

Territorial Integrity, Political Independence, and Consent: The Limitations of Military Assistance on Request under the Prohibition of Force

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Abstract

This paper builds upon previous research by the author into the mechanics and interpretation of Article 2(4) of the UN Charter, which sought to explain the apparent contradiction between the status of the prohibition as a non-derogable norm of *jus cogens* and its well-recognised ‘exceptions’. Turning to the role of state consent within the prohibition, this paper explores the scope and limits of a State’s ability to consent to the use of force within its territory – for example, by requesting military assistance in the context of a civil war - in light of this mechanical interpretation. The principles of territorial integrity and political independence are integral to the prohibition of force, and the role of consent in restricting the application of these principles, this author argues, has a very key role in determining the ‘operating scope’ of the prohibition as it applies to a specific State. This paper seeks to explore whether this could mean that certain interventions into a State may still be prohibited even where a State requests these. With these issues in mind, the paper will ultimately consider: (i) whether these limitations exist at all; and (ii) if they do exist, whether they form part of the prohibition of force itself, the principle of non-intervention, or indeed whether there is a standalone prohibition of intervention in civil wars.

1. Introduction

The issue of ‘intervention by invitation’ or ‘military assistance on request’ rests primarily on the idea that a State may consent to the use of force within its jurisdiction.¹ There are, however,

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¹ This paper will prefer the phrase ‘military assistance on request’, to avoid the seemingly contradictory terminology of ‘intervention by invitation’. The very fact of consent itself implies there is no ‘intervention’ in the legal sense against the State consenting to operations within its territory, but nevertheless still a use of force by one State upon the request of another State.

important questions on whether the legality of such assistance is in accordance with international law – whether there is a standalone prohibition of intervention in civil wars; whether this is a breach of the principle of non-intervention; or whether it is fundamentally a breach of the prohibition of force in international relations under Article 2(4) of the UN Charter. This paper is dedicated to an examination of the latter point, and whether ‘military assistance on request’ could be limited by the prohibition of force itself.

Previously, I have offered a view on the mechanics and interpretation of the prohibition of force under Article 2(4) of the UN Charter, offering research findings that help to explain the problems and contradictions with the common interpretations of the prohibition.² As will be explained, the original interpretation of Article 2(4), confirmed through the preparatory debates during the drafting of the Charter, was one that prohibited all *unilateral* uses of force but not all uses of force completely. Importantly, the prohibition itself is to be interpreted as leaving room for the recognised lawful acts of force: self-defence, and action taken or authorised by the UN Security Council. But these lawful uses of force are not to be interpreted as ‘exceptions’ to the provision, but rather instances that are compatible with the wording and mechanics of the prohibition of force in the first place. This is a subtle but important distinction, because it not only explains why the purported ‘exceptions’ to Article 2(4) are not unlawful derogations from a *jus cogens* norm, but it also explains why the terms ‘territorial integrity and political independence’ were inserted to *strengthen* the prohibition of force rather than qualify it. In particular, the mechanical interpretation of Article 2(4) reveals that the Security Council itself is bound by the provision, so as not to use force in a way in which violates the principles of territorial integrity, political independence, or is inconsistent with the purposes of the United Nations.

² PM Butchard, ‘Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter’, (2018) 23(2) *Journal of Conflict and Security Law* 229.

This original interpretation of Article 2(4) logically requires the consent of States to play a vitally important role in determining the scope of the prohibition of force as it applies in a given situation. Because consent limits the scope and application of the principles of territorial integrity and political independence, this explains the Security Council's ability to use or authorise force that may otherwise violate those principles. But this does not mean that consent may displace the prohibition in its entirety, or else its status as a *jus cogens* norm would be void of any meaning. Therefore, in this paper, the author will explore the role of consent in this mechanical interpretation of Article 2(4), and how (if at all) the prohibition of force limits the ability of States to consent to force within its jurisdiction.

After setting out this position, the paper will then move on to address some of the more recent theories that seek to explain the legality of military assistance on request, including views on the long-running debate regarding the existence of a standalone prohibition of intervention in civil wars. The paper will address the compatibility of the original interpretation of Article 2(4) with the findings of these commentators, offering some views on how they largely arrive at the same destination, but with very different legal explanations and therefore subtly different legal consequences.

2. The Original (Mechanical) Interpretation of Article 2(4)

In full, Article 2(4) 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 prohibition is also found in customary international law, which technically maintains a separate existence, and is not completely identical in scope due to the nature of the other UN Charter provisions allowing the lawful use of force, but flows from the same common principle outlawing the use of force in international relations.³ Indeed, declarations of the UN General Assembly seem to evidence that the customary prohibition largely reflects in its essence and wording that outlined in Article 2(4).⁴

This paper does not seek to repeat the distinctions between the two main interpretations of Article 2(4), because they have been studied and rejected in detail elsewhere,⁵ but they are worth briefly explaining here. Firstly, restrictive and overly-narrow interpretations that suggest States may use unilateral force when it is *not* directed against the territorial integrity or political independence of a State, and remains consistent with the purposes of the United Nations,⁶ ignore the very purpose of the prohibition as outlawing *all* unilateral uses of force no matter their intent or purpose, because unilateral force without UN approval undermines the very purposes of the UN itself.⁷ Secondly, it is important to note that a number of problems also arise when the prohibition is interpreted as ‘all-encompassing’ or ‘general’ in nature. In other words, when the prohibition is interpreted as prohibiting *all* uses of force in international relations, rather than as a more nuanced provision that allows for the recognised lawful uses of force within the construction of the rule itself. This is particularly revealing when we consider the nature of the prohibition as *jus cogens*.

³ See, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits), Judgment of 27 June 1986, [1986] ICJ Rep 14 [hereinafter ‘Nicaragua Case’], at paras [174]–[178].

⁴ See, for example, UNGA Res 2625(XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, (24 October 1970) UN Doc A/RES/2625(XXV), Annex, Principle 1.

⁵ See Butchard (n 2) at 223-246. For an overview of these competing approaches, see for example: Christine Gray, *International Law and the Use of Force* (3rd edn, OUP, 2008), at 30–31; Lindsay Moir, *Reappraising the Resort to Force: International Law, Jus ad Bellum, and the War on Terror* (Hart Publishing, 2010), at 5–9.

⁶ On this argument, see Fernando R Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York, 2nd edn, Transnational Publishers, 1997), at 151-157.

⁷ See Butchard (n 2), at 249 and 261. This point will also be addressed further below.

2.1 The *Jus Cogens* Problem and ‘Intrinsic’ Consent

It is widely argued that Article 2(4) is a peremptory norm of international law – in other words, the prohibition of force has the status of *jus cogens*. The ICJ in the *Nicaragua Case* made reference to such support,⁸ and Olivier Corten provides a thorough account of *opinio juris* confirming this view.⁹ By having such a status, the prohibition of force is ‘a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.¹⁰

The International Law Commission (ILC), in its Articles on State Responsibility,¹¹ recognised at Article 20 that consent of a State may preclude the wrongfulness of an act in respect to an obligation owed to that State, but Article 26 clearly restricts this and prohibits precluding any wrongfulness of an act ‘not in conformity with an obligation arising under a peremptory norm of general international law.’ In other words, the ILC suggest that consent cannot disapply the application of a norm of *jus cogens*. In its commentaries to the Articles, the ILC states that ‘One State cannot dispense another from the obligation to comply with a peremptory norm ... whether by treaty or otherwise.’¹² Accordingly, *ad hoc* consent to an act prohibited by a *jus cogens* can also be considered an unlawful ‘derogation’.

Therefore, if the prohibition of force was an all-encompassing prohibition of all inter-State force, then consent to the use of force within a State’s territory would not be valid. Further, even the use of force on behalf of the Security Council would technically be covered

⁸ See, for example, *Nicaragua Case* (n 3), at [190].

⁹ O Corten, *The law Against War: The Prohibition of the Use of Force in Contemporary International Law* (Hart Publishing, 2012), at 200-213.

¹⁰ See, Vienna Convention on the Law of Treaties, (adopted 23rd May 1969, entered into force 27th January 1980) 1155 UNTS 331 [hereinafter VCLT], Article 53.

¹¹ UNGA Res 56/83, *Responsibility of States for Internationally Wrongful Acts*, (28th January 2002) UN Doc A/RES/56/83, Annex.

¹² ILC, ‘Report of the International Law Commission on the Work of its Fifty-Third Session’, (23 April–1 June and 2 July–10 August 2001), UN Doc A/56/10, Article 26, and para [6]; reproduced in [2001] (Vol II, Part Two) *Yearbook of the International Law Commission*, from 31.

by such an all-encompassing prohibition,¹³ because according to Article 64 of the Vienna Convention on the Law of Treaties, any existing treaty provision which is in conflict with a newly-established norm of *jus cogens* becomes void and terminates. The only way to counter this would be to accept that the *jus cogens* version of the prohibition of force also contains the powers of the Security Council within its formulation.¹⁴ But the problem with this position is that it requires the powers of the Security Council to also have a status of *jus cogens* – an idea that does not stand up to scrutiny, especially in light of the fact that States who are not members of the UN could not be considered bound by the Council’s powers and therefore these powers are incapable of achieving *jus cogens* status.¹⁵

Some seek to explain consent and the use of force by suggesting that consent is built into the primary rule itself, rather than being provided by a secondary rule such as the circumstances precluding wrongfulness in the law of State Responsibility.¹⁶ Indeed, James Crawford, then-Special Rapporteur during the drafting of the Articles on State Responsibility, wrote about the relationship between consent and peremptory norms:

Some peremptory norms contain an “intrinsic” consent element. For example, the rule relating to the non-use of force in international relations embodied in Article 2, paragraph 4, of the Charter of the United Nations does not apply in certain cases where one State has consented to the use of force on its territory by another State. But one State cannot by consent *eliminate* the rule relating to the use of force in international

¹³ Since it is Members who use force on the order or authorisation of the Security Council, then this type of force would be captured by the prohibition. Similarly, The Security Council is bound by Article 24(2) to ‘act in accordance with the Purposes and Principles’ of the Charter when exercising its powers, which includes the prohibition of force – See Butchard (n 2) at 235-238.

¹⁴ See, for example, U Linderfalk, ‘The Effect of *Jus Cogens* Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’, (2007) 18(5) *European Journal of International Law* 853, at 860-867; James Green, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force,’ (2011) 32 *Michigan Journal of International Law* 215, at 234.

¹⁵ See Butchard (n 2), at 241-243.

¹⁶ This issue will also be explored further below, see section 4.2.3.

relations in its relations with another State. Thus it may be necessary to distinguish between a consent which applies Article 2 (4), which may be valid, and a purported consent which displaces or excludes it entirely, which, if Article 2 (4) is peremptory in character, would be invalid ...¹⁷

Corten argues that Crawford's suggestion implies that 'it is impossible to evoke a circumstance excluding "wrongfulness", as no wrongfulness can have been observed'.¹⁸ However, this suggestion – to be a little semantic – seems to forget that the consent would be *precluding* (i.e. preventing) wrongfulness, rather than excluding or *undoing* a wrongfulness that has taken place. Without the 'circumstance precluding wrongfulness', the act would be wrongful. But when a circumstance precluding wrongfulness applies, the act itself was never wrongful in the first place. So, there is some merit to suggest that consent may be an 'intrinsic' part of the prohibition of force, but Crawford does not further explore exactly where in Article 2(4) this 'intrinsic' consent may come from.¹⁹

In this regard, Crawford's argument also does not outline whether and where any limits on this consent may come from within the primary rule itself. If, as he argues, consent cannot displace the whole prohibition, then how does the primary rule itself define such limits? In other words, where does the threshold lie between a legally valid consent to use force within a territory, and a consent to use force that disapplies Article 2(4) entirely? Indeed – the consent of States to the powers of the Security Council seems to be an example of such a total disapplication of Article 2(4), which again does not fit with the idea that the prohibition is a

¹⁷ ILC, 'Second Report on State Responsibility by Mr James Crawford, Special Rapporteur', (1999) UN Doc A/CN.4/498/Add.2, at para [240(b)].

¹⁸ Corten (n 9), at 252-253.

¹⁹ See also Helmersen, who explains this in terms of 'primary' and 'secondary' rules, and concludes that consent must be inherent in the primary rule itself to be lawful for the prohibition of force: S T Helmersen, 'The Prohibition of Force as Jus Cogens: Explaining Apparent Derogations', (2014) 61(2) *Netherlands International Law Review* 167, at 177-178. But again, Helmersen does not explain exactly how the provision of Article 2(4) provides for this in its wording.

peremptory norm of international law. Therefore, there must be a more nuanced interpretation of the prohibition of force that both allows for the powers of the Security Council, and for the limited consent of States.

The original interpretation of Article 2(4) offers such an explanation. On the basis of the subsequent analysis of the preparatory works of the UN Charter, it is submitted that the ‘intrinsic’ consent for Article 2(4) can be explained by the incorporation of the principles of territorial integrity and political independence.²⁰ While it is not the purpose of this article to determine in detail how or why consent is *intrinsic* to these principles (i.e. inherent in those principles, rather than provided by an external rule), it is submitted that these principles are very much linked to (or indeed derive from) sovereignty itself, and so any permission to encroach upon them is intrinsic in the nature of that sovereignty. On the other hand, the prohibition in Article 2(4) of force ‘inconsistent with the purpose of the United Nations’ is not directly linked to a State’s rights under sovereignty – this part of Article 2(4) is a prohibition separate to any rights of sovereignty, meaning that consent cannot not ‘provide permission’ in an intrinsic way to this part of the provision and, because of Article 2(4)’s *jus cogens* status, also cannot have an ‘extrinsic’ effect either as a ‘circumstance precluding wrongfulness’ because of the restriction in Article 26 of the ILC’s Articles on State Responsibility. Therefore, while consent may limit the application of territorial integrity and political independence as part of the prohibition, such consent does not extend to limiting the latter provision of Article 2(4) – it is not possible to consent to force ‘inconsistent with the purposes of the United Nations’. This further indicates that the legality of military assistance upon request may well be limited by the prohibition of force itself.

2.2 Explanations from the Preparatory Works

²⁰ See sections 3.1 and 3.2 elaborating on territorial integrity and political independence respectively.

In seeking to explain the contradictions outlined above, and other problems with the traditional interpretations of Article 2(4), previous research has sought to clarify or confirm the meaning of the precise terms of this provision by referring to the preparatory works of the UN Charter itself. The research clarifies that States were very clearly of the view that all *unilateral* uses of force were prohibited by Article 2(4), but nevertheless Article 2(4) itself left room for the use of force by the Security Council, and in self-defence.²¹

Firstly, this intention was clearly demonstrated when the UK representative at the drafting of the Charter sought to reassure the Norwegian delegate that the prohibition ‘did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defence’²² and the UK stated that ‘the wording of the text had been carefully considered so as to preclude interference with the enforcement clauses of [Chapter VII] of the Charter’.²³ This was further supported by a subsequent report detailing the conclusions of these discussions relating to Article 2(4), which stated:

The Committee likes it to be stated in view of the Norwegian amendment to the same paragraph that the *unilateral use of force* or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defence *remains admitted and unimpaired*. The use of force, therefore, *remains legitimate only to back up the decisions of the Organization* at the start of a controversy or during its solution in the way that the Organization itself ordains. The intention of the Norwegian amendment is thus covered by the present text.²⁴

²¹ For the full details of these findings, see Butchard (n 2), at 247-254.

²² *Eleventh Meeting of Committee I/1*, (5 June 1945), Doc 784, I/1/27, 6 UNCTAD 331, at 334.

²³ *Ibid*, at 335.

²⁴ *Report of Rapporteur of Committee I, Commission I*, (9th June 1945), Doc 885, I/1/34, 6 UNCTAD 387, at 400 (emphasis added).

Elsewhere during the drafting, Australia – who had a considerable hand in amending Article 2(4) into what it eventually became – noted that Article 2(4) ‘was not entirely negative but implied the positive use of force.’²⁵ This, of course, indicating that Article 2(4) itself left room for the lawful uses of force by the Security Council and in self-defence.²⁶

Because the original ‘Dumbarton Oaks’ proposals for Article 2(4) did not contain the phrases prohibiting force against the ‘territorial integrity’ or ‘political independence’ of a State,²⁷ some commentators highlighted the possibility that their addition necessarily qualified and restricted the prohibition of force.²⁸ On the other hand, Brownlie’s widely-cited argument was that ‘territorial integrity’ and ‘political independence’ were inserted at the insistence of smaller States to offer specific guarantees or protections under the prohibition, and not to restrict or qualify the prohibition of force.²⁹ While Brownlie is right in that smaller States did insist upon the insertion of these terms – it was not to simply clarify the prohibition of force, but to *strengthen* it. Furthermore, there was not only pressure from some States to restrict the ability of other States to take forcible measures, but these smaller States also sought specific guarantees that the *Security Council* itself would not cross certain lines in the use of its enforcement powers.

This much is evident from several discussions relating to proposals that sought to place specific safeguards on the use of the Security Council’s powers, some of them relating explicitly to the idea that the Council should be bound to respect the principles of territorial integrity and political independence when using its enforcement powers. For example, a

²⁵ *Twelfth Meeting of Committee I, Commission I*, (6th June 1945), Doc 810, I/1/30, 6 *UNCIO* 342, at 346.

²⁶ See also, *Verbatim Minutes of the Second Meeting of Commission I*, (20th June 1945), Doc 1123, I/8, 6 *UNCIO* 65, at 68-69 (Peru).

²⁷ *Dumbarton Oaks Proposals for a General International Organisation*, Doc 1, G/1, 3 *UNCIO* 1, at 3 (Chapter II, para 4).

²⁸ Steve G Simon, ‘The Contemporary Legality of Unilateral Humanitarian Intervention’, (1993-1994) 24 *California Western International Law Journal* 117, at 131; and O Schachter, ‘International Law in Theory and Practice: A general Course in International Law’, (1982) 178 *Recueil des Cours de l’Académie de Droit International* 9, at 140.

²⁹ Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963), at 266-267.

Czechoslovakian proposal very clearly considered that the Security Council was bound by the principles of ‘territorial integrity’ and ‘political independence’ – two fundamental elements of the prohibition of force.³⁰ The Czechoslovakian representative eventually withdrew the proposal, giving the reason that it was merely an ‘observation’ that the Security Council was bound to respect territorial integrity and political independence in a part of the Charter under consideration by a different Committee.³¹ Exactly how and where the Security Council is bound to respect these principles was revealed in subsequent discussions of the Czechoslovakian proposal and a similar Norwegian amendment that sought similar limitations on the powers of the Council.³²

In particular, Norway sought assurances that States’ territorial integrity and political independence should be protected especially when the Security Council used coercive actions and sanctions.³³ The debates surrounding this proposal reveal that, although States rejected Norway’s amendment – it was not because they disagreed with all of its content or the purpose behind it, but because they believed that some of the assurances sought were already guaranteed elsewhere in the Charter – particularly in what became Article 2 of the Charter.³⁴ For example, the United States argued that the Purposes and Principles of the Charter ‘constituted the highest rules of conduct’ and that ‘the Charter had to be considered in its entirety and if the Security Council violated its principles and purposes it would be acting *ultra vires*.’³⁵ But more revealing was the argument put by the Australian delegate, as the meeting records show:

³⁰ *Document Table on Chapter VI Sections B, C, and D*, (15th May 1945), Doc 360, III/1/16, 11 UNCIO 766, at 770 (citing Doc 2 G/14 (b), p.2).

³¹ *Continuation of the Report of the Activities of Committee III/1 Concerning Sections A, B, C, and D of Chapter VI of the Dumbarton Oaks Proposals*, (14th June 1945), Doc WD 313, III/1/51, 11 UNCIO 555, at 557; see also *Summary Report of Thirteenth Meeting of Committee III/1*, (24th May 1945), Doc 555, III/1/27, 11 UNCIO 375, at 378.

³² See proposal at (n 30), 11 UNCIO 766, at 770 (citing Doc 2 G/7 (n)(1), p.4).

³³ *Thirteenth Meeting of Committee III/1* (n.31), 11 UNCIO 375 at 378-379.

³⁴ *Ibid*, 379-380.

³⁵ *Ibid*, 379.

The Australian Delegate agreed that Norway's amendment was important. He further agreed that its proper place was in another part of the Charter to which Australia has proposed an amendment that all nations should refrain from the threat or use of force against on each other. This idea, as well as the Czechoslovak desire for guarantees of independence and territorial integrity, was concerned with the same basic question as the Norwegian amendment, but belonged in an earlier section of the Charter.³⁶

Australia's reference to its own amendments earlier in the Charter referred to an amendment to Article 2(4) which added the terms 'territorial integrity' and 'political independence' to that provision.³⁷ This clearly suggests that Norway's aim for the Security Council to respect these principles is achieved through its own amendment to Article 2(4), which in turn indicates a view on the part of the drafters that the Security Council itself is bound by Article 2(4). Similarly, another one of the 'Principles' that the Security Council is bound to respect is 'sovereign equality' as recognised in Article 2(1), which during the drafting of this provision it was clear also includes a requirement to respect political independence and territorial integrity.³⁸

It is on this basis that I have argued that 'territorial integrity' and 'political independence' are dynamic principles that contain inherent qualifications based upon the consent of states and other rules of customary international law.³⁹ Their scope and operation, as they apply to each State, depend on the rules that State is subject to in custom, or any relevant

³⁶ *Ibid.*

³⁷ *Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia*, (5th May 1945), Doc 2, G/14 (1), 3 UNCTAD 543.

³⁸ *Report of Rapporteur of Committee I to Commission I*, (9th June 1945), Doc 885, I/1/34, 6 UNCTAD 387, at 397-398.

³⁹ See further, Butchard (n 2), at 254-259.

consent that State has given in restricting the application of these principles. This also explains how and where the ‘intrinsic’ consent may fall within Article 2(4) as suggested by Crawford.⁴⁰

3. The Role of Consent

Since the original intentions of the drafters of the Charter was to leave room within Article 2(4) for the recognised lawful measures using force, it necessarily requires elements of consent to ‘limit’ the application of the principles of territorial integrity and political independence for that to work.

However, while these principles on their own may have ‘intrinsic’ elements of consent allowing their application to be limited, the reasons for smaller states wishing to insert these principles explicitly into the prohibition to *limit* the powers of the Security Council, seems to suggest that the principles cannot be extinguished from the prohibition altogether. In other words, while it is unclear whether these principles alone have *jus cogens* status,⁴¹ the very fact that they are seen as a limitation of the Security Council’s powers (themselves valid on the basis of consent) suggests at the very least that there are some limits to this consent as it applies to the principles of territorial integrity and political independence.

While this section will explore the effects of consent on the prohibition of force in Article 2(4), it will not explore the ‘validity’ of this consent – including the question as to which actors may validly give consent on behalf of a State. Such questions are beyond the scope of this paper and have been explored in detail by other commentators, including in this special issue.

3.1 Limiting the Application of Territorial Integrity

⁴⁰ See above, n 17 and accompanying discussion.

⁴¹ The author is not aware of any *opinio juris* of States discussing any *jus cogens* nature of these principles outside of the prohibition of force.

There is still some debate surrounding the scope of the principle of territorial integrity – i.e. whether this covers the complete inviolability of borders or boundaries and the unauthorised *presence* of elements within a State, or whether it is specifically prohibiting the unlawful changes, alterations, occupations, or annexations of territory.⁴² In this regard, for example, Bowett insists on giving ‘territorial integrity’ its plain meaning, arguing that: ‘The rights of territorial integrity and political independence have never been absolute, but always relative to similar rights in other states, so that “integrity” has always been a more accurate term than “inviolability”.’⁴³

Notwithstanding this debate, this author submits that the drafters’ original intentions for Article 2(4) necessarily require that the principle of territorial integrity can be inherently qualified by the consent of a State. Put differently, because the Security Council is bound to respect the principles of territorial integrity and political independence, it must logically follow that a State’s consent to the Council’s powers through adopting the UN Charter must in some way limit the application of those principles without wholly excluding this application. By consenting to such powers, States qualify the principles of territorial integrity and political independence as they apply between that State and the United Nations, because consent is an ‘intrinsic’ element of territorial integrity and political independence. As will be explained below, such consent does *not*, however, affect the final part of Article 2(4) precluding any use of force ‘in any other manner inconsistent with the Purposes of the United Nations’, because such a requirement is not logically connected to the elements or rights, and therefore the consent, of a State.

⁴² This author has outlined these different arguments previously – see Butchard (n 2) at 254-258; and has recently extended the view that ‘territorial integrity’ is a much more precise and distinct principle than that of ‘territorial inviolability’ or ‘territorial sovereignty’, and this distinction seems to have veiled confirmation in recent case law of the International Court of Justice: See, P M Butchard, *The Responsibility to Protect and the Failures of the United Nations Security Council*, (Hart Publishing, 2020) at 108-188; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) 16 December 2015, [2015] ICJ Rep 665, para [93]-[99].

⁴³ D W Bowett, *Self-Defence in International Law* (Manchester, Manchester University Press, 1958), at 152.

An example explored previously is the use of military occupation or the administration of territory following a crisis by the Security Council.⁴⁴ As Ratner points out, there have been numerous examples of the Security Council authorising ‘occupation’ or ‘administration’ of territory.⁴⁵ Similarly, States consent to the presence, and sometimes occupation, of UN peacekeepers within their territory.⁴⁶ This should be compared to the position of the *Declaration on Friendly Relations*, which expands upon the prohibition of force,⁴⁷ and seems to make some references to the element of territorial integrity in this regard. In particular, the Declaration states:

The territory of a State shall not be the object of military occupation resulting from the use of force *in contravention of the provisions of the Charter*. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.⁴⁸

With regard to this particular part of the declaration, it further explains that ‘Nothing in the foregoing shall be construed as affecting ... [t]he powers of the Security Council under the Charter.’⁴⁹ But the important distinction in the text is between occupation and acquisition. The prohibition of occupation is framed squarely as occupation *in contravention of the provisions*

⁴⁴ See Butchard (n 2) at 257; See also generally, A Roberts, ‘What is Military Occupation?’, (1984) 55 *British Yearbook of International Law* 249.

⁴⁵ S R Ratner, ‘Foreign Occupation and International Territorial Administration: The Challenges of Convergence’, (2005) 16(4) *European Journal of International Law* 695, at 698-702.

⁴⁶ See for example, Y Dinstein, *International Law of Belligerent Occupation*, (Cambridge, Cambridge University Press, 2009), at 37-38.

⁴⁷ *Declaration on Principles of International Law concerning Friendly Relations* (n 4), Annex, Principle 1.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

of the Charter, whereas the obligation on States not to take part in or recognise territorial acquisition is seemingly absolute.

This could be explained as allowing for the *lawful* temporary occupation of territory for the maintenance of international peace and security, but completely outlawing the annexation of territory by the use of force, and any subsequent recognition of this. Lawful occupation may provide a permissible limitation of territorial integrity, but is there an element of territorial integrity that simply can't be 'consented to'- such as the acquisition of territory by force? In other words, while a State may consent to the presence or temporary occupation of its territory by another State for a lawful purpose, a State's consent to a use of force cannot provide a basis in and of itself for the annexation of territory. Such a *forcible change* in territory is clearly restricted by the prohibition of force itself.

On this point, one important question worth addressing is whether a State whose territory was unlawfully annexed or acquired by another State by force, could at a later stage cede this territory and therefore 'bring an end' to the breach of a *jus cogens* norm. In this situation, it is important to distinguish consent to voluntarily and peacefully transfer territory, with any consent, acquiescence, or waiver attempting to 'undo' the wrongfulness of the breach of a *jus cogens* norm. While the first type of consent is perfectly valid, the latter is not, as will now be explained.

Territorial acquisition or annexation by force, without consent, is arguably both a violation of territorial integrity (and so a use of force *against* the territorial integrity of a State), but also a use of force inconsistent with the purposes of the UN Charter.⁵⁰ The International Court of Justice, in the *Construction of a Wall* case,⁵¹ recognised the prohibition of force as a norm of customary international law, and in citing the *Friendly Relations Declaration* went on

⁵⁰ As outlined below, this could be because the force is 'unilateral', but also perhaps because the use of force also would threaten or breach international peace and security. See section 3.3.

⁵¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 136 (hereinafter *Construction of a Wall*), at para [87].

to say that ‘the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.’ How the court phrases this principle as a ‘corollary’ of the prohibition of force suggests that the illegality of territorial acquisition stems from the prohibition of force itself, perhaps confirming that this is not a standalone principle in international law but a consequence of Article 2(4) itself. Furthermore, it is clear from the *Declaration on Friendly Relations* that the prohibition of force contains an obligation that ‘No territorial acquisition resulting from the threat or use of force shall be recognised as legal’.⁵²

There are two consequences here worth noting. Firstly, in line with the *Declaration on Friendly Relations*, the prohibition of force itself comes with this in-built duty not to recognise a territorial acquisition resulting from this use of force, while Article 2(4)’s status as *jus cogens* also has the same effect under the law of State Responsibility.⁵³ Secondly, the prohibition’s status as a peremptory norm (*jus cogens*) also implies that consent to the breach – even after the fact – cannot absolve the wrongdoing state of international responsibility.

As mentioned above, consent cannot preclude the wrongfulness of a breach of *jus cogens* as demonstrated in Article 26 of the ILC Articles on State Responsibility.⁵⁴ The breach of *jus cogens* cannot be ‘made legal’ by consent – it still entails the international responsibility of that State. In this context, consent after the forcible acquisition of territory has taken place, is more correctly described as a ‘waiver’ of the right to invoke responsibility rather than consent, because the wrongful act has already taken place.⁵⁵ But even this categorisation comes with problems. The consent or waiver of the injured State alone cannot undo or ‘put right’ such a breach because the international community also has a legal interest in invoking responsibility

⁵² *Declaration on Principles of International Law concerning Friendly Relations* (n 4), Annex, Principle 1.

⁵³ See, *Responsibility of States for Internationally Wrongful Acts* (n 11), Article 41(2), which states that ‘No State shall recognize as lawful a situation created by a serious breach [of a peremptory norm of international law], nor render aid or assistance in maintaining that situation.’

⁵⁴ *Responsibility of States for Internationally Wrongful Acts* (n 11), Article 26.

⁵⁵ See the Commentaries to the ILC Articles on State Responsibility: ILC, ‘Report of the International Law Commission on the Work of its Fifty-Third Session’, (n 12), Article 20, para [3], and Article 45 generally.

for *jus cogens* breaches, as well as preventing the degradation of such rules by preventing the recognition of situations created by such breaches. This much is clear from the commentaries of the ILC's Articles on State Responsibility, when commenting on the consequences of a serious breach of a peremptory norm under Article 41 of the Articles, stating:

...since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement.⁵⁶

In the context of an injured State waiving its right to invoke responsibility, the ILC also commented:

Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.⁵⁷

Only the remedies available in the law of State Responsibility can right this wrong. For example, the first obligation the responsible State is under is to cease that wrongful act, and

⁵⁶ ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session', (n 12), Article 45, para [4].

⁵⁷ ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session', (n 12), Article 41, para [9].

guarantee that it will not be repeated.⁵⁸ The responsible state would then be under an obligation to make reparations according to State Responsibility,⁵⁹ whether that be through restitution, compensation, or satisfaction as appropriate in the circumstances.⁶⁰ Furthermore, a ‘serious breach’ of a peremptory norm⁶¹ also requires the responsible State to cooperate ‘to bring to an end through lawful means any serious breach.’⁶²

Ultimately, it is one thing to recognise a situation arising from an unlawful use of force as legal, but it is quite a separate thing to make the appropriate reparations for that unlawful breach, and then to consent to the *peaceful* transfer of territory once the breach of *jus cogens* has been rectified. This necessarily implies, then, that the obligation of non-recognition requires a situation arising from an unlawful use of force to be put right before the consent of a State can validate a transfer of that territory that is no longer subject to the threat or use of force. Therefore, the consent of an injured State cannot have the effect of ‘recognising’ a forcible acquisition of territory.

On the other hand, a later peaceful settlement – in accordance with the principles of justice and international law – could allow the transfer of territory to the State that previously forcibly annexed that territory by force. Such a peace agreement may even include a remedy to the injured State for the breach of *jus cogens* – but this does not stop that State from voluntarily relinquishing its territory should the previous breach have already been put right.

This is also consistent with the purposes of the United Nations, whereby it says that the *peaceful settlement of disputes* is to be done ‘in conformity with the principles of justice and international law’.⁶³ It is submitted, therefore, that the acquisition of territory or change of

⁵⁸ *Responsibility of States for Internationally Wrongful Acts* (n 11), Article 30.

⁵⁹ *Ibid*, Article 31.

⁶⁰ *Ibid*, Articles 34-37.

⁶¹ *Ibid*, Article 40, which provides that ‘A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.’ Territorial acquisition, it is submitted would clearly meet this test.

⁶² *Ibid*, Article 41(1).

⁶³ UN Charter, Article 1(1).

territorial boundaries is a matter exclusively limited to the *peaceful* settlement of disputes, and should not be subject to any forcible measures. The *lawful* occupation of territory, on the other hand, is not concerned with the peaceful settlement of disputes but the maintenance of international peace and security, and this itself may well constitute a limitation of territorial integrity that can render such occupation a lawful use of force.

How then can the role of consent be explained with regard to the desire for smaller States during the drafting of the Charter to limit the powers of the Security Council (that they have already consented to) using the very principle of territorial integrity? Put differently, how does the addition of 'territorial integrity' into Article 2(4) enhance the protection of States from the Security Council's power, when it is subject to the State's consent to the Security Council's powers anyway? One possible explanation is that the requirement that States do not recognise the acquisition of territory by force *is* absolute and cannot be limited by the consent of a State – for the very reason that such consent, waiver, or acquiescence would undermine the object and purpose of this element of the rule within the context of the prohibition of force. Therefore, it is arguable that consent to the limitation of territorial integrity cannot be valid where that consent undermines the very object and purpose of the protections of that principle in the first place. This is more nuanced than consent to a breach of *jus cogens*, or displacing the entirety of Article 2(4), but highlights that there may be an element of territorial integrity as its own principle that also has similar characteristics to a non-derogable norm of *jus cogens*. And so, according to this argument, even though States consent to the powers of the Security Council, such consent does not go so far as to allow the forcible annexation or acquisition of territory by or under the authorisation of the Security Council, because this would undermine what is so fundamental about the principle of territorial integrity.

An alternative argument may be that a complete limitation or exclusion of territorial integrity – i.e. such as the peaceful change of borders or boundaries, may only be done with

the *informed consent* of a State, rather than a general sweeping consent to use force. A similar argument seems to be supported in practice by the Special Rapporteur for the ILC's work on the Responsibility of International Organisations, Giorgio Gaja, who suggested:

While a State may validly consent to a specific intervention by another State, a general consent given to another State that would allow the latter State to intervene militarily on its own initiative would have to be taken as inconsistent with the peremptory norm.⁶⁴

Corten builds upon this by explaining that:

If consent relates to the mere presence or mere passage of troops, without the conducting any military action, a treaty is perfectly adequate, even if it can be withdrawn so long as the procedures specific to treaty law are observed. If, however, such consent relates to a genuine use of force, it is hard to imagine one can circumvent the requirement for *ad hoc* consent, as only such consent can exclude the characterisation of force and at the same time set aside the principle of observance of the peremptory prohibition stated in article 2(4).⁶⁵

What these authors seem to be suggesting is that a general treaty-based consent is insufficient to displace the prohibition of force – it must be an *ad hoc*, or specific consent to particular action. It might even be interpreted as requiring ‘informed consent’ as suggested above.

⁶⁴ ILC, ‘Fourth report on Responsibility of International Organizations by Giorgio Gaja, Special Rapporteur,’ (28 February 2006) UN Doc A/CN.4/564, at para [48].

⁶⁵ Corten (n 9), at 258-259.

However, this does not in itself explain the unique position of the general and far-reaching enforcement powers of the Security Council. Interestingly, Gaja attempts to explain this by arguing: ‘It is clear that no breach of that norm occurs because of the fact that the United Nations has been given the power to use force under Chapter VII of the Charter.’⁶⁶ Similarly, Corten seeks to explain the Security Council’s powers by arguing, ‘It goes without saying that we are *in the context here* of the rule prohibiting the use of force and not that of any derogation from that rule.’⁶⁷ Unfortunately, these positions themselves do not adequately explain why the Security Council’s powers are any different from other general treaty-based consents to use force against a State.⁶⁸

The original interpretation of Article 2(4), however, does provide for a workable explanation of these issues – especially in light of the ‘objective’ part of Article 2(4) outlawing force inconsistent with the purposes of the United Nations, which is explained below. In particular, what these suggestions are omitting is the fundamental element of the prohibition of force that prohibits all *unilateral* uses of force, while maintaining the possibility of the use of force on behalf of the United Nations itself. As explained above, this was the very intention behind the provision, and helps to explain why consent to the powers of the Security Council has a different affect with regards to the prohibition of force than consent to unilateral intervention. Both types of consent may limit the scope of territorial integrity (and, as will be discussed next, the scope of political independence), but only the United Nations may use or authorise force – as reflected in a fundamental Purpose of the UN as being a ‘center for the harmonising of the actions of nations’ in pursuit of other purposes such as the maintenance of international peace and security.⁶⁹ Accordingly, notwithstanding the effect of a State’s consent

⁶⁶ Gaja (n 64), at para [48].

⁶⁷ Corten (n 9), at 256.

⁶⁸ Corten’s argument in particular seems to suggest that the powers of the security council are an inherent part of the prohibition of force which, as explained above, cannot be sustained due to the *jus cogens* nature of the prohibition and the lack of any corresponding *jus cogens* status of the Security Council’s powers.

⁶⁹ See UN Charter, Article 1(4) and Article 1(1) respectively.

on the scope of territorial integrity as it applies to that State (or even its sovereignty more generally), such consent cannot render the use of force by a State acting alone consistent with this fundamental purpose of the United Nations that renders all unilateral force illegal. The question here is what is meant by ‘unilateral force’ and how a ‘unilateral’ use of force is rendered inconsistent with the purposes of the United Nations.⁷⁰ In this regard, any force on the basis of consent must also be in accordance with all the other purposes of the UN as listed in Article 1, as will be explored further below.

3.2 Limiting the Application of Political Independence

A very similar logic applies to the principle of political independence, whereby the consent of a State may limit the application of this principle in a given scenario. As with territorial integrity, the right of political independence is not absolute, but subject to the rights of other states.⁷¹ In this context, Bowett suggests that:

Perhaps the most important limitation on the rights of political independence today is the right of intervention assumed by the Security Council in the general interest of the international community as a whole.

...

This means, therefore, that the right of political independence is conditional upon it not constituting a ‘threat to the peace, breach of the peace, or act of aggression’ within the terms of Article 39.⁷²

⁷⁰ See further, below, section 3.3.

⁷¹ Bowett (n.43), at 51.

⁷² *Ibid*, at 51-52.

Political independence refers to ‘the autonomy in the affairs of the state with respect to its institutions, freedom of political decisions, policy making, and in matters pertaining to its domestic and foreign affairs.’⁷³ The Draft Declaration on the Rights and Duties of States⁷⁴ similarly declares:

Every State has the right to independence and hence to exercise freely, without dictation by any other state, all its legal powers, including the choice of its own form of government.⁷⁵

Erika de Wet⁷⁶ has previously argued that political independence – and territorial integrity for that matter – might also limit military intervention on request.⁷⁷ De Wet argues:

The mere fact that the forcible intervention was requested by the state does not in and of itself imply that its territorial integrity or political independence was not violated. For example, a military intervention on request that violated the right to self-determination recognized, inter alia, in Articles 1(2) and 55 of the UN Charter, would constitute an intervention ‘against the political independence’ of the requesting state. It would constitute a violation of Article 2(4) of the UN Charter, regardless of the fact that the intervention was based on state consent.⁷⁸

⁷³ Samuel KN Blay, ‘Territorial Integrity and Political Independence’, in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Online edn, March 2010).

⁷⁴ UNGA Res 375 (IV), 6th December 1949, *Draft Declaration on the Rights and Duties of States*, 6th December 1949, UN Doc A/RES/375(IV). Although this was never formally adopted, it is illustrative of views of States at this time.

⁷⁵ *Ibid*, Annex, Article 1.

⁷⁶ Erika de Wet, ‘The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force’, (2015) 26(4) *European Journal of International Law* 979.

⁷⁷ *Ibid*, at 980.

⁷⁸ *Ibid*, at 980, see also 995-996; de Wet clarified this argument slightly in 2017: Erika de Wet, ‘Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle’, (2017) 111 *AJIL Unbound* 307.

De Wet goes on to clarify the argument by suggesting that ‘a military intervention that violates the right to self-determination by preventing a state (and its peoples) from determining its political future independently is bound to amount to the use of force against the political independence of a state.’⁷⁹ More recently, de Wet repeated this position when considering the competing arguments regarding ‘the right to self-determination as vesting in the people(s) versus those regarding it as vesting in the state as an abstract entity’⁸⁰ especially in the context of a civil war – suggesting that ‘both interpretations can support the conclusion that a violation of the right to self-determination through foreign military assistance during a civil war ... simultaneously results in a violation of the prohibition of the use of force.’⁸¹

Unfortunately, this interpretation is not in line with the traditional concept of political independence as it applies to *States*. De Wet seems to conflate the political independence of a State – being an individual and unique legal identity in international law – with the self-determination of *peoples*. For legal purposes, peoples and States are two completely different personalities of international law, and so this interpretation is not convincing. Indeed, a similar suggestion was put by Corten when he suggested that:

... [I]t must be asked whether, in certain situations, outside military intervention does not have the effect of keeping a government in place against the will of its people. The political independence of a state would then seem to be in question, as would be its people’s right to self-determination.⁸²

⁷⁹ *Ibid*, at 996.

⁸⁰ Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press, 2020), at 80-81, see also 7-8.

⁸¹ *Ibid*, but see also 123-124, and the discussion on why de Wet believes this doctrinal position may still not be an effective limitation on military assistance on request in practice.

⁸² Corten (n 9), at 259.

In fact, the *effect* of de Wet's argument might still be achieved through the final provision of Article 2(4), which requires consistency with the purposes of the UN – one of those very purposes being the development of respect for self-determination.⁸³ So in this regard, de Wet is absolutely correct when she argues there is a 'close relationship between the right to self-determination and the prohibition of the use of force'.⁸⁴ But it is important to separate these principles for the sake of clarity, and so it is argued that political independence and self-determination are two completely separate principles of international law, with political independence only applying to the State as a legal entity.

Military intervention on the basis of consent that comes from the *wrong authority*, or a party that is *not* the official representative of the State, could indeed undermine the political independence of that State, especially given the fact that such 'consent' itself would also be considered invalid.⁸⁵ But it is different to suggest that force with the consent from the official government, albeit in a civil war situation, also undermines that political independence, because this position wrongly conflates the legal personalities of the State and the peoples.

3.3 Impossibility of Consenting to Force Inconsistent with the Purposes of the United Nations

The final provision of Article 2(4) is arguably the most far-reaching part of the prohibition of force and, as will be shown, offers a number of limitations to intervention by invitation or military assistance on request. This part of the provision should be seen as a residual 'catch-all' clause capturing all other uses of force, as advocated by Dinstein.⁸⁶ This is similar to

⁸³ Kritsiotis makes a similar observation when refuting de Wet's argument: See, D Kritsiotis, 'Interrogations of Consent: A Reply to Erika de Wet', (2015) 26(4) *European Journal of International Law* 999, at 1000-1001.

⁸⁴ Erika de Wet (n 80), at 81.

⁸⁵ See further, Erika de Wet (n 80), Chapter 2 generally.

⁸⁶ Y Dinstein, *War, Aggression and Self-Defence* (Cambridge, 6th Ed, Cambridge University Press, 2017), at 93, para [255]-[256].

Lachs,⁸⁷ who originally argued that the final sentence is ‘at first sight a residual “catch-all” provision’.⁸⁸ However, Lachs continued to suggest that ‘it may render the operation of the Article more specific, since it serves to prohibit the substitution of a forcible solution for any process decided upon by the United Nations, in pursuance of its purposes, for the settlement of a particular issue.’⁸⁹

The ‘catch-all’ interpretation is also supported by Corten, who reads it as an *objective* prohibition of any force used in a manner inconsistent with the purposes of the UN,⁹⁰ and Chesterman, who suggests that it includes all uses of force whether or not they violate the territorial integrity or political independence of a State.⁹¹

The main restriction from this part of Article 2(4) is the effect it has in prohibiting unilateral uses of force. This is based on a number of considerations. Article 1(1), outlines a purpose of the UN as being ‘To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace...’. The current author has previously argued that unilateral uses of force, without the authorisation of the UN, inherently threatens international peace and security.⁹² Because of this, unilateral uses of force are ineffective for this purpose, and furthermore are not sufficiently ‘collective’ to be correctly described as ‘effective collective measures’ in Article 1(1).⁹³ Secondly, Article 1(4) provides that the United Nations is to be ‘a center for harmonising the actions of nations’ for the attainment of the other purposes of the UN. In this regard, unilateral action would be clearly

⁸⁷ M Lachs, ‘The Development of General Trends of International Law in Our Time’, (1980) 169 *Recueil des Cours de l’Académie de Droit International* 9.

⁸⁸ *Ibid.*, at 162.

⁸⁹ *Ibid.*

⁹⁰ Corten (n 9), at 499-500.

⁹¹ Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford, OUP, 2001), at 52-54.

⁹² Butchard (n 2), at 261.

⁹³ *Ibid.*

inconsistent with the goal of harmonising the effective and collective maintenance of international peace and security.⁹⁴ This is confirmed by the preparatory works of the Charter, where the Report of the Committee drafting Article 2(4) expressly stated that ‘the unilateral use of force or similar coercive measures is not authorized or admitted.’⁹⁵

It is important to understand what is meant by ‘unilateral’ force in this context. It is clear from the preparatory works cited that this certainly encompasses action taken beyond the United Nations collective security framework. However, could military assistance requested by a State also fall within this definition? This is a question that would require much more investigation than is possible within this article to thoroughly answer, however some points are worth addressing here. It has been argued previously that self-defence, although a use of force beyond the UN security apparatus, does not fall foul of this prohibition on ‘unilateral’ uses of force because self-defence is an important and fundamental pillar recognised by the UN Charter that is required in order to ensure that the maintenance of international peace and security by the UN can be effective.⁹⁶ After all, self-defence is meant to be the international community’s ‘first response’ to an armed attack ‘until the Security Council has taken measures necessary to maintain international peace and security.’⁹⁷ Self-defence is therefore compatible with this reading of Article 2(4).

Similarly, military assistance on request, where consistent with the purposes of the UN, may also be an important ‘first defence’ for the collective security system, especially in tackling internal terrorist threats that may become a security problem for the international community. Strictly speaking, military assistance on the request of a State may not technically count as ‘unilateral force’, since the State is not taking the measures *of its own accord* but with the

⁹⁴ This is further supported by the fact that the Security Council, under Article 24, *acts on behalf* of Member States in its primary responsibility for the maintenance of international peace and security.

⁹⁵ *Report of Rapporteur of Committee I, Commission I*, (9th June 1945), Doc 885, I/1/34, 6 *UNCIO* 387, at 400.

⁹⁶ Butchard (n 2), at 263-4.

⁹⁷ UN Charter, Article 51.

request and invitation of a State for that particular purpose. This would suggest that the general prohibition of ‘unilateral’ uses of force implies the force is used: (i) beyond the UN collective security system; and (ii) upon the initiative of a State or coalition without the *ad hoc* or ‘informed’ consent of the target State. However, if there is a general and imprecise consent to *intervene* at any point within a State, this would amount to a ‘unilateral’ use of force given the lack of input and choice of the victim State, rendering that force inconsistent with this purpose of the UN, and therefore in breach of Article 2(4). It is clearly within the interests of maintaining international peace and security to ensure that even where the consent of a State allows military force to be used by another State, that such consent should be based on the *ad hoc* or *informed* consent of that State⁹⁸ – rather than a generally-worded agreement or security treaty that may be open to abuse or inherently undermine the primacy of the UN’s collective security system. Such an approach would balance the inherent sovereignty of a State (including the boundaries of consent within the principles of territorial integrity and political independence), with the need to ensure force is not used in any other manner inconsistent with the purposes of the United Nations.

However, this is not to say that every precisely defined consent to use force within a State’s territory renders such force consistent with the purposes of the Charter. As mentioned above, intervention within the context of a civil war could have implications for peoples’ rights to self-determination – itself recognised as a purpose of the UN in developing relations on the basis of respect for this right under Article 1(2). In a similar argument, Corten argues that a use of force incompatible with the right to self-determination is unlawful because ‘it opposes any use of force in international relations “in any other manner inconsistent with the Purposes of the United Nations”, and that one of its purposes is without contest the protection of the right

⁹⁸ As discussed in the context of consent and territorial integrity above, n 64 - 65 and accompanying discussion.

of peoples to self-determination.’⁹⁹ Corten refers to the debates preceding the *Declaration on Friendly relations* to support this.¹⁰⁰ Moreover, the *Declaration on Friendly Relations* itself seems to support this position where it states, in the context of the prohibition of force, that:

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.¹⁰¹

Furthermore, the purposes of the UN in Article 1 further reveal a number of instances where military assistance on request may also fall foul of the prohibition of force, including: (1) where the use of force constitutes a threat to the peace, a breach of the peace, or an act of aggression; (2) where it undermines the adjustment or settlement of international disputes in a way not in conformity with the principles of justice and international law; (3) where it is inconsistent with measures to strengthen universal peace; (4) or, where it is inconsistent with promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Of particular note here is the purpose of maintaining international peace and security. This purpose in particular helps to explain why some military assistance on request may not be permissible, especially where it would undermine the UN collective security system, or inherently threaten international peace and security itself. An extreme example here could be where military assistance is requested by a State to quell an internal terrorist threat, but the use of force against such targets descends into the use of chemical weapons or disproportionate attacks against civilians too. Not only would this use of force be illegal under other areas of

⁹⁹ Corten (n 9), at 289-290.

¹⁰⁰ *Ibid.*

¹⁰¹ *Declaration on Principles of International Law concerning Friendly Relations* (n 4), Annex, Principle 1.

international law, but the force used may well threaten international peace and security, and therefore might also be considered a use of force ‘inconsistent with the purposes of the United Nations’ and a breach of Article 2(4) too.

The purpose of the UN to peacefully settle disputes, a use of force inconsistent with which could be apparent where a military assistance on request is used by one State to undermine a peaceful settlement of a dispute between a third State and the requesting State (or even a dispute between two third-party States). This might be done by targeting any assets, nationals, or strategic interests of a third-party State that are located within the requesting State’s jurisdiction. In this context, a use of force targeting such assets – for whatever reason – could undermine an existing dispute settlement or agreement by using such heavy-handed tactics and violate the principles of justice and international law in the process. In this situation, even though the requesting State has fully consented to or requested a use of force within its territory, the manner in which that force is to be used is inconsistent with a purpose of the United Nations, and therefore violates Article 2(4).

These are just some of the possible scenarios that could transpire under Article 2(4) and be inconsistent with the purposes of the United Nations, serving only to demonstrate the many possibilities by which military assistance on request may fall foul of the prohibition of force.

4. Compatibility with Commentary and State Practice

This section will explore the compatibility of the original interpretation of Article 2(4) argued above with the existing commentary and State practice on military assistance. Much of the focus of this debate explored the question in the context of a civil war, and whether there is a standalone prohibition of intervention in civil wars. Some studies offer an insight into consent

itself, and when and by which actors this may be validly given in this context.¹⁰² This section, however, will focus on the more general attempts to explain the legality or otherwise of military assistance on request, especially with regard to the prohibition of force in international law. Commentary and State practice will be discussed together in this section because of the numerous assertions made in the literature when interpreting such practice, and so it is economical to address them both together in this context.

4.1 The Existence of a Standalone Prohibition in Civil Wars

4.1.1 The 'Negative Equality' Principle

There are diverging views in academic commentary on the existence of a standalone prohibition of intervention in a civil war, even with the consent of the *de jure* government. In the *Nicaragua Case*, it was suggested that:

[I]t is difficult to see what would remain of the principle of non-intervention in international law if intervention, *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition.¹⁰³

This statement by the ICJ clearly recognises that a request for military assistance by a State is well within the bounds of international law, and indeed the principle of non-intervention. However, on the other side of this, the Institut de Droit International has adopted two resolutions on this issue, clearly preferring a prohibition of intervention in this context. In 1975, the Wiesbaden Resolution stated that '[t]hird States shall refrain from giving assistance to

¹⁰² The precise mechanics of consent, and which actors may validly give such consent on behalf of a State, is a question beyond the scope of this paper.

¹⁰³ *Nicaragua Case* (n 3), at para [246] (emphasis added). See also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, [2005] ICJ Reports 168, at para [105].

parties in a civil war which is being fought in the territory of another State'.¹⁰⁴ In 2011, the Rhodes Resolution,¹⁰⁵ while not applying to the question of assistance in civil wars,¹⁰⁶ dealt more broadly with the idea of military assistance on request, and suggested that military assistance is prohibited:

when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.¹⁰⁷

Similarly, many commentators make reference to other principles of international law when arguing in favour of this prohibition. For example, de Wet and others refer to the principle of non-intervention,¹⁰⁸ and how the UN General Assembly has recognised that:

no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.¹⁰⁹

¹⁰⁴ Institut de Droit International, Resolution on The Principle of Non-Intervention in Civil Wars (Rapporteur: Mr Dietrich Schindler) (14 August 1975) Wiesbaden Session, available at: http://www.idi-ijl.org/app/uploads/2017/06/1975_wies_03_en.pdf.

¹⁰⁵ Institut de Droit International, Resolution on Military Assistance on Request (Rapporteur: M Gerhard Hafner) (8 September 2011) Rhodes Session, available at: http://www.idi-ijl.org/idiE/resolutionsE/2011_rhodes_10_C_en.pdf.

¹⁰⁶ *Ibid*, Article 2(1), which states: 'This Resolution applies to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977.'

¹⁰⁷ *Ibid*, Article 3(1).

¹⁰⁸ See de Wet (n 76), at 994; see also C Gray, *International Law and the Use of Force* (3rd edn, OUP, 2008) at 67-68, and 81; see also JA Perkins, 'The Right of Counterintervention', (1987) 17 *Georgia Journal of International and Comparative Law* 171, at 186-195.

¹⁰⁹ UNGA Res 2131(XX), *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, (21 December 1965), UN Doc A/RES/2131(XX), at para [2].

This was also repeated in the *Declaration on Friendly Relations*.¹¹⁰ Within the context of the prohibition of force, the *Declaration on Friendly Relations* also declares:

Every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised 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.¹¹¹

These principles have been highlighted by some authors as indicating the existence of a prohibition of intervention in civil wars, even with the consent or request of the *de jure* authorities of that State.¹¹² The broadest version of this argument refers to the so-called ‘negative equality principle’. Although this phrase has found recognition in recent literature, the origin of the concept itself does not lend itself to strong evidence of *opinio juris* or State practice that would indicate the existence of a distinct legal doctrine or individual prohibition. The Independent International Fact-Finding Mission on the Conflict in Georgia, in its 2009 report,¹¹³ referred to the ‘doctrine of negative equality’ as a ‘new doctrine’ reflecting ‘the most recent trend in scholarship’, whereby:

... in a state of civil war, none of the competing fractions can be said to be effective, stable, and legitimate. Therefore, it is argued that the principle of non-intervention and respect of the international right to self-determination renders inadmissible any type of foreign intervention,

¹¹⁰ *Declaration on Principles of International Law concerning Friendly Relations* (n 4), Annex, Principle 3.

¹¹¹ *Declaration on Principles of International Law concerning Friendly Relations* (n 4), Annex, Principle 1.

¹¹² See de Wet (n 76), at 994; Ruys and Ferro (n 167) at 87; Gray (n 108).

¹¹³ Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, (September 2009) Vol II, available at: www.mpil.de/de/pub/publikationen/archiv/independent_international_fact.cfm (accessed 29/02/2020).

be it upon invitation of the previous ‘old’ government or of the rebels. Any taking of sides and intervention in civil law is in that perspective forbidden. This reasoning leads to the conclusion that a military intervention by a third state in a state torn by civil war will always remain an illegal use of force, which cannot be justified by an invitation (doctrine of negative equality).¹¹⁴

This position suggests that all intervention or military assistance on request in the context of a civil war is prohibited absolutely, based on the principle of non-intervention and the right to self-determination. The Report bases its assertion on the work of the Institut de Droit International, highlighted above, and cites support for this position in a 1984 UK Foreign Policy Document.¹¹⁵ This Policy Document¹¹⁶ took the position that international law prohibited ‘interference or assistance’ to other States ‘when a civil law is taking place and control of the State’s territory is divided between warring parties.’¹¹⁷ Lieblich calls this position ‘strict-abstentionism’, highlighting the argument that apparently States strictly abstain from any intervention or assistance during an internal conflict.¹¹⁸

Indeed, this position seems more nuanced than an outright prohibition of all interference in civil wars by requiring that control over territory is also a necessary element. While Gray highlights the control over territory element derives from the definition of a non-international armed conflict according to international humanitarian law,¹¹⁹ Henderson questions whether the definition of a non-international armed conflict should be used as a legal threshold to this ‘principle’ given that it is ‘vague ... difficult to apply in practice, and open to subjectivity’.¹²⁰

¹¹⁴ *Ibid*, at 277-278, footnotes omitted.

¹¹⁵ *Ibid*, at 278, footnote 181.

¹¹⁶ UK Foreign Policy Document No 148, in ‘UK Materials on International Law’, (1986) 57 *British Yearbook of International Law* 614.

¹¹⁷ *Ibid*, at 616, para [11.7].

¹¹⁸ E Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, 2013), from 130.

¹¹⁹ Gray (n 108), at 81, footnote 70; more recently, Christine Gray, *International Law and the Use of Force* (4th edn, OUP, 2018) at 84-5; see also, Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) 1977 (adopted 6 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Article 1.

¹²⁰ C Henderson, *The Use of Force and International Law* (CUP, 2018), at 364.

But the UK Policy Document also went further to highlight the possible restriction of intervention where military assistance was to be used by a ‘colonial power’ in suppressing an armed struggle by peoples seeking to exercise their right of self-determination – but clearly warned that this view was not ‘shared by many international lawyers, and might be problematic for countries such as France or the United Kingdom.’¹²¹ The reliance of the Georgia Fact-Finding Mission on this policy document is therefore curious given the document’s own reservations about self-determination as a basis of restricting military assistance by request, while this seems to be the very preference of the Fact-Finding Mission’s report.¹²²

The UK policy document does not cite or highlight any evidence of State practice or *opinio juris* to indicate the existence of this doctrine as a general principle or ‘default position’.¹²³ Indeed, despite its recognition of a ‘doctrine’ of ‘negative equality’, the Fact-Finding Mission also does not seem to have taken this position either – as will be discussed below, it bases its recognition of the doctrine on the effect of existing legal principles, rather than the recognition of a new rule.¹²⁴

Therefore, we must be careful not to conflate a very nuanced point about circumstances where force is prohibited with a separate rule or doctrine prohibiting force in *all* circumstances in a civil war. In this light, the next section will explore some academic arguments that State practice is inconsistent with this broad position. But as this author will go on to point out, military assistance on request during a civil war may still be prohibited in some cases, but not necessarily all of them.

¹²¹ UK Foreign Policy Document No 148 (n 116), at 616, para [II.8].

¹²² Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (n 113), at 277, footnote 180.

¹²³ Indeed, this is the same Policy Document that famously described the so-called right of humanitarian intervention as ‘not unambiguously illegal’ – despite the contrary being very clear the history of the drafting of the Charter, as explained above. UK Foreign Policy Document No 148 (n 116), at 619, para [II.22].

¹²⁴ *Ibid.*

4.1.2 *Lack of State Practice and Explicit Opinio Juris for a Standalone Prohibition*

Other authors, on the other hand, reject the idea that there is a prohibition of military assistance in the context of civil wars. Primarily, they argue, this is inconsistent with State practice.¹²⁵

Dinstein argues that ‘the entire position is untenable’, and that while foreign States are not prohibited from intervening against insurgents at the request of a State, ‘Foreign States must remain neutral in the fighting only if the insurgents are granted “recognition of belligerency”, implying that the armed conflict has to be treated as if it were international in nature.’¹²⁶

Fox, using France’s military assistance in Mali in 2013 as an example of where States did not raise the ‘negative equality’ principle as a possible legal hurdle, argues that this lack of *opinio juris* ‘demonstrates that the international community has not in fact accepted this view.’¹²⁷ Similarly, Henderson suggests that ‘there does not seem to be much evidence on the whole that states accept that they are legally obliged to refrain from supporting governments in a civil war situation.’¹²⁸

Lieblich argues that the strict-abstentionism approach is a manifestation of ‘products of the eras of decolonisation and the Cold War’ and must be understood in this historical context.¹²⁹ Lieblich also suggests that it relies on a ‘simplistic understanding of internal armed conflicts’,¹³⁰ and takes more of a position of indifference than non-intervention - countering the international community’s supposed support for international assistance, capacity building, the protection of civilians, or the responsibility to protect populations from mass atrocities.¹³¹ While this may conflate the powers of the international collective security system with the will

¹²⁵ See, for example, G Fox, ‘Intervention by Invitation’, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), at 828-829; see also Erika de Wet (n 80), at 83-115, and 119-121, with a thorough account of more recent State practice.

¹²⁶ See Dinstein (n 86), at 126, para [338].

¹²⁷ Fox (n 125), at 828-829.

¹²⁸ Henderson (n 120), at 365. But see section 4.1.3 below, discussing commentary that highlights State practice which may indicate a more nuanced approach.

¹²⁹ Lieblich (n 118), at 138.

¹³⁰ *Ibid*, at 139.

¹³¹ *Ibid*, at 139-140.

and rights of individual States, Lieblich's argument does highlight why there is considerable nuance in the opinions of States which renders elusive or invisible any explicit support for 'negative equality' as a general prohibition itself.

While identifying that the 'strict-abstentionist' approach is 'strikingly scarce' in the *opinio juris* of states, Lieblich is also keen to point out that any preference for the position that governments may consent to military assistance is not unlimited.¹³² He suggests that State practice – certainly through the Cold War – highlights support for the ability of a State to request assistance in this context, and that condemnations of specific instances were mostly down to the specific circumstances and political interests or allegiances.¹³³

More recently, military action against the so-called Islamic State group in Iraq, and military assistance to the Syrian regime during its civil war, sparked further debate on the existence of a prohibition of intervention in civil wars. Akande and Vermeer revisited the debate in 2015,¹³⁴ noting that the legal justifications by States for military action against terrorist groups in Iraq were based upon the consent of Iraq, despite the Islamic State forces controlling territory in Iraq.¹³⁵ They suggest:

The generality of these statements about the legality of the consensual use of force, combined with a lack of any reference to a prohibition on military assistance to governments involved in civil wars, seem to count against the existence of such a prohibition as part of contemporary international law.¹³⁶

¹³² *Ibid*, at 140-141.

¹³³ *Ibid*, at 142-150.

¹³⁴ Dapo Akande and Zachary Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', *EJIL: Talk!* (2 February 2015) www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/ (accessed 29/02/2020).

¹³⁵ *Ibid*, including the summaries and links to the legal justifications of the coalition States for their justifications for intervention, many of which refer to the consent or request for assistance from Iraq. See also, Tom Rus and Nele Verlinden, 'Digest of State Practice: 1 July—31 December 2014', (2015) 2(1) *Journal on the Use of Force and International Law* 119, at 131-145.

¹³⁶ *Ibid*.

Ultimately, they conclude that ‘States’ positions on the airstrikes on Islamic State in Iraq do not seem to support the existence of a general prohibition on the use of force at the request of the government in civil wars or internal conflicts.’¹³⁷

Raphaël Van Steenberghe questioned this conclusion, suggesting that the situation in Iraq may not in fact have been a ‘civil war’ in any case, and that the so-called Islamic State militants ‘could not be seen as exercising any right of self-determination’ on behalf of the Iraqi and Syrian populations.¹³⁸ Visser addressed Russia’s military assistance in Syria, recognising the lack of consensus in commentary on the existence of the general prohibition of intervention in civil wars, and concluding that Russia’s assistance in this case is likely lawful on the basis of Syria’s consent.¹³⁹

What is clear from the commentary is that the existence of a standalone prohibition of force in civil wars is far from settled. State practice and *opinio juris* has not been so explicit as to recognise ‘negative equality’ as a ‘general rule’.¹⁴⁰ But the much more nuanced position of State practice reveals that there are some situations where military assistance is permissible, as we shall now discuss.

4.1.3 *The Purpose-Based Approach*

While it is not possible to highlight State practice in detail here, it is worth noting that interventions in the contexts of civil wars have led to a more nuanced conclusion among some

¹³⁷ *Ibid.*

¹³⁸ Raphaël Van Steenberghe, ‘The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer’, *EJIL: Talk!* (12 February 2015) www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/ (accessed 29/02/2020).

¹³⁹ Laura Visser, ‘Russia’s Intervention in Syria’, *EJIL: Talk!* (25 November 2015) www.ejiltalk.org/russias-intervention-in-syria/ (accessed 29/02/2020). But see below on why Russia/s justifications may support a more nuanced interpretation.

¹⁴⁰ For an up-to-date account of such practice, see Erika de Wet (n 80), at 83-115.

commentators. Some authors suggest that, while intervention is normally unlawful to ‘settle an exclusively internal political strife’, military assistance on request can be perfectly legal when the purpose of the intervention is to achieve other objectives (for example, to fight against terrorism).¹⁴¹ While some view this as an ‘exception’ to a general prohibition of assistance in civil wars,¹⁴² the subsequent section will discuss how this effect may actual be achieved from the original interpretation of Article 2(4) outlined above.

By adopting a ‘purpose-based’ approach, the proponents of this position argue that interventions in the context of civil wars may be legal where their purpose is not to become involved in the civil war, but to assist the State with an internal issue such as terrorism.¹⁴³ For example, Bannelier and Christakis cite France’s assistance to Mali as an example of military assistance at the request of the State, in the context of a civil war, but where the assistance was limited to the combatting of terrorism.¹⁴⁴ Commentary also recognises other purposes such as ‘maintaining law and order’, peacekeeping operations, humanitarian missions, or military assistance in response to a foreign State aiding rebels in a manner that does not necessarily give rise to an ‘armed attack’ and therefore the right of self-defence under Article 51 of the UN Charter (including so-called ‘counter-intervention’).¹⁴⁵ While some of this practice clearly does support a more nuanced reading of the prohibition of force in the context of a civil war, the danger of ‘counter-intervention’ in particular is that it may be used to justify an escalation of an internal civil strife into an international dispute¹⁴⁶ – a development that seems to run counter

¹⁴¹ See, e.g., K Bannelier-Christakis, ‘Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent’, (2016) 29 *Leiden Journal of International Law* 743; see also generally, K. Bannelier and T. Christakis, ‘Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict’, (2013) 26 *Leiden Journal of International Law* 855.

¹⁴² *Ibid.*

¹⁴³ *Ibid.* For a detailed overview of practice in this regard, see Corten (n 9), at 290-310.

¹⁴⁴ See generally Bannelier and Christakis (n 141); Gray (n 108), at 84-113; see also, on counter-intervention Henderson (n 120) at 368-371, and JA Perkins, ‘The Right of Counterintervention’, (1987) 17 *Georgia Journal of International and Comparative Law* 171.

¹⁴⁵ See Corten (n 9), at 290-310.

¹⁴⁶ Gray (n 108), at 92; see also Tom Ruys, ‘Of Arms, Funding, and “Non-lethal Assistance” – Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) 13 *Chinese Journal of International Law* 13, at 45-47.

to the purposes of the Charter in maintaining international peace and security, and the peaceful settlement of disputes. This, in turn, could be rendered unlawful under the original interpretation of Article 2(4) as advocated in this paper.

Indeed, even the Russian and Iranian States' justifications for their assistance to Syria in its civil war is often limited to justifying the fighting against terrorism and, at least in their public rhetoric, assurances that they are not striking targets belonging to opposition rebels.¹⁴⁷ One problem with prohibiting military assistance on request only in circumstances of a civil war rests on the paradox that the same military assistance might be offered to quell a rebel group a State views as 'terrorists' before they are able to descend the country into a State of civil war, but that such assistance would not be available should the rebellion succeed to develop into a non-international armed conflict. In other words, it would protect the rights of self-determination of opposition groups during a conflict, but not before.¹⁴⁸ This perhaps explains the Institut de Droit International's move towards the prohibition of the use of military assistance 'to support an established government against its own population' rather than solely in the context of a civil war.

Corten acknowledges one of the underlying problems with a purpose-based approach as being that 'the official justification of the intervening State (which systematically denies it is supporting the government against rebel forces) does not always correspond to reality (in which 'humanitarian' or 'peacekeeping' interventions often have *the effect if not the purpose* of supporting the authorities in office).'¹⁴⁹ Corten explains that a State's military assistance could still be unlawful 'if proved to have had as its aim to settle an internal conflict in favour

¹⁴⁷ Bannelier-Christakis (n 141), at 760-766.

¹⁴⁸ Similarly, see de Wet (n 80), at 120, where she highlights the problem that 'it is highly likely that the recognized government of the state requesting military assistance and its allies will regard all opposition groups as terrorist movements. In the absence of clear criteria of why this classification is inaccurate, it becomes very difficult to counter from a legal perspective.'

¹⁴⁹ Corten (n 9), at 310, (emphasis added).

of one side of another'.¹⁵⁰ This position, though, still maintains the underlying flaw in the purpose-based approach – by giving deference to the official justifications through shifting the burden of proof to prove a State has an unlawful intention, rather than requiring that State to prove its intentions are consistent with the law. The Article 2(4)-based interpretation of this prohibition offered in this article, however, looks to what the *effect* of a use of force would be, rather than its 'purpose' – as explained further below.

4.1.4 A By-Product of Article 2(4) Itself

None of the above serves to demonstrate that *the effect* of the 'negative equality' principle is not borne out by practice. On the contrary, there does seem to be some restriction at least on the legality of military assistance during an internal conflict – but the scope of that restriction is not as broad as the so-called 'negative equality' principle would suggest on first reading, and the position is much more nuanced.

Ruys and Ferro categorise the prohibition of assistance in a civil war as a presumption – a default position – that can be rebutted 'when the intervention does not imply actual interference in the civil strife and/or does not adversely affect the right of self-determination.'¹⁵¹ But many who argue that military assistance in civil wars is prohibited, do not actually rely on a single customary rule, but the effect of a combination of international legal principles that seemingly explain the impermissibility of force in this context. Ruys and Ferro, for example, suggest that 'the combined effect of the non-intervention principle and the

¹⁵⁰ *Ibid.*

¹⁵¹ T Ruys and L Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen', (2016) 65 *International and Comparative Law Quarterly* 61, at 89. This can be contrasted with Lieblich, who suggests there is a presumption in favour of government assistance which can be rebutted: Lieblich (n 118), at 140-152.

right of self-determination ostensibly serves to exclude military intervention by invitation in civil war.¹⁵² Several other commentators support a similar reading.¹⁵³

The same approach could support the inclusion of Article 2(4) in this debate, which would still maintain the effect of the more nuanced prohibition of intervention in civil wars in limited circumstances suggested by State practice. The nuanced position of State practice can be seen in Corten's detailed analysis of historical interventions during internal conflicts that had specific purposes other than taking part in the internal conflict.¹⁵⁴ In general, he concludes:

... it does seem that a legal conviction of a general order can be made out, prohibiting direct military intervention in favour of government forces in the context of a conflict against opposition forces...¹⁵⁵

However, Corten's support for the restriction of military assistance during civil wars is not based on a general principle, but on his reading of Article 2(4). It is worth repeating his argument as outlined above, whereby Corten in fact maintains that a use of force incompatible with the right to self-determination is unlawful because 'it opposes any use of force in international relations "in any other manner inconsistent with the Purposes of the United Nations", and that one of its purposes is without contest the protection of the right of peoples to self-determination.'¹⁵⁶

Even the Report of the Fact-Finding Mission that coined the 'negative equality' concept in this context, using Corten's very argument to suggest:

¹⁵² Ruys and Ferro, *ibid.*, at, 88-89.

¹⁵³ See, for example, de Wet (n 76 980, and 995-996; Ruys (146) at 42-43.

¹⁵⁴ Corten (n 9), at 289-296, and 301-309.

¹⁵⁵ Corten (n 9), at 296.

¹⁵⁶ Corten (n 9), at 289-290.

This argument can be based on the wording of Article 2(4) UN Charter, which says that use of force “inconsistent with the purposes of the United Nations” is prohibited. One of the purposes of the UN is to develop respect for the self-determination of peoples (Article 1(2) UN Charter). The international right to self-determination is incumbent on peoples, and not on governments or on competing fractions aspiring to become or remain the government of the country. If in a civil war none of the warring factions clearly represents the state’s people, the principle of self-determination mandates abstaining from intervention, because such an intervention would interfere with the people’s right to self-determination.¹⁵⁷

While it is beyond the scope of this paper to delve into the merits of this argument regarding the effect of self-determination and the exact limitations it may impose on the use of force, the framing of this argument within the working and structure of Article 2(4) can certainly be supported.

This current author argues that this issue falls squarely within the prohibition of force, especially in light of the original interpretation based on the drafting of the Charter. The key difference is that it does not result in a general prohibition of all force in civil wars with exceptions, but a dynamic prohibition of certain types and effects of force that are inconsistent with the purposes of the UN Charter in Article 1.

Combined with the arguments above relating to the prohibition of force, this position argues that there may not be a standalone prohibition of intervention in civil wars, but the use of force in this context may still be prohibited where it is inconsistent with certain purposes of the United Nations (inducing self-determination). In light of the original interpretation of

¹⁵⁷ Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (n 113), at 277, footnote 180.

Article 2(4), the current author submits that it may be better to look at the *effect* that a use of force would have (i.e. looking at the act itself), rather than its *purpose* (i.e. the State's advocated intention behind its actions). For example, just because a State does not 'intend' or have the 'purpose' of using force to undermine self-determination, does not mean that the use of force itself would not have such an effect because of the manner in which the State plans to use such force. Rather than treating the purpose of military assistance as a rebuttal to a presumption that the use of force is outlawed in a civil war, the original interpretation of Article 2(4) helps to strengthen and diversify the circumstances in which military assistance may violate the prohibition of force. In particular, military assistance must be: (1) within the intrinsic elements of consent with regard to territorial integrity and political independence; and (2) consistent with the purposes of the United Nations. Importantly, this does not unnecessarily restrict the prohibition of military assistance on request to a threshold of 'civil war', allowing other uses of force inconsistent with the prohibition of force to be considered illegal in *any* circumstance of conflict or otherwise.

The prohibition, therefore, is not restricted to the arbitrary and often difficult to identify threshold of a 'civil war' or 'non-international armed conflict', but limits the application of a consensual military assistance on request to force that remains consistent with the purposes of the United Nations. It also helps to alleviate the apparent scattered nature of the prohibition of military assistance in the context of a civil war, by bringing this prohibition squarely within the scope of Article 2(4) once again. In this author's view, applying the original interpretation of Article 2(4) to military assistance on request strikes the right balance between protecting the right of self-determination, and permitting lawful force with the consent of a State where that is necessary and remains consistent with the purposes of the United Nations.

4.2 Other Explanations for the Compatibility of Legal Military Assistance with Article 2(4)

In more recent studies, the question of military assistance to a State has gained much more attention. Visser very recently suggested that military assistance during an internal conflict that manifests as a violation of self-determination, and therefore as one of the purposes of the UN under the prohibition of force ‘is not in line with the majority opinion that asserts that the prohibition is not violated in the case of an intervention by invitation.’¹⁵⁸ Accordingly, Visser suggests there are four divergent views explaining the compatibility of military assistance on request with the prohibition of force.¹⁵⁹ The first position is that intervention by invitation falls outside of the scope of Article 2(4) because this would not be force used ‘in international relations’, as specified in the provision.¹⁶⁰ The second position is that it would fall outside the scope of Article 2(4) because force used with consent is not used against the territorial integrity or political independence of that State.¹⁶¹ The third view suggests that consent (or intervention by invitation in general) is an ‘exception’ to the prohibition of force.¹⁶² And finally, the fourth view, Visser suggests, is that the force would fall within the scope of Article 2(4) but the wrongfulness of such action is precluded on the grounds of consent¹⁶³ – reflecting the idea that consent is a ‘circumstance precluding wrongfulness’ according to the law of State responsibility.¹⁶⁴ Each of these positions is worth highlighting here to explain the suitability of applying the original interpretation of Article 2(4) to the issue of military assistance on request.

4.2.1 Military Assistance On Request is Outside of ‘International Relations’

¹⁵⁸ L Visser, ‘May the Force Be with You: The Legal Classification of Intervention by Invitation’, (2019) 66 *Netherlands International Law Review* 21, at 41.

¹⁵⁹ *Ibid*, at 31-42.

¹⁶⁰ *Ibid*, at 32.

¹⁶¹ *Ibid*, at 32-33.

¹⁶² *Ibid*, at 33.

¹⁶³ *Ibid*, at 34-39.

¹⁶⁴ See above, (n 17) and accompanying discussion.

Visser ultimately prefers the position that a use of force on request of a State is not a use of force in their ‘international relations’, and so it falls outside of the scope of Article 2(4) – with Visser suggesting that consent is built into the primary norm of Article 2(4) itself.¹⁶⁵ A similar position was adopted by Corten, who noted that, ‘we are not in the presence of a use of force by one State against another’, suggesting that the consent itself in effect determines that there has not been a violation of the rule.¹⁶⁶ Similarly, Ruys and Ferro suggest that force on request ‘hardly goes against that State’s “territorial integrity or political independence”, much less affects “the international relations” between the States concerned.’¹⁶⁷ A similar argument on the non-applicability of Article 2(4) is supported by Christakis and Bannelier, on the basis that the prohibition ‘is inoperative in such a situation because there is no use of force of one state against another, but two states co-operating together within an internal strife.’¹⁶⁸ Nevertheless, Christakis and Bannelier still took the position that the principle of self-determination ‘is applicable in this field and keeps a tight rein on the legitimating power of consent.’¹⁶⁹ More broadly, Dinstein argues that Article 2(4) is only to be interpreted as prohibiting inter-State force, and not force against non-State actors, thus supporting his view that intervention in internal conflict is not outlawed by the prohibition.¹⁷⁰ Finally, Dörr and Randelzhofer argue:

The international relations of a State are not affected if it consents to the use of armed force by another State in its own territory, including its territorial waters. Because sovereign States are in principle free to dispose of their territory, they also have the

¹⁶⁵ Visser (n 158), at 41-42.

¹⁶⁶ Corten (n 9), at 253-254; see also, A Randelzhofer, ‘Article 2(4)’ in B Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd Ed, 2002), at 121-123.

¹⁶⁷ Ruys and Ferro (n 152), at 79.

¹⁶⁸ Bannelier and Christakis (n 141), at 860.

¹⁶⁹ *Ibid.*

¹⁷⁰ Dinstein (n 86), at 126, para [339].

right to dispose of their exclusive right to use that territory, and thus to allow military operations of other States on their State territory.¹⁷¹

The current author believes these arguments apply an overly-restrictive definition of ‘international relations’ for the purposes of Article 2(4). Firstly, it creates a fiction that a use of force on request does not take place between the States or in their general international relations. These arguments seem to suggest that such a use of force on request is purely internal – but this is incorrect, especially when two or more States are involved, and stretches the meaning of ‘international relations’ beyond its ordinary meaning. Furthermore, Article 2(4) refers to the use of force *against* the specified elements of a State, or in any other manner inconsistent with the purposes of the UN. When a State consents to force, it is logically not being employed against that State, and so the use of force does not fall within the first part of Article 2(4). This means the force would be permissible, as outlined above, so long as this is not inconsistent with the purposes of the Charter.

The idea that consent alone renders a use of force *not* in the ‘international relations’ between those States overlooks the very fact that the consent must be expressed from one State to another – in other words, in the very context of their international relations. It fits much better with the ordinary meanings of the phrases of the provision, therefore, to treat the ‘consent’ as intrinsic elements of territorial integrity and political independence, rather than an element of ‘international relations’. Of course, as Dörr and Randelzhofer point out,¹⁷² a State does have ‘the right to dispose of their exclusive right to use that territory’ under the principle of territorial integrity, but there are important limits and contexts to such consent as outlined above, and this still does not enable a State to exclude the application of Article 2(4) entirely.¹⁷³

¹⁷¹ O Dörr and A Randelzhofer, ‘Article 2(4)’ in B Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd Ed, 2012), at 214.

¹⁷² *Ibid.*

¹⁷³ See above, section 3.1.

Furthermore, Article 2(4) simply refers to States refraining from the use of force ‘in their international relations’ – not ‘against’ their relations, or ‘affecting their international relations’ – referencing the inter-State *context* of the use of force and nothing more. The wording and structure of Article 2(4) makes this clear, by prohibiting States ‘in their international relations from the threat or use of force *against* ... any state, *or in any other manner* inconsistent with the Purposes of the United Nations.’ This wording and structure suggests that force in international relations can be used both *against* a state, or *in any other manner*. Logically, this means that both force against, and not against, a State can fall foul of the prohibition – so even where force is not directed against a State (e.g. with the consent of that State) can be a use of force within international relations. International relations should only be taken to mean an inter-State *context*, not the requirement that the force be directed by one State against the other.

In this context, it is submitted, even force used *with* the consent of a State should be seen as falling within this part of Article 2(4).

4.2.2 *Consent as an ‘exception’ to Article 2(4)*

The possibility that intervention by invitation is an ‘exception’ to the prohibition of force is explored by Visser briefly.¹⁷⁴ It is true that no explicit treaty exception provides for this, and ultimately, as Visser recognises, a customary exception ‘would lead to a clash of sources’, because it would mean ‘a customary exception leading to a deviation from a treaty norm without adapting the treaty itself.’¹⁷⁵

More fundamentally, however, consent as an exception to the prohibition of force would completely undermine its status as a *jus cogens* norm. The point of *jus cogens* is to

¹⁷⁴ Visser (n 158), at 33.

¹⁷⁵ *Ibid*, at 39-40.

prevent any possibility of derogation – to allow an exception whereby it can be derogated at will would mean the prohibition is not *jus cogens* at all, which would completely ignore the existing recognition of the international community of this status.¹⁷⁶

4.2.3 *Consent as a Circumstance Precluding Wrongfulness*

As explored above,¹⁷⁷ the rules of State responsibility indicate that consent cannot be used as a circumstance precluding wrongfulness for a norm of *jus cogens*. However, this does not prevent consent having an effect on the ‘operative scope’ of such a norm where that consent is an ‘intrinsic’ element of the rule itself.

Visser suggests that consent is intrinsic to Article 2(4) and the prohibition of force generally, and therefore the use of consent as a ‘circumstance precluding wrongfulness’ is redundant for the prohibition of force.¹⁷⁸ This is because, according to this argument, force without consent is prohibited *jus cogens*, but force with consent is not. So, it is impossible to consent to ‘aggressive force’, but not to force rendered outside the scope of the prohibition because of intrinsic consent.¹⁷⁹

This common assumption that consent is intrinsic to the entirety of the prohibition of force, relies on a misreading of Article 2(4), and where exactly within the article the ‘intrinsic consent’ lies. For the prohibition of force, it was argued above that the principles of territorial integrity and political independence have such intrinsic consent – i.e. consent will always determine the scope of these principles as they apply to each State – because of the fact they derive from, or are inherently part of, the sovereignty of a State.¹⁸⁰ However, the final part of

¹⁷⁶ Corten (n 9), at 200-213; see also, *Nicaragua Case* (n 3), at [190].

¹⁷⁷ See n 11 to 21 above, and accompanying discussion.

¹⁷⁸ Visser (n 158), at 38-39. On the role of consent in the use of force, see also: F Paddeu, *Justification and Excuse in International Law Concept and Theory of General Defences* (CUP, 2018), at 166-169; and Lieblich (n 118), at 122-125.

¹⁷⁹ *Ibid.*

¹⁸⁰ See above, section 2.1.

Article 2(4) which prohibits force *in any manner* inconsistent with the purposes of the UN Charter, does not contain such intrinsic consent. It is an ‘objective’ provision, meant to cover all uses of force inconsistent with Article 1 of the Charter. This is where the *jus cogens* nature of the prohibition has its full effect and prevents any consent or ‘contracting out’ of the prohibition that could undermine these purposes.

4.3 Conclusions on Compatibility with Commentary and Practice

Ultimately, the interpretation of Article 2(4) offered in this paper, based upon the discussion during the drafting of the Charter, does seem to provide a fitting explanation for most, if not all, of the issues and nuances highlighted by commentary and State practice.

Visser, however, rejects the proposition that consent renders a use of force outside the scope of the prohibition of force when it does not violate the principles of territorial integrity and political independence, based upon the widely-perceived suggestion that the terms were inserted into Article 2(4) not to restrict the provision, but to clarify it.¹⁸¹ This view traces back to Brownlie’s analysis of the drafting of the Charter,¹⁸² and is partly correct – but, as evidenced above, the actual intentions of inserting these phrases on the insistence of smaller States was meant to *strengthen* the provision by ensuring that the far-reaching powers of the Security Council would not be used to affect the political independence or territorial integrity of States.¹⁸³ Importantly, this indicates that the principles of territorial integrity and political independence must be two things: they must be limited in some way (i.e. by consent) to ensure they do not overly restrict the powers of the Security Council; but they also must not be totally devoid of meaning so as to have the desired effect of actually strengthening the prohibition of force by their addition.

¹⁸¹ Visser (n 158), at 40-42.

¹⁸² Ian Brownlie, *International Law and the Use of Force by States* (OUP, 1963), at 266–67

¹⁸³ See above, n 22 onwards and accompanying text.

As explained above, the original interpretation of Article 2(4) suggests that even the Security Council should be bound to act within the restrictions of the prohibition of force – and while the scope of the prohibition is reduced because of a State’s consent to the enforcement powers of the Council, it is not extinguished altogether. Therefore, even with the most widely-accepted example of consent to use force (even against a State itself), the prohibition of force still has application. This is because the ‘objective’ part of Article 2(4), which required that force not be use *in any other manner* inconsistent with the purposes of the UN, still has effect and cannot be ‘contracted out of’ by a State’s consent. In other words, because of the status of Article 2(4) as a *jus cogens* norm, the latter part of the provision cannot be derogated from either by a treaty, or through the *ad hoc* consent of a State.

This is not to say that consent does not have any role in the application of the provision altogether. As discussed, consent is still an integral part of determining the ‘operating scope’ of the prohibition as it applies to a specific State. The range of force outlawed with regards to any given State depends on a number of factors, including: whether that State has consented to permissible force, within the boundaries of Article 2(4); and whether the State is a Member of the United Nations and has therefore consented to the Security Council using force against that State itself, or within that State’s territory.

5. Conclusion

This paper has sought to apply this author’s previous findings relating to the original interpretation of Article 2(4) to the context of military assistance on request. In particular, it has highlighted how these important statements during the drafting of the Charter help to explain the operation of consent with regard to the prohibition of force, especially in light of the prohibition’s status as a non-derogable *jus cogens* norm. After demonstrating that consent to military assistance is, in principle, compatible with Article 2(4) because of the ‘intrinsic’

nature of consent within the principles of territorial integrity and political independence, the research also reveals that the final part of the provision does have some ‘objectively’ limiting effects. In other words, the requirement that a use of force would be prohibited in any other manner inconsistent with the purposes of the United Nations reveals several safeguards that might explain the necessary restrictions of military assistance on request.

With regard to the long-running debate on the ability of States to seek military assistance during a civil war, this interpretation explains why the use of force in such circumstances may be legal in some cases but impermissible in others – in particular, when the effect of the force in a given circumstance is inconsistent with the UN’s purpose of protecting the right of self-determination, or when the use of military assistance itself constitutes a threat to international peace and security.

It appears from the debates surrounding the so-called negative equality principle that there may not be a standalone prohibition of intervention in civil wars, but that the illegality of such action can, in some cases, be attributed to the effect of other international rules. The principle of non-intervention operates to prevent *any* interference in a civil war, without the State’s consent. The prohibition of force, according to the interpretation outlined in this paper, operates to allow States to consent to force, or request military assistance, but maintains strict limits on that force remaining consistent with the purposes of the Charter. This, in effect, outlaws intervention in some contexts where the force would undermine a peoples’ right to self-determination.

In this regard, the interpretation offered in this paper operates to replace the ‘negative equality’ principle, with the simple operation of Article 2(4) itself. It explains that consent or requests for military assistance may be valid, by limiting the operation of territorial integrity and political independence, but so long as the actual use of force remains within the bounds of those principles and that consent. In other words, it seems elements of territorial integrity and

political independence may require more than a general consent, or even more than a prior-treaty based right for a State to intervene, especially where the force being used might seriously degrade or remove the most fundamental elements of a State's territorial integrity or political independence. This could be, for example, where a use of force, based on general consent provided in a treaty, goes to such extremes as to annex territory or replace political elements of the State concerned. These limitations also apply to the treaty-based consent to the powers of the Security Council in the UN Charter. It is submitted by this author that such fundamental alterations to these elements of a State require more than a general consent – but a specific or 'informed' consent, and usually without the coercive element of force present.

However, even where such consent is given, and remains within the agreed boundaries, the use of military force on request or with consent must also remain consistent with the purposes of the United Nations, as stipulated by the 'objective' part of Article 2(4). Therefore, while a State may consent to assistance with combatting terrorist fighters within its borders, such assistance must also not be inconsistent with the Charter's purposes in Article 1, which includes the maintenance of international peace and security, and the right to self-determination.

Ultimately, this paper does not seek to enlarge or diminish in any way the scope of the prohibition of force, and those recognised instances where force is lawful. It does, however, offer an alternative legal basis for achieving the same *effects* in law of the arguments made by other authors – including supporters of the negative equality principle, or proponents of the purpose-based exception to this purported right. It does not really change the destination, but only the route in which the law takes to get there. It explains why certain force on request is viewed as legal by States, while remaining consistent with the original intentions of the drafters of the UN Charter.

What this paper does reveal, however, is more than one restriction on the use of military force on request – all of the purposes of the UN Charter listed in Article 1. Of course, this approach upholds and reinforces the centralised nature of the UN collective security system – as was the intention in 1945. It is only because of the Security Council’s failure or inaction in regulating how consensual force is utilised that the international community, and legal scholars more widely, are met with a situation where we must explain the compatibility of State’s actions that should not ultimately be so far-reaching and widespread. As Erika de Wet warns, the reluctance on the part of the United Nations to uphold its responsibility to maintain international peace and security could mean that ‘bilateral requests for direct military assistance by fragile *de jure* governments to military strong states are likely to proliferate in the immediate future. This in turn implies an increased risk of a further erosion of article 2(4) of the UN Charter and the gains of collective security since the adoption of the UN Charter.’¹⁸⁴

Ultimately, this paper hopes to shed some light on the mechanics of Article 2(4) as they apply in the context of consent and military assistance, and perhaps provide a workable framework for authors to utilise in exploring the modes and limitations of military assistance on the request of a State. This, in turn, could help to shift the focus back to the primacy of the United Nations and the principles and purposes of the UN Charter.

¹⁸⁴ Erika de Wet (n 80), at 227.