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COMPLICITY IN VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW BY INCUMBENT GOVERNMENTS THROUGH DIRECT MILITARY ASSISTANCE ON REQUEST

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Abstract This article examines whether general international law supports the claim that direct military assistance by one State to another State upon the latter's request is prohibited where the inviting State is implicated in (gross) violations of international humanitarian and/or human rights law. It approaches the question from the perspective of State responsibility, analysing the threshold requirements of Article 16 of the Articles on State Responsibility (ASR),[1] which represents the customary international law standard for responsibility for aiding or assisting wrongful conduct by another State. In so doing, the article illuminates how factual uncertainties complicate the triggering of the responsibility of the intervening (assisting) State for any violations of international humanitarian and/or human rights law by the territorial (recipient) State. Thereafter, the article questions whether, in the event that the responsibility of the intervening State is triggered, it would in consequence have to withdraw its troops and/or military air power from the territorial State.

Keywords: human rights, public international law, international humanitarian law, intervention by invitation, State responsibility, use of force.

I. INTRODUCTION

Article 3 of the Resolution on Military Assistance by Request of the *Institut de Droit International* (IDI) 2011 claims that the 'sending of armed forces by one State to another State upon the latter's request'[2] is prohibited if it is in violation of 'generally accepted standards of human rights'.[3] This statement may be read

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[1] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) II UNYBILC; UN Doc A/Res/56/83 (12 December 2001).

[2] *Institut de Droit International* (IDI), Resolution on Military Assistance on Request (8 September 2011) arts 1(a) and (b), available at <http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf>. For its earlier work on the same topic, see IDI, Resolution on the Principle of Non-Intervention in Civil Wars (14 August 1975) art 1 <http://www.idi-iil.org/app/uploads/2017/06/1975_wies_03_en.pdf>.

[3] IDI (n 2) art 3.

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in various ways. First, it can be understood as meaning that the troops of the intervening (assisting) State themselves must adhere to international human rights standards when exercising force at the request of the territorial (recipient) State. Stated differently, the intervening State must refrain from conduct that will directly trigger State responsibility under international human rights law. This, for example, would include the wilful killing of civilians, or the commission of torture during military operations in the assisted State.[4]

Article 3 of the IDI 2011 resolution, however, could also be interpreted as prohibiting direct military assistance that would result in the aiding or assisting of human rights violations by the recipient State. In situations of forcible intervention by invitation, such derivative responsibility would be incurred where the intervening State aids or assists any of the above-mentioned acts (or other violations of international human rights law by the assisted State).[5] The drafting history of the IDI 2011 Resolution does not clarify whether Article 3 does indeed encompass this second interpretation, as the issue of State responsibility did not feature during the debates.[6] Yet, as the subsequent analysis reveals, the possibility of aiding and assissting gross violations of international human rights and humanitarian law in the context of direct military assistance on request is a prominent one. Therefore, regardless of the scope of applicability of Article 3 of the 2011 IDI Resolution,[7] the question of whether an intervening State can incur responsibility for the international human rights and humanitarian law

[4] V Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart Publishing 2016) 6. Examples of direct violations of international humanitarian law by the intervening State would include indiscriminate targeting of civilians by the assisting State during military operations, which can occur either through the use of weapons, which are in themselves indiscriminate, or by the indiscriminate use of lawful weapons. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977), 1125 UNTS, art 51(2). See B Finucane, 'Partners and Legal Pitfalls' (2016) 92 International Law Studies 412.

[5] G Nolte and HP Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 5. In addition, there may be individual criminal responsibility for State agents under international criminal law. See H Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (November 2016) Chatham House Research Paper, 7 <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>. See also C Gray, 'The Limits of Force' (2016) 367 Collective Courses of the Hague Academy of International Law 175.

[6] See G Nolte, 'The Resolution of the *Institut de Droit International* on Military Assistance on Request' (2012) 45 Revue Belge de Droit International 253, 260.

[7] According to IDI (n 2) art 2, the resolution does not apply to situations of non-international armed conflicts (NIACs). If the resolution indeed were not to apply to NIACs, most current situations of direct military assistance on request of incumbent governments would fall outside of its scope. Elsewhere, this author has argued that interventions at the request of an incumbent government during a NIAC as such is accepted in State practice. See E de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force' (2015) 26 EJIL 979; for a different opinion, see K Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 LJIL 743.

violations of the territorial State merits scholarly attention. Furthermore, the consequences of incurring State responsibility under such circumstances need to be assessed. In particular, the question arises as to whether an intervening (assisting) State will have to withdraw its troops and/or military air power from the inviting (territorial) State in order to avoid any further derivative State responsibility for violations of human rights and/or humanitarian law by the latter.

These questions pertaining to incurring and the consequences of derivative State responsibility of an intervening State for the violations of international human rights and humanitarian law of the territorial State constitute the focus of the article. The issue of derivative responsibility for such violations may also arise in relation to conduct stopping short of direct military support. For example, it may arise in relation to the supply of arms, intelligence, financial resources or training provided to an incumbent government embroiled in an armed conflict.[8] This was vividly illustrated in the recent case of the *Campaign Against Arms Trade v The Secretary of State for International Trade* (*CAAT* case) in the United Kindgom.[9] While case law and doctrine pertaining to such conduct will inform the analysis in the article, its primary focus is on derivative State responsibility arising in the context of direct military assistance on request. The issue of derivative responsibility arguably gains particular significance under such circumstances, as the provision of direct military support by one State to another implies close cooperation on various levels. In the interests of a coherent military strategy, such support is very likely to be accompanied also by the sharing of intelligence, coordination of military operations and the provision of other operational support. This fact, combined with the as of yet limited scholarly attention devoted to the issue, merits an analysis of derivative State responsibility specifically in the context of direct military assistance on request.

The following sections will explore the above-mentioned questions by examining the general framework of the principles of complicity (as the aiding and assisting of internationally wrongful acts are often referred to),[10] as well as the implications of this framework for direct military assistance on request. In so doing, the analysis will focus primarily on Article 16 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ASR) of the International Law Commission (ILC),[11] which represents the

[8] For example, the transfer of conventional weapons from one State to another could trigger State responsibility if the assisting State was aware that the arms would be used to attack civilians or civilian objects. See Arms Trade Treaty (adopted 2 April 2013) 52 ILM 988, art 6; see also Finucane (n 4) 419.

[9] *The Queen on the Application of Campaign Against Arms Trade v The Secretary of State for International Trade* [2017] EWHC 1726 (QB) paras 64ff. See also *Final Report of the Panel of Experts on Yemen,* S/2017/81 (31 January 2017) paras 119 and 126ff.

[10] See Lanovoy (n 4) 41–2.

[11] ILC (n 1).

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customary international law standard pertaining to responsibility for aiding and assisting an internationally wrongful act.[12]

The responsibility regime comprised by Article 16 ASR is of a residual nature and becomes applicable in the absence of more specific obligations (*lex specialis*).[13] As in the case of direct responsibility, the requirements for derivative State responsibility for aiding and assisting an internationally wrongful act is determined first and foremost by any applicable, specialized treaty obligations binding on the States in question.[14] The regime contained in Article 16 ASR also implies a higher threshold for incurring responsibility through aiding or assisting an internationally wrongful act than most obligations under international humanitarian or human rights law treaties.[15] As a result, it is unlikely that it will be the decisive rule determining whether State responsibility is incurred by an intervening State for aiding or assisting an illegal act of the inviting State. Instead, the more far-reaching specialized rules stemming from widely-ratified international humanitarian or human rights law treaties are more likely to be decisive in this regard.[16]

For example, the due diligence obligations in human rights treaties often impose far-reaching precautionary measures, as can be illustrated by the case of *El-Masri v The Former Yugoslav Republic of Macedonia*.[17] The European Court of Human Rights (ECtHR) determined that the Macedonian authorities actively facilitated the detention of the applicant by handing him over to the United States Central Intelligence Agency when they ought to have been

[12] The customary status of art 16 ASR (n 1) has been confirmed in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 420. In *Al-M* (5 November 2003) 2 BVerfGE 1506/3 [47], the German Federal Constitutional Court was confronted with a case where Germany was accused of aiding the United States in luring a Yemeni citizen to Germany by trickery, after which the person faced an extradition request to the United States. The Court determined that if there were indeed an international rule against trickery, Germany would be liable in accordance with art 16 ASR. See M Jackson, *Complicity in International Law* (Oxford University Press 2015) 151; ILC (n 1) para (7); Moynihan (n 5) 6; Nolte and Aust (n 5) 7. See also HP Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 113ff for a discussion of situations in which States buttressed their argumentation with art 16 ASR.

[13] This remains the case regardless of whether one regards art 16 ASR as a primary or secondary rule of international law (a distinction which in itself is controversial). On the one hand, art 16 ASR resembles a primary rule as it does not merely address the consequences of a wrongful act, but extends responsibility for that act to the assisting State. On the other hand, it has the characteristics of a secondary rule as the wrongfulness of the assisting State's conduct is derived from the wrongfulness of the conduct of the receiving State. See Nolte and Aust (n 5) 8; Moynihan (n 5) 2 and 7. See also Jackson (n 12) 149–50 who argues that art 16 ASR is a primary rule.

[14] Aust (n 12) 383; Moynihan (n 5) 28; NHB Jørgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 Chinese Journal of International Law 22.

[15] See Aust (n 12) 383 and 417, who describes art 16 ASR as the 'red line' for incurring responsibility for aiding or assisting the 'point of no return'.

[16] Aust (n 12) 390–1 and 417.

[17] Lanovoy (n 4) 211.

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aware of the risk of mistreatment that might result from this transfer.[18] While the ECtHR also referred to Article 16 ASR,[19] its decision first and foremost turned on the specialized obligations in the European Convention on Human Rights (ECHR), such as those relating to the prohibition of torture.[20] Such facilitation of detention and transfer of prisoners can also occur during forcible interventions by invitation, where the intervening State assists in the arrest and detention of members of opposition groups and subsequently hands them over to the inviting State. This, in turn, could trigger due diligence and other specialized obligations contained in human rights treaties binding on the intervening State, leaving little room for a central role for Article 16 ASR.[21]

Even so, Article 16 ASR remains a useful analytical tool as it can serve as a vehicle to inform the interpretation of any specialized regime on international responsibility, including that of international human rights and humanitarian law.[22] Furthermore, the high threshold requirements contained in Article 16 ASR as such underscore the relevance of the questions addressed in this article. If even these high threshold requirements for derivative responsibility can be triggered by the type of military assistance rendered during forcible interventions by invitation, intervening States will have to consider what measures to take in order to prevent any further derivative responsibility under such circumstances. In order to provide context to an assessment of the threshold requirements pertaining to Article 16 ASR and the consequences of its triggering, the following section first will give a brief overview of recent situations where invited governments were rendering direct military

[18] *El-Masri v The Former Yugoslav Republic of Macedonia*, App No 39630/09, ECtHR Judgment of 13 December 2012 (GC), paras 180–223. Similarly, art III(e) of the Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948) 278 UNTS 1021 (Genocide Convention) constitutes an example of a specialized regime. Although this provision focuses on the punishing of individuals who were involved in genocide, the ICJ has concluded that the acts enumerated in art III (which includes complicity to genocide) could also trigger State responsibility.

[19] *El Masri* deicison (n 18) para 97.

[20] See also *Al Nashiri v Poland*, App No 28761/11, ECtHR Judgment of 24 July 2014 (Former Fourth Section); *Husayn (Abu Zubaydah) v Poland*, App No 7511/13, ECtHR Judgment of 24 July 2014 (Former Fourth Section); and *Nasr and Ghali v Italy*, App No 44883/09, ECtHR, Judgment of 23 February 2016 (Fourth Section). While the ECtHR did make general references to art 16 ASR, it did not integrate its benchmarks into its analysis. Therefore, it is difficult to ascertain whether and to what extent art 16 ASR did inform the ECtHR's decision. See Jørgensen (n 14) 31. See *Bosnia Genocide* decision (n 12) para 166. See also Aust (n 12) 383; Lanovoy (n 4) 225–6; Moynihan (n 5) 28.

[21] See B Oswald, 'Interplay as Regards Dealing with Detainees in International Military Operations' in E de Wet and JK Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press 2014) 76ff.

[22] Lanovoy (n 4) 204. Moreover, the principles underpinning art 16 ASR have also influenced the responsibility framework applicable to international organizations, as art 14 of the 2011 Draft Articles on the Responsibility of International Organizations (DARIO) effectively mirrors the content of art 16 ASR. See ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries 2011' (2011) II UNYBILC; (DARIO), art 14.

assistance to incumbent governments implicated in widespread international human rights and humanitarian law violations.

II. RECIPIENT GOVERNMENTS IMPLICATED IN WIDESPREAD VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

A cursory survey of the situation in countries that currently are or recently have been the object of forcible intervention by invitation reveals that all the inviting governments have been implicated in widespread violations of humanitarian and/or human rights law. These typically (although by no means exclusively) include the wilful killing or indiscriminate targeting of civilians, torture and conflict-related sexual violence. For example, in Afghanistan, government forces are currently receiving military support from the United States (US) in their battle against the Taliban and Islamic State (IS) on the basis of a bilateral security agreement (BSA) signed on 30 September 2014.[23] The Afghan forces have been criticized for an escalation in civilian casualties since 2015, due to the indiscriminate use of mortars and rockets during ground operations in civilian-populated areas.[24] In addition, approximately one-third of detainees in Afghan detention centres have reportedly been subjected to torture, while unofficial detention centres also continue to function.[25]

In Iraq, a United States-led coalition has been undertaking air strikes against the IS since August 2014 at the request of the Iraqi government.[26] Throughout this period, the UN and human rights organizations have expressed concern about continued reports of human rights violations perpetrated by armed groups associated with the Iraqi security forces, as well as elements of the

[23] See *Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America of 30 September 2014* (Bilateral Security Agreement/BSA) <http://mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf>. Aerial attacks by the United States at the request of the Afghan government at times have directly resulted in civilian casualties. For example, in October 2015 an erroneous aerial attack on a hospital run by *Médecins Sans Frontières* resulted in 67 casualties. See Report of the Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security*, UN Doc A/70/601–S/2015/942 (10 December 2015) paras 29–30. See also Report of the Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security*, UN Doc A/71/616–S/2016/768 (7 September 2016) para 19.

[24] Report of the Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security*, UN Doc A/70/601-S/2015/942 (10 December 2015) para 29; Report of the Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security*, UN Doc S/2016/1049 (13 December 2016) para 29. See also Human Rights Watch, 'Afghanistan events of 2015', *World Report: Afghanistan* (2016) <https://www.hrw.org/world-report/2016/country-chapters/afghanistan>. In August 2015, President Ghani issued orders to assess operational procedures and to take steps to reduce civilian casualties.

[25] The National Directorate of Security (NDS) reaffirmed an order prohibiting torture in June 2015. However, it remains unclear whether and to what extent any of these cases was investigated and prosecuted. See Human Rights Watch (Afghanistan) (n 24).

[26] The White House, 'Statement of the President' (7 August 2014) <http://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>; Bannelier-Christakis (n 7) 751.

Peshmerga and affiliated groups.[27] Iraqi forces and paramilitary groups have inter alia been accused of torture and unlawful killings of Sunni Arab men as a form of reprisal in their battles to free cities such as Falluja and Tikrit from IS.[28] In Somalia, Kenyan air strikes against Al-Shabaab between October 2011 and February 2012 took place at the invitation of the Somali government, in accordance with a joint Communiqué adopted by the two countries on 18 October 2011.[29] Subsequent to the adoption of UN Security Council (UNSC) Resolution 2036 of 22 February 2012, the Kenyan military operations were formally integrated into the African Union Mission in Somalia (AMISOM) under Chapter VII of the UN Charter.[30] Large-scale human rights violations, including those by government forces and AMISOM, were reported in the period before the Kenyan forces were integrated into AMISOM, as well as thereafter. These included continuous reports of rape and sexual violence against internally-displaced women and girls, including those by transitional federal government soldiers.[31]

In January 2013, France intervened militarily in Mali in response to a request for assistance by the interim President of the Republic of Mali, Dioncoundra Traoré, in order to counter terrorist elements that had taken control over the northern part of the country.[32] During the time of the French intervention in Mali, the UN continued to receive allegations of serious human rights violations in the north in which the Malian armed forces were also implicated.[33] In their campaign to retake the north, Malian soldiers engaged in summary executions, enforced disappearances and torture against suspect Islamist rebels and alleged collaborators. These included summary executions, arbitrary arrests, enforced disappearances and destruction and looting of private property.[34]

[27] *Report of the Secretary-General Pursuant to Resolution 2299 (2016)*, UN Doc S/2016/897 (25 October 2016) para 46; A Dewan, 'Amnesty International: Iraqi Forces Must Not Repeat "War crimes" in Mosul Offensive' *CNN* (18 October 2016) <http://edition.cnn.com/2016/10/18/middleeast/iraq-mosul-amnesty-international/>.

[28] Dewan (n 27). The Iraqi Prime Minister, Haider al-Abadi, as well as the Kurdistan Regional Government have stated that they have established procedures to investigate the allegations. A KRG spokesman further submitted that some officials had been punished for human rights violations.

[29] Joint Communiqué issued at the Conclusion of a Meeting between the Government of Kenya and the Transitional Federal Government of Somalia of 18 October 2011, paras 1 and 2, <http://graphics8.nytimes.com/packages/pdf/world/joint-communique-kenya-somalia.pdf>.

[30] See African Union Mission to Somalia (AMISOM) <http://amisom-au.org/kenya-kdf/>.

[31] Military operations by Kenyan and Ethiopian forces in late 2011 and early 2012 also resulted directly in civilian casualties. See Secretary-General, *Report of the Secretary-General on Somalia*, UN Doc S/2012/283 (1 May 2012) paras 68 and 70.

[32] Identical letters dated 11 January 2013 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2013/17 (14 January 2013); see also Bannelier-Christakis (n 7) 859.

[33] Human Rights Watch, 'Mali: Events of 2013' *World Report* (2014) <https://www.hrw.org/world-report/2014/country-chapters/mali>.

[34] Report of the Secretary-General, *Report of the Secretary-General on the Situation in Mali*, UN Doc S/2013/338 (10 June 2013) para 35; Report of the Secretary-General, *Report of the*

As far as the armed conflict in South Sudan is concerned, the Ugandan People's Defence Force (UPDF) was almost from the outset assisting the government of South Sudan militarily at the latter's request.[35] This presence continued until after the conclusion of the Agreement on the Resolution of the Conflict in the Republic of South Sudan on 17 August 2015.[36] The conflict has been marked by human rights abuses on all sides. For example, government and opposition forces have targeted and killed hundreds of civilians, often because of their ethnicity, and have pillaged and destroyed civilian property, as well as engaged in torture.[37] Government forces were also accused of conflict-related sexual violence in areas under their control.[38] These violations have continued despite the adoption of the ceasefire in 2015.[39]

The pervasive violations of humanitarian and human rights law by all parties in the Syrian conflict have ranged from torture; extrajudicial killings; sexual violence; the indiscriminate targeting of civilians; to the use of barrel bombs and chemical weapons and attacks on medical and educational facilities.[40] Since 30 September 2015, Russia has been engaged in air strikes in support of the Syrian government which were directed against IS as well as other anti-government forces.[41] Similarly, Iran has reportedly sent up to 3000

Secretary-General on the Situation in Mali, UN Doc S/2013/582 (1 October 2013) paras 36ff; Human Rights Watch (Mali) (n 33).

[35] President Museveni of Uganda, at the invitation of President Salva Kiir, sent troops across the border shortly after fighting had broken out between forces loyal to President Kiir and rebels in December 2013. The countries signed a Status of Forces Agreement between the Government of the Republic of Uganda and the Government of the Republic of South Sudan of 10 January 2014, <http://www.sudantribune.com/IMG/pdf/status_of_forces_agreement-2.pdf>.

[36] The Agreement on the Resolution of the Conflict in the Republic of South Sudan of 17 August 2015, <http://www.gurtong.net/LinkClick.aspx?fileticket=CytVwytJdyM%3D&tabid=124>. This Agreement was steered by the Intergovernmental Authority on Development (IGAD) and signed by the two warring parties and another breakaway SPLM faction, the G10. See F Nicolaisen, T Heggli Sagmo and O Rolandsen, 'South Sudan – Ugandan Relations. The Cost of Peace' African Centre for the Constructive Resolution of Disputes (ACCORD) (23 December 2015), <http://www.accord.org.za/conflict-trends/south-sudan-uganda-relations/>.

[37] Human Rights Watch, 'South Sudan: Events of 2014' World Report (2015), <https://www.hrw.org/world-report/2015/country-chapters/south-sudan>. In one incident, government forces rounded up between 200 and 400 Nuer men and a day later massacred all but 13.

[38] Secretary-General, *Report of the Secretary-General on South Sudan*, UN Doc S/2014/821 (18 November 2014) para 43.

[39] *Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan*, UN Doc S/2016/951 (10 November 2016) paras 14ff; S Jones, 'UN Report: South Sudan Allowed Soldiers to Rape Civilians in Civil War' *The Guardian* (11 March 2016) <https://www.theguardian.com/global-development/2016/mar/11/south-sudans-soldiers-allowed-to-rape-civilians-civil-war-says-un-government-torture>. See also UN Doc S/RES/2206 (3 March 2015) Preamble; UN Doc S/RES/2223 (28 May 2015) paras 22ff; UN Doc S/RES/2252 (15 December 2015) para 25; UN Doc S/RES/2327 (16 December 2016) paras 22ff.

[40] See eg UN Human Rights Council, *First Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/S-27/2/Add.1 (23 November 2011) paras 51ff; *Seventh Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/25/65 (12 February 2014) paras 21ff.

[41] UN Doc A/HRC/31/68 (Advanced Edited Version) (11 February 2016) paras 19 and 28. See also Human Rights Council, 'They Came to Destroy: ISIS Crimes Against the Yazidis' UN Doc A HRC/32/CRP.2 (15 June 2016) para 191.

troops to Syria in support of the Assad regime.[42] Both Russia and Iran have justified their military presence in Syria with a request from President Assad to assist in combating IS and other terrorist groups in Syria.[43] The United Kingdom and the United States have openly accused Russia of complicity in the Assad regime's aerial attacks on hospitals and civilian targets.[44]

In Libya, successive governments have requested military assistance against IS and other groups that have since 2015 been posing a threat to security.[45] Violations of international humanitarian and human rights law by all sides and groups have been reported before and after these requests.[46] All sides have been accused of abductions and the unlawful killing of civilians who were targeted for their political opinions, affiliations and family or tribal identity.[47] Arbitrary detention and torture reportedly occurred across the country in official detention centres as well as in one centre run by armed groups.[48]

The case of Yemen is also noteworthy, where Saudi Arabia has since 26 March 2015 been leading an intensive aerial campaign against the Houthi insurrection at the invitation of the Hadi government.[49] In this instance, the allegations of direct violations of international human rights and humanitarian law by the intervening States have attracted extensive international attention. These included, inter alia, aerial attacks on a civilian market, a civilian funeral

[42] Bannelier-Christakis (n 7) 760.

[43] Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN Doc S/2015/792 (15 October 2015) 2; H Rohani, 'La lutte contre le terrorisme doit être la base de tout en Syrie' *Le Monde* (29 January 2016), <http://www.lemonde.fr/international/article/2016/01/29/hassan-rohani-la-lutte-contre-le-terrorisme-doit-etre-la-base-de-tout-en-syrie_4855748_3210.html>; see also Bannelier-Christakis (n 7) 760–1.

[44] Record of UNSC meeting 7777 (25 September 2016), UN Doc S/PV.7777, 5–7 (United States); ibid 9 (United Kingdom); J Algot, 'Boris Johnson: Russian Complicity in War Crimes Precludes Syria Talks' *The Guardian* (20 October 2016).

[45] Record of UNSC Meeting 7387 (18 February 2015), UN Doc S/PV.7387, 5 (Libya); UN Doc S/RES/2259 (23 December 2015) para 12. In February 2016, NATO and 23 States participating in a meeting on Libya in Rome declared that it would only intervene in Libya after the formation of a government of national unity and a request from this government to NATO to intervene. See Statement by NATO Secretary-General, Jens Stoltenberg, cited by N Guibert and G Paris, 'L'OTAN n'interviendra pas sans accord politique national en Libye' *Le Monde* (2 February 2016), <http://www.lemonde.fr/international/article/2016/02/01/libye-l-otan-n-interviendra-pas-sans-accord-politique-national_4857166_3210.html>; See also Bannelier-Christakis (n 7) 758–9.

[46] Report of the Secretary-General, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc S/2016/1011 (1 December 2016) para 33. For human rights violations during 2014 and 2015, see Office of the United Nations High Commissioner for Human Rights, Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya, UN Doc A/HRC/31/47 (15 February 2016) paras 16ff.

[47] *Report of the Secretary-General on the United Nations Support Mission in Libya*, (n 46) paras 37 and 43.

[48] ibid paras 39ff.

[49] M Nichols, 'UPDATE 1 – Yemen Asks UN to Back Military Action by "Willing Countries"' *Reuters* (24 March 2015) <http://uk.reuters.com/article/yemen-security-un-idUKL2N0WQ29620150324>.

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hall, hospitals and water facilities.[50] The military coalition was criticized for failing to take all precautions to minimize civilian targets as required by international humanitarian law, causing disproportionate harm to civilian objects and failing to distinguish between military and civilian targets.[51] In addition, ground operations in Yemen under the effective control of the United Arab Emirates resulted in forced disappearances of (suspected) members of terrorist groups.[52]

It is striking that in none of the above-mentioned cases did the human rights track record of the inviting State prevent the invited States from accepting the request for military assistance. In addition, criticism by third States relating to such military assistance was limited to the manner in which the military assistance was exercised and/or its implications for a political settlement. This is exemplified by the reaction of Western States to Russia's intervention in Syria, which accused Russia of direct violations of international humanitarian law, as well as aiding and assisting such violations by the Syrian government.[53] Even so, the criticism stopped short of suggesting that the invitation for direct military support (or the acceptance of the invitation) as such was illegal under international law. Stated differently, State practice at first sight does not support the conclusion that the human rights record of the inviting government (or that of the invited State) would in and of itself form a legal barrier under international law to extending or accepting an invitation for forcible intervention.

However, this is not the end of the matter. As indicated at the outset, there is also the question of whether an intervening State can incur derivative responsibility for aiding or assisting internationally wrongful acts by the territorial State, as well as questions concerning what consequences would result from such responsibility. The analysis now turns to these questions. It will examine the benchmarks of Article 16 ASR, as well as their implications in the context of direct military assistance to another State. Furthermore, it will question whether the threshold requirements for Article 16 ASR equally apply in situations of serious violations of peremptory obligations of international law. This will be followed by an assessment of the legal consequences in case the responsibility framework of Article 16 ASR is triggered—in

[50] *Final Report of the Panel of Experts on Yemen* (n 9) paras 119 and 126ff; *CAAT* case (n 9) paras 64ff.

[51] European Parliament, Resolution on the Situation in Yemen (2015/2760(RSP), 9 July 2015 (*AB* B(EP)1-B(EP) 6).

[52] *Final Report of the Panel of Experts on Yemen* (n 9) para 132ff; EM Lederer, 'UN Experts Say Saudi Coalition Violated International Humanitarian Law in Yemen Attack' *The Independent* (21 October 2016) <http://www.independent.co.uk/news/world/middle-east/un-saudi-arabia-yemen-air-strikes-violated-international-law-a7372936.html>.

[53] See Record of UNSC meeting 7777 (25 September 2016), UN Doc S/PV.7777, 5–7 (United States); ibid 9 (United Kingdom); Algot (n 44). See Record of UNSC meeting 8055 (25 September 2017), UN Doc S/PV.8055, 9 (Russia) for criticism of the political wisdom of the United States military strategy in Afghanistan.

particular whether it would require the withdrawal of direct military support by the intervening State.

III. THRESHOLD REQUIREMENTS OF ARTICLE 16 ASR

Article 16 ASR determines:

> 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) the 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.[54]

In order for the responsibility regime of Article 16 ASR to be triggered, several requirements need to be fulfilled. The first is that the responsibility of the assisting State cannot be engaged independently from the illegal conduct of the recipient State. The second is that such conduct must also be wrongful under international law if it were committed by the assisting State itself. Third, the assisting State must have provided actual assistance. Fourth, there has to be some causal link (nexus) between the aid and assistance rendered and the internationally wrongful act. Finally, the assisting State must have provided the aid or assistance with the knowledge of the (pending) internationally wrongful conduct and must have had the intention to facilitate it.

Article 16 ASR is not concerned with the responsibility incurred by the recipient State for an internationally wrongful act, but with the responsibility for assisting that State to commit an internationally wrongful act.[55] It concerns ancillary responsibility that arises from the fact that a State facilitated a wrongfully committed act by another State. Under Article 16 ASR, State responsibility turns on collaborative conduct and cannot be engaged independently of the breach of international law by the recipient State.[56] Therefore, it is only engaged once the illegal act of the recipient State has occurred. If the assisted act either does not occur or does not amount to an internationally wrongful act, no responsibility arises for the assisting State.[57]

Moreover, as reflected by Article 16(b) ASR, the assisting State's responsibility will only become relevant if the act performed by the recipient State would also be illegal if performed by the assisting State.[58] This requirement protects assisting States against independent responsibility for breaches of obligations resulting from treaties to which they are not party. In essence, it is a reaffirmation of the third party principle in treaty law (*pacta tertiis*), in accordance with which a treaty does not create rights or

[54] ILC, art 16 ASR (n 1).
[55] Moynihan (n 5) 7; V Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 Journal of International Law and Diplomacy 5. [56] Moynihan (n 5) 29. [57] ibid.
[58] ILC Commentary to art 16 ASR (n 1) para (6); Moynihan (n 5) 10; Jackson (n 12) 162.

obligations for third States without their consent.[59] However, many of the illegal acts that recipient governments are typically accused of during non-international armed conflicts (NIACs), such as torture, the wilful killing of civilians and indiscriminate targeting, inter alia are prohibited by Common Article 3 of the four Geneva Conventions of 1949, which have been ratified almost universally and under customary international law.[60] Therefore, it is unlikely that the *pacta tertiis* principle would pose a major hurdle for triggering Article 16 ASR in the context of military intervention by invitation.

As far as the actual assistance provided is concerned, most authors seem to agree (although grudgingly) that the assistance provided has to be undertaken through actions attributable to the assisting State and does not include the aiding of omissions.[61] This may be inferred from the ILC Commentary to Article 16 ASR, which does not contain any reference to an example where responsibility for complicity is incurred on the basis of an omission.[62] Also, the International Court of Justice (ICJ) in the *Bosnia Genocide* decision determined that complicity always requires that positive action has been taken to furnish aid or assistance to the perpetrators.[63] Authors have cautioned against reading too much into this statement, as it first and foremost concerns Article III of the Genocide Convention which establishes the grounds for individual criminal liability in the case of genocide. It does not necessarily have to apply to Article 16 ASR which embodies customary international law in relation to complicity by States.[64] Moreover, including omission in the scope of the responsibility regime of Article 16 ASR would improve the coherence of the ASR, since their definitions of internationally wrongful acts include both acts and omissions.[65]

Nevertheless, despite these criticisms, it is fair to conclude that the assistance contemplated by Article 16 ASR does not (yet) extend to omissions. The type of acts to be provided is not defined in Article 16 ASR and can include a broad range of activities of varying gravity.[66] In instances of forcible intervention by invitation, the sending of troops and/or air power is likely to be accompanied by tactical, technical and operational assistance, the provision of military equipment or arms, as well as the sharing of intelligence with the

[59] Moynihan (n 5) 10; Jackson (n 12) 162.

[60] The status of ratifications of the four Geneva Conventions of 1949 on the laws and customs of war are available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

[61] J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 404–5. Both Aust (n 12) 209 and 226 and Jackson (n 12) 155–6 are critical of the dominant position and suggest that complicity through omission is plausible.

[62] Aust (n 12) 226–7.

[63] *Bosnia Genocide* decision (n 12) para 432.

[64] Jackson (n 12) 155; Aust (n 12) 226. It is also worth mentioning that in *Prosecutor v Jean Paul Akayesu*, Case No ICTR-96-4-T (2 September 1998) para 548, Trial Chamber I of the International Criminal Tribunal for Rwanda suggested that aiding and abetting in international criminal law can consist of an omission.

[65] Lanovoy (n 4) 97.

[66] Lanovoy (n 4) 95; Moynihan (n 5) 7; Jackson (n 12) 153; Aust (n 12) 129.

inviting State's military. Any combination of these acts, depending on the circumstances, could trigger the ancillary responsibility of the intervening State.

A. Nexus between the Aid or Assistance Provided and the Internationally Wrongful Act

The responsibility regime foreseen in Article 16 ASR requires a link between the aid or assistance provided by the assisting State and the internationally wrongful act subsequently committed by the recipient State. However, there is considerable uncertainty in international law as to the required proximity of this link.[67] The ILC Commentary to Article 16 ASR notes that the assistance need not be essential to the performance of the internationally wrongful act, but that it has to contribute 'significantly' to the act.[68] On the one hand, it seems clear that aid or assistance that is indeed essential for the performance of the internationally wrongful act would effectively amount to co-responsibility for the internationally wrongful act.[69] For example, the supply of combat units for military patrols that results in the targeting of civilians or medical facilities may amount to co-responsibility for internationally wrongful acts, rather than mere aid or assistance in the commitment thereof.[70] This may particularly be the case where an assisting partner emphasizes the jointness of a particular military operation that results in internationally wrongful acts, as it thereby acknowledges the operation as its own and assumes responsibility for its consequences.[71]

On the other hand, the challenge remains to identify the non-essential aid or assistance that would be sufficiently 'significant', that is, to overcome the *de minimis* threshold implied by this requirement.[72] The case of *Rasheed Haje Tugar v Italy* before the former European Commission on Human Rights illustrates the difficulties that arise in this context.[73] The applicant was injured by an anti-personnel mine of Italian origin while participating in a mine-clearing operation in Iraq in an area that was heavily mined during the Iran–Iraq war in 1985. According to the applicant, the export of anti-personnel mines by Italy to Iraq in the absence (at the time) of an effective arms transfer licensing system in Italy violated Article 2 of the ECHR. He

[67] Moynihan (n 5) 9; Aust (n 12) 195 and 217.

[68] ILC Commentary to art 16 ASR (n 10) paras (1) and (5). See also Jackson (n 12) 158; Moynihan (n 4) 8; Aust (n 12) 197 and 210; Lanovoy (n 4) 97.

[69] Moynihan (n 5) 9; Aust (n 12) 195 and 217. A further consequence of the *sine qua non* test would be to absolve the main actor from any responsibility for the international wrongful act, as the emphasis on the causal impact could shift most of the responsibility to the assisting State.

[70] Aust (n 12) 220.

[71] ibid; S Talmon, 'A Plurality of Responsible Actors – International Responsibility for Acts of the Coalition Provision Authority in Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (1st edn, Hart Publishing 2008) 220.

[72] Lowe (n 55) 5; Lanovoy (n 4) 184 and 185.

[73] *Rasheed Haje Tugar v Italy* (Admissibility) [1995] ECHR (First Chamber), App No 22869/93 Ser 83-A 26; Lanovoy (n 4) 173.

submitted that such export had exposed him to harm by 'indiscriminate' weapons that did not contain any self-detonating or self-neutralizing system, as well as the 'indiscriminate' use of such weapons by Iraq, a country with a notoriously poor human rights record.[74] However, the European Commission of Human Rights held that there was no 'immediate relationship between the mere supply, even if not properly regulated, and the possible indiscriminate use thereof by a third State'.[75]

While this decision turned on the specific obligations contained in Article 2 of the ECHR, it can also illuminate the challenges in determining the content of a 'significant contribution' to an internationally wrongful act in terms of Article 16 ASR.[76] It raises the question whether a 'significant contribution' implies that a particular act of assistance has to have a direct (that is, immediate) causal link with a specific wrongful act.[77] More specifically in the context of the use of direct military force on request, the question arises as to whether the mere presence of the troops of the intervening State in certain parts of the conflict-ridden territorial State would establish a direct causal link. After all, it does provide the government troops with the opportunity to concentrate their capacity on, for example, reprisals against civilians in other parts of the country. Alternatively, would the intervening troops have to provide more concrete assistance, such as the sharing of intelligence which the territorial State then uses in reprisals against civilians who are (ethnically) related or politically sympathetic to members of rebel movements?[78] If so, how close should the relationship between the concrete assistance and the principal wrongful act be? If the provision of intelligence had been essential for identifying the relatives or sympathizers, one arguably would be dealing with a situation of co-responsibility. If the information was not essential for the identification but nonetheless accelerated it, would this constitute a significant contribution to (or even an immediate relationship with) the internationally wrongful act of the principal actor? Furthermore, how—if it all—does the fact that various other actors, such as armed groups, were also involved in the reprisals affect the nexus between the aid and assistance and the internationally wrongful conduct of the assisted State?[79]

There is support in literature for the position that a clear factual link between the aid or assistance and the principal wrongdoing should suffice to engage Article 16 ASR, as any other test would make the nexus requirement in Article 16(a) unworkable.[80] However, given the limited State practice as well as decisions by international courts and tribunals in this regard, the nature of the

[74] *Rasheed Haje Tugar* decision (n 73).
[75] *Rasheed Haje Tugar* decision (n 73) 29; Lanovoy (n 4) 173.
[76] Lanovoy (n 4) 173.
[77] Lanovoy (n 4) 174.
[78] Aust (n 12) 130.
[79] Lanovoy (n 4) 174.
[80] Lanovoy (n 4) 174 and 218.

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nexus between the aid or assistance and the wrongful conduct of the principal actor remains unsettled.[81]

B. Knowledge of the Circumstances

Article 16(a) requires that the assisting (intervening) State must have had knowledge of the circumstances of the internationally wrongful act. This requires the presence of the mental elements of knowledge and intent (discussed separately below).[82] As far as the knowledge requirement is concerned, the text of Article 16(a) ASR explicitly refers to knowledge as a component of the mental element.[83] The type of knowledge at issue concerns specific illegality in the sense that the assisting State must be aware that the assistance it is providing will contribute to the committing of (a) specific internationally wrongful act(s).[84] This raises questions as to the level of specificity of the knowledge that is required, as well as when this knowledge has to become known to the assisting State or an entity whose conduct is legally attributable to it.[85] For example, it is not clear whether the specificity requirement would be satisfied if the intervening State merely knows that its military assistance will lead to reprisals against civilians by the territorial State or, in the alternative, whether the intervening State also has to have knowledge of the particular (group of) individuals that will be targeted—and whether it even has be familiar with the modalities of the execution.[86]

Also, the assisting State must have advance knowledge of the likely consequences of its assistance.[87] Where an intervening State had actual prior knowledge of the fact that the territorial State intended to use the military assistance for acts such as wilful killing of or reprisals against (a specific group of) civilians, the knowledge requirement in Article 16 ASR will clearly have been fulfilled.[88] However, it is more difficult to determine whether the knowledge requirement has been fulfilled in situations where the factual situation is uncertain or disputed, as Article 16 ASR does not contain a constructive knowledge component.[89] It does not determine that an assisting

[81] In *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* (Judgment) [2009] EWHC 1910 (Admin) para 7, a court in the United Kingdom dismissed a claim pertaining to art 16 ASR as non-justiciable. The organization Al-Haq, based in Ramallah, brought a claim for judicial review of the United Kingdom's arms trade policy with Israel, in light of the January 2009 human rights violations committed in Palestine. Al-Haq claimed that the United Kingdom's continued trading of military equipment with Israel violated the former's customary obligations under art 16 ASR. See also Lanovoy (n 4) 175.

[82] Moynihan (n 5) 8.

[83] ILC Commentary to art 16 ASR (n 1) para (4); Moynihan (n 5) 11.

[84] Moynihan (n 5) 11; Crawford (n 61) 407. In the *Bosnia Genocide* decision (n 12) para 421, the ICJ referred to art 16 ASR when considering the complicity provision in the Genocide Convention (n 18). The Court noted that Serbia had not known that genocide was being committed by the Bosnian Serb army, since Serbia was not aware of the specific intent of the forces concerned.

[85] Moynihan (n 5) 11 and 24.

[86] Lanovoy (n 4) 227.

[87] Moynihan (n 5) 11.

[88] Moynihan (n 5) 13.

[89] Moynihan (n 5) 12; Lanovoy (n 4) 100.

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State should have inquired—prior to providing any assistance—into the specific purposes for which the recipient State intends to use it.[90]

As a general rule, the principle of good faith in international law implies that a State may provide aid or assistance to another in the belief that it would be used for legal purposes.[91] States may assume that other subjects of international law with whom they interact in the course of events will act in accordance with good faith.[92] Accordingly, there is no general obligation on States to keep themselves informed of legislative and constitutional developments in other States with which they have dealings.[93] Nor does a State have to stay abreast of the international obligations of other States with which it maintains relations (something which in practice also would be very difficult to do).[94] As a result, it is unlikely that the knowledge requirement would be fulfilled if an intervening State is unaware that intelligence or operational support provided to the territorial State in the course of the military intervention will be abused to target innocent civilians who, for example, happen to be related to or acquainted with members of the rebel group.[95]

Commentators nonetheless support the view that the knowledge requirement would be met by virtual certainty that a particular wrongful conduct will occur in the ordinary course of events.[96] For example, long-standing prior cooperation between the assisting and recipient States can have an impact on the knowledge of the assisting State of any wrongful intentions of the recipient State,[97] as does geographical proximity.[98] In addition, the knowledge may be assessed in light of public statements, diplomatic exchanges, official policies of the relevant organs of the recipient State, as well as its general patterns of conduct.[99] Information about a State's record regarding human rights and humanitarian law may also be available in the public domain via media reports and the investigations of international organizations and non-governmental

[90] Moynihan (n 5) 13 and 15; Aust (n 12) 235–6; Lanovoy (n 4) 22. This point was reaffirmed during debates pertaining to art 14 of the DARIO (n 22), where it was emphasized that 'actual' and not presumed knowledge was required. See ILC, *Responsibility of International Organizations, Comments and Observations Received from International Oganizations* (14 February 2011) UN Doc A/CN.4/637, 28 (World Bank); see also ILC, *Comments and Observations Received from Governments* (2001) UN Doc A/C.6/54/SR.22, 52 (United Kingdom; United States). See also the *Bosnia Genocide* decision (n 12) para 421. The ICJ determined that in the case of genocide, complicity required at least knowledge of the specific intent of the principal perpetrator. This suggests actual knowledge which is a stricter requirement than 'should have known'. See also Jørgensen (n 14) 31.

[91] ILC, Commentary to art 16 ASR (n 1) para (4); Lowe (n 55) 10; Lanovoy (n 4) 99–100.

[92] Lanovoy (n 4) 174 and 234.

[93] Lanovoy (n 4) 253.

[94] ibid.

[95] Moynihan (n 5) 12. See also Lowe (n 55) 6 who notes that the mere possibility that assistance will be used for unlawful acts does not suffice as such a possibility always exists in principle.

[96] Statement of The Netherlands, UNYBILC, Vol II, Pt One (2001) 52; Crawford (n 61) 406; Lowe (n 55) 8; Moynihan (n 5) 13; Aust (n 12) 233–5; Lanovoy (n 4) 100.

[97] Lanovoy (n 4) 227.

[98] *Bosnia Genocide* decision (n 12) para 430; Lanovoy (n 4) 238.

[99] Lanovoy (n 4) 100 and 227.

organizations (NGOs).[100] If credible and readily-available reports of fact-finding commissions, independent monitors or international organizations such as the UN draw attention to systematic violations of international humanitarian or human rights law by the recipient States, actual knowledge on the part of the assisting State can be assumed.[101] Under these circumstances, the assisting State will have to make prior inquiries into the specific purposes for which its assistance will be used by the recipient State.[102] Anything else would amount to wilful blindness, that is, 'a deliberate effort by the assisting [S]tate to avoid knowledge of illegality on the part of the [S]tate being assisted, in the face of credible evidence of present or future illegality'.[103]

However, the difficulty in establishing whether the threshold of virtual certainty or wilful blindness (which may be seen as two sides of the same coin) has been crossed, is illustrated by the recent High Court *CAAT* case in the United Kingdom concerning arms exports to Saudi Arabia.[104] At issue was whether the United Kingdom government had to cease the granting of new export licences, due to 'a clear risk that the arms might be used in the commission of serious violations of international humanitarian law' by the Saudi-led coalition in Yemen.[105] In addition to exporting arms, the United Kingdom also provided military training and liaison to the Saudis and had considerable insight into the military systems and practices of Saudi Arabia.[106] Having become aware of concerns about Saudi Arabia's approach to international humanitarian law in Yemen, the United Kingdom government had engaged extensively with Saudi Arabia in order to improve their military processes and approach in Yemen.[107] It further monitored

[100] Lanovoy (n 4) 101 and 238. See also *The Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 22–23, which emphasizes the relevance of the publicity and communication of information (in this instance maps).

[101] Moynihan (n 5) 14; Jackson (n 12) 162.

[102] Moynihan (n 5) 15; Jackson (n 12) 162.

[103] Moynihan (n 5) 13; Lanovoy (n 4) 253. The longer the violations of international law by the recipient States continue, the more likely it is that the assisting State is aware of the wrongful conduct and is turning a blind eye. See also Jackson (n 12) 162.

[104] *CAAT* case (n 9) paras 64ff; E Wilmshurst, 'Testing Jackson's Discussion of State Responsibility in the Context of Government Assistance. Book Discussion' EJIL:*Talk!* (13 April 2017), <https://www.ejiltalk.org/author/elizabethwilmshurst/>.

[105] *CAAT* case (n 9) paras 1, 4 and 6. The applicable law concerned secs 8 and 9(3) of the Export Control Act 2002. Sec 9, in particular, incorporated European Council Common Position 2008/944/CFSP (The Common Rules Governing the Control of Exports of Military Technology and Equipment), as well as obligations under the Arms Trade Treaty (n 8).

[106] Some United Kingdom staff members are located in the Saudi Arabian military headquarters in a liaison capacity, in order to obtain information about targeting procedures. However, they are not involved in any direct way in selecting targets, although they have advised the Saudi Arabian government on targeting. The United Kingdom has also trained the Saudi Arabian military personnel on compliance with international humanitarian law, and provided logistical and technical support. See also *CAAT* case (n 9) para 121; Wilmshurt (n 104). See First Joint Report of the Business Innovation and Skills and International Development Committees of Session 2016–17, *The use of UK-manufactured arms in Yemen. Response of the Secretaries of State for International Trade, Defence and International Development*'(November 2016).

[107] *CAAT* case (n 9) paras 126ff.

developments in Yemen on an ongoing basis through a variety of sources.[108] The United Kingdom government ultimately concluded that a clear risk that the exported arms would be used for serious violations of international humanitarian law had not (yet) been established.[109]

The Court accepted that the United Kingdom's conclusion was 'rational' (reasonable), which was the public law yardstick it had to apply.[110] More precisely, the Court accepted that it was rational for the United Kingdom government to conclude that the Saudi-led coalition was not deliberately targeting civilians; that Saudi Arabia had put in place procedures to secure respect for international humanitarian law; that Saudi Arabia was investigating instances of alleged violations; and that it had remained highly constructive in its dialogue with the United Kingdom.[111] In reaching its conclusion, the Court underscored the complex nature of the assessment which required specialized diplomatic and military expertise.[112] The Court also regarded the involvement of senior United Kingdom officials (such as the Secretary of State) in the decision-making process as evidence of a rigorous assessment process.[113] It further emphasized the qualitative difference between the risk analysis undertaken by government agencies and that of third parties, such as NGOs. Whereas government agencies can draw on highly-sophisticated intelligence that is often confidential, NGOs and other independent experts have to rely on much more limited, often second-hand sources.[114]

While the decision dealt with the domestic application of specialized rules under international law pertaining to the arms trade, it may also be instructive for interpreting the knowledge criterion (in the form of virtual certainty or wilful blindness) in Article 16 ASR. If one by analogy applied the Court's reasoning to Article 16 ASR, one can conclude that virtual certainty or wilful blindness implies a high level of certainty about the factual situation. This certainty is not in and of itself provided by credible allegations available in the public domain pertaining to violations of international humanitarian law and/or human rights by the recipient government. Stated differently, the fact that the information underpinning the allegations does justify an investigation (risk assessment) by the assisting State into the use of its aid or assistance by the recipient State does not mean that such information suffices to determine the results of the investigation. It is possible that a thorough risk assessment by the assisting State, relying on a comprehensive set of sources, reveals significant uncertainty regarding the scope of the violations of international humanitarian and/or human rights law, as well as the extent of the recipient

[108] *CAAT* case (n 9) paras 150ff. [109] ibid paras 208(7) and (8). [110] ibid para 25.
[111] ibid paras 129 and 135. [112] ibid para 31. [113] ibid paras 209 and 210.
[114] ibid para 180.

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State's involvement.[115] If this were the case, knowledge on the part of the assisting State about (the use of its military assistance during) the commission of any such violations cannot necessarily be assumed.

One caveat to this conclusion concerns the fact that the United Kingdom was not a party to the conflict in Yemen (that is, it did not provide direct military assistance to the Saudi-led coalition). The court emphasized that in such a case the access of the assisting State to information on targeting and other military operational practices of the recipient State remains limited, even in situations of close cooperation.[116] This may be read as implying that in situations where the United Kingdom provided direct military assistance to a territorial State, it would more readily have access to the targeting and other military operational practices of the territorial State. This in turn can provide more certainty about the latter's involvement in violations of international humanitarian and/or human rights law and whether it used any military aid or assistance when doing so. However, whether this indeed is the case will also be dependent on the specific factual context of each case.

C. Intent

In addition to the knowledge requirement, Article 16 ASR also requires wrongful intent on the part of the assisting State.[117] Although the text of Article 16(a) does not refer to intent, the ILC Commentary claims that a State is not responsible for aid or assistance under Article 16, unless the relevant State organ intended to facilitate the occurrence of the wrongful conduct.[118] The ILC Commentary thus clearly supports an element of intent in order to trigger Article 16 ASR,[119] even though the general approach of the ASR is opposed to requiring fault or wrongful intent as a criterion for engaging State responsibility.[120] This deviation from the objective responsibility regime by introducing a subjective (cognitive) element may be regarded as necessary to prevent too broad a responsibility for complicity.[121] However, this in turn raises the question of what the benchmarks of this subjective element are and what the relationship is between intent and knowledge.

[115] *CAAT* case (n 9) paras 31, 34. The High Court attached significant weight to the assisting government's own risk assessment, in light of the technical and complex nature of such assessments and its intertwinement with matters of national security.
[116] ibid para 181(iii).
[117] Lanovoy (n 4) 101.
[118] ILC Commentary to art 16 ASR (n 1) para (5); Finucane (n 4) 417; Lanovoy (n 4) 101.
[119] Aust (n 12) 172; Moynihan (n 5) 18; Crawford (n 61) 407–8.
[120] See Aust (n 12) 235–6 and 241ff, who notes some of the criticisms against the intent requirement in the context of State responsibility. These, inter alia, include the difficulty in attributing psychological requirements to States that in the abstract do not have a will of their own. Also, where the assisting State's intent is inferred from its conduct, this State would bear the onus of proving that it did not have any intent to aid or assist an internationally wrongful act. Proving 'a negative' may be very difficult to do. Similarly, Lanovoy (n 4) 101.
[121] Lanovoy (n 4) 221.

According to one line of reasoning, the intent requirement requires a desire to reach a particular outcome.[122] This argument is based on the ICJ's interpretation of complicity in accordance with Article III(e) of the Genocide Convention,[123] combined with the assumption that this reasoning is equally applicable to the notion of complicity in Article 16 ASR.[124] According to the ICJ, conduct can only be treated as aid or assistance to genocide if the person or organ, at the very least, had acted knowingly in the sense that it had to be aware of the specific intent of the principal wrongdoer.[125] The ICJ found a lack of intent on the part of Serbia, because of the fact that the resources in possession of the principal perpetrators of genocide resulted from a general policy of aid or assistance which was not specifically addressed towards facilitating the crime of genocide.[126] The ICJ also took cognizance of the fact that the decision of the Bosnian Serb leaders to commit genocide had been taken only shortly before it was carried out. Even if Serbia had known that mass atrocities were about to be committed, it was not aware of the specific intent *(dolus specialis)* of the principal perpetrator of genocide at the time the assistance was rendered.[127]

Whether this high threshold attached to intent is also applicable to Article 16 ASR is debatable. The ICJ was first and foremost interpreting the notion of complicity in relation to a specialized regime, namely, that of genocide.[128] The high burden of proof required in this instance is a result of the gravity of the internationally wrongful act in question. It does not necessarily mean that the customary notion of complicity in Article 16 ASR contains a similarly high threshold in relation to the specificity of the intent and the temporal proximity between the assistance given and the commission of the wrongful act.[129] If this stringent threshold were to apply to Article 16 ASR, this would imply that its intent requirement would not be fulfilled where a State committed an internationally wrongful act with aid from another State which was aware of the specific pending wrongful act by the principal actor, but did not desire this outcome. This, in turn, would make Article 16 ASR almost unworkable, as proving that a desired outcome was indeed intended by an assisting State could be very difficult. For example, where it depended on information which is controlled exclusively by the assisting State and which it will not disclose, it would not be possible to prove intent.[130]

[122] ibid 230; see *Bosnia Genocide* decision (n 12) para 419.
[123] See n 18.
[124] Lanovoy (n 4) 230.
[125] *Bosnia Genocide* decision (n 12) para 421; Lanovoy (n 4) 231.
[126] *Bosnia Genocide* decision (n 12) para 422; Lanovoy (n 4) 232.
[127] At the crucial time, it could not be established that the FRY supplied aid or assistance to the forces of Republika Srpska knowing that such assistance would be used to commit genocide. *Bosnia Genocide* decision (n 12) para 423; Lanovoy (n 4) 232.
[128] Lanovoy (n 4) 231.
[129] Lanovoy (n 4) 231 and 232.
[130] See Lanovoy (n 4) 229 and 232; see also *Corfu Channel* (*United Kingdom v Albania*) (Merits) [1949] ICJ Rep 4, 18.

As a result, there is support in scholarship for interpreting intent as the flipside of knowledge.[131] In line with this reasoning, actual knowledge of the fact that the recipient State will act illegally in the ordinary course of events will amount to intent.[132] This would further imply that knowledge in the form of virtual certainty or wilful blindness would simultaneously establish intent.[133] The fact that the assisting State did not desire a particular outcome (in the form of an internationally wrongful act) would not be decisive for establishing intent, but rather whether it knew that its assistance would be used for illegal purposes.[134] However, if the reasoning of the High Court in the recent *CAAT* case is anything to go by,[135] the determination of virtual certainty (and by extension intent) in complex military situations where the factual situation is likely to be disputed is highly challenging.

D. Knowledge and Intent in the Case of Serious Violations of Peremptory Obligations

At first sight it seems that the stringent requirements pertaining to knowledge and intent in accordance with Article 16 ASR can be overcome more easily where the violations of international humanitarian and/or human rights law qualify as 'a serious breach by a State of an obligation arising under a peremptory norm of general international law'.[136] In accordance with Article 40(2) ASR, '[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation'.[137] While the list of recognized peremptory norms in international law remains limited, the prohibition of torture and the core obligations under international humanitarian law (such as the prohibition of indiscriminate targeting or the wilful killing of civilians) are recognized as constituting such obligations.[138] In order for a violation of a peremptory obligation under international law to be 'serious' or 'gross', a certain scale of intensity is required.[139] Sporadic incidents of torture in State prisons, for example, would not be covered.[140] For the purposes of the current analysis, it is assumed that the type of alleged violations of humanitarian and human rights law outlined in section II above can amount to serious violations of peremptory obligations.

[131] Lanovoy (n 4) 221.
[132] See Moynihan (n 5) 19 who draws an analogy between individual criminal responsibility under international criminal law and State responsibility under art 16 ASR. While such analogies need to be handled with care, a logic similar to that of art 16 ASR is displayed in art 30(2) of the Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 38544. It determines that 'a person has intent where (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'.
[133] Jackson (n 12) 160.
[134] Moynihan (n 5) 21; Lanovoy (n 4) 232.
[135] *CAAT* case (n 9) paras 181(iii), 209 and 210.
[136] Art 40(1) ASR (n 1).
[137] Art 40(2) ASR (n 1).
[138] ILC Commentary to art 40 ASR (n 1) para (5).
[139] ILC Commentary to art 40 ASR (n 1) para (7); Lanovoy (n 4) 111.
[140] See Lanovoy (n 4) 112 who criticizes this limitation.

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Sub-articles 41(1) and (2) ASR are specifically aimed at prohibiting complicity in (the continuation of) serious breaches of international law and constitute a concretization (*lex specialis*) of Article 16 ASR.[141] Article 41(1) determines that States have to cooperate to bring to an end through lawful means any serious breaches of international law.[142] In addition, sub-article 41 (2) ASR determines that '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, *nor render aid or assistance in maintaining that situation*'.[143] The duty of non-cooperation in sub-article 41(1) ASR is aimed at the general (political) isolation of the State that committed a serious breach of peremptory norms.[144] The duty of non-assistance in sub-article 41(2) concerns concrete measures that can impact the wrongful conduct.[145] The specific obligations in sub-article 41(2), therefore, are an extension of the general obligation not to cooperate in sub-article 41(1).[146]

Both these articles are triggered only once serious breaches of peremptory norms have already taken place and regardless of whether the breach itself is an ongoing one.[147] Once such a wrongful situation has been brought about, States have to refrain from acts that contribute to maintaining the wrongful situation.[148] The obligations in sub-articles 41(1) and 41(2) are not dependent on evidence that the assisting State had knowledge of the circumstances of the internationally wrongful act, nor whether it had the desire to bring about the wrongful situation.[149] Instead, States aiding or assisting the principal actor are assumed to have the knowledge and the intention to provide assistance with a view to facilitating the maintenance of a situation that resulted from gross violations of peremptory norms.[150] This relates to the fact that the nature and scope of the violations of the international obligations at stake are such that they are unlikely to go unnoticed by other States.[151]

That being said, the added value of sub-article 41(2) ASR, in practice, including situations of forcible intervention by invitation, is questionable.[152] First, the fact that an alleged serious breach of international law is unlikely to go unnoticed by States implies that credible sources will also have reported widely on it. As a result, an assisting State would be in the same situation as in the case of Article 16 ASR, namely, under an obligation to engage in prior investigations before committing future aid or assistance to the government

[141] Lanovoy (n 4) 106; Aust (n 12) 336.
[142] Art 41 ASR (n 11).
[143] Art 42 ASR (n 11) (emphasis added). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* P [2004] ICJ Rep 136, para 159.
[144] For a discussion, see Aust (n 12) 336–7.
[145] Aust (n 12) 337; Lanovoy (n 4) 108.
[146] ILC, Commentary to art 41 ASR (n 11) para (4); Lanovoy (n 4) 108.
[147] ILC Commentary to art 41(2) ASR (n 11) para (11); Lanovoy (n 4) 106 and 115.
[148] ILC Commentary to art 41(2) ASR (n 11) para (11); Aust (n 12) 381; Lanovoy (n 4) 107–8.
[149] ILC Commentary to art 41(2) ASR (n 11) para (11); Lanovoy (n 4) 115.
[150] ILC Commentary to art 41(2) ASR (n 11) para (11).
[151] ILC Commentary to art 41(2) ASR (n 1) para (11); Moynihan (n 5) 22–3; Nolte and Aust (n 5) 16; Lanovoy (n 4) 115 and 238.
[152] Aust (n 12) 417.

allegedly responsible for the serious breaches.[153] However, as illustrated above in section III.B, the outcome of these investigations may not necessarily yield the factual certainty that is necessary to determine whether a recipient government was indeed responsible for (in this instance) serious breaches of peremptory norms and/or whether aid or assistance by the assisting State will contribute to maintaining the situation brought about by such violations. As in the case of Article 16 ASR, such factual certainty may be difficult to obtain even after rigorous risk assessment has been undertaken by the assisting State. The result is that the assisting State's knowledge of gross violations of peremptory norms and (by extension) its intention to provide assistance that will maintain the situation brought about by these violations cannot necessarily be assumed. Finally, it also remains disputed whether sub-article 41(2) ASR has acquired customary international law status, which may in practice weaken its application.[154]

IV. LEGAL CONSEQUENCES OF COMPLICITY UNDER ARTICLE 16 ASR FOR DIRECT MILITARY SUPPORT

The foregoing analysis suggests that whether an intervening State risks derivative responsibility for violations of humanitarian and/or human rights law by the inviting government in terms of Article 16 ASR depends on various, and as of yet unclear, criteria. These include the factual and temporal proximity (nexus) between the assisting and principal act; the specificity (and certainty) of the knowledge requirement; as well as the specificity of the intent requirement and its relationship with the knowledge requirement. If one applies these criteria to the situations of forcible intervention by invitation outlined in section II, one would first have to assess on a case-by-case basis whether the military assistance of the intervening State in any significant manner facilitated or contributed to the principal wrongful conduct of the territorial State. This in itself can be a difficult hurdle to overcome.

As far as the knowledge requirement is concerned, it is arguable that any assumption of knowledge on the part of the assisting State must be based on a high level of factual certainty about the role of the recipient government in committing violations of humanitarian and/or human rights law and its use of military assistance for this purpose. Where the factual context remains disputed, knowledge cannot necessarily be assumed. If one were to regard knowledge and

[153] Aust (n 12) 336 and 343ff. See also Lanovoy (n 4) 115. The serious breaches are also likely to be of a continuous nature and, therefore, would in any case also fall under art 16 ASR (n 1).

[154] Moynihan (n 5) 22; Aust (n 12) 336 and 343ff. According to Lanovoy (n 4) 116–7, art 41(2) ASR and art 42 DARIO may have a certain added value in relation to the nexus requirement, as the aid or assistance need not significantly contribute to the maintenance of the situation flowing from the serious breach of a peremptory norm. A lower degree of significance in relation to the link with the wrongful act would be acceptable, as one is dealing with the maintenance of a serious breach which has already occurred and not a situation pertaining to a wrongful act that still has to be committed.

intent as two sides of the same coin, such factual uncertainty would further imply that intent also could not be assumed. Furthermore, even if one were to assume that the alleged wrongful conduct constituted serious breaches of peremptory obligations in terms of Article 40 ASR, this would not make much practical difference, given the effective overlap in consequences between sub-article 41(2) ASR and Article 16 ASR.

In essence, therefore, the answer to whether the conduct of any of the intervening States in the situations outlined in section II triggered derivative responsibility, would require a close scrutiny of the facts of each specific case. However, if one were to assume for the sake of argument that the threshold requirements for Article 16 ASR have been met in the above-mentioned scenarios, general international law requires the State responsible for the internationally wrongful act 'to cease that act, if it is continuing'.[155] For the purposes of the current analysis, this raises the question of how exactly to cease the wrongful assistance and—in particular—whether this would require the intervening State to withdraw direct military support.[156] If the assisting State has agreed with the recipient State that the military assistance must be used in accordance with international humanitarian and human rights law and then becomes aware that its assistance is used in contravention of this condition, this could eventually amount to a material breach that suspends further obligations to provide military assistance.[157] However, where no agreement regarding the termination of military assistance in case of violations of humanitarian and human rights law by the recipient State is in place, it is unclear if and under which conditions general international law would so require.

In considering this question, the 2013 Human Rights Due Diligence Policy (HRDPP) of the UN, which serves as a guideline to the UN when engaging in military operations, can be instructive.[158] Its aim is to prevent the UN from rendering assistance in situations where there is credible evidence that the entities receiving such assistance are likely to commit grave violations of international humanitarian law, human rights or refugee law, and where the relevant authorities fail to take the necessary corrective or mitigating measures.[159] The type of military assistance affected may range from financial support to strategic, tactical, logistical and operational support. It further includes field action and joint operations conducted by the UN and other forces.[160]

[155] Art 30(a) ASR (n 1); Lanovoy (n 4) 109.
[156] Lanovoy (n 4) 229.
[157] Lanovoy (n 4) 174.
[158] Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces, UN Doc A/67/775-S/2013/110 Annex (5 March 2013) paras 1, 14(d); see also HP Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism Against Complicity of Peacekeeping Forces?' (2015) 20 JC&SL 66.
[159] UN Doc A/67/775-S/2013/110 Annex (n 165) para 1; Aust (n 158) 64.
[160] UN Doc A/67/775-S/2013/110 Annex (n 159) paras 8(c)–(8(f) and 10; Aust (n 158) 64–5.

In accordance with this document, the threshold for withdrawal of UN military assistance is crossed only once there is a likelihood of 'grave violations' of humanitarian, human rights and refugee law.[161] This, for example, would include war crimes or crimes against humanity as referred to in the Statute of the International Criminal Court,[162] or large-scale, repeated (patterns of) human rights violations.[163] Furthermore, the withdrawal of military support would occur only if such grave violations by the recipient government persist, despite precautionary measures which the UN may have taken.[164] If one applies the logic of this policy to (coalitions of) States engaged in forcible intervention by invitation, the threshold for troop withdrawal would only be crossed in cases of serious violations of peremptory obligations of international law within the meaning of Article 40 ASR. Moreover, it would only become necessary after it has become clear that any precautionary measures taken have proved to be unsuccessful. In drawing this analogy, one has to keep in mind that the purpose of the HRDDP is not to determine the scope and consequences of responsibility of the UN for (complicity in) violations of international humanitarian, human rights and refugee law. Instead, its aim is to prevent such violations from occurring.[165] The document, therefore, does not directly address the question of cessation and its implications. Even so, the issue of troop withdrawal does implicitly touch on these questions. Also, the fact that troop withdrawal is to be considered only as a last resort implicitly does suggest that cessation can also be achieved by lesser means.[166]

An obvious 'lesser step' would be to request concrete assurances from the territorial State about its adherence to international humanitarian law and human rights law. For example, it would need to indicate the steps it is taking to improve targeting and other operational practices, as well as that it is undertaking investigations into allegations of violations of international humanitarian and/or human rights law.[167] The intervening State may also have to intensify its monitoring of and involvement in the military operations of the territorial State.[168] For example, it may need to engage in advance screening of commanding officers of the territorial State and those making up

[161] Aust (n 158) 71.

[162] The Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 90, arts 7 and 8.

[163] For a list of actions that qualify as 'gross violations', see UN Doc A/67/775-S/2013/110 Annex (n 159) paras 12 (a)(i), (ii) and (iii); Aust (n 158) 65–6.

[164] UN Doc A/67/775-S/2013/110 Annex (n 159) para 16; Aust (n 158) 71.

[165] Aust (n 158) 71.

[166] See *Final Report of the Panel of Experts on Yemen* (n 9) 129 which *inter alia* stated: 'All coalition Member States and their allies also have an obligation to take appropriate measures to ensure respect for international humanitarian law by the coalition. This obligation is especially incumbent upon the Government of Yemen, upon whose request and with those consent the air strikes are being conducted.'

[167] As was the case with Saudi Arabia in the *CAAT* case (n 9) paras 129. 135. See also Finucane (n 4) 425.

[168] Finucane (n 4) 426 and 430.

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their units; the placing of operational and legal expertise within the forces of the territorial State; as well as embedding personnel in the units of the territorial State that decide on targeting practices.[169] If such measures (or any combination thereof) do not succeed in preventing gross violations of humanitarian and human rights law by the recipient State, the intervening State may ultimately be obliged to withdraw its troops. However, the point at which this obligation would arise under general international law is yet to be determined by State practice.

V. CONCLUDING REMARKS

In light of the foregoing analysis, it is fair to conclude that any claim according to which direct military assistance is prohibited if it aids or assists violations of international human rights and humanitarian law by the incumbent government does not (yet) find support in general international law. Therefore, if the statement in Article 3 of the IDI 2011 Resolution, according to which direct military support on request would be prohibited if it violated 'generally accepted standards of human rights',[170] also encompasses direct military support that aided and assisted such violations by the requesting government,[171] it would be merely aspirational. First, the triggering of the responsibility framework in Article 16 ASR in situations where direct military assistance is provided to incumbent governments accused of continued violations of international humanitarian and human rights law is fraught with uncertainty. Moreover, even if it can be assumed that Article 16 ASR was triggered in all the situations of forcible intervention by invitation outlined in section II, this does not in and of itself imply that the intervening States have to terminate their direct military support. State practice does not yet support the conclusion that such withdrawal is required by general international law. This remains the case even where such violations amounted to serious violations of peremptory norms of international law in terms of Article 40 ASR.

If and to the extent to which an assisting State does decide to withdraw its troops and/or air power from the territorial State, this would more likely have to do with policy reasons. Intervening States may find the nature and scope of the precautionary measures necessary to prevent their implication in violations of international humanitarian and human rights law too time-consuming and costly. However, in the absence of such measures the intervening States (in addition to incurring derivate State responsibility) risk significant reputational loss and credibility in terms of its own respect for international law. This risk is particularly high where the institutional shortcomings of an inviting State may be such that no amount of training or technical assistance would bring about,

[169] ibid 425 and 426.
[170] IDI (n 2) art 3.
[171] Assuming for the sake of argument that the resolution would also apply during a NIAC.

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within a foreseeable time, the expertise and discipline required for ensuring that the governmental military forces act in accordance with international humanitarian and human rights law.[172] In such an instance, the intervening State may conclude that the withdrawal of direct military assistance would be the most prudent option.

[172] Finucane (n 4) 430.

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