CHAPTER 25

THE INTERNATIONAL COURT OF JUSTICE AND THE 'PRINCIPLE OF NON-USE OF FORCE'

CLAUS KREß

I. Introduction

The international law on the use of force underwent significant developments in the inter-war period, most significantly through the renunciation of war as an instrument of national policy, as enshrined in Article I of the 1928 Kellogg–Briand Pact.[1] Yet, the law preceding the United Nations Charter[2] remained fraught with uncertainties due, perhaps most importantly, to the notoriously ambiguous concept of war and the possible scope for certain lawful forcible measures short of war.[3] The

[1] General Treaty for Renunciation of War as an Instrument of National Policy of 27 Aug 1928, LNTS XCIV (1929), 58.

[2] Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945.

[3] For one important exposition of the complexities of the pre-Charter law on the use of force, see Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), 19–111, 214–50; Sir Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952-II) 81 *Receuil des cours de l'Académie de droit international* 455.

Permanent Court of International Justice (PCIJ) had not developed a case law on those matters[4] and only limited light was shed on them by the International Military Tribunals immediately after the Second World War.[5] Since 1945, the International Court of Justice (ICJ) has been called upon to interpret the UN Charter provisions on the use of force in international relations against this international law background full of obscurities. It was clear from the outset that the ICJ's mandate to construe the new provisions went far beyond a technical legal exercise. The new provisions on the use of force were to form one of the main pillars of the new international legal order. As the new body of law consists of just a few rules, ambiguities were almost certain to come to light on closer inspection and in the course of the subsequent practice of states. Controversies about the correct interpretation of the new law were thus to emerge almost inevitably and those controversies would almost necessarily involve 'high' principles laden with political sensitivity. The challenge posed to the Court was therefore a formidable one.

The first opportunity for the ICJ to confront this challenge presented itself as early as 1949 in the *Corfu Channel* case. This arose out of the mining of the Corfu Channel in Albanian territorial waters, which had affected the British navy, and the latter's minesweeping operation without Albanian consent. In its judgment of 9 April 1949, the Court avoided a direct reference to Article 2(4) of the UN Charter, but the pertinent parts of its reasoning foreshadowed its subsequent jurisprudence in an important respect.[6] After this early encounter, the Court had to wait almost four decades before it could again turn its attention to the international law on the use of force.

After having devoted, in passing, a brief *obiter dictum* on the attempted 1980 rescue operation by US forces in its judgment in 1980 in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*,[7] the prohibition on the use of force was central to the Court's judgment in 1986 in the *Case Concerning Military and*

[4] For a recent appraisal of the work of the PCIJ, see Christian J. Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Leiden: Martinus Nijhoff, 2013).

[5] For the text of the main judgment at Nuremberg, see (1947) 41 *American Journal of International Law* 172; for an appraisal, see Oscar Solera, *Defining the Crime of Aggression* (London: Cameron May, 2007), 247–51; for the texts of the judgments in the subsequent Nuremberg trials in the *High Command*, *Ministries*, *Farben*, and *Krupp* cases, which all dealt with crimes against peace, see respectively Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, vol XI, 462, vol XIV, 314, vol VIII, 1081; vol IX, 390 (Opinion of the Tribunal concerning the Dismissal of the Charges of Crimes Against Peace); for an appraisal, see Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), 179–202; for the text of the judgment in the Tokyo war crimes trial, see Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal. Indictment and Judgment* (Oxford: Oxford University Press, 2008), 70; for an appraisal, see Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 115.

[6] *Corfu Channel*, Merits, Judgment of 9 Apr 1949, ICJ Rep 1949, 4.

[7] *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment of 24 May 1980, ICJ Rep 1980, 3.

Paramilitary Activities in and against Nicaragua.[8] The most important aspect of the case—and rather typical of the Cold War era—was the vast military and financial support given by the US between 1981 and 1984 to the Contras, a rebel force fighting against the government of Nicaragua, support which the US had justified as a lawful exercise of the right of collective self-defence in view of hostile action of Nicaragua against El Salvador. The Court decided that it lacked competence to decide the case on the basis of UN Charter law and it therefore rendered its judgment in the *Nicaragua* case essentially on the basis of customary international law. From a substantive perspective, however, the Court dealt with the international law on the use of force as a whole and made pronouncements that have shaped the ICJ's jurisprudence on this body of law until today.

The prohibition on the use of force also played a role in the ICJ's advisory opinion in 1996 in the *Legality of the Threat or Use of Nuclear Weapons*.[9] Owing to the abstract nature of the question posed, the Court, in this opinion, made general pronouncements. The ICJ was again much more specific in its judgment of 2003 in the *Case Concerning Oil Platforms*, which Iran brought against the US.[10] The proceedings were about the destruction by the US of certain Iranian oil platforms which the US claimed to have been a lawful exercise of the right of individual self-defence against Iranian attacks on US-flagged merchant vessels and war ships in the Persian Gulf within the context of the 1980–8 international armed conflict between Iran and Iraq. The Court, in the light of its findings on other issues, could have easily avoided dealing with the prohibition of the use of force. The ICJ, however, placed the international law on the use of force, albeit being an ancillary issue from a procedural perspective, in the foreground of its judgment.

In its advisory opinion in 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ devoted only a single paragraph to the international law on the use of force (and more specifically to the right of self-defence in the case of transnational violence by non-state actors).[11] But due to its rather opaque formulation, this paragraph has given rise to a significant amount of commentary.

The judgment in 2005 in the *Case Concerning Armed Activities on the Territory of the Congo*[12] contains the last substantial engagement to date by the ICJ with the international law on the use of force. The Democratic Republic of the Congo

[8] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, Judgment of 27 June 1986, ICJ Rep 1986, 14.

[9] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep 1996, 226.

[10] *Case Concerning Oil Platforms (Iran v. US)*, Judgment of 6 Nov 2003, ICJ Rep 2003, 161.

[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep 2004, 136.

[12] *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 Dec 2005, ICJ Rep 2005, 168.

(DRC) brought a case against Uganda because of the latter's extensive military operations in the DRC between 1998 and 2003. Uganda had justified those operations partly on the basis of a consent allegedly given by the DRC to the Ugandan military presence and partly on the basis of the need both to defend Uganda against cross-border violence carried out by anti-Ugandan non-state actors and to meet some other less specified legitimate security interests. Uganda also counterclaimed that the DRC was illegally involved in cross-border armed activity against Uganda. The *Armed Activities* case has provided the ICJ with the only occasion to date to pronounce, in a contentious case, directly on Article 2(4) of the UN Charter.

This chapter is divided into two sections. Section II sets out the ICJ's jurisprudence in some detail. It will be shown that the Court has touched (but not necessarily elaborated) upon an impressive number of relevant legal issues pertaining to the use of force. For the sake of clarity, the review of the case law will be structured under four subsections: Section II.A with certain basic issues, Section II.B with the prohibition of the use of force, Section II.C with the exceptions to that prohibition, and Section II.D with the prohibition of the threat of force. The section aims to present and to explain the ICJ's case law as comprehensively as possible. The references to state practice and to scholarly writings are therefore selective and only serve the limited purpose of elucidating the background against which the Court has developed its legal views on the subject.

The purpose of Section III is no more than an attempt to shed light on the *overall* picture of the Court's case law.

In concluding, the chapter offers suggestions regarding the desirable development of the ICJ's future case law.

II. The Case Law of the Court

A. Basic Issues

The core of the ICJ's case law on the use of force directly addresses the prohibition of the use of force and the exceptions to it as well as the prohibition of the threat of force. Before the Court's views on those matters are set out, it is useful to review what the ICJ decided on some issues concerning the law on the use of force more broadly. In a way, those views build the framework for the Court's more specific legal findings, and perhaps some of those findings were even influenced in a subtle manner by this framework.

1. *Terminology*

The international law on the use of force is widely referred to as the *jus ad bellum* (as contrasted with the *jus in bello*).[13] This term has also been used by individual ICJ judges.[14] The Court, however, has avoided the term and has instead used the language of Article 2(4), such as the 'area of the regulation of the use of force in international relations'.[15] In the *Nicaragua* case, the ICJ repeatedly referred to the 'principle of non-use of force' which, according to the Court, includes the prohibition of the threat of force.[16] This use of terms has become so firmly entrenched in the ICJ case law that, in the *Armed Activities* case, the Court, while being competent to adjudicate on the basis of Article 2(4) of the UN Charter, found Uganda to have violated 'the principle of non-use of force in international relations'.[17] The Court's preference for this expression over the generic term *jus ad bellum* may imply a subtle inclination towards the tendency (which is apparent from some of the more recent literature on the subject[18]) to replace the generic term *jus ad bellum* with that of *jus contra bellum*.

2. *No political question doctrine*

In the *Nicaragua* case, the ICJ explicitly rejected the idea that it could be prevented from dealing with the international law on the use of force by virtue of some kind of international political question doctrine. The Court stated:

> It must be remembered that, as the *Corfu Channel* case . . . shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.[19]

The Court specifically recognized the 'legal dimension' of the right to self-defence.[20] The ICJ hereby implicitly endorsed the famous statement made by the International Military Tribunal at Nuremberg that:

> whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.[21]

[13] See eg Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010), 1; Keiichiro Okimoto, *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello (Oxford: Hart, 2011).

[14] For most recent examples, see *Armed Activities*, Judgment, Declaration of Judge Koroma, para 7; Separate Opinion of Judge Kooijmans, paras 58 ff.

[15] *Nicaragua*, Merits, para 176.

[16] *Nicaragua*, Merits, para 227.

[17] *Armed Activities*, Judgment, para 345(1).

[18] See, most notably, Robert Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix internationale* (2nd edn, Basel: Helbing Lichtenhahn, 2009); see also Olivier Corten, *Le droit contre la guerre* (Paris: Pédone, 2008).

[19] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application of 26 Nov 1984, para 96.

[20] *Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application, para 98.

[21] (1947) 41 *American Journal of International Law* 207.

The Court made these statements, although the US had not raised a fully-fledged political question objection in the *Nicaragua* case. The argument advanced by the latter state was more specific in that it referred to the unsuitability of the ICJ becoming involved in an *ongoing* armed conflict.[22] The Court's response was as follows:

> A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for it (*Corfu Channel, I.C.J. Reports, p. 18; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 10, para. 13*).[23]

3. *No Security Council monopoly*

In the *Nicaragua* case, the US had also argued that the claim that a member state of the UN had unlawfully resorted to the use of armed force constituted a matter that the UN Charter confined to the political organs of the organization and essentially to the Security Council.[24] The Court considered:

> the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*.[25]

More specifically, the Court emphasized that Article 24 of the UN Charter entrusts the Security Council with *primary* instead of *exclusive* responsibility for the maintenance of international peace and security and that no provision such as Article 12 demarcates between the competences of the Security Council and the Court. In the light of this, the Court concluded that:

> both organs can … perform their separate but complementary functions with respect to the same events.[26]

It should be added that the ICJ has not yet indicated its position on possible conflicts between its judicial findings and Security Council action with respect to one and the same armed conflict. In fact, the Court emphasized in the *Nicaragua* case that it was 'not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which members of the Council employed their right to vote'.[27]

In the *Armed Activities* case, the Court avoided a determination as to whether Uganda's vast military operation in the DRC constituted an *act of aggression*. The Court instead characterized Uganda's armed activities as 'grave violations of Article 2,

[22] *Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application, para 99; cf also the observation in n 24.

[23] *Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application, para 101.

[24] *Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application, para 89; this, again, goes some way towards formulating (a kind of) political question argument.

[25] *Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application, para 93.

[26] *Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application, para 95.

[27] *Nicaragua*, Judgment, Jurisdiction of the Court and Admissibility of Application, para 98.

paragraph 4, of the Charter'.[28] The ICJ's caution with respect to the use of the term 'act of aggression' is perhaps explained by the fact that the Security Council had refrained from making a determination pursuant to Article 39 of the UN Charter that Uganda had committed an act of aggression. By omitting a judicial finding to that effect, the Court may have wished to avoid any impression of disharmony in the approach of both UN organs to the same conflict. This judicial restraint was criticized by Judges Elaraby[29] and Simma in their respective separate opinions.[30]

4. *Treaty and custom*

In the *Nicaragua* case the customary international law on the use of force gained prominence in the Court's case law. The Court established that both the prohibition of the use of force and the right of self-defence form part of customary international law alongside Articles 2(4) and 51.[31] The precise meaning of the ICJ's views, as expressed in the *Nicaragua* judgment, on the sources of the right to self-defence, is not entirely free from ambiguity:

> the Charter, having itself recognized the existence of this right [ie the customary right to self-defence] does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well-established in customary international law. Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not provided in the Charter, and is not part of treaty law.[32]

In the light of the fact that the Court had stated that 'the right to self-defence is of course *enshrined* in the United Nations Charter',[33] it would probably go too far to interpret this passage as saying that the right of self-defence exists only in customary international law and that Article 51 of the UN Charter does no more than refer to this customary right as an exception to the (treaty and customary) prohibition on the use of force. Yet, one wonders whether the Court considers the right to self-defence, *as enshrined in Article 51*, to constitute an incomplete treaty rule which, in order to be properly applied, requires referring to certain parts of the (supposedly complete) customary right to self-defence. While the above citation creates this impression, a second (and perhaps more natural) construction of the

[28] *Armed Activities*, Judgment, para 153.

[29] *Armed Activities*, Judgment, Separate Opinion of Judge Elaraby, paras 9–20.

[30] The latter stated (Separate Opinion of Judge Simma, *Armed Activities*, para 3): 'The Council will have had its own—political—reasons for refraining from such a determination. But the Court, as the principal *judicial* organ of the United Nations, does not have to follow that course. Its very *raison d'être* is to arrive at decisions based on law and nothing but law, keeping the political context before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is not the division of labour between the Court and the political organs of the United Nations envisaged by the Charter!'.

[31] *Nicaragua*, Merits, paras 172–86.

[32] *Nicaragua*, Merits para 176.

[33] *Nicaragua*, Merits, para 48 (emphasis added).

Court's position would be that the latter components of the right of self-defence (the definition of the term 'armed attack' as well as the limitations of necessity and proportionality), while having been of a purely customary nature in the first place, have been incorporated into the treaty rule in Article 51 on the right to self-defence. Seen this way, a complete treaty regulation on the right to self-defence exists alongside its customary corollary.

In the *Nuclear Weapons* advisory opinion, the Court did not eliminate the ambiguity. On the one hand, the Court reaffirmed the customary law nature of the requirements of necessity and proportionality, but on the other hand the Court stated that:

> The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.[34]

According to the ICJ, the 'dual condition' of necessity and proportionality 'applies equally to Art. 51 of the UN Charter';[35] this can mean that the treaty rule on self-defence must be completed by reference to the customary 'dual condition' of necessity and proportionality or that those requirements are 'inherent' in the very concept of self-defence so that they form part of the treaty right to self-defence enshrined in Article 51 even without the need of any incorporation of customary law.

The ICJ's recognition of customary rules on the prohibition of the use of force and the right of self-defence raised the question whether the content of those rules is identical or (partly) different from their UN Charter counterparts. In the *Nicaragua* judgment, the ICJ held: 'The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same contents'.[36] While this general statement leaves room for rather significant differences between the UN Charter and the customary law regulation of the use of force, the subsequent more specific passages of the *Nicaragua* judgment make it clear that the Court, quite to the contrary, construes the treaty and customary regulation on the prohibition of the use of force and on the right to self-defence in a largely identical manner.[37]

In fact, upon closer inspection the non-existence under customary law of the duty to report the exercise of the right to self-defence to the Security Council as contained in Article 51 turns out to be the only difference identified by the Court.[38] In its subsequent case law, the ICJ has at no point departed from this essentially 'harmonious construction'. In the *Armed Activities* case, the Court went as far as to base (the relevant part of) its judgment on 'the principle of non-use of force in international relations' without specifying this principle's source.[39] It can therefore be concluded that, in the view of the Court, the international legal regime governing the use of force by states—outside the UN Charter's collective security system—is

[34] *Nuclear Weapons*, Advisory Opinion, para 40.
[35] *Nuclear Weapons*, Advisory Opinion, para 41.
[36] *Nicaragua*, Merits, para 176.
[37] *Nicaragua*, Merits, paras 181, 188.
[38] *Nicaragua*, Merits, para 200.
[39] *Armed Activities*, Judgment, para 345(1).

based on essentially identical rules of treaty and customary law existing alongside each other.

This 'harmonious construction' has been criticized within the Court. In his dissenting opinion in *Nicaragua*, Judge Jennings rejected the idea that Articles 2(4) and 51 merely codified existing customary law rules and he further disputed the idea that the UN Charter, in conjunction with consonant state practice, had subsequently generated a body of customary law with a content essentially mirroring that of the treaty rules. According to Judge Jennings, the few states that were not parties to the Charter had not been in a position to produce a sufficiently significant amount of state practice to such an effect, while the post-1945 practice of UN member states had to be explained by their being bound by the Charter itself.[40] The passage where the Court came closest to explaining its contrary view reads:

> far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations.[41]

In this statement, the Court refrained from making an attempt to elucidate the pre-Charter state of customary law on the use of force.[42] While the passage signals the Court's readiness to accept the view, as articulated perhaps most prominently by Ian Brownlie,[43] that the pre-1945 customary law had already been developing in the direction of the new restrictive Charter rules on the use of force, the Court did not consider the Charter regime on the prohibition of the use of force and the right to self-defence as a mere codification of pre-existing customary international law. Instead, the Court held that the almost complete convergence between Article 2(4) and 51 and customary law came about 'under the influence of the Charter'. This implies that the ICJ, contrary to Judge Jennings' view, did not feel that, with respect to the 'principle of the non-use of force', the famous 'Baxter paradox', prevented it from recognizing the development of customary international law through treaty rules that enjoy widespread ratification.[44] While the Court does not justify this approach explicitly, it would seem that it was guided by two considerations. First, the Court stressed that it considered the international regulation of the use of force to flow from a 'fundamental principle'. This may be taken to suggest that the

[40] *Nicaragua*, Merits, Dissenting Opinion of Judge Jennings, 530–1.

[41] *Nicaragua*, Merits, para 181.

[42] This holds true for the whole *Nicaragua* judgment and for the ICJ's jurisprudence in general.

[43] Brownlie, *International Law and the Use of Force by States*, 110–11.

[44] Richard S. Baxter, 'Treaties and Custom' (1970-I) 129 *Recueil des cours de l'Académie de droit international* 64, 73.

Court did not see the need to subject customary law developments pertaining to the 'principle of the non-use of force' to the most stringent 'inductive' test because of this body of law's paramount importance for the international legal order as a whole. In addition, however, the Court relied on the consideration that:

> apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways.[45]

Given the heavy reliance,[46] on General Assembly Resolution 2625,[47] this document, in the view of the Court, probably constituted the most important instance of UN member states expressing their recognition of the 'principle of non-use of force' as part of customary international law.

5. *No 'death' of the 'principle of the use of force'*

In 1970, Thomas M. Franck famously proclaimed the death of Article 2(4) of the UN Charter because of widely diverging state practice and because of the ineffectiveness of the collective security system.[48] The Court, however, never alluded to the possibility that the 'principle of non-use of force' might have lost its legal validity. In the *Nicaragua* judgment, the Court implicitly dealt with the argument of widely diverging state practice in the context of its analysis of the emergence of a rule of customary international law and held:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of the attitude is to confirm rather than to weaken the rule.[49]

This argument had already been addressed in passing in the judgment in the *Corfu Channel* case where the possible defects in international organization had been considered to constitute an irrelevant consideration with respect to forms of forcible intervention as practised in the pre-Charter era.[50] In its *Nicaragua* judgment, the ICJ returned to the issue in a much more explicit form and found:

[45] *Nicaragua*, Merits, para 185. [46] *Nicaragua*, Merits, para 188.

[47] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2615 (XXV) (24 Oct 1970).

[48] Thomas M. Franck, 'Who Killed Article 2(4)?' (1970) 64 *American Journal of International Law* 809; Georg Schwarzenberger had made an argument pointing in the same direction as early as 1955 in his study 'The Fundamental Principles of International Law' 87 (1955-I) *Recueil des cours de l'Académie de droit international* 338–9.

[49] *Nicaragua*, Merits, para 186. [50] *Corfu Channel*, Merits, 35.

The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter.[51]

While this argument is situated at the customary law level, one would be surprised if, under the Court's vision of an essentially identical corpus of customary and treaty law, the reliance on the argument were allowed with respect to Articles 2(4) and 51. In fact, the Court has never suggested that such reliance might be possible.

6. Jus cogens *and obligation* erga omnes

The *Nicaragua* judgment recalled that the International Law Commission (ILC) had in 1966 expressed the view that the prohibition of the use of force constitutes *jus cogens*.[52] This may indicate an inclination itself to move in that direction, but it does not constitute a determination to that effect. It is worth noting that, as yet, no such determination has been made by the Court.[53]

The concept of 'obligation *erga omnes*' has not played any role in the ICJ's judgments which specifically deal with the use of force. This may perhaps partly be explained by the existence of the right to *collective* self-defence, which specifically deals with the legal position of third states. Be this as it may, in its judgment in the *Barcelona Traction* case, where the Court famously introduced the concept of obligation *erga omnes* into its case law, it was recognized that such an obligation was to be derived from the 'outlawing of acts of aggression'.[54]

7. *Legal consequences of an unlawful use of force*

In its *Nicaragua* and *Armed Activities* judgments, the ICJ recognized that a violation of the 'principle of the non-use of force', in accordance with the law of state responsibility for internationally wrongful acts, resulted in the obligation of the offending state to make reparation to the victim state.[55] The Court has not, however, had the occasion to go into any legal detail on this point. In its *Wall* advisory opinion, the ICJ further held that the illegality of territorial acquisition resulting from the threat or use of force constituted a corollary of the principle of the non-use of force.[56] In

[51] *Nicaragua*, Merits, para 188.

[52] *Nicaragua*, Merits, para 190.

[53] In particular, the Court again stopped short of such a determination in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Rep 2010, para 81, where it notes 'the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.

[54] *Case Concerning the Barcelona Traction, Light and Power Co, Ltd (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment of 5 Feb 1970, ICJ Rep 1970, para 34.

[55] *Nicaragua*, Merits, para 292(13); *Armed Activities*, Judgment, paras 259–60, 345(5).

[56] *Wall*, Advisory Opinion, para 87; where the Court held that '*all* States were under the obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, it did not return to the obligation not to use force, but it based this statement on the *erga omnes* effect of the obligation to respect the right to self-determination and of certain obligations under international humanitarian law' (paras 155, 159).

none of its judgments has the ICJ alluded to the possibility that the unlawful use of force could give rise to international rights of *individuals* to reparation vis-à-vis the offending state. Finally, the Court, unsurprisingly in the light of its interstate jurisdiction, has not touched upon matters of *individual* criminal responsibility under international law for the participation in (certain) breaches of the prohibition of the use of force.[57]

B. The Prohibition of the Use of Force

The prohibition of the use of force raises a number of legal issues beginning with its addressees and its geographical scope, including the question of possible 'in-built limitations' of the material scope of the prohibition and ending with the very concept of 'use of force'. This section structures the ICJ's views around those various issues.

1. *The use of force* by states *in their* international relations

There is nothing in the ICJ's case law to suggest that the 'principle of non-use of force' could, as a result of a more recent development, have become binding on *non*-state actors.[58] To the contrary, in its 2010 advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the Court determined that the prohibition of the use of force as a particular aspect of the obligation to respect the territorial integrity of states is confined to 'the sphere of relations between States'.[59]

In its advisory opinion in *Nuclear Weapons*, the ICJ was careful to distinguish the use of force by a state 'within its own boundaries' from the prohibition of the use of force.[60] It would probably overstate the significance of the Court drawing this broad demarcation line in *Nuclear Weapons* to deduce therefrom that the Court would *never* be prepared to characterize the use of force by a state on its own territory as unlawful under the 'principle of the non-use use of force *in the international relations*'. But the Court would certainly not so qualify the use of force by a state *against its own population* on its own soil.

[57] In his separate opinion in the *Armed Activities* judgment, Judge Elaraby criticized the Court's avoidance of the issue of 'aggression' (cf the text accompanying n 29) also for a missed opportunity to contribute to overcoming 'the culture of impunity'; *Armed Activities*, Judgment, separate opinion of Judge Elaraby, para 20.

[58] For a (perhaps) different position, see Anne-Marie Slaughter and William Burke White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1.

[59] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Rep 2010, para 80.

[60] *Nuclear Weapons*, Advisory Opinion, para 50.

2. *The 'all-inclusive' nature of the prohibition of the use of force*

In the *Corfu Channel* case, the UK justified its minesweeping action as a lawful measure of self-help responding to unlawful behaviour by Albania and, more specifically, as a limited intervention in order to secure possession of evidence to be submitted to an international tribunal.[61] In the course of its oral argument, the UK explicitly addressed Article 2(4) of the UN Charter and argued that its action 'threatened neither the territorial integrity nor the political independence of Albania'.[62] It was implicit in the argument that the operation was also 'not in any other manner inconsistent with the purposes of the United Nations Charter' because it was directed towards facilitating the work of an international tribunal. The UK thus anticipated a legal argument, which was later to be developed in much greater detail and sophistication by legal scholars: that the Article 2(4) prohibition is subject to an exception for certain 'non-aggressive' uses of force.[63]

In the judgment in the *Corfu Channel* case, the ICJ, while recognizing 'the Albanian Government's complete failure to carry out its duties', rejected the UK's line of reasoning and stated:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.[64]

The legal significance of this determination suffers somewhat from the fact that the Court, following the language used in the Special Agreement between the UK and Albania, did not specifically relate it to the prohibition of the use of force.[65] Yet, had the Court wished to reject the UK's argument of a 'limited right to intervention for a benign purpose' even without qualifying the latter's action in Albanian waters as a use of force, it would be surprising if the same Court accepted such an argument in the case of a more serious action that did amount to a use of force within

[61] In its judgment, the Court treats the UK's line of reasoning as consisting of the two distinct arguments of a limited right of intervention to secure evidence and of a limited right to self-help (*Corfu Channel*, Merits, 34), but, in fact, those arguments are too closely intertwined to be separated; for a close analysis of the UK's pleadings in *Corfu Channel*, see Christine Gray, 'A Policy of Force' in Karine Bannelier, Theodore Christakis, and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law. The Enduring Impact of the Corfu Channel Case* (Abingdon: Routledge, 2012), 234–5.

[62] Oral Statement of 12 Nov 1948, *Corfu Channel*, ICJ, Pleadings, Oral Arguments, Documents, Oral Proceedings (First Part), 296.

[63] For an early exposition of this view, see Julius Stone, *Aggression and World Order* (Berkeley, CA: University of California Press, 1958), 95–6; for a prominent later variation, see Michael Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 *American Journal of International Law* 642.

[64] *Corfu Channel*, Merits, 35.

[65] A number of judges, however, did address Art 2(4) directly in their individual opinions attached to the judgment; *Corfu Channel*, Merits, Individual Opinions of: Judge Alvarez, 42; Judge Krylow, 77; and Judge ad hoc Ečer, 130; for a cautious appraisal that reflects the ambiguity of the majority's approach, see Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958; repr Cambridge: Cambridge University Press, 1982), 317.

its technical legal meaning. It is therefore plausible to read the Court's judgment in *Corfu Channel* as the judicial rejection of the idea that the words 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN Charter' subject the prohibition of the use of force to an exception for certain 'non-aggressive' uses of force.[66] There is nothing in the subsequent jurisprudence of the ICJ to suggest that the Court has subsequently developed a different opinion on that question.

3. *'Indirect' use of force*

In the *Nicaragua* case, the ICJ considered the *arming* and *training* of non-state actors fighting on the territory of another state against the latter's governmental forces as violating the prohibition of the use of force.[67] The Court based this broad interpretation of the prohibition of the use of force on the formulation of the eighth and ninth paragraphs of General Assembly Resolution 2625, but it added that 'the mere supply of funds' was not covered. The Court again referred to Resolution 2625 in the *Armed Activities* case, this time to consider the *toleration* by a state of non-state actors who make use of that state's territory for cross-border armed action.[68] This decision strongly suggests that the ICJ also considers this form of state involvement into forcible non-state action to constitute (an indirect) use of force by the respective state. There is no suggestion in the Court's jurisprudence that the inclusion of the two aforementioned forms of state conduct in the prohibition of the use of force is based on the idea that, in those cases, the use of force *of the non-state actors* can be *attributed* to the involved state. It is rather the arming, the training, and the toleration as such that, according to the Court, constitute instances of a use of force by the state concerned.

4. *'Use of force'*

A closer look into state practice and scholarly writing reveals that in a number of situations the question whether the legal threshold for the use of force has been passed by state action is open to argument.[69] It is the subject of debate, for example, under what conditions the intrusion or otherwise uninvited presence of military (or even police organs) on foreign soil without actual fighting amounts to a use of

[66] For the same view, see Gray, 'A Policy of Force' in Bannelier, Christakis, and Heathcote, *The ICJ and the Evolution of International Law*, 237; and Christopher Greenwood, 'The International Court of Justice and the Use of Force' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996), 378–9.

[67] *Nicaragua*, Merits, para 228; oddly, the authoritative English version of this paragraph contains an ambiguity in that it says that 'the arming and training of the *contras* can certainly be said to involve the *threat or* use of force' (first emphasis in the original, second emphasis added), while the French version uses only the word 'l'emploi de la force'.

[68] *Armed Activities*, Judgment, para 300.

[69] For a fairly recent detailed account, see Corten, *Le droit contre la guerre*, 65–121.

force, and, to mention another example, whether a minimal use of coercion, such as the arrest of a person, the seizure of a foreign fishing vessel, or the opening of a diplomatic bag,[70] could constitute a use of force. A more recent discussion focuses on whether state use of computer malware with detrimental cross-border consequences may be qualified as a use of force.[71] Those debates refer back to the very concept of 'use of force'.

The Court could have shed light on this concept as early as the *Corfu Channel* case where the state conduct in issue was the UK's 'assembl[ing] of a large number of warships in the territorial waters of another State . . . to carry out minesweeping in those waters',[72] such sweeping resulting in no physical harm to persons or property. The ICJ, however, failed to use this early occasion to specify whether and why the mere presence, in foreign territorial waters, of a large number of warships adopting a threatening posture amounted to a use of force and whether such use must pass a certain minimal threshold of intensity in order to fall within the prohibitive scope of the 'principle of the non-use of force'. The ICJ did not explicitly refer to this principle or even more precisely to Article 2(4) of the UN Charter, but chose instead to condemn, without any conceptual elaboration, the UK's Operation Retail as a policy of force.[73] This left room for divergent interpretations and the subsequent case law did nothing to dispel the ambiguity. While the use of the term 'force' may be taken to suggest that the ICJ *implicitly* qualified Operation Retail as an unlawful use of force,[74] it is also *possible* to interpret the Court's avoidance of any explicit reference to Article 2(4) as implying the view that the threshold for a use of force in its technical legal meaning had not been reached.[75]

The ICJ has also on no subsequent occasion set out to define the concept of a use of force. Yet, a number of elements of the use of force with some indicative value can be discerned from the case law of the ICJ. In the *Oil Platforms* case, the

[70] In *Fisheries Jurisdiction (Spain v. Canada)*, Spain characterized the seizure by Canadian authorities of a Spanish fishing vessel and the arrest by the same authorities of the ship's master as a 'violation of Article 2, paragraph 4, of the Charter'; the ICJ found that it lacked jurisdiction and therefore abstained from dealing with the matter; *Fisheries Jurisdiction (Spain v. Canada)*, Judgment, Jurisdiction of the Court of 4 Dec 1998, paras 19–20 (for the factual allegation), para 78 (for Spain's legal characterization), and para 84 (for the Court's abstention from dealing with the legal issue); the other two examples mentioned in the previous text are inspired by Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge: Cambridge University Press, 2011), 208.

[71] Michael N. Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge: Cambridge University Press, 2013), 42–52.

[72] *Corfu Channel*, Merits, 33–4. [73] cf citation accompanying n 64.

[74] This would seem to be the inference drawn by Robert Jennings, 'International Force and the International Court of Justice' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Leiden: Martinus Nijhoff, 1986), 332–3, and (probably) also by Lauterpacht, *The Development of International Law by the International Court*, 317.

[75] For such a view, see Theodore Christakis, 'Intervention and Self-Help' in Bannelier, Christakis, and Heathcote, *The ICJ and the Evolution of International Laws*, 220 ff; Corten, *Le droit contre la guerre*, 91.

ICJ emphasized that 'The United States never denied that its actions against the Iranian platforms amounted to a use of *armed* force'.[76] This indicates the Court's view that the concept of use of force only covers *armed* force. Yet, in its advisory opinion in *Nuclear Weapons*, the ICJ had made it clear that the prohibition of the use of force applies 'regardless of the weapon employed'[77] and, within the context of the 'principle of the non-use of force', the Court has never confined the concept of weapons to those traditionally used by the military. This would allow the Court to place emphasis rather on the (potential) *effect* of the conduct concerned than on the *means* used to decide borderline cases. As far as the requisite effect is concerned, it is worth noting that in the *Nicaragua* case the ICJ had highlighted 'the element of coercion' as forming 'the essence' of unlawful *intervention*,[78] while clarifying at the same time that not every such unlawful intervention amounts to a *use of force*. This may be taken to imply the requirement, in the view of the Court, for a *qualified* form of coercion as forming 'the essence' of the use of force and such qualified form of coercion could exist in *physical* harm to a person or *physical* damage to objects.

As regards the question whether state conduct must be liable to produce physical harm to persons or physical damage to objects of *a certain intensity*, the ICJ has also not yet pronounced a definitive view. While the Court made it clear in the *Nicaragua* case that the prohibition of the use of force covers 'less grave forms' of such use[79] and it had no difficulty in the *Oil Platforms* case in qualifying US military action that was limited in time and space as a use of force, the Court's jurisprudence does not seem to categorically rule out the possibility of setting a *de minimis* threshold.

The ICJ's judgment in the *Armed Activities* case adds a final element to the 'use of force' picture. In that judgment, the Court went as far as to qualify Uganda's (unlawful) *military occupation* of part of the territory of the DRC *as such* as a violation of the principle of the non-use of force.[80] In the same judgment, the ICJ refrained from characterizing the *un*lawful presence of Ugandan troops during the withdrawal period as a use of force.[81]

In the light of all this, it is difficult to avoid the impression that the Court has yet to fully clarify its understanding of the concept of the 'use of force'. It might be safely concluded from the ICJ's reference to *armed* force in the *Oil Platforms* case (and perhaps also from the exclusion of the 'mere supply of funds' from the concept of an 'indirect' use of force in the *Nicaragua* case[82]) that the Court would not

[76] *Oil Platforms*, Judgment, para 45 (emphasis added).
[77] *Nuclear Weapons*, Advisory Opinion, para 39.
[78] *Nicaragua*, Merits, para 205.
[79] *Nicaragua*, Merits, para 191.
[80] *Armed Activities*, Judgment, para 345(1); in paras 56–64 of his Separate Opinion, Judge Kooijmans dissented from this finding by the Court.
[81] *Armed Activities*, Judgment, para 99, in conjunction with para 345(1).
[82] cf Section II.C.

consider the mere infliction of *economic* harm (eg sanctions) to amount to a use of force. However, it cannot be predicted with certainty if, and at what point, the ICJ would characterize the use of computer malware with detrimental cross-border effects as a use of force. It is also not clear under what precise circumstances it would regard the mere uninvited presence of military or police organs of a state on foreign soil as a use of force, and it finally remains an open question whether the Court would require the state conduct to have (or to be capable of having) a minimum degree of physical impact for it to violate the 'principle of non-use of force'.

5. *Consent*

The ICJ touched upon the issue of consent in the *Nicaragua* case when it stated that a foreign intervention is 'allowable at the request of the government of a state'.[83] While this *dictum* forms part of a passage of the *Nicaragua* judgment that deals with unlawful *intervention*, it is difficult not to extend it to the *use of force*. This is because the Court had made it clear that the most important forms of US intervention in the internal affairs of Nicaragua, such as the arming and training the Contras, constituted an intervention *amounting to the use of force*. Interestingly, the ICJ did not qualify its *dictum*. The Court therefore did not indicate the possibility that a non-international armed conflict, as has been argued in the literature,[84] might be of a nature or might reach a point that precludes the government from expressing legally valid consent. Yet one should probably not consider this question to have been settled by this one sentence that the Court included, somewhat in passing, in its *Nicaragua* judgment.

The issue of consent was much more prominent in the *Armed Activities* case.[85] In its judgment, the ICJ assumed that the use of force by a state on foreign soil is not unlawful if it is based on the consent of the territorial state. The Court did not address the issue of consent as an *exception* to the prohibition of the use of force. It rather (implicitly) held that the valid consent expressed by the territorial state precludes the existence of use of force within the meaning of the principle of the non-use of force if the invited state acts within the parameters of such consent. The ICJ did not exclude the possibility that valid consent may by expressed *implicitly* and emphasized at the same time that such consent may, as a rule, be withdrawn explicitly or implicitly and at any time.[86]

[83] *Nicaragua*, Merits, para 246.

[84] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189.

[85] *Armed Activities*, Judgment, paras 42 ff.

[86] *Armed Activities*, Judgment, paras 46–7.

C. Exceptions to the Prohibition of the Use of Force

The following section on the (possible) exceptions to the use of force is subdivided between the use of force *within* and *outside* the collective security system and it begins with the former.

1. *The use of force within the collective security system*

The ICJ has not yet pronounced on any legal question surrounding the UN Charter's collective security system in a contentious case, but one can make an attempt to draw a measure of support from two advisory opinions for the 'authorization model' on the use of force under Chapter VII of the UN Charter. This model has been developing in practice since the adoption of Security Council Resolution 678[87] after Iraq's invasion of Kuwait.[88] In *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, the Court stated that it 'cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded'.[89] This, of course, was stated with a view to peacekeeping rather than to (fully-fledged) enforcement action. The latter kind of action was directly addressed by the Court only in the *Nuclear Weapons* advisory opinion where it held in the most general terms that 'a further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter'.[90] In the light of the fact that this statement was made a couple of years after the practice on the 'authorization model' had begun, it may perhaps be read as implying the Court's inclination towards seeing that model in a legally favourable light. Be that as it may, the ICJ certainly did not go any further in the *Nuclear Weapons* advisory opinion, and it explicitly abstained from addressing 'questions which might, in a given case, arise from the application of Chapter VII'.[91]

2. *The unilateral use of force*

For the purposes of the following considerations, the term 'unilateral' simply means 'outside the collective security system' and it does not therefore generally exclude forcible action taken *collectively*, such as collective self-defence.

The ICJ's views on the one exception to the prohibition of the use of force, the *existence* of which is uncontroversial, will be set out first.

[87] S/678 (29 Nov 1990).

[88] On this practice, see Thomas M. Franck, *Recourse to Force. State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), 24 ff; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart, 2004), 260 ff.

[89] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Rep 1962, 167.

[90] *Nuclear Weapons*, Advisory Opinion, para 38.

[91] *Nuclear Weapons*, Advisory Opinion, para 49.

1. Individual *self-defence*

For the sake of clarity, the ICJ's views on *individual* self-defence will be presented initially. The right of collective self-defence, in the view of the Court, is accessory to the right of individual self-defence and subject to certain *additional* conditions. The latter will be set out in a separate subsection.

a) An (actual or imminent) armed attack as a *conditio sine qua non*

The question whether the right of individual self-defence, as recognized in Article 51 of the UN Charter, requires an armed attack, has perhaps given rise to the most famous controversy surrounding this provision. As early as 1952, Waldock argued that Article 51, despite its reference to an armed attack, did not limit the wider 'inherent' customary right of self-defence as it had existed at the time of the entry into force of the UN Charter. This included, for example, the right of *anticipatory* self-defence in case of an *imminent* armed attack.[92]

In 1958, this position was taken up and developed further by Bowett who listed the right to protect nationals abroad and the defence of certain economic interests as important aspects of this wider customary right of self-defence.[93] The contrary position, whereby an armed attack constitutes a *conditio sine qua non* of the right of individual self-defence under the UN Charter was most prominently defended by Brownlie in 1963.[94] Leaving the special question of *anticipatory* self-defence (to which we shall turn specifically in the next subsection) aside, it is certainly fair to say that the position requiring an (actual or perhaps imminent) *armed attack* has become the prevailing one in the international scholarly discourse.[95]

Since the *Nicaragua* case, the ICJ has been following this majority view.[96] The Court categorically stated that in 'the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an *armed attack*'.[97] While the *Nicaragua* Court decided the matter under customary international law, it was clear that, in that very respect, its view on the customary nature of the law of individual self-defence was based on the restrictive interpretation of Article 51.[98] This position has not changed since.[99]

[92] Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 463–4 in connection with 496 ff.

[93] Derek W. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), 87 ff, and 106 ff, each time in connection with 182 ff.

[94] Brownlie, *International Law and the Use of Force by States*, 270 ff.

[95] For two recent treatments of the matter in the sense of the predominant position, see Ruys, '*Armed Attack' and Article 51 of the UN Charter*, 55 ff; Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma et al (eds), *The Charter of the United Nations. A Commentary*, vol II (3rd edn, Oxford: Oxford University Press, 2012), 1403 ff (marginal notes 9 ff).

[96] Randelzhofer and Nolte, 'Article 51' in Simma et al, *The Charter of the United Nations*, 1404 (marginal note 13).

[97] *Nicaragua*, Merits, para 195 (emphasis added). [98] cf Section II.A.4.

[99] eg in *Oil Platforms* the ICJ held: 'in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right to self-defence, the United States has to show that attacks had

It was primarily due to Judge Schwebel that the expansive reading of the right of individual self-defence under the UN Charter and customary international law did not go completely unnoticed by the ICJ. In his voluminous dissent in the *Nicaragua* case, Judge Schwebel questioned whether the ICJ had actually wished to decide the matter, and stated, before explicitly referring to Waldock's earlier article, the following:

> [The] Judgment may be open to the interpretation of inferring that a State may react in self-defence, only if an armed attack occurs.…I wish, *ex abundanti cautela*, to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs…'. I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of Article 51.[100]

Judge Schwebel was right to question whether the ICJ had decided the question of *anticipatory* self-defence, as we shall see in the next subsection, but it is impossible to deny that the Court rejected the idea that Article 51 recognizes a pre-Charter right of self-defence that goes beyond the case of an actual or perhaps imminent *armed attack*.

b) The case of an *imminent* armed attack

Another classical controversy focuses on the question whether the contemporaneous international law on the use of force leaves room for anticipatory self-defence.[101] This debate has been an important part of the controversy as to whether the armed attack constitutes a *conditio sine qua non* for the right of self-defence. The latter fact explains why some of the formulations of the ICJ on the requirement of an armed attack read *as if* the Court had ruled out any scope for anticipatory self-defence. Such a construction of the jurisprudence would, however, go too far in the light of two explicit statements by the Court to the effect that it did *not* wish to decide that matter. In its judgment in the *Nicaragua* case, the ICJ found as follows:

> In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly, the Court expresses no view on that issue.[102]

been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force'; Judgment, para 51.

[100] *Nicaragua*, Merits, Dissenting Opinion of Judge Schwebel, para 173.

[101] Björn Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht. Eine systematische Ermittlung des gegenwärtigen friedenssicherungsrechtlichen Besitzstands aus völkerrechtsdogmatischer und praxisanalytischer Sicht* (Berlin: Duncker & Humblot, 2012).

[102] *Nicaragua*, Merits, para 194.

This caveat was reiterated in the *Armed Activities* case.[103] While the ICJ has therefore refrained from deciding the question of anticipatory self-defence, it has made clear its view that such anticipatory self-defence is conceivable only in a case where an armed attack is *imminent*. The following statement in the *Armed Activities* case may be read as a firm rejection of any legal claims of anticipatory self-defence exceeding the situation of an imminent armed attack:

> Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force to protect perceived security interests beyond these parameters. Other means are available, including, in particular, recourse to the Security Council.[104]

c) The concept of armed attack *ratione materiae*

In the *Nicaragua* case, the ICJ opined: 'There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks'.[105] Yet, the Court did not specify that nature either in the abstract or by a list of acts. In particular, the ICJ has at no point in its jurisprudence suggested that the concept of *armed* attack implies the use of *weapons* generally recognized as *military* in nature. Again in the *Nicaragua* case, the ICJ made reference to Article 3(g) of the Definition of Aggression annexed to General Assembly Resolution 3314[106] in order to give meaning to the concept of armed attack in the case before the Court. Importantly, however, the ICJ did not state that the concepts 'armed attack' (within the meaning of Art 51) and 'act of aggression' (within the meaning of Art 39) have the same meaning. The Court also refrained from establishing any other conceptual relationship between those two terms. While the ICJ has thus not yet defined the concept of armed attack (and it did not have to), its case law, in a similar manner as regards the concept of a 'use of force' (within the meaning of Art 2(4) and customary international law), provides a number of elements that shed light on the Court's understanding of the concept *ratione materiae*.

In the *Nicaragua* case, the ICJ found it necessary 'to distinguish the *most grave forms of the use of force* (those constituting an armed attack) from other less grave forms'.[107] A gravity threshold for the concept of 'armed attack' and a gap between that concept and the one of use of force were thus established. While the formulation 'most grave' might be taken to indicate a high threshold, the subsequent reference to a 'frontier incident'[108] as an example of a case where the gravity threshold is not reached reads somewhat differently.[109] The ICJ confirmed the existence of a

[103] *Armed Activities*, Judgment, para 143. [104] *Armed Activities*, Judgment, para 148.
[105] *Nicaragua*, Merits, para 195. [106] GA Res 3314 (XXIX) (14 Dec 1974).
[107] *Nicaragua*, Merits, para 191 (emphasis added). [108] *Nicaragua*, Merits, para 195.
[109] The same is true for the fact that the ICJ did not rule out the possibility that a *single* 'trans-border incursion' may amount to an armed attack; *Nicaragua*, Merits, para 231.

gravity threshold in the *Oil Platforms* case and repeated the *Nicaragua* distinction between 'most grave' and 'less grave forms' of the use of force.[110] Subsequently in the same judgment, the Court became much more specific and declared that it did 'not rule out the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence" '.[111] The judgment in the *Oil Platforms* case also contains a new element pertaining to the gravity threshold in that the ICJ alludes to the possibility of considering a *series of attacks* 'in combination' in order to determine whether an armed attack was committed.[112] The Court displayed a similar openness to regard certain attacks as 'cumulative in nature' in its judgment in the *Armed Activities* case.[113] In both instances, however, the ICJ did not decide that question and did not specify any conditions for accepting an 'accumulation of events' for the purpose of determining whether the gravity requirement of the concept of armed attack has been fulfilled in a given case.[114] It may be concluded that the ICJ has posed a gravity requirement for the concept of armed attack within the meaning of Article 51 and customary international law. While the Court's abstract description of armed attacks as 'the most grave forms' of a use of force may suggest a stringent threshold, the recognition of the possibility of a use of force against a single military vessel amounting to an armed attack appears to nuance that impression. The question would lose some practical significance were the ICJ to finally endorse, as it seemed inclined to do in the *Oil Platforms* case as well as in the *Armed Activities* case, some form of accumulation of events doctrine for the purpose of measuring gravity in cases of a series of attacks.

The armed attack within the meaning of Article 51 and customary international law must be directed *against a state*. This is clearly the case where the attack is against the *territory* of such a state. It is less clear whether armed attacks may also be directed against (certain) *extraterritorial manifestations* of another state.[115] In the *Oil Platforms* case the ICJ recognized the possibility of an armed attack against *one military vessel* of a state outside that state's territorial waters. Interestingly, the Court, in the same case, did not seem to exclude the possibility of an armed attack being directed against a *merchant* vessel of a state. The ICJ may thus be prepared to extend the concept of 'armed attack' beyond the confines of Article 3(d) of the General Assembly's Resolution on the Definition of Aggression. In that context, it is perhaps also noteworthy that the ICJ, while not directly addressing the right of

[110] *Oil Platforms*, Judgment, para 51.

[111] *Oil Platforms*, Judgment, para 72.

[112] *Oil Platforms*, Judgment, para 64; to be precise, this element was foreshadowed in *Nicaragua* where the Court, in passing, alluded to the possibility that 'trans-border incursions' could amount 'singly or *collectively*' to an armed attack; *Nicaragua*, Merits, para 231.

[113] *Armed Activities*, Judgment, para 146.

[114] For a critical stance vis-à-vis the use of the accumulation of events doctrine in this context, see *Oil Platforms*, Judgment, Separate Opinion of Judge Simma, para 14.

[115] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 199 ff.

self-defence, repeatedly used the term 'armed attack' in the *Tehran Hostages* case to label the seizure of the US embassy in Tehran.[116]

Finally, the question arises whether an armed attack within the meaning of Article 51 of the UN Charter requires some kind of *intent*. In the *Oil Platforms* case, the ICJ, when examining whether the minelaying could have amounted to an armed attack, considered the issue of intent. It noted that it had not been established that this action 'aimed specifically' at the US and that the mine struck by one of the ships in question, 'was laid with the specific intention of harming that ship'.[117] This reads as if the ICJ had wished to establish the requirement of an attacker's *intent specifically directed* against the victim state. While such a rather odd requirement would perhaps constitute too far-reaching an inference from this one passage,[118] the same passage would, however, at least seem to signal the Court's inclination to exclude *mistaken action* from the concept of armed attack.

d) The concept of armed attack *ratione personae*

aa) Armed attack *by a state*

In the *Nicaragua* case, the ICJ found that an armed attack by a state does not require action by de jure organs of that state. Instead, and relying on Article 3(g) of the Definition of Aggression, the ICJ determined:

> that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.[119]

In the same paragraph, the Court formed the view that the 'assistance to rebels in the form of the provision of weapons or logistical or other support' did not amount to an armed attack. The *Nicaragua* Court avoided establishing a direct connection between the idea of an armed attack by a state through irregular forces and the customary international law rules on attribution. However, it would seem fair to infer that the Court accepted the possibility of extending the concept of an armed attack by a state beyond the conduct of de jure state organs to all those cases where the use of armed force by persons can be otherwise *attributed* to a state under customary international law. It is also clear that there is, according to the Court, a (second) gap between the concepts of 'armed attack' and 'use of force'.

[116] *Tehran Hostages*, Judgment, paras 57, 64, 91.

[117] *Oil Platforms*, Judgment, para 64.

[118] For a similar expression of caution, see 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 966; the unexplained reference to 'motivations' in *Nicaragua*, Merits, para 231, is too vague to enable one to infer a clear-cut position adopted by the Court on the matter of intent.

[119] *Nicaragua*, Merits, para 195.

This is because the (mere) arming and training by a state of non-state actors fighting the government of another state on the latter's territory, while constituting a(n indirect) use of force by the supporting state,[120] does not amount to an armed attack. The remaining grey area concerns forms of state involvement into the use of force by persons, which go beyond the mere arming or training of rebels fighting in another state, but which are insufficiently intense to justify the attribution of that use of force to the involved state under the strict requirements, as they have eventually come to be clarified by the Court in its judgment in the *Genocide* case.[121] Those requirements are, in the alternative, the *complete dependence* of a group of violent non-state actors on the support of the state concerned or the latter's *effective* control over the specific forcible actions carried out from within such a group.[122] The 'harbouring' by a state of transnationally violent non-state actors on its territory, to take one specific and recently much discussed example, would seem to fall into that grey area. There are two legal avenues through which the ICJ could proceed to construe the concept of armed attack by a state so as to cover this form of state involvement (and similar ones). The Court could recognize the emergence of a *lex specialis* on attribution within the specific context of the law on the use of force[123] or it could accept some limited room for the concept of an *indirect* armed attack consisting in the *substantial* (though insufficient for purposes of attribution) involvement of a state in the (transnational) use of force by non-state actors. As yet, there is, however, very little in the case law of the ICJ that would suggest that the Court is inclined to use either of those avenues. The ICJ has, in particular, refrained completely from indicating whether the concept of 'substantial involvement', as contained in Article 3(g) of the Definition of Aggression, possesses a scope of application exceeding that covered by the general requirements of attribution, as understood by the Court.[124]

[120] cf Section II.B.3.

[121] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb 2007, ICJ Rep 2007, paras 385–415.

[122] Jérôme Reymond, *L'attribution de comportements d'organes de facto et d'agents de l'Etat en droit international. Étude sur la responsabilité internationale des Etats* (Zurich: Editions Schulthess, 2013).

[123] This question has been the subject of much discussion; see eg Tal Becker, *Terrorism and the State. Rethinking the Rules of State Responsibility* (Oxford: Hart, 2006), 285 ff; Christian Henderson, *The Persistent Advocate and the Use of Force. The Impact of the United States upon the* Jus ad Bellum *in the Post-Cold War Era* (Farnham: Ashgate, 2010), 137 ff; for the suggestion that a particularly far-reaching *lex specialis* has emerged, see Randelzhofer and Nolte, 'Article 51' in Simma et al, *The Charter of the United Nations*, 1418–19 (marginal note 41).

[124] For an analysis of *Nicaragua* in the light of the alternative of 'substantial involvement', see *Nicaragua*, Merits, Dissenting Opinion of Judge Schwebel, paras 165 ff.

bb) Non-state *armed attack*

One of the most important current debates on the right to self-defence concerns the question whether the armed attack within the meaning of Article 51 of the UN Charter must be carried out *by a state*. While the predominant scholarly view before the terror attacks of 11 September 2001 was perhaps to insist on such a requirement,[125] there has since been a growing trend to accept the possibility of *non-state* armed attacks.[126] In the *Nicaragua* case, the ICJ confined the concept of armed attack to *state* conduct.[127] The Court followed this line in the *Oil Platforms* case, where it required the US to show that attacks had been made upon it '*for which Iran was responsible*'.[128]

The picture becomes less clear with the ICJ's *Wall* advisory opinion. The pertinent passage of the opinion reads:

> Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of an armed attack *by one State* against another State. However, Israel does not claim that the attacks against it are *imputable to a foreign State*. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising the right of self-defence.[129]

It would be an understatement to say that this passage is not entirely clear. In the first two sentences of the citation, the ICJ appeared to follow its prior case law and seemed to require, in the most explicit terms, *state* action. Then, however, the Court made a reference to Resolutions 1368 and 1373, adopted in the wake of the attacks of 9/11, the preambular references of which to the right of self-defence are often taken as evidence for the Security Council's recognition of the possibility of *non*-state armed attacks falling within the meaning of Article 51. The ICJ did not clarify the significance of its reference to those two resolutions. Instead, it distinguished the situation before it from that addressed by those resolutions. The very fact, though, that the Court felt the need to engage in that distinguishing exercise casts doubt on the rigour with which the Court wished to adhere to the requirement of state action despite its seemingly clear articulation of that requirement at the beginning of that paragraph.

[125] For an earlier view to the contrary, see Claus Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (Berlin: Duncker & Humblot, 1995), 206–35.

[126] See eg para 10 of the 2007 resolution of the Institut de Droit International on Self-Defence; 'The Chatham House Principles', 969; for a thorough more recent account of the debate with numerous references, see Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 419 ff.

[127] *Nicaragua*, Merits, para 195; for the same interpretation of this passage, see *Wall*, Advisory Opinion, Separate Opinion of Judge Higgins, para 33.

[128] *Oil Platforms*, Judgment, para 51 (emphasis added).

[129] *Wall*, Advisory Opinion, para 139 (emphasis added).

The ICJ returned to the question of non-state armed attacks in the *Armed Activities* case. In that case, the Court was asked to determine whether Uganda could justify part of its military operations in the DRC by reference to the right of individual self-defence because of cross-border armed action having emanated from the territory of the DRC and having been directed against Uganda. The Court examined the possibility of attributing that armed action to the DRC and rejected the possibility. The Court continued its analysis as follows:

> For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.[130]

In his separate opinion, Judge Kooijmans drew upon his diplomatic skills when he characterized this passage as 'not altogether clear'.[131] In fact, it remains a matter of speculation why the ICJ did not feel the need to address the issue of *non*-state armed attacks *after having rejected the possibility of attributing the armed action* in question to a state. Whatever the reasons were, it is worth noting that the ICJ has addressed the issue of a *non*-state armed attack as an *open question* rather than considering the matter to have been conclusively dealt with in the negative in its prior jurisprudence. This may be taken as a signal by the Court that it is willing to (re) consider the issue on a future occasion.

Judges Higgins, Kooijmans, and Buergenthal (in the *Wall* advisory opinion), and Judges Kooijmans and Simma (in the *Armed Activities* case) have been less reluctant than the Court and have all expressed their preference for recognizing the possibility of non-state armed attacks within the meaning of Article 51.[132]

cc) The requirements of necessity and proportionality

There would seem to be a broad consensus that the exercise of the right of self-defence under international law is governed by the principles of necessity and proportionality. Reference is generally made to the famous 1837 *Caroline* incident in support of that position.[133] The content of those two principles turns out to be remarkably controversial[134] and the situation is further complicated by the fact that there is uncertainty about the preliminary question whether the halting or repelling of the

[130] *Armed Activities*, Judgment, para 147.

[131] *Armed Activities*, Judgment, Separate Opinion of Judge Kooijmans, para 20.

[132] *Wall*, Advisory Opinion, Separate Opinion of Judge Higgins, para 33; Separate Opinion of Judge Kooijmans, para 35; Declaration of Judge Buergenthal, para 6; *Armed Activities*, Judgment, Separate Opinion of Judge Kooijmans, paras 28 ff; Separate Opinion of Judge Simma, para 11.

[133] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 92 ff.

[134] Thorough scholarly treatises of the relevant legal issues are rare; for one exception, see Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004).

armed attack constitutes the only legally admissible goal of self-defence action apart from the specific case of anticipatory self-defence.[135]

With respect to the content of the principle of necessity, it is unclear whether it imposes a *temporal* restraint on the defensive use of force often referred to as the requirement of *immediacy*. With respect to proportionality, there is a more fundamental uncertainty about the legal point of reference. Proportionality may be understood to require 'some sort of equation between the gravity of the armed attack and the defensive response'.[136] Alternatively (or cumulatively), proportionality is measured against the aim of the defensive action. This second view on proportionality, which is sometimes referred to as the *functional* approach,[137] follows an often-cited statement by Roberto Ago, Special Rapporteur of the ILC on state responsibility for internationally wrongful acts, which reads:

> The action…may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself.[138]

Such an understanding of the concept of proportionality reduces its practical relevance to an examination which could also be conducted under the requirement of necessity. In the light of those and other questions, it is interesting to see what the Court has had to say on such matters.

Beginning with its judgment in the *Nicaragua* case, the ICJ has left no doubt that it considers the right of self-defence to be subject to the requirements of necessity and proportionality. The Court, without ever specifically referring to the *Caroline* incident, considers those requirements to be rooted in customary international law and, perhaps, even to be inherent in the very concept of self-defence.[139] Regarding the more precise content of those principles, the ICJ has refrained from defining them in the abstract so that it is necessary to look at how the Court applied them to the concrete cases before it. In that respect, however, one important general caveat is in place. None of the ICJ judgments in question actually hinged on the question of necessity or proportionality. The Court has therefore addressed those questions indirectly, rather briefly, and more as marginal issues, in particular in the *Nicaragua* and *Armed Activities* cases.[140] This cautions against drawing far-reaching conclusions from the relevant parts of the judgments.

[135] For an intriguing recent argument to broaden the list of possible aims of self-defence action beyond 'halting and repelling', see David Kretzmer, 'The Inherent Rights to Self-Defence and Proportionality in *Jus ad Bellum*' (2013) 24 *European Journal of International Law* 260; for a response, see Georg Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer' (2013) 24 *European Journal of International Law* 283.

[136] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 111, calls this a 'quantitative approach'.

[137] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 112.

[138] Roberto Ago, 'Addendum to the 8th Report on State Responsibility', *Yearbook of the International Law Commission*, 1980, vol II (1), 69.

[139] cf Section II.A.4.

[140] *Nicaragua*, Merits, para 237; *Armed Activities*, Judgment, para 147.

In the *Nicaragua* case, the ICJ rejected the necessity of the use of force by the US because the 'major offensive of the armed opposition against the Government of El Salvador had been completely repulsed, and the actions of the opposition considerably reduced in consequence'. 'Thus', the Court continued, 'it was possible to eliminate the danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua'.[141] In this passage, the Court alluded to the temporal aspect of the necessity requirement and its formulation may be read to suggest that forcible measures of self-defence are no longer necessary when the armed attack has ended. For the reasons stated previously, it would seem problematic, though, to interpret this one and rather broad reference to the 'elimination of the danger' as precluding the possibility for a state (such as the US after 9/11) to act in self-defence in order to prevent the reoccurrence in the near future of an armed attack emanating from the same source from which an armed attack had recently emanated. Even if one interprets the previously cited passage in the *Nicaragua* judgment as the endorsement of the view that the only admissible aim of self-defence action is to halt and repel an ongoing armed attack, its application requires a clear understanding of when an armed attack ends, and such a determination may well be controversial in the light of the fact that, here again, there may be room to resort to the concept of a continuing armed attack based on the idea of an accumulation of events.

While the Court has yet to pronounce clearly on those legal questions, it is important to recall that the ICJ has already, albeit implicitly, dealt with another aspect of the question of when an armed attack ends. The Court qualified Uganda's military occupation of parts of the DRC, resulting from an unlawful use of force against that state, to constitute as such an (unlawful) use of force.[142] If this reasoning were transferred to the level of an armed attack, it would mean that an armed attack continues as long as the attacker militarily occupies (parts of) the victim state.[143] The implications for the application of the necessity requirement in its temporal dimension are obvious and only an additional requirement of immediacy could then limit the temporal scope of defensive action. Whether the ICJ would accept such a requirement, either as an independent condition or as part of the principle of necessity, is impossible to tell from its case law so far.

In the *Oil Platforms* case, the ICJ observed, as part of its analysis of the necessity of the use of force in question 'that there is no evidence that the United States complained to Iran of the military activities of the platforms'[144] before bombarding them. This may be understood as implying that the use of force must be a measure of *last resort* in order for it to qualify as a necessary measure of self-defence. While this principle would again hardly seem problematic, if stated in the abstract, it would appear imprudent for the ICJ to require a state, that is actually under attack,

[141] *Nicaragua*, Merits, para 237. [142] cf Section II.B.4.

[143] For such a view, see Okimoto, *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello, 52.

[144] *Oil Platforms*, Judgment, para 76.

invariably to attempt a diplomatic solution before adopting defensive measures. The Court's brief statement in the *Oil Platforms* case, which concerned a claim of self-defence against an alleged series of minor uses of force, would therefore be better interpreted in not such a sweeping manner.[145]

In the *Oil Platforms* case, the ICJ also alluded to the possibility that the necessity requirement could limit the scope of lawful targets—independently and perhaps beyond the limitations imposed by the applicable law of armed conflict—to such objects that directly contribute to the ongoing armed attack.[146] The Court was not, however, very specific in this respect and did not elaborate upon this point so that, here again, it would seem appropriate to confine the significance of the reasoning to the particularities of an alleged series of relatively low-scale attacks.

With respect to the proportionality principle, it is even more difficult to identify the ICJ's position in abstract terms, perhaps with one exception. The Court makes it fairly clear in the *Oil Platforms* case that the proportionality of an exercise of the right of self-defence must—other than the proportionality of an attack under the law of armed conflict—be assessed in the light of the defensive operation and the armed attack, both taken as a whole.[147]

The ICJ has not specified explicitly at any point in its jurisprudence whether it prefers the 'functional' or the 'quantitative' approach to proportionality. Yet, it would seem clear that the Court would not accept as lawful a forceful response to an armed attack that does not even meet the requirements of the functional approach, meaning a forceful response which exceeds that necessary to halt and repel the armed attack. Whether the Court would base its rejection of such a forceful response on *necessity* or on *proportionality* or on some sort of combination thereof is unclear. But this is more of analytical than practical relevance. What matters in practice is whether the Court, in addition, recognizes some quantitative limitation of the forceful response to an armed attack despite the necessity of the latter response. The pertinent passages in the *Nicaragua*[148] and *Armed Activities* cases[149] suggest that the ICJ indeed assumes the existence of such a limitation, but as the Court's findings were not supported by reasons it is impossible to derive any criteria that could guide the identification of the quantitative threshold in question. While the Court was somewhat more elaborate in

[145] For a more circumspect formulation of the same principle, see 'The Chatham House Principles', 966.

[146] 'The Chatham House Principles', para 74.

[147] 'The Chatham House Principles', para 77: 'the Court cannot assess in isolation the proportionality of that action to the armed attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation…'; for the same interpretation of this passage, see the Principles, 969.

[148] *Nicaragua*, Merits, para 237: 'Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid.'

[149] *Armed Activities*, Judgment, para 147: 'The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.'

the *Oil Platforms* case, the considerations contained in that judgment, in the end, do not elucidate the matter. In that case, the ICJ held that the destruction of two Iranian oil platforms in response to the mining of a single military vessel was disproportionate, while the destruction of two other oil platforms in response to a missile attack on a single merchant vessel might have been proportionate.[150] It is not easy to make sense of this distinction.[151] In conclusion, all that can be said in the abstract is that the ICJ is inclined to recognize the possibility that a forceful defensive measure is *dis*proportionate because its intensity is in *excess* of the gravity of the armed attack. The jurisprudence offers no real guidance, however, as to *when* an action taken in self-defence can be said to become excessive in that quantitative sense.

e) Self-defence and Security Council action

The ICJ has yet to address the words 'until the Security Council has taken the measures necessary to maintain international peace and security'.[152] In *Nuclear Weapons*, the ICJ simply ignored that part of Article 51 of the UN Charter and instead restated the rest of the provision.[153]

f) The duty to report to the Security Council

The ICJ has consistently referred to the UN Charter[154] requirement to report immediately any exercise of the right of self-defence to the Security Council.[155] In the *Nicaragua* case, the ICJ treated the failure of the US to report its alleged collective self-defence action as an indication that the US was perhaps itself not convinced of the strength of its legal claim.[156] In the *Armed Activities* case, the ICJ, in the light of Uganda's omission, could have specified the legal consequence, under the UN Charter, of a failure to report. But it did not. As the Court did not say that Uganda's self-defence claim failed because of its failure to report,[157] it may be assumed that the Court does not consider this requirement to be a condition for the lawfulness of self-defence, but rather as an independent procedural obligation.

g) Self-defence and military occupation

In the *Wall* advisory opinion, the ICJ rejected Israel's claim that the security barrier it erected was an act of individual self-defence against (non-)state armed attacks against Israel's territory emanating from occupied territory. The ICJ noted that Israel,

[150] *Oil Platforms*, Judgment, para 77.

[151] James A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart, 2009), 86 ff.

[152] But see Nico Krisch, *Selbstverteidigung und Kollektive Sicherheit* (Berlin: Springer, 2001).

[153] *Nuclear Weapons*, Advisory Opinion, para 44.

[154] On the Court's position that no such requirement exists under *customary* international law, see Section II.A.4.

[155] *Nicaragua*, Merits, para 200; *Nuclear Weapons*, Advisory Opinion, para 44; *Armed Activities*, Judgment, para 145.

[156] *Nicaragua*, Merits, para 235.

[157] For the relevant passage, see *Armed Activities*, Judgment, para 145.

as the occupying force, exercised control in the territory from which the alleged armed attack originated.[158] This can be taken to mean that the Court prefers not to qualify individual forcible measures adopted by an occupying force within the occupied territory as a use of force within the meaning of the 'principle of the non-use of force in the international relations', but rather as measures to be examined exclusively under the law of military occupation.[159] At the same time it should be recalled that the ICJ in the subsequent *Armed Activities* case, found Uganda's military occupation of parts of the DRC to constitute such a use of force.[160] The ICJ could therefore hardly deem the right of self-defence as irrelevant with respect to the question whether the use of force, which consists in a military occupation as such, can be justified. The distinction between the military occupation itself and an individual forcible measure adopted by the occupying power during such occupation, is a fine one, but it is submitted that this distinction would allow the reconciliation of what the ICJ had to say on 'the principle of non-use of force' and military occupation in the *Wall* advisory opinion, on the one hand, and in the *Armed Activities* case, on the other hand.

II. *Collective self-defence*

The very concept of the right of *collective* self-defence (the existence of which in pre-Charter customary international law is less clear than the ICJ assumed in the *Nicaragua* case)[161] has long been the subject of two conflicting views. According to the first, the right in question entitles a state, which is not itself the victim of an armed attack, to come to the assistance of such a victim.[162] The second position has been articulated most clearly by Bowett who stated:

> The requirements of the right of collective self-defence are two in number; firstly that each participating state has an individual right of self-defence, and secondly that there exists an agreement between the participating states to exercise their rights collectively.[163]

In the *Nicaragua* case, the ICJ implicitly rejected Bowett's position and sided with the concept of collective self-defence as the 'defence of another State'. Starting from that premise, the Court subjected the right of collective self-defence to the following specific conditions:

> The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such State should have declared itself to have been attacked.[164]

[158] cf the citation accompanying n 122.

[159] For a thoughtful treatment of this difficult question, see Iris Canor, 'When *Jus ad Bellum* Meets *Jus in Bello*: The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories' (2006) 19 *Leiden Journal of International Law* 139.

[160] Section II.B.4.

[161] *Nicaragua*, Merits, para 193; for the contrary view, see Dissenting Opinion of Judge Jennings, 530–1.

[162] Brownlie, *International Law and the Use of Force by States*, 330–1.

[163] Bowett, *Self-Defence in International Law*, 207; Bowett's view was followed by Judge Jennings in his Dissenting Opinion in the ICJ's judgment in *Nicaragua*, Merits, 545.

[164] *Nicaragua*, Merits, para 199.

Judge Jennings criticized this formulation of a specific double requirement as 'somewhat formalistic'.[165] Perhaps the ICJ took that observation into account when it formulated somewhat more generously in the *Oil Platforms* case. Here the Court cited only part of the relevant passage in the *Nicaragua* judgment and held that the right of collective self-defence required 'the existence of a request "by the State which *regards* itself as the victim of an armed attack" '.[166]

a) Exceptions to the prohibition of the use of force other than self-defence?

The ICJ has at no point unambiguously stated that the right to self-defence constitutes the *only* exception to the prohibition of the use of force outside the collective security system. Instead, the Court said in the *Nicaragua* case that the 'general rule prohibiting force allows for *certain* exceptions'.[167] And in *Nuclear Weapons*, after mentioning Article 51 of the UN Charter, it referred to Article 42 as the legal basis for '[a] further lawful use of force'[168] instead of calling it the only further exception. At the same time, the ICJ has not to date recognized any exception to the prohibition of the use of force, apart from self-defence and collective security, in its existing jurisprudence.

aa) Individual *forcible countermeasures against less grave uses of force*

The point where the ICJ perhaps came closest to recognizing another (and very limited) exception is in the *Nicaragua* case, where the Court addressed in some detail the gap that exists, in its view, between the prohibition of an *indirect* use of force[169] and the narrower concept of armed attack.[170] In that respect, the ICJ wondered:

> whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force.[171]

The Court did not answer this question because it held that it was inconceivable that such a right to adopt 'counter-measures' involving a 'less grave' use of force could be relied upon by a *third* state as analogous to the right to *collective* self-defence.[172]

In the *Oil Platforms* case, the ICJ did not revisit the matter despite the relatively small-scale nature of the Iranian uses of force, as alleged by the US, and despite the difficulties the Court was facing in establishing whether the threshold of an armed attack had been passed. This was criticized by Judge Simma. Where a state has been subject to an unlawful use of force that falls short of an armed attack, Judge Simma argued that this victim state has the right to take individual 'defensive action by

[165] *Nicaragua*, Merits, Dissenting Opinion of Judge Jennings, 544.
[166] *Oil Platforms*, Judgment, para 51 (emphasis added).
[167] *Nicaragua*, Merits, para 193 (emphasis added).
[168] *Nuclear Weapons*, Advisory Opinion, para 38.
[169] cf Section II.B.3.
[170] cf Section II.C.2.i(a)(cc).
[171] *Nicaragua*, Merits, para 210.
[172] *Nicaragua*, Merits, paras 210, 249.

force also short of Article 51'.[173] It is somewhat tempting briefly to speculate why the idea of a right to individual forcible countermeasures 'short of Article 51', as Judge Simma put it, was not taken up by the ICJ in the *Oil Platforms* case. The most straightforward reason is that when the Court found that the evidence did not bear out on an Iranian armed attack, it implicitly also found no 'less grave' Iranian use of force thereby rendering moot any consideration of forcible individual countermeasures by the US 'short of Article 51'. Yet, in the *Nicaragua* case the ICJ had also flagged the same issue by way of an *obiter dictum* so that one might have expected the Court to recall it, had it attributed great significance to it. Perhaps, therefore, the ICJ's silence in the *Oil Platforms* case suggests that the Court was not too eager to confirm the question that it had asked in the *Nicaragua* case, and instead chose to lower the gravity threshold for the concept of armed attack[174] in order to reduce the gap between Article 2(4) and Article 51.[175]

On a final terminological note, it is worth mentioning that it was surprising to see the ICJ using the term 'countermeasures' in that specific context. This is because the term came into use through the ILC as a modern term replacing that of *reprisals* within the legal framework of state responsibility,[176] and the ICJ would observe in *Nuclear Weapons* that 'armed reprisals in time of peace…are considered to be unlawful'.[177]

bb) The use of force in an anti-colonial struggle

In the *Nicaragua* case, the ICJ explicitly left open the possibility that an exception to the prohibition of the use of force could have come into existence within the context of 'decolonization'[178] and this *obiter dictum* met with the criticism of Judge Schwebel.[179] In the light of the near completion of the decolonization process, it is unlikely that this controversy will have any bearing on the future jurisprudence of the Court.

cc) The state of necessity

In 1980, and again as Special Rapporteur of the ILC, Roberto Ago had expressed an open mind to the possibility that, under certain limited conditions, the state of necessity could serve as an independent exception from the prohibition of the use of force.[180] Subsequently, a few writers have gone further and have explicitly argued

[173] *Oil Platforms*, Judgment, Separate Opinion of Judge Simma, para 12.

[174] cf Section II.C.2.i(c).

[175] For an observation pointing in that direction, see Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 143.

[176] Hubert Lesaffre, 'Countermeasures' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 471.

[177] *Nuclear Weapons*, Advisory Opinion, para 46.

[178] *Nicaragua*, Merits, para 206.

[179] *Nicaragua*, Merits, Dissenting Opinion of Judge Schwebel, paras 179–81.

[180] Roberto Ago, 'Addendum to the 8th Report on State Responsibility', *Yearbook of the International Law Commission*, 1980, vol II (1), 39 ff (paras 56 ff).

in favour of such an exception.[181] There is nothing in the jurisprudence of the ICJ suggesting that the Court would be amenable to accept such an exception. In the *Armed Activities* case, for example, one would have expected the ICJ, after having rejected the claim of self-defence, to deal with such an exception had it been inclined to recognize it in principle.[182]

dd) Forcible rescue actions abroad

In the *Tehran Hostages* case, the ICJ stated that it could not 'let pass without comment the incursion into the territory of Iran made by the United States military units on 24–25 April 1980' in order to liberate US nationals taken hostage at the time and the Court went on to express 'its concern' regarding this failed rescue attempt.[183] This has been the only encounter the ICJ has had with the controversial question whether there is a right of states to use (limited) force to protect their nationals abroad.[184] While it is clear that the ICJ's critical observation in the *Tehran Hostages* case is very far from indicating a willingness to favourably consider the possibility of such a right, it would go too far to treat this cursory remark as the rejection of such right.[185] This is because the ICJ recognized explicitly that it did not have jurisdiction to rule upon the 'legality of the operation . . . under the Charter of the United Nations and under general international law',[186] and it also explained its criticism on the ground that, under the specific circumstances of the case, the operation would 'undermine respect for the judicial process in international relations'.[187]

ee) Humanitarian intervention

In the *Nicaragua* case, the ICJ held:

> In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method

[181] See eg Andreas Laursen, 'The Use of Force and (the State of) Necessity' (2004) 37 *Vanderbilt Journal of Transnational Law* 485; for two more recent examples, see (in the context of anticipatory self-defence) Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Oxford: Hart, 2011), 19; and (albeit much more cautiously and in the context of humanitarian intervention); Michael Wood, 'The Law on the Use of Force: Current Challenges' (2007) 11 *Singapore Year Book of International Law* 11; the ILC eventually abstained from explicitly deciding the question either directly in Art 25 of its Articles on State Responsibility or in its commentary thereon; see Sarah Heathcote, 'Necessity' in Crawford, Pellet, and Olleson, *The Law of International Responsibility*, 498–9.

[182] The reference to the state of necessity in *Wall*, Advisory Opinion, is not situated in the context of possible justification of use of force.

[183] *Tehran Hostages*, Judgment, para 93.

[184] In *Wall*, Advisory Opinion, para 141, the Court held that Israel had 'the right, and indeed the duty to respond [to numerous indiscriminate and deadly acts of violence against its civilian population] in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law'; this statement is not only phrased in very general terms, but it is also not placed in the context of the specific legal question as to whether use of force could be justified.

[185] For the same view, Jennings, 'International Force and the International Court of Justice' in Cassese, *The Current Legal Regulation of the Use of Force*, 330–1.

[186] *Tehran Hostages*, Judgment, para 94.

[187] *Tehran Hostages*, Judgment, para 93.

to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.[188]

In the light of this statement, it would seem impossible to suggest that in *Nicaragua* the Court saw any place for the use of force to end serious human rights violations in another state. Yet, as the ICJ itself pointed out, the 'legal strategy of the respondent State' was not to claim a right to use force to avert a 'humanitarian catastrophe'. Accordingly, the Court dealt with the matter only cursorily.

The legal claim that a state is entitled, under certain circumstances, to use force unilaterally to avert a humanitarian catastrophe in another state was subsequently brought before the ICJ in 1999 by Belgium in the *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)*.[189] The ICJ was, however, precluded from addressing this justification of the 'Kosovo intervention' in the various *Legality of Use of Force* cases for lack of jurisdiction.[190]

In the *Genocide case*, the ICJ recognized the duty of states to prevent genocide even beyond their own borders. When the Court specified the parameters of that duty, it was careful to add that states 'may only act within the limits permitted by international law'.[191] The ICJ thus precluded the possibility of relying on its judgment in support of a right to (forcible unilateral) humanitarian intervention to prevent *genocide*.[192]

ff) On the possible emergence of new exceptions through subsequent practice

The ICJ has not directly addressed the question of whether a new exception to the prohibition of the use of force could come into existence through state practice. In the context of the prohibition of intervention, however, the Court stated in the *Nicaragua* case that 'reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law'.[193] While this sentence was directly concerned only with the prohibition of intervention and the change of *customary*

[188] *Nicaragua*, Merits, para 268.

[189] *Case Concerning Legality of Force (Serbia and Montenegro v. Belgium)*, Provisional Measures of 10 May 1999, CR 99/15.

[190] See eg *Case Concerning Legality of Force (Serbia and Montenegro v. Belgium)*, Judgment, Preliminary Objections of 15 Dec 2004, para 129.

[191] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb 2007, para 437.

[192] This is emphasized by Bruno Simma, 'Genocide and the International Court of Justice' in Christoph Safferling and Eckart Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (The Hague: TMC Asser Press, 2010), 262.

[193] *Nicaragua*, Merits, para 207.

international law, it can perhaps also be read as an indication that the Court does not wish to exclude the possibility that a new exception to the prohibition of the use of force might emerge.[194] In that regard, in the *Nicaragua* case, the ICJ had dealt with a case of forcible intervention so that it had to apply the two prohibitions in a closely intertwined manner. Also in the *Nicaragua* case, the Court developed its vision of an essentially identical corpus of international law on the use of force based on both the UN Charter and customary international law. Accordingly, one would expect the Court not to confine the relevance of the emergence of a new exception to the prohibition of the use of force to the realm of custom.

D. The Prohibition of the *Threat* of Force

The prohibition of the *threat* of use of force has received comparatively little attention in state practice and international legal scholarship and this is mirrored in the case law of the ICJ.[195] The Court explicitly dealt with this aspect of 'the principle of the non-use of force' only on the occasion of the *Nuclear Weapons* case and, due to the nature of the proceedings, in the abstract. The one substantial statement made by the Court in that advisory opinion is brief, though of considerable importance. The ICJ held that 'if it is to be lawful, the declared readiness of a state to use force must be a use of force that is in conformity of the Charter'.[196]

[194] For the same view, see Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford: Oxford University Press, 2008), 8.

[195] But see Francis Grimal, *Threats of Force: International Law and Strategy* (Abingdon: Routledge, 2012); and Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge: Cambridge University Press, 2007); see also Michael Wood, 'Use of Force, Prohibition of Threat' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, vol X (Oxford: Oxford University Press, 2012), 620.

[196] *Nuclear Weapons*, Advisory Opinion, para 47; for an analysis of this statement, see James A. Green and Francis Grimal, 'The Threat of Force as Action in Self-Defense Under International Law' (2011) 44 *Vanderbilt Journal of Transnational Law* 292; those authors also argue that the ICJ addressed the prohibition of the threat of force *implicitly* in *Corfu Channel* in two respects. They observe (at 292–3) that the Court, after having qualified Operation Retail 'as the manifestation of a policy of force' (cf Section II.B.4), went on to say that it 'did not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania' (*Corfu Channel*, Merits, 35), and they infer from that remark that the ICJ recognized the possibility of breaching the prohibition of the use of force without at the same time breaching the prohibition of the threat of force. This may be a possible inference, but the precise significance of the whole passage remains uncertain as pointed out in Section II.B.4). Green and Grimal also argue that the ICJ implicitly accepted the possibility of justifying an otherwise unlawful threat of force as a measure of self-defence. This inference is drawn from another passage of the judgment in *Corfu Channel* in which the Court said about an earlier passage of UK warships through the Corfu Channel that, in the light of the fact that the warships had been 'at action stations', the intention of the UK had to be taken 'to demonstrate such force that she [Albania] would abstain from firing again on passing ships' (*Corfu Channel*, Merits, 31). As the ICJ did not 'characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty' (ibid), the Court, according to Green and Grimal, must have considered the otherwise unlawful threat of force by the UK as a legitimate

III. Some Reflections on the Overall Picture of the Jurisprudence of the Court

The ICJ has addressed a broad range of legal issues concerning the legality of the unilateral use of force by states in their international relations. Perhaps the most striking feature of the Court's rich jurisprudence on 'the principle of non-use of force' is its apodictic style. The ICJ has stated the law as if neither ambiguities nor controversies existed. It has accordingly almost never entered into an exegesis (which would deserve that term) of the *texts* of Articles 2(4) and 51 of the UN Charter, nor has it had a closer look at the practice of states as it has evolved in the course of particular incidents[197] involving the use of force. The Court's general approach finds its most remarkable expression in the statement made in the *Nicaragua* case that there 'appears now to be *general* agreement on the nature of the acts which can be treated as constituting armed attacks'.[198] In the light of the many (and at times quite heated) controversies surrounding the concept of an armed attack[199] (and some of those controversies had already come to light through dissenting judicial opinions),[200] the ICJ's claim of a 'general agreement' had an almost unintended irony.

Yet, and this holds true irrespective of the many criticisms voiced in international legal scholarship on various aspects of the ICJ's jurisprudence on the use of force,[201] it is fair to assume that the Court, be it only by virtue of its institutional prominence, was remarkably successful in clarifying the law and in influencing state practice in accordance with its interpretations.[202] The ICJ is likely to have contributed to the

measure of self-defence 'because of the preceding use of force by Albania'. With respect, this reads much into a passage in which the ICJ did not even use the term 'threat of force'. Besides, if one absolutely wishes to read this part of the judgment in *Corfu Channel* as implicitly dealing with the prohibition of the threat of force, it would be much more natural to read it as foreshadowing the *Court*'s approach in *Nuclear Weapons*: the threat of force by the UK was lawful because it did no more than signal the intention to defend itself in the case of (renewed) armed attacks against their warships.

[197] On the considerable legal significance of that part of state practice, see Michael Reisman, 'The Incident as a Decisional Unit in International Law (1984–5) 10 *Yale Journal of International Law* 1.

[198] *Nicaragua*, Merits, para 195 (emphasis added).

[199] Ruys, *'Armed Attack' and Article 51 of the UN Charter*.

[200] *Nicaragua*, Merits, Dissenting Opinion of Judge Schwebel, paras 162–71; Dissenting Opinion of Judge Jennings, 542–4.

[201] James A. Green arrives at the following rather grim conclusion: 'in the cases that have reached the Court, it has demonstrated itself to be unsuitable to deal with the crucial question of self-defence in international law'; Green, *The International Court of Justice and Self-Defence in International Law*, 210.

[202] These reflections are concerned with the ICJ's function to ascertain and to prudently develop the law. While a detailed assessment of the Court's success in exercising its dispute settlement function in the field currently under discussion is beyond the ambit of this text, it may at least be said that it will probably pose quite a challenge to recognize more than limited success in that latter respect.

firm entrenchment of a modern law governing (and so limiting) the use of force in international relations. (The 'death' of Article 2(4) may have occasionally been declared by scholars in the heat of the moment,[203] but not by states.) The Court has probably also had an effect upon the consolidation of the understanding of the prohibition of the use of force as being 'all-inclusive' in nature.[204] It has certainly provided a powerful incentive for states increasingly to frame their justifications for the unilateral use of force as measures of *self-defence*[205] against *armed attacks*.[206] Finally, it would seem that the ICJ's view on the concept of collective self-defence[207] has by and large been accepted in state practice[208] and that the Court has increasingly induced states to comply with the duty to report their use of force in (alleged) self-defence to the Security Council.[209]

On the other hand, it is impossible to ignore the significant extent to which ambiguities and controversies continue to characterize the international law on the use of force. This is partly due to a lack of occasions on which the ICJ is able to state the law in certain important respects. But significant controversies also continue to surround legal questions that the Court has already sought to clarify. The uncertainties begin at the most fundamental level and concern the very concept of 'force'.[210] The Court has made it clear that 'economic coercion' does not, as such, amount to a use of force, and this position appears to enjoy almost universal acceptance by states. However, the ICJ's jurisprudence does little to guide the emerging debate as to whether hostile cyber operations may reach the level of a use of force, and the existing uncertainty in that respect necessarily also affects the concept of 'armed attack'.[211] As regards the ICJ's construction of the concept of 'armed attack' *ratione materiae*,[212] the US, for its part, has declared in the clearest possible terms its dissent from the Court's recognition of a gravity threshold.[213] Indeed, the same critical position has been adopted in the Chatham House Principles.[214] In that context, the

[203] cf Section II.A.5. [204] cf Section II.B.2.

[205] On the ICJ's reserved position on possible other exceptions, see Section II.C.2.ii.

[206] cf Section II.C.2.i(a)(aa); this is not to say, however, that *all* states have *necessarily* abandoned any claim to self-defence rights exceeding the case of an (imminent) armed attack; international legal *scholarship* has always been predominantly in favour of seeing an (actual or imminent) armed attack as a *conditio sine qua non* for the right of self-defence; interestingly, however, there would now also seem to be widespread endorsement of this position among *Anglo-American* international lawyers; see the 'Chatham House Principles', 965; and Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, 54.

[207] cf Section II.C.2.i(b). [208] Gray, *International Law and the Use of Force*, 188.

[209] Gray, *International Law and the Use of Force*, 121. [210] cf Section II.B.4.

[211] Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, 54 ff.

[212] cf Section II.C.2.i(c)(aa).

[213] William H. Taft, IV, 'Self-Defense and the *Oil Platforms* Decision' (2004) 29 *Yale Journal of International Law* 302: 'For its part, if the United States is attacked with deadly force by the military personnel of another State, it reserves its inherent right preserved by the U.N. Charter to defend itself and its citizens'; for the *ambiguous* practice of other states, see Green, *The International Court of Justice and Self-Defence in International Law*, 121 ff.

[214] At 966.

ICJ has not only been unsuccessful in coming up with an interpretation of the law that commands general agreement, but it has even contributed to confusing the state of the law. This confusion was caused by alluding, in one of the most problematic aspects of its entire jurisprudence on the use of force,[215] to the possibility of a right to adopt individual forcible countermeasures 'short of Article 51',[216] in order to alleviate the consequences that might otherwise result from the gap which, according to the ICJ, exists between Articles 2(4) and 51 of the UN Charter. With a view to the concept of 'armed attack' *ratione personae*, the present state of the Court's jurisprudence is difficult to define with precision. As yet, the ICJ's jurisprudence does not provide anything close to *clear* authority for a right of self-defence which would go beyond the case of an armed attack attributable (under the Court's very stringent standard) to the state on whose territory the defensive operation is to take place. Such a restrictive view of the right of self-defence has, to put it mildly, never been uncontroversial. Indeed, state practice after 9/11 has certainly not been moving in this direction.[217] Apart from the concept of 'armed attack', it is also difficult to say that the Court has been successful in clarifying the legally possible goal (or goals?) of self-defence action as well as the precise meaning of the requirements of *necessity* and *proportionality*.[218] Finally, the ICJ has explicitly left open the question of *anticipatory* self-defence,[219] and has yet squarely to address the hotly disputed cases of a use of force to protect nationals in acute physical danger abroad[220] or to avert a humanitarian catastrophe.[221] The existence of this grey area, which the ICJ has, to date, not had the occasion to eliminate, forms an important part of the background against which the states parties to the Statute of the International Criminal Court have qualified the act of aggression for the purposes of the definition of the crime of aggression. They have qualified it using the words 'which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[222]

[215] For just a few examples of the widespread scholarly critique, see, Dinstein, *War, Aggression and Self-Defence*, 209 and 254; Greenwood, 'The International Court of Justice and the Use of Force' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, 380 ff; Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 141.

[216] It would be preferable had the Court, at least, called those measures 'limited measures of *self-defence*' instead of 'countermeasures' to clearly separate them from unlawful armed *reprisals*.

[217] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 394 ff, 447 ff; for a 'collective scholarly dissent' from the restrictive position referred to in the previous text, see the 'Chatham House Principles', 969.

[218] Suffice it to refer to the critical response by the then legal adviser of the US, William Taft, IV, to the ICJ's proportionality and necessity analysis in *Oil Platforms*; Taft, 'Self-Defense and the *Oil Platforms* Decision', 303 ff.

[219] cf Section II.C.2.i(a)(bb). [220] cf Section II.C.2.ii(d). [221] cf Section II.C.2.ii(d).

[222] Emphasis added; Art 8*bis* of the Statute of the International Criminal Court; Review Conference RC/Res 6, 11 June 2010, *Review Conference Official Records*, RC/11, part II, 17; for the connection between the 'grey area' of international law on the use of force and the requirement of a 'manifest' violation of the UN Charter in the definition of the crime of aggression, see Stefan Barriga, 'Negotiating

It remains to be seen how the ICJ in the future deals with a case of anticipatory self-defence, a cross-border use of force in defence of a non-state armed attack, a forcible rescue mission abroad, and a use of force to avert an impending humanitarian catastrophe. With respect to the latter, it may be predicted that the Court would rather frame the legal issue as one of the emergence (or not) of a new exception to the prohibition of the use of force rather than recognizing a residual legal relevance for the state of necessity to preclude the wrongfulness of state use of force. In a case of genuine humanitarian intervention, the ICJ is therefore likely to apply the standard for legal change through state practice as set out in the *Nicaragua* case.[223] While this standard is undoubtedly a stringent one, the ICJ was wise enough *not* to elevate the threshold even further through a determination that the prohibition of the use of force is not only 'all-inclusive', but also forms in its entirety part of *jus cogens*.[224] The considerable challenge in dealing with the remaining 'hard cases' of anticipatory self-defence, defensive action against a non-state armed attack, and the forcible protection of nationals abroad results from the fact that, in their respective ways, the text of both Articles 2(4) and 51 of the UN Charter and subsequent state practice are fraught with ambiguity. The ICJ has yet to recognize that such an ambiguity exists and it has therefore yet to reveal a method that would allow it convincingly to address such an ambiguity. At the present time, no more can be said than the ICJ has not closed the door to accommodating the controversial legal claims to anticipatory self-defence, to the use of cross-border force necessary to repel a non-state armed attack, and to conduct, under well-defined and stringent conditions, a forcible rescue mission abroad within the legal framework as it was established by (and under the influence of) Articles 2(4) and 51 of the UN Charter.[225]

IV. Conclusion

> The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with

the Amendments on the Crime of Aggression' in Stefan Barriga and Claus Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge: Cambridge University Press, 2012), 29; Claus Kreß and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1192–3.

[223] cf Section II.C.2.ii(f).

[224] cf Section II.A.5; for a thoughtful analysis of this point, see Ruys, *'Armed Attack' and Article 51 of the UN Charter*, 24 ff.

[225] The alternative for the ICJ would be to ask (as it would probably do in the case of a genuine humanitarian intervention) whether state practice has given rise to a new exception to the prohibition of the use of

> such questions of ultimate power—power that comes close to the sources of sovereignty.[226]

This famous statement, made by Dean Acheson looking back on the Cuban Missile Crisis, may serve as a useful reminder of the challenge of overcoming effectively the idea of a sovereign *jus ad bellum* that was so firmly entrenched in 19th-century legal and political discourse on this subject matter. In the light of the powerful historical legacy and the realities of power struggles within a decentralized international legal order, the ICJ may well have felt that the UN Charter's provisions on the use of force remained vulnerable in practice for the foreseeable future. At the same time, the early judgment in the *Corfu Channel* case had already made it clear that the Court believed its mandate to bring the prohibition of the use of force from the books into practice to be of central importance. In the same vein, the ICJ, in the *Nicaragua* case, stated that the law on the use of force is based on the '*fundamental* principle outlawing the use of force in international relations'.[227] In the *Armed Activities* case, the ICJ made explicit its basic conviction that 'The prohibition of the use of force is a *cornerstone* of the United Nations Charter'.[228] The ICJ has not elaborated on this determination, but it is fair to assume that it implies recognition of the fact that the prohibition of the use of force (irrespective of the well-defined exceptions to it, of course) is constitutive for the very existence of (an international) legal order in the full meaning of the term.

The sense of a judicial duty to consolidate a vulnerable rule of paramount importance to the international legal order would explain why the ICJ has not only firmly rejected a political question doctrine with respect of the use of force[229] and has insisted on its competence to conduct judicial proceedings *pari passu* with the political deliberations within the Security Council.[230] It would also explain why the ICJ, in both the *Nicaragua* and *Oil Platforms* cases, resorted to a rather broad interpretation of its jurisdiction to deal with the legality of the use of force by a powerful[231] state[232] and why the Court has not demonstrated much hesitance in expressing its legal views on the regulation of the use of force through *obiter dicta*.

force; for a legal view pointing in this direction for 'certain forms of evacuation operations', see Randelzhofer and Nolte, 'Article 51' Simma et al, *The Charter of the United Nations*, 1413 (marginal note 28 *in fine*).

[226] Dean Acheson, *Proceedings of the American Society of International Law* (1963), 14.

[227] *Nicaragua*, Merits, para 181 (emphasis added).

[228] *Armed Activities*, Judgment, para 148 (emphasis added).

[229] cf Section II.A.2.

[230] cf Section II.A.3.

[231] In another famous sentence in *Corfu Channel* (Merits, 35), the ICJ explicitly assumed the role of a guardian against possible abuses of 'the most powerful States'; against the background of that pronouncement, it is interesting to note that the ICJ was perhaps more reluctant than necessary to deal with the use of force in *Land and Maritime Boundary between Cameroon and Nigeria (Cameron v. Nigeria: Equatorial Guinea intervening)*, Merits, Judgment of 10 Oct 2002, paras 308–24; Green (*The International Court of Justice and Self-Defence in International Law*, 206) takes this inconsistency as pointing towards the possibility that the Court might have been 'too eager to pronounce upon disputes involving superpower states'.

[232] The Court's rather liberal approach to its jurisdiction in *Oil Platforms*, met with the more general critical observation by Judge Owada: 'The general problem of self-defence under international law is

Much more importantly, the sense of a duty to consolidate a vulnerable rule of paramount importance may also provide one reason for the fact that, overall, the ICJ has adopted a markedly prohibitive stance on the unilateral use of force by states. In the *Nicaragua* case, in particular, the ICJ chose the more prohibitive legal view wherever the law was arguably open to conflicting interpretations.[233] As a result, the *Nicaragua* judgment reads a little bit as if the Court, at the time of its first major encounter with the modern international law on the use of force, felt the need to strengthen the paradigm shift on the use of force brought about through the UN Charter by pronouncing in favour of the most prohibitive conceivable legal framework.

As has been shown, none of those legal findings have been overturned in the ICJ's subsequent jurisprudence. Yet, there are subtle indications in both the *Oil Platforms* and *Armed Activities* cases that the Court may have begun to reconsider certain legal issues in a manner that nuances the *Nicaragua* Court's prohibitive rigour. Those indications concern the concept of an 'armed attack'. *Ratione materiae*, the ICJ signalled in the *Oil Platforms* case that the gravity threshold for an armed attack (by a state) may well be lower than one would have assumed on the basis of the *Nicaragua* judgment.[234] And in both the *Oil Platforms* and *Armed Activities* cases the Court expressed (at least more clearly than before) an inclination to recognize the relevance of an *accumulation* of uses of force in this specific context.[235] Perhaps even more importantly, the one sentence that the ICJ devoted to the problem of non-state armed attacks in the *Armed Activities* case,[236] may (with all due caution in the light of its sibylline nature) be taken to express the Court's awareness that there is a need to squarely address the matter should an appropriate occasion arise in the future. Perhaps, those very few and still barely visible elements pointing towards a little less prohibitive rigour indicate the ICJ's recognition of the fact that the 'principle of the non-use of force', despite occasional violations, has now reached a stage of considerable consolidation and that the remaining grey area, though being significant in scope (and comprising anticipatory self-defence, defence against non-state

an extremely complex and even controversial subject both in terms of theory and practice . . . [W]hile it is of utmost importance for the Court to pronounce its authoritative position on this general problem in a proper context, it should do so in a context where it should be possible for the Court to deal with the problem squarely in a full-fledged manner, with all its ramifications both in terms of the law and the facts involved' (*Oil Platforms*, Judgment, Separate Opinion of Judge Owada, para 38); this critique has been taken up and elaborated upon by Green, *The International Court of Justice and Self-Defence in International Law*, 199 ff. There may be some merit in this line of criticism, though it would not seem that any questionable legal position adopted by the ICJ in its jurisprudence can be easily explained on the ground that its jurisdiction rested on shaky ground or was partial only.

[233] The *dictum* concerning a possible right to individual forcible countermeasures 'short of Article 51' (cf Section II.C.2.ii(a)) constitutes the only exception.

[234] cf Section II.B.2.i(a) and Section II.B.4.i; citation accompanying n 111.

[235] cf Section II.B.2.i(a) and Section II.B.4.i; citations accompanying nn 112 and 113.

[236] cf Section II.C.2.i(a) and Section II.C.4.ii; citation accompanying n 126.

armed attacks, forcible rescue missions, and genuine humanitarian interventions), is not one which can be satisfactorily dealt with by a simple presumption in favour of prohibition.

If this were the ICJ's evolving position, it should be welcomed. International law has come an extremely long way from the 19th-century idea of a *jus ad bellum* to the present-day situation of a firmly entrenched prohibition of the use of force. There would now seem to be 'general agreement'[237] among states not only about the elimination of a 'sovereign right to go to war', but also about the prohibition to use force in self-help to secure or enforce legal rights, and even about the impossibility of invoking a state of *necessity* (as distinct from a situation of *self-defence*) in order to forcibly avert a serious threat. This constitutes a remarkable development for a legal order without reliable centralized enforcement powers and the ICJ deserves credit for having contributed to that state of affairs.

The remaining grey area on the international law on the use of force is of a different kind. This grey area, for the most part, covers cases where states are confronted with (imminent) illegal physical violence, which is being directed against their own territory or their own extraterritorial emanations, and where the use of force may constitute the only effective protection against such violence.[238] In order to deal with the undisputable legal ambiguities governing these cases, the ICJ could (explicitly or implicitly) state the one 'paramount background principle of a *Dworkinian* kind'[239] to have the use of force in international relations reduced to the greatest possible extent in order to derive from that principle the general interpretative presumption against the admission of exceptions to the prohibition of the use of force. Such an approach would be profoundly questionable, though. It must already be doubted whether such a principle exists (or, at least, that exists without any competitor) and apart from that such a principle would not necessarily justify the interpretive presumption in question. It should rather be recognized that imminent armed attacks, massive transnational violence by non-state actors, and life-threatening violence against nationals abroad constitute very serious threats to powerful and weak states alike. To postulate a Dworkinian principle that requires states only passively

[237] This is to use the words of the ICJ in *Nicaragua* (cf Section II.C.2.i(a) and Section II.C.4.i citation accompanying n 105, but in their proper context (for the critique of the context in which those words were used by the Court, cf text accompanying n 200).

[238] The case of genuine humanitarian intervention is different because such an *international* use of force aims at ending (massive) *internal* violence. It may thus be said that the acceptance of genuine humanitarian intervention implies a shift at the level of the '*Dworkinian* principles' (to which the following text will allude) which underlie the modern international legal order as established in 1945. In the light of the evolution of the practice under the UN's collective security system, it is difficult to deny that such a shift is underway. The hard question is whether the shift has reached a point that would justify even *unilateral* humanitarian intervention as a measure of last resort.

[239] For a stimulating reflection about the fundamental controversies haunting international law on the use of force in the light of '*Dworkinian* principles', see Green, *The International Court of Justice and Self-Defence in International Law*, 182 ff.

to endure such a threat if the use of force constitutes the only effective remedy, is therefore open to serious argument. What is more, to overstretch the rigour of the prohibition of the use of force would mean to lose an instrument to *deter* transnational violence from occurring in the first place. It is therefore also open to serious question whether an overly restrictive view on the lawful use of force effectively contributes to keeping the use of force in international relations to a minimum. Be that as it may, quite a few subjects of the largely decentralized international legal order would certainly regard the loss of this instrument of deterrence as a luxury which they cannot afford.

In conclusion, neither the effectiveness of the prohibition of the use of force nor the ICJ's authority would suffer from the Court adopting a somewhat less prohibitive approach in dealing with anticipatory self-defence, with the defensive use of force against massive transnational non-state violence and with the forcible protection of nationals abroad under well-defined conditions. Perhaps quite a number of states, be they more or less powerful, would then even reconsider their decision to qualify their submission to the ICJ's jurisdiction by some type of 'war exclusion clause'.[240] It would be somewhat simplistic to question the 'peace-loving' nature of those many states that have thus far decided *not* to accept the ICJ's jurisdiction over the use of force. This decision is much more likely to have been animated by the fear that the state concerned could, in a future case, be compelled to use force to avert an imminent armed attack, to defend itself against massive transnational non-state violence, or to forcibly rescue nationals who have come under an acute threat to their lives abroad. In view of the sad but real possibility that such a case may indeed arise, those many states that do not currently accept the ICJ's jurisdiction, simply do not wish to be subjected by the ICJ to a degree of prohibitive rigour which they—legitimately—deem unreasonable.

[240] On this clause, see Shabtai Rosenne, *The Law and Practice of the International Court—1920–2005. Vol II: Jurisdiction* (Leiden: Martinus Nijhoff, 2006), 772.