none of the affected States has referred to the attacks as an unlawful use of force.[843]

In sum, recent State practice shows that States do not unequivocally assess the same situation in terms of Article 2(4) UN Charter. Often, the victim State is the one that refers to an incident in terms of 'use of force', followed by a more limited number of other (allied) States. Thus, the Russian annexation of Crimea was labelled a use of force by Ukraine and Lithuania. The attacking of Vietnamese and Chinese fishing vessels was labelled as such by both States (even though, remarkably, in the first incident it was China that attacked the Vietnamese vessel). Violent incidents on the border between Armenia and Azerbaijan seem to be more widely accepted as unlawful use of force, whereas the United Kingdom seems to stand alone regarding its qualification of the Skripal poisoning as a violation of Article 2(4). Lastly, concrete cyber attacks were not identified as an unlawful use of force, even though theoretically such a qualification would not seem to be excluded. In conclusion, recent State practice illustrates that

---

[839] Pavel Polityuk, 'Ukraine to probe suspected Russian cyber attack on grid', *Reuters*, 31 December 2015, https://www.reuters.com/article/us-ukraine-crisis-malware-idUSKBN0UE0ZZ20151231.

[840] Tom Ruys, Luca Ferro and Nele Verlinden, 'Digest of State Practice 1 July – 31 December 2015', *Journal on the Use of Force and International Law* 3, no. 1 (2016): 130.

[841] See e.g. Joe Uchill, 'WikiLeaks posts 20,000 DNC emails', *The Hill*, 22 July 2016, https://thehill.com/policy/cybersecurity/288883-wikileaks-posts-20000-dnc-emails. For an official report of the investigations into the hackings, see US, Department of Homeland Security and Federal Bureau of Investigation, Grizzly Steppe – Russian Malicious Cyber Activity, 29 December 2016, https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf.

[842] Tom Ruys et al., 'Digest of State Practice: 1 July – 31 December 2016', *Journal on the Use of Force and International Law* 4, no. 1 (2017): 207. Some US officials have however referred to the interference in very strong terms, denouncing the hackings as 'attack' or 'act of war'. See respectively the statement by Senator Mark Warner ('we are here because a foreign adversary attacked us right here at home', X, 'Full text: James Comey testimony transcript on Trump and Russia', *Politico*, 8 June 2017, https://www.politico.com/story/2017/06/08/full-text-james-comey-trump-russia-testimony-239295) and former vice President Dick Cheney (Matthew Sheffield, 'Dick Cheney lashes out at Russia for "act of war" as neocons try outreach to liberals', *Salon*, 29 March 2017, https://www.salon.com/2017/03/29/dick-cheney-alleged-russian-election-interference-was-an-act-of-war/).

[843] Tom Ruys, Luca Ferro and Carl Vander Maelen, 'Digest of state practice: 1 January – 30 June 2017', *Journal on the Use of Force and International Law* 4, no. 2 (2017): 379.

sufficiently grave acts are considered as unlawful use of force, whereas divergent views remain as to less grave acts.

3.2. Armed attack

Article 51 of the UN Charter reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.
>
> Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

This article reflects one of the two[844] exceptions to the general prohibition on the use of force enshrined in Article 2(4) UN Charter. It contains both a threshold ('armed attack') and explains what the possible consequence is if the threshold is reached ('self-defence'). The conditions to exercise self-defence have been briefly touched upon in Section 2.1. In what follows, I will focus the analysis on the threshold of Article 51: armed attack. Similar to the analysis on the threshold of the use of force, I will not (yet) deal with the question whether acts in support of an armed attack could themselves qualify as an (indirect) attack. That theoretical question, together with an overview of the various categories of support, will be tackled in Section 4. Here too, however, the same logic applies: the lower the threshold for an armed attack, the more likely it is that supportive acts could also be considered as an armed attack.

3.2.1. The threshold for a direct 'armed attack'

A first element that can immediately be noted is that Article 51 clearly demands an 'armed' action. This is indeed contrary to the prohibition on the use of force, where 'force' is interpreted by the majority view as being 'armed force', while not explicitly labelled as such. It is therefore undisputed that political or economic attacks, in analogy with political or economic force, do not give rise to measures in self-defence. This is logic, as self-defence is an exception to a

[844] It is sometimes argued that outside the UN Charter various other exceptions to the prohibition exist, such as force to protect nationals abroad, humanitarian intervention or force in support of a war of national liberation. See *inter alia* Kolb, *Ius contra bellum*, 303–32. Force used with a duly given consent is 'not a true exception'. See ILA, Committee on the Use of Force, 'Draft Report on Aggression and the Use of Force', *International Law Association Reports of Conferences* 77 (2016): 249. While the use of force with duly given consent is generally considered as lawful, views divergence with regard to force upon request of a government involved in a civil war. See *inter alia* Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force', *European Journal of International Law* 26, no. 4 (2015): 979–98 (arguing pro), and Louise Doswald-Beck, 'The Legal Validity of Military Intervention by invitation of the Government', *British Yearbook of International Law* 56 (1985): 189–252 (arguing contra).

general prohibition, and thus, in accordance with the maxim '*exceptio est strictissimae applicationis*', needs to be construed narrowly in order to avoid undermining that prohibition.

Despite the explicit requirement of an attack of 'armed' nature, it would be too premature to exclude the supportive acts which form the focus of our study from the scope of Article 51. Indeed, as will be outlined below, some acts which do not necessarily include the use of lethal force are nevertheless considered to be an act of aggression (and therefore arguably also, as will be explained below, an armed attack).[845]

The key ICJ-case on the definition of 'armed attack' is again the *Nicaragua* case. Confronted with the claim by the US that it could act in collective self-defence alongside El Salvador, Honduras and Costa Rica against Nicaragua[846], the ICJ had to assess whether Nicaragua had committed an armed attack against those States. The Court explained that 'there appears […] to be a general agreement on the nature of acts'[847] which constitute armed attacks:

> The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, *because of its scale and effects*, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a *significant scale* but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[848] [emphasis added]

Even though the Court abstained from determining a threshold for 'armed attack', it did indicate that such an attack requires an operation of a certain scale, entailing a certain degree of effects. This view was endorsed by the *Institut de Droit International*[849], the Eritrea Ethiopia Claims Commission[850] and the International Fact-Finding Mission on the Conflict in Georgia.[851] According to Green, State practice preceding the 1986 *Nicaragua* judgment does indeed indicate a relationship between an armed attack and its gravity (being 'something more than a use of force simpliciter'), which was rightly identified by the ICJ.[852] Even though Dinstein

---

[845] Take for instance the extension of military presence on another State's territory beyond the termination of the bilateral agreement (Art. 3(e) Definition of Aggression).
[846] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 165.
[847] *Ibid.*, para. 195.
[848] *Ibid.*
[849] 'An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law.' See IDI, Session of Santiago 2007, 10th Commission, Present Problems of the Use of Armed Force in International Law, Self-defence, Resolution, 27 October 2007, para. 5.
[850] Award on Ethiopia's Ius ad Bellum Claims 1-8, XXVI Reports of International Arbitral Awards 457–69 (Eritrea Ethiopia Claims Commission, 2005), para. 11.
[851] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II, 245.
[852] Green, *The International Court of Justice and Self-Defence in International Law*, 120. Green is nevertheless of the opinion that 'in trying to reconcile the admittedly confused *lex lata*, [the Court] opted to focus upon the wrong criterion.' *Ibid.*, 128. Instead, Green contends, the criterion of necessity and the allegedly needed 'gravity' perform

criticizes the Court's exclusion of 'small scale' attacks, he also agrees with a *de minimis* threshold as a starting point for the spectrum of armed attacks.[853]

Nevertheless, the gravity threshold for armed attack is not undisputed. According to Sari and Lauva, the gravity criterion is even denied by 'a strong current of opinion'.[854] First, it is argued that the text of Article 51 does not suggest a gravity requirement.[855] Second, several authors stress that a threshold requirement cannot be found in practice. Gazzini states that 'State practice is entirely inconsistent with the existence of a threshold of gravity or intensity below which the right of self-defence cannot be exercised.'[856] Antonopoulos contends that 'State practice does not make a distinction between armed attack and a use of force short of an armed attack.'[857] A recent example of State practice going against the generally held view can be found in the 2016 US Law of War Manual, which states that '[the] United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force.'[858] The position taken by some authors and States defending that all uses of force constitute armed attacks can therefore be labelled as 'unified gravity approach', applying one unified threshold for both the (direct) use of force and armed attack.

Arguing that there is no threshold for an armed attack does not necessarily mean the acceptance of a broad use of self-defence. Usually the authors defending the no-threshold view stress the existence of other criteria that limit the right to self-defence. In that regard, Taft notes that '[the] gravity of an attack may affect the [proportionality] of the defensive use of force […], but it is not relevant to determining whether there is a right of self-defense in the first instance.'[859] Similarly, Wilmshurst observes that the absence of gravity may be an indication of the

---

the same function: limiting self-defence as an exception to the prohibition on the use of force to the extreme cases. *Ibid.*, 135.

[853] '[There] is no reason to remove small-scale armed attacks (above a *de minimis* threshold) from the Article 51 spectrum of armed attacks.' Dinstein, *War, Aggression and Self-Defence*, 2011, 211.

[854] Aurel Sari and Arnis Lauva, 'Hybrid Threats and the United States National Security Strategy: Prevailing in an "Arena of Continuous Competition"', *EJIL: Talk!*, 19 January 2018, https://www.ejiltalk.org/hybrid-threats-and-the-united-states-national-security-strategy-prevailing-in-an-arena-of-continuous-competition/#more-15827. See also Wilmshurst, who concludes after a survey among international legal scholars that '[a]n armed attack means any use of armed force, and does not need to cross some threshold of intensity.' Elizabeth Wilmshurts, Principles of International Law on the Use of Force by States in Self-Defence (Chatham House, 2005), 6, https://www.chathamhouse.org/publications/papers/view/108106.

[855] William H. IV Taft, 'Self-Defense and the Oil Platforms Decision Symposium: Reflections on the ICJ's Oil Platforms Decision', *Yale Journal of International Law* 29 (2004): 300; Hargrove, 'The Nicaragua Judgment and the Future of the Law of Force and Self-Defense', 139.

[856] Gazzini, *The Changing Rules on the Use of Force in International Law*, 133, 237.

[857] Constantine Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence', *Netherlands International Law Review* 55, no. 2 (2008): 166.

[858] US, DoD Law of War Manual, 47. See also former legal advisor to the US State Department, Herald Koh, who argued that '[the] inherent right of self-defense potentially applies against any illegal use of force […] there is *no threshold for a use of deadly force to qualify as an "armed attack"* that may warrant a forcible response.' Harold Hongju Koh, 'International Law in Cyberspace. Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012', *Harvard International Law Journal Online* 54 (2012): 7 [emphasis added]. Koh nevertheless adds: 'But that is not to say that any illegal use of force triggers the right to use any and all force in response—such responses must still be necessary and of course proportionate.' *Ibid.*

[859] Taft, 'Self-Defense and the Oil Platforms Decision Symposium', 300.

attacker's (lack of) intention, or that it may impact the criteria of necessity and proportionality.[860] Wilmshurst touches upon yet another contested issue: that of the need for an '*animus aggressionis'*.

There is no general agreement on the mental element requirement for an armed attack.[861] Article 51 UN Charter does not mention any intent criterion. While for large-scale attacks it seems obvious that the attacker has an *animus aggressionis*[862], it is precisely for small-scale acts that such a conclusion is less evident. There are arguments both in favour and against an intent requirement for an armed attack. First, in addition to the fact that no subjective element is included in Article 51 UN Charter, it is not easy for a victim of an armed attack to know what the intention of the attacker was. Imposing an intent requirement would thus limit the right of self-defence of the victim.[863] On the other hand, accidents can happen. In such scenarios, a response in self-defence does not seem warranted.[864] The ICJ has not particularly been helpful in clarifying whether or not an intentional requirement exists for an armed attack. In the *Oil Platforms* case, when assessing whether a range of Iranian acts could qualify as an armed attack on the United States, the Court first noted that

> the Sea Isle City [an American vessel] was in Kuwaiti waters at the time of the attack on it, and that [an Iranian] Silkworm missile fired from (it is alleged) more than 100 km away could not have been *aimed* at the *specific* vessel, but simply programmed to hit some target in Kuwaiti waters.[865]

Subsequently, in the same paragraph, the Court held that

> [t]here is no evidence that the minelaying alleged to have been carried out by the Iran Ajr, at a time when Iran was at war with Iraq, was *aimed specifically* at the United States; and similarly it has not been established that the mine struck by the Bridgeton was laid with the *specific intention* of harming that ship, or other United States vessels.[866]

Both passages seem to suggest a specific intention criterion for an armed attack. This is problematic, as it would mean that States can easily deny responsibility for an attack by simply

---

[860] Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence', 6.
[861] Arguing pro, see *ibid.*; Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 166. Arguing contra, see Norman Menachem Feder, 'Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack Notes', *New York University Journal of International Law and Politics* 19 (1986-1987): 412; James A. Green, 'Self-Defence: A State of Mind for States?', *Netherlands International Law Review* 55, no. 2 (2008): 201–6.
[862] As Green notes, even though mine-laying can have far-reaching effects, it can still be 'indiscriminate' because the mine-laying State cannot know in advance which States will be affected. See Green, 'Self-Defence: A State of Mind for States?', 204.
[863] In the words of Green: 'It is quite simply incorrect to hold that the subjective 'psychological' position of the attacking state has any bearing upon the lawfulness of the action taken in response to that attack.' See *ibid.*, 206.
[864] In this regard, see the position taken by a number of States during the negotiations for a Definition of Aggression: UNGA, Special Committee on the Question of Defining Aggression, 'Summary Records of the Fifty-Second to Sixty-Sixth Meetings 13 - 29 July 1970', 19 October 1970, 26–27, 35–36 and 41 (statements by Canada, France and Japan, respectively).
[865] Case concerning oil platforms (Islamic Republic of Iran v. United States of America), 2003 ICJ Reports, para. 64 [emphasis added].
[866] *Ibid.* [emphasis added].

arguing the object of attack was not specifically targeted. At most, the quoted passages can be read as an indication that a general intent is required for an armed attack.[867] The matter remains subject to debate. In addition, a third option has been defended as well: an aggressive intent would not be a constitutive part of an 'armed attack', but needs to be taken into account when assessing whether the response in self-defence complies with the 'necessity' requirement. To a certain extent the practical result is the same as considering that an *animus aggressionis* is needed for an armed attack.[868] However, for supportive acts in particular, there is a notable difference: if the supported act is not an armed attack (because of the absence of the requisite intent), the supportive act cannot constitute an armed attack either.[869]

For the purpose of this study, the introductory Chapter clarified that only intentional support would be considered as 'supportive acts'. The question of an *animus aggressionis* is thus at first sight not relevant here. Nevertheless, the proponents of a *mens rea* element stress that the intentional requirement for armed attack it is particularly valuable for those scenarios whereby the material act of the attack is only of a low scale.[870] Yet, there is still a difference between low-scale force between two States, for instance in case of a border incident, and support provided by a third State to another State that commits an armed attack. Given the majority position that an armed attack requires a certain gravity threshold, it is unlikely that supportive acts, even if clearly committed with the intent to support an armed attack, would classify themselves as armed attacks.

The debate on whether or not an armed attack requires acts of a certain gravity remains abstract if we do not have concrete examples of possible armed attacks. The notion of 'armed attack' is not defined in international law. The phrase is not explained in the *travaux préparatoires* of the UN Charter.[871] The definition that comes the closest to the notion of armed attack is that of aggression, adopted by the General Assembly in 1974.[872]

---

[867] See e.g. Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-defence', *European Journal of International Law* 16, no. 3 (2005): 514; Taft, 'Self-Defense and the Oil Platforms Decision Symposium', 302. There is also no agreement on whether or not State practice confirms a requirement of *mens rea* for an armed attack. Arguing pro, see Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 163–66. Arguing contra, see Green, 'Self-Defence: A State of Mind for States?', 205. It should be noted though that Green, in contrast with Ruys, does not cite any concrete State practice to support his argument.

[868] Yoram Dinstein, *War, aggression and self-defence*, 4th ed. (Cambridge: Cambridge University Press, 2005), 209.

[869] As will be explained below, for instance, allowing territory to be used for an armed attack arguably also constitutes an armed attack. If however there was no *animus aggressionis* for the attack that was committed, then the territorial State can hardly be accused of an armed attack itself. See *infra* Section 4.1.2.

[870] '[T]he concept of '*animus aggressionis*' is most relevant when dealing with small-scale uses of force, in particular 'border incidents' and the like.' Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 161.

[871] Brownlie, *International Law and the Use of Force by States*, 278.

[872] UNGA Res. 3314 (XXIX), Definition of Aggression, UN Doc. A/RES/3314(XXIX) (14 December 1974).

3.2.2. The Definition of Aggression as basis for 'armed attack'

UNGA Resolution 3314 on the Definition of Aggression defines the notion of 'act of aggression' for the purpose of Article 39 UN Charter.[873] That provision identifies the trigger for the so-called 'Chapter VII-powers' of the Security Council. It states that

> [t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Once the UN Security Council has discretionally decided whether or not a threat to peace, breach of the peace or act of aggression exists, it can thus assess to what extent a situation requires further recommended or even compulsory action. Such measures can be far-reaching for the States (or their leaders) concerned: economic sanctions, a travel ban, an authorization to use all necessary measures (including force) – just to name a few. In addition to this practical importance attached to the notion of aggression in Article 39 of the Charter, Article 1(1) more broadly defines 'suppression of acts of aggression or other breaches of the peace' as a major purpose of the United Nations. While some of the negotiating States in San Francisco already wished to define the notion of 'aggression' because of its pivotal role within the collective security system, the majority of States rejected that idea, as they found a definition would be too political, not leaving the necessary discretion to the Security Council to act.[874] Notwithstanding this general reluctance to define aggression, immediately after the adoption of the UN Charter the process was launched within the General Assembly to develop a definition of aggression. While initially the search for such a definition was undertaken against the background of developing an International Criminal Code, or at least a 'general codification of offences against the peace and security of mankind'[875], eventually that aspiration was abandoned. Instead, the purpose of the Definition of Aggression that was achieved in 1974 was narrowed down to ensuring peace and security, as part of the trigger for Chapter VII powers of the Security Council. Upon the adoption of the Definition of Aggression, the General Assembly explicitly stated it was 'deeply convinced that [it] would contribute to the strengthening of international peace and security'.[876]

---

[873] The notion of aggression is also mentioned in Article 53(1)(2) UN Charter (now outdated) and in the French version of Article 51, which allows for acts in self-defence against *'une aggression armée'* (armed attack).

[874] Thomas Bruha, 'The General Assembly's Definition of the Act of Aggression', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 146. See also the preparatory works of the Charter: '[T]he majority of the Committee thought that a preliminary definition of "aggression" went beyond the scope of the Charter and that the modern techniques of warfare rendered any definition of "aggression" impossible.' X, 'Part 1: Origin and evolution of the United Nations', *Yearbook of the United Nations* (1946–1947): 26.

[875] UNGA Res. 95(I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, UN Doc. A/RES/95(I) (12 November 1946).

[876] See Preamble of UNGA Res. 3314 (XXIX), Definition of Aggression, UN Doc. A/RES/3314(XXIX) (14 December 1974).

The Definition of Aggression as annexed to UNGA Resolution 3314 consists of 8 articles, in addition to a lengthy preamble. The text combines a more general, abstract definition with a specific (non-exhaustive)[877] list of 'acts of aggression'. Article 1 starts the definition by stipulating in general that

> [a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

More specifically, Article 3 determines that

> [a]ny of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The question that is crucial for the purpose of this study is whether the list of acts enshrined in Article 3 of the Definition of Aggression can be considered when assessing the scope of 'armed attack' under Article 51 UN Charter. Two issues underlie this question: first, does the Definition of Aggression reflect the customary law status on what is considered to be an act of aggression, and second, is an act of aggression equal to an 'armed attack' or, if not so, is the former a sub-category of the latter?

The customary value of UNGA Resolution 3314 is disputed. The Resolution itself does not claim to offer a customary definition of the 'act of aggression'. As the process leading towards the definition was characterized by a strong divide between the Western States and the non-aligned States, with the USSR somewhere in between, States could only achieve a result

[877] See Article 4 of the Definition.

through what Stones has labelled 'conflict through consensus'[878], a technique aptly described by Bruha as

> a dialectical process of cooperation and confrontation, this technique is characterised by the preparedness of antagonistic political actors to agree on mutually acceptable understandings and arrangements to promote peaceful change, while maintaining their basic conflicting opinions and objectives.[879]

In addition to the cumbersome three-decades long drafting process, States made sure not to create the impression that the Definition of Aggression would be considered as a product of the lawmaking function of the General Assembly: instead of being included in a General Assembly Resolution, the Definition was annexed to a Resolution. Moreover, the General Assembly 'approved' the Definition, rather than 'adopting' it.[880] The Definition was also complemented with a significant amount of statements and explanatory notes by States, which form an important source for grasping its real significance and which illustrate the remaining fundamentally different understandings of the notion of aggression.[881]

While all of these elements illustrate that a significant number of States back in 1974 did not desire the Definition of Aggression to be a crystallization of customary law[882], the lack of reference to the Definition by the UN Security Council is perhaps even more telling: in none of its resolutions concerning aggression, the Council made reference to UNGA Resolution 3314.[883]

---

[878] Julius Stone, *Conflict through consensus, United Nations approaches to aggression* (Baltimore: Johns Hopkins University Press, 1977).

[879] Bruha, 'The General Assembly's Definition of the Act of Aggression', 152.

[880] See the first operational paragraph of Resolution 3314, which reads: '[the General Assembly] 1. Approves the Definition of Aggression, the text of which is annexed to the present resolution.'

[881] The following footnote was added to the Definition of Aggression: 'Explanatory notes on articles 3 and 5 are to be found in paragraph 20 of the Report of the Special Committee on the Question of Defining Aggression (Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1). Statements on the Definition are contained in paragraphs 9 and 10 of the report of the Sixth Committee (A/9890)'. See UNGA Res. 3314 (XXIX), Definition of Aggression, UN Doc. A/RES/3314(XXIX) (14 December 1974), n. 3.

[882] The following paragraph from the Dissenting Opinion of Judge Schwebel to the ICJ's Nicaragua judgment sums up the criticism quite well:

> The significance of the Definition of Aggression - or of any definition of aggression - should not be magnified. It is not a treaty text. It is a resolution of the General Assembly which rightly recognizes the supervening force of the United Nations Charter and the supervening authority in matters of aggression of the Security Council. The Definition has its conditions, its flaws, its ambiguities and uncertainties. It is openended. Any definition of aggression must be, because aggression can only be ultimately defined and found in the particular case in the light of its particular facts. At the same time, the Definition of Aggression is not a resolution of the General Assembly which purports to declare principles of customary international law not regulated by the United Nations Charter.

See Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Dissenting Opinion Judge Schwebel, 1986 ICJ Reports 259 (ICJ, 27 June 1986), para. 168. It is interesting to note that Schwebel was the representative of the US in the Special Committee on the Question of Defining Aggression. The views expressed above will therefore probably not be far removed from the position taken by the US during the negotiations of the Definition of Aggression.

[883] While the number of resolutions in which the Security Council uses the wording 'aggression' or 'aggressive act' is already limited, none of those resolutions refers to UNGA Resolution 3314. For an overview of the UNSC resolutions dealing with aggression, see Carrie Mcdougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2013), 83–84. Her list dates from 2013

If the main addressee of the Definition of Aggression does not refer to it when dealing with cases of aggression, one can wonder what the value of the Definition is. It should be noted, however, that the absence of explicit reference to UNGA Resolution 3314 could also be explained because of the fact that a number of recent 'aggressions' have been committed by permanent members of the Security Council.[884]

On the other hand, we can note that the UNGA itself has referred to its own Definition[885], and so have States affected by or condemning certain acts of aggression.[886] Moreover, the ICJ has relied on the Definition of Aggression and labelled it – or at least part of it – as customary law. In the *Nicaragua* case, the ICJ noted that the 'description, contained in Article 3(g) […] of the Definition of Aggression […], may be taken to reflect customary international law.[887] The States involved in the dispute did not contradict this finding.[888] The Court referred to the same littera in the context of the possible Ugandan self-defence against the DRC in the *Armed activities* case.[889] The ICJ has not, however, explicitly declared the entire Definition of Aggression to be of customary nature.[890] One could nevertheless argue that since the ICJ accepted littera g, the most contested of all acts of aggression, as customary law, that characterization would equally

but is still up to date, as no recent UNSC Resolutions have used the wording 'aggression' or 'aggressive act', nor have they referred to UNGA Resolution 3314.

[884] There has, for instance, not been a UNSC Resolution on the aggression of the US and the UK versus Iraq in 2003, or on the Russian aggression against Ukraine in 2016.

[885] See e.g. UNGA Res. ES-9/1, Resolution on the Situation in the Occupied Arab Territories, UN Doc. A/RES/ES-9/1 (2 May 1982); UNGA Res. 37/123A, Resolution on the Situation in the Middle East, UN Doc. A/RES/37/123A (16 December 1982) (both Resolutions declaring that the Israeli occupation of the Syrian Golan Heights constitutes an aggression in the meaning of Resolution 3314).

[886] See for instance the statements by Syria with regard to third-State assistance to rebels (Identical letters dated 19 September 2013 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2013/563, 19 September 2013), by Jordan regarding the Russian intervention in Ukraine in 2014 (UNSC Verbatim Record, UN Doc S/PV.7125, 3 March 2014, 9/20) and by China with regard to Indian border crossings (China, Ministry of Foreign Affairs, The Facts and China's Position Concerning the Indian Border Troops' Crossing of the China-India Boundary in the Sikkim Sector into the Chinese Territory, 8 February 2017, para. 9, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/P020170802542676636134.pdf). Interestingly, Ukraine even specified which litteras of Article 3 it considered to have been violated by Russia, when it wrote to the UN Secretary-General that

> the occupation and subsequent attempt to annex the Autonomous Republic of Crimea and the city of Sevastopol, as well as Russia's illegal actions in Donbas, fall squarely under the definition of an act of aggression, in line with the provisions of paragraphs (a), (b), (c), (d), (e) and (g) of article 3 set out in the annex to General Assembly resolution 3314 (XXIX).

See Letter Dated 14 December 2016 from the Permanent Representative of Ukraine to the United Nations Addressed to the Secretary-General, UN Doc. A/71/692-S/2016/1056, 2/3.

[887] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 195. Note that the Court referred to Article 3(g) in order to define the scope of 'armed attack' for the purpose of Article 51 UN Charter.

[888] Corten, *The Law Against War*, 405. For an analysis of the separate and dissenting opinions on this particular issue, see Mcdougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 90–95.

[889] Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 ICJ Reports, para. 146.

[890] For an opposite reading of the ICJ's judgment, see e.g. Alberto L. Zuppi, 'Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil', *Penn State International Law Review* 26 (2007–2008): 19.

be valid for all the other acts enshrined in Article 3.[891] In addition, and most relevant for the purpose of this study, the list of acts underlying an 'act of aggression' has been copied into Article 8bis of the ICC Statute without any modification.[892] Therefore, while the Definition of Aggression may perhaps not have reflected the understanding of customary law at the time it was adopted, States clearly did not feel the need to make any changes with regard to the list of acts enshrined in Article 3. Importantly, the list of Article 3 is not exhaustive (as mentioned explicitly in Article 4 of the Definition), thus leaving room for potential other 'acts of aggression'. For these reasons, it is submitted here that, at least as far as Article 3 is concerned, the Definition of Aggression can be considered of customary nature. This does of course not exclude that other forms of aggression may exist, especially forms that where technologically not yet envisageable in 1974.

The question now, *arguendo* that Article 3 reflects the customary law regarding acts of aggression, is whether the listed acts of Article 3 also constitute proper examples of 'armed attacks' under Article 51 UN Charter. As a starting point, we can observe that the UN Charter uses different notions in different contexts. Aggression is used in Article 39, where it delineates one of the three situations (in juxtaposition with a 'threat to peace' and 'breach of peace') that trigger the powers of the UN Security Council to take enforcement measures under Chapter VII of the Charter. Armed attack, on the other hand, generates a right to self-defence under Article 51 of the Charter. Even though authors like Broms submit that '[a]lthough the term "aggression" has not been used in [Article 51] it has been generally interpreted that the words "armed attack" refer to aggression'[893], it seems more consistent with the general rule on the interpretation of treaties to argue that, if the States negotiating the UN Charter decided to use different notions, one can assume they intended to attach a different meaning to both notions.[894] This obvious observation should be nuanced to the extent that the French version of the Charter does not use different notions at all: Article 51 refers indeed to *'une aggression armée'* as the French translation of 'armed attack'. Yet, UNGA Resolution 3314 itself explicitly confirms that the negotiating parties indeed intended to define the notion of aggression and not that of armed attack.[895]

---

[891] Marek Melesko, 'The Definition of the Crime of Aggression in the Context of the Rome Statute', *Acta Societatis Martensis* 4 (2009–2010): 142; Mohammed M. Gomaa, 'The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime', in Giuseppe Nesi and Mauro Politi (eds.), *The international criminal court and the crime of aggression* (Aldershot: Ashgate, 2004), 74.

[892] See however the US position on the Kampala amendment as expressed in the recent Law of War Manual: '[T]he definition of the act of aggression in the Kampala amendments to the Rome Statute does not reflect customary international law.' See US, DoD Law of War Manual, 1129–30.

[893] Bengt Broms, 'The definition of aggression', *Collected Courses of the Hague Academy of International Law* 154 (1978): 370.

[894] See Article 31(1) Vienna Convention on the Law of Treaties: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Mcdougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 65.

[895] See paragraphs 2 and 4 of the Preamble and Article 6 UNGA Res. 3314.

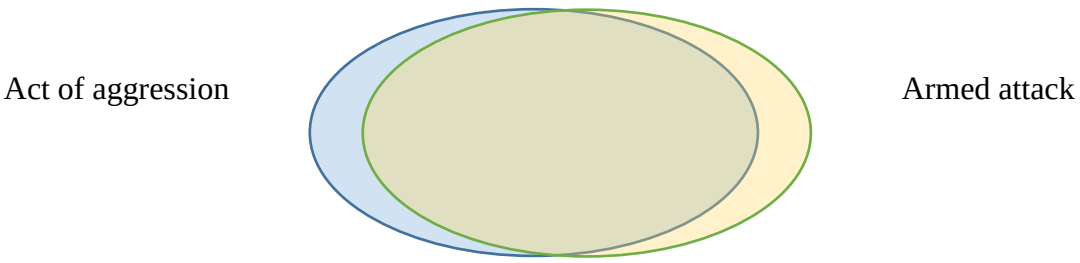
Still, numerous scholars who try to identify the boundaries of the right to self-defence do so by reference to the Definition of Aggression.[896] Corten, for instance, while he acknowledges that the distinction between aggression and armed attack 'is an essential one'[897], refers to a number of States who, during the negotiations of UNGA Resolution 3314, indicated that they considered aggression to be an essential part of self-defence. In a more recent article, Corten moreover notes that '[t]he definition of an 'armed attack' – or *agression armeé* in the French version – gave rise to various debates, that led to the definition annexed to GA Resolution 3314 (XXIX), generally considered as reflecting customary international law.'[898] Akande and Tzanakopoulos argue that '[the] combination of the ICJ's introduction of a distinction between a mere 'use of force' and an 'armed attack', along with the Court's implicit and explicit references to the 1974 GA Resolution 3314, do create the impression that the two concepts, i.e. 'aggression' and 'armed attack' are quite closely related, if not one and the same.'[899] Franck notes that '[i]t seems logical, but not necessarily self-evident, that any action rising to the level of "aggression" – including indirect aggression – would also satisfy the criterion of an "armed attack" against which forceful measures of self-defense may be taken until the Council has invoked effective collective measures.'[900] O'Connel and Miyazmatov submit that '[a]cts serious enough to trigger the Article 51 right of self-defence will constitute aggression.' While the latter authors start from the concept of armed attack in order to determine the scope of 'aggression', rather than the other way around, the end result is the same: aggression is equated with armed attack and vice-versa.[901]

However, a number of authors also stresses the subtle yet important differences between the two concepts – even though without general agreement on their exact relationship. On the one hand, a considerable number of scholars[902] and States[903] have held that 'armed attack' is narrower than aggression. According to Ruys, the negotiation history of UNGA Resolution 3314 confirms that 'in general, a cascading relationship exists between the terms 'force', 'aggression', and 'armed attack'. The implication would be that any 'armed attack' in the sense of Article 51 would normally also constitute an 'act of aggression' in the sense of Article 39.'[904] What remains unclear under this theory, however, is which acts would constitute an 'act of aggression' without being an 'armed attack'. One could argue that a 'peaceful annexation'

[896] See e.g. Randelzhofer and Nolte, who discuss de different forms of 'armed attack' by reference to UNGA Res. 3314: Nolte and Randelzhofer, 'Article 51', paras 22–46.
[897] Corten, *The Law Against War*, 404.
[898] Olivier Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?', *Leiden Journal of International Law* 29, no. 3 (2016): 796.
[899] Akande and Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', 224–25.
[900] Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks*, Hersch Lauterpacht Memorial Lectures 15 (Cambridge: Cambridge University Press, 2002), 65.
[901] Mary Ellen O'Connell and Mirakmal Niyazmatov, 'What is Aggression?: Comparing the Jus ad Bellum and the ICC Statute', *Journal of International Criminal Justice* 10, no. 1 (2012): 198.
[902] Nolte and Randelzhofer, 'Article 51', 1408.
[903] On the relationship between 'aggression' and 'armed attack' as reflected in the various proposals within the Fourth Special Committee on the Question of Defining Aggression (1968-1974), see Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 129ff.
[904] *Ibid.*, 138.

would fall into that category[905], yet, the victim of that annexation will most likely nevertheless claim its right to self-defence.[906] One the other hand, the contrary relationship between the two concepts has also been argued.[907] Some scholars stress that the term 'aggression' is reserved for the greatest breaches of peace, thus excluding some (lighter) forms of armed attack.[908] Armed attacks, while still requiring a considerable degree of gravity[909], would not necessarily be a *grave* breach of peace. The mining of a single vessel – an act acknowledged by the ICJ to potentially trigger the right to self-defence[910] – would arguably not be a such grave breach of peace. If the latter view is followed, one could argue that those acts that are considered to be an 'act of aggression' *a fortiori* also constitute an 'armed attack'.

Given the divergent views in doctrine and practice, it seems therefore that the notions of aggression and armed attack, while considerably overlapping, at least theoretically do not allow to be presented as concentric circles. The most appropriate way to illustrate the relationship between the two notions is thus with a Venn diagram, whose intersection is considerably bigger than the remaining parts of the individual sets:



[905] For a recent example, see the Russian annexation of Crimea, Ruys and Verlinden, 'Digest of State Practice 1 January – 30 June 2014', 324–40.
[906] Schwebel seems to be of the opinion that some forms of intervention would also fall into the category of 'acts of aggression' without classifying as 'armed attacks': 'The General Assembly has placed on record that "armed intervention is synonymous with aggression." Presumably, the phrase "armed intervention" is not synonymous with armed attack, but is suggestive of something distinct.' See Stephen M. Schwebel, *Justice in International Law* (Cambridge: Cambridge University Press, 1994), 560.
[907] During the negotiations of the Definition, some States expressed the view that the notion of aggression under the Charter could 'include other forms of aggression not necessarily consisting in the use of armed force'. This view was expressed by Bolivia, China, Iran, Mexico, Polen, Syria and the USSR. See UNGA, 'Report of the Special Committee on the Question of Defining Aggression. 24 August - 21 September 1953' (New York, 1954), 5.
[908] See for instance Fleck, who writes that '[i]t should be noted that the term aggression only encompasses extreme cases of armed attack. It is easy to imagine situations where armed attacks remain below the threshold of aggression.' Dieter Fleck, 'Rules of Engagement for Maritime Forces and the Limitation of the Use of Force under the UN Charter', *German Yearbook of International Law* 31 (1988): 175. See also Hargrove, 'The Nicaragua Judgment and the Future of the Law of Force and Self-Defense', 139–40, note 15 *in fine*. The commentary to Rule 71 of the Tallinn 2.0 Manual also seems to take this view, even though no concrete example is provided: see Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 339.
[909] One that is, as argued above, higher than the gravity threshold for 'use of force'.
[910] Case concerning oil platforms (Islamic Republic of Iran v. United States of America), 2003 ICJ Reports, para. 72.

Such an interpretation would also be in accordance with Article 6 of the Definition of Aggression, which holds that

> [n]othing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Yet, this abstract delineation between the notion of armed attack and aggression does not help us with regard to supportive acts: it is not because indeed some situations would be considered only an act of aggression and not an armed attack, that precisely the supportive acts would fall within that part of the Venn diagram. The fact that States participating in the 2010 Kampala Review Conference of the ICC Statute decided to include the list of Article 3 of the Definition of Aggression as part of Article 8bis is perhaps significant in this regard: it shows that, despite shortcomings and obviously vague and political wordings, States still considered it sufficiently clear and meaningful to serve as a basis for prosecution. While of course the other (gravity) criteria for the crime of aggression would have to be fulfilled, the fact that both Article 3(f) and 3(g) (which will be discussed at length in Section 4) were not excluded from Article 8bis ICC Statute shows that States believe that the supporting acts they represent can be considered acts of aggression as much as an invasion or bombardment of territory can. While criminal prosecution is still different from constituting a lawful basis for a reaction in self-defence, it is interesting to wonder whether the former cannot be an argument in favour of the latter: if States are prepared to prosecute (and thus potentially sentence and imprison) world leaders for the crime of aggression, one could ask the question whether they would also agree with acts in self-defence for the same underlying facts. Thus, perhaps Article 8bis ICC Statute can be read as a confirmation of the list of Article 3 as examples of 'armed attack'. State practice on the two literras dealing with supportive acts specifically, differs however greatly, as will be discussed below.[911]

3.2.3. Recent examples of 'armed attack' identifications

In order to illustrate how the threshold for armed attack has been applied by States, some examples of the explicit State references to 'armed attack' from 2014 to 2018 are provided below. First, however, it should be noted that except for one case (the Russian invasion in Ukraine), the recent examples of explicit indications of unlawful use of force listed in Section 3.1.2, were clearly *not* considered sufficiently grave to additionally be labelled as 'armed attacks'.

As indicated, the Russian intervention in eastern Ukraine and the annexation of the Crimea was not only denounced as an unlawful use of force, but also as an 'armed attack' or 'aggression'

[911] See Sections 4.1.2.A. and 4.1.3.A.

by a number of States.[912] Other situations were also considered to meet the 'armed attack' threshold. For instance, in 2014, (former) US President Obama announced the capture of Ahmed Aby Khatallah by US special forces in Libya. Khatallah was allegedly a key figure in the attack on the US embassy in Bengazi of 2012. In a letter to the UNSC, the US Government explained that '[t]he measures […] taken to capture Abu Khattalah in Libya were therefore necessary to prevent such armed attacks, and were taken in accordance with the United States' inherent right of self-defence.' The attack on the embassy was thus considered as an armed attack.

In 2015, Israel released a report on the 2014 Gaza conflict. In the report, the Israeli government argued that the rockets coming from the Gaza strip into Israeli territory 'independently [qualified] as an armed attack triggering Israel's inherent right of self-defence'.[913] It is interesting to note that the word 'independently' was used here, perhaps to contrast with a potential application of the accumulation of events theory.[914] While this of course remains speculation, the facts in question might indicate that Israel considers attacks of a low threshold sufficient to constitute an armed attack.

In October 2016, the Iraqi Prime Minister announced that Turkish armed forces chasing PKK members on Iraqi territory would 'be treated as non-friendly forces and, when absolutely necessary, [would] be dealt with in accordance with the provisions of the Charter, Article 51, which provides that States have the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.'[915] Thus, the unwanted presence of Turkish troops on Iraqi soil, even for the purpose of attacking PKK forces, would be considered as an armed attack by Turkey against Iraq.

The overwhelming majority of references to 'armed attack' and the 'right to self-defence' in the period 2014-2018 were however linked to the international coalition against ISIS in Syria. While the actions against ISIS on Iraqi territory could be justified on the basis of a request for support by Iraq, the actions against ISIS on Syrian territory required another *jus ad bellum* basis. Multiple States *inter alia* argued that ISIS had carried out 'armed attacks' against Iraq and a number of Western States, therefore justifying a response under Article 51 UN Charter.[916]

---

[912] See for instance: UNSC Verbatim Record, UN Doc. S/PV.7154, 13 April 2014, 4 and 11 (Lithuania: '[W]e understand and support the right of Ukraine to defend itself in the face of external aggression and to tackle militant separatism'; Luxembourg: 'Like every State Member of the United Nations, Ukraine has the right to defend itself by virtue of Article 51 of the Charter of the United Nations'); UNSC Verbatim Record, UN Doc. S/PV.7185, 24 May 2014, 3 (United Kingdom: 'We respect the Ukrainian Government's right to respond to such armed attacks, to protect its citizens and to reassert control over its sovereign territory'); UNSC Verbatim Record, UN Doc. S/PV.7167, 2 May 2014, 7 (United States: 'The country that has a right of self-defence […] is Ukraine').

[913] Ministry of Foreign Affairs Israel, The 2014 Gaza Conflict (7 July–26 August 2014): Factual and Legal Aspects, May 2015, para. 67, www.mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf.

[914] On this theory, see *infra* Section 4.2.

[915] Identical letters dated 17 October 2016 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2016/870, 19 October 2016, 3.

[916] For instance, in June 2015 the Dutch Ministry for Foreign Affairs argued in a letter to the parliament that 'it is sufficiently established that there is an international legal basis for the recourse to force against ISIS in Syria. This

While the legality of the forcible response against ISIS on Syrian territory is contested[917], at least it shows that States consider the acts of ISIS as sufficiently grave to meet the armed attack threshold. In addition, it also shows that an armed attack, according to recent State practice, arguably does not necessarily need to be carried out by a State.[918]

This brief overview of recent State practice illustrates, first, that the term 'armed attack' is far less used than 'use of force', indicating that a higher threshold may apply for the former; second, that an armed attack may also occur in case there is an unwanted presence of troops on another State's territory, regardless whether violence is used directly against that State; and third, that States seem to be increasingly willing to accept a right to self-defence in case the actual attack is carried out by a non-State actor. The examples listed above do not however provide any guidance for the question whether supportive acts would trigger a right to self-defence.

3.3. Principle of non-intervention

3.3.1. The threshold for the principle of non-intervention

The principle of non-intervention[919], as opposed to the prohibition on the use of force and the right to self-defence, does not find an explicit legal basis within the UN Charter.[920] The principle can nevertheless be derived from the 'sovereign equality' of UN Member States (Article 2(1)

legal basis consists in the right of collective self-defence, as enshrined in Article 51 UN Charter, in defence of Iraq against armed attacks by ISIS from Syria against Iraq.' (See Bert Koenders, Kamerbrief Inzake Nader Advies Extern Volkenrechtelijke Adviseur Geweldgebruik Tegen ISIS in Syrië, MinBuza-2015.333470, 26 June 2015). In November 2015, after the Paris attacks, the British PM declared that 'ISIL's campaign against the UK and our allies [had] reached the level of an 'armed attack', such that force could lawfully be used in self-defence to prevent further atrocities being committed by ISIL' (United Kingdom, PM Statement Responding to FAC Report on Military Operations in Syria, Prime Minister David Cameron, 26 November 2015, https://www.gov.uk/government/speeches/pm-statement-responding-to-fac-report-on-military-operations-in-syria.). On 10 December, the German Government informed the UNSC that 'States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.' (Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/946, 10 December 2015.) In June 2016, Belgium argued in its letter tot he UNSC that 'States that have been subjected to armed attack by ISIL originating in that part of the Syrian territory are therefore justified under Article 51 of the Charter to take necessary measures of selfdefence' (Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc.S/2016/523, 9 June 2016).

[917] Corten, 'The "Unwilling or Unable" Test'; Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor - Birth of the "Unable or Unwilling" Standard?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3, no. 75 (2015): 455–501.

[918] This is a debate that falls beyond the scope of this thesis. See also the introductory paragraphs of Section 4.1.

[919] Often also referred to as 'non-interference', see for instance Niki Aloupi, 'The Right to Non-intervention and Non-interference', *Cambridge Journal of International and Comparative Law* 4, no. 3 (2015): 566–87, and the examples of State practice mentioned in Section 3.3.2.

[920] The principle of non-intervention is however reflected in numerous regional treaties or instruments. See for example Art. 4 Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3; Principle VI Final Act of the Conference for Security and Cooperation in Europe, Helsinki, 1 August 1975 (1975) 14 ILM 1292; and Art. 19 Charter of the Organization of American States, 30 April 1948, 119 UNTS 3.

UN Charter) and has been recognized as customary international law.[921] Contrary to the prohibition on the use of force, the principle is not recognized as a *jus cogens* norm.[922] As for its content, the 1970 Friendly Relations Declaration adopted by the General Assembly describes the principle in the following wording:

> No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.[923]

Two constitutive elements can be derived from this definition: non-intervention prohibits measures which (i) include a coercive element and (ii) impact the sovereign rights of a State. In other words, the principle of non-intervention seeks to prevent that States are *forced* by other States to take certain decisions in their *domaine réservé.*[924] Or, as the ICJ stated in the *Nicaragua* case,

> the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.[925]

While the constitutive elements of the principle of non-intervention are fairly straightforward, their application is much less so. Determining whether an area lies solely within a State's domestic affairs is 'particularly difficult.'[926] Traditionally 'domestic affairs' are understood as areas which are not regulated by international law (international treaties, customary law or soft law rules). Yet, in times of global economy, (regional and international) cooperation and international security threats, there is hardly any domain which is not in one way or another regulated at the international level. Identifying a fixed field of application of the non-

[921] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 202.
[922] See for instance Aloupi, who argues that 'violations of [the principle of non-intervention] constitute a violation of a peremptory norm of general international law only when, and to the extent that, such a violation of a state's sovereignty constitutes an unlawful use of force'. Aloupi, 'The Right to Non-Intervention and Non-Interference', 570. As discussed *supra* (Section 2), a violation of the principle of non-intervention thus triggers less consequences than the unlawful use of force.
[923] UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).
[924] See also the famous definition by Oppenheim, who wrote that 'intervention is forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state. […] Since every state has the right, as an attribute of its sovereignty and insofar as it is not qualified by treaty obligations, to decide for itself such matters as its political, economic, social and cultural systems, and its foreign policy, interference in those matters can infringe its sovereignty.' Lassa F. L. Oppenheim, Robert Jennings and Arthur Watts, *Oppenheim's international law. Vol. 1: Peace*, 9th ed. (London: Longman, 1996), 430.
[925] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 205.
[926] Philip Kunig, 'Prohibition of Intervention', *Max Planck Encyclopaedia of Public International Law*, 2008, para. 3.

intervention principle is therefore an impossible task.[927] What can be noted with certainty, however, is that the principle of non-intervention clearly does *not only* apply in the context of an armed conflict.[928] In addition, while States usually argue that a non-international armed conflict within their territory falls within their exclusive domestic affairs, the protection against foreign intervention may cease if the UN Security Council takes measures under Chapter VII of the Charter, after having determined that the internal conflict forms a threat to international peace and security, in accordance with Article 39 of the UN Charter.[929]

In addition, the coercive nature of an intervention may not always be clear-cut. Traditionally, only *forcible* intervention was envisaged by the principle of non-intervention, focusing mainly on the territorial integrity of a State. Gradually, however, in order to protect the political independence of a State, other and more subtle forms of coercion, without the actual use of military force, were included in the concept of non-intervention.[930] Consequently, the principle of intervention is now understood to cover not only military force, but also *indirect* interference through political, diplomatic and economic means.[931] In the *Nicaragua* case, the ICJ held that

> [i]ntervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[932]

Still, the line between unlawful intervention and lawful interference is difficult to draw, and should happen on a case-by-case basis.[933] While there is general agreement that coercion is broader than 'force', scholars do not always agree on how exactly coercion is to be conceived. The Tallinn Manual 2.0 noted for instance two divergent views on the matter:

---

[927] *Ibid.*

[928] For an analysis of the principle of non-intervention in other areas than the use of force, see Jamnejad and Wood, 'The Principle of Non-Intervention'.

[929] A 'threat to peace' may include a situation of NIAC. See Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 30. For an overview of practice, see Franck, *Recourse to Force*, 40–44.

[930] Kunig, 'Prohibition of Intervention', para. 6.

[931] As illustrated by Chapter I and Chapter II, Article 1 of the UNGA Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, UN Doc. A/RES/29/3281 (12 December 1974). For examples of this type of coercion, see Kunig, 'Prohibition of Intervention', paras 22–27. On economic coercion, see Antonios Tzanakopoulos, 'The Right to Be Free from Economic Coercion II. Case Studies', *Cambridge Journal of International and Comparative Law* 4 (2015): 616–33. On political coercion through premature recognition of independence, see Olivier Corten, 'Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du sud et à l'Abkhazie', *Revue générale de droit international public* 112, no. 4 (2008): 721–59.

[932] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 205.

[933] Refusing or terminating the supply of aid to developing countries is arguably not considered to be a breach of the non-intervention principle. See Kunig, 'Prohibition of Intervention', para. 26, who bases this observation on Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 276.

> According to the majority [of experts consulted for the Manual], the intervening act must be *designed* to influence outcomes in or decisions on matters reserved to the sovereign prerogatives of the target State. In the opposite view, a few experts considered that is was already sufficient that the act had the *effect* of depriving the target State of control over the matter at issue.[934]

Nevertheless, the experts agreed on the fact that '[c]oercion does not need to be direct to amount to an unlawful intervention, indirect operations are also prohibited.'[935] As such, the principle of non-intervention potentially covers a wide range of acts in support of a party to an armed conflict, including the four categories identified for this study, as long as they involve coercion and impact the *domaine réservé* of a State. Indeed, as was already highlighted above[936], the Court indicated in the *Nicaragua* case that 'assistance to rebels in the form of the provision of weapons or logistical or other support […] may be regarded as a threat or use of force, or *amount to intervention* in the internal or external affairs of other States'[937] One could derive from the wording 'and other support' that there is no threshold for the principle of non-intervention. In contrast with the use of force, there is no further case-law[938] or doctrine that seems to contradict this broad interpretation. Indeed, the Friendly Relations Declaration also specifies that

> no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[939]

Again, a very broad range of supportive activities is included in the principle of non-intervention. Nevertheless, there is a caveat. The wide scope in the Friendly Relations Declaration only refers to support provided to activities 'directed towards the violent overthrow of the regime of another State or [interfering] in civil strife in another State.' It cannot be concluded from this paragraph whether the same broad interpretation can be applied to acts in support of an entity with different goals. Similarly, the ICJ hinted at a more restrictive interpretation when it determined that 'if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose *purpose is to overthrow the government* of that State, that amounts to an intervention by the one State in the internal affairs of the

---

[934] Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 319.

[935] The Manual continues with the following example: 'an indirect cyber intervention could for instance consist of the transmission of a cyber weapon to a rebel group engaged in a conflict against another State. In this case, the intervening State would not be conducting the cyber operations itself but it will still contravene to the principle of non-intervention.' See *ibid.*

[936] The same quote is important when discussing the threshold for the use of force, see *supra* Section 3.1.

[937] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, 195.

[938] As will be explained in further detail below, in the same *Nicaragua* case the ICJ narrowed down the definition of the use of force by excluding the mere financing of armed groups from its scope. See Section 4.1.3.A.

[939] UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).

other'.[940] What can be concluded from the Friendly Relations Declaration and the ICJ case-law is that the principle of non-intervention imposes no specific threshold for prohibited support to insurgents who aim to overthrow a government.

Further guidance on the range of supportive acts that is prohibited by the principle of non-intervention can be found in the Wiesbaden Resolution on 'The Principle of Non-Intervention in Civil Wars' of the *Institut de Droit International*, which sums up a very broad range of activities[941]:

> a) sending armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out;
>
> b) drawing up or training regular or irregular forces with a view to supporting any party to a civil war, or allowing them to be drawn up or trained;
>
> c) supplying weapons or other war material to any party to a civil war, or allowing them to be supplied;
>
> d) giving any party to a civil war any financial or economic aid likely to influence the outcome of that war, without prejudice to the exception provided for in Article 3 (b);
>
> e) making their territories available to any party to a civil war, or allowing them to be used by any such party, as bases of operations or of supplies, as places of refuge, for the passage of regular or irregular forces, or for the transit of war material. The last mentioned prohibition includes transmitting military information to any of the parties;
>
> f) prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question.

The *Institut de Droit International* is an institution comprised of numerous experts in the field of international law, but it is not a State. Therefore, resolutions adopted by the *Institut* do not (directly) offer 'general practice' as one of the two components of customary international law. At most, resolutions of the *Institut* constitute '[t]eachings of the most highly qualified publicists of the various nations [which] may serve as a subsidiary means for the determination of rules of customary international law.'[942] It is questionable however whether this is the case for the

---

[940] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 241.

[941] IDI, Session of Wiesbaden 1975, The Principle of Non-Intervention in Civil Wars, Resolution, 14 August 1975, Article 2(2).

[942] See Draft Conclusion 14 of the ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10' (to appear in the *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two), 150. In its commentary, the ILC notes that

> [t]he output of international bodies engaged in the codification and development of international law may provide a useful resource in this regard. Such collective bodies include the Institute of International Law (*Institut de droit international*) […]. The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others.

Ibid., 151.

entire Wiesbaden resolution. Not all passages of the resolution reflect a consensus among the experts of the *Institut*, as discussed below.[943]

The list quoted above is based on the Report prepared for the Rome meeting of the *Institut* in 1973 by Schindler, who sought inspiration in the law of neutrality law.[944] Based on this resolution, nearly all possible supportive acts in support of a party to a non-international armed conflict would be a violation of the principle of non-intervention. Note that the consistent reference to 'any party' is highly disputed, as will be discussed below. Even acts supporting the supportive acts are prohibited by this resolution: see sections a, b and c of Article 2(2), which refer to 'allowing' the forces to be sent or trained or weapons to be supplied. Importantly, any financial or economic aid 'likely to influence the outcome of [the] war' is prohibited. Even though Jessup warned that this formulation is 'susceptible of broad interpretation which could lead to disagreements', it was kept unchanged in the final resolution.[945] The activities listed in Article 2 of the Resolution were unanimously adopted by the experts of the *Institut*.[946] The discussion in Wiesbaden focused on the addressee of the support (as discussed below), rather than on the supportive acts. Therefore, the list quoted above correctly reflects the scope of the non-intervention principle. It can be concluded that there is no threshold for the principle of non-intervention. Any type of supportive act that may affect the outcome of the conflict potentially breaches the non-intervention principle – provided that it is exercised with coercion, of course. Since the coercive element of the principle of non-intervention no longer requires the use of force, it does not substantially limit the scope of the principle.

Conversely, the only three remaining exceptions to the principle of non-intervention in civil war are (i) humanitarian assistance[947], (ii) assistance that is 'prescribed, authorized or recommended by the United Nations' and (iii) 'technical or economic aid which is not likely to have any substantial impact on the outcome of the civil war'.[948] Unfortunately, both humanitarian aid and 'substantial impact on the outcome of the civil war' remain undefined. Neutrality law cannot offer much clarification in this regard. In fact, in the original proposal by Schindler, the provision of *all* 'war material, financial or economic aid' was prohibited.[949] The limitation that the aid is only prohibited insofar as it substantially influences the outcome of the

[943] See note 960.
[944] Dietrich Schindler, 'IDI, Session de Rome, 1973, 8ème Commission, Les notions de guerre civile et d'intervention', *Annuaire de l'Institut de Droit International* 55 (1973): 476ff.
[945] See 'Observations de M. Philip C. Jessup' in Dietrich Schindler, 'Le Principe de Non-intervention dans les Guerres Civiles', *Annuaire de l'Institut de Droit International* 56 (1975): 155.
[946] *Ibid.*, 414.
[947] See also Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 242: 'There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.'
[948] IDI, Session of Wiesbaden 1975, The Principle of Non-Intervention in Civil Wars, Resolution, 14 August 1975, Article 3.
[949] Schindler, 'IDI, Session de Rome, 1973, 8ème Commission, Les notions de guerre civile et d'intervention', 477.

conflict was thus added at a later stage, even though it remains unclear how such an impact should be assessed.

The question remains whether the same broad interpretation applies if support is provided to a government fighting insurgents on its own territory, or to a rebel group that is not fighting the regime, but another rebel group within the same State.

First, with regard to support provided to rebel groups not aiming to overthrow the government, no ICJ case has dealt with such support. The Friendly Relations Declaration is equally silent in this regard. Therefore, such support can only be prohibited if it fulfils the two constitutive elements of non-intervention: coercion and *domaine réservé*. It is however unlikely that support in favor of a rebel group – even if that rebel group does not fight the government directly – falls *beyond* the scope of the principle of non-intervention. Certainly if the group is fighting on a State's territory, one can easily argue that supporting that fight affects the domestic affairs of the State in question: its internal security is in danger. Nevertheless, State practice is inconclusive on this point. In recent conflicts, States have provided extensive assistance to rebel movements with the justification that they were fighting against a terrorist group. Thus, in Syria, for example, so-called 'moderate' rebel movements have received extensive military support from various Middle Eastern countries, European States, the United States in the form of weapons, training, defensive equipment, etc.[950] The scope of the support indicates that the supporting States do not consider their actions to be a violation of international law. Syria, in contrast, has repeated on multiple occasions that the support provided to the rebels violates its sovereignty and the UN Charter.[951] Other UN Member States have stressed that the fight against terrorism should be conducted in accordance with the UN Charter.[952]

The former question, whether the principle of non-intervention does not only prevent States from supporting armed groups, but also governments involved in a non-international armed conflict, has already led to lengthy debates in doctrine. On the one hand, textually, the principle of non-intervention does not seem to limit itself to support provided to non-governmental entities only. Therefore, supporting *any* side in a non-international armed conflict would be prohibited by the principle of non-intervention.[953] This view is reflected in the above-quoted Wiesbaden Resolution on 'The Principle of Non-Intervention in Civil Wars' of the *Institut de Droit International*, which prescribes that '[t]hird States shall refrain from giving assistance to

[950] See Luca Ferro and Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties', *Chinese Journal of International Law* 17, no. 1 (2018): 22–27.
[951] For an overview of the plethora of letters written by Syria to the UNSC in this regard, see Tom Ruys, Nele Verlinden and Luca Ferro, 'Digest of State Practice 1 January – 30 June 2015', *Journal on the Use of Force and International Law* 2, no. 2 (2015): 283–85; Ruys and Verlinden, 'Digest of State Practice 1 July – 31 December 2014', 135.
[952] See for instance statements by China and Chile, UNSC Verbatim Record, UN Doc. S/PV.7565, 20 November 2015, 3 and 7.
[953] This is also the view defended by Doswald-Beck, see Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 251.

parties to a civil war which is being fought in the territory of another State.'[954] In addition, if one considers the right of self-determination of peoples (by some recognized as a *jus cogens* norm)[955] as an element of the internal affairs of a State, supporting a government against a people striving for self-determination would entail a violation of the non-intervention principle.[956]

On the other hand, it has also been argued that the principle of non-intervention aims to protect the sovereign rights of a State, not the rights of the people in that State.[957] The right to self-determination of peoples is thus not a part of the *domaine réservé* of a State. It is therefore submitted here that supporting a government while the people of a State is fighting against that government for its independence, is not prohibited under international law because of the principle of non-intervention, but because of the hierarchically higher *jus cogens* norm of the right to self-determination of peoples. The potential effect of the norm should not, however, outlaw support to a government on the request of that government as a violation of the principle of non-intervention.[958] According to Gray and Shaw, this is the predominant view in State practice.[959] The passage of the Wiesbaden Resolution suggesting the contrary indeed did not reflect a consensus among the members of the *Institut de Droit International*.[960]

In sum, the types of support discussed in this study are all likely to be considered violations of the principle of non-intervention.[961] Moreover, if we find that the supportive acts qualify as a

---

[954] IDI, Session of Wiesbaden 1975, The Principle of Non-Intervention in Civil Wars, Resolution, 14 August 1975, Article 2(1) [emphasis added].

[955] Stefan Oeter, 'Self-determination', *The Charter of the United Nations: A Commentary*, 3rd ed., vol. I (Oxford: Oxford University Press, 2012), 316. The ICJ has identified the right to self-determination as an erga omnes norm, see Case concerning East Timor (Portugal v. Australia), 1995 ICJ Reports 90 (ICJ, 30 June 1995), para. 29.

[956] Among those who have argued along this line, see Brownlie, *International Law and the Use of Force by States*, 327; Quincy Wright, *The Role of International Law in the Elimination of War* (Manchester: Manchester University Press, 1961), 61.

[957] See for instance the European Court of Justice, which held that '[the principle of non-intervention] is set out for the benefit of sovereign States, and not for the benefit of groups or movements.' Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union (supported by the Netherlands, the United Kingdom and the European Commission), No. Joined Cases T-208/11 and T-508/11 (CJEU, General Court, 16 October 2014), para. 69.

[958] The 2011 Rhodes Resolution of the Institut de Droit International confirmed this principle for cases *below the scope of non-international armed conflict*, see IDI, Session of Rhodes 2011, Present Problems of the Use of Force in International Law, Military assistance on request, Resolution, 8 September 2011. The resolution did however not pronounce on intervention *during* a NIAC.

[959] Shaw, *International Law*, 1152. By way of example, see US, DoD Law of War Manual, para. 17.18.3. which reads: 'International law does not prohibit States from assisting other States in their armed conflicts against non-State armed groups.' According to Gray, however, State practice shows that '[i]f there is a civil war rather than mere internal unrest, it has come to be accepted that there is a duty not to intervene, even at the request of the government, in the absence of UN or regional authorization. But even if there is a civil war, states may justify forcible intervention at the request of the government on the ground that there has been prior foreign intervention against the government.' Gray, *International Law and the Use of Force*, 92.

[960] One group argued that there is a traditional rule which allows third States to help governments confronted with an insurgency. Another group argued that this right was limited by the right to self-determination. Yet a third group argued that no assistance to any side of the conflict is allowed, because both fighting parties should be treated equally. See Schindler, 'Le Principe de Non-Intervention Dans Les Guerres Civiles', 127.

[961] What would not qualify as a violation of the principle of non-intervention, is being unable to prevent the territory from being used by other actors to violate the principle *vis-à-vis* third States. This is an interesting

use of force or even an armed attack, then *a fortiori* they also qualify as violations of the principle of non-intervention. In contrast with committing a use of force or an armed attack, violating the principle of non-intervention does not trigger any specific *jus ad bellum* consequences. Of course, an international norm will have been violated by providing support, making consequences derived from general public international law (such as countermeasures) possible. Because of the absence of concrete *jus ad bellum* consequences, and because of the already broad scope of the principle of non-intervention, covering supportive acts, there is no need to further inquire whether there are alternative ways for supportive acts to meet the threshold of the principle of non-intervention. This exercise will however be conducted for the thresholds of 'use of force' and 'armed attack' in Section 4. Before turning to that analysis, this Section will be concluded by providing examples of recent State practice illustrating the broad scope of the principle of non-intervention.

3.3.2. Recent examples of (non-)violations of the principle of non-intervention

States regularly refer to the principle of non-intervention, occasionally by using the related notion of 'non-interference'.[962] In relation to the already cited conflict in eastern Ukraine and the Russian annexation of Crimea in 2014, States have denounced Russia's actions not only as an unlawful use of force or an armed attack, but also as a violation of the principle of non-intervention.[963] Similarly, regarding to the already discussed international coalition in support of the Yemeni President Hadi against the Houthi rebels, launched in the spring of 2015, the Iraqi Minister of Foreign Affairs held that 'bringing external forces is not right', as it was the position of Iraq to 'resort to non-interference in Yemen's internal affairs.'[964]

In relation to yet another internal conflict mid-September 2014, Libya accused Qatar and Sudan from interfering in Libyan internal affairs by sending military planes loaded with weapons and ammunition, destined for rebels, to airports in Libya.[965]

---

observation in light of the currently advanced 'unable or unwilling theory' as a basis for action in self-defence, see *infra* Section 4.1.2.B.

[962] See also note 919.

[963] See for instance the statement by Australia: 'Russia's actions are undermining the right of the Ukrainian people to choose their own future, and are also contrary to international law. They contravene the Charter of the United Nations […]; the 1994 Budapest Memorandum; the 1975 Helsinki Final Act; and the 1997 bilateral Treaty of Friendship, Cooperation and Partnership between the Russian Federation and Ukraine. Under those agreements, there is a specific commitment to respecting the territorial integrity of Ukraine, as well as to non-intervention and to refraining from the use or threat of use of force.' UNSC Verbatim Record, UN Doc S/PV.7125, 3 March 2014, 10. Similarly, referring to the 'principles of non-interference in the internal affairs of any country', China expressed its concern regarding the situation in Ukraine. *Ibid.*, 9. For further examples, see Ruys and Verlinden, 'Digest of State Practice 1 January – 30 June 2014', 333.

[964] Ministry of Foreign Affairs Iraq, Foreign Minister: The Summit Needs to Exert Efforts to Find Proper Solution to the Yemeni Issue, 29 March 2015, http://www.mofa.gov.iq/en/news/foreign-minister-the-summitneeds-to-exert-efforts-to-find-proper-solution-to-the-yemeni-issue.

[965] Feras Bosalum and Ayman al-Warfalli, 'Libyan PM Accuses Qatar of Sending Planes with Weapons to Tripoli', *Reuters*, 14 September 2014, https://www.reuters.com/article/us-libya-security-qatar/libyan-pm-accuses-qatar-of-sending-planes-with-weapons-to-tripoli-idUSKBN0H90W220140914.

In June 2016, Russia and China issued a joint declaration on the promotion of international law. Paragraph 4 of the declaration mentions two examples of violations of the principle of non-intervention:

> [Russia and China] fully support the principle of non-intervention in the internal or external affairs of States, and condemn as a violation of this principle any *interference* by States in the internal affairs of other States with *the aim of forging change of legitimate governments*. [Russia and China] condemn *extraterritorial application of national law by States not in conformity with international law* as another example of violation of the principle of non-intervention in the internal affairs of States.[966]

In June 2017, a massive ransomware campaign, referred to as WannaCry, affected organizations worldwide. While the author of the campaign remained uncertain, researchers of the NATO Cooperative Cyber Defence Centre of Excellence argued in line with the Tallinn Manual 2.0, that

> '[i]f attribution to a particular state can be established in this case, the legal qualification would be similar to some earlier cases linked to states: the WannaCry campaign would not reach the threshold of armed attack or use of force, nor could it be qualified as prohibited intervention, due to the lack of a coercive element with respect to a government. […] However, government systems were also affected by the operation (Russian Ministry of Interior systems were compromised), which could be considered as interference with 'inherently governmental functions.'[967]

Thus, while the coercive element is still required for a violation of the principle of non-intervention (thus excluding some forms of cyber influence), from this short overview of recent State practice its seems that supportive acts (such as the provision of weapons) would easily meet the requisite threshold for the principle of non-intervention.

3.4. Intermediate conclusion

An analysis of the different points of view regarding the appropriate thresholds under *jus ad bellum* reveals that there is no generally agreed position on the exact threshold of either the use of force, armed attack or the principle of non-intervention. The various approaches and the stakes at hand can be summarized as follows:

First, there is what I would call the *double gravity-approach*. This entails that the principle of non-intervention, the use of force and an armed attack operate as concentric circles going from

[966] Russian Federation and People's Republic of China, The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, para. 4, http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698 [emphasis added].

[967] CCDCOE, WannaCry Campaign: Potential State Involvement Could Have Serious Consequences, 16 May 2017, https://ccdcoe.org/news/2017/wannacry-campaign-potential-state-involvement-could-have-serious-consequences/.

the broadest (non-intervention) to the smallest (armed attack) range of possibilities. A gravity is required for an act to be an unlawful use of force, and only the most grave uses of force are armed attacks – hence the 'double gravity approach'. Under this scenario, the option to use self-defence is limited to the gravest uses of force. The consequences related to a (serious) breach of a peremptory norm are limited to those acts that reach, as a minimum, the gravity threshold of an unlawful use of force. This is the view that is defended by the ICJ-case law. Overall it seems to be the position taken by most scholars.

Second, there is the *unified gravity-approach*. This view implies that the same gravity threshold applies to the use of force and an armed attack.[968] There is thus no difference, under this view, between the two. As soon as a certain gravity threshold is reached, a reaction in self-defence is warranted. Under both this approach and the previous one, neither of the four categories of supportive acts would generally qualify as a use of force or an armed attack. A victim State may thus not respond in self-defence against the supporting State. In addition, as the supporting State will not have committed a *jus cogens* breach, the secondary consequences of *jus cogens* breaches will not be applicable. The support would, however, still remain unlawful, triggering possible countermeasures.

Third, there is the *single gravity approach*. Under this view, there is only a gravity threshold for an armed attack. A *de minimis* threshold for the use of force is rejected. The use of force would thus be a violation of the principle of non-intervention which involves armed force – even minimal force. A *de minimis* threshold leaves the door open for considering supportive acts as unlawful uses of force. While this approach would still exclude a response in self-defence, supportive acts could be qualified as a violation of the *jus cogens* prohibition of Article 2(4). This approach is therefore the 'safest' from the collective security perspective: the scope of lawful force in self-defence is kept narrow, while the prohibition of using force is considered as broad as possible, even including supportive acts. The consequences linked to a *jus cogens* violation would also apply to the support provided. It should be noted however that this approach is only the safest insofar the possibility of forcible countermeasures against 'low-level' uses of force is excluded – as done by the vast majority of scholars.

Fourth, to make the picture complete, there is the *no gravity approach*, under which an armed attack or a use of force does not require an act of a certain gravity. Violating the principle of non-intervention by using force could therefore, regardless the gravity, trigger both the right to self-defence and the consequences of *jus cogens* violations.

It speaks for itself that the lower the thresholds are set, the more likely supportive acts could be considered to reach the thresholds. However, as the majority view still defends a double gravity threshold (one for the use of force and a higher one for armed attack), supportive acts would at first sight fall outside the scope of these two *jus ad bellum* norms. Nevertheless, even if one

[968] See for instance the argument made by Green: Green, *The International Court of Justice and Self-Defence in International Law*, 162.

applies a gravity threshold (for either armed attack or the use of force, or both), as will be argued in the next Section, there are ways through which supportive acts can still meet the *jus ad bellum* thresholds.

4. Supportive acts and *jus ad bellum* thresholds

If there is no gravity requirement for either the use of force or an armed attack, supportive acts would easily themselves be considered as uses of force or armed attacks. As explained in the previous paragraphs, the predominant view is that a gravity is required. If one accepts that the use of force requires a certain gravity, and that armed attack requires an even higher gravity, it is difficult to imagine that the supportive acts which form the focus of this study are considered as use of force or armed attacks. Nevertheless, there are still two possibilities which do not rule out such a consideration: the indirect use of force or armed attack (Section 4.1) and the accumulation of events theory (4.2).

4.1. Indirect use of force or armed attack

This Section explores to what extent the supportive acts by a State can be considered as indirect uses of force or armed attacks. 'Indirect use of force' or 'indirect armed attack' in this Section will refer to support provided by a State to a use of force or an armed attack committed by another State or an armed group. I will assume that another actor (be it a State or an armed group) has committed an act that, based on its gravity, could be classified as a use of force or an armed attack. From this perspective, the starting point of this Section is similar to the one used for the Section on the support-based approach in Chapter 3[969]: I assume that a certain threshold (in case of the support-based approach that of a non-international armed conflict, in this Section that of 'armed attack' or 'use of force') has been met by the principal actor, and assess whether acts in support of the primary act should be held against the same standards.

Importantly, it should be noted that we are not discussing the question as to whether or not a use of force or an armed attack can be committed by a non-State actor.[970] It suffices to note that both in doctrine and in State practice there is a growing acceptance of this possibility[971], while

[969] See Chapter 3, Section 4.2.2.

[970] On this issue, see *inter alia* Lubell, *Extraterritorial Use of Force against Non-State Actors*, 30–36, concluding that 'even in historical terms, the concept of self-defence as a result of attacks by non-state actors has been recognized by states.' *Ibid.*, 35. See also Dinstein, *War, Aggression and Self-Defence*, 2011, 227–30. For a good overview of the different positions in doctrine, ranging from the restrictive, state-centered paradigm to the expansionist view and alternative conceptual interpretations, see Dirk Peters and Wolfgang Wagner, 'Between Military Efficiency and Democratic Legitimacy: Mapping Parliamentary War Powers in Contemporary Democracies, 1989–2004', *Parliamentary Affairs* 64, no. 1 (2011): 175–92.

[971] See for instance the recent judgment in the Ramstein case before the North Rhine-Westphalia Higher Administrative Court in Germany, concluding that '[i]n view of this broad practice in the international community, it can be assumed that self-defense law today is no longer limited to armed attacks by states, but can also be given to non-state aggressors.' Judgment from 19 March 2019, 4 A 1361/15, Oberverwaltungsgericht NRW, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00, para. 318. The International Law Association notes that 'there is

the case-law of the ICJ remains conservative in this regard.[972] Instead of focusing on the principal actor, we focus on the supportive acts provided by a State and whether or not they constitute a use of force or an armed attack.

Having clarified this baseline, I will now turn to the question whether *acts in support of* a use of force or armed attack can be considered as uses of force or armed attacks themselves.

4.1.1. Support in the form of control

A. Controlling armed groups: a false indirect character

A first possibility for a State to commit a use of force or an armed attack solely by virtue of supportive acts is by having such a control over the actors that actually commit the use of force or armed attack that those actors are equated to the State. As the acts of the primary actor (the armed group) are considered to be acts of the controlling (and supporting) State, this results in a 'false' indirect character: as control will be a reason for attribution, the conclusion will be that a use of force or an armed attack has been committed directly by the supporting State.

The exact degree of control that is required for such attribution to take place remains subject to debate. The question of attribution of behavior of private individuals to a State for the purposes of State responsibility has already been explained in Chapter 1. To recall, the general rule is that a State is only responsible for conduct of its own organs. In addition, a State can be held responsible for internationally wrongful acts committed by private individuals if the acts can be attributed to the State.[973] In Chapter 1, I have outlined the various ways of attribution, with a special focus on the case-law of the ICJ (requiring a 'complete dependency' or 'effective control' over the specific acts) and Article 8 ARSIWA (requiring instructions, direction or control over the wrongful acts). I concluded that even though there might be difference in wording used by the ICJ and the ARSIWA, current international law would appear to require a high degree of control for attribution to take place. In addition, in Chapter 3, I shed light on the criterion of 'overall control' developed by the ICTY when dealing with the issue of internationalization of a non-international armed conflict. I argued that the criterion used for

growing recognition – including through State practice – that there are certain circumstances in which a State may have a right of self-defence against non-state actors operating extraterritorially and whose attacks cannot be attributed to the host State.' See ILA, Committee on the Use of Force, 'Final Report on Aggression and the Use of Force', 15. In addition to the accompanying footnotes in the ILA report, see also Trapp, who argues that State practice after 9/11 shows that States have accepted the right to use defensive force in response to terrorist attacks, limited however to 'force exclusively targeting non-State terrorist actors'. See Trapp, *State Responsibility for International Terrorism*, 2011, 54.

[972] In the *Wall* Advisory Opinion, the Court still explicitly ruled out this option: see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Reports, para. 139. In the *Armed Activities* case, the Court avoided the issue by stating that 'the Court [had] no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'. Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 ICJ Reports, para. 147.

[973] Article 2 ARSIWA.

conflict classification under *jus in bello* may differ from that of attribution for the purposes of State responsibility.

The question that is important in this Chapter is whether under *jus ad bellum*, the general attribution rules of the State responsibility framework may be used to assess when a use of force or an armed attack by an armed group is considered as committed by a State because of the latter's control over the former, or whether other, special rules apply in that case. To recall, Article 55 ARSIWA explicitly foresees in this latter option by determining that '[the ARSIWA] do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.'

The threshold of 'use of force' included in Article 2(4) indicates the boundary of a prohibition. If the prohibition on the use of force is violated, an internationally wrongful act is committed. It is therefore logical that the general attribution rules of the law of State Responsibility would apply in case a State controls the acts of an armed group that uses force. Article 2(4) of the UN Charter, which consolidated the prohibition on the use of force in the collective security system, does not contain an indication of a special attribution rule that would replace the general framework. Control by a State over an armed group should therefore be assessed under the rules included in the ARSIWA, in particular its Article 8, and the ICJ case-law.

The threshold of 'armed attack', on the other hand, indicates the boundary of a right: the right to individual or collective self-defence, as enshrined in Article 51 of the UN Charter.[974] Here too, Article 51 does not provide any further guidance regarding the attribution of acts by private individuals to a State. Nollkaemper argues that 'in the cases of self-defence and state responsibility the question is the same: in both cases it needs to be determined whether a particular act is indeed an act of a state.'[975] While the general rules on attribution of the law on State responsibility can indeed be used for this purpose, this is not as self-evident as for the prohibition on the use of force. If one accepts that the Definition of Aggression can serve as a basis for defining the scope of 'armed attack'[976], then Article 3(g) should be considered. That article closes the (non-exhaustive) list of examples of 'acts of aggression' with

> [t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

[974] See however the confusing language of the ICJ in the *Nicaragua* case, when the Court argues that 'in customary law, the *prohibition of armed attacks* may apply to […]'. Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 195 [emphasis added].
[975] Nollkaemper, 'Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility', 151.
[976] On this point, see *supra* Section 3.2.2.

Some commentators have argued that Article 3(g) serves as a *lex specialis* to the general rules on attribution[977], while others contend that Article 3(g), instead of attributing an act of aggression to a State, defines an act of aggression itself.[978] The difference between these two approaches is of limited relevance: if Article 3(g) is an attribution rule, the sending State will only have committed aggression if the armed group has conducted a grave act of aggression. If the armed group was instructed or send to another State to commit certain acts, but refrains from carrying them out, there is no conduct to be attributed to the sending State. If Article 3(g) is not a rule of attribution, but immediately defines an act of aggression, the question whether or not the armed group has materialized an act of aggression would at first sight seem less relevant: the fact that a State gave instructions to do so, or sent an armed group to commit certain grave acts of aggression, suffices to conclude that the State has committed an act of aggression. In the latter instance, however, the gravity threshold would probably not be met (as there is not actual aggression, merely the instructions for such acts), thus the end conclusion would be that the State has not committed aggression.

The latter part of Article 3(g) can be read in two different ways. Either the 'substantial involvement' is linked to the grave acts committed by the armed group, thus strongly resembling the support without control as discussed in Section 4.1.2.A below. The second option is however that 'substantial involvement' should be read as connected to the 'sending' of armed groups, thus implying, as the 'sending' does, an element of control.[979] It can be questioned whether the threshold of 'sending' differs from the 'complete dependency' or 'effective control'-standards as advanced by the ICJ[980], or from the 'instructions, directions or control' required by Article 8 ARSIWA. In practice, the variety in wording will perhaps not make a difference. In the *Nicaragua* case, the ICJ had to answer the question whether the US support to the actions of contras against the Nicaraguan government consisted an armed attack by the US against Nicaragua. After referring to Article 3(g) of the Definition of Aggression, the Court held that it saw

---

[977] Trapp, *State Responsibility for International Terrorism*, 2011, 27; Corten, *The Law Against War*, 468. See however Ryngaert, who holds that Article 3(g) 'is not a rule of attribution' (Ryngaert, 'State-Responsibility and Non-State Actors', 171).

[978] Becker, *Terrorism and the State*, 177: '[T]he language of the provision and numerous other sources suggests that it is the substantial involvement or sending *itself* that is the 'act of aggression', presuming of course that the armed bands have subsequently engaged in armed force of sufficient gravity.'

[979] According to Kress, the French version supports the latter interpretation, but I would argue it equally leaves open both options. The French version of Article 3(g) reads:

> L'envoi par un Etat ou en son nom des bandes ou de groupes armés, de forces irrégulières ou de mercenaires qui se livrent à des actes de force armée contre un autre Etat d'une gravité tell qu'ils équivalent aux actes énumérés ci-dessus, ou le fait de s'engager d'une manière substantielle dans une telle action.

See UNGA Res. 3314 (XXIX), Définition de l'agression, UN Doc. A/RES/3314(XXIX) (14 December 1974); Kress, 'The State Conduct Element', 448.

[980] Kress even suggests that the standard for 'substantial involvement in the sending' should be that of 'overall control' as developed in the ICTY case-law, based on the fact that the ICJ *Nicaragua* judgment only discussed the passage related to the 'sending' of armed groups. See Kress, 'The State Conduct Element', 449. Arguing against this is Kampto, referred to by Kress in note 185: see *ibid.*

> no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.[981]

The ICJ thus confirmed that if a State sends an armed group to another State, the attack carried out by that group actually is an armed attack by the sending State. The Court did not specify what it meant with 'sending', but it did clarify that the connection between the US and the contras, consisting of 'assistance to rebels in the form of the provision of weapons or logistical or other support', was not sufficient.[982] Arguably, 'sending' can also include controlling the acts of an armed group that is already physically present on the victim's State's territory.[983] Article 3(g) of the Definition of Aggression merely confirms – though does not clarify – the existing rules of the law on State Responsibility.

The conclusion here is thus the same as in Chapter 1 on State responsibility: it seems that the supportive acts identified for this study could be an indication of State control over an armed group, but are insufficient to establish such situation by themselves. If a State allowed its territory to be used, provided logistic support including weapons, shared intelligence information or trained members of an armed group that subsequently attacked another State, the supporting State will still not be considered as having 'sent' those members to the victim State, which under Article 3(g) Definition of Aggression would be equal to an act of aggression. Similarly, as submitted already in Chapter 1, it would be difficult to argue that such supportive acts lead to a 'complete dependency' or 'effective control', the two criteria developed in the ICJ case-law, to lead to attribution of responsibility for an unlawful use of force. Consequently, unless there are other ways to assess such forms of support (as discussed below, Section 4.1.2.A), they will not trigger sufficient control over an armed group so as to turn the use of force or armed attack by an armed group into a State's own act.

B. Controlling another State: a rare occurrence

As discussed in Chapter 1, a State can be held responsible for the acts of another State if the former exercised control or direction over the latter (Article 17 ARSIWA).[984] Similarly, if the organ of the latter State was voluntarily put under the 'exclusive direction and control' of the

[981] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 195.
[982] *Ibid.*
[983] Arguing the contrary, see Kress, 'The State Conduct Element', 448.
[984] See Chapter 1, Section 1.

former, Article 6 ARSIWA allocates responsibility to the controlling State. This theoretical bar of 'exclusive direction and control' will however rarely be met in practice.

In the Introduction, the scope of this study was limited to support that is provided on a voluntary basis.[985] In the military field, State cooperation frequently takes the form of 'embedding' personnel from one State into the armed forces of another. Loaning personnel to another State allows for a fluent transfer of expertise and strengthens the alliance between the involved States. In return, the loaned personnel receives practical training and experience by joining the daily operations of the receiving State. To a great extent, the embedded personnel operates under the control of the latter State. Importantly, this short sub-Section discusses the *jus ad bellum* consequences of controlling personnel voluntarily put at the State's disposal, such as embedded personnel. It does not discuss the consequences of embedding personnel from the perspective of the original State. The latter can be considered as a form of support (for instance logistical support) close to what is discussed in the sub-Section 4.1.3.B.

By analogy with what has been argued for control over armed groups, if control over organs of another State triggers State responsibility, it also triggers the consequences attached to the *jus ad bellum* thresholds of use of force and armed attack. Nevertheless, the situation whereby a State controls another State differs from the situation whereby a State controls an armed group because in the former scenario the responsibility will most likely be shared between the two States, whereas in the latter scenario the State becomes responsible for the acts of private individuals.

In practice, if embedded personnel has to operate in the context of an unlawful use of force or an armed attack, the control over that organ will always remain shared: the receiving State exercises the operational control, whereas the sending State retains the criminal jurisdiction and military disciplinary authority. Full control by a State over another State, at least if achieved with the consent of both States involved, will not occur. At most, the responsibility for wrongful acts will be shared between the sending State and the receiving/controlling State. From a *jus ad bellum* perspective, this means that two States can expect to face the consequences triggered by an unlawful use of force or an armed attack.

In the context of the Syrian conflict, for instance, the British government stated to have 'a long-standing embed programme with allies [*in casu* the US], where small numbers of UK personnel act under the command of host nations. That has been the case in Syria […].'[986] If British pilots embedded to the US armed forces carry out air strikes on Syrian territory without Syrian approval (which they did), from a *jus ad bellum* perspective Syria could not only respond in self-defence against the US but also against the UK. While this may be a consequence that is difficult and counter-intuitive to envisage if the embedded personnel concern drone pilots, it is

[985] See the Introduction, Section 3.
[986] Ministry of Defence UK, 'Defence in the Media: 18 July 2015', *Defence in the Media*, 18 July 2015, https://modmedia.blog.gov.uk/2015/07/18/defence-in-the-media-18-july-2015/.

worthwhile imagining that the embedded personnel are ground troops. If victim State C is invaded by the troops of State B, and it observes among those troops soldiers in the uniform of State A, surely it will consider itself entitled to react in self-defence against both B and A.

In sum, if a State controls organs of another State, and if those organs commit unlawful uses of force or even an armed attack, then the controlling State is likely to face the consequences of those *jus ad bellum* thresholds. However, as control is rarely exclusively shifted to a receiving State, those consequences will be shared by the sending and the receiving State.

4.1.2. Allowing territory to be used: a special category of support

Allowing territory to be used by another entity (a State or an armed group) is the first category of supportive acts that has been identified for this study. It is also a very specific type of support that merits a separate treatment in an especially devoted sub-Section for three reasons.

First, 'allowing territory to be used' by another State for the commission of an act of aggression is explicitly equated with an act of aggression by Article 3(f) of the Definition of Aggression. Whether this means that allowing territory to be used for an armed attack amounts to a separate armed attack will be discussed below, but it is remarkable that a distinct legal provision is devoted to this type of supportive act.

The second reason that distinguishes 'allowing territory to be used' from the other three categories of supportive acts discussed in the next sub-Section concerns the mental element, which can vary significantly: at one side of the spectrum, we can observe that States often grant other States the permission to permanently establish military bases on their territory. In such cases, the question still remains whether such a general permission of foreign military presence can also serve as a specific permission or approval of the actions taken by the foreign armed forces from within the host territory. On the other side of the spectrum, we find the situation in which a State or an armed group may simply use part of the host State's territory without the approval, or even without the knowledge of the latter. Such a range of possibilities for the intentional element is hard to imagine when one delivers weapons, shares intelligence or provides training: those are all supportive acts which cannot be done unwillingly. While arguably a due diligence duty rests on a State to at least know what is going on in its own territory, in practice the constant monitoring of (foreign) activities on the territory may not be an easy task. In addition, while a State may disapprove the presence of armed groups of foreign forces on its territory, it may not have sufficient resources to efficiently prevent those actors from using the territory in violation of the UN Charter, for instance by launching attacks against another State. The supportive act of 'allowing territory to be used' thus reflects a wide variety of concrete scenarios. The consequences attached to such type of support should therefore not necessarily be homogenous and may require a case-by-case approach.

A third and last reason to discuss 'allowing territory to be used' separate from the three other categories of support is that the ICJ has provided some guidance with regard to the latter three in its *Nicaragua* case, whereas the Court remained silent on 'allowing territory to be used'.

The following sub-Sections will discuss two distinct scenarios: the situation whereby a State allows another State to make use of its territory in order to commit an unlawful use of force or an armed attack (A) and the situation whereby a State allows an armed group to operate from within its territory against another State (B).

A. Allowing territory to be used by States

It frequently occurs that States have agreements to allow military bases of other States on their territory. Some of those agreements foresee in a permanent military base[987], others make *ad hoc* arrangements adjusted to the particular needs in a given situation.[988] In both instances, the territorial State, which exercises full sovereignty over its territory, has given its consent to the use of its territory by another State. However, if that other State decides to 'use' the territory of the host State without the latter's consent, or beyond the boundaries of that consent[989], it seems difficult to argue that the latter 'allowed' its territory to be used. The rare situation whereby a State's territory is *unwillingly* used by another State to carry out an armed attack against a third State thus does not fall within the ambit of the type of support identified as the first category for this study.[990] For instance, when Belgium refused to provide passage over its territory to

[987] For instance, on 12 July, China opened its first overseas military base in Djibouti, to be used for for 'escorting, peace-keeping and humanitarian aid in Africa and west Asia', in addition to 'military cooperation, joint exercises, evacuating and protecting overseas Chinese and emergency rescue' and 'jointly maintaining security of international strategic seaways.' See Ben Blanchard, 'China sends troops to open first overseas military base in Djibouti', *Reuters*, 12 July 2017, https://www.reuters.com/article/us-china-djibouti-idUSKBN19X049. According to a recent list of countries with overseas military bases provided by Wikipedia, the US has the most military bases on foreign territory. See Wikipedia, 'List of countries with overseas military bases', 11 February 2018, https://en.wikipedia.org/wiki/List_of_countries_with_overseas_military_bases.

[988] For instance, in 2017 Turkey opened a military base in Somalia in order to train the Somali forces for their fight against the Islamist armed group Al-Shabaab: Abdirahman Hussein and Orhan Coskun, 'Turkey opens military base in Mogadishu to train Somali soldiers', *Reuters*, 30 September 2017, https://www.reuters.com/article/us-somalia-turkey-military-idUSKCN1C50JH.

[989] In this regard, Article 3(e) of the Definiton of Aggression qualifies the following as an act of aggression:

> The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.

[990] A State thus arguably has to do an effort to at least be aware of the acts committed by another State that makes use of its territory. The North Rhine-Westphalia Higher Administrative Court held for instance in the *Ramstein* case (dealing with a US drone base located in Germany, from which drone attacks were carried out in Yemen) that

> [m]easures taken by the Federal Government so far regarding the use of Air Base Ramstein for US drone missions against the United States are based on the inaccurate assessment, at least in relation to Yemen, that there is no reason to doubt the international legal compliance of the missions. In this respect, there is no judgment of the Federal Government which is beyond the control of the court […]. The measures taken so far are completely inadequate to achieve the constitutional protection objective.

See Judgment from 19 March 2019, 4 A 1361/15, Oberverwaltungsgericht NRW, ECLI:DE:OVGNRW:2019:0319.4A1361.15.00, para. 555. While the case concerned violations of IHL and human rights law rather than the unlawful use of force (as Yemen consented with the US' actions, see *ibid.*, para. 223),

Germany when the latter wanted to attack France in 1914, and when German troops subsequently invaded Belgium on their way to France, Belgium could not have been said to have 'allowed its territory to be used' by Germany for an armed attack against France.[991] In such a scenario, the 'host' State will be considered as a victim of an unlawful use of force or even an armed attack, rather than the author of such acts *vis-à-vis* the third State.

The question that is relevant here is, if a State consents to the use of its territory by another State, what the consequence of such consent means for the host State if the guest State commits a use of force or an armed attack against a third State. In other words, can the supportive act of 'allowing territory to be used' be equated to a use of force or armed attack, triggering the consequences attached to those *jus ad bellum* concepts?

As for the question whether allowing territory to be used for an armed attack can amount to an armed attack itself, we can note on the one hand that, as we have indicated above in Section 3.2, an armed attack requires a certain gravity threshold.[992] Taking this gravity threshold as a starting point, it seems easily acceptable that by merely allowing a territory to be used for an attack, the territorial States has *not* committed a sufficiently grave act. From the perspective of the attacked State, however, granting another State the permission to attack from your territory will always be 'grave' – especially, as is mostly the case, when the territory was the only origin of the attack. From the victim's point of view, it would therefore not be logic nor useful to be solely allowed to respond in self-defence against the attacking State. Indeed, the crucial military infrastructure from where an attack originated will probably be located on the territory of the third State. Depending on the interpretation that one gives to the criterion of 'necessity' for an act in self-defence, under this approach one could even argue that (even though technically the victim State is entitled to respond in self-defence against the attacker), there is no need to attack the attacking State's territory since the infrastructure used for the attack is not present on the latter's territory. As a result, without permission to also attack that third State, the victim's right to self-defence becomes an empty shell. In addition, by strictly denying a right to self-defence against the State who allowed its territory to be used as a basis for an armed attack, one could inspire States to creatively circumvent the consequences of Article 51 UN Charter: instead of attacking from within a State's own territory, rendering itself a potential target in self-defence, a State could rely on another State's territory in order to exclude any potential lawful reaction by the victim of its attack.

this judgment confirms that a State cannot turn a blind eye to the potential use of its territory for wrongful acts by another State.

[991] For the official text of the German ultimatum and the reply by the Belgian government, see Germany, 'Official Text of German Ultimatum to Belgium. The Reply by Belgium.', *Current History (New York); New York* 4, no. 3 (1 June 1916): 536–537.

[992] A gravity threshold for armed attacks is accepted by defendants of what I called the double gravity approach, the single gravity approach and the unified gravity approach. See Section 3.4.

The above reasoning illustrates the risk of *not* considering the act of 'allowing territory to be used' for an armed attack as equal to an armed attack. It is thus not surprising that Article 3(f) of the Definition of Aggression precisely deals with this scenario. Article 3(f) reads:

> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State

Apart from the few remarks regarding the intentional element and the scope of 'territory' discussed below, Article 3(f) was adopted without triggering any controversy among the negotiating States.[993] Before dealing with those issues, the preliminary question should be asked as to what the exact function of Article 3(f) is. Roughly, there are three possible functions for Article 3(f): according to some, Article 3(f) does not define a separate act of aggression but rather a special form of complicity to aggression. According to others, including myself, Article 3(f) does provide an example of a specific act of aggression. Moreover, as I have indicated already and as I will further argue below, Article 3(f) can also be seen as an example of an armed attack.[994]

Some authors contend that Article 3(f) defines a form of complicity in aggression, rather than a form of aggression.[995] From the examples of State practice that both Quigley and Jackson cite in support of this claim, only very few explicitly mention 'complicity': in 1958 the USSR protested to Israel for its permission to US and British planes to fly over Israeli territory on their way to Jordan, including the accusation that Israel had 'become a direct accomplice in the aggressive actions of the United States and Britain'.[996] When Belgium and the US invaded the DRC in 1964, the UK allowed the Belgian and US troops to make use of its Ascension Island, in the Atlantic Ocean in order to launch the operation. Guinea accused the UK of complicity in aggression for this assistance.[997] In a number of other examples, States referred to a responsibility incurred on the basis of allowing territory to be used.[998] Such statements certainly do not *exclude* the conclusion that allowing territory to be used would be equated with an armed

---

[993] For an analysis of the origins of this provision, see Thomas Bruha, *Die Definition der Aggression: Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974: zugleich ein Beitrag zur Strukturanalyse des Völkerrechts*, Schriften zum Völkerrecht, Bd. 66 (Berlin: Duncker & Humblot, 1980), 262–64. For a critical analysis of the content and structure of the rule, see Jackson, *Complicity in International Law*, 137–44.

[994] I have discussed this question elaborately in Section 3.2.2. I concluded by arguing that the concepts of 'armed attack' and 'aggression', while they do not entirely overlap, are sufficiently similar in order to use the examples of Article 3 as a basis for defining the notion of 'armed attack'. Consequently, Article 3(f) arguably defines an armed attack.

[995] Quigley, 'Complicity in International Law', 86; Jackson, *Complicity in International Law*, 137–39.

[996] See Quigley, 'Complicity in International Law', 84.

[997] UNSC Verbatim Record, UN Doc. S/PV.1171, 12 October 1964, para. 8. In slightly different wording, Mali said that the UK had a 'share of responsibility' by making its territory (Ascension Island) available to Belgian troops. See *ibid.*, para. 53.

[998] For instance, when the US used UK air bases to carry out attacks on Libyan targets in 1986, both Libya and the United Arab Emirates said that in addition to the US, they held the UK responsible for the act of aggression. UNSC Verbatim Record, UN Doc. S/PV.2674, 15 April 1986, 6 and 11–12. For other examples see Quigley, 'Complicity in International Law', 83–86.

attack. In addition, as most examples predate the adoption of the Definition of Aggression, it is logic that no language similar to that of Article 3(f) was used.

While Jackson strongly criticizes the formulation of Article 3(f), suggesting it should have referred to 'complicity in aggression' or 'facilitating aggression', he fails to appreciate the importance States wanted to attach to the commission of an 'act of aggression'. The Definition of Aggression does not explicitly prohibit aggression but indeed intended to determine an important threshold under the *jus ad bellum*, namely that of Article 39 UN Charter. All the littera of Article 3 were considered as self-standing acts of aggression that could trigger the special powers of the Security Council *vis-à-vis* the perpetrating State. Such a position is also confirmed by the full inclusion of Article 3 in Article 8bis of the Rome Statute: all of the littera can potentially lead to a conviction of a crime of aggression – provided that the gravity requirements of that crime are fulfilled. A remark by Germany during the negotiations of the ARSIWA on the exact meaning of Article 3(f) confirms the view that littera (f) constitutes a separate act of aggression rather than a form of complicity. Commenting on draft Article 27 on 'aid and assistance', what would later become Article 16 ARSIWA, Germany noted that

> the German Government has some doubts as to whether this provision has a solid foundation in international law and practice. It would appear that many of the situations envisaged by the Commission and quoted as examples of aid and assistance actually refer to independent breaches of obligations under international law. For example, the action of a State allowing its territory to be used by another State for perpetrating an act of aggression as described in article 3 (f) of the Definition of Aggression *qualifies as an act of aggression and not as aiding aggression*.[999]

The ILC itself admits in its commentary to draft Article 27 that the reference to Article 3(f) of the Definition of Aggression is perhaps not fully correct. It notes that

> the wrongful act of participation by complicity is not necessarily an act of the same nature as the principal internationally wrongful act to which it pertains. The conduct of a State which supplies, for example, weapons or other means to another State in order to facilitate the commission of an act of aggression or genocide by that other State does not necessarily, and in every case, constitute conduct that can also be classified as aggression or genocide. An argument in favour of a different conclusion could be drawn from the fact that the Definition of Aggression, for example, as has been seen, also treats as an act of aggression the placing by a State of its territory at the disposal of another State with a view to aggression by the latter against a third State. It would be inadmissible, however, to generalize the idea of such equivalence […].[1000]

It is thus submitted here that Article 3(f) of the Definition of Aggression, rather than defining a form of complicity in aggression, identifies a specific type of aggression. This can be drawn

[999] ILC, 'Documents of the Fiftieth Session: State Responsibility: Comments and Observations Received by Governments', *Yearbook of the International Law Commission* II, no. I (1998): 128 [footnotes omitted, emphasis added].
[1000] ILC, 'Report of the International Law Commission on its thirtieth session: State Responsibility', *Yearbook of the International Law Commission* II, no. II (1978): 103–4.

from the ordinary meaning of the wording of Article 3(f), as well as from statements by the ILC and Germany with relation to the development of the general complicity rule in Article 16 ARSIWA. In addition, I submit that Article 3(f) also defines a type of an armed attack, capable of triggering a lawful reaction in self-defence. As argued above, the right to self-defence would become an empty shell if a victim State would not be entitled to launch an attack against the territory from which a first attack originated, even when that attack was not conducted by the territorial State. That being said, it is true that little State practice exists whereby States claim to act in self-defence against a State that has allowed its territory to be used for the purpose of an armed attack.[1001] An example of the application of Article 3(f) predating the adoption of the Definition of Aggression (and thus without any explicit reference to it) can be found in 1970, when the United States and South Vietnam invaded Cambodia, whose territory was being used by North Vietnam to carry out attacks against South Vietnam. In its letter to the UNSC, the United States mentions a violation of neutral duties by Cambodia, but nevertheless seems to base its actions on the right of collective self-defence, carefully limiting them to the presence of Vietcong troops and material on Cambodian territory.[1002] Schindler notes, after dismissing an argument based on neutrality law[1003], that 'the invasion could […] be justified by the right

[1001] When Israel attacked Iranian missile launchers located on Syrian territory in January 2019, a colonel of the Israeli Defense Forces states that 'Syria paid a price for allowing Iran to conduct attacks from its soil.' Isabel Kershner, 'Israel Confirms Attacks on Iranian Targets in Syria', *The New York Times*, 22 January 2019, https://www.nytimes.com/2019/01/20/world/middleeast/israel-attack-syria-iran.html. In a UNSC meeting, the Israeli representative said that 'Israel [held] the Syrian regime responsible for the missile that was launched against Israel from Syrian territory', without however explicitly qualifying Syria's role as an 'armed attack'. See UNSC Verbatim Record, UN Doc. S/PV.8449, 22 January 2019, 8/66.

[1002] See Letter dated 5 May 1970 from the Permanent Representation of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/9781, 5 May 1970:

> For five years North Viet-Nam has maintained base areas in Cambodia, against the expressed wishes of the Cambodian Government, These bases have been used in violation of Cambodian neutrality as supply points and base areas for military operations against the Republic of Viet-Nam. In recent weeks North Viet-Namese forces have rapidly expanded the perimeters of these base areas and expelled the remaining Cambodian Government presence from the areas. The North Viet-Namese forces have moved quickly to link the bases along the border with South Viet-Nam into one continuous chain as well as to push the bases deeper into concentrating its main forces in these base areas in preparation of further massive attacks into South Viet-Nam. These military actions against the Republic of Viet-Ram and its armed forces and the armed forces of the United States require appropriate defensive measures.
>
> […] The measures of collective self-defence being taken by United States and South Viet-Namese forces are restricted in extent, purpose and time. They are confined to the border areas over which the Cambodian Government has ceased to exercise any effective control and which has been completely occupied by North Viet-Namese and Viet Gong forces. Their purpose is to destroy the stocks and communications equipment that are being used in aggression against the Republic of Viet-Nam. When that purpose is accomplished, our forces and those of the Republic of Viet-Nam will promptly withdraw. These measures are limited and proportionate to the aggressive military operations of the North Viet-Namese forces and the threat they pose. The Unites States wishes to reiterate its continued respect for the sovereignty, independence, neutrality and territorial integrity of Cambodia.

[1003] 'These actions were justified by some authors with the argument that Cambodia had violated its neutral duty to prevent its territory from being used for war purposes by North Vietnam and the Vietcong. This argument would only have been pertinent if Cambodia had been internationally obliged to apply the law of neutrality, which presumably it was not.' Dietrich Schindler, 'Transformations in the law of neutrality since 1945', in Frits Kalshoven, Astrid J. M. Delissen, and Gerard J. Tanja (eds.), *Humanitarian law of armed conflict: challenges ahead: essays in honour of Frits Kalshoven* (Dordrecht: Martinus Nijhoff Publishers, 1991), 381. As I explain in Chapter 5, Section 3.3, I do not agree with the reason for Schindler's dismissal in the passage quoted, as in my

of self-defence, since the use of Cambodian territory in order to attack South Vietnam amounted to an armed attack in the sense of Article 51 of the Charter.'[1004]

Having established that Article 3(f) of the Definition of Aggression should be seen as an example of an armed attack, rather than merely an act of aggression or a complicity rule, we still need to explore the meaning and scope of this littera. It is grounded in the more general idea advanced by Max Huber in the *Island of Palmas* case, that State sovereignty comes with the duty to ensure that the sovereign territory is not used for harming other sovereign States.[1005] Yet, littera (f) was only included in the drafts of the Definition of Aggression at a later stage of the negotiations. The 1953 proposal by the USSR did not list 'allowing territory to be used' as an act of aggression.[1006] None of the proposals received by the Special Committee for its 1969 meeting contained such an act.[1007] The Working Group, after its meeting in August 1970, did not mention it in its conclusions either.[1008] Romania proposed to include the allowing of territory in the list of acts of aggression in 1971, presenting it as a form of indirect aggression.[1009] Precisely because of the suggested link with the highly contentious topic of 'indirect aggression' (referring to the sending of armed groups to another State, see *supra* sub-Section 4.1.1.A), this proposal was not picked up immediately. None of the proposals sent to the Special Committee for its 1972 meeting mentioned it[1010], neither did the proposal by the Working Group in the same year.[1011] The first time it appeared in a draft was in the first common proposal of 1973, where the following wording was used:

> (f) The action of a State placing its territory at the disposal of another State when the latter uses this territory for perpetrating an act of aggression against a third State with the acquiescence and agreement of the former.

---

opinion contemporary neutrality law can no longer form a lawful legal basis for the use of force between States. This is also what Schindler acknowledges one page further in his chapter.

[1004] *Ibid.*, 381–82.

[1005] Max Huber, Island of Palmas case (Netherlands, USA), 1928, Vol. II Reports of International Arbitral Awards 829 (Permanent Court of Arbitration, 1928), 839: 'Territorial sovereignty […] involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.'

[1006] UNGA, 'Report of the Special Committee on the Question of Defining Aggression. 24 August - 21 September 1953', 13.

[1007] UNGA, 'Report of the Special Committee on the Question of Defining Aggression. 23 February - 3 April 1969' (New York, 1969), 4–10.

[1008] UNGA, 'Report of the Special Committee on the Question of Defining Aggression. 13 July - 14 August 1970' (New York, 1970), 63–65.

[1009] 'With regard to the question of indirect aggression, [the Romanian] delegation felt that it should be sated that the act of organizing and supporting armed bands of mercenaries, terrorists or saboteurs and the act of inciting, assisting or participating in internal struggles or subversive activities were acts of aggression: *the same applied to cases where a State made its territory available to another State so that the latter could commit aggression against a third State*.' [emphasis added] See UNGA, 'Special Committee on the Question of Defining Aggression, Summary Records of the 79th to 91st Sessions, 1 February - 5 March 1971', 6 July 1971, 68.

[1010] UNGA, 'Report of the Special Committee on the Question of Defining Aggression. 31 January - 3 March 1972' (New York, 1972), 7–12.

[1011] *Ibid.*, 14–15.

The sudden inclusion of littera (f) did not meet much resistance among States. In fact, almost none of the States commented on this newly added act of aggression.[1012] Only the Italian delegate criticized the wording 'with the acquiescence and agreement of the former' as being too broad.[1013] The Syrian delegate, while not objecting to the concept, had reservations about the idea of putting this form of aggression 'on the same footing as the direct and flagrant acts of aggression mentioned in sub-paragraphs a-d.'[1014] The Soviet delegate expressed his concern that the draft formulation of Article 3(f) would 'give the impression that the responsibility for the aggression lay with the [territorial State]', hence excluding responsibility by the actual aggressor.[1015]

The final version of Article 3(f), quoted above, was slightly rephrased, based on Italy's suggestions. It no longer explicitly refers to 'acquiescence and agreement' of the host State, thus leaving open the question as to which intentional element would be required. Commenting on the final text, the Canadian delegate noted that Article 3(f) 'described [a situation] which had not traditionally been thought of as [act of aggression]' and expressed his delegation's hope that it 'would be applied with caution, for it should be remembered that the knowledge and control of a State regarding the improper use of its territory might vary considerably, and that that State might suffer more than the third State as a result of the act in question.'[1016] While the degree of involvement by the territorial State is still open to interpretation under the Canadian view, the Kenyan delegate stated more explicitly that 'the action of a State, in allowing its territory to be so misused must amount to *active collusion* with the aggressor State'.[1017] Similarly, Italy explicitly stated that 'the territorial State could be called upon to answer for an act of aggression only if it had actively participated in the wrongdoing, for example by specifically allowing troops of another State stationed in its territory to commit aggression against a third State.'[1018]

Absent any further concrete reference by State practice to the mental element behind littera 3(f), we cannot draw any conclusions from the minor references in the *travaux préparatoires*. In literature, few explicit statements on this can be found. Despite the Italian and Kenyan (and to a lesser extent Canadian) insistence on an active involvement by the territorial State, Kress contends for instance that it is not necessary that the territorial State shares the aggressor's

[1012] Bulgaria mentioned (f) without commenting on it, by merely noting that 'in principle, [the Bulgarian] delegation could accept sub-paragraphs (a) to (f) of article 3.' UNGA, 'Special Committee on the Question of Defining Aggression UNGA, Summary Records of the 100-109th meetings, 25 April - 30 May 1973', 29 August 1973, 42. A same comment was made by the US Delegate, see *ibid.*
[1013] UNGA, 'Summary Records of the 100-109th Meetings, 25 April - 30 May 1973', 27.
[1014] *Ibid.*, 38.
[1015] *Ibid.*, 47.
[1016] UNGA, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1473rd meeting', 10 October 1974, UN Doc. A/C.6/SR.1473, para. 13.
[1017] UNGA, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1474th meeting', 11 October 1974, UN Doc. A/C.6/SR.1474, para. 23 [emphasis added].
[1018] UNGA, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1472nd meeting', 9 October 1974, UN Doc. A/C.6/SR.1472, para. 25.

intent to make aggressive use of its territory.[1019] A mere failure to exercise due diligence would however not be sufficient. Instead, according to Kress, the territorial State should have foreseen the perpetration of the act of aggression.[1020] Such a position is broader than the interpretation defended by the Italian and Kenyan delegate during the negotiations of the Definition of Aggression. Randelzhofer and Nolte note that this provision 'envisages only the voluntary 'placing' of territory at another State's disposal and does not cover the case where a State has done what is required to prevent acts of aggression from being carried out from its territory by another State.'[1021] On the other hand, Jackson argues that 'a state that acquiesces in the use of its territory for an act of aggression should be responsible for complicity in aggression'[1022], but he deals with complicity to an act of aggression, which is different than committing the actual act of aggression.[1023]

With regard to the requirement that the territory is put at disposal of a State for being used to commit an act of aggression, Article 3(f) does not specify how that aggression should be committed. The negotiation process does not reveal any guidance in this regard either.[1024] Obviously, if the troops that invade a State or the weapons that attack it are located on a State's territory, this will be covered by Article 3(f). However, according to Kress, the territorial connection may be 'less direct'. He submits that it could 'consist of a command-and-control facility through which the act of aggression is being directed, or a military base from which targeting information for use in the course of the act of aggression is provided.'[1025] Interestingly, Kress suggests to rely on the ICRC's Guidance on the Notion of Direct Participation in Hostilities and its analysis of the 'directness' criterion[1026] for the participation in hostilities 'in order to determine whether the other State has made an aggressive use of the territory concerned'.[1027] This proposition is far-reaching. It would expand the scope of Article 3(f) significantly. It would, for instance, potentially expose all territories of those States that provide

[1019] Kress, 'The State Conduct Element', 446–47. While Kress approaches the definition of aggression in the context of the newly added crime of aggression under the Rome Statute, he nevertheless submits that 'one motivation behind the inclusion of littera (f) in the list of acts of aggression' was presumably 'the implicit recognition of a right of self-defence to be exercised on the territory of the base state' (*ibid.*, 448). Thus, the comments Kress makes about the mental requirement for Article 3(f) equally apply, according to him, to determine whether an armed attack has occurred.
[1020] Kress, 'The State Conduct Element', 446–47.
[1021] Nolte and Randelzhofer, 'Article 51', para. 30.
[1022] Jackson, *Complicity in International Law*, 142.
[1023] Such a position would then deviate from what some consider to be the fault requirement under Article 16 ARSIWA on complicity (knowledge). On the ongoing debate on the fault requirement for complicity and on the difference between responsibility on the basis of complicity in the commission of a wrongful act and responsibility for the commission of that wrongful act, see Chapter 1, Section 2.2.
[1024] The only remark related to the underlying act of aggression came from Libya, which noted that 'the provision of assistance to national liberation movements did not fall within the scope of Article 3(f).' UNGA, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1477th meeting', 15 October 1974, UN Doc. A/C.6/SR.1477, para. 15.
[1025] Kress, 'The State Conduct Element', 447.
[1026] As explained in Chapter 3, the ICRC Guidance has developed three criteria to determine whether an act qualifies as a direct participation in the hostilities. The second criterion is labelled 'direct causation' and requires that 'there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.' See *supra* Chapter 3, Section 4.2.1.A.
[1027] Kress, 'The State Conduct Element', 447.

crucial intelligence information collected with technology based on their respective territories to an attacking State for a potential response in self-defence by a victim State, as providing targeting information is considered to be an act of 'direct participation in hostilities' under IHL. From the few remarks regarding the knowledge requirement for the application of this littera, it can be derived that States wished to keep the application of Article 3(f) narrow. States therefore probably did not have the broad interpretation submitted by Kress in mind when they easily accepted the inclusion of littera (f) in Article 3.

Another element that is not entirely clear from the text of Article 3(f) is whether that provision also applies to the airspace above a State's territory. This is particularly relevant in the context of *jus ad bellum*, as often contemporary armed attacks are carried out by bombing another State from the air, without 'boots on the ground'. Does allowing overflight to fighter jets of a State that are on their way to commit an armed attack amount to an armed attack itself?

If the wording of Article 3(f) is interpreted narrowly, it would not include the granting of overflight rights[1028] – an airplane merely crossing a State's airspace indeed does not make use of the actual territory of that State. However, in public international law, airspace above a State's territory is generally equated with that State's territory.[1029] With regard to the Definition of Aggression, Ferencz notes that from the *travaux préparatoires* it can be derived that the Members of the Special Committee had no doubt that 'territory' not only referred to a State's soil, but also to its waters and airspace.[1030] Even though this comment was made in relation to the Special Committee's discussion on whether or not aggression should be directed at the 'territorial integrity' of a State, its consensus on the scope of 'territory' should arguably have been the same in the context of Article 3(f).[1031] Nevertheless, the Kenyan delegate defended a different view. Commenting on Article 3(f), he claimed that '[i]t would be unreasonable to extend that paragraph to such an instance as routine permission of overflight to military aircraft which proceeded to attack a third State."[1032] No other State made a similar statement. It could be questioned, however, whether granting overflight to a State if one knows that that State will commit an aggression is a 'routine' permission. Perhaps the Kenyan delegate's concern dealt more with the subjective element of Article 3(f): if overflight is 'routinely' granted, without knowing that the overflying aircrafts are on their way to commit aggression, then the territorial State cannot be regarded as having committed aggression itself. Of course, a State cannot resolve itself from a possible application of Article 3(f) by willingly ignoring information that indicates that aggression will be committed. Even though Article 3(f) would not be triggered,

[1028] Aust, *Complicity and the Law of State Responsibility*, 382.
[1029] Ian Brownlie, *Principles of public international law*, 7th ed. (Oxford: Oxford University Press, 2008), 115.
[1030] Benjamin B. Ferencz, 'A Proposed Definition of Aggression: By Compromise and Consensus', *International and Comparative Law Quarterly* 22 (1973): 417.
[1031] Aust notes that, even if one would contest that the airspace of a Stat is covered by Article 3(f), granting overflight rights would certainly violate a State's obligation not to allow use of its territory (and airspace) to the detriment of another State, as defined by the *Island of Palmas* case. See Aust, *Complicity and the Law of State Responsibility*, 382.
[1032] UNGA, 'Official Records of the General Assembly Twenty-Ninth Session. Sixth Committee, Legal Questions. Summary Records of the 1474th Meeting', 56.

as Kress submits, by a mere violation of a due diligence obligation[1033], in a context where an act of aggression is likely to happen (think of the weeks before the invasion in Iraq), overflight rights should not be 'routinely' granted. The problem in practice remains nonetheless that it is very difficult to prove what a State knew at the time when the overflight rights were granted. States can very easily deny the fact that they received sufficient information pointing at a planned unlawful use of their airspace.

With regard to the use of force, it is mere logic that if a State allows its territory to be used for an armed attack, this constitutes not only a distinct armed attack but also an unlawful use of force. It is however less clear whether allowing territory to be used for force constitutes a use of force itself. Let us illustrate this with an example. State A trains and arms rebels who conduct attacks against State B. This training and arming activity is not an armed attack, but does constitute an unlawful use of force by State A (see *supra* Section 3.1 and *infra* Section 4.1.3.A). What if State C allows its territory to be used by A to organize training camps for the rebels, without being involved in the training activities itself? Does State C also commit an unlawful use of force *vis-à-vis* State B? At an abstract level, we are dealing here with an example of State support to a State that supports an armed group.

To recall, it is not settled whether there is a gravity threshold for the use of force (proponents of what I called the 'single gravity approach' argue there is no such threshold), and if there is one, whether it is as high as the one for armed attacks (the 'unified gravity approach') or whether it is situated at a lower level (the 'double gravity approach'). Of course, Article 3(f) could easily be applied by analogy to putting territory at the disposal of a use of force. As the link between the act of State C (allowing territory to be used) and the acts of the armed group is rather low, proponents of the unified gravity approach would not easily accept that State C commits an unlawful use of force. Defendants of a double gravity approach, and even more those of a single gravity approach, would more easily accept an analogy application of Article 3(f) to situations whereby the territory is used for 'mere' unlawful use of force. As is the case for Article 3(f), it would not be sufficient that a State merely acquiesces the use of its territory for a use of force, or is incapable of preventing it. The territorial State should know and accept the context for which its territory is used.

It should be noted that occasionally it has been argued that the territory of the affected State is merely collateral damage to the lawful reaction in self-defence against the attacking armed forces of another State.[1034] Such a reasoning would of course make the analysis above

[1033] Kress, 'The State Conduct Element', 348.

[1034] See for instance Randelzhofer, who wrote in 1994 that 'it may be assumed that a state can defend itself against an attack resulting from a concerted action in an effective manner only if it is allow to confront the acting state at its operational base within another state's territory, that kind of defensive action does not need to refer, for a justification, to the concept embodied in Art. 3(f). […] It does not follow from the fact that the right of self-defence pursuant to Art. 51 is restricted to the case of an 'armed attack' that defensive measures may only affect the 'attacker'.' See Albrecht Randelzhofer, 'Article 51', in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994), 673. Remarkably, this entire passage, to which the US Department of Defense Manual also refers, was left out of the Commentary to Article 51 in the 2012 edition of

redundant, more specifically the one on whether 'allowing territory to be used' can be equated with an armed attack. According to this point of view, no separate legal basis to attack an enemy on a third State's territory is required, as a right to self-defence against the enemy would be sufficient. I cannot subscribe such a position. First, it should be recalled that the right to self-defence remains an exception to the *jus cogens* prohibition on the use of force between States. The purpose of that prohibition is ensuring international peace and security, through the protection of the territorial sovereignty of States. Simply putting the protection of territorial sovereignty aside by reference to 'collateral damage' does not give the core prohibition of the UN Charter the weight it deserves. In addition, the term 'collateral damage' flows from the *jus in bello*, a body of law which balances humanity with military necessity and which explicitly foresees in the lawfulness of collateral damage as long as it is proportionate. Since no such explicit exception to the prohibition on the use of force exist under *jus ad bellum*, an additional legal basis is needed to justify a response in self-defence that would affect a State that did not commit itself an armed attack. Lastly, the development of the 'unable or unwilling' theory[1035], which according to some would justify attacks against States who cannot or do not want to prevent attacks by non-State actors to originate from their territory, proves that the 'collateral damage' argument is insufficient, and that according to States a separate legal basis is indeed necessary to justify actions taken against the territorial State.

One could nevertheless argue that such a legal basis could be found in an analogy application of the unable or unwilling theory. From a practical perspective, one could indeed raise the concern that victim States would be deprived of a response in self-defense if they are not allowed to attack the location from where an armed attack originated, simply because that location (the territorial State) does not correspond with the attacker (the attacking State). While such a concern is in my view warranted, I am not convinced that it is a reason to apply an 'unable or unwilling' theory to the level of States. First, as already stressed above, self-defence is an exception to a core prohibition. Exceptions should be construed narrowly, which offers few or no room for analogy reasonings. In addition, applying the 'unable or unwilling' theory by analogy to a situation that solely involves States neglects the fact that the foundation of that theory is (currently) still considerably weak. As will be outlined in more detail in sub-Section 4.1.2.B, its basis in neutrality law is insufficiently strong[1036], the limitation of Article 3(f) of the Definition of Aggression to State-State territorial support can be seen as arguing against the unable or unwilling theory and, crucially, State practice on the matter is very divergent. More importantly, even if the unable or unwilling theory would become an accepted legal basis for responses against armed attacks committed by a non-State actor from within a third State's

---

the book. Compare with Nolte and Randelzhofer, 'Article 51', para. 30. See also Benjamin Nussberger and Paula Fischer, 'Justifying Self-defense against Assisting States: Conceptualizing Legal Consequences of Inter-State Assistance', *EJIL: Talk!*, 23 May 2019, https://www.ejiltalk.org/justifying-self-defense-against-assisting-states-conceptualizing-legal-consequences-of-inter-state-assistance/. For an analysis of the law of neutrality and the argument why that body of law cannot serve as a basis for an action in self-defence, see Chapter 5, Section 3.3.

[1035] As discussed below in sub-Section 4.1.2.B.

[1036] For an analysis of the law of neutrality and the argument why that body of law cannot serve as a basis for an action in self-defence, see Chapter 5, Section 3.3.

territory – *quod non* –, there is still a fundamental difference between a State and a non-State actor: non-State actors do not have a territory. Attacks by non-State actors will *always* occur from a State's territory, which may or may not be willing or unable to prevent them. A victim State will *never* be able to direct its response in self-defence against the territory of the non-State actor, simply because it does not exist. The same problem does not arise for a State that has become the victim of an attack by another State from a third State's territory. In such a scenario, the victim has two options: either it attacks the territory of the attacking State (respecting, of course, the criteria of necessity and proportionality), or it attacks the launching base of the attacking State located on the territory of the third State. As I argued above, the latter option should be limited to those scenarios whereby a State *allowed* its territory to be used by another State, since Article 3(f) of the Definition of Aggression can serve as a legal basis. Put differently, Article 3(f) represents half of the 'unable or unwilling' theory if applied to States: only those States that are *unwilling* to prevent their territory from being used (thus those States that *allow* their territory to be used) by another State can be considered as committing an armed attack that warrants a response in self-defence.[1037] The core prohibition of Article 2(4) is too crucial to allow for more lenient exceptions.

B. Allowing territory to be used by armed groups

It often occurs that an armed group operates from within the territory of a State and carries out attacks in the territory of another State. For example, Islamic State operated from within Syria (and Iraq) and carried out attacks not only on Iraqi territory, but also in a number of Western States.[1038] Similarly, Boko Haram has its basis in Nigeria but regularly carries out attacks in neighbouring States such as Niger, Chad or Cameroon.[1039] Likewise, the Somali-based group al-Shabaab conducts attacks in neighbouring country Kenya.[1040] While these examples show that in contemporary armed conflicts armed groups often no longer (solely) fight the government of the territory on which they are based, but (also) another State, they also illustrate the complexity of the legal questions behind those operations: rarely, a State willingly allows its territory to be used by an armed group. In most cases, a State is simply unable, or implicitly unwilling to prevent an armed group from operating within its territory.[1041] The question is

[1037] Note that this is also the reason why I argue below that the unable or unwilling theory, if applied to State-armed group territorial support, could only be accepted insofar as it would be limited to 'unwilling' States.
[1038] See for instance Ruys, Ferro, and Verlinden, 'Digest of State Practice 1 July – 31 December 2015', 127–28; Tom Ruys, Luca Ferro and Nele Verlinden, 'Digest of State Practice 1 January – 30 June 2016', *Journal on the Use of Force and International Law* 3, no. 2 (2016): 294.
[1039] For instance, for a summary of cross-border Boko Haram attacks that occurred in the second half of 2016, see: Ruys et al., 'Digest of State Practice: 1 July – 31 December 2016', 174–76.
[1040] For an overview of the attacks that occurred in the first half of 2016, see Ruys, Ferro, and Verlinden, 'Digest of State Practice 1 January – 30 June 2016', 296–98.
[1041] By 'implicitly unwilling' I refer to the scenario whereby a State *claims* not to willingly tolerate the group, but in practice does not undertake anything to prevent it, even though it would be able to do so. A third option would be that a State is simply unaware of the fact that an armed group is operating from its territory. As indicated in the

whether such positions would be sufficient to amount to an unlawful use of force by the territorial State, or even trigger a right to self-defence against that territorial State.

First, it should be noted that if a State knowingly allows its territory to be used by armed groups, it most likely violates its due diligence obligation *vis-à-vis* the State that is victim of the actions of that group. As articulated by the ICJ in the *Corfu Channel* case, the due diligence obligation means 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'[1042] While non-compliance with the due diligence standard may give rise to possible countermeasures or a duty to compensate, this responsibility for absence of reasonable action is not to be confused with concluding that the omitting State has committed itself an unlawful use of force or an armed attack.[1043] For such a conclusion, either an attribution of the acts of the armed group to the State is required (see Section 4.1.1.A), or a rule that equates 'allowing territory to be used' by an armed group to a separate form of use of force or armed attack. It is the latter option that will be discussed in the following paragraphs.

Different approaches are possible here. First, it could be argued that the actions (or omissions) by the State itself form an unlawful use of force or armed attack. With regard to a use of force, the Friendly Relations Declarations seems to accept a broad interpretation of the scope of Article 2(4) UN Charter when it imposes upon States the duty

> to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or *acquiescing in organized activities within its territory directed towards the commission of such acts*, when the acts referred to in the present paragraph involve a threat or use of force.[1044]

While this principle clearly prohibits States from acquiescing in activities of terrorist groups towards another State, it is unclear whether that acquiescence is also *equated* with the use of force itself. As this principle is a sub-principle of the general rule on the prohibition of the use of force, one could indeed argue that that is the case. In addition, in the *Nicaragua* case, the ICJ held that

> General Assembly resolution 2625 (XXV) equates assistance [to rebels] with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force".

Introduction, this study focuses on support that is knowingly provived. The scenario whereby a State is not aware of the use of its territory by an armed group will therefore be disgarded here.

[1042] Case concerning the Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, 1949 ICJ Reports, 22.

[1043] On due diligence in general, see for instance Robert P. Barnidge, 'The Due Diligence Principle Under International Law', *International Community Law Review* 8, no. 1 (2006): 81–121; Kulesza, *Due Diligence in International Law*. On due diligence in the context of the use of force specifically, see Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 374–79.

[1044] UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).

> These forms of action are therefore wrongful in the light of […] the principle of non-use of force […].[1045]

While the Court in the same case nevertheless somewhat inconsistently ruled out an equation of certain acts in support of armed groups with an unlawful use of force[1046], it did not do so with regard to 'allowing territory to be used'. It is therefore safe to conclude, on the basis of both UNGA Res. 2625 and the *Nicaragua* case, that if a State allows an armed group to operate from within its territory against another State, the former State commits an unlawful use of force against the latter.

With regard to an armed attack, however, no similar provision or jurisprudence exists. With regard to two specific forms of assistance (the provision of weapons and training of armed group), the ICJ even explicitly excluded a possible equation with an armed attack.[1047] One could argue that allowing territory to be used for an armed attack by an armed group – assuming that such an attack is possible – should be equated with an armed attack on the basis of an analogy application of Article 3(f) of the definition of aggression. To recall, Article 3(f) reads as follows

> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

If the analogy is made, a State having allowed an armed group to conduct an armed attack against another State from within its territory would be considered as having committed an act of aggression, and thus, as argued above, an armed attack itself. This would provide the victim State with a lawful basis to respond in self-defence, not only against the armed group, but also against the territorial State. A word of caution is however needed here. First, this analogy exercise depends entirely on whether or not one accepts that Article 51 UN Charter can be triggered by the armed attack of an armed group in the first place. It not, as defended by the ICJ, the analogy with Article 3(f) cannot be completed. Second, expanding the scope of an exception to the *jus cogens* prohibition of the use of force, certainly by using an analogy interpretation, is generally not accepted. Third, if States would have wanted this scenario to be equated with an aggression or an armed attack, they could simply have added that option to the list of Article 3 (which they did for other acts in support of an armed group, as discussed in Section 4.1.3.A. below). The fact that they did not do so, indicates that they thought such form of support should rather *not* be equated with an act of aggression or armed attack.

While it would thus be very difficult to argue that allowing territory to be used by an armed group that commits an armed attack is equated with an armed attack, the question is whether that step is even necessary in order to allow for a forcible response against the non-State actor located on the territorial State. Indeed, recently the argument has been raised in doctrine and

---

[1045] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 205.
[1046] The Court notably argued that 'financing' rebels would not amount to an unlawful use of force, see *ibid.*, para. 228. For further discussion, see Section 4.1.3.A.
[1047] *Ibid.*, para. 195. See also Section 4.1.3.A.

State practice that a right to self-defence in response to an attack by a non-State actor exists, and that no separate basis for the use of force on another State's territory is needed.

One argument is that if the response in self-defence is limited to the non-State actor, no additional basis is needed *vis-à-vis* the territorial State. Trapp has analysed the State practice on defensive actions against terrorists since 9/11 and concludes that a right to self-defence against a non-State terrorist group is accepted, but only to the extent that the act in self-defence exclusively targets the terrorist group in question.[1048] Importantly, however, according to Trapp, States do not seem to accept an act in self-defence *against the territorial State* that harbours or even supports a terrorist group.[1049] While such State would undoubtedly violate its primary duties with regard to supporting terrorism, against such violation no reaction in self-defence is warranted. Moreover, Trapp continues, if a State is merely unable to prevent a terrorist group from operating from its territory, a reaction against the State in self-defence would not be proportionate and necessary[1050], thus failing to fulfill two essential customary requirements of self-defence.

Others contend that it would be accepted to attack an armed group on the territory of the 'allowing' State because the latter is 'unable or unwilling' to prevent attacks by the armed group from within its territory.[1051] This argument goes further than what is suggested by Trapp, as it explicitly provides for a legal basis to attack not only the non-State actor but also the 'allowing' State, and as it does so if the territorial State is either unable OR unwilling to effectively prevent that non-State actor from carrying out attacks. In the post 9/11 era, States increasingly seem to rely on a form of the unable or unwilling theory. The test especially came to the forefront among States searching for a legal basis to act against Islamic State in Syria from 2014 onwards. While Iraq had formally requested help from third States in order to counter the successful campaign of ISIL on its territory[1052], States quickly realized that a military operation against ISIL would only be successful if it also involved attacks against ISIL on Syrian territory. Since the Syrian government did not approve the use of force on its territory, another legal basis needed to be found for the operation against ISIL. Generally, States invoked a double basis for their actions in Syria. First, they argued that they were operating in collective self-defence on the request of

[1048] Trapp, *State Responsibility for International Terrorism*, 2011, 51–58.
[1049] For the opposite view, see Ryngaert, 'State-Responsibility and Non-State Actors', 171: '[I]t is an (alleged) customary international law rule that allows the injured state to use force against another state that has harboured terrorists or tolerated their presence on its territory, without necessarily actively supporting them or endorsing their activities.'
[1050] Trapp, *State Responsibility for International Terrorism*, 2011, 60.
[1051] Ashley S. Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense', *Virginia Journal of International Law* 52 (2011–2012): 483–550. See also Dinstein, *War, Aggression and Self-Defence*, 2011, 272: 'Extra-territorial law enforcement is a form of self-defence, and it can be undertaken by Utopia against terrorists and armed bands inside Arcadian territory only in response to an armed attack unleashed by them from that territory. Utopia is entitled to enforce international law extra-territorially if and when Arcadia is unable or unwilling to prevent repetition of that armed attack.' It is rather confusing – and seemingly contradicting – to label something simultaneously as self-defence and law-enforcement.
[1052] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/691, 22 September 2014, 691.

Iraq, and second, they argued that Syria was 'unwilling or unable' (or a slightly different phrase) to stop ISIL's military gain.[1053] The US, for instance, explained in its letter to the Security Council that

> States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself.[1054]

According to the US, the 'unable or unwilling' theory is part of the necessity criterion that has to be assessed in case a State wishes to rely on its right to self-defence.[1055] Yet, the exact contours of this test remain rather vague.[1056] Even among those using the unable or unwilling theory, the exact scope of this test is not clear. This is illustrated by the UK Prime Minister statement justifying the use of force on Syrian territory. The UK interestingly left open whether the standard should be 'unable AND unwilling' or 'unable OR unwilling'.[1057] The first option obviously is more restrictive than the latter.

[1053] For an overview, see Elena Chachko and Ashley Deeks, 'Who is on Board with "Unwilling or Unable"?', *Lawfare*, 10 October 2016, https://www.lawfareblog.com/who-board-unwilling-or-unable.

[1054] See for instance US, Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014. For similar examples, see for instance:

Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/221, 31 March 2005:

> In accordance with the inherent rights of individual and collective selfdefence reflected in Article 51 of the United Nations Charter, States must be able to *act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory* […] Canada's military actions against ISIL in Syria are aimed at further degrading ISIL's ability to carry out attacks. *These military actions are not aimed at Syria* or the Syrian people, nor do they entail support for the Syrian regime. [Emphasis added].

Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/693, 9 September 2015:

> States must be able to act in self-defence when the Government of the State where the threat is located is *unwilling or unable* to prevent attacks originating from its territory. The Government of Syria has, by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks. [Emphasis added].

[1055] Department of Defense US, 'The Legal Framework for the United States' Use of Military Force since 9/11', Speech delivered by Stephen W. Preston, 5 April 2015, https://dod.defense.gov/News/Speeches/Speech-View/Article/606662/; Bryan Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations', *International Law Studies*, International Law Studies Series US Naval War College, 92 (2016): 240–41.

[1056] The US has attemptedly provided some further guidance by stating that

> [w]ith respect to the "unable" prong of the standard, inability perhaps can be demonstrated most plainly where, for example, a State has lost or abandoned effective control over the portion of its territory where the armed group is operating. With respect to the "unwilling" prong of the standard, unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group.

See US, 'Use of Military Force', 10. In a search for clear criteria, Deeks has developed 6 factors to assess whether a State can rely on the unable or unwilling test, see Deeks, 'Unwilling or Unable'.

[1057] Prime Minister's Office UK, PM Statement Responding to FAC Report on Military Operations in Syria, Prime Minister David Cameron, 26 November 2015, https://www.gov.uk/government/speeches/pm-statement-responding-to-fac-report-on-military-operations-in-syria:

Other States of the coalition against IS stressed the lack of effective control by Syria over the territory under control of IS, rather than a lack of willingness or ability to act against the group. Thus, Germany for instance argued in its letter to the UNSC that

> ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic *does not at this time exercise effective control*. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic. Exercising the right of collective selfdefence, Germany will now support the military measures of those States that have been subjected to attacks by ISIL.[1058]

Albeit formulated differently than the unable or unwilling test, this justification is equally problematic, as it is implicitly based on the incapability of a State to effectively control its territory – even though it would take all necessary measures (and thus be willing) to do so.

Important divergence in State practice remains, even among Western States. France did for instance not refer to the unable or unwilling test, nor to a lack of effective control of Syria over its territory.[1059] In addition, some States (especially Syria as affected State) have explicitly denounced the legality of the Western use of force on Syrian territory without permission of the government.[1060]

In sum, State practice certainly has not crystallized in favour of the unable or unwilling theory as a legal basis for the use of force against a State that allows its territory to be used by a non-State actor. Doctrine is equally divided on the matter.[1061] The unable or unwilling test, which

---

> There is a solid basis of evidence on which to conclude, first, that there is a direct link between the presence and activities of ISIL in Syria and its ongoing attack on Iraq, and secondly, that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq, or indeed attacks on us. It is also clear that ISIL's campaign against the UK and our allies has reached the level of an 'armed attack', such that force may lawfully be used in self-defence to prevent further atrocities being committed by ISIL.

[1058] Letter Dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, UN Doc. S/2015/946, 10 December 2015. For a similar statement by Belgium, see Letter Dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council, UN Doc.S/2016/523, 9 June 2016.

[1059] Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/745, 9 September 2015: 'In accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic.'

[1060] Jonathan Tepperman, 'Syria's President Speaks', *Foreign Affairs*, March 2015, http://www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks. See also the analysis made by Corten: Corten, 'The "Unwilling or Unable" Test', 780–85. See also the interesting analysis by Heller, who points at the problematic use of the 'acquiescence' argument in relation to the unable or unwilling theory, and who cites some (Spanish) protests by Mexico against the theory: Kevin John Heller, 'An Insider's View of the Life-Cycle of Self-Defense Reports by U.N. Member States', *Just Security*, 2 April 2019, https://www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/.

[1061] See for instance pro: Deeks, 'Unwilling or Unable'; Kress, 'The State Conduct Element', 448; Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence', 11–12. And contra: Starski, 'Right to Self-Defense, Attribution and the Non-State Actor'; Corten, 'The "Unwilling or Unable" Test'; Jutta Brunnée

would make the above-discussed analogy with Article 3(f) superfluous, inherently includes an element of arbitration, providing an extra basis for the powerful States to pursue their (political) goals by force. In addition, by proposing the test as a factor to be analysed in order to assess whether the necessity criterion for acts in self-defence is fulfilled, a fundamental weakness of the test is revealed: while it is understandable that it would be necessary to operate against a non-State actor in case the territorial State does not want to take action (the 'unwilling State'), it is far less acceptable to do so when the territorial State simply does not *succeed* in taking action (the 'unable State').[1062] This remark brings us back to the limitation that was already flagged by Trapp, namely that a reaction in self-defence against a State that is merely unable to prevent an armed group from operating on its territory would not be considered lawful.

C. Overview: 'allowing territory to be used' as a basis for self-defence

The following scheme summarizes the analysis of the two previous sub-Sections, dealing with allowing territory to be used for an attack by States and by armed groups respectively.

A State			
that allows territory to be used by …	**for the commission of …. against a third State**	**commits itself a(n)…**	
		armed attack (and may thus lawfully be attacked in self-defence)	**use of force**
a State	an armed attack	Yes (Article 3(f) Definition of Aggression, derived from modified neutrality law. But only if *knowingly* allows)	Yes (Article 3(f) *a fortiori*)
	a use of force	/	Yes (Article 3(f) by analogy)
a non-State actor	an armed attack	No (However, potentially on the basis of the unable & unwilling theory which has not yet crystallized. But its scope should be reduced to encompass only 'unwilling' States)	Yes (Friendly Relations Declaration and ICJ *Nicaragua* case *a fortiori*)
	a use of force	/	Yes (Friendly Relations Declaration and ICJ *Nicaragua* case para. 205)

and Stephen J. Toope, 'Self-Defence against non-State actors: are powerful States willing but unable to change international law?', *International & Comparative Law Quarterly* 67, no. 2 (April 2018): 263–86.

[1062] As was arguably the case for Syria.

4.1.3. Logistical support, providing intelligence and training

After discussing the first sub-category of supportive acts ('allowing territory to be used'), the current sub-Section deals with the three remaining categories of support identified for this study (categories (ii) logistic support, (iii) training and (iv) crucial intelligence sharing). The reason for clustering these categories in one sub-Section can be found in the ICJ's *Nicaragua* case, which, as will become clear below, has mentioned the three supportive acts in one single paragraph. Yet, a distinction still has to be made between such support if provided by a State to an armed group (A), or to another State (B).

A. Delivery of weapons, training, intelligence, … to armed groups: possible indirect character sensu stricto

A.1. The Nicaragua *approach*

Having established in sub-Section 4.1.1.A that supportive acts can be considered as uses of force or armed attack if they are an indication of a sufficient degree of control over an armed group, we are left with the question what happens if no such control can be derived from the supportive acts. This will happen in the majority of cases of (non-lethal) support provided by a State to an armed group. This situation describes indirect use of force or indirect armed attack *sensu stricto*, meaning that the supportive acts can only be considered a use of force or armed attack because another independent actor committed the 'core' use of force or armed attack in the first place. Both the possibility of indirect use of force and indirect armed attack through supportive acts will be explored in this Section.

The indirect use of force is not explicitly included in Article 2(4). Schmitt correctly notes that '[on] its face, Article 2(4) would not seem to reach the mere arming of rebels.'[1063] Nevertheless, the notion potentially refers to any kind of action in support of the actual use of force. The Friendly Relations Declaration indeed seems to indicate such a broad understanding of indirect force by stating that

> [e]very State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

[1063] Schmitt, 'Legitimacy versus Legality Redux', 140.

These two paragraphs cover a wide range of supportive acts: organizing, encouraging, instigating, assisting and even acquiescing acts by groups that involve a threat or use of force. It is however unlikely that Article 2(4) of the Charter covers all possible supportive acts by States. Indeed, while the ICJ has acknowledged the prohibition of indirect force, it has also limited its scope.

As already mentioned above, in the *Nicaragua* case the ICJ decided that the US had not committed an armed attack against Nicaragua by supporting the contras in that State. While deciding which actions were not sufficient to amount to an armed attack, the Court said that 'assistance to rebels in the form of the *provision of weapons or logistical or other support* […] may be regarded as a *threat or use of force*, or amount to intervention in the internal or external affairs of other States'.[1064] The ICJ therefore clearly accepts that force does not need to be directly carried out by a State, but can be carried out by private individuals supported by the State. This is confirmed when the Court states that 'General Assembly resolution 2625 (XXV) equates assistance […] with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention.'[1065] While the latter phrase might suggest that any form of assistance will fall within the scope of Article 2(4), in paragraph 228 of the *Nicaragua* judgment the Court is somewhat more restrictive:

> In the view of the Court, while the *arming and training* of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is *not necessarily so in respect of all the assistance* given by the United States Government. In particular, the Court considers that the *mere supply of funds* to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.

If paragraphs 195 and 228 are read together, the *Nicaragua* case reveals that, according to the ICJ (i) providing weapons, logistical or other support to rebels does not trigger a right of self-defence; (ii) arming[1066] and training rebels does violate Article 2(4); (iii) financing rebels does not violate Article 2(4); and (iv) possibly other assistance will also fall beyond the scope of Article 2(4). The following table clarifies this conclusion:

[1064] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 195 [emphasis added].
[1065] *Ibid.*, para. 205.
[1066] For instance, Austria clearly stated that the delivery of weapons to opposition groups constitutes a violation of the prohibition on the use of force as enshrined in Article 2(4) of the UN Charter. See Austria, 'The Austrian Position on Arms Embargo in Syria - Official Document Dated 13.05.2013'.

ICJ *Nicaragua* case			
	Violates the principle of non-intervention	Violates the prohibition on the use of force (Art. 2(4) UN Ch)	Constitutes an armed attack (Art. 51 UN Ch)
Training	?	Yes	?
Arming / 'providing weapons'	Yes	Yes	No
Logistical support	Yes	Possibly no	No
Other support	Yes	Possibly no	No
Financing	Yes	No	?

These conclusions are far from satisfactory at a practical level. It is unclear why financing rebels (and possibly all assistance other than arming and training) would not be a violation of the use of force, whereas providing weapons and training would be a violation. If the provided funds are used to buy weapons, the end result is the same.

In this regard, various authors have criticized the ICJ for making arbitrary distinctions between different kinds of support. According to Henderson, not only the training of troops or the provision of arms – as identified in the ICJ case-law – constitutes an unlawful use of force, but also, following an analogy argument, the provision of non-lethal equipment such as body armour and satellite telephones.[1067] While such an expansion based on analogy seems logical, the question becomes what the lower limit is: can *any* support to rebels be equated with an unlawful use of force, or should the link between the actions of the rebels and the support provided be sufficiently close? Perhaps the exclusion of financing by the ICJ is related to the intentional aspect of providing support: it is much more difficult to control what is eventually done with funding that was provided than with weapons. In addition, while intent is important, the absence of a material aspect can also indicate that no use of force occurred. The mere political or moral support provided to rebels would therefore not qualify as an unlawful use of force. Lastly, it is important to keep in mind that the majority of scholars still accepts a gravity threshold for the use of force in the first place. Equating support with unlawful use of force should therefore, at least if one follows the 'double gravity approach', be applied with care.

Thus far we have dealt with the question whether supportive acts could be considered as an unlawful use of force. As indicated in the table, the above-quoted paragraphs in the *Nicaragua* case also offer us insight in the ICJ's position with regard to indirect armed attack. The ICJ seems to exclude that States would commit an 'armed attack' merely on the basis of their

[1067] Christian Henderson, 'The centrality of the United Nations Security Council in the legal regime governing the use of force', in Nigel White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham: Edward Elgar Publishing, 2013), 656.

support to armed groups.[1068] This passage of the judgment has however not been unanimously accepted. In his Dissenting Opinion, Judge Schwebel criticized the Court for having used too broad language when excluding 'logistic' support from being classified as 'armed attack':

> [L]et us assume, arguendo, that the Court is correct in holding that provision of weapons or logistical support to rebels of themselves may not be tantamount to armed attack (*an assumption which I do not share*, not least because the term "*logistic support" is so open-ended*, including, as it may, the *transport, quartering and provisioning of armies*).[1069] [emphasis added]

From the above paragraph, we can derive that Judge Schwebel would indeed be willing to consider certain logistic tasks, such as transporting, quartering and provisioning as constituting an 'armed attack.' Similarly, Bruha argues that the Court's formulation in paragraph 228, which interprets Article 3(g) of the Definition of Aggression, is far too narrow, as it ignores the 'long and well-documented drafting history' of the provision, which 'shows that demands of the non-aligned countries to exclude self-defence against acts of indirect aggression were unsuccessful'[1070]. As their demand to exclude such basis for self-defence was unsuccessful, this means that indirect armed attacks could in some instances be equated with armed attack giving rise to self-defence actions.

Yet, this fairly limited criticism on the ICJ's judgment does not find wide agreement among scholars. On the contrary, it seems that scholars generally agree with the Court's exclusion of indirect armed attack. Gray notes for instance that Judge Schwebel does not cite any State practice to support this particular passage quoted from his Dissenting Opinion.[1071] According to Henderson, an attribution of the attack by a non-State actor to a State is always required.[1072] Ruys argues that the broad interpretation of the ICJ [accepting indirect use of force] cannot simply be copied *vis-à-vis* Article 51 UN Charter.'[1073] Similarly, Schmitt observes that 'there is a general consensus the merely providing of arms, while a use of force, is not an armed attack.' Rather, Schmitt continues, 'an armed attack is usually understood as involving significant death, injury, damage, or destruction that is caused by a state directly or by a non-state group under another state's direction and control.'[1074] In similar vein, Brownlie noted already in 1963 that '[since] the phrase "armed attack" strongly suggests a trespass it is very doubtful if it

[1068] See also the position taken by Judge Ruda, who argues that 'that even if there was such assistance and flow of arms, that is not a sufficient excuse for invoking self-defence because, juridically, the concept of "armed attack" does not include assistance to rebels.' Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Separate Opinion of Judge Ruda, 1986 ICJ Reports 174 (ICJ, 27 June 1986), para. 13.
[1069] See Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Dissenting Opinion Judge Schwebel, 1986 ICJ Reports 259, para. 171.
[1070] Bruha, 'The General Assembly's Definition of the Act of Aggression', 170–71.
[1071] Gray, *International Law and the Use of Force*, 131.
[1072] 'Whether the provision of arms and non-lethal assistance can rise to the level of an armed attack revolves more around the extent to which the actions of the non-state actors can be attributed to the states involved and not whether the provision of arms and/or non-lethal assistance is in itself sufficient to give rise to an armed attack.' Henderson, 'The Prohibition of the Use of Force', 652.
[1073] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 374.
[1074] Schmitt, 'Legitimacy versus Legality Redux', 142.

applies to the case of aid to revolutionary groups […] which do not involve offensive operations by the forces of a state.'[1075] Interestingly, Brownlie nevertheless left the door open for an 'extensive interpretation' by suggesting that a campaign by 'powerful bands' with complicity by a State could constitute an armed attack under certain conditions.[1076] He concludes however that 'a right to resort to force against […] indirect aggression' cannot be derived from Article 51 if the requirement of proportionality is strictly observed.'[1077]

However, in the *Armed Activities* case, the Court seems not to close the door entirely. In that case, the ICJ had to decide whether the Ugandan military presence in the Democratic Republic of the Congo ('DRC') was an unlawful use of force. To justify its military presence in the DRC, Uganda had argued *inter alia* that it reacted in self-defence against the DRC, since the latter allegedly supported rebel groups who carried out attacks against the Ugandan regime.[1078] The Court stated that it '[had] found […] that there [was] no satisfactory proof for the involvement in these attacks, direct or indirect, of the Government of the DRC.'[1079] While the 'indirect' may have referred to the ICJ's earlier ideas on indirect armed attacks in the form of sending armed bands, it cannot be excluded that it also had in mind a broader range of assistance. As the Court does not provide any further clarification, this is of course speculation.

In sum, if there is no attribution of an armed group's activities to a State because of the absence of control, only arming and training the groups is certainly equated with the unlawful use of force. Arguably, however, other types of support should be given the same consequence, although one risks to expand the consequences of a use of force to an overly broad range of activities. With regard to the threshold for armed attack, it has traditionally been defended that acts supporting an attack by armed groups do not amount to such an attack themselves.

In the practice that was collected for the Digest of State Practice in the Journal on the Use of Force and International, covering practice from 2014 to 2018, only one example explicitly connects an act of support (except for the disposal of territory, see Section 4.1.2) with a *jus ad bellum* threshold. In the context of the armed conflict in Syria, a significant number of States provided different types of support to the Free Syrian Army or other groups fighting the Assad

[1075] Brownlie, *International Law and the Use of Force by States*, 278.
[1076] *Ibid.*, 279. The full quote reads: 'However, it is conceivable that a co-ordinate and general campaign by powerful bands or irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an 'armed attack', more especially if the object were the forcible settlement of a dispute or the acquisition of territory.' One may wonder whether it is correct to distinguish between complicity that is 'obvious and easy' to prove and complicity that is not: if proven, complicity is complicity and the consequences should be the same. Second, according to Brownlie the right to self-defence could only be exercised against the supporting State if the actions by the 'irregulars' aimed at 'the forcible settlement of a dispute or the acquisition of territory'. One may again wonder why a general intent on behalf of the State is not sufficient, or why other goals would not warrant a reaction in self-defence.
[1077] *Ibid.*
[1078] Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 ICJ Reports, paras 131–135.
[1079] *Ibid.*, para. 146.

regime. In response to that third-State assistance, the Syrian government complained numerous times to the UN Secretary-General and the UN Security Council, arguing for instance that

> the United States of America, France, Britain, Turkey, Saudi Arabia and Qatar, along with certain other states, are *continuing to support, fund, arm, recruit and dispatch terrorists to Syria*, in clear violation of the rules and principles of international law and the principles governing international relations and goodneighbourly relations, as well as the Security Council resolutions concerning counter-terrorism. They *are also acting in clear and blatant violation of Article 2, paragraph 4, of the Charter of the United Nations*.[1080]

Syria clearly considered not only the types of support as listed by the ICJ as examples of an unlawful use of force, but also the funding, and more generally the 'support' (without defining that notion) provided to so-called terrorist groups on Syrian territory. Interestingly, and important for this part of the study, Syria did not refer to the support by numerous States as constituting an 'armed attack'. Both observations confirm what has been discussed thus far: the ICJ's decision to limit the scope of 'use of force' to a number of supportive acts is not workable in practice, while its decision not to label such acts as 'armed attacks' is considered in conformity with the understanding of the right to self-defence.

A.2. The Bethlehem Principles: introducing a support-based approach in the jus ad bellum*?*

In the contemporary era of terrorism, the Court's vision towards self-defence in general and supportive acts more specifically is considered by some as too stringent.[1081] Logically, therefore, some alternative views on the matter have been advanced.[1082] If a State provides support to an armed (terrorist) group, whether or not it also tolerates the group on its territory[1083], it has been suggested by some that there is increasing State practice which would accept that an action in self-defence is taken against the supporting State.[1084] The most explicit plea for broadening the basis for self-defence to include actions against State supporting armed attacks conducted by armed groups was expressed in the Bethlehem Principles. This list of 16 '*Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors'* was advanced in 2012 by Sir Daniel Bethlehem QC, former principal Legal Adviser of the UK Foreign & Commonwealth Office, as the result of a

[1080] Identical Letters Dated 19 September 2013 from the Permanent Representative of the Syrian Arab Republic to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc S/2013/563, 19 September 2013.
[1081] Nolte and Randelzhofer, 'Article 51', 1415.
[1082] Some others strongly object a modification of the existing rules. See for instance Corten, who contends that until the evening of 9/11, there was certainly no acceptation for a so-called 'indirect aggression'. Second, he argues that the *opinio juris* of States right after 9/11 is unclear, as States made decisions under pressure or for emotional reasons. Corten, *The Law Against War*, 460–64.
[1083] On 'allowing territory to be used' by an armed group, see *supra* Section 4.1.2.B.
[1084] See for instance Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion Judge Simma, 2005 ICJ Reports 334 (ICJ, 19 December 2005), para. 11.

series of workshops held at the military academy of West Point, US.[1085] Among the Principles, the following deserve closer attention here:

> 1. States have a right of self-defense against an imminent or actual armed attack by nonstate actors.
>
> […]
>
> 5. An appreciation that a series of attacks, whether imminent or actual, constitutes a concerted pattern of continuing armed activity is warranted in circumstances in which there is a reasonable and objective basis for concluding that those threatening or perpetrating such attacks are acting in concert.
>
> 6. Those acting in concert *include those planning, threatening, and perpetrating armed attacks and those providing material support essential to those attacks*, such that they can be said to be *taking a direct part in those attacks.*
>
> 7. Armed action in self-defense may be *directed against those actively planning, threatening, or perpetrating armed attacks*. It may also be directed against those in respect of whom there is a strong, reasonable, and objective basis for concluding that they are taking *a direct part in those attacks through the provision of material support essential to the attacks.*

From the above quoted fragments of the Bethlehem Principles, we can learn a number of issues. First, the Principles clearly acknowledge that an armed attack does not necessarily have to be committed by a State, but may also be committed by non-State actors (see Principle 1). Second, Principle 5 implicitly recognizes the need of a gravity threshold for an armed attack but suggests that that threshold may be reached through a 'series of attacks' or a 'concerted pattern of armed activities' – an expression of the accumulation of events theory, as discussed below in Section 4.2. Lastly, Principles 6 and 7 contain important new elements. While these two Principles confirm the general rule that the right to self-defence is triggered against the *perpetration* of an armed attack, they also more broadly stipulate that even the *threat* of such an attack can trigger self-defence actions – a rule that already goes beyond the traditional understanding of Article 51 UN Charter. Most importantly for this study, however, is the recognition enshrined in Principles 6 and 7 that certain supportive acts are clearly considered as 'armed attacks', and that against their author a response in self-defence may be undertaken. More specifically, the Principles equate (i) planning attacks and (ii) providing material support essential to the attacks to the commission of an armed attack. The latter supportive act is however only considered an armed attack if the perpetrator can be considered 'taking a direct part in those attacks'. Interestingly, a footnote added to Principle 6 reads: **'**The concept of direct participation in attacks draws on, but is distinct from, *the jus in bello* concept of direct participation in hostilities.'

[1085] On the process leading to the principles, see Victor Kattan, 'Furthering the "war on terrorism" through international law: how the United States and the United Kingdom resurrected the Bush doctrine on using preventive military force to combat terrorism', *Journal on the Use of Force and International Law* 5, no. 1 (2018): 97–144.

It is remarkable that the quoted footnote explicitly recognizes the inspiration for this rule, while simultaneously denying that it should be interpreted in the same way as its *jus in bello* counterpart: the question then is, how should this phrase be interpreted? Bethlehem's article does not provide any answers to that question. Lacking clear guidance in this regard, we can only observe that the principles propose a general analogy between the concept of DPH, which operates in a different field of law (*jus in bello*) and at a different level (the micro-level of individuals) and the basis for self-defence against supporting States (a *jus ad bellum* issue operating at the macro-level of States). Does this mean that the categories of support identified for this study could be considered as a separate 'armed attack'? And how does this approach relate to the support-based approach (and its expanded version), as discussed in Chapter 3?

First, it should be noted that 'planning' or 'threatening' with an armed attack is equated to the perpetration of an armed attack. This potentially covers a broad range of supportive acts, as no limit is imposed on the required relationship between the plans or the threat and the actually committed attack. Thus, for instance, providing crucial intelligence information (category iv) could easily be considered as 'planning' an attack. The same can be said of training activities (category iii). Similarly, allowing territory to be used for the commission of an attack could be interpreted as planning or even threatening with an attack (category i). It is important to note here that, contrary to the support-based approach under *jus in bello*, Bethlehem Principles 6 and 7 on the one hand do not impose a restriction: *any* planning, or *any* threatening, no matter how directly related to the attack, would be sufficient to trigger the right to self-defence. Even general intelligence information, rather than concrete information on a specific target, could therefore potentially be equated to an 'armed attack'. Moreover, on the other hand, the Principles do impose a restriction on the 'material support' provided for the commission of an armed attack. That support, what in this study would fall under category ii of 'logistic support', would only be considered an armed attack if it forms a direct part of the attack. Again, no further guidance on this restriction is provided.

There are thus a number of important differences between the support-based approach suggested under *jus in bello* and what is proposed by the Bethlehem Principles. First, the Principles do not limit their understanding of 'direct participation' to the ICRC's Guidance on the Notion of DPH.[1086] While of course the ICRC Guidance is not unanimously accepted, the lack of any other guidance in the Principles opens the right to self-defence to potential abuse. This risk is amplified by the fact that for multiple supportive acts, the direct participation limit is not even imposed. Indeed, for the acts of 'planning' or 'threatening', no such limitation is included in the Principles. A second important difference relates to the actors that are envisaged by the Principles: they concern support provided by a State to a non-State actor, a scenario that was clearly not considered in the SBA and only limitedly applies in case of SBA(+).[1087] Crucially, the planning, threatening or providing material support to an armed attack committed

[1086] See Chapter 3, Section 4.2.1.A.
[1087] See Chapter 3, Section 4.2.2.D.

by another State is not dealt with by the Principles. It thus remains unclear whether such support would also be equated with an armed attack.

Despite the differences between the SBA(+) and the Bethlehem Principles, some of the general concerns raised for the SBA(+) equally (and even more strongly) apply to the Bethlehem Principles.[1088] First and foremost, it is obvious that the Bethlehem Principles 6 and 7 would lead to a potential increase of force used by States. Victims of armed attacks would not only be entitled to lawfully attack the perpetrator of the actual attack, but also any State that helped the non-State actor in the planning of the attack, or that provided material support that amounted to a direct participation in the attack. Thus, for instance, if a non-State actor would carry out an attack from the territory of State A, by using intelligence information of State B, victim State C would be entitled to respond to States A and B. This considerably enlarges the scope of lawful actions in self-defence, and therefore poses a risk to the international peace and collective security. An overly broad interpretation of the exception to the crucial prohibition on the use of force between States would undermine the very goal of the *jus ad bellum*. To apply an analogy of the support-based approach, as was developed under the *jus in bello*, to the *jus ad bellum* framework would therefore do more harm than good. This is even more so if we take into account that one of the concerns related to the support-based approach under *jus in bello*, namely that it would lead to more force, was alleviated by arguing that the *jus ad bellum* still serves as a legal firewall against unnecessary force between States.[1089]

Secondly, there is a lack of a legal basis for Principles 6 and 7.[1090] The Principles advanced by Bethlehem are not widely accepted. Bethlehem himself recognizes that 'some of the principles will undoubtedly prove controversial. There is little scholarly consensus on […] who may properly be targetable within the non-state-actor continuum of those planning, threatening, perpetrating, and providing material support essential to an armed attack. Principles 6 [and] 7 are therefore likely to attract comment […]'.[1091] Some aspects of the Principles, notably the recognition that self-defence can be undertaken against an armed attack by a non-State actor, and the factors identified in order to assess the imminence of an attack (Principle 8), have been endorsed by State officials from the US, the UK and Australia.[1092] Nevertheless, the vast majority of States has not paid attention to the Bethlehem principles, and even the officials that have referred to it did not make a reference to those aspects relating to supportive acts.[1093] It is

[1088] For an overview of the general concerns raised for the SBA(+), see Chapter 3, Section 4.2.2.C.
[1089] See Chapter 3, Section 4.2.2, sub-Section C.1.
[1090] Arguably also for the other principles, but this is not our concern here.
[1091] Daniel Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors Notes and Comments', *American Journal of International Law* 106 (2012): 773–74.
[1092] Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations', 239; Jeremy Wright, 'Attorney General's speech at the International Institute for Strategic Studies', 11 January 2017, https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies; George Brandis, 'The Right of Self-Defence Against Imminent Armed Attack In International Law', 11 April 2017, https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.
[1093] Apart from the statements mentioned in the previous footnote, no State practice referring to the Bethlehem principles was included in the Digest of State practice (JUFIL) covering the period 2014-2018.

thus safe to conclude that the proposals included in the principles relating to supportive acts do not constitute a general agreement of States on the matter. While certainly thought-provoking, the Principles extend way beyond what is currently seen as the framework for self-defence.

Lastly, just as for the SBA(+) in *jus in bello*, it would be very difficult for the victim of an armed attack to properly assess the exact link between certain material support and the attack. The absence of any guidance in this regard makes it even more difficult to conclude whether or not a certain material support would be sufficiently 'directly' taking part in an attack by a non-State actor.

In sum, for the reasons outlined above, it is submitted here that Bethlehem Principles 6 and 7 equating support to armed attacks by non-State actors to an armed attack better remain a proposal on paper that turning into a new rule of *jus ad bellum*. The current status of *jus ad bellum* with regard to support to armed groups is, while still far from being clear, much more restrictive. Certain acts in support of armed groups would amount to unlawful use of force, whereas supportive acts would not amount to separate armed attacks.

B. Delivery of weapons, training, intelligence…to States: no indirect character

Because of the wide attention given to possible State involvement in force or armed attack by non-State actors, it is often overlooked that supportive can also be provided by a State *to another State.* The supportive act of 'allowing territory to be used' by another State has already been dealt with in a separate sub-Section (see 4.1.2.A). The limited scenario whereby a State controls the acts of another State has also briefly been dealt with (see 4.1.1.B). In what follows I will discuss support that is provided without the parallel exercise of control over another State. At an inter-State level, military support that does not entail a form of control by one State over another (logistic support, training, intelligence sharing,…) occurs on a frequent basis. Multinational military cooperation is encouraged by the UN Charter.[1094] Such cooperation may take the form of a permanent structure (such as the extensive military cooperation between the Member States of the North Atlantic Treaty Organization) or can happen on an *ad hoc* basis (such as the provision of weapons to Ukraine after the start of the conflict in the Donbass)[1095].

From a *jus ad bellum* perspective, there is no general rule determining that State support to other States who commit an unlawful use of force or an armed attack equates to such a use of force or armed attack.[1096] Even the UNGA Friendly Relations Declaration does not contain a paragraph applicable to State-to-State support which could be interpreted as equating support to an unlawful use of force, similar to the paragraphs on State-to-armed group support referred

[1094] Art. 52 UN Charter.
[1095] See for instance the support by the UK (military advisors) and the US (training and $75 million dollars of non-lethal assistance including counter-mortar radars, drones, Humvees and medical equipment): Ruys, Verlinden, and Ferro, 'Digest of State Practice 1 January – 30 June 2015', 261–62.
[1096] One exception is of course Article 3(f), discussed in Section 4.1.2.A.

to above.[1097] While the Friendly Relations Declaration explicitly excludes interpretations of the declaration that would be 'enlarging or diminishing in any way the scope of [Article 2(4) UN Charter]'[1098], an analogy reasoning applied to the ICJ above-discussed jurisprudence is not necessarily excluded: one could argue that the ICJ's *Nicaragua* case, which defines 'arming' and 'training' of *rebels* as an unlawful use of force, should be applied by analogy to the arming and training of the armed forces of another *State*. The main difference between the two scenarios, which complicates an analogy reasoning, is that support provided to rebels who are present on the territory of a State they are fighting arguably violates the territorial sovereignty of the State at hand, and therefore more easily qualifies as an unlawful use of force. If similar support (weapon supply, training, etc…) is provided to armed forces of another State, on their own territory, and if those forces subsequently use force against a third State, the support-providing State has not violated the victim's State sovereignty. It would thus be much more difficult to qualify these supportive acts as meeting the 'use of force' threshold. On the other hand, it is also true that States occasionally provide training to rebels on their own territory, rebels who then subsequently return to their home State and join the fight against their government. If that support would be qualified by the ICJ as unlawful use of force, then the step to a similar argument for State-to-State support is not to be excluded.

While for the use of force on the basis of supportive acts an analogy reasoning of the *Nicaragua* case is still imaginable, no such case-law is available regarding supportive acts and armed attack.

With regard to acts in support of an aggression (and thus not explicitly with regard to an armed attack), the UNGA adopted in 1951 a remarkable resolution in the context of the Korean War, when it found that:

> the Central People's Government of the People's Republic of China, by giving *direct aid and assistance* to those who were already engaged in committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea.[1099]

The language of this operative paragraph might suggest that providing aid and assistance to aggression is equated, by the General Assembly and thus the majority of States, to an act of aggression itself. The facts of the case, however, would contradict such an interpretation. The

---

[1097] To recall:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

[1098] See Principle 1, last paragraph of UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).

[1099] UNGA Res. 498 (V), UN Doc. A/RES/498(V) (1 February 1951), para. 1.

'direct aid and assistance' provided by China to North Korea in the Korean war involved not only the type of support under discussion in this study, but also the *direct intervention* by Chinese troops into Korea. Against that background, the UNGA Resolution is not surprising. More importantly, it is not an indication of a general rule that supportive acts which do not amount to control would be equated with aggression under international law.

Absent a specific rule, similar to Article 3(f) on allowing territory to be used, the general framework of State responsibility learns us that there will only be a link between the supportive State and the final act committed in case the support amounts to control. Contrary to the *jus in bello*, where the ICRC has advanced a support-based approach in order to assess inter-State forms of support not amounting to control, and contrary to what Bethlehem Principles 6 and 7 advance for State support provided to armed groups, there has not been a similar suggestion for assessing State-to-State support under *jus ad bellum*. I have argued in the previous Section why an analogy theory of the support-based approach applied to the *jus ad bellum* framework, as implicitly suggested by the Bethlehem Principles, would undermine the collective security system. This objection equally concerns a potential expansion of Principles 6 and 7 to State-to-State support for assessing whether an armed attack has occurred. In addition, the main reason to expand the scope of the SBA under *jus in bello* was the crucial concept of 'equality of belligerents' under humanitarian law. The absence of such a consideration under *jus ad bellum* forms an additional reason not to apply Principles 6 and 7 to State-to-State support.

Nevertheless, the absence of a clear *jus ad bellum* framework with regard to supportive acts included in categories ii, iii and iv does not mean that these acts remain fully unregulated under international law. First, some support, in particular arms trade, is heavily restricted by international instruments. Second, support for unlawful acts remains prohibited in general, and this is additionally so if the wrongful act is a violation of a *jus cogens* norm (which is the case for an unlawful use of force).

Arms trade (as part of category iii on providing logistic support) is restricted by various regional instruments[1100] and by the 2013 Arms Trade Treaty.[1101] The latter instrument prohibits, for instance, the transfer of weapons in case the transferring State

> has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.[1102]

[1100] For instance for the EU: EU, Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (Official Journal of the European Union L 335/99, 8 December 2008).
[1101] For an interesting analysis of the nexus required between the arms provided and the internationally wrongful acts, see Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty', 722-749.
[1102] Article 6 ATT. For a recent application of this provision, see The Queen (on the application of Campaign Against Arms Trade) (Appellant) and the Secretary of State for International Trade (Respondent), [2019] EWCA

Remarkably, an explicit prohibition to supply weapons to a State which is committing an unlawful use of force or an armed attack is lacking in the ATT. Nevertheless, export of weapons may not be authorized if there is an 'overriding risk' that, *inter alia*, it would 'undermine peace and security' (Art. 7 ATT).

There are no other international treaties focusing on one specific type of support. More generally, however, international law does prohibit the assistance (in any form) to certain unlawful acts. Such a prohibition flows, first, from the rules on 'complicity' under the law of State responsibility, second, from a due diligence obligation[1103] and, third, from the *jus cogens* character of the prohibition on the use of force.[1104]

If a State provides aid an assistance to the commission of an unlawful act, it can be held responsible as an accomplice for that act.[1105] To some extent, the consequences of responsibility as an 'accomplice' are the same as the consequences for reaching *jus ad bellum* thresholds: the supporting State will have to give compensation or reparation to the victim State, appropriate countermeasures may be taken against the responsible supporting State.[1106] Nevertheless, it is important to recall that responsibility on the basis of complicity is not equated with responsibility for the core act.[1107] Therefore, the consequences of complicity to a *jus ad bellum* violation are not as far-reaching as when a supporting State itself is considered to having committed a *jus ad bellum* violation: a reaction in self-defence, for instance, is only allowed if the support provided to an armed attack is equated to an armed attack.[1108] Similarly, the consequences for a breach of *jus cogens* (e.g. an unlawful use of force) are only triggered *vis-à-vis* the State that committed the breach, not towards the accomplice State.

There are numerous examples of States protesting other States' support to the unlawful use of force.[1109] The *Oil Platforms* case provides such an example dealing with various acts in support of an unlawful use of force. In that case, Iran accused the United States for having actively

Civ 1020 (Court of Appeal (Civil Division), 20 June 2019), para. 138, where the Court decided that the UK had to take into account Saudi Arabia's past IHL violations when assessing the risk that new IHL violations would be committed with the arms exported.

[1103] See also *supra* notes 1042 and 1043.

[1104] Article 41 ARSIWA prohibits States from aiding or assisting in the maintenance of a grave breach of a *jus cogens* norm. See also Section 2.2.

[1105] Article 16 ARSIWA and the conditions for its application have already been analysed in more detail in Chapter 1.

[1106] On the consequences of complicity and the possible procedural difficulties, see Aust, *Complicity and the Law of State Responsibility*, 269–318.

[1107] In the words of the International Law Commission, the complicit State is only responsible 'to the extent that its own conduct has caused or contributed to the internationally wrongful act'. Complicity is thus distinct from 'co-perpetration' or 'co-participation' in an internationally wrongful act. See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 66.

[1108] Therefore, if one would consider 'allowing territory to be used' as a form of complicity rather than as an armed attack, the consequences would be significantly different. See discussion in Section 4.1.2.A.

[1109] See for instance the overview by Aust (Aust, *Complicity and the Law of State Responsibility*, 108–20) or Jackson (Jackson, *Complicity in International Law*, 144–46). Some of the examples have already been cited when discussing whether 'allowing territory to be used' defines a form of complicity in aggression or rather a separate form of aggression. See Section 4.1.2.A.

supported Iraq's attack against Iran in a military way[1110]. This military support included, according to Iran, 'sharing of intelligence information, joint military briefings and providing assistance to Iraq in obtaining weapons from third countries.'[1111] More specifically, Iran accused the US of providing concrete support to Iraq in its operations:

> The U.S.-supplied data was said to include satellite reconnaissance photos of strategic Iranian sites for targeting bombing raids, data on Iranian air force and troop positions, communications intercepts, and other vital military information. One commentator notes that Iraq received:
>
> ". . . reports every 12 hours on the Iranian military activity on the ground - culled from the information gathered from the many American satellites orbiting the [Persian] Gulf and from the American Awacs - which were passed on to Baghdad via Riyadh. This information played a vital role in aiding the effectiveness of the operations mounted by Baghdad."[1112]

Based on these activities, Iran subsequently claimed compensation from the US. First, it reminded the Court of the complicity rule[1113]:

> International law not only prohibits the use of force, it also prohibits assistance to any unlawful use of force. This is based on the general principle of law that participation in a violation of the law committed by a different actor itself constitutes a violation. [cites Article 16 ARSIWA]

Subsequently, it argued the following[1114]:

> The activities of the United States […] constituted unlawful assistance to an aggression, *i.e., a violation of the prohibition of the use of force*. This violation engages the international responsibility of the United States. [emphasis added]

The passage in italics is interesting, as it can be interpreted in two ways. Either Iran intended to say that aggression is always an unlawful use of force, and that the US, by supporting Iraq's aggression, is responsible on the basis of Article 16 ARSIWA. Alternatively, Iran could have argued that the US support to aggression should be equated to a *use of force by the US*. This second interpretation would then be based on the idea that supporting an *armed attack* by sharing intelligence linked to concrete military operations amounts to an *unlawful use of force* by the supporting State. This would be an acceptable position, but the overview of State practice included in the Digest of State Practice 2014-2018 did not reveal any other examples to support that theory.

As a result, supportive acts resolving under categories ii to iv provided to States do not result in the same consequences as in case the same support is provided to armed groups. This dichotomy is remarkable, but not entirely surprising either. As mentioned earlier, the *Nicaragua*

[1110] In addition to economic, political and diplomatic support. See *inter alia* Oil Platforms Case (Islamic Republic of Iran v. United States of America), Further Response to the United States of America Counter-claim submitted by the Islamic Republic of Iran, 24 September 2001, para. 3.30 and 3.31.
[1111] *Ibid.*, para. 3.32.
[1112] *Ibid.*, footnotes omitted.
[1113] *Ibid.*, para. 7.50.
[1114] *Ibid.*, para. 7.51.

case assessed various types of support provided by the US to rebels present on the territory of Nicaragua, and concluded that on the basis of some types of support the US had committed an unlawful use of force *vis-à-vis* Nicaragua. Such an element of territorial presence (of the support-receiver) in the 'victim State' is more often absent in case of State-to-State support: weapons are first delivered to the territory of the receiving State, training is provided either in the territory of the support-providing or -receiving State, the sharing of intelligence does not have a specific geographic limitation. This observation raises two additional questions: first, I have already flagged the question whether the ICJ would have come to the same conclusion with regard to weapon supply and training if the support provided to the contras was done exclusively outside the territory of Nicaragua, and second, if a State provides support to another State in the territory of a third State, one may wonder why a similar reasoning to the Nicaragua case-law could not be applied. Especially in light of a single gravity approach under *jus ad bellum*, which argues that there is no gravity required for the commission of a use of force, equating State-to-State support would be a reasonable conclusion (see *supra* Section 3.1 on the threshold for the use of force and the conclusion in Section 3.4). However, as highlighted in those Sections, that single gravity approach is not accepted by the majority – and a similar conclusion cannot be drawn on the basis of the double gravity approach. What remains clear, however, is that in neither situation, supportive acts falling under category ii, iii or iv are equated to an armed attack.

In addition, the conclusion that supportive acts, if provided to another State, would not amount to an unlawful use of force or armed attack, does not exclude that such support is nevertheless prohibited in various ways. Arms supply is a concrete form of support that is regulated or even occasionally prohibited by various international regal instruments. More generally, providing support to the commission of an internationally wrongful act, may trigger the responsibility of the supporting State if the conditions of Article 16 ARSIWA are fulfilled – an option that does not exist, to recall, for similar support provided to armed groups. Additionally, if an unlawful use of force is committed, supporting it is arguably covered by Article 41 ARSIWA, which prohibits States from rendering aid and assistance in maintaining a grave breach of a *jus cogens* norm. Importantly, however, all of these possible venues that would prohibit a State from providing support to another State which breaches *jus ad bellum* rules do not equate the support with a *jus ad bellum* breach. Hence, the support will not trigger all the consequences of reaching a *jus ad bellum* threshold. Concretely, with the exception of 'allowing territory to be used', support that does not amount to control cannot, by itself, trigger a right to self-defence by the victim State. Nor will it trigger the consequences of a *jus cogens* violation[1115], even though that conclusion would be different if one applies the single gravity approach which denies the existence of a *de minimis* threshold for the use of force.

[1115] This would only be the case if Article 41 ARSIWA itself is considered to be a *jus cogens* norm – a claim which, given the multiple contested elements of Article 41, would be too far-reaching.

4.2. Accumulation of events

The above analysis has learnt us that while supportive acts could fairly easily be considered as an unlawful use of force (at least if provided to armed groups), the contrary is true for considering them as separate 'armed attacks', and perhaps rightly so. In only a limited number of cases – allowing territory to be used by a State for the commission of an armed attack – an act in support of an armed attack arguably equally meets the threshold of an armed attack.

However, this conclusion does not immediately rule out the option that supportive acts are considered as armed attacks. Indeed, the ICJ's emphasis on 'scale and effects' for the threshold of an armed attack[1116] leaves the door open for supportive acts to be considered as such. One could, for instance, imagine that a *combination of* supportive acts, which separately do not reflect sufficient gravity, would reach the 'scale and effects' threshold identified by the Court and seemingly accepted by the majority of doctrine. This reasoning is commonly referred to as the 'accumulation of events' theory (or *Nadelstichtaktik*, needle prick tactics).[1117] Multiple 'minor' acts which separately do not reach a certain gravity threshold could, if combined, be considered to reach the threshold of an armed attack (thus trigger a right of self-defence). While there is no case in which the ICJ explicitly concluded that an armed attack had occurred based on this theory, the ICJ has at least implicitly accepted it on various occasions.

In the *Nicaragua* case, the Court hinted that it was difficult to decide whether certain intrusions from Nicaragua into the territory of Costa Rica and Honduras could, 'singly or collectively, [amount] to an "armed attack"'.[1118] In the *Oil Platforms* case, the Court explored whether a 'series of […] attacks' by Iran could be classified as armed attack triggering a right to self-defence by the US (and concluded this was not the case).[1119] In the *Armed activities* case, the ICJ was of the view that the 'series of deplorable attacks' by the Allied Democratic Forces on Ugandan territory could be regarded as 'cumulative in character', but nevertheless concluded they were not attributable to the DRC and hence did not give rise to an Ugandan right to self-defence.[1120] In these judgments, the Court looked at incidents which probably did not meet the threshold of armed attack as such (respectively intrusions, attacks against vessels and cross-border attacks by an armed group), but taken jointly, the Court would have been ready to accept that the threshold was met.

The accumulation of events theory seems to be relatively well accepted in doctrine. Dinstein asserts that 'should a distinctive pattern of behaviour emerge, a series of pin-prick assaults may

[1116] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 195.
[1117] See for instance Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 168.
[1118] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, para. 231.
[1119] Case concerning oil platforms (Islamic Republic of Iran v. United States of America), 2003 ICJ Reports, para. 64.
[1120] Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 ICJ Reports, para. 146.

be weighed in its totality and count as such as an armed attack.'[1121] Blum accepts the 'needle prick' theory for considering the combination of various terrorist attacks as an armed attack.[1122] With regard to cyber operations, the Tallinn Manual 2.0 asserts that if smaller-scale incidents originating from the same actor, taken together, meet the requisite scale and effects, they can form an armed attack.[1123] The Bethlehem Principles, already referred to above, also recognize that an attack by a non-State actor can consist of a 'series of attacks that indicate a concerted pattern of continuing armed activity.'[1124]

Nevertheless, Lubell more carefully notes that 'there is some, not entirely consistent, evidence in support of the theory, but is has not been widely accepted.'[1125] Notably, Lubell raises the concern that by applying the accumulation of events theory, one comes close to the 'debatable arena of pre-emptive self-defence'.[1126] He nevertheless admits that 'non-acceptance of an accumulation approach does have its drawbacks, such as ignoring the wider set of circumstances in which an incident takes place, and preventing states from responding and perhaps preventing the next attacks.'[1127]

The accumulation of events theory is indeed not without problems. Besides the fact that it merely postpones the difficult assessment of whether or not a threshold has been reached, it additionally creates possible leeway in terms of timing: what is the accepted time-frame during which acts of a 'lower' threshold can be considered together as one single sufficiently grave armed attack? A State faced with a single 'needleprick' faces a dilemma: either it responds in self-defence, and is accused for not having respected the armed attack threshold, or it waits for another needle prick, and risks being accused for not having respected the criterion of necessity, which demands an urgent reaction. Despite these difficulties, there seems to be an overall agreement that the accumulation of events theory can be used to identify an armed attack.

What is missing in the above ICJ case-law and in doctrine, is the question whether the accumulation of events theory could also apply to *supportive acts*.[1128] The ICJ did not deal with this issue – it did not accept this proposition, neither ruled it out. Therefore, while theoretically it could be derived by analogy from the Court's cases that the accumulation of events theory

[1121] Dinstein, *War, Aggression and Self-Defence*, 2011, 221.
[1122] Yehuda Z. Blum, 'State Response to Acts of Terrorism', *German Yearbook of International Law* 19 (1976): 233.
[1123] Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 342.
[1124] Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors Notes and Comments', 775.
[1125] ILA, Commitee on the Use of Force, 'Report on Aggression and the Use of Force', *International Law Association Reports of Conferences* 76 (2014): 652.
[1126] Lubell, *Extraterritorial Use of Force against Non-State Actors*, 53–54. For a (very) brief summary of the debate on anticipatory self-defence, see ILA, Committee on the Use of Force, 'Final Report on Aggression and the Use of Force', 13-14.
[1127] Lubell, *Extraterritorial Use of Force against Non-State Actors*, 54.
[1128] For a discussion of supportive acts identified for this Study, see the Introduction, Section 3.

may be used for supportive acts, in practice the ICJ has not yet come to such conclusion. This observation is also reflected in Judge Jennings' Dissenting Opinion, who takes the view that

> [i]t may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is *coupled with other kinds of involvement*. Accordingly, it seems to me that to say that the provision of arms, coupled with "logistical or other support" is not [an] armed attack is going much too far. Logistical support may itself be crucial. […] If there is added to all this "other support", it becomes difficult to understand what it is, short of direct attack by a State's own forces, that may not be done apparently without a lawful response in the form of collective self-defence […].[1129]

The question whether the accumulation of events theory can also be applied to supportive acts becomes even more relevant if one takes into account the rather stringent view that a State supporting an armed (terrorist) group may only be attacked if the State controls the acts of the group (a position that, even though still defended by the ICJ, seems to be abandoned in current practice).[1130] Absent the requisite control, supportive acts could, if accumulated, still be considered as reaching the threshold of an armed attack. An argument in this direction can be observed with Randelzhöfer and Nolte, who note that if 'a State knows that an irregular organized group is willing to commit significant acts of armed force against another State *and* it places its territory at the disposal of this group to train members *and* to offer them a safe haven after they have committed these acts, *and additionally* provides them with weapons *and* logistical support'[1131], the State should be regarded as having 'sent' the armed group and therefore having committed an armed attack.[1132] Nevertheless, they still link the accumulation to reach a threshold of 'control', whereas the question remains whether *absent* such control, the accumulation of events theory can be of any use. The Bethlehem Principles again seem to be rather permissive in this regard: according to Principles 5 and 6, a concerted pattern of continued armed activity may consist not only of the acts committed by the actual perpetrators of the armed attack, but also of the acts committed by those threatening with or planning the attack, of providing material support to it.[1133] It should however be recalled that, despite the limited recognition of some of the suggested Principles by a few States, this particular position on the accumulation of supportive acts has not found any approval among States.

Of course, the controversies linked to the accumulation of events theory as discussed above equally apply if one would use the theory when assessing whether *supportive acts* should be considered an armed attack. Indeed, how much time can one leave between the various supportive acts and the final 'armed attack' they support? In addition, arguably the

[1129] Dissenting Opinion Judge Jennings, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, 543.
[1130] See also *supra* notes 970-971.
[1131] Nolte and Randelzhofer, 'Article 51', 1415–16.
[1132] 'Sending' an armed group refers to Article 3(g) Definition of Aggression, as discussed in Section 4.1.1.A.
[1133] Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors Notes and Comments', 775.

accumulation of events theory can only be applied to supportive acts which all originate from one single author State. If different States each contribute with a separate type of support, which on itself does not reach the armed attack threshold, to an armed attack, their support cannot be considered together as reaching the armed attack threshold. Imagine an armed attack by State A against B. Imagine that one month before the attack, State C has delivered crucial military intelligence to A. Imagine that two weeks before the attack, State D has furnished a special weapon system to A which allows A to circumvent B's defence satellite system. One hour before the attack, soldiers of State E have explained the soldiers of State A how to use the weapon system for the planned attack. The eventual attack is, however, solely carried out by personnel of State A. States C, D and E have contributed to the attack by various ways of support (intelligence, weapon delivery, training) on various moments in time. Yet, it would be too far-stretched to argue that because of the accumulation of their acts, each single one of them has committed an 'armed attack'.

In sum, while the accumulation of events theory is a useful way to take into account the context of an attack, and to consider multiple lower threshold attacks from the same author altogether as one single attack, it is highly unlikely that this theory merits application to supportive acts. This would only work (i) if all the supportive acts considered originate from the same supporting State, (ii) if the supportive acts are committed at a moment which is sufficiently close to the actual attack and (iii) if the supportive acts are sufficiently closely directed towards supporting the actual attack. In practice, such a high degree of operational cooperation would probably only occur if the supporting State is also involved, at other levels, in the commission of the armed attack. In addition, while the accumulation of events theory seems to be fairly well accepted when it comes to combining low-intensity forcible acts, it is highly questionable whether the same condonance would exist for combining acts that do not involve force in the first place.

Importantly, while the accumulation of events theory seems to be relatively well accepted as an alternative way to reach the threshold of an armed attack, there are no indications in international jurisprudence or doctrine that the accumulation of events theory would also apply to the threshold of the use of force. The absence of a discussion on the accumulation of events theory linked to the use of force is perhaps an indication for the overall absence of a use of force threshold in the first place (hence supporting the 'single gravity approach', see *supra* Section 3.4). Accumulating events to reach a threshold is indeed unnecessary if there is no (or a very low) threshold.

Yet, as the majority view defends a certain gravity threshold for unlawful use of force, the accumulation of events theory could still be an alternative way to consider whether or not a combination of supportive acts would jointly meet the use of force threshold. Applying the accumulation of events theory would be especially useful for assessing State-to-State support, as there is no case-law or provision of the UNGA Friendly Relations Declaration that could lead to similar conclusions as for State-to-armed group support. The potential scope of such a

theory would be twofold: on the one hand, it would serve as a tool to assess the rather limited scenario whereby support is provided to an actor that merely commits an unlawful use of force. On the other hand, the accumulation of events theory could be used to argue that, in case support to an armed attack is not considered sufficient to be equated with an armed attack, the supportive acts would still jointly constitute an unlawful use of force. The latter conclusion is particularly relevant for State-to-State support.

4.3. Intermediate conclusion

When looking at the alternative ways to meet *jus ad bellum* thresholds, the available legal framework offers an incomplete picture.

Support in the form of control over another actor is a 'false' example of indirect use of force or aggression, as it leads to the attribution of conduct to the supporting State. The *jus ad bellum* does not contain a lot of guidance on how to attribute acts of armed groups to a State. In absence thereof, the high thresholds of Article 8 ARSIWA and of the ICJ's 'effective control criterion' should be used as a reference to determine whether the controlling State commits an unlawful use of force. In addition, Article 3(g) of the Definition of Aggression can be used to identify whether the controlling State, by sending and armed group or by its substantial involvement therein, has committed an armed attack. All four categories of support are indications of control but do not fulfil themselves the requisite thresholds. Moreover, control by one State over another State is a very rare scenario, as States usually do not voluntarily give up the full command and control over their troops: more likely is the scenario whereby responsibility for a potential unlawful use of force or armed attack is shared by multiple States.

Much more relevant for this study is the scenario whereby the supporting State does not exercise control over the supported entity. An analysis of the various categories of support in light of the existing *jus ad bellum* framework has resulted in a diverse picture.

On the one hand, we can observe that none of the four types of supportive acts, if provided to armed groups, is equated with an 'armed attack'. The ICJ has explicitly equated arming and training rebels to the use of force (supportive acts that would fall under the category of logistic support and training, respectively) – arguably this should be broadened in order to encompass all four categories of support.

The same conclusion in light of the prohibition on the use of force does not exist for support provided to States. This could be explained because State-to-State support, even though it is not considered to meet a *jus ad bellum* threshold as such, is still prohibited through the rule of complicity under Article 16 ARSIWA. In absence of a well-established analogous complicity rule for State-to-armed group support, the equation of arming and training rebels (and arguably also other types of support) to a use of force seems justified.

‘Allowing territory to be used’ is the only form of support that, if provided by a State to a State, is arguably considered as an armed attack (provided that we accept the Definition of Aggression as examples of armed attacks). While that rule could be applied by analogy to putting territory at the disposal of an armed group, caution is warranted: as an armed attack triggers an exception to the prohibition on the use of force (namely a forcible action in self-defence), it should be construed narrowly. Analogy interpretations broadening the scope of an armed attack, in absence of a legal rule, should therefore be avoided.

Lastly, the ‘accumulation of events’ theory is accepted fairly well – despite its theoretical difficulties –, but only applies to acts that could jointly reach the threshold for an armed attack. It is however difficult to imagine that the accumulation theory, if applied solely to supportive acts, would still result in the conclusion that the threshold of an armed attack has been reached – especially if one takes into account the fact that the double gravity approach accepted by the majority imposes a high threshold for ‘armed attack’. There is moreover no indication that the accumulation theory is used to meet the threshold of a use of force – hinting at the absence of a gravity threshold for the use of force in the first place. An analogy application to supportive acts can however not be excluded, even though given the already very low or event absent threshold, no such theoretical construction would be necessary.

5. Conclusion

This Chapter has dealt with supportive acts in light of the *jus ad bellum* framework. It has sought to answer to the following two research questions:

c) When does a State supporting an armed attack, a use of force or a violation of the principle of non-intervention commit either of these acts itself?
d) What are the consequences of crossing *jus ad bellum* thresholds?

The second Section of this Chapter has dealt with the latter question. The consequences of meeting *jus ad bellum* thresholds vary greatly depending on the applicable rule: the farthest-reaching consequence, namely the lawfulness of a reaction by force, is only triggered in case of an armed attack. Other consequences, such as those linked to the commission of a *jus cogens* violation, are also triggered in case of a (mere or serious) unlawful use of force. The principle of non-intervention, however, lacking a *jus cogens* nature, merely triggers the responsibility of the violating State and the consequences attached thereto. Importantly, under the collective security system, no forcible countermeasures are allowed.

Sections 3 and 4 jointly formed the answer to the former question. First, in Section 3 it has become clear that there is no unanimous point of view on the various thresholds that apply to the concepts of armed attack or use of force and even the principle of non-intervention under the *jus ad bellum* framework. The various positions were summarized as the double gravity approach (requiring a gravity for the use of force and a higher threshold for armed attack), the single gravity approach (requiring solely a gravity for armed attack), the unified gravity approach (requiring the same gravity threshold for use of force and armed attack) and the no gravity approach (allowing for very low-intensity acts to constitute armed attacks or uses of force). The Section concluded by arguing that depending on the approach one takes, supportive acts are more likely or not to qualify as a separate *jus ad bellum* threshold. Yet, because of the majority view defending a double gravity approach, it is unlikely that supportive acts would directly constitute an armed attack or a use of force. The supportive acts would however more easily amount to a violation of the principle of non-intervention. For that reason, there is no need to look for alternative ways to meet the threshold for non-intervention, contrary to what is necessary for an armed attack or a use of force.

Section 4 explored whether the requisite thresholds for armed attack and use of force can be met by supportive acts through alternative ways. First, is was established that the four categories of supportive acts can be indicative of, but do not meet themselves the necessary (high) level of control to attribute a use of force or an attack by an armed group to a State. It is similarly unlikely that such supportive acts between two States would lead to exclusive control by one State over another. Subsequently, this Section analysed the various legal provisions and ICJ-judgments relevant to supportive acts in case there is no control exercised over the support-receiver. The picture that emerged from this analysis was diverse at two different levels: on the one hand, most types of supports (arguably) amount to a use of force if provided to an armed

group that itself commits either an armed attack or a use of force. On the other hand, only one specific form of support (allowing territory to be used) provided to a State clearly constitutes an armed attack by the supporting State. For the other categories of support, no guidance can be found in the available instruments or cases. This difference can be partially explained by reference to the complicity rule of Article 16 ARSIWA, which applies to supportive acts by a State to another. Despite the recent attempts to argue that 'allowing territory to be used' by armed groups would also provide for a lawful response in self-defence, it is too soon to state that this rule has crystallized in practice. Lastly, while it is fairly accepted that a combination of minor acts could jointly constitute an armed attack, it is highly questionable whether such a reasoning can also be applied to a combination of only supportive acts. In addition, no such reasoning can be found in doctrine or practice applied to the use of force, indicating the low or absent gravity threshold for the use of force.

Based on the foregoing, the second research hypothesis can be confirmed: assisting another State in the commission of an armed attack or a use of force may have the same consequences as carrying out those acts as a main actor. Yet, the hypothesis can only be confirmed because of the use of the verb 'may'. Indeed, as submitted above, the only type of support that will trigger the same consequences as the core act it supports is 'allowing territory to be used': based on Article 3(f) of the Definition of Aggression, 'allowing territory to be used' for an armed attack constitues a separate armed attack. By analogy, allowing territory to be used for a 'mere' use of force would also constitue a use of force. For all the other categories of supportive acts, however, no provision similar to Article 3(f) exists. Thus, for training, logistical support or crucial intelligence sharing, the hypothesis cannot be confirmed.

In the end, many of the contentious points concerning supportive acts and *jus ad bellum* thresholds boil down to the same question: whether priority should be given to collective security or to national security. As aptly put by Sari and Lauva, '[l]owering the gravity threshold of armed attack, adopting the accumulation of events principle and including non-violent subversive activities integrally linked to the use of force among the elements that may make up an armed attack would go some way towards recalibrating the right of self-defence for the challenges of grey zone conflict and hybrid warfare.'[1134] Yet, such broadening does not come without risks. The question on including supportive acts in the use of force and armed attack coincides with the debates on the thresholds that should apply for those concepts. Especially a broadening of the scope of 'armed attack', would mean broadening the scenarios where force may lawfully be used – thus shrinking the scope of the prohibition on the use of force, or, as Sari and Lauva argue 'it would hollow out the prohibition to use force'.[1135]

From a collective security perspective, it would thus be advisable to include supportive acts in the prohibition on the use of force, while simultaneously developing and strengthening the consequences attached to violations of *jus cogens* norms. Conversely, supportive acts should

[1134] Sari and Lauva, 'Hybrid Threats and the US NSS'.
[1135] *Ibid.*

be kept out of the ‘armed attack’ notion, in order to limit the lawful use of force as much as possible. This would of course entail that one accepts the distinction between use of force and armed attack, hence excluding the ‘unified gravity’ approach outlined above.

Whether such approach is desirable from a State security perspective, is yet another question. The scope of the prohibition on the use of force and the right to self-defence lies at the heart of the crossroad between collective security and national security interests. In the current era of increasing nationalism and decreasing globalism, one can observe that States are willing to accept a broadening of their own right to self-defence, to the detriment of the crucial prohibition on the use of force in the UN Charter. While this is of course not new, the contemporary security risks in the form of terrorism and hybrid warfare have been used to challenge the already fragile boundaries of the two cornerstone concepts of the UN Charter. Yet, distinct from volatile international politics, international law should function as a guardian of collective security. While some supportive acts may lead to *jus ad bellum* consequences, this should not become the general rule.

Chapter 5. Supportive acts and the law of neutrality

The previous two Chapters dealt with the consequences of and thresholds to assess acts in support of parties to an armed conflict from the perspective of *jus in bello* and *jus ad bellum*. In Chapter 2, I have presented the law of neutrality as a particular body of international law, which is generally considered as part of the *jus in bello* but shares important features (especially regarding the regulation of supportive acts) with the *jus ad bellum*. I have submitted therefore that the law of neutrality should be best conceived as a hybrid body of international law, consisting of rules which are purely *jus in bello*, but also rules which are more *jus ad bellum* or at least of a *sui generis* character. It is with that position of neutrality in mind that this Chapter seeks to answer the last two research questions of this study:

e) When does a neutral State breaching neutrality law become party to an armed conflict?; and
f) What are the consequences of violating the law of neutrality?

'Neutrality' is a concept used in many different contexts. This Chapter will only focus on the *law of neutrality*, meaning the rights and duties of neutral States, as enshrined in various instruments such as Hague Conventions V and XIII of 1907.[1136] It will not look at neutrality as a political position.[1137] It will also not differentiate between political nuances and related concepts of neutrality, such as 'military neutrals', 'non-aligned States' or 'non-allied States'. The only related concept that will be discussed in more detail below, is that of non-belligerency, as some authors argue that non-belligerency is an intermediate legal status between that of being a party to the conflict as opposed to being neutral.[1138]

However, an explanatory remark seems appropriate on 'permanent neutrality'. Indeed, while the law of neutrality only becomes applicable in time of 'war'[1139], some States consider themselves as 'permanently neutral', even in peacetime (for example, Switzerland or Costa Rica). This permanent neutrality can originate from a unilateral declaration[1140], a treaty[1141],

[1136] Hague Convention (V) Respecting the Rights and Duties of Neutral powers and Persons in Case of War on Land of 18 October 1907; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War of 18 October 1907.
[1137] For literature on neutrality from a political point of view, see for example Jessica L. Beyer and Stephanie C. Hofmann, 'Varieties of neutrality: Norm revision and decline', *Cooperation and Conflict* 46, no. 3 (2011): 285–311; Christine Agius and Karen Devine, '"Neutrality: A really dead concept?" A reprise', *Cooperation and Conflict* 46, no. 3 (2011): 265–84.
[1138] See Section 3.2.1.
[1139] See however a more nuanced approach below, Section 1.
[1140] This was the case for Austria, see Memorandum über die Ergebnisse der Besprechungen Zwischen der Regierungsdelegation der Republik Österreich und der Regierungsdelegation der Sowjetunion, 15 April 1955, reprinted in Gerald Stourzh, *Geschichte des Staatsvertrages, 1945-1955: Österreichs Weg zur Neutralität*, 3. Aufl. (Graz: Styria, 1985), 226-229.
[1141] Finnish neutrality was laid down in the Treaty of Friendship, Cooperation and Mutual Assistance between Finland and the Soviet Union, 6 April 1948, 48 UNTS 156. However, Havel argues that the Finnish permanent neutrality is an example of a 'unilateral form of neutralization'. See Brian F. Havel, 'An International Law Institution in Crisis: Rethinking Permanent Neutrality', *Ohio State Law Journal* 61 (2000): 210.

custom[1142], or merely be grounded in a general policy[1143] and is often – but not necessarily – enshrined in a State's Constitution. It is important to note that neutrality law does not differentiate between these 'permanently neutral' States and other States that are neutral once an international armed conflict occurs. The obligations for permanently neutral States during peacetime are self-imposed, while during 'war', these States will have the same rights and duties under neutrality law as other States.

This Chapter[1144] starts by tackling an important preliminary question: when does the law of neutrality apply (Section 1)? Subsequently, it will outline some core rules of the law of neutrality, focusing thereby especially on those that regulate whether or not certain forms of support to belligerents is allowed (Section 2). Lastly, this Chapter will explore the consequences of violations of neutrality law and in particular the interaction of those consequences with the existing legal framework under *jus in bello* and *jus ad bellum* as identified in the previous Chapters (Section 3). Contrary to the Chapters 3 and 4 dealing with supportive acts under *jus in bello* and *jus ad bellum* respectively, this Chapter does not explain the consequences of meeting neutrality law thresholds before dealing with the actual thresholds. The reason for this reverse order of treatment is that the controversies within neutrality law do no so much lie in the question whether or not certain supportive acts violate neutrality law (as will become clear soon, most support violates neutrality law), but predominantly turn around the question what the consequences of violations of neutral duties are.

1. Preliminary question: when does the law of neutrality apply?

The law of neutrality was developed in an era where 'war' was still permitted under international law. In the 19th Century, 'war' in the material sense, as opposed to peace, was seen as a situation of 'large-scale fighting between governments'.[1145] A 'status of war', in the legal sense[1146], was usually declared, even though international lawyers did not agree upon the formality of such a declaration.[1147] Third States were bound by the law of neutrality as soon as

[1142] Swiss neutrality is said to reflect customary law. See *ibid.*, 197.
[1143] This is/was the case for Sweden. See Wilhelm Wachtmeister, 'Neutrality and international order', in John Norton Moore and F Turner (eds.), *Readings on International Law from the Naval War College Review*, International Law Studies 68 (Newport: Naval War College, 1995), 525.
[1144] This Chapter is to a great extent based on a chapter that I published earlier elsewhere: see Verlinden, 'The Law of Neutrality'. Some of the practical examples, notably the ones referring to supportive acts in the context of the 2003 Iraq invasion, have been based on the following co-authored article I wrote: Ferro and Verlinden, 'Neutrality During Armed Conflicts'.
[1145] Quincy Wright, 'The Present Status of Neutrality', *American Journal of International Law* 34 (1940): 393.
[1146] Wright defines war in the legal sense as 'a period of time during which the extraordinary laws of war and neutrality have superseded the normal law of peace in the relations of states'. He adds that '[a] state of war may exist without active hostilities, and active hostilities may exist without a state of war.' See Quincy Wright, 'When does war exist?', *American Journal of International Law* 26 (1932): 363.
[1147] Stephen C. Neff, *War and the law of nations: a general history* (Cambridge: Cambridge University Press, 2005), 104. Declarations of war had become a usual practice since the mid-17th century. See *ibid.*, 106. A legal 'state of war' could be declared by an attacking State expressing an *animus belligerandi*, it could be declared by the victim of an attack, or it could even be recognized by third States (albeit with a more limited effect). Macini,

they became aware of the existence of a state of war between belligerents. Often a declaration of neutrality was issued.[1148]

Two drastic changes of international law in the 20th century are relevant to the law of neutrality. First, the use of force became prohibited under international law (Article 2(4) UN Charter), although still with some exceptions.[1149] Second, in the context of international humanitarian law, the use of the notion of 'war' was replaced by the broader notion of 'armed conflict', making IHL applicable to both international armed conflicts and – more hesitantly – non-international armed conflicts.[1150] Consequently, States could no longer avoid the applicability of IHL rules by denying that a status of war existed.[1151] Indeed, the rules governing situations of armed conflict automatically apply once the factual circumstances point at the existence of an armed conflict.[1152]

What has been the influence of these developments on the law of neutrality? While IHL became applicable during both international and non-international armed conflicts, the law of neutrality, as codified in 1907, has not been adapted to this 'new' concept of armed conflict. Therefore, to date, divergent views exists on the issue whether for the purpose of the applicability of the law of neutrality, the concept of war has also been replaced by that of 'international armed conflict'. According to the majority view, the law of neutrality nowadays applies in all cases of international armed conflict, assuming that the latter notion has replaced the notion of 'war'.[1153] This point of view was also followed by the International Court of Justice in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where it stated that 'the principle of neutrality […] is applicable [...], to all *international armed conflicts,* whatever type of weapons might be used.'[1154]

'The Effects of a State of War or Armed Conflict', 989–91. There was however no requirement of a formal declaration under the just-war theory during the Middle Ages. See Neff, *War and the Law of Nations*, 103.

[1148] Lassa F. L. Oppenheim, *International Law: A Treatise. Volume II: War and Neutrality*, 2nd ed., vol. 2 (London: Longmans, Green and Co., 1912), paras 307 and 309.

[1149] See Chapter 4.

[1150] See Chapter 3. The 1949 Geneva Conventions (GCs) and Additional Protocol I are applicable to international armed conflicts, whereas common Art. 3 of the GCs and Additional Protocol II are applicable to non-international armed conflicts.

[1151] 'Declarations of war' have become very rare in the post-1945 era. Algeria still declared war against Israel in 1967. See Maurice Torrelli, 'La neutralité en question', *Revue générale de droit international public* 96, no. 1 (1992): 13.

[1152] Common Art. 2 GCs reads: '[…] the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.' See also Chapter 3, Section 3.1.

[1153] See Schindler, 'Transformations in the law of neutrality since 1945', 375. Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in M.N. Schmitt and Jelena Peijic (eds.), *International Law and Armed Conflict: Exploring the Faultlines: essays in honour of Yoram Dinstein*, International Humanitarian Law Series (Leiden: Martinus Nijhoff Publishers, 2007), 560, relying on post-WWII State practice to support this view. Michael Bothe, 'Neutrality at sea', in Ige F. Dekker and Harry H.G. Post (eds.), *The Gulf War of 1980-1988: the Iran-Iraq War in international legal perspective* (Dordrecht: Martinus Nijhoff Publishers, 1992), 206. However, Bothe seems to have changed his opinion and defends in more recent work that 'there must be a conflict of a certain duration and intensity'. See Bothe, 'The Law of Neutrality', 556.

[1154] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports, para. 89.

Another group of authors differentiates between a status of war (which automatically triggers the applicability of the law of neutrality for States not party to the conflict), and a 'mere' situation of armed conflict which does not amount to war. In the latter case, States would have the option to apply the law of neutrality or not.[1155] For those who still consider the law of neutrality to be only applicable in case of 'war', there is still the problem of identifying its existence. Some say neutrality law only applies when a legal status of war exists, requiring a formal declaration[1156] or certain neutrality measures.[1157] The latter argument is however circular: the application of neutrality measures cannot be an indication for the existence of war, which would trigger the applicability of neutrality law. Others say that the existence of a war depends on the intensity and duration of the conflict: a short, low intensity IAC would therefore not amount to a war.[1158] A minority argues that the existence of a status of war depends on the conduct of third parties *vis-à-vis* the conflict.[1159] There is, in sum, no agreement upon the exact legal definition of a 'status of war'.

While the codified law of neutrality, its most recent binding instrument dating from 1907, still uses the notion of 'war', Greenwood acknowledged in 1992 that *de lege ferenda*, the view that the notion of IAC has replaced the notion of war 'probably reflects the direction in which international law is moving'.[1160] True, this means that even in small-scale IACs, the law of neutrality governs the position of third States.[1161] Yet, many of the neutral rights apply to very specific events and will not become applicable in a small-scale IAC.[1162] Nevertheless, other obligations, such as the duty of belligerents to respect the neutral territory, will apply in any

[1155] Greenwood, 'The Concept of War in Modern International Law', 298.
[1156] This also seems to be the position of Sweden, as the Swedish Military Manual notes that '[w]ith a declaration of neutrality, the state imposes an obligation to be impartial towards the warring parties, which, in turn, have to respect neutral territory and neutral property.' [Translated with the assistance of Google Translate]. Sweden, Folkrättskommittén, Folkrätt i vapnad konflikt: -svensk tolkning och tillämpning: slutbetänkande (Stockholm: Fritzes, 2010), 106.
[1157] Lauterpacht, *Oppenheim's International Law*, 2:655; Tucker, *The Law of War and Neutrality at Sea*, 199–200.
[1158] The German military manual follows these criteria of intensity and duration, stating that '[t]he neutrality of a State in an international armed conflict begins with the outbreak of an international armed conflict between other States which is of such duration or intensity that it requires the application of the law of neutrality. The law of neutrality thus has a smaller scope of application than the rest of the law applicable in international armed conflicts.' Germany, Humanitäres Völkerrecht in Bewaffneten Konflikten – Handbuch –, ZDv15/2, DSK AV230100262, para. 1202. Bothe does not use the concept of war but states that the law of neutrality applies in international armed conflicts 'of a certain duration and intensity'. See Michael Bothe, 'Neutrality, concept and general rules', *Max Planck Encyclopedia of Public International Law*, 2011, 19. See also Petrochilos, who acknowledges that 'neutrality and state of war have […] been dissociated', but instead introduces the concept of a 'state of generalized hostilities', which in practice leads to the same view as the proponents of the intensity and durations requirement for a status of war. See Georgios C. Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality', *Vanderbilt Journal of Translational Law* 31 (1998): 603 and 605.
[1159] Wright, 'When Does War Exist?', 365; Christopher Greenwood, 'The Concept of War in Modern International Law', 301 (Greenwood adds to this argument however that it is not so different from the position that the applicability of the law of neutrality remains optional).
[1160] Christopher Greenwood, 'Comments to Chapter 6. Neutrality at sea', in Dekker, Ige F. and Post, Harry H.G. (eds.), *The Gulf War of 1980-1988: the Iran-Iraq War in international legal perspective* (Dordrecht: Martinus Nijhoff Publishers, 1992), 213.
[1161] One of the consequences of the applicability of neutrality law is that all belligerent soldiers present on neutral territory have to be captured (see *infra* Section 2.3). If the IAC is small-scale, for example exchange of fire during a few hours, by the time the neutral State has carried out its obligations the conflict might already be over.
[1162] ICRC, *Commentary on the First Geneva Convention*, para. 909.

type of IAC. It must be acknowledged that this theoretical observation is perhaps not always desirable in practice. One of the consequences of the applicability of neutrality law is for instance that all belligerent soldiers present on neutral territory have to be captured (see *infra* Section 2.3). If the IAC is small-scale, for example exchange of fire during a few hours, by the time the neutral State has carried out its obligations the conflict might already be over. In reality, very few third States would in such case make use of the possibilities the law of neutrality offers (e.g. to take countermeasures against breaches of neutrality law).

Occasionally it has been argued that the law of neutrality should apply also in case of non-international armed conflicts, or to situations involving non-State actors. This was for example argued by both Ingber[1163] and Bridgeman[1164] with regard to the conflict between the US and al-Qaeda, or by Jensen with regard to cyber operations in a NIAC.[1165] Deeks has referred to the law of neutrality in order support her argument in favour of the acceptability of a right of self-defence against a non-State actor operating on the territory of an unable or unwilling State.[1166] The majority view, including my own, remains however that the law of neutrality does not apply in case of non-international armed conflict.[1167] This is where the law of neutrality still stands today, the 1907 Hague Conventions simply do not mention the case of non-international armed conflict. The 2015 Geneva Academy Commentary to the Geneva Conventions confirms this view,[1168] and so did the DC Court of Appeals in Columbia in a recent case.[1169] This would however not exclude the possibility that neutral States apply a policy of neutrality *vis-à-vis* NIAC situations, leaving them the option to ignore rules of neutrality law that would be less suitable for such situations. At least one neutral State, Costa Rica, has declared to adopt a neutral policy by analogy to NIACs.[1170]

[1163] Rebecca Ingber, 'Untangling Belligerency from Neutrality in the Conflict with al-Qaeda', *Texas International Law Journal* 47 (2011): 89.
[1164] Tess Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda', *New York University Law Review* 85 (2010): 1212.
[1165] Eric Talbot Jensen, 'Sovereignty and neutrality in cyber conflict', *Fordham International Law Journal* 35 (2011–2012): 839–40.
[1166] See Chapter 4, Section 4.1.2.B and Deeks, 'Unwilling or Unable', 497–503.
[1167] See, *inter alia*, Bothe, 'The Law of Neutrality', 557; Kevin John Heller, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang', *Texas International Law Journal* 47 (2011): 120. See also the interesting statement by the Austrian Minister of Defence Gerald Klug, on the military operation against IS: '*Gegenüber Terrorismus kann es keine Neutralität geben*.' ['There can be no neutrality towards terrorism'] X, 'Klug: "Keine Neutralität" bei Terrorismus', *Oe24*, 17 November 2015, http://www.oe24.at/oesterreich/politik/Klug-Keine-Neutralitaet-bei-Terrorismus/212454574. See also Ralph Janik, 'Austria and the Fight Against the "Islamic State": Whither Neutrality?', *EJIL: Talk!*, 2 March 2016, http://www.ejiltalk.org/austria-and-the-fight-against-the-islamic-state-whither-neutrality/.
[1168] Yves Sandoz, 'Rights, Powers and Obligations of Neutral Powers under the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 107.
[1169] United States Court of Appeals, District of Columbia Circuit, *Ghaleb Nassar AL-BIHANI v. Barack OBAMA*, President of the United States, et al., Case No. 09-5051, 5 January 2010, 590 F.3d 866, 389 U.S. App. D.C. 26: '[T]he laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states.'
[1170] Havel, 'Rethinking Permanent Neutrality', 255.

Of course, under *jus in bello*, if a non-international armed conflict internationalizes because of the involvement of third States[1171], or if a situation of internal conflict is considered as an international armed conflict in accordance with Article 1(4) AP I, the law of neutrality becomes applicable.[1172] In addition, but of rather historical relevance, the law of neutrality also becomes applicable in case of recognition of belligerency.[1173] Traditionally, if the insurgents were recognized as belligerents by the State they were fighting against, the conflict was seen as an international armed conflict, thereby also triggering the law of neutrality.[1174] However, the last time the recognition of belligerency was arguably used was during the American Civil War.[1175]

Under *jus ad bellum*, the principle of non-intervention partially fulfils the same role as the law of neutrality: to prevent other States from becoming embroiled in the ongoing struggle between two States or within a State. The main difference between the law of neutrality and the principle of non-intervention is that support provided to a State involved in a civil war is (generally) not considered to be a violation of the principle of non-intervention, whereas support to any side of an international conflict is prohibited by neutrality law (see also Section 2.2 below).

While legally the law of neutrality does not apply in times of non-international armed conflict, this does not mean that the influence of the law of neutrality does not reach beyond situations of international armed conflict. The already mentioned *jus ad bellum* theory on 'unable or unwilling States' draws heavily on the old rule of neutrality law, allowing for the targeting of neutral States that were unable or unwilling to protect the neutral character of their territory.[1176] Similarly, the idea that certain breaches of neutrality law (e.g. when strongly assisting one belligerent) would terminate the status of a neutral undoubtedly has had influence on the current debate in the *jus in bello*, focusing on the support-based approach.[1177] Both links with *jus ad bellum* and *jus in bello* with be discussed in further detail in Section 3.

[1171] Depending on which criterion one uses, see *supra* Chapter 2.
[1172] Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda', 1213.
[1173] There are four belligerency criteria: (1) the existence of a civil war, beyond mere unrest; (2) the insurgents have to occupy a substantial part of the territory and (3) they have to control the administration in that area; (4) the insurgents have to observe the rules of the law of war, thereby acting under a responsible authority. In addition to these criteria, the majority view is that belligerency should be recognized and cannot exist automatically if the criteria are fulfilled. See Yair M. Lootsteen, 'The Concept of Belligerency in International Law', *Military Law Review* 166 (2000): 134–35. On the recognition of belligerency, see Brad R. Roth, *Governmental illegitimacy in international law* (Oxford: Clarendon Press, 1999), 177–82; Tom Ruys, 'The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict', *Stanford Journal of International Law* 50 (2014): 257–60.
[1174] Or in the words of the US Supreme Court during the 1863 Prize Cases, 'the condition of neutrality cannot exist unless there be two belligerent parties.' See Prize Cases 67 U.S. 635 (1862), Justia Law, 669, https://supreme.justia.com/cases/federal/us/67/635/case.html.
[1175] The British government recognized the belligerency of the Confederate States in 1861. See Lootsteen, 'The Concept of Belligerency in International Law', 114. During the Spanish Civil War, the issue of recognition of belligerency was discussed, but not applied. See *ibid.*, 115–17. Mikos-Skuza argues that Colombia recognized belligerency following a ruling by the Constitutional Court in 1995. See Elzbieta Mikos-Skuza, 'International law's changing terms: "war" becomes "armed conflict"', in Mary Ellen O'Connell (ed.), *What is war? An invesigation in the wake of 9/11* (Boston: Martinus Nijhoff Publishers, 2012), 29.
[1176] See Chapter 4, Section 4.1.2.B
[1177] See Chapter 3, Section 4.2.2, sub-Section B.2.

The question remains however whether the existence of an IAC leaves States the *option* not to abide by the law of neutrality. Schindler, for instance, argues that neutrality law is optional.[1178] Petrochilos, on the other hand, says the law is 'not entirely conclusive as to [its] mandatory or optional character'.[1179] Indeed, Hague Conventions V and XIII do not explicitly impose their automatic applicability during an IAC. Nevertheless, Article 16 of Hague Convention V states that 'the nationals of a State which is not taking part in the war are considered as neutrals', hence leaving no room for an intermediate status. Moreover, the ICJ seems to have acknowledged automatic applicability of neutrality law in its already quoted Advisory Opinion on the *Legality of the Threat or use of Nuclear Weapons*, where it stated that 'the principle of neutrality […] is applicable […] to all international armed conflict'.[1180] Similarly, the 2015 Geneva Academy Commentary to the Geneva Conventions stresses that 'whenever an IAC breaks out, states are either belligerent or neutral'.[1181] In addition, the HPCR Manual on International Law Applicable to Air and Missile Warfare defines 'neutral' as 'a State not a Belligerent Party in an international armed conflict.'[1182] The Canadian Military Manual states very clearly that 'the neutrality of a non-participating state commences with the outbreak of an armed conflict between other States.'[1183] Bothe aptly summarizes the applicability of neutrality law as follows:

> Neutrality is not optional, in the sense that each state is free to violate single duties of the law of neutrality as it will, or to declare them irrelevant, without having to fear a countermeasure taken by the adversely affected state.[1184]

[1178] Schindler, 'Transformations in the law of neutrality since 1945', 273. According to Schindler, 'State practice since 1945 shows that States have in fact assumed a great variety of intermediate positions regarding armed conflicts between other States.' He therefore *inter alia* refers to the Iran-Iraq War, where neutral duties might indeed have been altered by UNSC Resolutions (on this, see *infra* Section 3.1), which does not however render neutrality law optional. He also refers to the wording used in some provisions of the Geneva Conventions and Additional Protocols, an argument which will be addressed below (Section 3.2.1).

[1179] Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality', 601.

[1180] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports, para. 89. This statement was not challenged in the multiple separate/dissenting opinions attached to the Advisory Opinion. In contrast, Judge Fleischauer, for instance, argued that 'the respect for the neutrality of States not participating in an armed conflict is a key element of orderly relations between States. The nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict and of the principle of neutrality. The nuclear weapon cannot distinguish between civilian and military targets. It causes immeasurable suffering. The radiation released by it is unable to respect the territorial integrity of a neutral State.' He continued by referring to '[t]he principles and rules of the humanitarian law and the other principles of law applicable in armed conflict, such as the principle of neutral', hence implying the automatic applicability of neutrality law. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Separate Opinion of Judge Fleischauer, 1996 ICJ Reports 305 (ICJ, 8 July 1996), paras 2 and 5. Judge Weeramantry stressed that '[t]he radiation [a nuclear weapon] releases over immense areas does not discriminate between combatant and non-combatant, or indeed between combatant and neutral States.' See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting Opinion of Judge Weeramantry, 1996 ICJ Reports 429 (ICJ, 8 July 1996), 499.

[1181] Sandoz, 'Rights, Powers and Obligations of Neutral Powers under the Conventions', 93.

[1182] See Rule 1(aa) of Program on Humanitarian Policy and Conflict Research Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare*.

[1183] Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels, 13 August 2001, para. 1303.

[1184] Bothe, 'The Law of Neutrality', 551.

The automatic applicability of neutrality law is therefore a feature flowing from the *jus in bello* aspect of neutrality law: *jus in bello* applies as soon as an armed conflict erupts. That being said, while the trigger for its applicability is of *jus in bello* nature, the character of some of the neutrality law rules are more *jus ad bellum*-focused. I will now turn to a discussion of those neutrality rules and their impact on supportive acts in times of international armed conflict.

2. Neutral rights and duties

The law of neutrality grants rights to and imposes duties on both neutral States and belligerent States. Some of these rights and duties are purely humanitarian in character and have been integrated in the Geneva Conventions. For instance, Article 4 GC IV defines neutral persons as one of the categories of protected persons in case of capture. Prisoners of war can be transmitted to neutral States until the end of the hostilities (Articles 109-111 GC III).

However, the bulk of neutral rights and duties – the *essentialia neutralitatis*[1185] – are more *jus ad bellum*, or at least hybrid in nature. In essence, they all derive from three principles: impartiality, abstention (or non-participation) and prevention.[1186] Some of the neutral duties have been explicitly enshrined in the two neutrality law conventions: Hague Conventions V and XIII. Often, however, a neutral duty is derived from custom, or even from an authoritative author writing on neutrality law. As a consequence, the exact scope of neutral rights and duties is difficult to detangle, especially if one considers that contemporary military manuals have already undergone considerable influence from more recent international rules on the use of force or on countermeasures.

In addition, the hybrid character of some neutrality rules may flow from the fact that they in essence prohibit a certain from of support by linking a targetability to a violation of that prohibition. That targetability can be interpreted as a targetability in the sense of the conduct of hostilities rules under *jus in bello* (meaning that the target is considered a lawful military target) or in the sense of the *jus ad bellum* rules (meaning that a certain State may be lawfully attacked because of its violation of neutrality law).

2.1. Duty of non-participation in hostilities

A first, almost too obvious, rule is that a neutral State should not get involved in the hostilities between the belligerents. This prohibition, also called the principle of non-participation, flows from the very meaning of the concept of neutrality and the prohibition of assistance. Although being a cardinal rule of neutrality law, it is not explicitly mentioned in HC V or XIII.

[1185] Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 567.
[1186] For a detailed overview, see Bothe, 'The Law of Neutrality', paras 1108–1156.

This rule impacts a neutral State's possibility to provide support of the second category identified for this study: logistical support. Non-participation prohibits a neutral State from using its armed forces in an ongoing conflict, including, for example, the supply of military advisors to the armed forces of a party to the conflict.[1187]

Does the rule also prohibit private individuals from that neutral State from participating in hostilities? While for the belligerents it is prohibited to recruit troops on the neutral territory (Art. 4 HC V) or to recruit mercenaries (Art. 47 AP I)[1188], citizens of a neutral State may join the armed forces of a party to the conflict at their own risk (Art. 6 HC V). In such case, the neutral State will not be deemed to have violated its neutrality, except if the neutral State tolerated or even supported the formation of a 'volunteer corps' by a group of its citizens.[1189] The latter would be a violation of the neutral State's duty of impartiality, and arguably also of the duty to protect the neutral character of its territory (see Section 2.3). The neutral private individuals who decide to join the troops of a belligerent cannot claim their neutrality when captured.[1190] They must not, however, be treated more severely than nationals of the party to the conflict they joined (Art. 17 HC V).

2.2. Prohibition of assistance and duty of impartiality

A neutral State may not provide assistance to the belligerent parties.[1191] This equally goes for goods (e.g.: weapon delivery) and for services (e.g.: intelligence sharing), thus covering supportive acts resorting under categories ii (logistical support), iii (training) and iv (crucial intelligence sharing) identified for this study. Together with the prohibition to actually participate in the hostilities alongside a belligerent party, this prohibition of assistance forms part of the general principle of abstention. The prohibition of assistance is absolute and

[1187] *Ibid.*, para. 1111.

[1188] The prohibition to recruit mercenaries also flows from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 2163 UNTS 75. In Belgium, the recruitment of persons to join foreign armed forces, and all acts facilitating such recruitment, may be punished with a prison sentence from two months up to three years. See Article 1 of Wet betreffende diensten bij een vreemde leger- of troepenmacht die zich op het grondgebied van een vreemde Staat bevindt, BS 24 August 1979, 9272.

[1189] In this regard see also the recent UNSC Resolution on foreign terrorist fighters, which obliges States to 'prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities'. UNSC Res 2178, 24 September 2014, UN Doc. S/RES/2178(2014), 4/8. This resolution is of course only linked to neutrality law insofar the foreign fighters participate in an *international* armed conflict.

[1190] This is important to know, for example, to determine whether a person can be considered a protected person under Art. 4 GC IV.

[1191] Obviously, in case of aggression or even the mere unlawful use of force by one State against another, this prohibition of assistance to the aggressor also flows from other rules of international law, such as the Friendly Relations Declaration or Article 41 ARSIWA. In more detail on this topic, see Olivier Corten, 'Quels droits et quels devoirs pour les États tiers ? Les effets juridiques d'une assistance à une acte d'aggression', in Centre de droit international (ed.), *L'intervention en Irak et le droit international: actes du colloque international, 17-18 octobre 2003, Paris* (Paris: Pédone, 2004), 105–28. Corten states that 'on peut estimer que les obligations de non-assistance qui relèvent du régime de neutralité se confondent largement, voire entièrement, avec celles qui découlent de la règle correspondante en droit international general.' *Ibid.*, 126.

therefore does not only apply if a neutral State supports one of the belligerent parties, but even if the State supports *all* the belligerent parties.[1192]

The neutrality law conventions do not contain a general provision encompassing the scope of this prohibition of assistance and duty of impartiality. One aspect of the rule can be found in Article 6 HC XIII, which stipulates that a neutral State should not supply the belligerents with war material. Even though this provision does not contain specific norms related to the provision of *other types of support*, the prohibition of assistance is considered to include also the provision of services that could influence the outcome of the conflict, such as intelligence sharing[1193], and financial aid, such as gifts and loans.[1194] In general, while no provision of neutrality law explicitly mentions it, a neutral State should not give any assistance that could *influence the outcome of the conflict*. As already indicated in Chapter 4, it is precisely this (unwritten) rule of neutrality law that has served as an inspiration for the Wiesbaden Resolution of the *Institut de Droit International* on the Principle of Non-Intervention in Civil Wars.[1195] In the words of Heintschel von Heinegg, neutral States 'are prohibited from assisting one party in a manner that could lead to a temporal, spatial or other widening of the conflict.'[1196] Even though its exact contours are not entirely clear, it seems that the prohibition of assistance must be construed broadly.

An application of this prohibition can be found in the UK practice during the Iran-Iraq War (1980-1988). The British Government was asked in the House of Commons whether the UK would 'cease supplying military equipment to the Khomeini regime in Iran, and proceed no further in accepting Iranian military personnel for training in the United Kingdom'. The Government responded having adopted 'a policy of strict neutrality in the conflict between Iran and Iraq', assuring that the UK would 'not supply lethal equipment to either side'. In addition, the government asserted that '[n]o Iranian personnel [was at the time] receiving military training from the Ministry of Defence, and any future requests for such training would be considered in the context of the [UK's] policy of neutrality.'[1197]

Similarly, a German Court held in the context of the 2003 invasion in Iraq that some support provided by Germany to the US and the UK was clearly in violation of Hague Convention V

[1192] Bothe, 'The Law of Neutrality', 561.
[1193] Eric Castrén, *The present law of war and neutrality*, Annales Academiae Scientiarum Fennicae, B 85 (Helsinki: Suomalaisen Kirjallisuuden Seuran Kirjapainon Oy, 1954), 474. Castrén further notes that '[it] would seem that it suffices for a State to refrain from delivering to belligerents material which has, exclusively or at least mainly, a military purpose.'
[1194] Lauterpacht, *Oppenheim's International Law*, vol. 2, para. 352. Here again, the situation is different with regard to loans by neutral individuals to belligerents. Since under Art. 18(a) HC V loans are not considered as acts causing the loss of neutrality by an individual, it can be implied that the neutral State does not have a duty to prevent those loans. Heller, 'Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda', 127.
[1195] See note 944.
[1196] Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 565.
[1197] UK, House of Lords, 'Iran: Uk Military Equipment And Training - Question of Lord Molloy', Hansard, 5 February 1984, https://hansard.parliament.uk/Lords/1984-05-02/debates/9bb20c14-7a03-4668-a0f9-07ec67b24441/IranUkMilitaryEquipmentAndTraining?highlight=neutrality#contribution-670325aa-c4e6-4c4f-99b8-ddd83dcc430f.

(notably granting overflight rights to fighter jets on their way to Iraq, see Section 2.3 below), whereas for other types of support the Court was more measured. With regard to the AWACS reconnaissance flights that Germany had deployed over Turkey, the Court held that the compliance with neutrality law '[depended] on whether the data obtained during these operations were of importance for the war operations in Iraq and whether the US and UK forces had *de facto* access to them'.[1198] With regard to the role of German soldiers in protecting US barracks on German territory, the Court decided that compliance with neutrality law depended on whether these tasks were taken over from US soldiers 'in order to enable or facilitate the withdrawal of the respective troops into the war zone'.[1199] For both types of support, it is clear that if the US gained a military advantage from the support in the context of the Iraq war, these supportive acts would not be compatible with the prohibition under neutrality law of supporting a belligerent party.[1200]

In similar vein, when an Austrian State firm sold weapons to Iran during the Gulf War, this constituted a violation of neutrality law.[1201] But while the supply by the neutral State is clearly prohibited, under traditional neutrality law the neutral State does not have the duty to prevent supplies of war material by private individuals to the belligerent parties (Article 7 HC V and Article 7 HC XIII). However, in recent decades, the private arms industry has become more and more controlled by the State. Even though technically many arms production companies remain private, they need State approval for import and export. The most recent example of this evolution is the UN Arms Trade Treaty, which entered into force on 24 December 2014.[1202] In this changed context, it would not be consistent with the concept of neutrality to abide by the too permissive rule of Articles 7 HC V and XIII. Therefore, arguably a neutral State is under a duty to prevent weapons supply by private 'individuals' to belligerent parties. Granting export licenses would constitute a non-neutral service. This position is however not shared by all scholars.[1203] Even those that do defend it, such as Bothe, admit that there is not yet sufficient *opinio juris* to state that the same duty applies for the prevention of weapons supply through the black market.[1204] In any case, the practical obligation of this newly arisen obligation poses some difficulties. What about, for example, the licenses granted before any international armed conflict started? During the Iraq-Iran conflict in 1980, the United Kingdom stopped issuing licenses for export of weapons to both sides.[1205] France however kept on supplying weapons to

[1198] Judgment of 21 June 2005 – 2 WD 12.04. [ECLI:DE:BVerwG:2005:210605U2WD12.04.0] (Bundesverwaltungsgericht, 21 June 2005), para. 4.1.4.1.4.
[1199] *Ibid.*
[1200] *Ibid.*
[1201] Havel, 'Rethinking Permanent Neutrality', 176. However, I disagree with Havel's point of view that the law of neutrality did not apply to the Gulf War, because it 'was not a declared war in the technical sense'. On the latter issue, see *supra* Section 1.
[1202] Arms Trade Treaty, 2 April 2013, (2013) 52 ILM 988. For example, the ATT obliges States to set up a national control system to control the export of the weapons covered by the treaty (Arts. 3-5 ATT). It also prohibits the transfer, and especially the export of weapons in certain instances (Arts. 6-7 ATT).
[1203] According to Heller it even remains a minority view. See Heller, 'Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda', 132.
[1204] Bothe, 'The Law of Neutrality', 558.
[1205] Neff, *The Rights and Duties of Neutrals*, 2000, 201.

Iraq, justifying its exports on the ground that it concerned contracts that were concluded before the outbreak of the conflict.[1206] The latter justification by France could be seen as implying an acceptance of the newly emerged rule. However, State practice does not yet seem to be settled on the extent to which this rule influences existing contracts.

An important exception to the prohibition of assistance to the belligerent parties concerns humanitarian aid (Article 14 HC V). Even though this aid could in a way influence the outcome of the conflict, here the care for the victims of the conflict is deemed more important and therefore humanitarian aid can never be considered as an interference with the military dynamics of the conflict. A neutral State will thus not violate its neutrality by delivering humanitarian aid to the victims of the conflict, even though it should follow some basic rules in doing so (Article 70 AP I).[1207] Humanitarian aid indeed is in itself subjected to the criteria of neutrality and impartiality.

Another (more limited) exception is the traditional right of a neutral State to uphold its trade and diplomatic relations with a belligerent State, as long as it also does so with the other belligerent(s).[1208] The duty of impartiality does not however oblige a neutral State to engage in new trade relations with a belligerent State if it had no such relations before the outbreak of the conflict. Yet, if the neutral State decides to impose restrictions on the commerce relationship with one belligerent, it equally has to do so with regard to the other belligerent(s). The same can be said about diplomatic relations. The duty of impartiality means that '[e]very measure of restriction or prohibition taken by a neutral Power […] must be impartially applied by it to both belligerents.'[1209] As Tucker explains, '[t]he so-called "attitude of impartiality" does not refer, in its strict legal meaning, to the political motives behind neutral behavior, but to that behavior itself. […] The neutral state may be – in spirit – wholly in sympathy with one side in the conflict, but as long as it *acts* in an impartial manner […] it fulfils its obligations.'[1210] For instance, the US noted in the context of the 1991 Gulf conflict that '[a]lthough Jordan's attitude toward Iraq and the Coalition appeared inconsistent with its UN obligations, mere sympathy for one belligerent does not constitute a violation of traditional neutral duties, nor even a rejection of the obligations imposed by the UNSC resolutions cited. Conduct is the issue.'[1211] Therefore,

[1206] *Ibid.*

[1207] A discussion of the conditions for humanitarian aid during armed conflict falls beyond the scope of this dissertation. See for example Ruth Abril Stoffels, 'Legal regulation of humanitarian assistance in armed conflict: achievements and gaps', *International Review of the Red Cross*, no. 855 (2004): 515–46; Denise Plattner, 'La neutralité du CICR et la neutralité de l'assistance humanitaire', *Revue internationale de la Croix-Rouge*, no. 818 (1996): 169–89.

[1208] Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda', 1198.

[1209] Art. 9 HC V. A minority view in literature states that there is no general duty of impartiality for neutral States. According to this view, impartiality was merely the historical principle forming the basis of the emergence of neutrality law, rather than being a normative principle from which rights and duties can be derived. Andrea Gioia, 'Neutrality and non-belligerency', in Harry H.G. Post (ed.), *International economic law and armed conflict*, Nova et Vetera Iuris Gentium 18 (Dordrecht: Martinus Nijhoff Publishers, 1994), 80.

[1210] Tucker, *The Law of War and Neutrality at Sea*, 205.

[1211] 'United States: Department of Defense Report to Congress on the Confuct of the Persion Gulf War - Appendix on the Role of the Law of War, April 10, 1992', *International Legal Materials* 31, no. 3 (1992): 638.

correlated to the *duty* of impartiality is the *right* for neutral States to maintain their trade and diplomatic relations with belligerents as well as with other neutral States. Belligerent parties need to respect these trade and diplomatic relations between neutral States.

The duty of impartiality has to be nuanced in light of the possible actions taken by the UNSC.[1212] If the UNSC imposes an economic embargo upon one of the belligerents – as was the case during the Second Gulf War[1213] –, neutral States will have to discriminate to some extent, instead of remaining fully impartial.

2.3. Inviolability of neutral territory

A third and last important principle of neutrality law is that the territory of a neutral State shall not be violated (Article 1 HC V). This first and foremost implies a duty for the belligerent States to respect the territorial integrity of a neutral State: they cannot conduct hostilities on that territory, nor can they pass their troops, convoys or munition through the territory[1214] or install or use 'wireless telegraphy station[s]' on neutral territory.[1215]

Correlated to the duty of belligerents to respect the neutral territory is the duty of the neutral State to ensure the neutral character of that territory – hence an obligation not to 'allow the territory to be used' (supportive category i in this study). This duty does not extend to all possible activities by a belligerent on neutral territory though. Under traditional neutrality law as enshrined in Article 8 HC V, a neutral State does not have the obligation to prevent the belligerents from using generally accessible means of communication located on the neutral territory. This provision is important in the light of the recent evolution towards cyber warfare, whereby a cyber-attack could be carried out by 'using' a server located on neutral territory. In light of that evolution, Rule 93 Tallinn Manual states in a more nuanced way that neutral States 'may not *knowingly* allow the exercise of belligerent rights by the parties to the conflict from cyber infrastructure located in its territory or under its exclusive control.'[1216] [emphasis added]

[1212] See *infra* Section 3.1.
[1213] UNSC Res. 661, UN Doc. S/RES/661 (6 August 1990).
[1214] Art. 2 HC V.
[1215] Art. 3 HC V. While the rule also applies to neutrality in case of naval warfare, meaning that the internal and archipelagic waters and the territorial sea of a neutral State must be respected (Art. 1 HC XIII), there is an important difference with regard to the passage of troops. Indeed, a right of innocent passage exists in the territorial and archipelagic waters of a neutral State, and for that reason, according to Art. 10 HC XIII, '[t]he neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.' On innocent passage, see Articles 17-19 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 31363 ('UNCLOS'), and on the special rules for war-ships, see Articles 29-32 UNCLOS. HC XIII also contains a set of rules regulating the extent to which warships may stay in neutral waters or ports, the general rule being that a stay of no longer than 24 hours is allowed in order to make a warship seaworthy (see Arts. 12 to 20 HC XIII). After that period a neutral State may 'detain' the ship, including the crew (Art. 24 HC XIII). This was precisely the reason why the Germans decided to destroy their warship 'Graf Spee', which had entered the neutral port of Montevideo, Uruguay, after being damaged by British warships in 1939 (see Lauterpacht, *Oppenheim's International Law*, 2:709).
[1216] See also Rule 167(b) HPCR Manual, stating that 'when Belligerent Parties use for military purposes a public, internationally and openly accessible network such as the Internet, the fact that part of this infrastructure is situated

A contrario, therefore, if a State uses a server located on neutral territory without the knowledge of the neutral State, the latter would not violate its neutral duties.

The territorial inviolability also extends to the airspace above the neutral territory.[1217] Consequently, no air bases on neutral territory, and no penetration into the neutral airspace are allowed.[1218] Thus, Rule 167(a) HPCR Manual states that 'neutral territory must not be used by Belligerent Parties for the movement of troops or supplies, including overflights by military aircraft or missiles, or for operation of military communication systems.' The inviolability of neutral territory thus operates at different levels: it prohibits not only the passage through neutral territory, but also the use of such territory by a belligerent, even if it concerns a mere stop-over for refuelling purposes. Obviously, the use of neutral territory as a basis for attacks is also prohibited. Of all these gradations, examples can be found in State practice.

During the 1991 Gulf War, Iran protested 'on several occasions […] alleged entry of its airspace by Coalition aircraft or missiles.'[1219] In the same conflict, India refused to grant overflight rights to the coalition operating against Iraq.[1220] In the context of the 2003 Iraq invasion, both Switzerland and Austria denied overflight to the coalition forces.[1221] The Austrian Foreign Minister stated that

> [f]or Austria, the rules of neutrality have become applicable with the onset of military action against Iraq. This means that Austrian national territory and Austrian air space will be closed for transit movements of armed forces and military transit flights operated by states involved in the military action; Austria will permit transit transports and flights only in cases that serve humanitarian goals or have been approved by the United Nations Security Council.[1222]

Similarly, the Swiss President Couchepin declared on 20 March 2003 that

within the jurisdiction of a Neutral does not constitute a violation of neutrality'. As the legal framework applicable to cyber warfare is still very much discussed among scholars and States, non-lethal support through the use of cyber facilities will not further be discussed in this dissertation.

[1217] See Art. 40 HRAW, Rule 166 HPCR Manual and para. 14 San Remo Manual.

[1218] Bothe, 'The Law of Neutrality', 576–79.

[1219] Sally J. Cummins and David P. Stewart (eds.), *Digest of United States practice in international law: 1991-1999* (Washington, DC: International Law Institute, 2005), 2106.

[1220] 'United States: Department of Defense Report to Congress on the Confuct of the Persion Gulf War - Appendix on the Role of the Law of War, April 10, 1992', *International Legal Materials* 31, no. 3 (1992): 640: '[O]verflight denial by the Government of India required Marine combat aviation assets in the Western Pacific to fly across the Pacific, the continental US, the Atlantic, and through Europe to reach SWA, substantially increasing the transit route. Air Force transport aircraft delivering substantially increasing the transit route. Air Force transport aircraft delivering ammunition were also denied permission.

[1221] For an overview of the support provided by European States to the US-led 'coalition of the willing', see: Hartwig Hummel, A Survey of Involvement of 15 European States in the Iraq War 2003 (revised version), Paks Working Paper 7 (2007), http://paks.uni-duesseldorf.de/Dokumente/paks_working_paper_7_rev.pdf.

[1222] Federal Ministry Austria, 'Ferrero-Waldner on the initiation of military action against Iraq', Press Release, 20 March 2003, https://www.bmeia.gv.at/en/the-ministry/press/announcements/2003/ferrero-waldner-on-the-initiation-of-military-action-against-iraq/. See also 'Einigkeit in der Ablehnung des Irak-Kriegs', Parlamentskorrespondenz Nr. 151 vom 26.03.2003, www.parlament.gv.at/PAKT/PR/JAHR_2003/PK0151/.

> [t]he coalition led by the US has decided to resort to force without the approval of the UNSC. We are therefore confronted with an armed conflict between states during which the law of neutrality applies […].[1223]

Micheline Calmy, then head of the Swiss Federal Department of Foreign Affairs, further explained that,

> [i]f an armed conflict breaks out in Iraq without the approval of the UNSC, the law of neutrality is applicable. In that case, overflight for military purposes will not be authorized, while overflight for humanitarian purposes, including the transport of wounded, will be allowed.[1224]

In two States that did grant overflight rights in the context of the Iraq invasion, this decision led to a case involving neutrality law. Although Germany strongly opposed the war,[1225] it nevertheless provided overflight rights for American and British military aircraft and authorized its own military to monitor the Turkish-Iraqi border with AWACS aircraft. The German government justified this support by reference to the NATO treaty and bilateral agreements with the US.[1226] However, the *Bundesverwaltungsgericht* (Federal Administrative Court) did not agree with that justification.[1227] After referring to various provisions of neutrality law,[1228] the Court ruled that Germany 'was not freed from these obligations under international law by being […] a member of NATO'.[1229] The Court specified that the obligations certainly included a prohibition on granting 'cross-border rights for US and UK military aircraft' and the 'admission of troops, the transport of weapons and military supplies from German soil to the war zone'.[1230] Since the 'purpose of these measures was to facilitate or even to promote the military action of the USA and the UK', the Court held that the supportive measures raised 'serious concerns' in light of Hague Convention V.[1231]

Similarly, in Ireland, the question of the inviolability of neutral territory led to a case before the Irish High Court. The case concerned US airplanes that were allowed to enter into Irish airspace and to land at Shannon airport for refuelling, before continuing their journey to Iraq. After having considered the relevant treaty provisions and state practice on neutrality law, the High Court decided that 'there is an identifiable rule of customary law in relation to the status of

---

[1223] Switzerland, 03.200 Déclaration du Conseil fédéral concernant la crise en Irak, BO 2003 N 531. The President specified that 'transit over land and overflight for military purposes linked to the conflict or outside the courant normal', as well as 'the export of war material destined to the ongoing operations' would be prohibited. See *ibid*. [own translation].
[1224] Switzerland, Nationalrat, Frühjahrsession 2003, 11th session, 17 March 2003, 03.5017, 17 March 2003 [own translation].
[1225] UNSC Verbatim Record, UN Doc. S/PV.4701, 5 February 2003, 36-37/39.
[1226] Germany, Deutscher Bundestag – 15. Wahlperiode – 34. Sitzung. Berlin, Mittwoch, den 19. März 2003, 19 March 2003, 2728.
[1227] Judgment of 21 June 2005 – 2 WD 12.04. [ECLI:DE:BVerwG:2005:210605U2WD12.04.0] (Bundesverwaltungsgericht, 21 June 2005) [own translation].
[1228] *Ibid.*, para. 4.1.4.1.2. which cites Hague Convention V, Arts. 1, 2, 3, 5 and 11 and Hague Convention XIII, Arts. 2, 9 and 24.
[1229] *Ibid.*, para. 4.1.4.1.3.
[1230] *Ibid.*, para. 4.1.4.1.4.
[1231] In addition, the support caused the same 'serious concerns' in light of the prohibition on the use of force. *Ibid.*

neutrality where under a neutral state may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory end route to a theatre of war with another.'[1232] One may wonder, however, whether the *a contrario* consequence of this judgment would be that the passage of small amounts of troops or munition through neutral territory would be permitted under neutrality law.[1233] In my view, *any* permission for passage by belligerents violates the duties of a neutral State. A permission for a belligerent to use the neutral territory as basis for attacks – such as Kuwait's permission to the US to launch attacks from Kuwait territory against Iraq in 2003[1234] – certainly violates the duties of a neutral State.[1235]

How should a neutral State respond if the neutral character of its territory is violated? If a combatant enters the neutral territory and thus violates it, the neutral State has the duty to capture and intern him (Articles 11 and 12 HC V).[1236] Accordingly, a neutral State is entitled to intern the crew of a warship that has not complied with the rules of passage through territorial neutral waters (Article 24 HC XIII), and it must intern the crew of military aircraft that has been brought down (Article XL HRAW and Rule 170(c) HPCR Manual). During the 1991 Gulf War, Iran seized Iraqi military aircraft that had made emergency landings on its territory.[1237] Escaped prisoners of war that enter the neutral territory may not be interned, but the neutral State may assign them a residence (Article 13 HC V). The obligation to intern combatants who have entered the neutral territory is one of the reasons why Italy refused to 'be neutral' during the 2003 Iraq invasion: as a neutral State, it would have been obliged to intern the US soldiers who were present on the US bases on Italian territory.[1238] Whether the Italian claim of non-belligerency in order to avoid the obligation of internment was permissible under international law, will be discussed under Section 3.1.

In addition, the question is raised whether the neutral State should react with force against a belligerent who enters the neutral territory, for instance for a passage of troops. The answer to this question is intrinsically linked to the question how neutrality law relates to contemporary *jus ad bellum* rules, an issue discussed in detail below in Section 3.3. Neutrality law remains

[1232] Horgan v. An Taoiseach & Ors [2003] IEHC 64 (IEHC (2003), 28 April 2003).
[1233] The Irish High Court probably limited its wording to 'large number of troops' in order not to pronounce itself on the legal value of claims of 'qualified' neutrality or non-belligerency. On this topic, see *infra* Section 3.2.1.
[1234] Corten, 'Quels Droits', 119.
[1235] In relation to the 2003 Iraq war, the International Commission of Jurists noted that 'States which are not taking a part in the hostilities must benefit from, and themselves respect, the rules of neutrality. In particular, they may not allow their territory to be used for military purposes nor may they be made the object of attack.' See International Commission of Jurists, 'This illegal war must be conducted lawfully', 20 March 2003, http://www.icj.org/this-illegal-war-must-be-conducted-lawfully/.
[1236] Even though it was a NIAC – and therefore the law of neutrality was not applicable – the US unilaterally decided to comply with this duty during the Mexican Revolution, by disarming and interning troops who had sought refuge on US territory. See Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda', 1202.
[1237] While Iran did not explicitly make reference to the law of neutrality, it did declare to take a position of 'non-engagement in the hostilities' and said it would apply the 'relevant rules of international law'. See Letter dated 28 January 1991 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc. S/22163, 28 January 1991.
[1238] Natalio Ronzitti, 'Italy's non-belligerency during the Iraqi War', in Mauricio Ragazzi and Oscar Schachter (eds.), *International responsibility today: essays in memory of Oscar Schachter* (Leiden/Boston: Brill, 2005), 200.

rather vague as to the duty for neutral States to respond against violations of neutral territory. While the duty is generally derived from the principle of impartiality[1239], only a few neutrality rules concretize that duty. For instance, Article 5 HC V merely stipulates that

> [a] neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not called upon *to punish acts in violation of its neutrality* unless the said acts have been committed on its own territory. [emphasis added]

In different wording, Article 24 of HC XIII applicable to naval warfare[1240] provides that

> [i]f, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to *take such measures as it considers necessary* to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures. [emphasis added]

The wording 'punish acts in violation of its neutrality' or 'take such measures as it considers necessary' does not explicitly allow for a use of force. Within its own neutral territory, however, such force cannot be excluded. If a neutral State wishes to respond against a belligerent outside its own territory, it is of course limited by the UN Charter – as will be discussed below. According to some authors[1241], the duty imposed by Articles 5 HC V and 24 HC XIII implies that the neutral State should have an armed force ready to react in case of a violation. Some (permanently) neutral States, such as Switzerland, indeed take this point of view, in which case the neutrality can be called 'armed neutrality'. Other authors however have said that there is no obligation for States under the law of neutrality to have armed forces at their disposal. Costa Rica follows the latter view and applies a policy of 'unarmed neutrality'.[1242]

2.4. Intermediate conclusion

The above brief overview of neutral rights and duties shows that all of the four categories of supportive acts identified for this study would constitute violations of neutrality law if provided by a neutral State to any of the belligerents involved in an international armed conflict. The traditional idea that a neutral State should not provide any assistance that may impact the outcome of the conflict, even though not explicitly included in a specific rule of neutrality law, allows for a broad understanding of the prohibitive scope of neutral duties. Only a few exceptions are allowed, notably humanitarian aid and the right to maintain ongoing trade and diplomatic relations. There is thus, contrary to what was the case for the analysis of supportive acts under *jus in bello* and *jus ad bellum*, no need to search for potential alternative ways to assess such acts. The broad prohibitive scope of neutrality law is similar to the one imposed by

[1239] Lauterpacht, *Oppenheim's International Law*, vol. 2, para. 360.
[1240] For similar provisions applicable to air warfare: see the non-binding provisions of Art. 42 HRAW and Rule 168(a) HPCR Manual (using the wording 'all means at its disposal' and 'all available means' respectively).
[1241] Wachtmeister, 'Neutrality and International Order', 524.
[1242] Bothe, 'The Law of Neutrality', 560.

the principle of non-intervention, with the crucial difference however that the latter principle prohibits support to only one side of the ongoing (non-international armed conflict): it prevents States from supporting rebels, but arguably not from supporting a State embroiled in a civil war.[1243] Neutrality law, on the other hand, prohibits a broad scope of supportive acts to any side of an international armed conflict.

The advantage of the relative clarity as regards the scope of supportive acts prohibited by neutrality law is contrasted with the unclarity as regards the consequences attached to violations of such prohibitions. In other words, what are the consequences for neutral States if they, despite being prohibited from doing so, provide support to belligerents involved in an international armed conflict? And how do these consequences relate to the contemporary rules under *jus in bello* and *jus ad bellum*? This will be the topic of the next Section.

3. Consequences of violating neutral duties

As neutrality law imposes duties on both neutral and belligerent States, violations of the law of neutrality can be committed by either the neutral State itself, or by one of the belligerents.[1244] This Section will solely focus on the consequences for a neutral State that violates its neutral duties. Such violation may however be linked to the violation of a neutral duty by a belligerent: notably if the belligerent makes unlawful use of the neutral territory and the neutral State does not respond to that violation, both the belligerent and the neutral State commit a violation of neutrality law.

When a neutral State violates its neutral duties, the impact is potentially threefold: from a State responsibility perspective, the neutral State could expect countermeasures by the disadvantaged belligerent – even though that possibility arguably depends on the collective security context (Section 3.1); from a *jus in bello* perspective, the neutral State could become a party to the ongoing armed conflict – an intermediate legal status of 'non-belligerency' does however not exist (Section 3.2); and from a *jus ad bellum* perspective, the neutral State could potentially expect a lawful response in self-defence, even though that possibility should be used only when it meets the criteria of the collective security framework (Section 3.3).

3.1. State responsibility: countermeasures as a contested consequence

Since a violation of the law of neutrality is an internationally wrongful act by the neutral State, the aggrieved belligerent has a wide range of possibilities at its disposal, ranging from merely complaining to taking proportionate countermeasures in accordance with the law on State

[1243] On this point, see Chapter 4, Section 3.3.
[1244] Lauterpacht, *Oppenheim's International Law*, vol. 2, para. 357.

responsibility.[1245] Imagine an international armed conflict between States A and B. If State C, neighbour of B, provides weapons to B, State A can take countermeasures against C based on a violation of neutrality law by the latter. Those countermeasures cannot involve the use of force.[1246]

However, there are a number of reasons that would nevertheless prevent an aggrieved belligerent (in our example State A) from taking possible countermeasures against the violating neutral State (State C): one could argue that the neutral State's obligations are temporarily superseded by a UNSC Resolution (Articles 103 and 2(5) UN Charter); one could argue that support in self-defence of another State prevails the wrongfulness of the neutral State's actions (Article 21 ARSIWA); and one could argue that the obligation for State C to remain neutral is superseded by the obligation to assist a victim of aggression (Article 41 ARSIWA). All three arguments nevertheless face theoretical and/or practical difficulties, turning the question of countermeasures against neutrality violations into a complex patchwork of various international norms and interests.

First, one could argue that in light of the collective security system installed by the UN Charter, State support to one of the belligerents will not always constitute an internationally wrongful act.[1247] More precisely, a UN Security Council measure can temporarily suspend (some) neutrality law duties, thus removing the wrongful character of an act against which an aggrieved belligerent would like to respond.[1248] This will be certainly the case if the UNSC, acting under Chapter VII of the Charter, imposes sanctions or other compulsory measures in its Resolutions, which have to be respected and followed by all UN Member States. This duty flows from the UN Charter itself, more precisely from the hierarchy of norms imposed by Articles 103 and 25 of the Charter. Indeed, Article 25 UN Charter stipulates that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter', whereas Article 103 UN Charter prescribes that

---

[1245] Heller, 'Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda', 138, stating that '[t]he idea that a belligerent is entitled to engage only in *proportionate* responses to a neutral state's violation of its duty of impartiality is at the heart of the law of neutrality.' See also Walter L. Jr Williams, 'Neutrality in Modern Armed Conflicts: A Survey of the Developing Law', *Military Law Review* 90 (1980): 40: 'Regardless of the reasons, the neutral's failure to perform its duty authorizes the opposing belligerent to take proportionate preventive action against the unlawful belligerent activity, including action within neutral territory.' The notion of countermeasures is to be distinguished from that of reprisals, the latter nowadays being only used in the context of an armed conflict. See Matthias Ruffert, 'Reprisals', *Max Planck Encyclopedia of Public International Law*, 2009, para. 7.

[1246] See Article 50 (1)(a) ARSIWA.

[1247] It is this what President Wilson also had in mind when he stated already in 1907 that

> [n]eutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its people, and the menace to that peace and freedom lies in the existence of autocratic governments backed by organized force which is controlled wholly by their will, not by the will of their people. We have seen the last of neutrality in such circumstances.

See President Wilson's message to Congress requesting a declaration of war against Germany, 2 April 1917, printed in Russell D. Buhite (ed.), *Calls to arms: presidential speeches, messages, and declarations of war* (Wilmington: Scholarly Resources, 2003), 150–51.

[1248] See in this regard also Rule 95 Tallinn Manual, Section III.8 San Remo Manual and Rule 165 HPCR Manual.

> [i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

While it is uncontested that this provision applies not only to obligations as enshrined in the Charter but also obligations arising from UNSC Resolutions,[1249] the question whether UNSC *authorizations* also prevail over other international obligations (such as some or all neutral duties) remains unsettled. Under a literal reading of Article 103 UN Charter, such UNSC authorizations would not prevail over other international obligations. This position is also taken by authors such as Combacau,[1250] Bernhardt,[1251] Marchisio[1252], Seidl-Hohenvelrdern[1253] or Lauwaars,[1254] *inter alia* based upon the principle of *pacta sunt servanda* in international law.[1255] The European Court of Justice also defended this view by stating in a case related to UNSC sanctions against Yugoslavia that 'when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law,

---

[1249] See *inter alia* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, Separate Opinion of Vice-President Ammoun, 1971 ICJ Reports 67 (ICJ, 21 June 1971), para. 18: '[O]bligations of Members of the United Nations under the Charter, contemplated by [Art. 103], clearly include obligations […] laid down by binding decisions of the organs of the United Nations.' See also Andreas Paulus and Johann Leiß, 'Article 103', in Bruno Simma et al. (eds.), *The Charter of the United Nations: a Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), 2124.

[1250] Jean Combacau, *Le pouvoir de sanction de l'ONU: étude théorique de la coercition non militaire*, Publications de la Revue générale de droit international public 23 (Paris: Pedone, 1974), 284:

> Que l'habilitation à agir contrairement à ses obligations internationals ne puisse être donnée à un Etat que par un acte juridique incontestable, c'est une évidence ressortant de l'art. 103, qui parle d' « *obligations* en vertu de la présente Charte »; seules parmi les obligations dérivées présentent ce dernier caractère celles resultant d'une résolution que le Conseil de sécurité a rendue obligatoire pour ses destinataires en vertu de l'art. 25; *les autres invitations* ne créent pas d'obligations et *ne sauraient l'amporter sur des obligations préexistantes.*

[1251] Rudolf Bernhardt, 'Article 103', in Bruno Simma (ed.), *The Charter of the United Nations: a Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002), 1296: 'When UN organs, including the SC, adopt non-binding resolutions, Art. 103 is not applicable. This follows from the text of the Article, which speaks only of obligations (meaning legal obligations).'

[1252] Quoted by Kolb in Italian, see Robert Kolb, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 1 (2004): n. 15.

[1253] 'L'article 103 de la Charte, assurant la priorité de celle-ci sur d'autres traités, ne peut apporter aucun changement au sens même du terme "neutralité", de même qu'il serait incapable de protéger, le cas échéant, les neutres contre des mesures de représailles prises par la partie oppose aux Forces de Nations Unies.' See Seidl-Hohenveldern quoted in Edvard Hambro, 'Les conditions d'application des règles, autres que les règles humanitaires, relatives aux conflits armés, aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées', *Annuaire de l'Institut de Droit International* 56 (1975): 478.

[1254] Richard H. Lauwaars, 'The Interrelationship between United Nations Law and the Law of Other International Organizations', *Michigan Law Review* 82, no. 5/6 (1984): 1607: '[R]ecommendations (declarations or determinations) of the General Assembly and the Security Council do not create legal obligations. Therefore, the definition of "obligations under the Charter" within the meaning of article 103 must be confined to those obligations that have been laid down in provisions of the Charter and binding decisions of the Security Council.'

[1255] See for instance Bernhardt, who writes that Article 103 'represents a partial suspension of the basic international law maxim pacta sunt servanda. Such a suspension is only acceptably in the case of a conflict between obligations the superior or stronger of which should prevail. If a certain measure or form of behavior is merely recommended without being legally obligatory, existing treaty obligations must be respected and the recommendation cannot be followed.' Bernhardt, 'Article 103', 1296.

the Member State must refrain from adopting such a measure'.[1256] Dealing with a UNSC Resolution on detention in the context of the Iraq conflict, the European Court on Human Rights asserted in the *Al Jedda* case that it had to 'choose the interpretation [of a UNSC Resolution] […] which avoids any conflict of obligations.'[1257]

On the other hand, the opposite view[1258] – labelled by some as 'the majority view',[1259] – defends a wider interpretation, including UNSC *authorizations* into the scope of Article 103 UN Charter. When it comes to proving that State practice supports a broad interpretation of Article 103, defendants of this position remain rather vague – or, as Milanović rightfully notes, their arguments are based 'on policy grounds and without much textual support in the Charter'.[1260] Kolb carefully mentions the 'seemingly preponderant practice' that would support a broad interpretation, while immediately admitting that 'no firm conclusions can be drawn from it'.[1261] In addition, Kolb argues that UNSC authorizations should prevail over international treaty obligations because of the 'public order character of the area at stake'.[1262] In similar vein, Paulus and Leiß note that 'it is necessary to take into account that Charter law itself embodies "community interests"'.[1263] While such arguments probably make sense in relation to obligations of treaties dealing with non-security related issues such as trade, it is much less strong in relation to neutrality treaties. The Friendly Relations Declaration, for instance, indeed requires States to 'co-operate with other States in the *maintenance* of international peace and security.' Arguably, abstaining from becoming involved in a conflict respects that obligation. As the underlying goal of neutrality law is to avoid escalation of conflict, it belongs to the very same 'area at stake' or 'community interest' the above-quoted authors refer to.

[1256] The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England, 1997 European Court Reports I–00081 (Court of Justice of the European Communities, 1997), para. 60.

[1257] Case of Al-Jedda v. United Kingdom, No. 27021/08 (ECtHR (Grand Chamber), 7 July 2011), para. 102. In the *Serdar Mohammed* case, which also dealt with the question of detention in a NIAC, the UK Supreme Court nonetheless recognized that even in absence of one of the grounds for detention included in Article 5 ECHR, the UK forces had the power to detain individuals pursuant to the UNSC Resolution authorising the use of 'all necessary measures', if the detention was required for imperative reasons of security. It nevertheless concluded that the procedural requirements of Article 5(4) ECHR had not been complied with. See Abd Ali Hameed Al-Waheed (Appellant) v. Ministry of Defence (Respondent) and Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant), No. UKSC 2014/0219 (UK Supreme Court, 17 January 2017).

[1258] See Michel Virally, *L'organisation mondiale*, Collection U. Droit international public (Paris: Colin, 1972), 188. Virally did not make this statement in the context of Art. 103, nor did he link this to the law of neutrality. See also C.J.R. Dugard, 'The legal effects of United Nations Resolutions on apartheid', *South African Law Journal* 83 (1966): 58.

[1259] See, for instance, Paulus and Leiß, 'Article 103', 2122. In this regard, see however the excellent article by Liliane Boer on consensus claims in legal doctrine: Lianne J. M. Boer, '"The greater part of jurisconsults": On Consensus Claims and Their Footnotes in Legal Scholarship', *Leiden Journal of International Law* 29, no. 4 (2016): 1021.

[1260] Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?', *Duke Journal of Comparative & International Law* 20 (2009–2010): 78.

[1261] Kolb, 'Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?', 34.

[1262] *Ibid.*, 26 and 34.

[1263] Paulus and Leiß, 'Article 103', 2120.

Despite the above mentioned concerns with regard to a wide interpretation of Article 103 UN Charter, most of the authors writing on neutrality law seem to take on the view that acts authorized by the UNSC suspend neutral obligations – albeit without always explicitly mentioning that this flows from a broad reading of Article 103.[1264] Thus, Seger argues that, because of Article 103 UN Charter, a neutral power is entitled to assist a collective security operation 'for instance by granting transit or overflight rights to participating armed forces, if necessary for the fulfilment of the mandate.'[1265] According to Greenwood, neutral States may in any case not 'rely upon the law of neutrality in order to evade the obligation to carry out binding Security Resolutions'.[1266] In addition, Greenwood adds that

> any state […] may assist a UN force or a force acting under the authorization of the Security Council, even if such assistance would normally be a violation of the law of neutrality.[1267]

This position seems strengthened by Article 2(5) UN Charter, which stipulates that

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

Nevertheless, two issues should be noted here. First, the first phrase of Article 2(5) seems to refer only to action taken by the UN itself ('all Members shall give the United Nations every assistance in any action *it* takes', emphasis added), rather than to action authorized by the UN but carried out by States. Second, the Commentary to this provision clarifies that 'UN Member States can decide […] to what extent they wish to contribute to the collective effort of enforcing international peace and security.'[1268] If States can decide to what extent they contribute to a collective effort, surely they can decide to abstain from providing support. Neutral State C therefore would still have the option not to actively support measures authorized by the Security Council. Under this reading, aggrieved belligerent A would therefore still be entitled to take countermeasures against the wrongful act committed by C, as the latter decides to violate its neutral duties.

[1264] See for instance Bothe, 'The Law of Neutrality', 553; Daniel Thürer, 'Comment: UN Enforcement Measures and Neutrality. The Case of Switzerland', *Archiv des Völkerrechts* 30, no. 1 (1992): 81; Seger, 'The Law of Neutrality', 262.
[1265] Seger, 'The Law of Neutrality', 262.
[1266] Greenwood, 'Scope of International Humanitarian Law', 46.
[1267] *Ibid.*
[1268] See Helmut Philipp Aust, 'Article 2(5)', in Bruno Simma et al. (eds.), *The Charter of the United Nations: a Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), 248. Nevertheless, the United States argued during the Second Gulf War that all States, including neutrals, were *obliged* to provide assistance in support of the operations as collection action authorized by the Security Council. See Havel, 'Rethinking Permanent Neutrality', 226.

In the domestic practice of military manuals, no unanimous answer to the theoretical question outlined above is provided.[1269] The Danish Military Manual merely confirms that neutral States may be obliged to undertake certain actions, while remaining silent on authorizations:

> By virtue of their membership of the United Nations, Member States commit themselves to compliance with the Security Council's binding resolutions. This means, for instance, that States *may be required* to place their territories at the disposal of the military troop transports of belligerent States. The Council may also impose an embargo against one of the parties to the conflict – typically, the aggressor – which the UN Member States are *obliged to respect*. Today, it is assumed that States may maintain their status as conflict-neutral States even if they comply with UN Security Council's enforcement measures such as those mentioned above.[1270]

In similar vein, the US Department of Defense LOAC Manual only refers to examples whereby there is a clear UNSC-imposed obligation that supersedes neutral obligations, while it remains silent as to what happens in case of UNSC authorizations. Paragraph 15.2.3. of the Manual reads:

> [U]nder the Charter of the United Nations, States *may* have *obligations* to support military operations that have been authorized by the U.N. Security Council. In such circumstances, the obligations under the Charter would prevail over the obligations under the law of neutrality. For example, a State that is not participating in the conflict that received in its territory military forces operating pursuant to a U.N. Security Council resolution might be *required* to return them, rather than to intern them under the law of neutrality. Moreover, *U.N. Security Council resolutions may obligate* States to take measures that would not be required by neutrality law. For example, the U.N. Security Council *may require* States to impose restrictions on private conduct within their jurisdiction, such as to prevent private individuals from selling weapons to certain States or non-State armed groups. [emphasis added][1271]

In practice, however, the US seems to support the view that UN authorized action sets aside neutrality law. Thus, it held that

> [n]eutrality in the Persian Gulf War was controlled in part by the 1907 Hague V Convention; but traditional concepts of neutral rights and duties are substantially modified when, as in this case, the United Nations authorizes collective action against an aggressor nation. It was the US position during the Persian Gulf crisis that, regardless of assertions of neutrality, all nations

[1269] Remarkably, Switzerland is of the opinion that countermeasures cannot be taken against a neutral state acting under a UNSC authorization, but it reaches this conclusion on a different basis. It argues that neutrality law does not apply to military enforcement measures taken by the UNSC, as such a conflict is not an 'armed conflict in the sense of neutrality law'. DFAE Switzerland, La neutralité à l'épreuve du conflit en Irak. Synthèse de la pratique suisse de la neutralité au cours du conflit en Irak en réponse au postulat Reimann (03.3066) et à la motion du groupe UDC (03.3050), 12 February 2005, 6544. This reasoning is problematic because it does not respect the crucial distinction between *jus in bello* and *jus ad bellum.* In this regard, see also Aust, 'Article 2(5)', 247.
[1270] Denmark, Ministry of Defense, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, 63 [emphasis added].
[1271] See US, DoD Law of War Manual, para. 15.2.3 [footnotes omitted].

> were obligated to avoid hindrance of Coalition operations undertaken pursuant to, or in conjunction with, UNSC decisions, and to provide whatever assistance possible.[1272]

The German Military Manual more broadly states that neutrality law can be set aside when the UNSC has acted under Chapter VII:

> The Charter of the United Nations does not generally supersede the law of neutrality. […] If the United Nations Security Council has made a binding decision according to Chapter VII of the Charter of the United Nations, no State may invoke the law of neutrality in order to justify behaviour that is inconsistent with its obligations under the Charter.[1273]

Recent soft-law documents on neutrality law (implicitly) accept such a reading of Article 103 as well. For instance, Rule 95 of the Tallinn Manual stipulates that '[a] State may not rely upon the law of neutrality to justify conduct […] that would be incompatible with preventive or enforcement measures decided upon by the Security Council under Chapter VII of the Charter of the United Nations.'[1274] The Swedish Military Manual similarly does not seem to make the distinction between authorizations and obligations. Yet, it stipulates in an even broader manner that whenever the UNSC or another international/regional organization takes a stance, neutrality no longer counts:

> Given the collective security systems developed since the 1907 Hague Conventions, the concept of neutrality today lost some of its practical meaning. Sweden can, for example, do not assert neutrality in case armed conflict breaks out and the UN decides on compelling measures that affect Sweden.
>
> The collective security of international law, with the UN Charter at the forefront, requires solidarity from the cooperating states and excludes neutrality as soon as sanctions have been taken. Article 2.5 of the UN Charter requires Member States to leave the organization "all assistance" when the UN made a decision on a question. However, neutrality can still play a role in the mechanisms of collective security not working. Sweden can thus assert neutrality in a state when an armed conflict breaks out and neither the UN, the EU, the OSCE or any other organization that claims to act under the UN Charter has pointed out a peace-breaking party in the conflict like that the international community must respond to. For example, the United Nations Security Council unable to make a decision in the conflict, the UN cannot also count on the solidarity of the Member States in accordance with Article 2.5.[1275]

[1272] Cummins and Stewart, *Digest of United States Practice in International Law: 1991-1999*, 2102–3. For an extensive analysis of the US position of violations of and respect for neutral obligations by other States during the Gulf conflict, see *ibid.*, 2102–7.

[1273] Germany, Humanitäres Völkerrecht in Bewaffneten Konflikten – Handbuch –, ZDv15/2, DSK AV230100262, para. 1203.

[1274] In similar vein, Article 165 Air and Missile Warfare Manual reads: 'Where the Security Council takes binding preventive or enforcement measures under Chapter VII of the Charter of the United Nations — including the authorization of the use of force by a particular State or group of States — no State may rely upon the law of neutrality to justify conduct which would be incompatible with its obligations under the Charter of the United Nations.'

[1275] Sweden, Folkrättskommittén, Folkrätt i vapnad konflikt, 110.

While theoretically the question as to whether or not UNSC authorizations can override obligations flowing from a treaty or customary law remains unsolved, in practice (doctrinal as well as State practice) there seems to be a tendency at least to accept that neutrality law cannot be used to set aside cooperation with UNSC-imposed enforcement measures. This would mean that if a neutral State violates its neutral duties in order to provide assistance to one of the belligerents in accordance with a UNSC-Resolution, the aggrieved belligerent cannot take countermeasures against that neutral State. Such a conclusion could even be warranted in the absence of a UNSC Resolution, merely in the case whereby a State acting in self-defence against an armed attack of another State asks for assistance. Indeed, countermeasures cannot be taken if the wrongful nature of an act is precluded by a certain circumstance.[1276] Crucially in this context is Article 21 ARSIWA, which states that

> [t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

The scope of this provision is however contested. First, is it unclear whether this provision operates only for the State acting in self-defence (thus the victim of an armed attack), or also for States joining the reaction in collective self-defence. The former and more restrictive view would not preclude the wrongfulness of the violation of a neutral State duties. However, even if one accepts Article 21's operability in situations of collective self-defence[1277], it remains debated which violations could be justified by this provision.[1278] Indeed, the commentary to Article 21 explicitly excludes justification of violations of international humanitarian law from the scope of Article 21.[1279] This is logical, as the application of IHL does not depend on the side of the conflict or the reasons why it started. All parties to the conflict are bound equally by IHL rules. The question then becomes whether or to what extent the law of neutrality can be considered as a part of international humanitarian law. As I have argued in Chapter 2, there are

---

[1276] See Articles 20-27 ARSIWA. Gowlland-Debbas argues that Security Council authorizations serve as a 'circumstance precluding wrongfulness', but that does not seem to be one of the options considered by the ILC. See Vera Gowlland-Debbas, 'The limits of unilateral enforcement of community objectives in the framework of UN peace maintenance', *European Journal of International Law* 11, no. 2 (2000): 371.

[1277] A case in which, arguably, the neutral State that decides to support the actions in collective self-defence, needs to do so within a timeframe that would still be considered as 'immediate' under self-defence (see also *supra* note 747). Consequently, if a neutral State would wait too long to offer its assistance, its violations of neutrality law (if the assistance would not render the neutral State a party to an ongoing armed conflict) could arguably not be justified on the basis of Article 21 ARSIWA, and could thus potentially trigger countermeasures by the affected State.

[1278] According to Paddeu, Article 21 only justifies 'forcible measures': 'Thus, excluded from the scope of Article 21 are non-military measures that a state may adopt to accompany its self-defence campaign.' Paddeu, *Justification and Excuse in International Law*, 192–93. See also *infra* note 1284.

[1279] See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 74:

> This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.

a number of ways to position the law of neutrality within the spectrum of the dichotomy between *jus in bello* and *jus ad bellum*.

On the one hand, an important part of the neutral rights and duties are clearly included in the main IHL treaties, leading to the conclusion by some that neutrality law forms an integral part of *jus in bello*.[1280] Interestingly, the ICRC did not want to pronounce on this issue. In the preparatory conference for the Additional Protocols in 1971, it stated that

> the ICRC [does not intend] to take a stand on the opinion shared by some authors and by the Institute of International Law itself, according to which, in case of a characteristic and recognized aggression, derogations in favour of the victim State, or of a third State, are authorized in certain fields of the law of war or of international relations. The defenders of this thesis have particularly in mind […] the law of neutrality. These are fields of law which quite specifically do not enter into the concerns of the ICRC nor touch on the subject matters submitted to the Conference of Experts, and, consequently, […] the ICRC does not intend to take a stand on that aspect of inequality in the application of law, a complex aspect which still remains to be clarified.[1281]

On the other hand, rules on neutrality share main characteristics with *jus ad bellum* rules, such as the prohibition on the use of force.[1282] The ILC noted in this regard that 'neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.'[1283] This statement determines that Article 21 cannot be used by a State acting in self-deference to justify violations of the rights of neutral States. It does not, however, deal with the issue whether those neutral States themselves can rely on Article 21 to preclude the wrongfulness of their own violations. It remains therefore open to debate whether or not neutrality obligations are covered by Article 21 or not.[1284]

Yet, in situations where Article 21 ARSIWA is applicable, Article 41 ARSIWA will most likely be applicable as well. Indeed, Article 21 will only be applicable if a victim State is entitled to act in self-defence in the first place. If so, presumably another State has committed an armed attack, which is a violation of a *jus cogens* norm.[1285] Assuming, *arguendo*, that all armed attacks are 'serious breaches' of a *jus cogens* norm, Article 41 ARSIWA would impose upon all States (including our neutral State C) the following:

1. States shall cooperate to bring to an end through lawful means any serious breach [of a jus cogens norm].

[1280] Along this line, see Bothe, 'The Law of Neutrality', 559; Bothe, 'Neutrality, concept and general rules'.
[1281] See ICRC, 'Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. I', 35.
[1282] On the characteristics of *jus ad bellum*, see Chapter 2.
[1283] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 75.
[1284] A restrictive view in this regard is defended by Paddeu, who argues that 'non-forcible unlawful measures against aggressors cannot be justified by reference to Article 21, as they would be excluded from its intended scope.' Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness', 110.
[1285] As indicated in Chapter 4, Section 2.2.

2. No State shall recognize as lawful a situation created by a serious breach [of a jus cogens norm], nor render aid or assistance in maintaining that situation.

At first sight, this provision confirms the impossibility to take countermeasures against a neutral State providing assistance to a victim of aggression, as the neutrality obligations of State C would be superseded by the obligation enshrined in Article 41(1), demanding all States to cooperate to bring the armed attack to an end. Nevertheless, three caveats need to be mentioned here. First, Article 41(1) clearly requires the use of 'lawful means'. This provision could therefore not be used to remove the unlawful character of a supportive act: as a supportive act would violate neutrality law, it is not a 'lawful means' in terms of Article 41(1). Second, this obligation of cooperation is 'less settled in international law than its partner obligations of non-recognition and non-assistance'.[1286] The ILC itself had already noted in its commentary to the provision that '[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law.'[1287] Finally, in practice, it is always difficult to determine which State has unlawfully started a conflict. The UNSC could provide a conclusive answer in this regard[1288], but more often than not remains silent.[1289] In such instances, it seems that States have to make their own evaluation of the facts, taking into account the implicit labelling by the UNSC when it takes enforcement measures under Chapter VII.[1290]

Of course, if a neutral State supports not the victim of aggression, but the aggressor itself, the aggrieved belligerent is entitled to take countermeasures – which can *inter alia*, but certainly not solely, be based on a violation of the law of neutrality. To translate this situation to our fictitious case: if State B attacked State A, and neutral State C supported B, State A could without any problem take countermeasures against State C. For example, during the conflict between Israel and its Arab neighbours in 1973, Arab States imposed an oil embargo against Western States, because the latter were aiding Israel in its war effort. The Arab States justified this embargo by arguing that the targeted Western States (in particular the US and the Netherlands) violated their neutral duty of impartiality.[1291]

The problem underlying both the doctrinal work as well as the provisions included in contemporary military manuals on the issue of countermeasures against violation of neutrality

[1286] Jørgensen, 'The Obligation of Cooperation', 696.
[1287] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', 114.
[1288] The UNSC has only on a few occasions explicitly identified an aggressor, see Mcdougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 83–84.
[1289] Aust notes that reliance on the law of neutrality will 'only be possible in situations in which the UN Security Council has not made any determination as to the party to a conflict which bears responsibility for its outbreak. However, as international practice shows, most cases will fall into this category.' Aust, *Complicity and the Law of State Responsibility*, 382–83.
[1290] See also Dinstein, who argues that states must abide by what is imposed by a UNSC resolution and can neglect neutrality law if the UNSC has identified the aggressor (see Dinstein, *War, Aggression and Self-Defence*, 2011, 177). *A contrario*, neutrality law must still be followed when, lacking a resolution, no such identification took place.
[1291] Neff, *The Rights and Duties of Neutrals*, 2000, 199.

law is that the law of neutrality is considered as one homogenuous body of law, to which one single approach can apply. As I have submitted in Chapter 2, the law of neutrality is far from homogeneous: due to the fact that it predates the now crucial dichotomy between *jus in bello* and *jus ad bellum*, it shares characteristics of both. Some rules of neutrality remain purely humanitarian in character, whereas others (in particular the rules limiting the possibility for neutral State to provide assistance to belligerents) are more *jus ad bellum* in nature. The law of neutrality is in essence a hybrid body of international law. Therefore, it is not useful to state that the law of neutrality 'as a whole' can or cannot be set aside by a UNSC authorization – or even in absence thereof, but merely in case of an act of aggression. The better view would be to accept that indeed some neutral obligations can be set aside on the basis of a UNSC Resolution, or that countermeasures against some neutrality violations can be excluded on the basis of Article 21 ARSIWA, whereas other duties (and rights) – because of their purely humanitarian character – should remain applicable regardless any violation of *jus ad bellum* or UNSC action taken.

3.2. *Jus in bello* consequence: party to a conflict or contested non-belligerency?

3.2.1. Non-belligerency as an intermediate status?

As not all violations of neutrality law will be a 'resort to armed force' – the criterion for international armed conflicts to come into existence – supportive acts easily fall within a grey zone between the legal status of being 'party to a conflict' and being a 'neutral State', acting in full compliance with the law of neutrality. Scholars have tried to legally classify this grey zone as 'qualified neutrality'[1292], 'differentiated neutrality', 'benevolent neutrality' or 'non-belligerency'.[1293] It remains however a 'major subject of dispute'.[1294]

The notion of non-belligerency was introduced by Italy in 1939, when it initially decided not to take part in WWII but nevertheless supported Germany.[1295] The US also claimed to be a non-belligerent during WWII before entering the War[1296], and Sweden claimed to be non-belligerent during the Finnish winter war years of 1939-1940.[1297] Non-belligerent States willingly abandon their duty of impartiality and non-assistance, respecting only the duty of non-participation in the hostilities.[1298] In doing so, they hope to keep the protection offered to neutrals (inviolability

[1292] Lauterpacht, *Oppenheim's International Law*, 2:648.
[1293] Torrelli, 'La neutralité en question', 13–14. On the nuances between the various notions, see Havel, 'Rethinking Permanent Neutrality', 179.
[1294] Bothe, 'Neutrality at Sea', 206.
[1295] Torrelli, 'La neutralité en question', 14.
[1296] Bothe, 'The Law of Neutrality', 550.
[1297] Sweden, Folkrättskommittén, Folkrätt i vapnad konflikt, 108.
[1298] On those duties, see Section 2. See also Torrelli, 'La neutralité en question', 14.

of the neutral territory, for example)[1299], but as will be shown below, this is probably a vain hope. While some scholars have defended non-belligerency as a legal intermediate status[1300], others argue that non-belligerency cannot exist from a legal point of view, meaning that non-belligerency still constitutes a violation of the law of neutrality.[1301]

The arguments used in favour of a status of non-belligerency are twofold. The first argument is the literal text used in the Third Geneva Convention (GC III) and Additional Protocol I (AP I). Article 4(B)(2) GC III deals with persons who have been received 'by neutral or *non-belligerent* Powers in their territory'[1302], whereas Article 2(c) AP I defines the notion of 'Protecting Power' as 'a neutral or *other State not a Party* to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol' [emphasis added]. The Commentary to the former provision does not explain why two different concepts were included in Article 4 GC III, and it consistently only refers to 'neutral States' when dealing with the scope of the provision[1303] – thus suggesting that the negotiating States did not intend to create a difference between neutral and non-belligerent States. The commentary to Article 2 AP I does devote a paragraph to the different wording, explaining it by a concern of the negotiating powers to include all States not engaged in the armed conflict as neutrals, and not only the neutral States in a more strict sense (for instance, the permanently neutral States).[1304] Both provisions thus

---

[1299] Ronzitti, 'Italy's Non-Belligerency during the Iraqi War', 199. According to Gioia, '"non-belligerent" States enjoy all the traditional "rights of neutral States", without being bound by traditional neutrality obligations.' See Gioia, 'Neutrality and Non-Belligerency', 79. A position also defended by Schindler, stating that 'all rights of neutrals can be claimed by all the States not participating in an armed conflict.' See Schindler, 'Transformations in the law of neutrality since 1945', 380. Other 'advantages' of adopting a status of non-belligerency are listed by Ronzitti and include, for example, the fact that it signals that a State is 'not insensitive to the reasons of the warring Party it is helping', or that it can be used as a 'temporary posture', before becoming an actual party to the conflict. See Ronzitti, 'Italy's Non-Belligerency during the Iraqi War', 199.

[1300] Gioia, 'Neutrality and Non-Belligerency', 76–80. See also Jessup, Fauchille and de la Pradelle referred to by Heintschel von Heinegg in footnote 6, Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 544–45. This position was also strongly defended by US Attorney General Jackson in 1941, relying on the 'just war doctrine'. See *ibid.*, 546.

[1301] Most authors acknowledge that a state of war, or a situation of international armed conflict, *automatically* triggers the applicability of the law of neutrality. See Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 558; Bridgeman, 'The Law of Neutrality and the Conflict with Al Qaeda', 1198. Note however Goia who disagrees and says that 'the outbreak of an armed conflict cannot, by itself, automatically bring about the application of the law of neutrality.' Gioia, 'Neutrality and Non-Belligerency', 58. While indeed this statement is partially true (a non-international armed conflict will not trigger the applicability of the law of neutrality at all), Goia uses it as a general statement to argue that an intermediate status of non-belligerency exists.

[1302] In the 1948 Stockholm draft prepared by the ICRC, the wording 'neutral or non-belligerent Powers' was also included. However, in the remarks to the draft article, the ICRC merely noted that

> [i]t would certainly be preferable that the regulations concerning the treatment of personnel of belligerent forces who are interned in neutral countries, should form the subject of a distinct and more detailed Convention. However, pending the establishment of such a Convention, the ICRC has thought it necessary to extend to these combatants the benefit of the provisions of the Convention relative to the treatment of Prisoners of War, due attention being paid, as far as possible, to their peculiar situation.

The ICRC thus made no reference to 'non-belligerent Powers' in its remarks, thus suggesting that it considers the notion equal to 'neutral Powers'.

[1303] de Preux et al., *The Geneva Conventions of 12 August 1949. III*, 72.

[1304] Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras 135–136.

show that in 1949 and 1977 States were aware of the old and stricter concept neutrality, which often had to be declared, and a broader notion (aimed at by the provisions in the Geneva Conventions) covering all States not party to the international armed conflict. As Bothe notes, the wording in Article 4 GC III and Article 2 AP II can be easily explained since the texts were concluded in a time where the UN Charter already existed, which to a certain extent has modified neutrality law.[1305] In addition, in instances where the applicability of neutrality law would not be entirely clear[1306], the wording 'or other State not Party' would avoid any confusion on the application of IHL.[1307]

A second argument used by those supporting the status of non-belligerency is that State practice shows that sometimes States prefer to take a position of non-belligerency, as opposed to neutrality. In addition to the more historical examples cited above, Italy took this position with regard to the 2003 US/UK invasion in Iraq, when the Italian Supreme Defence Council formally defined the terms of Italy's non-belligerency.[1308] Italy, as a NATO member, allowed the US to use American military bases on Italian territory in order to conduct hostilities in Iraq. In addition, it also provided intelligence support to the American and British troops.[1309] The possibility to take a non-belligerent position is also outlined in the 2010 Swedish Military Manual, which explains that a non-belligerent State 'can, without taking direct part in the conflict, provide financial and military support to one party.'[1310] Opponents of the non-belligerency theory however state that 'there is no sufficiently uniform general practice which would justify the conclusion that non-belligerency has become a notion recognized by customary international law.'[1311] Indeed, while various States have behaved in a similar way as Italy during the Iraq invasion (for example, Germany, France and Turkey allowed overflight over their territory), none of them has referred to a status of non-belligerency as justification for their behavior.[1312]As additional argument, the absence of any reference to non-belligerency in the more recent Helsinki Principles, the San Remo Manual, the HPCR Manual or the Tallinn

[1305] Bothe, 'The Law of Neutrality', 551.
[1306] See Section 1.
[1307] Bothe, 'The Law of Neutrality', 551. See also Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 554.
[1308] Comunicato del Presidente Ciampi, 19 March 2003, http://presidenti.quirinale.it/Ciampi/dinamico/ContinuaCiampi.aspx?tipo=comunicato&key=21748.
[1309] Italy allowed the use of US military bases on Italian soil for 'transit, refueling and maintenance exigencies' and authorized flight over its air space. However, Italy explicitly prohibited the 'participation in military actions by the Italian armed forces', the 'supply and provision of armaments or military vehicles of any kind' and the 'use of military structures [on Italian territory] as a basis for direct attacks on Iraqi targets'. See *ibid.* [translated with the assistance of Google Translate]. On this topic, see also: Ronzitti, 'Italy's Non-Belligerency during the Iraqi War', 201.
[1310] The Manual nevertheless also acknowledges that such a position does not comply with neutrality law, nor does it fulfill the criteria to become party to an armed conflict. See Sweden, Folkrättskommittén, Folkrätt i vapnad konflikt, 108.
[1311] Bothe, 'The Law of Neutrality', 550. See also Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 553; Bothe, 'Neutrality at Sea', 207.
[1312] Ronzitti, 'Italy's Non-Belligerency during the Iraqi War', 202; Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 553.

Manual shows that the existence of such a legal intermediate status has not been recognized in legal doctrine.[1313]

As a result of the arguments above, the fact remains that acts of non-belligerents, such as the ones by Italy in the case explained, violate the law of neutrality. By simply using a different legal label for a situation, the violation of certain rules cannot be removed. Non-belligerency is merely a political concept, not providing any legal justification for violations of the law of neutrality. States taking a non-belligerent status (whether they acknowledge it or not) still have to take into account possible countermeasures by an aggrieved belligerent, who finds that the State has violated its duties under neutrality law.[1314] If the aggrieved belligerent State has the actual means to react, the non-belligerent State will 'most often return to strict neutrality.'[1315]

In sum, while there are defenders of the status of non-belligerency, opponents agree that '[a]s a matter of legal principle and in view of State practice, a legal status of 'non'-belligerency has to be rejected'.[1316] Some put it even more drastically by stating that 'there is no room for […] non-belligerency. States are either neutrals, or they are participants.'[1317] It is telling that the Danish Military Manual explicitly introduces non-belligerency merely as a synonym for the classic term of 'neutrality'.[1318]

Consequently, the only possible correct use of a separate notion of non-belligerency[1319], would be by reference to a neutral State which sees its neutral duties temporarily superseded by a UNSC Resolution imposed obligation (as discussed *supra*, see Section 3.1). The Austrian president aptly confirmed this conclusion during the Kuwait crisis (when Iraq invaded Kuwait), when he clarified why Austria allowed American airplanes to land on Austrian territory: 'When the members of the United Nations act against an aggressor [*in casu* Iraq], there can be no question of neutrality, only of solidarity.'[1320] Such an understanding of United Nations-related non-belligerency is however not what the proponents of the non-belligerent theory have in mind. Indeed, when Italy relied on its 'non-belligerent status' to justify its actions during the 2003 Iraq invasion, it did not act within the framework of the United Nations. The limited

[1313] Heintschel von Heinegg, 'Benevolent Third States in International Armed Conflicts', 553–54.
[1314] *Ibid.*, 555–56, citing for example Bring, who states that '[s]ince non-belligerents could be expected to deviate from the law of neutrality, they cannot reasonably expect to receive all the protection that flows from it.'
[1315] *Ibid.*, 554.
[1316] *Ibid.*, 555.
[1317] Jensen, 'Sovereignty and Neutrality in Cyber Conflict', 821. See also the 2015 Geneva Academy Commentary, which States that 'when an IAC breaks out, states are either belligerent or neutral.' Sandoz, 'Rights, Powers and Obligations of Neutral Powers under the Conventions', 93.
[1318] 'To be a party to an armed conflict presupposes that IHL is applicable to the mutual relations of the conflicting parties. On the other hand, there will be States that do not take part in the conflict. These States are called "non-belligerent States" or, to use a more classical term, "neutral States".' Denmark, Ministry of Defense, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, 62.
[1319] Note that some authors make the semantic distinction between the legally acceptable situation of 'qualified belligerency', in case of a Security Council determination of an aggressor, and the non-existent intermediate position of 'non-belligerency', an excuse to circumvent neutrality law. See Boothby and Heintschel von Heinegg, *The Law of War*, 376. In the present study, the semantic distinction is not made, so called 'qualified belligerency' is referred to as 'the only acceptable form of non-belligerency'.
[1320] Neff, *The rights and duties of neutrals: a general history*, 193.

version of non-belligerency moreover does not need a separate legal qualification, as its *rationale* can be explained by references to the relationship between the UN Charter and the law of neutrality, as outlined in the previous Section.

If States wish to create an intermediate category of non-belligerency between being neutral and being party to a conflict, they should change the law of neutrality. Until today, a non-belligerent position might involve actions which consist of violations of neutral duties. Some violations will end a State's neutrality, turning it into a party to the ongoing international armed conflict.

3.2.2. Neutral State becoming party to an international armed conflict

Having established that a State is either neutral or party to an armed conflict, the important question is now *when* a neutral State loses its neutral status and becomes party to an armed conflict. Once a neutral State has become a belligerent, it can no longer rely on the protection of a neutral State, while at the same time it no longer has to abide by its neutral duties. In parallel, the belligerents no longer have to respect the neutral rights of the neutral State. While there are provisions of neutrality law focusing on the micro-level of individuals[1321] or objects[1322], determining when those persons or objects lose their protected status as neutral, no

[1321] See e.g. Article 17 HC V:

> A neutral cannot avail himself of his neutrality (a) If he commits hostile acts against a belligerent; (b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties. In such a case, the neutral shall not be more severly treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act;

and Art. 18 HC V:

> The following acts shall not be considered as committed in favour of one belligerent in the sense of Article 17, letter (b): (a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories; (b) Services rendered in matters of police or civil administration.

[1322] See e.g. Program on Humanitarian Policy and Conflict Research Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare*, para. 174. For a similar provision focusing on the loss of protected status of neutral objects included in a domestic military manual, see for instance Germany, Humanitäres Völkerrecht in Bewaffneten Konflikten – Handbuch –, ZDv15/2, DSK AV230100262, para. 1255.

> 1255. The fact that a civil aircraft bears the marking of a neutral State is *prima facie* evidence (what is known as presumptive evidence) of its neutral character. The following activities render a civil aircraft of a neutral State a military objective:
> − there is probable cause that such an aircraft is transporting contraband and, after previous warning or interception, the aircraft refuses deliberately and unequivocally to fly to a destination other than its original destination or to an enemy airfield that is within reasonable reach and that is suitable for this kind of aircraft (14 50),
> − participation in hostile activities in support of the adversary, e.g. interception of or attack on other aircraft, persons or objects on land or at sea, use as a means of attack, participation in electronic warfare or transfer of target data to the adversary (14 53 lit.c),
> − facilitating military activities of adverse forces, for instance performing troop transportation, transport of military materiel or fuelling of military aircraft (14 53 lit.c),
> − integration into or support of adversary information gathering activities, for instance participation in reconnaissance, early warning or surveillance measures or command, control and information transfer measures,

provision of neutrality law explicitly defines such a consequence at the macro-level of the neutral State.[1323]

To recall, under *jus in bello*, the threshold for an international armed conflict to erupt is rather low.[1324] Indeed, a simple resort to force between two or more States suffices, no intensity of the fighting is required. Moreover, the mere capture of enemy soldiers, or the occupation or foreign territory without using force is also considered to trigger an IAC. More recently, the ICRC has taken the position that the mere unconsented presence by armed forces on foreign territory also amounts to an IAC situation.[1325] The question is how the rules of neutrality law relate to the general framework of IAC classification. Three potential points of friction exist between that framework and neutrality rules.

The first two points of friction are related to the inviolability of the neutral territory and the neutral State's duty to protect that character. First, as noted above, a neutral State is obliged to intern belligerents entering the neutral territory.[1326] The paradox is quite obvious here: on the one hand, the neutral State risks losing its neutral status by not interning these belligerent forces, whereas on the other hand, the mere internment of foreign forces is considered sufficient to trigger an international armed conflict.

Second, complementary to the duty of internment, a neutral State is obliged to defend the neutral character of its territory. It is generally accepted that even (limited) force may be used to do so: Article 10 HC V clearly determines that '[t]he fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.' If however one single shot between States is sufficient to trigger an IAC, the neutral State is potentially faced with a catch-22: not responding against violations of its neutral territory may entail the loss of its neutral status, whereas using even limited force may trigger an IAC anyway.

The two points of friction described above are however not so problematic as they seem at first sight. Indeed, if one considers the duty of internment as a *lex specialis* rule *vis-à-vis* the general idea that internment could trigger an IAC, there is no contradiction or friction whatsoever. A neutral State who interns a soldier entering its territory merely fulfills its duty as a neutral to maintain the neutral character of its territory. In addition, the absence of a *animus belligerendi* – even though not formally a requirement for the existence of an IAC[1327] – reinforces this conclusion. In similar vein, the use of limited force by a neutral State within its own territory against a belligerent violating that territory should be seen as a form of 'law enforcement'

− refusal to obey instructions of military authorities if these instructions concern alighting, inspection or possible seizure, or the unequivocal refusal to obey interception measures,
− any other activity constituting an effective contribution to the military activities of a Party to a conflict (14 53 lit.a-k).

[1323] Of course, if a belligerent resorts to force against a neutral State – as Germany did *vis-à-vis* Belgium in 1914 – the neutral State will (unwillingly) become a belligerent involved in the international armed conflict.
[1324] See Chapter 3, Section 3.1.
[1325] See *supra* note 476.
[1326] See *supra* Section 2.3.
[1327] See *supra* note 466.

ensuring the respect for neutral rights (the inviolability of neutral territory) rather than as a 'resort to armed force' between two States. This is true insofar the use of force by the neutral remains limited both in intensity and in geographical scope: it should not surpass the neutral territory it aims to protect. In case the force used by the neutral State is extensive, it is more difficult to argue that it concerns the mere protection of neutral territory, and there will be more indication of an *animus belligerendi*, strengthening the potential conclusion that an IAC indeed erupts between the neutral State and on of the belligerents. With that idea in mind, it becomes more acceptable that the (non-binding) HPCR Manual stipulates that

> [t]he fact that a Neutral resists, even by force, attempts to violate its neutrality cannot be regarded as a hostile act. However, the use of force by the Neutral must not exceed the degree required to repel the incursion and maintain its neutrality.[1328]

In similar vein, the US DoD Manual determines that

> [t]he fact that a neutral State resists, even by force, attempts to violate its neutrality cannot be regarded as a hostile act. For example, a State whose territory is adjacent to a theater of war normally mobilizes a portion of its forces to prevent the forces of either belligerent from entering its territory, to intern such persons as may be permitted to enter, and generally to carry out its duties of neutrality. Such military operations are not regarded as hostile acts against the belligerent State.[1329]

Both the internment and the use of limited force in protection of neutral territory thus indeed do not render a neural State party to an ongoing international armed conflict. These rules do not conflict with the low threshold generally used to classify the existence of such conflicts in the first place.

A third point of friction between the *jus in bello* framework and the law of neutrality concerns the violation of the neutral duty not to provide any assistance to the belligerents. Under traditional neutrality law, a rule seems to exist (even though no concrete provision in this regard can be found in the Hague Conventions) determining that only serious violations of neutral duties would end the neutral status of a State. In other words, minor violations of neutrality by a neutral State would not turn a neutral State into a belligerent, whereas serious violations – even if they do not amount to a 'resort to force' – would make a neutral State party to an ongoing IAC.

In this regard, Bothe writes for instance that 'neither limited actions of armed defence of neutrality [on this, see the previous paragraph], nor breaches of single duties of neutrality by

[1328] Rule 169 of the Program on Humanitarian Policy and Conflict Research Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare*.
[1329] US, DoD Law of War Manual, para. 15.4.3 [footnotes ommitted]. Similar provisions can also be found in other domestic military manuals, such as the one of Peru and Germany: Centro del Derecho Internacional Humanitario y Derechos Humanos de las Fuerzas Armadas Peru, Manual para las Fuerzas Armadas: derechos humanos, derecho internacional humanitario, 2010, para. 106(j); Germany, Humanitäres Völkerrecht in Bewaffneten Konflikten – Handbuch –, ZDv15/2, DSK AV230100262, para. 1250.

the state alone necessarily result in that state becoming a party to the conflict.'[1330] He even adds that '[o]nly where a hitherto neutral state participates to a significant extent in hostilities is there a change of status.'[1331] It remains unclear, however, which acts under the law of neutrality would exactly be considered 'serious' enough in order to render a neutral State party to an armed conflict. For instance, the US DoD Manual determines in a rather general way that

> [a]cts that are incompatible with the relationship between the neutral State and a belligerent State under the law of neutrality need not end the neutral State's neutrality and bring that State into the conflict as a belligerent.[1332]

This passage confirms the idea that not necessarily every violation of the law of neutrality would end the neutral status of a State. Formulated in this way, there is no contradiction with the *jus in bello* framework. It remains however unclear which acts would end a neutral status. While according to Bothe (see quote above) only 'significant' participation in hostilities would end such a status, the Norwegian Military Manual seems to defend a rather broad position:

> In order to maintain its status as neutral, states may refrain from participating in or *contributing to* the ongoing armed conflict, and they must avoid letting a warring party use their territory for military purposes, for example, to have training camps and military headquarters there.[1333] [emphasis added]

While the seriousness of the violation of a neutral right or duty may in practice have an impact on whether or not there has been a 'resort to force' between the neutral State and a belligerent, it is the latter rather than the former criterion that is now considered determinative. 'Resort to force' does not entail a degree of 'significance', as 'one single shot' may be sufficient to trigger an international armed conflict between two States.[1334]

The scale of the violation will nevertheless be more influential when the supportive act does not concern a direct participation in the hostilities, but another type of support. It is precisely on this point that the support-based approach, as recently introduced by the ICRC, could potentially also find its benefit. To recall, the support-based approach was developed by the ICRC as a reaction to the denial of some States participating in a multinational operation that they were party to an ongoing non-international armed conflict.[1335] As the existence of a non-international armed conflict depends on the organization of the parties involved and the intensity of the fighting, the States merely providing essential military support without being engaged in hostilities with an armed group, denied their status as party to the NIAC. In response, the ICRC has developed the argument that the intensity criterion for a NIAC can be circumvented under certain conditions. In Chapter 3, I have analysed the support-based approach and submitted that its current scope should be broadened: the support-based approach

[1330] Bothe, 'The Law of Neutrality', para. 1107.
[1331] *Ibid.*, para. 1107(3).
[1332] US, DoD Law of War Manual, para. 15.4.1.
[1333] Norway, Forsvaret, Manual i Krigens Folkerett, para. 1.45 [translated with the assistance of Google translate].
[1334] On this general rule see *supra* Chapter 3, Section 3.1.
[1335] See Chapter 3, Section 4.2.1.A.

should not only be applied to State-to-State support in NIAC situations, but also to State-to-armed group support, armed group-to-armed group support, armed group-to-State support in NIAC and to State-to-State support in IAC.[1336] It is the latter scenario that becomes relevant here: if supportive acts, other than those amounting to a 'resort to force', could be seen as the trigger point of an IAC, then violations of neutrality law potentially would have the same result.

Of course, a broadened application of the support-based approach to include supportive acts during international armed conflict does not come without restrictions. To recall, the reformulated conditions for the support-based approach+ were submitted as follows[1337]:

> Under the support-based approach +, it is submitted that IHL applies to States, international organizations or armed groups (the 'supporting entity') when the following conditions are met:
>
> 1. There is a pre-existing armed conflict ongoing when the supporting entity intervenes;
> 2. Actions related to the conduct of hostilities are undertaken by the supporting entity in the context of the pre-existing conflict;
> 3. The supporting entity's operations are carried out in support of a party to that pre-existing armed conflict;
> 4. The action in question is undertaken pursuant to an official decision by the supporting entity in question to support a party involved in that pre-existing conflict.

Thus, if a neutral State decides to furnish crucial intelligence information related to a belligerent for a military operation, the neutral State could arguably become party to the existing international armed conflict. This regardless whether 'sharing crucial intelligence information' would have been considered as a serious violation of neutrality law. Conversely, if a neutral State merely provides weapons to a belligerent, without any link to concrete military operations, the State would not become party to the ongoing international armed conflict – even if, under the traditional neutrality law, this may have been considered as a 'serious violation' of neutral duties. Consider for instance the position of the Irish Government in defense of granting permission to US-aircrafts for stopovers and overflights during the 2003 Iraq invasion (see also *supra* Section 2.3). During the parliamentary debate, the government contended it did 'not regard the provision of landing and overflight facilities to foreign aircraft as participating in a war'.[1338] More specifically, it argued that 'the provision of facilities [did] not make Ireland a member of a military coalition nor [did] anybody regard us as such. [Ireland] remains militarily neutral.'[1339] Regardless the fact that 'military neutrality' is not a legal term as such, the Irish government clearly did not consider that 'allowing its territory to be used' by the US aircraft was sufficient to render it a party to the ongoing conflict. This could indeed be an accepted conclusion if one takes into account the necessary link with the conduct of hostilities under a support-based approach +, as submitted here. From the perspective of neutrality law, however, granting overflight and stop-over rights would likely be considered as a serious violation of

[1336] See Chapter 3, Section 4.2.2.B.
[1337] *Ibid.*
[1338] See Ireland, Foreign Conflicts: Motion, 563 Dáil Éireann Debate, 20 March 2003.
[1339] *Ibid.*

neutrality law, ending the neutral status of Ireland. For Saudi Arabia, which also allowed the US to make use of its Prince Sultan Air Base and simultaneously declared that it '[would] not participate in any way' in the war against Iraq[1340], such a conclusion is more problematic. Even though Saudi Arabia 'denied the United States permission to use its bases to attack Iraq', the base was nevertheless used as an important 'command and control center for U.S. aircraft, U.S. aerial refueling tankers [and] reconnaissance planes'[1341] – activities which are closely linked to the ongoing hostilities. Such support would arguably lead – both under the SBA(+) and the old neutrality rules – to the loss of a neutral status.

The future of the support-based approach is unknown. State practice has not yet responded publically to the proposals of the ICRC. Logically, it is also uncertain whether an expanded version of the support-based approach applicable to situations of international armed conflict would be accepted. Importantly, under contemporary international law, it is well accepted that whether or not a State becomes party to an armed conflict is purely a question of *jus in bello*, as discussed in Chapter 3. The current situation therefore remains unclear. Either one takes the (in my opinion) correct view that *jus in bello* rules determines which State becomes party to an armed conflict, and that the law of neutrality cannot, for the purpose of conflict classification, be considered as part of the *jus in bello*.[1342] Such a position has the advantage of clarity (all States are assessed in an equal manner) and legal certainty. All third States who are not yet party to an armed conflict will only become so if they resort to armed force with another State, or, as suggested above, if they commit supportive acts that fulfill the criteria of the SBA+. Alternatively, one could still rely on the old reasoning of neutrality law, whereby a neutral State becomes a belligerent it the neutral duties are seriously violated. While this approach predominantly overlaps with the former approach in practice, it nevertheless leaves a grey area, covering primarily the supportive acts under investigation in this study. There is no complete overlap between a 'serious violation' of neutral duties (if that concept can ever be defined) and a resort to armed force. The position that neutrality law, in addition to the general *jus in bello* rules, can still identify a party to an armed conflict should therefore be rejected.

This argument is strengthened if one takes into account the conclusion of Section 3.1, namely that some neutral duties may be suspended following a UNSC Resolution. If there is no neutral duty (for instance not to provide assistance to a State), no serious violation of such duty can take place. If serious violations of neutrality law would be considered as a basis to decide

[1340] Even though this base had a crucial role during the Iraq invasion, it is unclear whether or not Saudi Arabia allowed the US to launch attacks against Iraq from it. See Craig S. Smith, 'THREATS AND RESPONSES: A COMMAND POST; Reluctant Saudi Arabia Prepares Its Quiet Role in the U.S.-Led War on Iraq', *The New York Times*, 20 March 2003, https://www.nytimes.com/2003/03/20/world/threats-responses-command-post-reluctant-saudi-arabia-prepares-its-quiet-role-us.html.

[1341] Barbara Starr, 'U.S. to move operations from Saudi base', *CNN*, 29 April 2003, http://edition.cnn.com/2003/WORLD/meast/04/29/sprj.irq.saudi.us/.

[1342] The 2016 ICRC Commentary to GC I confirms this starting point, by clearly stating that '[the] criteria for determining whether a neutral State has become a Party to an international armed conflict are found *exclusively* in international humanitarian law, not in the law of neutrality' [emphasis added]. ICRC, *Commentary on the First Geneva Convention*, 328.

whether or not a State becomes party to an armed conflict, then this would mean that becoming party to an armed conflict may depend on whether or not the UNSC took action in a particular context. Such a reasoning would violate the fundamental distinction between *jus in bello* and *jus ad bellum*.[1343]

3.3. *Jus ad bellum* consequence: no longer a basis for a lawful use of force?

As discussed in Section 2, neutrality law imposes duties and rights on both belligerents and neutral States. When a neutral State or a belligerent violates its neutral duties, the affected belligerent or neutral State may respond to that violation in accordance with international law. While one option would be to respond through countermeasures (subject to some theoretical and practical difficulties, as discussed in Section 3.1), the most radical option is to respond by using force. Even though neutrality treaties do not explicitly foresee in a right to use force, it has been generally understood that the old customary rules of neutrality permitted belligerent States to react with force against a neutral State that violated its neutral duties.[1344] In particular, when a belligerent made use of a neutral territory, for instance to find refuge or to prepare hostile actions, and when the neutral State did not undertake any steps to protect or restore the inviolability of its territory, the disadvantaged belligerent was considered entitled to respond with the use of force. For instance, when Norway allegedly did not properly respond to a German warship (the 'Altmark') carrying British prisoners of war entering Norwegian territorial waters, Britain was considered entitled to use force on the basis of the neutrality law violation:

> Norway showed inability (and possibly will) to enforce its neutrality. When a neutral state does not have the ability and / or the will to enforce it neutrality, there is a self-defense right that the British used in this case as a basis for interfering with "Altmark".[1345]

While the duty of a neutral to prevent its territory from being used by belligerents clearly flows from neutrality law provisions[1346], the assumed corresponding right of a disadvantaged belligerent to use force in case the neutral State remains passive can nevertheless nowhere be found in treaty provisions. Such a right to act on neutral territory against an adversary seems to

[1343] A crucial mistake made by Greenwood, when he argues that '[w]here one of the parties to the conflict is the United Nations, or is authorized by it, a state is entitled to give support to that party without forfeiting its status as a neutral. The line between participation in an armed conflict and neutrality is no longer as clear as it once was. Between the two there is now a grey area in which a state engages in non-neutral service without overtly becoming a party to the conflict.' Greenwood, 'Scope of International Humanitarian Law', 50–51.
[1344] See for instance Erik Castrén, *The present law of war and neutrality*, 442.
[1345] Norway, Forsvaret, Manual i Krigens Folkerett, 202 [translated with the assistance of Google Translate].
[1346] See e.g. Article 5 HC V, which stipulates that '[a] neutral Power must not allow any of the acts referred to in Articles 2 to 4 [i.e. the movement of troops, the use of telegraph stations, the recruitment of troops,…] to occur on its territory.' Nevertheless, this duty is nuanced by the Swedish Military Manual, which states that 'the neutral state is not obliged to intervene against violations that occur at such a height that it lies beyond the reach of the neutral state forces or weapons.' Sweden, Folkrättskommittén, Folkrätt i vapnad konflikt, 110.

have been the common understanding of what neutrality law entailed – at least before the UN Charter. This is not surprising, as before the UN Charter, or more correctly before the Briand-Kellogg Pact of 1928, no general prohibition on the use of force existed.

The UN Charter formed the starting point of the collective security system. The use of force between States became prohibited, with the exception of force authorized by the UN Security Council and the right to individual or collective self-defence against an armed attack. Contrary to what some have tried to argue in the immediate years after the adoption of the UN Charter[1347], neutrality law remained in place – or, in Neff's, words, 'neutrality has succeeded in cheating death'[1348]. Even though arguably the UN Charter still leaves open some room for a broader interpretation of the notion of 'self-defence' by referring to the 'inherent right' of States, generally these two exceptions should be read narrowly as they form exceptions to a concrete prohibition.

There is nevertheless some contemporary practice that suggests that, contrary to what one would assume under the post-Charter system of collective security, neutrality law does provide for a legal basis to use force against other States in certain circumstances. All military manuals implicitly or explicitly referring to a legal basis for a use of force against a neutral State, limit this option to the case whereby the inviolability of the neutral territory has not been respected by a belligerent. The other modalities for the use of force differ from one military manual to another, as outlined below. For instance, the 2009 Mexican Military Manual implicitly foresees in a legal basis to use force on neutral territory when it explains that

> [t]he duty of the belligerents to respect the territorial sovereignty of the neutral state ceases, however, from the moment when the neutral territory or a part of it is occupied by a belligerent.[1349]

Somewhat more explicit, yet still without referring to the use of force, is the Danish Military Manual, that allows for 'intervention' in the neutral territory:

> On the other hand, the general rule is that States desirous of remaining neutral in relation to an on-going armed conflict must prohibit the belligerent States from any use of the neutral State's territory that is contrary to international law. Any failure by the neutral state to do so constitutes an act in "breach of neutrality".[1350]

Even more explicit language can be found in other military manuals. For instance, Article 1304(3) of the 2001 Canada LOAC Manual determines that

> [a] neutral state is permitted to resist any attempted violation of its borders by force and such resistance does not make the neutral a party to the conflict. If enemy forces enter neutral such

[1347] Among those defending this view are Lalive and Fenwick. See Torrelli, 'La neutralité en question', 7.
[1348] See Neff, *The Rights and Duties of Neutrals*, 2000, 7–26.
[1349] Mexico (Secretaria de la Defensa Nacional), Manual de derecho internacional humanitario para el ejercito y F.A.M., 2009, para. 397 [own translation].
[1350] Denmark, Ministry of Defense, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, 62.

> territory and the neutral state is unwilling or unable to intern or expel them, the opposing party is entitled to attack them there, or to demand compensation from the neutral for this breach of neutrality.[1351]

This manual identifies a right of a belligerent State to operate against enemy forces on neutral territory, if the neutral State is 'unable or unwilling' to defend its neutral status. Importantly, the quoted provision specifies that there is a right to act against the enemy on neutral territory, rather than claiming there is a right to use force against the neutral State. The manuals quoted thus far fail to clarify how a legal basis for the use of force against a neutral State would relate to the existing *jus ad bellum* framework.

The US Department of Defense Manual contains a somewhat different provision, which places the basis for the use of force on neutral territory within the existing legal framework on self-defense:

> [C]onsistent with the jus ad bellum requirements for self-defense, belligerent forces may act in self-defense when attacked or threatened with attack from enemy forces unlawfully present in neutral territory, including by taking appropriate action to counter the use of neutral territory as a base of enemy operations when the neutral State is unwilling or unable to prevent such violations.[1352]

The UK LOAC Manual goes even further, subjecting the right of a belligerent to operate against enemy forces on neutral territory to the ordinary rules of *jus ad bellum*:

> If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of such military operations, a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state. Whether or not they are so entitled will depend on the ordinary rules of the *jus ad bellum*.[1353]

The above-quoted fragments of military manuals have in common that they offer a legal basis for a use of force in case the neutral State is 'unable or unwilling' to prevent a belligerent from using the neutral territory. So does the doctrinally developed Tallinn Manual, although the 'unable or unwilling' condition is not included in Rule 153 but only in the commentary thereto.[1354] Remarkably, that condition is absent in the HPCR and San Remo Manuals. In turn, both manuals do include a requirement of 'seriousness' of the violation of neutral territory[1355], in combination with the absence of an alternative to force and the condition that the force used is strictly necessary to terminate the violation. The San Remo Manual is even more stringent

[1351] Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels, para. 1304(3).
[1352] US, DoD Law of War Manual, para. 15.4.2.
[1353] United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, para. 1.43(a).
[1354] Schmitt and NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 561.
[1355] So does the Tallinn Manual, see *ibid.*, 560–61.

by adding a notification duty. The HPCR Manual on International Law Applicable to Air and Missile Warfare notes that

> [i]f the use of the neutral territory or airspace by a Belligerent Party constitutes a serious violation, the opposing Belligerent Party may, in the absence of any feasible and timely alternative, use such force as is necessary to terminate the violation of neutrality

The San Remo Manual stipulates in its paragraph 22 in similar yet more elaborate wording that

> [s]hould a belligerent State be in violation of the regime of neutral waters […] the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.[1356]

Interestingly, this provision of the San Remo Manual is copied into paragraph 13.9E of the UK LOAC Manual related to the protection of neutral waters.[1357] Thus, contrary to paragraph 1.43(a) of the same LOAC Manual quoted above, in order to respond with force to a violation of neutral waters (as opposed to a violation of neutral territory), no criterion of an 'unable or unwilling' neutral State is mentioned. Depending on how one interprets a 'failure to terminate', the notion may encompass only inability of a neutral State to properly respond, or also unwillingness – the second interpretation would obviously be the most logical in light of the previously quoted passages.

Contrary to what we can observe in the UK and US military manuals, but similar to the Mexican and Canadian manuals, the San Remo and HPCR Manuals do not formulate this legal basis for the use of force within the *jus ad bellum* framework. The practice allowing for a use of force against a belligerent on neutral territory is thus far from uniform. A curious case in this regard is the Australian LOAC Manual, which seems to offer at least three different positions on the matter. First, by way of introductory remark to its chapter on neutrality law, the Manual observes that

---

[1356] Doswald-Beck and International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, para. 22. The Swedish IHL Manual has included a more concise version of this provision: 'If the neutral state fails to prevent a warring party's violation of its neutral waters, the warring counterparty must notify the neutral state and give the reasonable time to prevent the violation. The warring party may, in the absence of any practically possible or appropriate alternatives, use such violence as is strictly necessary to respond to the threat of the violation means.' Sweden, Folkrättskommittén, Svensk manual i humanitär rätt m.m.: Bilaga 7 till slutbetänkande (Stockholm: Fritzes, 2010), para. 711(2).

[1357] See United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, para. 13.9E. For a similar provision in the Norwegian Miltary Manual, see Norway, Forsvaret, Manual i Krigens Folkerett, 203.

> [a] neutral state has a duty to prevent the use of its territory as a sanctuary or a base of operations by the belligerent forces of any side. If the neutral state is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces, including warships and military aircraft, making unlawful use of that territory. Belligerents are also authorised to act in self-defence when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.[1358]

With regard to violations of the neutral airspace, this right is formulated as a form of self-help, yet still under the condition that the neutral State is unable or unwilling to defend its neutral inviolability:

> Neutral states have a duty to prevent violation of neutral airspace by belligerent aircraft, to compel offending aircraft to land and to intern both aircraft and crew. If a neutral state is unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.[1359]

While the previous two paragraphs suggest an Australian position that is close to the one of other States such as Canada, the following paragraphs shed a different light on the matter:

> 11.35. Where there are severe breaches of the rules of neutrality, for instance by the commission of an armed attack or by assistance in such an attack, it may justify a conclusion that the nation is no longer neutral. This may then give rise to a legitimate exercise of the right to self-defence by the belligerent which was the subject of such an attack.
>
> 11.36. In instances short of this situation, *particularly where the neutral has been unable to prevent its territory or waters being violated by a belligerent*, the nation would not lose its neutral status. The principal remedy in this case would be for the belligerent nation to seek reparations as it would for any other international wrong. To respond to such violations by a declaration of war or by armed attack directed against the neutral is contrary to international law. [1360] [emphasis added]

The Australian LOAC Manual thus seems to accept a forcible reaction against a neutral State only insofar it was unwilling to prevent an armed attack from its territory, and it formulates this possibility as a 'legitimate exercise of the right to self-defense'. This is rather different than what is suggested in paragraph 11.8, where being unable or unwilling to prevent the mere use of neutral territory (be it as a base for an armed attack, a sanctuary or other operations) would trigger the possibility to use force against the neutral State.

In addition to the lack of a clear position among (and in some case within) military manuals on whether or not the use of neutral territory may serve as a basis for use of force against a neutral

[1358] Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, para. 11.8.
[1359] *Ibid.*, para. 11.26.
[1360] *Ibid.*, paras 11.35 and 11.36.

State, there are also military manuals that remain silent on this point. For instance, the German Military Manual repeats the general rule that neutral territory is inviolable, without attaching any consequences to the inability or unwillingness of the neutral State to protect its territory:

> 1108. The territory of a neutral state is inviolable. It is prohibited to commit any act of war on such territory (Art. l HC V).
>
> 1109. A neutral state is bound to resist any violation of its neutrality, if necessary by force (Art. 5 HC V; Art. 2, 9, 24 HC XIII). This Obligation is, however, limited by the international prohibition of the use of force. Legally permitted are only such measures of defence of neutrality which are also justified as self-defence against an armed attack.
>
> […]
>
> 1149. The airspace of a neutral state is inviolable (Art. 40 HRAW 1923).
>
> 1150. The parties to the conflict are forbidden to enter neutral airspace with military aircraft, rockets or other missiles (Art. 40 HRAW 1923).

The Military Manual of Peru does not include a provision suggesting that a neutral State that does not effectively protect its territory may be attacked. On the contrary, the Manual's Chapter on neutrality law strongly refers to the existing *jus ad bellum* framework, by repeating the general rules on self-defence:

> The exercise of the law of legitimate defense, individual or collective, recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations stipulated in the said Charter and those arising from general international law, including, in particular, the principles of necessity and of proportionality.[1361]

In order to illustrate the wide diversity among military manuals on this issue, the following table offers a useful overview of the consulted military manuals:

[1361] Peru, 'Manual Para Las Fuerzas Armadas: Derechos Humanos, Derecho Internacional Humanitario', para. 111.

Manual of State X	**Permission for use of force under the following conditions…**								**Only implicit permission: end of protection**	**No permission for use of force**
	No conditions	*Only in case of 'serious violation' of neutral territory*	*Neutral State is 'unable or unwilling'*	*Against belligerent on neutral territory*	*Against neutral territory*	*Notification required*	*Absence of feasible and timely alternative*	*Within framework of UN Charter or right to self-defence*		
Mexico									X	
Denmark	X				X					
Australia – para. 11.8			X	X						
Australia – para. 11.26			X	X						
Australia – para. 11.36		X (only if armed attack committed)	X (only unwilling)					X		
Canada			X	X						
US			X					X		
UK – neutral territory			X	X				X		
UK – neutral waters			X ('fails to terminate')			X	X			
Peru										X
Germany										X
Sweden – neutral waters			X			X	X			

Manuals developed by experts										
HPCR Manual		X					X			
San Remo Manual			X (‘fails to terminate’)			X	X			
Tallinn Manual		X	X	X	X (implicitly: eg. destroy cyber infrastructure)	X	X			

The absence of a general agreement on the matter is also reflected in the doctrinal works on neutrality law. Despite the continued repetition by some military manuals of the old rule of neutrality law providing a basis for a forcible reaction in case a neutral State is unable or unwilling to defend its neutral territory, Bothe strongly rejects the idea that neutrality law can serve as a lawful basis for the use of force under *jus ad bellum*, as he considers the law of neutrality to be an integral part of *jus in bello*:[1362]

> [A] reaction against violations of neutrality which would involve the use of force against another state is permissible only where the violation of the law triggering that reaction itself constitutes an illegal armed attack. […] Illegal support for an aggressor, however, is not necessarily equivalent to an armed attack. Therefore, the victim of aggression reacting to a non-neutral service in favour of the aggressor is still subject to the prohibition of the use of force.

A somewhat different position is taken by Schindler, who considers the law of neutrality (at least partially) as a predecessor of the *jus ad bellum* framework of the UN Charter. He observes that

> [a]s the use of force against the territory of another State is now regulated by the UN Charter, the cited rule of the law of neutrality is no longer applicable. The legality of armed countermeasures is to be judged on the basis of Article 51 of the Charter, the Charter taking precedence over the old law of neutrality.[1363]

While Schindler thus clearly rejects the possibility that an old rule of neutrality law could still serve as a lawful basis for the use of force in the contemporary post-Charter era, he nevertheless only seems to do so under the condition that the Charter rules allow for a broad interpretation of what constitutes an armed attack under Article 51. He formulates the scope of lawful actions in self-defence as follows:

> Article 51 of the Charter allows acts of hostility by a belligerent on the territory of a third State if enemy forces use this territory to carry out attacks against it. Such acts of self-defence by belligerents have to be restricted to enemy forces on neutral territory. Acts of self-defence by belligerents on neutral territory are also to be considered as lawful if such territory has been occupied by the opponent or serves as a military base for him or is used for the permanent passage of troops.

Thus, following what Schindler argues, the old rule of neutrality law would be replaced by the rule as incorporated in Article 3(f) of the Definition of Aggression, in the widest possible understanding of that provision. Not only allowing territory to be used for an attack would trigger self-defence actions on the territorial State (as I argued in the previous Chapter)[1364], also the mere location of a military base or the 'permanent passage' (excluding, presumably, a single passage but including a more frequent permission for passage) of troops. This conclusion finds

[1362] A position which in turn can also be criticized, see Section 3.2.2. See Bothe, 'The Law of Neutrality', 2013, para. 5.
[1363] Schindler, 'Transformations in the law of neutrality since 1945', 382.
[1364] See Chapter 4, Section 4.1.2.A.

some confirmation in the above-quoted passages of domestic military manuals[1365], but certainly not in all of them.

Another doctrinal source offers a somewhat confusing view on the matter. The 1994 version of the Commentary to the UN Charter still asserted that 'it is compatible with Art. 51 and the laws of neutrality when a warring state fights hostile armed forces undertaking an attack from neutral territory on the territory of the neutral state, provided that the state concerned is either unwilling or unable to curb the ongoing violation of its neutrality.'[1366] While this would affirm the position of most of the manuals quoted above, it is interesting to note that this passage was entirely left out in the most recent version of the Commentary, dating of 2012.[1367] If the 'unable and unwilling' theory as basis for a use of force against neutral States is really a settled issue in international law, then why was it left out in the most recent version of the Commentary to the UN Charter?

The correct view is therefore, in my opinion, that a violation of neutrality law can no longer serve as a basis for the lawful use of force against a neutral State. Belligerents can only attack a neutral State if there is a UNSC authorization to do so, or if the neutral State has committed an armed attack against them. The latter option would however include the scenario whereby a neutral State 'allows its territory to be used' by armed forces of another State, who carry out an armed attack. That option, currently included in Article 3(f) of the Definition of Aggression, is reminiscent of the old neutrality rule – but apart from that heritage, there is no room in the collective security system for exceptions to the prohibition on the use of force flowing from the law of neutrality.

3.4. Intermediate conclusion

As has become clear in this Section, the consequences of neutrality violations, rather than the thresholds for such violations, are under dispute today. These contentious consequences play at three levels: it is unclear whether and when an aggrieved State is entitled to take countermeasures against a violating neutral State; it is unclear when violations of neutrality law end the status of a neutral State and it is unclear whether a lack of response against violations of the neutral territory by a belligerent entitles States to attack the neutral territory. To that vague current status of the law, the complexity surrounding the nature of the law of neutrality is added. Indeed, if one considers the law of neutrality as fully *jus in bello*, the answers to the

[1365] See for instance the first passage quoted from the Australian Military Manual, stipulating that a 'neutral state has a duty to prevent the use of its territory as a sanctuary or a base of operations by the belligerent forces of any side. If the neutral state is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces, including warships and military aircraft, making unlawful use of that territory.' The other passages of the same manual moreover suggest a more restrictive position.
[1366] Randelzhofer, 'Article 51', 673.
[1367] Compare the 1994 version with the section on Article 3(f) in the 2012 edition: Nolte and Randelzhofer, 'Article 51', para. 30.

above legal uncertainties may be considerably different than in case one argues that the law of neutrality is not part of the *jus in bello* at all.

I have argued in this Section that neutrality can neither be seen as entirely belonging to *the jus in bello*, nor as entirely falling under the *jus ad bellum*. Neutrality law shares characteristics of both bodies of law, and contains rules pursuing their respective objective: reducing suffering of victims of armed conflict and preventing States from becoming involved in international armed conflicts.

As a result, therefore, the following consequences of violations of neutrality law may be expected:

In terms of State responsibility, a neutral State violating its neutral duties may *a priori* indeed expect lawful countermeasures to be taken against it. There are however a number of caveats attached to this starting principle: first, some neutral duties (but not the purely humanitarian ones) can be temporarily set aside by UNSC-imposed obligations, and are most likely also set aside by measures authorized by the Council (even though this consequence can be theoretically disputed, this is what is considered most in practice). In addition, even in the absence of a UNSC Resolution, one could argue that in case of aggression neutral duties are overridden by an obligation to assist the victim of aggression and an obligation to end the aggression. This reasoning comes however with two difficulties: first, the identification of an aggressor is left to the States at hand, and second, the scope of the obligations triggered in case of aggression are far from being clear.

In terms of *jus in Bello*, I have explained that an intermediate status of 'non-belligerency' has no legal meaning. Contrary to what has longtime been assumed as a traditional rule of neutrality law, namely that serious violations can end a neutral status, I have submitted that under contemporary *jus in bello* it is the latter framework that should define the end of a neutral status. In this regard, I have also defended the application of an expanded support-based approach to situations of international armed conflict, as a reference to the old neutrality rule – with however not always the same result. Rather than trying to identify which neutrality violation is 'serious' enough to end a neutral status, the close link between a form of assistance by the neutral State and the hostilities should be assessed in order to conclude that the neutral State becomes party to the ongoing IAC.

Lastly, in terms of *jus ad bellum*, I have shown by referring to a broad range of military manuals that there is no unanimous view on whether a lack of proper response by a neutral State against violations of its neutral territory would be a sufficient legal basis for a forcible reaction by a victim State. Given the importance of the *jus cogens* prohibition of the use of force between States installed by the UN Charter in 1945, an exception to that rule based on an unclear and unsettled old neutrality rule cannot be accepted. This does not mean that not properly responding against violations of the neutral territory will never result in the possibility of a forcible response against the neutral State: under the existing framework of the *jus ad bellum*,

as argued in the previous Chapter, a State is allowed to react in self-defence against a State that 'allows its territory to be used' for an armed attack (based on Article 3(f) of the Definition of Aggression). In addition, as has also been discussed in the previous Chapter, the debate on the unable or unwilling theory as a basis for a use of force against a State not preventing armed groups from operating within its territory is clearly inspired on this old neutrality rule. Neutrality law thus no longer serves as a separate legal basis for the use of force, but has clearly influenced – and keeps on influencing – the contemporary *jus ad bellum* framework.

4. Conclusion

The law of neutrality is an old body of law that predates the 1945 UN Charter or the 1949 Geneva Conventions. Logically, therefore, its position within the contemporary spectrum of rules that apply in times of armed conflict is not clearly determined. Yet, it is still of (limited) relevance today, even though many of the consequences it may trigger are arguably now subject to the more contemporary bodies of *jus in bello* and *jus ad bellum*.

Section 1 of this Chapter clarified when the law of neutrality starts applying: its rules become applicable as soon as an international armed conflict erupts, and neutral States are all those States that are not involved in the ongoing conflict. States cannot opt out of neutrality law: their actions would simply be violations of neutral duties.

Section 2 provided a brief overview of relevant neutral rights and duties. The hybrid character of neutrality law was shown by referring to purely humanitarian duties, nowadays mainly included in the Geneva Conventions, and to neutral duties that share more characteristics with *jus ad bellum*, such as the prohibition of assisting belligerent States, the inviolability of the neutral territory and the duty of impartiality. Given the broad scope of those duties, all four categories of support identified for this study (allowing territory to be used/logistical support/training/crucial intelligence sharing) would constitute violations of the law of neutrality. There is thus no need to look for alternative ways to meet neutrality thresholds – contrary to the exercise that was conducted in the previous Chapters in order to assess supportive acts under *jus in bello* and *jus ad bellum*.

While the broad scope of neutral duties renders it easy for supportive acts to constitute a violation of neutrality law, the consequences attached to such violations are far less clear. Section 3 clarified some of the most contentious points in relation to State responsibility, *jus in bello* and *jus ad bellum*. In essence, it was argued that neutrality law should not be seen as purely a part of the *jus in bello*. Such a position would not only conflict with the *jus ad bellum* nature of important neutral duties, it would also exclude the possibility to take countermeasures against violations of those duties. At the same time, however, neutrality law cannot function as a separate *jus ad bellum* set of rules either: part of it is still clearly included in *jus in bello* treaties and some rules share at least characteristics of both *jus in bello* and *jus ad bellum*.

What remains from neutrality law is a set of rules that, if it is established that a State is party to an armed conflict, should be respected *vis-à-vis* the non-parties and, if it is not, should be followed *vis-à-vis* the parties. It is an etiquette that determines behaviour without classifying who belongs to the group. Similarly, neutrality law can arguably no longer determine the lawfulness of the use of force between two States. In the interest of collective security, the UN Charter is the only source for such possible exceptions to the prohibition on the use of force.

It goes without saying that neutrality law has had an impact, both on *jus in bello* and on *jus ad bellum*. For the former we can observe this impact with the idea that has been advanced under the support-based approach theory. For the latter we can see its impact on Article 3(f) of the Definition of Aggression, and by analogy also on Article 3(g). Both examples should not be seen as a proof that neutrality law still fulfils those original functions, but rather as an illustration of the natural evolution of international law. The Geneva Conventions and the UN Charter did not fall from the sky after the end of World War II. There were grounded in rules that had been developed before, despite the fact that they also clearly marked a new beginning in the international community. Neutrality law, while still functioning, now only serves as an additional layer of rules aiming to protect victims of armed conflict and trying to preserve peace among States. Its application should be seen as serving in the interest of the two other bodies of law.

Despite the theoretical debate and the most favourable outcome suggested in this Chapter, it should also be acknowledged that the law of neutrality frequently remains only a valid body of law on paper. While States on numerous occasions refer to the rules of international humanitarian law or to the principles enshrined in the UN Charter as the legal framework of reference that applies to situations of conflict, they only very rarely refer to the law of neutrality. In practice, neutral obligations are easily set aside by reference to other, more politically inspired, commitments. For instance, during the already discussed 2003 invasion of Iraq, France granted overflight rights to the US, even though it had strongly opposed the Iraq invasion before the Security Council.[1368] The then French Foreign Affairs Minister, Dominique de Villepin, explained to the *Assemblée Nationale* that 'some practices between allies exist, which [France] needs to respect.'[1369] This practical observation should not, however, devaluate the potential importance of neutrality law as a whole. On the contrary, given the potential consequences of neutrality law violations, States should be more conscious of neutrality law, and conduct supportive acts with caution.

[1368] UNSC Verbatim Record, UN Doc. S/PV.4704, 23 February 2003, 11-13/32.

[1369] France, Assemblée nationale, Débats parlementaires, Journal official de la République française du mercredi 26 Mars 2003, Compte Rendu integral, 2e séance du mardi 25 mars 2003, question by M. Jean-Pierre Brard and answer by M. Dominique de Villepin, 25 March 2003.

Conclusion: Are we at war? State support to parties in armed conflict: consequences under *jus in bello*, *jus ad bellum* and neutrality law

Fighting wars is intrinsically connected with the existence of humanity. Cooperation between military powers during wars is not a new phenomenon. However, due to the increased globalization and the newly available technologies, supportive acts take more complex forms and concern a wider variety of actors – both States and non-State actors. The position of supportive acts under international law has not been scrutinized thus far. That is what this study aspired to do. To recall, the overall research question underlying this study was the following:

> What are the possible consequences under *jus in bello*, *jus ad bellum* and neutrality law of State support to a party to an armed conflict?

In order to streamline the analysis, four categories of support were identified: (i) allowing territory to be used; (ii) providing logistical support; (iii) training and (iv) crucial intelligence sharing. For each of these categories, this study investigated whether or not they would trigger the specific consequences attached to the respective thresholds under *jus in bello*, *jus ad bellum* and neutrality law. The following sub-questions were answered in the three core Chapters (Chapters 3, 4 and 5):

a) When does a State supporting a party to an armed conflict become party to that conflict itself?
b) What are the consequences of becoming a party to an armed conflict?
c) When does a State supporting an armed attack, a use of force or a violation of the principle of non-intervention commit either of these acts itself?
d) What are the consequences of crossing *jus ad bellum* thresholds?
e) When does a neutral State breaching neutrality law become party to an armed conflict?
f) What are the consequences of violating the law of neutrality?

The following Sections summarize the answers to the research (sub-)questions, first, by providing an overview of the consequences of meeting *jus in bello*, *jus ad bellum* and neutrality law thresholds (Section 1), and second, by grouping the conclusions with regard to *jus in bello*, *jus ad bellum* and neutrality law thresholds per category of support (Section 2). In addition, Section 3 evaluates the three research hypotheses that were formulated in Chapter 1 of this study. Lastly, Section 4 formulates some recommendations for States that are planning to or are already actively supporting parties in armed conflict.

1. Consequences of meeting *jus in bello*, *jus ad bellum* and neutrality law thresholds

By way of preliminary observation, it should be noted that supportive acts may trigger the responsibility of a State when the support is used to commit an internationally wrongful act. This responsibility may result from an attribution of the conduct of an armed group on the basis of control exercised by the State. It may also result from the general complicity rule enshrined in Article 16 ARSIWA, which currently is only applicable to State-to-State assistance but could evolve to a rule that similarly applies to State-to-armed group assistance. Lastly, responsibility may flow from the obligation of due diligence that is violated in case support is provided to a wrongful act. Importantly, however, State responsibility should be seen as separate from the consequences under *jus in bello*, *jus ad bellum* and neutrality law as dealt with in this study.

From a *jus in bello* perspective, Chapter 3 has identified the most important consequences of becoming a party to an armed conflict. Counterintuitively perhaps, they are less far-reaching than one would assume at first sight. While being party to an armed conflict obviously has an impact on the protective regime for detained persons or on the targetability of military objectives, in practice supportive acts will rarely be the only trigger for such situations. More relevant are the consequences in the field of criminal law: being a party to an armed conflict may strongly indicate a nexus of a crime with a conflict, and it may determine whether or not a domestic crime, such as terrorism or treason, has been committed. Importantly, responsibility for IHL violations does not *per se* depend on being a party to an armed conflict: this is certainly not the case for responsibility triggered by common Article 1 GCs, which demands States to respect and ensure respect for IHL in all circumstances. The capacity of States to ensure respect is however considerably higher if the State at hand is also a party to the ongoing armed conflict.

Chapter 4 dealt with the possible consequences of meeting thresholds under *jus ad bellum*. If a supportive act would violate the principle of non-intervention – which, in the context of an armed conflict, will mainly depend on the identity of the support-receiver, not on the act itself – a mere violation of an international rule would be committed, with possible countermeasures as a result. However, if a supportive act would amount to an unlawful use of force, the supporting State would violate the cardinal prohibition rule of the collective security system. Given the *jus cogens* character of this rule, the supporting State could not only expect countermeasures by the aggravated State but arguably also by other States. In addition, duties of cooperation to bring a grave *jus cogens* violation to an end and a prohibition to assist in the continuation of that violation would probably apply. The most serious consequence under *jus ad bellum* is however reserved for acts that meet the threshold of an 'armed attack': a victim State is entitled to respond by force against the attacking State. Supportive acts, if amounting to an armed attack, would thus trigger enormous security risks for the supporting State at hand.

Lastly, the consequences of supportive acts under the law of neutrality are not entirely clear: there is an ongoing debate on whether or not countermeasures may be taken in case the support

(and thus the violation of neutrality law) is conducted following a UNSC Resolution. In practice, States seem to be of the opinion that collective security overrides (at least) certain neutral duties. In addition, I have argued in Chapter 5 that neutrality law can no longer be used as a basis to determine whether or not a neutral State becomes party to an ongoing international armed conflict: the answer to that question should be sought exclusively under *jus in bello*. Moreover, neutrality law violations can also no longer form a lawful basis for a forcible response – here again, guidance should be sought in the existing *jus ad bellum* framework. As a result of the hybrid character of neutrality law, the consequences attached to violations thereof are governed by the other two main subfields of international law relevant in time of conflict: *jus in bello* and *jus ad bellum*.

2. Overview: supportive acts under *jus in bello*, *jus ad bellum* and neutrality law

In order to provide a comprehensive overview of each category of supportive acts and whether or not (and how) they would meet the relevant thresholds under the three subfields of international law scrutinized in this study, the following paragraphs group the research results of the previous Chapters per category of support. While obviously similarities exist between the conclusions for each type of support, some remarkable differences can also be detected.

2.1. Allowing territory to be used

This is the most 'static' form of support, in the sense that a State merely has to allow another entity to conduct activities from within its territory, without any other involvement being necessary in those activities. Yet, in this study I have assumed that 'allowing territory to be used' at least implied that the State knowingly put part of its territory at the disposal of another State or armed group in the context of an armed conflict.

Under *jus in bello*, there is no reason why this supportive act would out of itself trigger the existence of an armed conflict: allowing territory to be used does not constitute the 'resort to force' between States, nor does it meet the requisite intensity for fighting in a NIAC. Nevertheless, this type of support could fall under an expanded version of the support-based approach, even though in that case a sufficiently close link with ongoing hostilities would still need to be shown. Thus, not all situations whereby a State allows its territory to be used by a party to an armed conflict would automatically render that State party to the conflict. This conclusion remains moreover dependent on the (future) acceptance of the support-based approach(+).

Under *jus ad bellum*, different views exist with regard to 'allowing territory to be used'. I have argued in Chapter 4 that if a State puts its territory at the disposal of another State for the

commission of an armed attack, the former can be considered as equally committing an armed attack on the basis of Article 3(f) of the Definition of Aggression. While a similar reasoning has recently been used for putting territory at the disposal of an attacking armed group (or at least in a modified form as part of the necessity criterion for self-defence on the basis of the 'unable or unwilling theory'), this theory has not yet crystallized in practice. As a result, the consequences of this form of support may differ greatly depending on at whose disposal the territory is put.

Lastly, allowing territory to be used by a belligerent is a clear violation of the neutral obligation to maintain the inviolability of the neutral territory. This does not mean, however, that a violating neutral State automatically loses its neutral status. That consequence can arguably only be triggered if the *jus in bello* criteria, discussed above, for becoming party to an armed conflict are fulfilled. In addition, a forcible response by the aggrieved belligerent can only be expected on the basis of the idea that Article 3(f) of the Definition of Aggression forms an example of an armed attack for the purposes of *jus ad bellum*.

2.2. Providing logistical support

This category of support is the most diverse group of the four: it may consist of (mere) supply of weapons, but it can also cover air-to-air refuelling or assistance with the transport of military equipment, etc. As a consequence, general conclusions for this group should be made rather carefully.

Yet, for *jus in bello* it can be observed that this type of support would not trigger an IAC or a NIAC, because of a lack of 'resort to force' or 'intense' fighting with an adversary. The only possible way this category of support could automatically render the supporting State party to a conflict is if the support entails the unconsented presence of troops on the territory of another State: that would arguably trigger the existence of an international armed conflict. In addition, while all supportive acts in this category indicate a certain level of control, separately they would certainly not be sufficient to conclude that a State has overall control over an armed group. These supportive acts would nevertheless be suitable for an application of the expanded support-based approach: a case-by-case assessment of the supportive act in question and the ongoing hostilities would have to determine whether the link between the support and the hostilities is sufficiently close (something which is obviously more evident in the case of air-to-air refuelling than in the case of weapon supply).

As for the *jus ad bellum* thresholds, a diverse picture emerges. At least for weapon delivery to armed groups, the ICJ has decided that this would amount to an unlawful use of force. Arguably the same consequence should be applied to other supportive acts within this category. Importantly, however, the ICJ excluded that this support would amount to an armed attack. There is no indication in case-law as to whether these acts, if provided to States, would equally

amount to an unlawful use of force. The absence of such guidance can be partially explained because of the existence of a complicity rule under Article 16 ARSIWA, which prohibits assistance by States to other States committing internationally wrongful acts. In addition, States wish to keep options of international cooperation as open as possible, hence they avoid determining *jus ad bellum* consequences for this category of support.

Lastly, from a neutrality law perspective, the supportive acts resorting under this category would constitute violations of the law of neutrality, notably of the prohibition not to assist the warring parties. Potentially this support could lead to the loss of a neutral status, but I have argued that this would only be the case if the above-discussed scenario of support-based approach would be accepted. In addition, the supportive acts of this category would not lead to a possible lawful reaction in self-defence, as they do not constitute an armed attack under the *jus ad bellum* framework.

2.3. Training

Training is a category of support that covers a range of possible forms of cooperation between armed forces and/or armed groups with a training purpose. This may entail general training in a military school or on a specially founded training base, or also close mentoring by joining forces on their daily military activities (including, possibly, during the hostilities).

From a *jus in bello* perspective, it is clear that providing training as such would not render a State party to an armed conflict. However, in case the training consists of actively joining troops during the hostilities, this may entail the unwanted presence on another State's territory, hence leading to an international armed conflict. Training moreover may be a strong indication of overall control over armed groups. As for the potential application of the expanded support-based approach to training activities, the difficulty consists of indicating the exact link between the training activity and the hostilities. Given the often secret content of training programs, in practice it would seem rather difficult to come to the conclusion that a State has become party to an armed conflict.

Under *jus ad bellum*, the ICJ has accepted that training rebels constitutes an unlawful use of force. Remarkably, the Court has not specified which exact forms of training would trigger this consequence, thus leaving it open to a fairly broad range of possible training activities. If the training is moreover provided within the territory of the training State, this form of support arguably coincides with 'allowing territory to be used'. There is no indication that training armed forces of another State would also amount to an unlawful use of force, probably for the same reasons as explained for the previous category of support. In addition, training is in neither of the scenarios considered as an armed attack.

Training troops of a belligerent would be a violation of neutrality law if there is a military advantage for the support-receiver: the training thus needs to take place in the context of an

ongoing armed conflict and has to be sufficiently linked to that conflict. As for the potential consequences: becoming party to the conflict is rather unlikely based on the *jus in bello* assessment made above, and training would not be a lawful basis for the use of force in self-defence.

2.4. Crucial intelligence sharing

The last category of support analysed in this study is at the same time also the most paradoxical one: while crucial intelligence sharing is very susceptible of being closely related to ongoing hostilities or plans for an armed attack, it is also the most difficult type of support to grasp from an outsider's point of view. It is very unlikely that States would openly share the content of the intelligence they use, let alone be that they would admit from which ally they have received the crucial information.

Crucial intelligence sharing is not an activity that would normally render a State party to an ongoing conflict for the purposes of *jus in bello*. Similar to the previous categories of support, intelligence sharing can be an indication of overall control. Certainly, the support-based approach can be applied to crucial intelligence sharing, as inherently 'crucial intelligence' implies a sufficiently close link with concrete ongoing hostilities. The difficulty remains however to know what exactly the information was that has been shared – if the exchange of information between parties has been made public in the first place.

Under *jus ad bellum*, the ICJ has not explicitly pronounced on intelligence sharing, yet seemingly was of the opinion that it would not amount to an unlawful use of force as it would qualify under 'other types of support'. Arguably, however, this point of view should be reconsidered: there is no reason why training or weapon delivery to armed groups would be an unlawful use of force, whereas intelligence sharing would not. Nevertheless, as for the two previous categories, intelligence sharing would not amount to an armed attack. In addition, no parallel reasoning for intelligence sharing between States exist.

From a neutrality law perspective, the same reasoning applies as for the two previous categories of support: sharing intelligence with a belligerent would violate a neutral State's neutral duties, yet it could only render a State party to the conflict in application of the expanded support-based approach. It would not provide the aggrieved belligerent with a basis to use force against the neutral State.

3. Evaluation of the research hypotheses

The first hypothesis of this study was that *a State can become party to an armed conflict by doing less than providing kinetic assistance to parties to an armed conflict.* As has become clear in Chapter 3, there are several ways in which a State can become party to a conflict that

already exists. Obviously, when a State becomes involved in the actual hostilities, it will most likely be considered as party to the conflict: this would certainly be the case for support in the context of an international armed conflict, where a very low threshold of violence is required, and arguably (but less evidently) also in a non-international armed conflict, where at least a certain intensity (under the traditional criteria) is required. Nevertheless, Chapter 3 has in addition also revealed that (intense) kinetic involvement is not always necessary to become party to an ongoing conflict. On the one hand, a State can become party to a pre-existing NIAC (and turn that NIAC into an IAC) by controlling an armed group. It was argued that overall control over an armed group would be sufficient to trigger such a consequence. Nevertheless, while the supportive acts discussed in this study are indicative of such control, they do not necessarily meet the required threshold. In addition to the 'control' scenario, Chapter 3 has extensively discussed the option of becoming party to an ongoing armed conflict on the basis of a newly developed support-based approach. Such an approach (and the expanded version of it) would lead to the conclusion that a number of supportive acts (for instance air-to-air refuelling, or providing crucial intelligence information linked to concrete operations) would indeed render the supporting State party to an ongoing conflict. Future State practice will tell us whether this is the direction that States are willing to go. Even regardless the acceptance of the support-based approach, the first research hypotheses can be confirmed: States can indeed become party to an armed conflict than by doing less than kinetic involvement (be it by controlling an armed group, or through the support-based approach).

The second hypothesis was that *assisting another State in the commission of an armed attack or a use of force may have the same consequences as carrying out those acts as a main actor*. Chapter 4 has revealed that, at least from a legal perspective, this is only partially so. As far as support for the commission of an armed attack concerns, I have argued that Article 3(f) of the Definition of Aggression should be considered as defining 'allowing territory to be used' as an armed attack, exposing the supporting State to a possible and lawful reaction in self-defence by the victim State. The three other categories of supportive acts, if provided to a State, do not trigger the same consequence. It should be noted, however, that this hypothesis does not refer to the situation whereby a State provides support to an armed group committing an armed attack (if one accepts such a possibility): in such a scenario, the support provided to an armed group committing the armed attack would only trigger a potential reaction in self-defence if it meets a considerably high level of control over the group. In other scenarios, the support provided by a State to the armed group would at most constitute an unlawful use of force.

Lastly, as has already become clear in the previous Section, the third research hypothesis of this study can be confirmed: *each form of supporting parties to an armed conflict has its specific international legal consequences*. This study indeed reveals that international law does not devote equal attention to all types of support. The origin of this mixed picture can be situated at two levels: first, while there are similarities between how supportive acts are dealt with in the various subfields of international law studied here (it is for instance clear that a single

supportive act would not be sufficient to establish a certain degree of 'control' over an armed group), there are also significant differences (by way of example, 'allowing territory to be used' is regulated by a particular provision of *jus ad bellum*, while it is rarely discussed as a basis to become party to an armed conflict under *jus in bello*). Such a disperse approach should not necessarily be considered negative: as stressed in Chapter 2, *jus in bello* and *jus ad bellum* each have their own *rationale*, allowing for different conclusions regarding a specific type of support. Second, international law does not always treat State-to-State support on an equal basis as State-to-armed group support. While under *jus in bello* the principle of equality of belligerents ensures that in principle supportive acts provided to armed groups should be assessed in the same way as support provided to States, a discussion of the possible supportive scenarios under the support-based approach revealed that this equal application is limited by the fact that armed groups cannot become party to an international armed conflict, just as States cannot become party to a non-international armed conflict when the adversary is another State. However, the divergent approach is much more apparent under *jus ad bellum*, where on the one hand some supportive acts, if provided to armed groups, have been identified as 'unlawful uses of force' by the ICJ, while no such identification was done for State-to-State support. On the other hand, Article 3(f) and 3(g) of the Definition of Aggression each deal with specific scenarios of support, focusing respectively on States and armed groups as the receiver of that support. While the use of force in response to non-State actors did not form the focus of this study, the findings with regard to supportive acts confirm that to date it remains an underdeveloped area of international law. While from a national security perspective such uncertainty could be seen as positive, for collective security this is certainly not the case.

4. Recommendations to support-providing States

War by proxy is still alive and kicking, even though it has undergone drastic changes: while in the past States tried to achieve their goals by 'controlling' a side of the conflict, States now offer their support while leaving the support-receiver to exist as an independent actor. This study is not a plea against multinational cooperation. It even is not a plea against cooperation between States and armed groups. States should be aware, however, of the fact that cooperation, like control, entails certain responsibilities. Diligence is warranted, and smaller States should not shy away from engaging with more powerful States in order to ensure respect for international law.

States should first and foremost understand that the framework in which support is provided to parties in armed conflict does not 'neutralize' international law. Thus, whether a State provides support on an *ad hoc* basis to a State or an armed group so that it could win a particular armed conflict, or whether the support occurs in the framework of long-standing treaties of friendship or alignment (such as within NATO), the great bulk of consequences of State support are

determined by general rules of international law. Those rules cannot be set aside by reference to political or other agreements.

In addition, States should understand that absence of kinetic involvement in an armed conflict does not necessarily mean the avoidance of far-reaching consequences of supportive acts under international law. Depending on the type of support a State provides to parties in armed conflict, those consequences can however vary considerably. In particular, the supportive act of 'allowing territory to be used' could potentially open up the territory to a lawful response in self-defence. This is a serious risk of which the population of a State should be aware. While other forms of support do not trigger such a drastic consequence, they still potentially violate the prohibition on the use of force, and in most cases also violate the principle of non-intervention. Moreover, all four categories of supportive acts could arguably also render a State party to an ongoing armed conflict, which has an impact on the targetability of a State's military objectives in accordance with *jus in bello* and on the protection of its nationals if detained.

That being said, and playing the devil's advocate, the most advisable type of supportive acts that States can undertake is the sharing of crucial intelligence information: it has the advantage of being very effective, even indispensable, for the targeting of specific persons or military objectives, while at the same time a State can more easily hide behind the veil of military secrecy when challenged by actors within its political structure or even by other States or external stakeholders. The paradoxical nature of intelligence – namely that in theory it could more easily meet the required thresholds under *jus in bello*, *jus ad bellum* or neutrality law, while in practice it will almost be impossible to prove – renders this type of supportive act a useful tool for States that wish to have impact while remaining under the radar in terms of targetability.

Third, States should take into account possible future (and ongoing) evolutions of international law: the support-based approach may become accepted in State practice as a way to assess supportive acts; the unable (or unwilling) theory may gain more acceptance as a basis to use force against a State that puts its territory at the use of armed groups; the complicity rule of Article 16 ARSIWA, currently still limited to scenarios of State-to-State support, may be broadened in order to encompass State-to-armed group support. Future State practice and international jurisprudence will serve as a litmus test for these new developments in international law. More explicit references by States to the lawful or unlawful character of certain supportive acts would facilitate the assessment of these possible evolutions.

Lastly, given the potentially far-reaching effects of certain forms of support, it would be advisable that governments carefully consider the possible impact of their intended support before providing it. Support should not be an automatic consequence of political alliances. In that respect, a tremendous potential role is to be played by domestic parliaments: they can interpellate their governments on the scope and consequences of all forms of supportive acts.

While in some States the parliament is already consulted when deciding to send troops abroad, it should be considered to expand such procedures to supportive acts as well.

"Are we at war?" is the question raised in the title of this study. It should also be, in its non-legal meaning, the question that governments asks themselves, and that parliaments and civil society groups ask their governments, when they provide support to parties to an armed conflict.

Bibliography

1. Treaties

- Paris Declaration Respecting Maritime Law, 16 April 1856, 115 CTS 1
- Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, 129 CTS 361
- Hague Convention (I) for the Pacific Settlement of International Disputes, 29 July 1899, 91 BFSP 970
- Hague Convention (I) for the Pacific Settlement of International Disputes, 18 October 1907, 100 BFSP 298
- Hague Convention (II) Respecting the Limitation of the Employment of Force for Recovery of Contract Debts, 18 October 1907, 205 CTS 250
- Hague Convention (III) relative to the Opening of Hostilities, 18 October 1907, 205 CTS 263
- Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 205 CTS 277
- Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, 205 CTS 299
- Hague Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 18 October 1907, 205 CTS 305
- Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 18 October 1907, 205 CTS 319
- Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, 205 CTS 331
- Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, 18 October 1907, 205 CTS 345
- Hague Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 18 October 1907, 205 CTS 367
- Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 205 CTS 395
- Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907, 205 CTS 403
- Declaration of London, 26 February 1909, 208 CTS 338
- Covenant of the League of Nations, 28 April 1919, 225 CTS 195
- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 LNTS 65
- General Treaty for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 94 LNTS 57
- Havana Convention on Maritime Neutrality, 20 February 1928, 135 LNTS 187
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, 118 LNTS 303
- Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343.
- Charter of the United Nations, 26 June 1945, 1 UNTS xvi
- Statute of the International Court of Justice, 26 June 1945, annexed to the UN Charter
- Charter of the Organization of American States, 30 April 1948, 119 UNTS 3
- Treaty of Friendship, Cooperation and Mutual Assistance between Finland and the Soviet Union, 6 April 1948, 48 UNTS 156

- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31
- Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85
- Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135
- Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287
- Memorandum über die Ergebnisse der Besprechungen Zwischen der Regierungsdelegation der Republik Österreich und der Regierungsdelegation der Sowjetunion, 15 April 1955, reprinted in Gerald Stourzh, *Geschichte des Staatsvertrages, 1945-1955: Österreichs Weg zur Neutralität*, 3. Aufl. (Graz: Styria, 1985), 226-229
- Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331
- Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977, 1125 UNTS 3
- Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), 8 June 1977, 1125 UNTS 609
- United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 31363
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 2163 UNTS 75.
- Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363
- UN Convention for the Surpression of Terrorist Bombings, 15 December 1997, 2149 UNTS 256
- Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, 2187 UNTS 90
- Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III), 8 December 2005, 2404 UNTS 261
- Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, 8 December 2005, 2689 UNTS 59
- Arms Trade Treaty, 2 April 2013, (2013) 52 ILM 988

2. Travaux Préparatoires

UN Charter

Documents of the United Nations Conference on International Organization, San Francisco, Vol. VI (1945).

Geneva Conventions

ICRC, Report of the XVIIth International Red Cross Conference, Stockholm, 1948.

Switzerland, Final Record of the Diplomatic Conference of Geneva, Vol. I (Federal Political Department, 1949).

———, Final Record of the Diplomatic Conference of Geneva, Vol. II-A (Federal Political Department, 1949).

———, Final Record of the Diplomatic Conference of Geneva, Vol. II-B (Federal Political Department, 1949).

Additional Protocols

ICRC, 'Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Report on the Work of the Conference' (Geneva, 1971), 121 p.

———, 'Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. I', 1971.

Switzerland, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva 1974-1977), Vol. I (Federal Political Department, 1978).

———, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva 1974-1977), Vol. IV (Federal Political Department, 1978).

Definition of Aggression

UNGA, 'Report of the Special Committee on the Question of Defining Aggression. 24 August - 21 September 1953' (New York, 1954), 15 p.

———, 'Report of the Special Committee on the Question of Defining Aggression. 23 February - 3 April 1969' (New York, 1969), 15 p.

———, 'Summary Records of the Fifty-Second to Sixty-Sixth Meetings 13 - 29 July 1970', 19 October 1970.

———, 'Report of the Special Committee on the Question of Defining Aggression. 13 July - 14 August 1970' (New York, 1970), 15 p.

———, 'Special Committee on the Question of Defining Aggression, Summary Records of the 79th to 91st Sessions, 1 February - 5 March 1971', 6 July 1971.

———, 'Report of the Special Committee on the Question of Defining Aggression. 31 January - 3 March 1972' (New York, 1972), 23 p.

———, 'Special Committee on the Question of Defining Aggression, Summary Records of the 100-109th meetings, 25 April - 30 May 1973', 29 August 1973, 53 p.

———, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1472nd meeting', 9 October 1974, UN Doc. A/C.6/SR.1472.

———, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1473rd meeting', 10 October 1974, UN Doc. A/C.6/SR.1473.

———, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1474th meeting', 11 October 1974, UN Doc. A/C.6/SR.1474.

———, 'Official records of the General Assembly twenty-ninth session. Sixth Committee, legal questions. Summary records of the 1477th meeting', 15 October 1974, UN Doc. A/C.6/SR.1477.

3. Case-law

3.1. International case-law

Arbitration

US, Alabama claims of the United States of America against Great Britain Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, XXIX Reports of International Arbitral Awards 125–34 (1872), 125.

Huber, Max, Island of Palmas case (Netherlands, USA), 1928, Vol. II Reports of International Arbitral Awards 829 (Permanent Court of Arbitration, 1928), 829.

Estate of Jean-Baptiste Caire (France) v. United Mexican States, V RIAA 516–34 (1929), 516.

Trail Smelter Case (Decision of 11 March 1941) (United States v. Canada), 3 UNRIAA 1938 (1941), 1938.

Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname (Guyana v. Suriname), XXX Reports of International Arbitral Awards 1–144 (Permanent Court of Arbitration, 2007), 1.

Award in the matter of the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China), No. 2013–19 (Permanent Court of Arbitration, 7 December 2016).

Award on Ethiopia's Ius ad Bellum Claims 1-8, XXVI Reports of International Arbitral Awards 457–69 (Eritrea Ethiopia Claims Commission, 2005), 457.

International Court of Justice

- Advisory Opinions

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, Separate Opinion of Vice-President Ammoun, 1971 ICJ Reports 67 (ICJ, 21 June 1971).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports 226 (ICJ, 8 July 1996).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting Opinion of Judge Weeramantry, 1996 ICJ Reports 429 (ICJ, 8 July 1996).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Separate Opinion of Judge Fleischauer, 1996 ICJ Reports 305 (ICJ, 8 July 1996).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Reports 136 (ICJ, 9 July 2004).

- Cases

Case concerning the Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, 1949 ICJ Reports 4 (ICJ, 9 April 1949).

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgment, 1969 ICJ Reports 3 (ICJ, 20 February 1969).

Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 1980 ICJ Reports 3 (ICJ, 24 May 1980).

Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 ICJ Reports 7 (ICJ, 25 September 1997).

Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports 14 (ICJ, 27 June 1986).

Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Dissenting Opinion Judge Schwebel, 1986 ICJ Reports 259 (ICJ, 27 June 1986).

Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Separate Opinion of Judge Ruda, 1986 ICJ Reports 174 (ICJ, 27 June 1986).

Case concerning East Timor (Portugal v. Australia), 1995 ICJ Reports 90 (ICJ, 30 June 1995).
Case concerning oil platforms (Islamic Republic of Iran v. United States of America), 2003 ICJ Reports 161 (ICJ, 6 November 2003).
Case concerning oil platforms (Islamic Republic of Iran v. United States of America), Separate Opinion of Judge Simma, 2003 ICJ Reports 324 (ICJ, 6 November 2003).
Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 ICJ Reports 168 (ICJ, 19 December 2005).
Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion Judge Simma, 2005 ICJ Reports 334 (ICJ, 19 December 2005).
Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ Reports 43 (ICJ, 26 February 2007).

International Criminal Court
Prosecutor v. Callixte Mbarushimana, Decision on the confirmation of charges, No. ICC-01/04-01/10 (ICC, Pre-Trial Chamber, 16 December 2011).
Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, No. ICC-01/04-01/07-717 (ICC, Pre-Trial Chamber, 30 September 2008).
Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, No. ICC-01/04-01/06 (ICC, Pre-Trial Chamber, 7 February 2007).
Prosecutor v. Thomas Lubanga Dyilo, Judgment, No. ICC-01/04-01/06 (ICC, Trial Chamber, 14 March 2012).
Prosecutor v. Germain Katanga, Judgment, No. ICC-01/04-01/07 (ICC, Trial Chamber, 7 March 2014).
Prosecutor v. Thomas Lubanga Dyilo, Judgment, No. ICC-01/04-01/06 A 5 (ICC, Appeals Chamber, 1 December 2014).

International Criminal Tribunal for the Former Yugoslavia
Prosecutor v. Rajić, Review of the Indictment Pursuant to Rule 61, No. IT-95-12-R61 (ICTY, Trial Chamber, 13 September 1994).
Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY, Appeals Chamber, 2 October 1995).
Prosecutor v. Dusko Tadić, Judgment, No. IT-94-1-T (ICTY, Trial Chamber, 7 May 1997).
Prosecutor v. Dusko Tadić, Judgment, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, No. IT-94-1-T (ICTY, Trial Chamber, 7 May 1997).
Prosecutor v. Mucić et al., Judgment, No. IT-96-21-T (ICTY, Trial Chamber, 16 November 1998).
Prosecutor v. Furundžija, Judgment, No. IT-95-17/1-T (ICTY, Trial Chamber, 10 December 1998).
Prosecutor v. Dusko Tadić, Judgment, No. IT-94-1-A (ICTY, Appeals Chamber, 15 July 1999).
Prosecutor v. Dusko Tadić, Judgment, Separate Opinion of Judge Shahabuddeen, No. IT-94-1-A (ICTY, Appeals Chamber, 15 July 1999).
Prosecutor v. Zlatko Aleksovski, Judgment, No. IT-95-14/1-A (ICTY, Appeals Chamber, 24 March 2000).
Prosecutor v. Delacići et al. (Čelebići), Judgment, No. IT-96-21-A (ICTY, Appeals Chamber, 20 February 2001).
Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic, Judgment, No. IT-96-23 & 23/1 (ICTY, Appeals Chamber, 12 June 2002).

Prosecutor v. Mitar Vasiljevic, Judgment, No. IT-98-32 (ICTY, 29 November 2002).
Prosecutor v. Kordić and Ćerkez, Judgment, No. IT-95-14/2-A (ICTY, Appeals Chamber, 17 December 2004).
Prosecutor v. Mrksic et al., Judgment, No. IT-95-13/1 (ICTY, Trial Chamber, 27 September 2007).
Prosecutor v. Ramush Haradinaj et al, Judgment, No. IT-04-84-T (ICTY, Trial Chamber, 3 April 2008).
Prosecutor v. Boškoski, Judgment, No. IT-04-82-T (ICTY, Trial Chamber, 10 July 2008).
Prosecutor v. Gotovina et al., Judgment, No. IT-06-90-T (ICTY, Trial Chamber, 15 April 2011).

International Criminal Tribunal for Rwanda
Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T (ICTR, Trial Chamber, 2 September 1998).
Prosecutor v. Jean-Paul Akayesu, Judgment, No. ICTR-96-4 (ICTR, Appeals Chamber, 1 June 2001).
Prosecutor v. Théoneste Bagosora et al., Judgment and Sentence, No. ICTR-98-41 (ICTR, Trial Chamber, 18 December 2008).
Prosecutor v. Nyiramasuhuko et al. ("Butare"), Judgment and Sentence, No. ICTR-98-42 (ICTR, Trial Chamber, 24 June 2011).
Prosecutor v. Ephrem Setako, Judgment, No. ICTR-04-81 (ICTR, Appeals Chamber, 28 September 2011).

Special Court for Sierra Leone
Prosecutor v. Fofana and Kondewa, Judgment, No. SCSL-04-14-T (SCSL, Trial Chamber, 10 September 2007).
Prosecutor v. Fofana and Kondewa, Judgment, No. SCSL-04-14-A (SCSL, Appeals Chamber, 28 May 2008).

European Court of Human Rights
Case of Loizidou v. Turkey (Merits), Judgment, No. 15318/89 (ECtHR, 18 December 1996).
Case of Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision as to the Admissibility, No. 7414/01 and 78166/01 (ECtHR (Grand Chamber), 5 February 2007).
Case of Al-Jedda v. United Kingdom, No. 27021/08 (ECtHR (Grand Chamber), 7 July 2011).

Other
The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England, 1997 European Court Reports I–00081 (Court of Justice of the European Communities, 1997), I.
Robert W. Gauthier v. Canada, UN Doc. CCPR/C/65/D/633/1995 (Human Rights Committee, 1999).
Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union (supported by the Netherlands, the United Kingdom and the European Commission), No. Joined Cases T-208/11 and T-508/11 (CJEU, General Court, 16 October 2014).

3.2. Domestic case-law

Belgium
Sharia4Belgium Case, Prosecutor v. B.F. et al., Judgment, No. FD35.98.47-12-AN35.F1.1809-12 (Antwerp, Court of First Instance, 11 February 2015).
Sharia4Belgium Case, [unpublished] (Court of Appeals, Antwerp 27 January 2016).

Sharia4Belgium Case, AR P.16.0244.N, 2016 Arr. Cass. 1179 (Court of Cassation, 24 May 2016).
PKK Case, Judgment No. 2019/939 (Court of Appeals Brussels, Kamer van Inbeschuldigingsstelling, 8 March 2019).

Canada
Daniel Turp v. the Minister of Foreign Affairs, No. T-462-16 (Canada, Federal Court, 24 January 2017).

Germany
Judgment of 21 June 2005 – 2 WD 12.04. [ECLI:DE:BVerwG:2005:210605U2WD12.04.0] (Bundesverwaltungsgericht, 21 June 2005).
Investigation proceedings against Colonel (Oberst) Klein and Staff Sergeant (Hauptfeldwebel) W. based on the suspicion of a criminal offence having been committed in violation of the Code of Crimes Against International Law (Völkerstrafgesetzbuch, VStGB) along with other offences, No. 3 BJs 6/10-4 (The Public Prosecutor General of the German Federal Court of Justice (Bundesgerichtshof), 16 October 2010).
1 O 460/11 (Landesgerichts Bonn, 12 November 2013).
I-7 U 4/14 (Oberlandesgerichts Köln, 30 April 2015).
III ZR 140/15 (Bundesgerichtshof, 10 June 2016).
Judgment of 19 March 2019 – 4 A 1361/15 ECLI:DE:OVGNRW:2019:0319.4A1361.15.00] (Oberverwaltungsgericht NRW, 19 March 2019).

Ireland
Horgan v. An Taoiseach & Ors [2003] IEHC 64 (IEHC (2003), 28 April 2003).

Israel
Public Committee Against Torture v. Government, 2006(2) Israel Law Reports 459 (Israel High Court of Justice, 14 December 2006).

Netherlands
OM v. Y, No. AF9546 (District Court of Rotterdam, 6 May 2003).
The Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović, Judgment, No. 12/03324 (Supreme Court of the Netherlands, 6 September 2013).

United Kingdom
Nissan v. Attorney General, No. [1970] AC 179, [1969] UKHL 3 (House of Lords, 2 November 1969).
Abd Ali Hameed Al-Waheed (Appellant) v. Ministry of Defence (Respondent) and Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant), No. UKSC 2014/0219 (UK Supreme Court, 17 January 2017).
The Queen (on the application of Campaign Against Arms Trade) (Appellant) and the Secretary of State for International Trade (Respondent), [2019] EWCA Civ 1020 (Court of Appeal (Civil Division), 20 June 2019).

United States
Prize Cases 67 U.S. 635 (1862), Justia Law, https://supreme.justia.com/cases/federal/us/67/635/case.html.

United States Court of Appeals, District of Columbia Circuit, *Ghaleb Nassar AL-BIHANI v. Barack OBAMA*, President of the United States, et al., Case No. 09-5051, 5 January 2010, 590 F.3d 866, 389 U.S. App. D.C. 26.

4. International practice

4.1. United Nations

General Assembly

UNGA Res. 95(I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, UN Doc. A/RES/95(I) (12 November 1946).

UNGA Res. 498 (V), UN Doc. A/RES/498(V) (1 February 1951).

UNGA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970).

UNGA Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, UN Doc. A/RES/29/3281 (12 December 1974).

UNGA Res. 3314 (XXIX), Définition de l'agression, UN Doc. A/RES/3314(XXIX) (14 December 1974).

UNGA Res. 3314 (XXIX), Definition of aggression, UN Doc. A/RES/3314(XXIX) (14 December 1974).

UNGA Res. ES-9/1, Resolution on the Situation in the Occupied Arab Territories, UN Doc. A/RES/ES-9/1 (5 February 1982).

UNGA Res. 37/123A, Resolution on the Situation in the Middle East, UN Doc. A/RES/37/123 (16 December 1982).

UNGA Res. 58/97, Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the other occupied Arab territories, UN Doc. A/RES/58/97 (17 December 2003).

UNGA Res. 62/61, Responsibility of States for internationally wrongful acts, UN Doc. A/RES/62/61 (6 December 2007).

UNGA Res. 65/19, Responsibility of States for internationally wrongful acts, UN Doc. A/RES/65/19 (6 December 2010).

Secretary-General

UN Secretary-General, Secretary-General Condemns Killing of Peacekeepers in Democratic Republic Of Congo, Tells Armed Groups to Stop Hostilities, Disarm Immediately, Press Release, UN Doc. SG/SM/19345-PKO/756, 15 November 2018.

Security Council

UNSC Res. 138, UN Doc. S/RES/138 (23 June 1960).

UNSC Res. 661, UN Doc. S/RES/661 (6 August 1990).

UNSC Res. 681, UN Doc. S/RES/681 (20 December 1990).

UNSC Res. 827, UN Doc. S/RES/827 (25 May 1993).

UNSC Res. 955, UN Doc. S/RES/955 (8 November 1994).

UNSC Res. 1483, UN Doc. S/RES/1483 (22 May 2003).

UNSC Res. 1511, UN Doc. S/RES/1511 (16 October 2003).

UNSC Res. 1973, UN Doc. S/RES/1973 (17 March 2011).

UNSC Res. 2100, UN Doc. S/RES/2100 (25 April 2013).

UNSC Res. 2139, UN Doc. S/RES/2139 (22 February 2014).

UNSC Res. 2217, UN Doc. S/RES/2217 (18 September 2014).
UNSC Res. 2227, UN Doc. S/RES/2227 (29 June 2015).
UNSC Verbatim Record, UN Doc. S/PV.1171, 12 October 1964.
UNSC Verbatim Record, UN Doc. S/PV.2674, 15 April 1986.
UNSC Verbatim Record, UN Doc. S/PV.4701, 5 February 2003.
UNSC Verbatim Record, UN Doc. S/PV.4704, 23 February 2003.
UNSC Verbatim Record, UN Doc S/PV.7124, 1 March 2014.
UNSC Verbatim Record, UN Doc S/PV.7125, 3 March 2014.
UNSC Verbatim Record, UN Doc. S/PV.7154, 13 April 2014.
UNSC Verbatim Record, UN Doc. S/PV.7167, 2 May 2014.
UNSC Verbatim Record, UN Doc. S/PV.7185, 24 May 2014.
UNSC Verbatim Record, UN Doc S/PV.7253, 28 August 2014.
UNSC Verbatim Record, UN Doc. S/PV.7565, 20 November 2015.
UNSC Verbatim Record, UN Doc. S/PV.8203, 14 March 2018.
UNSC Verbatim Record, UN Doc. S/PV.8449, 22 January 2019.
UNSC, Security Council Press Statement on Attack against Multidimensional Integrated Stabilization Mission in Central African Republic, Press Release, UN Doc. SC/13588-PKO/759, 18 November 2018.

International Law Commission

ILC, 'Document A/6309/Rev.l: Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session', *Yearbook of the International Law Commission* 67, no. II (1966): 169–364.
———, 'Documents of the fiftieth session: State Responsibility: Comments and Observations received by Governments', *Yearbook of the International Law Commission* II, no. I (1998): 93–174.
———, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', *Yearbook of the International Law Commission* II, no. 2 (2001): 31–143.
———, 'Draft Articles on the Law of Treaties with Commentaries', *Yearbook of the International Law Commission* 2 (1966): 173–273.
———, 'Report of the International Law Commission on its thirtieth session: State Responsibility', *Yearbook of the International Law Commission* II, no. II (1978): 74–105.
———, 'Summary records of the meetings of the fifty-first session 3 May-23 July 1999, UN Doc. A/CN.4/SER.A/1999', *Yearbook of the International Law Commission* I (1999): 1–318.
———, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the Internatioanl Law Commission. Finalized by Martti Koskenniemi', UN Doc. A/CN.4/L.682, 13 April 2006.
ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, Report of the International Law Commission on Its Sixty-Third Session (26 April - June and 4 July - 12 August 2011), UN Doc. A/66/10, 2011.
———, 'Draft conclusions on identification of customary international law, with commentaries, UN Doc. A/73/10' (to appear in the *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two), 2018.

Other

International Conference on Human Rights, Report of the Second Committee, UN Doc. A/CONF.32/34, 9 May 1968.
International Conference on Human Rights, Teheran, Res. XXIII on the protection of human rights in armed conflict, UN Doc. A/CONF.32/41, 12 May 1968.
Summary record of the twenty-fifth meeting of the International Conference on Human Rights, UN Doc. A/CONF.32/SR.25, 12 May 1968.
Preliminary report of the International Commission of Inquiry on the Central African Republic, submitted pursuant to Security Council resolution 2127 (2013), UN Doc. S/2014/373, 26 June 2014.
Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc. S/2005/60, 2 January 2005.
Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2244 (2015): Somalia, UN Doc. S/2016/919, 31 October 2016.
Report of the Panel of Experts established pursuant to paragraph 3 of resolution 1591 (2005) concerning the Sudan, UN Doc. S/2006/65, 30 January 2006.
Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan prepared in accordance with paragraph 2 of resolution 1713 (2006), UN Doc. S/2007/584, 10 March 2007.
Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan, UN Doc. S/2009/562, 29 October 2009.
Report of the Panel of Experts on the Sudan established pursuant to resolution 1591 (2005) , UN Doc. S/2013/79, 2 December 2013.
Report of the Panel of Experts on the Sudan established pursuant to resolution 1591 (2005), UN Doc. S/2014/87, 2 November 2014.
Report of the working group on arbitrary detention 2000, UN Doc. A/CN.4/2000/4, 28 December 1999.
The International Commission of Inquiry on the Central African Republic: Final Report, UN Doc. S/2014/928, 22 December 2014.
UN Commission of Inquiry on Lebanon, Report of the Commission of Enquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006.

4.2. European Union

European Framework Decision of 13 June 2002 on combating terrorism, Pub. L. No. 2002/475/JHA, OJ L 164 3 (2002).
EU, Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (Official Journal of the European Union L 335/99, 8 December 2008).
———, Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya), 4 January 2011.
European Council, Conclusions on the Salisbury Attack, Conclusion 163/18, 22 March 2018, https://www.consilium.europa.eu/en/press/press-releases/2018/03/22/european-council-conclusions-on-the-salisbury-attack/pdf.

5. State practice

5.1. Military Manuals

Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 5 November 2006.

Canada, Use of Force for CF Operations, Canadian Forces Joint Publication, Chief of the Defence Staff, B-GJ-005-501/FP-001, August 2008.

———, Department of National Defence, Joint Doctrine Manual B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels, 13 August 2001.

Denmark, Ministry of Defense, Military Manual on international law relevant to Danish armed forces in international operations, 2016/2019, 713 p.

Ecuador, Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques, Academia de Guerra Naval, 1989.

Germany, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch –, ZDv15/2, DSK AV230100262, May 2013.

India, Army Training Note, Chief of Staff, Army Training Command, Ministry of Defence, Government of India, 1995.

Mexico (Secretaria de la Defensa Nacional), Manual de derecho internacional humanitario para el ejercito y F.A.M., 2009.

Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005.

Norway, Forsvaret, Manual i krigens folkerett, Forsvarssjefen, 2013.

Peru, Centro del Derecho Internacional Humanitario y Derechos Humanos de las Fuerzas Armadas, Manual para las Fuerzas Armadas: derechos humanos, derecho internacional humanitario, 2010.

Sierra Leone, The Law of Armed Conflict. Instructor Manual for the Republic of Sierra Leone Armed Forces (RSLAF), Armed Forces Education Centre, September 2007.

Spain, Ministerio de Defensa, Salamanca Presidency Declaration, International Humanitarian Law European Seminar, Salamanca, 22-24 April 2002, DIH/Rev.01.Corr1, 2002.

Sweden, International Humanitarian Law in Armed Conflict, with reference to the Swedish Total Defence System, Swedish Ministry of Defence, January 1991.

———, Folkrättskommittén, Folkrätt i vapnad konflikt: -svensk tolkning och tillämpning: slutbetänkande (Stockholm: Fritzes, 2010), 483 p.

———, Svensk manual i humanitär rätt m.m.: Bilaga 7 till slutbetänkande (Stockholm: Fritzes, 2010), 271 p.

United Kingdom, Ministry of Defence, *The joint service manual of the law of armed conflict* JSP 383 (Swindon: The Joint Doctrine and Concepts Centre, 2004), 614 p. (as amended by Amendment 3, Ministry of Defence, September 2010).

US, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007.

———, Department of Defense Law of War Manual, 2016.

5.2. Letters sent to the United Nations

Letter dated 15 June 1960 from the Permanent Representative of Argentina addressed to the President of the Security Council, UN Doc. S/4336, 15 June 1960.

Letter dated 5 May 1970 from the Permanent Representation of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/9781, 5 May 1970.
Letter dated 28 January 1991 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc. S/22163, 28 January 1991.
Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/221, 31 March 2005.
Letter dated 8 October 2007 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/62/491-S/2007/615, 23 October 2007.
Report on the Legal Consequences of the Armed Aggression by the Republic of Armenia against the republic of Azerbaijan, Letter dated 22 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General (annex), UN Doc. A/63/662-S/2008/812, 24 December 2008.
Letter dated 23 January 2009 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/63/692-S/2009/51, 27 January 2009.
Annex to the letter dated 1 October 2009 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council Report of the Independent Fact-Finding Committee on Gaza , UN Doc. S/2009/537, 14 October 2009.
Letter dated 30 April 2012 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/66/787–S/2012/289, 12 March 2012.
Identical letters dated 19 September 2013 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2013/563, 19 September 2013.
Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/2014/440, 25 June 2014.
Letter dated 6 February 2014 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/245, 4 July 2014.
Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/691, 22 September 2014.
Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014.
Annex to the letter dated 17 April 2015 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/2015/263, 17 April 2015.
Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/745, 9 September 2015.
Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/693, 9 September 2015.

Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/946, 10 December 2015.
Letter dated 15 August 2016 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/70/1016-S/2016/711, 16 August 2016.
Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc.S/2016/523, 9 June 2016.
Identical letters dated 17 October 2016 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2016/870, 19 October 2016.
Letter dated 14 December 2016 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, UN Doc. A/71/692-S/2016/1056, 16 December 2016.
Identical letters dated 16 March 2017 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/71/846–S/2017/228, 21 March 2017.
Letter dated 7 November 2017 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2017/936, 11 July 2017.

5.3. Other State practice

Austria

Austria, Federal Ministry, 'Ferrero-Waldner on the initiation of military action against Iraq', Press Release, 20 March 2003, https://www.bmeia.gv.at/en/the-ministry/press/announcements/2003/ferrero-waldner-on-the-initiation-of-military-action-against-iraq/.
'Einigkeit in der Ablehnung des Irak-Kriegs', Parlamentskorrespondenz Nr. 151 vom 26.03.2003, www.parlament.gv.at/PAKT/PR/JAHR_2003/PK0151/.
Austria, 'The Austrian position on arms embargo in Syria - official document dated 13.05.2013', *The Guardian*, 15 May 2013, http://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf.

Belgium

Wet betreffende diensten bij een vreemde leger- of troepenmacht die zich op het grondgebied van een vreemde Staat bevindt, BS 24 August 1979, 9272.

Canada

Dewing, Michael and Carinne McDonals, International Deployment of Canadian Forces: Parliament's Approval (Parliamentary Information and Research Service, 2006).

China

China, Ministry of Foreign Affairs, 'The Facts and China's Position Concerning the Indian Border Troops' Crossing of the China-India Boundary in the Sikkim Sector into the Chinese Territory', 8 February 2017, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/P020170802542676636134.pdf.

Russian Federation and People's Republic of China, The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698.

Denmark

Constitutional Act of Denmark (1953).

LBK nr. 977 (Danish Criminal Code) (2017).

Anders, Samuelsen, 'B 50 Proposal for a parliamentary resolution on the sending of additional Danish military contributions in support of the efforts against ISIL in Iraq and Syria', Pub. L. No. B 50, 2017–2018 (2017).

Jensen, Kristian, 'B 8 Proposal for a parliamentary resolution on the sending of a supplementary Danish military contribution in support of the action against ISIL', Pub. L. No. B 8, 2015–2016 (2015).

Jensen, Kristian, 'B 108 Proposal for a parliamentary resolution on the sending of additional Danish military contributions in support of the efforts against ISIL in Iraq and Syria', Pub. L. No. B 108, 2015–2016 (2016).

Lidegaard, Martin, 'B 122 Proposal for a parliamentary resolution on Danish military contribution in support of efforts in Iraq', Pub. L. No. B 122, 2013–2014 (2014).

Lidegaard, Martin, 'B 123 Proposal for a parliamentary resolution on additional Danish military contribution in support of action against ISIL', Pub. L. No. B 123, 2013–2014 (2014).

Samuelsen, Anders, 'B 56 Proposal for a parliamentary resolution on Danish military contribution to the US aircraft carrier group, including in support of the international coalition's efforts against ISIL in Iraq and Syria and promoting maritime security', Pub. L. No. B 56, 2016–2017 (2017).

France

France, Assemblée nationale, Débats parlementaires, Journal official de la République française du mercredi 26 Mars 2003, Compte Rendu integral, 2e séance du mardi 25 mars 2003, question by M. Jean-Pierre Brard and answer by M. Dominique de Villepin, 25 March 2003.

Germany

Germany, Deutscher Bundestag – 15. Wahlperiode – 34. Sitzung. Berlin, Mittwoch, 19 March 2003.

Germany, Lower House of Federal Parliament (Bundestag), Reply by the Federal Government to the Minor Interpellation by Members Jerzy Montag, Hans-Christian Ströbele, Omit Nouripour, further Members and the Parliamentary Group BÜNDNIS 90/DIE GRÜNEN, BT-Drs. 17/3916, 23 November 2010.

Iran

Nuclear Weapons Advisory Opinion, Public Sitting, Verbatim Record, Oral Statements of the Islamic Republic of Iran (ICJ, 6 November 1995).

Oil Platforms Case (Islamic Republic of Iran v. United States of America), Further Response to the United States of America Counter-claim submitted by the Islamic Republic of Iran, 24 September 2001.

Iraq

Iraq, Ministry of Foreign Affairs, Foreign Minister: The Summit Needs to Exert Efforts to Find Proper Solution to the Yemeni Issue, 29 March 2015,

http://www.mofa.gov.iq/en/news/foreign-minister-the-summitneeds-to-exert-efforts-to-find-proper-solution-to-the-yemeni-issue.

Ireland

Ireland, Foreign Conflicts: Motion, 563 Dáil Éireann Debate, 20 March 2003.

Israel

Israel, Ministry of Foreign Affairs, The 2014 Gaza Conflict (7 July–26 August 2014): Factual and Legal Aspects, May 2015, www.mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf.

Italy

Comunicato del Presidente Ciampi, 19 March 2003, http://presidenti.quirinale.it/Ciampi/dinamico/ContinuaCiampi.aspx?tipo=comunicato&key=21748.

Malaysia

Wall Advisory Opinion, Written Statement of Malaysia (ICJ, 30 January 2004).

Netherlands

Koenders, Bert, Kamerbrief inzake nader advies extern volkenrechtelijke adviseur geweldgebruik tegen ISIS in Syrië, MinBuza-2015.333470, 26 June 2015.

Netherlands, Ministry of Defence, "Het Nederlandse aandeel in operatie Enduring Freedom in Afghanistan", 12 January 2016, https://www.defensie.nl/onderwerpen/historische-missies/missie-overzicht/2001/enduring-freedom/nederlands-aandeel.

Barnhoorn, L. a. N. M., 'Netherlands Judicial Decisions Involving Questions of Public International Law, 2007–2008', *Netherlands Yearbook of International Law* 40 (2009): 397–489.

Russia

Russian Federation and People's Republic of China, The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698.

United Kingdom

'Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline. Letter No. 2 Mr. Webster to Mr. Fox, 24 April 1841', *British and Foreign State Papers* 29 (1840–1841): 1126–42.

UK, House of Lords, 'Iran: Uk Military Equipment And Training - Question of Lord Molloy', Hansard, 5 February 1984, https://hansard.parliament.uk/Lords/1984-05-02/debates/9bb20c14-7a03-4668-a0f9-07ec67b24441/IranUkMilitaryEquipmentAndTraining?highlight=neutrality#contribution-670325aa-c4e6-4c4f-99b8-ddd83dcc430f.

Tatcher, Margareth, Letter to George Foulkes MP (General Belgrano), 25 October 1984, 65/786-89. Hansard HC.

UK, Chemical weapon use by Syrian regime: UK government legal position, 23 August 2013, https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-

uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.
UK, Prime Minister's Office, PM Statement Responding to FAC Report on Military Operations in Syria, Prime Minister David Cameron, 26 November 2015, https://www.gov.uk/government/speeches/pm-statement-responding-to-fac-report-on-military-operations-in-syria.
UK, Ministry of Defence, 'Defence in the Media: 18 July 2015', *Defence in the Media*, 18 July 2015, https://modmedia.blog.gov.uk/2015/07/18/defence-in-the-media-18-july-2015/.
UK, Written Statement by Earl Howe, Minister of State (Ministry of Defence), HLWS139, 20 July 2015, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2015-07-20/HLWS139/.
United Kingdom, PM Statement Responding to FAC Report on Military Operations in Syria, Prime Minister David Cameron, 26 November 2015, https://www.gov.uk/government/speeches/pm-statement-responding-to-fac-report-on-military-operations-in-syria.
House of Lords, House of Commons, Joint Committee on Human Rights, "The Government's policy on the use of drones for targeted killing", 27 April 2016.
UK, Foreign & Commonwealth Office, Press Release: G7 Foreign Ministers' Statement on the Salisbury Attack, 17 April 2018, https://www.gov.uk/government/news/g7-foreign-ministers-statement-on-the-salisbury-attack.
Mills, Claire, Parliamentary approval for military action, Briefing Paper CBP 7166 (House of Commons Library, 5 August 2018).
Johnson, Boris, Saudi Arabia: Written statement - HCWS716 (UK Parliament, House of Commons), Accessed 8 May 2019. https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-05-23/HCWS716/.
UK, Prime Minister's Office, Oral statement to Parliament: PM Commons Statement on Salisbury incident response, 14 March 2018, https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-response-14-march-2018.
———, Oral statement to Parliament: PM Commons statement on Salisbury incident, 3 December 2018, https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-12-march-2018.

United States

President Wilson's message to Congress requesting a declaration of war against Germany, 2 April 1917, printed in Russell D. Buhite (ed.), *Calls to arms: presidential speeches, messages, and declarations of war* (Wilmington: Scholarly Resources, 2003), 150–51.
Reagan, Ronald, 'Message to the Congress Transmitting a Protocol to the 1949 Geneva Conventions - January 29, 1987', *Public Papers of the Presidents of the United States*, no. Book I (1987): 88–89.
Koh, Harold Hongju, 'International Law in Cyberspace. Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012', *Harvard International Law Journal Online* 54 (2012): 1–12.
US, Message from the President of the United States Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37, 25 July 2000.
US, Department of Defense, 'The Legal Framework for the United States' Use of Military Force since 9/11', Speech delivered by Stephen W. Preston, 5 April 2015, https://dod.defense.gov/News/Speeches/Speech-View/Article/606662/.

US, Department of Homeland Security and Federal Bureau of Investigation, Grizzly Steppe – Russian Malicious Cyber Activity, 29 December 2016, https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf.
US, The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (Washington, December 2016), 61 p.
———, Statement by the President on ISIL, 9 October 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1.
Cummins, Sally J. (ed.), *Digest of United States practice in international law: 2005* (Cary, NC: Oxford University Press/International Law Institute, 2007), 1290 p.
Cummins, Sally J., and David P. Stewart (eds.), *Digest of United States practice in international law: 1991-1999* (Washington, DC: International Law Institute, 2005), 2499 p.
'United States: Department of Defense Report to Congress on the Confuct of the Persion Gulf War - Appendix on the Role of the Law of War, April 10, 1992', *International Legal Materials* 31, no. 3 (1992): 612–44.
Wright, Jeremy, 'Attorney General's speech at the International Institute for Strategic Studies',11 January 2017, https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies.

Switzerland
Switzerland, Nationalrat, Frühjahrsession 2003, 11th session, 03.5017, 17 March 2003.
———, 03.200 Déclaration du Conseil fédéral concernant la crise en Irak, BO 2003 N 531.
———, DFAE, La neutralité à l'épreuve du conflit en Irak. Synthèse de la pratique suisse de la neutralité au cours du conflit en Irak en réponse au postulat Reimann (03.3066) et à la motion du groupe UDC (03.3050), 12 February 2005.
———, Federal Council, Report on IHL and Current Armed Conflicts, 17 September 2010.

Vietnam
Vietnam, Statement by Mr Tran Duy Hai, Deputy Chairman of the National Boundary Committee, Ministry of Foreign Affairs of Viet Nam at the International Press Conference on Developments in the East Sea, 16 June 2014, http://www.quangngai.gov.vn/dofa/Pages/qnp-contentsoftheinternationalpressconference-qnpnd-102-qnpnc-23-qnpsite-1.html.

5.4. Reports of State practice

Note: these reports of State practice, drafted for the ICRC Study on Customary IHL, can be consulted in the ICRC Library, Geneva

Al Douri, Mohammed Abdallah (ed.), Report on the practice of Iraq, 1998.
Burgos, Hernán Salinas (ed.), Report on the practice of Chile, 1998.
Karomba, Félécité (ed.), Report on the practice of Rwanda, 1997.
Khalil, Nurhalida binti Mohamed (ed.), Report on the practice of Malaysia, 1997.
Muyot, Alberto (ed.), Report on the practice of the Philippines, 1997.
Zowa, Joel (ed.), Report on the practice of Zimbabwe, 1998.

6. Doctrine

6.1. Books

Aust, Helmut Philip, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011), 487 p.

Becker, Tal, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006), 304 p.

Boothby, William H. and Wolff Heintschel von Heinegg, *The law of war: a detailed assessment of the US Department of Defense law of war manual* (Cambridge: Cambridge University Press, 2018), 456 p.

Bothe, Michael, Karl Josef Partsch and Waldemar A. Solf, *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff Publishers, 1982), 746 p.

Bowett, Derek, *Self-defence in international law* (Clark, NJ: Lawbook Exchange (original work published in 1958), 2009), 294 p.

Brownlie, Ian, *International law and the use of force by states* (Oxford: Clarendon Press/Oxford University Press, 1963), 532 p.

———, *Principles of public international law*, 7th ed. (Oxford: Oxford University Press, 2008), 784 p.

Bruha, Thomas, *Die Definition der Aggression: Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974: zugleich ein Beitrag zur Strukturanalyse des Völkerrechts* Schriften zum Völkerrecht, Bd. 66 (Berlin: Duncker & Humblot, 1980), 366 p.

Buhite, Russell D. (ed.), *Calls to arms: presidential speeches, messages, and declarations of war* (Wilmington: Scholarly Resources, 2003), 374 p.

Carron, Djemila, "L'acte déclencheur d'un conflit armé international" (Université de Genève, 2015), 490 p.

Cassese, Antonio, *International law*, 2nd ed. (Oxford: Oxford University Press, 2005), 558 p.

Castrén, Erik, *The present law of war and neutrality*, Annales Academiae Scientiarum Fennicae 85 (Helsinki: Suomalaisen Kirjallisuuden Seuran Kirjapainon Oy, 1954), 630 p.

Clapham, Andrew, *Human rights obligations of non-state actors* (Oxford: Oxford University Press, 2006), 613 p.

Combacau, Jean, *Le pouvoir de sanction de l'ONU: étude théorique de la coercition non militaire* Publications de la Revue générale de droit international public 23 (Paris: Pedone, 1974), vii+396 p.

Corten, Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010), 569 p.

Crawford, Emily, *Identifying the enemy: civilian participation in armed conflict* (New York: Oxford University Press, 2015), 255 p.

Crawford, James, *State responsibility: the general part* (Cambridge: Cambridge University Press, 2013), lxxiv+825 p.

———, *The International Law Commission's articles on state responsibility: introduction, text and commentaries* (Cambridge: Cambridge University Press, 2002), 387 p.

Cryer, Robert, Tamara Hervey, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law* (Oxford: Hart Publishing, 2011), 144 p.

Cullen, Anthony, *The concept of non-international armed conflict in international humanitarian law* Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2010), 219 p.

David, Eric, *Principes de droit des conflits armés*, 3rd ed. (Bruxelles: Bruylant, 2002), 994 p.

———, *Principes de droit des conflits armés*, 5th ed. (Bruxelles: Bruylant, 2012), 1151 p.
Dawidowicz, Martin, *Third-party countermeasures in international law* Cambridge Studies in International and Comparative Law 131 (Cambridge: Cambridge University Press, 2017), 438 p.
de Preux, Jean, Jean S. Pictet, Frédéric Siordet, Claude Pilloud, Henri Coursier and René-Jean Wilhelm, *The Geneva Conventions of 12 August 1949. III: Geneva Convention III relative to the treatment of prisoners of war: commentary*, Translated by A.P. de Heney (Geneva: ICRC, 1960), 764 p.
Dinstein, Yoram, *War, aggression and self-defence*, 4th ed. (Cambridge: Cambridge University Press, 2005), 349 p.
———, *War, aggression and self-defence*, 5th ed. (Cambridge: Cambridge University Press, 2011), xxxii+375 p.
Dittmar, Falko, *Angriffe auf Computernetzwerke: ius ad bellum und ius in bello* Schriften Zum Völkerrecht 159 (Berlin: Duncker & Humblot, 2005), 318 p.
Dörmann, Knut, *Elements of war crimes under the Rome Statute of the International Criminal Court: sources and commentary* (Cambridge/New York: Cambridge University Press, 2003), 524 p.
Doswald-Beck, Louise, and International Institute of Humanitarian Law (eds.), *San Remo manual on international law applicable to armed conflicts at sea* (Cambridge: Cambridge University Press, 1995), 257 p.
Franck, Thomas M., *Recourse to Force: State Action against Threats and Armed Attacks* Hersch Lauterpacht Memorial Lectures 15 (Cambridge: Cambridge University Press, 2002), 205 p.
Gardam, Judith Gail, *Necessity, proportionality, and the use of force by states* Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2004), 259 p.
Gazzini, Tarcisio, *The changing rules on the use of force in international law* Melland Schill Studies in International Law (Huntingdon: Manchester University Press, 2005), 266 p.
Gill, Terry D., and Dieter Fleck (eds.), *The handbook of the international law of military operations*, 1st ed. (Oxford: Oxford University Press, 2010), 657 p.
Gill, Terry D., Dieter Fleck, William H. Boothby, and Alfons Vanheusden (eds.), *Leuven manual on the international law applicable to peace operations* (Cambridge: Cambridge University Press, 2018), 403 p.
Gray, Christine D., *International law and the use of force*, 3rd ed. Foundations of Public International Law (Oxford: Oxford University Press, 2008), 455 p.
Green, James A., *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart Publishing, 2009), 229 p.
Grignon, Julia, *L'applicabilité temporelle du droit international humanitaire* (Genève: Schulthess, 2014), 487 p.
Grob, Fritz, *The Relativity of War and Peace: A Study in Law, History, and Politics* (New Haven: Yale University Press, 1949), 402 p.
Grotius, Hugo, *Hugonis Grotii ... Epistolae quotquot reperiri potuerunt: in quibus praeter hactenus editas plurimae theologici iuridici philologici historici & politici argumenti occurrunt* (Wolfgang, 1687), 998 p.
Guggenheim, Paul, *Lehrbuch des Völkerrechts: unter Berücksichtigung der internationalen und schweizerischen Praxis*, Vol. II (Basel: Verlag für Recht und Gesellschaft, 1951), 508 p.
Hannikainen, Lauri, *Peremptory norms (jus cogens) in international law: historical development, criteria, present status* (Helsinki: Finnish Lawyers Publishing Co, 1988), xxxii+781 p.

Henckaerts, Jean-Marie and Louise Doswald-Beck, *Customary international humanitarian law*, Vol. 1 (Cambridge: Cambridge University Press, 2005), 628 p.
ICRC (ed.), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: Cambridge University Press, 2016), 1344 p.
Independent International Commission on Kosovo, *The Kosovo report: conflict, international response, lessons learned* (Oxford/New York: Oxford University Press, 2000), 372 p.
International Commission on Intervention and State Sovereignty, *The responsibility to protect: report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), 91 p.
Jackson, Miles, *Complicity in International Law* (Oxford: Oxford University Press, 2015), 272 p.
Jørgensen, Nina H.B., *The responsibility of states for international crimes* (Oxford: Oxford University Press, 2000), 325 p.
Kolb, Robert, *Ius contra bellum: le droit international relatif au maintien de la paix; précis*, 2. éd. Collection de droit international public (Bâle: Helbing Lichtenhahn, 2009), 435 p.
Kulesza, Joanna, *Due diligence in international law* Queen Mary Studies of International Law 26 (Leiden: Brill, 2016), 315 p.
Lanovoy, Vladyslav, *Complicity and its limits in the law of international responsibility*, Vol. 59 Studies in International Law (Oxford/Portland: Hart Publishing, 2016), 383 p.
Lauterpacht, Hersch, *Oppenheim's International law: a treatise. Disputes, war and neutrality*, 7th ed. Vol. 2 (London: Longmans, 1952), 941 p.
Lubell, Noam, *Extraterritorial use of force against non-state actors* (Oxford: Oxford University Press, 2010), 288 p.
Mačák, Kubo, *Internationalized armed conflicts in international law* Oxford Monographs in International Humanitarian and Criminal Law (Oxford: Oxford University Press, 2018), 268 p.
McConville, Mike, and Wing Hong Chui (eds.), *Research methods for law* Research Methods for the Arts and Humanities (Edinburgh: Edinburgh University Press, 2007), 239 p.
Mcdougall, Carrie, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2013), 382 p.
Melzer, Nils, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law* (Geneva: ICRC, 2009), 85 p.
Naert, Frederik, *International law aspects of the EU's security and defence policy, with a particular focus on the law of armed conflict and human rights* (Antwerp: Intersentia, 2010), 682 p.
Neff, Stephen C., *The rights and duties of neutrals: a general history* Melland Schill Studies in International Law (Manchester/New York: Manchester University Press/Juris Publishing, 2000), 246 p.
———, *War and the law of nations: a general history* (Cambridge: Cambridge University Press, 2005), 443 p.
Okimoto, Keiichiro, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Oxford: Hart, 2011), 389 p.
Oppenheim, Lassa F. L., Robert Jennings and Arthur Watts, *Oppenheim's international law. Vol. 1: Peace*, 9th ed. (London: Longman, 1996), 554 p.
Oppenheim, Lassa F. L., *International Law: A Treatise. Volume II: War and Neutrality*, 2nd ed. Vol. 2 (London: Longmans, Green and Co., 1912), 711 p.
Paddeu, Federica, *Justification and excuse in international law: concept and theory of general defences* Cambridge Studies in International and Comparative Law 130 (Cambridge/New York: Cambridge University Press, 2018), 556 p.

Pictet, Jean S., Henri Coursier, Frédéric Siordet, Ronald Griffin, C. W. Dumbleton and Oscar M. Uhler, *The Geneva Conventions of 12 August 1949. IV: Geneva Convention IV relative to the protection of civilian persons in time of war: commentary* (Geneva: ICRC, 1958), 660 p.

Program on Humanitarian Policy and Conflict Research Harvard University, *HPCR manual on international law applicable to air and missile warfare* (Cambridge, Massachusetts: Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), 2009), 56 p.

Roth, Brad R., *Governmental illegitimacy in international law* (Oxford: Clarendon Press, 1999), 439 p.

Ruys, Tom, *"Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010), 617 p.

Sandoz, Yves, Christophe Swinarski, and Bruno Zimmermann (eds.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva/Norwell: International Committee of the Red Cross/Martinus Nijhoff Publishers, 1987), 1625 p.

Sassòli, Marco, *International humanitarian law: rules, controversies, and solutions to problems arising in warfare* Principles of International Law (Cheltenham, UK/Northampton, MA: Edward Elgar Publishing, 2019), 656 p.

Sassòli, Marco, Antoine A. Bouvier and Anne Quintin, *How does law protect in war?*, 3rd ed. 3 vols. (Geneva: International Committee of the Red Cross, 2011), 2580 p.

Schmitt, Michael N., and NATO Cooperative Cyber Defence Centre of Excellence (eds.), *Tallinn manual 2.0 on the international law applicable to cyber operations*, Second edition. (Cambridge: Cambridge University Press, 2017), 598 p.

Schwebel, Stephen M., *Justice in International Law* (Cambridge: Cambridge University Press, 1994), 373 p.

Shaw, Malcolm N., *International law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 1542 p.

Stone, Julius, *Aggression and the world order* The Library of World Affairs 39 (London: Stephens, 1958), 226 p.

———, *Aggression and world order: a critique of United Nations theories of aggression* Foundations of the Laws of War (Clark, N.J: Lawbook Exchange, 2006), 226 p.

———, *Conflict through consensus, United Nations approaches to aggression* (Baltimore: Johns Hopkins University Press, 1977), 234 p.

Stourzh, Gerald, *Geschichte des Staatsvertrages, 1945-1955: Österreichs Weg zur Neutralität*, 3. Aufl. (Graz: Styria, 1985), 336 p.

Tams, Christian, *Enforcing obligations erga omnes in international law* Cambridge Studies in International and Comparative Law 44 (Cambridge: Cambridge University Press, 2005), 363 p.

Trapp, Kimberley, *State Responsibility for International Terrorism* (Oxford: Oxford University Press, 2011), 295 p.

Tucker, Robert W., *The Law of War and Neutrality at Sea* (Washington: The Lawbook Exchange, 2005), 464 p.

Van Steenberghe, Raphaël, *La légitime défense en droit international public* Droit international (Bruxelles: Larcier, 2012), 608 p.

Verdross, Alfred, *Völkerrecht* (Berlin: Julius Springer, 1937), 362 p.

Verdross, Alfred and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin: Duncker & Humblot, 1984), 956 p.

Virally, Michel, *L'organisation mondiale* Collection U. Droit international public (Paris: Colin, 1972), 587 p.

von Clausewitz, Carl, *Vom Kriege* (Hamburg: Nikol, 2008), 909 p.
Weiler, Joseph H. H. and Antonio Cassese, *International crimes of state: a critical analysis of the ILC's draft article 19 on state responsibility* (Berlin: de Gruyter, 1989), 368 p.
White, Nigel D., and Christian Henderson (eds.), *Research handbook on international conflict and security law: jus ad bellum, jus in bello and jus post bellum* Research Handbooks in International Law (Cheltenham, UK: Edward Elgar, 2013), 685 p.
Wright, Quincy, *The Role of International Law in the Elimination of War* (Manchester: Manchester University Press, 1961), 136 p.
Zwanenburg, Marten, *Accountability of peace support operations* International Humanitarian Law Series, Vol. 9 (Leiden: Martinus Nijhoff Publishers, 2005), 363 p.

6.2. Book chapters

Akande, Dapo, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 32–79.
Akande, Dapo and Antonios Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 214–32.
Arimatsu, Louise, 'The Democratic Republic of the Congo 1993-2010', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 146–202.
Aust, Helmut Philipp, 'Article 2(5)', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: a Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), 235–51.
Barriga, Stefan and Niels Blokker, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and Proprio Motu Investigations', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 652–74.
———, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 621–45.
Bernhardt, Rudolf, 'Article 103', in Bruno Simma (ed.), *The Charter of the United Nations: a Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002), 1292–1302.
Blokker, Niels and Stefan Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 646–51.
Bothe, Michael, 'Neutrality at sea', in Ige F. Dekker and Harry H.G. Post (eds.), *The Gulf War of 1980-1988: the Iran-Iraq War in international legal perspective* (Dordrecht: Martinus Nijhoff Publishers, 1992), 205–16.
———, 'The law of neutrality', in Dieter Fleck (ed.), *The handbook of international humanitarian law*, 3rd ed. (Oxford: Oxford University Press, 2013), 549–80.
Bruha, Thomas, 'The General Assembly's Definition of the Act of Aggression', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 142–77.
Cathcart, Blaise, 'Command and control in military operations', in Terry D. Gill and Dieter Fleck (eds.), *The handbook of the international law of military operations*, 1st ed. (Oxford: Oxford University Press, 2010), 235–44.

Chadwick, Elizabeth, 'Neutrality revisited', in Liivoja Rain and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (London: Routledge, Taylor & Francis Group, 2016), 455–74.

Christakis, Théodore, 'Vers une reconnaissance de la notion de guerre préventive?', in Karine Bannelier, Théodore Christakis, Olivier Corten and Pierre Klein (eds.), *L'intervention en irak et le droit international* (Paris: Editions Pédone, 2004), 9–45.

Clapham, Andrew, 'The Concept of International Armed Conflict', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 3–26.

Condorelli, Luigi and Laurence Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des Etats "de respecter et faire respecter le droit international humanitaire en toutes circonstances"', in Christophe Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (Genève/La Haye: CICR/Martinus Nijhoff Publishers, 1984), 17–35.

Corten, Olivier, 'Etat de nécessité et opérations militaires ciblées', in Cherif Bassiouni, Joanna Gomula, Paolo Mengozzi, John G. Merrills, Rafael Nieto Navia, Anna Orilio, William Schabas and Anna Vigorito (eds.), *The Global Community: Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo* (Oxford: Oxford University Press, 2013), 293–332.

———, 'Judge Simma's Seperate Opinion in the Oil Platforms Case', in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andeas Paulus, Sabine von Schorlemer and Christoph Vedder (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 843–61.

———, 'Quels droits et quels devoirs pour les États tiers ? Les effets juridiques d'une assistance à une acte d'aggression', in Centre de droit international (ed.), *L'intervention en Irak et le droit international: actes du colloque international, 17-18 octobre 2003, Paris* (Paris: Pédone, 2004), 105–28.

D'Allessandra, Federica and Robert Heinsch, 'Rethinking the Relationship Between Jus in Bello and Jus ad Bellum: A Dialogue Between Authors', in Leila Nadya Sadat (ed.), *Seeking accountability for the unlawful use of force* (Cambridge: Cambridge University Press, 2018), 453–92.

De Frouville, Olivier, 'Attribution of conduct to the State: private individuals', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The law of international responsibility* (Oxford: Oxford University Press, 2010), 257–80.

de Hoogh, André J. J., 'Jus Cogens and the Use of Armed Force', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 1161–86.

Engdahl, Ola, 'Multinational peace operations forces involved in armed conflict: who are the parties?', in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (Cambridge: Cambridge University Press, 2013), 233–71.

Françoise J., Hampson, 'Afghanistan 2001-2010', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 242–79.

Geiss, Robin, 'The Obligation to Respect and Ensure Respect for the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions. A commentary* (Oxford: Oxford University Press, 2015), 111–34.

Gioia, Andrea, 'Neutrality and non-belligerency', in Harry H.G. Post (ed.), *International economic law and armed conflict* Nova et Vetera Iuris Gentium 18 (Dordrecht: Martinus Nijhoff Publishers, 1994), 51–110.

Gomaa, Mohammed M., 'The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime', in Giuseppe Nesi and Mauro Politi (eds.), *The international criminal court and the crime of aggression* (Aldershot: Ashgate, 2004), 55–77.

Greenwood, Christopher, 'Comments to Chapter 6. Neutrality at sea', in Dekker, Ige F. and Post, Harry H.G. (eds.), *The Gulf War of 1980-1988: the Iran-Iraq War in international legal perspective* (Dordrecht: Martinus Nijhoff Publishers, 1992), 212–16.

———, 'Historical Development and Legal Basis', in Dieter Fleck (ed.), *The handbook of international humanitarian law*, 2nd ed. (New York: Oxford University Press, 2008), 1–43.

———, 'Scope of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), 39–63.

———, 'Self-defence and the conduct of international armed conflict', in Yoram Dinstein and Mala Tabory (eds.), *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff Publishers, 1989), 273–88.

Heintschel von Heinegg, Wolff, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in M.N. Schmitt and Jelena Peijic (eds.), *International Law and Armed Conflict: Exploring the Faultlines: essays in honour of Yoram Dinstein* International Humanitarian Law Series (Leiden: Martinus Nijhoff Publishers, 2007), 543–68.

———, 'Blockades and Interdictions', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 925–46.

Henderson, Christian, 'The centrality of the United Nations Security Council in the legal regime governing the use of force', in Nigel White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham: Edward Elgar Publishing, 2013), 120–69.

Jean Monnier, 'Développement du droit international humanitaire et droit de la neutralité', *Quatre études du droit international humanitaire: études présentées à la dixième Table Ronde de l'Institut international de droit humanitaire, San Remo, septembre 1984* (Genève: Institut Henry-Dunant, 1985), 5–16.

Jørgensen, Nina H.B., 'The obligation of cooperation', in Crawford, James, Pellet, Alain and Olleson, Simon (eds.), *The law of international responsibility* Oxford Commentaries on International Law (New York: Oxford University Press, 2010), 695–701.

Kress, Claus, 'The State Conduct Element', in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: a Commentary* (Cambridge: Cambridge University Press, 2016), 412–564.

Macini, Marina, 'The Effects of a State of War or Armed Conflict', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 988–1013.

Mikos-Skuza, Elzbieta, 'International law's changing terms: "war" becomes "armed conflict"', in Mary Ellen O'Connell (ed.), *What is war? An invesigation in the wake of 9/11* (Boston: Martinus Nijhoff Publishers, 2012), 19–29.

Moussa, Jasmine, 'Nuclear Weapons and the Separation of Jus ad Bellum and Jus in Bello', in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear weapons under international law* (Cambridge: Cambridge University Press, 2014), 59–87.

Nollkaemper, Andre, 'Attribution of forcible acts to States: connections between the law on the use of force and the law of State responsibility', in Niels Blokker and Nico Schrijver

(eds.), *The Security Council and the use of force: theory and reality--a need for change?* Legal Aspects of International Organization (Leiden: Martinus Nijhoff Publishers, 2005), 133–71.

Nolte, Georg and Albrecht Randelzhofer, 'Article 51', *The Charter of the United Nations: A Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), II:1397–1428.

O'Connell, Mary Ellen, 'The prohibition of the use of force', in Nigel White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham: Edward Elgar Publishing, 2013), 89–119.

Oeter, Stefan, 'Self-determination', *The Charter of the United Nations: A Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), I:231–333.

Okimoto, Keiichiro, 'The relationship between jus ad bellum and jus in bello', in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 1224–38.

Paulus, Andreas and Johann Leiß, 'Article 103', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andeas Paulus (eds.), *The Charter of the United Nations: a Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), 2111–37.

Randelzhofer, Albrecht, 'Article 51', in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994), 661–78.

Randelzhofer, Albrecht and Oliver Dörr, 'Article 2(4)', *The Charter of the United Nations: A Commentary*, 3rd ed. (Oxford: Oxford University Press, 2012), I:200–234.

Reydams, Luc and Jan Wouters, 'A la guerre comme à la guerre', in Jan Wouters, Philip De Man and Nele Verlinden (eds.), *Armed Conflicts and the Law* International Law Series 17 (Antwerp: Intersentia, 2016), 1–28.

Ronzitti, Natalio, 'Italy's non-belligerency during the Iraqi War', in Mauricio Ragazzi and Oscar Schachter (eds.), *International responsibility today: essays in memory of Oscar Schachter* (Leiden/Boston: Brill, 2005), 197–208.

Ryngaert, Cedric, 'State-Responsibility and Non-State Actors', in Math Noortmann, August Reinisch and Cedric Ryngaert (eds.), *Non-State Actors in International Law* (London: Hart Publishing, 2015), 163–82.

Sandoz, Yves, 'Rights, Powers and Obligations of Neutral Powers under the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 85–108.

Sassòli, Marco, 'Ius Ad Bellum and Ius in Bello the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?', in Michael Schmitt and Jelena Peijic (eds.), *International Law and Armed Conflict : Exploring the Faultlines. Essays in Honour of Yoram Dinstein* International Humanitarian Law Series (Leiden: Martinus Nijhoff Publishers, 2007), 15:241–64.

———, 'The Concept and the Beginning of Occupation', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 1389–1419.

Schindler, Dietrich, 'Transformations in the law of neutrality since 1945', in Frits Kalshoven, Astrid J. M. Delissen, and Gerard J. Tanja (eds.), *Humanitarian law of armed conflict: challenges ahead: essays in honour of Frits Kalshoven* (Dordrecht: Martinus Nijhoff Publishers, 1991), 367–86.

Schöberl, Katja, 'Boundaries of the battlefield: the geographical scope of the laws of war', in Steven J. Barela (ed.), *Legitimacy and drones: investigating the legality, morality and efficacity of UCAVs* (Farnham/Burlington: Ashgate, 2015), 71–89.

———, ‘The Geographical Scope of Application of the Conventions’, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 67–83.

Seger, Paul, ‘The Law of Neutrality’, in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014), 248–70.

Sharma, Serena, ‘Reconsidering the Jus ad Bellum/Jus in Bello distinction’, in Carsten Stahn and Jan Kleffner (eds.), *Jus Post Bellum. Towards a Law of Transition From Conflict to Peace* (The Hague: TMC Asser Press, 2008), 9–30.

Stahn, Carsten, ‘“Jus ad Bellum”, “Jus in Bello”... “Jus post Bellum?” - Rethinking the Conception of the Law of Armed Force’, in Charlotte Ku and Paul F. Diehl (eds.), *International Law Classic and Contemporary Readings*, 3rd ed. (Colorado: Lienne Rynner Publishers, 2009), 247–68.

Szesnat, Felicity and Annie R. Bird, ‘Colombia’, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 203–41.

Verlinden, Nele, ‘The Law of Neutrality’, in Jan Wouters, Philip De Man and Verlinden (eds.), *Armed Conflicts and the Law* International Law Series 17 (Antwerp: Intersentia, 2016), 75–106.

Viner, Steve, ‘The Moral Foundations of the ‘jus ad bellum/jus in bello’ distinction’, in Fritz Allhoff, Nicholas G. Evans and Adam Henschke (eds.), *Routledge Handbook of Ethics and War* (London: Routledge, 2013), 49–62.

Wachtmeister, Wilhelm, ‘Neutrality and international order’, in John Norton Moore and F Turner (eds.), *Readings on International Law from the Naval War College Review* International Law Studies 68 (Newport: Naval War College, 1995), 523–33.

Watts, Sean, ‘Who Is a Prisoner of War?’, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: a Commentary* (Oxford: Oxford University Press, 2015), 3–26.

Wyler, Eric and Léon Castellanos-Jankiewicz, ‘Serious breaches of peremptory norms’, in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibilty in International Law* (Cambridge: Cambridge University Press, 2014), 284–311.

6.3. Journal articles

Agius, Christine and Karen Devine, ‘“Neutrality: A really dead concept?” A reprise’, *Cooperation and Conflict* 46, no. 3 (2011): 265–84.

Ago, Roberto, ‘Addendum to the eight report on State responsibility’, *Yearbook of the International Law Commission* II, no. 1 (1980): 13–86.

———, ‘State Responsibility’, *Yearbook of the International Law Commission* II (1972): 71–160.

Aloupi, Niki, ‘The Right to Non-intervention and Non-interference’, *Cambridge Journal of International and Comparative Law* 4, no. 3 (2015): 566–87.

Antonopoulos, Constantine, ‘Force by Armed Groups as Armed Attack and the Broadening of Self-Defence’, *Netherlands International Law Review* 55, no. 2 (2008): 159–80.

Barnidge, Robert P., ‘The Due Diligence Principle Under International Law’, *International Community Law Review* 8, no. 1 (2006): 81–121.

Blandin, Amandine, ‘Article 35 de la Constitution: état de l’information du Parlement sur les interventions militaires à l’étranger’, *Revue française de droit constitutionnel*, no. 105 (2016): 3–36.

Benvenisti, Eyal, 'Rethinking the Divide Between Jus Ad Bellum and Jus In Bello in Warfare Against Nonstate Actors', *Yale Journal of International Law* 34, no. 2 (2009): 541–48.
Besson, Samantha, 'Sovereignty', *Max Planck Encyclopedia of Public International Law*, 2011.
Bethlehem, Daniel, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors Notes and Comments', *American Journal of International Law* 106 (2012): 770–77.
Beyer, Jessica L. and Stephanie C. Hofmann, 'Varieties of neutrality: Norm revision and decline', *Cooperation and Conflict* 46, no. 3 (2011): 285–311.
Blum, Yehuda Z., 'State Response to Acts of Terrorism', *German Yearbook of International Law* 19 (1976): 223–37.
Bodansky, Daniel and John R. Crook, 'Symposium: The ILC's State Responsibility Articles: Introduction and Overview', *American Journal of International Law* 96 (2002): 773–91.
Boer, Lianne J. M., 'Restating the Law "As It Is"': On the Tallinn Manual and the Use of Force in Cyberspace', *Amsterdam Law Forum* 5, no. 3 (2013): 4–18.
Boer, Lianne J. M., '"The greater part of jurisconsults": On Consensus Claims and Their Footnotes in Legal Scholarship', *Leiden Journal of International Law* 29, no. 4 (2016): 1021–42.
Boothby, William H., 'And for Such Time as: The Time Dimension to Direct Participation in Hostilities', *New York University Journal of International Law and Politics* 42, no. 3 (2010): 741–68.
Bothe, Michael, 'Neutrality, concept and general rules', *Max Planck Encyclopedia of Public International Law*, 2011.
Brehm, Maya, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', *Journal of Conflict and Security Law* 12, no. 3 (2007): 359–87.
Breslin, Andrea, 'A Reflection on the Legal Obligation for Third States to Ensure Respect for IHL', *Journal of Conflict and Security Law* 22, no. 1 (2017): 5–37.
Bridgeman, Tess, 'The Law of Neutrality and the Conflict with Al Qaeda', *New York University Law Review* 85 (2010): 1186–1224.
Broms, Bengt, 'The definition of aggression', *Collected Courses of the Hague Academy of International Law* 154 (1978): 136–61.
Brunnée, Jutta and Stephen J. Toope, 'Self-Defence against non-State actors: are powerful States willing but unable to change international law?', *International & Comparative Law Quarterly* 67, no. 2 (April 2018): 263–86.
Bugnion, François, 'Guerre juste, guerre d'agression et le droit international humanitaire', *International Review of the Red Cross* 84, no. 847 (2002): 523–46.
———, 'Jus ad Bellum, Jus in Bello and Non-International Armed Conflict', *Yearbook of International Humanitarian Law* 6 (2003): 167–98.
Byron, Christine, 'Armed Conflicts: International or Non-International?', *Journal of Conflict and Security Law* 6, no. 1 (2001): 63–90.
Carron, Djemila, 'Transnational Armed Conflicts', *Journal of International Humanitarian Legal Studies* 7, no. 1 (2016): 5–31.
Cassese, Antonio, 'The Nexus Requirement for War Crimes', *Journal of International Criminal Justice* 10, no. 5 (2012): 1395–1417.
———, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law* 18, no. 4 (2007): 649–68.
Corten, Olivier, 'Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du sud et à l'Abkhazie', *Revue générale de droit international public* 112, no. 4 (2008): 721–59.

———, ‘The “Unwilling or Unable” Test: Has it Been, and Could it be, Accepted?’, *Leiden Journal of International Law* 29, no. 3 (2016): 777–799.
Daskal, Jennifer C., ‘The geography of the battlefield: a framework for detention and targeting outside the “hot” conflict zone’, *University of Pennsylvania Law Review* 161, no. 5 (2013): 1165–1234.
David, Éric, ‘L’avis de la Cour internationale de Justice sur la licéité de l’emploi des armes nucléaires’, *International Review of the Red Cross* 79, no. 823 (1997): 22–36.
David, Eric and Ola Engdahl, ‘How does the involvement of a multinational peacekeeping force affect the classification of a situation?, *International Review of the Red Cross*, no. 891 (2013): 659–79.
de Hoogh, André J. J., ‘Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia’, *British Year Book of International Law* 72, no. 1 (2002): 255–92.
de La Pradelle, Paul, ‘Le Nord-Vietnam et les Conventions humanitaires de Genève’, *Revue générale de droit international public* 75, no. 2 (1971): 1–20.
de Wet, Erika, ‘The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force’, *European Journal of International Law* 26, no. 4 (2015): 979–98.
Deeks, Ashley S., ‘Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense’, *Virginia Journal of International Law* 52 (2011–2012): 483–550.
Del Mar, Katherine, ‘The Requirement of ‘Belonging’ under International Humanitarian Law’, *European Journal of International Law* 21, no. 1 (February 1, 2010): 105–24.
Dinstein, Yoram, ‘The laws of air, missile and nuclear warfare’, *Israel Yearbook on Human Rights* 27 (1997): 1–16.
Dörmann, Knut and Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations’, *International Review of the Red Cross* 96, no. 895/6 (2014): 707–34.
Doswald-Beck, Louise, ‘International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons’, *International Review of the Red Cross* 37, no. 316 (1997): 35–55.
———, ‘The Legal Validity of Military Intervention by invitation of the Government’, *British Yearbook of International Law* 56 (1985): 189–252.
Dugard, C.J.R., ‘The legal effects of United Nations Resolutions on apartheid’, *South African Law Journal* 83 (1966): 44–59.
Egan, Bryan, ‘International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations’, *International Law Studies,* International Law Studies Series US Naval War College, 92 (2016): 235–48.
Engdahl, Ola, ‘The Status of Peace Operation Personnel Under International Humanitarian Law’, *Yearbook of International Humanitarian Law* 11 (2008): 109–138.
Feder, Norman Menachem, ‘Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack Notes’, *New York University Journal of International Law and Politics* 19 (1986-1987): 395–432.
Ferencz, Benjamin B., ‘A Proposed Definition of Aggression: By Compromise and Consensus’, *International and Comparative Law Quarterly* 22 (1973): 407–33.
Ferraro, Tristan, ‘The applicability and application of international humanitarian law to multinational forces’, *International Review of the Red Cross* 95, no. 891–892 (2013): 561–612.
———, ‘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’, *International Review of the Red Cross* 97, no. 900 (2015): 1227–52.

Ferro, Luca and Nele Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties', *Chinese Journal of International Law* 17, no. 1 (2018): 15–43.
Fleck, Dieter, 'Rules of Engagement for Maritime Forces and the Limitation of the Use of Force under the UN Charter', *German Yearbook of International Law* 31 (1988): 165–86.
———, 'The legal status of personnel involved in United Nations peace operations', *International Review of the Red Cross* 95, no. 891–892 (2013): 613–636.
Focarelli, Carlo, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', *European Journal Of International Law* 21, no. 1 (2010): 125–171.
Germany, 'Official Text of German Ultimatum to Belgium. The Reply by Belgium.', *Current History (New York); New York* 4, no. 3 (1 June 1916): 536–537.
Goodman, Ryan, 'Controlling the recourse to war by modifying jus in bello', *Yearbook of International Humanitarian Law* 12 (2009): 53–84.
Gowland-Debbas, Vera, 'The limits of unilateral enforcement of community objectives in the framework of UN peace maintenance', *European Journal of International Law* 11, no. 2 (2000): 361–83.
Graefrath, Bernhard, 'Complicity in the Law of International Responsibility', *Revue Belge de Droit International* 29 (1996): 370–80.
Green, James A., 'Questioning the Peremptory Status of the Prohibition of the Use of Force', *Michigan Journal of International Law* 32, no. 2 (2011): 215–57.
———, 'Self-Defence: A State of Mind for States?', *Netherlands International Law Review* 55, no. 2 (2008): 181–206.
———, 'The Article 51 Reporting Requirement for Self-Defense Actions', *Virginia Journal of International Law* 55 (2014–2015): 563–624.
Greenwood, Christopher, 'International humanitarian law and United Nations military operations', *Yearbook of International Humanitarian Law* 1 (1998): 3–34.
———, 'The concept of war in modern international law', *International & Comparative Law Quarterly* 36, no. 2 (April 1987): 283–306.
———, 'The Relationship between ius ad bellum and ius in bello', *Review of International Studies* 9, no. 4 (1983): 221–34.
Grenfell, Katarina, 'Perspective on the applicability and application of international humanitarian law: the UN context', *International Review of the Red Cross*, no. 891 (2013): 645–52.
Hambro, Edvard, 'Les conditions d'application des règles, autres que les règles humanitaires, relatives aux conflits armés, aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées', *Annuaire de l'Institut de Droit International* 56 (1975): 81–118 and 475–94.
Hargrove, John Lawrence, 'The Nicaragua Judgment and the Future of the Law of Force and Self-Defense', *American Journal of International Law* 81, no. 1 (1987): 135–43.
Hathaway, Oona A., William Holste, Scott J. Shapiro, Jacqueline Van De Velde and Lisa Lachowicz, 'War Manifestos', *University of Chicago Law Review*, no. 85 (2018): 1139–1225.
Havel, Brian F., 'An International Law Institution in Crisis: Rethinking Permanent Neutrality', *Ohio State Law Journal* 61 (2000): 167–266.
Heinsch, Robert, 'Conflict Classification in Ukraine: The Return of the "Proxy War"?', *International Law Studies* 91, no. 1 (2015): 323–60.
Heller, Kevin John, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang', *Texas International Law Journal* 47 (2011): 115–41.

Henderson, Christian, 'The Provision of Arms and "Non-Lethal" Assistance to Governmental and Opposition Forces', *University of New South Wales Law Journal* 36, no. 2 (2013): 642–81.

Henriksen, Anders, 'Kriminalisering af deltagelse i konflikter i udlandet og Danmarks status af part i en væbnet konflikt', *Ugeskrift for Retsvaesen* 2015, no. 40 (2015): 342–46.

Hessbruegge, Jan Arno, 'The historical development of the doctrines of attribution and due diligence in international law', *New York University Journal of International Law and Politics* 36, no. 2 & 3 (2004): 265–306.

Ingber, Rebecca, 'Untangling Belligerency from Neutrality in the Conflict with al-Qaeda', *Texas International Law Journal* 47 (2011): 75–114.

Jamnejad, Maziar and Michael Wood, 'The Principle of Non-intervention', *Leiden Journal of International Law* 22, no. 2 (2009): 345–381.

Jensen, Eric Talbot, 'Sovereignty and neutrality in cyber conflict', *Fordham International Law Journal* 35 (2011–2012): 815–41.

Jørgensen, Nina H.B., 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty', *American Journal of International Law* 108, no. 4: 722-749.

Kattan, Victor, 'Furthering the "war on terrorism" through international law: how the United States and the United Kingdom resurrected the Bush doctrine on using preventive military force to combat terrorism', *Journal on the Use of Force and International Law* 5, no. 1 (2018): 97–144.

Kaufman, Dayna L., 'Don't Do What I Say, Do What I Mean: Assessing a State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State', *Fordham Law Review* 70 (2001–2002): 2603–56.

Koivurova, Timo, 'Due Diligence', *Max Planck Encyclopedia of Public International Law*, 2010.

Kolb, Robert, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 1 (2004): 21–35.

———, 'Origin of the twin terms jus ad bellum/jus in bello', *International Review of the Red Cross* 37, no. 320 (1997).

Koutroulis, Vaios, 'International organisations involved in armed conflict: material and geographical scope of application of international humanitarian law', *International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. Proceedings of the 12th Bruges Colloquium, 20-21 October 2011* 42 (2012): 29–40.

Kowalski, Michal, 'Armed Attack, Non-State Actors and a Quest for the Attribution Standard', *Polish Yearbook of International Law* 30 (2010): 101–31.

Krebsbach, Ryan T., 'Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities Notes', *Journal of National Security Law and Policy* 9 (2017): 124–58.

Kress, Claus, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', *Journal of Conflict and Security Law* 15 (2010): 245–74.

Kunig, Philip, 'Prohibition of intervention', *Max Planck Encyclopedia of Public International Law*, 2008.

Kunz, Joseph, 'Plus de lois de guerre?', *Revue générale de droit international public* 41 (1934): 22–57.

Larsen, Kjetil Mujezinović, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', *European Journal of International Law* 19, no. 3 (2008): 509–31.
Lauwaars, Richard H., 'The Interrelationship between United Nations Law and the Law of Other International Organizations', *Michigan Law Review* 82, no. 5/6 (1984): 1604–19.
Lehmann, Julian M., 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus in Bello and the Jus ad Bellum', *Journal of Conflict and Security Law* 17, no. 1 (2012): 117–46.
Lootsteen, Yair M., 'The Concept of Belligerency in International Law', *Military Law Review* 166 (2000): 109–41.
Lubell, Noam and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', *Journal of International Criminal Justice* 11, no. 1 (2013): 65–88.
Mačák, Kubo and Noam Zamir, 'The Applicability of International Humanitarian Law to the Conflict in Libya', *International Community Law Review* 14, no. 4 (2012): 403–36.
Macura, Tomas, 'Accountability and Protection of UN Peacekeepers in Light of MONUSCO', *Die Friedens-Warte* 88, no. 3/4 (2013): 143–56.
Melesko, Marek, 'The Definition of the Crime of Aggression in the Context of the Rome Statute', *Acta Societatis Martensis* 4 (2009–2010): 139–60.
Melzer, Nils, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities', *Journal of international law and politics*, no. 3 (2010): 831–916.
Meron, Theodor, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', *American Journal of International Law* 92, no. 2 (1998): 236–42.
Milanović, Marko, 'Norm Conflict in International Law: Whither Human Rights?', *Duke Journal of Comparative & International Law* 20 (2009–2010): 69–132.
———, 'State Responsibility for Genocide', *European Journal of International Law* 17, no. 3 (2006): 553–604.
———, 'The end of application of international humanitarian law', *International Review of the Red Cross* 96, no. 893 (2014): 163–88.
Moussa, Jasmine, 'Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law', *International Review of the Red Cross* 90, no. 872 (2008): 963–990.
Moynihan, Harriet, 'Aiding and assisting: the mental element under Article 16 of the International Law Commission's Articles on State Responsibility', *International & Comparative Law Quarterly* 67, no. 2 (April 2018): 455–71.
Mrazek, Josef, 'Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law', *Canadian Yearbook of International Law* 27 (1989): 81–112.
Murphy, Ray, 'United Nations Military Operations and International Humanitarian Law: What Rules apply to Peacekeepers?', *Criminal Law Forum* 14, no. 2 (2003): 153–194.
Nolte, Georg and Helmut Philipp Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', *International & Comparative Law Quarterly* 58, no. 1 (January 2009): 1–30.
O'Brien, James, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', *American Journal of International Law* 87 (1993): 639–68.
Ochoa-Ruiz, Natalia and Esther Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-defence', *European Journal of International Law* 16, no. 3 (2005): 499–524.
O'Connell, Mary Ellen, 'Saving lives through a definition of international armed conflict', *Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities. Proceedings of the 10th Bruges Colloquium 22-23 October 2009* 40 (2010): 19–27.

O'Connell, Mary Ellen and Mirakmal Niyazmatov, 'What is Aggression?: Comparing the Jus ad Bellum and the ICC Statute', *Journal of International Criminal Justice* 10, no. 1 (2012): 189–207.

Orakhelashvili, Alexander, 'Overlap and Convergence: The Interaction between Jus ad Bellum and Jus in Bello', *Journal of Conflict & Security Law* 12 (2007): 157-196.

———, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', *European Journal of International Law* 16, no. 1 (2005): 59–88.

Österdahl, Inger, 'Dangerous Liaison: The Disappearing Dichotomy between Jus ad Bellum and in Bello International Humanitarian Law - Celebrating the 60th Anniversary of the Geneva Conventions', *Nordic Journal of International Law* 78 (2009): 553–66.

Paddeu, Federica, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility', *British Yearbook of International Law* 85 (2015): 90–132.

Parks, W. Hays, 'Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect', *New York University Journal of International Law and Politics* 42 (2009–2010): 769.

Pellet, Alain, 'Can a State commit a crime? Definitely, yes!', *European Journal of International Law* 10, no. 2 (1999): 425–434.

Peters, Dirk and Wolfgang Wagner, 'Between Military Efficiency and Democratic Legitimacy: Mapping Parliamentary War Powers in Contemporary Democracies, 1989–2004', *Parliamentary Affairs* 64, no. 1 (2011): 175–92.

Petrochilos, Georgios C., 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality', *Vanderbilt Journal of Translational Law* 31 (1998): 575–615.

Plattner, Denise, 'La neutralité du CICR et la neutralité de l'assistance humanitaire', *Revue internationale de la Croix-Rouge*, no. 818 (1996): 169–89.

Quigley, John, 'Complicity in International Law: A New Direction in the Law of State Responsibility', *British Yearbook of International Law* 57, no. 1 (1987): 77–131.

Ratner, Steven R., 'Jus Ad Bellum and Jus in Bello after September 11', *American Journal of International Law* 96 (2002): 905–21.

Rosen, Nachama, 'How are Multinational NATO Operations Responsible for International Humanitarian Law Violations?', *The Fletcher Forum of World Affairs* 37, no. 3 (2013): 163–175.

Ruffert, Matthias, 'Reprisals', *Max Planck Encyclopedia of Public International Law*, 2009.

Ruys, Tom, 'Of Arms, Funding and "Non-lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', *Chinese Journal of International Law* 13, no. 1 (2014): 13–53.

———, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)', *American Journal of International Law* 108, no. 2 (2014): 159–210.

———, 'The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict', *Stanford Journal of International Law* 50 (2014): 247–80.

Ruys, Tom, Luca Ferro and Tim Haesebrouck, 'Parliamentary war powers and the role of international law in foreign troop deployment decisions: The US-led coalition against "Islamic State" in Iraq and Syria', *International Journal of Constitutional Law* 17, no. 1 (2019): 118–50.

Ruys, Tom, Luca Ferro and Carl Vander Maelen, 'Digest of state practice: 1 January – 30 June 2017', *Journal on the Use of Force and International Law* 4, no. 2 (2017): 371–418.

Ruys, Tom, Luca Ferro and Nele Verlinden, 'Digest of State Practice 1 January – 30 June 2016', *Journal on the Use of Force and International Law* 3, no. 2 (2016): 290–321.

———, ‘Digest of State Practice 1 July – 31 December 2015’, *Journal on the Use of Force and International Law* 3, no. 1 (2016): 126–70.
Ruys, Tom, Luca Ferro, Nele Verlinden and Carl Vander Maelen, ‘Digest of State Practice: 1 July – 31 December 2016’, *Journal on the Use of Force and International Law* 4, no. 1 (2017): 161–209.
Ruys, Tom and Nele Verlinden, ‘Digest of State Practice 1 January – 30 June 2014’, *Journal on the Use of Force and International Law* 1, no. 2 (2014): 323–73.
———, ‘Digest of State Practice 1 July – 31 December 2014’, *Journal on the Use of Force and International Law* 2, no. 1 (2015): 119–62.
Ruys, Tom, Nele Verlinden and Luca Ferro, ‘Digest of State Practice 1 January – 30 June 2015’, *Journal on the Use of Force and International Law* 2, no. 2 (2015): 257–98.
Sari, Aurel, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases’, *Human Rights Law Review* 8, no. 1 (2008): 151–70.
Sassòli, Marco, ‘State responsibility for violations of international humanitarian law’, *International review of the Red Cross* 84, no. 846 (2002): 401–34.
Schindler, Dietrich, ‘Le Principe de Non-intervention dans les Guerres Civiles’, *Annuaire de l’Institut de Droit International* 56 (1975): 119–56 and 411–74.
———, ‘IDI, Session de Rome, 1973, 8ème Commission, Les notions de guerre civile et d’intervention’, *Annuaire de l’Institut de Droit International* 55 (1973): 416–608.
Schmitt, Michael N., ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’, *New York University Journal of International Law and Politics* 42 (2009–2010): 697–739.
———, ‘Legitimacy versus legality redux: arming the Syrian rebels’, *Journal of National Security Law & Policy* 7, no. 1 (2014): 139–159.
Seibert-Fohr, Anja, ‘From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?’, *German Yearbook of International Law* 60 (2017): 667–708.
Simma, Bruno and Andreas L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, *American Journal of International Law* 93, no. 2 (1999): 302–16.
Sloane, Robert D., ‘The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War’, *Yale Journal of International Law* 34 (2009): 47–112.
Spinedi, Marina, ‘On the Non-Attribution of the Bosnian Serbs’ Conduct to Serbia’, *Journal of International Criminal Justice* 5, no. 4 (2007): 829–38.
Starski, Paulina, ‘Right to Self-Defense, Attribution and the Non-State Actor - Birth of the “Unable or Unwilling” Standard?’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3, no. 75 (2015): 455–501.
Stoffels, Ruth Abril, ‘Legal regulation of humanitarian assistance in armed conflict: achievements and gaps’, *International Review of the Red Cross*, no. 855 (2004): 515–46.
Taft, William H. IV, ‘Self-Defense and the Oil Platforms Decision Symposium: Reflections on the ICJ’s Oil Platforms Decision’, *Yale Journal of International Law* 29 (2004): 295–306.
Talmon, Stefan, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’, *International & Comparative Law Quarterly* 58, no. 03 (July 2009): 493–517.
Tams, Christian, ‘The use of force against terrorists’, *European Journal of International Law* 20, no. 2 (2009): 359–97.
Thürer, Daniel, ‘Comment: UN Enforcement Measures and Neutrality. The Case of Switzerland’, *Archiv des Völkerrechts* 30, no. 1 (1992): 63–85.

Torrelli, Maurice, ‘La neutralité en question’, *Revue générale de droit international public* 96, no. 1 (1992): 5–43.
Tzanakopoulos, Antonios, ‘The Right to Be Free from Economic Coercion II. Case Studies’, *Cambridge Journal of International and Comparative Law* 4 (2015): 616–33.
Van den Herik, Larissa and Elies Van Sliedregt, ‘Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes’, *Leiden Journal of International Law* 17, no. 3 (2004): 537–57.
Vité, Sylvain, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’, *International Review of the Red Cross*, no. 873 (2009): 69–94.
Watkin, Kenneth, ‘Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance’, *New York University Journal of International Law and Politics* 42 (2009–2010): 641.
Williams, Walter L. Jr, ‘Neutrality in Modern Armed Conflicts: A Survey of the Developing Law’, *Military Law Review* 90 (1980): 9–48.
Wouters, Jan and Thomas Van Poecke, ‘Van strijdkrachten, terroristen en het Belgisch strafrecht’, *Rechtskundig Weekblad* 2017–2018, no. 41 (2018): 1611–1621.
Wright, Quincy, ‘The Meaning of the Pact of Paris’, *American Journal of International Law* 27 (1933): 39–61.
———, ‘The Present Status of Neutrality’, *American Journal of International Law* 34 (1940): 391–415.
———, ‘When does war exist?’, *American Journal of International Law* 26 (1932): 327–68.
X, ‘Part 1: Origin and evolution of the United Nations’, *Yearbook of the United Nations* (1946–1947): 1–50.
Zuppi, Alberto L., ‘Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil’, *Penn State International Law Review* 26 (2007–2008): 1–36.
Zwanenburg, Marten, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, *International Review of the Red Cross* 86, no. 856 (2004): 745–69.
———, ‘International humanitarian law interoperability in multinational operations’, *International Review of the Red Cross* 95, no. 891–892 (2013): 681–705.

6.4. Papers

Arimatsu, Louise and Mohbuba Choudhury, ‘International Law PP 2014/01: The Legal Classification of the Conflicts in Syria, Yemen and Libya’ (Chatham House, 2014), https://www.chathamhouse.org/publications/papers/view/198023.
Aust, Helmut, ‘Complicity in Violations of International Humanitarian Law’ (SSRN Scholarly Paper, 20 December 2011), http://papers.ssrn.com/abstract=2136885.
Jones, Seth G. and Maxwell B. Markusen, ‘The Escalating Conflict with Hezbollah in Syria’ (CSIS Briefs, 20 June 2018), https://www.csis.org/analysis/escalating-conflict-hezbollah-syria.
Hummel, Hartwig, A Survey of Involvement of 15 European States in the Iraq War 2003 (revised version), Paks Working Paper 7 (2007), http://paks.uni-duesseldorf.de/Dokumente/paks_working_paper_7_rev.pdf.
Moynihan, Harriet, Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism (Chatham House, 2016), https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism.
Peters, Anne, ‘Between Military Deployment and Democracy: Use of Force Under the German Constitution’, Research Paper (Heidelberg: Max Planck Institute for Comparative

Public & International Law (MPIL), 2 May 2018), https://papers.ssrn.com/abstract=3172049.
Wilmshurst, Elizabeth, Principles of International Law on the Use of Force by States in Self-Defence (Chatham House, 2005), https://www.chathamhouse.org/publications/papers/view/108106.

6.5. Blog posts

Akande, Dapo, 'Embedded Troops and the Use of Force in Syria: International and Domestic Law Questions', *EJIL: Talk!*, 9 November 2015, http://www.ejiltalk.org/embedded-troops-and-the-use-of-force-in-syria-international-and-domestic-law-questions/.
———, 'When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?', *EJIL: Talk!*, 18 October 2016, http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/.
Brandis, George, 'The Right of Self-Defence Against Imminent Armed Attack In International Law', 11 April 2017, https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.
Chachko, Elena and Ashley Deeks, 'Who is on Board with "Unwilling or Unable"?', *Lawfare*, 10 October 2016, https://www.lawfareblog.com/who-board-unwilling-or-unable.
Goodman, Ryan and Miles Jackson, 'State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)', *Just Security*, 31 August 2016, https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen/.
Haque, Adil Ahmad, 'Human Rights in Armed Conflict, Part II', *Just Security*, 23 November 2016, https://www.justsecurity.org/34815/human-rights-armed-conflict-part-ii/.
Haque, Adil Ahmad Haque, 'Triggers and Thresholds of Non-International Armed Conflict', *Just Security*, 29 September 2016, https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/.
Helal, Mohammed, 'Of Fire and Fury: The Threat of Force and the Korean Missile Crisis - Opinio Juris', *Opinio Juris*, 30 August 2017, http://opiniojuris.org/2017/08/30/of-fire-and-fury-the-threat-of-force-and-the-korean-missile-crisis/.
Heller, Kevin John, 'An Insider's View of the Life-Cycle of Self-Defense Reports by U.N. Member States', *Just Security*, 2 April 2019, https://www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/.
Janik, Ralph, 'Austria and the Fight Against the 'Islamic State': Whither Neutrality?', *EJIL: Talk!*, 2 March 2016, http://www.ejiltalk.org/austria-and-the-fight-against-the-islamic-state-whither-neutrality/.
Kels, Charles, 'Contextualizing the Debate on First Strikes', *Opinio Juris*, 12 February 2016, http://opiniojuris.org/2016/12/02/32907/.
Khalil, Mona Ali, 'When Is an Attack on UN Peacekeepers a War Crime and When Is It Not?', *PassBlue*, 30 November 2018, https://www.passblue.com/2018/11/30/when-is-an-attack-on-un-peacekeepers-a-war-crime-and-when-is-it-not/.
Lubell, Noam, 'The Legal Questions About the UK's Drone Strike in Syria', *Just Security*, 9 October 2015, https://www.justsecurity.org/25951/legal-questions-uks-targeted-killing-syria/.
Milanović, Marko, 'How to Qualify the Armed Conflict in Libya?', *EJIL: Talk!*, 1 September 2011, https://www.ejiltalk.org/how-to-qualify-the-armed-conflict-in-libya/.
Nussberger, Benjamin and Paula Fischer, 'Justifying Self-defense against Assisting States: Conceptualizing Legal Consequences of Inter-State Assistance', *EJIL: Talk!*, 23 May

2019, https://www.ejiltalk.org/justifying-self-defense-against-assisting-states-conceptualizing-legal-consequences-of-inter-state-assistance/.
O'Reilly, Marie, 'In Congo, UN Peacekeepers Are Becoming Party to the Conflict: Interview with Arthur Boutellis', *IPI Global Observatory*, 29 August 2013, https://theglobalobservatory.org/2013/08/interview-with-arthur-boutellis/.
Pearlstein, Deborah, 'The NIAC Threshold', *Opino Juris*, 10 April 2016, http://opiniojuris.org/2016/10/04/the-niac-threshold/.
Pothelet, Elvina, 'U.S. Military's "Collective Self-Defense" of Non-State Partner Forces: What Does International Law Say?', *Just Security*, 26 October 2018, https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/.
Rodenhäuser, Tilman, 'Self-defense Operations Against Armed Groups and the Jus in Bello', *EJIL: Talk!*, 16 December 2015, http://www.ejiltalk.org/self-defense-operations-against-armed-groups-and-the-jus-in-bello/.
Ruys, Tom, '"License to Kill" in Salisbury: State-sponsored assassinations and the jus ad bellum', *Just Security*, 15 March 2018, https://www.justsecurity.org/53924/license-kill-salisbury-state-sponsored-assassinations-jus-ad-bellum/.
Sari, Aurel and Arnis Lauva, 'Hybrid Threats and the United States National Security Strategy: Prevailing in an "Arena of Continuous Competition"', *EJIL: Talk!*, 19 January 2018, https://www.ejiltalk.org/hybrid-threats-and-the-united-states-national-security-strategy-prevailing-in-an-arena-of-continuous-competition/#more-15827.
Schmitt, Michael and Jeffrey Biller, 'The NotPetya Cyber Operation as a Case Study of International Law', *EJIL: Talk!*, 7 November 2017, https://www.ejiltalk.org/the-notpetya-cyber-operation-as-a-case-study-of-international-law/.
Van Poecke, Thomas, 'The IHL Exclusion Clause, and why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences', *EJIL: Talk!*, 20 March 2019, https://www.ejiltalk.org/the-ihl-exclusion-clause-and-why-belgian-courts-refuse-to-convict-pkk-members-for-terrorist-offences/.

7. Media articles

Barry, Ellen and Richard Pérez-Peña, 'Britain Blames Moscow for Poisoning of Former Russian Spy', *The New York Times*, 29 March 2018, https://www.nytimes.com/2018/03/12/world/europe/uk-russia-spy-poisoning.html.
Blanchard, Ben, 'China sends troops to open first overseas military base in Djibouti', *Reuters*, 12 July 2017, https://www.reuters.com/article/us-china-djibouti-idUSKBN19X049.
Bosalum, Feras and Ayman al-Warfalli, 'Libyan PM Accuses Qatar of Sending Planes with Weapons to Tripoli', *Reuters*, 14 September 2014, https://www.reuters.com/article/us-libya-security-qatar/libyan-pm-accuses-qatar-of-sending-planes-with-weapons-to-tripoli-idUSKBN0H90W220140914.
Boyle, Danny and Martin Evans, 'Salisbury poisoning: Two men charged over Novichok attack are "Russian military intelligence officers"', *The Telegraph*, 9 May 2018, https://www.telegraph.co.uk/news/2018/09/05/salisbury-poisoning-two-russians-charged-conspiracy-murder-novichok/.
Brooks-Pollock, Tom, 'Russia unveils 'proof' Turkey's Erdogan is smuggling Isis oil across border from Syria', *Independent*, 12 April 2015, https://www.independent.co.uk/news/world/europe/russia-releases-proof-turkey-is-smuggling-isis-oil-over-its-border-a6757651.html.

Burkeman, Oliver, 'Obama administration to end use of term "war on terror"', *The Guardian*, 25 March 2009, https://www.theguardian.com/world/2009/mar/25/obama-war-terror-overseas-contingency-operations.

Dearden, Lizzie, 'Novichok victim Charlie Rowley accidentally picked up nerve agent in "cosmetic bottle" as present for Dawn Sturgess', *Independent*, 24 July 2018, https://www.independent.co.uk/news/uk/crime/novichok-attack-charlie-rowley-perfume-bottle-dawn-sturgess-amesbury-dead-nerve-agent-a8461616.html.

Felsenthal, Mark and Patricia Zengerle, 'Obama says ending Iraq crisis could be "long-term project"', *Reuters*, 9 August 2014, https://www.reuters.com/article/us-iraq-crisis-usa-obama-idUSKBN0G90GL20140809.

Gore, Will, 'Opinion: Venezuela's crisis suggests Cold War alliances and strategies are being renewed', *The Independent*, 28 January 2019, https://www.independent.co.uk/voices/venezuela-crisis-us-russia-nicolas-maduro-juan-guaido-cold-war-a8750341.html.

Hussein, Abdirahman and Orhan Coskun, 'Turkey opens military base in Mogadishu to train Somali soldiers', *Reuters*, 30 September 2017, https://www.reuters.com/article/us-somalia-turkey-military-idUSKCN1C50JH.

Kershner, Isabel, 'Israel Confirms Attacks on Iranian Targets in Syria', *The New York Times*, 22 January 2019, https://www.nytimes.com/2019/01/20/world/middleeast/israel-attack-syria-iran.html.

Polityuk, Pavel, 'Ukraine to probe suspected Russian cyber attack on grid', *Reuters*, 31 December 2015, https://www.reuters.com/article/us-ukraine-crisis-malware-idUSKBN0UE0ZZ20151231.

Sheffield, Matthew, 'Dick Cheney lashes out at Russia for "act of war" as neocons try outreach to liberals', *Salon*, 29 March 2017, https://www.salon.com/2017/03/29/dick-cheney-alleged-russian-election-interference-was-an-act-of-war/.

Smith, Craig S., 'THREATS AND RESPONSES: A COMMAND POST; Reluctant Saudi Arabia Prepares Its Quiet Role in the U.S.-Led War on Iraq', *The New York Times*, 20 March 2003, https://www.nytimes.com/2003/03/20/world/threats-responses-command-post-reluctant-saudi-arabia-prepares-its-quiet-role-us.html.

Starr, Barbara, "U.S. to move operations from Saudi base", *CNN*, 29 April 2003, http://edition.cnn.com/2003/WORLD/meast/04/29/sprj.irq.saudi.us/.

Stern, Jessica, 'Obama and Terrorism', *Foreign Affairs*, 1 October 2015, https://www.foreignaffairs.com/articles/obama-and-terrorism.

Tepperman, Jonathan, 'Syria's President Speaks', *Foreign Affairs*, March 2015, http://www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks.

Uchill, Joe, 'WikiLeaks posts 20,000 DNC emails', *The Hill*, 22 July 2016, https://thehill.com/policy/cybersecurity/288883-wikileaks-posts-20000-dnc-emails.

X, 'Klug: "Keine Neutralität" bei Terrorismus', *Oe24*, 17 November 2015, http://www.oe24.at/oesterreich/politik/Klug-Keine-Neutralitaet-bei-Terrorismus/212454574.

X, 'Full text: James Comey testimony transcript on Trump and Russia', *Politico*, 8 June 2017, https://www.politico.com/story/2017/06/08/full-text-james-comey-trump-russia-testimony-239295.

X, 'Spy poisoning: Russia escalates spy row with new expulsions', *BBC News*, 31 March 2018, https://www.bbc.com/news/world-europe-43596812.

X, 'US lawmakers vote to end US support for war in Yemen', *The Guardian*, 14 February 2019, https://www.theguardian.com/us-news/2019/feb/13/us-congress-house-yemen-war-trump-saudi-arabia.

8. Websites/Databases

Customary IHL Database (ICRC), https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

European Centre for Constitutional and Human Rights, www.ecchr.org.

Geneva Academy, 'RULAC Database', www.rulac.org.

Hansard, UK Parliament, https://hansard.parliament.uk/.

Merriam-Webster Dictionary online, https://www.merriam-webster.com/dictionary/support.

Trapp, Kimberly, *State Responsibility for International Terrorism*, Audiovisual Library of International Law, Lecture Series, 2016, http://legal.un.org/avl/ls/Trapp_S.html#.

Wikipedia, "List of countries with overseas military bases", consulted on 11 February 2018, https://en.wikipedia.org/wiki/List_of_countries_with_overseas_military_bases.

9. Other materials

ASIL, 'Peace Forces at War: Implications under International Humanitarian Law', *American Society of International Law Proceedings* 108 (2014): 149–63.

ASIL, 'The Relationship between Jus ad Bellum and Jus in Bello: Past, Present, Future Panel Discussion', *American Society of International Law Proceedings* 100 (2006): 109–24.

CCDCOE, WannaCry Campaign: Potential State Involvement Could Have Serious Consequences, 16 May 2017, https://ccdcoe.org/news/2017/wannacry-campaign-potential-state-involvement-could-have-serious-consequences/.

Chatham House, 'The Applicability of International Humanitarian Law to Multinational Forces: Discussion Summary', International Law Programme, 20 November 2014, https://www.chathamhouse.org/event/applicability-and-application-international-humanitarian-law-multinational-forces.

Declaration concerning the laws of naval war (London Declaration), 26 February 1909, 208 CTS 338

Final Act of the Conference for Security and Cooperation in Europe, Helsinki, 1 August 1975 (1975) 14 ILM 1292

Hague Rules on Air Warfare, Drafted by a Commission of Jurists, The Hague, December 1922, February 1923, Parliamentary Papers, Cmd. 2201, Miscellaneaous No. 14 (1924).

ICC, Elements of Crimes, ICC-PIDS-LT-03-002/11_Eng, 2011.

ICC, Assembly of State Parties, Activation of the jurisdiction of the Court over the crime of aggression, Resolution ICC-ASP/16/Res.5, 14 December 2017.

ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2018, 5 December 2018.

ICC Review Conference, 13th Plenary Meeting, RC/Res.6, 6 November 2010.

ICRC, The Geneva Conventions of August 12, 1949. Analysis for the Use of Red Cross Societies, Vol. I, 1950, 106 p.

———, 'Annual Report 2000', June 2001, 298 p.

———, 'Annual Report 2001', June 2002, 474 p.

———, 'Annual Report 2003', June 2004, 375 p.

———, 'Annual Report 2004", June 2005, 392 p.

———, 'Annual Report 2005', May 2006, 418 p.

———, 'Annual Report 2006', May 2007, 439 p.

———, 'Annual Report 2007', May 2008, 464 p.

———, 'Annual Report 2008', May 2009, 472 p.

———, 'Annual Report 2009', May 2010, 492 p.

———, 'Annual Report 2010', May 2011, 578 p.

———, ‘Annual Report 2011’, May 2012, 512 p.
———, ‘Annual Report 2012’, May 2013, 556 p.
———, ‘Annual Report 2014’, May 2015, 614 p.
———, ‘Annual Report 2015’, May 2016, 616 p.
———, International humanitarian law and the challenges of contemporary armed conflicts. Report for the 32nd International Conference of the Red Cross and the Red Crescent, 2015.
———, ‘Colombia: Five armed conflicts – what’s happening?’, 30 January 2019, https://www.icrc.org/en/document/colombia-five-armed-conflicts-whats-happening.
———, ‘South Sudan: Attacks against civilians must end, News Release’, 22 December 2013, https://www.icrc.org/eng/resources/documents/news-release/2013/12-22-south-sudan-attacks-against-civilans.htm.
———, ‘Syria: ICRC urges full respect for international humanitarian law, News Release’, 8 April 2012, https://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-07-31.htm.
———, ‘Ukraine: ICRC calls on all sides to respect international humanitarian law - New Release 14/125’, 23 July 2014, https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm.
———, Letter of Philip Spoerri, Legal Advisor, to the UK House of Commons (Select Committee on international Development), 20 December 2002, https://publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm.
ICRC and College of Europe, ‘Proceedings of the Bruges Colloquium: Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts. 18-19 Oct 2018’, forthcoming 2019.
———, ‘Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law. 17th Bruges Colloquium, 20-21 October 2016’, Collegium, 2017, 208 p.
International Conference of the Red Cross and Red Crescent, Geneva, Resolution 3: Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, 2007.
IDI, Session of Rhodes 2011, Present Problems of the Use of Force in International Law, Military assistance on request, Resolution, 8 September 2011.
———, Session of Santiago 2007, 10th Commission, Present Problems of the Use of Armed Force in International Law, Self-defence, Resolution, 27 October 2007.
———, Session of Wiesbaden 1975, The Principle of Non-Intervention in Civil Wars, Resolution, 14 August 1975.
ILA, Committee on Maritime Neutrality, ‘Helsinki Principles on the Law of Maritime Neutrality’, *International Law Association Reports of Conferences* 68 (1998): 496-521.
———, Committee on the Formation of Customary (General) International Law, ‘Statement of Principles Applicable to the Formation of General Customary International Law’, *International Law Association Reports of Conferences* 69 (2000): 712-790.
———, Committee on the Use of Force, ‘Final Report on the Meaning of Armed Conflict in International Law’, *International Law Association Reports of Conferences* 74 (2010): 676–721.
———, Commitee on the Use of Force, ‘Report on Aggression and the Use of Force’, *International Law Association Reports of Conferences* 76 (2014): 648-687.
———, Committee on the Use of Force, ‘Draft Report on Aggression and the Use of Force’, *International Law Association Reports of Conferences* 77 (2016): 248-283.

———, Committee on the Use of Force, 'Final Report on Aggression and the Use of Force' (Sydney, 2018), 30 p.
Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II, September 2009, http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf.
International Commission of Jurists, 'This illegal war must be conducted lawfully', 20 March 2003, http://www.icj.org/this-illegal-war-must-be-conducted-lawfully/.
Ministerio de Defensa Spain, Salamanca Presidency Declaration, International Humanitarian Law European Seminar, Salamanca, 22-24 April 2002, DIH/Rev.01.Corr1, 2002.
NATO, Statement by the North Atlantic Council on the Use of a Nerve Agent in Salisbury, 14 March 2018, https://www.nato.int/cps/en/natohq/news_152787.htm.
OSCE, Joint Statement by the Head of Delegation of the OSCE Minsk Group Co-Chair Countries, 12 August 2016, https://www.osce.org/mg/287531.
Polisario Front, Declaration under Article 96(3) AP I, 21 June 2015, http://theirwords.org/media/transfer/doc/declarationofficielle_polisariofront_2015-f426d1a96a4465affd1f87e794374b06.pdf.
Statutes of the International Red Cross and Red Crescent Movement (1986).