Ch.I Purposes and Principles, Article 2 (4)

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From: The Charter of the United Nations: A Commentary, Volume I (3rd Edition)

Edited By: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf, (Assistant Editor)

Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Series: Oxford Commentaries on International Law
Published in print: 22 November 2012
ISBN: 9780199639762

Subject(s):

Self-defence — Humanitarian intervention — Customary international law

(p. 200) Article 2 (4)

The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles:

…

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

…

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A. Fundamental Significance

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 in Art. 2 (4) of the 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 Moreover, the prohibition of the use of force is a major element in the efforts of the international community to prevent war. Due to current levels of armament, prevailing strategic concepts, and the development of modern weaponry, war today endangers the survival of mankind. Thus, the prevention of war must be among the most prominent aspirations of international politics and, and since war is a feature of human behaviour and law is an important instrument for regulating human behaviour, also of international law. Because little success can be expected from the establishment of a rule of law prohibiting war without paying due regard to the causes of war (as they have been examined in other disciplines such as anthropology, biology, sociology, history, and economics), law has to summarize the relevant results of those disciplines and mould them into clear rules for the prevention of war. Peace and war constitute relations between States, and since public international law is the means through which those relations are governed, juridical efforts to prevent war must concentrate in particular, though not exclusively, on public international law. In fact, since the beginning of the twentieth century, international law has increasingly been dedicated to the task of war prevention, which is why today it is possible to refer to a system of war prevention in international law comprising: (1) the prohibition of the use of force, (2) collective measures to secure that prohibition, (3) the obligation to resort to peaceful means for the settlement of (p. 204) disputes, (4) regulations on arms limitation and reduction, and (5) rules, though so far barely developed, concerning 'peaceful change'. As a more recent development, the criminal responsibility under international law of individuals for acts of international force may be added.

3 Although the use of force is still very much a fact in international practice, in recent years concentrating on the fight against terrorism, on policing the sea, on restoring order in failed States, and 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 repeatedly the subject of controversy, are the scope and content of certain exceptions to the prohibition. Also States justifying their unilateral use of military force 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 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.[1]

Therefore, it appears that international practice and legal doctrine, 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 and, thus, the legal force and fundamental significance of Art. 2(4).

B. History of the Prohibition of the Use of Force

I. Pre-Twentieth Century

4 Prior to the twentieth century, no prohibition of the use of force existed, so that States were free to resort to war.[2] The medieval theory of *bellum iustum* had been developed by theologians and was never a valid rule of public international law.[3] Besides, that theory lost its (virtual) war-preventing effects when it was recognized that recourse to war could be just for either side. 'Contemporary public international law does not know of any rules about when it is permissible to wage war. If a State so decides, it may resort to war at any time. Force is thus permitted in the relations between States without any conditions.'[4] This quotation correctly describes the legal situation almost up to 1919.

II. The Hague Conventions

5 The Hague Peace Conferences of 1899 and 1907[5] marked the beginning of attempts to restrict the freedom to resort to war. In Art. 1 of the Hague Convention III of 1907 relating to the Opening of Hostilities, the contracting powers recognized that hostilities (p. 205) between them must not commence without a prior and unambiguous warning in the form of either a reasoned declaration of war or an ultimatum containing a conditional declaration of war. Whereas Convention III was, more than anything else, a formalization of the freedom to resort to war, Art. 1 of the Hague Convention II of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Drago-Porter Convention)[6] contained a substantive, if modest, restriction upon that freedom. The provision prohibited the recourse to armed force for the recovery of contractual debts. This prohibition, however, was subject to the debtor State's obligation not to reject or evade an offer of arbitral settlement. Having accepted that offer, the State must not prevent the compromise from being concluded and was bound to comply with the subsequent award.

6 A similarly modest restriction on the freedom to resort to war was introduced through the so-called Bryan Treaties, concluded from 1913 onwards by the United States with a number of other States.[7] In 1916, nineteen such treaties existed. The contracting parties undertook the obligation to submit all their disputes to a conciliation commission and not to begin hostilities prior to the commission's report, which had to be delivered within one year.

III. The League of Nations Covenant

7 The experience of World War I gave rise to a more comprehensive effort to restrict war within the framework of the League of Nations. But that attempt still fell far short of establishing a general prohibition of war, even though Art. 10 may, at first glance, suggest such an interpretation.[8] But if Art. 10 is read together with Arts 12, 13, and 15, it becomes evident that the League Covenant, similar in this respect to the Bryan Treaties, merely provided for a moratorium ('cooling-off period') for all cases of armed conflict, while it was only in very special cases that League members were actually deprived of their freedom to go to war. The members were bound not to resort to war before the dispute had been submitted to judicial settlement, arbitration, or to the Council of the League. It was further prohibited to begin war within a period of three months from the arbitral award or the Council's report.

8 Recourse to war was definitely forbidden only against a State complying with the award or a report that had been unanimously adopted by the Council (Arts 13 (4) and 15 (6) Covenant). Since, in practice, most of the disputes submitted to the Council were not dealt with unanimously, this mechanism of the Covenant did not prove to be an effective prohibition of war. 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) Covenant), thus in essence underlining their right to use military force. Besides, it has to be remembered that the United States never belonged to the League, and that the Soviet Union, Germany, Japan, and Italy were members for only a short period of time.

(p. 206) IV. The Geneva Protocol of 1924

9 The Geneva Protocol for the Pacific Settlement of International Disputes (1924) was an attempt to overcome the shortcomings of the League Covenant by stipulating, in Art. 2, the obligation of States 'in no case to resort to war', except in self-defence or in the case of collective enforcement measures.[9] The Protocol, however, never became binding law. A general prohibition of war was only achieved on a regional basis: Art. 2 of the multilateral Locarno Treaty of 1925 proscribed any attack, invasion, or war, subject to some narrow exceptions, as between Germany and Belgium and France, respectively.[10] But that treaty lost its binding force in 1935.

V. The Briand-Kellogg Pact

10 The decisive turning-point in the development from the freedom to wage war towards a universal and general prohibition of war proved to be the Briand-Kellogg Pact, signed in Paris on 27 August 1928.[11] Article I of the Pact read as follows:

> The High Contracting Parties solemnly declare in the names of their respective peoples 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.
>
> Here, for the first time, a general prohibition of war was formulated, subject only to the right of self-defence. This latter exception is not expressly mentioned in the text of the treaty, but undoubtedly represented a tacit agreement between all parties.[12] During the years following 1928, nearly all States existing at the time became parties to the Pact. Only a number of Latin American States remained outside the Pact, but they became bound by the Saavedra-Lamas Treaty,[13] signed in Rio de Janeiro on 10 October 1933, Art. 1 of which is worded almost identically to Art. I of the Briand-Kellogg Pact. However, the denunciation of war was not confined to relations among the parties to the Saavedra-Lamas Treaty, but also covered their relations with third States. The provisions of the Briand-Kellogg Pact soon became part of general customary international law and as such are still valid today.[14]

11 Although of outstanding importance, the Briand-Kellogg Pact had its shortcomings. The prohibition of war, for instance, failed to be linked to a system of sanctions.[15] Its Preamble simply declared that a State violating the Pact 'should be denied the benefits furnished by the Treaty'. An even more serious deficiency proved to be the fact that the (p. 207) prohibition, at least according to its wording, merely referred to war, and not to the use of force in general.[16] Consequently, several States disguised their military actions by not declaring them as war, and claimed that no violations of the Pact were being committed. The most discouraging example in this respect was the behaviour of China and Japan in 1931 and 1937, when they engaged in extensive military operations against each other, inflicting heavy casualties and destruction of property.[17] Both governments, however, insisted that no state of war existed between them, as was illustrated by their continuing diplomatic relations, and that accordingly the situation did not fall under the Briand-Kellogg Pact.

VI. Article 2 (4) of the Charter

12 That particular defect of the Pact was to be remedied by Art. 2 (4) of the UN Charter which not only extends the scope of the prohibition to the threat or use of all kinds of military force, but is also characterized by a contextual relationship with the multilateral system of enforcement provided for in Chapter VII UN Charter. Today Art. 2 (4) constitutes by necessity the basis of any discussion of the problem of the use of force. Its predominant significance is recognized in practice and legal doctrine and has been particularly emphasized by authors who labelled it 'the cornerstone of peace in the Charter',[18] 'the heart of the United Nations Charter',[19] or the 'basic rule of contemporary public international law'.[20]

13 The eminent importance of Art. 2 (4) is also recognized in the jurisprudence of the ICJ which in the *Congo-Uganda* Case referred to the provision as 'a cornerstone of the United Nations Charter'.[21] This assessment is not affected by considerations of the Court on the customary character of the prohibition in its *Nicaragua* judgment of 1986.[22] In that case, the Court interpreted certain customary rules on the prevention of war in a rather extensive manner, which might suggest a tendency to diminish the significance of Art. 2 (4) of the UN Charter. But clearly the Court's approach of basing its findings on a far-reaching coincidence of the Charter provisions (Arts 2 and 51) and corresponding rules of customary international law, which was confirmed in its subsequent jurisprudence,[23] is open to considerable doubt and, moreover, simply underlines the universal recognition of the prohibition as representing a common value of the modern international community.[24]

(p. 208) C. Scope and Content of the Prohibition

14 Undoubtedly, the wording of Art. 2 (4) constitutes a considerable improvement in comparison with Art. I of the Briand-Kellogg Pact. The use of force in general is prohibited, rather than only war. Furthermore, the prohibition is not confined to the actual use of force, but extends to the mere threat of force. Finally, the prohibition is, at least in theory, safeguarded by a system of collective sanctions against any offender (Arts 39–51).

15 The scope and content of the prohibition of the use of force in contemporary international law cannot be determined by an isolated interpretation of Art. 2 (4) alone. Rather, the provision must be read in its context with Arts 39, 51, and 53. Here the problem arises that those Articles contain a number of terms which, though related to one another, differ considerably in their meaning. Thus, notions such as 'use or threat of force', 'threat to the peace', 'breach of the peace', 'act of aggression', 'armed attack', and 'aggressive policy' are used, but do not receive any further explanation in the Charter. Neither legal writings[25] nor State practice[26] have so far clarified these terms beyond doubt, nor have the attempts within the UN system as yet led to a satisfactory result.[27] Therefore, even the fundamental terms used in the provision and concepts enshrined therein are still the subject of some controversy in legal doctrine and international practice.

I. The Notion of 'Force'

16 Already the scope of the fundamental notion of 'force' is not undisputed. The term does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed force.[28]

1. *The Problem of Political and Economic Force*

17 The developing countries and formerly the Eastern bloc countries had repeatedly claimed that the prohibition of the use of force also comprises other forms of force, for instance, (p. 209) political and, in particular, economic coercion.[29] While the political debate on this point has lost most of its steam by now, it must be admitted that the actual wording of Art. 2 (4) does not provide a clear solution to it.

18 However, para 7 of the Preamble to the Charter states as one of the goals of the United Nations 'that armed force shall not be used, save in the common interest'. And Art. 44 supports the view that the Charter uses the term 'force' where it clearly means 'armed force'.[30] The prevailing view is further corroborated by a teleological interpretation of Art. 2 (4): were this provision to extend to other forms of force, States would be left with no means of exerting pressure on other States which act in violation of international law.[31] That consequence would be unacceptable considering the present state of international law, where compliance with the law is not effectively ensured through international organs. Finally, the *travaux préparatoires* of the UN Charter illustrate the fact that only military force is the concern of the prohibition of the use of force. At the San Francisco Conference, a proposal by Brazil to extend the prohibition of force to economic coercion, was explicitly rejected.[32]

19 This conclusion is confirmed by the Friendly Relations Declaration, adopted by the GA on 24 October 1970 (UNGA Res 2625 (XXV)),[33] which contains an interpretation of the fundamental Charter principles. When interpreting the principle that States shall refrain in their international relations from the threat or use of force, the Declaration deals solely with military force. Apart from that, the Declaration stipulates as a further principle the obligation not to intervene in matters within the domestic jurisdiction of another State. It is in this context that the Declaration reads: 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State'. By doing so, the Declaration underlines the fact that the scope of Art. 2 (4) is restricted to armed force.[34] Also, the prevailing international practice of States and international organizations treats only incidents involving military force as falling under the prohibition of the use of force and thereby confirms its narrow reading. Economic and other types of coercion are not covered by Art. 2 (4), but may fall under the general principle of non-intervention.[35]

20 No support for the prevailing view as to the scope of Art. 2 (4) can be derived, however, from the Definition of Aggression adopted by the GA on 14 December 1974, in Res 3314 (XXIX), Art. 1 of which states that '[a]ggression is the use of *armed* force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. Although this (p. 210) definition apparently resembles the wording of Art. 2 (4), it must be emphasized that it does merely contain an interpretation of the notion of an 'act of aggression' as used in Art. 39, a fact that is illustrated by the Preamble and Art. 6 of the Resolution.[36]

2. *The Problem of Physical Non-Armed Force*

21 Some authors argue that Art. 2 (4) also covers physical force of a non-military nature.[37] Reference is made to examples such as the cross-frontier expulsion of populations, the diversion of a river by an up-stream State, the release of large quantities of water down a valley, and the spreading of fire across a frontier.[38] That view can be accepted only within narrow limits. Admittedly, physical force can affect a State just as severely as the use of military force. But, as has been pointed out with regard to measures of political and economic coercion, the purpose of Art. 2 (4) is to ban only one means of coercion, namely military force. Besides, under normal circumstances there is no need to extend the prohibition to physical non-military force, since the unlawfulness of such actions under international law mostly follows from other rules, such as the principles of non-intervention or of territorial integrity.[39] This is probably why in practice acts of non-military coercion have not so far been treated under the principle of the non-use of force.

22 Exceptions to this might arise where, in extreme situations, the use of physical non-military force may produce the effects of an armed attack prompting the right of self-defence laid down in Art. 51. Only in that particular case could an affected State respond by using armed force, without itself being in violation of Art. 2 (4).[40] This extensive interpretation of 'armed attack', however, is acceptable only within the narrowest possible limits.[41] The same may apply with regard to computer network attacks against the information systems of another State, given the weapon-like destructive potential which some attacks by means of information technology may develop and which in modern State practice are increasingly treated as an instrument of warfare.[42]

(p. 211) 3. The Problem of Indirect Force

23 Article 2 (4) may be restricted to the prohibition of armed force, but this prohibition in turn has to be interpreted broadly.[43] Not only is the direct use of force proscribed, ie the open incursion of regular military forces into the territory of another State or cross-border shooting into that territory, but also the use of indirect armed force.[44] The notion of 'indirect force', sometimes imprecisely replaced by 'indirect aggression',[45] refers to the participation of one State in the use of force by another State (eg by allowing parts of its own territory to be used for violent acts against a third State), as well as to a State's participation in the use of force by unofficial bands organized in a military manner, such as irregulars, mercenaries, or rebels, against another State.[46]

24 Whereas States are ever less inclined to use direct armed force in their international relations, in an increasing number of cases they tend to prefer different kinds of participation in or assistance to acts of violence in another State's territory. The reasons that preference is given to the indirect use of force are manifold, among them the risk of an escalation of the conflict, the consideration for public opinion against war, insufficient military strength for a traditional war, or the obviousness of a breach of the prohibition of the use of force. The willingness to use indirect force is enhanced by a change of political goals.[47] States, in particular the powerful ones, have ceased to try to acquire territory from other States, instead, they are now focused on the governments of other States.[48] Consequently, States endeavour to overthrow disliked governments or at least to destabilize them, regularly striving to install friendly forces in the other State. In order to achieve these goals, the use of indirect force by giving assistance to anti-government forces is more appropriate in most cases than recourse to a State's own troops. The restriction to supporting foreign units at the same time limits the military and political risk the intervening State has to take.[49] It can, if appropriate, deny any participation in the rebel activities or at least disguise the true scale of participation.[50]

25 In particular the Western States, which were affected by that form of the use of force in the first place, had tried to restrain the use of indirect force at the level of international law through a broad interpretation of Art. 2 (4).[51] As a result of their efforts it is virtually undisputed today, both in international legal writings[52] and in UN practice,[53] that the scope of Art. 2 (4) extends to the use of indirect force. The significance of this consensus, however, must not be overestimated, as it is still unclear which forms of participation (p. 212) in acts of violence committed by militarily organized groups can be said to constitute 'force' within the meaning of Art. 2 (4). A clear-cut statement on the activities to be regarded as 'force' in this context is possible only to a limited extent, owing to the great variety of forms of such participation.

26 A certain specification can be drawn, however, from the Friendly Relations Declaration of the GA which describes the prohibition of the use of indirect force in the eighth and ninth paragraphs of its section dealing with the prohibition of force as follows:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[54]

The ICJ refers in its case-law to these formulations in the Declaration as being declaratory of customary international law on the non-use of force.[55]

27 Both the organization of irregular forces or armed bands and the prohibition of participation in acts of civil strife or terrorist acts are characterized by the broadest possible wording.[56] In the final analysis, every possible act of support can be included under terms such as 'encouraging', 'assisting', or 'participating'.[57] This kind of interpretation, however, blurs the limits of the notion of armed force and can hardly be reconciled with the object and purpose of Art. 2 (4).[58] That is why in the *Nicaragua* Case the ICJ correctly found that not every act of assistance is to be qualified as a use of force.[59] Thus it characterized the arming and training of the 'Contras' by the United States as use of force, but not the mere supplying of funds to them. The ICJ did not, however, indicate any criteria according to which it could be decided what acts of assistance, under what circumstances, are to be considered a threat or use of force. The only hint given, namely that the act of assistance has to involve a threat or use of force, does not lead any further, for it simply repeats the question to be answered.[60]

(p. 213) **28** In sum, it must be said therefore that the scope of the prohibition of the use of force is still not sufficiently clear with regard to the problem of assistance to subversive activities.[61] Whether Art. 2 (4) has been violated in a given case can only be established by taking into account and evaluating all the relevant circumstances. Two things are certain, though: first, a breach by the assisting State of the prohibition of the use of force laid down in Art. 2 (4) can only be established if the units receiving the support commit the use or threat of force in another State.[62] Second, not every form of assistance results in an infringement of the prohibition of the use of force.[63]

II. Addressees of the Prohibition

29 Article 2 (4) stipulates that it is the members of the UN who shall refrain from the threat or use of force. According to Art. 4 of the Charter, only States are eligible to become members of the UN. Thus the prohibition of the use of force indisputably only protects and is only addressed to States. It does not matter in this respect whether the States recognize each other.[64] Even States that are not members of the UN are protected, though not bound, by Art. 2 (4), owing to the provision's broad wording ('any State').[65] It is almost generally accepted that de facto regimes exercising their authority in a stabilized manner are also bound and protected by Art. 2 (4).[66]

30 Since they cannot become parties of the UN Charter, international organizations are not bound by Art. 2 (4) as a norm of treaty law. However, those international organizations that are in a position to conduct military operations may be considered to be bound under customary international law.[67] This applies to regional security arrangements, such as NATO, the European Union, ECOWAS, and the African Union, but also to the United Nations itself. Most of the organizations concerned acknowledge the binding character of the prohibition already in their constituent documents, and moreover in cases of military operations usually declare themselves bound by the customary rules on the use of force.

31 Private individuals or groups do not fall under Art. 2 (4), nor under the customary prohibition of the use of force, even if they may dispose of the financial, military, and organizational capacities allowing them to commit acts of armed force against States which have the scale and effects of interstate 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 which then would (p. 214) be the legitimate target of self-defence.[68] 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.[69] 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 (MN 23–28). 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.[70]

III. The Prohibition and ‘International Relations’

32 Article 2 (4) proscribes the threat or use of force in the international relations between States. The use of force solely within a State is not covered. That means that the provision does not prevent insurgents from starting a civil war, nor the government concerned from using armed force against them.[71] The legal situation changes, however, when the rebels have succeeded in establishing a stabilized de facto regime (MN 29).

33 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, and 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, therefore, to military actions of other States’ forces on the territory of a State whose government has consented to those operations.[72] In principle, this includes 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) seems to confirm this conclusion, and in the recent *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.[73] The legalizing effect of State (p. 215) consent may, however, be questioned in situations when the consenting government is not legitimate, no longer effective, or when the intervention consented to would violate the right of peoples to self-determination.[74] 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 MN 67) cannot affect the validity of the consent.

34 As the prohibition of the threat or use of force is limited to the international relations between States, it does not apply to military acts of protection by a State within its own territory against intruding persons, ships, or aircraft.[75] Thus, the enforcement of a State’s own territorial jurisdiction by means of armed force does not fall under Art. 2 (4).

35 It is a different story, however, when a foreign ship or aircraft is attacked on or over the high seas. In State practice forcible attacks against ships and aircraft of another State, either of a 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. Those attacks may be considered to fall under Art. 2 (4) because they are also 'inconsistent with the purposes of the UN'.[76] Authority for this might already be derived 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'.[77] Along the same lines, Art. 3 (d) of the 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.[78] 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.

36 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.

IV. Territorial Integrity and Political Independence

37 Article 2 (4) stipulates that members shall refrain from the threat or use of force 'against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. The terms 'territorial integrity' and 'political independence' are not intended to restrict the scope of the prohibition of the use of force.[79] Thus, an illegal use of force within the meaning of these two phrases (p. 216) not only occurs when a State's territorial existence or the status of its political independence is altered or abolished. Rather, the two modes of the use of force cover any possible kind of trans-frontier use of armed force.[80] Thus an incursion into the territory of another State constitutes an infringement of Art. 2 (4), even if it is not intended to deprive that State of part of its territory and if the invading troops are meant to withdraw immediately after completing a temporary and limited operation ('in-and-out operations'). In other words, 'integrity' has to be read as 'inviolability',[81] proscribing any kind of forcible trespassing. Therefore, most forms of the exercise of armed force, especially the graver ones, already fall under the first two modes of the prohibition of force.

38 Gaps that may possibly be left are filled by the remaining form, which outlaws the threat or use of force 'in any other manner inconsistent with the purposes of the United Nations'. The paramount purpose of the UN is, according to Art. 1 (1) of the Charter, to maintain international peace and security, and to that end to prevent and remove threats to the peace, as well as to suppress acts of aggression or other breaches of the peace. Furthermore, para 7 of the Charter's Preamble, as was mentioned earlier, lays down the goal of ensuring that armed force shall not be used, save in the common interest. It follows from these provisions that the use of armed force is lawful only in those cases that are explicitly specified in the Charter as exceptions to Art. 2 (4)[82] or that are universally recognized under customary international law.

39 This conclusion is confirmed by the *travaux préparatoires* to Art. 2 (4).[83] The first two modes of the prohibition had not been part of the Dumbarton Oaks Proposals, but at the San Francisco Conference, several smaller States succeeded in introducing these variants into the wording of Art. 2 (4).[84] They wanted particular emphasis to be placed on the protection of territorial integrity and political independence by means of the prohibition of the use of force.[85] But there was no intention whatsoever to restrict the general and comprehensive prohibition of force put forward in the Dumbarton Oaks Proposals. The *travaux préparatoires*, as well as the broad formulation used in the third strand of the prohibition, are being disregarded by those authors who, contrary to the predominant view, consider the forms referring to territorial integrity and political independence to limit the prohibition of the use of force.[86]

(p. 217) **40** The intended wide scope of the prohibition of the use of force laid down in Art. 2 (4) is also neglected by those authors who argue in favour of a teleological reduction of the prohibition when it comes to 'failed States': The argument points out that, when effective government has vanished due to civil war or violent unrest, the protective effect of the prohibition to use force would merely benefit the warring parties within the State concerned and add to the suffering of the population, which is why in those cases a forcible intervention by the international community, but also by neighbouring States must be admissible.[87] Such a reduction of the prohibition, however, is not generally recognized in State practice which, for example, seems to continue to apply Art. 2 (4) to Somalia and which seems to prefer to have interventions in 'failed States' authorized by means of Chapter VII UN Charter, rather than left to the sovereign will of individual States.[88]

41 Although the terms 'territorial integrity' and 'political independence' are generally not intended to restrict the scope of the prohibition of the use of force, they lend an argument in favour of the widely accepted view that certain cases of the threat or the use of force within the law of the sea are not covered by Art. 2 (4).[89] According to Arts 105–110 of the UN Convention of the Law of the Sea, warships of a State are entitled to stop and seize a pirate ship or a ship engaged in slave trade. To do so successfully will eventually require the threat or use of military force. The same applies to the use of the right of hot pursuit according to Art. 111 of the UN Convention of the Law of the Sea.[90] It may be argued that these types of force are not directed against the territorial integrity or political independence of any State, nor are they in any other manner inconsistent with the purposes of the United Nations, since it cannot be assumed that the UN Charter is directed against well-established rules of the law of the sea. Alternatively, in order to keep the protective scope of Art. 2 (4) intact, those rules may be considered legitimate exceptions to the prohibitions of the use of force.[91] Their use has been demonstrated in the recent State practice of armed actions against pirates off the coast of Somalia.[92]

V. Threat of Force

42 The definition of a 'threat of force' has received far less consideration in legal writings than that of the 'use of force'.[93] This results from the fact that so far the mere threat of (p. 218) force has rarely led in State practice to a case that has been argued under Art. 2 (4). That is not to say that threats of force have never occurred. But in most cases those threats preceded an actual use of force, so that the resulting dispute focused on the latter aspect. On the other hand, State practice reveals a relatively high degree of tolerance towards mere threats of force, one decisive reason for which seems to be that some of the most obvious threats of force are legitimized by the right of self-defence embodied in Art. 51 UN Charter. The piling-up of armaments, as well as the shaping of alliances, both imply the threat of force against any possible aggressor, yet this happens in conformity with the requirements of lawful self-defence. Moreover, one has to admit that distinguishing in a clear-cut manner between offensive and defensive preparations is far from easy, and is often virtually impossible. There are, for instance, hardly any weapons that can be used only for defensive purposes.

43 Another reason why it is difficult to qualify certain acts of a State as a prohibited threat of force is that the causal link between a threat and the behaviour of the target State is often indeterminable. It is not sufficient that another State reacts or believes it is reacting to a presumed threat of force. Only a threat directed towards a specific reaction on the part of the target State is unlawful under the terms of Art. 2 (4). Thus it is correct, though of only limited value, to state that 'a blatant and direct threat of force, used to compel another State to yield territory or to make substantial political concessions, would have to be seen as illegal under article 2(4)'.[94] After all, it has to be pointed out that the threat of force forbidden by Art. 2 (4) requires a coercive intent directed towards specific behaviour on the part of another State. A third reason why threats of force are often tolerated in State practice may be that they play the role of a ritualized substitute for the use of force and, as such, may help to speed up the peaceful settlement of disputes.[95] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ held[96] that the possession of nuclear weapons could amount to a threat of force contrary to Art. 2 (4), if the envisaged use of such weapons, even if anticipated as an act of defence, would necessarily violate the requirements of necessity and proportionality.[97]

D. Exceptions to the Prohibition

44 The legal and practical relevance of Art. 2 (4) cannot be assessed without looking at the recognized exceptions to the prohibition, 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 which wishes to invoke an exception to that rule in order to justify forcible actions in its international relations, will carry the burden to show that the invoked justification exists as a legal norm *in abstracto* and that its preconditions were fulfilled in a given case of armed force. Probably, 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, which is demonstrated by the fact that current international practice and legal argument with regard to the use of (p. 219) 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 the UN Charter itself, while two (controversial) others are discussed as norms of customary international law.

I. Measures Against Former Enemy States

45 It is commonly held that Art. 107 of the UN Charter, which reads:

> Nothing in the present Charter shall invalidate or preclude action in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorised as a result of that war by the Governments having responsibility for such actions,

prevents Art. 2 (4) from taking effect as between a signatory and a former enemy State.[98] Article 53 (1) allows enforcement actions under regional security arrangements to be taken against such enemy States without authorization by the SC. Both Articles illustrate that the creation of the UN not only marked the beginning of a new era, but also the continuation of the victorious alliance of World War II.[99] Today these provisions have become obsolete, since all former enemy States are now UN member States.[100] Although possibly not shared by the former Soviet Union,[101] the general view has been for a long time that Arts 53 (1) and 107 could not be invoked against member States, since the latter, upon admission to the UN, are formally characterized as peace-loving pursuant to Art. 4 UN Charter.[102] Besides, it would be incompatible with the fundamental principle of the sovereign equality of all members (Art. 2 (1)).[103] It is worth mentioning that the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, dealing with the exceptions to the prohibition of the use of force does, not mention Arts 53 (1) and 107.[104] This is certainly not an omission, but must be seen as a corroboration of the view that these Articles are obsolete today. Alternatively to basing their obsoleteness on the system of the UN Charter itself, it may be argued that Arts 53 (1) and 107 have become void through desuetude extrinsic to the Charter.[105]

(p. 220) II. SC Enforcement Actions

46 According to Arts 24 and 12 of the Charter, the SC has the primary responsibility for the maintenance of international peace and security. If pursuant to Art. 39 it determines the existence of a threat to the peace, a breach of the peace, or an act of aggression, it can decide to take measures involving the use of armed force. Since every threat or use of force entails, *eo ipso*, at least a threat to the peace, the SC could respond to any infringement of Art. 2 (4) by taking such measures.[106] UN members are bound to carry out the decision taken by the Council,[107] thus a member State is entitled to 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.

47 In UN practice, beginning in 1990 with UNSC Res 665 and 678, adopted in reaction to the Iraqi invasion of Kuwait,[108] the SC is not actually 'taking' the actions envisaged in Art. 42 UN Charter itself, but usually authorizes member States to take the measures assigned. Thus, 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.[109] This may not have been the way in which the concept of the UN Charter had envisaged enforcement actions under Chapter VII, but it represents a legitimate evolution of that concept by undisputed practice of UN organs and member States. And there is some basis for that development in the text of the Charter itself: The second sentence of Art. 42 expressly states that sanctions may include military operations of members of the UN, and Art. 48 (1) clearly shows that actions required to carry out the decisions of the SC may also be taken either by all the member States or by some of them. Finally it can be derived from Art. 106 of the UN Charter that military sanctions under Chapter VII are possible even in the absence of special agreements provided for in Art. 43, that is to say even if the SC does not have troops at its disposal and under its direct command. As a result, the practice of enforcement actions under Chapter VII usually conveys the image of interstate conflicts in which one side is, by virtue of an authorization on behalf of the international community, allowed to use armed force and the other is not.

48 From the fundamental importance of the prohibition of the use of force and its peremptory character it follows, however, that only those SC resolutions can be taken to (p. 221) grant 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.[110]

49 It was not on the basis of Arts 39 and 42 of the Charter that armed force was used under the UN flag against an aggressor State in the Korean War.[111] In this case on 25 June 1950, the SC, in the absence of the Soviet representative, characterized North Korea's invasion of South Korea as a breach of the peace.[112] On 27 June and 7 July, the Council recommended that the members assist South Korea.[113] But further decisions pursuant to Art. 42 were vetoed by the Soviet Union, which, as of 1 August 1950, had returned to its seat in the SC.[114] As a consequence, the GA adopted the 'Uniting for Peace' Resolution on 3 November 1950, para 1 of which reads:

> if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including…the use of armed force.[115]

The ICJ seems to consider that resolution and the prerequisites set up in it as still binding on the GA, since in its recent *Wall* opinion it examined the conduct of the Assembly by those standards.[116]

50 Nor are the so-called peacekeeping operations of the UN based on Arts 39 and 42.[117] In those cases the use of force is not directed against an aggressor State. In the name of the UN and with the consent of the States concerned, troops are sent in for various purposes, such as supervising a ceasefire or a demarcation line, exercising police functions, or forming a 'cordon sanitaire' between hostile parties. The legal bases for these operations, though by no means beyond doubt, are to be found in Arts 29 and 34 of the Charter.[118]

(p. 222) III. Self-Defence

51 The most important exception to the prohibition of the use of force laid down in Art. 2 (4), and at the same time the most controversial norm in this area, is the right of individual and collective self-defence in case of an armed attack pursuant to Art. 51.[119]

IV. Humanitarian Intervention

52 It is highly controversial in international legal doctrine whether the use of armed force for the prevention or discontinuation of massive violations of human rights in a foreign State can be lawful.[120] In contrast to actions for the purpose of protecting a State's own nationals abroad (MN 58–61), which also usually occur on humanitarian grounds, the objective of humanitarian intervention is the protection of foreign nationals.[121] Quite a number of writers on international law regard forcible humanitarian intervention under certain pre-conditions as lawful.[122] Authors taking this view often argue that the use of force on strictly humanitarian grounds is directed neither against the 'territorial integrity' nor the 'political independence' of the target State, and, moreover, is in conformity with the 'most fundamental peremptory norms' of the Charter.[123] As has been shown above (at MN 37–39), such an interpretation of Art. 2 (4) disregards the *travaux préparatoires* and the purpose of the provision and is, therefore, not tenable.

53 Nor is it any more convincing to argue that Art. 2 (4) prohibits humanitarian intervention only to the extent that the UN does in fact fulfil its task of safeguarding human rights.[124] The UN Charter does not contain the slightest hint to the effect that the (p. 223) validity of Art. 2 (4) might be in any way conditioned by the effectiveness of collective mechanisms for the protection of human rights.[125]

54 Some try to justify humanitarian interventions by referring 'to the need for balancing the sometimes opposite goals of conflict-minimalization and protection of human rights', which is why in 'certain extreme situations', it is said, forcible humanitarian intervention should be recognized as lawful.[126] Such a balancing of interests, however, would be contrary to the systematic interpretation of the Charter, which clearly shows that the individual States are to be divested of the use of armed force as an instrument of their international policy.[127] Thus, there is no room for the concept of humanitarian intervention being deduced from the UN Charter, nor could the judgment of the ICJ in the *Nicaragua* Case possibly be read as endorsing such an exception.[128] Under the UN Charter, forcible humanitarian intervention cannot, therefore, be considered lawful[129](p. 224) and also the right of self-defence pursuant to Art. 51 of the Charter cannot be interpreted as encompassing that kind of intervention.[130]

55 Finally, there is no evidence of sufficient State practice or *opinio iuris* that could have led to the creation of a new rule of customary international law, establishing humanitarian intervention as a legitimate exception to the prohibition laid down in Art. 2 (4).[131] Although there have been several incidences which, at first sight, might develop precedential value for such a customary rule (interventions by India in East Pakistan (1971), by Viet-Nam in Cambodia (1979), by Tanzania in Uganda (1979), the no-fly zones in Northern Iraq (1991)), in all those cases the States involved advanced various justifications for their forcible actions,[132] so that a uniform *opinio iuris* referring to the humanitarian purpose of the use of force could not develop. 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.[133] The armed intervention of NATO forces 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. The NATO operation itself was not compatible with international law, as it stood at the time.[134]

(p. 225) **56** Nor is the newly developed concept of a *responsibility to protect*[135] suited to establish humanitarian intervention as a new rule of international law, since, insofar as it is supposed to be more than just a political concept, it appears to be based on the competence of the Security Council to adopt measures against the State concerned, thus referring for the authority to use armed force to Chapter VII of the UN Charter.[136] The concept, as it has been incorporated in UN documents,[137] 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.[138]

57 As long as international law does not contain a recognized exception on humanitarian intervention, the international community may continue to face situations in which there is a divergence of law and morality. For some States it becomes increasingly unacceptable to see grave violations of human rights occurring within another State and still be banned by international law from intervening. If the SC does not act in those cases on the basis of Arts 39 and 42 of the Charter to stop the violations of human rights, as occurred in the *Kosovo* Case, States will time and again be tempted to intervene (p. 226) on their own.[139] Thus, eventually a rule of customary international law making humanitarian intervention lawful might develop,[140] which, above all, the SC could prevent by extending its practice under Chapter VII to grave human rights violations, thereby making the development of such a rule unnecessary.

V. Protection of Nationals Abroad

58 It is also very controversial 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. Quite a number of legal writers used to argue against such a rule, because it would be open to abuse and is not firmly established in State practice.[141] And surely armed action to rescue nationals abroad cannot be justified on the basis of the right to self-defence,[142] 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.[143] Also the repeated argument, that rescue operations would not be contrary to Art. 2 (4), because the territorial integrity and political independence of the States concerned were not affected,[144] is not convincing, since it disregards the context and *ratio* of the prohibition, as well as its *travaux préparatoires* (MN 37–39, 52).[145] Nor does the concept of a state of necessity provide a valid basis for protective measures involving the use of force.[146]

59 However, forcible operations by States to rescue their own nationals and nationals of other States who have asked for the intervening State's assistance, have been a consistent element of State practice at least since 1960.[147] Well-known examples are operations by UK (p. 227) forces in Suez in 1956,[148] the 1960 protective measures taken by Belgium in the Congo, the Belgian-United States rescue operation, also concerning the Congo, of Stanleyville and Paulis (1964), the freeing of hostages by Israel at Entebbe (1976), and the failed American attempt to free its diplomatic staff held hostage in Iran (1980).[149] The landing of American troops on Grenada in October 1983 and the American intervention in Panama in December 1989 were also justified by the US government, inter alia, by invoking the necessity of protecting its own nationals.[150] More recent operations were carried out, for instance, by the US in Liberia (1990),[151] by France and the United States in the Central African Republic (1996 and 2003), by Belgium and France in Rwanda (1990, 1993, and 1997), by France in Chad (1992 and 2006), by Germany in Albania (1997),[152] by France in the Ivory Coast (2002/2003). The governments of the intervening States have on those occasions expressed the view that Art. 2 (4) does not prohibit the use of armed force in order to rescue a State's own nationals whose lives or health are endangered in a foreign State, provided that the latter is not able or not willing to provide the required protection.[153] Besides, those rescue operations have regularly received explicit approval by other States or met with inaction on the part of the international community.[154] In its judgment of 24 May 1980, in the *US Diplomatic Staff in Teheran* Case,[155] the ICJ declined to pronounce upon the legality of the abortive American rescue operation.

60 Given the regular State practice for more than fifty years now, the positive *opinio iuris* of the intervening and many third States, and a considerable reluctance on the part of other States to qualify forcible rescue operations as unlawful, the argument can be made that a rule of customary international law is by now established allowing limited forcible action with the legitimate aim to rescue a State's own nationals (and (p. 228) nationals of other States upon their request) in another State's territory without that State's consent and entailing, therewith, an unwritten justification to use armed force.[156] Rescue operations conducted with the consent of the territorial State are generally seen as permissible,[157] which conforms to the overall legalizing effect of genuine consent with regard to the prohibition of the use of force (MN 33).

61 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 and 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 on 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.[158]

VI. Wars of National Liberation

62 The former Soviet doctrine of public international law,[159] supported in this respect by the majority of developing countries,[160] had maintained that there is a further exception to the prohibition of the use of force. Wars of national liberation by peoples under colonial or racist regimes or other forms of alien domination were claimed to be as lawful as the support, including the use of force, given to those peoples by third States.[161] (p. 229) The arguments in favour of this view varied, depending on the state of the doctrine's development.[162] The main argument seemed to be that colonialism may be considered a permanent armed attack, against which individual and collective self-defence is allowed.[163] Such a view, seeking to revive the idea of *bellum iustum* as an element of modern international law,[164] is incompatible with the relevant interpretation of Arts 2 (4) and 51 of the Charter.[165]

63 This is notwithstanding the fact that Art. 7 of the Definition of Aggression adopted by the GA seems to endorse the doctrine just described. As pointed out earlier (MN 20), that Definition relates neither to Art. 2 (4) nor to Art. 51. Moreover, being a UNGA resolution, it is merely a recommendation and not binding law. Finally, the interpretation of that Art. 7 is highly disputed.[166] Its wording proclaims a right of peoples 'to struggle' for their liberation, while the draft of that Article had still referred to a right 'to use force'. That formulation, however, was successfully objected to by the Western States, and consequently they interpreted the term 'struggle' in the final text as meaning 'to fight peacefully'. Despite the resolution's preparatory work, the Third World and socialist countries upheld their interpretation of the notion of 'struggle', which does include the use of force.

E. Special Problems

I. Article 2 (4) as Customary International Law

64 The overwhelming majority of writers on international law consider Art. 2 (4) to be part of customary international law.[167] In its decisions in the *Nicaragua* Case, the ICJ adopted this point of view and, presupposing the existence of a customary prohibition of the use of force, held the United States to be in breach of its 'obligation under customary international law not to use force against another State'.[168] In its *Wall* opinion (p. 230) of 2004 the Court confirmed the customary character of the 'principles as to the use of force incorporated in the Charter' and extended that holding to the corollary of the prohibition, entailing the illegality of territorial acquisition resulting from the threat or use of force.[169]

65 The Court deduces the *opinio iuris* required for the assumption of a customary rule from the consent given to certain GA resolutions, in particular to the Friendly Relations Declaration (UNGA Res 2625 (XXV)).[170] With regard to the requirement of uniform practice, the need for State practice that corresponds to that *opinio iuris* is emphasized.[171] But the ICJ refuses to review the relevant State practice with respect to the prohibition of force any more closely; instead it simply assumes it to be sufficient that the conduct of States be 'in general' consistent with the rule.[172] Very briefly, the Court touches on the lack of coincidence of treaty and customary rules on the use of force,[173] but does not indicate in any way that it might determine the scope of the customary prohibition of force and that of Art. 2 (4) differently. Rather, in interpreting the customary rule, the ICJ adheres to the terms used in Art. 2 (4)[174] and refers explicitly to its wording.[175] Whereas the ICJ does indeed deal, if rather briefly, with the lack of coincidence of treaty and customary law with regard to the right of self-defence,[176] this point is not dealt with in respect of the prohibition of the use of force itself, leaving a number of questions unanswered.[177] It follows that the ICJ for all practical purposes tends to view the prohibition of force under general international law and the prohibition laid down in Art. 2 (4) as being identical in content.[178] Although the Court's line of argument appears to be highly objectionable, the result is that the existence of a prohibition of the use of force under customary law, though possibly differing in content from that laid down in Art. 2 (4), can in practice hardly be denied.

(p. 231) **66** The opposite view, referring to the divergent interpretations given to the prohibition by States,[179] disregards the fact that, despite all that divergence, a 'hard core' of the prohibition of the use of force is recognized today. The differing interpretations by individual States are, however, to be considered in determining the extent to which Art. 2 (4) is paralleled in customary international law.[180] Although they cannot alter Art. 2 (4) as part of treaty law, it is submitted that those differences result in the customary prohibition not extending beyond a generally recognized core area. This latter point is overlooked by the prevailing view, which indiscriminately regards Art. 2 (4) as part of general international customary law.[181]

II. Article 2 (4) as Part of International *Ius Cogens*

67 In addition to being a norm of customary international law, the prohibition of the use of force laid down in Art. 2 (4) is usually acknowledged in State practice and legal doctrine to have a peremptory character, and thus to be part of the international *ius cogens*.[182] In terms of the responsibility of States this would in case of gross or systematic violations imply an obligation of all States to cooperate 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.[183] However, the peremptory character of the prohibition of the use of force does not affect the rules of State immunity and, thus, the possibility of a State being accused of having committed illegal acts of force to invoke those rules with respect to proceedings in the courts of another State.[184]

68 In terms of the law of treaties, the *ius cogens* character of the prohibition of force leads to the invalidity of treaties whose substance is contrary to Art. 2 (4) (Art. 53 Vienna Convention on the Law of Treaties).[185] However, this can only apply to treaties which (p. 232) actually are in contradiction to the prohibition, thus excluding those treaties to which the State concerned has validly consented (see MN 33). Therefore, only treaties concluded between States which relate to the use of force 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,[186] whereas (peace) treaties forced upon an aggressor State are not *eo ipso* invalid (Art. 75 Vienna Convention).

III. Article 2 (4) and Individual Responsibility

69 Neither Art. 2 (4) nor any other Charter provision provides a basis for the criminal prosecution of individuals violating the prohibition of the use of force. For a considerable time, the international community did not succeed in transforming the respective principles emanating from the Nuremberg and Tokyo trials into binding international law.[187] The Definition of Aggression adopted by the GA in 1974 (MN 20) stipulated in Art. 5 (2) that 'a war of aggression is a crime against international peace. Aggression gives rise to international responsibility'. However, being a mere GA resolution, that definition was not binding law. Moreover, Art. 5 (2) spoke somewhat enigmatically of 'responsibility', which, coupled with 'international', usually refers in the international legal context to State, rather than individual responsibility.[188]

70 Individual responsibility is, however, introduced into international law through the 1998 Rome Statute of the International Criminal Court, which entered into force on 1 July 2002 and which is binding today upon some 120 State parties.[189] Article 5 (1) (d) of the Statute confers upon the ICC subject-matter jurisdiction with respect to the crime of aggression, the definition of which that 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.[190] The newly inserted Art. 8 bis 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'. As 'acts of aggression' the new provision simply incorporates the wording of Art. 3 of the Definition of Aggression adopted by the GA in 1974 (MN 20). The amendment needs to be ratified by at least thirty State 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 (p. 233) been taken by the State parties after 2017.[191] Thus, it will still take some time before individual criminal responsibility for grave violations of the prohibition of the use of force will effectively be enforced on the international plane.

F. Concluding Remarks

71 The prohibition of the use of force laid down in Art. 2 (4) represents, beside the protection of human rights, the major achievement of the international legal order in the twentieth century. Today it features as the cornerstone of that order and an undisputed core principle of the international community. Also as a rule of international law the prohibition is virtually undisputed, as State practice and doctrinal debate clearly demonstrate that it is not the prohibition as such, but the exceptions to it that are the subject of controversy (MN 2). So in reality there is no 'massive global disagreement', as some authors suggest,[192] which could have led to the abrogation of the prohibition as a legal norm.

72 However, the effectiveness of the prohibition of force, which is vital for its acceptance by States, might be seen to be in danger. This does not so much result from uncertainties which the scope of Art. 2 (4) itself might entail, since the latter appears to be practically settled today: the prohibition is in principle restricted to armed force (MN 16–22), but this restriction is to be interpreted broadly (MN 37–40) to encompass every kind of armed force in the international relations between States.

73 The effectiveness of the prohibition of force could, however, suffer from the fact that the bold prohibition is not sufficiently linked to other international legal means of preventing war. There is no comprehensive obligation to submit disputes to peaceful settlement,[193] nor a procedure for 'peaceful change' deserving that name,[194] nor an obligation of substantial disarmament.[195] The system of collective enforcement measures embodied in Chapter VII UN Charter proved abortive for a long time[196] and functions today in a way not envisaged by the Charter (MN 47).

74 With this deplored lack of effectiveness in mind, doubts regarding the purpose of the prohibition of force have arisen in legal doctrine.[197] Others have ventured to ask: 'Who killed Art. 2 (4) (of the UN Charter)?',[198] only to answer that the prohibition of the use of force in the Charter depends on the functioning of the system of coercive measures in accordance with Chapter VII. Since the renunciation of force by individual States is acceptable only when it is assured that the SC is in the position to take the steps (p. 234) necessary for the prohibition to succeed, and since that system did not work, it was said, Art. 2 (4) has become void.[199] This argument, however, was fundamentally flawed. Undoubtedly the functioning of Chapter VII is of some significance for the willingness of States to comply with Art. 2 (4). But in no way can the relationship between the two be taken to result in the legal validity of the prohibition of force being conditioned, as of law, by the effective functioning of the system of collective enforcement.[200] The present authors, therefore, subscribe to the view that 'the reports of the death of Art. 2 (4) are greatly exaggerated'.[201] It must be admitted, however, that whenever the system of collective sanctions provided in the UN Charter does not function properly, States might find it difficult to fully comply with Art. 2 (4). This applies in particular to cases, such as the Israeli raid on Entebbe or the Kosovo intervention of NATO, in which the requirements of the prohibition of the use of force appear to be in conflict with moral values.

Footnotes:

[1] *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14, para 186.

[2] F Berber, *Lehrbuch des Völkerrechts*, vol 2: *Kriegsrecht* (2nd edn, CH Beck 1969) 26–27; H Fischer, in K Ipsen, *Völkerrecht* (5th edn, CH Beck 2004) § 59 para 2; J Kunz, 'Bellum justum et bellum legale' (1951) 45 AJIL 529.

[3] H Wehberg, *Krieg und Eroberung* (Metzner 1953) 21–28.

[4] P Heilborn, *Grundbegriffe des Völkerrechts* (Kohlhammer 1912) 23 [translation by the author].

[5] cf B Baker, 'Hague Peace Conferences of 1899 and 1907' MPEPIL (online edn).

[6] cf W Benedek, 'Drago-Porter Convention (1907)' MPEPIL (online edn).

[7] cf HJ Schlochauer, 'Bryan Treaties (1913/1914)' MPEPIL (online edn).

[8] Wehberg (n 3) 32–33, 35–36.

[9] cf FA Freiherr von der Heydte, 'Geneva Protocol for the Pacific Settlement of International Disputes (1924)' EPIL II (1995) 529–31; H Wehberg, *Das Genfer Protokoll betreffend die friedliche Erledigung internationaler Streitigkeiten* (Stilke 1927) 37–38.

[10] cf J Lindley-French, 'Locarno Treaties (1925)' MPEPIL (online edn) MN 1, 2, 6–11.

[11] cf Berber (n 2) 35–36; I Brownlie, *International Law and the Use of Force by States* (1963) 74–75; Wehberg (n 3) 43–44; Fischer (n 2) § 59 para 7; Q Wright, 'The Meaning of the Pact of Paris' (1933) 27 AJIL 39–40; R Lesaffer, 'Kellogg-Briand Pact (1928)' MPEPIL (online edn) MN 1; M Schmidl, *The Changing Nature of Self-Defence in International Law* (Nomos 2009) 27.

[12] Concurring Fischer (n 2) § 59 para 7; Schmidl (n 11) 27f; H Thierry, J Combacau, S Sur, and C Vallée, *Droit international public* (4th edn, Montchrestien 1984) 500; Y Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 86, who even sees an early concept of collective self-defence embodied in the Preamble to the Pact.

[13] cf Brownlie, 95–96; H Caminos, 'Saavedra-Lamas Treaty (1933)' MPEPIL (online edn) MN 1–3.

[14] Berber (n 2) 35; Thierry and others (n 12) 501; R Wolfrum, '§ 169 Gewaltverbot' in G Dahm, J Delbrück, and R Wolfrum, *Völkerrecht*, vol I/3 (2nd edn, de Gruyter 2002) 821. See also Brownlie, 110. For the reactions of States to the conclusion of the Pact, cf F Przetacznik, 'The Unlawfulness of War under Contemporary International Law' (1989) 67 RDI 183, at 190–95.

[15] Concurring Wehberg (n 3) 48.

[16] ibid, 49–50.

[17] For the course of the conflict on Manchuria, see the account given by R Langer, *Seizure of Territory* (Princeton UP 1947) 50–66, 123–31.

[18] CHM Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952-II) 81 Rec des Cours 492.

[19] L Henkin L, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated' (1971) 65 AJIL 544.

[20] Jiménez de Aréchaga, *El derecho internacional contemporaneo* (Tecnos 1980) 108.

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

[22] [1986] ICJ Rep (n 1) 14f.

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 87.

[24] See in more detail MN 65.

[25] cf eg C Stelter, *Gewaltanwendung unter und neben der UN-Charta* (2007) 145f; B Fassbender, 'Die Gegenwartskrise des völkerrechtlichen Gewaltverbotes vor dem Hintergrund der geschichtlichen Entwicklung' (2004) 31 EuGRZ 248; C Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 128–48 and 173–83.

[26] cf the following contributions R Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Nijhoff 1986) 435–52; H Bokor-Szego, 'The Attitude of Socialist States Towards the International Regulation of the Use of Force' 453–77; and M Sahović, 'Non-Aligned Countries and the Current Regulation of the Use of Force' 480–88.

[27] Worth mentioning are, above all, the Friendly Relations Declaration (UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) reprinted in (1971) 65 AJIL 243), the Definition of Aggression (UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX) reprinted in (1975) 69 AJIL 480), and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, adopted by the UNGA on 18 November 1987 (UNGA Res 42/22 (18 November 1987) reprinted in (1988) 27 ILM 1672). Nor could the *Nicaragua* Judgment of the ICJ of 1986 (n 1), solve the interpretative problems with regard to Art. 2 (4), since the Court was not basing its ruling on the Charter provisions at all, but on customary international law. In the *Corfu Channel* Case, the ICJ did not see any cause for discussing Art. 2 (4) extensively, either. One thing that judgment made clear, however, is that, except in self-defence pursuant to Art. 51 of the Charter, the prohibition of the use of force forbids military force to be used as a reprisal (cf [1949] ICJ Rep 4f, 35).

[28] Concurring GHS, 49; A Verdross andB Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) para 476; H Kelsen and R Tucker, *Principles of International Law* (2nd edn, Holt 1966) 86; Brownlie, 362; Bowett, 148; Khare, 27–28; Singh, 212; Schindler, 14; Malanczuk, 244; Dinstein, 88; further references given by Derpa 26 fn 17.

[29] eg Zourek, 73–78; cf the reference given by Derpa, 26–28 and Dohna, 54–58. Asrat, 113–38, also favours a wider notion of 'force'.

[30] Concurring CP (2nd edn)/Virally 122–23.

[31] Concurring T Stein and C v Buttlar, *Völkerrecht* (13th edn, Heymanns 2012) MN 775.

[32] See UNCIO VI, 334, 609. A more extensive prohibition of force which also covers economic coercion is contained in the OAS Charter: cf Arts 15, 16 of the 1948 Charter and Arts 18 and 19 of the 1967 Charter.

[33] See n 27.

[34] The ICJ, too, seems to interpret the Friendly Relations Declaration as implying a narrow understanding of 'force', since, in order to determine the scope of the prohibition of force

under customary international law, the Court refers to this resolution without mentioning the paragraph quoted in the text (cf [1986] ICJ Rep (n 1) para 191).

35 Which does not mean, however, that measures of economic coercion are prohibited without exception. Thus, in its *Nicaragua* judgment, the ICJ did not consider the economic actions taken by the United States against Nicaragua to be in breach of the principle of non-intervention ([1986] ICJ Rep (n 1) para 245).

36 See A A Randelzhofer, 'Die Aggressionsdefinition der Vereinten Nationen' (1975) 30 EA 621–30.

37 eg Brownlie, 362–63, 376–77; Wehberg (n 3) 69; Kelsen and Tucker (n 28) 86; Derpa, 25 (with further references).

38 cf Derpa, 25.

39 Similarly Singh, 213.

40 According to the prevailing and correct view, the unilateral use of force in international relations is permissible under the UN Charter exclusively in response to an armed attack (see Randelzhofer and Nolte on Art. 51 MN 10 and 13.

41 Similarly Hailbronner, 76. In principle against: W Kewenig, 'Gewaltverbot und noch zulässige Machteinwirkung und Interventionsmittel' in W Schaumann (ed), *Völkerrechtliches Gewaltverbot und Friedenssicherung* (Nomos 1971) 211–12, who considered such an interpretation of 'armed attack' not to have any basis at all in UN practice.

42 cf eg MN Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework' (1999) 37 Colum J of Transntl L 885, 912–15; M Roscini, 'World Wide Warfare—Jus ad Bellum and the Use of Cyber Force' (2010) 14 Max Planck YB UN L 85, 102–09; MC Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36 YJIL 421; K Ziolkowski, 'Computer Network Operations and the Law of Armed Conflict' (2010) 49 Military Law and the Law of War Review 47. To include computer attacks within the scope of Art. 2 (4) is also thought to be possible, eg by Dinstein, 88; M Bothe, in Graf Vitzthum (ed), *Völkerrecht* (5th edn, de Gruyter 2010) VIII MN 10 with further references; reluctant, however, M Benatar, 'The Use of Cyber Force: Need for Legal Justification?' (2009) 1 Go JIL 375–96.

43 Dörr, 'Use of Force, Prohibition of' MPEPIL (online edn) MN 13.

44 Today virtually undisputed: see GHS, 50; Randelzhofer, 'Use of Force' 1250; Verdross and Simma (n 28) para 481; Stein and von Buttlar (n 31) MN 774; Dohna, 60; Derpa, 20 (with further references); Schachter, 1625; Schindler, 33; P Lamberti Zanardi, 'Indirect Military Aggression' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Nijhoff 1986) 111–19, 111.

45 eg Schindler, 32.

46 cf Randelzhofer, 'Use of Force', 1250.

47 Neuhold, 76–77.

48 R Falk, *Legal Order in a Violent World* (Princeton UP 1968) 112, aptly describes this point: 'If empire once depended primarily upon the extent of colonial occupation, it now increasingly depends upon the capacity to influence the outcome of important internal wars' J Fawcett, *Law and Power in International Relations* (Faber and Faber 1982) 46, sees that 'shift…from wars between States to irregular fighting against particular regimes' as also being recognized in the 1970 Friendly Relations Declaration.

[49] Falk (n 48) 110–11.

[50] Neuhold, 77.

[51] For greater detail, see Neuhold, 76–79; Bruha, 169–72.

[52] See the authors referred to in (n 44).

[53] As to which, cf RP 51, 30–48 (esp 31, 39–43).

[54] UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

[55] *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep (n 1) para 191; *Armed Activities on the Territory of the Congo* [2005] ICJ Rep (n 21) paras 162 and 300.

[56] However, the eighth paragraph of the Declaration is more important than the ninth, since the prohibition of organizing irregular forces, unlike the prohibition of participating in acts of civil strife, belongs to the 'core' of indirect aggression, the unlawfulness of which is generally accepted: see Neuhold, 228–29.

[57] cf CP (2nd edn)/Virally, 123, who, by invoking the Friendly Relations Declaration, asserts that any form of assistance is illegal.

[58] For this point, cf Kewenig (n 42) 187–88, who, prior to the adoption of the Friendly Relations Declaration, advocated the view that assistance for terrorist acts should be regulated solely through the law of non-intervention.

[59] [1986] ICJ Rep (n 1) para 228.

[60] Apart from that, the Court is not quite correct here in its interpretation of the Friendly Relations Declaration. The phrase 'involve a threat or use of force', which is quoted in the Declaration, is merely meant to make clear that the activities assisted must entail an element of force. This seems to be the ICJ's view, too, when it states that '[a]ccording to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force, when the acts of civil strife referred to involve a threat of use of force' ([1986] ICJ Rep 14 para 228). But then in the very next sentence the ICJ alters the meaning of that phrase, in that it now refers to the act of assistance itself, ie the arming and training of the 'Contras'. This change in the point of reference is incompatible with the wording and meaning of the respective paragraph of the Declaration.

[61] Nor did the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations contain anything new. The relevant para 6 reads as follows: 'States shall fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts' (cf UNGA Res 42/22 (8 November 1987) UN Doc A/RES/42/22, reprints in (1988) 27 ILM 1672f, 1676).

[62] That is because the prohibition of the use of *indirect* force cannot possibly extend further than the prohibition of the use of *direct* force.

[63] [1986] ICJ Rep (n 1) para 228.

[64] J Frowein, *Das de-facto-Regime im Völkerrecht* (Heymanns 1968) 35; Schindler, 29–30.

[65] Dinstein, 86. The conditions of Art. 36 (1) of the 1969 VCLT can be taken to be fulfilled in this case.

[66] See Brownlie, 380; Bowett, 153–54; Verdross and Simma (n 28) para 406; Neuhold, 75–76; Frowein (n 64) 69; Schindler, 29–30; Lombardi, 50. Naturally, the binding character of the prohibition of force can only be based here on a corresponding rule of general customary international law.

[67] Dörr, 'Use of Force, Prohibition of' MPEPIL (online edn) MN 28.

[68] *Construction of a Wall* (n 23) para 139; *Armed Activities on the Territory of the Congo* (n 21) paras 146–47. Critical as to this approach, eg *Construction of a Wall* (n 23) (Separate Opinion Judge Higgins) 215; ibid (Separate Opinion Judge Kooijmans) 229–30; ibid (Declaration Judge Buergenthal) 242; Dinstein, 229–30; SD Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An *ipse dixit* from the ICJ?' (2005) 99 AJIL 62–76; R Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense' (2005) 99 AJIL 58; CJ Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2005) 16 EJIL 970–73; C Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 J Conflict & Security L 248.

[69] See *Armed Activities on the Territory of the Congo* (n 21) paras 160–65.

[70] Concurring, eg Wolfrum (n 14) 825.

[71] On this point there is consensus in legal doctrine: see eg Verdross and Simma (n 28) para 468; Berber (n 2) 42; G Dahm, *Völkerrecht*, vol 2 (Kohlhammer 1961) 358; Wehberg, *Krieg und Eroberung*, 74; E Castren, *Civil War* (Suomalaisen Tiedeakatemia 1966) 19; Neuhold, 88; Schindler, 14–15; K Doehring, 'Intervention im Bürgerkrieg', in FJ Kroneck and T Oppermann (eds), *Festschrift Grewe* (Nomos 1981) 454; Lombardi, 49.

[72] Brownlie, 320–21.

[73] cf ICJ *Armed Activities on the Territory of the Congo* (n 21) paras 92–105.

[74] Nolte, 604.

[75] Concurring, eg Bowett, 38; Hailbronner, 60; Schachter, 1626; Schindler, 15; Skubiszewski, 773; Verdross and Simma (n 28) para 472; Antonopoulos, 339–50; Stein and v Buttlar (n 31) para 778.

[76] Wolfrum (n 14) 824.

[77] *The 'Lotus' Case (France v Turkey)* [1927] PCIJ Ser A, No 10, 25.

[78] *Case concerning the Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161f, paras 64 and 72.

[79] This represents the dominant view: eg L Oppenheim, *International Law*, vol 2 in H Lauterpacht (ed), *Disputes, War and Neutrality* (7th edn, Longmans, Green & Co 1952) 154 ; Verdross and Simma (n 28) para 469; Berber (n 2) 43–44; DW Greig, *International Law* (2nd edn, Butterworth 1976) 871; Neuhold, 108–10; Brownlie, 267; Schindler, 14; Wehberg (n 3) 70–71; M Akehurst and P Malanczuk, *A Modern Introduction to International Law* (7th edn, Routledge 1997) 309–10; U Beyerlin, 'Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht' (1977) 37 ZaöRV 217–19; E Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978-I) 159 Rec des Cours 89–92; Mrazek, 86–87.

[80] Berber (n 2) 43; Wehberg (n 3) 77–78; Verdross and Simma (n 28) para 469; Schindler, 14; Oppenheim and Lauterpacht (n 79) 154; Derpa, 31.

[81] This is the term used by Oppenheim and Lauterpacht (n 79) and Ronzitti, 8 (with further references). cf also Verdross and Simma (n 28) para 469 fn 4.

[82] Concurring, Verdross and Simma (n 28) para 469; Q Wright, 'The Outlawry of War and the Law of War' (1953) 47 AJIL 365–76, 370; Kelsen, 269; D Ott, *Public International Law in the Modern World* (Pitman 1987) 309; Dinstein, 91.

[83] See Brownlie, 265–67; Fischer (n 2) § 59 para 15.

[84] cf UNCIO VI, 556–58.

[85] UNCIO VI, 304, 334–35. cf moreover the SG's report on the 'Question of Defining Aggression', UN Doc A/2211, GAOR (VII), Annexes.

[86] This minority view is held, eg by Bowett, 152; J Stone, *Aggression and World Order* (University of California Press 1958) 43; presumably also A D'Amato, *International Law: Process and Prospect* (New York 1987) 57–73, 79–80. M Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 AJIL 642–45 goes even further than the authors quoted. He rejects a 'mechanical interpretation' of Art. 2 (4) and regards any use of force as permissible for the promotion of the right of every people to determine their own political destiny. cf the reply by O Schachter, 'The Legality of Pro-Democratic Invasion' (1984) 78 AJIL 645–49, 649, who rightly points out that this view represents neither the current *lex lata* nor a desirable *lex ferenda*.

[87] M Herdegen, 'Der Wegfall effektiver Staatsgewalt: "The Failed State"' (1996) 34 DGVR Berichte 49–83, 58–61; following him Stein and v Buttlar (n 31) MN 808.

[88] Against excluding 'failed States' from being protected by the prohibition of force also Bothe (n 41) MN 13; Schadtle, 688.

[89] See Bowett, 82f; Skubiszewski, 773, fn 3; Schindler, 15; Hailbronner, 60.

[90] In its judgment of 1 July 1999, *The M/V 'SAIGA' (No. 2)* Case, the International Tribunal for the Law of the Sea dealt with the problem of proportionality of the use of force in case of hot pursuit under paras 153–159. On that judgment see H v Brevern and L v Carlowitz, 'Die erste Hauptsacheentscheidung des Internationalen Seegerichtshofs' (1999) 45 RIW 856–66; as to the problem of hot pursuit 862–63.

[91] Dörr, 'Use of Force, Prohibition of' MPEPIL (online edn) MN 39.

[92] cf A von Arnauld, 'Die moderne Piraterie und das Völkerrecht'(2009) 47 AVR 454f.

[93] Remarkable studies have been undertaken, however, by Sadurska, Roscini, and Stürchler. See also Asrat, 138–44; D Kritsiotis, 'Close Encounters of a Sovereign Kind' (2009) 20 EJIL 299–330; H Hofmeister, '"Ceterum censeo Chartaginem esse delendam"—Eine Analyse des völkerrechtlichen Gewaltandrohungsverbots' (2010) 48 AVR 248–65.

[94] Schachter, 1625.

[95] See Sadurska, 246–47.

[96] See [1996] ICJ Rep 246f, para 48.

[97] On those principles see Randelzhofer and Nolte on Art. 51 MN 57–62.

[98] See Ress and Bröhmer on Art. 107 MN 7; Berber (n 2) 52–53; D Blumenwitz, *Die Feindstaatenklauseln—Die Rechtsordnung der Sieger* (1972) 59; Wehberg (n 3) 85.

[99] cf Berber (n 2) 52–53.

[100] Berber (n 2) 97, 125; Stein and v Buttlar (n 31) MN 781; Verdross and Simma (n 28) para 106; S Hobe, *Einführung in das Völkerrecht* (9th edn, 2008) 130; A Cassese, *International Law in a Divided World* (Clarendon Press 1986) 137. *Contra* M Bettati,

‘L’Admission des deux Allemagnes à l’ONU’ (1973) 19 AFDI 231. See further Ress and Bröhmer on Art. 53 MN 111 and Art. 107 MN 2.

101 Thus the then Soviet Ambassador-designate to the Federal Republic of Germany, Valentin Falin, declared on 17 March 1971, that Arts 53 and 107 were applicable to all former enemy States, including (the UN members) Hungary and Romania; cf von H Siegler, *Dokumentation zur Deutschlandfrage in Verbindung mit der Ostpolitik*, vol 7 (Siegler 1972) 100–02, 101. A change of that attitude was later suggested by General-Secretary Mikhail Gorbachev in his speeches before the UNGA on 7 December 1988, and the Assembly of the Council of Europe on 6 July 1989.

102 See Verdross and Simma (n 28) para 106; Blumenwitz (n 99) 94–95. cf also the concurring statement by the Japanese Foreign Minister on 13 April 1970 (1975) 19 Japan Ann Intl L 162–63. This view was partly shared in Eastern bloc writings, cf the references given by D Frentzke, ‘Einige Aspekte der Art. 53 und 107 VN-Satzung aus östlicher Sicht’ (1969) 13 ROW 165–66.

103 cf Berber (n 2) 53; Blumenwitz (n 98) 94–95.

104 See [1996] ICJ Rep 226f, para 38.

105 For the concept and effects of desuetude, cf Wolfrum (n 14) 722–74; Hobe (n 100) 195; MG Kohen, ‘Desuetude and Obsolescence of Treaties’ in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (2011) 350–59; R Kolb, ‘La desuetude en droit international public’ 111 (2007) RGDIP 577–607; G Le Floch, ‘La desuetude en droit international public’ (2007) 111 RGDIP 609–42.

106 The predominant view regards Art. 39 as encompassing acts falling under Art. 2 (4): see eg Bowett, 149; U Fink, *Kollektive Friedenssicherung*, vol 2 (Lang 1999) 866–71; Wengler 23, fn 31; Wehberg (n 3) 75; Neuhold, 113–14. Mostly it is assumed that the scope of Art. 39 extends even beyond that; see eg Verdross and Simma (n 28) para 234; Frowein (n 64) 47–48; Kewenig (n 42) 190–91 with further references in 42. For the practice of the UN organs which interpret the notion ‘threat of the peace’ very broadly indeed, cf Krisch on Art. 39 MN 12–34.

107 cf Peters on Art. 25 MN 29–31; Reinisch and Novak on Art. 48 MN 1.

108 On that incidence as a case of Chapter VII UN Charter, eg TM Franck, and F Patel, ‘UN Police Action in Lieu of War: “The Old Order Changeth”’ (1991) 85 AJIL 63–74, 74; U Heinz, C Philip, and R Wolfrum, ‘Zweiter Golfkrieg: Anwendungsfall von Kapitel VII der UNO-Charta’ (1991) 39 VN 125–26; AM Dastis Quevedo, ‘El uso de la fuerza armada en el Golfo: Una justificación jurídica’ (1991) 43 Rev Esp de Derecho Internac 109–16; U Fink, ‘Der Konflikt zwischen dem Irak und Kuwait und die internationale Friedensordnung’ (1991) 29 AVR 474; KH Kaikobad, ‘Self-Defence, Enforcement Action and the Gulf Wars, 1980–88 and 1990–91’ (1993) 63 BYJL 353–63; D Bowett, ‘Collective Security and Collective Self-Defence: The Errors and Risks in Identification’ in M Rama Montaldo (ed), *Liber Amicorum in tribute to Professor E. J. de Aréchaga*, vol 1 (FCU 1994) 425–40; K Zemanek, ‘Peace-Keeping or Peace Making?’ in N Blokker and S Müller (eds), *Towards More Effective Supervision by International Organizations; Essays in Honour of Henry G. Schermers*, vol 1 (Nijhoff 1994) 31.

109 Krisch on Art. 42 MN 10–13.

110 O Dörr, ‘Use of Force, Prohibition of’ MPEPIL (online edn) MN 42; P Kunig, ‘Das Völkerrecht als Recht der Weltbevölkerung’(2003) 41 AVR 327–35, 329–30; Schadtle, 691; J Lobel and M Ratner, ‘Bypassing the Security Council: Ambiguous Authorizations to Use

Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 AJIL 124–54, 127–30. See also Krisch on Art. 42 MN 21.

111 On this, see the accounts given by M Schaefer, *Die Funktionsfähigkeit des Sicherheitsmechanismus der Vereinten Nationen* (Springer 1981) 118–50, and DW Bowett, *United Nations Forces* (Stevens 1964) 29–60.

112 cf RP II, 340, para 20.

113 UN Docs S/1511 (27 June 1950) and S/1588 (7 July 1950). Texts in (1950) UNYB 222–24, 230.

114 See (1950) UNYB 230–44.

115 UNGA Res 377 (V) (3 November 1950) UN Doc A/RES/377(V); text in (1950) UNYB 193–95; cf also C Binder, 'Uniting for Peace Resolution' MPEPIL (online edn) MN 1–6.

116 cf *Construction of a Wall* (n 23) paras 29–32.

117 cf the extensive documentation by R Higgins (ed), *United Nations Peacekeeping*, vols 1–4 (OUP 1969–81); M Bothe, 'Peacekeeping Forces' MPEPIL (online edn) MN 32–36.

118 See Verdross and Simma (n 28) para 257. This is discussed at length by ND White, *The United Nations and the Maintenance of International Peace and Security* (Manchester UP 1990) 181–212

119 For a detailed analysis see Randelzhofer and Nolte on Art. 51.

120 cf the comprehensive account by Pauer, 123–81.

121 For the distinction between the two grounds of intervention, see Beyerlin, *Humanitäre Aktion*, 35–36.

122 eg FK Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer 1999), especially 277–81; K Doehring, *Völkerrecht* (2nd edn, Müller 2004) MN 1012–1015; id, 'Die Humanitäre Intervention—Überlegungen zu ihrer Rechtfertigung', in Inter-American Institute on Human Rights (ed), *The Modern World of Human Rights, Essays in Honor of Thomas Buergenthal* (IIDH 1996) 549–64; JP Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter' (1974) 4 Calif W Intl LJ 258; C Greenwood, 93–106; RB Lillich, 'Humanitarian Intervention. A Reply to Ian Brownlie and a Plea for Constructive Alternatives' in JN Moore, *Law and Civil War in the Modern World* (Johns Hopkins UP 1974) 229–51, 241, 250; id, Iowa L Rev, 344–47; M Reisman and MS McDougal, 'Humanitarian Intervention to Protect the Ibos', in RB Lillich (ed), *Humanitarian Intervention* (1973) 167–221, 178, 192–93; id, 'Humanitarian Intervention and Fledgling Democracies' (1995) 18 Fordham Intl LJ 794–805 ; id, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 866–76; Seeger, 400–12; Tesón, 313–17; W Verwey, 'Humanitarian Intervention' in A Cassese, *Current Legal Regulation* (1986) 74–75; C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 Rec des Cours 218–26 in favour of the lawfulness of humanitarian intervention as 'a remedy of last resort' against genocide; Wellhausen, 247; presumably also Stein and v Buttlar (n 31) MN 817. For further reference for this view see Pauer, 129–30, fn 16, who himself may be considered to hold this point of view (182).

123 Reisman and McDougal (n 122) in *Humanitarian Intervention*, 177; K Ipsen, 'Der Kosovo-Einsatz—Illegal? Gerechtfertigt? Entschuldbar?'(1999) 24 Friedens-Warte 21. Tesón, 149–57, argues that an interpretation of Art. 2 (4) itself yields a *non liquet* as to the lawfulness of humanitarian intervention; similarly Doehring, *Völkerrecht* (2nd edn, Müller 2004) MN 1013.

124 In this direction see M Reisman, *Nullity and Revision* (Yale UP 1971) 850; id, 'Sanctions and Enforcement' in C Black and R Falk (eds), *The Future of the International Legal Order*, vol 3 (Princeton UP 1971) 332–33 and Lillich (n 122) 238–41; Seeger, 406; Wellhausen, 244; U Rünger, *Unilaterale humanitäre Intervention* (2000) 162. Tesón, 158, explicitly refers to the 'theory of *rebus sic stantibus*'.

125 cf Schindler, 18–19; U Beyerlin, 'Humanitarian Intervention' EPIL II (1995) 926–33, 927–28; T Farer, 'Foreign Intervention in Civil Armed Conflict' (1974-II) 142 Rec des Cours 391–92; I Brownlie, 'Thoughts on Kind-Hearted Gunmen' in RB Lillich (ed), *Humanitarian Intervention* (1973) 139–48, 145–46; Epping, 40–41; Ziegler, 201–04.

126 See eg Fonteyne (n 122) 255 and 258; C Tomuschat, 'Völkerrechtliche Aspekte des Kosovo-Konflikts' (1999) 24 Friedens-Warte 34–35.

127 See Pauer, 138; cf also Hailbronner, 98 and M Akehurst, 'Humanitarian Intervention' in H Bull (ed), *Intervention in World Politics* (Clarendon Press 1984) 95–118, 105–6.

128 See esp para 268 of the Judgment ([1986] ICJ Rep (n 1): 'the use of force could not be the appropriate method to monitor or ensure…respect [for human rights]'. Tesón's reading of the decision, namely that it condemned the American actions solely on grounds of disproportionality in that particular case (270, 308–12), is clearly too narrow. Against the background of the whole judgment, the phrase quoted must be read as proscribing the use of force for humanitarian purposes as a matter of principle, rather than as one of scale and effects.

129 This represents by far the dominant view in international legal doctrine: eg Antonopoulos, 454–66; Beyerlin, *Humanitäre Aktion*, 66; id, fn 150; HJ Blanke, 'Menschenrechte als völkerrechtliche Interventionstitel' 36 (1998) AVR 267; Bothe (n 41) MN 22; Bowett 45, fn 76; I Brownlie, 'Humanitarian Intervention' in JN Moore, *Law and Civil War in the Modern World* (Johns Hopkins UP 1974) 217–28; id, fn 150; M Byers and S Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in JL Holzgrefe and OK Keohane (eds), *Humanitarian Intervention: Ethic, Legal and Political Dilemmas* (CUP 2003) 177–203; A Cassese, 'Return to Westphalia? Considerations on the Gradual Erosion of the Charter System' in Cassese (ed), *Current Legal Regulation* 505–23, 514; O Corten and Klein, 'Devoir d'ingérence ou droit de réaction armée collective?' (1991) 24 RBDI 46f; Dinstein, 73–75; T Franck and N Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 AJIL 302–03; G Hafkin, 'The Russo-Georgian War of 2008, Developing the Law of Unauthorized Humanitarian Intervention after Kosovo' (2010) 28 Boston University ILJ 219–39, 230–32; Hailbronner, 100; P Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12 EJIL 437–67; Kewenig (n 42) 206–07; O Kimminich, 'Der Mythos der humanitären Intervention' 33 (1995) AVR 430–58; P Kunig, 'Humanitäre Intervention' (1994) 12 Jahrbuch Dritte Welt 47–54; Liebach, 71–160; P Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Het Spinhuis 1993); M Pape, *Humanitäre Intervention* (Nomos 1997) 81–104; KK Pease and DP Forsythe, 'Humanitarian Intervention and International Law' 45 (1993) AJPIL 1–20; Ronzitti, 108–10; JE Rytter, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo—and Beyond' (2001) 70 Nordisk Tidsskrift Intl Ret 121–60; Schadtle, 689–90; T Schilling, 'Zur Rechtfertigung der einseitigen gewaltsamen humanitären Intervention als Repressalie oder als Nothilfe' (1997) 35 AVR 430–58, esp 444 and 458; K Schmalenbach, 'Recht und Gerechtigkeit im Völkerrecht' [2005] Juristenzeitung 641–42; B Schöbener, 'Die humanitäre Intervention im Konstitutionalisierungsgefüge der Völkerrechtsordnung' (2000) 47 ZfP 317; Skubiszewski, 758–59; Verdross and Simma (n 28) para 473; Stelter, 267–68; C Walter, *Vereinte Nationen und Regionalorganisationen* (Springer 1995) 245–48; Ziegler, 197–200; further references by Pauer 128–29, fn 15 and Bothe, ibid. Thus, at its 1989 session, the Institut de Droit International adopted a resolution on ‘the protection of human rights and the principle of non-intervention in internal affairs of States’, Art. 2 para 3 of which allows for punitive measures towards any State that has violated its human rights obligations, ‘provided such measures…do not involve the use of armed force in violation of the Charter of the United Nations’. cf 63-II (1990) Annu de l’Inst de Droit Intl 338–45, 343.

130 *Contra* Doehring, *Völkerrecht* (2nd edn, Müller 2004) MN 1013–1015; R Wedgwood, ‘NATO’s Campaign in Yugoslavia’ (1999) 93 AJIL 833; further references by Seeger, 349–61.

131 Concurring, Akehurst (n 127) 99; Beyerlin (n 125); Epping, 43–45; Hailbronner, 98–100, CPF/Schrijver, 449; V Lowe and A Tzanakopoulos, ‘Humanitarian Intervention’ MPEPIL (online edn) MN 26–35. On this point, see the extensive accounts of State practice given by Pauer, 155–81 and Tesón, 175–223, who both draw the opposite conclusion, though, with Pauer maintaining that proper humanitarian intervention would in practice be regarded as not constituting ‘fault’ or even as lawful (181), while Tesón draws on the ‘moral reality of international politics’ (222). Not convincing Greenwood, 93–106, presuming that allied actions in Iraq, because they were broadly accepted by other States, have brought about a change in public international law, now allowing unilateral humanitarian intervention.

132 cf the statement of the Indian representative before the SC with regard to the Indian intervention in the Pakistan civil war (RPSC Supp (1969–71) 156–65, 161); the statement of the President of Tanzania on the invasion of Uganda (Keesing’s (1979) 29671, 29673); and that of the Vietnamese Foreign Minister on the intervention in Cambodia (Keesing’s (1979) 29613).

133 See R Clark, ‘Humanitarian Intervention: Help to your Friends and State Practice’ (1983) 13 Ga J Intl & Comp L 212–13.

134 Concurring, eg D Blumenwitz, ‘Souveränität—Gewaltverbot—Menschenrechte’ 4 (1999) Politische Studien Sonderheft 19–40; M Bothe and B Martenczuk, ‘Die NATO und die Vereinten Nationen nach dem Kosovo-Konflikt’ (1999) 47 VN 125–32; A Cassese, ‘*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ EJIL 10 (1999) 23–30; JJ Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’ (1999) 93 AJIL 834–41; O Corten and F Dubuisson, ‘L’hypothèse d’une règle émergente fondant une intervention militaire sur une “autorisation implicite” du Conseil de Sécurité’ (2000) 104 RGDIP 873–910; Dinstein, 336–38; F Dubuisson, ‘La problématique de la légalité de l’opération “force alliée” contre la Yougoslavie: enjeux et questionnements’ in O Corten and B Delcourt (eds), *Droit, légitimation et politique extérieure: L’Europe et la guerre du Kosovo* (Bruylant 2000) 149–83 ; Epping, 47; MJ Glennon, *Limits of Law, Prerogatives of Power* (Palgrave 2001) 19–35; S Hobe, ‘NATO-Intervention im Kosovo: Rückkehr zur Lehre vom gerechten Krieg?’ in D Dörr and others (eds), ‘Die Macht des Geistes’, *Festschrift für H. Schiedermair* (Müller 2001) 819–39, 831; W Kälin, ‘Humanitäre Intervention: Legitimation durch Verfahren? Zehn Thesen zur Kosovo-Krise’ (2000) 2 SZIER 159–69; N Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council’ (1999) 3 Max Planck UN YB L 59–103; D Momtaz, ‘L’intervention d’humanité de l’OTAN au Kosovo et la règle du non-recours à la force’ (2000) 82 RICR 89–101; G Nolte, ‘Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten’ (1999) 59 ZaöRV 941–60; Rytter 121–60, fn 157; B Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1–22; N Valticos, ‘Où va-t-on? Eclipse de Conseil de Sécurité ou réforme du droit de veto?’ (2000) 104 RGDIP 5–18. *Contra*, defending NATO’s action as lawful, eg K Ipsen, ‘Der Kosovo-Einsatz Illegal? Gerechtfertigt? Entschuldbar?’ (1999) 74 Friedens-Warte 19–23; HF Köck, ‘Legalität und Legitimität der Anwendung militärischer Gewalt’ (1999) 54 AJPIL 153; D Kritsiotis, ‘The Kosovo Crisis and NATO’s Application of Armed Force Against the Federal Republic of Yugoslavia’ (2000) 49 ICLQ 330–59; O Luchterhand, ‘Völkermord: Humanitäre

Intervention—Recht contra Moral?' [1999] Zeitschrift für Genozidforschung 92–116; M Reisman, 'Kosovo's Antinomies' (1999) 93 AJIL 860–62; D Thürer, 'Der Kosovo-Konflikt im Lichte des Völkerrechts: Von drei—echten und scheinbaren—Dilemmata' (2000) 38 AVR 1–22, 8–9; C Tomuschat, 'Völkerrechtliche Aspekte des Kosovo-Konflikts' (1999) 74 Friedens-Warte 35; R Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 AJIL 833. See generally on the different views A Paulus, *Die internationale Gemeinschaft im Völkerrecht* (Beck 2001) 319–28.

135 On this concept see eg Vashakmadze on Responsibility to Protect; A v Arnauld, 'Souveränität und Responsibility to Protect' (2009) 84 Friedenswarte 11–52; J Eaton, 'An Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect' (2010–11) 32 Mich J Intl L 765–804; A Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Kovač 2011); A Orford, *International Authority and the Responsibility to Protect* (CUP 2011); A Peters, 'The Security Council's Responsibility to Protect' (2011) 8 Intl Org L Rev 1–40; A Rausch, *Responsibility to protect—eine juristische Betrachtung* (Lang 2011); C Schaller, 'Die völkerrechtliche Dimension der "Responsibility to Protect"' (June 2008) 46 SWP-Aktuell; C Stahn, 'Responsibility to Protect—Political Rhetoric or Emerging Legal Norm?' (2007) 101 AJIL 99–120; C Verlage, *Responsibility to Protect* (Mohr Siebeck 2009); M Wenzel, *Schutzverantwortung im Völkerrecht: zu Möglichkeiten und Grenzen der, Responsibility to Protect'-Konzeption* (Kovač 2010).

136 Concurring Peters (n 135) 13–15; Eaton (n 135) 800; Kolb (n 135) 236; V Lowe and A Tzanakopoulos, 'Humanitarian Intervention' MPEPIL (online edn) MN 46.

137 See above all the 2005 World Summit Outcome, contained in UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1, para 139, referring to 'collective action through the Security Council in accordance with the Charter, including Chapter VII …'. Before that the report of SG Annan entitled 'In Larger Freedom. Towards Development, Security and Human Rights for All' (UN Doc A/59/2005 (21 March 2005)) had explicitly stated that threats facing humanity can be solved only through collective action (paras 18–22) and as modes of implementation exclusively referred to enforcement action by the UNSC under the UN Charter (paras 125–126 and 135. It comes as no surprise, therefore, that the resolutions of the UNSC on Libya, where the Council explicitly invoked the responsibility to protect the Libyan population, involved enforcement actions under Chapter VII of the UN Charter, cf UNSC Res 1970 (26 February 2011), in para 9 of the Preamble, and UNSC Res 1973 (17 March 2011) in para 4 of the Preamble.

138 Concurring Gray, 52–53; Stein and v Buttlar (n 31) MN 823a; Stahn (n 135) 111–15; Vashakmadze on Responsibility to Protect MN 78. *Contra* Verlage (n 135) 293–331, 374–85.

139 See A Randelzhofer, 'Das Kosovo-Dilemma: Gewaltverbot gegen Menschenrechtsschutz' (2000) 17 Nihon University Comparative Law 13–14; J Delbrück, 'Effektivität des UN-Gewaltverbots' (1999) 74 Friedens-Warte 157.

140 See C Kreß, 'Staat und Individuum in Krieg und Bürgerkrieg' (1999) 52 NJW 3077–84. A Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*' (1999) 10 EJIL 791–99 and Wolfrum (n 14) 828–30 rightly emphasize that up to now no such rule has emerged.

141 eg Beyerlin, *Humanitäre Aktion*, 60; id, 'Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht' (1977) 37 ZaöRV 239; Bothe (n 41) MN 21 with further references; Brownlie, 301; id, 'The Principle of the Non-Use of Force in Contemporary International Law' in WE Butler, *The Non-Use of Force in International Law* (Nijhoff 1989)

23; BO Bryde, 'Self-Help' EPIL IV (2000) 377–80, 379–80; Mrazek, 97; Ronzitti, 65; Verdross and Simma (n 28) para 1338; Wehberg (n 3) 71–72; Wengler, 25–26.

142 Advocating such a justification, eg Bowett, 91–94, 104; Kewenig (n 42) 206; F Paasche, 'The Use of Force in Combating Terrorism' (1987) 25 Colum J of Transnatl L 377–402, 390; M Schröder, 'Die Geiselbefreiung von Entebbe—ein völkerrechtswidriger Akt Israels?' (1977) 32 JZ 420–26, 424–25; Dinstein, 256–59, though confined to what he sees as the special circumstances of the Israeli raid on Entebbe; similarly O Schachter, 'In Defense of International Rules on the Use of Force' (1986) 53 U Chi L Rev 139.

143 See Randelzhofer and Nolte on Art. 51 MN 10 and 13.

144 eg d'Angelo, 494–95, 518; HG Franzke, 'Die militärische Abwehr von Angriffen auf Staatsangehörige im Ausland—insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen'(1966) 16 Österr ZöR 148–49; L Henkin, *How Nations Behave* (2nd edn, Columbia UP 1979) 145; very reluctantly also R Higgins, 'Intervention and International Law' in H Bull (ed), *Intervention in World Politics* (Clarendon Press 1984) 39.

145 Concurring Beyerlin, *Humanitäre Aktion*, 42–46; Ronzitti, 7–15; Antonopoulos, 420–51.

146 For that approach, cf J Raby, 'The State of Necessity and the Use of Force to Protect Nationals' (1988) 26 Can YB Intl L 253–72 who, as legal basis for his argument, simply refers to Art. 33 of the 1980 ILC Draft on State Responsibility.

147 See the account given eg by Amerasinghe, 16–19.

148 cf G Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: the Legal Advice Tendered to the British Government' (1988) 37 ICLQ 773–817.

149 cf the account of the Israeli and the two Congo operations given by U Beyerlin, 'Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht' (1977) 37 ZaöRV 213–43. For the Tehran hostage crisis see O Schachter, 'International Law in the Hostage Crisis: Implications for Future Cases' in PH Kreisberg (ed), *American Hostages in Iran, The Conduct of a Crisis* (Yale UP 1985) 325–73.

150 See the statement on 'Grenada' by the then US President Ronald Reagan on 25 October 1983, US Dept St Bull 83, No 2081 (December 1983) 67. For the Panama operation, cf the television address made by President George Bush on 20 December 1989 (text in *Financial Times*, 21 December 1989, 4), as well as the legal justifications given by the US Justice Department (*International Herald Tribune*, 21 December 1989, 4).

151 cf RB Lillich, 'Forcible Protection of Nationals Abroad: the Liberian incident of 1990' (1992) 35 GYIL 205–23.

152 cf C Kreß, 'Die Rettungsoperation der Bundeswehr in Albanien am 14.3.1997 aus völker- und verfassungsrechtlicher Sicht' (1997) 57 ZaöRV 329–62; V Epping, Die Evakuierung deutscher Staatsbürger im Ausland als neues Kapitel der Bundeswehrgeschichte ohne rechtliche Grundlage?' (1999) 124 AöR 423–69.

153 See eg US President Carter addressing Congress on 26 April 1980, about the Tehran hostage crisis, US Dept St Bull 80, No 2039 (June 1980) 42–43, 43 as well as the statements made by the respective US representatives to the UNSC on the Israeli operation at Entebbe, (1976) UNYB 319, and on the landing on Grenada, US Dept St Bull 83, No 2081 (December 1983) 74–76, 75. For the justifications given for the Belgian-US operation at Stanleyville and Paulis, cf RP 3 I, 160.

154 For instance, several Member States of the European Communities, and the EC Assembly expressed their satisfaction with regard to the Israeli operation at Entebbe. The SC did not determine the raid to constitute an act of aggression, or a breach of or threat to the peace, nor did the Stanleyville operation result in a condemnation of Belgium. However, in UNGA Res 44/240 (29 December 1989) UN Doc A/RES/44/240 the UNGA deplored the

American intervention in Panama as ‘a flagrant violation of international law’, cf (1990) 24 United Nations Law Reports 34–35.

155 [1980] ICJ Rep 3f.

156 Concurring, beside the authors named in nn 142 and 144, eg Bowett, ‘The Interrelation of Theories of Intervention and Self-Defense’ in JN Moore (ed), *Law and Civil War in the Modern World* (Johns Hopkins UP 1974) 44; CPF/Schrijyer, 448; O Dörr, ‘Use of Force, Prohibition of’ MPEPIL (online edn) MN 44; Hailbronner, 106; P Kunig, *Das völkerrechtliche Nichteinmischungsprinzip* (Nomos 1979) 350; RB Lillich, ‘Forcible Self-Help by States to Protect Human Rights’ (1967) 53 Iowa L Rev 325–51; Schadtle, 694–95; H Strebel, ‘Nochmals zur Geiselbefreiung in Entebbe’ (1977) 37 ZaöRV 691–710; UO Umozurike, ‘The Israelis in Entebbe—Rescue or Aggression?’ (1979) 12 VRÜ 391; presumably also Stein and Buttlar (n 31) MN 805. Schweisfurth, 179–80, albeit rejecting the existence of a right of military protection, regards forcible rescue operations as justified when they reflect an obligation to protect human rights.

157 cf the thorough analyses by Ronzitti, 77–88 and by L Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’ (1985) 56 BYIL 189–252.

158 O Dörr, ‘Use of Force, Prohibition of’ MPEPIL (online edn) MN 45.

159 See GI Tunkin, *Recht und Gewalt im internationalen System* (Duncker & Humblot 1986) 74–75; IP Blishchenko, ‘Use of Force and Prohibition of Weapons’ in A Cassese, *Current Problems of International Law* (1975) 172–74; Zourek, 108–11; RA Müllerson, ‘The Principle of Non-Threat or Non-Use of Force in the Modern World’ in WE Butler (ed), *The Non-Use of Force in International Law* (1989) 30. cf moreover, the accounts by J Toman, ‘Conception soviétique des guerres de libération’ in A Cassese, *Current Problems of International Law* (Giuffrè 1975) 355–75; FC Schroeder, ‘Die Rechtmässigkeit des Krieges nach westlicher und sowjetischer Völkerrechtsauffassung’ in R Maurach and B Meissner (eds), *Völkerrecht in Ost und West* (Kohlhammer 1967) 215–18; and Falk, *Legal Order*, 143–44. The Soviet conception was also reflected, for instance, in para 6 of the definition proposed by the Soviet Union on 26 February 1969, in the Special Committee on the Question of Defining Aggression; see GAOR 24th Session Supp No 20 (UN Doc A/7620) 4–6, 6.

160 Efforts made by developing countries led to the adoption by the UNGA of resolutions in which ‘the legitimacy of the peoples’ struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle’ is reaffirmed; see eg UNGA Res 3070 (XXVIII) (30 November 1973) UN Doc A/RES/3070(XXVIII), GAOR 28th Session Supp No 30 (UN Doc A/9030) 78, and UNGA Res 3246 (XXIX) (29 November 1974) UN Doc A/RES/3246(XXIX), GAOR 29th Session Supp No 31 (UN Doc A/9631) 87.

161 The latter claim ie the admissibility of support by third States for suppressed peoples, shows the real significance of this alleged exception, see Schindler, 27; Neuhold, 142; Dinstein, 570–71.

162 cf Schroeder (n 159) 216–17.

163 eg Zourek, 110; EC Udechuku, *Liberation of Dependent Peoples in International Law* (2nd edn, 1978) 19–64; further references given by Dohna, 90–92.

164 E Klein, ‘Nationale Befreiungskämpfe und Dekolonisierungspolitik der Vereinten Nationen: Zu einigen völkerrechtlichen Tendenzen’ (1976) 36 ZaöRV 649, rightly regarded that attempt as a step backwards.

165 A right of self-defence against colonial and other forms of suppression is rejected by the Western States (cf the account by Dohna, 92 with references in fn 161, as well as in Western writings: see eg Akehurst and Malanczuk (n 79) 337; Dinstein, 93; Dohna, 94–95; Henkin (n 144) 144; Klein (n 164) 647–48; Neuhold, 142–43; N Ronzitti, 'Force in Wars of National Liberation' in A Cassese, *Current Problems of International Law* (Giuffrè 1975) 351–53; Schindler, 27. The ICJ in *Nicaragua*, when alluding to a right of intervention in the context of decolonization, was obviously considering the matter only *de lege ferenda* ([1986] ICJ Rep 14 para 206).

166 cf A Randelzhofer, 'Die Aggressionsdefinition der Vereinten Nationen' (1975) 30 EA 626–27; Bruha, 195–203; Y Dinstein, 'Aggression' MPEPIL (online edn) MN 20.

167 Among many others: Akehurst and Malanczuk (n 79) 309; Brownlie, 113; M Bothe, 'Das Gewaltverbot im allgemeinen' in W Schaumann (ed), *Völkerrechtliches Gewaltverbot und Friedenssicherung* (Nomos 1971) 16; Fischer (n 2) § 59 para 27; Hobe (n 100) 329; Schindler, 14; Wehberg (n 3) 66.

168 *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 73; [1986] ICJ Rep (n 1) paras 187–190 and 292 (4), (6). For comments on the *Nicaragua* Case, cf the contributions by K Highet, 'Evidence, the Court and the Nicaragua Case' (1987) 81 AJIL 1–56; GL Scott and CL Carr, 'The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause', 57–76, as well as the notes by various authors, edited by HG Maier, ibid 77–183. For further comments, see eg PM Norton, 'The Nicaragua Case: Political Questions Before the International Court of Justice' (1987) 27 Virginia J Intl L 459–526; RSJ Macdonald, 'The Nicaragua Case: New Answers to Old Questions?' (1986) 24 Can YB Intl L 127–60; M Eisemann, 'L'Arrêt de la CIJ du 27 juin 1986 (fond) dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci' (1986) 32 AFDI 153–89; H Hohmann and JIM de Waart, 'Compulsory Jurisdiction and the Use of Force as a Legal Issue: The Epoch-Making Judgment of the International Court of Justice in Nicaragua v. United States of America' (1987) 34 NILR 162–91; M Knof and C Kress, 'Der Nicaragua-Fall des IGH im Spannungsfeld zwischen Gewaltverbot und Interventionslust' (1990) 41 Österr ZöR 9–55.

169 ICJ (n 23) para 87.

170 [1986] ICJ Rep (n 1) para 188; repeated in [2004] ICJ Rep (n 23) para 87. This association of voting attitudes in UN organs with the creation of customary law has been criticized, among others, by A d'Amato, 'Trashing Customary International Law' (1987) 81 AJIL 102. The ICJ's method is defended by Hohmann and de Waart (n 168) 183.

171 [1986] ICJ Rep (n 1) para 184.

172 ibid, para 186. That the ICJ ignores State practice is rightly criticized by d'Amato (n 170) and TM Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations' 81 (1987) AJIL 118–19. For a methodological critique of the judgment, cf also M Mendelson, 'The Nicaragua Case and Customary International Law' in WE Butler, *The Non-Use of Force in International Law* (Nijhoff 1989) 85–99.

173 [1986] ICJ Rep (n 1) para 175: 'On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content.'

174 ibid, para 227.

175 ibid, para 190.

176 ibid, para 176.

[177] For instance, it is extremely doubtful whether the prohibition of participating in acts of civil strife, as laid down in para 9 of the section on the non-use of force in the Friendly Relations Declaration, really is, as the ICJ claims (cf [1986] ICJ Rep (n 1) para 191), already part of customary international law.

[178] Concurring, D Simon and LA Sicilianos, 'La contre-violence unilatérale—Pratiques étatiques et Droit international' 32 (1986) AFDI 53–78, 70, and FL Kirgis, 'Custom on a Sliding Scale' 81 (1987) AJIL 147.

[179] eg Berber (n 2) 40. cf also the Dissenting Opinion by Judge Sir Robert Jennings who denies the existence of a customary prohibition of force on the grounds that there was 'no room and no need' for it ([1986] ICJ Rep (n 1) 531).

[180] See A Randelzhofer, 'Discussion Statement' 26 (1986) DGVR Berichte 133. Very reluctant in this respect Dinstein, 100, who merely anticipates 'an eventual dissonance' between Art. 2 (4) and custom for the future.

[181] See the references in n 167.

[182] cf *Military and Paramilitary Activities in and against Nicaragua* (Merits) (Separate Opinion Judge Singh) [1986] ICJ Rep 153; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Separate Opinion Judge Elaraby) [2004] ICJ Rep 254; the International Law Commission in its Draft Articles on the Law of Treaties (1966), commentary to Art. 50, para 1 ((1966-II) ILC Yearbook 247). In legal doctrine eg I Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 488–89; K Doehring, *Völkerrecht* (2nd edn, Müller 2004) MN 300; Gray, 30; L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Lakimiesliiton Kustannus 1988) 323–56; W Heintschel v Heinegg, in K Ipsen (ed), *Völkerrecht* (5th edn, Beck 2004) § 15 MN 59; Hobe (n 100) 329; S Kadelbach, *Zwingendes Völkerrecht* (Duncker & Humblot 1992) 234–36; L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (OUP 1988) 323–56; W Heintschel v Heinegg, in K Ipsen (ed), *Völkerrecht* (5th edn, CH Beck 2004) § 15 MN 59; Graf Vitzhum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in Graf Vitzthum (ed), *Völkerrecht* (5th edn, de Gruyter 2010) 12, I. MN 13 in fn 28. But see also the scepticism of CPF/Schrijver, 461, who points to the contrarian practice of 'certain great powers in defiance of the general norm'.

[183] ICJ (n 23) para 87.

[184] ICJ *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment of 3 February 2012) paras 93–97.

[185] For the substance and theoretical background of Art. 53, cf K Schmalenbach, 'Art. 53' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) MN 18f.

[186] On the difference between Arts 52 and 53 of the Vienna Convention, cf Schmalenbach (n 186) Art. 52 MN 4.

[187] See HH Jescheck, 'Nuremberg Trials' EPIL III (1997) 747–54, 752; Verdross and Simma (n 28) para 442; Berber (n 2) 257–63; K Ipsen, in Ipsen (n 2) § 42 paras 26–28; Dohna, 101–03. *Contra* Neuhold, 163–64; B Röling, 'Crimes against Peace' in A Cassese, *The Current Legal Regulation of the Use of Force* (1986) 392; Brownlie, 191–94; *contra* Dinstein, 125–34, who unconvincingly refers to 'a string of uncontested UNGA resolutions' (para 341), the works of the ILC for a Code of Offences against the Peace and Security of Mankind (paras 341–43) and, probably above all, the need for a respective rule of law ('war simply must be a crime', para 337).

188 See A Randelzhofer, 'Die Aggressionsdefinition der Vereinten Nationen' (1975) 30 EA 627–28.

189 Current ratification status under <http://treaties.un.org> accessed 12 June 2012.

190 See Res RC/Res 6 (adopted 11 June 2010), available at <http://www.icc-cpi.int> accessed 12 June 2012, and reprinted at (2010) 49 ILM 1334–38. On the results of Review Conference eg K Ambos, 'The Crime of Aggression After Kampala' (2010) 53 GYIL 463f; D Scheffer, 'States Parties Approve New Crimes for International Criminal Court' vol 14, Issue 16 ASIL Insight (22 June 2010).

191 See the Rome Statute, as amended, Art. 15 bis and Art. 15 ter, (2) and (3) respectively.

192 Glennon (n 134) 207–08.

193 Neuhold, 394. *Contra* GG Shinkaretskaia, 'Peaceful Settlement of International Disputes: An Alternative to the Use of Force' in WE Butler, *The Non-Use of Force in International Law* (Nijhoff 1989) 39–52.

194 On this point see Randelzhofer, 'Die Bedeutung von "peaceful change" für die Kriegsverhütung im geltenden Völkerrecht', in B Börner, H Jahrreiß, and K Stern (eds), *Festschrift Carstens*, vol 1 (Heymanns 1984) 465–76; id, '"Peaceful change" als Problem de lege ferenda' in W Fürst, R Herzog, and DC Umbach (eds), *Festschrift Zeidler*, vol 2 (de Gruyter 1987) 1819–32.

195 cf the summary by Verdross and Simma (n 28) paras 485–488.

196 cf R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 173, and the comprehensive account given by ND White, *The United Nations and the Maintenance of International Peace and Security* (Manchester UP 1990).

197 Röling, 174–87.

198 TM Franck, 'Who killed Art. 2(4)? or: The Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809.

199 ibid, 809–10.

200 Schindler, 18–19; Malanczuk, 217; Henkin (n 144) 138; Schachter (n 142) 125–26.

201 L Henkin, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated' (1971) 65 AJIL 544.