Use of Force, Prohibition of

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A. Introduction

1 The prohibition of the threat or use of force constitutes one of the cornerstones of the modern international legal order. Besides being laid down explicitly in Art. 2 (4) UN Charter and referred to in many other treaties, it is today universally accepted as a norm of → *customary international law*. Moreover, it is agreed by many to belong to the special category of international → *ius cogens*, which gives expression to the fundamental importance of the prohibition, as well as to its general acceptance by the international community. In the terms of modern politics, the non-use of force between States represents one of the core values of the international community.

2 Although the use of force is still very much a fact in today's international community, in recent years concentrating on the fight against → *terrorism*, on policing the sea, on restoring order in failed States, and on upholding human rights vis-à-vis dictatorial regimes, the debate on each of those incidents hardly ever questioned the general norm on the prohibition of force. Instead, what is discussed and is repeatedly the subject of controversy, are scope and content of certain exceptions to the prohibition. Also, States justifying their unilateral use of military force (such as recently Russia against Georgia in 2008 and Ukraine in 2014, or France and the United States against forces of the Islamic State of Iraq and the Levant in Syria in 2014–15) regularly do so by claiming that one of those exceptions applies, rather than by denying that there is a rule of international law that gives rise to the necessity of them justifying every single act of military force. As the → *International Court of Justice (ICJ)* aptly pointed out in the *Nicaragua Case*:

> If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule (→ *Military and Paramilitary Activities in and against Nicaragua Case [Nicaragua v United States of America] [Merits]* para. 186).

3 Thus, it appears that international practice, by relying on and discussing the scope of various exceptions to the rule, in principle strengthens the rule that the use of military force between States is generally prohibited. The actual relevance of the prohibition, however, can only be properly assessed if its historical development (B.), its scope and content (C.), and the exceptions to it (D.) are taken into account.

B. Historical Development of the Prohibition

4 Limitations to the use of military force by States in their international relations are clearly an achievement of the 20th century. Prior to World War I, virtually no prohibition to resort to force or war against another State existed on the international plane, the exception being Art. 1 Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts ([done 18 October 1907, entered into force 26 January 1910] [1908] 2 AJIL Supp 81), the so-called → *Drago-Porter Convention (1907)*. That restriction upon the freedom to use force was only a modest one, though, since it applied only to the recovery of contractual debts and it was subject to the debtor State's having agreed to arbitral settlement and complying with that settlement.

5 With the system of the → *League of Nations* a much more comprehensive effort to restrict war was undertaken. War and its containment became one of the pillars of the post-war international order of 1919, with Art. 11 League Covenant explicitly declaring war and the threat of war 'a matter of concern to the whole League'.

However, the specific legal rules of that system fell far short of a general prohibition of force. Art. 12 League Covenant prohibited nations resorting to war before a dispute had been submitted to peaceful settlement and for three months after an arbitral award or a judicial decision had been given, thus providing, in essence, merely for a moratorium on war. It was only in very special cases that the League members were definitely deprived of their freedom to go to war, namely against another member that complied with an arbitral award or a decision of the → *Permanent Court of International Justice* (PCIJ) (Art. 13 (4) League Covenant) (Art. 15 (6) League Covenant). In case the Council failed to adopt a report by unanimous vote, the League members reserved to themselves 'the right to take such action as they shall consider necessary for the maintenance of right and justice' (Art. 15 (7) League Covenant). Those provisions were remarkable in their time as the first efforts of something like the international community to outlaw war, but they did not have much practical effect in the end.

6 In an attempt to overcome the shortcomings of the League Covenant, the members of the League adopted the Geneva Protocol for the Pacific Settlement of International Disputes in 1924 (signed 2 October 1924 [1925] 19 AJIL Supp 9), which not only acclaimed in its preamble the 'solidarity of the members of the international community', but also stipulated in Art. 2 the obligation 'in no case to resort to war', except in self-defence or in the case of collective enforcement measures. The Protocol, however, never entered into force due to Britain's failure to ratify.

7 A general prohibition of war was brought about through the famous → *Kellogg-Briand Pact (1928)*, in Art. I of which the parties declared, 'that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another'. In 1933, several Latin American States concluded the Anti-War Treaty of Non-Aggression and Conciliation (163 LNTS 393), the so-called → *Saavedra Lamas Treaty (1933)*, in Art. I of which the parties declared, 'that they condemn wars of aggression in their mutual relations or in those with other states'. When this treaty entered into force in 1935, with the United States of America acceding one year earlier, practically all States of the time were bound to a general prohibition of war, subject only to the implicit right of → *self-defence*. However, the fact that those prohibitions were restricted to war, and did not refer to the use of force in general, proved to be a serious shortcoming when States, such as China and Japan, insisted that their military actions against each other did not amount to war and were, thus, not in violation of international law.

8 This particular defect of the legal situation was to be remedied by Art. 2 (4) UN Charter, which not only extends the scope of the prohibition to the threat or use of all kinds of military force, but also has it supported with a multilateral system of enforcement in Chapter VII UN Charter. Every discussion on the use of force in the international legal system today necessarily focuses on Art. 2 (4) UN Charter and its interpretation in jurisprudence, legal doctrine, and practice. The ICJ referred to the provision as 'a cornerstone of the United Nations Charter' (*Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Merits]* para. 148; → *Armed Activities on the Territory of the Congo Cases*).

C. Scope and Content of the Prohibition

1. Treaty norm and customary rule

9 In order to describe the prohibition of the use of force under current international law, two legal bases for that rule must be distinguished: Art. 2 (4) UN Charter as a conventional norm; and the corresponding rule of customary international law. In its jurisprudence the ICJ has, on several occasions, acknowledged that the prohibition of the use of force is indeed part of customary law (eg *Military and Paramilitary Activities in and against Nicaragua [Jurisdiction and Admissibility]* para. 73; *Military and Paramilitary Activities in and against Nicaragua [Merits]* paras 187–190; → *Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]* para. 87), and in doing so regularly proceeded on the assumption that both rules have the same content.

10 While this assumption is being criticized in legal doctrine, where authors point to the fact that States have interpreted the prohibition in a divergent manner, international practice indeed appears to bear out the conclusion that treaty and custom law on the non-use of force are identical in content. Differing views put forward by States and international organs do not so much relate to the prohibition of force as such, as to scope and content of exceptions to it. Thus, it may prove to be difficult to establish a uniform *opinio iuris* on humanitarian intervention as a rule of international law, or on certain constellations of (alleged) self-defence, but not on the basic elements of the prohibition of the use of force. Moreover, since all States are today bound by the treaty norm of the UN Charter, possible differences of interpretation among them would equally concern the treaty and the customary rule. It is submitted, therefore, that the prohibition of the use of force is today both a norm of treaty law and of international customary law and that both rules are, at least in general, identical in content (Dinstein mn 269–70). Differences between the two rules may be argued to exist, however, in respect of their personal scope, ie of their addressees (see below paras 26–30).

2. The Notion of 'Force'

11 The scope of the prohibition is essentially determined by the notion of 'force', which in the context of the UN Charter must clearly be interpreted as referring solely to armed or military force. Paragraph 7 of the Preamble of the UN Charter identifies as one of the goals of the United Nations 'to ensure … that armed force shall not be used, save in the common interest', and Art. 44 shows that the UN Charter uses the term 'force' where it refers to the application of military force. This restrictive interpretation is further supported by the *travaux préparatoires* of the UN Charter, since at the San Francisco Conference a Brazilian proposal to extend the prohibition to encompass → *economic coercion* was explicitly rejected (Randelzhofer and Dörr mn 18). Also, the prevailing international practice of States and international organizations, including the → *Friendly Relations Declaration*

(1970) of the UN General Assembly, only treats incidents involving military force as falling under the prohibition of the use of force and thereby confirms its narrow reading.

12 Thus, the use of political or economic means of coercion may, in a given case, be contrary to the principle of non-intervention (→ *Intervention, Prohibition of*), but it cannot as such violate the prohibition of the use of force, neither under the UN Charter nor under customary international law. Also, the use of non-military forms of physical force between States, such as the deliberate cross-frontier employment of natural forces (eg the release of water, the deprivation of water by a riparian State, or the spreading of fire), cross-border pollution, the expulsion of parts of the population, or the causation of a massive influx of refugees, has not so far been treated in practice under the principle of the non-use of force. The same applies, so far, with regard to computer network attacks against the information systems of another State, although current and future State practice may, in this respect, lead to a different interpretation, given the weapon-like destructive potential which some attacks by means of information technology may develop: computer network attacks intended to directly cause physical damage to property or injury to human beings in another State may reasonably be considered armed force (cf Schmitt [1999] 912–15; Schmitt [2011] 573–78; see also → *Cyber Warfare*).

13 In its restriction to armed or military force the prohibition must, however, be interpreted very broadly to basically capture each and every form of armed force by individual States. Only such an extensive reading is apt to accommodate the universally acknowledged fundamental character of the prohibition and to fulfil the relevant purpose of the UN Charter, which is to ensure that armed force should generally not be used by individual States against each other. The use of force between States is meant to be outlawed altogether, save on the basis of a recognized legal norm that is established to form an exception to the prohibition.

14 The comprehensive character of the prohibition is, at a close reading, confirmed by the wording of Art. 2 (4) UN Charter. Although it contains the terms that the use of force must be directed 'against the territorial integrity or the political independence of any state' (→ *Territorial Integrity and Political Independence*), these are obviously not meant to be indispensable requirements for the prohibition to apply, nor to restrict its scope in any other way. First, the two terms are supplemented by a third variant of the threat or use of force covered by the provision, which is one 'in any other manner inconsistent with the purposes of the United Nations'. Since one of those purposes is clearly to prevent every unilateral use of armed force, the third variant takes on the character of a 'catch-all phrase'. Moreover, as the *travaux préparatoires* of the UN Charter reveal, the reference to 'territorial integrity' and 'political independence' was introduced into the text of the provision in order to place special emphasis on two particularly grave forms of the prohibited use of force and not to restrict the scope of the prohibition (Ruys [2014] 164; Randelzhofer and Dörr mn 39). It was in this sense that the prohibition was inserted, eg into Art. 1 North Atlantic Treaty ([signed 4 April 1949, entered into force 24 August 1949] 34 UNTS 243), and that the 2005 World Summit Outcome, adopted as a General Assembly resolution, reaffirmed the 'obligation of Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter' (UNGA Res 60/1 '2005 World Summit Outcome' [12 September 2005] GAOR 60th Session Supp 49 vol 1, 3, para. 77), thus simply omitting the two qualifications contained in Art. 2 (4) UN Charter. The prohibition therefore captures every threat (→ *Use of Force, Prohibition of Threat*) or use of armed force of any kind that is directed by one State against another.

15 The broad interpretation of the prohibition is of particular relevance when it comes to the use of indirect force by one State against another. The principle of the non-use of force not only prohibits the direct use of force, ie the incursion of regular troops or cross-border shooting into the territory of another State, but also the participation of a State in the use of force, by another State or by private individuals, against or in the territory of another State. In particular the participation in forcible acts committed by unofficial bands, → *mercenaries*, or rebels can fall under the prohibition. Thus, the Friendly Relations Declaration, which the ICJ held to be declaratory of customary international law in this respect (*Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Merits]* para. 162), stated with regard to the principle of the non-use of force, the duty of States to refrain 'from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State' and 'from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to … involve a threat or use of force'.

16 The ICJ referred to the Friendly Relations Declaration in the *Nicaragua* case and held that certain forms of assistance rendered by a State to private rebel groups amount to the use of indirect force, provided that the supported groups commit acts of armed violence in another State. The Court characterized the arming and training of the Contras as an act of force on the part of the United States, but not 'the mere supply of funds' to them (*Military and Paramilitary Activities in and against Nicaragua [Merits]* para. 228). Thus, the support by a State of private acts of armed force against or in another State can amount to a prohibited use of force on the part of the supporting State. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, the Court confirmed that training and military support given by a State to private groups that then commit acts of violence in the territory of another State is in violation of the principle of non-use of force (paras 163–65).

17 On the other hand, the mere financial support of private individuals who commit acts of armed force seems, according to the ruling in the *Nicaragua* case, not to fall under the prohibition of the use of force. This ruling might come under pressure, however, in times of an international conflict against → *terrorism*, when the harbouring of private terrorists by a State is regarded by the international community as giving rise to the right of self-defence, and thus as amounting to a grave act of force. This feature of State practice, which has, as a consequence of the events of 9/11, extended the criteria for attributing acts of private violence to a supporting State (cf Tams 383–87), cannot remain without effect upon the prohibition of the use of force.

18 Even if the comprehensive character of the prohibition of the use of force is beyond dispute and its broad scope generally acknowledged, one may ask whether there actually is no lower threshold of any kind that triggers the prohibition and must be reached in order to bring it into application. Is it perceivable at all that there could be actions of armed forces of a State against another that fall below that threshold and are thus outside the prohibition? It is submitted in this respect that with regard to actions of armed forces, the prohibition of the use of force needs to be distinguished from other rules of international law, such as the prohibition of intervention and the prohibition of the violation of State → *sovereignty*. The essential feature that characterizes the prohibition of the use of force is the application of military force as a means of coercion, it is not the intrusion into the sovereign realm of another State, nor is it even the element of coercion as such, but only an intrusion or coercion using the special features of military weaponry and displaying hostile intent.

19 The behaviour of a State's armed forces must possess those special features in order to fall under the prohibition of the use of force. Therefore, it is very doubtful whether, for example, the violation of airspace or territorial waters by units of armed forces that remain unopposed, or even undetected—so that no actual use of force occurs—is covered by the prohibition of the use of force. Although during the → *Cold War (1947–91)*, such incidents were occasionally referred to as 'acts of aggression' or the like, it would seem that the mere intrusion into the territory of another State that is not related to any armed operation is much more adequately dealt with under the principle of non-intervention. Also, in practice, incidents that involve a State's armed forces, but not the special features of their weaponry (eg uninvited humanitarian aid by unarmed soldiers), are more likely to be addressed as violations of sovereignty or territorial authority of another State than as a prohibited use of force. In relation to small-scale intrusions of a military character it is decisive to determine whether they reflect a hostile intent on the part of the intruder (Ruys [2014] 172). Other than that, no specific gravity threshold can be read into Art. 2(4) UN Charter nor be shown to exist in the customary practice of States (Ruys [2014] 171–91; *contra* Corten [2010] 52–92).

20 The use of force, as prohibited by international law, must be put in relation to another term of international law: → *aggression*. The definition of aggression, as adopted by the UN General Assembly in 1974, captured the term to mean 'the most serious and dangerous form of the illegal use of force'. This is supposedly why the ICJ in the *Nicaragua* case referred to the definition in order to interpret the term → *armed attack* within the meaning of Art. 51 UN Charter, since the Court distinguished 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms' (*Military and Paramilitary Activities in and against Nicaragua [Merits]* para. 191; → *Oil Platforms Case [Iran v United States of America]* para. 51). 'Armed attack' and aggression both describe particularly grave forms of the use of force and are therefore, in any case, caught by the prohibition laid down in Art. 2 (4) UN Charter.

3. In the International Relations of States

21 Art. 2 (4) UN Charter prohibits the use of force solely in the international relations between States. It does not, therefore, apply to the use of military force within the territory of a State: it does not prevent insurgents from starting an armed fight against the government, nor the government from using armed force against them. Insurgents are only protected by the prohibition of the use of force when they have succeeded in establishing a stabilized → *de facto* regime (Randelzhofer and Dörr mn 29). Forcible enforcement actions undertaken by a State against private individuals within its own territory are not covered by the prohibition, either under the UN Charter or under customary international law.

22 The international relations of a State are not affected if it consents to the use of armed force by another State in its own territory, including its territorial waters. Because sovereign States are in principle free to dispose of their territory, they also have the right to dispose of their exclusive right to use that territory, thus to allow military operations of other States on their State territory. As long as that consent is genuine, the prohibition of the use of force does not apply to military actions of other States' forces on the territory of a State whose government has consented to those operations (Brownlie 320–21). This does in principle include the intervention of other States' armed forces in a civil war or in the fight against terrorists by invitation or with the consent of the competent government. The recent practice of collective operations against private terrorist groups (eg in Afghanistan) or pirates (eg in the territorial waters of Somalia; → *Piracy*) seems to confirm this conclusion, just as in the *Armed Activities on the Territory of the Congo* case the ICJ clearly proceeded on the assumption that the valid consent by the Democratic Republic of the Congo could have justified the military operations of Ugandan troops on its territory (*Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Merits]* paras 92–105). The legalizing effect of government/State consent may, however, be questioned in situations where the consenting government is not legitimate or is no longer effective, or when the intervention consented to would violate the right of peoples to → *self-determination* (Nolte 604). Since a valid consent by the State whose territory is affected excludes the application of the prohibition of force altogether, the peremptory character of the prohibition (see para. 32 below) cannot affect the validity of the consent.

23 In order to come under the prohibition, the use of armed force by a State must be directed against the territory of another State. This territorial element was clearly underlined by the ICJ in the *Construction of a Wall* advisory opinion where the Court held that the concept of an armed attack (Art. 51 UN Charter) only applies to attacks from outside a State's territory that are imputable to another State (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian-Territory* para. 139). It is submitted that the same applies to the general rule on the use of force, of which armed attack is nothing but a severe example. Therefore, any form of a blockade, by land or by sea, cannot be said to involve a use of force against the State concerned, since it merely consists of a denial of entry to the State's territory and lacks any physical action against that territory (Brownlie 376–77). Admittedly, however, the Definition of Aggression, adopted by the UNGA in 1974, refers in Art. 3 (c) to 'the blockade of the ports or coasts of a State by the armed forces of another State'.

24 In State practice forcible attacks against ships and aircraft of another State of a non-commercial or military

character are also regarded as acts of force against that State and as falling under the prohibition of the use of force. Authority for this might already be taken from the famous *Lotus* case of the PCIJ, which held that as a corollary of the principle of the freedom of the seas 'a ship on the high seas is assimilated to the territory of the State the flag of which it flies' and that 'a ship is placed in the same position as national territory' (*The 'Lotus' [France v Turkey]* PCIJ Series A No 10, at 25; → *Lotus, The*). Along the same lines, Art. 3 (d) Definition of Aggression qualified the attack 'on the land, sea or air forces, or marine or air fleets of another State' as an act of aggression. And in the *Oil Platforms* case the ICJ clearly proceeded on the assumption that the attack on a military vessel of another State, either through missiles or sea mines, may, in case of the required severity, amount to an armed attack, provided the vessel is flying the flag of that State (*Oil Platforms* paras 64 and 72). Forcible attacks against official—as opposed to private—aircraft or ships of another State are sometimes even then considered to come within the prohibition of the use of force, when they occur in the territory of the attacking State (Ruys [2014] 180–88 and 209). When a foreign ship or aircraft is attacked in the territory of a third State, the use of force is not only directed against the flag State, but also against the State whose territory is affected.

25 Violent attacks against diplomatic premises do not amount to acts of force against the sending State, since the premises are not part of its territory. If committed from outside the territory of the receiving State, such acts may amount to a use of force against the latter. Should the receiving State itself be responsible for the incident, the latter must be dealt with under the *leges speciales* of the law on diplomatic relations.

4. Personal Scope

26 The prohibition of the use of force, as laid down in Art. 2 (4) UN Charter, only applies between States, thus solely armed operations by States and against States fall under the provision. Private individuals or groups are not members of the United Nations and cannot, therefore, be addressed by the rule as a matter of treaty law. In State practice an extension of the rule to bind private actors in their armed operations or to protect them against State operations cannot be shown to be accepted either. It is, however, generally accepted that stabilized *de facto*-regimes as pre-State entities are also bound and protected by the prohibition (Randelzhofer and Dörr mn 29).

27 A sovereign State remains protected by the prohibition of the use of force, even if it loses its effective government and becomes a so-called failed or → *failing State*. An exemption of those States from the scope of the prohibition by way of its teleological reduction, which is argued by some authors, has not been generally recognized in State practice and is, therefore, not part of the *lex lata*, apart from the possibility that such a reduction could invite interested States to an abusive behaviour and is thus inadvisable as a matter of legal policy. It may be, however, that where States are unable to control private activities in their territory effectively, the right of self-defence would apply under more lenient conditions, so that the threat failed States might pose to international peace and security could be dealt with under one of the exceptions to the prohibition of the use of force.

28 Also, under customary international law, which in theory would allow for more flexibility as to the personal scope of the prohibition, the latter is primarily addressed to States. A certain extension can be observed in practice, however, with regard to international organizations which are responsible for the conduct of military operations and which in those cases usually declare themselves to be bound by the customary rules on the use of force. This concerns regional security arrangements (→ *Regional Arrangements and the United Nations Charter*), such as the → *North Atlantic Treaty Organization (NATO)*, the European Union, the → *Economic Community of West African States (ECOWAS)*, the → *African Union (AU)*, and the United Nations itself. Most of the organizations acknowledge the binding character of the prohibition already in their constituent documents. Thus, Art. 1 North Atlantic Treaty refers explicitly to the UN Charter and repeats the obligation of the Member States of NATO 'to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations'. Art. 21 Treaty on European Union declares that any action of the EU on the international scene shall be guided by, among others, 'respect for the principles of the UN Charter and international law', and that the EU shall work in order to preserve peace, prevent conflicts, and strengthen international security 'in accordance with the purposes and principles of the UN Charter'. The constitutive treaties of the AU and ECOWAS re-affirm the commitment of their Member States to comply with the international rules of non-aggression, as does the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (1999). Such explicit references in the primary legal documents give rise to the presumption that the founding States also want to bind the organization as a subject of law to the international legal principles referred to and convey that commitment to the international community.

29 If those organizations are then themselves bound by the customary prohibition of the use of force, they may conduct their military operations, at least in the territory of a non-member State, only with the consent of the States concerned, with an authorization of the UN Security Council under Chapter VII UN Charter or under any of the recognized exceptions to the prohibition (see paras 37–50 below). Moreover, since international organizations are creatures of their Member States, the latter remain, in principle, responsible under international law for the actions of the organizations and are therefore under the obligation to ensure that the organization complies with all applicable rules of international law. This is the case even if in the *Behrami and Saramati* case the → *European Court of Human Rights (ECtHR)* seems to have set a different tone by declining to legally attribute UN forces' behaviour to the UN Member States (*Behrami and Behrami v France* [ECtHR] App 71412/01; *Saramati v France Germany and Norway* [ECtHR] App 78166/01, Decision of 2 May 2007).

30 Also under customary law, private individuals or groups do not fall under the scope of the prohibition of the use of force, even if they may dispose of the financial, military, and organizational strength allowing them to commit acts of armed force against States that have the scale and effects of inter-State operations. In its recent

jurisprudence the ICJ made it clear that acts of violence by → *non-State actors* can only become relevant as amounting to an armed attack if they are attributable to a State that then would be the legitimate target of self-defence (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* para. 139; *Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda]* paras 146–47). The same must apply to the prohibition of the use of force, as both rules systematically correspond to each other. This is why the ICJ, in *Armed Activities on the Territory of the Congo*, took great pains in attributing private violent conduct to the government of Uganda, having recourse to Arts 4–8 of the 2001 ILC Draft Articles on the Responsibility of States and to the Friendly Relations Declaration (see *Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda]* paras 160–165). Another way of attributing private actions to a State, making the latter responsible under the prohibition of the use of force, is the concept of indirect force applied by the Court in the *Nicaragua* case (see paras 15 and 16 above). Also, recent State practice (eg with regard to the conflicts in Lebanon [2006] and Georgia [2008]) confirms that armed force used by non-State actors only becomes relevant with regard to the prohibition of the use of force if it can be attributed to a State other than the one affected by it. Private individuals or terrorist groups do not qualify as legal subjects of the rules on the non-use of force—they may be the objects of policing or law enforcement operations, but not the addressees of legitimate acts of self-defence.

5. Legal Effects

31 The prohibition of the use of force renders every act of armed force covered by it, and not justified by an exception to it, a violation of international law, and the State that is responsible for it liable to counter-measures and reparation in accordance with customary international law (cf UN ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] GAOR 56th Session Supp 10, 43; Arts 31–39 and 49–54). Another State that has aided or assisted in the commission of a prohibited use of force may be responsible for that in its own right (cf Art. 16 ILC Draft Articles). Moreover, since the prohibition is generally recognized to entail an obligation *erga omnes* (an obligation owed to the international community as a whole), its violation may not only be invoked by the State that is territorially affected, but by any other State under the conditions set out in Art. 48 ILC Draft Articles (→ *Obligations erga omnes*).

32 Additionally, the prohibition is usually acknowledged in State practice and legal doctrine to have a peremptory character, thus to be part of the international → *ius cogens* (cf *Military and Paramilitary Activities in and against Nicaragua [Merits] [Separate Opinion of Judge Singh]* [1986] ICJ Rep 151, 153; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Separate Opinion of Judge Elaraby]* [2004] ICJ Rep 246, 254). In terms of the responsibility of States this would, in case of gross or systematic violations, imply an obligation of all States to co-operate in order to bring the breach to an end and not to recognize as lawful any situation created by the use of force (Art. 40 (1) ILC Draft Articles). This duty of → *non-recognition* was taken up by the ICJ in the *Construction of a Wall* advisory opinion, when it held that as a corollary of the prohibition of the use of force any territorial acquisition resulting from the threat or use of force was illegal and must be treated as such by other States (at para. 87). This view was confirmed in the recent case of the Russian annexation of Crimea (March 2014), when many States declared their non-recognition (Grant 87–90) and the UNGA called upon all States not to recognize the territorial alteration (UNGA Res 68/262).

33 In terms of the law of treaties the *ius cogens* character of the prohibition leads to the invalidity of treaties whose content is in violation of it (Art. 53 Vienna Convention on the Law of Treaties [1969]). However, this can only refer to treaties that are actually in contradiction to the prohibition, thus excluding those treaties to which the State concerned has validly consented (see para. 22 above). Therefore, only treaties concluded between States that relate to the use of force as against a third State can be subject to the invalidity provided for in Art. 53 Vienna Convention. Moreover, a treaty is void if its conclusion has been procured by an illegal threat or use of force according to Art. 52 Vienna Convention on the Law of Treaties, whereas (peace) treaties forced upon an aggressor State are not *eo ipso* invalid (Art. 75 Vienna Convention).

34 In modern international law the commission of prohibited acts of armed force may not only entail the legal responsibility of the State to whom those acts can be attributed, but also the criminal responsibility of individuals who were personally involved in the illegal violence. Already the UNGA Friendly Relations Declaration and the UNGA Definition of Aggression (Art. 5 (2)) had enunciated that aggression constitutes a crime against international peace and that it gives rise to international responsibility, but the context of both declarations suggested that they referred to State—rather than to individual—responsibility.

35 This is about to change under the Rome Statute of the International Criminal Court ('ICC'): Art. 5 (1) (d) Rome Statute confers upon the ICC subject-matter jurisdiction with respect to the crime of aggression. While the definition of that crime, which would 'activate' the Court's jurisdiction, had been postponed to later agreement (Art. 5 (2) Rome Statute), in June 2010, the Assembly of State Parties to the Rome Statute adopted, in Kampala, the required amendments to the Statute on the crime of aggression. The newly inserted Art. 8bis of the Statute defines as such crime the

> planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

As 'acts of aggression' the new provision simply incorporates the wording of Art. 3 of the 1974 UNGA 'Definition of Aggression'. The amendment needs to be ratified by at least 30 States Parties, and the ICC shall exercise jurisdiction over the crime of aggression only one year after that ratification process has been concluded, but not before another two-thirds vote has been taken by the States Parties after 2017 (see the Rome Statute, as amended, Art 15bis and Art. 15ter, (2) and (3) respectively). As of 1 September 2015, 23 parties to the Statute had ratified the Kampala amendments. Thus, it may still take some time before the → *individual criminal*

responsibility for grave violations of the prohibition of the use of force will effectively be enforced on the international plane.

36 Finally, as the *Oil Platforms* case demonstrates, the prohibition of the use of force can be used as general legal backdrop for the interpretation of other treaties, thus securing their conformity with the international rules on the use of force. In the said case, the ICJ had to interpret a clause in the Iran-US treaty of friendship, which essentially allowed every party to adopt those measures 'necessary to protect its essential security interests', and in cases where that clause is invoked to justify actions involving the use of armed force it could in the Court's view only encompass measures in conformity with the general rules on the use of force and self-defence. The latter were in this respect taken into account as 'relevant rules of international law applicable in the relations between the parties' within the meaning of Art. 31 (3) (c) Vienna Convention on the Law of Treaties (*Oil Platforms* paras 40–41). Given the fact that all States are bound by the prohibition of the use of force, the latter's instrumentalization for the systemic approach of treaty interpretation (Dörr 'Art. 31' in Dörr and Schmalenbach [eds], *Vienna Convention on the Law of Treaties* 89–104) is bound to affect a considerable number of treaty relationships in the international community.

D. Exceptions to the Prohibition

37 The relevance of the prohibition of the use of force cannot be assessed without taking a look at the recognized exceptions to it, ie at the grounds on which the use of armed force by a State can be justified today on the basis of a norm of international law. Since the proscriptive norm, outlawing any kind of armed force between States, is the basic rule, a State who wishes to invoke an exception to that rule in order to justify forcible actions in its international relations, will carry the burden of showing that the invoked justification exists as a legal norm *in abstracto* and that its preconditions were fulfilled in a given case of armed force. It is probable that the protective and stabilizing function of the prohibition of the use of force rests, to a considerable extent, on that shift of the burden of argument, and, as was pointed out earlier (at para. 2 above), current international practice and legal argument with regard to the use of force mainly focus on exceptions to the basic rule and on their prerequisites. Three exceptions to the prohibitions of the use of force can be found in universally binding treaties, while two (controversial) others are discussed as unwritten norms of customary law.

1. Right to Self-Defence

38 The best-known justification for the use of armed force is the right to → *self-defence* laid down in Art. 51 UN Charter and recognized as a rule of customary international law. This right is generally recognized *in abstracto* to exist as a permissive legal norm, but its necessary preconditions and how to establish them in a given case are still very controversial. At least three points, however, seem to be settled through the jurisprudence of the ICJ: first, under the UN Charter and customary law there can be no legitimate self-defence without an armed attack, ie without a grave incident of armed force (*Military and Paramilitary Activities in and against Nicaragua [Merits]* paras 195 and 211; *Oil Platforms* para. 51); secondly, measures of self-defence may only be directed against a State who is responsible for the armed attack, ie to whom the latter can be legally attributed (cf *Oil Platforms* para. 51; *Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Merits]* para. 146); and thirdly, any act of self-defence can only be legal under international law if it observes the conditions of necessity and → *proportionality* (*Military and Paramilitary Activities in and against Nicaragua [Merits]* paras 194 and 237; *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* para. 41; → *Nuclear Weapons Advisory Opinions*).

2. Measures under the Law of the Sea

39 If ships flying the flag of another State are suitable objects of a use of force (see para. 24 above), then rules of the → *law of the sea*, which allow every State to interfere with foreign ships on and foreign aircraft above the → *high seas*, must be taken to contain exceptions to the prohibition of the use of force, since without the element of armed force at the disposal of the entitled State those rights would remain ineffective. This concerns the right to seize pirate ships (Art. 105 UN Convention on the Law of the Sea), the right of boarding (Art. 110 UN Convention on the Law of the Sea), and the right of → *hot pursuit* (Art. 111 UN Convention on the Law of the Sea). This was confirmed by the → *International Tribunal for the Law of the Sea (ITLOS)* in its *Saiga (No 2)* case, where the Tribunal, without referring to Art. 2 (4) UN Charter, stipulated that

> international law, which is applicable by virtue of Art. 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law (*The M/V 'Saiga' [No 2] [Judgment of 1 July 1999]* para.155; → *Saiga Cases*).

The Tribunal specified that it is only after the appropriate actions, such as giving auditory or visual signals to stop, or the firing of shots across the bows of the ship, have failed that a pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (ibid para. 156).

3. Enforcement Actions under Chapter VII UN Charter

40 A State may use armed force against another if it is acting under the terms of a resolution of the UN Security Council, adopted under Chapter VII UN Charter. If the Security Council determines, pursuant to Art. 39 UN Charter, that a threat to the peace, a breach of the peace, or an act of aggression exists, it can, according to Art. 42, 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. Member States are bound by those decisions and obliged to carry them out in accordance with Art.

48 UN Charter.

41 Since the Council is not actually 'taking' the actions envisaged in Art. 42 UN Charter itself, but usually authorizes Member States to take the measures assigned, UN enforcement actions under Chapter VII function in practice as often ill-defined authorizations of States to use armed force against or in the territory of another State. While the concept of the UN Charter might have envisaged the Security Council, acting on behalf of the international community, as the head of a multi-national enforcement enterprise, the practice of Chapter VII actions usually conveys the image of modern (ie authorized) inter-State conflicts in which one side is allowed to use armed force and the other is not.

42 From the fundamental importance of the prohibition of the use of force and its peremptory character it follows, however, that only those Security Council resolutions can be taken to offer the required authorization, which contain an explicit and sufficiently clear mandate to that effect. It is not sufficient that the Council merely characterizes a situation or a State's conduct as a threat to the peace, or even condemns a particular State for its illegal actions. 'Taking action' under Art. 42 UN Charter—interpreted in the light of the prohibition of the use of force—requires the Security Council to explicitly grant an authorization and to envisage a forcible course of events in a sufficiently concrete manner.

4. Protection of Nationals Abroad

43 For a long time it was a very controversial issue among authors on international law whether there is, as part of the *lex lata*, an unwritten exception to the prohibition of the use of force, which would allow States to protect or rescue their nationals by means of armed force in the territory of another State. The traditional majority of legal writers seem to argue against such a rule, because it would be open to abuse and is not firmly established in State practice (Brownlie 301; further references given by Ruys 2008 234–36; Randelzhofer and Dörr mn 58). Additionally, armed action to rescue nationals abroad surely cannot be justified on the basis of the right to self-defence, as is often done in State practice, because the territorial element required for a legitimate case of an armed attack is absent in the relevant situations, and without an armed attack there can be no lawful self-defence (see para. 38 above).

44 It is submitted, however, that a limited forcible action with the legitimate aim of rescuing a State's own nationals, and nationals of another State that has asked for the intervening State's assistance, is by now established as a rule of customary international law and, there-fore, as an unwritten justification to use armed force in another State's territory without that State's consent. Rescue operations of this kind have been a regular element of modern State practice at least since 1960, and even if the reasons given for an operation do not always fit the facts, no operation seems to have been challenged on the grounds that the abstract claim behind it, ie to be allowed to protect nationals abroad by forcible means, is as such illegal under international law. Thus, the *opinio iuris* of the States carrying out the rescue operations—eg Belgium in Congo (1960); Belgium and the US in Congo (1964); Israel in Entebbe/Uganda (1976); the US in Iran (1980); the US in Grenada (1983); the US in Panama (1989); the US in Liberia (1990); France in Chad (1990); the US in the Central African Republic (1996); the US in Sierra Leone (1997); Belgium and France in Rwanda (1990, 1993, and 1997); Germany in Albania (1997); France in the Ivory Coast (2002/2003); France in the Central African Republic (2003); Thailand in Cambodia (2003); a multinational evacuation operation in Lebanon (2006) etc—and of those advocating or tolerating them would seem to carry enough weight, as to give evidence of an unwritten rule of customary law.

45 To ensure that the fundamental rule of the prohibition of force is not undermined, the use of armed force for the purpose of rescuing nationals abroad is only admissible in limited cases under well-defined preconditions. Legitimate use of the rescue exception presupposes that the life of nationals is genuinely in danger in the territory of another State, that that State itself is either unwilling or unable to ensure the safety of the persons concerned (*ultima ratio*), that the intervening State does not pursue any other purpose at the occasion of the operation, and that the scale and effects of the military force used are adequately measured to the purpose and conditions of the operation, thus the impact on the other State's territory is kept to the absolutely necessary minimum.

5. Humanitarian Intervention

46 Even more controversial is another possible exception to the prohibition of the use of force which, under the label of 'humanitarian intervention', purports to legally justify armed operations by States against another State in order to safeguard the human rights in that State. The legitimate purpose of such an intervention is thus to protect the population in that other State against massive violations of their human rights. While the great majority of legal writers refuse to accept the humanitarian purpose as sufficient ground for another exception to the basic rule against armed force, the essential argument in favour of such a rule is, of course, the protection of human rights as another core value of the international legal community (for extensive references on the debate see Randelzhofer and Dörr mn 52–55). Yet, this argument is far from convincing, since the function of the prohibition of the use of force is not only to establish a core value of the international community, but also, and probably foremost, to deprive individual States of armed force as an instrument of their foreign policy. Thus, a simple weighing of interest or values neglects the essential function of that prohibition.

47 In the *Nicaragua* case the ICJ used formulations that could be interpreted as an, at least implicit, statement against humanitarian intervention, when it pointed out that the use of force could not be the appropriate method to monitor or ensure such respect (for human rights in Nicaragua) and that 'the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States' (*Military and Paramilitary Activities in and against Nicaragua [Merits]* para. 268).

48 Also, as a matter of State practice, humanitarian intervention is far from firmly established. Although there

have been several incidences which, at first sight, might seem to develop precedential value for a new rule of customary law (eg interventions by India in East Pakistan [1971]; by Vietnam in Cambodia [1979]; by Tanzania in Uganda [1979]; and the no-fly zones in Northern Iraq [1991]), in all those cases the States involved advanced various justifications for their forcible actions, so that a uniform *opinio iuris* referring to the humanitarian purpose of the use of force has not developed. Moreover, the abusive character of a humanitarian pretext, and thus the danger involved in accepting humanitarian intervention as a legal justification for armed force, became clear through the Indonesian intervention in East Timor in late 1975, justified on humanitarian grounds, which was followed several months later by a full-scale annexation of the invaded territory. The armed intervention of NATO in March 1999 against Yugoslavia, in order to end atrocities against the Albanian population in Kosovo, might have set an apt precedent in favour of humanitarian intervention as a permissive norm of international law, but as such it was not able to change the law, not the least because important States, such as Russia, China, and India, challenged the operation as being unlawful.

49 Neither is the newly developed concept of a → *responsibility to protect* suited to establish humanitarian intervention as a new rule of international law, since, insofar as it goes beyond a mere political concept, it appears to be based on the competence of the Security Council to adopt measures against the State concerned, thus using the authority of Chapter VII UN Charter. The concept, as it has been incorporated in UN resolutions, stops short of including the autonomous right of individual States to use armed force against another State and does not therefore, from the viewpoint of international law, add anything new to the debate on humanitarian intervention.

50 Therefore, the latter is, as the law stands at present, not an established rule of international law. The protection of human rights in another State cannot, therefore, lend a legal justification to the use of armed force against that State. This may, on the basis of specific State consent, be different within special treaty regimes, when States agree to establish among themselves a right of forcible intervention on humanitarian grounds. Art. 4 (h) Constitutive Act of the African Union (2158 UNTS 3), even if authorizing an international organization and not individual States, might be regarded as an example. It sets out as one of the principles of the organization,

> the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.
>
> (as amended in 2003: … as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council).

Similar provisions are contained in several regional treaties concluded among African States, for example the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (1999); Art. 7 Economic Community of Central African States Pact on Mutual Assistance (2000); and Art. 4 (8) Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region (2006).

E. Assessment

51 The prohibition of the use of force represents, beside the protection of human rights, the major advancement of the international legal order in the 20th century. Today it features as the cornerstone of that order and an undisputed core principle of the international community. Its effectiveness depends, more than that of any other rule of international law, on its acceptance by States, especially by those who live under a constant threat of being attacked from external enemies. It also seems as if that acceptance has a great deal to do with the extent to which exceptions to the rigid basic rule are accepted and to which States are allowed to defend their existence, their territory, and their people against external threats. Thus, the future of the prohibition of the use of force, which remains undisputed as the basic rule of current international law, seems to be contingent on how the international community, in applying and developing the rules on the use of force, succeeds in keeping the community interest in the non-use of force and the legitimate security interests of States in an adequate balance.

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