

Chapter 2

Elements of an Act of Aggression: An Overview of Modern International Law and Practice

Abstract The Charter of the United Nations is the principal source of contemporary international law for the regulation of the use of force in inter-State relations. It sets out the interrelated competences of the main bodies of the United Nations—first of all, of the Security Council, the General Assembly and the International Court of Justice—in the area of maintaining international peace and security, and confirms States’ inherent right of self-defence as a matter of applicable customary international law. The Charter’s main provision pertaining to the prohibition of the use of force—Article 2(4)—is at the heart of the in-depth legal analysis, as a rule of conventional and customary international law as well as one of *jus cogens*. The chapter suggests that any use of force not falling within one of three categories—Charter-based exceptions, Charter-related exceptions and extra-Charter exceptions to the prohibition of the use of force—might potentially qualify as aggression and entail consequences provided for under international law, including the individual criminal responsibility of its authors.

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As was discussed above (see *supra* 1.2.5), a major objective of the modern international legal order, which is founded upon the Charter of the United Nations, consists in the maintenance of international peace and security. Contrary to a widespread opinion, the Charter contains more than just a few articles relating to the use of armed force¹—there are, in effect, many more, from which circumstance it must be inferred that the conditions under which force can be used under current international law are more strictly defined than some scholars have suggested.² Article 2(4) of the Charter laid down a fundamental restriction on the use of force in international relations (see *infra* 2.1.1)—an obligation which was, from its inception, designed to be of a superior legal nature³ and is now recognized to have acquired the character of customary international law (see *infra* 2.1.2) and even that of *jus cogens* (see *infra* 2.1.3). Notably, Peter Malanczuk suggests that this norm is now binding even for the few States which are not Members of the United Nations.⁴

Permitted uses of force are regulated by a sequence of the Charter’s provisions, which is opened with the seventh preambular paragraph: “[T]o ensure [...] that armed force shall not be used, *save in the common interest* [...]” (emphasis added). Although the Preamble does not *per se* possess a legally binding force,⁵ it does provide an indication as to the spirit of the subsequent articles. In line with the Preamble’s “common interest” clause, Article 1(1) lists among the purposes of the United Nations “effective *collective* measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of

¹ Some treatises on public international law essentially limit themselves to the analysis of Articles 2(4), 24, 41, 42 and 51 of the Charter. See, for example, Adilkariev 2003, pp. 272–276; Kalamkaryan and Migachev 2005, pp. 381–384; Kolosov and Kuznetsov 1998, pp. 310–323; Kovalev and Chernichenko 2008, pp. 761–765; Kuznetsov 2001, pp. 490–497. However, a more comprehensive overview of applicable law, involving more provisions of the UN Charter relating to the use of force and relevant customary international law, shall be required for our purpose.

² See Franck 1970, pp. 809–837; Franck 2003, pp. 607–620; Henkin 1971, pp. 544–548; Wood 2005, pp. 75–90.

³ Cf. Charter of the United Nations, Article 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

⁴ Malanczuk 1997, p. 309. In turn, A. Randelzhofer specifies that States which are not members of the United Nations “are protected, though not bound” by Article 2(4). See A. Randelzhofer, “Article 2(4),” in Simma 1994, p. 115.

⁵ See Lukashuk 2004b, p. 585.

peace” (emphasis added, see *infra* 2.4.1.5).⁶ At least, two of the United Nations main organs, the General Assembly (Article 12, cf. *supra* 1.2.5.3 and *infra* 2.4.2.1) and the Security Council (Articles 24(1) and 39, cf. *supra* 1.2.5.2 and *infra* 2.4.1.5), were given powers to react, albeit in different manners, to threats to peace, breaches of peace, and acts of aggression.⁷ Chapters VII (“Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”) and VIII (“Regional Arrangements”) are devoted in their entirety, correspondingly, to the maintenance of international peace and security through collective action under the auspices of the United Nations or of regional arrangements. More specifically, Article 42 endows the Security Council with the authority to “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.” Article 43 was intended to set a framework for the conclusion of agreements between the Security Council and the United Nations Member States who would participate in the maintenance of international peace and security, and Article 44 is devoted to specific relations between the Security Council and Member States who, not being members of the Security Council, would participate in such operations (for a discussion, see *infra* 2.4.1.5.2). The fundamental Article 51 recognizes the Member States’ “inherent right to self-defence” against armed attacks (see *infra* 2.4.1.1–2.4.1.4). Finally, already outdated Articles 53 and 107 of the Charter address the use of force, where necessary, against former enemies in the Second World War.⁸

During the period since the 1999 NATO operation in Kosovo,⁹ and especially in connection with the US-led *Operation Enduring Freedom* (Afghanistan)¹⁰ and, subsequently, *Operation Iraqi Freedom* (Iraq), a number of novel doctrines have been put forward with a view to justifying these uses of force (cf. *supra* 1.1.2.3)—potentially an important development in a field of international law as conservative as the post-1945 *jus ad bellum*,¹¹ for, at times, these doctrines claimed to be as far-reaching

⁶ UN Charter, Article 1(1), emphasis added.

⁷ On the role of the International Court of Justice in this domain, see *supra* 1.2.5.4.

⁸ With the admission of Italy (1955), Japan (1956) and Germany (1973) as “peace-loving States” (in the language of Article 4 of the Charter) to the United Nations, these provisions became obsolete and were recommended for deletion from the Charter. See: “A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change,” UN Doc. A/59/565 (2004), para 298, published at: <http://www.un.org/secureworld/> (last accessed 15 November 2012); In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005 (2005), para 217, published at: <http://www.un.org/largerfreedom/> (last accessed 15 November 2012). See also Odello 2005, pp. 231–262.

⁹ Cf. Badescu 2011, p. 1: “In March 1999, the North Atlantic Treaty Organization (NATO) started a bombing campaign against the Former Federal Republic of Yugoslavia to protect the Albanian population in Kosovo from being ethnically cleansed [...] NATO’s actions were morally justified yet violated international law, as the UN Security Council had not authorized the military intervention”

¹⁰ See Schmidt-Radefeldt 2005, pp. 245–253.

¹¹ As Rein Müllerson so candidly noted, “the legal texts concerning use of force have indeed undergone little, if any, change since the adoption of the UN Charter in 1945. Even General Assembly resolutions on the issue have not contained anything that could be even remotely defined as ‘progressive development of international law.’” See Müllerson 2002, pp. 150–151.

as to be able to modify the Charter's provisions on the use of force. By contrast, it is argued in this chapter that Article 2(4) and relevant customary international law should not be interpreted in too broad a manner,¹² and that any use of force in inter-State relations, which would not be compatible with the overarching prohibition contained in Article 2(4), would accordingly constitute a breach of the Charter.¹³ Then again, since not all unlawful uses of inter-State armed force constitute acts of aggression (see *infra* 2.3 and 5.1.1.2–5.1.1.3),¹⁴ and hence entail individual criminal liability under customary international law (see *infra* 4.1–4.2) and the Rome Statute of the International Criminal Court (see *infra* Chap. 5), it will be an aim of this chapter to distinguish between distinctively aggressive and other, less grave, unlawful uses of inter-State armed force which, though breaching Article 2(4), would not (necessarily) entail individual criminal responsibility.

2.1 Nature of States' Obligation to Refrain from the Threat or Use of Force in International Relations (Article 2(4) of the UN Charter)

As the Covenant of the League of Nations (see *supra* 1.1.6.2) and the Kellogg-Briand Pact (see *supra* 1.1.6.5) were unable to prevent the Second World War, it was an aim of the drafters of the Charter of the United Nations to remedy the deficiencies of both instruments (see *supra* 1.2.5).¹⁵ The ambitious reform which they undertook to accomplish was without a precedent in that it sought to transform the traditional *jus ad bellum*, which had not excluded States' right to use force in furtherance of their foreign policies, into a novel *jus contra bellum*, which not only outlawed war as a legitimate means of settlement of international disputes but also banned most uses of military force short of war and even threats to use force in international relations.¹⁶ This section examines the relevant rule contained in the Charter as a conventional one (see *infra* 2.1.1), as one of customary international law (see *infra* 2.1.2) and of *jus cogens* (see *infra* 2.1.3).

¹² Again, in the words of Rein Müllerson, "[i]n the domain of use of force, which is so central to international law that novelties in it may affect the very foundations of this legal system as a whole, significant changes have occurred only after most terrible conflicts, which, using today's formula, have shocked the conscience of humankind. In such cases, changes in the political configuration of the world, in international law generally and in *jus ad bellum* in particular, have not only coincided in time and space, but have all been caused by the same set of factors and reflect different facets of the same process." See Müllerson 2002, p. 151.

¹³ See Schrijver 2005, pp. 36–37.

¹⁴ The UN Charter distinguishes, in Article 39, between threats to international peace and security, breaches of peace and aggression but does not define either of the terms. Cf. *infra* note 30.

¹⁵ See Dinstein 2001, p. 80.

¹⁶ See Simma 1994, p. 111.

2.1.1 *Treaty Obligation Under Article 2(4)*

A provision of paramount importance, Article 2(4) has been referred to as “the cornerstone of peace in the Charter,” “the heart of the United Nations Charter” or the “basic rule of contemporary public international law.”¹⁷ Undoubtedly, Article 2(4) is by far better worded than was Article 1 of the Kellogg-Briand Pact (cf. supra 1.1.6.5), for it prohibits the use of force in general and not only war, and covers even threats of force. Besides, this rule of international law, in conjunction with related ones (see supra introductory note to this chapter), creates—in the words of Albrecht Randelzhofer, at least in theory—an institutional United Nations system of collective sanctions against *any* offender (Articles 39–51).¹⁸ However, as will be seen, even this major provision is not without ambiguities. As adopted at the San Francisco Conference, Article 2(4) 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.

2.1.1.1 Protected States and Values

The content of Article 2(4) raises a number of legal and technical issues. First, whilst formally creating legal obligations only for the United Nations Members, the provision in fact protects Members and non-Members (“any State”) alike.¹⁹ Second, it singles out two groups of objects which are protected against unlawful threats or use of force under the Charter: on the one hand, States’ territorial integrity and political independence are mentioned as specific examples of protected values; on the other hand, it is also forbidden to issue threats or use force “in any other manner inconsistent with the Purposes of the United Nations.” These two groups of protected values, although equated in one provision, are not quite of the same nature (because Article 2 technically lists the institutional Principles—not the Purposes—of the United Nations). Whereas the territorial integrity and political independence are referred to in Article 2(4) expressly and in a self-contained manner, the purposes of the United Nations are listed separately in Article 1 of the Charter and include:

- the maintenance of “international peace and security” and related undertakings to that end (Article 1(1));
- developing “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” and taking “other appropriate measures to strengthen universal peace” (Article 1(2));

¹⁷ Ibid.

¹⁸ Ibid. See also Waxman 2013, pp. 151–189; Werle 2009, p. 407.

¹⁹ See Malanczuk 1997, p. 309.

- developing “international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (Article 1(3));
- and being “a centre for harmonizing the actions of nations in the attainment of these common ends” (Article 1(4)).

Nonetheless, since both parts of the phrase are to be read in conjunction, one may conclude that the purposes of the United Nations are, as objects protected under Article 2(4) of the Charter, of an equal value with the territorial integrity and political independence of States. Importantly, an inverse interpretation of Article 2(4) appears to suggest that (Members of) the United Nations *might* lawfully threaten to use force in their international relations, or use it, in order to preserve the territorial integrity or political independence of theirs or, in appropriate circumstances, also of (an)other State(s), or in another manner, which would be consistent with the Purposes of the United Nations. The foremost exceptions to the prohibition contained in Article 2(4) will be considered below at 2.4.

2.1.1.2 The Meaning of “Force”

The meaning of the notion “force” referred to in Article 2(4) is essential. It is generally agreed among scholars that this provision covers, in the first place, the threat or use of *armed* or *military* force—i.e., the employment by a State of its regular armed forces²⁰ (in a broad sense currently accepted in international law²¹), or of irregular armed groups.²² and of means²³ and methods of warfare (in the sense of applicable international humanitarian law) against another State, its nationals, public or private property. Although Article 2(4) contains no qualification of the term “force,” one may derive this conclusion from the Charter’s related provisions (for example, from Articles 41 and 46 where this explicit qualification is found), the 1970 Friendly Relations Declarations and from the Charter’s *travaux préparatoires*: it is known, for instance, that the proposal Brazil made on 6 May 1945 at the San Francisco Conference with a view to extending the prohibition of force to economic coercion, was explicitly—and quite correctly—rejected.²⁴ As Albert Randelzhofer notes, an extension of Article 2(4) to other forms of force would

²⁰ Christine Gray refers to “an invasion by the regular armed forces of one state into the territory of another state” as “[t]he paradigm case” of an armed attack. See Gray 2008, p. 128.

²¹ For a current definition of armed forces under international law, cf. Article 43 of the First Additional Protocol to the 1949 Geneva Conventions, of 8 June 1977.

²² It is understood that the activities of those groups should be attributable to the State in question in accordance with international law. See Gray 2008, pp. 132–140.

²³ See *ibid.*, at 128, especially notes 57 and 58, respectively, regarding the use of missiles and naval mines as particular types of armed attacks, and at 129, especially, note 59, regarding the regulation of cyber-attacks.

²⁴ See Simma 1994, p. 112.

result in leaving States virtually with no internationally lawful means of exerting pressure upon States that violate international law.²⁵ Correspondingly, the first Principle in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, which interpreted Article 2(4), dealt solely with the military force,²⁶ and the prohibition of economic, political and other types of coercion was covered under the heading of non-intervention.²⁷

The following sections will briefly examine the use of two particular types of force—the so-called “physical” and “indirect” force—which, while being distinct from the use of armed force, may, in some circumstances, entail the effects of the latter (first and foremost, the exercise by a State of its right to self-defence (cf. *infra* 2.4.1.1–2.4.1.4).

2.1.1.2.1 Physical (Non-military) Force

It is submitted that in situations where a State does not resort to its armed forces, irregulars or means and methods of warfare (cf. *supra* 2.1.1.2) against another State, its nationals, public or private property, there is no use of military force in the sense of Article 2(4) of the UN Charter. Even so, States can be affected by forcible measures of a social, natural or technical kind not involving the use of military force in a proper sense of the word—i.e. by manifestations of the so-called “physical” force—whose effects at times can be just as critical as those of military force.²⁸ It appears that a contemporary—and most relevant—example of physical non-military force, which, as a matter of fact, did produce the effects of an armed attack, were the terrorist attacks of 11 September 2001 in New York, Washington, D.C. and Pennsylvania.²⁹ They

²⁵ *Ibid.*

²⁶ Cf. the General Assembly Resolution 2625 (XXV) of 24 October 1970, Annex, Principle 1, for text see: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement> (accessed 9 October 2012).

²⁷ *Ibid.*, Principle 3, para 2.

²⁸ See Simma 1994, p. 112. Cf. Kulagin 2006, pp. 79–103; Sayapin 2009, pp. 8–13

²⁹ For insightful comments on the impact of the 9/11 attacks on international law, see Abi-Saab 2002, pp. 305–313; Arnold 2006, pp. 297–319; Bianchi 2006, pp. 881–919; Branche 2007, pp. 543–560; Cassese 2001, pp. 993–1001; Droegge 2007, pp. 515–541; Fitzpatrick 2003, pp. 241–264; Franck 2001, pp. 839–843; Hudson 2009, pp. 702–717; Kemp 2010, pp. 59–63; McWhinney 2002a, pp. 280–286; Murphy 2003a, pp. 347–364; Neuman 2003, pp. 283–298; Neuman 2004, pp. 1019–1029; Newman and Clarke 2011, pp. 290–296; Pejic 2005, pp. 71–100; Pellet and Tzankov 2004, pp. 68–72; Ratner 2002, pp. 905–921; Reisman 2003, pp. 82–90; Roberts 2004, pp. 721–749; Ross 2007, pp. 561–590; Ruys and Verhoeven 2005, pp. 289–320; Sassóli 2006, pp. 959–981; Shaw 2008, pp. 1159–1166; Tams 2009, pp. 359–397; Vagts 2003, pp. 313–326; Von Schorlemer 2003, pp. 265–282; Warbrick 2004, pp. 989–1018; Wellens 2003, pp. 15–70; Yee 2002, pp. 287–293; Zwitter 2008, pp. 24–33.

were of such an unparalleled magnitude that the UN Security Council pronounced in its resolution 1368 (2001)³⁰ that “such acts, like any act of international terrorism, [were] a *threat* to international peace and security” (emphasis added), and emphasized “that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts [should] be held accountable.”³¹ These provisions necessitate at least two observations for the purpose of our argument. First, the Security Council held “any act of international terrorism”—including the specific ones, which occurred on 11 September 2001—to be a threat to international peace and security considerable enough to be commensurate with the invocation by a victim State of its “inherent right of individual or collective self-defence in accordance with the Charter,”³² i.e., one comparable to an “armed attack” in the sense of Article 51 of the Charter (cf. *infra* 2.4.1.1). Yet, in this author’s view, the attacks of 11 September 2001 were, *stricto sensu*, not “armed,” unless the hijacked civilian airplanes were to be regarded, by analogy, as “military weapons.” True, the airplanes have been *used* to perform the destruction they did but they were not meant, by their primary function, to be used for killing people and destroying property, and should therefore not be regarded as “military weapons” or “means of warfare” in the sense of applicable international law. The Security Council’s reference to Article 51 was entirely appropriate in the light of the 9/11 terrorist attack’s *effects* comparable to those of an armed attack but not because of the attack’s armed or military *nature*.

Second, the attack of 11 September 2001 was carried out not by a State, or on behalf of a State, but by a non-State actor on its own behalf. That an act of aggression can, in accordance with current theory, only be committed by a State (see *infra* 3.1.5), might be yet another reason for not having termed the attack an act of aggression. As a matter of fact, Article 51 of the UN Charter does not specify that an armed attack in respect of which a State’s right of individual or collective self-defence may be invoked must of necessity be committed by a State. It states that “[n]othing 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” (emphasis added), without specifying the origin of the armed attack. Accordingly, a literal interpretation of Article 51 suggests that every Member of the United Nations has an inherent right to individual or collective self-defence against *any kind* of armed attack, be it carried

³⁰ In so doing, the Security Council acted in accordance with Article 39 of the Charter: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Notably, neither this Article nor any other Article in the Charter defines these terms, and the practical distinction between the three types of situations is left up to the Security Council.

³¹ Resolution 1368, adopted by the Security Council at its 4370th meeting, on 12 September 2001, paras 1 and 3.

³² *Ibid.*, 3rd preambular paragraph.

out by another State or a non-State entity. The decisive issue is therefore that of accommodating Article 51's requirement that the attack in question be armed, whereas the attack of 11 September 2001 was, as was discussed above, of an extremely violent but still non-military nature; it was the *effect* of the attack that placed it on an equal footing with an armed one. To conclude, the United States, befallen by an international terrorist attack, was right in invoking Article 51 but that invocation should have been founded on the quasi-military effects of the physical attack rather than on its ostensibly military nature. More generally, a State finding itself under an international terrorist attack is certainly entitled to repel it, including by military means, individually or collectively, without thereby violating Article 2(4) of the Charter, but the precise justification of an invocation of the right to self-defence under Article 51 should depend on the circumstances in each case.

2.1.1.2.2 "Indirect Force"

As was discussed above at 2.1.1.2, the scope of Article 2(4) is indeed limited to the proscription of armed force but, notably, this proscription also embraces the concept of "indirect force." This notion generally stands for a State's technical or organizational involvement in an international armed conflict ongoing between other States (cf. *infra* 5.1.1.3.6), or else in a non-international armed conflict occurring in another State³³—for example, by sending to that State armed bands, groups, irregulars or mercenaries (cf. *infra* 5.1.1.3.7). The UN General Assembly interpreted the prohibition of indirect force in the 1970 Friendly Relations Declaration (cf. *supra* 1.2.5.3) as follows:

Every State has the duty to refrain from organising or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.³⁴

Obviously, as Albrecht Randelzhofer notes, both prohibited modes of action—the organization or encouragement of irregular forces or armed bands, on the one hand, and the prohibition of participation in acts of civil strife or terrorist acts, on the other hand—are worded in such a broad manner that virtually every act of technical or organizational support rendered by a State would be covered by "organizing," "encouraging," "instigating," "assisting" or "participating," and the meaning of "armed force" under international law would thereby almost inevitably be blurred.³⁵

³³ See Gray 2008, pp. 105–110.

³⁴ See the Friendly Relations Declaration, *supra* note 26, paras 8 and 9.

³⁵ See Simma 1994, p. 113.

With a view to avoiding this effect, the International Court of Justice made a proper observation in the *Nicaragua* Judgment that not every act of assistance should be regarded as a use of force.³⁶ However, the Court did not suggest any definitive criteria for determining which acts of assistance, and in which circumstances were to be viewed as an internationally wrongful threat or use of force in the sense of Article 2(4) of the Charter.³⁷ It appears that such a criterion might consist in the legal evaluation of the threat or use of force itself, and the employment of “indirect force” in its furtherance would derive its (il)legality from that of the main effort. In other words, providing assistance in the circumstances of an internationally lawful use of force should be regarded as lawful, whereas employing “indirect force” in support of a threat or use of force in breach of Article 2(4) of the Charter would itself constitute a breach thereof. Should the International Law Commission be tasked with producing the “Draft Articles” on the use of force by States (see *supra* 1.2.5.3), its expert opinion on the issue of “indirect force” might hopefully contribute to resolving the normative ambiguity left unanswered by the International Court of Justice in the *Nicaragua* Judgment.

2.1.2 *Obligation Under Customary International Law*³⁸

In addition to its conventional nature (see *supra* 2.1.1), some publicists deem Article 2(4) of the Charter to also be part of customary international law.³⁹ Yet, this point of view is only partially accurate. In the *Nicaragua* Judgment, the International Court of Justice held that the use of force was also—in addition to its being subject to the Charter’s conventional provisions—regulated by customary

³⁶ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua case)*, ICJ Reports (1986), para 116.

³⁷ *Ibid.*, paras 95, 97, 107, 110.

³⁸ See Baker 2010, pp. 173–204; Bernhardt 1976, pp. 50–76; Bing 2010, pp. 81–109; Brownlie 1998, pp. 4–11; D’Amato 1969, pp. 211–223; D’Amato 1987, pp. 101–105; Harris 2004, pp. 20–42; Kunz 1953, pp. 662–669; Norman and Trachtman 2005, pp. 541–580; Roberts 2001, pp. 757–791; Skubiszewski 1971, pp. 810–854; Strebel 1976, pp. 301–346.

³⁹ The International Law Commission held the view that “the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force.” See *ILC Yearbook* 1966, vol. II, p. 247. The view expressed by T. Gazzini may also be noted: “[T]he norms on the use of force embodied in the Charter and those existing under international law are substantially identical because of the interaction between the Charter and customary international law, on the one hand, and the virtual universality of the UN, on the other hand.” See Gazzini 2006, at 320. See also Doehring 1976, pp. 77–95.

rules of international law, the content of which was not necessarily identical to that of the treaty provisions:

As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter [...] by no means covers the whole area of the regulation of the use of force in international relations.⁴⁰

The ICJ held explicitly that the operation of the Charter did not either “subsume” or “supervene” applicable customary international law,⁴¹ and that “the areas governed by the two sources of law [did] not exactly overlap, and the substantive rules in which they are framed [were] not identical in content.”⁴² Moreover, the Court ruled that nothing should impair the parallel applicability of a relevant customary norm, even if a conventional norm and a customary norm were to have exactly the same content.⁴³ This leads us to a discussion of the International Court of Justice’s view of customary international law on the prohibition of the use of force between States, as it was reflected in the *Nicaragua* Judgment, with a view to reconciling it with Article 2(4).

2.1.2.1 Article 2(4) of the UN Charter Versus Customary International Law

This distinguished Judgment has, in fact, been somewhat inconsistent on a few essential points. Having, on the one hand, acknowledged the primacy of the Charter of the United Nations in the legal regulation of the use of force in international relations, the ICJ nonetheless considered it apposite to “supplant” the Charter’s relevant rules by customary international law applicable to a given case.⁴⁴ Having further claimed to embark on the determination of such rules, the Court, in fact, limited itself to concluding that the practice of States must “in general, be consistent” with the rules in question,⁴⁵ without considering the idiosyncratic particulars of such

⁴⁰ See *Nicaragua* Judgment, *supra* note 35, para 176. For a contrary position, see *The Legality of United States Participation in the Defense of Viet-Nam*, 4 March 1966, where the United States affirmed that “it should be recognized that much of the substantive law of the Charter has become part of the general law of nations through a very wide acceptance by nations the world over. This is particularly true of the Charter provisions on the use of force”, quoted in Falk 1968, p. 585. See also Constantinou 2000, p. 204.

⁴¹ *Nicaragua* Judgment, para 174.

⁴² *Ibid.*, para 175.

⁴³ *Ibid.*

⁴⁴ In the words of Tarcisio Gazzini, the Court concluded “that the rules on the use of force cannot be construed on the basis of postulates established through the inclusion of these rules in the Charter and their reiteration in subsequent documents. Rather, it has to be determined through the analysis of the practice regarding the interpretation and application of these norms by the subjects to which these are addressed.” See Gazzini 2006, at 321.

⁴⁵ See *Nicaragua* Judgment, para 186.

practice in a more comprehensive fashion. And, finally, when assessing the *opinio juris* on the subject, the ICJ regarded, quite inaccurately, a few non-binding (“soft law”) sources as constituting evidence of States’ *opinio juris* on the prohibition of the use of force.⁴⁶

As was noted above at 2.1.2, the Court’s starting point was that the legal regulation of the use of force in international relations was not limited to the United Nations Charter and also included rules of customary international law.⁴⁷ The Court referred, by way of providing an example of continued application of customary international law alongside the Charter, to its Article 51—a State’s inherent right to individual or collective self-defence.⁴⁸ Having restated the Charter text that “nothing [in the present Charter] shall impair” the realization of this inherent right in the event of an armed attack, the Court concluded that Article 51 would only be meaningful on the assumption that the right in question were of a customary nature—even if its present content was indeed confirmed and influenced by the Charter⁴⁹ (for a detailed discussion of States’ right to self-defence, see *infra* 2.4.1.1–2.4.1.4). Nor did the Charter regulate all aspects of the right’s content and ways of implementation: for example, it did not contain any rule to the effect that individual or collective self-defence would warrant only measures which are proportionate to the armed attack and necessary to respond to it efficiently—a rule well established in customary international law.⁵⁰ The ICJ observed likewise that the notion of “armed attack,” which triggers the exercise of the right of self-defence by the State(s) affected by the attack, was not defined in the Charter, and was not part of either general or particular treaty law either.⁵¹ In the absence of detailed conventional regulations on such issues, the Court could not plausibly conclude that Article 51 of the UN Charter “subsume[d] and supervene[d]” applicable customary international law. Instead, the ICJ concluded that, with regard to the use of force in inter-State relations, customary law continued to apply alongside treaty law, and that the areas governed by the two sources of international law did not “overlap exactly.”⁵²

⁴⁶ *Ibid.*, paras 191–192.

⁴⁷ A passage in the Separate Opinion of the Court’s President, Judge Singh, on the interrelation between the rules of customary and conventional law on the use of force is remarkable: “If an issue was raised whether the concepts of the principle of non-use of force and the exception to it in the form of use of force for self-defence are to be characterized as either part of customary international law or that of conventional law, the answer would appear to be that both concepts are inherently based in customary international law in their origins, but have been developed further by treaty-law. In any search to determine whether these concepts belong to customary or conventional international law it would appear to be a fallacy to try to split any concept to ascertain what part or percentage of it belongs to customary law and what fraction belongs to conventional law. There is no need to try to separate the inseparable [...]” See Separate Opinion of President Nagendra Singh, 152.

⁴⁸ See *Nicaragua Judgment*, para 24.

⁴⁹ *Ibid.*, para 176.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

2.1.2.2 Customary International Law on the Use of Force: The State Practice

Substantial problems started emerging when the Court attempted to identify the gist of rules of customary international law governing the use of force in inter-State relations. Having noted that there existed a substantial degree of accord between Nicaragua and the United State as to the applicable rules of customary law,⁵³ the Court nevertheless declared its willingness to deal with the matter:

This concurrence of their [the Parties'] views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.⁵⁴

The Court did not thereby require "that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs."⁵⁵ In other words, the Court was not of the view that, in order for Article 2(4) and other relevant rules of the UN Charter to be recognized as customary, the corresponding State practice must be in exact conformity with those rules. Instead, the ICJ deemed it sufficient that the State practice⁵⁶ be in *general* consistency with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, and not as indications of the recognition of a new rule:

If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then

⁵³ Ibid., para 187.

⁵⁴ Ibid., para 184.

⁵⁵ Ibid., para 186.

⁵⁶ It has been suggested that "[b]oth physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battlefield behavior, the use of certain weapons and the treatment provided to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organizations and at international conferences and government positions taken with respect to resolutions of international organizations." See Henckaerts and Doswald-Beck 2005, p. xxxii.

whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁵⁷

In the opinion of Nicholas Tsagourias, the ICJ allowed for a methodological inaccuracy in that it focused predominantly on the *opinio juris*, from which it deduced, almost mechanically, the conformity of State practice and refused to test the actual practice of States with respect to the prohibition of the use of inter-State force.⁵⁸ It appears that the issue of State practice in an area as crucial and delicate as this should have been treated with more attention, for at present it is not sufficiently measurable. Michael J. Glennon observes that, according to the 2004 Report of the High-Level Panel on Threats, Challenges and Change,⁵⁹ “from 1945 to 1989, states used military force numerous times in interstate disputes. By one count, force was employed 200 times, and by another count, 680 times.”⁶⁰ In other words, he goes on, “the panel does not tell us who is right; indeed, it does not seem to care who is right. Apparently, it would not matter whether the rules had been violated 200 or 680 or 6800 times—the panel seems to suppose the number of violations is irrelevant.”⁶¹ However, he continues, the actual number of violations of a rule is important, for at least two reasons:

First [...] the report rejects humanitarian intervention by states. The reason, the report says, is that humanitarian intervention by states would pose a fatal risk to the stability of the global order. Yet, how can we know how great the threat would be to the stability of the global order unless we know how stable that order really is—unless we know how effective the current rules actually have been in preventing the use of force?

Second, after the number of violations exceeds a certain point, it is reasonable to conclude that states no longer consent to the rule and that the rule is no longer binding—that it has fallen into desuetude. Without examining the extent of non-compliance, however, it is impossible to know whether the rule is still a good law. Why does the panel assume that the law is what it believes the law *should be*?⁶²

⁵⁷ *Nicaragua Judgment*, para 186.

⁵⁸ As N. Tsagourias point out, it would have been more accurate to derive the *opinio juris*, as evidence of States' conviction that their behavior is in conformity with binding rules of international law, from their practice (in the first place, physical but also verbal acts), whereas the inverse methodology is not as convincing. See Tsagourias 1996, p. 85. Besides, in practices contrary to established rules of customary international law there is, in fact, an inherent risk that these contrary practices can, over time, “shake” the rules and weaken them. T. Gazzini thus explained the technicality of reforming a rule of customary international law: “The process of change is ignited by the proposal for a new legal regulation put forward by some States. These States develop and manifest an *opinio necessitatis* to the effect that a norm ought to be changed. When the generality of the States composing the international community express their acceptance, or at least acquiesce, to such a proposal, conscious of its potential binding effect, the norm changes.” Importantly, there may be periods when the content of customary rules would not be clear: “Given the incremental nature of this process, rules may occasionally be in a state of flux or legal incertitude. This is physiological in a horizontal system such as the international legal system.” See Gazzini 2006, p. 321.

⁵⁹ See supra note 8.

⁶⁰ Quoted in Glennon 2006, p. 310. See also Bleckmann 1976, pp. 374–406; Bleckmann 1977, pp. 107–121.

⁶¹ Glennon 2006, p. 311.

⁶² *Ibid.*

2.1.2.3 Customary International Law on the Use of Force: The *opinio juris*

As concerns the *opinio juris*, the Court did not produce any more clarity on the matter either, for it followed from the Parties' submissions to the Court that they regarded Article 2(4) as being generally reflective of customary international law on the issue in question, and that they did not challenge the obligation emanating from that Article "to 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."⁶³ The Court nonetheless felt that it had to go beyond the submissions of the States involved in the dispute, and to satisfy itself as to the existence in customary international law of a more universal *opinio juris* of the mandatory character of this rule. According to the Court, an adequate *opinio juris* might be inferred from, *inter alia*, the attitude of the parties to the dispute and of other Members of the United Nations towards relevant General Assembly resolutions, especially towards the 1970 Friendly Relations Declaration (see supra 1.2.5.3):

The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law [...]⁶⁴

As regards the United States in particular, an expression of its stance towards the prohibition of the use of force was alleged to be found in some of its earlier verbal acts, such as its approval of a resolution condemning aggression adopted at the Sixth International Conference of American States (18 February 1928),⁶⁵ or its ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933) whose Article 11 obliged States Parties not to recognize territorial acquisitions or special advantages which have been obtained by force.⁶⁶ In the same spirit, the acceptance by the US of the principle of the prohibition of the use of force, which was integrated in the 1975 CSCE Final Act's Declaration of principles whereby the participating States had undertaken to "refrain in their mutual

⁶³ *Nicaragua Judgment*, para 188.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, para 189.

⁶⁶ See Article 11 of the Montevideo Convention on the Rights and Duties of States, 26 December 1933: "The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily," text available at: <http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> (last accessed 15 November 2012).

relations, as well as in their international relations in general” from the threat or use of force, was considered to constitute an evidence of its official position towards the legal prohibition of the inter-State use of force.⁶⁷ Thus, without examining actual State practice, the International Court of Justice held that the acceptance of the above non-binding declarations and resolutions, most of which had been worded in political—not even legal—terms, proved to a sufficient degree the existence of an *opinio juris* prohibiting the use of force in international relations.⁶⁸

This conclusion could not have been more dubious, for instead of reflecting upon appropriate State practice, the Court merely acknowledged the Parties’ verbal acts as evidence of customary international law. As a matter of fact, the provisions of General Assembly resolutions are not necessarily endowed with *opinio juris*—the psychological conviction that their rules do indeed reflect binding international law. As Nicholas Tsagourias recalled—by reference to H. Hart—States sometimes consent to rules either because they face popular “criticism and pressure,” or because the rules at issue are “not mandatory.”⁶⁹ In N. Tsagourias’ view, the General Assembly resolutions, in addition to their non-mandatory legal status under the UN Charter,⁷⁰ always are products of policy deals, concessions and political wrestling over the United Nations Member States’ national interests.⁷¹ He also recalled, quite properly, H. W. A. Thirlway’s suggestion to the effect that, in order for a UN General Assembly resolution to be regarded as evidence of *opinio juris*, there should be “a sufficient body of state practice for the usage element of the alleged custom to be established without reference to the resolution.”⁷² However, the confusing statistics offered in the High Panel Report (see *supra* 2.1.2.2) lead one to conclude that the State practice with regard to the legal prohibition of the use of force is not either coherent or uniform. Besides, as N. Tsagourias suggested, the fact that States at times behave inconsistently with the General Assembly resolutions they consented to allows assuming that States sometimes vote in the General Assembly for what they believe international law “ought to be”—or *might* be in the future—and not for what it “actually is” at the present stage.⁷³ The legal justifications for some of States’ modern practices in the area of the use of force are examined below, at 2.4.

⁶⁷ See Conference on Security and Co-operation in Europe, Final Act, 1 August 1975, Principle II (“Refraining from the threat or use of force”), text available at: <http://www.osce.org/mc/39501> (last accessed 15 November 2012).

⁶⁸ See *Nicaragua* Judgment, paras 186 and 189.

⁶⁹ Quoted in Tsagourias 1996, at 86 and 92, note 42.

⁷⁰ UN Charter, Article 14: “Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations”

⁷¹ See Tsagourias 1996, at 86.

⁷² Quoted in Tsagourias 1996, at 87 and 93, note 45.

⁷³ See Tsagourias 1996, at 87.

2.1.3 *Jus cogens* Obligation

Whereas the treaty-based and customary nature of Article 2(4) has been considered above (see *supra* 2.1.1–2.1.2), it may also be useful to reflect on whether this provision—or at least some of its elements—also constitutes a *jus cogens* norm, a peremptory norm of general international law.⁷⁴ If this indeed is the case, the legal consequences of its breach should be more far-reaching than those of a breach of an “ordinary” conventional or customary rule of international law.⁷⁵ The *jus cogens* rules give rise to *erga omnes* obligations,⁷⁶ that is to say, their breaches affect the interests of larger groups of States—indeed, those of the international community of States as a whole⁷⁷—which suggests that international law should provide States with more compelling tools for reacting to such breaches, commensurate with their particular gravity.

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts⁷⁸ (cf. *supra* 1.2.5.6) suggest, in Articles 40⁷⁹ and

⁷⁴ See the Vienna Convention on the Law of Treaties, Article 53 (“Treaties conflicting with a peremptory norm of general international law (“*jus cogens*”)): “[...] For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See Scheuner 1967, pp. 520–532; Scheuner 1969, pp. 28–38.

⁷⁵ See Abashidze 2009, pp. 505–510; Bassiouni 1996, pp. 63–74; Brownlie 1998, pp. 511–519; Christakis 2006, pp. 127–166; Kadelbach 2006, pp. 21–40; Klein 2002, pp. 1241–1255; Malanczuk 1997, pp. 57–59; Orakhelashvili 2005, pp. 59–88; Riesenfeld 1966, pp. 511–515; Salcedo 1997, pp. 583–595; Schwelb 1967, pp. 946–975; Scobbie 2002, pp. 1201–1220; Shelton 2006, pp. 291–323; Sicilianos 2002, pp. 1127–1145; Talmon 2006, pp. 99–126; Tomuschat 2006, pp. 425–436; Von Verdross 1966, pp. 55–63; Vranes 2005, pp. 391–405; Vranes 2006, pp. 395–418; Weiler and Paulus 1997, pp. 545–565; Wyler 2002, pp. 1147–1160.

⁷⁶ See Lukashuk 2004a, p. 252.

⁷⁷ See *ibid.*

⁷⁸ See UN General Assembly resolution A/RES/56/589, 12 December 2001. On the Articles, see: Aust 2005, pp. 407–429; Bowett 1999, pp. 163–173; Brown Weiss 2002, pp. 798–816; Caron 2002, pp. 857–873; Condorelli 1994, pp. 106–115; Crawford 1999a, pp. 435–460; Crawford 2002, pp. 874–890; Crawford et al. 2001, pp. 963–991; Dominicé 1999, pp. 353–363; Dupuy 1992, pp. 139–148; Dupuy 2002, pp. 1053–1081; Gaja 1999, pp. 365–370; Gaja 2010, pp. 11–14; Garcia-Amador 1955, pp. 339–346; Gattini 1999, pp. 397–404; Gibney 2007, pp. 1–14; Harris 2004, pp. 504–654; Kunz 1960, pp. 324–347; Malanczuk 1997, pp. 254–272; Murphy 2001, pp. 626–628; Nollkaemper 2003, pp. 615–640; Nolte 2002, pp. 1083–1098; O’Connell 2002, pp. 63–79; Pellet 1999, pp. 425–434; Posner and Sykes 2007, pp. 1–63; Rosenstock 2002, pp. 792–797; Spinedi 2002, pp. 895–899; Tams 2002, pp. 1161–1180; Wilmschurst 2004, pp. 93–96; Wyler 2002, pp. 1147–1160.

⁷⁹ See Articles on Responsibility of States for Internationally Wrongful Acts, Article 40 (“Application of this chapter”):

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

41,⁸⁰ a number of important implications, if a State's use of force in violation of Article 2(4) of the Charter were to be regarded as a breach of a peremptory norm of general international law, and not "merely" of treaty law or customary international law.⁸¹ First, it follows from Article 40 of Articles on Responsibility of States that a breach by a State of an obligation arising under a peremptory norm of general international law can be "serious"—if it involves "a gross or systematic failure by the responsible State to fulfil the obligation"—and "less-than-serious," logically, if the obligation in question is breached to a minor degree or not systematically.⁸² The UN Charter makes a formal distinction, in Article 39, between three types of breaches of obligations arising under Article 2(4): threats to the peace, breaches of the peace and acts of aggression—but does not contain any more specific normative or practical criteria for distinguishing between them. It appears that acts of aggression, as the most serious type of breaches in this classification, should of necessity fall within the ambit of Article 40 of the 2001 Articles,⁸³ whereas threats to the peace or breaches of the peace, although breaching Article 2(4), might not necessarily reach this threshold of gravity. We will not tackle threats to the peace or breaches of the peace in much detail, for the sake of volume space, as they do not fall within the scope of this research. The definitional particulars of acts of aggression are dealt with below, at 2.3 and 5.1.1.2–5.1.1.3.

Second, States are required ("*shall cooperate*")—not merely allowed or encouraged—to bring an end, by joint efforts, to any serious breach within the meaning of Article 40. Under current international law, such "lawful means" for suppressing acts of aggression—as the most serious breaches of the obligation arising under Article 2(4) of the UN Charter—include the suspension of rights and privileges under the Charter of the United Nations (Article 5), expulsion from the UN membership (Article 6), individual or collective self-defence (Article 51, see *infra* 2.4.1.1–2.4.1.4), collective enforcement action under the auspices of the Security

⁸⁰ See *ibid.*, Article 41 ("Particular consequences of a serious breach of an obligation under this chapter"): 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

⁸¹ The legal consequences of internationally wrongful acts of a lesser gravity than those of serious breaches of peremptory norms of general international law are outlined in Chapters 1 ("General principles") and 2 ("Reparation for injury") of the Articles' Part II, and consist in the continued duty of performing the obligation breached (Article 29), of ceasing and not repeating the internationally wrongful act in question (Article 30), and of making full reparation for the injury caused by the internationally wrongful act (Article 31). In turn, full reparation for the injury caused may take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of Chapter II.

⁸² In the latter situation, only general rules on the implementation of the international responsibility of States laid down in the Articles (Part II, Chapters I and II) would apply.

⁸³ See Lukashuk 2008a, p. 287.

Council (Chapter VII, see *infra* 2.4.1.5), or having recourse to regional security arrangements (Chapter VIII). The victim of a serious breach of an obligation arising under Article 2(4) of the UN Charter should not be left alone vis-à-vis the aggressor State(s). Instead, lawful means must be used to put an end to such an aggression as soon as possible.⁸⁴

Third, States are required to refrain from recognizing as lawful situations created by serious breaches of *jus cogens*, and from rendering aid or assistance in maintaining such situations. Acts of aggression can lead to a variety of unlawful results (see *infra* 4.1 and 4.5.1–4.5.4) most of which are, in one way or another, related to the victim State's territorial integrity or political independence (cf. *supra* 2.1.1.1). As will be shown below at 2.1.3.2, States and relevant international bodies have, as a rule, indeed refrained from recognizing the legal validity of circumstances resulting from unlawful uses of force or from violations of the principle of self-determination of peoples (cf. *infra* 2.4.2.2), which most probably testifies to the respective rules' status of *jus cogens*.

And last but not least, Article 41(3) mentions that serious breaches of obligations arising under *jus cogens* norms may also entail "further consequences" under international law. Assuming that Article 2(4) indeed constitutes *jus cogens*, one should think, among such further consequences, of a direct (see *infra* Chap. 5) or indirect (see *infra* 4.6.1 and Chap. 4) enforcement of individual criminal responsibility (see especially *infra* 5.2.4) of natural persons who would have contributed to the planning, preparation, initiation or execution of an act of aggression by a State (see *infra* 2.3 and 5.1.1.2–5.1.1.3). As will be discussed below (at 5.3.2.7 and 5.3.3), a determination by the Security Council that an act of aggression—a serious breach of an obligation arising under the hypothetical *jus cogens* provision contained in the Charter's Article 2(4)—has been committed should predictably lead to the identification of individuals who caused that act to happen, and to the determination of their criminal responsibility for the act. Likewise, the ICC Prosecutor's substantiated assumption about a State's having committed an act of aggression—even without a plain determination to the effect by the Security Council—may, in appropriate circumstances, lead to the same consequences (see *infra* 5.3.2.8–5.3.2.9).

Having outlined the specific consequences that the most serious type of breach of Article 2(4) of the Charter of the United Nations—an act of aggression—would necessitate, if this Article were confirmed to constitute *jus cogens*, the suitability of attributing this status to Article 2(4) should now be examined. This analysis should help in the assessment of a lasting discrepancy between the Charter's strongly worded prohibition of the use of inter-State force (see *supra* 2.1.1) and the actual, deplorably frequent, practice of its use (see *supra* 2.1.2.2). In other words, should State practices diverging, in serious ways, from Article 2(4) of the Charter be regarded as testifying to the emergence of new customary rules of international law on the inter-State use of force, or should they, instead, be viewed as serious breaches of obligations arising under a peremptory norm of general international law?

⁸⁴ See Okimoto 2011b, p. 35.

The 1969 Vienna Convention's definition of a peremptory norm of general international law (*jus cogens*, see *supra* note 74) includes a number of elements whose consideration should be useful for the purpose of this research: (1) a norm in question must be accepted and recognized by the international community of States as a whole; (2) due to its overarching character, such a norm allows for no derogation in any circumstances; and (3) it is a norm of a lasting, system-building nature, for it can be modified only by a subsequent norm of general international law having the same character. To which extent does the prohibition of the use of force embodied in Article 2(4) of the Charter of the United Nations meet these criteria?

2.1.3.1 Acceptance and Recognition by the International Community of States as a Whole

Article 2(4) is, by and large, accepted and recognized by the international community of States as a whole. As a Principle of the United Nations, it is binding upon all United Nations Member States and, as was pointed out above (see *supra* note 4), Article 2(4) also provides protection to non-Members, without being formally binding upon them. It was relied upon in numerous acts adopted by international bodies—such as the United Nations General Assembly (see *supra* 1.2.5.3) or the CSCE/OSCE—and in decisions of the International Court of Justice (cf. *supra* 2.1.2.2–2.1.2.3). Yet, as was noted above at 2.1.2.2, the practice of applying Article 2(4) since 1945 has not always been consistent with such formal recognitions. States were breaching the prohibition, directly or indirectly, on a variety of grounds but most frequently invoking the right to individual or collective self-defence, which is referred to in the Charter's Article 51 as a plain exception to the prohibition of the use of force (see *infra* 2.4.1.1–2.4.1.4). As was noted above (see *supra* 2.1.2.1), Article 51 does not itself regulate the implementation of this inherent right and necessitates further regulation by rules of customary international law—which creates space for (possibly selfish) interpretations of the provision. It may thus be concluded, somewhat paradoxically, that Article 2(4) is not contested by States verbally but is in fact breached, more often than could reasonably be expected from a Principle of the United Nations, as a matter of their practice.

2.1.3.2 Non-derogable Character

Now turning to the second criterion, one should ask whether there exist any specific (normative or practical) standards on whose basis one could differentiate between legitimate uses of force and “derogations” from Article 2(4)—which are not allowed, if that rule indeed constitutes one of *jus cogens*.⁸⁵ Clearly, the assertion of

⁸⁵ Article 2(4) itself contains only one such criterion—against which all relevant State practice, as inconsistent as it is—must be measured: no threat or use of force is to be applied by a State “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” (cf. *supra* 2.1.1.1).

a legal title over territory by (armed) force (cf. supra 2.1.1.2 and infra 4.1.2, 5.2.2–5.2.3) is among such specific standards. According to Alexander Orakhelashvili—a recognized authority on *jus cogens*—since 1945, the prohibition of deriving legal title from illegal uses of force and breaches of the principle of self-determination did acquire the status of a peremptory norm of general international law.⁸⁶ In his important treatise on the subject, A. Orakhelashvili recalled the opinions of Sir Robert Yewdall Jennings (1913–2004) to the effect that a use of force might not result in the acquisition of title if it has been condemned as illegal,⁸⁷ and of Charles de Visscher (1884–1973)—that international law could not regard as lawful the benefits ensuing from the use of force, if it outlaws the use of force in an absolute way.⁸⁸ A. Orakhelashvili evoked further that several territorial changes had been regarded as null and void due to their conflict with the *jus cogens* norms: for instance, “Jordan’s occupation of East Jerusalem since 1948 was a violation of Article 2(4) of the UN Charter, and consequently Jordan was unable to acquire the sovereignty over that area,”⁸⁹ and “[t]he Israeli Occupation of the West Bank and East Jerusalem was similarly void for an identical reason.”⁹⁰ Consequently, he concluded that the corollaries of the said occupations⁹¹ had not merely been denoted as “illegal”—they had been deemed null and void, that is to say, no legal effect could be derived from them ab initio.⁹² Therefore, despite the lapse of time, these territories are still referred to as occupied territories, and Israel as an occupying power.⁹³ A. Orakhelashvili recalled that these unequivocal characteristics had been confirmed by the UN Security Council in Resolution 672 (1990) and by the ICJ in the 2004 *Wall* Advisory Opinion.⁹⁴ A. Cassese (1937–2011) explained these opinions of the key bodies of the United Nations in the following manner:

[A]t present general international law has departed markedly from the principle of effectiveness: de facto situations brought about by force of arms are no longer automatically endorsed

⁸⁶ Orakhelashvili 2006b, pp. 218–219.

⁸⁷ See R. Jennings, *The Acquisition of Territory in International Law* (1967), p. 54, referred to in Orakhelashvili 2006b, p. 218.

⁸⁸ C. de Visscher, *Les effectivités du droit international public* (1967), pp. 115–116, referred to in Orakhelashvili 2006b, p. 218.

⁸⁹ See Orakhelashvili 2006b, p. 220.

⁹⁰ Ibid.

⁹¹ In accordance with Article 2 common to the 1949 Geneva Conventions on the Protection of Victims of War, the Conventions apply, in addition to any international armed conflicts, “to all cases of partial or total occupation [...] even if the said occupation meets with no armed resistance.” Consequently, Israel was expected to comply fully with the Fourth Geneva Convention since its entry into force for Israel on 6 July 1951. Cf. the ICRC database on international humanitarian law: <http://www.icrc.org/ihl> (last accessed 14 November 2012).

⁹² See Orakhelashvili 2006b, p. 220.

⁹³ Ibid.

⁹⁴ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports (2004), especially paras 19, 20, 31, 73, 74, 77 and others, referred to in Orakhelashvili 2006b, p. 220. See also Orakhelashvili 2006a, pp. 119–139.

and sanctioned by international legal standards. At present the principle of legality is overriding—at least at the normative level—and effectiveness must yield to it.⁹⁵

A. Orakhelashvili further stressed that the voidness of a forcible acquisition of territory should result in the nullity of juridical acts emanating from the unlawful exercise of sovereign powers in furtherance of that acquisition.⁹⁶ Thus, the International Court of Justice recalled in the *Wall* Advisory Opinion resolution 298 (1971) adopted by the Security Council on 25 September 1971 to the effect that “all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status.”⁹⁷ The Court further recalled the Security Council Resolution 478 (1980) by which a provision in Israel’s Basic Law on the status of Jerusalem as the “complete and united” capital of Israel,⁹⁸ along with all measures “which have altered or purport to alter the character and status of the Holy City of Jerusalem,” were declared null and void.⁹⁹ The ICJ also recalled the UN Security Council’s attitude—expressed in resolution 446 (1979) of 22 March 1979—towards “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967” as being in flagrant violation of the provisions of the Fourth Geneva Convention relative to the Occupying Power’s rights and responsibilities,¹⁰⁰ especially Article 49.¹⁰¹ The Court ruled that

⁹⁵ Quoted in Orakhelashvili 2006b, p. 221.

⁹⁶ Articles 42–56 of the 1907 Hague Regulations lay down the legal framework for the administration of occupied territories by an Occupying Power. In line with those provisions, recalls A. Orakhelashvili, the Security Council pronounced in its Resolution 497 (1981) that Israel’s policies of imposing “its laws, regulations and jurisdiction over the occupied Golan Heights [were] null and void.” See Orakhelashvili 2006b, p. 221.

⁹⁷ See *Legal Consequences*, para 75, quoted in Orakhelashvili 2006b, p. 221.

⁹⁸ Cf. Article 1 of the Basic Law of Israel, text available at: http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm (last accessed 16 November 2012), quoted in Orakhelashvili 2006b, p. 221.

⁹⁹ See *Legal Consequences*, paras 74–75, quoted in Orakhelashvili 2006b, p. 221.

¹⁰⁰ See *Legal Consequences*, para 99, quoted in Orakhelashvili 2006b, p. 221.

¹⁰¹ Cf. Geneva Convention IV, Article 49: “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in questions have ceased. The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated. The protecting Power shall be informed of any transfers and evacuations as soon as they have taken place. The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

those measures were “without legal effect” and could not alter the status of these territories (including of East Jerusalem) as occupied territories, and the continued status of Israel as an Occupying Power was confirmed accordingly.¹⁰² In A. Orakhelashvili’s opinion, the peremptory prohibition of the use of force under international law was also relevant in the cases of East Timor¹⁰³ and Northern Cyprus¹⁰⁴: “[I]n all these cases the invalidity of titles as confirmed by the United Nations organs [was] implementing and declaratory of the *jus cogens* nullity, not just a discretionary action.”¹⁰⁵

To wrap up on the second criterion, one may suggest, by way of analogy, that, if the prohibition of the use of armed force against the territorial integrity or political independence of States and the principle of self-determination of peoples were found, both by the International Court of Justice and leading publicists, to constitute a peremptory norm of general international law (*jus cogens*), there should be little reason to oppose why the other fundamental values protected by Article 2(4)—such as “international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (cf. Article 1(3) of the UN Charter)—as well as the other Purposes of the United Nations (cf. *supra* 2.1.1.1) might not be protected in a similar manner. If that were indeed so, the case for the legitimacy of “humanitarian intervention”—an international military tool to stop large-scale violations of fundamental human rights—could become a good deal stronger (see *infra* 2.4.3.2).¹⁰⁶

2.1.3.3 Normative Stability

As for the last criterion—that a *jus cogens* norm can be modified only by a subsequent norm of general international law having the same character—it seems to evoke no particular difficulty. It has been observed above (see note 11) that the conservative law regulating the use of force in international relations has experienced virtually no changes since the adoption of the Charter of the United Nations (cf. *supra* 1.2.5.1)—and no considerable revision of its text is to be expected in a foreseeable future, due to the complex technicalities of revising a treaty as

¹⁰² See Orakhelashvili 2006b, p. 222. See also *Legal Consequences*, para 78.

¹⁰³ See *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, ICJ Reports (1995).

¹⁰⁴ On this case, see Harris, O’Boyle and Warbrick 1995, pp. 7, 520, 643–644, 646, 652–653, 655, 674.

¹⁰⁵ Orakhelashvili 2006b, p. 222.

¹⁰⁶ Igor Lukashuk seems to share this supposition. See Lukashuk 2004a, pp. 249–250.

system-building as the Charter.¹⁰⁷ For sure, Article 2(4) shall not be formally replaced by an alternative provision having the same status for decades to come—which means that States should have to adapt their conduct to its requirements, or else learn better interpreting its content—as a matter of putting the principle of legality into practice, to borrow from Antonio Cassese’s statement quoted above (at 2.1.3.2)—in their favor, in light of their conflicting practices. Whereas rules of customary international law can indeed be altered by the practice of States (cf. supra 2.1.2.2), a peremptory norm of general international law (*jus cogens*) cannot be modified by any contrary practice of States, for any contrary practice would itself constitute a breach of the norm in question. As the foregoing analysis suggests, there are sufficient grounds to believe that Article 2(4) of the UN Charter does constitute a peremptory norm of general international law, and aggression should be regarded as a serious breach thereof and entail both the responsibility of a delinquent State and the individual criminal responsibility of its authors, in the sense of Article 41(3) of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts. A more detailed analysis of this assumption will now be offered.

2.2 Aggression as a Serious Breach of a Peremptory Norm of General International Law

As the Articles on Responsibility of States for Internationally Wrongful Acts were being drafted (cf. supra 1.2.5.6), there was an important debate within the International Law Commission as to whether and how the Articles should reflect the existence of a “hierarchy” of obligations arising under international law and, accordingly, one of breaches of those obligations (cf. supra 2.1.3).¹⁰⁸ The learned debate involved such contentious issues as the legal nature of international responsibility, the feasibility of imposing responsibility on sovereign States and of enforcing a collective “criminal liability” of States, the appropriateness of classifying States’ infractions as international delicts and international crimes, and the like.¹⁰⁹ A vast majority of the International Law Commission’s members favored

¹⁰⁷ Cf. Article 109 of the UN Charter: “1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference. 2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional process by two-thirds of the Members of the United Nations including all the permanent members of the Security Council.

¹⁰⁸ Lukashuk 2004a, pp. 262–266.

¹⁰⁹ Ibid., pp. 260–261.

the adoption of this two-level classification.¹¹⁰ Hence, the Commission's Special Rapporteur on International Responsibility, Roberto Ago (1907–1995), suggested, in 1976, a categorization of breaches of States' international obligations under the headings of international crimes and international delicts:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
 - (a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; [...]
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.¹¹¹

This proposal took into account post-War developments in international criminal law (see *supra* 1.2) inasmuch as it referred to aggression, in an explicit manner, among serious breaches of international obligations of essential importance for the maintenance of international peace and security (Article 19(3)(a)) and characterized these as international crimes (Article 19(2)). Even so, as the International Law Commission's attitude towards the "criminal responsibility of the State" evolved over time, the final version of the Articles contained no reference to international crimes but dealt with less controversially worded "internationally wrongful acts" (Article 2) and "serious breaches of peremptory norms of general international law" (Article 40, cf. *supra* 2.1.3). Notably, the final edition of the Articles, unlike R. Ago's earlier proposal, made no more specific mention of aggression and offered no other samples of serious breaches of international obligations. The effects of this omission are twofold: on the one hand, the formulation

¹¹⁰ For instance, T. Elias was in favor of the notion "international crime," E. Hambro used the concept "international criminal acts," and J. Castañeda underscored that breaches of *erga omnes* obligations—such as acts of genocide—should be regarded as international crimes. See *Ejegodnik Komissii mejdunarodnogo prava* 1973, volume I, session 1203, para 26. However, it should be noted that the sensitive term "international crime" was to be used, for the purpose of the draft Articles, in the words of D. Levin of the Soviet Union, "in the sense of international law, and not in the sense of criminal law, that is to say, the abovementioned conduct of a State [serious breach of an obligation emanating from a fundamental rule of international law] should entail a more severe political condemnation on the part of other States, as well as more severe international sanctions, including collective sanctions from an international organization or a number of States." See Levin 1966, p. 29. In the International Law Commission's opinion, the issue of individuals' criminal responsibility for their role in the commission of international crimes was to be dealt with essentially separately from—although in a functional conjunction with—the responsibility of States, which approach was duly reflected in the 2001 edition of the Articles. See Lukashuk 2004a, pp. 262–263.

¹¹¹ *Ejegodnik Komissii mejdunarodnogo prava* 1976, volume II (Part Two), p. 110.

included in the Articles' final edition is comprehensive enough to allow States to react, by lawful means, to a serious breach of any peremptory norm of general international law; on the other hand, the range of these norms has not been determined in a clear-cut manner and is capable of further development over time.¹¹² Although the prohibition of aggression is, under modern international law, among the least dubious of such norms, it does merit a supplementary test.

2.2.1 Aggression as a Serious Breach of an Obligation Arising Under Article 2(4) of the Charter of the United Nations

Comprehensive opinions favoring the qualification of the prohibition of the use of force under Article 2(4) of the UN Charter as a *jus cogens* norm are to be found in the official proceedings of international judicial and expert bodies, in States' statements at international conferences,¹¹³ and in the international legal doctrine (cf. *supra* 2.1.3).

2.2.1.1 Attitude of the International Court of Justice

The International Court of Justice observed in para 190 of the *Nicaragua* Judgment that Article 2(4) "is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law."¹¹⁴ This affirmative opinion took account of the official positions of both Nicaragua and the United States in the case:

Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its

¹¹² As the International Law Commission put it in its Commentary on Article 40, "[i]t is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values." See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *Yearbook of the International Law Commission* 2001, volume II (Part Two), p. 112.

¹¹³ At the 1968–1969 United Nations Conference on the Law of Treaties, a number of Governments characterized the prohibition of aggression as peremptory: see *Official Records of the United Nations Conference on the Law of Treaties* 1968, 52nd meeting, paras 3, 31 and 43; 53rd meeting, paras 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras 9, 41, 46 and 55; 55th meeting, paras 31 and 42; and 56th meeting, paras 6, 20, 29 and 51.

¹¹⁴ *Nicaragua* Judgment, para 190. See also Christenson 1987, 93–101.

Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a “universal norm”, a “universal international law”, a “universally recognized principle of international law”, and a “principle of *jus cogens*”.¹¹⁵

The Court’s observation was echoed, in an even more assertive way, in the Separate Opinion of the President of the Court, Judge Nagendra Singh (1914–1988), who stated that “the principle of non-use of force belongs to the realm of *jus cogens*, and is the very cornerstone of the human effort to promote peace in a world torn by strife.”¹¹⁶

2.2.1.2 Attitude of the International Law Commission

The International Law Commission also dealt with the legal implications of the characterization of the prohibition of aggressive use of force as a *jus cogens* norm, especially in the course of the codification work on the Vienna Convention on the Law of Treaties. The Commission held that a peremptory norm of general international law forbidding aggressive use of force had already come into existence in 1945,¹¹⁷ which meant that any treaty designed to instigate aggression against another State made after the entry into force of the Charter would be invalid *ab initio*, and that any acts performed in reliance on such a treaty would be illegal. In its Commentary on Article 50 of its draft Articles on the Law of Treaties, the Commission reiterated its view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”¹¹⁸ The specific discussions on issues arising from the effects of aggression on treaties were concerned, *inter alia*, with the effects of the determination of an act of aggression on the treaty relations of an aggressor State,¹¹⁹ and the nature and validity of treaties concluded between the victorious States and vanquished aggressors (“case of an aggressor State”).¹²⁰

¹¹⁵ *Nicaragua Judgment*, para 190.

¹¹⁶ Separate Opinion of President Nagendra Singh, 153.

¹¹⁷ *Yearbook of the International Law Commission* 1963, volume II, pp. 198–199.

¹¹⁸ *Yearbook of the International Law Commission* 1966, volume II, p. 247.

¹¹⁹ In this regard, the Commission discussed “[q]uite apart from any questions of *jus cogens*, the problem [...] of an aggressor being obliged to terminate or withdraw from certain treaties.” See *ibid.*, pp. 181, 186.

¹²⁰ A draft article on the “case of an aggressor State” read as follows: “Nothing in the present articles may be invoked by an aggressor State as precluding it from being bound by a treaty or any provision in a treaty which in conformity with the Charter of the United Nations it has been required to accept in consequence of its aggression.” See *ibid.* p. 197. A rephrased version of this article read: “The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.” See *ibid.*, p. 222.

In its Commentary on the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, the International Law Commission has been even more assertive in pointing out the *jus cogens* character of the prohibition of aggression. Although not having provided any examples of peremptory norms of general international law in the Articles' final text, the Commission did give such examples in its official Commentary on Article 40 (see *supra* 2.1.3). Having recalled that such practices as "slavery and the slave trade, genocide, and racial discrimination and apartheid [...] have been prohibited in widely ratified international treaties and conventions admitting of no exception,"¹²¹ the ILC reminded further the ICJ's conclusions to the effect that the fundamental rules of international humanitarian law applicable in armed conflict were "intransgressible" in character and hence peremptory,¹²² and that "[t]he principle of self-determination [was] one of the essential principles of contemporary international law," which gave rise to "an obligation to the international community as a whole to permit and respect its exercise."¹²³ In the International Law Commission's view, the prohibition of aggression under international law was likewise generally agreed to be regarded as peremptory, for a few reasons: it is consistent with every State's "legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations,"¹²⁴ constitutes an obligation *erga omnes*,¹²⁵ and serves the purpose of protecting "the survival of each State and the security of its people."¹²⁶ As Article 40 of the 2001 Articles does not itself lay down any procedure for determining whether or not a serious breach of an obligation arising under a peremptory norm of general international law has been committed,¹²⁷ it is useful to look into the rules for attributing an act of aggression to a delinquent State.

¹²¹ See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *supra* note 112, at 112.

¹²² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 (ICJ Reports 1996), para 79, quoted *ibid.*, at 113.

¹²³ In the *East Timor* case, the International Court of Justice stated that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable." See *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports (1995), para 29, quoted *ibid.*, at 113.

¹²⁴ See *ibid.*, p. 33.

¹²⁵ See *ibid.*, p. 127.

¹²⁶ See *ibid.*

¹²⁷ Paragraph 9 of the Commentary on Article 40 reads that "[i]t is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations." See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *supra* note 112, at 127.

2.2.2 Attribution of Aggression to a State Under International Law

The conduct of an organ of a State, or of a person or entity directed, instigated or controlled by a State, is usually attributed to that State.¹²⁸ This rule has acquired the character of a customary norm of international law.¹²⁹ In conformity with this recognized rule, Article 4 (“Conduct of organs of a State”) of the 2001 Articles reads:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

As the International Law Commission pointed out, “[a]s a normative operation, attribution must be clearly distinguished from the characterization of [a State’s] conduct as internationally wrongful.”¹³⁰ The distinctive task of attribution is to establish whether an act in question is an act of the State for the purpose of responsibility, and this can be done by showing that an internationally wrongful act—or, for the purpose of this research, an alleged act of aggression in the quality of a serious breach of an obligation arising under a *jus cogens* norm, Article 2(4) of the Charter—committed by a State derived from an act performed by an organ of that State.¹³¹ Since international law does not, as a rule, govern the internal organization of States and the functions of their organs, the domestic law and practice of each State are crucial in determining what constitutes an organ for the purposes of responsibility. In particular, the power to declare a war or, more generally, to engage a State in an international armed conflict is usually possessed by the executive or the legislature, or else is divided between these branches—hence the potential authors of a hypothetical act of aggression are to be sought, first and foremost, among officials belonging to these categories (cf. *infra* 4.2.1–4.2.3). However, whereas each State certainly determines its internal structure and functions through its own laws and practices, international law does have a role to play, as far as States’ war-making functions (in both *jus ad bellum* and *jus in bello*) are concerned: it should be recalled that “the characterization of an act of a State as internationally wrongful is governed by international law,” and that “such characterization is not

¹²⁸ Lukashuk 2004a, p. 109. See also Kramer and Michalowski 2005, pp. 446–469; Nollkaemper 2005, pp. 133–171.

¹²⁹ Lukashuk 2004a, pp. 109–147.

¹³⁰ See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *supra* note 112, p. 39.

¹³¹ *Ibid.*

affected by the characterization of the same act as lawful by internal law.”¹³² Consequently, any decision to use military force against another State, even if has been taken in accordance with an initiator State’s appropriate domestic laws and procedures, must be tested in light of applicable international law, with due regard to the *jus cogens* character of Article 2(4) of the UN Charter. Applicable thematic sources, such as the 1974 Definition of Aggression, may be helpful for this purpose, as interpretative tools.

2.3 Elements of an Act of Aggression Under the 1974 Definition of Aggression

The General Assembly resolution 3314 (XXIX) was adopted on 14 December 1974, as an interpretation of Article 2(4) of the UN Charter, with a Definition of Aggression annexed to it¹³³ (cf. supra 1.2.5.3). Constructed, to a substantial extent, upon the draft definition of aggression proposed by the Soviet Union in 1933 (see supra 1.1.6.6) and upon alternative drafts suggested by the USSR and groups of Western and developing States during the 1950s and 1960s,¹³⁴ the new definition was adopted, almost thirty years after the entry into force of the UN Charter, as a guideline for the Security Council’s determination of the existence of an act of aggression¹³⁵ and was generally (albeit not universally) recognized.¹³⁶ A useful interpretative instrument, the Definition—as a General Assembly resolution—was not legally binding and allegedly had “no visible impact” on the subsequent practice of the Security Council,¹³⁷ probably, due to the two major blocks’ political confrontation in the Cold War.¹³⁸ Yet, although the Definition had lacked a binding force and suffered from a number of structural and substantial deficiencies, it is worth considering here in some detail, as it did exercise a considerable impact on the drafting of the Rome Statute’s definition of the crime of aggression (see infra 5.1.1.3).

¹³² See 2001 Articles on State Responsibility, Article 3 (“Characterization of an act of a State as internationally wrongful”).

¹³³ UN GA Res. 3314 (XXIX), GAOR 29th Sess., Supp. No. 31 (1974). See generally Kemp 2010, pp. 116–124; Werle 2009, p. 407.

¹³⁴ Ferencz 1972, at 495.

¹³⁵ Garvey (1976–1977), pp. 193–194.

¹³⁶ Stone 1977, pp. 224–246; Hazard 1968, pp. 701–710.

¹³⁷ See Bassiouni and Ferencz 1999, at 313, 334. On some contemporary aspects of the Definition’s impact, see Sayapin 2009, pp. 3–42.

¹³⁸ See McWhinney 1962, pp. 951–970; McWhinney 1965, pp. 1–15; Reisman 1990, pp. 859–866.

2.3.1 “Chapeau” of the Definition

The 1974 Definition contains a general part followed by an incomplete list of examples of acts of aggression. The general part of the Definition (Article 1) reads as follows:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Yoram Dinstein singled out six essential distinctions between this formula and the primary rule articulated in Article 2(4) of the Charter of the United Nations (cf. *supra* 2.1.1): “(i) the mere threat of force is excluded; (ii) the adjective ‘armed’ is interposed before the noun ‘force’; (iii) ‘sovereignty’ is mentioned together with the territorial integrity and the political independence of the victim State; (iv) the victim is described as ‘another’ (rather than ‘any’) State; (v) the use of force is proscribed whenever it is inconsistent with the UN Charter as a whole, and not only with the Purposes of the United Nations; (vi) a linkage is created with the rest of the Definition.”¹³⁹ It has been suggested that the adding of a number of elements to the definition of aggression was just intended to raise the assessment threshold and accordingly to do away with the possibility of invoking shooting “a few stray bullets across a boundary” as the commission of an act of aggression by a State.¹⁴⁰ Yet, the normative and practical influence of this major—indeed, progressive—development in international law could have been more far-reaching. Its more precise wording, in comparison with Article 2(4) of the Charter, could have made the Definition a workable tool for the protection of sovereign interests of individual States and for the maintenance of international peace and security, and so would have reinforced the impact of Article 2(4) itself. The chief problem with the Definition was its recommendatory status of an annex to a General Assembly resolution.¹⁴¹ If the Definition had been bestowed with a proper adequate legal force—for instance, by way of approval by

¹³⁹ Dinstein 2001, p. 116.

¹⁴⁰ Article 2 of the Definition provided that alleged acts of aggression or their consequences should be of “sufficient gravity” and that minor incidents of the use of armed force might therefore not constitute aggression, subject to appreciation by the Security Council in accordance with the Charter. Cf. B. Broms, “The Definition of Aggression,” 154 *Recueil des Cours de l’Académie de Droit International* (1977), p. 346, referred to in Dinstein 2001, p. 116.

¹⁴¹ UN Charter, Article 11: “1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may *make recommendations* with regard to such principles to the Members or to the Security Council or to both. 2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except provided in Article 12, may *make recommendations* with regard to any such questions to the state or states concerned or to Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion [...]”

the Security Council whose decisions are mandatory for all Members of the United Nations¹⁴² and the carrying out of whose foremost function¹⁴³ the Definition was intended to facilitate—it would have become a “harder” source of international law and should have been complied with by States in a more consistent manner.

2.3.2 *Examples of Acts of Aggression*

In furtherance of the general part, Article 3 of the Definition lists possible examples of acts of aggression, regardless of their being accompanied by a declaration of war:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed hands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Notably, each subparagraph of Article 3 refers to an action performed *by or on behalf of a State*, thereby confirming that aggression is an internationally unlawful act of State committed against another State. The list is quite comprehensive (cf., however, *infra* 5.1.1.3.8), probably with one exception consisting in that subparagraphs (a) and (b) seem to be somewhat repetitive, for it is difficult to imagine how an “attack by the armed forces of a State of the territory of another State” (subparagraph (a), cf. *infra* 5.1.1.3.1) can be carried out without “the use of any weapons” referred to in subparagraph (b) (cf. *infra* 5.1.1.3.2),—as was discussed above (under 2.1), the word “attack” implies its military character and, consequently, the use of weapons.¹⁴⁴ On the other hand, the “[b]ombardment by the armed forces of a State against the territory of

¹⁴² Ibid., Article 25: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”

¹⁴³ Cf. Article 24 of the UN Charter.

¹⁴⁴ Cf. also Article 51 of the UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed* attack occurs against a Member of the United Nations [...]” (emphasis added).

another State or the use of any weapons by a State against the territory of another State” is well possible without “the invasion or attack by the armed forces of a State” prohibited under subparagraph (a), and the singling out of bombardment or the use of weapons as a separate type of aggression is therefore justified.

Out of these, only the last subparagraph was explicitly pronounced by the International Court of Justice to be declaratory of customary international law (cf. *infra* 5.1.1.3.7).¹⁴⁵ Yoram Dinstein maintains, however, that, possibly, the other portions of the 1974 Definition’s Article 3 may too be regarded as being indicative of “harder” rules of international law than the General Assembly resolutions are as a rule.¹⁴⁶ As a matter of fact, the *Nicaragua* case is not an apposite source to look for the attitude of the ICJ towards the issue in question, for in that case, the Court could not practically examine whether subparagraphs (a)–(f) of Article 3 were reflective of customary international law, because the factual basis of the case was limited to subparagraph (g).¹⁴⁷ The absence of the Court’s jurisprudence on subparagraphs (a)–(f) of the 1974 Definition’s Article 3 should therefore not be interpreted as the ICJ’s unambiguously disapproving or doubtful attitude towards their substance but simply as a matter of fact that the Court did not yet have an opportunity of scrutinize their legal force in light of customary international law.

2.3.3 *Non-Exhaustive Character of the List*

Another problem about the international legal value of the 1974 Definition is that its Article 3 is not exhaustive, and the Security Council may itself determine what other international uses of force may amount to aggression.¹⁴⁸ This autonomy of political appraisal accorded to the Council is indeed warranted in the light of its required operational flexibility as an international organ primarily charged with the maintenance of international peace and security (see *supra* note 143). Yet, the *legal* qualification of uses of force as acts of aggression, in order for them to necessitate specific consequences for States and individuals under applicable international law (see *supra* 2.2.1.2), should involve more strictly defined assessment criteria and a less politicized procedure than the Security Council’s is. As the Rome Statute’s definition of an individual crime of aggression contains a direct reference to the 1974 Definition (see *infra* 5.1.1.2–5.1.1.3), one must note that the ICC Statute’s

¹⁴⁵ *Nicaragua* Judgment, paras 106 et seq. As was discussed above (under 2.1.3), in the 2004 *Wall* Advisory Opinion, the Court found that the lasting occupation by Israel of adjacent Palestinian territories and related administrative measures were in violation of international law. See Burgis 2008, pp. 33–63. It may be recalled in this regard that “any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof” is too characterized as aggression under subparagraph (a) of the 1974 Definition’s Article 3.

¹⁴⁶ Dinstein 2001, p. 118.

¹⁴⁷ *Ibid.*

¹⁴⁸ UN GA Res. 3314 (XXIX), *supra* note 121, Annex, Article 4.

Article 8 bis (2)—unlike its “parent provision”—is exhaustive, in accordance with the principle of legality (*nullum crimen sine lege*) established in ICL. Whilst the Security Council may indeed “determine that other acts [than only those listed in Article 3 of the 1974 Definition may] constitute aggression under the provisions of the Charter,”¹⁴⁹ the ICC Statute does not allow for such an extensive interpretation of elements of individual crimes within its jurisdiction (see *infra* 5.2.1).

2.3.4 The Problem of the “First Use” of Force

In accordance with Article 2 of the 1974 Definition, the first use of armed force by a State in contravention of the Charter of the United Nations constitutes *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.¹⁵⁰ It appears that the reference to the first use of armed force should be read in connection with the essential circumstance that follows, namely, that such first use of armed force must be “in contravention of the Charter.” It is conceivable that a State uses minor force against another State in the first instance but the target State responds to the trivial incident in a disproportionately forceful fashion and thus—in overreaction—itself violates the Charter. In such a case, the target State might itself probably be found guilty of committing aggression¹⁵¹ (cf. *infra* 4.3.1.1.2). It must have been for this reason that the first use of force is not as such referred to in the Rome Statute’s Article 8 bis but the major qualification of the potentially aggressive use of armed force—namely, its use in manifest violation of the Charter of the United Nations—is integrated in the provision (cf. *infra* 5.1.1.1.5). It would then be up to appropriate international organs to assess on a case-by-case basis (cf. *infra* 5.3.2.7–5.3.2.9, 5.3.3) whether it was the first actual use of force or a forceful response thereto that would have been in manifest violation of the Charter and hence would have constituted an act of aggression.

2.3.5 The Discretionary Power of the UN Security Council

In accordance with the Charter, the primary power to determine acts of aggression rests with the Security Council.¹⁵² Yet, in many instances, even the manifestly hostile behavior of States was not qualified as acts of aggression (see *supra* 1.2.5.2).

¹⁴⁹ Ibid.

¹⁵⁰ Ibid., Article 2 (first sentence): “The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression [...]”

¹⁵¹ Dinstein 2001, p. 117.

¹⁵² Cf. *supra* note 143.

The motivation behind such a restrictive application of the concept of aggression must have been far from purely legal: the Security Council is an international political body in whose action interests of its members—especially of permanent members—prevail,¹⁵³ and it may not be expected to apply rules of international law in the same impartial way as a judicial body—such as the International Court of Justice or the International Criminal Court—should have to.¹⁵⁴ It may be asserted with a good degree of certainty that the normative standards for the determination of aggression listed in Article 3 of the 1974 Definition were not often used by the Security Council due to political and procedural circumstances, and not necessarily due to that Article's inherent substantive deficiencies.

By contrast, these provisions should, hopefully, become more workable in the future practice of the International Criminal Court. Although the content of Article 8 bis (2) of the Rome Statute was drawn literally from Article 3 of the 1974 Definition of Aggression (see *infra* 5.1.1.3), and Article 8 bis (2)—probably, unnecessarily—made an explicit mention of the General Assembly resolution 3314 (XXIX) (see *infra* 5.1.1.2), the verbatim integration of these provisions in the Rome Statute as a matter of its own content should elevate them from the rank of “soft law” to the level of treaty law binding upon an increasing number of States Parties to the Statute, once Article 8 bis enters into force (see *infra* 5.1.2), and the Security Council might not ignore this development (see *infra* 5.3.2.7–5.3.2.9, 5.3.3).

2.4 Exceptions to the Prohibition of the Use of Force

It may be inferred from the foregoing analysis (cf. *supra* 2.1–2.3) that any use of force in inter-State relations not expressly authorized by international law would constitute a breach of Article 2(4) of the Charter of the United Nations, and the most serious breaches of an obligation arising under this *jus cogens* provision may be found to constitute aggression. Hence, an examination of lawful exceptions to the imperative prohibition of the use of force is required, to help identify acts, which do not, as a matter of current or emerging international law, qualify as aggression and, consequently, cannot entail States' responsibility under international law and individuals' liability under international or national criminal law. On the other hand, it may be assumed that any inter-State use of force, which cannot be justified by one of the lawful exceptions analyzed below, might constitute an act of aggression and should be subjected to an appropriate judicial scrutiny. This section will examine three categories of exceptions to Article 2(4): the Charter-based exceptions, i.e. ones explicitly mentioned in the UN Charter; the Charter-related exceptions, which are not explicitly mentioned in the UN Charter but have been inferred from its pertinent

¹⁵³ Cf. Link 1998, p. 120; Chauprade 2003, p. 767.

¹⁵⁴ See Higgins 1970, pp. 1–18; Johnstone 2003, pp. 437–480.

provisions by international organs; and, last but not least, extra-Charter exceptions, which derive from extra-Charter sources of international law.

2.4.1 *Charter-Based Exceptions*

The Charter of the United Nations allows explicitly only for two exceptions to the prohibition of the use of force—States’ “inherent” right of individual or collective self-defence (Article 51) and collective security measures under Chapter VII (Articles 39–50).¹⁵⁵ Both legal regimes will be considered in turn.

2.4.1.1 Individual or Collective Self-Defence: General Observations

As was noted by Oscar Schachter, at the origin of States’ inherent right of self-defence¹⁵⁶ there stood two principal schools of thought—the natural law school represented, *inter alia*, by Hugo Grotius (cf. supra 1.1.2.4), and the *realpolitik* school represented by practitioners such as the US Secretary of State Dean Gooderham Acheson (1893–1971).¹⁵⁷ According to the natural law school, States’ right of self-defence is intrinsic in their nature and may be invoked in a variety of circumstances—ranging from “an extreme circumstance of self-defence”¹⁵⁸ to routine situations below the threshold of life-or-death existential emergencies. In other words, in the opinion of the natural law scholars, the exercise by a State’s of its right of self-defence should be regarded as its regular and legitimate function, among such other functions—such as the maintenance of law and order, the regulation of its internal and external affairs, the emission of currency, and the like.¹⁵⁹ At the same time, as a technique of self-help—which, according to Yoram Dinstein, is typical to all primitive legal systems, including international law¹⁶⁰—individual or collective self-defence was quite beyond the confines of law.¹⁶¹

¹⁵⁵ See generally Kelsen 1948, pp. 783–796.

¹⁵⁶ On the right of self-defence, see generally: Dinstein 2001, pp. 157–245; Gill 2006, pp. 361–369; Harris 2004, pp. 886–971; Kemp 2010, pp. 57–59; Kretzmer 2013, pp. 235–282; Kunz 1947, pp. 872–879; Okimoto 2011a, pp. 45–75; Shah 2007, pp. 95–126; Shaw 2008, pp. 1131–1146.

¹⁵⁷ See generally Schachter 1989, at 259–260. Dean Acheson shared his views in 1963—in connection with the Cuban missile crisis—and, according to Louis Henkin, “received no support from the audience.” For details, see L. Henkin, *How Nations Behave: Law and Foreign Policy* (Council on Foreign Relations, 1968), pp. 265–267, referred to in Schachter 1989, at 260, note 8.

¹⁵⁸ *Legality of the Threat or Use of Nuclear Weapons*, para 97.

¹⁵⁹ On functions of the State, see Korelsky and Perevalov 1998, pp. 142–153; Marchenko 2002, pp. 336–353.

¹⁶⁰ See Y. Dinstein, “International Law as a Primitive Legal System,” in 19 *New York University Journal of International Law and Politics* (1986–1987), p. 12, quoted in Dinstein 2001, p. 159.

¹⁶¹ Dinstein 2001, p. 160.

Since—especially before the First World War but also between two World Wars (see *supra* 1.1)—any State might, in principle, resort to war against any other State, the quality of self-defence as a legal concept was rather limited. In the words of Eduardo Jiménez de Aréchaga (1918–1994), self-defence essentially “was not a legal concept but merely a political excuse for the use of force.”¹⁶² This actual state of affairs allowed representatives of the *realpolitik* school, in their turn, to conceive of States’ right of self-defence in terms of “power,”¹⁶³ not of law—a view that might prevail until the entry into force of the Charter of the United Nations, with due regard to its Articles 2(4) (see *supra* 2.1) and 51 (see *infra* 2.4.1.1.1–2.4.1.1.5). It appears that, already in the inter-war period, a decisive argument in favor of the legal nature of the right of self-defence—suitably recalled by O. Schachter—was put forward by Sir Hersch Lauterpacht (1897–1960) in his seminal treatise *The Function of Law in the International Community*: “It [the right of self-defence] is regulated to the extent that it is the business of the courts to determine whether, how far, and for how long, there was a necessity to have recourse to it.”¹⁶⁴ In point of fact, it would make no sense to refer to self-defence as a State’s *right* under international law, if a State using armed force, allegedly, in self-defence were not willing or prepared to justify its military action in terms of such international law as may be applicable. H. Lauterpacht’s opinion was recalled in the Nuremberg Tribunal’s Judgment (for details, see *infra* 3.1.1),¹⁶⁵ and the Tribunal itself confirmed that “whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if International Law is ever to be enforced.”¹⁶⁶

2.4.1.1.1 Article 51 of the Charter of the United Nations

As a matter of conventional international law, the general conditions under which States may resort to force in self-defence are specified in Article 51 of the Charter of the United Nations:

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.

Whereas it may be agreed that Article 51 does not indeed represent an exhaustive regulation of States’ right of self-defence under modern international law (cf. *supra* 2.1.2.1), it is submitted that it does constitute a suitable and overarching

¹⁶² E. Jiménez de Aréchaga, “International Law in the Past Third of a Century,” in 159 *Recueil des Cours de l’Académie de Droit International* (1978), p. 96, quoted in Dinstei 2001, p. 160.

¹⁶³ On the role of power in modern international politics, see Kissinger 1994, pp. 804–836.

¹⁶⁴ H. Lauterpacht, *The Function of Law in the International Community* (1933), p. 180, quoted in Schachter 1989, p. 261.

¹⁶⁵ See Schachter 1989, pp. 261–262.

¹⁶⁶ International Military Tribunal (Nuremberg), Judgment of 1 October 1946, p. 436.

conventional framework for the exercise of this right's customary elements, which "fill" and complement the framework but do not replace it as such.¹⁶⁷ An outline of the main elements of Article 51 is offered below.

2.4.1.1.2 "Nothing in the present Charter shall impair the inherent right [...]"

The opening language of Article 51 confirms the inviolability of a State's right of self-defence as a matter of principle. The right of self-defence is referred to as "inherent"—in line with the natural law theory recalled above—and is placed in a relatively superior position with respect to the other provisions of the Charter ("Nothing in the present Charter shall impair [...]), i.e. the right of self-defence, if exercised by a State in good faith, appears to stand above any other rule of the Charter.¹⁶⁸ The exercise of the right, though, is subject to two cumulative conditions (see *infra* 2.4.1.1.4–2.4.1.1.5).

2.4.1.1.3 "[... O]f individual or collective self-defence [...]"

It is presumed that the term "self-defence" means recourse to armed or military force (cf. *supra* 2.1.1.2.1–2.1.1.2.2 and *infra* 2.4.1.1.4),¹⁶⁹ and does not, for the purpose of Article 51, directly cover non-military (e.g. diplomatic, economic, etc.) measures, which of course may too be used—as subsidiary tools¹⁷⁰—in order to restore the security of a State or States under attack. A State may exercise its right of self-defence individually or collectively with other States, whereby the collective exercise of the right may be more or less formalized—respectively, under the auspices of regional security organizations (e.g. NATO, CSTO, etc.) or else in the format of temporary international coalitions formed for the purpose of specific operations.¹⁷¹

2.4.1.1.4 "[I]f an armed attack occurs against a Member of the United Nations [...]"

It formally appears from this formula that Article 51 protects only Members of the United Nations. However, the "inherent" nature of States' right of self-defence (see *supra* 2.4.1.1.2) as well as the applicability of the UN Charter's more general regulations on the use of force to all States, including non-Members (see *supra* 2.1.1.1) lets

¹⁶⁷ See generally Skakunov 1973 *Samooborona v mejdunarodnom prave* [Self-Defence in International Law]. Moscow, referred to in Lukashuk 2008b p. 289.

¹⁶⁸ According to Igor Lukashuk, "[s]uch a right is an indispensable institution of any legal system." See Lukashuk 2008b, p. 290.

¹⁶⁹ See *ibid.*, p. 289.

¹⁷⁰ See *ibid.*, pp. 407–410.

¹⁷¹ See *ibid.*, pp. 296–297.

one conclude that the Charter recognizes, as a matter of fact, any State's right of self-defence, on the condition that the State is subjected to an armed attack. Two key issues are worthy of noting in this regard. First, the right of self-defence must be understood as a lawful reaction only to an *armed attack*—i.e. the employment by a State of its regular armed forces (in a broad sense currently accepted in international law), or of irregular armed groups (cf. supra 2.1.1.2.1), and of means and methods of warfare (in the sense of applicable international humanitarian law) against another State, its nationals, public or private property (cf. supra 2.1.1.2), or the employment of such physical force by a non-State actor as would result in *effects* comparable to those of an armed attack (cf. supra 2.1.1.2.2). In the sense of Article 51, no other factor may justify the use of armed force in self-defence.¹⁷² Second, there exists a substantial controversy among scholars regarding the admissibility of anticipatory (preventive, pre-emptive or interceptive) self-defence in the case of an imminent danger of an armed attack. For the purpose of this research, the issue will be dealt with below, at 2.4.1.2–2.4.1.4, in more detail. It suffices to mention here that competent international courts—in the first place, the International Court of Justice—did not yet pronounce themselves on the matter,¹⁷³ although it was maintained in at least one dissenting opinion that Article 51 should not confine States' right of self-defence to cases “if, and only if an armed attack occurs.”¹⁷⁴

2.4.1.1.5 “[U]ntil the Security Council has taken measures necessary to maintain international peace and security”

It follows from the concluding clause of Article 51 that the Security Council must take measures to maintain international peace and security, if an armed attack occurs against a Member of the United Nations. The nature of these measures is considered below, at 2.4.1.5. It may appear from the language that the right of self-defence ceases, once the Security Council has taken the required measures.¹⁷⁵ It is submitted, though, that in practice a State may continue exercising its right of self-defence until the full restoration of international peace and security, with due regard to its “inherent” (cf. supra 2.4.1.1.2) and, consequently, inalienable nature.

2.4.1.2 Preventive Self-Defence

Since the end of the Second World War (cf. supra 1.2 and infra 3.1.1–3.1.3), there has only been a limited State practice favoring the legitimacy of preventive

¹⁷² See *ibid.*, p. 290.

¹⁷³ Cf. *Nicaragua* Judgment, para 194: “[T]he issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised. Accordingly the Court expresses no view on that issue”

¹⁷⁴ Judge Schwebel, *ibid.*, para 190.

¹⁷⁵ See Lukashuk 2008b, p. 290.

self-defence.¹⁷⁶ A notable case—appropriately recalled by M. Kinacioglu¹⁷⁷—was Israel’s attack, in 1981, against an Iraqi nuclear reactor under construction, on the purported ground that it would be used for producing material for nuclear weapons, which Iraq would employ for attacking Israel. The circumstances of the case were considered by the Security Council,¹⁷⁸ and the Israeli action was unanimously condemned: “[T]he military attack by Israel [was] in clear violation of the Charter of the United Nations and the norms of international conduct.”¹⁷⁹ The Security Council members’ views about the legitimacy of preventive self-defence as such were thereby divided.¹⁸⁰

Dieter Wiefelspütz suggested defining preventive self-defence as “repelling an attack, which is not immediately challenging or threatening, or repelling a danger, which is not at hand.”¹⁸¹ This author shares D. Wiefelspütz’s opinion to the effect that the absence of an identifiable threat or danger should render preventive self-defence internationally unlawful, unlike pre-emptive self-defence (see *infra* 2.4.1.3) whose legitimacy under international law—although not completely undisputed—is more well-founded.¹⁸² With due regard to the “Webster formula,”¹⁸³ it appears that the preventive self-defence theory does not indeed meet the normative criteria laid down in Article 51 of the Charter of the United Nations (see *supra* 2.4.1.1.1–2.4.1.1.5) and should be discarded.

2.4.1.3 Pre-emptive Self-Defence

Especially after 11 September 2001 (cf. *supra* 2.1.1.2.1), the United States has been the world’s foremost promoter of the concept of pre-emptive self-defence.¹⁸⁴

¹⁷⁶ On the notion of preventive self-defence, see Fischer 2003, pp. 4–7; Kröning 2003, pp. 82–87; Luban 2004, pp. 207–248; Potter 1951, pp. 142–145; Wiefelspütz 2006, pp. 103–111.

¹⁷⁷ Kinacioglu 2008, at 39.

¹⁷⁸ See *ibid.*, with references to documents UN Doc. S/PV. 2280 (1981), at 16; UN Doc. S/PV.2283 (1981), at 56; UN Doc. S/PV.2282 (1981), at 42; UN Doc. S/PV.2288 (1981), at 14.

¹⁷⁹ Security Council Resolution 487 (1981), quoted in Kinacioglu 2008, at 39.

¹⁸⁰ Kinacioglu 2008, at 39.

¹⁸¹ Wiefelspütz 2006, at 103.

¹⁸² *Ibid.*

¹⁸³ In the words of former US Secretary of State Daniel Webster (1782–1852), in order for anticipatory self-defence to be lawful, the threat to be countered (“the necessity”) must be “instant, overwhelming and leaving no choice of means, and no moment for deliberation,” quoted in Wiefelspütz 2006, at 108.

¹⁸⁴ As such, the claim was not a novelty in the United States’ foreign policy. Over 15 years before the issuance of the “Bush Doctrine” cited in the body of the text, President Ronald Reagan declared in his *Address to the Nation on the Air Strikes against Libya*, 14 April 1986, *Public Papers of the United States Presidents*, 1986, volume I, 468–469: “We believe that this pre-emptive action against the terrorist installations will not only diminish Colonel Qadhafi’s capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior.” See also “*Testimony of the Legal Adviser of the Department of State*” (1986) AJIL 80, at 641.

In the 2002 *National Security Strategy to Combat Weapons of Mass Destruction*, President George W. Bush declared as follows:

United States military force and appropriate civilian agencies must have the capability to defend against weapons of mass destruction-armed adversary, including in appropriate cases through pre-emptive measures. This requires capabilities to detect and destroy an adversary's weapons of mass destruction assets before their weapons are used [...] The primary objective of a response is to disrupt an imminent attack or an attack in progress, and eliminate the threat of future attacks.¹⁸⁵

This statement only received a limited support among international lawyers, not least because in its concluding sentence, three essentially different legal regimes (interceptive self-defence, pre-emptive self-defence and preventive self-defence) had been put together in a manner, which is inappropriate from the point of view of applicable international law, under the same umbrella. Notably, even the closest ally of the United States in the “global war against terror”—the United Kingdom—expressed reservations about the notion of pre-emptive self-defence. The British Foreign Secretary commented on the issue as follows:

The issue of pre or post-pre-emption in respect of Iraq, I do not quite see the relevance. The issue is that here you have a regime which is in clear breach of an endless number of Security Council Resolutions requiring them to do certain things under Chapter VII [...]¹⁸⁶

Pre-emptive self-defence stands for a State's military action against potential adversary (usually, another State) in expectation of a hypothetical armed attack.¹⁸⁷ Pre-emptive self-defence differs both from preventive (see *supra* 2.4.1.2) and interceptive (see *infra* 2.4.1.4) self-defence in that its political constituent is indeed oriented towards a more or less defined potential threat, but the relevant military action is devoid, in a strict sense, of a *prima facie* defensive quality. The main justification the supporters of pre-emptive self-defence put forward is the imperfection of the Security Council's decision-making procedure (cf. *supra* 1.2.5.2 and 2.3.5), whereby the Council's permanent members

¹⁸⁵ United States President, *National Security Strategy to Combat Weapons of Mass Destruction*, 17 September 2002, 3.

¹⁸⁶ United Kingdom, House of Commons, Foreign Affairs Committee, 2nd Report, Session 2002–2003, para 150.

¹⁸⁷ M.-E. O'Connell, “The Myth of Preemptive Self-Defense” 2002, *American Society of International Law* 2: footnote 10, defines pre-emptive self-defence as “use of force to quell any possibility of future attack by another State, even where there is no reason to believe that an attack is planned and where no prior attack has occurred.” According to Reisman (2003, at 87), pre-emptive self-defence is concerned with “conjectural and contingent threat of *possible* attack” (italics in the original). See also Bothe 2003, pp. 227–240; Ching 2013, pp. 1–8; Farer 2003, pp. 621–628; Gazzini 2008, pp. 25–32; Gray 2002b, pp. 437–448; Gray 2005, pp. 555–578; Gray 2011, pp. 35–53; Guiora 2008, pp. 3–24; Henderson 2004, pp. 3–24; Johnstone 2004, pp. 813–838; Kinacioglu 2008, pp. 33–48; Von Lepel Frhr. 2003, pp. 77–81; Lukashuk and Boklan 2003, pp. 587–597; McWhinney 2002b, pp. 421–436; Reisman and Armstrong 2006, pp. 525–550; Sapiro 2003, pp. 599–607; Sofaer 2003, pp. 209–226; Tuzmukhamedov 2006, pp. 374–384; Wedgwood 2003, pp. 576–585; Zagaynov 2006, pp. 29–45.

and their allies are protected against any possible enforcement action (see *infra* 2.4.1.5). However, this is not completely true. As the example of the Security Council resolution 487 (1981) shows (see *supra* 2.4.1.2, especially note 179), even the closest allies of permanent Security Council members are not entirely immune from condemnation under the UN Charter (whereas the permanent members themselves indeed are). Furthermore, however flawed the Council's procedure may be, the Charter's rule to the effect that non-defensive uses of military force are only allowed for the purpose of enforcing relevant Security Council decisions (see *infra* 2.4.1.5), which have been taken on behalf of all Members of the United Nations,¹⁸⁸ remains valid—and, in that sense, the United States-led coalition's invasion of Iraq in 2003 was clearly unlawful. In the aftermath of the invasion, an overwhelming majority of States opposed the United States' conduct decisively, asserting, on the one hand, that the eradication of the Security Council's primary authority in dealing with situations threatening international peace and security¹⁸⁹ would denote the end of collective supervision over the international use of force and, eventually, of multilateralism in the post-World War II international relations¹⁹⁰ (cf. *supra* 1.2), and, on the other hand, that a reintroduction of States' liberty to resort to military action unilaterally would be unwarranted under modern international law.¹⁹¹ In other words, such a reintroduction would put an end to the entire contemporary normative and institutional system of maintaining international peace and security. As Christopher Greenwood correctly observed, there must be a point beyond which self-defence ceases to be an exception to the prohibition of the use of force under international law and itself becomes plainly inconsistent with this prohibition.¹⁹²

2.4.1.4 Interceptive Self-Defence

Unlike in the context of anticipatory self-defence (see *supra* 2.4.1.2–2.4.1.3), interceptive self-defence is resorted to when the danger of an armed attack against a

¹⁸⁸ UN Charter, Article 24(1): "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf" (emphasis added).

¹⁸⁹ Greenwood emphasizes that "no State is entrusted under the Charter [of the United Nations] with the power to take military action to preserve or restore international peace and security without such a [Security Council] decision," Greenwood 2003, at 20.

¹⁹⁰ Cf. Delbrück 2001, at 19; Corten and Dubuisson 2002, at 76; Farer 2002, pp. 99–100.

¹⁹¹ The UK Foreign Affairs Committee, *supra* note 186, para 154, pointed out "that should the United States, British and other governments seek to justify military action against Iraq for example, on an expanded doctrine of "pre-emptive self-defence," there is a serious risk that this will be taken as legitimising the aggressive use of force by other, less law-abiding States."

¹⁹² Greenwood 2003, at 36, confirms that "[t]here is [...] no right to take military action against a threat that is not imminent."

State is grave, imminent and unmistakable. The nature of interceptive self-defence was illustratively explained by Yoram Dinstein:

Let us assume hypothetically that the Japanese carrier striking force, *en route* to the point from which it mounted the notorious attack on Pearl Harbor in December 1941, had been intercepted and sunk by the US Pacific Fleet prior to reaching its destination and before a single Japanese naval aircraft got anywhere near Hawaii. If that were to have happened, and the Americans had succeeded in aborting an onslaught which in one fell swoop managed to change the balance of military power in the Pacific, it would have been preposterous to look upon the United States as answerable for inflicting an armed attack upon Japan [...]

Had the Japanese striking force been destroyed on its way to Pearl Harbor, this would have constituted not an act of preventive war but a miraculously early use of counter-force. To put it in another way, the self-defence exercised by the United States (in response to an incipient armed attack) would have been not anticipatory but interceptive in nature. Interceptive, unlike anticipatory, self-defence takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates an armed attack that is merely 'foreseeable' (or even just 'conceivable'), an interceptive strike counters an armed attack which is 'imminent' and practically 'unavoidable'. It is the opinion of the present writer that interceptive, as distinct from anticipatory, self-defence is legitimate even under Article 51 of the Charter.¹⁹³

It is only possible to agree with Yoram Dinstein's conclusion. Indeed, it would be unwise on the part of a potential victim State to wait for a fatal blow ("armed attack" in the sense of Article 51 of the UN Charter), which would incapacitate or severely harm that State's defensive potential. If the aggregate of circumstances at a given time¹⁹⁴ leaves no doubt as to the impending attack, the potential victim State(s) should be entitled—by virtue of Article 51 of the Charter—to intercepting the attack by offering a targeted and proportionate military reaction. As was discussed above (at 2.4.1.1), though, a State exercising its right to self-defence in an interceptive manner must be prepared to justify its conduct in a court of law. Importantly, "[t]he invocation of the right to self-defence must be weighed on the ground of the information available (and reasonably interpreted) at the moment of action, without the benefit of *post factum* wisdom."¹⁹⁵

¹⁹³ See Dinstein 2001, pp. 171–172 (italics in original, footnotes omitted).

¹⁹⁴ Yoram Dinstein gave the following practical example of a comprehensive assessment of circumstances prompting interceptive self-defence: "[I]n the 'Six Days War' of June 1967, Israel was the first to open fire. Nevertheless, a careful analysis of the events surrounding the actual outbreak of the hostilities (assuming that the factual examination was conducted, in good faith, at the time of action) would lead to the conclusion that the Israeli campaign amounted to an interceptive self-defence, in response to an incipient armed attack by Egypt (joined by Jordan and Syria). True, no single Egyptian step, evaluated alone, may have qualified as an armed attack. But when all of the measures taken by Egypt (especially the peremptory ejection of the United Nations Emergency Force from the Gaza Strip and the Sinai Peninsula; the closure of the Straits of Tiran; the unprecedented build-up of Egyptian forces along Israel's borders; and constant sabre-rattling statements about the impending fighting) were assessed in the aggregate, it seemed to be crystal clear that Egypt was bent on an armed attack, and the sole question was not whether war would materialize but when." See *ibid.*, p. 173.

¹⁹⁵ *Ibid* (italics in original).

2.4.1.5 Collective Security Measures Under Chapter VII

Unlike the mechanism of individual or collective self-defence examined above at 2.4.1.1–2.4.1.4, which is designed against “outside” aggression, the collective security mechanism is—in the words of Y. Dinstein—“introverted” in the sense that it is there to employ force against aggressors from within the system.¹⁹⁶ The principal difference between these mechanisms is that self-defence is exercised at the discretion of a State or States, against which (armed or physical) force has been employed (cf. *supra* 2.1.1.2), and collective security is founded upon the centralized authority of an organ of the international community—the Security Council of the United Nations (cf. *supra* 1.2.5.2).¹⁹⁷

The United Nations’ collective security system is set out in Chapter VII of its Charter (Articles 39–51). It follows from Article 39¹⁹⁸ that the Security Council’s functions in this domain are both preventive and restorative. As Yoram Dinstein put it:

The notion of maintaining international peace and security has a preemptive thrust. The purpose is to ensure, before it is too late, that no breach of the peace will in fact occur. Measures taken by the Council to forestall a breach of international peace and security have deterrence and prevention as their goals. Once a breach of international peace and security occurs (notwithstanding any prophylactic measures that may have been taken), the situation changes dramatically. At this point, the Council’s mission is to restore the peace. It has to take steps calculated to re-establish international law and order.¹⁹⁹

Pursuant to Article 39, the Security Council can make non-mandatory recommendations or take binding decisions, in order to propel action by the Member States of the United Nations. A grammatical interpretation of Article 39 suggests that measures of a non-military and military nature—listed, respectively, in Articles 41 and 42—are associated with mandatory decisions rather than with recommendations.²⁰⁰ Let us succinctly consider non-military and military measures provided for in Chapter VII.

2.4.1.5.1 Non-military Measures

Article 41 of the Charter deals with non-military measures and reads as follows:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the

¹⁹⁶ *Ibid.*, p. 246.

¹⁹⁷ *Ibid.* See also Caron 1993, pp. 552–588.

¹⁹⁸ UN Charter, Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”

¹⁹⁹ See Dinstein 2001, p. 248.

²⁰⁰ *Ibid.*

United Nations to apply such measures. These may include 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.

Notably, this list is not exhaustive (“[the measures] *may* include [...]”), and the Security Council may itself decide which other measures not involving the use of force may be employed.²⁰¹

2.4.1.5.2 Military Measures

As was discussed above (at 1.2.5.2), the Security Council became noticeably more functional in matters of maintaining international peace and security after the end of the “Cold War.” Chapter VII of the Charter was invoked, as a whole, in a number of resolutions adopted by the Security Council, as were some of its specific Articles.²⁰² Nevertheless, as was observed in the UN Secretary-General’s report entitled *An Agenda for Peace* (cf. supra 1.2.5.5), the key provision in Chapter VII, Article 42,²⁰³ was not used, due to the absence of special agreements required by Article 43, and alternative means had to be sought. The same discord among the permanent Security Council members that rendered impossible the conclusion of special agreements under Article 43 did also cause the invalidity of Article 106 of the Charter and the ineptitude of the Military Staff Committee provided for under Article 47. Therefore, over time, two principal alternative mechanisms have developed—peacekeeping and non-Article 42 peace-enforcement.

The functional modalities of both mechanisms have been well summarized in Yoram Dinstein’s classic monograph.²⁰⁴ To borrow from his terminology, the principal function of a peacekeeping force is that of a “*cordon sanitaire*”—to physically separate parties to a conflict and to prevent further clashes.²⁰⁵ All peacekeeping forces—unlike forces set up for peace-enforcement—are established and maintained with the consent of all States concerned and are normally not authorized to employ military force, except in self-defence.²⁰⁶ Peacekeeping forces are usually—although not always—associated with the United Nations and

²⁰¹ See *ibid.*, p. 249. See also Conforti 1991, pp. 110–113; Coppieters et al. 2002, pp. 165–167.

²⁰² See Dinstein 2001, pp. 256–263.

²⁰³ See UN Charter, Article 42: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”

²⁰⁴ See Dinstein 2001, pp. 263–273.

²⁰⁵ *Ibid.*, p. 263. See also generally *Report of the Panel on UN Peacekeeping Operations*, UN, 23 August 2000 (*Brahimi Report*), document A/55/305–S/2000/809. See also Breau 2006, pp. 429–464; Gaja 1995, pp. 39–58; Gray 2001, pp. 267–288; Kühne 1995, pp. 91–112; Murphy 2003b, pp. 71–99; White 2001, pp. 127–146; Bilostkiy 2010, pp. 333–372.

²⁰⁶ See Dinstein 2001, p. 263. See also Garvey 1970, pp. 241–269.

are made up of national contingents supplied by the UN Member States.²⁰⁷ Thus, as an aggregate of representatives of national armed forces with an international mandate, peacekeeping forces have a dual legal status:

[T]he commander of the United Nations force is head in the chain of command and is answerable to the United Nations. The functions of the force as a whole are international. But its individual component forces have their own national duty and discipline and remain in their own national service.²⁰⁸

It must also be noted that members of the UN peacekeeping forces are bound to comply with the fundamental principles and rules of international humanitarian law when they use force in self-defence.²⁰⁹

In turn, as Yoram Dinstein put it, peace-enforcement is a practical way for getting round Article 42 of the Charter in the absence of special agreements provided for in Article 43.²¹⁰ Since the 1990s, the Security Council has been *authorizing* individual or collective military actions by the UN Member States (instead of *imposing* a duty upon them to engage in such actions), in order to enforce its resolutions.²¹¹ The *Operation Desert Storm* (1990) is broadly regarded as a “revolutionary development” and “the catalyst for fundamental change in the international regulation of the use of force.”²¹² The ensuing operations in Somalia (1992), Rwanda (1994), the former Yugoslavia (1994–1995),²¹³ Haiti (1994²¹⁴ and 2004), Albania (1997),²¹⁵ the Central African Republic (1997), East Timor (1999),²¹⁶ Liberia, the Democratic Republic of the Congo,²¹⁷ and Côte d’Ivoire (2003), Kosovo (1999), Afghanistan (2001–2014), Iraq (2003–2011),²¹⁸ Chad (2007) and other actions followed in the novel trend. In carrying out the peace enforcement operations, the Security Council largely relied upon

²⁰⁷ See Dinstein 2001, p. 268.

²⁰⁸ *Attorney-General v. Nissan* (1969), [1970] A.C. 179, 223, quoted in Dinstein 2001, p. 268.

²⁰⁹ See document ST/SGB/1999/13 (Secretary-General’s Bulletin “Observance by United Nations forces of international humanitarian law”). See also Abrisketa 2009, pp. 85–93; Okimoto 2011b, pp. 164–238; Tsagourias 2006, pp. 465–482.

²¹⁰ See Dinstein 2001, p. 268.

²¹¹ See Byers 2002, pp. 21–41; Frowein 1987, pp. 67–79; Harris 2004, pp. 972–1023; Stein 1987, pp. 56–66; Van Walsum 2005, pp. 65–74.

²¹² See Gray 2008, p. 327. See also Dominicé 1991, pp. 85–109; Reisman 1994, pp. 120–133; Tavernier 1990, pp. 278–285.

²¹³ See Cox 1999, pp. 201–244; Gray 1997, pp. 155–197; Figà-Talamanca 1996, pp. 164–175; Gaeta 1996, pp. 147–163; Gazzini 2001, pp. 391–435.

²¹⁴ See Corten 1995, pp. 116–133.

²¹⁵ See Kreß 1997, pp. 329–362.

²¹⁶ See Chinkin 1993, pp. 206–222; Drew 2001, pp. 651–684; Maffei 1993, pp. 223–238.

²¹⁷ See Okowa 2007, pp. 203–255.

²¹⁸ See Buchan 2007, pp. 37–64; Dörr 2003, pp. 181–188; Fassbender 2002, pp. 273–303; Franck 2003, pp. 607–620; Gray 2002a, pp. 1–19; Heintze 2003, pp. 16–21; Howse 2002, pp. 89–92; Lowe 2003, pp. 859–871; McWhinney 2003, pp. 571–585; Stahn 2003, pp. 804–823; Stromseth 2003, pp. 628–642; Taft IV and Buchwald 2003, pp. 557–563; Wedgwood 2003, pp. 576–585; Wheatley 2006, pp. 531–551; Yoo 2003, pp. 563–576; Zedalis 1999, pp. 37–50.

regional arrangements dealt with in Chapter VIII of the Charter (Articles 52–54).²¹⁹ The level of success in those operations has not been consistent. Besides, as Christine Gray observed, the policy of involving regional arrangements²²⁰ might not be free from ulterior motives (cf. the principle of good intentions dealt with above at 1.1.2.3):

There is [...] a danger that interested states operating under UN authorization would gain legitimacy to further their own interests. The early tradition of not using the forces of permanent members of the Security Council or of those states with geographical or historical interests in the state concerned has been further circumvented through this type of operation. Thus it was the USA that led the 1994 and 2004 operations in Haiti, France in Rwanda and the Central African Republic (1997), Italy in Albania, and Australia in East Timor. There was some suspicion of the motives of these states. In Rwanda *Operation Turquoise* was criticized for providing a safe haven for the perpetrators of genocide. These were, however, all temporary, limited forces operating with the consent of the host states even where this was not expressly indicated in the relevant resolutions. It is not clear that the use of the EU to lead an operation instead of a single member state will necessarily meet this concern as to ulterior motives. There were newspaper reports that the use of the EU in the DRC was interpreted by some as evidence of foreign state support for the incumbent President in the elections. And Chad seems to have regarded an EU force led by its former colonial power and current supporter, France, as more acceptable than a UN force.²²¹

It is obvious that, at the present stage of affairs, “[c]lear divisions have emerged between those states claiming to act on behalf of the international community and those who reject such claims in the absence of express Security Council authorization of force”²²² The latter group of States suggests that the United States, the United Kingdom and some other States have gone too far in their interpretation of “implied authorisations by the Security Council” for them to use force,²²³ and stricter compliance with the UN Charter would be required in the future. Notably, even a former Secretary-General of the United Nations supported this opinion of a majority of States within the international community, by having stated, at a press conference on 10 March 2003, in rather direct a manner: “If the US and others were to go outside the [Security] Council and take military action, it would not be in conformity with the Charter [of the United Nations].”²²⁴

²¹⁹ See Dinstein 2001, p. 269.

²²⁰ See Abass 2000, pp. 211–229; Al-Qahtani 2006, pp. 129–147; Bebr 1955, pp. 166–184; Dolzer 1987, pp. 113–133; Gazzini 2003, pp. 231–263; Khadduri 1946, pp. 756–777; Van Kleffens 1949, pp. 666–678; Leeds 2003, pp. 427–439; Levitt 2005, pp. 213–251; Mandel 2001, pp. 95–128; Ofosu-Amaah 1987, pp. 80–94; Schreuer 1995, pp. 477–499; Simma 1999, pp. 1–22; Stein 1987, pp. 5–112; Wills 2004, pp. 387–418; Wolfrum 1993, pp. 576–602; Zöckler 1995, pp. 274–286; Zwanenburg 2005, pp. 189–211; Zwanenburg 2006, pp. 483–508.

²²¹ See Gray 2008, p. 334 (footnotes omitted).

²²² Ibid., p. 368. See also Benvenisti 2004, pp. 677–700; Glennon 2000, pp. 3–25; Hathaway 2000, pp. 121–134; Krisch 2005, pp. 369–408; Wedgwood 2000, pp. 349–359; Zemanek 1987, pp. 32–43.

²²³ See Chinkin 2000, pp. 31–41; Gowlland-Debbas 2000, pp. 361–383; Koskeniemi 2005, pp. 113–124; Koskeniemi 2004, pp. 305–314; Lehman 2000, pp. 1–2; Licková 2008, pp. 463–490; Neuhold 2004, pp. 263–279; Pellet 2000, pp. 385–392; Wolfrum 2004, pp. 255–262.

²²⁴ See document Off-the-cuff: Secretary-General’s press conference (unofficial transcript), available at: <http://www.un.org/sg/offthecuff/?nid=394> (last visited 15 May 2012).

2.4.2 *Charter-Related Exceptions*

The second group of exceptions to the prohibition of the use of force (cf. *supra* 2.1) is not to be found in the Charter of the United Nations explicitly but is still related to it and can be inferred, more or less credibly, from some of its programmatic and operative provisions. The UN General Assembly resolution 377 A (V) (“Uniting for Peace”) of 3 November 1950 (see *infra* 2.4.2.1) and the use of force in pursuance of peoples’ right to self-determination (see *infra* 2.4.2.2) are the principal examples.

2.4.2.1 “Uniting for Peace”

As the draft resolution “Uniting for Peace”²²⁵ was being discussed in the UN General Assembly, numerous arguments deriving from both positive international law and legal scholarship were suggested for and against it.²²⁶ It was noticeable already at the time that the Security Council’s procedure for the maintenance of international peace and security lacked perfection, and it was sought to remedy this flaw through the medium of the General Assembly (cf. *supra* 1.2.5.3). The first operative paragraph of the resolution read as follows:

The General Assembly [...]

1. *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.

Since 1956, ten emergency special sessions were convened under the resolution.²²⁷

The principal argument put forward against the resolution consisted in that it would constitute a violation of the UN Charter inasmuch as it would bequeath the General Assembly with a role, which is in fact the Security Council’s, and thereby ignore a fundamental working principle of the United Nations, i.e. the unanimity of all permanent members of the Security Council as a requisite condition for an

²²⁵ See UN General Assembly resolution 377 (V), 3 November 1950.

²²⁶ For a comprehensive analysis of the resolution, see generally Andrassy 1956, pp. 563–582; Kemp 2010, pp. 21–24; Tomuschat 2001, pp. 289–303; Woolsey 1951, pp. 129–137.

²²⁷ See official website of the United Nations: <http://www.un.org/en/ga/sessions/emergency.shtml> (last visited 10 November 2012).

effective maintenance of international peace and security.²²⁸ In turn, according to the resolution's opponents, it was inconsistent with the UN Charter and constituted, technically, an illicit amendment thereof, contrary to Articles 108 and 109.²²⁹

However, although a strict division of tasks between the General Assembly and the Security Council was indeed intended by the Charter's drafters, it was accomplished only to an extent.²³⁰ Under Article 24(1) of the Charter, the Security Council bears the "primary responsibility" for the maintenance of international peace and security.²³¹ Yet, as Juraj Andrassy noted, a literal reading of this expression suggests the existence of another—"subsidiary" or "supplementary"—responsibility, which, according to the resolution's proponents, should have been conferred upon the General Assembly.²³² Under Article 10 of the Charter,²³³ the General Assembly is authorized to discuss any questions or matters within the competence of the United Nations—and thus also matters of maintaining international peace and security, although they are under the "primary responsibility" of the Security Council.²³⁴ In Article 11(2),²³⁵ three types of possible reactions by the General Assembly with respect to such matters are distinguished: (1) a mere discussion of a question, (2) the adoption of a recommendation, and (3) the necessity of (enforcement) action.²³⁶ The General Assembly's authority to discuss questions and matters within the scope of the UN Charter is not restricted. With respect to "action," it is commonly acknowledged that it means an "enforcement action" or a "military action."²³⁷ Since, in accordance with the second sentence of Article 11(2), the General Assembly may not itself take substantive decisions with respect to such questions and is obliged to refer them to the Security Council,²³⁸ paragraph 1 of resolution 377 (V) limits the

²²⁸ See Andrassy 1956, p. 563.

²²⁹ Ibid.

²³⁰ See *ibid.*, pp. 563–564. See also Greenwood Onuf 1970, pp. 349–355.

²³¹ See Brunnée 2005, pp. 107–132.

²³² Doc. A/C.1/SR. 360, p. 101, referred to in Andrassy 1956, p. 564.

²³³ UN Charter, Article 10: "The General Assembly may discuss *any questions or any matters* within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters" (emphasis added).

²³⁴ Cf. Andrassy 1956, p. 565.

²³⁵ Ibid., Article 11(2): "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion".

²³⁶ For a discussion of these types of reaction, see Andrassy 1956, p. 566.

²³⁷ See *ibid.*, pp. 566–567. See also Bentwich and Martin 1950, p. 40; Goodrich and Hambro 1946, p. 99; Kelsen 2008, pp. 204–205.

²³⁸ See Andrassy 1956, pp. 567–568.

Assembly's competence to "making [...] recommendations." In the case of such a referral, the Security Council might not remain inactive (otherwise it would not act in accordance with the Purposes of the United Nations, cf. the Charter's Article 1(1)), and would be duty-bound to take substantive decisions. It appears that the potential of the UN General Assembly resolution 377 (V) has not been sufficiently exploited, and its operative mechanism might help suppress at least some acts of aggression in the future. The capacity of the General Assembly as an international forum for exchange among nations and peoples with different political, economic and religious backgrounds, including in the area of maintaining international peace and security, is quite sizeable, and the Security Council—whose function consists in putting into action, promptly and effectively (cf. the first sentence of Article 24(1) of the UN Charter), the legitimate collective ambitions of all nations represented in the General Assembly—might not ignore the Assembly's recommendations made under resolution 377 (V).

2.4.2.2 The Use of Force in Pursuance of Peoples' Right to Self-Determination

The question whether national liberation movements might use force in pursuit of peoples' right to self-determination²³⁹—and whether like-minded States might assist them in this pursuit²⁴⁰—has been on international lawyers' agenda since after the Second World War (cf. supra 1.2 and infra 3.1.1–3.1.3). As the Charter of the United Nations (see specifically supra 1.2.5.1) whose Articles 73 and 74 dealt with the status of non-self-governing territories had entered into force, many of the former colonies started progressively claiming independence from their "mother countries," including by military force. As Christine Gray recalls, this tendency started out by violent independence movements in Tunisia, Morocco and Algeria against France, in Malaya, Kenya and Cyprus against the UK, in Indonesia against The Netherlands, and in India against Portuguese authority in Goa.²⁴¹ Especially the latter case caused a heated debate in the Security Council where some States maintained that the issue should be regarded as one of colonialism (for Portugal sought to preserve its authority in Goa), and another group of States argued that it was about India's allegedly unlawful use of force breaching Article 2(4)²⁴² (cf. supra 2.1–2.2). As decolonization progressed, some ex-colonies and socialist States increasingly asserted the right for national liberation movements to use force—and for third States to support them—a claim that was

²³⁹ See Brownlie 1998, pp. 599–602; Tomuschat 1993, pp. 8–11; Van Boven 1995, pp. 461–476; Weller 2009, pp. 111–165.

²⁴⁰ See Malanczuk 1997, pp. 326–337.

²⁴¹ See Gray 2008, p. 59.

²⁴² Ibid., p. 60.

resolutely resisted by Western States.²⁴³ In the General Assembly (cf. *supra* 1.2.5.3), compromise solutions were found at the expense of ambiguity; Christine Gray identified at least three relevant examples. The key document on decolonization—the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples²⁴⁴—made no direct reference to the use of force but some of the subsequent resolutions on the subject did use expressions, which could be interpreted as endorsing the use of force in certain circumstances.²⁴⁵ Thus, resolution A/RES/2105 (XX) “recognise[d] the legitimacy of the *struggle* by the peoples under colonial rule to exercise their right to self-determination and independence and invite[d] all states to provide material and moral assistance to the national liberation movements in colonial territories” (emphasis added).²⁴⁶ Christine Gray notes that the meaning of “struggle”—whether it meant in this specific context “armed struggle” or “peaceful struggle”—remained unclear²⁴⁷; it appears to this author that the word’s usual literary meaning does imply the permissibility of a use of force. In a similar way, the 1970 Friendly Relations Declaration did not plainly allow for the use of force by national liberation movements but it called upon States

[t]o refrain from any forcible action which deprives peoples [...] of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of the right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.²⁴⁸

A comparable approach was used in Article 7 of the General Assembly resolution 3314 (XXIX) (cf. *supra* 2.3):

Nothing in this Definition [...] could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of

²⁴³ Ibid. Cf. also Article 1(4) of the First Additional Protocol to the 1949 Geneva Conventions (“General principles and scope of application”): “The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”

²⁴⁴ See UN General Assembly resolution 1514 (XV) of 14 December 1960, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514\(XV\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514(XV)) (last accessed 15 November 2012).

²⁴⁵ See Gray 2008, p. 60.

²⁴⁶ See UN General Assembly resolution A/RES/2105 (XX), 20 December 1965, quoted in Gray 2008, p. 60.

²⁴⁷ See Gray 2008, p. 60.

²⁴⁸ See the Friendly Relations Declaration, *supra* note 26, Principle 5, para 5, quoted in Gray 2008, p. 61.

alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the abovementioned Declaration.²⁴⁹

As the issue of the use of force in the context of self-determination currently remains pertinent—principally, if not exclusively—only in the context of Palestine²⁵⁰ and the continued occupation of the West Bank and Gaza by Israel (cf. supra 2.1.3.2),²⁵¹ it may for the most part be regarded as one of the past. Ethnic groups' claims to secession from existing States based on the right to self-determination are typically not supported by States.²⁵² In the few remaining contexts where self-determination remains on the agenda, the United Nations must take all necessary measures to ensure, to the maximum extent possible, its progressive and peaceful implementation, with due regard to the interests of and in association with all parties involved, for the risks inherent in the lasting inter-ethnic and interreligious conflict in the area—if not managed aptly—may result in dramatic effects to the Middle East and the world at large.

2.4.3 *Extra-Charter Exceptions*

The extra-Charter exceptions to the prohibition of the use of force are the most problematic in the sense that they have no express or implicit foundations in the Charter of the United Nations and derive, in the quality of emerging norms of customary international law, from extra-Charter sources of international law. As these rules are not yet codified in written sources, their content remains vague, and the quality of international recognition is not undisputed. In this sense, they may be termed “purported”—or, in the best of cases, “emerging”—exceptions to the prohibition of the use of force (cf. supra 2.1). The three most notable examples we will focus upon are the protection of nationals abroad (see infra 2.4.3.1), the so-called “humanitarian intervention” (see infra 2.4.3.2), and the “pro-democratic intervention” (see infra 2.4.3.3).

2.4.3.1 **Forcible Protection of Nationals Abroad**

The political and scholarly discussion on the legitimacy of the so-called “forcible protection of nationals abroad” has been ongoing for decades now. The substantive basis for this important debate consisted in military interventions

²⁴⁹ Quoted in Gray 2008, p. 62.

²⁵⁰ See Boyle 1990, pp. 301–306; Cassese 1993, pp. 564–571; Crawford 1990, pp. 307–313; Husain 2003, pp. 207–225; Malanczuk 1996, pp. 485–500; Vidmar 2013, pp. 19–41.

²⁵¹ See Gray 2008, p. 64.

²⁵² Ibid. See also Aust 2005, p. 23; Crawford 1999b, pp. 85–117; Heintze 2008, pp. 238–246; Werner 2001, pp. 171–190.

carried out by a few States in other States, without the Security Council authorizations, for the purpose of rescuing and/or evacuating their nationals who were menaced by a collapse of law and order or by other life-threatening dangers in the respective target States.²⁵³ As Christine Gray notes, there is currently no unity of opinion among policy-makers as to the legality of such military actions: throughout numerous debates within the Security Council and the General Assembly,²⁵⁴ many of these claims were regarded as pretexts to intervene in States' domestic affairs, in violation of a respective Principle of the United Nations,²⁵⁵ and as a modern type of the nineteenth century "gunboat diplomacy."²⁵⁶ Consultations on the issue of diplomatic protection, which were held in the General Assembly in 2000, contributed to this important debate.²⁵⁷ It appears that customary international law on the "forcible protection of nationals abroad," as it currently stands, does not spell out either the range of exceptional circumstances where States might have recourse to military force to protect or rescue their nationals abroad or the extent of such force, which could be used to this end.

Among scholars, the supporters and antagonists of the concept have fashioned more than a few mutually exclusive views based, chiefly, on the Charter of the United Nations and its relevant *travaux préparatoires*.²⁵⁸ Both opposing groups included outstanding authorities in international law, and many scholars have at times claimed to represent the prevalent views, but it seems very difficult to establish which group is, as a matter of fact, more representative²⁵⁹; it is probably more accurate to say that, to date, the legal scholarship has been largely incapable of bringing contradictory State practices to a common denominator.

At times, the military operations under discussion are regarded as a sub-type of "humanitarian intervention" (see *infra* 2.4.3.2), as both types of operations (1) take place outside the territory of the intervening State, (2) involve the use of inter-State military force in the sense of Article 2(4) of the Charter (cf. *supra* 2.1), and (3) aim at preventing the infliction of physical harm on identifiable persons or groups in the territory of the target State.²⁶⁰ Still, there exists common agreement that, from the point of view of international law, the two types of operations must

²⁵³ See, for example, Gazzini 2005, pp. 170–171; Gray 2008, p. 156.

²⁵⁴ See Gray 2008, p. 158.

²⁵⁵ See UN Charter, Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII"

²⁵⁶ On this concept, see generally Cable 1994, Hood 1983.

²⁵⁷ For an overview of these consultations, see Corten 2008, pp. 774–777.

²⁵⁸ See Gray 2008, pp. 157–158.

²⁵⁹ See *ibid.*, pp. 156–157, especially note 184.

²⁶⁰ See Eichensehr 2008, p. 462. See more generally Beyerlin 1977, pp. 213–243; Ruys 2008, pp. 233–271; Shaw 2008, pp. 1143–1145.

be kept distinct.²⁶¹ The principal reason for that distinction is in those operations' different *ratione personae* fields of application: whereas the purpose of "humanitarian intervention" is to protect the target State's population against massive and/or grave violations of human rights, military operations for the protection of nationals seek to defend the intervening States' own nationals whose lives or physical integrity are under an imminent threat in the to-be-attacked State.

As a rule, States and publicists justify the "forcible protection of nationals" by a combination of three cumulative conditions: (1) there has to exist an impending threat of physical injury being caused to a State's nationals; (2) the territorial sovereign must be unwilling or unable to protect them, and (3) the military action of the intervening State may not extend beyond the purpose of protecting its nationals against the identified impending threats.²⁶² It is not doubted that States' right to such interventions was undisputed before 1945.²⁶³ Likewise, it is agreed that they are fully consistent with the Charter of the United Nations where the host State grants its consent to an intervention. On the other hand, whether States' military operations aimed at protecting their nationals by force where no such sovereign consent is granted, or where its authority is dubious—for example, where there is a high intensity non-international armed conflict ongoing within the to-be-attacked State—are compatible with relevant international law (cf. supra 2.1) is one of the principal issues of present-day *jus ad bellum*.²⁶⁴

Scholars who favor the "forcible protection of nationals" doctrine give a number of reasons.²⁶⁵ One group of publicists suggests, quite plausibly, that such military operations do not breach the prohibition of the use of force contained in the Charter's Article 2(4), because they do not affect the "territorial integrity or political independence" of a State; their only aim is to rescue foreign nationals from an imminent threat, which the host State is unable or unwilling to remove.²⁶⁶ According to another mainstream approach, military operations aimed at providing protection to a State's nationals abroad represent a form of self-defence under Article 51 of the Charter of the United Nations²⁶⁷ (cf. supra 2.4.1.1). A two-level argument is often offered to substantiate this claim. First, it is asserted that the Charter recognized the *inherent* right of States to self-defence (cf. supra 2.4.1.1.2), which implies this right's rather broad interpretation in the context of the relevant pre-existing customary international law, which had encompassed, *inter alia*, the right of each State to protect its nationals abroad. Second, it is suggested that a State's nationals who are temporarily abroad do still constitute a part of that State's

²⁶¹ See Eichensehr 2008, pp. 461–463.

²⁶² Cf. Waldock 1952, at 467.

²⁶³ See Brownlie 1968, p. 289.

²⁶⁴ For a discussion, see Doswald-Beck 1985, pp. 189–252; Ronzitti 1985, pp. 1–88.

²⁶⁵ For an overview of the relevant argumentation, see Zedalis 1990, pp. 221–244.

²⁶⁶ Similar views have been expressed, for instance, in Paust 1978, at 89–90; Higgins 1994, pp. 220–221.

²⁶⁷ This group of scholars includes, for example, Gerard 1967, at 254–255; Schachter 1986, at 139; Lillich 1993a, at 216.

population and thus embody its basic attribute²⁶⁸; hence, a deliberate attack against that State's nationals abroad may be taken for an attack against the State itself, and the State might, on this basis, exercise its right to self-defence on the basis of Article 51. Occasionally, some other justifications have been offered but they did not become as common as these two; they included references to the existence of a "state of necessity"²⁶⁹ or to "humanitarian considerations" and fundamental human rights.²⁷⁰ Another group of publicists have maintained, probably most accurately, that the right of State to protect its national abroad should be considered as a novel, essentially customary in nature and self-sufficient exception to Article 2(4), as it cannot be easily placed into the current framework of international law.²⁷¹ This author tends to agree to the permissibility of the mechanism under discussion, on the condition that it be resorted to as a matter of exceptional legitimacy where a host State is manifestly unable or unwilling to remove the threat, especially where the level of violence against individuals requiring protection reaches that of a widespread or systematic attack in the sense of Article 7(1) of the Rome Statute. Of course, it is understood that a State so intervening in another State must immediately withdraw, together with its rescued nationals, once the operation is over, and must be prepared to subsequently justify its good intention in a court of law.

2.4.3.2 "Humanitarian Intervention"

Likewise, the legal regulation of the so-called "humanitarian intervention" is among the most complex issues of modern *jus ad bellum*.²⁷² Sean Murphy defined "humanitarian intervention" as "the threat or use of force by a State, group of States, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights."²⁷³ The key issue here is exceptionally difficult: should States be permitted as

²⁶⁸ See Lukashuk 2008a, p. 25.

²⁶⁹ Raby 1988, pp. 253–272.

²⁷⁰ See, for instance, Gordon 1977, at 132; Schweisfurth 1980, at 161.

²⁷¹ This opinion has been expressed, for example, by Ronzitti 2006, at 354.

²⁷² See the United Nations Secretary-General's Press Release SG/SM/7136 (20 September 1999) where Kofi Annan stated that humanitarian intervention would constitute a "core challenge to the Security Council and the United Nations as a whole in the next century"; see also Bederman 2001, at 717; Abashidze 2006, pp. 360–373; Berman 2006, pp. 743–769; Cassese 1999a, pp. 791–799; Cassese 1999b, pp. 23–30; generally Chesterman 2001; Craven 2002, pp. 43–61; Dekker 2001, pp. 115–126; Dias 2011, pp. 48–62; Dreist 2002, pp. 68–77; Glanville 2012, pp. 1–32; Hilpold 2001, pp. 437–467; Kemp 2010, pp. 64–69; Lietzau 2004, pp. 281–304; Lillich 1993b, pp. 557–575; McClean 2008, pp. 123–152; Nardin 2013, pp. 67–82; Reisman 2000, pp. 3–18; Shaw 2008, pp. 1155–1158; Stowell 1939, pp. 733–736; generally Tesón 2005; Thakur 2011, pp. 32–47; Werle 2009, at 413; Zwitter 2007, pp. 231–236.

²⁷³ See Murphy 1996, pp. 11–12. Badescu's definition is quite similar: "The definition of humanitarian intervention used in this study is the use of armed force by either a state, a group of states, or an international organization to address widespread suffering or death among civilians in another state affected by grave violations of human rights," see Badescu 2001, at 8 (footnotes omitted).

a matter of international law to intervene militarily, without a Security Council authorization, in other States, in order to stop genocide or other atrocities of a comparable magnitude?²⁷⁴

During the past decade, the issue became particularly important in connection with international coalitions' interventions in Kosovo (1999)²⁷⁵ and Iraq (2003) as well as with the community of States' failure to do so in the Sudan.²⁷⁶ The principal apprehension related to the legitimacy of "humanitarian intervention" is that, if it is once legalized, States would exploit it as a pretext for waging wars to attain their selfish national interests.²⁷⁷ This policy problem was well known since the time of Grotius and the medieval European classics of international law that followed him (see *supra* 1.1.2.4). The doctrine of "humanitarian intervention" had been quite influential at the beginning of the twentieth century,²⁷⁸ before the League of Nations erected initial legal barriers to the inter-State use of force after the end of the First World War (see *supra* 1.1.6.1–1.1.6.2). After the entry into force of the Charter of the United Nations' (cf. *supra* 1.2.5.1), the center of gravity in the international political²⁷⁹ and scholarly²⁸⁰ debate determinedly shifted towards opposing "humanitarian intervention." Notably, even States that have themselves been involved in "humanitarian interventions" without Security Council authorizations, tended not to justify their conduct in terms of a legal *right* to practise such interventions, and explained it as *ad hoc* solutions.²⁸¹

²⁷⁴ C.G. Badescu summarized the essence of current scholarly debate about the concept of "humanitarian intervention" as follows: "Lawyers, international relations theorists, philosophers, and policy makers alike have addressed the dilemmas of humanitarian intervention from a variety of approaches. Discussions on whether there is a legal right of humanitarian intervention, on how to address ethical considerations and what morality requires, and on the practical dilemmas related to the politics of intervention abound in the relevant literature," see Badescu 2001, at 2 (footnotes omitted).

²⁷⁵ See Charney 1999, pp. 834–841; Chinkin 1999, pp. 841–847; Henkin 1999, pp. 824–828; Joyner 2002, pp. 597–619; Milano 2003, pp. 999–1022; Orford 1999, pp. 679–711; Wheatley 2000, pp. 261–273; White 2000, pp. 27–43.

²⁷⁶ See "Warum hat der Sicherheitsrat keine humanitäre Intervention in dem Fall "Sudankonflikt" gestartet? Eine Erklärung anhand der Konstruktivismus-Theorie," available at: <http://www.e-polis.cz/evropska-unie/571-warum-hat-der-sicherheitsrat-keine-humanitare-intervention-in-dem-fall-sudankonflikt-gestartet-eine-erklarung-anhand-der-konstruktivismus-theorie.html> (last accessed 15 November 2012).

²⁷⁷ See Goodman 2006, pp. 107–141.

²⁷⁸ See Brownlie 1968, p. 338.

²⁷⁹ Within five years since the 1999 intervention in Kosovo, more than 130 States representing about 80 per cent of the world's population have issued policy statements to the effect of rejecting the legality of humanitarian intervention. See, for example, UN Doc. S/PV.4011 (10 June 1999) documenting China's opinion that humanitarian intervention "promote[s] hegemonism under the pretext of human rights"

²⁸⁰ See, for example, Bilder 1999, at 153, 161; Schachter 1984, at 1620, 1629.

²⁸¹ See, for example, United Kingdom Foreign Office, Policy Document No. 148, reprinted in *BYIL* (1986), at 614, 619.

Although some publicists have suggested otherwise,²⁸² it is widely agreed that international law forbids States to use force unilaterally even for the purpose of rescuing victims of humanitarian catastrophes.²⁸³ The chief treaty regulating the use of force, the Charter of the United Nations does not name “humanitarian interventions” among lawful exceptions to Article 2(4) (cf. supra 2.4.1–2.4.2), and relevant General Assembly resolutions confirm this overarching rule²⁸⁴ (cf. supra 1.2.5.3). It was also confirmed by the International Court of Justice²⁸⁵ and recognized in leading treatises that “humanitarian intervention” was prohibited under both the relevant treaty law and customary international law, some inconsistent State practices over the past decade or so notwithstanding.²⁸⁶

In light of the issue’s undoubted importance, one may assume, though, that the legal regulation of humanitarian intervention might develop, to some extent, in a foreseeable future. Following ECOWAS interventions in Liberia (1990) and Sierra Leone (1997) and NATO’s intervention in Kosovo (1999), some authors appeared to suggest that new rules allowing for an exception to the prohibition of the use of force under Article 2(4) of the Charter might be emerging.²⁸⁷ Some time ago, even a codification of the law of “humanitarian intervention” was suggested in the doctrine.²⁸⁸ It remains to be seen whether and to which extent States—whose majority expressed themselves against the legitimisation of humanitarian intervention some time ago (cf. supra note 279)—might allow their practices and *opinio juris* to take an alternative direction.

2.4.3.3 “Pro-democratic Intervention”

Whereas the US-led coalition’s intervention in Iraq in March 2003 divided opinions within the international community,²⁸⁹ the declared aim of introducing democracy in that country after the establishment of a military occupation regime

²⁸² For a persuasive discussion in favor of the lawfulness of humanitarian intervention, see Greenwood 1999, at 141.

²⁸³ Cf. Badescu 2001, pp. 48–73.

²⁸⁴ Cf., for example, Definition of Aggression, GA Res. 3314 (XXIX) (14 December 1974); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (24 October 1970); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA Res. 36/103 (9 December 1981).

²⁸⁵ See *Nicaragua* Judgment, para 268: “[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect [...] The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States [...]”

²⁸⁶ Cf., for example, Cassese 2005, pp. 373–374; Brownlie 1998, pp. 710–712; Shaw 2008, p. 1046; Malanczuk 1997, p. 221.

²⁸⁷ See, for instance, Gray 2008, p. 99.

²⁸⁸ See Henke 2009, pp. 15–21.

²⁸⁹ See S/PV.4726, 26 March 2003, and S/PV.4726 (Resumption 1), 27 March 2003.

was not practically contested. The change of Iraq's political regime from dictatorial to democratic was an official political end of *Operation Iraqi Freedom*,²⁹⁰ in line with the dual ambition of President George W. Bush's administration, on the one hand, to remove threats emanating from "rogue" States and, on the other hand, to proliferate democracy—the Middle East and, more generally, the Muslim world being a special focus of this aspect of the United States' foreign policy.²⁹¹

It seems that this ambition, however inconsistent with the pre-existing international law in force it might have been, did manage to influence the practice of the Security Council to a sizeable extent, at least for the duration of President Bush's terms of office. As W. H. Taft IV and T. F. Buchwald argued, *Operation Iraqi Freedom* had found its legal basis in a specific reading of the Security Council resolutions 678 (1991), 687 (1991), and 1441 (2002), whereby the purported "material breach" of Iraq's disarmament obligations under resolution 687 (1991) recovered the right to use armed force provided under resolution 678 (1991).²⁹² For our purpose, the question is to which extent the Security Council resolutions 1483 (2003), 1511 (2003), and 1546 (2004)—which were adopted in the aftermath of the intervention with a view to giving legal effect to the reality of a forcible regime change—might be regarded as reflections of the Security Council's *legitimate* political authority in accordance with the Charter of the United Nations.

It may appear that Iraq's "forced democratization" is not coherent with current international law: in accordance with Article 43 of the Regulations annexed to the 1907 Hague Convention (IV) with respect to the Laws and Customs of War on Land, an intervening State, which establishes a military occupation regime, is obliged to respect "unless absolutely prevented, the laws in force in the [occupied] country." Article 43 embodies customary international law,²⁹³ and the forced democratization of occupied territories must consequently be disallowed. Yet, this conclusion is somewhat incomplete in view of Articles 24(1) and 103 of the Charter of the United Nations: if the UN Members' obligations under the Charter prevail over those under other international treaties, including the 1907 Hague Convention (IV), and the Members agree that, in carrying out its duties for the purpose of maintaining international peace and security, the Security Council acts on their behalf, one may conclude that resolutions of the Security Council may, in certain cases, deviate from written international law, even if relevant provisions also amount to customary law (as the 1907 Hague Regulations do). As a matter of practice, there is little use in some Council members' *ex post facto* critique of the US-led coalition's intervention in and occupation of Iraq and the subsequent regime change, if they themselves allowed for the adoption of relevant Security Council resolutions, by not having

²⁹⁰ See Agence France Presse, "The leaders' two declarations: "We uphold a vision of international security," *New York Times*, 17 March 2003.

²⁹¹ Cf., for example, President Bush's address to the General Assembly of the United Nations, of 12 September 2002, and relevant paragraphs in the US *National Security Strategy* (2002).

²⁹² Taft IV and Buchwald 2003, at 557. See also Benounne 2002, pp. 243–262; Werle 2009, at 413.

²⁹³ See *Legal consequences*, para 89.

vetoed them. To conclude on this issue, the Security Council's indecisive behavior with respect to developments in Iraq—and, later, also in Libya—established critical precedents whose future implications remain to be seen.²⁹⁴

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²⁹⁴ See Müllerson 2008, pp. 1–31.

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