Chapter 3 The United Nations Charter and Interstate Assistance

The United Nations Charter[1] is the focal point for the rules governing the use of force in international relations. What is its regulatory approach on interstate assistance? How, and to what extent, is interstate assistance prohibited? To determine this, this chapter focuses on the bare regulatory framework of the UN Charter on interstate assistance, as put into place originally in June 1945. At this stage, the interpretation is confined to a textual one as envisaged by Article 31 paras 1-2 VCLT. Accordingly, this chapter addresses only the first part of a "single and combined interpretation operation"[2] necessary to determine the regulatory framework on interstate assistance. The second part, i.e., subsequent practice in the application of the treaty, will remain behind a veil of ignorance for the moment. Practice relating to interstate assistance that may gradually shape, clarify, and develop the Charter's original framework will be the subject of Chapter 4. This step-by-step approach to interpretation seeks to provide a clear view of the very foundation that underlies the manifold international practice filling the Charter with life.[3]

I. The *ius contra bellum* under the UN Charter and interstate assistance: an overview

In pursuit of its primary goal, "to save succeeding generations from the scourge of war,"[4] and more concretely, "to maintain international peace and security",[5] the UN Charter establishes a comprehensive system that is

1 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

2 Conclusion 2 (5) ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/73/10 (2018), para 51.

3 On the importance of a clear view on the legal framework for the later assessment of subsequent practice in application of the Charter, Claus Kreß, *Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995) 34-40.

4 Preamble UNC.

5 Article 1(1) UNC.

usually referred to as the *ius contra bellum*. Its "cornerstone"[6] is laid down in Article 2(4) UNC:

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

The UN Charter further defines other fundamental principles and individual obligations,[7] and establishes mechanisms and procedures whereby member States seek to ensure international peace and security.[8] Not all of those will be of interest here. The system will be viewed through the prism of 'interstate assistance to a use of force' as defined in the introductory chapter. On that note, the following provisions, their relevance, and their interaction require scrutiny:

In subsection (II), the UN Security Council's competencies will be revisited, as the Council could address interstate assistance under its powers in Article 41 UNC. Article 2(5) UNC, the scope of which is examined in subsection (III), is the only provision of the Charter that explicitly prohibits "assistance to any state against which the United Nations is taking preventive or enforcement action". Subsection (IV) asks what it means for the general permissibility of interstate assistance that the UN Charter explicitly recognizes a *right* to give assistance in (only) two situations: in case of force used by the Security Council, Article 43 UNC, and force used in self-defense, Article 51 UNC. To what extent solidarity obligations under the Charter may embrace a duty *not* to support the attacking State is subject of subsection (V).

Besides, the Charter makes no further reference to interstate assistance. Notably, the Charter makes no mention of interstate assistance outside the system of collective security. Article 2(4) UNC prohibits the use of force but is silent on assistance to the use of force. Similarly, the principle of non-intervention as derived from Article 2(1) UNC likewise does not address interstate assistance. Sections (VI) and (VII) hence ask whether those provisions may govern interstate assistance, nonetheless. Whether interstate assistance could be subject to an unwritten but inherent rule of

6 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Rep 2005, 168, [*Armed Activities*], 223, para 148.

7 Article 2(1)-(5) UNC.

8 See in detail Robert Kolb, *International Law on the Maintenance of Peace. Jus Contra Bellum* (2018).

the UN Charter is then addressed in subsection (VIII). Subsection (IX), in concluding, brings the Charter's regulatory approach together.

II. A prohibition of assistance by a UN sanction – Article 41 UN Charter

The UN Charter is widely accepted as having established a system of collective security.[9] It governs States' reactions to an event triggering its collective security mechanism. By its nature, the collective security mechanism may also touch upon interstate assistance.[10]

Under the Charter, in case of a threat to international peace and security, UN members shall respond collectively. This collective response is placed into the hands of the Security Council. The Security Council has i.a. the authority to impose "measures not involving the use of armed force" (hereafter referred to as 'sanctions').[11] Thereby, as will be shown, the Security Council may address interstate assistance (A) to a use of force (B). This regulatory approach is a politicized, discretionary one (C) that is one piece of the Charter's general regime on interstate assistance (D).

9 High-Level Panel on Threats, Challenges and Change, "A more secure world: our shared responsibility" A/95/565 (2 December 2004); World Summit Outcome, A/RES/60/1 (24 October 2005); *Military and Paramilitary Activities in und against Nicaragua (Nicaragua, USA)*, Merits, Judgment, ICJ Rep 1986, 14 [*Nicaragua*] 100, para 188; Vaughan Lowe and others, *The United Nations Security Council and War. The Evolution of Thought and Practice since 1945* (2008) 15; Erika de Wet, Michael Wood, 'Collective Security' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) para 3.

10 See Chapter 2, II.A.

11 Article 41 UNC. On the terminology see Alain Pellet, Alina Miron, 'Sanctions' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2013); Antonios Tzanakopoulos, 'State Reactions to Illegal Sanctions' in Paul Eden and Matthew Happold (eds), *Economic Sanctions and International Law*, vol 62 (1 edn, 2016) 67-69; Tom Ruys, 'Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (2017). Note that not all measures that find their basis in Article 41 UNC will be considered sanctions, e.g. the establishment of *ad hoc* tribunals.

A. Sanctions as non-assistance obligations? The scope and content of sanctions

Sanctions under the Charter are not predetermined. The Security Council imposes them as obligations on member States.[12] The Security Council has wide discretion in defining the scope and content of sanctions. The list of possible "measures not involving the use of armed force" in Article 41 s. 2 UNC is non-exhaustive.[13] Hence, the Security Council can also take more narrowly defined measures than the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." This allows the Security Council to prohibit interstate assistance to the specific conduct triggering UN action by means of sanctions.

Still, Article 41 UNC describes the general playing field of sanctions. It is worth noting what is not mentioned in Article 41 UNC: typical interstate assistance. There is no reference to the provision of arms, logistical support, territorial assistance, or any other form of 'military' contribution. This is all the more remarkable as Article 43 UNC, in contrast, acknowledges the importance of 'military support', mentioning the provision of facilities or permissions for transit expressly. Also, the suspension of "financial relations" is absent from Article 41 UNC. "Financial measures" had been discussed in the founding debates; yet Venezuela's proposal to include them was rejected.[14]

Instead, the examples given in Article 41 s. 2 UNC are fairly remote from the specific conduct triggering Security Council action – in line with its predecessor, Article 16 LoN.[15] This reflects the design of sanctions as a collective enforcement tool, as coercive measures "not involving the use of armed force". More generally, the measures to be imposed by the Security Council are not limited to addressing behavior that has a close causal relationship to the conduct triggering the Security Council's inter-

12 Articles 41 and 25 UNC.

13 This is already indicated by the text "may include". See also Leland M Goodrich, Anne Patricia Simons, Edvard Isak Hambro, *Charter of the United Nations: Commentary and Documents* (3rd rev edn, 1969) 312; Krisch, *Article 41 UNC*, 1311 para 12.

14 III UNCIO, 189–231, 211, Doc 2 G/7 (d)(1); XII UNCIO 508, Doc 881 III/3/46; Kolb, *Jus Contra Bellum*, 146.

15 Royal Institute of International Affairs, *International Sanctions: A Report by a Group of Members of the Royal Institute of International Affairs* (1938) 76; David Hunter Miller, *The Drafting of the Covenant*, vol I (reprint 1969 edn, 1928) 15; Krisch, *Article 41*, 1307 para 1. See also Chapter 2.

vention. Rather measures can extend to *general cooperation* that may (only) indirectly and remotely affect and support the conduct triggering UN action.

In brief, albeit not expressly mentioned, under Article 41 UNC the Security Council is vested with the legal capacity to also regulate assistance. But the measures were primarily designed to go well beyond.[16]

B. The precondition for sanctions

The Security Council may take action under Chapter VII UNC if it has determined a threat to the peace, breach of the peace or act of aggression.[17] First and foremost, a State's use of force in its international relations may trigger the Security Council's authority to impose sanctions.[18] Sanctions may, therefore, involve obligations on interstate assistance to a use of force. In that respect, two features merit special mention.

First, in contrast to its "predecessor," the LoN, the Security Council is empowered to effectively maintain and restore international peace and security, irrespective of legal responsibilities of the parties.[19] It is hence also not necessary for the Security Council to act upon a violation of international law – although in practice it will do so in many cases. *Any* use of force, even if in accordance with international law,[20] can be subject to sanctions, including non-assistance obligations.

Second, sanctions do not presuppose that a use of force has taken place. The UN Charter allows action already against a *threat* to international peace and security. In particular, sanctions do not require that the triggering conduct meets the conditions of the prohibition of a use or threat of force under Article 2(4) UNC.[21] This situation was originally sought to be covered by the category of a "breach of the peace" that characteristically embraces the materialization of the abstract threat, most prominently active

16 Kolb, *Jus Contra Bellum*, 147.
17 Article 39 UNC.
18 See also the (originally dominant) negative definition of peace, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 138.
19 Niko Krisch, 'Article 39' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol II (3rd edn, 2012) 1278, para 10 with further references. This distinguishes sanctions from law enforcement and legal consequences of a wrongful act, Pellet, Miron, *Sanctions* para 15.
20 Cf also Article 51 s 1 UNC.
21 Krisch, *Article 39 UNC*, para 13.

hostilities.[22] This observation has two consequences: Sanctions are not necessarily confined to assistance once a use of force has occurred and is continuing. Instead, sanctions may already regulate assistance to a single "one-strike" use of force. Moreover, it allows UN enforcement action to address assistance to a use of force in two ways: On the one hand, the Security Council may restrict assistance from one State to a State that is involved in a threat to the peace, breach of the peace, or act of aggression. Thereby, the Security Council has the power to regulate a third and innocent State's relationship with a State responsible for a situation meeting the threshold of Article 39 UNC.[23] The measure is (non-overtly[24]) directed against the State using force but implemented through the assisting State. On the other hand, the provision of assistance in and of itself may also qualify as a threat to the peace, breach of the peace or act of aggression. The Security Council's measure would then be directed directly against the assisting State and the assistance itself.

Accordingly, UN sanctions are a mechanism through which the Security Council may impose non-assistance obligations in the case of, and even in anticipation of, a use of force, irrespective of its wrongfulness.

C. Non-automatic sanctions: the role of the Security Council

Unlike in the Covenant of the League of Nations, the UN Charter did *not* opt for the drastic solution of automatic and immediate sanctions. The decision on sanctions is concentrated in the Security Council instead, the primary organ responsible for securing international peace and security.

By vesting the Security Council with the power to impose non-assistance obligations, the Charter recognizes two issues: first, the importance of assistance, and the potentially powerful impact of non-assistance; and second, the general idea of non-assistance in its regime of securing international peace and security. As the Security Council operates within the confined framework of the UN Charter, it operationalizes dormant non-assistance principles already embodied in the Charter. This does not mean,

22 Ibid para 40; Johanna Friman, 'Deblurring the concept of a breach of the peace as a component of contemporary international collective security', 6(1) *JUFIL* (2019) 31.

23 Article 50 UNC acknowledges that this may have repercussions on third States and provides for a mitigating procedure.

24 Kolb, *Jus Contra Bellum*, 144 noting that it is not necessary to specifically designate a violator.

however, that the Charter contains obligations, which the Council only *reaffirms*. The very existence of such obligations depends on the Security Council's decision and whether the specific resolution designates a call for non-assistance as mandatory.[25]

There were good reasons for the centrality of the Security Council for non-assistance obligations. In fact, it was a deliberate change of direction from the League Covenant that was discussed in the drafting committees.[26] It was meant to tie the existence of the non-assistance obligation to the political will and assessment of the specific situation of the international community, as represented and reflected in the Security Council. States were well aware that this would necessarily allow for political discretion and leeway.[27] Not every situation that constitutes a threat to or breach of peace or an act of aggression would be subject to sanctions – especially when veto powers are involved in the situation. But the 'politicization' of sanctions and hence of prohibitions of assistance was considered to also have important benefits:[28]

First, the effectiveness of the sanction was meant to be improved through ensuring universal participation.[29] Sanctions can only be effective, if the sanctioned State is isolated and alternatives to circumvent the sanctions are cut off. This requires widespread, if not universal, participation of States. Linking the sanction to agreement in the Security Council sought to ensure universal participation. The Security Council is the organ bearing the primary responsibility for maintaining international peace and security. Its design claims to represent the international community. In case the Security Council, including the veto powers, agreed on a sanction, the sanction is presumed not to remain a dead letter, but – as an adequate reflection of the power-politics – to be acceptable to all and to be implemented.

25 Anne Peters, 'Article 25' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 792, para 8-10. For debates on the limits of the Council's discretion see de Wet, *Chapter VII*, 131 et seq.

26 Bolivia's proposal would have required immediate collective action in case an act of aggression has been investigated, III UNCIO 577-586, 584, Doc 2 G/14 (r); XII UNCIO 502, 505, Doc 881 III/3/46. Bengt Broms, 'The Definition of Aggression', 154 *RdC* (1978) 315.

27 Krisch, *Article 39 UNC*, 1275 para 4-5.

28 See also Gary Wilson, *The United Nations and Collective Security* (2014) 8; Goodrich, Simons, Hambro, *UN Charter Commentary*, 290 et seq.

29 See also Wilson, *UN and Collective Security*, 8. Also in this direction C Lloyd Brown-John, *Multilateral Sanctions in International Law: A Comparative Analysis* (1975) 3.

Second, closely tied to the idea of universality of sanctions, requiring agreement in the Security Council for imposing a sanction reduces the (political and financial) costs and necessary sacrifices of States implementing the sanction. This will again increase the political will to implement. Universality reduces the risk that other States will take advantage of States that comply with the sanction.[30] Strict sanctions may hurt the sanctioning State more than the sanctioned State.[31] Even if it is assumed that the non-assistance was necessary and effective, it may at times bear disproportionately high costs for the assisting State. Universal participation renders possible assistance and cooperation among sanctioning States to absorb the costs and impact for sanctioning States.

Third, loosening up the trigger as well as the consequence and placing it at the discretion of the Security Council introduces more flexibility to achieve the main goal of maintaining or restoring international peace and security.[32] The UN sanction mechanism is reflective of the fact that there is no silver bullet to achieving this aim. Each situation requires case-specific means. Even non-assistance to the violator or violation at times might have no, disproportionate, or even counter-productive effects. In this light, Chapter VII UNC introduced flexibility, specificity and discretion – leaving it to the Security Council to decide on prompt and effective measures and obligations tailored specifically to the specific situation.

Last but not least, all these considerations also acknowledge and reflect the breadth of (potential) assistance, as being capable of potentially facilitating the threat to or breach of peace or act of aggression. Even minor and limited uses of force are costly – both economically and politically.[33] Anything that upholds economic relations, development aid, or even

30 The sanctioning regime is ineffective in achieving its goals, when other States step in and fill the gap the State left that decided to comply. Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954) 180. The sanctioning State runs risk to cut politically or financially important ties with the sanctioned State, without any (proportionate) advantage and compensation.

31 For example, these were main reasons for States not to impose comprehensive sanctions against Italy when invading Abyssinia, George de Fiedorowicz, 'Historical Survey of the Application of Sanctions', 22 *TGS* (1936) 129-130. This argument remains popular today, e.g. Ray Rounds, 'The Case Against Arms Embargos, Even For Saudi Arabia', *War on the Rocks* (16 April 2019). Article 50 UNC acknowledges the potential hardship of sanctions on the sanctioning States.

32 See also Wilson, *UN and Collective Security*, 19.

33 Even limited airstrikes, such as the US firing of 66 Tomahawk cruise missiles on Syria in response to the alleged use of chemical weapons, are (politically and economically)

mere political encouragement, support, or backing can constitute (remote, but decisive) assistance. In a globalized world, any cooperation with a State using force can be seen as (albeit remote) assistance to the violation. The Security Council's decision hence serves as a case-specific filter to specify which State cooperation is particularly dangerous in effect, and which form of State cooperation with the violator in fact constitutes decisive assistance to the violation. Again, its aim is to avoid disproportionate and overly harsh repercussions of general non-assistance obligations and to prevent potentially even worse impacts on international peace and security by cutting ties of cooperation.[34]

By granting the Security Council discretion to determine sanctions, and thereby non-assistance obligations, the UN Charter refrains from making a definitive normative judgment on non-assistance. Instead, it is reluctant to automatically prohibit assistance and leaves it to the specific situation, thereby introducing reasoning motivated by political and effectiveness concerns.

In brief, Chapter VII UNC recognizes that assistance may be problematic. But Chapter VII UNC does not prohibit assistance. Assistance *may* be prohibited – if there is political will that both compensates for concerns about an automatic obligation and tailors the scope of the obligation acceptable to all.

D. UN sanctions as the exclusive regime governing assistance?

The sanction scheme under Chapter VII UNC allows for a *comprehensive* regulation of assistance – through secondary obligations decided upon by the Security Council. What is its place in the UN Charter's general regime

expensive: Amanda Macias, 'US taxpayers paid millions of dollars for the airstrikes on Syria', *NBC* (16 April 2018), https://www.cnbc.com/2018/04/16/syria-airstrikes-cost-to-us-taxpayers.html.

34 Along those lines warning against the risks of too strict non-assistance obligations Georg Nolte, 'Zusammenarbeit der Staaten bei der Friedenssicherung: Steuerung durch Verantwortlichkeit und Haftung' in Marten Breuer and others (eds), *Im Dienste des Menschen: Recht, Staat und Staatengemeinschaft: Forschungskolloquium anlässlich der Verabschiedung von Eckart Klein* (2009); Georg Nolte, Helmut Aust, 'Equivocal Helpers - Complicit States, Mixed Messages, and International Law', 58(1) *ICLQ* (2009).

on assistance? Does it mean that assistance is only prohibited if and only if the Security Council decides so?[35]

By design, this is not a necessary conclusion from Chapter VII UNC. It does not exclude the existence or development of complementary regulations on assistance under the UN Charter. Article 41 UNC primarily has an 'enabling' function, enriching the Security Council's enforcement arsenal with a politically more agreeable and less intrusive weapon than the resort to armed forces, which proved effective and powerful during both World Wars.[36] Sanctions were an institutionalized response to the fact that, without institutionalization, general rules on war did not prove effective.[37] Sanctions generally regulate the *consequences* of a threat to peace, here the use of force by States. As such, they can also prohibit assistance; but they were not exclusively designed as non-assistance obligations, and as the Charter's definitive response to assistance. The primary function of sanctions is to maintain international peace and security, not to establish responsibility.

Moreover, the UN system for sanctions and its preconditions are tailored to address *any* form of cooperation. For assistance, this means that sanctions may also address remote assistance and impose regulations in the event of a (mere) threat to the peace, irrespective of a violation of international law. This again limits the informative value for the Charter's normative stance on assistance that does not share these characteristics, for example on proximate assistance directly contributing to a use of force that accordingly transcends the purely economic and political relations between States. It cannot be concluded with certainty that the reasons for politicizing the regulation of cooperation apply with similar force here.

Nonetheless, Chapter VII UNC marks the framework within which non-assistance rules may develop. In particular, Article 41 UNC certifies States' reluctance to accept an automatic, legally required absolute economic boycott of a State using force. In a globalized world, such a duty is conceived as

35 Eckart Klein, 'Beihilfe zum Völkerrechtsdelikt' in Ingo von Münch (ed), *Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (1981) 437 seems to take this view, after referring to the UN mechanism by which prohibitions of assistance may be imposed, when he holds that "jede darüber hinausgehende, insbesondere natürlich eine generelle Regelung überfordert das Völkerrecht als eine zwischen den Staaten bestehende Ordnung".

36 Stone, *Legal Controls of International Conflict*, 180.

37 Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 469.

too intrusive, and politically too sensitive to exist without the case-specific political agreement of the international community as represented by the Security Council. Within the UN Charter, a prohibition of assistance will therefore not, although conceptually not excluded, go as far.

UN sanctions are designed as an enforcement part of the UN Charter. As such, they form part of the UN Charter's assistance regime, leaving room conceptually for further rules governing assistance. Still, (the reasons for) the design of the sanction regime may guide international practice. It suggests that in a globalized world, a non-assistance norm will not be unlimited and unqualified.

III. Article 2(5) UN Charter: non-assistance only if the United Nations takes action?

The only provision in the UN Charter that expressly mentions a prohibition of interstate assistance is Article 2(5) UNC. It reads:

> "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

The first part of Article 2(5) UNC establishes a duty of solidarity. It does not concern the present topic of inquiry. It addresses States' assistance to actions of the United Nations, not solidarity among member States. The second part of Article 2(5) UNC squarely addresses and prohibits *interstate* assistance. The United Nations may take preventive or enforcement action in view of States using force, as seen above. The prohibition may hence apply to assistance to a use of force.

Does this mean that Article 2(5) UNC is a general rule of non-assistance to a (wrongful) use of force? It is submitted that it is not. Article 2(5) UNC applies only in the specific situation where UN enforcement measures are taken (A). In view of its scope (B), this prompts questions about the role of Article 2(5) UNC within the regulatory framework of the Charter. More precisely, does the existence of Article 2(5) UNC in its present scope imply that a general prohibition of assistance is not part of the Charter regime (C)? Or does Article 2(5) UNC, despite its specific scope, represent a generalizable idea of non-assistance to States that may be lawfully targeted even by force (D)?

A. The trigger: A general prohibition of interstate assistance?

The non-assistance obligation in Article 2(5) UNC applies when the "United Nations is taking preventive or enforcement action" under Chapter VII.[38]

It is not already triggered when the United Nations *is empowered to* take preventive or enforcement action, i.e. when the threshold of Article 39 UNC is met, allowing the Council to take actions. The use of the present progressive "is taking" makes it clear that the United Nations must be *in the course of* taking the enforcement measure. This choice of wording is no coincidence. It reflects the main idea behind the provision: to ensure member States' solidarity with UN actions. By design, it aims at securing the member States' full support for UN enforcement action, that is necessary to ensure its effectiveness and success.[39] It is further reflected in the fact that the second part of Article 2(5) UNC is not a separate principle, but is systematically closely linked to the general duty to assist the UN in *any action* as enshrined in Article 2(5) alt 1 UNC. In fact, the original two separate principles[40] were even merged in Article 2(5) UNC, for they were viewed as two sides of the same coin: effectively facilitating the establishment of international peace and security through the UN.[41] The distinguishing line would also be very thin: non-assistance to the United Nations may be viewed as (minimal) assistance to the targeted State; and *vice versa*, assistance to the target State may be considered as non-sufficient assistance to the United Nations. In addition, Chile's proposal to exclude States outside the region of the conflict from the obligation of assistance points in

38 On the debate whether preventive measures pursuant to Article 40 suffice to trigger the obligation under Article 2(5) see Helmut Aust, 'Article 2(5)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) para 18.

39 Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (2007) 158.

40 The Dumbarton Oaks proposals entailed two different principles: Doc 1 G/1, III UNCIO 1-23, 3. See also the draft VI UNCIO 402-404, Doc 908 I/1/34 (a), 404 principles 5 and 6.

41 Ahmed Mahiou, 'Article 2(5)' in Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies. Commentaire article par article* (3rd edn, 2005) 467; Robert Kolb, *An Introduction to the Law of the United Nations* (2010) 138; Aust, *Article 2(5) UNC*, para 2.

that direction of a unity of those two rules.[42] The second alternative hence "complements",[43] or, more precisely, clarifies[44] that the duty to assist the UN when taking enforcement measures also embraces non-assistance to the violating State. On that basis the non-assistance obligation only applies to actual UN actions taking place, not *potential* UN actions.

This limited field of application of the non-assistance obligation is again indicative of the Charter's generally reluctant approach to (non)-assistance. In fact, the non-assistance obligation again only applies once the Security Council has created legal certainty through a political agreement reflected in an agreed enforcement measure.[45] This regulation is no surprise, however. It aligns with the general conception of the UN Charter that places the Security Council at the center of efforts to maintain international peace and security.

The application of the non-assistance obligation under Article 2(5) UNC depends on UN preventive or enforcement action. Still, by design, it remains an independent obligation, legally distinct from the specific obligations arising from preventive or enforcement action. Both obligations coexist, even if they overlap or are identical in content. This means that the obligation of non-assistance neither replaces nor substitutes a preventive or enforcement action. Nor is the UN's action a *concretization* of the obligation under Article 2(5) UNC for a specific situation.[46]

What, then, is UN preventive or enforcement action that triggers Article 2(5) UNC?

First, Article 2(5) UNC requires action by the "United Nations". For the positive assistance duty laid down in 2(5) alt 1 UNC, it is controversial whether this refers only to the Security Council or also includes other

42 Doc 2, G/7(i), III UNCIO 282-291, 284: Chile proposed to include: "But whenever disputes affect a Continent or region and do not constitute a danger to the general world peace, the states of other Continents or regions shall not be obligated to participate in operations of a military nature decided upon by the Council and the Assembly."

43 Mahiou, *Article 2(5)*, 130-131.

44 Jochen Abr Frowein, 'Article 2(5)' in Bruno Simma and Hermann Mosler (eds), *The Charter of the United Nations. A Commentary*, vol I (1st edn, 1994) 130 para 5; Aust, *Article 2(5) UNC*, para 18.

45 See e.g. Bernhard Graefrath, Edith Oeser, 'Teilnahmeformen bei der völkerrechtlichen Verantwortlichkeit', 29(5) *Staat und Recht* (1980) 448; Aust, *Article 2(5) UNC*, para 29.

46 In a similar direction Aust, *Article 2(5) UNC*, para 18 who states that the "obligation of non-assistance supplements the principal enforcement action the SC has taken".

UN organs.[47] For the non-assistance duty under Article 2(5) Alt 2 UNC, it is accepted that only Security Council action suffices. Only the Council may take enforcement measures, i.e., binding measures under Chapter VII UNC.[48] However, this does not exclude the possibility that the obligation is triggered in cases where "delegated organs of the United Nations", such as regional agencies authorized by the Security Council, exercise the relevant conduct.[49]

Second, the non-assistance obligation presupposes 'preventive and enforcement' action. This excludes recommendations, as otherwise their recommendatory nature would be obverted.[50] Similarly, it is doubtful if the obligation applies "when the Security Council simply finds that an act of aggression or of the unlawful use of force has been taken by a State without deciding upon further action under Chapter VII."[51]

Last but not least, action may be taken in view of a use of force that amounts to a threat to peace, breach of peace or aggression.[52] It is not necessary for the use of force that prompted UN enforcement action to have already taken place. Neither is it essential that the pertinent use of force is contrary to international law.[53]

The non-assistance obligation applies hence to any use of force against which the Security Council lawfully *may, and does* in fact, take measures.

B. The scope: A prohibition of assistance to conduct obstructing UN action

Article 2(5) alt 2 UNC prohibits "assistance to any State." It does not specify in what *action* the State must not be assisted, in contrast to Article 2(5) alt 1 UNC that refers to "assistance in any action". Instead, the *State itself* must not be supported. At first glance, one could be prompted to read Article 2(5) as a duty to fully isolate the violator against which the UN takes action.

47 Ibid para 6, 24.
48 Ibid para 18, 24. To that extent the second part is viewed a l*ex specialis* to the first part of Article 2(5) UNC, Hans Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems* (1966) 92; Aust, *Article 2(5) UNC*, para 18.
49 Kelsen, *Law of the United Nations*, 91-92. See also Jochen Abr Frowein, Nico Krisch, 'Article 2(5)' in Bruno Simma (ed), *The Charter of the United Nations. A Commentary*, vol I (2nd edn, 2002) 138 para 6 in view of authorization practice.
50 Frowein, *Article 2(5) UNC (1994)*, 130 para 2; Frowein, Krisch, *Article 2(5) UNC (2002)*, 138, para 4-5, 139 para 8-9.
51 Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011) 382.
52 Article 39 UNC.
53 See Article 51 s 1 UNC.

But several indicators suggest a more restrictive understanding of Article 2(5) UNC, according to which it only prohibits assistance to conduct that has a specific connection to the enforcement action.

For one, Article 2(5) UNC prohibits 'assistance', not 'cooperation' in general. This implies that, despite its broad wording, what is considered problematic is the specific relationship to a specific conduct of the State against which the United Nations is taking action. Moreover, a broader interpretation of Article 2(5) UNC would be incompatible with the UN system. Article 2(5) UNC cannot undermine the Security Council's enforcement measures, which are carefully crafted responses to specific cases. This internationally agreed response cannot be thrown out of balance if States were always required to sever all ties with the violator once the Security Council takes an enforcement measure. A broader interpretation might blur the legal separation between the UN enforcement measure and Article 2(5) UNC and disregard the Charter's system of competencies, in particular the primary responsibility of the Security Council for the maintenance of international peace and security.[54]

In view of its purpose to protect and strengthen the UN in its enforcement action, Article 2(5) UNC hence is concerned with *conduct* that assists States in resisting the Security Council's enforcement action.[55] This again allows for two interpretations in practice:

Under a broad interpretation, the non-assistance obligation under Article 2(5) UNC could capture any conduct that runs counter to the *purpose* of the enforcement action. Any assistance to the conduct that prompted the Security Council to take action would be prohibited. For example, assistance that prolonged or facilitated a use of force which the Security Council attempted to end through imposing enforcement measures under

54 For assistance obligations, similar considerations apply. Pursuant to Article 43 UNC, States' obligations to *provide troops* to the Security Council are subject to a specific agreement between the Council and the States. Article 43 UNC also covers the provision of "assistance, facilities, including the right of passage" to a force "exercised or authorized by the Security Council". Article 2(5) UNC cannot introduce obligations to provide support, without undermining Article 43 UNC that only entails an obligation to negotiate. See also Aust, *Article 2(5) UNC*, para 4; Frowein, Krisch, *Article 2(5) UNC (2002)*, para 4. But see Derek W Bowett, George Paterson Barton, *United Nations Forces: A Legal Study of United Nations Practice* (1964) 387, 413 et seq.

55 In a similar direction see Frowein, Krisch, *Article 2(5) UNC (2002)*, 139 para 8 who argue that "no other state may grant assistance to that state in a manner inconsistent with the purpose of the action of the SC"; Felder, *Beihilfe*, 159 adopting the same definition; Aust, *Article 2(5) UNC*, 18.

Chapter VII UNC would be prohibited. Such assistance could be understood to undermine the necessary solidarity of States with the UN; not at least it renders the enforcement action eventually necessary and, in any event, more costly. By this broad interpretation, Article 2(5) UNC would go beyond what was required by the enforcement measure itself. To illustrate: if the Security Council imposes sanctions confined to an arms embargo against a State illegally using force against another State, the obligation under Article 2(5) UNC would go beyond that. Member States would also be prohibited from providing other contributions, e.g., provision of oil that fuels the war efforts, or not to provide assistance that facilitated circumventing the arms embargo, e.g., through providing materials necessary to build arms themselves.

Alternatively, under a narrower interpretation, any assistance provided to the targeted State that obstructs the *specific* enforcement measure *itself* would be prohibited.[56] In effect, Article 2(5) UNC would not go beyond ensuring compliance with the specific UN enforcement action. For example, economic aid that alleviated the consequences of an economic embargo would be outlawed.[57] In a case where the Security Council authorizes a no-fly-zone against a State intervening in another State with ground troops, military assistance to a State that is tailored towards resistance to a no-fly-zone authorized by the Security Council, e.g., through air raid defense, would be prohibited. Assistance that leaves the specific enforcement measure however unaffected, e.g. the delivery of tanks to facilitate the intervention through ground troops, would not fall under the prohibition. As for the duty to assist in enforcement action, it would only require the implementation of the specific enforcement measure imposed. Any assistance that enabled the enforcement measure or rendered it more effective in ending the violation would not be necessary. Accordingly, at a minimum, remaining permanently neutral despite obligations to act, could run counter to the enforcement action.[58] For example, in cases where the Council authorizes a use force, and calls for assistance, there would be *no obligation* to provide assistance under Article 2(5) UNC to the authorized

56 The same is true for the assistance obligation: only specific assistance to the very specific enforcement action.

57 Frowein, Krisch, *Article 2(5) UNC (2002)*, 139.

58 France wanted to include this effect in the text. This proposal was rejected, however, on the understanding that this effect is already covered, as it is "tacitly accepted". Doc 423 I/1/20, VI UNCIO 312; Doc 739, I/1/19(a), VI UNCIO 722.

force in the form of troops, facilities, or overflight rights. States would only be obliged to comply with the specific enforcement measures.

In application of Article 2(5) UNC, it would be a fine line between the two possible interpretations. In most cases, support for the violation usually also obstructs the specific enforcement measure. Assistance typically has an effect on both the violation and the enforcement measure. While it may not be the main purpose of Article 2(5) UNC, in most cases Article 2(5) UNC will hence indirectly outlaw support for the violation.

In any event, Article 2(5) alt 2 UNC establishes a comprehensive prohibition without further conditions. It is not limited to a specific type of assistance. Unlike other prohibitions of assistance, it does not introduce any further limiting criteria. Most notably, there is no mention of any subjective element such as knowledge or intent.[59]

C. Is Article 2(5) alt 2 UN Charter exclusive?

Article 2(5) alt 2 UNC is the only provision in the UN Charter that expressly stipulates a rule on interstate assistance. If understood broadly, Article 2(5) alt 2 UNC may also prohibit assistance to a use of force that triggered a Security Council response. This might invite to think that the Charter prohibits assistance to the use of force only under the conditions set forth in Article 2(5) UNC.[60]

This conclusion is not justified, however, for two reasons. First, Article 2(5) alt 2 UNC does not prohibit interstate assistance to a use of force, in a general and comprehensive manner. Instead, its main focus is ensuring the effectiveness of UN enforcement action. Second, the regulation of horizontal assistance is no more than a component of the regulation of vertical assistance, i.e., assistance to the United Nations. Non-assistance required by Article 2(5) UNC is part of the enforcement system. It is an *institutional* rule directed at building a strong and effective enforcement

59 But see Bernhard Graefrath, 'Complicity in the Law of International Responsibility', 29(2) *RBDI* (1996) 376 seeking to deduce a presumption of intention "in cases where assistance is given to a State knowing that the international community has taken action against that State because of a serious violation on international law". He hence seems to understand any State violating Article 2(5) UNC to have intention also to facilitate the resistance against the UN.

60 In this direction Aust, *Complicity*, 34: "Article 2(5) provides by implication that the UN Charter does not automatically ban complicity with wrongful acts in an all-encompassing manner."

mechanism, expressly granting the UN a right. It is not however a provision that regulates assistance on a primary level.

Accordingly, Article 2(5) UNC does not aim to establish an exclusive and definitive normative framework for assistance. Rather, it is concerned with the effectiveness of UN (steered) enforcement action. In this respect, the regulation of horizontal assistance is merely a tool. Non-assistance required by Article 2(5) alt 2 UNC is a means to assist the UN. As such, it does not preclude a broader regulatory regime on assistance.

D. Article 2(5) UN Charter as embodiment of a general idea

Article 2(5) alt 2 UNC itself is a part of the Charter's regulatory regime on interstate assistance. In addition, it embodies a general idea of (minimal) solidarity. Non-assistance as required by Article 2(5) UNC primarily "protects" the Security Council. In doing so, it also has a deliberate impact on the horizontal relationships among States – in fact, protecting the targeted State. Thereby, it reflects a general idea: the idea of non-assistance to a State which may be lawfully subjected to enforcement measures.[61] As seen, this includes non-assistance to a State that resorts to force in a manner threatening international peace and security. On that note, Article 2(5) UNC brings to light in express terms the foundational idea of solidarity that is deeply entrenched in the UN system of collective security: not only by recognizing a right to assistance, but also by expressly stipulating a non-assistance obligation.[62] While Article 2(5) UNC primarily tailors this general idea to the specific implementation of collective security in the UNC, centralized through the Security Council, it certifies the general idea of non-assistance within the Charter. As such, it may serve as a basis for further development through State practice.

One should be careful to assume that the absence of additional preconditions for the non-assistance obligation pursuant to Article 2(5) UNC

61 Aust, *Article 2(5) UNC*, para 1, para 28; Kelsen, *Law of the United Nations*, 94. Both formulate the general idea that a member that has violated the Charter shall be deprived of any assistance. While it is at least for the use of force true that most cases are also a violation of the Charter, this is not precise, if creating a threat to international peace and security is not considered a 'violation' of the Charter. Even a lawfully acting State may be subject to enforcement action.

62 Similarly, the ILC ARS Commentary, Article 16, 66 para 2; Aust, *Article 2(5) UNC*, para 1.

implies that such preconditions are *generally* not necessary. Article 2(5) UNC reflects the unique situation in which the UN has taken binding enforcement measures. Additional requirements obliging States to prevent obstruction thereof might seem unduly restrictive. The comprehensive prohibition of assistance is justified by the bottle neck created by requiring agreement among members representative of the international community in the Security Council.[63]

Furthermore, Article 2(5) UNC provides guidance on the relationship between an obligation to assist (the targeted State), and a prohibition to assist (the State using force). Non-assistance to the violator may be part of an assistance obligation. At the same time, non-assistance to the violator is *only* part of the assistance obligation to the targeted State. Anything that violates the non-assistance obligation also violates the assistance obligation. But not everything that violates the assistance obligation (i.e., no assistance to the victim) also violates the non-assistance obligation (i.e., prohibited assistance to the aggressor). Assistance obligations would otherwise be void and meaningless. The same would be true for the specification of a non-assistance obligation.

IV. An implicit prohibition of assistance in view of specifically recognized rights to provide assistance?

Originally, as still reflected in the express terms of the Charter, the use of force is permissible only in two situations. Under the Charter, the use of force is monopolized by the Security Council, as per Articles 2(4) and 42 UNC. Unlike measures below the threshold of armed force that were to be taken by member States when called for by the Security Council,[64] the use of force was meant to be exercised through the hands of the Security Council and its military forces only, and not, as was the case with the League of Nations,[65] through member States.[66] Until the Security Council has taken measures necessary to maintain international peace and security, however, the Charter does not impair States' inherent right of individual or collective self-defense if an armed attack occurs against a member State of

63 Aust, *Article 2(5) UNC*, para 29.
64 Article 41 UNC.
65 Article 16(2) LoNC.
66 Article 42 UNC.

the United Nations.[67] In other words, unilateral use of force was exceptionally permissible only in cases of self-defense.

For both cases, the UN Charter addresses assistance by other States.[68] With respect to the use of force by the Security Council, Article 43 UNC describes how States may contribute (A). With respect to a situation of self-defense, the Charter recognizes a right of "collective self-defence" (B). Does the exclusive recognition of those rights imply that assistance is prohibited in all other cases in which the Charter does not expressly recognize rights to assist?

A. Is assistance permissible only to a use of force through the United Nations?

Article 43 UNC is the only provision in which assistance is expressly mentioned in relation to a use of force. But it does not address *interstate* assistance; it concerns assistance to the Security Council as an organ of the United Nations. It is nonetheless interesting as it pertains to contributions to a use of force considered lawful under the Charter.[69] Pursuant to Article 43 UNC

> "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, *assistance, and facilities, including rights of passage*, necessary for the purpose of maintaining international peace and security."[70]

67 Article 51 UNC.

68 The use of force is permissible under the UN Charter in a third scenario: consensual use of force. The Charter itself is not only silent on such use of force itself, but also on assistance thereto. Hence, *a priori* this excludes any significant inference for specific prohibitions of assistance. Other independent grounds such as a humanitarian intervention, pro-democratic intervention, or rescue missions for nationals abroad are highly controversial. As the Charter does not explicitly regulate assistance to a use of force in those situations, they are not considered here.

69 The UN armed forces have never been established. Instead, the Security Council authorizes use of force of member States. As such, later practice is directly interesting with respect to *interstate* assistance.

70 Emphasis added.

Irrespective how to qualify the placement of military contingents to the Security Council itself, Article 43 UNC expressly mentions several forms of assistance short of force. "Assistance" was primarily meant to relate to direct military assistance, such as the provision of facilities, military bases, intelligence, reconnaissance, passage through territory, or military logistics.[71] The importance of such assistance for an effective military endeavor is illustrated by the express reference to a "right of passage," which the original proposal at the Dumbarton Oaks Conference did not contain.[72] At the San Francisco Conference, France successfully advocated for its insertion,[73] in view of the experiences in World War II, when Scandinavian States refused the right of passage to France and the UK who were seeking to defend Finland against Soviet aggression.[74] The clause was not meant to "exclude the granting of other facilities", but to stress the crucial importance of such assistance to effective military operations.[75]

Assistance pursuant to Article 43 UNC was however not conceptualized as *ad hoc* assistance to specific measures taken by the Security Council in response to a particular situation. Instead, member States were required to provide assistance in the abstract to a standing armed force. States are obliged to assist, yet only if "special agreements" on the details of their contribution can be realized.[76] States hence were only willing to accept a duty *de negotiando et de contrahendo*.[77]

71 Ruth B Russell, *A History of the United Nations Charter: the Role of the United States 1940-1945* (1958) 468. The UK and USA rejected an even more explicit proposal by the USSR as they thought Article 43 UNC already encompass it.

72 Doc 1 G/1, III UNCIO 1-23, 15-16. See also Bowett, Barton, *UN Forces*, 418; Krisch, *Article 43*, para 4. It was also not explicitly included in the United States Department of State, 'United States Tentative Proposals for a General International Organization, July 18, 1944' in E Ralph Perkins and S Everett Gleason (eds), *Foreign Relations of the United States: Diplomatic Papers, 1944, General*, vol I (1966) 661-662 VI D 2, 6. This did not mean however that the importance of that form of assistance was not recognized. In fact, according to the proposal, the Council should be "empowered to call upon member states to grant rights of passage and to furnish facilities, including bases, necessary to the effective action of forces operating under authority of the council. The conditions of the exercise of these rights and of the furnishing of facilities, including bases, should be determined, in advance or at the time of action, by agreement between the executive council and the member states in whose territories these rights and facilities are required."

73 Doc 881 III/3/46, XII UNCIO 509, 510.

74 Bowett, Barton, *UN Forces*, 418.

75 Doc 881 III/3/46, XII UNCIO 509, 510.

76 Krisch, *Article 43 UNC*, 1353 para 6.

77 Ibid para 6; Bowett, Barton, *UN Forces*, 418.

For the present purpose, Article 43 UNC is interesting in three respects: First, it acknowledges the importance of assistance for a successful military operation to maintain or restore international peace and security. Second, it distinguishes between different types of contributions, most notably through armed forces and through "assistance and facilities". Third, it presupposes and thus builds upon a *right* of member States to provide assistance to a use of force in accordance with Article 42 UNC.

An implicit *prohibition* of assistance to unilateral use of force outside the UN framework does not follow from Article 43 UNC, however. The (exclusive) recognition of a right to assist cannot be equated with a prohibition of assistance in any other situation than the one recognized. Also, Article 43 UNC constitutes an essential piece in the UN Charter's monopolization of the use of force. But it does not establish monopolization itself. This rather follows from Articles 2(4), 39, 42, and 51 UNC.[78] The regulation of assistance with respect to monopolized force hence cannot extend the monopolization of force to a monopolization of assistance.

B. Is assistance permissible in collective self-defense only?

In addition to a use of force through the UN, unilateral use of force in self-defense remains permissible in exceptional circumstances according to the Charter. Article 51 s 1 UNC states:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Article 51 UNC positively recognizes the existence of two rights:[79] first, the right of a State to defend itself (individual self-defense);[80] second, the right of third States to *collectively* defend a State, if requested.[81] It is thus clear

78 See also Hans Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations', 42(4) *AJIL* (1948) 785.

79 It is controversial whether it establishes or merely affirms a right. On the right of collective self-defense, it is further controversial if this right was a novel right, Christine Gray, *International Law and the Use of Force* (3rd edn, 2008) 170; Christian Henderson, *The Use of Force and International Law* (2018) 260

80 The exact circumstances of the right are fiercely contested.

81 Ian Brownlie, *International Law and the Use of Force by States* (1963) 331; Emmanuel Roucounas, 'Present Problems of the Use of Force in International Law', 72 *AIDI*

that States have the right to cooperate in defending a State until the Security Council takes necessary measures.

Aside from the question of circumstances under which defense is permitted,[82] the question of permissible means by which defense may be exercised is even more crucial to the current constellation of third State's assistance.

It is beyond serious doubt that a State defending itself *individually* against an attack may do so by resorting to force.[83] Naturally, the drafters of the Charter had the use of arms in mind.[84] This is also true for the collective defense; other States may use force as well. As Lauterpacht has succinctly put it, "[i]n that sense collective self-defence is no more than rationally conceived individual self-defence."[85]

Lawful self-defense is not however – *a maiore ad minus* – confined to a forceful response. Measures directed against the attacking State that do not involve force (e.g., economic pressure) are likewise encompassed. If they

---

(2007) 129 para 110. According to another school of thought, collective self-defense refers to a situation where *each* participating State must have been breached in its own rights or have some substantive rights affected. Cf Derek W Bowett, *Self-Defence in International Law* (1958) 207; Derek W Bowett, 'Collective self-defence under the Charter of the United Nations', 32 *BYIL* (1955-1956) 137-141. Bowett even claimed that each participating State must have an individual right to self-defense. While he seemed to be primarily concerned with a use of force in collective self-defense, he consistently referred to "lending assistance". Especially the concern that the assisting State would have to assess itself whether there was a situation of individual self-defense, sidestepping the UN, and the argument that otherwise it would be a sanction seeking to preserve international peace and security that is left to the Security Council, suggests that Bowett considered any assistance, even short of force, impermissible, at least if directed *against* the targeted State. See on discussion on this view Stanimir A Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) 102; Gray, *Use of Force 2008*, 170. Ultimately, it remains a question of under what circumstances a right to collective self-defense is permissible.

82 As a common denominator it is accepted that, first, means taken are allowed only in situations of defense, and second, that the Security Council measures enjoy primacy and may restrict States' actions. Anything beyond, in particular the exact boundaries are utterly controversial. See on this in detail Olivier Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (2010) 401 et seq; Henderson, *Use of Force*, 208.

83 E.g. James A Delanis, 'Force under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion', 12(4) *VandJTransnatlL* (1979) 107.

84 E.g. VI UNCIO 459, Doc 576 III/4/9, XII UNCIO 679, 680-682. See also on the term "defending", Harvard Law School, 'Draft Conventions, with Comments, Prepared by the Research in International Law of the Harvard Law School, III, Rights and Duties of States in Case of Aggression', 33 Supplement *AJIL* (1939) 879.

85 Lauterpacht, in Oppenheim's International Law, Vol. II, 7th ed. (1952), 155-156.

prima facie violated international law, they would be permissible under the circumstances recognized in Article 51 UNC, too.[86]

In a situation of collective self-defense, an act of (permissible) self-defense can be even more remote. The specific act need not be *directly* directed against the attacking State. It can also be geared (only) towards the State that uses force in self-defense. As joint efforts to counter the attack are permissible, it is likewise legitimate to provide assistance short of force to a State that actually uses force. Article 51 UNC hence also recognizes a right to provide assistance to unilateral use of force in self-defense.[87]

But Article 51 UNC does more than recognize the existence of this right. It unconditionally states that "*nothing* in the present Charter *impairs*" this right. In other words, Article 51 UNC serves as an exception to other Charter provisions. It seeks to ensure that self-defense remains exceptionally permissible, notwithstanding other (prohibitory) provisions under the Charter. This extends to assistance short of force.

This negates two implications that might be inferred from Article 51 UNC as being necessary or logical: first, that conduct exceptionally permissible as self-defense under Article 51 UNC, i.e., in particular assistance short of force, would otherwise be unlawful; and second, that such conduct is necessarily prohibited under conditions other than those recognized by Article 51 UNC.[88] Instead, Article 51 UNC operates on the *assumption*

86 Cf also Article 21 ARS, according to which self-defense not only precludes the wrongfulness of a violation of Article 2(4) UNC, but also of other norms. ILC ARS Commentary, Article 21, 74 para 2.

87 The precise conditions have been controversial. It is clear that collective self-defense presupposes consent of the assisted State. The necessary form has been controversially debated over time. Some required pre-existing treaty arrangements, others required the defense to take place within a regional arrangement. On the debate Alexandrov, *Self-Defense*, 101-102; Henderson, *Use of Force*, 256-262. On recent conditions see James A Green, 'The 'additional' criteria for collective self-defence: request but not declaration', 4(1) *JUFIL* (2017).

88 It has even been controversial if self-defense is limited to an armed attack or if other inherent rights exist. See e.g. Bert V A Röling, 'The Ban on the Use of Force and the U.N. Charter' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (1987) 6-7. This debate concerns however the level of *under what circumstances* defense may be exercised. While some read Article 51 UNC to allow self-defense "only" if an armed occurs, others reject that reading. Stephen M Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law', 136 *RdC* (1972) 479. It is not challenged however that Article 51 UNC allows the use of force in only limited circumstances.

that the Charter contains prohibitions that might impair individual and collective self-defense.

With respect to any *defense by force*, the non-impairment clause in Article 51 UNC is necessary. There is 'something' in the Charter that impairs this right of self-defense by force, albeit Article 51 UNC does not name it: Articles 2(4) and 42 UNC. Article 51 UNC primarily carves out an exception to the Security Council's monopoly on the use of force and to the general prohibition of the use of force. Hence, as there are specific prohibitions under the Charter, it is idle to further pursue the question of whether the fact that Article 51 UNC is limited to recognizing a right to use force *only* in self-defense has (also) a prohibitory effect *in itself*.

This question arises, however, in the context of collective self-defense that implicitly entails a right to assistance. In the UN Charter, there are no explicit provisions to which Article 51 UNC might refer and which might impair the recognized right to assistance. An explicit and comprehensive equivalent to Articles 2(4) and 42 UNC for assistance short of force is absent. And still, the fact remains that the Charter recognizes such a right to assist in a specific situation (only).

There is little reason to treat assistance short of force structurally differently from assistance through the use of force. The nature of Article 51 UNC speaks clearly: it presupposes but does not establish a prohibition.

This is especially true since the (positive or negative) recognition of the right to provide assistance short of force was not the main focus of the Charter but rather a side effect of the recognition of assistance through force. The *travaux préparatoires* primarily focused on the use of force. There is little indication that *without* Article 51 UNC, assistance short of force would have been considered unlawful. Even when States indicated that collective self-defense also entailed 'mere' support,[89] it was not suggested that Article 51 UNC constituted a *prohibition*. The primary goal of the addition was to alleviate the concerns of Latin American States that regional defense pacts, such as the 1945 Act of Chapultepec, were compatible with the UN Charter.[90]

89 For example, Colombia when defining collective self-defense used the open wording "giving support", Doc 576 III/4/9, XII UNCIO 679, 687. See also France who referred to a case of "mutual assistance against aggression", ibid 681.

90 Josef L Kunz, 'Individual and Collective Self-Defence in Article 51 of the Charter of the UN', 41(4) *AJIL* (1947) 873, 875; Gray, *Use of Force 2008*, 170; Doc 576 III/4/9, XII UNCIO 679, 680-681 (Colombia). The Act of Chapultepec allowed non-attacked

Last but not least, the *a maiore ad minus* reasoning and logical interpretation used to determine the scope of the *right* cannot be easily applied to determine the scope of such a *prohibition*. One can conclude that a right to take certain measures also embraces a right to take less intrusive means. But one cannot conclude that those less intrusive means would be otherwise prohibited, in particular if the right was established for the specific case of using force in collective defense. In fact, the drafting history leaves little doubt that the specific threshold under which self-defense was permissible was chosen deliberately in view of the use of force, not of assistance short of force.[91]

Collective self-defense under Article 51 UNC recognizes an exceptional right to provide assistance short of force. Its very existence presupposes a prohibition. But it does not establish one. At the same time, Article 51 UNC makes it clear that nothing impairs the right to provide assistance in case an armed attack occurs, even if a prohibition develops under the Charter. The incidental regulation of collective self-defense in Article 51 UNC hence does not make an unambiguous statement on the permissibility of interstate assistance outside the Security Council context. But it indicates a direction; and adumbrates that (at least) some forms of assistance may require justification and may be permissible only if they fall within the realm of the right recognized in Article 51 UNC.

C. Some observations

The express recognition of both rights – even when viewed together – does not establish a prohibition of assistance in other cases. But it does not oppose such prohibitions either. On the contrary, both provisions are indicators that – even in view of the UN mechanism to regulate assistance under sanctions – the general regulation of assistance in the Charter has not been forgotten. It removes any doubt that, in any event, the Charter does not prohibit assistance to a use of force through the United Nations and assistance to a use of force in self-defense.

States "the use of *armed force* to repel aggression" but also collective measures short of armed force (emphasis added).

91 Henderson, *Use of Force*, 217.

V. Obligatory solidarity under the UN Charter?

The UN Charter is considered a system of collective security, which, in its ideal form implicates a *general duty* of solidarity.[92] Accordingly, a prohibition of assistance to a State using force might be inferred – as a potential minimal component of solidarity obligations with the targeted State.[93] But the UN Charter does not go that far.

Under the Charter, member States are obliged to offer "mutual assistance" only to States carrying out UN action.[94] It may be controversial to what extent States are actually required to provide military assistance to other States.[95] It further may be doubtful to what extent assistance must be provided directly to the targeted State rather than to those States taking enforcement measures. Irrespective of these controversies regarding the scope of the required solidarity, it in any event presupposes UN action, and as such, does not establish a general prohibition of assistance.[96]

In situations of self-defense, as seen earlier, member States have the *right* to provide assistance to the targeted State. They are however generally *not required* to do so.[97] This was a deliberate decision during the drafting process. For example, New Zealand had proposed to include the following principle in the Charter:

> "All members of the Organization undertake collectively to resist any act of aggression against any member."[98]

In advocating for this, New Zealand primarily argued :

> "If it were left to an ad hoc decision to decide whether or not to take action, even after the Security Council had decided that an act of aggres-

92 Inis L Claude, *Swords into Plowshares: the Problems and Progress of International Organization* (3rd rev edn, 1964) 231, 236; Kelsen, *AJIL* (1948) 783; Robert Kolb, 'The Eternal Problem of Collective Security: From the League of Nations to the United Nations', 26(4) *RefugSurvQ* (2007) 220; Charles A Kupchan, Clifford A Kupchan, 'The Promise of Collective Security', 20(1) *IntlSec* (1995) 53.

93 That this is possible and usually considered part of such a duty shows Article 2(5) UNC.

94 Article 49 UNC. See also Article 2(5) alt 1 UNC.

95 Gregor Novak, August Reinisch, 'Article 49' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol II (3. edn, 2012) para 8-10.

96 See also Kelsen, *AJIL* (1948) 787.

97 Klein, *Beihilfe*, 435; Alexandrov, *Self-Defense*, 102.

98 VI UNCIO 334 (announcement of the proposal), 342 (explanation), 563.

> sion had taken place, the door would be open to evasion, appeasement, weaseling and sacrifice on the part of small nations. This amendment was, he felt, the minimum obligation which would guarantee the success of the Organization in the maintenance of peace and security."[99]

The proposal received some support,[100] but was ultimately rejected as it did not secure the necessary two-thirds majority.[101] In addition to difficulties with the concept of aggression,[102] the UK articulated the reasons most explicitly, especially to the extent that the proposal could be understood to go beyond assistance obligations in case of UN action:

> "[I]t altered the whole basis of the Organization. The amendment imposed an automatic collective obligation to resist aggression, whereas the whole basis of the new Charter was the identification by the Security Council of threats to the peace, followed by action by the member states in accordance with the Security Council's plans and requests."[103]

Regarding assistance in the case of UN action, the UK believed the proposal to be sufficiently covered in the solidarity provisions relating to the enforcement of UN action, in particular Article 2(5) UNC.[104]

VI. Assistance as a prohibited threat or use of force? – Article 2(4) UN Charter

The principle laid down in Article 2(4) UNC reads:

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

99 Doc 810 I/1/30 (6 June 1945), VI UNCIO 342-343.
100 VI UNCIO 343 (Peru). Norway also wanted to expressly apply the principle to cases where the Security Council was unable to act, VI UNCIO 345.
101 VI UNCIO 346, 400, 721.
102 VI UNCIO 721.
103 Doc 866 I/1/30 a (8 June 1945), VI UNCIO 356.
104 Similarly, VI UNCIO 344 (China), VI UNCIO 345 (Australia).

Article 2(4) UNC also establishes an independent prohibition against the threat or use of force.[105] The prohibition is not conditioned by the UN system of collective security.[106]

Unlike other provisions of the Charter, Article 2(4) UNC does not mention "assistance". That the provision of assistance may nonetheless fall under the prohibition is, as a matter of principle, not seriously contested within the international community – most notably in view of State support to non-State actors engaging in forcible activities.[107] However, what is controversial is the concrete scope of the norm – in particular, in view of the elephant in the room when discussing the use of force: a potential right of self-defense. Accordingly, various standards for the necessary degree of assistance have been proposed.

Whether and how assistance generally, and interstate assistance specifically, may be captured under Article 2(4) UNC depends on the conceptualization of and guidance provided by Article 2(4) UNC.[108] Before delving into the analysis of international practice in Chapter 4, it is crucial to determine how Article 2(4) UNC dogmatically allows interstate assistance to qualify as a "threat or use of force." Article 2(4) UNC allows for four avenues. First, the 'act of assistance' in and of itself could constitute *'force*' (A). Second, the commitment to refrain from the use of force could inherently embrace a prohibition to *assist* a use of force by another State (B). Third, through an act of assistance, a State might *'use*' another actor's force (C). Finally, assistance may be considered a *threat* of force, parallel to the dogmatic conceptions for 'use of force', either when assistance itself qualifies as 'threat' or through the contribution of assistance to another actor's threat qualified as 'threat' (D).

105 Ibid; *Nicaragua*, 118 para 227. See Section VIII for the fact that Article 2(4) UNC establishes a *principle* of non-use of force.

106 *Nicaragua*, 100 para 188; Clauß Kreß, 'On the Principle of Non-Use of Force in Current International Law', *Just Security* (30 September 2019).

107 Kreß, *Gewaltverbot und Selbstverteidigung*, 346-354; Henderson, *Use of Force*, 60-62.

108 It is important to note that the interpretation at stake only relates to assistance being prohibited as *use of force*. This *is prima facie* irrespective of related questions whether assistance may trigger self-defense, or whether assistance may be prohibited as another form of intervention under the rule of non-intervention.

A. An act of assistance to a use of force as 'force'?

In factual terms, the scope of the present analysis is limited to assistance short of armed force.[109] Nonetheless, one may wonder if the act of giving assistance to another use of force may qualify as 'force' in legal terms according to Article 2(4) UNC. If this were proven to be true, by providing assistance, the assisting State would be considered to be using its *own* force – independently, and irrespective of the conduct of an intermediary. This conceptualization is described here as '*direct* use of force'. On the understanding of a clear distinction between assisting and assistance conduct (1), assistance could be considered force for its contribution to another use of force (2), or for creating a risk itself (3). On that note, some terminological clarifications are in order (4).

1) Dogmatic distinction between assisting and assisted conduct

The *assisting* and the *assisted* conduct are dogmatically distinct. At all times, they remain two factually separate actions.[110] Accordingly, it must be assessed separately for each conduct, the assisted conduct and the act of assistance, whether it qualifies as an act of 'force'.

In this context, the assisted conduct will always qualify as an act of force, as the present analysis is concerned solely with such scenarios.[111] This however leaves the act of assistance unaffected. The mere fact that the act of assistance later contributes to another actor's conduct that qualifies as force does not change the character of the act of assistance.[112] By its very nature, the act of assistance supports *other* force. It remains a contribution to force, which is, by definition, an independent act and not the assisted act of force.

Even the legal operation of attribution of conduct maintains this principled distinction between the assisted and the assisting act. In cases of attribution, ultimately, the relevant forceful conduct is legally treated as the assisting State's *own* conduct. This might be triggered through the

109 See Chapter 1, II.A.3.

110 Piereluigi Lamberti Zanardi, 'Indirect Military Aggression' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (1986) 113.

111 See Chapter 1 II.A.4. Usually, the assisted State will engage *itself* in an act of '*force*'.

112 Similarly Zanardi, *Indirect Military Aggression*, 113; Maziar Jamnejad, Michael Wood, 'The Principle of Non-intervention', 22(2) *LJIL* (2009) 361.

provision of assistance.[113] But the attribution of conduct is only a legal fiction, which assigns the assisted conduct to the assisting State by virtue of its assisting contributions. Nonetheless, the two acts remain doctrinally distinct. The act of assistance has the legal effect of attributing another conduct to the assisting State. But the act of assistance does not take on the nature of the assisted conduct.

Accordingly, the provision of assistance does not fall under Article 2(4) UNC for the mere fact that it contributes to a use of force. The connection between an act of assistance and armed force *by another actor* does not make the act of assistance, in and of itself, an act of 'force'.

2) The contribution of assistance to a use of force as 'force'?

Following the principle of distinction, only the assisting State's own act of assistance is relevant to determine whether assistance qualifies as 'force' in terms of Article 2(4) UNC. Examples of relevant acts include the provision of territory, sale of weapons, sharing of identified targets, or refueling of aircraft. On that note, it is case-specific whether assistance constitutes an act that qualified as force in terms of Article 2(4) UNC.

For instance, when the means used to provide assistance simultaneously constitute armed 'force', it is clear that assistance qualifies as force. This would be the example of a State providing aerial fire to assist another State's ground troops. Such scenarios are however excluded from the present analysis.[114] The main interest here is not whether the means used for assistance qualify as force, but rather whether the *contribution to* another actor's force may constitute 'force', regardless of the *means used*. At the core of the inquiry is the defining feature of any act of assistance: its (potential) contribution to another actor's force.

The answer to this question depends crucially on the exact meaning of 'force' prohibited by Article 2(4) UNC. It is well accepted that force presupposes coercion. Beyond that, however, there are many controversies. The Charter provides only little guidance, which allowed the debate to develop many different, yet interwoven strands. There is ongoing discussion regard-

113 For a more detailed discussion see Chapter 6.
114 For details see Chapter 1.

ing whether force requires a minimal threshold of intensity.[115] Moreover, beyond the consensus that *armed force* is covered,[116] there has long been dispute as to whether other types, such as economic, political or ideological force, fall within the ambit of Article 2(4) UNC.[117] More recently, the debate has shifted to the extent to which cyber operations amount to 'force'.[118] At the core of these debates is the controversy surrounding the definition of the necessary scale and extent of an act of coercion and, more fundamentally, the precise threshold that an act of coercion must meet to fall under Article 2(4) UNC.

Different views exist on the definition of the necessary threshold. Under any view, there are valid reasons why assistance as a contribution itself may not qualify as 'force' in terms of Article 2(4) UNC. For example, if one subscribes to the view that force in terms of Article 2(4) UNC requires at least *armed* force (which has strong justifications[119]), the inherent risk associated with assistance alone would not suffice. If the focus is on the *means*, then the instrument used, i.e a weapon, would be decisive.[120] A weapon is understood as means that has violent consequences.[121] Again, the mere act of providing assistance (even in the form of weapons or lethal assistance) in itself does not directly harm another actor. The assistance

115 Corten, *Law against War*; Mary Ellen O'Connell, 'The Prohibition on the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law; Jus ad Bellum, Jus in Bello, and Jus Post Bellum* (2013). Critical Tom Ruys, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Uses of Force Excluded from UN Charter Article 2(4)?', 108(2) *AJIL* (2014).

116 Committee on the Use of Force (2010-2018) International Law Association, 'Final Report on Aggression and the Use of Force' (*Sydney Conference*, 2018) 4.

117 Albrecht Randelzhofer, Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 208-210 para 17-22; Delanis, *VandJTransnatlL* (1979); Henderson, *Use of Force*, 54 with further references.

118 Michael N Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework', 37(3) *ColumJTransnatlL* (1998-1999); Russell Buchan, 'Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions?', 17(2) *JCSL* (2012); Marco Roscini, *Cyber Operations and the Use of Force in International Law* (2014).

119 The Charter allows arguments for both sides. In combination with international practice, however, the better arguments speak for a prohibition under Article 2(4) UNC of *armed* force only. For the classical arguments see Randelzhofer, Dörr, *Article 2(4) UNC*, 208-210 para 17-20; Schmitt, *ColumJTransnatlL* (1998-1999) 904-905.

120 Roscini, *Cyber Operations*, 49.

121 Ibid 49, 50.

may be used to do so. But *as such*, it only enables to use weapons, but is not a weapon itself.[122]

One does not necessarily reach different conclusions when applying an *effect*-based understanding of 'force'. It has been submitted that the relevant action must produce physical effects comparable in gravity to armed force.[123] There seems to be agreement that the specific action causing the effect must affect the targeted State.[124] At the same time, the 'effect' criterion raises further questions.[125] What kind of effects are required? This issue has resurfaced recently in the context of cyber operations. Do effects beyond physical damage suffice?[126] Moreover, are indirectly caused destructive effects sufficient?[127] As for assistance, it has no more than the potential effect of contributing to another State's force. It does not itself cause significant physical damage. Still, assistance may eventually lead to force.[128] Accordingly, while an effects-based understanding of force theoretically allows for acts of assistance to be classified as force, it ultimately depends on how the threshold of effects is defined. According to the prevailing understanding that requires physical damage, assistance does not qualify as force.[129]

122 In this respect the argument by Roscini, ibid 50 is not convincing. He states that the "focus on instrumentality explains why the ICJ qualified arming and training of armed groups as a use of force: although not directly destructive, those activities are strictly related to weapons, as they aim at enabling someone to use them." These means however would not have the "(violent) consequences" which Roscini requires. Those are only achieved by the actor using force.

123 On physical effects: International Law Association, 'Final Report on Aggression and the Use of Force', 25.

124 See for example: ibid 25 "directly cause significant damage". Roscini, *Cyber Operations*, 47-48; Lianne J M Boer, ''Echoes of Times Past': On the Paradoxical Nature of Article 2(4)', 20(1) *JCSL* (2015) 10-12; Henderson, *Use of Force*, 55; Buchan, *JCSL* (2012) 217; Michael N Schmitt, 'Cyber Operations and the Jus Ad Bellum Revisited', 56(3) *VillLRev* (2011-2012) 576-577.

125 See also Kreß, *Non-Use of Force* (2019).

126 Boer, *JCSL* (2015) 14.

127 Indirect in the sense of 'as a consequence of the alternation, deletion, or corruption of data or software, or the loss of functionality of infrastructure'. Cf Roscini, *Cyber Operations*, 48.

128 Cf ibid 48, 50 for such a broad reading of effects.

129 It is true that 'effects' may also include any conduct that contributes to conduct that meets the relevant threshold. Ultimately, when the act of assistance leads to a use of force, it has the effect of physical damage. 'Effects' may hence also be understood to raise questions of causation and directness. It is submitted here however that in view of the above described principle of distinction, only the act of assistance

But it is submitted here that there is an additional, more fundamental reason why a contribution to a use of force cannot qualify as force itself under Article 2(4) UNC – irrespective of the (controversial) threshold. Assistance is only *indirect in nature*. It is not directed against the targeted State, but rather towards the assisted State. It benefits the assisted State, but it does not, in and of itself, target another State. It is not only a more remote intervention compared to some forms of cyber operations that do not directly cause damage. It does not set into action any (let alone irreversible) process against the targeted State. It exclusively depends on the assisted State whether it has any effect on the targeted State. By definition, the assisting State leaves the ultimate decision to the assisted State. It is not different if the assisting State concretizes and directs the act of assistance against a specific target.[130] This becomes particularly clear when the assisted State eventually does not use force. Assistance remains without a direct effect on the targeted State.

3) The risk created by assistance as 'force'?

This leaves only the impact of the act of assistance itself that may qualify as force. Although indirect by definition, the provision of assistance itself may have a significant impact on international relations. In practice, in view of military assistance, States often feel coerced to react. For example, a State's decision to allow another State to establish a military base on its territory impacts its neighboring State, too. This feature is not indirect. It does not depend on another actor. It directly affects other States. As assistance strengthens specific States, it creates a risk for other States; in most cases, for *all* States, as assistance is not tailored against a specific State. Instead,

itself matters as relevant conduct. The act of assistance itself does not result in the physical damage; it is the assisted act, to which the assistance merely contributes.

130 Note that the nature of the assisted actor may be relevant in this respect. This may explain positions like Delanis, *VandJTransnatlL* (1979) 126. But not even for non-State actors that receive support and that (necessarily) sit within another State, assistance always constitutes force. Assistance is only *coercion* against the territorial State if the non-State actor's conduct is directed against the territorial State. It is different when the non-State actor's conduct is directed against a third (non-territorial) State. Assistance could be viewed as intervention against the territorial State as the territorial State is 'coerced' to tolerate an infringement of its exclusive sovereignty. This may qualify as violation of sovereignty, but not as coercion or force.

only the action of the assisted State concretizes and directs the risk against a specific State.

Article 2(4) UNC does not capture such a general risk, however. Article 2(4) UNC is a key feature in the Charter's task to "maintain international peace and security".[131] But, it does not prohibit any threat to international peace and security. It is concerned with the "uncontested core threat of the peace":[132] direct conflict between States. At its core, Article 2(4) UNC requires a specific, precise and identifiable[133] relationship between two or more (legal) persons, namely the State using or threatening 'force' and the State being *targeted* by that force.[134]

Already the wording reflects the basic assumption that force must be directed against another actor. 'Force' is widely defined as "physical strength or power *exerted upon* a person or object".[135] Other elements of Article 2(4) UNC point in a similar direction. The phrase "in international relations" defines the target of force, and excludes force remaining within the internal relations of a State. Put differently, again, there must be an actor outside of those internal relations that is specifically and directly targeted.[136] The clarification "against the territorial integrity or political independence of any state" then specifies the basic assumption in that any State may be such a target.[137]

131 Article 1(1) UNC.

132 Krisch, *Article 39 UNC*, 1279 para 12.

133 Corten, *Law against War*, 93 et seq.

134 See comparable ibid 94.

135 *Oxford English Dictionary* (2018), force 5a, emphasis added.

136 In that direction also Roscini, *Cyber Operations*, 44 who seems to see already here a narrowing down to States.

137 There is some discussion under what circumstances a State is targeted in terms of Article 2(4) UNC. Some argue that this is only the case if force is directed "against the territorial integrity or political independence". This school hence sees only interventions prohibited that touch upon the targeted State's right of territorial integrity and political independence. This view resurfaces in a slightly different guise in view of the use of force in response to non-State terrorist attacks. It is used to argue that targeted and confined operations that are not directed against the territorial State where force is used is not prohibited under Article 2(4) UNC. Again, others hold the view that any force that intervenes in any sovereign rights is covered, e.g. Brownlie, *Use of Force*, 268. See for a brief overview on the debate Henderson, *Use of Force*, 19-21. Irrespective whether these views are convincing, for the present purposes it is interesting to note that these arguments are based on the accepted assumption that Article 2(4) UNC presupposes a conduct that is in some form specifically *directed against* a State.

Article 2(4) UNC's character of prohibiting intervention rather than situational and vague risks is further reflected in the fact that a threat of force was not meant to be prohibited, unless it is sufficiently precise.[138] This interpretation, as Oliver Corten has convincingly shown, is supported by the inter-Charter comparison between the term "threat of force" used in Article 2(4) UNC and the term "threat to international peace and security", employed as a threshold for Security Council action in Article 39 UNC.[139] The latter broadly refers to *situations* threatening international peace and security in general, in order to grant the Security Council broad powers to react to situations, even those which are not in violation of international law and other States' rights generally, or Article 2(4) UNC particularly. In contrast, the former is meant to cover only threats that are directed against a State specifically, i.e. governing a specific relation between two states.[140] Vague and abstract threats are hence not generally prohibited. They do not fall however in a regulatory gap. Their regulation is left to the UN Security Council.

The *travaux préparatoires* solidify this interpretation of the character of Article 2(4) UNC. The provision was included to extend the prohibition of formal war to any use of force.[141] The structural adversarial nature was not meant to be thereby abrogated.

The inherent design of Article 2(4) UNC becomes clear when transferring the situation from the triangular relationship between the targeted, the assisting, and the assisted State to a bilateral relationship between a targeted State and State using force alone. In this case, the assisted State would not receive assistance from a third State but would support itself. The functional equivalent to assistance in this scenario is preparation. It is widely agreed that such military preparation is not considered 'force'. At best, it is discussed under the concept of 'threat of force'. For example (self-)armament is not generally prohibited, and in particular does not constitute 'force'.[142] Although arms buildup and militarization can exert pressure on other States, 'forcing' them into a (voluntary) arms race, they

138 Corten, *Law against War*, 93 et seq.
139 Ibid 94.
140 Ibid 94-95.
141 On this see Kolb, *Jus Contra Bellum*, 62, 329-330; Hans Kelsen, 'The Draft Declaration on Rights and Duties of States', 44(2) *AJIL* (1950) 271.
142 Efforts to include general disarmament obligations in the Charter were not heeded. States left it to the General Assembly, Article 11 UNC. *Nicaragua* 135, para 269; Bakhtiyar Tuzmukhamedov, 'Disarmament' in Rüdiger Wolfrum (ed), *Max Planck*

merely contribute to increasing a State's potential to prospectively use force.[143] The same is true for maneuvers and military training, which are not prohibited as 'force'.[144] To the extent that they are not at the very least directed against a State in particular, they are not considered under Article 2(4) UNC.[145]

To summarize, Article 2(4) UNC does not prohibit assistance as a use of one's *own force*. As such, it does not touch upon the exclusive relationship between an assisting and an assisted State.[146] Interstate assistance does not fall within the affairs of another (potentially targeted) State but remains within a State's sovereign right to conduct its own foreign policy in co-ordination with another State.[147] Article 2(4) UNC does not seek to grant States a right to be free from powerful enemies or enemies with allies. In absence of Security Council action, States are expected to tolerate this.

4) Terminological clarification

In view of the foregoing, this is a moment to pause for terminological clarifications.

With respect to terms, the debate appears to be reminiscent of the Wild West. Assistance under Article 2(4) UNC is most prominently discussed (in relation to assistance to non-State actors) as "indirect force",

---

Encyclopedia of Public International Law (online edn, 2011) para 5; Randelzhofer, Dörr, *Article 2(4) UNC*, para 73.

143 This is even true for cases in which armament is explicitly targeted against a State, although under specific circumstances it may then be considered a threat of force – force again being however not the armament, but the prospect of using the armament. Increasing armament can be an indicator in determining whether there is a threat.

144 Dale Stephens, Tristan Skousgaard, 'Naval Demonstrations and Manoeuvres' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2009) para 11.

145 See for example the NATO Trident Juncture Maneuvers in Norway in 2018. Russia understood the maneuver to be directed against itself, it to be provocative, sending a signal. And yet, it refrained from seeing them as a violation of international law. NATO states on the other hand emphasized that the maneuver's message is that "NATO is capable of defending, it is capable of deterring any adversary, no particular adversary." NATO, Tridente Juncture 2018 Press Conference, (9 October 2018), https://www.nato.int/cps/en/natohq/opinions_159119.htm.

146 Cf Chapter 1, II, figure 1.

147 *Nicaragua*, 133, para 265.

"indirect aggression" or "indirect use of force". Moreover, these terms are rarely explicitly defined and subject to varying interpretations, at times differing substantially in the scenarios they are considered to capture.[148] The terminological diffusion, as the chapter on international practice will later prove true, not only widely obfuscates the debates, but also creates uncertainty about the lines of (dis)agreement.

The present analysis will not employ the term "indirect force."[149] The term dilutes the problem. It leads to a discussion of how giving assistance can constitute *force*. Thereby, it fails to fully capture the necessary discussion, as it leads to the too narrow question of whether assistance constitutes 'force'. Moreover, it does not adequately reflect the dogmatic conceptualization of the issue. The term "indirect force" may misleadingly suggest that the assisting State (directly) engages in an act of force which however is not directed against the targeted State. It further implies that assistance is considered the assisting State's own force.[150] Thereby, it inadequately represents the fact that in most cases, there is only one conduct that qualifies as 'force': the conduct of the assisted actor. This assisted force is usually direct. In contrast, as seen, assistance to force does not render an assisting act as 'force' itself. The assisting State does not engage in an act of force.

148 For example, for an overview on the early understanding of the term "indirect aggression", see A/2211 (3 October 1952), para 408-440.

149 For authors discussing the question of assistance to a use of force under this terminology: Rolf M Derpa, *Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nichtmilitärischer Gewalt* (1970) 18 with further references; Randelzhofer, Dörr, *Article 2(4) UNC*, 211-213 para 23-28; Roscini, *Cyber Operations*, 48, 50 discusses assistance under the question of "force"; International Law Association, 'Final Report on Aggression and the Use of Force', 4. In this direction also Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (2010) 282-283 classifying assistance as an "element of the unlawful act". Undecided: Erin K Pobjie, ''Use of Force' and Article 2(4) of the UN Charter: The Meaning of a Prohibited 'Use of Force' between States under International Law' (Doctorate, University of Cologne 2019); de Wet, *Chapter VII*, 146, 148. In addition, the term "indirect force" also refers to the threshold debate, i.e. whether "force" embraces also forms of (extreme) coercion other than armed force, e.g. economic, or political coercion. Thomas Bruha, *Die Definition der Aggression: Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974; zugleich ein Beitrag zur Strukturanalyse des Völkerrechts* (1980) 219.

150 If assistance qualified as 'force', the assisting State would be using own force. It would be a "direct use of force."

In this light, unless assistance to the use of force is prohibited as a necessary complement to the prohibition to use force, the key question is whether another actor's force can be *used through providing assistance*.

Accordingly, the present analysis prefers the term "indirect use of force" to describe assistance to force that falls under Article 2(4) UNC. It describes the situation where the assisting State does not commit force through its own organs, but through its involvement in another actor's (direct use of) force, it can be considered to *use* that force, too.[151] The use is indirect in the sense that the *direct force is used through an intermediary, a third party*.[152]

151 Authors using this terminology, too: Hans Wehberg, 'L'interdiction du Recours a La Force. Le Principe et les Problèmes qui se posent', 78 *RdC* (1951) 68-69; Eugène Aroneanu, *La définition de l'agression* (1958) 84; Schwebel, *RdC* (1972) 458; Eduardo Jiménez De Aréchaga, 'International Law in the Past Third of a Century', 159 *RdC* (1978) 93, 115; Tom Ruys, *"Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010) 372; Dapo Akande, 'The Contribution of the International Court of Justice to the Law of the Use of Force', *EJIL:Talk!* (18 November 2011); Abdulqawi A Yusuf, 'The Notion of Armed Attack in the Nicaragua Judgment and Its Influence on Subsequent Case Law', 25(2) *LJIL* (2012); Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 71; Claus Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2016) 574; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, 2019) 720. See also Manfred Lachs, 'The Development and General Trends of International Law in Our Time', 169 *Recueil des Cours de l'Académie de Droit International de la Haye* (1980) 166. States likewise use this terminology most frequently: see e.g.: A/36/41 (1981) para 238. Note that if the direct use of force was *attributable* to the assisting State under the Articles on State responsibility, the assisting State would be engaged in a *direct* use of force. Attribution creates the legal fiction that an attributable conduct is the State's *own* conduct. For more details when this is the case, see Chapter 6.

152 In that sense also: UNSG A/2211 (1952) para 414, 415: "The characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative." Ann Van Wynen Thomas, Aaron J Thomas, *The Concept of Aggression in International Law* (1972) 46-47, 66; Rosalyn Higgins, 'Legal Limits to the Use of Force by Sovereign States United Nations Practice', 37 *BYIL* (1961) 288; Schwebel, *RdC* (1972) 455-456 ("operating through third parties"); Henderson, *Use of Force*, 60 refers to "indirect use of armed force". He describes the problem as "the use of force through *indirect* means whereby as opposed to a state employing is armed forces to carry out a use of force it instead provides the means to others to do so." Unfortunately, however, in his further analysis, Henderson blurs his clear analytic setup, by then attempting to define "a forcible act" (60) or "whether [...] support has crossed the threshold between intervention and force". He then attempts to define "force" rather than the "indirect means" which he set out initially. See also Benjamin K Nussberger, 'Christian Henderson, The Use of

It is true that the labels "direct" and "indirect" may be subject to criticism. First, if not clearly defined, they are not without ambiguity. As such it is not a surprise that 'indirect' has been used in practice to describe scenarios other than the use of another actor's force.[153] Second, the distinction between 'direct' and 'indirect' may appear arbitrary, and may not be adequate in some cases of very remote or very proximate involvement.[154]

Nonetheless, the use the terminology is justified. In the present context, 'indirect use' refers to the *means* of committing a use of force through *another* actor, rather than a threshold. In contrast, 'Direct use' refers to the use of one's *own* force. Notably, this terminology is grounded in international practice. When discussing the issue at hand, States predominantly qualify the *action*, rather than *force* itself, as direct or indirect. They refer to the direct/indirect *use* of force rather than to "indirect force".[155] Similarly, the ICJ in the course of discussing the problem does not use the term "indirect force" but rather relates "indirect" to the "use of force."[156]

The term "indirect aggression" likewise is widely used in academia and international practice.[157] It is usually connected not only to Article 39 UNC,

---

Force and International Law', *JCSL* (2019). Schmitt, *ColumJTransnatlL* (1998-1999) 909 correctly classifies the problem as an application of an agency theory. But, again, he then sees the Nicaragua jurisprudence as a definition of "force"; Ruys, *Armed Attack*, 371; Corten, *Law against War*, 444 ("possible implication of a State's responsibility in the event of acts perpetrated by private groups").

153 For example, the USSR in 1952 used "indirect aggression" to refer to assistance irrespective of whether armed force was ever used. Thomas, Thomas, *Concept of Aggression*, 69.

154 Cf Ruys, *Armed Attack*, 371.

155 The reference to "directly or indirectly" is common in the resolution practice by the UNGA. Notably, however, this does not describe the form of intervention itself (e.g. "force"), but rather to the act of intervening (e.g. "use"). Similarly, States qualify the "use". Cf for example: Ghana, A/C.6/SR.815 para 33; UNSG A/2211 (1952) para 414, 415: "The characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative"; A/54/368-S/1999/993 (21 September 1999).

156 *Nicaragua*, 109 para 206, 110 para 209; see also para 205 where it refers to direct and indirect form of military action.

157 Using this term: Corten, *Law against War*, 444; Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71(2) *AJIL* (1977) 231, 232, 237-238. But Stone seems to still think about "force", as he states that the requirement of "force" by the assisted actor "has a rather circular ring to it." On the development of the term Thomas, Thomas, *Concept of Aggression*, 46-47. Critical Ruys, *Armed Attack*, 371. Higgins, *BYIL* (1961) 289 classifies aid and assistance not as indirect aggression,

but, more importantly, to a potential right of self-defense. 'Indirect aggression' is also imprecise and ambiguous. But, unlike the term "indirect force", it is not conceptually misleading. "Aggression" is widely understood to include at least[158] "*use* of armed force".[159] As such, the term is not limited to indirect force but embraces also indirect *use* of force. Nonetheless, the term will not be used. References to indirect aggression may, depending on the context, be understood as an affirmation of a prohibition of indirect use of force as well.

B. A prohibition of assistance as necessary and logical complement to the agreement to refrain from a use force itself?

An act of assistance is no prohibited (one's own) force. Still, States agree to an obligation of non-use of force in their international relations. Does this commitment not to *use* force also embrace a commitment not to *participate* in the prohibited use of force?

Some have advanced such arguments.[160] For example, *Hersch Lauterpacht*, in interpreting the renunciation of war under the Kellogg-Briand Pact, suggested such a reading:

---

but aggression proprio suo. For States see e.g. A/2638 (1953) 8 para 72 (Dominican Republic), 73 (Iran).

158 There is substantial debate whether it is even broader. For example, the USSR viewed the mere giving of assistance to non-State actor rebels (even without force) as aggression. Similarly, the OAS Charter distinguishes between an 'armed attack' and 'act of aggression that is not an armed attack' (Article 29). See on the term Henderson, *Use of Force*, 65.

159 Article 1 Aggression Definition.

160 Derpa, *Gewaltverbot*, 20 argued that this is "for reasons of logic, and is justified because of the involvement in and causation of the unlawful result." Second Report Crawford, 51 para 188 held: "For State A deliberately to procure the breach by State B of an obligation by which both States are bound cannot be justified; a State cannot do by another what it cannot do by itself." It should be noted however that this is not the *reason* for accepting a prohibition of assistance, but merely a *precondition*. Crawford, and the ILC, based the prohibition also in State practice. Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016) 23 may also be understood in this direction when he claimed that "complicity is a by-product of the multilateralization of the relations of responsibility, hesitantly stretching beyond the orthodox bilateralist structure of international law". Kelsen, *AJIL* (1950) 271 made an even broader claim. He viewed a non-assistance obligation as "implied in the concept of international law". It is not beyond doubt however that Kelsen viewed the prohibition to use force to also cover assistance to a use of force.

> "The process of interpretation is essentially a simple one. Its object is to discover whether a fact or set of facts falls logically within the rule. Thus a rule of interpretation may tell us that a person who aids a criminal takes part in the crime. This is a rule of juridical logic, although the criminal law finds it convenient to refer specifically to accessories before, during and after the fact. Art. 3 of the Budapest Articles, which lays down that "a signatory State which aids a violating State thereby itself violates the Pact," may therefore be regarded as a proper instance of genuine interpretation."[161]

While Lauterpacht is certainly correct in claiming that it is a "rule of juridical logic" that an accessory takes part in the crime, his ultimate conclusion needs to be taken with a grain of salt, especially when transferring it to other treaty regimes, like the UN Charter. This is because he does not fully elaborate on his thoughts but operates on the unproven assumption that the provision was meant to prohibit *any* taking part in war, i.e. also assistance.[162] It is only on this assumption that Lauterpacht's "rule of juridical logic" comes into play.

This assumption, however, is not based on legal logic. A unitarian understanding of participation cannot simply be presumed. The mere fact that a prohibition outlaws a certain conduct does *not necessarily* mean that *any* form of participation in that prohibited conduct is proscribed as well. It rather requires careful interpretation to determine whether States' consent includes the belief that participation should be prohibited, too.

In general, a prohibition of a certain behavior may be deliberately limited to (the higher threshold of) perpetration, i.e. the direct execution, only. There may be good reasons not to outlaw participation in a specific conduct.[163] Even though a broader prohibition might seem more effective, it would also be more intrusive on interstate cooperation and States' freedom.

Also thinking in this direction with an argument of "good faith": Aust, *Complicity*, 34.

161 Hersch Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *TGS* (1934) 182. Recall also the debates on the Budapest Articles, Chapter 2, II.B.2.

162 In fact, this is a point that Lauterpacht (ibid 182) noted himself with respect to deducing a renunciation of recourse to force from the renunciation of the right of war.

163 See also A/33/10, ILCYB vol II Part Two, (1978), commentary on Article 27, 103-104 para 16. 'Participation' is not used here as the generic term that captures different forms of involvement (perpetration, complicity, instigation) (for such a use see e.g. German criminal law § 25-28 StGB, Claus Kress, 'The German Chief Federal

A prohibition of participation would have wide-ranging effects on the international legal order, as it would inherently also define how other States must react to the conduct of other States. It cannot be easily accepted that States always agree to such an automatic "enforcement" regime.

In fact, a general distinction between perpetration and participation is consistently reflected in general international and national regulatory practice. Participation, and assistance in particular, is subject to explicit and separate provisions specifically addressing this issue.[164] Typically, it is *not* assumed to always be inherent in a prohibition of a certain conduct. This is in particular true for the regulation of the use of force, as evidenced in the treaty practice leading up to the UN Charter. Multiple predecessors to the prohibition of the use of force, especially in bilateral non-aggression treaties, included additional specific provisions on assistance to the use of force.[165] As will be seen, this distinction is widely upheld in bilateral treaties that codify, repeat, and reaffirm Article 2(4) UNC.[166]

This distinction is also reflected in the Charter itself. The UN Charter acknowledges the relevance of assistance to a use of force. It provides several express rules on assistance and the reactions of third States, all of which are subject to Security Council action. States were well aware of the potential and danger that assistance could be used to circumvent the prohibition, as various attempts to define acts of assistance as force or aggression demonstrate.[167] And yet, despite being in the drafter's mindset, no general rule on assistance is (expressly) reflected in the Charter's text, and Article 2(4) UNC specifically. This omission is even more striking

---

Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2(1) *JICJ* (2004) 252 n 26. 'Participation' describes here a specific form of involvement in, i.e. the contribution to another States' act, distinct from perpetration that captures the principal commission of the prohibited conduct.

164 "Participation" is usually regulated explicitly, when it is meant to be proscribed. This is a common feature across the fields of international law. For example, Article III (e) Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, or international criminal law (Article 25 ICC-Statute). In national legal orders, if assistance is outlawed, usually there is an express and separate provision, e.g. § 27 German Penal Code, or § 840 German Civil Code.

165 See Chapter 2 II.B.I.

166 See for details Chapter 4 II.B.

167 The debate concerned in particular non-State actors, but interstate assistance was also repeatedly referred to. See for an overview of the pre-Charter approaches UNSG, 'Question of Defining Aggression' A/2211 (1952).

in light of the neighboring provision of Article 2(5) UNC that squarely addresses assistance.

The Charter's focus on perpetration (i.e. one's own use) seems to reflect the priorities following the experience of World War II. The primary threat to peaceful co-existence of States was identified as the perpetrators of acts of aggression, not the bystanders.[168] The UN Charter aimed to solidify the emerging, yet still fragile principle of non-use of force that had been trampled upon during World War II.[169] States hence primarily focused on the core norm (and the then perceived core threat to international peace and security). This did not mean that the reaction of third States was not deemed crucial. Yet, in light of previous experiences under the League of Nations, States left the regulation primarily to the Security Council.

It is hard to shake the impression of cynicism associated with accepting that a specific conduct is prohibited for oneself but not prohibiting participation in the very same conduct by another actor. This would be even more pronounced in light of the general object and purpose of the UN Charter in general, and Article 2(4) UNC in particular that sought to establish a comprehensive prohibition to use force. Why would States agree to refrain from using force in their international relations but allow support for other States using such force? But first, the historical experiences, the initially neutral and "non-interventionist" character of military assistance, and not least pragmatism may explain such a result. Second, the Charter does not leave assistance unregulated, as the Security Council is empowered to (also) address it. Third, even if it were cynical, cynicism in international law cannot be equated with legal logic.

Given the above, a prohibition of participation, as necessary and automatic complement to the prohibition against the use of force, does neither follow *solely* from the fact that it is an *erga omnes* norm and is widely described to have *ius cogens* character. Helmut Aust has laid this out in detail on a general level.[170] Also, even though the acceptance of complicity

168 Cf also Higgins, *BYIL* (1961) 288.

169 See the debates on its nature in the time after drafting Brownlie, *Use of Force*, 112-116, 127-129.

170 Aust, *Complicity*, 35-49. See also Astrid Epiney, 'Nachbarrechtliche Pflichten im Internationalen Wasserrecht und Implikationen von Drittstaaten', 39(1) *AVR* (2001) 37-38. It does not exclude however that the special character may serve as an additional argument and justification for an extension. For the contrary view: Alexander Orakhelashvili, *Peremptory Norms in International Law* (2008) 578-579. For recent debates on a duty to cooperate to bring to an end and a duty to actively uphold

rules might be described as "byproduct of multilateralization",[171] multilateralization itself is not a sufficient condition. Not every multilateral obligation necessarily also prohibits assistance. The same is true for concepts of "abuse of rights"[172] or "principle of fair labelling".[173] These features may influence the existence of a complicity rule. But ultimately, the basis for a prohibition of assistance lies in States' consent.[174]

Accordingly, a prohibition of participation is not necessarily and automatically part of the prohibition of the use of force pursuant to Article 2(4) UNC. The *prohibition* against the use of force only prohibits the *use* of force. Whether this also includes assistance cannot be assumed but requires careful interpretation.

C. Assistance as a 'use' of force?

The key question then is what can be considered a 'use' of force.

It is crucial to free oneself from understanding 'use' in purely factual terms. It is an inherently *normative* concept. States are organized entities. But, in factual terms, they cannot 'act' or 'use'.[175] As artificial legal persons, States depend on the conduct of human beings, which is normatively attributed to States.[176] Prohibitions of conduct under international law, which address States, are hence premised on the idea that the prohibited act is attributable to the State. This is governed by general rules of international law. But a prohibition itself may set out what relationship between a responsible State and the actor engaged in an action that is captured by the prohibition suffices to be considered a violation by the respective State.[177]

---

norms of *ius cogens*, Helmut Aust, 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission' in Dire Tladi (ed), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (2021).

171 Lanovoy, *Complicity*, 23.

172 Aust, *Complicity*, 50-96 who does not however see this as the exclusive basis, but rather the normative framework under which international practice is assessed.

173 Miles Jackson, *Complicity in International Law* (2015) 120, 142-144.

174 Also emphasizing this Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (2020) 194-198.

175 ILC ARS Commentary, 35, Article 2, para 5.

176 Ibid, para 6.

177 Similarly Kreß, *Gewaltverbot und Selbstverteidigung*, 238.

With respect to the prohibition against the use of force, there is no doubt that Article 2(4) UNC normatively captures forceful conduct that is considered a State's *own* conduct, i.e. that can be attributed to a State.[178] This is the most common scenario of force used by the State's own army. Here it is referred to as 'direct use' of force.

Does the prohibition against the use of force, as conceptualized under the Charter, also allow to regulate other 'uses' of force, going beyond 'direct use' of force?[179] More specifically, can (certain forms of) assistance to another actor's force, i.e. active hostilities, qualify as 'use' of force?

This question is addressed in two steps: First, does the Charter limit the concept of "use" to a State's 'direct use' or can a "use" of force also be a "use" of another State's conduct amounting to force ('indirect use')? Second, if the Charter is open to 'indirect use', does Article 2(4) UNC provide a (conceptual) framework defining what constitutes "indirect use" prohibited under the Charter?

1) No limitation of Article 2(4) UN Charter to 'direct use'

It is beyond question that a State uses force when the relevant person "using force" acts on behalf of the State, meaning that the requirements for attribution of conduct are fulfilled.[180] But even then, force is actually *executed* by another actor (at the outset distinct from the legal person 'State'). As an artificial person, a State itself cannot physically perpetrate any conduct. It requires a normative operation to overcome this hurdle: attribution.[181] From a doctrinal and conceptual perspective, however, even then a State uses force through an 'intermediary'. What is described as "direct use" is technically a specific form, a specific intense degree, of "indirect use".[182]

The critical question, therefore, is whether the prohibition against the use of force is limited to such 'use' that is considered the State's *own* use under international law.

178 What conduct amounts to such use of force again is utterly controversial, as is the question which actors are bound to the prohibition.

179 Recall the argument above that the assistance to a use of force does not render the use of force the conduct of the assisting State itself.

180 See for example: Brownlie, *Use of Force*, 370 "some form of agency".

181 ILC ARS commentary, Article 2 para 6.

182 For a similar conclusion see ILC YB vol II Part Two, (1978), A/33/10, commentary on Article 27, 104 para 16.

The text of Article 2(4) UNC is drafted in an open manner. It does not specify *how* force shall be used. Article 2(4) UNC does not elaborate on, but also does not specifically exclude any modes of participation.[183] Unlike in other areas of international and national law, Article 2(4) UNC does not recognize in explicit terms that a prohibited conduct can also be perpetrated with the involvement of another actor – scenarios that are typically discussed under concepts such as unitarian perpetration, co-perpetration or perpetration by means.[184]

It is true that the Charter only cautiously received pre-Charter trends expressly prohibiting indirect use of force.[185] This allows for speculation about whether indirect use of force was already deemed prohibited at the time of the UN's inception.[186] But, even if indirect use of force was not already prohibited at that time, the Charter did not and does not preclude the possibility of further development through international practice.

Nothing else follows from the (convincing) view that Article 2(4) UNC only covers the use of *armed* force. It does not exclude the possibility of an indirect use of force. The necessary threshold for what qualifies as force is distinct from the captured means by which force that meets this necessary threshold is used.

A limitation of the scope of the prohibition against the use of force to a State's 'direct (own) use' might have the benefit of conceptual and practical clarity. The State using prohibited force would be relatively easy to identify. It would define and confine the responsibility of a State for a use of force unambiguously to cases where the State exercises control over the conduct. Again, the Charter does not exclude such a narrow conceptualization.

183 See also Schwebel, *RdC* (1972) 458.

184 Kai Ambos, 'Article 25' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (1 edn, 2016).

185 Recall Chapter 2.

186 Suggesting that the prohibition against indirect use of force was only later development of the Charter Higgins, *BYIL* (1961) 288-289; Ahmed M Rifaat, *International Aggression. A Study of the Legal Concept: Its Development and Definition in International Law* (1979) 217; Cornelis Arnold Pompe, *Aggressive War: An International Crime* (1953) 93. Also, in this direction Henderson, *Use of Force*, 60. This view has been in particular prominent with respect to a conclusion of self-defense in reaction to indirect use of force. For further references see Christian J Tams, 'Die Linke v. Federal Government and Federal Parliament (Counter Daesh)', 114(3) *AJIL* (2020) 469-470 n 25-27. Clauß Kreß, Benjamin Nußberger, 'The German Constitutional Court on the Right of Self-defense against ISIS in Syria', *Just Security* (16 October 2019).

Yet, such a narrow conceptualization would draw a line that may be conceived overly schematic. It also would run risk to not fully take account of the practical realities of international relations. As such, it would invite for a means to undermine the prohibition to resort to forceful means. States could hide behind other independent actors' force and carefully tailor their involvement to remain below the threshold of attribution of conduct, or, at least, below the threshold of possible proof. Throughout history, a common and popular alternative to direct use of force against a State has been to initiate, assist, and foster force through other actors. In fact, such involvement has consistently been described as one of the most dangerous forms of intervention.[187] Substantial involvement in another actor's force may achieve similar effects as direct use of force, yet in a more concealed and pervasive manner.[188] Considerations like these justify extending the scope of the prohibition against the use of force to cover such indirect uses of force, too, without necessarily devaluing the prohibition.

Such considerations led international scholars, and as will be seen States as well, to a rare show of unanimity. It is fair to conclude that there is wide consensus that Article 2(4) UNC, as a matter of principle, is open to 'indirect use' of force to also qualify as 'use'.[189] This interpretation is in particular widely accepted in the context of a State's involvement in the conduct of non-State actors.

a) 'Indirect use' – 'use' through interstate assistance?

Not every involvement in another actor's use of force can suffice to qualify as 'indirect use'. Otherwise, the prohibition would be limitless. It is

187 For example, as Schwebel, *RdC* (1972) 461 noted with respect to aggression for many States "aggression by indirect means presents a greater danger to national and international security these days than does aggression by direct means".

188 For more reasons see Randelzhofer, Dörr, *Article 2(4) UNC*, 211 para 24.

189 For a similar conclusion after a literature review see Ruys, *Armed Attack*, 372 ("it is widely accepted that 'indirect use of force' is fully covered by the Charter prohibition on the use of force"); Randelzhofer, Dörr, *Article 2(4) UNC*, 211, para 25; Derpa, *Gewaltverbot*, 20. See also Brownlie, *Use of Force*, 361; Thomas, Thomas, *Concept of Aggression*, 66-67; Kreß, *Gewaltverbot und Selbstverteidigung*, 247-248; International Law Association, 'Final Report on Aggression and the Use of Force', 4; Henderson, *Use of Force*, 60-62. It would go too far to speak of consensus, however, with respect to the scope of prohibited 'indirect use of force' and the consequence of self-defense against an indirect use of force.

ultimately a question of *degree*. It comes down to defining the necessary relationship between the other actor's forceful conduct and the relevant State to consider the State's "use" of that actor's conduct.[190] Can *assistance* provided to an intermediary that falls short of attribution qualify as a 'use' under the Charter regime?[191]

The definition of 'use' has only limited informative value. It is defined as "the act of employing something."[192] It only affirms that 'use' allows for different interpretations.

One interpretation of 'use' could require control over the execution of force. This would include only assistance that also leads to attribution of conduct.

Another interpretation within the terminological scope of 'use' would be a more holistic and functional understanding, in line with general concepts of perpetration. Accordingly, 'use' could describe conduct that (decisively) influences and dominates the if and how of the force. The physical commission of the relevant act of force would be only one relevant feature among many. Other criteria could be likewise considered, such as the scope of involvement, the relevance and significance of the contribution, or the subjective position towards the use of force. 'Use' would not necessarily require setting an irreversible process of force into motion; it would not need to focus on the execution of force only. Accordingly, the interpretation of 'use' would not necessarily align with the concept of 'attribution of conduct'.[193]

Both positions find legitimate grounds in the Charter.

---

190 James Crawford, *State Responsibility: The General Part* (2013) 338.

191 On the preconditions for attribution, see Chapter 6.

192 *Oxford English Dictionary*, use.

193 If an assisting State is considered to 'use' another State's act of force, ultimately, this has the same effect as in case of attribution of conduct: the assisting State violated Article 2(4) UNC. But conceptually, one arrives at the same conclusion via different routes. Attribution of conduct has the effect that the assisted conduct is considered the assisting State's *own* conduct. The act of assistance itself does not violate international law; it only serves as a vehicle for attribution. In case of an indirect use of force below the threshold of attribution of conduct, there remain two separate conducts which are exclusively attributable to two actors. Conceptually, the assisting State is using another State's conduct. It is the assisting State's *own* (assisting) conduct that qualifies as 'use'. Similarly Zanardi, *Indirect Military Aggression*, 113; Marko Milanovic, 'Special Rules of Attribution of Conduct In International Law', 96 *IntlLStud* (2020) 32-35. The ICJ in *Nicaragua* also distinguished between attribution of conduct and indirect use of force. In both cases, both States may be responsible for the violation of Article 2(4) UNC, see also Crawford, *State Responsibility*, 327, 334-335.

At the time of drafting, driven by the experience of World War II, the primary concern of the Charter was States' execution of force themselves. The term 'use of force' was meant to capture any warring activities comprehensively. Indirect means were, albeit discussed, not the primary focus at that time. Also normatively, *perpetration* and *participation* are distinct. The Charter recognizes this as a general rule by distinguishing terminologically, systematically and consistently between the 'use' and perpetration of military force on one side, and 'assistance' to and participation in force on the other side.[194]

However, this distinction is not set in stone.[195] In particular, it does not exclude the possibility that specific forms of participation may nonetheless be considered as a 'use' or perpetration. Throughout the Charter, the significance of assistance is recognized. As *i.a.* the Charter preamble's grand promise of 'saving succeeding generations from the scourge of war', the *travaux préparatoires* and the Charter's very object and purpose to maintain international peace and security imply, the Charter sets out to establish a comprehensive rule of non-use of force. In particular, when indirect means, such as assistance, may have similar substance and effects as the use of direct means, adopting a strict means-based rather than an effect-based interpretation of the term 'use' may run counter the object and purpose of the Charter. Otherwise, assistance to proxies could be a loophole to circumvent Charter obligations. In fact, the Charter was not meant to stand back behind the previous prohibition of "war". The status of war could at that time also be triggered through acts of assistance contrary to the law of neutrality.[196] The decision to refer to "use of force" instead of "war" was meant to broaden the prohibition, and to close the loophole that was left when "only" outlawing war.[197] The legal term of "war" was replaced with a determination of a simple fact.[198]

194 See Article 2(4), (5), 42, 43, 51 UNC.

195 As John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57(1) *BYIL* (1987) 105-106 notes for general international law: "When one asks which acts fall into which category, the difficulty of drawing the line is apparent".

196 For such an argument see e.g. ILCYB 1951, vol I, SR.94, 105 para 79 (Spiropoulos) according to which "if a State gave *military* assistance [in violation of the law of neutrality] to an aggressor, it was considered an aggressor itself."

197 Stuart Ford, 'Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties', 4(1) *Journal of Armed Conflict Law* (1999) 78; Corten, *Law against War*, 51-52.

198 Kolb, *Jus Contra Bellum*, 329.

There is hence little to indicate that Article 2(4) UNC is committed to exclude assistance from its scope.

It is not excluded that assistance may be considered an 'indirect use' of another actor's force even when falling short of attribution standards. But the Charter does not definitively resolve the necessary conditions.

In particular, the Charter does not define the intermediary. Given the generic conceptualization and justification for a broad understanding of indirect use of force, the nature of the intermediary should not matter. Conceptually, there is no reason to limit indirect use of force through assistance to assistance provided *to non-State actors*.[199] This finds further support in the historical parallelism in discussions on indirect use of force related to both assistance to non-State actors and States.[200]

Moreover, the Charter equally allows for a prohibition of indirect use of force that is constructed as establishing mere objective liability as it is open to a prohibition that requires an additional subjective element of the assisting State. In that sense, the Charter is indecisive. It allows arguments for either side, as the vivid debate on the necessary prerequisites for an act to qualify as *direct* use of force illustrates.[201]

At the time of establishing the Charter, the precise scope of the use of force was subject to many controversies that remained unresolved. These controversies are also reflected in the broad wording that was phrased deliberately open to the lower end.[202] The Charter leaves it to international practice to concretize the line between prohibited perpetration of force and participation, and to answer what forms of assistance can be considered a 'use' of force.[203]

199 Likewise e.g. Randelzhofer, Dörr, *Article 2(4) UNC*, 211 para 23; Crawford, *Brownlie's Principles of Public International Law*, 720.

200 See Chapter 2.

201 See for example for debates whether the prohibition against use of force requires a certain gravity, and a subjective element of the State using force Henderson, *Use of Force*, 75-76 with further references.

202 Delanis, *VandJTransnatlL* (1979) 100.

203 This is also reflected in the fact that it was controversial whether the prohibition of force constituted the only prohibition of intervention, or whether a less stringent prohibition (of non-intervention) is recognized. The initial concept of the Charter was not predetermined on this question.

b) Proposals to define 'indirect use of force'

In view of the Charter's openness, it is not surprising that literature offers numerous proposals regarding what constitutes 'indirect use of force'.

It is interesting to note some common characteristics. First, there seems to be wide agreement that an intermediary must actually perform force. Second, most observations concern assistance provided to non-State actors. Only few define general standards also applicable to interstate assistance. Third, not every form of assistance is considered to qualify as 'use' of force; at least, some level of involvement that may be traditionally described as 'perpetration' is required.

Approaches specifying the required threshold are again diverse:[204]

Some propose a case-specific approach. For example the ICJ in the *Nicaragua* case holds that only the provision of weapons or military training, and not the supply of funds, suffices to meet the threshold of a *use* of force.[205] *Kreß* takes an even more nuanced approach.[206]

Others set the threshold high, requiring subjective and objective elements. For example, *Henderson* requires that "the physical coercion does not need to take place either through overt means or directly in one causal step, but it must nevertheless constitute an intentional and material contribution towards others carrying out the direct violence that ensues."[207] In

204 See for a detailed and nuanced survey, also in light of the (dominant) questions of a right to self-defense, Kreß, *Gewaltverbot und Selbstverteidigung*, 143-168.

205 For a detailed analysis see Chapter 4, II.D.5. Many authors adopt the ICJ's position rather uncritically: Henderson, *Use of Force*, 60-62; Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels', 7(1) *JNSLP* (2014) 140-144; Michael N Schmitt, Andru E Wall, 'The International Law of Unconventional Statecraft', 5(2) *HarvNatSecJ* (2014) 361-363; Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" - Issues Surrounding Third-State Intervention in the Syrian Civil War', 13(1) *CJIL* (2014) 31-32. Several authors apply it to the interstate context, e.g. Lanovoy, *Complicity*, 195-196; Oona A Hathaway and others, 'Yemen: Is the US Breaking the Law?', 10(1) *HarvNatSecJ* (2019) 61-62; Robert Chesney, 'U.S. Support for the Saudi Air Campaign in Yemen: Legal Issues', *Lawfare* (15 April 2015).

206 Kreß, *Gewaltverbot und Selbstverteidigung* sees a violation of Article 2(4) UNC in cases of sending (313), support of sending (318), toleration as well as both instigation and support (328), but no violation in cases of inability, negligence (288) and support or instigation separately (333). For a detailed summary (346-354).

207 Henderson, *Use of Force*, 61; Christian Henderson, 'The Provision of Arms and Non-Lethal Assistance to Governmental and Opposition Forces', 36(2) *UNSWLJ* (2013) 648, 649.

application he distinguishes between lethal or non-lethal support[208], taking into account in particular the "immediate and direct impact upon the forcible action."[209]

Some do not require subjective preconditions[210] but converge indirect use to standards that would lead to full attribution. For example, *Thomas* and *Thomas* require an almost puppet-like standard.[211] *Zanardi* argues for what amounts to basically a *de facto* organ.[212] Similarly, *Derpa* requires a high standard of conduct "through foreign hands", whose sincerity is however called into question as the failure to prevent the use of sovereign territory also suffices.[213] *Schmitt* also demands an agency relationship, which he seems to accept only for "actively and directly preparing another to apply armed force, but not merely funding the effort".[214]

Crawford remains vague. He accepts, without further elaboration, that "state participation in the use of force of another state" can amount to an indirect use of force.[215] In another context, Crawford suggests that state participation must be similar to the UK's involvement in the US operations in the Iraq War 2003 to qualify as "concerted conduct". This suggests that it also required the own use of force (i.e. that the assisting State fulfills an element of the unlawful *act* (i.e. force) *itself*.[216] Crawford qualifies other forms of assistance, such as (Ireland's) allowing a stop-over at an airbase before the invasion (of Iraq in 2003), as "only" aid and assistance but not concerted conduct, and hence, in terms of Article 2(4), no use.[217]

208 He defines unlethal support as "equipment that while not having the primary aim to taking life nonetheless is provided with the aim of assisting the party concerned to prevail in an armed conflict, or at least to possess some (or better) capabilities to defend itself." Henderson, *UNSWLJ* (2013) 649.

209 Ibid 648-650.

210 Dominicé, *Multiple States*, 282-283.

211 Thomas, Thomas, *Concept of Aggression*, 46-47, 66 ("the state in order to commit indirect aggression does not use its own armed forces to encroach upon a foreign territory or peoples, but operates through third parties, armed persons, who act against the other state, apparently but not in reality on their own initiative").

212 Zanardi, *Indirect Military Aggression*, 113 at least for armed attack, but arguably also for a use of force.

213 Derpa, *Gewaltverbot*, 18.

214 Schmitt, *ColumJTransnatlL* (1998-1999) 909.

215 Crawford, *Brownlie's Principles of Public International Law*, 720.

216 This can also be achieved through attribution of conduct, as in the case of UK in Iraq 2003 where US conduct was attributed to the UK on the basis of Article 11 ARS).

217 Crawford, *State Responsibility*, 334.

Dominincé requires that the assisting state engages in a contribution that "constitutes an element of the unlawful act", which can also consist of 'merely' providing logistics.[218] *Brownlie*, while acknowledging the problem also on the interstate level, remains unclear – and in fact seems to pursue a narrow reading. He mentions in passing that assistance has been described as "indirect aggression". He also concludes that "joint responsibility in delict" may arise. At the same time, he emphasizes that such claims have not been widely made in practice, noting that "assistance to an aggressor" has been specifically outlawed by some treaties other than the Charter. With respect to Article 2(4) UNC, he then only briefly remarks that "obviously" a violation of Article 2(4) UNC would be present "if aid takes the form of ordering forces to fight as elements in the field under the aggressor's command."[219] In his book on State responsibility, *Brownlie* then suggests two examples:

> "[T]he supply of weapons, military aircraft, radar equipment, and so forth would in certain situations amount to 'aid and assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment, and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility."[220]

Other authors also identify the problem in the interstate context, but do not clearly position themselves in this respect.[221]

---

218 Dominicé, *Multiple States*, 282-283. It should be added that Dominicé seems to define "force" broader as "military operation".

219 Brownlie, *Use of Force*, 370. With respect to support to non-State actors Brownlie requires the rebels to be "effectively supported and controlled". See also in more detail Ian Brownlie, 'International Law and the Activities of Armed Bands', 7(4) *ICLQ* (1958).

220 Cited from Quigley, *BYIL* (1987) 106.

221 Higgins, *BYIL* (1961) 289 ("it would seem that when State A aids State B by furnishing arms, &c., to it in its aggressive use of force against State C, State A is guilty of aggression rather than indirect aggression"). She thereby distinguishes interstate assistance from assistance to rebels, which she describes as "indirect aggression." Randelzhofer, Dörr, *Article 2(4) UNC*, 211 para 23 ("The notion of 'indirect force' […] refers to the participation of one State in the use of force by another State (eg by allowing parts of its own territory to be used for violent acts against a third State), as well as to a State's participation in the use of force by unofficial bands organized in a military manner […]"). Schwebel, *RdC* (1972) 455-456 ("operating through third parties") In the following, he discusses the debate on indirect aggression in the Aggression Definition relating to non-State actors.

2) Article 2(4) UN Charter's guidance on assistance

Following from the above, it is clear that Article 2(4) UNC does not cover assistance unconditionally. While the Charter is silent on the specifics, it still provides structural guidance and preconditions within which international practice can flesh out the prohibition against the (indirect) use of force.

a) An actual conduct that meets the threshold of use or threat of force

First, providing assistance may only qualify as indirect use of (another) force if the assisted actor actually performs conduct that in factual terms reaches the level triggering the threshold of Article 2(4) UNC.

The prohibition of indirect use of force under Article 2(4) UNC is conceptualized to establish accessory responsibility in the sense that it depends on that conduct taking place. It is not, however, necessarily derivative, in the sense that the wrongfulness of the conduct does not derive solely from the wrongfulness of the assisted conduct under international law.

Without force, assistance cannot amount to a use of force. There would be nothing that could be 'used' through assistance. This precondition, while obvious to some,[222] deserves mention as it reemphasizes the tacit consensus that Article 2(4) UNC presupposes intervention against a specific State. A vague and indefinite risk is not prohibited. Moreover, it reminds of the fact that Article 2(4) UNC establishes a factual prohibition.[223]

Consequently, preparation for force is not prohibited; assistance that may be directed at facilitating force that however never ultimately materializes in practice is nothing more than an attempted (indirect) use of force.

---

222 For a similar conclusion see e.g.: Henderson, *Use of Force*, 61; Thomas, Thomas, *Concept of Aggression*, 55 with reference to the Nuremberg Tribunals already, 57 aE; Quincy Wright, 'The Prevention of Aggression', 50(3) *AJIL* (1956) 527; Zanardi, *Indirect Military Aggression*, 112-113 for armed attack, because it otherwise does not occur; Randelzhofer, Dörr, *Article 2(4) UNC*, 213 para 28 arguing that indirect force cannot go further than direct force; Samuel G Kahn, 'Private Armed Groups and World Order', 1 *NYIL* (1970) 40-41. For some this has been obvious: Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', 65(5) *AJIL* (1971) 720.

223 Kolb, *Jus Contra Bellum*, 62, 329-330. A mere declaration of war even without actual hostilities does no longer trigger the prohibition.

The Charter does not require, however, that the assisted force qualifies as unlawful use of force under international law for the *assisted* actor.[224] It suffices that the assisted conduct would be prohibited for the *assisting* State. The responsibility of the assisting State is what needs to be established.

This has direct consequences: The assisting State does not benefit from the lawfulness of the other actor's force.[225] Shared responsibility of the assisted and the assisting State for the same force is possible under Article 2(4) UNC. Last but not least, conceptually, the author of 'force' is irrelevant, to the extent that the assisted actor is capable of engaging in conduct that meets the threshold of force. Hence, actors through whom States can use force can be non-State actors, such as opponent, rebel or terrorist groups, contractors, or "volunteers", within or outside the target State, or States.

b) The necessary degree of involvement

Second, although the Charter leaves open what degree of involvement qualifies as 'use', the fact remains that it generally distinguishes between assistance to force and use of force. This again suggests that not all forms of assistance, especially those expressly defined as such in the Charter, can be considered a *use* of force. Only in exceptional cases may the distinction be overcome.

Moreover, it is worth noting that the Charter, in its original conception, explicitly limits supportive cooperation (remote forms of assistance, such as economic relations) through the Security Council sanction regime alone. More direct forms of assistance are not addressed. Also, the fact that this regulation of assistance is based on specific (political) decisions of a central organ, the Security Council, is a reminder of assistance's ambivalence, and the complex struggle to find a balance between a globalized world and necessary cooperation and prohibiting intervention. It certifies a certain reluctance to automatically prohibit contributions that only remotely assist a use of force.

In this light, for an act to be considered a *use* of force, the Charter requires an active and major role of the assisting State. The involvement and contribution (indirect use) to an actual force must be similar in ex-

224 For example, the assisted actor may be justified under international law to use force, or may not even be bound to the prohibition against use of force.

225 It does not exclude however that the justification of the assisted actor influences the assisting State's justification.

tent, effect and importance to direct use of force itself. Article 2(4) UNC prohibits *perpetration*, not mere *participation.*

D. Assistance as a 'threat' of force?

Article 2(4) UNC also prohibits the 'threat of force'. If assistance itself does not qualify as 'force', can it be considered as 'threat' of force?

At the outset, it is crucial to note that the UN Charter prohibits only a threat *of force.* As the juxtaposition of threat of force with threat to peace underlines, a specific coercion against a State is prohibited, not the creation of a general risk or dangerous situations.[226]

The UN Charter does not define what conduct may qualify as threat of force. It leaves substantial room for a lively debate that has unfolded regarding to what extent demonstrations of force, militarization or the acquisition of armaments may be considered a threat of force.[227] Often, the discussed behavior is the direct consequence of assistance. Through assistance, a State may be substantially and essentially involved in potentially threatening conduct. For example, the provision of weapons by an assisting State may lead to the militarization of the assisted State. A State may also host a military base used by the assisted State for a military buildup near the border of the targeted State. This prompts the more fundamental question of whether the act of assistance – to the extent that a 'threat' was defined to capture such conduct – may qualify as a threat of force itself?

Once again, it is crucial to recall the defining features of an act of assistance. The act of assistance increases the military potential of the assisted State and potentially the risk of the assisted State using force. But at all times, assistance only makes a contribution. The assisting State may influence to the extent that the assisted use of force cannot take place without assistance, but it does not control whether the assisted use of force will materialize. The assisting State relinquishes control over (the use of) its assistance. As such, the act of assistance is decoupled from the potential future use of force. Moreover, the assistance is directed towards the assisted State, not against the targeted State.

226 Corten, *Law against War*, 94-95.

227 For a detailed assessment Nikolas Stürchler, *The Threat of Force in International Law* (2007).

Regardless of the exact boundaries of a threat of force,[228] the concept inherently requires two essential features that are relevant in the present context: first, the realization of the threat of force must depend on the threatening State's will.[229] A State must have control over the conduct with which it is threatening. It thus cannot threaten with another actor's use of force that it does not control. Second, the pertinent conduct potentially qualifying as a threat must be directed against the targeted State.

As a general rule, this leaves a limited field of application for the prohibition of a threat of force in the context of assistance. First, the prohibition does not seek to address the general risk created by a State's military cooperation with other States. Second, already on a conceptual level, an act of assistance itself may only rarely qualify as a threat, if it is directed against the targeted State and if it indicates the assisting State's own readiness to realize the threat through its own force. Similar to the prohibition of the use of force, the prohibition of the threat of force draws a line between a threat and assistance to a threat, which cannot necessarily be equated.

At the same time, structurally similar to indirect use of force, the UN Charter does not exclude the possibility that an assisting State, through providing assistance to another State's threat, may also be considered threatening. The necessary precondition then is that the assisted actor itself poses a threat. Whether the assistance amounts to a threat will depend on the conduct of the assisted State. Only if the latter qualifies as threat, may the assisting State also be considered to commit a threat.[230]

VII. Assistance and sovereign equality under Article 2(1) UN Charter

States enjoy sovereign equality.[231] As a corollary to this fundamental right, there is a protective regime of prohibitions and obligations that is widely

228 For different definitions see e.g. Marco Roscini, 'Threats of Armed Force and Contemporary International Law', 54(2) *NILR* (2007) 234; Corten, *Law against War*, 93-94.

229 Cf also Roscini, *NILR* (2007) 235.

230 Imagine a scenario in which the assisting State provides assistance to the assisted State to send a message to and threaten the targeted State, but the assisted State does not indicate at all to use force against the targeted State.

231 Article 2(1) UNC.

referred to under the *principle* of non-intervention.[232] This principle embraces several specific obligations, two of which are of particular interest here.[233] First, States must not intervene in the internal affairs of another State through coercion. Second, States bear the obligation to respect another State's territorial integrity and inviolability. Both rules are interrelated, and often both violated simultaneously.[234] But conceptually, they are distinct rules with separate preconditions.[235] The following addresses whether and under what circumstances the *provision of assistance* to another actor's threat or use of force may be in violation of these rules.[236]

A. Assistance as unlawful intervention in internal affairs of the target State?

The original conception of the UN Charter did not expressly[237] include a general prohibition of intervention addressed to member States. The general principle of non-intervention "in matters which are essentially within the domestic jurisdiction of any state" stipulated in Article 2(7) UNC only ap-

232 Niki Aloupi, 'The Right to Non-intervention and Non-interference', 4(3) *CJICL* (2015) 572; *Nicaragua*, 106 para 202.

233 Aloupi, *CJICL* (2015) 572; Robert Jennings, Arthur Watts, *Oppenheim's International Law: Volume 1 Peace* (9 edn, 2008) 382, 429. A further corollary of sovereign equality is the responsibility and obligation of States not to allow its territory to be used for acts contrary to rights of other States. See e.g. *Island of Palmas Case (Netherlands v USA)*, 4 April 1928, 2 UNRIAA, 839; *Corfu Channel (United Kingdom v Albania)* (Merits), 1949 ICJ Rep 4 [*Corfu Channel*], 22. As seen this aspect is outside the scope of the analysis' focus. But see on the differences in more detail Chapter 6. See also on the trends relating to due diligence obligations on interstate assistance, Chapter 4.

234 Aloupi, *CJICL* (2015) 573. *Nicaragua*, 111 para 212.

235 See only Aloupi, *CJICL* (2015) 571-572, 575; Russell Buchan, *Cyber Espionage and International Law* (2018) 68.

236 Note that this discussion is different from the question whether military assistance (short of armed force) to a government can constitute an unlawful intervention against the *recipient* State itself. See on this Ruys, *CJIL* (2014) 42-44; Henderson, *UNSWLJ* (2013) 646.

237 Gaetano Arangio-Ruiz, 'Human rights and Non-intervention in the Helsinki Final Act', 157 *RdC* (1977) 267-268; Vaughan Lowe, 'The Principle of Non-Intervention: Use of Force' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst* (1994) 68. *Nicaragua*, 106 para 202: "The principle is not, as such, spelt out in the Charter." It may be also against this background that the ICJ held in para 176 that the principle of non-intervention may be an example for a rule where the Charter and customary international law is not identical. The ICJ refrains from answering where to ground the rule exactly: in customary international law or the Charter.

plies to intervention by the United Nations. For member States intervention was only prohibited through Article 2(4) UNC – in the specific form of a use or threat of force.

It is the common understanding that the express recognition of obligations of non-intervention in Articles 2(4)[238] and (7) UNC[239] does not exclude a general prohibition, however. Instead, they may be seen as specifications, as *leges speciales*, of an unuttered, but implied general principle that may have different facets as well.[240]

By now, a *general* prohibition of intervention applicable also to acts of States has gained general acceptance in the international community. Initial uncertainties and controversies regarding the rule's existence and its legal basis can be safely assumed to be settled.[241] The rule is derived from and well-accepted as a corollary of the recognition of the principle of sovereign equality of States in Article 2(1) UNC[242] that has also acquired the status of customary international law.[243] Accordingly, States are under

238 Aloupi, *CJICL* (2015) 576. This has been however not uncontroversial. For example, in particular Western States claimed that as evidenced by Article 2(4) UNC the Charter regulated and prohibited only "armed force". Helal, *NYUJIntlL&Pol* (2019) 31. For early views see an overview Jackamo III, *VaJIntlL* (1991-1992) 954-956. At the time of drafting, prohibiting force and war was considered the primary purpose, yet it was not meant to be an exclusive regulation, ibid 959.

239 For Article 2(7) see: Nolte, *Article 2(7) UNC*, 284-285 para 7; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950) 770; Lowe, *Non-intervention*, 72-73.

240 Arangio-Ruiz, *RdC* (1977) 267-268; Raymond J Vincent, *Nonintervention and International Order* (1974) 325-326; Jamnejad, Wood, *LJIL* (2009) 349.

241 As Lowe, *Non-intervention*, 68 explains the driving force back then was the rule's recognition in the Charter of the Organizations of American States (Articles 15, 16, 18). Initially, the UNGA resolutions addressing a duty of non-intervention were controversial, and only deemed to be political expressions, Thomas J Jackamo III, 'From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention', 32(4) *VaJIntlL* (1991-1992) 961-963. In any event, with the adoption of the Friendly Relations Declaration, the rule as such gained universal acceptance in the legal sphere – irrespective of the fact that the exact scope of the rule remains elusive in many respects to put it mildly.

242 *Nicaragua*, 106 para 202; Jamnejad, Wood, *LJIL* (2009) 346-347; Aloupi, *CJICL* (2015) 568-569. Sometimes, the principle is also tied to Article 2(4) (e.g. Arangio-Ruiz, *RdC* (1977) 267-268) or Article 2(7) (for such views see Georg Nolte, 'Article 2(7)' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 284-285 para 7).

243 *Nicaragua*, 106 para 202, 108-110 para 206-209; Mohamed Helal, 'On Coercion in International Law', 52(1) *NYUJIntlL&Pol* (2019) 29-30; Aloupi, *CJICL* (2015) 570;

the obligation not to *intervene* in another State's internal affairs through coercive means.[244] For assistance to qualify as an unlawful intervention,[245] it would need to bear on the targeted State's internal affairs (a) and be considered a coercive means (b).

1) Can assistance bear on internal affairs of another State?

The rule of non-intervention has a broad scope. It protects a State's independence and autonomy, its internal affairs, i.e. the right to decide freely on a political, economic, social, and cultural system, and a foreign policy.[246] Unlike the infringement of territorial inviolability, it is not inherently necessary for there to be a territorial link. A State's autonomy is again circumscribed and defined by its individual international legal obligations.[247]

Accordingly, in a globalized world virtually any conduct may bear on another State's internal affairs. This is also true for a State's support of another State. The mere fact that assistance creates a risk of *enabling* another actor to potentially use the assistance for force can amount to an interference in the protected sphere.[248] This is true even when the assistance is never or

Jackamo III, *VaJIntlL* (1991-1992) 953; Henderson, *UNSWLJ* (2013) 645. By now it also is affirmed by State practice: Jamnejad, Wood, *LJIL* (2009) 352; Aloupi, *CJICL* (2015) 367. See also Lowe, *Non-intervention*, 68-75 for a discussion of the divergence between abstract and conflict practice.

244 Jamnejad, Wood, *LJIL* (2009) 347; Nolte, *Article 2(7) UNC*, 288 para 19; Helal, *NYUJIntlL&Pol* (2019) 4; *Nicaragua*, 108 para 205, 146 para 292. On the terminology: while the rule is often referred to as "principle" of non-intervention, relevant here is the specific 'obligation' not to intervene that is part of the (arguably) broader principle. See also *Nicaragua*, 106 para 202, 146 para 292, which concludes that the obligation has been violated.

245 "Inference" describes a conduct that bears on the internal affairs *or* territorial integrity/inviolability. "Intervention" is a specific form of interference understood as "coercive interference". See on this already ILCYB 1949, vol I, SR.11, 89 para 83 (Brierly).

246 *Nicaragua*, 108 para 206; Aloupi, *CJICL* (2015) 573.

247 Aloupi, *CJICL* (2015) 573-574; Antonios Tzanakopoulos, 'The Right to be Free from Economic Coercion', 4(3) *CJICL* (2015).

248 This is for example reflected in practice, where States at times adopt a broad conception. For example, A/RES/36/103 (9 December 1981) stipulated: II (i) "The duty of States to refrain from any measure which could lead to the strengthening of existing military blocs or the creation or strengthening of new military alliances, interlocking arrangements, the deployment of interventionist forces or military bases or other military installations conceived in the context of great-Power confrontation".

not yet used against that third State, when there is no territorial connection, such as when the assisted actor is within the territory, or the territorial influence sphere,[249] or when it is not intended to be used against another State.[250]

2) Assistance as coercion?

Not any such *interferences* with a State's *right* to independence and autonomy, and thus any assistance, amounts to a prohibited *intervention*.[251] In other words, the prohibition of intervention does not congruently mirror States' sovereign right to autonomy.[252] Treating the right and the prohibition as identical would unduly restrict other States' sovereignty, and threaten to strangle State interaction substantially.[253] States are hence expected to tolerate some interference with their autonomy. Balancing both spheres, the rule of non-intervention is confined to coercive interfer-

See also II (h) and (n) which also outlaw preparatory acts without requiring action taken against another State, but let suffice the mere designation of that act. It is a distinct question whether such conceptualizations reflect *lex lata*. Resolution 36/103 did not receive unanimous support and was fiercely opposed by most developed States. Lowe, *Non-intervention*, 69.

249 For such arguments see the Monroe or Breshnew doctrine.

250 See e.g. A/RES/36/103 II (1981). Again, this was required to establish coercion, not interference. Accepting an interference is not in contradiction to the conclusion that assistance, as such, can never constitute force. An interference is a necessary, but not a sufficient condition for "force".

251 Helal, *NYUJIntlL&Pol* (2019) 36, 47.

252 See for this for example also the Friendly Relations Declaration. It acknowledges that "Every State has an inalienable right to choose its political, economic, social and cultural systems, without *interference* in any form by another State." The prohibition is limited however to a duty not to *intervene*: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." See also Buchan, *Cyber Espionage*, 63.

253 This has also always been a prominent argument of critics against the very existence of such a rule, as well as its only reluctant acceptance by States. See Jamnejad, Wood, *LJIL* (2009) 348, 352; Arangio-Ruiz, *RdC* (1977) 263; Lowe, *Non-intervention*, 67, see also 78 where he states that "All States seek to influence the conduct of other States. That is what the international system of nation State signifies". Also, for example is seems to be acknowledged that the 1965 Declaration on the Inadmissibility of Intervention in Domestic Affairs and the Protection of Their Independence and Sovereignty was no more than a statement of political intent, Jamnejad, Wood, *LJIL* (2009) 348, 352-353.

ences.[254] The additional criterion of "coercion" operates as filtering-criteria.[255]

There is no authoritative definition of what conduct constitutes coercion.[256] In view of the rule's origin, it is not surprising that there is much room for concretization and uncertainty about its scope.[257]

On that note, this is not the place to seek to fully define what amounts to coercion. Instead, the focus is on how 'assistance' may amount to prohibited coercion. Assistance can be considered prohibited intervention in two ways: as direct (a) and indirect (b) intervention.

a) Assistance as direct intervention

It is not excluded that the provision of assistance to the assisted State, as such, i.e. merely enabling another actor to potentially use force, constitutes prohibited intervention against another State. But there are strong indications already on a conceptual level that it does not. It is suggested that coercion, like force, is limited by its nature to conduct specifically targeting other States. Creating abstract and vague risks by supporting other States would thus not constitute coercion.

The rule's origin points in that direction. The relationship between the prohibition of intervention and Article 2(4) UNC, which is viewed as a specific expression of the rule of non-intervention, indicates that both rules share the same basic characteristics. Both rules differ only in the scope and degree of conduct. The development of the prohibition of intervention as a legal rule was initially only accepted regionally. It gained universal momentum when it became clear that attempts to define means short of

254 Hence, a prohibition with a limited scope, and a narrow understanding of coercion, is a better reading of the apparently conflicting State practice than denying the rule as whole.

255 *Nicaragua*, 108 para 205 Nolte, *Article 2(7) UNC*, 288 para 19. For a discussion on different non-forcible interventions versus interferences, see Jamnejad, Wood, *LJIL* (2009).

256 Jamnejad, Wood, *LJIL* (2009) 347. Similarly vague: *Nicaragua*, 108 para 205.

257 Jackamo III, *VaJIntlL* (1991-1992) 968; Lowe, *Non-intervention*, 72 "began as an abstract and amorphous principle". The lack of definition has led some to questioning the existence of the rule all together: see for references Helal, *NYUJIntlL&Pol* (2019) 26-27, 4 n 9.

armed force as force would not be successful.[258] States aimed to lower the necessary threshold to include non-forceful measures. The main characteristics of intervention and the static of the Charter were not intended to be changed, however.[259] This is further reflected in the historic development of the rule, decisively rooted in and influenced by Latin American practice.[260] As Gaetano Arangio-Ruiz sets out, the Latin American regulation did not proscribe all forms of interaction. Diplomatic intercourse, or trade were not considered unlawful intervention.[261] Instead, the rule primarily sought to capture measures short of war such as economic or political pressure against a specific State. Last but not least, extending the rule beyond conduct specifically targeting another State may lead to incongruity with well-accepted permitted conduct. For example, it would be challenging to distinguish between potentially unlawful military assistance and (self)-armament that is widely considered permissible under international law.[262]

This would not necessarily be changed, even if the assisted actor sat within the targeted State's territory or found itself within its "territorial sphere of influence". This might be a *direct* violation of the territorial exclusiveness and inviolability of a State.[263] But, as for State autonomy, conceptually, assistance even then remains primarily an abstract *risk*. The coercive nature depends on the assisted actor's conduct. Yet, such cases could still open the door for a classification as coercion. It is characteristic for such cases that the risk is less abstract and vague, and arguably more concretized against a specific State.

258 Stephen Townley, 'Intervention's Idiosyncrasies: The Need for a New Approach to Understanding Sub-Forcible Intervention', 42(4) *FordhamIntlLJ* (2018-2019) 1173, 1181-1184 who also stipulates that the discussion on the outer limits of "force" was downgraded into non-intervention rule. Arangio-Ruiz, *RdC* (1977) 255 who describes the development of the rules in parallel to the prohibition of force. In particular Western States fiercely opposed to see included in Article 2(4) forms of coercion other than armed force. Helal, *NYUJIntlL&Pol* (2019) 31.

259 Jamnejad, Wood, *LJIL* (2009) 352-355. For the early discussions see: Jackamo III, *VaJIntlL* (1991-1992) 954-956.

260 Arangio-Ruiz, *RdC* (1977) 252 et seq sketching the development of the rule; Townley, *FordhamIntlLJ* (2018-2019) 1173, 1182, 1184-1185.

261 Arangio-Ruiz, *RdC* (1977) 264 para 38.

262 Helal, *NYUJIntlL&Pol* (2019) 59-60.

263 See on this below VII.B. It may be this aspect that Henderson, *Use of Force*, 61 refers to when arguing that the mere assistance without the actual perpetration of the assisted act violates the principle of non-intervention.

The conceptual constraints to qualify assistance as direct intervention shift the attention in cases of assistance to the assisted actor and its conduct, moving the analysis from the realm of a direct to indirect intervention, i.e. coercion through an intermediary.[264]

b) Assistance as indirect intervention

A conduct that qualifies as threat or use of force also qualifies as coercion. This is not at least affirmed by the *lex specialis* character of Article 2(4) UNC in relation to the prohibition of intervention.

When the assisted actor engages in coercive conduct, the assisting State could be considered to have committed an indirect intervention, too.[265]

In view of Article 2(4) UNC that allows for indirect use of force, *indirect* intervention is likewise conceptually possible under similar conditions. Through its involvement in another actor's coercion, the assisting State may also be considered to coerce. Conceptually, two features are noteworthy: first, there is nothing in the design of the rule that limits its application to cases of assistance to non-State actors. Second, the general prohibition of intervention may not only allow to deviate from the prohibition against the threat or use of force in the sense that it may also cover less intense forms of intervention short of armed force.[266] The lower threshold may also capture less proximate involvement or participation in another actor's threat or use of force than what would be required for an indirect use of

264 This of course is without bearing on the question whether a specific act of assistance that may (also) contribute to a use of force may for its means also violate the prohibition of intervention. This question is of particular relevance if the act of assistance is immediately directed *against* the targeted State (e.g. economic sanctions taken against a targeted State to support another State's use of force). This does not render the act's *contribution* to a use of force however prohibited as intervention.

265 For a similar argument *Nicaragua*, 108 para 205. But in contrast to the prohibition to use force, the obligation of non-intervention it is not predetermined what the assisted actor's conduct must consist of. It is not excluded that already the assisted actor's concrete intention suffices to render assistance an intervention. Cf also Henderson, *Use of Force*, 61. *Nicaragua*, 124 para 241.

266 *Nicaragua*, 108 para 206; Lowe, *Non-intervention*, 67; Helal, *NYUJIntlL&Pol* (2019) 43-44. See also the Friendly Relations Declaration stating: "*use of economic, political or any other type of measures* to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind", (emphasis added).

force.[267] Accordingly, as no specific *form* of participation in another actor's intervention is *prima facie* excluded, interstate assistance may also qualify as indirect intervention.

B. Assistance and the prohibition to infringe upon territorial sovereignty

Respect for a State's territorial sovereignty demands i.a. respect for a State's territorial inviolability.[268] The territorial State has exclusive jurisdiction and an exclusive right to exercise operational powers on its territory.[269] As a consequence, any non-consensual interference with such territorial rights is prohibited.[270] It is not necessary for the conduct to infringe upon the targeted State's territorial *integrity*, in the sense of a change of State territory and boundaries.[271] Neither is it required that the conduct is of a coercive nature,[272] nor that physical damage occurs.[273] Instead, the legality is crucially judged based on where the relevant sovereign act takes place.[274]

In and of itself, assistance may only constitute a *direct* infringement of territorial inviolability, when it impacts the territory, for example, when provided to an actor within the territory of the targeted State.[275] For interstate assistance, this will typically not be the case. Unlike assistance

267 For such a proposition for example Henderson, *UNSWLJ* (2013) 649.

268 Jennings, Watts, *Oppenheim's International Law: Volume 1 Peace*, 382, 385. Another aspect of territorial sovereignty is a State's territorial integrity.

269 Aloupi, *CJICL* (2015) 572. *Island of Palmas Case (Netherlands v USA)*, 4 April 1928, 2 UNRIAA 829, 838; *Corfu Channel*, 35; *Nicaragua*, 111 para 212; Buchan, *Cyber Espionage*, 49.

270 Aloupi, *CJICL* (2015) 572.

271 On the concept of territorial integrity see Christian Marxsen, 'Territorial Integrity in International Law – Its Concept and Implications for Crimea', 75 *ZaöRV* (2015) 9-10.

272 See e.g. ibid 12-13; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Declaration Judge Yusuf, ICJ Rep 2015, 665, 744-745 para 6, 9.

273 *Nicaragua*, 128 para 251.

274 Cf *Nicaragua*, 111 para 213; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Judgment, ICJ Rep 2015, 665, 703 para 93.

275 In this respect it is crucial to carefully define the act of assistance. An act of assistance may presuppose and build on a violation of territorial inviolability. But this does not mean that the act of assistance itself violates territorial inviolability. For example, the gathering of intelligence by reconnaissance aircraft unauthorizedly overflying another State constitutes a violation of the norm. *Nicaragua*, 128 para 251. But, sharing this information (that is the relevant act of assistance) does not constitute an (additional) violation.

to non-state groups that are situated within the targeted State's territory, assistance to States will not impinge upon the targeted State's territorial sovereignty.[276]

This does not exclude, however, that assistance, through its contribution to another actor's violation, may violate the territorial inviolability *indirectly*.[277] As before, this requires a connection through an actor acting against the territorial inviolability. Through an intermediary, the assisting State could violate the territorial inviolability. Again, this raises the question of what connection with the actor is required.

VIII. An unwritten prohibition of participation in a use of force?

So far, the survey has suggested that the UN Charter does not spell out a prohibition comprehensively governing interstate assistance outside the realm of UN action. But the mere fact that such a prohibition has not found its way into the express terms of the Charter does not mean that its existence was precluded.

In particular, the Charter's silence does not reflect Roberto Ago's famous observation made in his 1939 Hague Lectures. Ago had stated, based on a strictly bilateral understanding of international law:

> "Every form of complicity in, participation in or instigation to a delict is inconceivable in international law. International law, with its current structure, cannot provide for these forms of the common consideration of a plurality of actors with respect to one individual delict. These forms appear to be the feature of the elaboration and nature of the domestic criminal law."[278]

Ago had thereby not sought to generally deny the possibility that interstate assistance may be governed by international law. He required however *explicit* bi- or multilateral obligations that defined assistance to the assisted

276 Assistance in terms of 'contribution' is to be distinguish from how assistance is operationalized. The act of providing assistance, for example the transportation of assistance by the assisting State itself, to a State operating within the territory of another State, may also violate the targeted State's territorial sovereignty.

277 Aloupi, *CJICL* (2015) 573; Marxsen, *ZaöRV* (2015) 18.

278 Roberto Ago, 'Le délit international', 68 *RdC* (1939) 523. Translation by Aust, *Complicity*, 12.

State's conduct as an interference in the rights of the targeted State.[279] Ago's observation was hence limited to a general and universal prohibition of complicity. In any event, his structural concerns against a rule of complicity[280] would not apply to the UN Charter and the prohibition to use of force.[281] The prohibition to use force under the Charter transcended the bilateral conception. It was not only established in a multilateral treaty, but was from the outset established as a prohibition with the claim to universal application in which the community as a whole has an interest in its compliance. By now, the prohibition to use force is well accepted not only as a universally applicable rule of treaty and customary law[282] but also as an obligation *erga omnes*.[283]

In assessing whether the Charter contains a prohibition of participation, it is essential to understand the Charter in light of its function. The UN Charter claims primacy and defines firm boundaries.[284] But it does not purport to stipulate a comprehensive or rigid framework. As such, the Charter is a living instrument capable of adapting to political realities and developments.[285] The Charter establishes a framework that allows States to also go beyond what is required under the Charter. Also, crucially for the present context, the Charter lays out basic *principles*, not a conclusive, sophisticated set of *rules* and *obligations*.

The introductory sentence in Article 2 UNC leaves little doubt:

> "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles."

279 See in detail on Ago, Aust, *Complicity*, 12-15. For a similar view Klein, *Beihilfe*, 436.

280 See on the persuasiveness of such considerations: Pacholska, *Complicity*, 79-81. Critical Aust, *Complicity*, 11-49. But see Klein, *Beihilfe*, 434-436; Lanovoy, *Complicity*, 23-24.

281 This is also widely accepted by those critical of a general complicity rule in a bilateral conceptualization. See e.g. Klein, *Beihilfe*, 436-437; Pacholska, *Complicity*, 80. Recall also the early regulation of assistance in the pre-Charter era to which a prohibition of participation in a use of force was not foreign.

282 *Nicaragua*, 27 para 34, 99 para 188. In detail on the Court's view Kreß, *ICJ and Use of Force*, 567-570.

283 Paolo Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 1224-1225.

284 Article 103 UNC.

285 Delanis, *VandJTransnatlL* (1979) 116; Thomas M Franck, *Fairness in International Law and Institutions* (1998) 260; Henderson, *Use of Force*, 86, 121; Ruys, *AJIL* (2014) 163.

The recognition as 'principles' does not challenge the binding character of Article 2 UNC.[286] It indicates the basic character of their content. It also means that Article 2 UNC may serve as the basis for more specific obligations.[287] In fact, the principle is concretized by various specific rules and obligations. The fact that an obligation has not found its way into the express text of the Charter hence does not mean that the Charter may not nonetheless embrace such an obligation as corollary of the recognized principle. As such, the Charter is a realistic reflection of the (time) constraints which defined the drafting of the Charter, and which did not allow for a detailed stipulation of a comprehensive regulation of the rights and duties of States under international law.[288] Furthermore, the Charter mirrors its foundational nature, which for some even exposes characteristics of a global 'constitution'. In the words of the Rapporteur of the Drafting Committee 1:

> "The chapter on "Principles" sets, in the same order of ideas, the methods and regulating norms according to which the Organization and its members shall do their duty and endeavor to achieve the common ends. Their understandings should serve as actual standards of international conduct."[289]

The Rapporteur stressed that

> "[T]he Charter cannot be amplified to include all major purposes and principles that cover international behavior; but should include the basic ones, which, by virtue of their being basic, can and shall serve the Organization and its members to draw from them, whenever necessary, their corollaries and implications."[290]

This understanding of Article 2 UNC is also well accepted in international practice. The ICJ frequently derives specific obligations from general principles under the Charter.[291] For example, in the Nicaragua case the ICJ

---

286 Andreas Paulus, 'Article 2' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol I (3rd edn, 2012) 125 para 8.

287 Ibid; Jamnejad, Wood, *LJIL* (2009) 358.

288 There had been attempts to introduce such regulatory regimes in the Charter, that further concretized Article 2. Detailed discussions in that respect were however not considered adequate at that time in that context. See in detail Chapter 4, II.A.1.

289 Doc 944 I/1/34 (1), June 13, 1945, VI UNCIO, 447.

290 Jamnejad, Wood, *LJIL* (2009) 449; Paulus, *Article 2 UNC*, 125 para 9. See also VI UNCIO 18 (Commission I).

291 Just see e.g. *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, ICJ Rep 2012, 99, 123 para 57 where the ICJ derived State immunity

noted that the fact that "this principle [of non-intervention], as such, is not spelled out in the Charter" did not mean that States do not recognize that principle. In response, the ICJ held that "[i]t was never intended that the Charter should embody written confirmation of every essential principle of international law in force."[292] States share the ICJ's jurisprudential stance. They consistently seek to define and refine the rights and duties deriving from the general principles under the Charter. For example, the very purpose of UNGA resolutions, like the Friendly Relations Declaration, the Definition of Aggression or the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Use of Force in International Relations, is to spell out the specific aspects and obligations entailed in the principles under the Charter.[293] In fact, the UNGA has been tasked to consider the principles under Articles 11 and 13 UNC.

On that note, Article 2(4) UNC is not confined to an obligation for member States to refrain from the threat or use of force in their international relations.[294] It establishes a *principle of non-use of force*.[295] It embodies a holistic commitment to non-use of force.[296] It shall inform and guide all States' actions in their international relations to the extent that it conforms with the overall goal: abstinence from armed force except in the common interest.[297] While the *obligation* – expressly mentioned in the Charter – to refrain from the threat and use of force is arguably the most prominent and central implication and corollary of the principle under Article 2(4)

from the principle of sovereign equality. See also *Nicaragua*, 101 para 191. This is also true for Article 2(7) and the prohibition of intervention, see Nolte, *Article 2(7) UNC*, para 7.

292 *Nicaragua*, 106 para 202. See also above VII.A on conceptualization of the rule of non-intervention.

293 See in more detail on each resolution individually Chapter 4 below.

294 This is the difference to a "mere" prohibition from which it may not be inferred that assistance is prohibited as a "logical agreement". See above VI.B.

295 It is noteworthy that the ICJ consistently refers to the *principle* of non-use of force. E.g. *Nicaragua*, 118 para 227; *Armed Activities*, 280 para 345. See in detail Kreß, *ICJ and Use of Force*, 565.

296 See also Alan Vaughan Lowe, *International law. A Very Short Introduction* (2007) 102-103 "the first function focuses upon the whole of international society and on the system of international law". He also stresses that the interest of the international community derives from there.

297 VI UNCIO 447. Paulus, *Article 2 UNC*, 121 para 1: "principles provide the means to achieve the purposes".

UNC, it is not the only one.[298] As such, the *principle* of non-use of force in international relations could be the basis for a prohibition of participation in another State's use of force.

Such a prohibition would originate in more than a (mere) universal multilateral commitment to the *obligation* to refrain from the threat or use of force.[299] It likewise would not be, as Helmut Aust contemplates,[300] a good faith application of the spirit of collective security or based exclusively on the specific *erga omnes* or *ius cogens* nature of the prohibition to threat or use force. It would be grounded in Article 2(4) UNC. Ultimately, however,

298 Another prominent and well-accepted example is the duty of non-recognition as legal of territorial acquisitions resulting from the threat or use of force. Despite the fact that it is not spelled out in the Charter, it is by now well-accepted in State practice. David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law', 2(1) *CJIL* (2003) 130. The duty's origin and basis lie in the *principle* of non-use of force. See for example the ICJ which refers to it as a "*corollary*" duty, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, 136 para 87, see also *East Timor (Portugal v Australia)*, Dissenting Opinion Skubiszewski, ICJ Rep 1995, 90, 262-263. Also, in the Friendly Relations Declaration and the Aggression Definition it is seen as one emanation of the principle. This becomes also clear by looking at the origins of the rule. The principle of non-use of force was also advanced as justification already at the duty's emergence. Initially, it was not a legal obligation in the regulatory framework. But the accepted legal *principle* was only later fleshed out by State practice. See Brownlie, *Use of Force*, 418-419; Quincy Wright, 'The Legal Foundation of the Stimson Doctrine', 8(4) *PacAff* (1935) 439-440 who sees it as a "authentic interpretation" of the respective obligations. He also refers to "principles of the Pact and the Covenant."; Marcelo G Kohen, Mamadou Hébié, 'Territory, Acquisition' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2011) para 48. For example, the Stimpson Doctrine derived the *duty* of non-recognition from the prohibition in Kellogg-Briand Pact. Arnold McNair, 'The Stimson Doctrine Of Non-Recognition - A Note On Its Legal Aspects', 14 *BYIL* (1933); Quincy Wright, 'The Stimson Note of January 7, 1932', 26(2) *AJIL* (1932). Also, the ILA Budapest Articles came to a similar conclusion. The League responding to the Manchurian incident derived this from the anti-aggression guarantee of Article 10, seeing it as "incumbent" on Members. Claud Humphrey Meredith Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *RdC* (1952) 480-481; Brownlie, *Use of Force*, 418.

299 In this direction Lanovoy, *Complicity*, 23 ("by-product of multilateralisation"). But see 204 where he claims without substantiation that complicity constitutes a use of force in and of itself. This is discussed above.

300 Aust, *Complicity*, 34-35.

the existence and scope of such a rule depend on States positively accepting the obligation.[301]

Still, the general sentiment of the previous discussion of the conception of the Charter remains: a general prohibition of participation was initially met with reluctance, if not ignorance. Yet, beyond general normative reasons that may speak for a prohibition of participation,[302] there are good (policy) reasons to recognize such a rule. Not only does the Charter recognize this concept repeatedly.[303] Moreover, such a rule seems a natural corollary to the commitment to refrain from the threat or use of force, in particular in view of the Charter's preamble, where States commit "to *ensure*, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest".[304] Although not a logical necessity, it seems counterintuitive if a State can do through another what it cannot do by itself. Such a prohibition could disincentivize as well as factually render it more difficult for States to unilaterally resort to force. In fact, it is hard to believe that in a system seeking to establish the maintenance of international peace and security, participation in a use of force should *not* be prohibited. The value and importance of the cornerstone of international law militate for such a rule.

Nonetheless, a prohibition of participation can only lie within the Charter's framework. A prohibition of participation would concentrate on interstate assistance that qualifies as *participation* rather than *perpetration*. The latter would rather fall under the prohibition to *use* force. Moreover, a prohibition of participation would not establish automatic sanctions through the backdoor. A prohibition of participation derived from Article 2(4) UNC would not depend on a decision of the Security Council. Also, it would not cover forms of assistance as remote as mere interstate cooperation. Furthermore, as part of the regulation of Article 2(4) UNC, a prohibition of participation would be concerned with participation in a use of force that actually takes place, not with general prevention, which has been

301 See emphatically Pacholska, *Complicity*, 196-198. For a similar approach also Aust, *Complicity*, 97.

302 Aust, *Complicity*, 50-96 views responsibility as complicity as essential part of the international rule of law and the concept of abuse of rights. Similarly Kelsen, *AJIL* (1950) 271. Jackson, *Complicity*, 106, 120, 142-144 views such a rule necessary to live up to a "principle of fair labelling", and to adequately describe in legal terms a State's involvement in another State's conduct.

303 See for example Article 2(5) UNC. Recall also Article 51 UNC as analyzed above.

304 Preambular para 7 UNC, emphasis added.

left to the Security Council. Last but not least, a prohibition of participation would not interfere with rights to provide assistance recognized in the Charter. Participation in a use of force would hence not be prohibited in absolute terms, but only to the extent that it is implicated in the unlawful use of force. All these systematic boundaries share the characteristic, however, that they are not impermeable. As all provisions relate to interstate assistance, overlap is inevitable.[305]

Finally, the recognition of a prohibition of participation, by its nature, would embrace a general and automatic duty of solidarity – if only minimal and negative in scope, yet still potentially powerful. To the extent that the express terms of the Charter would only be complemented, the static of the Charter would not be altered, however. As a system of collective security, the Charter is receptive to the idea of non-assistance to a State violating the basic principles. Still, the conception of the Charter indicates that the recognition of a prohibition of participation has to strike a delicate balance – a balance that the Charter does not further elaborate but leaves to international practice to clarify.

IX. The UN Charter – Not comprehensive, but guidance for international practice

The Charter details a stringent and powerful mechanism to subject interstate assistance to rules in cases where the UN takes action. But, for scenarios where the UN does not take action, the Charter leaves a legal limbo.

The different regulatory strands developed in the treaty practice of the pre-Charter era to address assistance have not found their way into the express terms of the Charter. Neither did the Charter address the extent to which interstate assistance may qualify as a use of force, nor did it stipulate a general prohibition of participation.

One may have wished that the Charter had provided a more comprehensive answer on the relationship of third States to the use of force in the new *ius contra bellum* era. But in 1945, a time of upheaval when the world was only about to reorganize and when the principle of non-use of force itself sought recognition, it may not have been the right time to comprehensively address this multifaceted problem of interstate assistance to force and the relationship and role of third States in situations of war.

305 For example, any co-perpetration also qualifies as (proximate form of) participation.

It is interesting, yet in view of a system of collective security not surprising that throughout the Charter the importance and relevance of interstate assistance for any military efforts are reflected. All the more it is astonishing that the Charter does not spell out a rule on interstate assistance unless the UN takes action. But this fact does not mean that interstate assistance in this situation may not be subject to regulation; the Charter is neither exclusive nor expressly excluding such rules. Article 2(4) UNC constitutes a potential basis for rules governing interstate assistance that may be further interpreted (not modified) by practice. Whether or not, and if so, how such rules are fleshed out, the Charter leaves to international practice to which the next Chapter is dedicated.