

# INTERNATIONAL LAW ASSOCIATION

## SYDNEY CONFERENCE (2018)

### Use of Force

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### Final Report on Aggression and the Use of Force

In November 2010, the Executive Committee of the International Law Association approved a proposal to establish a Committee on the Use of Force, with a mandate to produce a report on Aggression and the Use of Force. In 2016, the Executive Committee extended the Committee for an additional two years.

The Committee held six meetings in which many members participated. The Committee met at the Sofia, Washington and Johannesburg ILA Conferences in 2012, 2014 and 2016, as well as at the University of Essex, UK (2012), the University of Cambridge, UK (2013), and the Max Planck Institute in Heidelberg, Germany (2017). Open Working Sessions were held during the Sofia, Washington and Johannesburg Conferences.

Many members of the Committee contributed to the report, whether at the meetings or in writing, and twelve members prepared background research papers which contributed to the drafting process. The draft report itself was prepared by the Chair and Rapporteur, with drafts for particular sections contributed by members of the Committee. The various drafts were circulated to all members for comment.<sup>1</sup>

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<sup>1</sup> Professor James A. Green, Professor Christian Henderson, Professor Claus Kreß, Professor Sean Murphy, Professor Tom Ruys and Ms Elizabeth Wilmshurst, individually or on at least one occasion jointly, prepared drafts for particular sections. In addition, the Chair and Rapporteur wish to acknowledge the excellent editorial assistance of Alfredo Crosato Neumann in the preparation of the final draft of the report, and the valuable assistance at committee meetings of Rachel Borrell, Nathan Derejko, and Erin Pobjie.

The report is a result of collective work conducted in a contested field of law. The mandate of the Committee is ‘Aggression and the Use of Force’. Members decided, however, that it was necessary to deal with other select topics of the law on the use of force in order to consider aggression in context. The report is not intended to be a comprehensive treatment of the *jus ad bellum*. It was completed, in substance, in April 2018, so it does not take account of later developments. While not all members can be committed to the precise formulation of each and every point in this report, it is believed that the report reflects a common general position on the current state of debate in the areas covered by the report.

This Final Report is divided into the following sections:

Part A: Context

- A.1. Introduction
- A.2. Clarification of *jus ad bellum* terms and concepts

Part B: Lawful uses of force

- B.1. Security Council authorization
- B.2. Self-Defence
  - B.2.a. Necessity and Proportionality
  - B.2.b. Anticipatory Self-Defence
  - B.2.c. Self-Defence against Non-State Actors
  - B.2.d. Rescue of Nationals Abroad
- B.3. Consent

Part C: Particular issues

- C.1. Humanitarian intervention
- C.2. Cyber-operations

Part D: Aggression

Conclusions

**Part A: Context**

**A.1. Introduction**

The Committee’s mandate concerns the international law on the use of force (*jus ad bellum*); it does not deal with international humanitarian law or international human rights law, though one or both of these fields of law will also be engaged whenever armed force is being used.

On one view the rules of international law on the use of force are relatively easy to state, though they can be difficult to apply in practice. The rules are to be found in the United Nations Charter and in customary international law.<sup>2</sup> The Charter contains, among the Principles of the United Nations, a prohibition of the threat

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<sup>2</sup> The political organs of the United Nations, in particular the General Assembly, have contributed to the law through consensus resolutions: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration) (UNGA res. 2625(XXV)); Definition of Aggression (UNGA res. 3314(XXIX)); Declaration on the Non-use of Force (UNGA res. 42/22). So too has the International Court of Justice in a series of judgments and advisory opinions: *Corfu Channel Case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168. See also C. Gray, “The International

or use of force (Article 2, paragraph 4), which is also indisputably part of customary international law.<sup>3</sup> The Charter refers to two exceptions to the general prohibition. First, forcible measures may be taken or authorized by the Security Council, acting under Chapter VII of the Charter. Second, force may be used in the exercise of the right of individual or collective self-defence, recognized in Article 51 of the Charter. A further exception that has been suggested, but which remains controversial, is the use of force to avert an overwhelming humanitarian catastrophe (sometimes referred to as ‘humanitarian intervention’). This is not mentioned in the Charter, and would have to be found, if at all, in the subsequent practice of the Parties to the UN Charter and in customary international law. Force used at the request or with the consent, duly given, of the government of the territorial state, which is not a true exception, is discussed in section B.3 below. The use of force in retaliation (punishment, revenge or reprisals) is illegal.<sup>4</sup>

Together with the obligation to resolve disputes peacefully,<sup>5</sup> the prohibition of the use of force is at the heart of the UN Charter’s collective security system. In the pre-Charter era of the League of Nations, the Covenant of the League adopted a formulation that failed to meet its objective, in part by focusing on the prohibition and regulation of ‘resort to war’ and thus giving rise to arguments that it allowed uses of force not characterized as war. This was followed by the Kellogg-Briand Pact of 1928, in which the Parties condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another.<sup>6</sup> The UN Charter, reflecting greater political will to prevent force, broadened the prohibition by obliging states not to use ‘force’, as opposed to the narrower term ‘war’. Article 2(4) has been described as the cornerstone of the Charter,<sup>7</sup> and is central to the desire for a peaceful global order. It contains a clear prohibition, declaring the following:

“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.”

This prohibition is the starting point for the current report, which seeks to further clarify its meaning. There are two key matters which must be addressed: i) the nature of the prohibited force; and ii) whether the aim for which the force is used is a determining factor in its prohibition. We consider these questions below, as well as the meaning of the concept of ‘armed attack’ for the purpose of the right of self-defence. The report then proceeds to analyse the principles regulating the exercise of self-defence and other uses of force, as well as current developments and challenges in this field. The final section of the report examines the concept of ‘aggression’ and its place within the principles on use of force.<sup>8</sup>

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Court of Justice and the Use of Force”, in C. J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013), at pp. 237-261; C. Kreß, “The International Court of Justice and the ‘Principle of Non-Use of Force’”, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at pp. 561-604.

<sup>3</sup> *Nicaragua v. United States of America*, *supra* n. 2, at paras. 188-190.

<sup>4</sup> Friendly Relations Declaration, *supra* n. 2 (“States have a duty to refrain from acts of reprisal involving the use of force”). See also S. Darcy, “Retaliation and Reprisal”, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at pp. 879-896.

<sup>5</sup> UN Charter, Articles 2(3) and 33.

<sup>6</sup> R. Lesaffer, “Kellogg-Briand Pact (1928)”, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, Vol. VI (Oxford: Oxford University Press, 2012), at pp. 579-584.

<sup>7</sup> *DRC v. Uganda*, *supra* n. 2, at para. 148.

<sup>8</sup> The literature is vast, and no attempt has been made to be comprehensive. See, for example, C. H. M. Waldock, “The Regulation of the Use of Force by Individual States in International Law”, in 81 *Recueil des Cours* 451 (1952); D. W. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958); I. Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963); T. M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002); R. Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge: Cambridge University Press, 2010); O. Corten, *Le droit contre la guerre* (Paris: Pedone, 2<sup>nd</sup> ed., 2014) – for an earlier edition in English, see O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010); M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015); Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 6<sup>th</sup> ed., 2017); C. Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 4<sup>th</sup> ed., 2018); T. Ruys, O. Corten and A. Hofer (eds.), *The Use of Force*

An important question is the *jus cogens* status of the rules on the use of force set forth in the Charter (and in customary international law), though there is a question whether that status should apply only to the prohibition of aggression or to any breach of the principle embodied in Article 2(4).<sup>9</sup>

Aggression is at the centre of the Committee’s mandate, and is highlighted in the title of the present report. An important recent development has been the adoption in Kampala in 2010 of a definition of the crime of aggression for the purpose of the Rome Statute of the International Criminal Court, and its activation with effect from 17 July 2018. At the same time, aggression needs to be seen in the context of the rules on the use of force more generally, and for this reason the concept is addressed towards the end of this report.

## A.2. Clarification of *jus ad bellum* terms and concepts

### ‘Use of force’

The nature of the prohibited force was the subject of much debate during the drafting of the UN Charter. There were proposals, for example, to include economic pressure as a form of force, but these were not accepted.<sup>10</sup> Coercive measures *per se* are not equated with the type of force envisaged in Article 2(4), although they may violate other prohibitions, including the principle of non-intervention.<sup>11</sup> Article 2(4) is generally accepted as referring to the use of ‘armed’ or ‘physical’ force.<sup>12</sup> This interpretation was confirmed in the list of examples appearing in the Friendly Relations Declaration.<sup>13</sup> The latter also clarifies that the prohibition of force extends to *indirect* force, such as arming rebel groups.<sup>14</sup>

The reference in Article 2(4) to the use of force “against the territorial integrity or political independence of any state” has been relied upon to support uses of force in circumstances that could be claimed as having other objectives (e.g. humanitarian intervention).<sup>15</sup> The claim, here, is that if a use of force is not “against” these apparent qualifiers, then that use of force does not fall within the scope of Article 2(4). This interpretation, however, is unsustainable for at least two reasons. First, an examination of the *travaux préparatoires* of the

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*in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018); C. Henderson, *The Use of Force and International Law* (Cambridge: Cambridge University Press, 2018). The *Institut de Droit International* (through its Tenth Commission - Present Problems of the Use of Force in International Law) has worked on a number of use of force issues and adopted four resolutions: Self-defence (27 October 2007, Santiago); Humanitarian action (27 October 2007, Santiago); Military assistance on request (8 September 2011, Rhodes); Authorization of the use of force by the United Nations (9 September 2011, Rhodes). See also the ‘Complementary Report’ on ‘Humanitarian intervention/humanitarian actions’ by the Secretary General of the Institut, Joe Verhoeven, for the Tokyo session in 2013.

<sup>9</sup> *Nicaragua v. United States of America*, *supra* n. 2, at para. 190. See also J. A. Green, “Questioning the Peremptory Status of the Prohibition of the Use of Force”, in 32 *Michigan Journal of International Law* 215 (2011); S. T. Helmersen, “The Prohibition of the Use of Force as *Jus Cogens*: Explaining Apparent Derogations”, in 61 *Netherlands International Law Review* 167 (2014); A. de Hoogh, “*Jus Cogens* and the Use of Armed Force”, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at pp. 1161-1186; Henderson, *supra* n. 8, at pp. 24-25.

<sup>10</sup> 6 U. N. C. I. O. Docs. 334 (1945), at p. 609; 3 U.N.C.I.O. Docs. 251 (1945), at pp. 253-254; Dinstein, *supra* n. 8, at p. 90.

<sup>11</sup> *Nicaragua v. United States of America*, *supra* n. 2, at para. 228 (financing the *contras*).

<sup>12</sup> See, for example, L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents* (Boston: World Peace Foundation, 1946), at p. 70; N. Schrijver, “Article 2, paragraphe 4”, in J. Cot *et al.* (eds.), *La Charte des Nations Unies* (Paris: Economica, 3<sup>rd</sup> ed., 2005), at pp. 437-466; A. Randelzhofer and O. Dörr, “Article 2(4)”, in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. I (Oxford: Oxford University Press, 3<sup>rd</sup> ed., 2012), at pp. 200-234, MN 16-27; R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), at p. 248; Dinstein, *supra* n. 8, at p. 88; American Law Institute, *Restatement of the Law – Third. The Foreign Relations Law of the United States* (St. Paul: American Law Institute Publishers, 1990), at p. 383; H. Wehberg, “L’interdiction du recours à la force: Le principe et les problèmes qui se posent”, in 78 *Recueil des Cours* 1 (1951), at pp. 68-69; A. Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Brussels: Bruylant, 2000), at pp. 36-37; D. Kritsiotis, “Topographies of Force”, in Y. Dinstein and M. N. Schmitt (eds.), *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007), at p. 68.

<sup>13</sup> Friendly Relations Declaration, *supra* n. 2.

<sup>14</sup> *Ibid.* See also *Nicaragua v. United States of America*, *supra* n. 2, at para. 228.

<sup>15</sup> See sections B.2.c, B.2.d and C.1 below.

Charter demonstrates that the inclusion of the reference to territorial integrity or political independence was not intended to narrow the prohibition. Rather, it was an addition intended to emphasise and recognise the equal sovereignty of weaker or post-colonial states.<sup>16</sup> Second, Article 2(4) goes on to state “or in any other manner inconsistent with the Purposes of the United Nations”. It is difficult to envisage a use of force without the consent of the territorial State that does not in some measure go against its “territorial integrity or political independence”, as those terms are used in Article 2(4); at San Francisco, it was made clear that “the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase ‘or in any other manner’ was designed to ensure that there should be no loopholes”.<sup>17</sup>

A further question is whether there is any threshold of seriousness below which a use of force does not fall within the Article 2(4) prohibition. While it has been claimed that there is a *de minimis* threshold,<sup>18</sup> there is no conclusive evidence to support either this or the contrary view. Cases in which States did not claim a violation of Article 2(4) do not necessarily prove that an incident was below the force threshold, but may simply indicate a political decision not to invoke a violation of Article 2(4).<sup>19</sup> There may also be law enforcement activities such as the enforcement of a State’s fisheries jurisdiction, kept within a limit of reasonableness and necessity,<sup>20</sup> which do not qualify as a use of force for the purposes of Article 2(4). Of course, a law enforcement situation may evolve into one involving a prohibited use of force.<sup>21</sup> It may be that the differentiation in these cases should be based on the level of force or the nature of force (i.e. excluding such operations due to the nature of force being a recognised and allowed form of law enforcement, rather than considering them to be force that is below the Article 2(4) threshold).<sup>22</sup>

The relatively wide net cast by Article 2(4) reflects the UN Charter’s overall objective to reduce the use of force by States to the point where it can only take place with UN Security Council authorisation or in self-defence against an armed attack. Nonetheless, even a wide interpretation of the notion of ‘use of force’ under Article 2(4) has its limits. Economic pressure, as noted earlier, is excluded in this context. And the limitation to armed or physical force may face certain challenges in light of potential future developments, such as certain cyber operations.<sup>23</sup>

### ‘Armed attack’

The term ‘armed attack’, which appears in Article 51 of the UN Charter, provides the trigger for the exercise of the right of self-defence, thus requiring an understanding of which acts qualify as armed attacks for this purpose. Depending upon the interpretations given to the thresholds of ‘use of force’ and ‘armed attack’, conflation of the two terms may have dangerous implications. The comparatively wide approach often advanced with regard to the prohibition of the threat or use of force is understandable in light of the Charter’s aims to minimise recourse

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<sup>16</sup> Brownlie notes that it was “not intended to be restrictive, but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect”. See Brownlie, *supra* n. 8, at p. 267.

<sup>17</sup> 6 U.N.C. I. O. Docs. 334 (1945), at pp. 334-335. See also the rejection of the UK argument in *Corfu Channel*, *supra* n. 2.

<sup>18</sup> *Nicaragua v. United States of America*, *supra* n. 2, at paras. 191, 195; Eritrea-Ethiopia Claims Commission – Partial Award, *Jus Ad Bellum* – Ethiopia’s Claims 1-8, 19 December 2005, XXVI RIAA 457, at para. 11.

<sup>19</sup> See, for example, the Rainbow Warrior incident, during which French military agents carried out an operation in New Zealand’s territory, which included the use of explosives and led to serious damage of property and death. For a description of the case, see M. Pugh, “Legal Aspects of the *Rainbow Warrior* Affair”, in *36 International & Comparative Law Quarterly* 655 (1987).

<sup>20</sup> Cf. *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, *ITLOS Reports 1999*, p. 10, at pp. 61-62, para. 155. In *Spain v. Canada*, the ICJ found that “the use of force authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures”, and hence that it had no jurisdiction (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 466, para. 84); but note *Guyana v. Suriname*, where – controversially – an arbitral tribunal regarded a coast guard vessel instructing an oil rig to leave a disputed maritime area as “an explicit threat that force might be used”, which in the circumstances was “in contravention of the Convention [UNCLOS], the UN Charter and general international law” (*Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, 30 RIAA 1 (2007), at paras. 439, 445).

<sup>21</sup> T. Ruys, *Armed Attack and Article 51 of the UN Charter* (Cambridge: Cambridge University Press, 2010), at pp. 12-13.

<sup>22</sup> See also related debate in section B.2.d below.

<sup>23</sup> See section C.2 below.

to force. However, if ‘force’ and ‘armed attack’ were to be seen as one and the same, the more acts that are banned as a result of being considered ‘force’, the more acts would have to be accepted as ‘armed attacks’ which trigger the right to self-defence – thereby widening the circumstances in which States can justify forcible reaction and leading to higher incidence of armed conflict. On the other hand, as has been reflected in the view of some States,<sup>24</sup> it may be regarded as equally dangerous to see a gap between ‘use of force’ and ‘armed attack’, since doing so arguably invites States to engage in forcible coercion below the threshold of ‘armed attack’, knowing that law-abiding States cannot respond with force, or invites all States to engage in levels of violence that they assess will not meet the threshold, thereby increasing the risks of, perhaps, unintended conflict.

Whatever position one might take with regard to the desirability of a gap between the thresholds of the two terms, the UN Charter predicates the right to resort to self-defence upon an ‘armed attack’; the term ‘armed attack’ therefore requires a definition of its own. There is some controversy with regard to a number of elements. The first is whether there is a threshold which can be measured in terms of scale and effects and whether this excludes so-called ‘minor border incidents’. In the 1986 *Nicaragua* merits judgment, the ICJ asserted that it was necessary “to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”.<sup>25</sup> The Court explained that the difference between ‘armed attacks’ and less grave forms of the use of force was primarily one of ‘scale and effects’ and gave an example of acts which did not constitute armed attacks, but which could nonetheless qualify as a less grave form of the use of force, that is, “assistance to rebels in the form of the provision of weapons or logistical or other support”.<sup>26</sup>

These statements have given rise to controversy. The Court’s exclusion of ‘mere frontier incidents’ has come in for particular criticism.<sup>27</sup> State practice indicates that small-scale border attacks involving the use of lethal force are not excluded from the concept of ‘armed attack’ and may give rise to the right of self-defence.<sup>28</sup> Overall, it would appear that the determining criteria would more appropriately be centred upon questions of scale and effects of the attack. Moreover, in practice it appears that the gravity threshold attached to armed attacks is not markedly high, and would include most uses of force likely to cause casualties or significant property damage. As such, if there is a gap between ‘use of force’ and ‘armed attack’, it would be relatively narrow. The gravity of the attack would nevertheless be a crucial factor in assessing the necessity and proportionality of a forcible response.<sup>29</sup>

A further issue is whether hostile intent must be displayed. Reference may be made to the Definition of Aggression, the case-law of the ICJ and State practice to support the argument that it is a relevant factor for determining whether an ‘armed attack’ has occurred.<sup>30</sup> Yet, the better view may be that while hostile intent is

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<sup>24</sup> Speech by Harold Koh, then-Department of State Legal Adviser, to U.S. Cyber Command on September 18 2012, at p. 7 (available at: <[www.harvardilj.org/wp-content/uploads/2012/12/Koh-Speech-to-Publish1.pdf](http://www.harvardilj.org/wp-content/uploads/2012/12/Koh-Speech-to-Publish1.pdf)>). See also W. H. Taft, “Self-Defense and the Oil Platforms Decision”, in 29 *Yale Journal of International Law* 295 (2004); M. Matheson, *International Civil Tribunals and Armed Conflict* (Leiden: Martinus Nijhoff, 2012), at pp. 252-255.

<sup>25</sup> *Nicaragua v. United States of America*, *supra* n. 2, at para. 191. See also J. A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart Publishing, 2009), at pp. 31-36.

<sup>26</sup> *Nicaragua v. United States of America*, *supra* n. 2, at para. 195 (“Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States”). In the *Oil Platforms* case, the Court repeats the distinction between “the most grave forms of the use of force” and “other less grave forms”, and reaffirms that only the former qualify as ‘armed attacks’ (*Oil Platforms*, *supra* n. 2, at paras. 51, 64).

<sup>27</sup> The critics doubtlessly share Fitzmaurice’s earlier view that “[t]here are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave”. See G.G. Fitzmaurice, “The Definition of Aggression”, in 1 *International & Comparative Law Quarterly* 137 (1952), at p. 139.

<sup>28</sup> See, for example, statements by Pakistan, Thailand, Cambodia and Israel, in relation to border incidents. In particular, the 2006 conflict between Israel and Hezbollah in Lebanon and Israel included disagreement over the initial categorisation of the opening incident in July 2006, which might be considered as a ‘border incident’. The majority of States speaking on this matter appeared to support the invocation of Article 51 self-defence by Israel (including eleven of the Security Council members), although many of them simultaneously expressed concerns over the proportionality and nature of Israel’s response. For discussion of these cases see Ruys, *supra* n. 21, at pp. 156-157, 452-453. See also discussion of the differing views in Gray, *supra* n. 8, at pp. 177-183.

<sup>29</sup> See section B.2.a below.

<sup>30</sup> Ruys, *supra* n. 21, at p. 29.

not an essential element of an armed attack, the existence of mistake or accident is highly relevant in deciding whether the use of force in self-defence is necessary.<sup>31</sup>

Another question is whether a number of incidents emanating from the same source and within a similar timeframe, which alone might not have met the threshold for an armed attack, might be considered in combination as an armed attack: the so-called accumulation of events theory.<sup>32</sup> There is some, not entirely consistent, support for the theory,<sup>33</sup> but it is unclear whether it has been widely accepted. The accumulation of smaller attacks may, however, be relevant from the point of view of anticipatory self-defence insofar as these incidents might in some circumstances support the case for likelihood of an imminent attack.<sup>34</sup> They could also affect the modalities of self-defence when assessing the necessity and proportionality of the force being used.<sup>35</sup>

As regards emanations of a State such as embassies and warships, practice indicates that no territorial nexus is needed, and attacks on them, and also in some circumstances on merchant vessels, may constitute armed attacks for the purposes of self-defence.<sup>36</sup> Finally, can attacks against the nationals of a State abroad be considered armed attacks against that State? The question of the rescue of nationals abroad is dealt with in section B.2.d below.

## **Part B: Lawful uses of force**

The UN Charter contains provision for two exceptions to the prohibition on the use of force in Article 2(4): Security Council authorization (**B.1**); and self-defence (**B.2**). Consent of the territorial State (**B.3**) is not a true exception, since where it is present there is no use of force contrary to Article 2(4).

### **B.1. Security Council authorization**

An authorization to use force by the UN Security Council constitutes a lawful exception to the prohibition of the use of force in Article 2(4). The legal source of the Council's power to authorize the use of force is rooted in Chapter VII of the Charter, which concerns action with respect to threats to the peace, breaches of the peace, and acts of aggression.<sup>37</sup> Having said this, it is worth noting that the power of the Council to authorize individual States or coalitions of States to use force on its behalf is not explicit in Chapter VII (or elsewhere in the Charter). It was originally envisaged that forces made "available to the Security Council" by Member States under Article 43 would undertake forcible actions, as required, at the Council's behest.<sup>38</sup> However, no such standing force materialised post-1945, and the Council's practice of authorizing Member States to act under Chapter VII has evolved over time.<sup>39</sup>

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<sup>31</sup> See J. A. Green, "Self-Defence: A State of Mind for States?", in 55 *Netherlands International Law Review* 181 (2008).

<sup>32</sup> See, generally, D. W. Bowett, "Reprisals Involving Recourse to Armed Force", in 66 *American Journal of International Law* 1 (1972), at p. 5; Gray, *supra* n. 8, at pp. 164-165.

<sup>33</sup> In particular, the ICJ has tentatively appeared to accept the theory in principle. See *Nicaragua v. United States of America*, *supra* n. 2, at para. 231 (considering whether certain incursions into the territories of Honduras and Costa Rica could be treated "as amounting, singly or collectively, to an armed attack..."); *Oil Platforms*, *supra* n. 2, at para. 64 (taking the view that the question was whether the attack in question, "either in itself or in combination with the rest of the 'series...of attacks' ... can be categorized as an 'armed attack' on the United States [but that] ... [e]ven taken cumulatively ... these incidents do not seem to the Court to constitute an armed attack on the United States..."); *DRC v. Uganda*, *supra* n. 2, at para. 146 ("on the evidence ... even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC").

<sup>34</sup> See section B.2.b below.

<sup>35</sup> See section B.2.a below.

<sup>36</sup> Ruys, *supra* n. 21, at pp. 32-34; UNGA res. 3314 (XXIX), at para. 3(d). For merchant vessels, see *Oil Platforms*, *supra* n. 2, at paras. 64, 72.

<sup>37</sup> As opposed to Chapter VI, which deals with the pacific settlement of disputes.

<sup>38</sup> See E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart, 2004), at pp. 256-262.

<sup>39</sup> *Ibid.* This evolution of the power of the Council to authorise force is strengthened when one considers Articles 42 and 48 of the Charter together.

In order to act under Chapter VII, the Council must determine the existence of a “threat to the peace, breach of the peace, or act of aggression” (Article 39). Such a determination is normally expressly included in a resolution by which the Council exercises its Chapter VII powers.<sup>40</sup> Having made such a determination, the Council can then, *inter alia*, “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security...” (Article 42). This has long been accepted as including the power to authorize States, or in some cases international organizations,<sup>41</sup> to use force.

As a matter of legal clarity, it is desirable that authorizing resolutions make reference to Chapter VII, or Article 42, as they usually do, but this is not essential. What *is* essential is a wording in a Council decision that authorizes the use of force. This does not mean that the Council must explicitly refer to the “use of force” in the relevant resolution, which – indeed – is not its practice; instead, it is accepted that when the Council authorizes States to take “all necessary means” or “all necessary measures” such terms may, and usually do, include the use of force.<sup>42</sup> Clarity in this regard is essential.

The resolution will describe the task that is to be performed by the authorized operation and will frequently require reports to the Council on how it is conducted. Such resolutions ought to be clearly drafted, though sometimes the need for agreement within the Council can lead to ambiguities.<sup>43</sup> In interpreting a resolution, all the circumstances can be taken into account, and recourse may be had, *inter alia*, to statements made by Council members at the time of adoption.<sup>44</sup> However, while Council resolutions can be ambiguous and may require careful interpretation, there is no such thing as an ‘implied authorization’ to use force: force has either been authorized by the resolution or it has not.

The degree of Council oversight of authorized operations raises important policy questions. Among the questions that arise are the breadth of the authorization; the nature of any requirement to report to the Council; and whether a particular authorization is time-limited.<sup>45</sup> Authorized uses of force must be both necessary and proportional. They must be necessary in two senses. First, the Council should only authorize force if it is satisfied that non-forcible measures “would be inadequate or have proved to be inadequate” (Article 42). Second, force on the part of the authorized State(s) must be necessary to achieve the mandate actually provided by the Council. Similarly, authorized uses of force must be proportional in two senses. First, Article 42 allows the Council to take action that is “necessary to maintain or restore international peace and security”, which suggests that it should only authorize action that is proportional to the necessity of that purpose. Second, for the State(s) using force, the action must be proportional to the goals established by the authorization.<sup>46</sup> Certainly, at times, these requirements – and the scope of the Council’s respective authorizations more generally – have been stretched, which has had implications for the efficacy of the collective security system envisaged by the Charter.

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<sup>40</sup> It is *not* the case that a reference to Chapter VII in a Security Council resolution necessarily indicates that the use of force has been authorized. The Council may make recommendations under Chapter VII, as well as take decisions. Furthermore, the Council may exercise Chapter VII powers short of the use of force: it can “call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable” (Article 40), or take measures not involving the use of armed force (Article 41).

<sup>41</sup> It is worth noting that Chapter VIII explicitly provides that the Council may utilize regional arrangements or agencies for enforcement action under its authority (Article 53). However, Article 53 contains the important proviso that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”.

<sup>42</sup> It has been suggested that the term “all necessary means” might have a narrower scope than “all necessary measures”. However, while the Security Council tended to use the former when authorizing force in the 1990s, and the latter when authorizing force since 2000 (with “all necessary means” being more commonly reserved for post-millennial peacekeeping operations), there is little to suggest that the differing terminology has any implications for the scope of the authorization of the Council in practice. See N. Blokker, “Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?”, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at p. 213.

<sup>43</sup> See, for example, some of the discussions over the possible ambiguities in UNSC res. 2249 (2015) in M. Wood, “The Use of Force against Da’esh and the *Jus ad Bellum*”, in 1 *Asian Yearbook of Human Rights and Humanitarian Law* 9 (2017).

<sup>44</sup> On the interpretation of Security Council resolutions, see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94.

<sup>45</sup> Blokker, *supra* n. 42, at pp. 202-226.

<sup>46</sup> On necessity and proportionality in relation to Security Council authorization, see generally J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), at pp. 188-212.

The reluctance of some members of the Security Council to authorize the use of force in Syria in 2013, for example, may have stemmed in part from what they saw as overbroad interpretations of previous authorizations.

It is regrettably the case that Security Council authorizations are sometimes ambiguous as to the scope and timing of the action that they authorize, and in other respects. It is important that the Council make every effort, on a matter as significant as the authorization of the use of force, to be as clear as possible in the circumstances. The ‘revival’ argument advanced by the US and others in relation to the 2003 intervention in Iraq highlighted some of the interpretative difficulties in relation to authorizing resolutions, and raised significant questions over the integrity of the Council-authorization process.<sup>47</sup> This is not the place to explore the arguments in detail.<sup>48</sup> However, it is worth recalling that – while resolution 1441 (2002) did not employ the phrase “all necessary means/measures”, and explicitly provided Iraq with “a final opportunity to comply” – the US (and allies) argued that, together with resolutions 678 (1991) (which authorized force in response to the invasion of Kuwait), and 687 (1991) (which revoked that authorisation subject to certain conditions), resolution 1441 amounted to the revival of a previously granted authorization. The argument was that resolution 1441 found Iraq to be in breach of conditions set out in resolution 687, thus, ‘reviving’ the original authorization of 678. This argument has, however, been found unpersuasive by a clear majority of scholarly commentators.<sup>49</sup> This matter was discussed at length, for example, in the reports of the Netherlands (Davids) and UK (Chilcot) Iraq Inquiries.<sup>50</sup> Although the Chilcot Inquiry refrained from reaching determinations of law,<sup>51</sup> it hardly presented the UK legal arguments in a favourable light, concluding that “the UK’s actions undermined the authority of the Security Council”.<sup>52</sup> Another example where the interpretation and application of an authorization resolution proved very controversial was resolution 1970 (2011) concerning Libya.<sup>53</sup>

It has been suggested that Security Council endorsement should be seen as politically desirable, even in cases of self-defence, where it is legally not needed (and that this can be done without affecting the right of self-defence).<sup>54</sup> There have indeed been cases where the Security Council has acknowledged the right of self-defence, without authorizing the use of force.<sup>55</sup> It has sometimes been claimed that the Security Council has authorized the use of force retrospectively (as opposed to merely condoning it), but whether this has happened in practice is doubtful.<sup>56</sup> The fact that the Council takes action to restore or maintain international peace and security after an unlawful (or questionable) use of force cannot in itself be seen as an endorsement of the original use of force, as was, for example, claimed by some after the Kosovo intervention. Any other approach would have the undesirable effect of making Security Council action less likely in situations where it is needed.

## B.2. Self-Defence

Self-defence is the second exception to the prohibition of the use of force in Article 2(4) of the UN Charter. The Charter contains an inherent tension between recognising the right of States to defend themselves, while aiming

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<sup>47</sup> See the US position in W. Taft and T. Buchwald, “Preemption, Iraq, and International Law”, in 97 *American Journal of International Law* 557 (2003).

<sup>48</sup> Writing on the legality of the Iraq intervention is extensive. See, for example, S. Murphy, “Assessing the Legality of Invading Iraq”, in 92 *Georgetown Law Journal* 173 (2004).

<sup>49</sup> J. Lobel and M. Ratner, “By Passing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires, and the Iraqi Inspection Regime”, in 93 *American Journal of International Law* 124 (1999).

<sup>50</sup> Rapport Commissie-Davids, Rijksoverheid (Dutch Government), 12 January 2010 (Davids Commission) (available at: <[www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2010/01/12/rapport-commissie-davids/rapport-commissie-irak.pdf](http://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2010/01/12/rapport-commissie-davids/rapport-commissie-irak.pdf)>); Report of the Iraq Inquiry (Report of a Committee of Privy Counsellors), 6 July 2016 (Chilcot Inquiry) (available at: <[www.iraqinquiry.org.uk/the-report](http://www.iraqinquiry.org.uk/the-report)>).

<sup>51</sup> Chilcot Inquiry, at paras. 99-100. See also C. Henderson, “Reading Between the Lines: The Iraq Inquiry, Doctrinal Debates, and the Legality of Military against Iraq in 2003”, in 87 *British Yearbook of International Law* (2017, forthcoming).

<sup>52</sup> Chilcot Inquiry, at para. 439.

<sup>53</sup> Henderson, *supra* n. 8, at pp. 137-139.

<sup>54</sup> L. van den Herik and N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013), at p. 715. See also UNSC res. 2249 (2015).

<sup>55</sup> See, in particular, the resolutions passed in the immediate aftermath of 9/11 (UNSC res. 1368 (2001) and 1373 (2001)), and – more controversially – UNSC res. 2249 (2015) on Da’esh.

<sup>56</sup> Henderson, *supra* n. 8, at pp. 149-154.

to restrict the use of force through Article 2(4). Since the principle of self-defence, though not its conditions and qualifications, is uncontroversial, it is common for States against which accusations of aggression are levelled to assert that their use of force was a lawful act of self-defence. It is therefore imperative that the right to self-defence is interpreted in a manner that allows States to protect themselves from armed attacks, without becoming a pretext for unwarranted uses of force. Accordingly, Article 51 of the Charter was formulated thus:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

There are a number of restrictions and procedural requirements included in Article 51. Above all, the right of self-defence hinges upon the need to respond to an armed attack, highlighting the need for clarity on the latter concept.<sup>57</sup> While an armed attack is a necessary trigger for the exercise of lawful self-defence, it is not in itself sufficient – once the right is triggered it is then further regulated by various legal constraints. The role of the Security Council in maintaining international peace and security remains prominent even during the exercise of self-defence by a State. The State must immediately report its exercise of self-defence to the Security Council, thereby giving the Council an opportunity to act if it has not done so already, and placing the matter in the public arena. While failure to report (or to report in a timely manner) could support an evidentiary claim that the action was not one of self-defence, such a procedural failure does not invalidate the lawful exercise of the right of self-defence.<sup>58</sup>

Article 51 provides that the right of self-defence may only be exercised until “the Security Council has taken measures necessary to maintain international peace and security”. Again, this is in line with the Security Council’s role as envisaged by the Charter. The article does not elaborate on what these measures might be,<sup>59</sup> but by specifying that these are measures “necessary to maintain international peace and security”, an element of effectiveness is assumed in relation to the victim State’s need to defend itself against the attack. Accordingly, should the Security Council, for example, adopt a resolution that condemns the attack but does not contain measures capable of obviating the need for self-defence, the right to act in self-defence would continue. Security Council resolutions may call for – or even demand – a ceasefire, and the Council has the power to require States, including the defending State, to cease all use of force.<sup>60</sup> If the initial attacking State complies with the Council’s demands, then failure by the victim State to cease its own use of force may very well change its conduct from lawful self-defence into an illegal use of force.<sup>61</sup>

The inherent right of self-defence derives from customary international law and is recognized in the UN Charter, and its exercise must conform to both. However the right may have been interpreted pre-1945, following the

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<sup>57</sup> See section A.2 above.

<sup>58</sup> J. A. Green, “The Article 51 Reporting Requirement for Self-Defense Actions”, in 55 *Virginia Journal of International Law* 563 (2015); Gray, *supra* n. 8, at p. 122; Ruys, *supra* n. 21, at pp. 70-72; C. Kreß, *supra* n. 2, at p. 590.

<sup>59</sup> These would include the possibility of Chapter VII enforcement measures of collective security. H. Kelsen, “Collective Security and Collective Self-Defense under the Charter of the United Nations”, in 42 *American Journal of International Law* 783 (1948), at p. 793.

<sup>60</sup> Dinstein, *supra* n. 8, at pp. 238-239; C. Henderson and N. Lubell, “The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions”, in 26 *Leiden Journal of International Law* 369 (2013).

<sup>61</sup> See, for example, Bowett, *supra* n. 8, at pp. 196-197. Questions in this regard were raised in the context of Security Council resolutions and measures during the 1990-1991 Gulf War. According to Schachter, for instance, “[t]he intent of the Council as expressed in its decision would determine whether the right to use force in self-defense had been suspended by the Council”, and “[s]ignificantly, no government contested the ultimate right of the Council to prohibit all military action by a state, even if defensive” (O. Schachter, “United Nations Law in the Gulf Conflict”, in 85 *American Journal of International Law* 452 (1991), at pp. 458-459). See also the analysis in N. Krisch, *Selbstverteidigung und kollektive Sicherheit (Self-Defense and Collective Security)* (Berlin: Springer, 2001), at pp. 101-117.

virtually universal participation in the Charter there should be no substantive discrepancies between the customary right and the Charter's provision.

### **B.2.a. Necessity and Proportionality**

Once self-defence has been triggered by an armed attack, any ensuing action taken in self-defence must adhere to the requirements of necessity and proportionality. These are fundamental principles, and the International Court of Justice has noted that: “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”<sup>62</sup> The application of both necessity and proportionality presupposes that the measures are being taken for a legitimate end. If a State engages in a prohibited use of force, it cannot then argue that the measures were lawful on the basis of necessity and proportionality; the analysis on the basis of these principles only enters the frame if the measures can in principle be seen as self-defence. With regard to armed attacks that have already occurred,<sup>63</sup> there are two primary approaches to defining the legitimate aims of action taken in self-defence: a narrower view allowing only for halting and repelling an ongoing attack; and a wider view that includes halting and repelling but also allows for preventing further attacks which are to be expected under the circumstances.<sup>64</sup>

Advocates of the narrower approach argue that the notion that self-defence can only be used to end the current attack resonates best with the aims of the UN Charter, by minimising the possibilities for lawful recourse to force.<sup>65</sup> There is, however, also significant support and practical reason to accept that the UN Charter should be read as accepting that self-defence measures may take into account the need to ensure that the attacker has not simply momentarily refrained from operations while the attacks are in fact set to continue in the near future. It would appear therefore that while self-defence cannot justify ‘all-out’ war to destroy the enemy, the forcible measures can include the need to defend the State from the continuation of attacks, and not only repel the attack of the moment.<sup>66</sup> This is separate from the debate over anticipatory action when there has not previously been an actual armed attack;<sup>67</sup> rather it is a question of whether the risk of further attacks can be seen as a continuation of the initial armed attack and prevention of these being a part of the same self-defence action. The risk of abuse will be reduced by two considerations: if the initial armed attack is over, there is more opportunity for the Security Council to be in a position to take measures that would prevent the need for further self-defence (and if the victim State does engage in force despite the Security Council obviating the need, this force would be unlawful<sup>68</sup>). Moreover, any measures taken in self-defence must in all circumstances adhere to the principle of necessity (and it is less likely that force will be necessary if an attack being responded to has ended). After the event, States may need to be able to present evidence of their necessity to use force, whether to the Security Council or elsewhere at a later date.

The principle of necessity requires that the self-defence measures be required in order to achieve the legitimate ends sought. Its formulation is often traced to the 1837 *Caroline* incident and the ensuing exchange between Great Britain and the United States.<sup>69</sup> In this exchange, the following was noted that:

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<sup>62</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* n. 2, at para. 41; *Nicaragua v. United States of America*, *supra* n. 2, at para. 176; *DRC v. Uganda*, *supra* n. 2, at para. 147.

<sup>63</sup> See section on B.2.b below.

<sup>64</sup> For a detailed analysis with further possible approaches, see D. Kretzmer, “The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*”, in 24 *European Journal of International Law* 235 (2013). See also the response in the same issue: G. Nolte, “Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer”, pp. 283-290.

<sup>65</sup> *Ibid.*

<sup>66</sup> S. Etezazian, “The Nature of the Self-Defence Proportionality Requirement”, in 3 *Journal on the Use of Force and International Law* 260 (2016), at pp. 264-277.

<sup>67</sup> See section on B.2.b below.

<sup>68</sup> *Supra* n. 61 and accompanying text.

<sup>69</sup> This revolved around an incident in which the British took forcible measures against Canadian rebels in US territory. See R. Jennings, “The *Caroline* and *McLeod* Cases”, in 32 *American Journal of International Law* 82 (1938); J. A. Green, “Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense”, in 14 *Cardozo Journal of International and Comparative Law* 429 (2006); C. Greenwood, “*Caroline*, The”, in *Max Planck Encyclopedia of Public International Law*, online (2009); C. Forcese, *Destroying the*

“It will be for [Her Majesty’s Government] to show, also, that the local authorities of Canada, - even supposing the necessity of the moment authorized them to enter the territories of the United States at all, - did nothing unreasonable or excessive; *since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it*”.<sup>70</sup>

And that:

“Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the ‘*necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation*’”.<sup>71</sup>

In practice, ‘no choice of means’ is interpreted as requiring that forcible measures be the only available effective measures for self-defence. It does not mean that extensive non-forcible measures must always be attempted, as there may be circumstances (such as, e.g., an ongoing barrage of missiles) in which such options cannot reasonably be explored in time and are manifestly futile in the specific context. However, should there be an option of non-forcible measures which would alleviate the need for force while achieving the defence of the State, then forcible measures would not be necessary.<sup>72</sup>

Many of the debates over adherence to the proportionality principle in specific cases have in fact been questions of necessity rather than proportionality.<sup>73</sup> Such debates have spoken of (dis)proportionality when taking the view that the forcible measures were not necessary in order to defend the State. This is, in fact, a question of the principle of necessity rather than proportionality. In essence, necessity responds to the question of whether the self-defence measures are required in order for the State to defend itself. That includes the questions of whether any force is necessary at all, as well as whether the specific amount of force used is required to achieve the aim of self-defence. The principle of proportionality is additional to and separate from necessity. Proportionality is a formula requiring the balancing of two elements against each other.<sup>74</sup> It might be said that the measures taken in self-defence must be proportionate to the armed attack which preceded them. However, such a pure ‘equivalence of scale’ approach to proportionality is incorrect: the preferred position is that the measures be balanced in light of the aims of the self-defence. As examined above, the legitimate aims in this context are to halt any ongoing attack and prevent the continuation of further attacks.<sup>75</sup> Accordingly, the proportionality assessment should weigh the relative interests against each other, thereby assessing whether the harmful effects of the force taken in self-defence are outweighed by achieving the legitimate aims.<sup>76</sup>

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*Caroline: The Frontier Raid that Reshaped the Right to War* (Ontario: Irwin Law, 2018); M. Wood, “The Caroline Incident (1837)”, in T. Ruys, O. Corten and A. Hofer (eds.) *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018), at pp. 5-14.

<sup>70</sup> Letter from Mr. Webster to Lord Ashburton, Department of State, Washington, 27 July 1842 (available at: <[www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm](http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm)>) (emphasis added).

<sup>71</sup> Letter from Mr. Webster to Lord Ashburton, Department of State, Washington, 6 August 1842 (available at: <[www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm](http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm)>) (emphasis added).

<sup>72</sup> See Addendum – Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (A/CN.4/318/Add.5-7) (available at *Yearbook of the International Law Commission*, 1980, Vol. II(1)), at para. 120 (“The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force”). See also the analysis of practice in Green, *supra* n. 25, at pp. 76-80; *Oil Platforms*, *supra* n. 2, at para. 76.

<sup>73</sup> See analysis in Kretzmer, *supra*, n. 64.

<sup>74</sup> The variables in the formula will vary and proportionality requires different elements to be measured depending on the legal context, with differences between international human rights law, the *jus in bello*, and the *jus ad bellum*.

<sup>75</sup> Ago report, *supra* n. 72, at para. 121; F. Berman, C. Greenwood, M. Shaw and M. Wood, all in E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* – working paper (The Royal Institute of International Affairs, 2005), at pp. 52-57.

<sup>76</sup> Kretzmer, *supra*, n. 64.

## B.2.b. Anticipatory Self-Defence<sup>77</sup>

Whether or not a State may rely on self-defence in order to take forcible measures prior to an armed attack is one of the clearest instances in which the line between self-defence and unlawful use of force is most often debated.<sup>78</sup> The English-language version of the Charter provides that the right to self-defence is available “if an armed attack occurs”. A temporal aspect is reflected in the use of the word “occurs”, which appears to rule out the possibility of taking action in self-defence in advance of an armed attack occurring.<sup>79</sup> The ensuing debate over the legality of anticipatory self-defence has been one of the most hotly contested issues surrounding the right to self-defence under international law.<sup>80</sup>

Positions in the past were likely to advocate one of two possibilities: first, that Article 51 of the Charter has firmly shut the door on any possibility of anticipatory action, and that recourse to self-defence will only become available if an armed attack has actually occurred.<sup>81</sup> Second, that self-defence is permissible in the face of imminent attacks.<sup>82</sup> A wide interpretation of the latter position, sometimes termed preventive self-defence and which permitted self-defence in connection with more temporally remote threats, was seen to have been adopted by the George W. Bush administration following 9/11, with particular reference to ‘rogue States’, terrorists, and weapons of mass destruction.<sup>83</sup> However, this expanded interpretation received very limited support, and has been superseded by later clarification of US policy reaffirming the requirement of an imminent attack.<sup>84</sup> There is still a debate between supporters of the original two positions stated above; there would seem to be increasing support for the view that the right to self-defence does exist in relation to manifestly imminent attacks, narrowly construed.<sup>85</sup> This position has received further validation in the reports of the UN Secretary-General, although there does not appear to be a clear majority for either side of the debate.<sup>86</sup>

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<sup>77</sup> The associated terminology is itself a subject of debate. The most often used terms are ‘anticipatory’, ‘pre-emptive’ and ‘preventive’. There are differing interpretations and differentiations between these terms, none of which can claim to be objectively correct. For the purposes of this report, ‘anticipatory’ is used as a general term for self-defence measures taken prior to an armed attack; ‘pre-emptive’ and ‘preventive’ are often in connection with measures claimed to be for purposes of defence against future attacks, even if said attacks are not imminent or specific.

<sup>78</sup> For example the Osirak attack. See T. Ruys, “Israel’s Airstrike Against Iraq’s Osirak Nuclear Reactor - 1981”, in T. Ruys, O. Corten and A. Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018), at pp. 329-341.

<sup>79</sup> While it is the English version of the Charter that is at the heart of the debates and most often at the centre of discussion, the French version (and Spanish) appears to present a less restrictive temporal phrase (“dans le cas où un Membre des Nations Unies est l’objet d’une agression armée”).

<sup>80</sup> Contrast, for example, the views of Bowett, *supra* n. 8, at pp. 191-192, and Brownlie, *supra* n. 8, at pp. 275-278.

<sup>81</sup> J. Kunz, “Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations”, in 41 *American Journal of International Law* 872 (1947), at p. 878.

<sup>82</sup> Bowett, *supra* n. 8, at pp. 191-192.

<sup>83</sup> See, for example, *The National Security Strategy of the United States of America* (The White House, 2002), at p. 15. See also the discussion over widening the scope of anticipatory self-defence in J. Bybee, “Authority of the President Under Domestic and International Law to Use Military Force Against Iraq – Memorandum Opinion for the Counsel to the President”, in 26 *Opinions of the Office of Legal Counsel* (2002), at pp. 194-195; A. Arend, “International Law and the Preemptive Use of Military Force”, in 26 *Washington Quarterly* 89 (2003), at pp. 97-98.

<sup>84</sup> *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* (The White House: 2016), at p. 9.

<sup>85</sup> “The Chatham House Principles of International Law on the Use of Force by States in Self-Defence”, in 55 *International & Comparative Law Quarterly* 963 (2006), at p. 965; C. Greenwood, V. Lowe, P. Sands and M. Wood, all in E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* – working paper (The Royal Institute of International Affairs, 2005) (“It is therefore the Government’s view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote”); Attorney General Lord Goldsmith, House of Lords, Hansard, 21 April 2004, column 370. See also the analysis of views in Ruys, *supra* n. 21, at pp. 324-342.

<sup>86</sup> See *A More Secure World: Our Shared Responsibility*, Report of the Secretary General’s High-level Panel on Threats, Challenges and Change (UN, 2004), at para. 188. See also *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General of the United Nations for Decisions by Heads of State and Government in September 2005* (UN, 2005), at para. 124 (“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened”). But see the reactions of a significant number of States that were opposed to a temporal widening of the right to self-defence, including Pakistan, Mexico and Turkey, as discussed in Ruys, *supra* n. 21, at pp. 339-341.

Although the matter remains unsettled, there may be reason to accept that when faced with a specific imminent armed attack based on objectively verifiable indicators, States may engage in measures to defend themselves in order to prevent the attack.<sup>87</sup> Any such measures would have to conform to all the earlier stated requirements of armed attack,<sup>88</sup> necessity and proportionality, which will further constrain the anticipatory use of force, and must give primacy to effective measures by the Security Council. If a State falsely describes its forcible measures as anticipatory self-defence when there was in fact no imminent armed attack to justify such action, its use of force will be examined in light of the prohibitions of the use of force and aggression.

### B.2.c. Self-Defence against Non-State Actors

An additional controversial area in the realm of self-defence is the question of resort to self-defence against non-state actors located in other States. The use of force in such circumstances is not a new phenomenon and has occurred in numerous situations over the past two centuries.<sup>89</sup> The legal debate in the context of self-defence became, however, a particularly prominent issue following the attacks against the US in September 2001. One approach to self-defence assumes that its primary relevance is in the context of armed attacks by States (or acts of groups attributable to States).<sup>90</sup> This seemed to be the position of the ICJ in its 2004 advisory opinion,<sup>91</sup> although in a later case the Court appeared to have noted that the issue was not yet settled, and the interpretation of the Court's position has been the subject of much debate.<sup>92</sup> Article 51 does not specify that the armed attack which gives rise to self-defence must have been carried out by a State, and therefore leaves room for a reading that includes attacks by non-state actors that have no connection to the State. Moreover, there is considerable State practice stretching back to the *Caroline* incident, and especially since 2001, which lends support to the claim of self-defence in such circumstances.<sup>93</sup> Ultimately, the argument in support of this rests upon the notion that self-defence is a right that exists in order that States are able to protect themselves when attacked from outside their borders. Self-defence is a right triggered by an act, rather than the actor. The source of attack does not change the fact that the State must be able to stop it from causing harm. Although the issue is still debated,

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<sup>87</sup> White House, *supra* n. 84; UK Attorney General's Speech at the International Institute for Strategic Studies on 11 January 2017 (available at: <[www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies](http://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies)>); Australian Attorney-General's lecture, "The Right of Self-Defence Against Imminent Armed Attack in International Law", at the T C Beirne School of Law, University of Queensland, 11 April 2017 (available at: <[www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#more-15255](http://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#more-15255)>). For an analysis of the meaning of imminence, see N. Lubell, "The Problem of Imminence in an Uncertain World", in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at p. 697.

<sup>88</sup> Meaning that there must be not merely an imminent attack, but an imminent *armed* attack. See *Nicaragua v. United States of America*, *supra* n. 2, at para. 35 ("what is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not been raised") (emphasis added), and para. 194 ("the issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised") (emphasis added); T. D. Gill, "The Law of Armed Attack in the Context of the Nicaragua Case", in 1 *Hague Yearbook of International Law* 30 (1988), at p. 35.

<sup>89</sup> See the *Caroline* case of 1837, and the US incursion into Mexico in 1916, as examples for the pre-Charter practice of States. For a detailed account of the practice of States before 1945 and up to 1994 (with further references), see C. Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen in Fällen staatlicher Verwicklung in Gewaltakte Privater* (Berlin: Duncker & Humblot, 1995).

<sup>90</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* n. 2, at para.139; J. Kunz, *supra* n. 81, at p. 878; M. Bothe, "Terrorism and the Legality of Pre-emptive Force", in 14 *European Journal of International Law* 227 (2003), at p. 233; S. Alexandrov, *Self-Defense Against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996), at pp. 182-183; G. Simpson, in E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* – working paper (The Royal Institute of International Affairs, 2005), at pp. 27-28.

<sup>91</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* n. 2, at para. 139.

<sup>92</sup> See, for example, the debate surrounding the ICJ's position on this issue in *DRC v. Uganda: S. A. Barbour and Z. A. Salzman*, "The Tangled Web: The Right of Self-Defense against Non-State Actors in the *Armed Activities Case*", in 40 *New York University Journal of International Law and Politics* 53 (2007-2008); A. Orakhelashvili, "Legal Stability and Claims of Change: The International Court's Treatment of *Jus ad Bellum* and *Jus in Bello*", in 75 *Nordic Journal of International Law* 371 (2006), at pp. 394-396; S. Verhoeven, "A Missed Opportunity to Clarify the Modern *Jus ad Bellum*: Case Concerning *Armed Activities on the Territory of the Congo*", in 45 *Military Law and Law of War Review* 355 (2006), at pp. 358-360.

<sup>93</sup> For example, US operations against Al-Qaida in Afghanistan and the support this received from other States; Iran and Turkey (separately) against Kurdish groups in Iraq; Israel against Hezbollah in Lebanon and Islamic Jihad in Syria; Ethiopia in Somalia, and others. See the analysis in N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), ch. 1-3.

there is growing recognition – including through State practice – that there are certain circumstances in which a State may have a right of self-defence against non-state actors operating extraterritorially and whose attacks cannot be attributed to the host State.<sup>94</sup> The military operations by numerous States from a variety of regions on Syrian territory against the so-called Islamic State since 2015 have, in particular, demonstrated the readiness of a considerable number of States to invoke Article 51 in the context of operations against a non-state actor.<sup>95</sup>

Nonetheless, the modalities of how self-defence might be carried out in this context do raise considerable challenges. A key question in this regard is that allowing for self-defence against non-state actors in the territory of a third State can appear to allow States forcibly to violate the territorial integrity of that State and cause harm on its territory, when the latter does not bear responsibility for the armed attack. The State in which the non-state actor is located (the host State) is likely in these circumstances to consider itself a victim of unlawful force. Consequently, the debate over self-defence against the non-state actor itself is inextricably linked to the question of whether this violates the prohibition of the use of force against the host State. Care must be taken not to conflate a number of issues: i) whether, conceptually, a State may invoke the right to self-defence in the case of an attack by an extraterritorial non-state actor; ii) what steps must be taken before any such right can be exercised; iii) whether force against the non-state actor can be distinguished from force against the host State; iv) whether the host State might be in violation of international law due to the activities of the non-state actor; v) if so, whether this justifies force against the host State itself.

While the first two issues can be dealt with separately,<sup>96</sup> the last three are often intertwined. The fact that a non-state actor was operating from its territory does not automatically open the host State to lawful forcible measures against it by the victim State. Indeed, claiming such a position would risk neglecting the implications created by allowing for force directly against a State that might not be responsible for the initial armed attack.<sup>97</sup> If the armed attack by the non-state actor can be attributed to the host State, then the right to self-defence may be directed against the State. However, without attribution of the armed attack, the host State may have been in violation of other rules of international law – including Security Council resolution 1373 (2001)<sup>98</sup> – but it is mistaken to say that such a violation automatically allows for forcible measures against the host State. Not all violations of international law give rise to the right to use force in self-defence. Accordingly, if the armed attack

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<sup>94</sup> Henderson, *supra* n. 8, ch. 8 (with references and further reading). See also O. Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, in 11 *Houston Journal of International Law* 309 (1988-1989), at p. 311; F. Berman, D. Bethlehem, C. Greenwood, V. Lowe, A. Roberts, P. Sands and M. Shaw, all in *Chatham House Principles of International Law*; S. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?”, in 99 *American Journal of International Law* 62 (2005), at pp. 64, 67-70; Wood, *supra* n. 43; M. E. O’Connell, C. J. Tams and D. Tladi, “Self-Defence Against Non-State Actors”, in A. Peters and C. Marxsen (eds.), *The Max Planck Trialogues on the Law of Peace and War*, Vol. I (2018).

<sup>95</sup> See letters to the Security Council by Canada, Turkey, the UK, the US, Australia, France, Denmark, Norway and Belgium: Letter dated 31 March 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (S/2015/2)2; Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (S/2015/563); Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (S/2015/688); Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (S/2014/695); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (S/2015/693); Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council (S/2015/745); Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council (S/2016/34); Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council (S/2016/523); Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council (S/2016/523). These letters reflect a mixture of claims relying on collective and individual self-defence. Claims of collective self-defence in aid of Iraq must still rest on the recognition that Iraq had the right to engage in cross-border self-defence against IS. See also White House, *supra* n. 87, at pp. 9-10.

<sup>96</sup> *Supra* n. 62-76, n. 89-94 and accompanying text.

<sup>97</sup> This is a particular danger for smaller/weaker States. See D. Ahmad, “Defending Weak States Against the ‘Unwilling or Unable’ Doctrine of Self-Defense”, in 9 *Journal of International Law and International Relations* 1 (2013).

<sup>98</sup> See, more generally regarding the legal requirement of due diligence in relation to terrorist activity on a State’s territory, R. Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (The Hague: TMC Asser Press, 2008).

is legally one of the non-state actor alone, the victim State may have a right to use force in self-defence against the armed group, but not against the State. It is precisely in such cases, where the actions of the non-state actor cannot be attributed to a State, where the heart of the debate lies.

A distinction must be made between force against the non-state actor and force against the host State.<sup>99</sup> In practical terms, this amounts to a differentiation between forcible measures taken *against* the host State, as opposed to forcible measures taken *within* the host State. However, this distinction does not absolve the need to ensure that Article 2(4) is not violated. The preferred approach to Article 2(4) of the Charter aims to prevent any such semantic exception to the prohibition of the use of force. Indeed, such a distinction is not dissimilar to certain arguments aiming to justify humanitarian intervention as not violating Article 2(4). No matter how temporary and limited the incursions are, they will still fall within the scope of Article 2(4).<sup>100</sup> Accordingly, using force within the territory of another State – even if the forcible measures are limited to strikes against a non-state actor – must be considered as within the notion of force as it exists in Article 2(4) of the Charter. Distinguishing between forcible measures *within* but not *against* the State does not, therefore, provide a solution for the *jus ad bellum* concerns.<sup>101</sup> As a consequence, the use of force in such circumstances will not be lawful unless justified by self-defence or Security Council authorisation. By accepting that self-defence may be invoked against a non-state actor located in another State, even absent attribution to this other State, the ensuing non-consensual force would not be a violation of Article 2(4) as it would be a lawful exercise of an exception to the prohibition.

Self-defence against non-state actors must adhere to all the requirements and restrictions placed on the exercise of self-defence generally. It can only be triggered by an armed attack, and it has been argued that the required gravity threshold for determining an event as an armed attack may be higher in the context of triggering a right to self-defence against non-state actors.<sup>102</sup> Moreover, its exercise is conditioned by the requirements of necessity and proportionality.<sup>103</sup> In the current context, necessity requires that, if possible, the host State be given the opportunity to halt and prevent the attacks by the non-state actor through its own law enforcement or other lawful means. This should be viewed as the preferred solution and the necessity principle requires it to be pursued within all reasonable bounds before force is employed.

Not infrequently, reference is made in this context to a requirement that the host State be unable or unwilling to take adequate action against the non-state actor.<sup>104</sup> Rather than being relied upon as a new justification for resort to force, the unable or unwilling test should be viewed as a component of the necessity criterion. It is an additional test that must be satisfied when taking action against a non-state actor on the territory of another State in response to an armed attack, and does not obviate the need to adhere to all other obligations attached to the exercise of self-defence. Even if seeking resolution through the host State proves futile, forcible measures by the victim State must be proportionate and be limited to those strictly necessary in the context of self-defence

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<sup>99</sup> For example, an air attack against an isolated camp of the non-state actor might have little effect on the host State itself (Columbia against the FARC in Ecuador; Israel against the Islamic Jihad in Syria). See also Canada's position that "Canada's military actions against ISIL in Syria are aimed at further degrading ISIL's ability to carry out attacks. These military actions are not aimed at Syria or the Syrian people, nor do they entail support for the Syrian regime", as well as Australia, both at *supra*, n. 76.

<sup>100</sup> Randelzhofer and Dörr, *supra* n. 12, at pp. 215-217.

<sup>101</sup> There will however remain a difference with regard to the *jus in bello*, since the classification of a conflict as international or non-international will largely rest on the question of the parties to the conflict. If there is no fighting between the two States but only between the victim State and the armed group, then this may be classified as a non-international armed conflict. See E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012).

<sup>102</sup> See discussion in C. Kreß, "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts", in 15 *Journal of Conflict & Security Law* 245 (2010), at p. 249; Lubell, *supra* n. 93, at pp. 50-51; F. Berman, D. Bethlehem, C. Greenwood, V. Lowe, A. Roberts, P. Sands and M. Shaw, all in *Chatham House Principles of International Law*.

<sup>103</sup> See section B.2.a above.

<sup>104</sup> See letters by Australia, Canada, Turkey and the US, *supra* n. 95; Henderson, *supra* n. 8, ch. 8, sections 3.2 and 3.2.1; A. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extra-Territorial Self-Defence", in 52 *Virginia Journal of International Law* 483 (2012); J. Brunnée and S. J. Toope, "Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?", in 67 *International & Comparative Law Quarterly* 263 (2018).

against the non-state actor. Accordingly, even if one accepts the right of self-defence against non-state actors, if the forcible measures taken by the victim State go beyond what is necessary and proportionate in relation to the threat from the non-state actor, this may be an instance in which self-defence comes in conflict with Article 2(4).<sup>105</sup> The situation has an added layer of complexity when the non-state actor is operating from more than one State. In such circumstances, a legitimate claim to engage in self-defence on the territory of one State does not provide automatic licence to use force on the territory of other States; the *jus ad bellum* rules as stated above must be applied in relation to each use of force in a new State.<sup>106</sup>

Although recent State practice can be read as allowing self-defence in these circumstances, certain aspects of the above discussion continue to be debated. It must be noted, in this context, that the Security Council has the power to take action directed against threats to the peace by armed groups, and has taken measures of this nature in the past.<sup>107</sup> By acting decisively in future situations of such type, the Council could reduce the risk of States taking matters into their own hands.

### **B.2.d. Rescue of Nationals Abroad**

The rescue of nationals abroad has long presented a challenge to the application of the rules on the use of force. It is the subject of contrasting opinions, numerous cases of inconsistent State practice, and ambiguous case-law.<sup>108</sup> The first question to be asked is whether the sending of armed forces to rescue nationals on the territory of another State is an act within the scope of use of force covered by Article 2(4) of the UN Charter. If so, then there is a need to enquire whether there are legal grounds for allowing such operations, or whether they might be a violation of Article 2(4) of the UN Charter.

Arguments for excluding such operations from the scope of Article 2(4) rest partly upon the notion that the force is not intended to jeopardise the “territorial integrity or political independence” of the other State. This, however, appears to contradict the widely accepted approach to Article 2(4) which, as explained in section A.2 above, should include any forcible measures on the territory and without the consent of the territorial State.<sup>109</sup> Nevertheless, while adhering to this approach to Article 2(4), there may be room to describe certain rescue operations as not consisting of a use of force, for example in the case of operations to evacuate nationals from within general unrest or conflict (as opposed to situations in which they are being attacked or held by a specific party).<sup>110</sup> This will depend on the position taken in relation to the existence of a *de minimis* threshold and whether it depends on the nature or level of force.<sup>111</sup> Acceptance of such an approach would be enhanced in cases in which the sending State does not intend to engage in any hostilities and, in particular, if there was at least an attempt to seek permission and if the territorial State does not actively object to the evacuation operations.

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<sup>105</sup> See, for example, debates over Israel’s actions against Hezbollah in Lebanon in 2006. There is strong argument that Israel had the right of self-defence against the Hezbollah, but that the nature of Israel’s response was disproportionate. See also Separate Opinion of Judge Simma in *DRC v. Uganda*, *supra* n. 2, at paras. 13-14.

<sup>106</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A /68/382), 13 September 2013, at para. 89.

<sup>107</sup> The Security Council has directly addressed armed groups in a number of resolutions, for example when demanding that “the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization” (UNSC res. 1244 (1999)). The Council has also authorized action in a number of situations involving violence by armed groups, for example in Somalia (UNSC res. 1725 (2006)), in the Democratic Republic of the Congo (UNSC res. 1484 (2003)), and more recently in the context of the ISIL (UNSC res. 2249 (2015)).

<sup>108</sup> See N. Ronzitti, “Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity”, in 34 *Netherlands International Law Review* 407 (1987); W. Friedmann, “United States Policy and the Crisis of International Law”, in 59 *American Journal of International Law* 857 (1965); L. C. Green, “Rescue at Entebbe - Legal Aspects”, in 6 *Israel Yearbook on Human Rights* 312 (1976), at p. 312; L. Henkin, “The Invasion of Panama under International Law: A Gross Violation”, in 29 *Columbia Journal of Transnational Law* 293 (1990); R. Wedgwood, “The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion”, in 29 *Columbia Journal of Transnational Law* 609 (1991); T. Ruys, “The Protection of Nationals’ Doctrine Revisited”, in 13 *Journal of Conflict & Security Law* 233 (2008).

<sup>109</sup> See earlier section on the scope of Article 2(4) of the UN Charter and similar discussion in sections on self-defence against non-state actors and on humanitarian intervention.

<sup>110</sup> ‘Non-combatant evacuation operations’ as opposed to ‘forcible hostage rescues’.

<sup>111</sup> *Supra* n. 18-21.

If an operation involves or is expected to involve hostilities, then it must be viewed as within the scope of Article 2(4).<sup>112</sup> If so, for such operations to be lawful, there must exist independent grounds that justify them. A number of possibilities have been raised over the years, including self-defence, reliance on the principle of necessity, and the notion of a separate right to conduct rescue operations. While there has been some support for the second and third theses,<sup>113</sup> the prevailing view is that, in the post-Charter era, only self-defence can provide for legal recourse to unilateral force that would otherwise violate Article 2(4). The only way to rely on the right to self-defence, under current prevailing views, would be to establish the occurrence of an armed attack. As discussed, armed attacks can include actions outside the victim State's territory, although there is disagreement whether attacks against the nationals of a State, not displaying even a distant resemblance with domestic law enforcement, may be included. The view that they are is stronger if it is clear that the nationals have been targeted as a result of their nationality and are seen by their attackers as individual manifestations of their State. The case of Entebbe, where the hijackers released all hostages other than those of Israeli nationality, is a case in point.<sup>114</sup>

Reliance on the self-defence justification will also require abiding by the restrictions placed on the exercise of self-defence. This means that any operation will be subject to the self-defence principles of necessity and proportionality. These must be adhered to strictly in order to prevent the possibility of abusing claims of rescuing nationals as a cover for forcible operations with ulterior motives.<sup>115</sup>

### B.3. Consent

The existence of consent may provide an additional lawful basis for a State's armed forces to enter and/or be stationed on the territory of another State. Yet, it should not be thought of as an exception to the prohibition of the use of force. The exceptions of Security Council authorisation and self-defence (as discussed above) remain in principle violations of Article 2(4) of the UN Charter, but are permitted under international law. On the other hand, a State's use of force on the territory of another State with its consent involves no breach of Article 2(4) *ab initio*. If consent to the deployment of military personnel is validly given, there is no use of force against the host State, and – in reference to Article 2(4) – the action is not against the “territorial integrity or political independence” of the consenting State, nor does it go against the purposes of the UN.<sup>116</sup>

However, while one may talk of the absence of a violation of *State* sovereignty, it is rather *governmental* authority which is at stake. Indeed, States are permitted in principle to use force in another State, providing it is at the invitation or with the consent of the *government* of the State concerned.<sup>117</sup> Conversely, non-governmental entities are not able to invite or consent to the use of force, whether directly or indirectly, upon the territory of a

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<sup>112</sup> See sections A.2 and A.3 above.

<sup>113</sup> N. Ronzitti, “The Expanding Law of Self-Defence”, in 11 *Journal of Conflict & Security Law* 343 (2006), at p. 354; D. Bowett, “The Use of Force for the Protection of Nationals Abroad”, in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff, 1986), at p. 43.

<sup>114</sup> Dinstein, *supra* n. 8, at pp. 277-279; C. Kreß and B. Nußberger, “The Entebbe Raid – 1976”, in T. Ruys, O. Corten and A. Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018), at pp. 220-233.

<sup>115</sup> See debates over the US operations in Grenada (1983) and Panama (1989/90): N. Hajjami, “The Intervention of the United States and other Eastern Caribbean States in Grenada - 1983”, in T. Ruys, O. Corten and A. Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018), at pp. 385-394; N. Tsagourias, “The US Intervention in Panama – 1989”, in T. Ruys, O. Corten and A. Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018), at pp. 426-438.

. The latter also raises the question of how to define ‘nationals’. It has been suggested that there must be a genuine link between the State and the nationals, and it cannot include ‘manufactured nationality’. See Independent International Fact-Finding Mission on the Conflict in Georgia (2009); J. A. Green, “Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defence”, in J. A. Green and C. P. M. Waters (eds.), *Conflict in the Caucasus: Implications for International Legal Order* (Basingstoke: Palgrave Macmillan, 2010), at pp. 54-79.

<sup>116</sup> M. Byrne, “Consent and the Use of Force: An Examination of ‘Intervention by Invitation’ as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen”, in 3 *Journal on the Use of Force and International Law* 97 (2016), particularly at p. 99.

<sup>117</sup> *Nicaragua v. United States of America*, *supra* n. 2, at para. 246.

State. The ICJ has held that there is no “right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State”.<sup>118</sup> Nevertheless, this relatively simple statement is deceptive in that the identity of those providing consent, the parameters of consent, the determination of its existence, and the implications of its withdrawal raise important questions in relation to the prohibition of force.<sup>119</sup>

The fact that the government of a State is able to provide consent to the use of force upon its territory opens up questions with regard to identifying the government. The entity consenting to the use of force may be the *de jure* governmental authority even if it no longer controls some or all of the State’s territory. In other words, it represents the constitutional government and/or democratically elected power. An entity may also have governmental power through exercising effective control over the territory and population of a particular State.<sup>120</sup> External recognition by other States may affect the international legitimacy of a governmental regime.<sup>121</sup> The Security Council has sometimes played a significant role in making determinations regarding the governmental regime.<sup>122</sup>

Requests or approval coming from members of a *previous* government no longer in office, or from the military/intelligence services not authorised to speak on behalf of the State, will not suffice. For consent to be recognised as emanating from the State, it must be freely given by the authorised representatives of the government.<sup>123</sup> Furthermore, consent must be given expressly prior to the entry of the armed forces into the State,<sup>124</sup> and situations of apparent contradiction between a public denial of consent occurring alongside secret approval by the same government, are a matter for evidentiary proceedings for determination of the said consent. Similarly, consent could potentially be valid whether it is given publicly or in private, but the key issue is likely to be whether the consent can be evidenced.

Generally speaking, consent can allow for the sending of armed forces into a State following the request by its government for assistance in quelling an insurrection.<sup>125</sup> It has been argued that if such internal unrest is to reach the level of a civil war then assistance to either side is prohibited, unless one side is being given assistance in which case it might be possible for States to counter-intervene on the side of the other.<sup>126</sup> However, State practice such as France in Mali, and the United States and its allies in Afghanistan and Iraq, might suggest otherwise. What *is* clear is that the giving of consent, while possibly ruling out a violation of Article 2(4), will not authorize an otherwise unlawful act. For example, if the requesting government is either attempting to quash a legitimate struggle for self-determination or engaging in massive human rights violations amounting to crimes

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<sup>118</sup> *Ibid.*, at para. 206; *DRC v. Uganda*, *supra* n. 2, at para. 164.

<sup>119</sup> For discussion, see Byrne, *supra* n. 116; G. H. Fox, “Intervention by Invitation”, in M. Weller (ed.) *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at p. 834.

<sup>120</sup> As a matter of international law, effective control is arguably the determinative factor for governmental authority. As stated in the *Tinoco* case, it is ‘independence and control’ that entitles an entity to be classed as a national personality: see *Aguilar-Amory and Royal Bank of Canada Claims*, in 1 *RIAA* 369 (1923), at p. 381. James Crawford has also noted, in reference to this arbitral decision, that “[i]n the case of governments, the “standard set by international law” is so far the standard of secure de facto control of all or most of the state territory” (J. Crawford, *Brownlie’s Principles of Public International Law* (Oxford: Oxford University Press, 2012), at p. 152).

<sup>121</sup> See M. Shaw, *International Law* (Cambridge: Cambridge University Press, 6th ed., 2014), at pp. 454-459.

<sup>122</sup> For discussion, see B. Nußberger, “Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen’s ‘Model Transitional Process’”, in 4 *Journal on the Use of Force and International Law* 110 (2017); C. Kreß and B. Nußberger, “Pro-democratic Intervention in Current International Law: the Case of the Gambia in 2017”, in 4 *Journal on the Use of Force and International Law* 239 (2017).

<sup>123</sup> This would usually be the head of State, head of government or foreign minister. On the challenges in determining the required authority, see G. Hafner (Rapporteur), Sub-group on Intervention by Invitation, 10th Commission, Present Problems of the Use of Force in International Law, Institut de Droit International – Session de Santiago (Paris: Pedone, 2007), at p. 264; Corten, *supra* n. 8, at pp. 422-437.

<sup>124</sup> Report of the International Law Commission, 53rd session, 2001 (A/56/10), at p. 73; Corten, *supra* n. 8, at pp. 267-269.

<sup>125</sup> Shaw, *supra* n. 121, at p. 1151. State practice shows that States are more likely to provide assistance when the insurrection is supported by a third State, or if their own interests are threatened (*ibid.*, at p. 1152).

<sup>126</sup> Gray, *supra* n. 8, at p. 81.

under international law, then consent will not legitimise the manner of the force used by the sending State.<sup>127</sup> In other words, while consent may preclude a violation of the *jus ad bellum*, it cannot justify violations of the *jus in bello* or international human rights law.

Although there were differing views about providing support to groups fighting to achieve an internationally recognised right to external self-determination, or in cases of popular mass uprisings against abusive regimes, it is generally prohibited to forcibly intervene on behalf of a rebel movement.<sup>128</sup>

In the absence of the requisite consent from the government, the sending of armed forces will violate the prohibition of the use of force. There may also be circumstances in which consent is given but a violation nevertheless ensues. This can occur if the sending State uses force in a manner going beyond the scope requested and agreed to by the territorial State.<sup>129</sup> If consent has been given and is subsequently withdrawn, failure by the sending State to proceed with removal of armed forces will be in violation of international law.<sup>130</sup> Should the remaining troops engage in hostilities or forcibly resist the territorial State, then this may be an unlawful use of force.<sup>131</sup> If, however, they remain within the military bases previously established by consent – especially during a period of negotiations over procedure for withdrawal – then their mere presence would not necessarily be an unlawful use of force, even though it may be a violation of State sovereignty and allow for non-forcible counter-measures.

## Part C: Particular issues

### C.1. Humanitarian intervention

The term ‘humanitarian intervention’ as used in this report<sup>132</sup> refers to the use of force across State borders by a State (or group of States acting together) aimed at preventing or ending a humanitarian catastrophe affecting individuals other than its own citizens, without the permission of the State within whose territory force is applied.<sup>133</sup>

When authorized by the Security Council, in conformity with the procedures and requirements set out in section B.1 of this report, humanitarian intervention will be lawful as a response to a ‘threat to the peace’, under the normal operation of the Council’s Chapter VII powers.<sup>134</sup> The legally contentious question is, therefore, whether

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<sup>127</sup> Declaration on Friendly Relations, *supra* n. 2; Shaw, *supra* n. 135, at p. 1148; E. Lieblich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge, 2013), at p. 188 (“the absence of effective protection can adversely affect the government’s legal capacity to express consent to external intervention”).

<sup>128</sup> Shaw, *supra* n. 121, at p. 1152; Gray, *supra* n. 8, at pp. 108-118. See also the related discussion in section C.1. There has, however, been some debate as to whether this prohibition is restricted to direct forcible intervention and the provision of arms and training, or whether it also extends to non-lethal equipment and supplies.

<sup>129</sup> UNGA res. 3314 (XXIX), Article 3(e)

<sup>130</sup> *Ibid.*; *DRC v. Uganda*, *supra* n. 2, at para. 105 (“The Court thus concludes that the various treaties directed to achieving and maintaining a ceasefire, the withdrawal of foreign forces and the stabilization of relations between the DRC and Uganda did not (save for the limited exception regarding the border region of the Ruwenzori Mountains contained in the Luanda Agreement) constitute consent by the DRC to the presence of Ugandan troops on its territory for the period after July 1999, in the sense of validating that presence in law”).

<sup>131</sup> There was some debate as to whether the movements of Russian troops beyond their bases in Sevastopol in Ukraine in 2014 was a violation of Article 3(e) of the Definition of Aggression (1974) given that no shots were fired. See M. Weller, “The Shadow of the Gun”, in 164 no. 7599 *New Law Journal* (2014) (noting, but not subscribing to this possible argument).

<sup>132</sup> It has sometimes, in the past, been used to refer to rescue of nationals abroad. See section B.2.d above.

<sup>133</sup> This definition is based on, but adapted from, the definition set out in J. L. Holzgrefe, “The Humanitarian Intervention Debate”, in J. L. Holzgrefe and R. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), at p. 18.

<sup>134</sup> The UN General Assembly endorsed this view in the 2005 World Summit Outcome (see n. 156 below). See also V. Lowe and A. Tzanakopoulos, “Humanitarian Intervention”, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, Vol. V (Oxford: Oxford University Press, 2012) at p. 50, para. 15 (“Security Council practice since 1990 has extended the interpretation of “threat to the peace”, to the point that *it is now accepted* that [this includes] egregious and widespread human rights violations within a single State”) (emphasis added); I. Österdahl, *Threat to the Peace: The interpretation by the Security Council of Article 39 of the UN Charter* (Uppsala: Iustus, 1998), at pp. 112-118; I. Österdahl, “By All Means, Intervene! The Security Council and the Use of Force under Chapter VII of the UN Charter in Iraq (to

force can be used in the absence of Security Council authorization in instances where gross violations of fundamental human rights are occurring (or will occur). There has been a long-running debate<sup>135</sup> as to whether States can use force lawfully in such circumstances (i.e., whether humanitarian intervention acts as an exception to the prohibition in Article 2(4), additional to self-defence and authorization by the Security Council).

The text of the UN Charter does not support a right to use force in order to avert a humanitarian catastrophe. Occasionally it has been argued that the formulation “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations” in Article 2(4) may open a small window of textual ambiguity in this regard, in that a targeted humanitarian action may not be caught within this phrase and will, thus, not violate the prohibition on the use of force at all.<sup>136</sup> However, the Charter’s *travaux préparatoires* unambiguously confirm that, apart from a use of force in self-defence, the prohibition contained in Article 2(4) was intended to be all-inclusive with respect to unilateral uses of force.<sup>137</sup>

As such, the only way in which humanitarian intervention (without the consent of the State in which the intervention occurs or authorization by the Security Council) could possibly be seen as a legal exception to the prohibition of the use of force is if State practice and *opinio juris* were to be found establishing its status as an additional exception in customary international law. There are a small number of instances of State practice, since the end of the Cold War,<sup>138</sup> which could support the emergence of a customary right of humanitarian intervention. The first of these was the use of force by the Economic Community of West African States in Liberia in 1990, to end massive atrocities occurring during the civil war.<sup>139</sup> The military intervention by ECOWAS was not internationally condemned as a violation of the prohibition of the use of force. Indeed, the President of the Security Council issued two statements to the effect that members of the Security Council “commend[ed] the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia”<sup>140</sup> and “to bring the Liberian conflict to a speedy conclusion”.<sup>141</sup>

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protect the Kurds), in Bosnia, Somalia, Rwanda and Haiti”, 66 *Nordic Journal of International Law* 241 (1996); N. MacQueen, *Humanitarian Intervention and the United Nations* (Edinburgh: Edinburgh University Press, 2011), particularly at pp. 42-66.

<sup>135</sup> See I. Pavone, “The Crisis of the ‘Responsibility to Protect’ Doctrine in the Light of the Syrian Civil War”, in 1 *The Global Community Yearbook of International Law and Jurisprudence* 103 (2014), at p. 132 (referring to unilateral humanitarian intervention as a “never ending dilemma”).

<sup>136</sup> See, for example, F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Irvington-On-Hudson: Transnational, 2<sup>nd</sup> ed., 1997) at p. 151; M. Reisman and M. McDougal, “Humanitarian Intervention to Protect the Ibos”, in R. Lillich (ed.), *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973) at p. 177. This argument was advanced by Belgium in relation to NATO action in Kosovo in 1999: *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Oral Proceedings, Public Sitting (10 May 1999), at p. 12.

<sup>137</sup> See Brownlie, *supra* n. 8, at pp. 266-267 (setting out examples of statements by States from the *travaux préparatoires* that demonstrate this, and concluding that “[t]here is no indication in the records that the phrase [“territorial integrity or political independence”] was intended to have a restrictive effect”).

<sup>138</sup> Some commentators have suggested that there may be State practice during the Cold War that might support the emergence of a customary exception of humanitarian intervention, with the most commonly cited instances being India’s intervention in East Pakistan (Bangladesh) in 1971; Vietnam’s intervention in Cambodia in 1978; and Tanzania’s intervention in Uganda in 1979. See T. Weiss, *Humanitarian Intervention* (Cambridge: Polity Press, 2<sup>nd</sup> ed., 2016), at p. 41 (“In retrospect, all three [of these examples] are frequently cited as evidence of an emerging norm of humanitarian intervention”). However, in all three of these situations, the use of force was primarily portrayed by the intervening State as an exercise of the right of self-defence. See UN Doc. S/PV.1606 (4 December 1971), at pp. 14, 17 (India); UN Doc. S/PV.2108 (11 January 1979), at pp. 12-13 (Vietnam); *Africa Contemporary Records* (1978-1979), at B395, B433 (Tanzania). Moreover, the international reaction to these instances was not such that it could have been interpreted, even implicitly, as embracing the idea of a new unwritten exception to the prohibition of the use of force when force is used to avert an impending humanitarian catastrophe. For the condemnation of these uses of force as violations of the prohibition of the use of force, see, for example, UN Doc. S/PV.1606 (4 December 1971), at pp. 18, 22 (in relation to India’s action); UN Doc. S/PV.2108 (11 January 1979), at p. 10, and UN Doc. S/PV.2110 (13 January 1979), at p. 79 (in relation to Vietnam’s action); and *Keesing’s* 25 (1979) 29841 (in relation to Tanzania’s action).

<sup>139</sup> A. Ofodile, “The Legality of ECOWAS Intervention in Liberia”, in 32 *Columbia Journal of Transnational Law* 380 (1994).

<sup>140</sup> UN Doc. S/22133 (22 January 1991).

<sup>141</sup> UN Doc. S/23886 (7 May 1992). See also UNSC res. 788 (1992) concerning Liberia; C. Walter, “Article 53”, in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. II (Oxford: Oxford University Press, 3<sup>rd</sup> ed., 2012), goes so far as to interpret the latter resolution as a “subsequent and implicit” authorisation by the Security Council in accordance with Chapter VII and Article 53(1) of the UN Charter (at p. 1501, para. 66). However, it is difficult to see how a

Similarly, the United Kingdom advanced a (qualified) humanitarian intervention claim in relation to the establishment of the safe havens in Northern Iraq in the spring of 1991.<sup>142</sup> This was, for the United Kingdom, “the underlying justification of the No-Fly Zones” in northern and southern Iraq.<sup>143</sup> However, it is equally notable that the United States attempted to justify the same operation by reference to Security Council resolution 688, rather than on a separate ground of humanitarian intervention.<sup>144</sup> In this case again, the international community did not deny the legality of the military action.<sup>145</sup>

The most prominent example of State practice relating to the notion of humanitarian intervention is the NATO action in Kosovo in 1999, which still is regularly discussed in this context.<sup>146</sup> The United Kingdom asserted that NATO’s action was “justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe”.<sup>147</sup> Belgium argued that the action in Kosovo was legally justified as humanitarian intervention, on the basis that the use of force was of a nature that did not violate Article 2(4) of the UN Charter.<sup>148</sup> However, no other NATO Member State explicitly justified the action in Kosovo on the basis of humanitarian intervention. The notion of right to use force to avert a humanitarian catastrophe met with significant State opposition following the intervention.<sup>149</sup> Admittedly, the attempt by the Russian Federation to persuade the Security Council to condemn the military intervention by NATO States in Kosovo as a violation of the UN Charter’s prohibition of the use of force failed by 12 votes to 3.<sup>150</sup> Soon thereafter, however, the G77 “rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law”.<sup>151</sup>

The controversy surrounding the Kosovo intervention led to the creation of the International Commission on Intervention and State Sovereignty (ICISS), and its resulting 2001 report: *The Responsibility to Protect*.<sup>152</sup> The 2004 report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*,<sup>153</sup> took up the ‘responsibility to protect’ concept developed by the ICISS, highlighting

“the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent”.<sup>154</sup>

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*subsequent* authorisation by the Security Council could *retroactively* transform unlawful State conduct into lawful State conduct. In any event, Walter appears to recognise that the Security Council reacted *positively* to a use of force which was not based on State consent and which had not been authorised by the Security Council.

<sup>142</sup> See G. Marston (ed.), “United Kingdom Materials on International Law 1992”, in 63 *British Yearbook of International Law* 615 (1992), at pp. 827-828.

<sup>143</sup> *Ibid.*

<sup>144</sup> See N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000), at p. 166.

<sup>145</sup> *Ibid.*, at p. 169; C. Greenwood, *Essays on War in International Law* (London: Cameron & May, 2006), at p. 622.

<sup>146</sup> See, for example, S. Richmond, “Why is Humanitarian Intervention So Divisive? Revisiting the Debate over the 1999 Kosovo Intervention”, in 3 *Journal on the Use of Force and International Law* 234 (2016).

<sup>147</sup> UN Doc. S/PV.3988 (24 March 1999), at p. 12.

<sup>148</sup> See *supra* n. 136.

<sup>149</sup> See, for example, the Ministerial Declaration of the twenty-third Annual Meeting of Ministers of Foreign Affairs of the Group of 77 of 24 September 1999 (UN Doc. A/54/432), at para. 69.

<sup>150</sup> See, for example, Greenwood, *supra* n. 145, at p. 623.

<sup>151</sup> *Supra* n. 149.

<sup>152</sup> *Report of the International Commission on State Sovereignty and Intervention: The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) (available at: <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>>). This was preceded by a report by the Danish Institute for International Affairs. See *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999) (available at: <[www.diiis.dk/files/media/publications/import/extra/humanitarian\\_intervention\\_1999.pdf](http://www.diiis.dk/files/media/publications/import/extra/humanitarian_intervention_1999.pdf)>).

<sup>153</sup> *A More Secure World: Our Shared Responsibility*, *supra* n. 86.

<sup>154</sup> *Ibid.*, at para. 203.

The Secretary-General's 2005 report, *In Larger Freedom*, also commended the responsibility to protect concept.<sup>155</sup> Similarly, and most pertinently, in the 2005 World Summit Outcome, the Heads of State and Government were clear that in case of "genocide, war crimes, ethnic cleansing and crimes against humanity"<sup>156</sup> they were

"prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".<sup>157</sup>

This is a significant political commitment, especially when combined with the *Our Shared Responsibility* and *In Larger Freedom* reports that immediately preceded it. However, crucially, while the 2004 High-level Panel report, the 2005 Secretary-General report and the 2005 World Summit Outcome all endorsed the responsibility to protect concept, none of these documents referred to a unilateral right of humanitarian intervention. Indeed, they each emphasised the need for any forcible action to be authorized by the Security Council. The extensive debates in the General Assembly in April 2005, on the occasion of the presentation of the *In Larger Freedom* report, offered no support for such a right either: those States that addressed the question of humanitarian intervention saw it as a matter to be decided upon by the Security Council, not one where unilateral action was permitted.<sup>158</sup>

It thus appears that the General Assembly (that is to say, the membership of the United Nations as a whole) indicated that enforcement action to protect populations from humanitarian catastrophe is within the remit of the Security Council, and not individual States.

This is not to say that the idea of a customary right of unilateral humanitarian intervention has disappeared. For example, in August 2013, in relation to the Syrian government's alleged use of chemical weapons, the United Kingdom asserted that "a legal basis [to use force was]... available, under the doctrine of humanitarian intervention [subject to certain conditions]...".<sup>159</sup> and took a similar position in April 2018.<sup>160</sup> In 2013, Denmark published a legal opinion that was broadly along the same lines.<sup>161</sup> It is perhaps also notable that, while the United States had not previously advocated for a right of humanitarian intervention, including in relation to the Kosovo conflict,<sup>162</sup> former President Barack Obama asserted, during his 2009 Nobel Lecture, that he took the view "that force can be justified on humanitarian grounds, as it was in the Balkans...".<sup>163</sup>

The right of humanitarian intervention remains controversial among writers. Most<sup>164</sup> are of the view that State practice since 1945 is insufficient to support the conclusion that humanitarian intervention, absent consent or

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<sup>155</sup> *In Larger Freedom: Towards Development, Security and Human Rights for All*, *supra* n. 86, at para 135.

<sup>156</sup> 2005 World Summit Outcome, adopted through UNGA res. 60/1 on 16 September 2005, at para. 139.

<sup>157</sup> *Ibid.*, at para 139. See also para. 138.

<sup>158</sup> See UN Doc. A/59/PV.86 (6 April 2005); UN Doc. A/59/PV.87 (7 April 2005); UN Doc. A/59/PV.88 (7 April 2005); UN Doc. A/59/PV.89 (8 April 2005); and UN Doc. A/59/PV.90 (8 April 2005).

<sup>159</sup> Prime Minister's Office, "Chemical Weapon use by Syrian Regime: UK Government Legal Position", policy paper (29 August 2013) (available at: <[www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version](http://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version)>). See also

<sup>160</sup> Prime Minister's Office, "Syria action – UK government legal position", policy paper (14 April 2018) (available at: [www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position](http://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position)). See also the 8233<sup>rd</sup> meeting of the Security Council on 14 April 2018 (S/PV.8233).

<sup>161</sup> "General Principled Considerations on the Legal Basis for a Possible Military Operation in Syria", UPN Alm.del Bilag (30 August 2013) (available at: <[www.ft.dk/samling/20121/almdel/upn/bilag/298/1276299/index.htm](http://www.ft.dk/samling/20121/almdel/upn/bilag/298/1276299/index.htm)>).

<sup>162</sup> M. Wood, "International Law and the Use of Force: What Happens in Practice?", in 53 *Indian Yearbook of International Law* 346 (2013), at p. 363, n. 64.

<sup>163</sup> B. H. Obama, "A Just and Lasting Peace", Nobel Lecture (10 December 2009).

<sup>164</sup> See N. Rodley, "Humanitarian Intervention", in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at pp. 775-776 (noting that the majority of scholars reject the lawfulness of unilateral humanitarian intervention).

Security Council authorisation, is lawful.<sup>165</sup> Beyond the well-established position of the United Kingdom – which has, since the Cold War, been a leading proponent of an exceptional and strictly limited justification for the use of force by States to avert an overwhelming humanitarian catastrophe<sup>166</sup> – there exists only a limited amount of State practice and *opinio juris* that even potentially could be seen as underpinning a legal basis for unilateral humanitarian intervention.

A minority of writers hold to the view that the use of force to avert a humanitarian catastrophe is lawful,<sup>167</sup> whereas others emphasise that a use of force to avert a humanitarian catastrophe will, if stringent conditions are met, fall into a legal grey area.<sup>168</sup> The existence of such minority positions means, at least, that it is difficult to conclude that a right of humanitarian intervention is unquestionably unlawful, a point that may well be of relevance with respect to the question whether a humanitarian intervention amounts to an “act of aggression, which by its character (...) constitutes a manifest violation of the Charter of the United Nations”. It should finally be noted that the majority *lex lata* conclusion of unlawfulness is without prejudice as to the arguable *lex ferenda desirability* of lawful humanitarian intervention, or the significant moral tensions that exist in relation to the need to balance the protection of human rights with the notion of State sovereignty.<sup>169</sup>

## C.2. Cyber operations

Much has been written in recent times about cyber operations in relation to the prohibition of the use of force and the crucial question of whether a cyber operation might be considered as a breach of Article 2(4) of the UN Charter.<sup>170</sup> The regulation of such operations within an existing armed conflict and the protection of individuals

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<sup>165</sup> See, for example, C. Henderson, “The UK Government’s Legal Opinion on Forcible Measures in Response to the Use of Chemical Weapons by the Syrian Government”, in 64 *International & Comparative Law Quarterly* 179 (2015), at p. 194; Rodley, *supra* n. 164, at pp. 793-794; Corten, *supra* n. 8, at pp. 873-874; S. Murphy, *Humanitarian Intervention: the United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996); Randelzhofer and Dörr, *supra* n. 12, at pp. 224-225; Dinstein, *supra* n. 8, at pp. 73-75; A. Sarvarian, “Humanitarian Intervention after Syria”, in 36 *Legal Studies* 20 (2015); M. Byers and S. Chesterman, “Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law”, in J. L. Holzgrefe and R. Keohane, *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), at pp. 177, 202-203; P. Hilpold, “Humanitarian Intervention: Is There a Need for a Legal Reappraisal?”, in 12 *European Journal of International Law* 437 (2001).

<sup>166</sup> Wood, *supra* n. 162, at pp. 360-362; C. Greenwood, “Humanitarian Intervention: The Case of Kosovo”, in 10 *Finnish Yearbook of International Law* 141 (1999); S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001).

<sup>167</sup> See, for example, Greenwood, *supra* n. 145, at pp. 311, 625; Tesón, *supra* n. 136, at pp. 313-317; V. P. Nanda, “Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti – Revisiting the Validity of Humanitarian Intervention under International Law – Part I”, in 20 *Denver Journal of International Law and Policy* 305 (1992), at pp. 310-311, 334; J-P. Fonteyne, “The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter”, in 4 *California Western International Law Journal* 203 (1974), at p. 269; R. B. Lillich, “Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives”, in J. N. Moore (ed.), *Law and Civil War in the Modern World* (Clark: Johns Hopkins University Press, 1974), at p. 229; M. Weller, “Introduction: International Law and the Problem of War”, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), at pp. 3, 31 (at least leaning in the same direction).

<sup>168</sup> See, for example, A. Roberts, “The So-Called Right of Humanitarian Intervention”, in 3 *Yearbook of International Humanitarian Law* 3 (2000); R. Kolb, *Ius contra Bellum: Le Droit International Relatif au Maintien de la Paix* (Basel/Bruxelles: Helbing Lichtenhahn/Bruylant, 2<sup>nd</sup> ed., 2009), at p. 315; T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), at p. 172; C. J. Tams, “Prospects for Humanitarian Uses of Force”, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at p. 369; J. Trahan, “Defining The ‘Grey Area’ Where Humanitarian Intervention May Not Be Fully Legal, But is Not The Crime of Aggression”, in 2 *Journal on the Use of Force and International Law* 42 (2015), at p. 42.

<sup>169</sup> See, for example, B. Simma, “NATO, the UN and the Use of Force: Legal Aspects”, in 10 *European Journal of International Law* 1 (1999) (examining the Kosovo intervention from a moral perspective, but not arguing that conclusions as to the intervention’s moral desirability meant that it was lawful). It should be noted that some writers have gone further and incorporated, in one form or another, what they see as the ‘moral case for lawfulness’ in their legal analysis of humanitarian intervention. See, for example, Tesón, *supra* n. 136, at pp. 166, 413. However, this approach risks conflating arguments about what the law should be with what the law is.

<sup>170</sup> See, for example, M. Waxman, “Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)”, in 36 *Yale Journal of International Law* 421 (2011); M. Schmitt, “Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework”, in 37 *Columbia Journal of Transnational Law* 885 (1999); M. E. O’Connell, “Cyber Security Without Cyber War”, in 17 *Journal of Conflict and Security Law* 187 (2012); International Group of

from its effects are matters for other branches of international law.<sup>171</sup> There is, however, also the possibility that cyber operations might fall within the scope of use of force under the *jus ad bellum*, and concern over the implications of such a determination. At the outset, it should be clear that types of cyber operations vary considerably and the vast majority of them will fall outside the realm of ‘force’. For example, a large proportion of cyber operations entail hacking into networks in order to retrieve classified information.<sup>172</sup> Other types of operations include those designed to disrupt networks, as seen for example in the operations directed against Estonia and Georgia, which included incidents known as ‘denial of service attacks’, leading to severe disruption of media, government and banking systems.<sup>173</sup> Incidents of this nature (most of them unreported) constitute the majority of known types of cyber operations to date and, other than rare exceptions,<sup>174</sup> the major efforts to regulate and control the risks from cyber operations should therefore be in branches of law other than those relating to force and armed conflict.<sup>175</sup>

Notwithstanding, cyber operations are capable in principle of crossing the threshold into use of force, and in some circumstances if cyber operations directly cause significant damage, the question arises whether they can be said to constitute an armed attack giving rise to a right of self-defence on the part of the victim State. Cyber operations can take place as part and parcel of a wider kinetic attack, as was said to have happened in the Israeli attack on an alleged nuclear development site in Syria.<sup>176</sup> In such cases they are one component of a wider operation clearly involving use of physical force, and can be assessed within the examination of the wider incident. There is, however, the potential for cyber operations alone to directly cause serious harm.<sup>177</sup> Scenarios include using cyber operations to open the flood-gates of a dam; causing a missile defence system to attack inwards; and the ultimate doomsday scenario of causing the meltdown of a nuclear reactor. Unlike the more common hacking into networks to sabotage or steal information, these operations are designed directly to cause significant harm which may result in massive casualties.

In such circumstances, an emerging view is that cyber operations may constitute a use of force or even an armed attack if their scale and effects mirror those of a traditional kinetic use of force or armed attack.<sup>178</sup> Any such

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Experts, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, (Cambridge: Cambridge University Press 2013), ch. II; International Group of Experts, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2017), ch. 14; H. Harrison Dinniss, *Cyber Warfare and the Laws of War* (Cambridge: Cambridge University Press, 2012); H. Lin, “Offensive Cyber Operations and the Use of Force”, in 4 *Journal of National Security Law & Policy* 63 (2010); M. Roscini, *Cyber Operations and the Use of Force in International Law* (Oxford: Oxford University Press, 2014); N. Tsagourias and R. Buchan (eds.), *Research Handbook on International Law and Cyberspace* (Cheltenham: Edward Elgar Publishing, 2015); J. A. Green, “The Regulation of Cyber Warfare under the *Jus ad Bellum*”, in J. A. Green (ed.), *Cyber Warfare: A Multidisciplinary Analysis* (Routledge, 2015).

<sup>171</sup> In particular international humanitarian law and international human rights law.

<sup>172</sup> For example the hacking into government or military networks, such as the ‘Titan Rain’ incident in 2003 when US Defense facilities, NASA labs, Lockheed Martin, and other systems were hacked into and lost many terabytes of information (Chinese sources were alleged to have been behind this operation). See R. Clarke and R. Knake *Cyber War: The Next Threat to National Security and What to Do About It* (HarperCollins, 2010), at pp. 58, 125-126. There have been a number of other such incidents originating from various sources, including those known as ‘Solar Sunrise’ and ‘Moonlight Maze’, as well as operation ‘Buckshot Yankee’. For the latter, see E. Nakashima, “Cyber-Intruder Sparks Massive Federal Response — and Debate Over Dealing with Threats”, *Washington Post* (9 December 2011); for a detailed list of these and others, see Harrison Dinniss, *supra* n. 170, Appendix 1.

<sup>173</sup> See detailed discussion in E. Tikk, K. Kaska and L. Vihul, *International Cyber Incidents: Legal Considerations* (Tallinn: CCD COE Publications, 2010).

<sup>174</sup> See n. 180 below.

<sup>175</sup> See analysis in M. E. O’Connell, *supra* n. 170.

<sup>176</sup> Clarke and Knake, *supra*, n. 172, at pp. 1-8.

<sup>177</sup> Even individuals with a personal agenda have demonstrated the potential for using computer networks to gain control of complex systems and unleash serious damage. For example, see the case of an Australian individual who caused the dumping of sewage into rivers, leading to serious harm to the local environment (R. O’Harrow Jr, “Search Engine Exposes Industrial-Sized Dangers”, *The Sydney Morning Herald*, 4 June 2012). In another case, a disgruntled employee disabled the system for detecting oil pipeline leaks off the Californian coast (D. Kravets, “Feds: Hacker Disabled Offshore Oil Platforms’ Leak-Detection System”, *Wired*, 18 March 2009). See also R. Allison, “Hacker Attack Left Port in Chaos”, *The Guardian*, 7 October 2003.

<sup>178</sup> Tallinn Manual 2.0, *supra* n. 170, at pp. 330-348; M. Schmitt, “‘Below the Threshold’ Cyber Operations: The Countermeasures Response Option and International Law”, in 54 *Virginia Journal of International Law* 698 (2014), at pp. 719-720.

conclusion must be reached with great caution: a wide interpretation of Articles 2(4) and 51 of the Charter in this context may affect the interpretation and debate surrounding other areas of the law of use of force as detailed in this report. Nor does the ‘scale and effects’ criterion give much guidance in view of the questions over the correct thresholds for the separate notions of ‘force’ and ‘armed attack’, as discussed above. As noted, the vast majority of known cyber operations do not reach the thresholds for either use of force or armed attack. An example of the challenge in determining the threshold in this regard was provided in the case of the Stuxnet worm, which was alleged to have led to physical damage to centrifuges at Iranian nuclear facilities.<sup>179</sup> Some commentators have considered this to have passed the threshold for use of force, and possibly even as an armed attack.<sup>180</sup> Moreover, if a conclusion were to be reached that a cyber operation could properly be termed an armed attack, it should be noted that self-defence does not require using the same means as the attack which provided the trigger for its exercise: determining that a cyber operation was an armed attack would therefore unleash the possibility of kinetic force in self-defence.

A particular challenge is raised in this regard by potential cyber operations which cause serious harm not of a direct physical nature, such as creating a major stock exchange crash or disabling the functions of critical infrastructure. There are contrasting opinions on whether this might be considered a use of force, or even an armed attack.<sup>181</sup> On the one hand – and as noted above – economic pressure is not considered to be within the scope of the prohibition on use of force, and financial harm is not usually considered as passing the threshold of armed attack. It could therefore be argued that such operations should be excluded from the scope of armed attacks. It will remain the case that other rules of international law will likely have been violated, including the principle of non-intervention,<sup>182</sup> the due diligence principle<sup>183</sup> and economic and trade agreements. On the other hand, disabling vital infrastructure goes beyond actions such as economic embargoes, as it involves direct invasive measures into the system of another State in order to cause internal harm; moreover, the harm caused could have severe consequences for the State and despite no direct physical effects the harm might be similar as if a missile had struck the infrastructure. The absence of State practice in relation to major cyber operations against critical financial infrastructure makes it difficult to draw definitive conclusions.

Lastly, one of the greatest concerns over cyber operations is that, unlike kinetic attacks for which the origin is usually apparent, the victim State may face great difficulties in identifying the attacker.<sup>184</sup> The accepted rules on State responsibility will apply, but their application will require uncovering the necessary facts in order to attribute the acts to a particular state.<sup>185</sup>

#### **Part D: Aggression**

During the Charter negotiations, the term ‘aggression’ was found to be too controversial for use in demarcating the scope of the right of self-defence; instead that right was made contingent on responding to what was regarded as the more neutral concept of ‘armed attack’.<sup>186</sup> The term ‘act of aggression’ was however used in the Charter in a different context, notably as one of the three circumstances listed in Article 39 (together with ‘threats to the peace’ and ‘breaches of the peace’) in which the Security Council might use its enforcement

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<sup>179</sup> D. Sanger, “Obama Order Sped Up Wave of Cyberattacks Against Iran”, *New York Times*, 1 June 2012.

<sup>180</sup> See discussion on Stuxnet in light of Article 2(4) in R. Buchan, “Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions”, in 17 *Journal of Conflict & Security Law* 211 (2012); Tallinn Manual 2.0, *supra* n. 170, at p. 342.

<sup>181</sup> Tallinn Manual 2.0, *supra* n. 170, at pp. 342-343.

<sup>182</sup> Buchan, *supra* n. 170.

<sup>183</sup> M. N. Schmitt, “In Defense of Due Diligence in Cyberspace”, in 125 *Yale Law Journal Forum* 68 (2015); J. A. Green, “Disasters Caused in Cyberspace”, in S. C. Breau and K.L.H. Samuel (eds.), *Research Handbook on Disasters and International Law* (Cheltenham: Edward Elgar, 2016), at p. 406.

<sup>184</sup> N. C. Rowe, “The Attribution of Cyber Warfare”, in J. A. Green (ed.), *Cyber Warfare: A Multidisciplinary Analysis* (Routledge, 2015), at p. 61 (noting these difficulties in relation to attribution, but also confirming that, from the computer science perspective, they are not necessarily insurmountable).

<sup>185</sup> It is perhaps telling that, as yet, *no* act of cyber aggression has been conclusively factually (and, as a result, legally) attributed to a State: see Harrison Dinmiss, *supra* n. 170, at p. 53.

<sup>186</sup> Ruys, *supra* n. 21, at p. 15.

powers.<sup>187</sup> The Definition of Aggression adopted by the General Assembly in 1974 is expressly not intended to define the concept of ‘armed attack’.<sup>188</sup> Ultimately, the relationship in the Charter between aggression and armed attack is not clear.

Is there a separate and autonomous legal meaning of ‘aggression’ in the post-1945 era? Article 39 of the Charter might be regarded as a mere institutional provision, indicating the circumstances in which the UN Security Council may exercise its Chapter VII powers, rather than a provision creating primary rules of international law. It is noted, for instance, that the related concepts of ‘threat to the peace’ or ‘breach of the peace’ are not regarded as triggers of State responsibility.<sup>189</sup>

In addition, since it is widely accepted that the prohibition of aggression is a *jus cogens* norm, the concept of aggression may be relevant whenever *jus cogens* is relevant. In particular, Articles 40 and 41 of the ILC Articles on State Responsibility suggest that there may be another layer to the question of aggression by a State in international law, as they are based on the assumption that there is a customary law concept of aggression.

As of yet, international case-law has not, however, taken up the concept of aggression within the concept of State responsibility. A finding of aggression is absent from the judgment in *DRC v. Uganda*, and this despite the Court’s finding of a “grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter” due to its “magnitude and duration”.<sup>190</sup>

For most of the post-Charter period, therefore, the concept of aggression has not been addressed in the context of the *jus ad bellum*, attention instead being invariably focused on the concepts of ‘use of force’ and ‘armed attack’. Thus, even if there is evidence that supports the continued existence of ‘aggression’ as an autonomous legal concept giving rise to State responsibility, it has arguably remained a dormant concept for most of the Charter era.

The question arises whether the position has changed with the 2010 adoption in Kampala of Article 8 *bis* of the Statute of the International Criminal Court (ICC Statute), which defines the ‘crime of aggression’ for the purpose of that Court and the activation of the Court’s jurisdiction over that crime with effect from 17 July 2018.<sup>191</sup> For the purposes of this report, it is only important to consider whether Article 8 *bis* will have any implications for the *jus ad bellum*.<sup>192</sup>

Under Article 8 *bis*(2), an ‘act of aggression’ is defined in terms that rely heavily on the General Assembly’s 1974 resolution. Since that resolution did not seek to provide a definitive statement as to what constituted aggression, but instead constituted guidance for the Security Council that, in context, might or might not lead to a finding of aggression, the ICC’s interpretation of an ‘act of aggression’ for the purposes of applying Article 8 *bis* of the ICC Statute may differ from the application of the concept of ‘act of aggression’ by the Security Council for the purposes of Article 39 of the UN Charter. An ‘understanding’ which was adopted in Kampala

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<sup>187</sup> Art. 39 of the UN Charter reads: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” See N. Strapatsas, “The Practice of the Security Council Regarding the Concept of Aggression”, in C. Kreß and S. Barriga (eds.), *The Crime of Aggression: A Commentary* (Cambridge: Cambridge University Press, 2016), at pp. 178-213.

<sup>188</sup> UNGA res. 3314 (XXIX).

<sup>189</sup> Ruys, *supra* n. 21, at p. 39.

<sup>190</sup> *DRC v. Uganda*, *supra* n. 2, at para. 165. In their separate opinions, Judges Elabary (at paras. 9 – 20) and Simma (at para. 3) criticize the Court for having avoided a finding of aggression.

<sup>191</sup> See C. Kreß, “On the Activation of ICC Jurisdiction over the Crime of Aggression”, in 16 *Journal of International Criminal Justice* 1 (2018).

<sup>192</sup> See M. O’Connell and M. Niyazmatov, “What is Aggression? Comparing the Jus ad Bellum and the ICC Statute”, in 10 *Journal of International Criminal Justice* 189 (2012); S. Murphy, “The Crime of Aggression at the ICC”, in M. Weller (ed.), *Oxford Handbook on the Use of Force* (Oxford: Oxford University Press, 2015); C. Kreß, “Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus”, in 20 *European Journal of International Law* 1129 (2009) (written before the adoption of the Kampala amendments, but focusing on aspects of the draft amendments which were subsequently adopted without change).

helps to reflect the fact that the Security Council may wish to reserve the application of the concept of ‘act of aggression’ to serious instances of an unlawful use of force by a State. The understanding in question states that ‘aggression’ is “the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations”.<sup>193</sup>

Further, in Article 8 *bis*(1) of the ICC Statute, the ‘crime of aggression’ is defined as “the planning, preparation, initiation or execution”, by a person in authority, of an act of aggression by a State, but only if that act of aggression “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.<sup>194</sup> This additional qualification or ‘threshold’ provides a distinction between the crime of aggression for which individuals bear responsibility on the one hand and an act of aggression by a State within the meaning of Article 39 of the UN Charter on the other. The threshold requirement was pivotal in order to achieve consensus on the definition of the crime of aggression.<sup>195</sup> It contains a quantitative (‘gravity and scale’) as well as a qualitative (‘character’) dimension. The quantitative dimension ensures that only very serious unlawful uses of force by States are covered by the definition and the qualitative dimension aims at excluding those instances of a use of force by a State from the scope of the definition which fall in a grey legal area, the most important examples of which have been indicated earlier in this report. It must, however, be acknowledged that the threshold requirement has met with criticisms from various directions. On one view, it is obscure and difficult to interpret.<sup>196</sup> On another view, the threshold may not achieve the goal accurately to reflect the customary law regarding the crime of aggression, as arguably still encapsulated in the concept of ‘war of aggression’. From the opposite direction it is argued that there should not have been a threshold requirement at all: instead, participation in *any* breach of Article 2(4) should have been included in the treaty definition, irrespective of the state of customary international law.<sup>197</sup> Whatever the correct position with respect to these international *criminal* law controversies, it is central for the purposes of this report to recognize that, given the threshold requirement, the State conduct element of a crime of aggression to be prosecuted under the Rome Statute may be considerably narrower than the concept of ‘act of aggression’ in Article 39 of the UN Charter, as applied by the Security Council.

Thus, concerns have been expressed about Article 8 *bis* of the ICC Statute, both in itself and because of its possible impact on the prohibition of the use of force and the crime of aggression under general international law. This report is not the place to address possible shortcomings of Article 8 *bis* of the ICC Statute,<sup>198</sup> since the report is not concerned with international criminal law and the International Criminal Court as such. On the other hand, it is important to recall here that concerns have been expressed that Article 8 *bis* of the ICC Statute may affect the *jus ad bellum* definition of aggression. It has been suggested that the definition of the crime should have followed exactly the concept of ‘act of aggression’ within the meaning of Article 39 of the UN Charter, and that, by not doing so, Article 8 *bis* of the ICC Statute will undermine the compliance pull of the *jus ad bellum*. Under this view, “public international law experts are right to be concerned about the rise of two

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<sup>193</sup> RC/Res. 6, Annex III, Understanding No. 6.

<sup>194</sup> Article 8 *bis*(1) of the Rome Statute reads: “For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

<sup>195</sup> For one analysis of the threshold requirement, see C. Kreß, “The State Conduct Element”, in C. Kreß and S. Barriga (eds.), *The Crime of Aggression. A Commentary* (Cambridge: Cambridge University Press, 2016), at pp. 412-545.

<sup>196</sup> M. Milanovic, “Aggression and Legality: Custom in Kampala”, in 10 *Journal of International Criminal Justice* 165 (2012), at p. 170 (“What exactly, for instance, makes an act of aggression ‘by its character, gravity and scale ... a manifest violation of the Charter of the United Nations?’ The vagueness of these terms is, well, manifest”); H. Koh and T. F. Buchwald, “The Crime of Aggression: The United States Perspective”, in 109 *American Journal of International Law* 257 (2015).

<sup>197</sup> O’Connell and Niyazmatov, *supra* n. 192.

<sup>198</sup> Murphy, *supra* n. 192.

competing definitions of aggression in public international law. They especially need to be concerned about the newer ICC definition eclipsing the wider *jus ad bellum* definition”.<sup>199</sup>

Others suggest that the prohibition of the use of force will not be weakened and that, on the contrary, the amendment to the ICC Statute may in practice have a stronger deterrent effect on individuals who direct the affairs of governments. According to this view, the very existence of the ICC jurisdiction is likely to have an impact on the willingness of the Security Council and governments to face up to aggression and that impact will be even greater if prosecutions are brought. Further, there is a view that the agreement of the State Parties to the ICC Statute on the crime of aggression has now helped to confirm aggression as a legal concept giving rise to (aggravated) State responsibility under international law. First, the definition of the crime predicates a finding that the State concerned has committed a serious act of aggression, and by implication an unlawful use of force, and, second, the definition in some sense gives normative weight to the definition in General Assembly resolution 3314.<sup>200</sup>

An ‘understanding’ adopted at the Kampala conference sought to address any concern that Article 8 *bis* of the ICC Statute might prejudice existing and future law:

“It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”.<sup>201</sup>

Thus, it is clear that Article 8 *bis* of the ICC Statute is relevant only to the crime over which the ICC will have jurisdiction. It neither affects the definition of ‘act of aggression’ within the meaning of Article 39 of the UN Charter nor should it lead to a diminished appreciation of the prohibition of the use of force under Article 2(4) of the UN Charter and customary international law, and the constraints on States resulting therefrom.

## Conclusions

It has occasionally been suggested that the rules of international law on the use of force are dead. This is clearly incorrect, but it nevertheless reflects – or reflected – a real concern. From Iraq to Crimea and Afrin, there has been concern over a lack of respect for the prohibition of the use of force. At the same time, there has been growing concern at the failure to respond adequately to modern security threats (not least, transnational terrorism and the proliferation of weapons of mass destruction) and to humanitarian catastrophes (such as in Rwanda, Darfur and Syria).

An important question is whether there are significant shortcomings in the traditional body of rules on the use of force by States. Is the law as it is the law as it ought to be? Are existing rules adequate to meet current threats, especially from terrorist groups and weapons of mass destruction?

The UN General Assembly, at the level of Heads of State and Government, responded to this question in its 2005 World Summit Outcome document. They reaffirmed:

“that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter”.<sup>202</sup>

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<sup>199</sup> *Ibid.*

<sup>200</sup> Ruys, *supra* n. 21, at p. 48.

<sup>201</sup> RC/Res. 6, Annex III, Understanding No. 4.

<sup>202</sup> UNGA res. 60/1, at para. 79.

It seems that, in the view of the Heads of State and Government in 2005, the rules on the use of force in the Charter (and in customary international law), properly interpreted and applied, are adequate to meet new challenges. The 2005 World Summit Outcome thus offered the response of States to a debate that took off after 9/11 questioning the effectiveness, the relevance, and even the existence of rules of international law on the use of force. What is needed are not new rules, but political will on the part of States, including members of the Security Council and potential troop-contributors. The Security Council, in particular, must use its powers proactively and positively, and with clarity. The unease over dubious humanitarian interventions as well as those which may be genuinely well-meaning could be resolved by a responsible Security Council acting without double-standards.

Faced with growing threats from non-state actors, States should engage with good faith in efforts to resolve such threats through cooperation, thereby minimising the concerns over non-consensual use of force in each other's territory. Greater involvement and support from the Security Council in countering threats by non-state actors would further obviate the escalation of such situations into inter-State uses of force.

A further danger for the rules on the use of force has been discussed above, namely that the traditional interpretations of 'armed attack' are being widened to encompass kinds of inter-State harm that do not come within the Purposes and Principles of the Charter. If harm which causes damage to a State's economic interests, environment, or infrastructure are all to be characterised as 'armed attacks', however the damage is caused, the scope of justifiable use of force in self-defence could be unacceptably enlarged.

The use of force in self-defence must be reported to the Security Council and whenever possible evidence supporting the legality of the action should be made available.

The inclusion of the crime of aggression in the ICC Statute, the definition of that crime agreed upon at Kampala, and the activation of ICC jurisdiction over that crime, are very significant developments, but care must be taken to ensure that the narrower scope of the crime does not adversely impact on the general prohibition of the use of force under international law. International criminal law has an important role to play in the maintenance of peace and security, but its increased prominence must not be allowed to dilute the centrality of the UN Charter based rules on the use force.

The UN Charter goal of collective peace and security is dependent upon strict adherence to the international law on the use of force. Unless the scope of the prohibition of the use of force is interpreted in a manner suited to achieving its aim, the maintenance of international peace and security will be impossible. This report has flagged concerns in this field of law and noted current debates. At the same time, it is believed that overall the current international law on the use of force, properly interpreted and properly applied, remains a solid 'cornerstone' for international peace and security.