PART VI

KEY ISSUES IN TIMES OF ARMED CONFLICT

CHAPTER 22

USE OF FORCE

GIOVANNI DISTEFANO

1 Introduction

Article 2(4) of the Charter of the United Nations[1] (UN Charter) introduced for the first time a comprehensive ban on the use of force in international relations between states. Indeed, the use of force is prohibited outright, applying not only to the waging of war (as in the Briand-Kellogg Pact of 1928) but also to forcible measures short of war such as intervention, blockades, and reprisals. Moreover, the ban extends not only to the actual use of force but also to its threat. The prohibition is accompanied by a robust system of collective security embodied primarily in Chapter VII of the UN Charter. As a matter of interpretation under the Vienna Convention on the Law of Treaties[2] (Vienna Convention), the content and scope of the prohibition must be construed in context,[3] that is, in the light of other relevant provisions in the UN Charter and its Preamble; 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty'; and 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.[4]

[1] (1945) 1 UNTS XVI.
[2] *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331.
[3] Vienna Convention, Art 31(1).
[4] Vienna Convention, Art 31(2). See also the *ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, § 38, 244.

2 The Prohibition of the Use of Force between States

In order to assess the content and scope of Article 2(4), it ought to be observed from the outset that while the prohibition is incumbent on all member states of the United Nations, its beneficiaries are states in general, whether or not they are UN members. If such specification is today irrelevant, given the customary international law nature of the prohibition enshrined in Article 2(4), this was not the case when the UN Charter was adopted and for a long time since then.

Quite obviously, Article 2(4) outlaws the use of military force, but it is still vociferously debated whether it covers other kinds of force, such as political, economical, and the like, to which states resort in their international life. Far from exhausting this highly sensitive matter, one could briefly list the elements in favour and against the extension of the prohibition to other species of force on the basis of a systemically integrated approach, requiring that relevant rules of international law applicable between the parties be taken into account in interpreting treaties.[5]

On the one hand, an expansive interpretation is supported as a matter of contextual interpretation and application of the textual canon *expressio unius est exclusio alterius*. Some provisions in the UN Charter including Article 2(4) refer only to 'force'[6] while other provisions refer to 'armed force'[7] (although the reference to 'force' in Article 44 is clearly intended only to refer to armed force). Further, General Assembly Resolution 2625 (XXV) on Friendly Relations[8] forbids 'armed intervention and all other forms of interference'[9] and clearly affirms that 'economic, political or any other types of measures'[10] aimed at subordinating sovereign rights breach the principle of non-intervention. While such measures are not expressly mentioned in Article 2(4), the propositions in the Resolution are consistent with a broad reading of the word 'force'. Arguably, therefore, Article 2(4) should not be read as excluding other kinds of force outside military force.

On the other hand, there are strong arguments in favour of a restrictive interpretation of Article 2(4). During the framing of the 1975 Helsinki Final Act on Security and Cooperation in Europe (Helsinki Final Act), a Soviet amendment to insert 'other' types of force was rejected by the Conference. The same had occurred in 1945, during the drafting of the UN Charter itself at the San Francisco Conference,

[5] See generally C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279.

[6] UN Charter, Arts 2(4), 44. [7] UN Charter, Preamble, Art 41, 46.

[8] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) Annex, 25 UN GAOR, Supp (No 28), UN Doc A/5217 (24 October 1970).

[9] UN Doc A/5217 (24 October 1970), 123. [10] UN Doc A/5217 (24 October 1970), 123.

where a similar proposition tabled by the Brazilian delegation was eventually dismissed.[11] In these two cases, the recourse to *travaux préparatoires* as a supplementary means of interpretation (one relating to the UN Charter itself and the other to a subsequent international instrument) conveys a restrictive interpretation of Article 2(4). In its 1973 judgment in the *Fisheries Jurisdiction Case*, the International Court of Justice (ICJ) seemed to suggest that only military force is envisaged by Article 2(4).[12] Later, in the seminal 1986 *Nicaragua Case*, the International Court of Justice clearly divided its analysis of allegedly wrongfully US actions into two categories: use of force under Article 2(4) and non-intervention under Article 2(1).[13] Non-military activities of the United States were scrutinized under the latter provision, and not under Article 2(4). Similarly, the Permanent Court of Arbitration in the 1981 *Dubai/Sharjah Border Case*[14] seemed cautiously to support a restrictive interpretation of Article 2(4). Finally, in this connection Article 52 of the Vienna Convention provides for the invalidity of treaties concluded 'by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. By referring reflexively to the principles embodied in the Charter, this provision purposely abstains from specifying what type of force is eligible to nullify a treaty. A proposal aimed at the insertion of economic coercion within the scope of Article 52 was rejected by the Vienna Conference,[15] though it ultimately adopted a non-binding Declaration condemning 'Military, Political or Economic Coercion in the Conclusion of Treaties'.

At the end of the day, while it can be tentatively suggested that Article 2(4) only encompasses military force, one can nonetheless agree that 'it cannot be concluded that [this] issue has definitively been settled'.[16]

Some words must now be devoted to the second and third clauses of Article 2(4). The second clause ('against the territorial integrity or political independence of any State'), added at the San Francisco Conference,[17] has been hastily and wrongly construed by some authors as being an overt loophole in the general prohibition of the use of force, allowing forcible actions that do not directly compromise territory or political status. Luckily, this is refuted by interpreting the clause 'in the light of its object and purpose' in accordance with Article 31(1) of the Vienna Convention.

[11] UN Doc 784, 1/1/27, *UNCIO Documents* 331, 334–5.

[12] *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, Jurisdiction of the Court, Judgment, ICJ Reports 1973, § 24, 59.

[13] *Military and Paramilitary Activities in and against Nicaragua*, Judgment, ICJ Reports 1986, §§ 187–92 (98–102) and §§ 239–53 (123–9).

[14] Arbitral Award of 19 October 1981 (1993) 91 *ILR* 569.

[15] Amendment sponsored by 19 states purporting to add 'including economic or political pressure' after the term 'force' (Official Documents of the Conference, at 171).

[16] O. Corten, 'Article 52. Convention of 1969', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press, 2011), 1207. By contrast, it is undisputed that any kind of political or economic coercion is likely to amount to an unlawful intervention in matters within the domestic jurisdiction of the affected state, thus breaching Art 2(1) of the UN Charter.

[17] UN Doc 784, 1/1/27, UNCIO Documents VI, 342–6.

According to its Preamble and reiterated in substance in its first Article,[18] one paramount purpose of the UN Charter is to restrict the unilateral use of force by states in their international relations. This construction is further supported by the UN Charter's *travaux préparatoires*, which record that the majority of delegations voted for the insertion of the second clause in an attempt to strengthen rather than to dilute the prohibition.[19] It was contended that small-scale or short-lived uses of force on another state's territory did not amount to the infringement of its territorial integrity and political independence. This interpretation is not correct. Rather, 'independence' must be read as 'inviolability' (that is, any forcible trespassing of state boundaries),[20] albeit of limited duration and scope. Hence, 'political integrity' does not merely cover attempts to modify the legal status of the invaded territory (for instance through annexation), but also any use of force directed within or against another state. In this respect, some scholars[21] have tried to demonstrate that military actions aimed at eradicating military or paramilitary non-state actors on another states territory without clashing, or targeting, the latter military forces, is not inconsistent with Article 2(4). This contention is not well founded for the same reasons as above (see also *infra* 1.B.3).

The third clause ('or in any other manner inconsistent with the Purposes of the United Nations') has likewise given birth to daredevil interpretations aimed at showing that some types of military interventions *on* another states territory may be compatible with Article 2(4). Such interpretations suggest that, for instance, humanitarian intervention, or the germane intervention for the protection of human rights, and intervention for the protection of nationals abroad, allegedly being carried in pursuance of UN goals, would not be at odds with its purposes. Protection of nationals abroad will be dealt with later on; it suffices here to emphasize that this clause aimed, again, at hardening the general prohibition as it clearly appears from the UN Conference in 1945.[22]

[18] '[T]o ensure […] that armed force shall not be used, *save in the common interest*' (emphasis added).

[19] See R.B. Russell, *A History of the United Nations Charter* (Washington, The Brookings Institution, 1958), 456–7.

[20] In accordance with General Assembly Res 2625 (XXV) (n 22), state boundaries must be here interpreted according to its widest meaning, thus including (in addition to internationally agreed and recognized state boundaries): 'international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect'. The ICJ's case law (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, § 87, 171) and UN Security Council practice (Res 111 (19 January 1956), 228 (25 November 1966) and so forth) concur to this interpretation.

[21] J.E.S. Fawcett, 'Intervention in International Law' (1961-II) 103 *RCADI* 359; B.A. Feinstein, 'The Legality of the Use of Armed Force by Israel in Lebanon—June 1982' (1985) 20 *ILR* 372–3; R.A. Friedlander, 'Retaliations as an Anti-Terrorist Weapon: The Israeli Lebanon Incursions and International Law' (1978) 8 *Israel Yearbook on Human Rights* 72; B. Levenfeld, 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisals Under Modern International Law' (1982) 21 *Columbia Journal of Transnational Law* 20, 29, 45–6.

[22] 'The Delegate of the United States made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase "or in any other

Finally, it is worth recalling that—whatever the actual or overrated deficiencies of the UN system of collective security[23]—Article 2(4) (and the overall régime concerning the use of force embodied therein) reflects customary international law as the ICJ rightfully stressed in *Nicaragua*.[24]

3 The Definition of Aggression

The UN Charter refers to 'aggression' and 'act of aggression' several times (Articles 1(1), 39, 53)[25] without defining these terms. In reality, during the San Francisco Conference, several propositions were submitted (by small and medium-sized states)[26] for the insertion in the UN Charter of a definition of aggression binding on the UN Security Council, but all of them were met by the hostility of the future UNSC permanent members. This was unsurprising, as it is likely to be within the interests of larger states and more powerful states to keep definitions as malleable as possible. Since then, the General Assembly approved a definition of aggression drafted by a Special Committee on the Question of Defining Aggression in Resolution 3314 (XXIX).[27]

Although, as stated above, the UN Charter régime pertaining to the use of force is comprised by several provisions and must be considered and construed as a whole, some significant differences exist between, Article 2(4) on the one hand and, on the other, those Articles referring to aggression. In other words, the scope of force prohibited under the former is not coextensive with the notion of aggression, the

manner" was designed to insure that there should be no loopholes' (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol VI, 335). '[T]he Committee [Special Committee of the General Assembly mandated to the elaboration of resolution 2625] regarded the concluding phrase of Article 2(4) as a limitation on State action and not an escape clause' (quoted in E. Jiménez de Aréchaga, 'International Law in the Past Third of a Century. General Course in Public International Law' (1978-I) 159 *RCADI* 92).

[23] 'Whatever the fate of Chapters VI and VII of the United Nations Charter, Article 2(4) remains. That norm, I stress, is independent of collective enforcement. The argument that, under the principle *rebus sic stantibus*, or some variation of it, the failure of the intended enforcement system vitiates Article 2(4), has no foundation. Clearly, that was not the intent of the framers of the Charter. No Government has claimed it. Not many scholars have argued it', L. Henkin, 'International Law: Politics, Values and Functions. General Course on Public International Law' (1989-IV) 218 *RCADI* 145–6; *Corfu Channel* case (*UK v Albania*), Judgment, ICJ Reports 1949, 35; UNGA Res 377 (V) 'Uniting for Peace', adopted 3 November 1950 (7th and 8th Preambles). See likewise *infra* 112.

[24] *Nicaragua* 1986 (n 13), 99–100 (§ 188).

[25] This list omits Art 51, which surprisingly—contrary to the French text—refers to 'armed attack'. See *infra* 1.A.1.

[26] Russell (n 19), 670–2.

[27] UNGA Res 3314 (XXIX) adopted the 14 December 1974 (Definition of Aggression).

existence of which can trigger the right for the victim-state to respond in accordance with Article 51 (which enshrines the right of self-defence).[28]

How do we know that not all acts prohibited as per Article 2(4) constitute aggression? First of all, this provision also bans the *threat* of force, which is clearly outside the scope of *actual* use of force. Secondly, and more importantly, not all *actual* uses of force amount to (an act of) aggression. Aggression is a subset of use of force, as the General Assembly declared in its Resolution 3314 (XXIX) defining aggression as 'the most serious and dangerous form of the illegal use of force'.[29] This discrepancy is corroborated by the majority, if not all, of the elements of the general rule of interpretation, codified by Article 31 of the Vienna Convention. First of all, in terms of literal interpretation, 'use of force' and 'aggression' have different 'ordinary' meanings; contextual[30] and judicial interpretation concur likewise to support this discrepancy;[31] systemic interpretation points to the same conclusion, through the recourse to the aforementioned General Assembly Resolutions 2625 (XXV) and 3314 (XXIX) and to the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts[32] (ILC Articles on State Responsibility). Furthermore, this is confirmed by recourse to the supplementary means of interpretation, *travaux préparatoires* (Article 32 of the Vienna Convention), from which clearly emerges the intention to restrict the grounds for unilateral use of force by states.[33]

Article 3 of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) takes a case-by-case approach to defining aggression, providing an open-ended list of situations that shall qualify as acts of aggression. Its non-exhaustive character can also be inferred explicitly from Article 4, which provides that '[t]he acts enumerated above are not exhaustive' and that 'the Security Council may determine that other acts constitute aggression'. In fact there are two conditions which determine the existence of an act of aggression: first, the temporal element, according to which '[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression'; secondly, the

[28] See *infra 1.A.1.*

[29] UNGA Res 3314 (XXIX) adopted the 14 December 1974 (Definition of Aggression).

[30] It suffices to recall that, as the ICJ said in 1996, 'The prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence': *Threat or Use of Nuclear Weapons* (n 4), 244 (§ 38).

[31] *Nicaragua* 1986 (n 13), 101, 110–11, 119, 126–7 (§§ 191, 210–210 [AQ?], 230, 247); *Threat or Use of Nuclear Weapons* (n 4), 244 (§§ 37–8); Eritrea/Ethiopia Claims Commission, Partial Award *Jus ad bellum* (Ethiopia's Claims 1–8), 19 December 2005, §§ 11, 12 (<http://www.pca-cpa.org/showfile.asp?fil_id=158>); *Oil Platforms* (*Islamic Republic of Iran v United States*), Judgment, ICJ Reports 2003, § 51, 186–7; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), Judgment, ICJ Reports 2005, 222–3 (§§ 146–7).

[32] 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations', Art 21 (Self-defence as a circumstance precluding wrongfulness), UN Doc A/56/10, 74–5.

[33] Russell (n 19), 560–5.

substantive element, for the acts concerned must attain the severity and magnitude required in order to fall within the definition. Otherwise, the use of force will not amount to an (act of) aggression, even though it may still infringe Article 2(4).

In this regard, it must be noted that this list constitutes the core of the definition of aggression (as the contextual interpretation in light of Article 4 corroborates), to the extent that any (act of) aggression whatsoever should *at least* possess these features. On scanning this list, it is obvious that in all the situations listed there are a number of common themes: (a) inter-State relations[34]; (b) in all but one (3(d)), the territorial dimension is the focal point of the act of aggression.

In this connection it must be observed that it seems that even a series of acts that do not individually reach the threshold of aggression can be considered as a whole, *globally taken* as such. The so-called needle-prick doctrine[35] was discussed by the ICJ in the seminal *Nicaragua* case[36] and reiterated in 2003[37] and 2005, thus conceding that a 'series of deplorable [military] attacks could be regarded as cumulative in character',[38] resulting in an aggression. Therefore a series of 'localized incidents'[39] of low intensity and restricted scope can, if taken *cumulatively*, amount to an aggression. In other words, while each one of them infringes Article 2(4), the whole set *additionally* constitutes an aggression. This point of view is consistent with the logic underlying the concept of aggression and its commission. In this vein, it is pertinent to refer to a well-established concept in international state responsibility, now codified by Article 15 of the ILC Articles on State Responsibility: composite act. As Article 15(1) recites, such an act comprises a 'a series of acts or omissions defined in aggregate as wrongful', for they are bound together by the same intention, plan, policy,[40] or even premeditation[41] and they pursue *as a whole* 'the same internationally wrongfully objective'.[42]

[34] Directly or indirectly (as encompassed by Art 3(g)), to which will be devoted a sub-section later on (1.B.1).

[35] In German: '*Nadelstichtaktik*'.

[36] The question was whether some military incursions 'may be treated for legal purposes (ie ascertainment of Nicaragua's aggression against some border states) as *amounting, singly or collectively,* to an "armed attack" by Nicaragua […]', (n 13), 120 (§ 231).

[37] *Oil Platforms* (n 31), 192 (§ 64): 'Even taken *cumulatively* […]' (emphasis added).

[38] *Armed Activities on the Territory of the Congo* (n 31), 223 (§ 146).

[39] See Eritrea/Ethiopia Claims Commission (n 31), §§ 11, 12.

[40] See ILC Commentary to its Article 15 of the Draft articles on Responsibility of States (n 32), 65.

[41] In fact, it was thanks to Latin-American states at the San Francisco Conference (defending their regional arrangement of collective self-defence) that Art 51 was *moved* from Ch VIII (Regional Arrangements) to its current place (Ch VII). Indeed, as Art 53(1), in UN Charter Ch VIII, provides, no state belonging to any of the regional arrangements can take an 'enforcement action' without Security Council authorization. See in this regard, Russell (n 19), 696–7, 700–2.

[42] Seventh report on state Responsibility by Mr Roberto Ago, Special Rapporteur—the internationally wrongful act of the state, source of international responsibility (continued), UN Doc A/CN.4/307 and Add 1 & 2 and Corr 1 & 2 (*IYLC*, 1978, vol I(1), 47 (§ 39))

4 Self-Defence

As Article 51 of the UN Charter states, all (member) states have an 'inherent right'[43] of self-defence.[44] As the legislative history of this provision shows, it was undisputed that member states do not need to be authorized by the UNSC in order to avail themselves of the right of self-defence.[45] However, like any subjective right, this too is constitutionally limited by the legal order by which is envisaged and within which is implemented. That is why the implementation of the right of self-defence is subject to the fulfilment of several conditions provided for by public international law. These cumulative requirements are enunciated by Article 51 of the UN Charter *and* by customary international law, which complements the former.[46] In sum, three conditions (armed attack, proportionality, and necessity) are required by general international law (that is, by the UN Charter *and* customary international law) while two are posited only by the UN Charter (ie the obligation to report to the UNSC and that of submitting the right of self-defence to the latter).[47]

Besides, self-defence can be individual and collective. In the first scenario the target state, after having reckoned that it has been *attacked* by one (or more) state(s), reacts alone in order to push back the aggressor. In the second case, the target state requests other states to help it to halt the aggression. The same conditions apply in both cases. However, as far as collective self-defence is concerned, there are two additional requirements to be met. First, that only the target state[48] can make the determination that it has been attacked; third states are not empowered to do so on its behalf.[49] Secondly, and more important, third states cannot intervene without being explicitly (and validly) requested or invited to this effect.[50]

[43] In the French text, '*droit naturel*'.

[44] '[T]he use of arms in legitimate self-defence remains admitted and unimpaired', in Documents of the United Nations Conference of International Organization (UNCIO) (n 22), 334.

[45] In this connection, it ought to be reminded that for this very reason Art 51 had been moved from Ch VIII (n 41).

[46] 'The Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law', *Nicaragua* 1986 (n 13), 94 (§ 176); *Oil Platforms* (n 31), 183 (§ 43); Resolution ('Present Problems of the Use of Armed Force in International Law') adopted by the Institut de Droit International during its 2007 session in Santiago de Chile: 'Necessity and proportionality are essential components of the normative framework of self-defence' (§ 2).

[47] *Nicaragua* 1986 (n 13), 105 (§ 200).

[48] In addition obviously to the UN Security Council, by virtue of Art 39 of the UN Charter.

[49] Quite naturally, UNSC may at any time determine by virtue of Art 39 of the UN Charter 'the existence […] of an act of aggression'.

[50] 'The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to

A. Conditions

(i) *Previous armed attack*

In accordance with Article 51 of the UN Charter, an 'armed attack' constitutes the *conditio sine qua non* triggering the right to self-defence,[51] be it individual or collective.[52] The armed attack must be underway (already launched) or, at most, imminent; hence, a simple threat (whatever be the meaning and effectiveness of it) does not suffice to trigger the right of self-defence.[53] The formula of 'armed attack' in the English version of the Charter correlates with the expression '*aggression armée*'[54] in the French text, but the meaning of the two is not exactly the same. Notwithstanding this linguistic discrepancy, 'armed attack' must be considered, for the purposes of application of Article 51, as being equivalent to '*agression armée*'. All interpretative methods point to this conclusion: judicial,[55] contextual, systemic interpretation,[56] *travaux préparatoires*.[57] Furthermore, Article 33 of the Vienna Convention (relating to treaties 'authenticated in two or more languages') requires adoption of the 'meaning which best reconciles the texts, having regard to the object and purpose of the treaty'. Once the link is established between 'armed attack' and 'aggression', the reader may recall the discussion of the definition of 'aggression' above.

The existence of this discrepancy between use of force under Article 2(4) and (acts of) aggression may give rise to the question of what a state can lawfully do in reaction to uses of force falling below the threshold of aggression. We will address this issue later in the chapter.

come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect', *Nicaragua* 1986 (n 13), 120 (§ 232). In the same vein: resolution adopted by the Institut de Droit International (n 46), 46: 'Collective self-defence may be exercised only at the request of the target State', § 8 <http://www.idi-iil.org/idiE/navig_chon2003.html>.

[51] *Nicaragua* 1986 (n 13), 103 (§ 195). [52] *Nicaragua* 1986 (n 13), 110 (§ 211).

[53] See resolution adopted by the Institut de Droit International (n 46), § 7: 'In case *of threat of an armed* attack against a State, only the Security Council is entitled to decide or authorize the use of force' (emphasis added). *Infra* 1.B.2.

[54] 'When it came (in San Francisco) to defining the criteria to be used in determining aggression, it was decided to avoid the words "war" and "aggression". The use of these words in the Covenant of the League had led to prolonged *legalistic debate*, as over the Manchurian affair in 1931, for example', Russell (n 19), 234 (emphasis added).

[55] With regard to Art 51 of the UN Charter, both the ICJ and other international tribunals consider armed attack as being the English equivalent of '*agression armée*'. For the purposes of its interpretation recourse is systematically made to the aforementioned General Assembly Res 3314 (XXIX), which purports to define 'Aggression'.

[56] See the French version of the Institut de Droit International's resolution (n 46), which states clearly this equivalence between 'armed attack' ('*attaque armée*') and 'armed aggression' (§ 3).

[57] Russell (n 19), 697–8.

(ii) *Necessity*

The doctrine of necessity embodies the requirement that force should only be used where there is no other *effective* means at the disposal of the attacked state to repel the aggression. If this is so then the target state is no longer required to exhaust peaceful means of dispute settlement, as mandated under Article 2(3) of the UN Charter. The leading and recurrently cited authority on this point emerged from the *Caroline* affair (1837–42) between the United States and Britain. The *Caroline*, a vessel used by US nationals to supply Canadian rebels across the border, was destroyed on US territory by British soldiers, causing a diplomatic incident. After lengthy correspondence, the dispute was settled through an agreement between the two states. In fact, what counts here is a diplomatic note sent on 24 April 1841 by US Secretary of State (Mr Webster) to the British minister at Washington (Mr Fox), which reads as follows: 'It will be for that Government [that is, Britain] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.'[58]

A caveat must nonetheless be imposed in this regard; as Ago showed as Special Rapporteur on State Responsibility,[59] at that time it was nonsense (both logically and historically)[60] to speak of self-defence, for recourse to the use of force to enforce legal rights (so-called self-help or self-protection)[61] was the prerogative of sovereign

[58] 'Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat *Caroline*.—March, April, 1841', (1857) 29 *British and Foreign State Papers (1840–1841)* 1126 at 1138; see further 'The *Caroline* Case', 2 *Moore's Digest of International Law* (1906) 409–14.

[59] 'What is the fundamental reason why these publicists argue so strenuously that the scope of self-defence under general international law is much wider than that of resistance to armed attack, and thus conclude that Art 51 of the Charter, in expressly safeguarding only the right of a State to react in self-defence only in the case of armed attack, was not intended to cover the entire field of application of the concept of self-defence and left intact the much wider scope of that concept in general international law? The reason is largely that many of these writers remain wedded to notions and to a terminology—which this writer regards as incorrect—drawn from a relatively antiquated portion of State practice with which they are more familiar. It is no accident that, in their arguments, they often cite practical cases, such as that of the *Caroline* and others, which they place under the heading of self-defence in keeping with the examples set by the diplomats of the time. It has, it is submitted, been clearly shown that these cases are in fact illustrations of different circumstances; admittedly, what they have in common with self-defence is that their effect is to preclude the wrongfulness of certain kinds of State conduct, but in many other essential respects they are quite unlike self-defence. It is indispensable to differentiate, clearly, the concept of self-defence properly so-called from the various notions that are often grouped together under the common label of self-help [...] The confusion between so very different situations hampers the task of arriving at an accurate definition of self-defence', Addendum—Eighth report on State responsibility by Mr Roberto Ago, Special Rapporteur—the internationally wrongful act of the State, source of international responsibility (part 1), *YILC*, 1980, vol II (1), 65–6 at 62 (§§ 113, 106).

[60] D. Anzilotti, *Cours de droit international* (transl from Italian, Paris, Sirey, 1929), 506.

[61] *Corfu Channel* case (n 23), 35: 'The United Kingdom Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this

states. The right of self-defence is a separate concept, which permits the target state to resort to force *only if* it has been attacked by another state and not to enforce its own rights or to react to minor infringements of Article 2(4) (uses of force under the threshold of armed attack or mere threats to use force). That said, the *Caroline* test is useful in order to elucidate the concept of necessity, that is, the requirement that there be no other effective means available to the attacked state to repel the aggressor.

(iii) *Proportionality*

The condition of proportionality, closely intertwined with that of necessity, puts emphasis on the outcome of self-defence, that is, stopping the armed attack and pushing back the aggressor. Military reaction by a target state cannot lawfully either assume a punitive character or cause unnecessary pain and suffering.[62] Proportionality can be assessed from two perspectives: proportionality of means and proportionality of result. In respect of the first meaning, there should be a 'proportionality of that action (by the target state) to the attack to which it was said to be a response'.[63] On the contrary, from the standpoint of the second perspective, 'the action needed to halt and repulse the attack may well have to assume *dimensions disproportionate to those of the attack suffered.* What matters in this respect is the *result to be achieved by the "defensive" action*, and not the forms, substance and strength of the action itself'.[64]

In this connection, one needs to make clear the differences between *jus ad bellum* (in the light of which self-defence must be analysed) and *jus in bello* (that is, international humanitarian law at large). In the same manner, we have to distinguish between the legality of the use of force at a macroscopic level and the legality of each singular military action *during* the conflict, to which of course relevant rules of international humanitarian law shall apply. In this regard, the ICJ's observations in its *Nuclear Weapons* Advisory Opinion are crystal clear: 'at the same time, *a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet* the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law'.[65] Hence, under the

defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations'.

[62] G. Abi-Saab, 'Cours général de droit international public', vol 207, 371.

[63] *Oil Platforms* (n 31), 198 (§ 77). Perhaps in the same vein, yet not fully elaborated: *Nicaragua* 1986 (n 13), 122 (§ 237)

[64] Ago (n 59), 69 (§ 120, emphasis added). In the same vein: 'it does not seem unreasonable as a rule to allow a State to retaliate beyond the immediate area of attack when that State has sufficient reason to expect a continuation of attacks (with substantial military weapons) from the same source' (O. Schachter, 'International Law in Theory and Practice. General Course of Public International Law', 1978 *RCADI* (1982-V) 156.

[65] *Threat or Use of Nuclear Weapons* (n 4), 245 (§ 42, emphasis added).

rules of *jus ad bellum*, a state's use of force can be (qualitatively and quantitatively) different[66] from that of the aggressor, if it is *necessary* in order to repel the latter.[67] In the light of the aforesaid, it can be maintained that proportionality in self-defence, under a *jus ad bellum* perspective, is related to the goal pursued by the military response and not to its means. However, as noted in *Nuclear Weapons*, such a use of force would not necessarily be lawful under *jus in bello*.

(iv) *Two conventional requirements*

First, Article 51 adamantly specifies that the right of self-defence can be exercised by a state 'until the Security Council has taken measures necessary to maintain international peace and security'. Secondly, the measures taken by the target state 'shall be immediately reported to the Security Council'. As the ICJ made clear in 1986 in *Nicaragua*, even though it can hardly be contended that these requirements are exacted by customary international law, 'if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the state in question was itself *convinced* that it was acting in self-defence'.[68]

As these two institutional conditions show, self-defence fits into the general scheme for the maintenance (or restoration) of international peace and security, the main responsibility for which is vested in the UN Security Council.[69] Member states need not be authorized by the Security Council to resort to force in self-defence, yet the exercise of this right is no longer unfettered once the Security Council has taken the necessary measures to maintain or restore international peace and security. The following fragment of Article 51 affirms the subordination of the right of self-defence to the system of collective security established in Chapter VII: 'Measures taken by Members […] shall not in any way affect the *authority and responsibility of the Security Council*' to this effect. In this respect,

[66] Each single 'attack' (as per Art 49 of the 1977 Geneva Protocol I) must satisfy IHL requirements in order to be considered as lawful *under this branch of law*.

[67] Even a temporary military occupation of the aggressor state's territory (or parties thereof) can be envisaged, but not its annexation or forceful modification of its legal status. This is explicitly banned by Art 2(4) of the UN Charter as authoritatively interpreted by General Assembly Resolutions 2625 (XXV) (n 20) and 3314 (XXIX) (n 29). Most authorities support this sound principle of public international law: R.R. Baxter 'Treaties and customs', 129 *RCADI* (1970-I) 69. In addition: 'However, the practice of States and the writings of eminent publicists show that self-defence cannot be invoked to settle territorial disputes' (Eritrea/Ethiopia Claims Commission (n 20), § 10).

[68] *Nicaragua* 1986 (n 13), 105 (§ 200, emphasis added).

[69] '[T]he authorization of self-defence is a provisional measure intended to protect the integrity and independence of a member State until the United Nations takes collective action', M. Lachs, 'The Development and General Trends of International Law in Our Time', 169 *RCADI* (1980-IV) 165.

though, no true precedent[70] can be cited to depict the application of this rule, with perhaps the sole exception of a debatable interpretation of Security Council action following Iraq's invasion of Kuwait in 1990.[71]

B. Two selected controversial topics

(i) *Self-defence against non-state actors*

For more than a couple of decades or so, no textbook or monograph study on the use of force has avoided this seemingly new topic (often in conjunction with another seemingly new topic—that of international terrorism). In fact, the large majority, if not all, of the classics of the Law of Nations, at least until Emer de Vattel, devoted substantial developments to what was then called 'private war', that is, conflict between a public authority (a state or state-like entity) and other generally non-sovereign entities (which did not possess territorial sovereignty).

However, the alleged analogy with Grotius' private war cannot be upheld, especially as a result of massive structural modifications of the international legal order since then (on the side of both substantive and institutional law). It suffices to glance at Vattel's *The Law of Nations* in order to realize that this kind of war had from then on fallen outside the scope of public international law; as it has been affirmed by an authoritative commentator, sovereign states cannot *literally* wage war against non-state actors.[72] Under traditional international law, states can only use force against their equals.[73] Sovereign states have a monopoly on the use of force within their territory; the UN Charter has enshrined this competence in Article 2(4) where it forbids the use of force by states *only* in their international relations, leaving unaffected their rights within their respective territories.

From this perspective, it is not too bold to affirm that, with regard to the régime of the use of force and self-defence, the international legal order is (still) essentially

[70] The paucity of practice can explained at the same time by the passivity during the Cold War of the Security Council and by the highly sensitive prerogative which is that of a state right of self-defence. This is not to mention the Security Council's lack of 'armed forces, assistance, and facilities […] necessary for the purpose of maintaining peace and security', as envisaged by the never-implemented Art 43 of the UN Charter.

[71] Reference is made to Res 678 (29 November 1990), a dispositive paragraph of which ('Member States co-operating with the Government of Kuwait') could allude to a Kuwaiti right of collective self-defence. However, apart from this sole indication, all other elements (textual and contextual) seem to point more convincingly to another ground of use of force, that is, Art 42 providing for collective security under UN Charter, Ch VII.

[72] According to Kelsen, armed attack under Art 51 solely covers cases where 'one State attacks another State with its armed forces', H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems* (New York, Praeger, 1950), 930.

[73] S. Laghmani, 'Vattel et le *Ius ad Bellum*', in V. Chetail and P. Haggenmacher (eds), *Vattel's International Law in a XXIst Century Perspective* (Leiden: Martinus Nijhoff Publishers, 2011), 308–10.

state-centred and fundamentally territorial. This entails that, technically speaking, a state cannot lawfully avail itself of the principle of self-defence in order to justify military force *on the territory* of another state unless, as stated in Article 3(g) of the Annex to General Assembly Resolution 3314 (XXIX): (a) that other state has sent the 'armed bands, groups, irregulars or mercenaries' on its 'behalf' and they commit acts 'of such gravity as to amount' to aggression, or (b) it can be proved that the other state had 'substantial involvement' in their acts.

Hence, public international law requires a *link* between the state towards which self-defence is directed and the military groups that have carried out acts of aggression against target state. This is arguably the position taken by the ICJ when faced with acts of aggression carried out by non-state actors from another state and directed at the target state. In addition to its judgment in *Nicaragua*, the ICJ has more recently addressed the link requirement:

> [W]hile Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The 'armed attacks' to which reference was made came rather from the ADF. The Court has found above (paragraphs 131–135) that there *is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3(g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974*. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained *non-attributable to the DRC*.[74]

The test of attribution clearly remands to the body of rules codified in the ILC Articles on State Responsibility, notably under Article 4 (the conduct of state organs) and Article 8 (conduct directed or controlled by a state).[75] In its judgment in the *Genocide* case, the ICJ reaffirmed its position with regard to each of these two Articles. As to the first title of attribution, the Court required that in order for some individuals to 'be equated with State organs even if that status does not follow from internal law' it must be proved that 'in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument'.[76] As to the second ground of attribution, and by reference to the very heading of the International Law Commission's Article 8, the Court held that the person or entity must have acted in accordance with the state's instructions or under

[74] *Armed Activities* (n 31), 222–3 (§ 146, emphasis added). In the same vein, see Wall in Palestine (n 20), 194 (§ 139): 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attack against it are imputable to a foreign State'; *Nicaragua* 1986 (n 13), 138–9 (§ 277)

[75] *Nicaragua* 1986 (n 13), 61–2, 64–5, 103–4, (§§1069, 11516, 195); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, ICJ Reports 2007, 202–10 (§§ 385–407).

[76] Crime of Genocide (n 75), 205 (§ 392). The Court makes further references to 'proof of a particularly great degree of State control over them' and 'complete dependence' (§ 393).

its 'effective control'. With regard to the latter, the Court's interpretation requires that, in order for the acts of private individuals to be attributable, it must be proved that the state concerned exercised 'effective control' over them. This criterion can be thus split in two dimensions, the horizontal and the vertical. In other words, 'it must […] be shown that this "effective control" was exercised, or that the state's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[77]

In order to grasp the concrete meaning of 'effective control', it can be said, on the footing of the ICJ's considerations in *Nicaragua*, that a state's participation 'even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military and paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself […] for the purpose'[78] of attribution. Or, in other words, this participation does not amount to the '*substantial* involvement' required for the purposes of Article 3(g) of General Assembly Resolution 3314 (XXIX). However, as the ICJ made clear, the United States, albeit not committing aggression against Nicaragua through the actions of the Contras, had infringed Article 2(4) of the UN Charter by 'organizing or encouraging the organization of irregular forces or armed bands […] for incursion into the territory of another State' and 'participating in acts of civil strife […] in another State', in the terms of General Assembly Resolution 2625 (XXV).[79] Hence, the Court rightly insisted on the aforementioned discrepancy between (mere) use of force and aggression.[80]

If no link can be established in accordance with the legal grounds of attribution or, alternatively, if no 'substantial involvement' can be proved, then the target state cannot, on account of self-defence, react by armed force in or against the state where those groups have their facilities or camps.[81] In the absence of such a link, the only situation in which a state can resort to self-defence is when an 'armed

[77] Crime of Genocide (n 75), 207 (§ 398), 208 (§ 400). In this connection, it must be recalled that, in 1999, ICTY Appeals Chamber, in the *Tadic case* (IT-94-1-A, 15 July 1999, <http://www.icty.org/case/tadic/4>), contested the application of such a stringent test of control in situations where the acts concerned are carried out by 'individuals making up an organised and hierarchically structured group, such as a military unit, in case of war or civil strife, armed bands of irregulars or rebels. […] Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the over control of the State' (§ 120). In sum, it must be proved that most of the time, most of the actions carried put by this organized group of individuals have been under the 'overall control' of the state concerned. For instance, while the ICJ rejected the attribution of Contras' acts to the United States in *Nicaragua*, the application of the ICTY's 'overall control' would have reached the opposite conclusion.

[78] *Nicaragua* 1986 (n 13), 65 (§ 115). [79] *Nicaragua* 1986 (n 13), 119 (§ 228).

[80] Not unsurprisingly, the Institut de Droit International follows the Court's established case law in this regard.

[81] *Contra* Judge Simma's and Judge Kooijmans' separate opinions appended to the ICJ Judgment in the *Armed Activities on the Territory of the Congo* (n 31), respectively 335–7 and 310–16.

attack by non-State actors is launched from an area beyond the jurisdiction of any State'; then 'the target State may exercise its right of self-defence in that area against those non-State actors'.[82] Once again, the interstate and territorial paradigm of the current international legal order is reaffirmed thus influencing the régime of use of force.

(ii) *Temporal aspects related to self-defence (anticipatory, preventive, pre-emptive)*

More than elsewhere, in the law of self-defence we are faced with a blossoming of labels, tags, neologisms, the result (and no doubt on occasion the aim) of which is to bewilder the critical mind. The stakes of this debate are in fact quite high, for we are dealing with the only ground allowing a state unilaterally to resort to force in international relations. Hitherto, great efforts have been made by states and scholars (sometimes even jointly) to expand self-defence by reference to the time element.

If we assume a large correspondence between Article 51 of the UN Charter and customary international law,[83] it is beyond doubt that a state possesses an 'inherent' right to react to an armed attack *already launched*.[84] What then of an armed attack which is about to be launched? Or what about of the imminent threat of an attack? On the basis of a brief review of doctrinal positions in the current debate, the following adjectives associated with self-defence can be put forward: (a) interceptive; (b) anticipatory; (c) pre-emptive; (d) preventive. We will tentatively sketch their distinctive features in turn.

As for the first ('interceptive'), it means, in a nutshell, the right of a state squarely to obstruct an armed attack already launched, yet not having physically hit its target; in other words, once an armed attack has been irremediably and irreversibly triggered. In this regard, Dinstein speaks of 'nipping an attack in the bud'.[85] Most scholars cite, in this respect, the right of the United States to intercept Japanese bombers airborne outside its territorial waters approaching Pearl Harbour[86] as well as Israel's right to intercept Iraqi Scuds launched during the second Gulf War in 1991.[87] In these examples drawn from state practice, the emphasis is thus put not only on the 'opening of fire' but also, and foremost, on the feature of 'irreversibility'.[88]

[82] Resolution adopted by the Institut de Droit International (n 46), § 10(ii).

[83] See *Nicaragua* 1986 (n 13), 93–5 (§§ 175–7).

[84] *Oil Platforms* (n 31), 186 (§ 51): 'in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United State *has to show that attacks had been made upon it* for which Iran was responsible'.

[85] Y. Dinstein, *War, Aggression and Self-Defence* (4th edn, Cambridge: Cambridge University Press, 2005), 91.

[86] I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 368.

[87] R. Kolb, *Self-Defence and Preventive War at the beginning of the Millennium* (Vienna: Springer Verlag, 2004), 125.

[88] Dinstein (n 85), 191.

A tenuous wall separates the previous scenario from that of 'anticipatory' self-defence. Notwithstanding a strong similarity, the time factor is more remote insofar as in the case of anticipatory self-defence the target state is faced with an armed attack 'on the brink of launch'.[89] This form of self-defence is considered lawful under current international law.

Between anticipatory self-defence and the scenarios of pre-emptive and preventive self-defence lies an invisible though significant dividing-line—that of legality. While the former two reflect current customary international law, the last two do not, in spite of recurrent and relentless attempts made by certain states and a minority of scholars. 'Pre-emptive'[90] self-defence is based on the premise that a state apprehends that in the short term it may become a (potential) target of an armed attack by another state. In effect, there lies a perception of a threat of aggression. In order to respond to this perceived threat, the (potential) target state attempts to *pre-empt*[91] its realization by acting 'while these processes [embodying the threat of aggression] still embody only a low level of coercion'.[92] The aim thereby pursued is to put an end to the threat by resorting to less costly means than those which would have been required later on when the threat materialized into actual aggression.

The fourth and last kind of self-defence is the notion of preventive self-defence or preventive war *tout court*; if the notion of 'pre-emptive' self-defence strongly resembles an oxymoron,[93] the latter concept of preventative self-defence is less hypocritical insofar as it unveils the real goal pursued, that is, to wage war when the (potential) target state is of the view that in the long-term another state could do the same. Unlike the 'pre-emptive' self-defence, in this case the perception of a threat is not only more remote in time, but also it rests on vague (and probably subjective) indicators of fear. At the end of World War II, German dignitaries accused before the International Military Tribunal at Nuremberg argued that the Third Reich was 'compelled' to invade Norway (a neutral state) in order to prevent a feared invasion of the latter by Great Britain. The Tribunal, relying on the requirements in the *Caroline* test, categorically rejected this form of 'preventive' self-defence by stating that: 'In the light of all the available evidence it is

[89] M.E. O'Connell, 'The Myth of Preemptive Self-Defense', *American Society of International Law Taskforce on Terrorism* (2002) 2. The United States invoked this kind of self-defence with a view to justify the shooting down by *USS Vincennes* of Iran Air Airbus (3 July 1988).

[90] Not to be misled with the same use of 'pre-emptive' in the Report of the Secretary-General's High-level Panel on Threats, Challenges and Change (Doc A/59/565, 2 December 2004, 63, § 189), discussed later in this chapter.

[91] It is not by accident that the word 'pre-empt' comes from Middle Latin '*prae-emere*': to 'buy beforehand'. In other words, to 'wage' war before others do it.

[92] M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1961), 211.

[93] See, in this respect, Abi-Saab (n 62), 371.

impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive war'.[94]

A vivid example of a similar strategy can be found in the 2006 US National Security Strategy.[95] Contrariwise, nearly six decades earlier, the US Truman Administration issued a Strategic Security Document that consecrated the Cold War policy of containment. This text adamantly affirmed that the United States would never have launched an armed attack 'unless it is demonstrably in the nature of a counter-attack to a blow which *is on its way or about to be delivered*'.[96] It must be observed in this regard that what was applicable for a threat of a nuclear aggression is all the more true for armed attack by conventional weapons. In short, this strategy, while implicitly admitting 'anticipatory' self-defence ('about to be delivered'), straightforwardly rejected preventive (and even pre-emptive) self-defence.

In conclusion, the first two kinds of self-defence are nowadays admitted as lawful whilst the last two are not. This is consonant with the Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, which strongly opposed the right for a state to act preventively, that is, in response to a 'non-imminent or non-proximate' threat. In this regard, this report reaffirmed the discrepancy of scope between Articles 39, 2(4), and 51 of the UN Charter: the first including even the threat to peace, thus situations not perforce encompassing the use of force in international relations, or being solely restricted within a single state; the second including only threat and use of force between states in international relations; and the third envisaging *exclusively and restrictively* inter-state aggression. In fact, the Panel added that 'if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to'. The Panel then concluded that:

> [T]he risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted […] We do not favour the rewriting or reinterpretation of Article 51.[97]

This is on par with a recent stand taken by the Institut de Droit International, which vigorously rejected any form of '"preventive" self-defence (in the absence of an actual or manifestly imminent armed attack)'.[98] Authorities, with the exception of

[94] IMT, Judgment,1 October 1946 (1947) 41 *AJIL* 207.

[95] Second edition (16 March 2006), <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/>.

[96] <http://www.mtholyoke.edu/acad/intrel/nsc-68/nsc68-3.htm> (*NSC 68: United States Objectives and Programs for National Security* (14 April 1950). A Report to the President Pursuant to the President's Directive of 31 January 1950), emphasis added.

[97] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change (n 90), 63 (§§ 190–2, bold emphasis in the original.

[98] 'Present Problems of the Use of Armed Force in International Law' (n 46), § 6.

a few authors, largely concur in rejecting these forms of self-defence.[99] Lastly, it must be noted that the ICJ has not yet had the chance yet to elaborate explicitly on the right of a state to resort to self-defence in a situation of an 'imminent threat of armed attack'.[100]

5 What Beyond? Unanswered Questions on Some Alleged Exceptions to the Comprehensive Ban on the Use of Force

Leaving aside the exception represented by the collective security system established by the UN Charter, we ought to address the issue whether there are other ways for states to resort unilaterally to force which may be admitted as legal under current public international law. In fact, as the ICJ affirmed in 1969, '[t]he general rule prohibiting force allows for certain exceptions';[101] the plural can be interpreted as including the aforementioned system of collective security or not, thus leaving room for other exceptions.

A. General prefatory remarks

The primary means by which a new exception can be introduced in the realm of positive international law is through custom, which can either modify the relevant provisions of the UN Charter or sit alongside it. The theoretical underpinnings of the two options are different, but the outcome is the same—that is, the modification of general international law. If international custom is the means, it is pertinent briefly to sketch out the customary process with a view to determining whether either of the alleged exceptions has crystallized into positive law. Without dwelling upon the customary source as such, it is important to highlight the inescapable jurisprudential conditions for the creation of a new customary rule or a new customary exception to the prohibition of the use of force.

[99] See eg T. Franck, 'Fairness in the International Legal and International System. General Course on Public International Law', 240 *RCADI* (1993-III) 254. See n 53.

[100] *Nicaragua* 1986 (n 13), 103 (§ 194). To our knowledge, no useful hints can be drawn either from the ICJ's subsequent decisions or from other international judicial bodies' practice.

[101] *Nicaragua* 1986 (n 13), 102 (§ 193).

The first clue is given by the ICJ in its landmark judgment in *Nicaragua*, where, in dealing with the need to verify an alleged new exception to the prohibition of the use of force, it concluded that: '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law'.[102] The question, then, is how to assess whether the novel exception is truly 'shared by other States'. The relevant requirements have been put forward by the Court, namely, a systematic practice of non-condemnation by a very large number of representative states including those specially affected.[103] Inversely, a lack of condemnation by *other states* of the use of force in a particular incident, even if widespread, does not amount to a change of the law in this respect.[104] Any other conclusion would lead to an unacceptable mechanical conception of the law, that is, that the validity of a norm in a given legal system would depend from either approbation or the condemnation of its violation in each specific case. Such a construction of law is tantamount to its negation. A second clue has likewise been elucidated by the ICJ in the *North Sea Continental Shelf* judgment, which clearly underlined that 'a very widespread and representative participation in the convention might suffice of itself, provided it included […] States whose interests were specially affected'.[105]

Hence, three conditions must be met: (a) a quantitative requirement of 'very widespread' adherence to the given practice (falling short of a requirement of absolute unanimity); (b) a qualitative requirement of representation, meaning that all sections of the international community (be they geographical, ideological, religious, economic, or political) must take part in the law-making process; (c) effectiveness, that is, those states and groups that have a special interest in the regulation or field concerned shall adhere to the practice, proving their *opinio juris* and ultimately the customary international law rule.

The meaning of 'representative' must be understood as pertaining to the different sections (or even sub-sections) of the international community, according not only to general dividing lines (North-South, East-West, Western/African/Asian, and so on), but also to the more specific field of international regulations in point.[106] As for the meaning of 'specially affected' states, it is worth quoting the International Committee of the Red Cross, affirming that '[w]ith respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict'.[107] In this connection, the US challenged this affirmation by asserting

[102] *Nicaragua* 1986 (n 13), 109 (§ 207).

[103] In this vein: *Nicaragua* 1986 (n 13), 98 (§ 186).

[104] Abi-Saab (n 62), 378.

[105] *North Sea Continental Shelf (Germany/Denmark/Netherlands)*, Judgment, ICJ Reports 1969, 42 (§ 73).

[106] See, in this respect, *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libya*, Arbitral award, ILR, vol 53, § 84 (the original French version in 104 *JDI* (1977) 350–89).

[107] J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* vol I (Cambridge: Cambridge University Press/ICR, 2005), xxxix.

that 'specially affected States [by a given regulation]' are those states which are *usually* involved in those problems, with regards to which state practice is accordingly analysed.[108]

Still on the same point, a distinguished scholar has remarked that *among* 'specially affected States', *special relevancy* must be given to those acts which go against states' interests:

> Particularly significant are manifestations of practice that go against the interest of the State from which they come, or that entail for them significant costs in political, military, economic or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy etc.[109]

Treves has thus proposed a 'unit of evaluation' for evidence of state practice within the international process, put forward from time to time by the ICJ itself. Hence, the behaviour of the state more deeply involved in a given situation is deemed to be more *representative* than that of other states that are but rarely 'affected'.[110] In addition, it can be contended that because Article 2(4) is a *jus cogens* rule, any state is by definition entitled to the same weighting coefficient in the assessment of its 'specially affected' status in a manner similar to the integral treaties under Article 60(2)(c) of the Vienna Convention. Therefore, since all the states are 'specially affected', none of them is ultimately, so that all states' practice is characterized (weighted) by the same coefficient of importance.

Finally it needs also to be stressed that, according to a general principle of law in the matter of interpretation, any exception to a rule must be construed restrictively; moreover, in the case in point, this is all the more true since the rule concerned is a peremptory norm of public international law.[111]

Another argument, often invoked in order to soften the prohibition of the use of force, relies on the asserted dysfunction or inefficacy of the UN collective security system. Without having to dwell upon this allegation, one ought to recall what the ICJ in 1949 affirmed in this respect: 'The Court can only regard the alleged right

[108] The letter, sent to the ICRC, read as follows: 'Not every State that has participated in an armed conflict is "specially affected"; such States do generate salient practice, but it is those States that have a distinctive history of participation that merit being regarded as "specially affected". Moreover, those States are not simply "specially affected" when their practice has, in fact, been examined and found relevant by the ICRC. Instead, specially affected States generate practice that must be examined in order to reach an informed conclusion regarding the status of a potential rule' (US Gov, 445). In this same letter also quoted is the opinion of one of the Committee's members (T. Meron) who drafted the customary IHL study: 'The practice of "specially affected states"—such as nuclear powers, other major military powers, and occupying and occupied states—which have a track record of statements, practice and policy, remains particularly telling': 'The continuing role of custom in the formation of international humanitarian law', 90 *AJIL* (1996) 249.

[109] T. Treves, 'Customary International Law', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), para 30.

[110] Treves (n 109), para 30.

[111] In this connection, one shall remind that in accordance with Art 53 of VCLT, a *jus cogens* rule cannot but be modified by another norm 'having the same character'.

of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, *whatever be the present defects in international organization*, find a place in international law'.[112] In the same vein, one year later, the General Assembly adopted the famous Resolution 377 (V) on 'Uniting for Peace', the Preamble of which declares, at paragraph 7, that 'failure of the Security Council to discharge its responsibilities on behalf of all the Member States [...] does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security'. Moreover, pursuant to the law of treaties, the oft-cited argument relying on a 'fundamental change of circumstances' as a cause for at least softening, if not squarely terminating, UN Charter provisions pertaining to the use of force must be straightforwardly and irrevocably rebutted.[113] In fact, even assuming that all Article 62 of VCLT's stringent (five) conditions—enunciated in paragraph 2—are met in the case in point, paragraph 2 would apply for the fundamental change invoked—ie the dysfunction (lack of unanimity and/or the failed implementation of Article 43 of the UN Charter) of the collective security system is due to member states which on turn attempt to avail themselves of this ground of termination/suspension.

B. Sampling of alleged exceptions

(i) *Armed counter-measures or 'self-defence lite'*

In *Nicaragua*, the Court suggested that if a state is affected by a 'use of force of a lesser gravity' it could then resort to 'proportionate counter-measures'.[114] Therefore, the Court, after adamantly rejecting collective armed counter-measures—invoked in this case by the United States—opened this possibility for a state that has been

[112] *Corfu Channel* case (n 23) (italics added).

[113] By the way, as it has been observed: 'But no responsible voice, surely no government, has suggested that the failures of the organization vitiated the agreement and nullified or modified the Charter's norms', L. Henkin, 'Use of Force: Law and U.S. Policy', in *Right v. Might. International Law and the Use of Force* (New York: Council on Foreign Relations Book, 1989), 37–70 at 38.

[114] *Nicaragua* 1986 (n 13), 127 (§ 249). In this connection, it must be observed that in a puzzling previous paragraph, the Court had affirmed that: 'Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a state which considers itself the victim of another state's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure': *Nicaragua* 1986 (n 13), 110 (§ 211).

victim of uses of force which fell below the threshold of armed attack.[115] Hence, as the Institut de Droit International declared:

> [A]cts involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3.[116]

Therefore, despite the Court's ambiguities in 1986 and its subsequent silence, Judge Simma has concluded that:

> [A]gainst smaller-scale use of force, defensive action—by force also 'short of Article 51'—is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an 'armed attack' within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter.[117]

This is fair enough; yet, while insisting on the 'defensive' character of these armed counter-measures (which could be crudely labelled 'self-defence lite'), it could be awkward in some circumstances to distinguish them from their companions, that is, armed reprisals in times of peace. For the latter are undoubtedly banned in public international law, as the ICJ itself affirmed in *Nuclear Weapons*,[118] relying on General Assembly Resolution 2625 (XXV).[119] Other international instruments uphold this prohibition, such as the ILC Articles on State Responsibility[120] and the Helsinki Final Act,[121] to name only two. Hence, a thin red line must be drawn between defensive counter-measures (short of self-defence) and (punitive) armed reprisals. To this end, timing ('leaving no moment for deliberation') and purposes—on the one hand to repel the hostile use of force, while on the other to punish its author and at the same time deter the latter from doing it again[122]—must be taken into account

[115] Quite obviously, the state concerned can make likewise recourse to peaceful counter-measures, the lawfulness of which is clearly attested by Arts 22 and 49–53 of the ILC Articles on State Responsibility; see in this regard: the ILC's Commentary to the aforementioned provisions (n 32), 75–6, 129–38.

[116] Resolution IDI, § 5.

[117] Individual opinion of Judge Simma appended to the Court's Judgment in the *Oil Platforms* case (n 31), 331–32 (§ 12).

[118] *Threat or Use of Nuclear Weapons* (n 4), 246 (§ 46).

[119] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations, UNGA Res 2625 (XXV) Annex, 25 UN GAOR, Supp (No 28), UN Doc A/5217 (24 October 1970), 122.

[120] Article 50(1)(c). [121] Principle II.3.

[122] 'A reprisal is an act of self-help (*Selbsthilfehandlung*) by the injured state, responding—after an unsatisfied demand—to an act contrary to international law committed by the offending state […] Its object is to obtain reparation from the offending state for the offense or a return to legality by the avoidance of further offenses': *Naulilaa* case (Portugal/Germany), arbitral award of 31 July 1928, *RIAA*, vol II, 1026 (our translation). Hence, the Tribunal clearly ranks (armed) reprisals among the states' means of

with a view to determining whether the facts present a defensive counter-measure or an armed reprisal. While the former is lawful, the latter remains unlawful since it is a means of forcible self-help, and as such 'cannot find a place in international law'.[123]

(ii) *Protection of nationals abroad*

In the past, states have regularly invoked this title in order to justify their interventions by forcible means in another state territory. Franco-British intervention in Egypt during the Suez Canal crisis,[124] Belgian intervention in Congo,[125] US intervention in the Dominican Republic (1965), Grenada (1983),[126] and Panama (1989)[127] well illustrate the case in point; not to mention the notorious Entebbe case.[128]

self-help. As already underlined, the latter banned by Art 2(4) of the UN Charter does not coincide at all with self-defence; see also nn 23 and 112.

[123] *Corfu Channel* case (n 23), 35.

[124] The UK representative at the Security Council argued in these terms: 'In Egypt there are many thousands of British and French nationals. The chain of events which began with the Israel moves into Egypt has developed into hostilities and hostilities have created a disturbed situation. In those circumstances, French and British lives must be safeguarded. I again emphasize […] that we should certainly not want to keep any forces in the area for one moment longer than it is necessary to protect our nationals' (quoted in N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht: Martinus Nijhoff Publishers, 1985), 28).

[125] France backed Belgian intervention on grounds of its humanitarian purposes: 'their mission of protecting lives […] is the direct result of the failure of the Congolese authorities is in accord with a recognized principle of international law, namely, intervention on humanitarian grounds' (UNSC Doc S/PV. 873 (1960), § 144).

[126] Operation 'Urgent Fury'. US President Reagan justified the intervention in the following terms: 'When I received reports that a large number of our citizens were seeking to escape the island thereby exposing themselves to great danger, and after receiving a formal request for help […] I concluded the United States had no choice but to act strongly and decisively' (interview, President Reagan with reporters, White House, 25 October 1983, weekly Compilation of Presidential Documents, 3l October 1983, l487) (cited in: R.H. Cole, *Operation Urgent Fury. Grenada* (Joint History Office, Office of the Chairman of the Joints Chiefs of Staff, Washington DC, 1997), 46. UNSC was unable to adopt a draft resolution submitted by Nicaragua and purporting to condemn US invasion, due to the latter's veto (11 affirmative votes and 3 abstentions). On the contrary, both the General Assembly (Res 38/7 of 2 November 1983) and CARICOM (see W. Gilmore, *The Grenade Intervention. Analysis and Documentation* (London: Mansell Publishers, 1984), 38) condemned the US raid on the Caribbean island.

[127] Operation 'Just Cause', see US President George Bush statement (*NYT*, 21 December 1989).

[128] On 27 June 1976, a French carrier airliner, flying from Tel-Aviv to Paris, was hijacked by a commando of four Palestinians who compelled the pilot to land at the Ugandan airport of Entebbe. All non-Israeli passengers were quickly freed while the hijackers ransomed the Israeli Government to liberate Palestinians jailed in different countries in exchange for the remaining 86 Israeli hostages. On 3 July, a special Israeli force landed at the airport, without prior Ugandan authorization, and managed to free the hostages. During the raid some Ugandan military forces were wounded and the Israeli forces destroyed ten or so Ugandan airplanes. Upon Uganda's request, the Security Council was convened five days later. While Israel asserted its right 'to take military action to protect its nationals in mortal danger', several other states categorically rejected this argument, with Uganda tagging the intervention as a 'barbaric aggression'. The United States stood up for Israel's right which 'flow[s] from the right

Neither the ICJ (nor its predecessor) has heretofore been called upon to examine the lawfulness of forcible actions aimed at rescuing nationals abroad. However, some hints can be drawn from its Judgment in *Hostages in Tehran*,[129] initiated by a US application asking the Court to assess the responsibility of Iran arising out of the invasion and occupation of the US embassy and general consulate in Tehran as well as from the detention of US nationals and diplomatic and consular staff. While the case was before the Court, the US Government decided to set up a rescue expedition, but the mission ended in a crushing fiasco. The Court ultimately determined that Iran's responsibility was engaged, yet it also noted that:

> [I]t cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24–25 April 1980 […] No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its *concern* in regard to the United States' incursion into Iran.[130]

The Court could not go further to assess the wrongfulness of US action (a hint of which can be inferred by the use of the word 'concern') for the substantive scope of its jurisdiction was limited to the two Vienna Conventions of 1961 and 1963 in a matter of diplomatic and consular relations. Therefore, as it took care to emphasize, 'neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court'.[131] The Court

of self-defence', while France argued that the Israeli intervention infringed Uganda's sovereignty yet not its 'territorial integrity'. India's and Sweden's stances must be briefly recalled in this connection. The former underlined that the UN Charter recognizes a state right to self-defence only if it has been the victim of an armed attack; in the case in point, it is not Israel which is the target State, but rather Uganda. India thus rebutted the legality of Israeli intervention. Sweden, in an articulate speech, recalled that the UN Charter makes room for two exceptions only (self-defence and forcible measures under Ch VII), adding that 'Any formal exceptions permitting the use of force or of military intervention in order to achieve certain aims; however laudable, would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak. In our view, the Israeli action which we are now considering involved an infringement of the national sovereignty and territorial integrity of Uganda'. Yet, in spite of that, the Swedish Government did 'not find it possible to join in a condemnation in this case' (S/PV.1940, §§ 121–2 at 14). The UN Security Council could not ultimately adopt any resolution condemning Israel's raid, on the account of lack of unanimity between its permanent members.

[129] *United States Diplomatic and Consular Staff in Tehran*, Judgment, *ICJ Reports 1980*.

[130] *United States Diplomatic and Consular Staff in Tehran*, Judgment, *ICJ Reports 1980*, § 93, 44 (italics added).

[131] *ICJ Reports 1980*, § 94, 44.

was thus impeded by its jurisdictional limits in the case in point to go further than the—already eloquent—expression of its 'concern'.

In the same vein, reference can be made to the works of the ILC pertaining to diplomatic protection. The second Special Rapporteur on Diplomatic Protection, John Dugard, recommended in his First Report to the ILC a provision that envisaged the right for a state to rescue its nationals abroad by resorting to forcible means.[132] The exercise of this right to intervention was subject to five stringent and cumulative conditions.[133] Moreover, the first paragraph of the proviso was framed in conditional and negative terms, for it stated the principle of non-intervention applied 'except in the case […] where' all the requirements were fulfilled. Yet, notwithstanding all these strictures, this draft provision was rejected by the ILC in 2000, on the ground 'that diplomatic protection did not include the use of force. It was thus quite clear that [Dugard's proposed article] was not acceptable to the Commission'.[134]

In the light of the foregoing it can hardly be contested that, at least *de lege lata*, public international law does not admit any right of a state to rescue its nationals abroad by forcible means. In this regard, the mechanism of diplomatic protection, that ancient institution of the law of nations, well reconciles each state's conflicting interests arising out of the infringement of public international law against aliens.

(iii) *(Hot) pursuit*

A right of (hot) pursuit has been asserted by some scholars and governments; so that it would be lawful for a state to send its troops into another state's territory for the purposes of catching military or paramilitary bands that have found a safe haven there. Quite obviously, in the case in point neither an organic link nor a 'substantial implication' can be established between the host-state and the private individuals, otherwise this action would constitute indirect aggression on the terms of Article 3(g) of the General Assembly Resolution 3314 (XXIX).[135]

Indeed, while some authors have sought to fit this hypothesis into a stretched definition of aggression,[136] so to trigger a right of self-defence,[137] others, no more

[132] First Report to the ILC, UN Doc A/CN.4/506, 16.

[133] They were: (a) 'The protecting State has failed to secure the safety of its nationals by peaceful means'; (b) 'The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State'; (c) 'The nationals of the protecting State are exposed to immediate danger to their persons'; (d) 'The use of force is proportionate in the circumstances of the situation'; (e) 'The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued' (First Report to the ILC, UN Doc A/CN.4/506, 17).

[134] ILC's Report to the General Assembly, UN Doc A/55/10, 76.

[135] This scenario has been already analysed (*supra* 1.B.1)

[136] For example, A.D. Sofaer, 'Terrorism and the Law', 64 *Foreign Affairs* (1986) 920–2; O. Schachter, 'The Extraterritorial Use of Force Against Terrorist Bases', 11 *Houston Journal of International Law* (1989) 312–15.

[137] Fewer authors have relied, even less convincingly, on state of necessity (D. Bowett, *Self-Defense in International Law* (Oxford: Oxford University Press, 1956), 38–41). Without dwelling upon this

plausibly, have endeavoured to establish a separate title of intervention, notably by analogy with the law of the sea. In fact, according to Article 111 of the UNCLOS III:

> The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.[138]

Therefore, the right of pursuit is subject to the condition that the chase has commenced in one of the maritime areas where the coastal state has sovereign rights or functional competencies and it can accordingly continue—with no discontinuation—into the High Seas (hence the label 'hot'). It must of course stop at the outer limit of another state's territorial waters.[139]

However, the propounded analogy cannot be sustained, not only in the light of state (and UN) practice but also from a juridical standpoint. Under the first heading, several elements bolster the refutation of a right of pursuit on foreign territory. UN Security Council practice in condemning or simply determining the unlawfulness of this behaviour abounds; for instance, in 1985, it '*denounc[ed] and reject[ed]* racist South Africa's practice of "hot pursuit" to terrorize and destabilize Botswana and other countries in southern Africa'.[140] Other Security Council resolutions can be

argument, it suffices to recall that state of necessity as a circumstance precluding wrongfulness—codified in Art 25 of the ILC Articles on State Responsibility (n 32)—is barred from being invoked when the breached obligation flows from a peremptory rule of public international law (see Art 26 of the Draft Articles). As already made clear, the prohibition of the use of force belongs to this body of international norms.

[138] The customary international law rule reflected in this proviso seemingly ripened during the US prohibition era (aimed at preventing and punishing the smuggling of alcohol in the Federal territory).

[139] In this connection it is relevant to note that in Res 1846 (2008) the Security Council authorized 'States and regional organizations cooperating (with the transitional Somali Government) to enter into the latter's territorial waters in order to "fight against piracy and armed robbery at sea off the coast of Somalia" ': at [10], albeit with the consent of the State concerned. It is important to underline in this respect the following paragraph, by which Security Council stressed that its 'resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and *affirms further* that such authorizations have been provided only following the receipt of the 20 November letter conveying the consent of the TFG'. Hence, it ought to be observed not only that this resolution cannot be taken into account as state practice likely to substantiate their *opinio juris*, but also that this was made possible only thanks to the prior consent given by the state concerned (even though it can be argued that it was not required for the Security Council to act under Ch VII, the resolution adopted under this heading being binding upon member states pursuant to Art 25 of the UN Charter).

[140] UNSC Res 568 (21 June 1985), para 4.

cited, the content of which clearly attests the consistent condemnation of the right of pursuit.[141]

Moreover, the alleged analogy with the Law of the Sea must be challenged from a purely juridical point of view. Of course, while exercising the right of (hot) pursuit in the High Seas, state action occurs in a space which is *res omnium*, that is, beyond the jurisdiction of any state. In the case of pursuit on foreign territory, the state action is under the exclusive jurisdiction of a sovereign state. According to the *Island of Palmas* case, 'territorial sovereignty […] involves the exclusive right to display the activities of a State', 'to the exclusion of any other State'.[142] In conclusion, since the legal status of spaces concerned are far from being identical, the analogy cannot be upheld. Consequently, there can be no right of pursuit—be it hot or not—on a territory under the jurisdiction of another state, unless of course the latter gives beforehand its consent to this effect.[143]

6 Conclusions

In the light of the aforesaid, a few observations ought to be put forward in addition to the intermediate conclusions drawn in each individual section of this study.

It can hardly be contested that the UN Charter not only provided for a comprehensive ban on the use and threat of force between states in their international relations, but it also established—for the first time ever—a substantive and institutional framework making this prohibition a truly attainable goal. To this effect, UNSC (and secondarily the General Assembly) have been entrusted by the UN Charter with the duty—and corresponding powers—to maintain (and restore) international peace and security.[144] By this oft-cited formula, the UN Charter means a collective enforcement of law, a function which beforehand was of one of the states' main prerogatives and was labelled under the tag 'self-help'. As already pointed out, the UN

[141] A far from exhaustive list would comprise, in addition to South Africa: South Rhodesia (against Botswana, 1977: Resolutions 403 and 406; Mozambique, 1976: Resolution 386; Zambia, 1978: Resolution 424); Israel (on Lebanon, 1982: Resolutions 517 and 520; Tunisia, 1985: Resolution 573; on Jordan's occupied West Bank, 1953: Resolution 101; on Jordan, 1966: Resolution 228; on Syria, 1956 (resolution 111), 1962 (resolution 171)); Great Britain (on Yemen, 1964: Resolution 188).

[142] *Island of Palmas* case (Netherlands/United States), arbitral award (1982) *RIAA*, vol II, 8–9.

[143] See, for instance, Art 41 of the Schengen Agreement between some European countries (19 June 1990); Mauritania, Algeria, Mali and Niger have presumably entered into an agreement (Tamanrasset agreement, 2010), or have at least reached and understanding, granting a reciprocal right of hot pursuit in their respective territories (parts of the Sahel) with a view to fight Al-Qaeda Organization in the Islamic Maghreb's terrorists (see *Le Temps*, 27 July 2010; *FT*, 22 April 2010).

[144] Article 24(1) of the UN Charter.

Charter has stripped states of their forcible self-help rights, so that use of force with a view of 'self-preservation' is thenceforth lawful only 'if an armed attack occurs' (Article 51 of the UN Charter).

Furthermore, as shown above, the obligation not to resort to threat or use of force is not subordinated to the actual functioning of the UN collective security system.[145] Kelsen was then right to stress, shortly after the entry into force of the UN Charter, its fundamental difference *vis-à-vis* the League of Nations system:

> The delinquent [State] which is in actual possession of the illegal advantage is *protected by the Charter against any enforcement action other than that taken by the Security Council*.[146]

Indeed, the UN Charter Preamble, the interpretative value of which is undisputed in accordance with Article 31(2) of VCLT, adamantly declares that 'armed forces shall not be used, *save in the common interest*'.[147] Now, the ascertainment of the 'common interest' can hardly be carried without and outside the endowed organs of the UN and certainly cannot be left to the self-interpretation of a few states.

Lastly, one cannot but share Georges Abi-Saab's illuminating thought according to which:

> To each level of normative density must correspond a certain level of institutional density allowing the norms to be enforced in a satisfactory way.[148]

It can thus be easily argued that either the international legal order has not yet found a *satisfactory* machinery, or that the latter is seldom resorted to by those in the interest of which it has been established. In the light of historical records, we tentatively lean towards the second hypothesis.

[145] See nn 23 and 112. [146] Kelsen (n 72), 269 (emphasis added). [147] Emphasis added.
[148] Abi-Saab (n 62), 95 (our translation).