State Responsibility for the Misconduct of Partners in International Military Operations

General and Specific Rules of International Law

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Editors' preface

The publications of this series present new research on defence and security policy of relevance to Danish and international decision-makers. This series is a continuation of the studies previously published as CMS Reports. It is a central dimension of the research-based services that the Centre for Military Studies provides for the Danish Ministry of Defence and the political parties behind the Danish defence agreement. The Centre for Military Studies and its partners are subject to the University of Copenhagen's guidelines for research-based services, including academic freedom and the arm's length principle. As they are the result of independent research, the studies do not express the views of the Danish Government, the Danish Armed Forces, or other authorities. Our studies aim to provide new knowledge that is both academically sound and practically actionable. All studies in the series have undergone external peer review. And all studies conclude with recommendations to Danish decision-makers. It is our hope that these publications will both inform and strengthen Danish and international policy formulation as well as the democratic debate on defence and security policy, in particular in Denmark.

The present publication is a result of the additional grant specifically aimed at research in the international legal challenges of the Danish Defence, which the parties to the Danish Defence Agreement have awarded to the Centre for Military Studies. The international legal research is conducted in collaboration with the Faculty of Law, University of Copenhagen, and the Royal Danish Defence College. Read more at: https://jura.ku.dk/icourts/research/intermil/.

The Centre for Military Studies is a research centre at the Department of Political Science, University of Copenhagen. The centre conducts research into security and defence policy as well as military strategy. Read more about the centre, its activities, and other publications at: https://cms.polsci.ku.dk/english/

Copenhagen, July 2021
Henrik Breitenbauch, Kevin Jon Heller, Astrid Kjeldgaard-Pedersen & Kristian Søby Kristensen

Table of Contents

Abstract and Recommendations

This report focuses on a number of foundational questions related to the division of responsibility between states and between states and non-state actors engaged in various kinds of military collaboration. When Danish forces collaborate with partners in international military operations, they are governed by a complex international legal framework, comprising both generally applicable rules and rules emanating from specialised regimes of international law, such as international humanitarian law and international human rights law. In order to determine the specific international legal requirements to be fulfilled by Danish forces in a concrete situation involving collaboration with a military partner, it is necessary to assess, first, whether that situation is governed only by the general rules (e.g. on state complicity) or whether rules under specialised regimes – possibly imposing stricter requirements – also apply. Secondly, it must be assessed precisely how Danish forces should act in accordance with the applicable rules so as to ensure that Denmark does not incur international responsibility under the particular circumstances.

The aim of the present report is to provide Danish decision-makers with a comprehensive overview of the international legal framework underlying Denmark's participation in international military operations with various kinds of partners. Moreover, the report offers an update on the international debate regarding the most central issues of particular relevance to international lawyers working in the field. Part I of the report deals with the general international legal rules concerning state responsibility for wrongful conduct of partners in international military operations, whereas Part II addresses rules emanating from specialised regimes of international law that are relevant in the same scenarios. As a common feature, both Parts I and II centre on a number of specific examples of mission scenarios which either have been or may become relevant when Danish armed forces contribute to international military operations.

Above all, the report exposes a highly complex and to some extent controversial international legal landscape governing state responsibility for the misconduct of military partners. Against the background of the identified challenges, the authors recommend that Danish forces further develop risk assessment procedures to be incorporated as a central part of their collaboration with partners. Moreover, as a corollary to such risk assessment procedures, it is necessary to adopt adequate procedures for mitigating measures that may be employed *vis-à-vis* specific partners, such as, for example, training in applicable legal standards under international humanitarian law and international human rights law.

In view of Denmark's frequent participation in international military operations with different partners, the risk that Danish forces may become implicated in the international legal violations by others is real and by no means negligible. It is therefore in Denmark's interest to devote further attention and resources – from decision-makers as well as practitioners and researchers in the field – to the continuous development and operationalisation of adequate procedures for risk assessments as well as accompanying mitigating measures to be employed when necessary in connection with partnered operations.

Resumé og anbefalinger

Denne rapport omhandler statsansvar i forbindelse med internationale militæroperationer, nærmere bestemt spørgsmål om fordeling af ansvar mellem stater og mellem stater og ikke-statslige aktører, som indgår i koalitioner eller andre former for samarbejde. Når danske styrker samarbejder med forskellige partnere i forbindelse med internationale militæroperationer, er de underlagt et omfattende folkeretligt regelkompleks. Dette regelkompleks består af både generelle regler og regler inden for en række folkeretlige særdiscipliner, herunder humanitær folkeret og internationale menneskerettigheder, som kun finder anvendelse i særlige situationer. For at kunne tage stilling til de folkeretlige krav, danske styrker skal opfylde i forbindelse med et specifikt samarbejde med en partner, må man derfor indledningsvis vurdere, om den pågældende situation alene er omfattet af folkerettens generelle statsansvarsregler, eller om regler hidrørende fra særdiscipliner – og eventuelt deraf følgende skærpede krav til den medvirkende stat – også finder anvendelse. Dernæst må det vurderes, hvordan danske styrker i overensstemmelse med de relevante regler konkret skal forholde sig i den givne situation for at undgå at påføre Danmark statsansvar.

Formålet med denne rapport er at give danske beslutningstagere et samlet, aktuelt overblik over den folkeretlige ramme for danske styrkers samarbejde med forskellige partnere i internationale militæroperationer. Samtidig kan folkeretsjurister, der beskæftiger sig med området i praksis, drage nytte af rapporten som en opdatering vedrørende de mest centrale spørgsmål i den internationale debat. I rapportens Del 1 behandles folkerettens generelle regler om medvirken, mens Del 2 beskæftiger sig med en række regler inden for folkeretlige særdiscipliner, der på forskellig vis regulerer spørgsmål om statsansvar for partneres folkeretsbrud. I både Del 1 og Del 2 tager rapporten udgangspunkt i en række konkrete eksempler på missionsscenarier, som enten har været eller kan tænkes at

blive relevante i forbindelse med danske styrkers deltagelse i internationale militæroperationer.

På baggrund af det omfattende – og i nogen grad uklare og kontroversielle – folkeretlige regelkompleks, der kortlægges i rapporten, anbefales det, at Danmark sætter yderligere fokus på at udvikle og opdatere de nødvendige procedurer for risikovurderinger, som bør indgå som en fast bestanddel af danske styrkers samarbejde med militære partnere. I umiddelbar forlængelse heraf anbefales det, at der udvikles procedurer for afbødende foranstaltninger, der i tilfælde af et kritisk udfald af en risikovurdering kan iværksættes over for den pågældende partner. Efter omstændighederne kan sådanne afbødende foranstaltninger eksempelvis bestå af undervisning og træning i relevante retlige standarder efter den humanitære folkeret eller international menneskeret.

Danske styrkers hyppige deltagelse i internationale militæroperationer i samarbejde med forskellige typer partnere indebærer en uomgængelig risiko for, at Danmark kan ifalde ansvar for folkeretsbrud begået af andre. Med henblik på bedst muligt at klæde danske styrker på til at løse deres opgaver inden for en kompliceret og ofte uklar folkeretlig ramme bør såvel danske beslutningstagere som praktikere og forskere på området bidrage aktivt til kontinuerlig udvikling og operationalisering af de nødvendige procedurer.

1

Introduction

As Denmark engages in ever more challenging military operations abroad with diverse allies and partners, complex international legal questions increasingly arise. Among the inherently most complicated issues is the extent to which Denmark can be held responsible for violations of international law committed by its partners, including states and non-state actors. Naturally, Danish forces must make sure that their own actions comply with the international legal obligations accruing to Denmark under, for example, the UN Charter, the four Geneva Conventions and their Additional Protocols, and the European Convention on Human Rights (ECHR). But what is required of Danish forces to ensure that their partners in an international military operation also respect international law? And, more specifically, which international legal rules apply to which kinds of partners in which mission scenarios?

To illustrate the relevance and complexity of these issues, we need only look at examples of Denmark's current engagement in different military operations around the world. In Mali, Denmark contributes to a robust peace-keeping force (MINUSMA) established by the UN Security Council in 2013 to implement a ceasefire between the government of Mali and armed groups and to protect civilians. Denmark supports also the French-led Operation Barkhane, which is focused on counter-terrorism in the broader Sahel region.

From the end of 2020 to mid-2022, Denmark leads NATO Mission Iraq (NMI), which supports reform and capacity building in the Iraqi security forces. Moreover, Denmark continues to contribute to the coalition's fight against ISIL, which involves close cooperation with a non-

state armed group, the Kurdish-aligned Syrian Democratic Forces.[1] All of the mentioned examples entail a risk that Denmark could be held liable for internationally wrongful conduct of allies and partners. Depending on the circumstances of the particular mission, applicable international law not only includes the general rules on the responsibility of states but also specialised international legal regimes, including primarily international humanitarian law (IHL), international human rights law (IHRL), and the international rules concerning the use of force (*jus ad bellum*). The requirements imposed on states under the different regimes vary significantly and the proper interpretations of a number of rules within each regime remain subject to debate. With this report, we aim to map and disentangle the international legal rules that may come into play when Danish forces are in some way implicated in the international wrongful acts of their partners in military operations.[2] Our purpose is to explain when the different regimes apply and what the most important rules prescribe. Moreover, we aim to provide an update on the key debates among primary stakeholders, including states and international organisations as well as practitioners and scholars. In Part I, we focus on the general rules concerning state responsibility regarding the wrongful conduct of partners in international military operations, whereas Part II addresses the rules emanating from specialised regimes of international law.

While our focus is purposefully on the international legal framework, a few introductory remarks about the relationship between international law and domestic Danish law in cases concerning responsibility for the misconduct of partners in military operations are pertinent. The *Green Desert* case, which is currently pending before the Danish Supreme Court, provides an illustrative starting point. In June 2018, the High Court of Eastern Denmark rendered a judgment ordering the Danish

1. An overview of Denmark's ongoing operations is available on the website of the Danish Ministry of Defence: https://fmn.dk/en/topics/operations/igangvarende-operationer/.
2. The report thus provides a useful supplement to the Danish *Military Manual*, which does not engage in much detail with the question of international legal responsibility for actions of the military partners of Danish forces. See *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, Danish Ministry of Defence, Danish Defence Command (2016), p. 74 and p. 658; see likewise p. 72 and p. 635 in the latest Danish edition, which was updated in 2020 and is available online: www2.forsvaret.dk/omos/publikationer/Documents/Milit%C3%A6rmanual%20AF%20SEPT%202016,%20opdateret%20version%202020.pdf.

government to compensate a group of Iraqi nationals for ill-treatment they had suffered during their detention in Iraq in November 2004. Approximately 350 Danish soldiers had assisted Iraqi and British forces in a counter-insurgency operation. 30 Iraqi insurgents had been captured in the course of that operation and subsequently transferred to a detention facility operated by the Iraqi police, where most of them were subjected to torture or other forms of inhuman treatment. The High Court accepted the government's view that Danish soldiers had not been involved in the apprehension and handling of the detainees. Nevertheless, the court found the Ministry of Defence liable as a matter of domestic Danish tort law. According to the High Court, the Danish forces 'should have known' that individuals captured during the operation were at risk of being subjected to inhuman treatment in Iraqi custody. For present purposes, it is noteworthy that international law did not play a pivotal role in the High Court's ruling. The court stated that the ordinary Danish law of torts concerning public authorities was to be applied in light of Article 3 of the ECHR,[3] but otherwise international legal standards were not taken into account.[4] It bears underlining in this context that as long as no international legal rules are breached, a domestic court's application of domestic law to a case concerning an international military operation is unproblematic from the point of view of international law. In other words, states are free to 'over-perform' when it comes to their international legal obligations. But 'over-performance' of course presupposes that a relevant international court, for example the European Court of Human Rights (ECtHR), would agree that the state in question had acted in compliance with e.g. the ECHR. Moreover, even if a domestic court accurately finds that no violation of international law has occurred, it may still allow appropriate international legal standards to inform its application of domestic legal standards to the specific circumstances of an international military operation.[5] Hence, there is – also

3. High Court of Eastern Denmark, *Operation Green Desert*, 15 June 2018, B-3448-14, p. 764-65.
4. For a critical appraisal of this approach, in particular the High Court's disregard for the question of jurisdiction, cf. Article 1 of the ECHR, as well as Common Article 1 of the Geneva Conventions, see Peter Vedel Kessing, 'Liability in Joint Military Operations – The Green Desert Case', 25 (2) *Journal of Conflict and Security Law* (2020) 343.
5. Here, it is interesting to note that there are significant differences between the extents to which domestic courts of different states have in fact taken account of the international legal

from a domestic law perspective – ample reason to try to disentangle the intricate web of international legal rules governing the responsibility of states for the internationally wrongful conduct of their partners in international military operations, and that is exactly what this report aims to do. Before we embark on the substantive international legal analysis, however, the following section will further demonstrate the importance of the questions at hand by providing examples of the wide variety of mission scenarios where they come into play.

1.1. Relevant Mission Scenarios

Since ancient times, states have cooperated militarily with one another as well as with other actors. Recent years show a trend towards more limited forms of military cooperation. Rather than committing sizeable numbers of their own troops (like previous missions in Iraq and Afghanistan), states increasingly rely on their partners, usually local forces, when providing specific forms of assistance. Such support may range from arms delivery as well as training and mentoring to air support and even joint combat roles. In the UK and the US, these kinds of military operations have become known as 'remote warfare',[6] 'proxy warfare',[7] and 'partnered operations'.[8] While they involve unique features and challenges from a military studies perspective, they do not necessarily denote distinct legal categories and are prone to being used interchangeably. Moreover, from an international legal perspective, they share many

standards discussed in this report. Examples of case law from domestic jurisdictions will be provided where relevant throughout the report.

6. Emily Knowles and Abigail Watson, 'Remote Warfare: Lessons Learned from Contemporary Theatres', Oxford Research Group, 27 June 2018, www.oxfordresearchgroup.org.uk/remote-warfare-lessons-learned-from-contemporary-theatre; Emily Knowles and Abigail Watson, 'Lawful But Awful? Legal and Political Challenges of Remote Warfare and Working with Partners', Oxford Research Group, 31 May 2018, www.oxfordresearchgroup.org.uk/awful-but-lawful-legal-and-political-challenges-of-remote-warfare-and-working-with-partners.
7. American Bar Association's Center for Human Rights & Rule of Law Initiative, 'Report on the Legal Framework Regulating Proxy Warfare', December 2019, www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf.
8. Melissa Dalton and others, 'The Protection of Civilians in U.S. Partnered Operations', 30 October 2018, Center for Strategic and International Studies (CSIS), www.csis.org/analysis/protection-civilians-us-partnered-operations.

features with multinational coalition operations, e.g. where a coalition member provides only limited forms of support.

For the purpose of the present report, we can distinguish a number of scenarios from the broad continuum of possible forms of interaction between military partners. Some of them may exist side by side with (or as part of) others. These scenarios differ greatly with regard to the contribution and proximity to as well as the knowledge of the partner's potential violations of international law.

Joint combat operations entail the greatest degree of cooperation, whether it involves land, air, or naval forces, including joint planning and command structures. In addition to fire support, states may also provide more *indirect forms* of (logistical) support to their partners, e.g. air-to-air refuelling of combat aircraft, reconnaissance flights in support of air strikes, or air lifting of military vehicles and personnel.

Training is another common form of assistance, e.g. the current NATO mission to train Iraqi security forces as part of the fight against ISIL. *Mentoring*, by contrast, involves accompanying partner forces into the field (i.e. post-training). *Advising* goes further and implies an even more embedded role, including military and legal advisers at command levels. Frequently, states assist their partners with the *apprehension*, *transport,* and *guarding of detainees* or they may *transfer* their own detainees to their military partners.

States often *share their military facilities* (such as bases and landing strips) with their partners. Sometimes, they may even grant them the right to maintain military bases on their own, such as in the case of the US Air Base Ramstein (Germany). This may be problematic where such military installations are used to mistreat detainees or to launch illegal air-strikes. Similar considerations would apply to the use of *cyber infrastructure* and *overflight rights*. While *arms exports* are commonplace among most states, many restrict the transfer of their most capable weapons systems to their allies and other close partners. The same is true for the *transfer of actionable intelligence*.

At the other end of the continuum, states may simply *remain passive*. Sometimes, they make explicit *deconfliction arrangements* to avoid each other, e.g. the US-Russian deal to prevent collisions in the sky and

unnecessary confrontations in Syria.[9] Likewise, when operating in Afghanistan, ISAF and the US-led Operation Enduring Freedom (OEF) tried to deconflict geographically, in view of their different mandates. This scenario and those outlined above raise a number of different legal issues, which will be addressed in the report.

1.2. Conceptual Distinction between General and Special Rules of International Law

As we turn our attention from the factual circumstances to the international legal rules that govern them, some remarks about the overarching analytical framework are called for. International legal scholars commonly draw on two principal distinctions when discussing the responsibility of states for the misconduct of their partners. One is the distinction between primary and secondary rules of international law, the other is the distinction between general and special rules. The purpose of the present section is to explain briefly why our analysis is primarily based on the latter distinction.

At the heart of the international legal rules governing state responsibility are the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission (ILC) in 2001.[10] ARSIWA is commonly referred to by international lawyers as a body of 'secondary' rules.[11] Following this conceptual frame-

9. Andrew Weiss and Nicole Ng, 'Collision Avoidance: Lessons From U.S. and Russian Operations in Syria', March 2019, Carnegie Endowment for International Peace, https://carnegieendowment.org/files/Weiss_Ng_U.S.-Russia_Syria-final1.pdf.
10. See further ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', 2001, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (hereinafter, ARSIWA with commentaries).
11. On the origins of this conceptual framework, see Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law', 96 *International Law Studies* (2020) 294, pp. 299-301. See also André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law* (Cambridge University Press 2014), p. 19. For critical analysis, see further Christian Tams, 'All's Well that Ends Well? Comments on the ILC's Articles on State Responsibilty' 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002) 759, pp. 764-765. Notably, the distinction is also employed in ILC, 'Draft Articles on the Responsibility of International Organizations, with commentaries', 2011, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (hereinafter, ARIO with commentaries).

work, 'primary' rules are rules prescribing substantive rights or obligations, whereas 'secondary' rules govern the modalities and consequences of a breach of a primary rule. However, while the distinction between 'primary' and 'secondary' rules is widely applied in international legal scholarship, it remains controversial and is often fraught with difficulties when it comes to the categorisation of particular rules.[12] It is, for example, unclear whether one of the most important provisions in the context of the topic of the present report, Article 16 of ARSIWA – which concerns one state's 'aid or assistance in the commission of an internationally wrongful act' of another state – is of a primary or a secondary nature. In fact, despite being included in ARSIWA, Article 16 plainly comprises features of a primary rule, as it sets forth the boundaries of how states may lawfully behave in accordance with international law. The analytical point of departure for this report is, therefore, not the 'secondary' nature of the ARSIWA rules, including Article 16, but rather their general applicability.[13] As the ILC Commentary makes clear, these rules are 'general' as they apply to all kinds of breaches of substantive rules across the subfields of international law. They are also, as explicated in Article 55, 'residual' since they can be displaced by special rules.[14] We do not mean to imply, however, that the distinction between 'general' and 'special' rules of international law is entirely straightforward. There is significant interplay between the two categories, and in many cases it is debatable whether a rule originating from a specialised legal regime is indeed (in the process of becoming) generalisable in the sense that it applies across the board in international law. This challenge is particularly noticeable in a recent contribution to the debate, namely the 'Guiding Principles on Shared Responsibility in International Law', which are the result of a comprehensive scholarly endeavour to 'provide guidance to judges, prac-

12. See also Miles Jackson, *Complicity in International Law* (Oxford University Press 2015), pp. 149-150 (labelling it a primary rule); Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016), p. 259 (referring to Article 16 as a 'meta-rule (a hybrid of a primary and secondary rule) of responsibility for complicity'); ARSIWA with commentaries (n 10), Part IV, p. 65, para. 7 (even acknowledging that Articles 16-18 blur the distinction between primary and secondary rules). Article 16 is discussed at length in Section 3.1.
13. Daniel Bodansky and John Crook, 'Symposium on the ILC's State Responsibility Articles: Introduction and Overview', 96 *American Journal of International Law* (2002) 773, pp. 777-80.
14. ARSIWA with commentaries (n 10) 32, paras. 5 and 140-141.

titioners and researchers when confronted with legal questions of shared responsibility of states and international organisations for their contribution to an indivisible injury of third parties'.[15] According to the authors, who count towering figures in the contemporary academic landscape, the SHARES Guiding Principles 'build on existing rules of the law of international responsibility and sometimes offer novel interpretations thereof. They also expand on those existing rules, backed by authoritative practice and scholarship, to address complex questions of shared responsibility'.[16] The aim of the SHARES Guiding Principles is to provide guidance on the interpretation of the international law on responsibility as it applies across the board in the international legal system. As will be discussed in Sections 3.1 and 5, some of the Guiding Principles appear to some extent to 'generalise' rules emanating from specialised regimes. In other words, they rely on sector-specific rules to establish a principle that is meant to be generally applicable. Importantly, however, the authors emphasise that they 'do not distinguish between the codification of existing rules of international law and the progressive development of international law.'[17] This, of course, somewhat limits the relevance of the SHARES Guiding Principles for those interested in ascertaining what the positive international legal obligations of states currently are.

In the present report, we therefore uphold the approach of clearly separating *general* rules (addressed in Part I) from *special* rules (outlined in Part II). We believe that – in particular as regards states' contributions to the internationally wrongful acts of other states and non-state actors – there are valid reasons for applying different standards within different legal regimes.[18] If a situation is governed by IHL, the international legal standard concerning state responsibility for misconduct of a partner is not necessarily the same as in situations covered by, for example, IHRL or international environmental law. In all situations, however, ARSIWA remain the fall back rules concerning state responsibility. The interplay

15. André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski and Ilias Plakokefalos, with the collaboration of Dov Jacobs, 'Guiding Principles on Shared Responsibility in International Law', 31 *European Journal of International Law* (2020) 15, p. 15 (hereinafter, SHARES Principles).
16. Ibid. p. 16.
17. Ibid. p. 21.
18. For a similar approach: Milanovic (n 11).

between the general and the special rules – including the extent to which they 'rub off' on each other in the assessment of specific situations – is a recurring theme throughout the report.

PART I

General Rules of International Law

In keeping with the analytical framework outlined above, the present Part I focuses on the general rules of international law and draws to a large extent on the ARSIWA rules of the ILC. It begins by addressing the question of attribution of conduct in Section 2: When are the acts of one or more human beings to be characterised as the acts of a particular state for the purpose of allocation of international responsibility? Section 3 studies the general customary rule of state complicity in international law, enshrined in Article 16 of ARSIWA, while Section 4 explores the aggravated regime governing serious violations of peremptory rules (*jus cogens*) following from Article 41 of ARSIWA. Ultimately, Section 5 examines the extent to which the so-called due diligence principle – as a part of customary international law applicable across the board of specialised international legal regimes – imposes a positive obligation on states to prevent or stop the international law violations of their military partners.

2

Attribution of Conduct

Before delving into the question of when states incur international responsibility for complicity in the internationally wrongful acts of others, it is pertinent briefly to examine the issue of attribution of conduct – the most direct avenue to international responsibility. Three basic sets of rules can be distinguished: attribution rules requiring (1) 'institutional links', (2) 'factual links', or (3) acknowledgment.[19]

The first category attributes all conduct of state organs (*de jure* or *de facto*) and equivalent entities and persons to the state in question.[20] This clearly applies to a state's armed forces and also extends to omissions and *ultra vires* acts (i.e. acts whereby the state official exceeds his authority).[21]

By contrast, the second category requires a factual link between the responsible state and the conduct in question. Chief among these rules is Article 8, which reads as follows:

> *The 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.*

19. Francesco Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) 60, pp. 65-67.
20. Articles 4-5 of ARSIWA. See also Article 6 of ARIO.
21. Article 7 of ARSIWA. See also Article 8 of ARIO.

The ILC's commentary to Article 8 begins by underlining the general principle that the acts of private persons or entities are not attributable to the state. The Commission then elaborates on the two situations in which, following Article 8, the link between the state and the person or entity performing the act is sufficient to warrant an exception to the general principle. The first situation regarding 'instructions' is fairly uncontroversial. Acts of auxiliaries or volunteers, who – although they do not form part of State A's official structure – are instructed by State A to complete specific missions, are attributable to State A. The second situation, which concerns 'direction or control', is more complicated. According to the ILC commentary, '[s]uch conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation'. One of the intricate questions is of course the degree of control required in order for Article 8 to come into play. This was a central issue in the ICJ's 1986 judgment in the *Nicaragua* case,[22] in which the Court found that 'financing, organizing, training, supplying, and equipping' did not suffice to establish attribution. Rather, the determining factor is whether the state exercises 'effective control'.[23] The threshold for attribution under Article 8 is, in other words, relatively high.

The third category comprises situations where states assume responsibility for an act or omission that is not otherwise attributable to them by acknowledging and adopting that conduct as their own. Article 11 of ARSIA provides as follows:

> *Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.*[24]

22. ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14.
23. Ibid. para. 115.
24. Article 11 of ARSIWA. See also Article 9 of ARIO and Magdalena Pacholska, *Complicity and the Law of International Organizations-Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (Elgar 2020), p. 220 (referring to the long-standing UN practice of assuming the responsibility for UN-led military operations).

2.1. Multiple Attribution

Where states cooperate in a highly integrated way, it may result in cases of multiple attribution: either through the creation of joint organs or through the operation of different attribution rules side by side.[25] For instance, if State A provides instructions (i.e. Article 8 of ARSIWA) to an organ of State B (i.e. Article 4 of ARSIWA), both states will be responsible for the resulting conduct. However, Article 6 of ARSIWA provides for a special exception:

> *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.*[26]

In its commentary to the provision, the ILC clarifies that Article 6 addresses the specific and limited situation in which an organ of State A is 'effectively put at the disposal of' State B in the sense that the organ in question temporarily acts under State B's authority, while severing its institutional link (albeit temporarily) with State A:

> *Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State.*[27]

25. See also Messineo (n 19), p. 70 ('the operation of attribution of conduct rules, is a 'cumulative' process, meaning that the criteria are not mutually exclusive (that is, someone could be the organ of a state under Article 4, and at the same time acting under the instructions, direction, or control of that same state under Article 8). But there is more. This legal process may apply at the same time with reference to more than one subject. ... [N]othing in the text of the ILC Articles prevents the contemporaneous application of the rules to more than one subject of international law').
26. For a detailed comparison of Article 6 of ARSIWA with its counterpart in Article 7 of ARIO, see: Messineo (n 19), pp. 83-96.
27. ARSIWA with commentaries (n 10), p. 44, para. 2, emphasis added.

As an example that would fall outside the scope of Article 6, the commentary explicitly mentions the situation where armed forces of State A – while remaining under State A's authority – are sent by State A to assist State B in the exercise of the right of collective self-defence.[28] In fact, even in complex military coalitions, states almost never relinquish full command over their forces but transfer only operational command and control. Hence, multiple attribution is far from being the exception. Much will depend on how effective the chain of command is and to what extent the lead nation can be said to give instructions or exercise effective control. The assessment is based on the link between the delegated operational control and the wrongful conduct as such.[29]

The facts of the *Kunduz* case, which was recently decided by the German Federal Constitutional Court, provide an illustrative example of dual attribution. Here, an airstrike was carried out by two US fighter jets, whose pilots were – for the specific purpose of the attack – acting under German instructions. This was not a case of full delegation under Article 6 of ARSIWA, and the airstrike was, therefore, attributable to the US under Article 4 and to Germany under Article 8.[30]

In contrast to such situations of multiple attribution, military operations in which states assist their partners – e.g. the mission scenarios outlined in Section 1.1 – are characterised by very loose command-and-control arrangements. Hence, such cooperation would almost never result in direct responsibility (through the operation of the rules of attribution) on the part of the assisting states for the misconduct of their partners.

28. Ibid. para. 3.
29. Berenice Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control' 18 (2) *Melbourne Journal of International Law* (2017) 154, 172-78 (including also other forms of military control, i.e. strategic control and organic control).
30. In the case itself, the Court did not find it necessary to specifically discuss the issue of attribution. German Federal Constitutional Court, *Kunduz Case*, 2 BvR 477/17, 18 November 2020, www.bundesverfassungsgericht.de/e/rk20201118_2bvr047717.html.

2.2. Special Rules on Attribution within Specialised Regimes

It is a subject of debate whether special rules on attribution have developed within particular sub-fields of international law, such as IHL or IHRL. ARSIWA explicitly allows for such *lex specialis* rules in Article 55, and the ICJ has expressly acknowledged the possibility in the *Bosnian Genocide* case, without, however, finding that a *lex specialis* rule of attribution existed with regard to genocide.[31] Marko Milanovic has recently argued that special rules of attribution should remain scarce exceptions, unless there are very good reasons for their existence. He shows convincingly that many candidates for such special rules set forth substantive obligations rather than modifying the element of attribution in an internationally wrongful act.[32] In Part II, we will return to this issue when exploring the specialised international legal regimes that may govern various kinds of partnered operations. The key take-away at this juncture is that the application of the rules on attribution – when properly distinguished from rules laying down substantive obligations – are less likely to pose significant legal challenges as regards the mission scenarios outlined in Section 1.1.

31. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 401 (eventually rejecting the so-called 'overall control test', developed by the ICTY, and applying its own 'effective control test').
32. See further Milanovic (n 11).

3

General Rule of State Complicity

3.1. Article 16 of ARSIWA

Under the heading 'Aid or assistance in the commission of an internationally wrongful act', Article 16 of ARSIWA 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.*

Article 16 governs situations where State A (the assisting state) acts in a way that facilitates the internationally wrongful conduct of State B (the assisted state). Before embarking on the specific conditions that must be met in order for State A to incur responsibility in accordance with Article 16, it should be emphasised that the provision was highly controversial during the ILC's drafting of ARSIWA, and that Special Rapporteur, James Crawford, for example, has characterised it as 'progressive development'.[33] On the other hand, the ICJ has clearly stated

33. James Crawford, *State Responsibility – The General Part* (Cambridge University Press, 2013), p. 408.

in the *Bosnian Genocide* case from 2007 that Article 16 'reflects a customary rule'.[34] Moreover, the fact that the underlying case concerned the support given to the forces of the self-styled Republika Srpska, a non-state armed group,[35] shows that the customary rule of state complicity is broader than the state-to-state assistance enshrined in Article 16.[36] This is also reflected by Article 58 Draft Articles on the Responsibility of International Organizations (ARIO), dealing with state complicity in internationally wrongful acts of international organisations.[37] Nevertheless, for the sake of simplicity, the following examination of the different constituent elements of Article 16 will only refer to the special case of non-state armed groups and international organisations where this is relevant for the legal assessment.

3.2. Aid or Assistance

Neither the wording of Article 16 nor the ILC's commentary give much guidance on what exactly it means to 'provide aid or assistance'. At the outset, it bears mention that there are no limitations on the kinds of aid or assistance that may fall within the ambit of Article 16. As long as the conditions of Article 16 are met, the aid or assistance provided can thus take several forms, including technical, logistic, or financial sup-

34. ICJ, *Bosnian Genocide* (n 31), para. 420.
35. Ibid. ('Although this provision [Article 16], because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration').
36. Ryan Goodman, Christof Heyns and Yuval Shany, 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36', blogpost on Just Security, 4 February 2019, www.justsecurity.org/62467; Ryan Goodman and Vladyslav Lanovoy, 'State Responsibility for Assisting Armed Groups: A Legal Risk Analysis', blogpost on Just Security, 22 December 2016, www.justsecurity.org/35790; Jackson (n 12), p. 215.
37. In fact, Roberto Ago mentioned this possibility as early as in 1979 but attached only limited relevance to those scenarios: 'Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g. an international organization or an insurrectional movement), although intellectually conceivable, are not covered, because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future', ILC Yearbook 1979/II, p. 5, para. 3, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1979_v2_p1.pdf.

port.[38] Forms of moral support, such as incitement or encouragement, are, however, excluded.[39]

The Commission did consider whether to explicate that the aid or assistance should be 'material', but the final version of the commentary simply states that the aid or assistance must 'actually' facilitate the wrongful act.[40] Moreover, the commentary explains that:

> *There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.*[41]

Overall, it is difficult to draw firm conclusions on the content of 'aid or assistance'. As the ILC itself noted during its discussion of the 'sister provision' in Article 14 of ARIO, 'much depends on the content of the obligation breached and on the circumstances'.[42] As an example of 'aid or assistance', which would be covered by Article 16, the ILC commentary mentions permission to use the assisting state's territory to carry out an armed attack against a third state.[43] *Jus ad bellum* violations also featured prominently in earlier (scholarly) contributions. ILC member Nikolai Ushakov, for instance, was of the view that:

> *Participation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that [is] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance*

38. See further Crawford (n 33), p. 402 and Jackson (n 12), pp. 153-154.
39. ARSIWA with commentaries (n 10), p. 65, para. 9 ('The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State').
40. Ibid. p. 66. See further Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011), pp. 195-197.
41. ARSIWA with commentaries (n 10), p. 66, para. 5, emphasis added. The commentary even seems to acknowledge insignificant forms of assistance, 67, para. 10 ('the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered').
42. Here cited from Lanovoy (n 12), p. 89.
43. ARSIWA with commentaries (n 10), p. 66.

> *given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.*[44]

Writing in 1983, Ian Brownlie made a similar remark:

> *[T]he supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility.*[45]

Both statements imply an upper and a lower threshold for state complicity. From a legal perspective, the upper threshold is rather unproblematic as it borders on direct participation in (and co-responsibility for) the violation of international law, cf. the rules on attribution discussed in Section 2. But it is important to highlight that – depending on the international legal rules that are violated – even very direct forms of participation may not result in co-responsibility. In relation to IHL and IHRL, for example, this primarily has to do with the complex way by which the application of these regimes is triggered, which will be discussed in greater detail in Part II of this report.

The lower threshold of what amounts to aid or assistance is more challenging. Common examples of *significant* contributions that are likely to cross the threshold include: supplying military equipment; allowing the use of territory, air space, or military bases; conducting reconnaissance flights, aerial refuelling, or interdictions at sea; and transferring detainees or targeting information.[46] What is essential is that there is a clear factual link between the assistance and the relevant violation of interna-

44. ILC Yearbook 1978/I, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1978_v1.pdf, p. 239 (Ushakov).
45. Ian Brownlie, *System of the Law of Nations: State Responsibility. Part 1* (Clarendon Press 1983), p. 191.
46. Lanovoy (n 12), pp. 172-86; SHARES Guiding Principles (n 15), p. 41.

tional law. This assessment may become even more complex if additional actors are involved (e.g. other assisting states).[47]

It remains an open question whether state complicity can also arise in cases of omissions or other forms of inaction. Some scholars reject this possibility,[48] with reference to the *Genocide* case, in which the ICJ claimed that complicity always required a 'positive action'.[49] This rejection, however, seems far too categorical. An illustrative example is the misuse of another state's airspace for an illegal attack. In fact, the failure to protest against the violation of one's air space – a *prima facie* omission – could equally be categorised as a tacit permission and thus as a *positive action*. By knowingly tolerating the misuse of its airspace or territory, the territorial state may provide a much more significant contribution to the other state's violations of international law than through other forms of support. Hence, it is reasonable to assume that certain forms of omission, in very limited situations, can be considered aid or assistance for the purpose of Article 16 of ARSIWA.[50]

The above-mentioned SHARES Guiding Principles advance a new concept of ancillary responsibility in Principle 7 'Shared responsibility in situations of concerted action'.[51] What distinguishes it from complicity is that Principle 7 does not require a significant contribution to an internationally wrongful act.[52] Rather, states (and other actors) incur responsibility for participating 'in a course of conduct with a view to achieving agreed goals' that results in an internationally wrongful act. The authors refer to the invasion of Iraq in 2003, where not all contributions by states amounted to aid or assistance for the purpose of Article

47. Erika de Wet, *Military Assistance by Request and the Use of Force* (Oxford University Press 2020), pp. 137-39; Aust (n 40), p. 130; Lanovoy (n 12), p. 174.
48. Crawford (n 33), pp. 404-405; De Wet (n 47), pp. 136-37.
49. ICJ, *Bosnian Genocide* (n 31), para. 432.
50. Similarly: Jackson (n 12), pp. 155-56; Lanovoy (n 12), pp. 96-97 (discussing both the airspace example and the specific case of black sites during the US extraordinary rendition programme); Aust (n 40), pp. 225-230 (discussing specifically a situation in 2009, when the US was faced with an Israeli request to (tacitly) permit the use of Iraqi airspace for an attack on Iran); Pacholska (n 24), pp. 97-98 (acknowledging the 'ostensive redundancy in light of the existence of the firmly recognized concepts of "duty to prevent" and due diligence obligations in general').
51. SHARES Guiding Principles (n 15).
52. The general rule of complicity is enshrined in Principle 6. Both Principle 6 and 7 use a constructive knowledge standard, see n 73.

16 of ARSIWA.[53] Their main rationale for shared responsibility for concerted action is that 'the injured party should not be put in a position of having to prove which parts of the injury are attributable to each of the responsible international persons'.[54] While perhaps understandable in the interest of international accountability, Principle 7 carries the risk of unlimited legal exposure for states. Being a scholarly proposition towards progressive development of the law,[55] Principle 7 is unlikely to crystallise into a rule of customary law in the foreseeable future; nor is it likely that it will affect the lower threshold of complicity under Article 16.

3.3. Mental Element

The most complex part of Article 16 is the mental element, which consists of knowledge and intent.[56] Before embarking on the issue of knowledge, it is pertinent to examine the intent requirement, as it is the more controversial of the two.

3.3.1. Intent

While intent is not explicitly mentioned in Article 16, the ILC's commentary provides that 'the aid or assistance must be given with a view to facilitating the commission of that act'.[57] It goes on to say that:

> *A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.*[58]

The question of intent also featured in the *Genocide* case:

53. Ibid. p. 46.
54. Ibid. p. 45.
55. See further Section 1.2.
56. Harriet Moynihan, 'Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility', 67 *International & Comparative Law Quarterly* (2018) 455, p. 458.
57. ARSIWA with commentaries (n 10), p. 66, para. 3.
58. Ibid. para. 5, emphasis added.

> *... there 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.*[59]

But the ICJ stopped short of inquiring whether the assisting state (Serbia) had acted with the same specific intent. Moreover, the pertinence of assessing the intent requirement in Article 16 on the basis of a case concerning genocide can be drawn into question given the specific intent required for that particular crime.[60]

A general requirement of intent on the part of the assisting state may seem artificial and arguably makes it almost impossible to hold states responsible for complicity.[61] For Aust and Crawford, however, the intent requirement should be seen in the light of reactions by states and the necessary support for the relatively new rule on complicity.[62] In fact, many states called for the inclusion of intent in Article 16 after it had featured in previous ILC drafts.[63] Legal policy considerations may also support an intent requirement to avoid the chilling effect on cooperation among states that a mental requirement based on knowledge alone might have.[64] While such considerations also apply in relation to cooperation with international organisations, this is not necessarily the case with regard to non-state armed groups,[65] such as in the context of military assistance to the Kurdish forces in Syria.

Despite their differences, opponents and supporters find common ground in recognising that intent can be *assumed* when the assisting state has knowledge (actual knowledge or virtual certainty) of the illegality of the partner's acts.[66] In those situations, intent operates as the flipside

59. ICJ, *Bosnian Genocide* (n 31), para. 421.
60. Lanovoy (n 12), pp. 231-32. Indeed, genocide is premised on the existence of special intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.
61. Ibid. p. 229; SHARES Guiding Principles (n 15), p. 43 (in relation to Principle 6).
62. Aust (n 40), p. 172; Crawford (n 33), pp. 407-408.
63. Aust (n 40), p. 172 (discussing the different state views); Pacholska (n 24), p. 107 (also citing statements by organisations during the ARIO process).
64. Aust (n 40), pp. 239-40.
65. Goodman and Lanovoy (n 36).
66. Crawford (n 33), p. 408; Georg Nolte and Helmut Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law' 58(1) *International & Comparative Law*

of knowledge, regardless of whether the assisted state desired the illegal outcome or not,[67] and the role of intent as an additional requirement is thus of little practical effect.[68]

3.3.2. Knowledge

Article 16 explicitly requires that the aiding or assisting state had 'knowledge of the circumstances of the internationally wrongful act'. This formulation leaves open how specific and detailed the knowledge has to be. According to the ILC's commentary to Article 16, an assisting state 'does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act'.[69] This sentence would seem to indicate that the aiding or assisting state must not only have knowledge about the broader factual circumstances, but must indeed have knowledge about the specific circumstances making the relevant act unlawful.[70] But according to Lanovoy, knowledge of the *circumstances* 'does not entail the full awareness of the content, specific form or modalities of the wrongful act as executed'.[71]

Closely related is the necessary degree of knowledge. Where the assisting state has *actual prior knowledge*, the requirement is fulfilled. In many situations, however, the facts are uncertain or disputed.[72] This raises the question how much knowledge may be assumed. The SHARES Guiding Principles define knowledge in relation to aid or assistance as 'knew or should have known'[73] – a standard commonly referred to as *constructive knowledge*, which involves a duty to make inquiries.[74] This suggestion by the authors of the SHARES Guiding Principles is remark-

Quarterly (2009), 1, p. 15 ('when State A regularly exports military material to State B and it is obvious that State B is systematically violating human rights when repressing its ethnic minorities with the help of this material, State A should not be allowed to hide behind the position that it did not wish/intend to support the commission of such wrongful acts'); Jackson (n 12), p. 160; Lanovoy (n 12), p. 221; Moynihan (n 56), p. 469; Pacholska (n 24), p. 109; De Wet (n 47), pp. 146-47.

67. Lanovoy (n 12), p. 221.
68. Moynihan (n 56), p. 469; Lanovoy (n 12), p. 232.
69. ARSIWA with commentaries (n 10), p. 66, para. 4.
70. Moynihan (n 56), pp. 458-459.
71. Lanovoy (n 12), p. 227; similarly De Wet (n 47), p. 140.
72. De Wet (n 47), p. 140.
73. SHARES Guiding Principles (n 15), Principle 6, para 2, and Principle 7, para 2.
74. Ibid. p. 42.

able, since it finds almost no support in state practice.[75] In fact, only the Netherlands advocated its inclusion during the ARSIWA drafting process, while other states argued for a stricter knowledge standard.[76] Furthermore, constructive knowledge and the resulting general duty to make inquiries is widely rejected by scholars in the field as a standard for the knowledge requirement of complicity.[77] This dominant view is premised on the principle of good faith, which means that states can generally assume that other states (with which they interact and cooperate) will act in accordance with their obligations under international law.[78] Accordingly, they do not incur responsibility if they are entirely unaware of the other states' wrongful conduct.

Nevertheless, there is wide scholarly support that knowledge includes cases of *wilful blindness*.[79] In other words, states cannot invoke ignorance – and thus evade their responsibility under Article 16 – in the face of available information from reliable sources that their assistance will contribute to internationally wrongful acts. Such information can be drawn from public statements and official policies of the assisted state,[80] but also from media reports and detailed investigations by NGOs and international fact-finding commissions.[81] A case in point is the 2019 report of the Group of Eminent International and Regional Experts on the situation in Yemen, which found a serious pattern of IHL and IHRL viola-

75. Remarkably, the very case referred to by the authors in support of their claim does not actually mention constructive knowledge. It was simply pleaded by the applicants but rejected by the Inter-American Commission of Human Rights in an unreported decision. See: Inter-American Commission of Human Rights, Report no. 86/10, Case no. 12.649, 14 July 2010. Moreover, as hightligted in Section 1.2, the fact that constructive knowledge is often the relevant standard in IHRL and IHL does not mean that such practice can be generalised for international law as a whole, including the general rules of state responsibility.
76. Statement of the Netherlands in ILC Yearbook 2001/II/P1, https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p1.pdf, p. 52. See Aust (n 40), pp. 233-35.
77. Moynihan (n 56), pp. 461-63; Aust (n 40), pp. 235-36; Lanovoy (n 12), p. 100; De Wet (n 47), p. 140.
78. Lanovoy (n 12), p. 100. The same reasoning seems to apply in relation to international organisations. By contrast, in case of assistance to non-state armed groups, the good faith argument does not necessarily apply. See also Goodman and Lanovoy (n 36).
79. Crawford (n 33), p. 408; Jackson (n 12), p. 161-62; Moynihan (n 56), p. 460; Pacholska (n 24), p. 104; Aust (n 40), pp. 233-35; Lanovoy (n 12), p. 100; De Wet (n 47), pp. 141-42; SHARES Guiding Principles (n 15), p. 42 (but using it instead as an argument in favour of constructive knowledge).
80. De Wet (n 47), p. 141.
81. Jackson (n 12), p. 162; Moynihan (n 56), p. 462.

tions by all parties to the conflict, including the Houthis, forces loyal to President Hadi and the Saudi-led coalition.[82] In addition to the detailed account of violations by those actors, the experts specifically addressed third states and warned them of the risk of complicity in those acts:

> *Third States have a specific influence on the parties to the conflict in Yemen, or directly or indirectly support them, including by means of intelligence and logistic support, as well as arms transfers. Such is the case of France, the Islamic Republic of Iran, the United Kingdom of Great Britain and Northern Ireland and the United States of America, among other States. States may be held responsible for providing aid or assistance for the commission of international law violations if the conditions for complicity are fulfilled.*[83]

It is important to underline that even credible allegations of violations by partners – as in the 2019 report on Yemen – will not necessarily lead to the final conclusion that this pattern of violations will continue in the future with 'virtual certainty' – the flipside of wilful blindness. As Erika de Wet shows quite convincingly, assisting states can *rebut* this conclusion by carrying out a genuine risk assessment and, if necessary, by taking additional precautionary measures.[84] Depending on the facts and the effectiveness of such measures, the assessment may rightly conclude that there is only a very low risk and thus exclude a finding of *knowledge* for the purpose of state complicity. Hence, while it is true that Article 16 of ARSIWA does not prescribe a general duty to make risk assessments – a unique feature of the constructive knowledge standard – such assessments (and accompanying measures) are important tools for assisting states to rebut the claim of wilful blindness, especially in the face of previously reported IHL and IHRL violations.

82. Human Rights Council, Report of the Group of Eminent International and Regional Experts on situation in Yemen, 9 August 2019, A/HRC/42/17, paras. 23-87.
83. Ibid. para. 92.
84. De Wet (n 47), pp. 144-45.

3.4. Double Obligation Requirement

As the third and final limitation, it follows from Article 16(b) that 'the completed act must be such that it would have been wrongful had it been committed by the assisting State itself'. The provision is a natural corollary to the *pacta tertiis* principle, i.e. the foundational notion that treaties are only binding upon the states that have consented to them. Notably, the assisting state and the assisted state do not necessarily have to be bound by, for example, the same treaty provision. As long as the relevant material obligation also accrues to the assisting state, the formal source of the norm is insignificant, and Article 16(b) of course encompasses all obligations arising from customary international law. In relation to IHL violations, for instance, the question of being a party to a specific treaty (e.g. Additional Protocol I) is not necessarily decisive if the IHL rule in question has the status of customary law.[85] In the same vein, the right to life and the prohibition of torture and other forms of inhumane treatment are recognised in many universal and regional human rights treaties and as part of customary international law.[86]

As mentioned above, state complicity may also arise in the context of support to international organisations or non-state armed groups. The possible difference of obligations may create particular challenges for the operation of the complicity rule.[87] The case of international organisations is less problematic. Certainly, they have not become – and are arguably not in a position to become – parties to the relevant treaties. But international organisations are widely believed to be bound by the underlying customary law obligations under the *jus ad bellum*, IHL, and IHRL.[88] Obligations of non-state armed groups provide a more challenging example. At least, it is uncontroversial that non-state armed groups that are

85. See further Section 7.
86. However, differences in the formulation and scope of those rights may be legally relevant.
87. Strictly speaking, if the assisted non-state actor is not even bound by the relevant obligation, a case of complicity would be excluded from the very outset (for lack of an internationally wrongful act). For didactic reasons, however, it is appropriate to discuss the non-state actor's international law obligations under this section.
88. Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds.), *The Charter of the United Nations: A Commentary, Volume I* (3rd edition, Oxford University Press 2012), 200, p. 213; Robert Kolb, Gabriele Porretto, Sylvain Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationals* (Bruylant 2005).

a party to an armed conflict are bound by IHL.[89] By contrast, the case of IHRL obligations is more debated, but there appears to be a growing consensus that armed groups and similar entities are bound by IHRL if they are in control of territory.[90] This is confirmed by the above-mentioned report on Yemen, which contains a clear reference to the Houthi regime (supported by Iran) and other armed groups operating in Yemen:

> *[D]e facto authorities, given their exercise of government-like functions in the areas they effectively control, are also bound by international human rights obligations. Human rights obligations of non-State armed groups ... may arise insofar as they exercise control over certain areas or facilities.*[91]

The same reasoning applies to Kurdish forces that control territory in Syria. By contrast, the *jus ad bellum* is not usually believed to apply to non-state armed groups. This means that complicity does not arise for a state arming a rebel group for the purpose of fighting the government forces of another state.[92] Nevertheless, some of those cases will be covered by the general no-harm rule, which is considered in Section 5 below. Moreover, the *jus ad bellum* and its specific rules may provide for more far-reaching obligations, which will be considered in Part II of this report.

89. Sandesh Sivakumaran, 'Binding Armed Opposition Groups', 55(2) *International and Comparative Law Quarterly,* (2006), 369; ICRC, *Commentary on the First Geneva Convention* (Cambridge University Press 2016), https://ihl-databases.icrc.org/ihl/full/GCI-commentary (hereinafter, ICRC Commentary on GC I), Common Article 3, paras. 505-508. See also Ezequiel Heffes, Marcos Kotlik, Manuel Ventura (eds.) *International Humanitarian Law and Non-State Actors* (T.M.C. Asser Press 2020).
90. Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Heffes, Kotlik, and Ventura (n 89), 195.
91. Report on the situation in Yemen (n 83) para. 12.
92. Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct', 28(2) *European Journal of International Law* (2017), 56.

4

Aggravated Regime for Peremptory Norms

Article 41 of ARSIWA lays down an obligation for *all* states to cooperate in order to bring serious breaches of peremptory norms of general international law to an end (paragraph 1), and not to 'render aid or assistance in maintaining that situation' (paragraph 2).

Before we discuss the material scope of this obligation, it should be noted that there has been some discussion in the literature about the legal status of Article 41.[93] This is hardly surprising, given that the ILC's commentary from 2001 suggests that the provision was in a state of development at the time of its adoption.[94] Unlike Article 16, which as mentioned above was affirmed as a part of customary international law in the ICJ's *Bosnian Genocide* judgment, there has been no explicit, authori-

93. Aust (n 40), p. 343, for example, questions whether Article 41(2) of ARSIWA will ever become a part of customary international law. See also Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism', Chatham House Research Paper, November 2016, www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf, p. 22. See further Cornelius Wiesener, 'Taking One for the Team: Legal Consequences of Misconduct by Partners', 3 *Scandinavian Journal of Military Studies* (2020) 45, p. 47.

94. ARSIWA with commentaries (n 10), p. 116. See also James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 38. It should also be noted, with reference to the discussion in Section 1.2 of the analytical framework of this report, that Article 41 could reasonably be categorised as a 'specific' rather than a 'general' rule in light of its relatively narrow scope of application. Given that the provision applies to all kinds of 'serious breaches of *jus cogens* norms', however, and not only to norms belonging to particular subfield of international law, we found it pertinent to conceive of Article 41 as a 'general' rule to be included in Part I.

tative pronouncement on the legal status of Article 41. The provision was, however, applied *inter alia* in the ICJ's judgment in *Jurisdictional Immunities of the State* from 2012.[95] Moreover, the ILC's commentary to Conclusion 19 in the 2019 'Draft Conclusions on Peremptory Norms' – referring e.g. to the ICJ's Advisory Opinions in *Namibia*[96] and *Wall*[97] – seems to suggest that the ILC no longer doubts the customary nature of Article 41(2).[98]

In terms of substance, a number of uncertainties accrue to Article 41(2). The most important characteristic of this provision compared to Article 16 is, arguably, that there is no requirement of knowledge or intent in Article 41(2). In respect of the elements of 'aid or assistance' in Article 41(2), the commentary provides that:

> *... article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.*[99]

The relaxed mental requirement, however, must be read in conjunction with the fact that Article 41 is only applicable once a 'serious breach of a *jus cogens* norm' has taken place and has resulted in 'a situation'.

First of all, while *jus cogens* is generally considered a core concept in international law, there is no universally recognised list of the specific

95. ICJ, *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) (Jurisdictional Immunities),* Judgement, ICJ Reports 2012, p. 99, para. 93.
96. ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, para. 119.
97. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para. 159.
98. ILC, 'Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)', 2019, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf?OpenElement (hereinafter, Draft Conclusions on Peremptory Norms), Chapter V, pp. 196-98. See further Palcholska (n 24), pp. 116-18.
99. ARSIWA with commentaries (n 10), p. 115, para 11.

norms which have obtained this status.[100] However, with particular relevance for the mission scenarios outlined in Section 1.1, the 'prohibition of aggression', 'the basic rules of IHL', and 'the prohibition of torture' are predominantly perceived a *jus cogens* norms – as also evidenced by the fact that they feature on the 'non-exhaustive list' of peremptory norms included in Draft Conclusion 23 of the ILC's 'Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*)' of 2019.[101]

Second, it needs to be clarified when a breach of a peremptory norms is 'serious'. In accordance with Article 40(2), that is the case if the breach '... involves a gross or systematic failure by the responsible state to fulfil the obligation'.[102] According to the ILC's commentary, the word 'systematic' implies that 'a violation would have to be carried out in an organised and deliberate way'. The word 'gross', on the other hand, 'denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule'. The ILC underlines that 'serious' breaches will normally be both 'systematic' and 'gross', and mentions the following as examples of factors which can be taken into consideration: 'the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims'.[103]

Third, the serious breach of a peremptory norm must have occurred and must have resulted in 'a situation'. The ILC does not give much guidance in its commentary as to how 'a situation' should be interpreted. It merely mentions the example of attempted acquisition of sovereignty over territory in violation of the self-determination of peoples. Yet, the wording of Article 41(2) seems to imply that the rule is only applicable 'after the fact'. This means that the provision of support during the initial

100. See further ILC, 'Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur', UN Doc A/CN.4/727, 31 January 2019, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf?OpenElement, paras. 48-55. See also Pacholska (n 24), pp. 119-120.
101. ILC, Draft Conclusions on Peremptory Norms (n 101), pp. 203-208. See further Dire Tladi, 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*): Making Wine from Water or More Water than Wine', 89 *Nordic Journal of International Law* (2020), 244. Notably, some authors advocate that the provision should also apply to *erga omnes* obligations. See further Lanovoy (n 12), pp. 115-16.
102. See also Conclusion 19 of the 'Draft Conclusions on Peremptory Norms' (n 101), pp. 193-98.
103. ARSIWA with commentaries (n 10), p. 113.

stages of the *jus cogens* violation is governed by Article 16. In cases of continuing violations, however, both Articles 16 and 41(2) may apply concurrently.[104]

104. Lanovoy (n 12), p. 115; Aust (n 40), p. 338. Pacholska (n 24) puts forward a 'normative claim that a sectoral norm – referred to here as aggravated complicity rule – prohibiting aiding or assisting the commission of serious human rights and IHL violations, *distinct* from the ILC bifurcated complicity regime [Articles 16 and 41] – has emerged in general international law', emphasis added (pp. 129-167). However, her argument (and methodology) relates more closely to the special rules discussed in Part II of this report.

5

General Standard of Due Diligence

An account of the general rules of international law governing responsibility for the misconduct of partners necessarily includes a discussion of the concept of due diligence. Indeed, scholars have argued that 'the notion of complicity raises so many difficulties that it generally appears preferable to resort to the concept of due diligence'.[105] Taking the *Corfu Channel* case before the ICJ as their starting point,[106] Corten and Klein show that while 'complicity' played a prominent role in the submissions of the parties, it was not attributed much weight by the judges.[107] In a similar way, the two scholars contend, the ICJ favoured due diligence over complicity in *Bosnian Genocide*.[108] They conclude:

> *It thus appears that the practice relied on to assert the customary character of the rule set out in Article 16 of [ARSIWA] evidences at least as*

105. Olivier Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility. Lessons Learned from the Corfu Channel Case' in Karine Bannelier, Theodor Christakis and Sarah Heathcote (eds.), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2012) 315, p. 316.
106. ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment (Merits), ICJ Reports 1949, p. 4. The case concerned the explosions of mines in the Albanian waters of the Corfu Channel in 1946 by which a number of British warships sustained significant damage and crew members were killed. The UK contended that Albania had laid or allowed a third State to lay the mines.
107. It is the hypothesis of the authors that this was a deliberate choice on the part of the judges. Corten and Klein (n 105), p. 317.
108. Ibid, p. 333.

> *much the existence of a general principle of due diligence as the presence in contemporary international law of a notion of complicity.*[109]

The overarching purpose of the concept of due diligence in international law is to set a standard of care by which it can be determined whether a state is at fault. In the development of international law to meet the demand for regulation of new and complicated issues, due diligence is frequently brought into play.[110] But it is questionable whether it does operate at an equally general level of international law as the rule of complicity.

Notably, in the ILC's work on ARSIWA, due diligence was categorised as dependent on the primary rules of international law, and as such outside the scope of the draft articles.[111]

> *Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation.*[112]

The concept of due diligence in international law has recently been the object of scrutiny of a Study Group under the auspices of the International Law Association (ILA),[113] which has issued two reports on the

109. Ibid.
110. The role of the due diligence principle in the international legal regulation of cyberspace provides an illustrative example. See further Marc Schack and Astrid Kjeldgaard-Pedersen, *Modforanstaltninger i cyberdomænet – den folkeretlige ramme,* Faculty of Law, University of Copenhagen, August 2020, https://jura.ku.dk/pdf/icourts/research/Rapport_Modforanstaltninger_i_cyberspace.pdf, pp. 26-29. For more information, see Heike Krieger, Anne Peters and Leonhard Kreuzer (eds.), *Due Diligence in the International Legal Order* (Oxford University Press 2020).
111. On the distinction between primary and secondary rules of international law, see Section 1.2.
112. ARSIWA with commentaries (n 10), p. 34, emphasis added.
113. The International Law Association (ILA) is an international non-governmental organisation founded in 1873. Its objectives are 'the study, clarification and development of international

subject in 2014 and 2016.[114] The ILA Study Group's central research question was whether due diligence can 'be viewed as a common standard applicable across a broad range of obligations in international law, or must each be viewed separately'.[115] In fact, the concept of due diligence can be found in the form of discrete positive obligations. In the *Genocide* case, for instance, the duty to prevent genocide – under Article 1 of the Genocide Convention – was central to holding Serbia responsible.[116] The ILA Study Group identified many other positive obligations across different specific legal regimes, including IHL and IHRL.[117] Some of them are particularly relevant to international military operations and will be discussed further in Part II of this report.

At the most general level, due diligence exists in the form of the so-called 'no-harm rule', which traces its way back to *Corfu Channel* case, the leading precedent on the 'core content' of the due diligence principle.[118] In its judgment from 1949, the ICJ famously invoked 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[119] This rule 'has developed over a lengthy period, is now clearly a part of customary international law, and reflects cornerstone concepts of international law (including State sovereignty, equality, territorial integrity, and non-interference)'.[120]

law, both public and private, and the furtherance of international understanding and respect for international law'. See further, www.ila-hq.org/index.php.

114. ILA Study Group on Due Diligence in International Law, First Report (March 2014), Tim Stephens (Rapporteur) and Duncan French (Chair), https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1429&StorageFileGuid=fd770a95-9118-4a20-ac61-df12356f74d0. In this First Report, the Study Group maps how due diligence is applied in a number of specialised fields of international law; ILA Study Group on Due Diligence in International Law, Second Report (July 2016), Tim Stephens (Rapporteur) and Duncan French (Chair), https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f. The Second Report focuses on broader, analytical issues relating to due diligence, including '... *what* functions due diligence serves, and *why* it is employed as a standard of conduct in many and varied areas of international law.'
115. ILA Study Group on Due Diligence in International Law, First Report (n 114), pp. 1 and 31.
116. ICJ, *Bosnian Genocide* (n 31), paras. 428-38.
117. ILA Study Group on Due Diligence in International Law, First Report (n 114), pp. 6-31 (featuring also international investment law, transnational criminal law, environmental law and the law of the sea).
118. ICJ, *Corfu Channel* (n 106).
119. Ibid. p. 22.
120. ILA Study Group on Due Diligence in International Law, Second Report (n 114), p. 5.

Compared with the prohibition of state complicity (Article 16 of ARSIWA), the no-harm rule has a number of distinguishing features: First, it only applies to a state's own territory or areas under effective control abroad. In relation to the mission scenarios outlined in Section 1.1, the no-harm rule thus only becomes relevant in case of a partner's use of military facilities on one's own territory (or occupied territory abroad). Second, the rule merely protects the rights of other states. Hence, it does not in the same way as the complicity rule apply to all internationally wrongful acts, but may, for example, exclude certain violations of international legal rights that accrue directly to non-state armed groups and individuals under IHL and IHRL. Third, some scholars claim that the rule is primarily concerned with preventing harm by non-state actors rather than states. Fourth, the no-harm rule is chiefly aimed at omissions, while complicity is primarily concerned with actions. Fifth and last, the knowledge requirement is less demanding under the no-harm rule, as constructive knowledge ('knew or should have known') is generally considered to be enough.[121]

In sum, due diligence – in the form of the no-harm rule – does not provide for a far-reaching duty under general international law, because of its narrow scope of application. Hence, in the context of military operations abroad, it is only of very limited relevance to violations of international law committed by partners.

By contrast, the recently published SHARES Guiding Principles put forward a remarkably far-reaching due diligence obligation.[122] Paragraph 1 of Principle 9 refers to the general duty of cessation and non-repetition of internationally wrongful acts, as enshrined in Article 30 of ARSIWA.[123] However, paragraph 2 addresses the duty of partners and puts forward that:

121. For a detailed discussion: Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for their Involvement in Serious International Wrongdoing?', 60 *German Yearbook of International Law* (2018) 668; Pacholska (n 24), pp. 179-190; Lanovoy (n 12), pp. 212-14; Jackson (n 12), p. 5.
122. SHARES Guiding Principles (n 15), Principle 9 ('Cessation and non-repetition in situations of shared responsibility').
123. See also Article 30 of ARIO.

> *Each responsible international person is under an obligation to ensure that other responsible international persons fulfil their obligations pursuant to paragraph 1 [i.e. duty of cessation and non-repetition].*

In the commentary, the authors explain that 'the obligation of cessation entails an obligation of conduct to take appropriate measures to ensure that other responsible international persons cease their respective wrongful conduct'.[124] This formulation echoes the duty of all states under Article 41 of ARSIWA to cooperate in order to bring serious breaches of peremptory norms to an end. Principle 9(2), however, is meant to apply to violations involving situations of shared responsibility, including cases of complicity. Complicit states are believed to be particularly able to:

> *exert some influence over their partners and induce them to cease their wrongful conduct. Therefore, the obligation to take measures to ensure cessation by other responsible international persons requires more effort from international persons that have means at their disposal to exert influence over the conduct of others.*[125]

The authors of the SHARES Guiding Principles claim that this obligation 'finds support in practice in different fields of international law' and refer *inter alia* to the duty to ensure respect by others under IHL, positive IHRL obligations in case of extraditions and specific safeguards in relation to arms exports.[126] However, this conclusion is problematic since these standards refer to very distinct positive obligations that have developed as part of very different specialised regimes. Hence, such practice can hardly be generalised to identify a common duty of conduct binding on all states under international law as a whole. Rather than *lex lata*, Principle 9(2) should, at present, be conceived as a proposition towards progressive development of international law.

124. SHARES Guiding Principles (n 15), p. 52.
125. Ibid.
126. Ibid. Following the analytical framework of this report, cf. Section 1.2, the legal basis and scope of these specific duties and safeguards are discussed in Part II below.

PART II

Special Rules of International Law

As described in Part I of this report, state complicity – within the meaning of general rule enshrined in Article 16 of ARSIWA and subject to its requirements – can only be established if the assisted state has committed a violation of a substantive (primary) rule of international law. In a military context, the substantive rules often follow from the specialised regimes of international humanitarian law (IHL), international human rights law (IHRL), and the rules concerning the inter-state use of force (*jus ad bellum*). Importantly – and this is the topic of the present Part II – each of these specialised regimes also contains rules proscribing illicit assistance,[127] which under certain circumstances complement the general complicity rule. More importantly, by providing far-reaching positive obligations, those specialised regimes significantly expand the legal framework governing states in the context of partnered military operations. The following sections will examine both the unique and the common features of those special rules.

Section 6 begins by briefly discussing the prohibition of the use of force and the corresponding right to self-defence enshrined in Articles 2(4) and 51 of the UN Charter, before addressing certain forms of indirect use of force, considered to be unlawful under the *jus ad bellum* itself. Section 7 covers the field of IHL. It examines support given to

127. Aust refers to these specific rules jointly as a 'network of rules on complicity', Aust (n 40), pp. 376-418. See further Lanovoy (n 12), pp. 186-210.

belligerents for the purpose of conflict qualification, followed by a discussion of the duty to maintain order in occupied territories and the non-refoulement principle governing transfers of detainees. Section 7 concludes with a discussion of the much debated issue of the duty 'to ensure respect' of IHL by others under Common Article 1 of the Geneva Conventions. In Section 8, we turn to IHRL. We first address the important issue of the jurisdiction clauses, which significantly limit the scope of application of human rights treaties in military operations abroad. We then go on to examine situations where the ECHR and other human rights treaties are not directly applicable, but where the assisting state may nevertheless incur responsibility for the human rights violations of its partners. Section 9 examines arms control regimes, focusing first on the prohibition in various weapons treaties (e.g. Chemical Weapons Convention) to 'assist, encourage or induce, in any way, anyone' engaging in prohibited activities, before examining the unique features of the more recently adopted Arms Trade Treaty of 2013.

6

Law on the Inter-State Use of Force (Jus ad Bellum)

6.1. Introduction

One of the cardinal rules of modern international law is the prohibition on the use of force. Historically, states were free to wage war against each other to pursue their strategic interests; and for that purpose, they would frequently form military alliances and coalitions. With the advent of the United Nations, however, the circumstances under which states can lawfully resort to armed force have been significantly limited.[128] Article 2(4) of the UN Charter states:

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

The UN Charter allows for only two exceptions: self-defence against an armed attack and forcible actions authorised by the UN Security Council acting under Chapter VII of the UN Charter.[129] As a matter of

128. Note that the Kellogg-Briand Pact of 1928 was an important precursor to the universal ban on the use of force.
129. Articles 51 and 42 UN Charter.

customary law, the prohibition on the use of force (including its exceptions) also binds states that are not members of the United Nations.[130]

The following Section 6.2 briefly presents some of the most relevant questions relating to the *jus ad bellum* in the context of partnered operations, before considering, in Section 6.3, the extent to which states may incur (direct) international responsibility for indirect (i.e. through assistance to partners) use of force.

6.2. *Jus ad Bellum* in the Context of Partnered Operations

Despite the very few provisions at stake, the terms and limits of the *jus ad bellum* remain hotly contested,[131] and some of the most contentious questions in the field may become relevant in relation to the actions of partners in international military operations. Article 51 of the UN Charter explicitly recognises the right to collective self-defence.[132] In other words, states may render support to repel an armed attack if so requested by the victim state. In such situations, the legality of the resort to force will often depend on whether an armed attack had in fact occurred (or was at least imminent) and whether forcible actions can be taken against non-state armed groups on the territory of third states based on the so-called 'unwilling and unable' doctrine.[133] Some states may also assert the controversial right to use force against another state on humanitarian grounds – without prior UN authorisation – in the face of large-scale atrocities against the civilian population, including

130. ICJ, *Nicaragua* (n 22), paras. 188-201.
131. For an overview of the different legal issues: Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015).
132. Article 51 UN Charter ('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. ...'). See also: Albrecht Randelshofer and Georg Nolte, 'Article 51' in Simma and others (eds.), *The Charter of the United Nations. A Commentary. Vol II* (3rd ed., Oxford University Press 2012), 1397.
133. Elena Chachko and Ashley Deeks, 'Which States Support the "Unwilling and Unable" Test?', blogpost on Lawfare, 10 October 2016, www.lawfareblog.com/which-states-support-unwilling-and-unable-test. See also Marc Schack, 'Resisting Clarity: Scandinavian Ambiguity in the "Unable or Unwilling"-Debate', *90(1) Nordic Journal of International Law* (2020), 31.

the use of particularly reprehensible weapons.[134] Moreover, even where the use of force is explicitly authorised under a UN resolution, states may decide to exceed the terms of those mandates.[135] Another relevant example is military intervention by request, which is excluded from the prohibition enshrined in Article 2(4) of the UN Charter to the extent that a valid invitation has been given by the host state government.[136] Where, however, the status of that government is in doubt or where the intervening forces disregard the terms of the invitation, an issue under the *jus ad bellum* may arise.[137]

6.3. Indirect Use of Force

In relation to partnered operations, the prohibition on the use of force under Article 2(4) of the UN Charter is often applied in conjunction with the general rule on state complicity. Yet, certain forms of indirect use of force are also recognised independently under the *jus ad bellum* itself.[138] The Declaration on Aggression of 1974, for example, specifically lists among acts qualifying as 'an act of aggression':

> *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 ...*[139]

Accordingly, allowing for use of territory by another state may not only be a case of state complicity under Article 16 of ARSIWA as well as a violation of the general due diligence rule,[140] but may also be a direct

134. Anders Henriksen, 'The Legality of Using Force to Deter Chemical Warfare', blogpost on Just Security, 17 April 2018, www.justsecurity.org/55005.
135. Reuters, 'NATO war in Libya Violates U.N. Mandate, Russia Says', 19 April 2011, www.reuters.com/article/us-russia-libya-idUSTRE73I26D20110419. For a more nuanced analysis, see Mahmoud Cherif Bassiouni, *Libya: From Repression to Revolution. A Record of Armed Conflict and International Law Violations, 2011-2013* (Martinus Nijhoff 2013), pp. 223-30.
136. See generally De Wet (n 47).
137. This may be the case with regard to a specific location or time of deployment of foreign forces or a withdrawal of the consent.
138. Randelshofer and Dörr (n 88), pp. 211-13.
139. Article 3(f) UNGA Res. 3314, 14 December 1974 (emphasis added).
140. See further Sections 3.2 and 5.

violation of Article 2(4), which – provided it amounts to an armed attack – triggers the right to self-defence on the part of the victim state.

The 1974 Declaration further defines as 'aggression' certain situations where 'armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State' are sent by or on behalf of a state.[141] In doing so, the 1974 Declaration elaborates on the Friendly Relations Declaration of 1970 with regard to the actions of non-state armed groups:

> *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.*[142]

While the ICJ has acknowledged the customary status of the relevant parts of both declarations,[143] it is noteworthy that the Court only found *some* forms of assistance to non-state armed groups to amount to a use of force:

> *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 inter-*

141. See Article 3(g) of the Declaration, which reads as follows: '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'.
142. UNGA Res. 2625 (XXV) 24 Oct 1970, paras 8-9.
143. ICJ, *Nicaragua* (n 22), paras. 191-95; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgement, ICJ Reports 2005, p. 168, paras. 146, 162 and 300.

> *vention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.*[144]

Nevertheless, the ICJ failed to indicate the decisive criteria for making that assessment in future cases with regard to other forms of assistance, on the spectrum between 'arming' or 'training', on the one end, and 'supply of funds', on the other end.[145] In this context, it is important to consider that the rule of complicity cannot be relied upon to prohibit forms of military assistance to armed groups not covered by the *jus ad bellum* itself. In fact, because armed groups are not directly bound by the prohibition of the use of force, states assisting such groups do not – unlike in the case of state-to-state assistance – commit an act of complicity in that regard.

144. Ibid. para 228, emphasis added.
145. Randelshofer and Dörr (n 88), p. 212.

7

International Humanitarian Law (Jus in Bello)

7.1. Introduction

For centuries, the *jus in bello* has been concerned with the way in which wars are fought, as opposed to the *jus ad bellum* (discussed in the previous section), governing the legality of such wars. Nowadays, *jus in bello* is better known as IHL or the law of armed conflict. This specialised international legal field governs the conduct of the belligerent parties in times of armed conflict and during military occupations, and reflects a careful balance between military necessity and considerations of humanity. The most relevant IHL treaties are the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, as well as a number of specific treaties on weapons and cultural property. While the Geneva Conventions are universally ratified, i.e. by all states, the picture is more mixed for other treaties. For instance, some of the major military powers (including India, Turkey, and the US) have not become a party to Additional Protocols I and II. Nevertheless, most of the relevant IHL rules bind all states as a matter of customary law. Moreover, they apply equally in international armed conflicts and non-international armed conflicts.[146] This is particularly important, considering the extent to

146. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I Rules* (Cambridge University Press 2005), https://ihl-databases.icrc.org/customary-ihl/ (hereinafter, Customary IHL Study). For a more cautious account of applicable customary IHL rules: International Institute of Humanitarian Law, *The Manual*

which the conflict scenarios discussed in this report involve hostilities against non-state armed groups,[147] governed by the law of non-international armed conflict.

There is a strong focus on civilian protection in relation to partnered operations; and the greatest challenges indeed lie in questions concerning targeting and humane treatment.[148] IHL provides for detailed rules on distinction (in relation to persons and objects), proportionality, and feasible precautions in the conduct of hostilities.[149] Blatant disregard for those rules by partners may have legal consequences for others and different interpretations of those rules among coalition members may complicate the legal interoperability. By the same token, inhumane treatment of civilians and persons *hors de combats* (e.g. captured enemy fighters) can be a particular challenge when working with military partners.[150]

In the subsequent sections, we examine some of the key questions concerning the application of IHL in the context of partnered operations. We begin, in Section 7.2, by addressing the issue of when support given to one or more belligerents means that the supporting state becomes a party to the conflict – and thereby possibly turns a non-international conflict into an international armed conflict. In Section 7.3, we examine the duty to maintain order in occupied territories, before turning, in Section 7.4, to the far-reaching IHL obligations concerning the transfer of detainees to partners. Finally, Section 7.5 examines the much-disputed issue of whether Common Article 1 of the Geneva Conventions includes an obligation for states to ensure respect for IHL by others.

on the Law of Non-International Armed Conflict. With Commentary, drafted by Michael Schmitt, Charles Garraway and Yoram Dinstein, Sanremo, 2006, https://www.fd.unl.pt/docentes_docs/ma/jc_MA_26125.pdf (also confirming the trend that most rules of the law of international armed conflict apply equally in non-international armed conflicts).

147. See Section 1.1.
148. See also Dalton and others (n 8).
149. Rules 1-30, Customary IHL Study (n 146).
150. In particular, Rules 87-105, Customary IHL Study (n 146).

7.2. Supporting Belligerents and Conflict Qualification

By and large, IHL only applies in situations of armed conflict. International armed conflicts are triggered by the resort to armed force between two opposing states.[151] Non-international armed conflicts presuppose the existence of an organised armed group involved in sufficiently intensive fighting with another armed group or state armed forces.[152] It has also been suggested that a state may become a party to an ongoing conflict due to the support it provides to one side, without itself being involved in actual fighting.[153] This is particularly relevant in a non-international armed conflict where a state assists the host state (e.g. Mali or Somalia) or a coalition of states (e.g. anti-ISIS alliance) against a non-state armed group.[154] Such support may range from air-to-air refuelling of combat aircraft, direct arms delivery into the combat zone as well as providing actionable intelligence and target information to training and mentoring in the field and handling captured enemy forces.

This support-based approach has become the official position of the ICRC.[155] What is decisive is not the form of support but its close relationship in space and time to the conduct of hostilities. Unlike general arms exports, direct supply of arms into the combat zone would clearly cross that threshold and turn the supporting state into a co-belligerent. The support-based test has also found approval among many experts at a Chatham House discussion in 2014,[156] with some participants, however, expressing concern over the unclear legal basis of this new test.[157] In the

151. ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70 ('whenever there is a resort to armed force between States'). Moreover, military occupations constitute another ground for the application of the law of international armed conflict.
152. ICTY, *Prosecutor v. Đorđević*, Judgement, 23 February 2011, Case no. IT-05-87/1, paras. 1523-26.
153. Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 95 *International Review of the Red Cross* (2013) 561, pp. 583-87.
154. In particular, as in the case of pro-Kurdish forces in Syria, support may also be rendered to another non-state armed group.
155. ICRC Commentary on GC I (n 89), Article 3, paras. 445-46.
156. Chatham House, Discussion Summary: The Applicability and Application of International Humanitarian Law to Multinational Forces, 20 November 2014, https://www.chathamhouse.org/sites/default/files/field/field_document/20141120IHLMultinationalForces.pdf.
157. Ibid. pp. 5-7. Note, however, that standard IHL textbooks have consistently supported a corresponding standard for international armed conflicts, governed by the rules of neutral-

absence of any explicit approval by states, it is difficult to assess the current legal status of the support-based test. However, the silence of states on this matter should perhaps not be overrated. In fact, in case of disagreement, states would presumably have made their positions known when the ICRC issued its new commentary in 2016. In contrast to other parts of the commentary which have been subject of severe criticism by states,[158] the support-based approach does not expand the scope of obligations under IHL. What it does is to re-align the balance between belligerents, primarily for the purpose of IHL targeting rules. Thus, if a state becomes a party to a pre-existing armed conflict due to its support for one of the belligerents, its own armed forces also become liable to lawful attacks by enemy forces.[159]

The situation changes if the intervening state supports an armed group in its fight against the government forces of the territorial state. Any direct fighting between the two states would invariably amount to an international armed conflict. Whether the pre-existing conflict becomes international depends on the relationship between the intervening state and the group. The overall control test, developed by the ICTY for such an assessment, implies a significantly lower threshold than the effective control test previously employed by the ICJ.[160] Notably, however, the ICJ in the *Genocide* case rejected the overall control test as an attribution test, but left open the possibility to use the test for classifying an armed conflict.[161] Accordingly, exercising overall control over an armed group may turn the pre-existing non-international armed conflict into an international one. Without more (i.e. effective control), however, the acts of the armed group would *not* be attributable to the intervening state.

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ity: Christopher Greenwood, 'Scope of Application of Humanitarian Law', in: Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd ed., Oxford University Press 2008), 45-78, p. 58, para. 214 ('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').

158. See, in particular, Section 7.5 on the duty to ensure respect by others.
159. The supporting state would also be bound by the IHL targeting rules during all offensive and defensive measures.
160. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, paras. 88-145.
161. ICJ, *Bosnian Genocide* (n 31), paras. 404-406. See also n 31 above.

7.3. Duty to Maintain Order in Occupied Territories

Occupying powers have particularly strict obligations in the occupied territories.[162] Article 43 of the Hague Regulations of 1907 states that:

> *The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

The ICJ considered this obligation in *Armed Activities*, which involved the Ugandan military presence in the Eastern part of the DRC. The Court held that:

> *This obligation comprised the duty to secure respect for the applicable rules of ... international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.*

The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of ... international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.[163]

The brief occupation of Iraq in 2003-2004 has been the only recent case of a multinational occupation. The designated occupying powers, the US and the UK,[164] were thus obliged to ensure public order and to prevent abuses by others, including their international and local partners. However, in more recent scenarios of partnered operations, the law

162. See, in general, ICRC, Occupation and Other Forms of Administration of Foreign Territory, 2012, www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf.
163. ICJ, *Armed Activities* (n 143), paras. 178-79, emphasis added.
164. Whether there were other states (besides the US and the UK) that qualified as occupying powers in Iraq at the time and in which exact areas they had to restore and ensure public order and safety are questions that have not been answered conclusively.

of occupation was not formally applicable due to the consensual nature of the presence of foreign troops.

7.4. Transfer of Detainees and Non-Refoulement

IHL provides for far-reaching obligations in relation to the transfer of detainees. According to Article 12(2) of Geneva Convention III:

> *Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. ...*[165]

This implies a positive obligation to make detailed assessments prior to the transfer. Moreover, even after a successful transfer, the transferring state may be required to 'take effective measures' or to 'request the return' of the prisoner if the new detaining power fails to uphold the required standards.[166] Concluding an agreement with the other side can be an effective tool in that context:

> *The specificity of the agreement, its binding nature, and the inclusion of an effective post-transfer monitoring mechanism, such as provisions governing access of the transferring Power, may contribute to demonstrating the willingness of the receiving Power to apply the Convention.*[167]

State practice has extended this underlying non-refoulement principle to the transfer of other detainees, including in non-international armed conflicts.[168] This development is relatively unproblematic and has been recognised by the so-called *Copenhagen Principles on the Handling of*

165. The same obligation applies to transfers of aliens in the territory of a party to an international armed conflict, as enshrined in Article 45(3) of GC IV.
166. Article 12(3) of GC III.
167. ICRC, *Commentary on the Third Geneva Convention* (Cambridge University Press 2020), https://ihl-databases.icrc.org/ihl/full/GCIII-commentary (hereinafter, ICRC Commentary on GC III), Article 12, para 1537.
168. Ibid. Article 3, paras. 708-16. Cordula Droege, 'Transfers of Detainees – Legal Framework, Non-Refoulement and Contemporary Challenges' 871 *International Review of the Red Cross*

Detainees in International Military Operations,[169] including the potential role of the ICRC in post-transfer monitoring mechanisms.[170] The real challenge in applying these standards in multinational military operations is often the identification of the detaining power prior to the transfer; in other words, who detained and held the detainee before the transfer took place? While acknowledging this challenge, the ICRC makes clear that there can usually only be one detaining power.[171]

Notably, as part of the current Operation Barkhane in the Sahel region, Denmark has more than 40 times provided airlifts by helicopter to transport detainees of other contributing nations. This did not make Denmark officially a detaining power. Nevertheless, on one occasion of interaction with a partner, Danish troops have seemingly found it pertinent to underline the duty to ensure treatment in compliance with IHL.[172]

(2008) 669; Emanuela-Chiara Gillard, 'There's no Nlace like Home: States' Obligations in Relation to Transfers of Persons', 871 *International Review of the Red Cross* (2008) 703.

169. Copenhagen Process on the Handling of Detainees in International Military Operations – Principles and Guidelines, 19 October 2012, http://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf, para 15 ('A State or international organisation is to only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law').
170. Ibid. para 15.4.
171. ICRC Commentary on GC III (n 167), paras. 1522-23.
172. See further the answer of Defence Minister, Trine Bramsen, to question No. 97 (Forsvarsudvalget 2020/21) posed by member of the Danish Parliament, Eva Flyvholm (available in Danish at www.ft.dk/samling/20201/almdel/fou/spm/97/svar/1733294/2314792.pdf). The relevant paragraph reads: 'Danske styrker har efter det oplyste ikke selv foretaget frihedsberøvelser i Operation Barkhane. Forsvarskommandoen har modtaget rapport om i alt 42 tilfælde, hvor transporthelikopterbidraget har transporteret frihedsberøvede under anden nations ansvar. Ved en enkelt lejlighed har dette givet anledning til bemærkninger i forhold til adfærd i overensstemmelse med den humanitære folkeret'.

7.5. Duty to Ensure Respect by Others

Common Article 1 of the Geneva Conventions (1949) requires states to 'ensure respect' for the Geneva Conventions.[173] The ICRC has consistently held that this duty has an *external* dimension, aimed at the respect by *others*.[174] According to the updated ICRC Commentary of the Geneva Conventions, states have a duty to ensure respect for IHL by *other* states and non-state entities involved in an armed conflict:

> *The interpretation of common Article 1, and in particular the expression "ensure respect", has raised a variety of questions over the last decades. In general, two approaches have been taken. One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties.*[175]

The duty to ensure respect applies to states regardless of the nature of the armed conflict and their involvement therein as a co-belligerent. It includes a *negative* obligation to refrain from encouraging or aiding and assisting in IHL violations:[176]

> *In the event of multinational operations, common Article 1 thus requires High Contracting Parties to opt out of a specific operation if there is an expectation, based on facts or knowledge of past patterns, that it would violate the Conventions, as this would constitute aiding or assisting violations.*
>
> *An illustration of a negative obligation can be made in the context of arms transfers. Common Article 1 requires High Contracting Parties*

173. The same provision is included in Article 1(1) of Additional Protocol I.
174. See also Customary IHL Study (n 146), Rule 144 (claiming that this principle is also applicable to the broader field of customary IHL).
175. ICRC Commentary on GC I (n 89), Article 1, para. 120.
176. Ibid. para. 154.

> *to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.*[177]

Beyond any form of assistance, states – according to the ICRC – also have a *positive* obligation to take feasible measures in order to influence the parties to the conflict towards full compliance with IHL.[178] The positive obligation is an obligation of means rather than of result; in other words, states are free to choose the measures reasonably in their power to prevent violations in case of a 'foreseeable risk' and to stop ongoing violations of IHL.[179] This is particularly relevant in conflict scenarios with military partners:

> *The duty to ensure respect for the Geneva Conventions is particularly strong in the case of a* partner in a joint operation*, even more so as this case is closely related to the negative duty neither to encourage nor to aid or assist in violations of the Conventions. The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a* unique position to influence *the behaviour of those forces, and thus to ensure respect for the Conventions*.[180]

In sum, the ICRC's interpretation of Common Article 1 provides for far-reaching obligations. First of all, it is important to note that the *negative* obligation under Common Article 1 operates at a different level than the general rule of state complicity under Article 16 of ARSIWA. In particular, the former also covers encouragement and is not subject to

177. Ibid. paras. 161-62, emphasis added and numbering removed.
178. Ibid. para. 154.
179. Ibid. paras. 164-66.
180. Ibid. para. 167. See also para. 181 (listing some individual measures that could be used vis-à-vis military partners: 'conditioning joint operations on a coalition partner's compliance with its obligations under the Conventions and/or planning operations jointly in order to prevent such violations'; 'intervening directly with commanders in case of violations, for example an imminent unlawful attack against civilians, by a coalition partner'; 'offering legal assistance to the Parties to the conflict and/or supporting assistance provided by others, such as instruction or training'; 'conditioning, limiting or refusing arms transfers').

a strict mental requirement.[181] In other words, even constructive knowledge may suffice under the negative obligation following from Common Article 1. At the same time, the *positive* obligation is significantly broader than Article 41 of ARSIWA (governing serious violations of peremptory norms)[182] in that it covers all possible IHL violations and requires states even to take individual rather than collective measures. What is most significant, however, is the interplay between negative and positive obligations in one comprehensive rule, which allows for a dynamic application to military partnerships, with different forms of assistance and varying degrees of influence.

The publication of the new ICRC Commentary has led to a severe pushback. Brian Egan, then Legal Adviser to the US Department of State, said in a speech in 2016 that:

> *Some have argued that the obligation in Common Article 1 of the Geneva Conventions to "ensure respect" for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners' compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners.*[183]

More elaborate criticisms can be found in recently published academic articles by Verity Robson,[184] Legal Counsellor at the Permanent Mission of the United Kingdom in Geneva, as well as by international legal

181. On the notion of 'aid or assistance' and the 'mental element' in Article 16 of ARSIWA, see Sections 3.2 and 3.3 respectively.
182. See further Section 4.
183. Brian Egan, Legal Advisor, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law, Washington DC, 1 April 2016, www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil.
184. Verity Robson, 'The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions', 25 *Journal of Conflict and Security Law* (2020) 101 (albeit writing in her personal capacity).

scholars Michael Schmitt and Sean Watts.[185] Earlier criticism was largely concerned with the scope and reach of the positive obligation under the duty to ensure respect,[186] which continues to be critically debated.[187] By contrast, Robson as well as Schmitt and Watts question the whole idea of Common Article 1 having an external dimension at all.[188]

This pushback is somewhat surprising in view of preceding pronouncements by the states involved. In 1971, the ICRC circulated a questionnaire in which it asked the state parties to the Geneva Conventions, among others, about the meaning of Common Article 1 and the possibility of collective enforcement by all states.[189] Remarkably, both the US and the UK implicitly endorsed the ICRC position in their official responses, alongside a number of other states.[190] The US response read as follows:

> *On the other hand, [Common Article 1] was also intended to put upon each of the Contracting States a commitment to insist that the Conventions be respected by other Parties. In our view, States Parties to the Con-*

185. Michael Schmitt and Sean Watts, 'Common Article 1 and the Duty to "Ensure Respect"', 96 *International Law Studies* (2020) 674.
186. James Crawford, 'Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories' (2012), www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf, pp. 15-18; Robert Kolb, 'Commentaires iconoclastes sur l'obligation de faire respecter le droit international humanitaire selon l'article 1 commun des Conventions de Genève de 1949', 46 *Revue belge de droit international* (2013) 513; Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', 21 *European Journal of International Law* (2010) 125; Frits Karlshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', 2 *Yearbook of International Humanitarian Law* (1999) 3.
187. Ryan Goodman, 'Two U.S. Positions on the Duty to Ensure Respect for the Geneva Conventions', blogpost on Just Security, 22 September 2016, www.justsecurity.org/33166; Monica Hakimi, 'US Responsibility Arising From Russian Violations of the Law of Armed Conflict', blogpost on Just Security, 21 September 2016, www.justsecurity.org/33075.
188. Robson (n 184); Schmitt and Watts (n 185). Instead, they hold that the negative obligation derives from the law of treaties and the general rules of state responsibility rather than from IHL itself.
189. ICRC, *Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949*, Geneva, 1973 (featuring the statements of all 32 states that provided responses to the questionnaire).
190. Ibid. p. 20 (Federal Republic of Germany), p. 21 (Belgium), p. 23 (Republic of Korea), p. 26 (Jordan), p. 27 (Malaysia), p. 27-28 (Monaco) and p. 25 (Israel).

> *ventions are under a duty to exercise their moral suasion and influence in order to induce Parties to a conflict to respect the Conventions.*[191]

The British statement acknowledged that state parties were at least obliged to take individual actions:

> *Whilst in HMG's view common Article 1 to the Conventions does not preclude States Parties from taking collective action to ensure respect for the Conventions, it is not so clear whether it imposes an obligation on them to take collective, as opposed to unilateral, action to this end ...*[192]

Among the Nordic states, Norway came closest to supporting the ICRC position,[193] while responses from Denmark, Finland and Sweden were more reserved in line with those of other states.[194]

Since 1971, states have progressively adopted the position that Common Article 1 entails a duty to ensure respect by others. As Zwanenburg has shown in a recent study,[195] they have done so through numerous resolutions and joint declarations adopted at the UN level, as part of regional organisations, and in other international settings.[196] While a large part of that practice concerns the Israel-Palestine conflict,[197] there is also relevant practice related to other conflicts.[198]

It is important to highlight that the ICRC's position on Common Article 1 finds at least some support in the case-law of the ICJ. In the *Nicaragua* case, the ICJ had determined that the armed conflict between

191. Ibid. p 24-25, emphasis added.
192. Ibid. p. 30, emphasis added.
193. Ibid. p. 28-29.
194. Ibid. p. 23-24 (Denmark), p. 25 (Finland) and p. 31 (Sweden).
195. Marten Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation', 97 *International Law Studies* (2021) 621 (arguing that this practice, involving the majority of states, can at least be used as a supplementary means of treaty interpretation, cf. Article 32 VCLT).
196. This practice also includes individual statements by states, e.g. adopted in a bilateral context with third states and other actors.
197. For instance: Security Council Resolution 681, 20 December 1990, para. 5 ('High Contracting Parties to the [Fourth Geneva] Convention to *ensure respect by Israel*, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof', emphasis added), which had received the affirmative vote of the US, the UK and Canada, among others.
198. Zwanenburg (n 195), pp. 639-41.

Nicaragua and the Contras was non-international in nature despite the US support for the latter.[199] Even though it was a non-belligerent in that conflict, the US was nevertheless considered to have an obligation under Common Article 1 to ensure respect and therefore to refrain from encouraging violations of Common Article 3 by the Contras.[200] Moreover, in the *Wall* Advisory Opinion, the Court found that it follows from Common Article 1 'that every State party to [the Geneva Conventions], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.[201] While the Court could no doubt have been more explicit as to the meaning and scope, it does clearly identify the duty to ensure respect by others as an integral part of the Conventions rather than the general rules of state responsibility.

Notably, domestic court proceedings have been rather unhelpful in clarifying the scope of the duty to ensure respect for IHL. In the *Ramstein Air Base* case, the German courts did not specifically discuss Germany's responsibility under Common Article 1 or its customary law equivalent.[202] Likewise, the High Court of Eastern Denmark managed to avoid the issue in the *Green Desert* case (alongside other relevant international law issues).[203] In the case of *Daniel Turp v Minister of Foreign Affairs,* concerning the legality of exporting lightly armed vehicles from Canada to Saudi Arabia in view of their potential use in Yemen, the Canadian Federal Court even explicitly rejected the ICRC interpretation of Common Article 1. Rather than denying the external dimension of Common Article 1 as such, the Court held that it did not apply in non-international armed conflicts, nor to states not party to the armed conflict.[204]

199. ICJ, *Nicaragua* (n 22), para. 219 (finding that the US was involved in a parallel international armed conflict with Nicaragua).
200. Ibid. para. 220.
201. ICJ, *Wall* (n 97), para. 158.
202. Oberverwaltungsgericht Nordrhein-Westfalen, *Ramstein Air Base*, 4 A1361/15, 19 March 2019, www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/4_A_1361_15_Urteil_20190319.html, paras. 573-83 (involving US drone operations in Yemen, conducted through Ramstein Air Base in Germany).
203. High Court of Eastern Denmark, *Operation Green Desert* (n 3). See also Kessing (n 4), p. 19 (criticising this omission). On the facts of the *Green Desert* case, see also Section 1.
204. Federal Court of Canada, *Daniel Turp v Minister of Foreign Affairs*, Judgement, 24 January 2017, 2017 FC 84, http://canlii.ca/t/gx77j. Upheld on appeal: Federal Court of Appeal, Daniel Turp v Minister of Foreign Affairs, Judgement, 6 July 2018, 2018 FCA 133 (Can-

The quality of the reasoning in this judgment is, however, open to challenge.[205] Moreover, the Court did nothing to explain why it chose to go against the jurisprudence established by the ICJ in *Nicaragua* and *Wall*.

While the issue remains an object of heated debate, the ICRC's contention that IHL provides for a direct obligation of states to ensure respect for IHL by others, especially their military partners, seems to find significant support in the jurisprudence of the ICJ as well as in state practice.[206] Nevertheless, uncertainties remain, especially on the exact content of the obligations arising from Common Article 1, which merits continuous scholarly attention and constructive engagement by relevant stakeholders.[207]

LII), [2019] 1 FCR 198, http://canlii.ca/t/hw4lf; Supreme Court of Canada, *Daniel Turp v Minister of Foreign Affairs*, Judgement, 11 April 2019, 2019 CanLII 29766 (SCC), http://canlii.ca/t/hzpgc.

205. In support of its position, the court referenced an academic (Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', 12(3) *Journal of Conflict and Security Law* (2007) 359), but seemingly misunderstood the author. See further Cornelius Wiesener and Astrid Kjeldgaard-Pedersen, 'Hvornår er stater ansvarlige for folkeretsstridige handlinger begået af deres partnere i militære operationer? 1 *Juristen* (2021) 35, p. 42.

206. See also: Knut Doermann and Jose Serralvo, 'Common Article I to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations', 895/896 *International Review of the Red Cross* (2015) 6; Robin Geiss, 'Common Article 1 of the Geneva Conventions: scope and content of the obligation to "ensure respect" – "narrow but deep" or "wide and shallow"?' in Heike Krieger (ed.) *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 417.

207. Controversially, states may be discouraged from exerting any influence over their partners towards better compliance as greater influence may increase the range of positive obligations, while at the same time implicating their responsibility under the negative obligations of Common Article 1. See also John Reid, 'Ensuring Respect: The Role of State Practice in Interpreting the Geneva Conventions', blogpost on ILA Reporter, 9 November 2016, http://ilareporter.org.au/2016/11/ensuring-respect-the-role-of-state-practice-in-interpreting-the-geneva-conventions-john-reid/.

8

International Human Rights Law

8.1. Introduction

International human rights law (IHRL) has its origins in domestic constitutional law and is essentially premised on the vertical relationship between the state and the individual. It is thus a relatively young part of international law, which saw most of its development after the adoption of the *Universal Declaration of Human Rights* in 1948.[208] The first phase of human rights treaties codified what is widely known as civil and political rights, which are meant to shield an individual's fundamental freedoms and liberties (such as their right to life, to physical integrity as well as liberty) from undue and arbitrary state interference; but they also entail positive obligations. While the role of economic, social and cultural rights should not be dismissed, including in times of armed conflict,[209] it is the category of civil and political rights which will be the main focus for this study. The vast majority of states are party to the International Covenant on Civil and Political Rights (ICCPR, adopted in 1966). In addition, regional human rights systems have emerged with their own human rights instruments, especially the ECHR adopted in 1950, which is of course particularly relevant for Denmark and its European partners. Despite some differences, these treaties and the case-law of their courts and monitoring bodies share a relatively large core of

208. UNGA, Res. 217 A (III), Universal Declaration of Human Rights, 10 December 1948.
209. See, for instance: Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014).

rights, which set the legal framework for law-enforcement by police and military forces of partner countries. In particular, the peacetime right to life restricts the use of lethal force to situations of self-defence and defence of others, while torture and other forms of inhumane treatment (e.g. in detention) are categorically prohibited. Even in armed conflict situations, IHRL continues to apply across the entire peace-war spectrum by governing, for instance, law-enforcement situations distinct from active hostilities.[210]

IHRL provides for both negative obligations to refrain from any arbitrary interference with a right; and positive obligations to protect such rights from abuse by third parties. While this ensures a comprehensive framework of protection at home, the picture is more complex when states act abroad, for example in international military operations.

The following Section 8.2 examines the general issue the extra-territorial application of human rights treaties due to a member states' exercise of control abroad. Subsequently, Section 8.3 outlines the disparate practice of the ECtHR and the UN Human Rights Committee (overseeing compliance with the ICCPR) concerning extra-territorial application of the treaties in specific relation to assistance provided to partner's human rights violations.

8.2. Exercise of Control Abroad

The question of the extra-territorial application of human rights treaties remains particularly challenging due to so-called 'jurisdiction clauses' that the ECHR, the ICCPR, and most others contain. Article 1 of the ECHR, for example, provides that the 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' defined in the Convention'.[211] The ECtHR has consistently maintained the primarily territorial nature of the term 'jurisdiction'.[212] Nonetheless,

210. See more generally Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011).
211. See similarly Article 2 ICCPR. By contrast, Article 1 of the Genocide Convention (1948) requires states to prevent genocide without any specific spatial limitation.
212. ECtHR, *Banković v. Belgium,* Decision, 12 December 2001, Application no. 52207/99, para. 61; ECtHR, *Georgia v. Russia II,* Judgment, 21 January 2021, Application no.

it has accepted the existence of extra-territorial jurisdiction in a number of exceptional situations.

For the Court and other human rights bodies, states are bound by their human rights treaty obligations when they exercise control abroad. Hence, they are expected to ensure the human rights of persons that find themselves in the physical custody of or in an area controlled by that state abroad.[213] Where this is the case,[214] the state has to take all necessary measures to protect these rights from possible abuse by others, including the state's partners.[215] Hence, Danish soldiers acting abroad may not transfer detainees to the host state authorities or to other partners if there is a real risk of torture or inhuman treatment (the non-refoulement principle).[216] In this regard, IHRL has significant similarities with the non-refoulement principle under IHL.[217] It also entails a self-standing duty to make an assessment of the risk that detainees will be subjected to human rights abuses upon transfer to a partner. For mitigating such

38263/08, para. 81.

213. ECtHR, *Al-Skeini v. United Kingdom*, Judgement, 7 July 2011, Application no. 55721/07, paras. 133-140; HRC, General Comment 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 29 March 2004, CCPR/C/21/Rev 1/Add 13, para. 10 ('[A] State party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party').
214. In reality, it may often be difficult to determine whether the required level of control applies in the contexts of international or partnered operations, where states often share control over a compound or a facility with other states or where they embark on joint patrols to detain possible suspects.
215. Another relevant case is ECtHR, *El-Masri v. Macedonia*, Judgement, 13 December 2012, Application no. 39630/09. The case involved the handover of the applicant by local security forces in Macedonia to US agents and his subsequent transfer to and ill-treatment in Afghanistan as part of the CIA rendition programme. The Court found that Macedonia had not only failed to comply with its positive obligations, but had even 'actively facilitated the subsequent detention' (para. 239). Hence, the Court found a direct violation of the ECHR by Macedonia. The Court apparently tried to couch complicit conduct within the binary language of positive and negative obligations under the ECHR. Similarly, see Milanovic (n 11), pp. 357-62 (showing that the complicity analogy became even more apparent in subsequent CIA rendition cases). Unlike in the case of state complicity under Article 16 of ARSIWA (see Section 3.4), it is of no relevance whether the perpetrator of the abuse (i.e. third state) was acting in breach of its own international law obligations.
216. ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Judgment, 2 March 2010, Application no. 61498/08, paras. 100-45 (involving the transfer of detainees – previously held in a British detention facility in Iraq – to Iraqi authorities without prior assurances that they would not face the death penalty or other forms of inhumane treatment).
217. Section 7.4.

potential risks, diplomatic assurances are particularly relevant. The ECtHR has found that the sending state may under certain conditions live up to its non-refoulement obligations if the receiving state assures that the human rights of the detainees will be safeguarded. For that purpose, the Court has drawn up a detailed list of factors to assess the reliability of the diplomatic assurance in question, including the formal legal status as well as the content and terms of those diplomatic assurances and the availability of judicial oversight and monitoring mechanisms.[218]

8.3. Assistance to Partners

Many situations in which states provide assistance to other states appear to fall outside the scope of the ECHR and other human rights treaties due to an insufficient level of control abroad. That will, for example, be the case where states only provide remote forms of assistance to their partners, e.g. intelligence sharing, arms delivery or logistical assistance.[219] In such situations, however, the rule on state complicity may apply. In

218. ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Judgment, 17 January 2012, Application no. 8139/09, para. 189 ('whether the terms of the assurances have been disclosed to the Court; whether the assurances are specific or are general and vague; who has given the assurances and whether that person can bind the receiving State; if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them; whether the assurances concerns treatment which is legal or illegal in the receiving State; whether they have been given by a Contracting State; the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances; whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers; whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible; whether the applicant has previously been ill-treated in the receiving State; and whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State', numbering removed).

219. Note that an additional 'public powers' model may also be relevant in situations where the high control standards (over territory or persons) are not met due to the involvement of different actors (e.g. host state or other partners), ECtHR, *Al-Skeini* (n 213), para. 135. Yet, this model only covers acts directly attributable to the state in question, not omissions; in other words, it does not apply to a state's failures to prevent abuses by others, including its partners. Hence, no jurisdiction and thus no positive obligations could possibly arise in relation to misconduct by others under the public powers model.

other words, even if a state is not directly bound by its IHRL obligations abroad, that state may nevertheless incur international responsibility under Article 16 of ARSIWA for contributing significant assistance to the commission of IHRL violations by a partner state.[220] Importantly, however, victims cannot bring a claim before a human rights body, such as the ECtHR. In order to fill this 'responsibility gap', Miles Jackson has therefore called for a broadening of the concept of jurisdiction under the ECHR to include cases of state complicity, which are not otherwise covered.[221] It is, however, unlikely that the Court will heed this call in the near future. In fact, many other relevant situations are not covered by the ECHR, according to the Court's own jurisprudence. In the recent judgement of *Georgia v. Russia (II)*, concerning the Russo-Georgian War in 2008, the Court held that the ECHR did not apply during the 'course of active hostilities'.[222] Russia's obligations under the ECHR were only triggered once it had established a military occupation over parts of Georgian territory and in relation to prisoners of war, as well as civilian detainees, captured during the fighting.[223] Hence, the Court remains reluctant to hold states accountable for the acts of their own armed forces involved in active hostilities abroad. Extending the extra-territorial reach of the ECHR even to the acts of military partners – as suggested by Jackson in relation to torture – would be an even greater stretch.

The UN Human Rights Committee has been more willing to extend the ICCPR to military operations abroad. In its General Comment 36 (Right to Life) from 2018, the Committee held that:

> *In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life*

220. See also n 215.
221. Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', 27 *European Journal of International Law* (2016) 817.
222. ECtHR, *Georgia v. Russia (II)*, Judgment, 21 January 2021, Application no. 38263/08, paras. 106-44.
223. Ibid. paras. 145-222 and 223-81, respectively.

> *is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner. States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.*[224]

This means that the negative obligation under the right to life (i.e. not to arbitrarily deprive someone of his/her life) is spatially unrestricted. In other words, Article 6 of the ICCPR applies to the full range of active hostilities, including ground operations, air strikes, and artillery shelling. In this regard, the Committee follows an approach advocated by a significant number of scholars.[225]

Nonetheless, it is unclear what exactly the Committee means by the reference to 'aid and assist' in violations of the right to life by others.[226] On the one hand, it could be read as a demarcation between the extra-territorial reach of the right to life and situations covered by the general rule of complicity (which does not imply an interference with Article 6 ICCPR by the assisting state). On the other hand, it could also be read as a clarification that all forms of state complicity in illegal killings abroad would – due to the 'direct and reasonably foreseeable' impact – fall within the wide scope of the extra-territorial right to life. It seems that the Committee could not agree on this matter and left a case of constructive ambiguity.[227]

224. HRC, 'General Comment 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', CCPR /C/GC/36, 30 October 2018, para. 63, emphasis added.
225. In particular: Marko Milanović, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy* (Oxford University Press 2011). Note, however, that nine western states were very critical of this expansive interpretation, already at the drafting stage: www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx; Daniel Møgster, 'Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR', blogpost on EJIL talk, 27 November 2018, www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/.
226. Notably, the paragraph contains an explicit reference (via endnote) to Article 16 of ARSIWA.
227. Reportedly, the reference to 'aid or assist' (including Article 16 of ARSIWA) was inserted into the text of General Comment 36 at a late stage of the drafting process, following the suggestion from a HRC member. See also Daniel Møgster, 'Indirect Support by States to Non-State Armed Groups under the ECHR and the ICCPR' in Andreas Zimmermann and Norman Weiß (eds.), *Human Rights and International Humanitarian Law: Challenges Ahead* (Elgar, forthcoming 2021).

9

Arms Control Regimes

9.1. Introduction

The use of certain weapons is subject to explicit restrictions as well as full-fledged bans under IHL, both under treaty and customary law.[228] Under some weapons treaties (e.g. on chemical weapons), the prohibitions apply at 'any time', including peace time. As a consequence, those conventions go beyond the scope of IHL and are part of the broader field of arms control regimes. Another significant feature of such treaties is that they do not only prohibit the use of such weapons but also other activities, including assistance to others, which – as discussed in Section 9.2 below – is of particular significance in relation to military partners.

The Arms Trade Treaty (ATT) of 2013 follows a different approach than those treaties banning specific types of weapons in that it primarily covers the transfer of conventional weapons that are not prohibited *per se*. Rather, as explained in Section 9.3, the ATT is concerned with the potential risk that those weapons could be used by the receiving state to commit serious violations of IHL and IHRL.

9.2. Specific Weapons Treaties

The Chemical Weapons Convention, the Anti-Personnel Mine Convention, the Cluster Munitions Convention and the Nuclear Weapons

228. See generally: William Boothby, *Weapons and the Law of Armed Conflict* (2nd ed, Oxford University Press 2016).

Convention all prohibit the use, development, production, acquisition, stockpiling, retention, and transfer of such weapons. Moreover, state parties may never 'assist, encourage or induce' anyone to engage in such prohibited activities.[229] According to Lanovoy, those provisions are an expression of the rules on state complicity under the specific arms control regime.[230] While there is, certainly, some overlap with Article 16 of ARSIWA, the analysis is open to question. The arms control treaties, for example, also include 'encourage or induce', which is not covered by the concept of state complicity. More importantly, the arms control treaties prohibit assistance rendered to states that are not a party to those specific treaties as well as to non-state actors, which cannot accede to those treaties.[231] For instance, the US is not a party to the Anti-Personnel Mine Convention. Therefore, partners of the US cannot incur responsibility for state complicity in relation to this Convention because of the lack of a breach of international law on the part of the assisted state.[232] It thus seems difficult to draw any conclusions from the meaning of the term 'assist' for the general rule of complicity and *vice versa*. In fact, the level of assistance and knowledge required is lower under the specific weapons treaties than under state complicity, enshrined in Article 16 of ARSIWA.[233]

Remarkably, in view of the difficulties that the non-assistance clause may mean for cooperation with other states, the Cluster Munitions Convention specifically allows state parties to 'engage in military co-

229. Article 1, respectively. The Biological Weapons Convention of 1972 contains corresponding prohibitions in Articles I-III.
230. Lanovoy (n 12), pp. 186-93.
231. See, in contrast, Section 3.4 on the 'double obligation requirement' in Article 16 of ARSIWA.
232. Notably, however, if the weapon is used during an armed conflict and subject to a specific ban – as in the case of chemical weapons, Rule 74, Customary IHL Study (n 146) – there may be a case of state complicity, alongside a possible breach of the duty to ensure respect for IHL. See further Section 3.
233. Walter Krutzsch, Eric Myjer and Ralf Trapp, *The Chemical Weapons Convention. A Commentary* (Oxford University Press 2014), p. 17 ('can be given by material or intellectual support ... but also financial resources, technological-scientific know-how or provision of specialised personnel, military instructions, etc. to anybody who is resolved to commit such prohibited activity or by support in the concealment of such activities'); Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons. A Commentary* (Oxford University Press 2019), pp. 158-67.

operation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.'[234]

In that case, however, state parties must refrain from the use of cluster munitions and may not 'expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control'.[235] Moreover, they shall at any time encourage those states to become a party to the Convention.[236] Understandably, this so-called 'interoperability clause' is controversial.[237]

9.3. Arms Trade Treaty

Adopted in 2013, the ATT provides an additional layer of responsibility.[238] The ATT entered into force in 2014, and so far it has 110 state parties, including the Nordic states and most Western countries, with the notable exception of the US.[239] Among other activities, the ATT prohibits the transfer of conventional arms, ammunition or parts thereof if the exporting state has 'knowledge at the time of authorization that the arms or items would be used' in the commission of genocide, crimes against humanity and war crimes.[240] In addition, the ATT requires states to *assess* the potential that such arms and items could be used to commit or facilitate serious violations of IHL and IHRL.[241] Where such risks exist, states must consider specific mitigating measures, including con-

234. Article 21(3). For instance, the US, Estonia, Latvia, Finland, Poland, Turkey, and Greece are not bound by that convention.
235. Article 21(4).
236. Article 21(1).
237. See also: ICRC, Convention on Cluster Munitions. Interoperability and National Legislation, 12 September 2012, https://www.icrc.org/en/doc/assets/files/2012/cluster-munitions-interoperability-icrc-2012-09-12.pdf. Note that a similar clause has not been included into the Nuclear Weapons Convention of 2017. No NATO member state has become a party to the latter convention, while Ireland and Austria are the only EU member states to have ratified it.
238. See generally: Andrew Clapham and others, *The Arms Trade Treaty: A Commentary* (Oxford University Press 2016).
239. The US is only a signatory and notified on 18 July 2019 that it no longer intends to become a party to the ATT. For further information: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en.
240. Article 6(3) of the ATT, emphasis added.
241. Article 7(1) of the ATT, which also mentions the potential risk of undermining peace and security, referring largely to the field of *jus ad bellum*.

fidence-building measures or joint programmes.[242] If an overriding risk persists, the transfer may not take place.[243]

The case of *Campaign Against Arms Trade v. Secretary of State for International Trade* before the England and Wales Court of Appeal is particularly instructive in clarifying the assessment procedure required, among others, under the ATT.[244] The case concerned the transfer of military equipment to Saudi Arabia. The Campaign Against Arms Trade claimed that the issuing of an export licence by the British Secretary of State for International Trade was in breach of UK legislation on arms exports, implementing (among others) the obligations under the ATT, to which the UK has been a party since 2014. On appeal from the High Court, the Court of Appeal revoked the grant of the export licence on 26 June 2019. It found that the government had erred in not considering earlier IHL violations by the Saudi-led coalition in Yemen in its mandatory risk assessment.[245] In fact, the UK government had largely relied on pronouncements by Saudi diplomats concerning the respect of IHL and human rights law rather than allegations of past violations.[246] Nevertheless, the Court of Appeal left open what the outcome of the assessment should have been.[247] This cautious interpretation of the risk assessment requirement leaves the government with a wide discretion to determine the terms of its assessments, both for the case at hand (i.e. the export to Saudi Arabia) and future arms exports to other countries.[248]

Overall, the ATT covers an important part of the assistance that states may provide to partners in international military operations and beyond. As it extends only to conventional arms and items, the ATT does not restrict the provision of facilities (e.g. landing strips or ports), intel-

242. Article 7(2) of the ATT.
243. Article 7(3) of the ATT.
244. England and Wales Court of Appeal, *Campaign Against the Arms Trade v. Secretary of State for International Trade*, Judgment, 20 June 2019, [2019] EWCA Civ 1020, http://www.judiciary.uk/wp-content/uploads/2019/06/CAAT-v-Secretary-of-State-and-Others-Open-12-June-2019.pdf.
245. Ibid. paras. 138-45 and 167.
246. Ibid. paras. 75, 132-144.
247. Ibid. paras. 144-45.
248. In the case at hand, the government concluded in the review ordered by the court that any violations of international law on the part of Saudi Arabia were merely isolated incidents. This allowed the UK government to re-issue export licenses. See also https://caat.org.uk/homepage/stop-arming-saudi-arabia/caats-legal-challenge.

ligence and targeting information or other forms of support that may potentially contribute to the commission of IHL and IHRL violations by partners. For those forms of assistance, the general rule of complicity enshrined in Article 16 of ARSIWA remains particularly relevant.

10

Conclusions and Recommendations

A central point that clearly emerges from the analyses presented in this report is that Danish forces should not only be mindful of the political risk of damaging Denmark's reputation by engaging in collaboration with partners who do not show adequate regard for compliance with international law. Danish forces must also be acutely aware that providing various kinds of assistance to partners in many different mission scenarios may entail direct legal consequences for Denmark in the form of international liability.

The assessment of international legal rules governing a specific mission scenario involving Danish forces and a partner is often highly complex and implicates a range of provisions emanating from general international law as well as specialised international legal regimes. A key take-away from this report, however, is the importance of treating the general and the special complicity rules separately. While mindful of the inherent difficulties when it comes to the categorisation of individual rules, we uphold the distinction between 'general' and 'special' rules throughout report. We believe that there are valid legal arguments for applying different standards within different specialised regimes – with the general rules as the 'fall back' framework. We do not mean to imply that there can be no cross-fertilisation between the different regimes. However, without consistent state practice to that effect, a rule and its related practice originating from a specialised regime cannot crystallise into or modify an existing general rule of international law. In our view, at the current stage of the development of international law, the special

rules on responsibility for the misconduct of partners must be distinguished from each other as well as from the general rules.

In keeping with this conceptual distinction, Part I examined the relevant rules of general application, largely based on ARSIWA drafted by the ILC. Chief among them is the general rule of state complicity, codified in Article 16 of ARSIWA. Article 16 may come into play in case of limited forms of assistance provided that there is a clear factual link between the support given and the violation in question, and provided that the mental requirement in the form of knowledge and intent is fulfilled. Notably, however, intent will usually operate as a corollary of knowledge rather than a separate requirement, and the crux is thus the meaning of 'knowledge of the circumstances of the internationally wrongful act' pursuant to Article 16. While 'actual prior knowledge' is (naturally) included, 'constructive knowledge' (also referred to as the 'should have known' standard) is – according to the predominant view – insufficient to establish state complicity. There is, in other words, no general duty to make assessments of the risk that one's partner will violate international law. Yet, such assessments may nevertheless serve as an important tool for assisting states wishing to rebut a claim of 'wilful blindness', which *is* generally perceived as sufficient to establish 'knowledge' under Article 16. In particular in situations of previously reported IHL and IHRL violations by the assisted state, the assisting state may thus be required under Article 16 to make adequate risk assessments and – depending on their outcome – to take appropriate precautionary measures. Part I also discussed the aggravated regime for serious violations of peremptory rules under Article 41 of ARSIWA as well as the general due diligence obligation of states to ensure that violations of the rights of other states do not emanate from their territories, known as the no-harm rule. Due to their limited scope of application, however, the latter rules impose relatively limited additional (positive) obligations on states beyond what is already covered by the general rule in Article 16.

As addressed in Part II, much more comprehensive responsibility for the misconduct of partners arises under the special rules emanating from the *jus ad bellum*, IHL, IHRL, and arms control regimes. To some extent, those special rules substantially resemble complicity under Article 16 of ARSIWA, such as in the case of indirect uses of force under the *jus ad bellum* or the non-assistance clause under the specific weapons

treaties. Yet, they also have a number of distinguishing features and very unique scopes of application.

An important characteristic of the specialised regimes are the far-reaching positive obligations that they entail, especially under IHL and IHRL. Similar to the duties of occupying or detaining powers under IHL, states are required under IHRL to protect the rights of those persons that are under their territorial or personal control abroad. Those due diligence obligations under both regimes are generally subject to a relatively low knowledge requirement. Hence, it is enough if the state in question 'should have known' of a certain risk in view of the circumstances. In other words, states are required actively to seek information about the conduct of their partners. For that purpose, both IHL and IHRL clearly provide for extensive risk assessment duties in relation to transfers of detainees. Failure to meet those requirements amounts to a self-standing violation on the part of the transferring state, even if eventually the expected mistreatment by the partner in question does not materialise. Along the same lines, the Arms Trade Treaty prescribes a (similarly) demanding risk assessment procedure in relation to arms transfers in order to minimise the risk of serious IHL and IHRL violations.

Where the law is currently much less clear is in relation to Common Article 1 of the Geneva Conventions. Despite recent pushback, state practice and ICJ jurisprudence arguably support the view of the ICRC that Common Article 1 entails an external dimension, i.e. that states have to ensure respect for IHL by others. Potentially, this could have direct consequences across the full range of mission scenarios when states engage with military partners that are involved in an armed conflict. However, the exact content of and interplay between the negative and positive obligations under Common Article 1 remains a matter of debate, which both requires further scholarly attention and constructive engagement by relevant stakeholders. Under IHRL, there is no equivalent duty to ensure respect by others. A major challenge exists, however, when states support their partners abroad without exercising the control level required to trigger the application of the relevant human rights treaties. In view of the ECtHR's restrictive approach to extra-territorial jurisdiction, such situations will most likely continue to fall outside the scope of the ECHR for the foreseeable future. By contrast, the UN Human Rights Committee may be more inclined to find the ICCPR

applicable and hold states responsible for failing to prevent human rights abuses by partners abroad.

Considering the significant level of legal uncertainty and ongoing developments, states face an increasingly complex legal framework for the operational planning of their interaction with partners. Depending on the facts on the ground, situations may quickly shift from merely being governed by the general rule of complicity to suddenly being subject to more far-reaching (positive) obligations under IHL and IHRL. In view of this complex legal and operational matrix, Danish forces should continuously make sure that adequate and updated risk assessments procedures (as well as procedures for accompanying mitigating measures) are incorporated as a central part of their cooperation with military partners. In doing so, inspiration could be drawn from the UN Human Rights Due Diligence Policy (HRDDP), which may be helpful as a blueprint for setting up clear procedures.[249] Issued by the UN Secretary-General, the HRDDP is only directly binding in the context of UN-led peace operations, including Danish forces deployed as part of MINUSMA in Mali. Nonetheless, the HRDDP provides clear and detailed guidance on the circumstances under which support may be given to partner forces and when such support must be withheld.[250] Concretely, the UN unit in question has to assess the potential risks and benefits involved in providing support,[251] based on a detailed list of factors, including the compliance record of the intended recipient of the support.[252] If there is no

249. UNSG, 'Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces', 5 March 2013, A/67/775 - S/2013/110. See also Helmut Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', 20(1) *Journal of Conflict and Security Law* (2015) 61.

250. For an outline of different vetting procedures (including the HRDDP) in relation to special operations forces: Marc Schack, 'Specialoperationer og international terrorisme. Anvendelsesmuligheder og implikationer' (CMS report 2017), 31-37, https://cms.polsci.ku.dk/publikationer/specialoperationer-og-international-terrorisme/CMS_Rapport_2017_Specialoperationer_og_international_terrorisme.pdf.

251. According to the HRDDP, support may be direct or indirect and can take the form of training and mentoring, financial or logistical support, fire support, tactical planning, and joint operations. HRDDP, para. 8.

252. Ibid. para. 14 ('(a) The record of the intended recipient(s) in terms of compliance or non-compliance with international humanitarian, human rights and refugee law, including any specific record of grave violations; (b) The record of the recipient(s) in taking or failing to take effective steps to hold perpetrators of any such violations accountable; (c) Whether any corrective measures have been taken or institutions, protocols or procedures put in place with a view to preventing the recurrence of such violations and, if so, their adequacy,

risk of grave violations of IHL or IHRL, support can be provided.[253] However, where – despite mitigating measures – a risk persists, assistance must be withheld.[254]

Training partners in applicable legal standards, especially IHL and IHRL, should also become a more common feature of military cooperation. Such training can be a useful mitigating measure to address concerns following a critical risk assessment. Further embedding IHL and IHRL instruction into standard tactical training may have the additional advantage that such activities can continue even though other forms of support must be withheld due to the risk of international law violations.[255]

For a state like Denmark, which regularly takes part in different kinds of international military operations with a variety of partners, the risk of becoming implicated in violations of international law committed by such partners is both apparent and real. As a consequence, it is in Denmark's interest to devote further resources and attention – from decision-makers as well as practitioners and researchers in the field – to the continuous development of necessary procedures for risk assessments (and accompanying mitigation measures) to be employed in connection with Danish forces' engagement in partnered operations. As an integral part of this work, there is a need to further explore how Denmark and like-minded countries can best develop and operationalise joint procedures and monitoring tools.

including institutions to hold any future perpetrators accountable; (d) An assessment of the degree to which providing or withholding support would affect the ability of the United Nations to influence the behaviour of the receiving entity in terms of its compliance with international humanitarian, human rights and refugee law; (e) The feasibility of the United Nations putting in place effective mechanisms to monitor the use and impact of the support provided; and (f) An assessment based on the factors above and on the overall context of the support, of the risk that the receiving entity might nevertheless commit grave violations of international humanitarian, human rights or refugee law').

253. Ibid. para. 17.

254. Ibid. para. 16.

255. According to the HRDDP (para. 9), training and other activities towards better compliance with IHL and IHRL do not fall under 'support' within the meaning of the HRDDP. The same reasoning arguably applies across the whole field of IHL and IHRL.

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