3

The Relationship between the Customary Prohibition of the Use of Force and Article 2(4) of the UN Charter

INTRODUCTION

Even if the content of the customary prohibition of the use of force and the prohibition of the use of force in article 2(4) of the UN Charter are currently identical, each source of law has a different method of interpretation and application. In order to determine which source to interpret or apply to discover the meaning of a prohibited 'use of force' between States under international law, this chapter will explore the current relationship between the treaty and customary prohibitions of the use of force (i.e. the effect of the parallel customary rule on the interpretation of article 2(4) and vice versa). The effect of article 2(4) on the customary international law prohibition after the emergence of the latter is more straightforward than the role of the customary rule in interpreting article 2(4). In essence, the scope of article 2 (4) acts as a restraint on the contraction of the customary rule (i.e. it makes it more difficult to assert that the customary rule has changed to become more permissive/less prohibitive than the article 2(4) prohibition). This is because a State taking action that violates the prohibition of the use of force in article 2 (4) and claiming that this action is not prohibited by the customary rule would still be violating its concurrent obligation under the UN Charter.

The current relationship between the Charter and customary prohibitions of the use of force is therefore best understood by looking at the way that the interpretation of the rule under article 2(4) of the UN Charter may change over time and the role that the customary rule can play in this process. In doing so, this chapter will examine the following related but distinct concepts: the use of pre-existing or subsequently developing custom to fill gaps in the treaty, the use of subsequently developing custom to informally modify the interpretation of the treaty, an evolutive interpretation of the UN Charter and informal treaty modification through subsequent practice.

This chapter will argue that since the rule in article 2(4) is the origin of the customary prohibition of the use of force, it is not appropriate to use pre-existing or subsequently developing customary international law to fill gaps in interpretation of article 2(4), nor to use subsequently developing customary international law to modify article 2(4). Accordingly, due to the present relationship between the customary and Charter prohibitions of the use of force, the preferable approach to determine the meaning of prohibited force under international law is to focus on interpreting the UN Charter.

EFFECT OF CUSTOMARY PROHIBITION ON THE INTERPRETATION OF ARTICLE 2(4)

In terms of the effect of custom on treaty interpretation, customary international law rules may be used to supplement treaty interpretation by filling in gaps in the treaty.[1] The legal basis for doing so is article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[2] This rule provides that, together with the context, 'any relevant rules of international law applicable in the relations between the parties' 'shall be taken into account' in interpreting a treaty. Such relevant rules include customary international law and treaty.[3] The use of customary international law rules to supplement treaty interpretation may take the form of a static interpretation (using customary international law rules existing at the time the treaty entered into force) or dynamic interpretation (using subsequently developing customary international law rules). One may take into account subsequent legal developments when interpreting a treaty if it was the intention of the parties at the time of concluding the treaty, taking into account the text, object and purpose of the treaty and the *travaux préparatoires*.[4] There is a presumption that this is the case for certain texts where they are open-ended or set out general obligations. International Court of Justice (ICJ) jurisprudence also supports this.[5]

[1] Michael Wood, 'First Report on Formation and Evidence of Customary International Law' UN Doc A/CN.4/663 (17 May 2013) ('Wood First Report'), para. 35, with further extensive references: 'Rules of customary international law may also fill possible lacunae in treaties, and assist in their interpretation.'

[2] *Vienna Convention on the Law of Treaties 1969* (adopted 22 May 1969, entered into force 27 January 1980) ('VCLT'), 1155 UNTS 331.

[3] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press, 2010), 20.

[4] *Ibid.*, 21.

[5] *Ibid.*

Use of Pre-existing Customary International Law to Fill Gaps

Since a customary international law rule prohibiting force did not pre-exist the UN Charter but developed as a consequence of it and is currently identical to it, it is not sensible to fill gaps in the interpretation of article 2(4) such as the term 'use of force' by looking to custom. This is the key difference between the interpretation of articles 2(4) and 51 of the UN Charter and means that the reasoning behind turning to customary international law to supplement the interpretation of the provision does not apply in the same way to article 2(4) as it does to article 51. As pointed out by the ICJ in the *Nicaragua* case, since article 51 refers to an inherent right of self-defence, it must therefore be a pre-existing right under customary international law which arises when an 'armed attack' occurs. Although there is debate regarding whether article 51 of the UN Charter confers a treaty right or merely recognises the pre-existing customary right,[6] it is not controversial that a right to self-defence pre-existed the UN Charter. Accordingly, it is appropriate to look to the content of that right under customary international law to fill gaps in the interpretation of article 51, such as the requirements of necessity and proportionality.[7]

Unlike article 51, which refers to a pre-existing customary rule (the right to self-defence), article 2(4) introduced a new rule (the prohibition of the 'use of force', as opposed to the prohibition of recourse to war). As the previous chapters explained, the new rule enshrined in article 2(4), though influenced by the pre-existing broader customary prohibition of recourse to war as an instrument of national policy, led to the emergence of a *new* customary rule. The term 'use of force' was not a legal term of art enshrined in customary international law prior to the UN Charter. It therefore does not make sense to look to the content of the customary prohibition of the use of force in order to

[6] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226 ('*Nuclear Weapons* Advisory Opinion'), para. 40.

[7] James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009), 131. Green looks at the issue from the perspective of two 'conceptions' of the law of self-defence, on the one hand 'armed attack as a grave use of force', which comes from article 51, and on the other hand one based on necessity and proportionality, which comes from customary international law. He asks whether the law on self-defence therefore stems from two distinct 'conceptions' with roots in two different formal sources of international law (p. 129). He interprets the *Nicaragua* case as the Court perceiving two distinct conceptions of the law on self-defence deriving from different sources, which are not identical but which are merged (p. 130). The *Nuclear Weapons* Advisory Opinion, n. 6, also suggests in his view that 'both conventional and customary international law are required to understand the right' (p. 130), since the Court stated that some constraints on the resort to self-defence were inherent in the very concept of self-defence and others specified in article 51.

interpret the treaty rule, since unlike the case of the right to use force in self-defence, the treaty provision in article 2(4) is itself the origin of the customary rule.

Use of Subsequently Developing Customary International Law to Interpret Article 2(4)

Though currently identical in scope, it is of course possible for the customary and treaty rule to diverge in the future. This 'could result from different methods of interpretation and application appropriate for each category'.[8] Although it is possible, it is unlikely that divergence would occur in the case of quasi-universal treaties. The main reason is that '[i]t is most unlikely in these cases that practice and *opinio juris* among the same States would distinguish conduct under the treaty from conduct in implementation of an identical rule of customary law'.[9] Hugh Thirlway also notes that 'the way in which customary law is formed theoretically involves awareness of, and lack of objection to, developments in the field on the part of the whole international community'.[10]

For our purposes, this means that developments in the customary prohibition of the use of force are at least accepted implicitly by the whole international community, most of the members of which are parties to the UN Charter, and, accordingly, the customary international law rule is unlikely to develop in a way that would directly conflict with their Charter obligations. The assertion of a new customary rule would require that States explicitly refer to a customary law justification for their acts. But there does not seem to be any evidence that States have already done this; when States make any reference to a source of the prohibition in their direct practice (claims and counterclaims attaching to actual uses of force), it is invariably also to the UN Charter. It therefore appears that the most plausible way the prohibition could

[8] Oscar Schachter, 'Entangled Treaty and Custom' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), 717, 728, footnote omitted.

[9] *Ibid*., 728, cf. Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011), 100, footnotes omitted:

> Although present-day customary international law can be looked upon essentially as a replica of Article 2(4), it is hard to believe that the exact correlation of the two will 'freeze' indefinitely. … Nonetheless, the present author cannot share the view that contemporary customary law has already changed – or is in the process of changing – to the point that the *jus ad bellum* is on the cusp of becoming 'protean' in nature.

[10] Hugh WA Thirlway, *The Sources of International Law* (Oxford University Press, 2014), 140–1.

change under custom only and not the UN Charter is if the prohibition is *extended* in a way that is clearly not covered by the terms of article 2(4) – for example, to cover uses of force by non-State entities or uses of force by a State within its own territory in a civil war, because then that conduct and *opinio juris* cannot be referable to the treaty provision.

Albeit unlikely, if it does occur, divergence in the scope or content of the prohibition of the use of force under article 2(4) and customary international law would lead to three possible interpretive outcomes. Firstly, it would result in separate rules from different legal sources simultaneously binding States.[11] Secondly, the development of a *new* customary rule with respect to the prohibition of the use of force could be used as an element of *interpretation* of article 2(4). And thirdly, the subsequent emergence of a new customary rule could be used as an element *modifying* the operation of article 2(4).[12] As the following discussion illustrates, these latter two possibilities – interpretation and modification – are not appropriate with respect to the prohibition of the use of force in article 2(4) of the UN Charter.

Interpreting Article 2(4) through Subsequently Evolving Custom

If the customary international law rule *subsequently develops* in a way that diverges from the article 2(4) rule, then it could make sense for the new customary rule to be used to interpret article 2(4) as a 'relevant rule of international law applicable between the parties',[13] since it would be a rule of international law *with a distinct content from article 2(4)*. An example of this is examining 'the evolution of the rule through custom'.[14] For instance, Olivier Corten's approach is that 'reliance on a novel right (A), supposedly accepted by all other States (B), would be both a customary evolution of the rule and a practice subsequently followed by the parties to the UN Charter and indicative of their agreement on the interpretation of the text'.[15] James Green applies similar reasoning when he states:

[11] See Schachter, n. 8.

[12] See Observations and Proposals of the Special Rapporteur in International Law Commission, 'Yearbook of the International Law Commission 1966, Vol. II' UN Doc A/CN.4/SER.A/1966/Add.l (1966), 88, para. 1: 'the three matters in question – a subsequent treaty, a subsequent practice of the parties in the application of the treaty and the subsequent emergence of a new rule of customary law – may have effects either as elements of interpretation or as elements modifying the operation of a treaty.'

[13] VCLT, n. 2, art. 31(3)(c).

[14] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010), 29.

[15] *Ibid.*, footnotes omitted.

> It may well be that a new interpretation of the meaning of 'force' will evolve in the future to take into account the growing threat of cyberwarfare. Such a change would not require any alteration of Article 2(4), of course, just a reinterpretation of its terminology in customary international law, based on state practice and *opinio juris* in the usual way.[16]

However, one must be careful not to automatically conflate changes in the customary international law rule with changes in the interpretation of the treaty rule. As noted by Roberto Ago in the International Law Commission (ILC) debates on the 1966 draft Convention on the Law of Treaties, such an approach does not sufficiently distinguish between the distinct modes of interpretation and application of customary law and treaty law.[17] Ago's interventions on the ILC regarding the draft 1966 VCLT support the position that we must differentiate between these separate processes: subsequent agreement and subsequent practice as an element of treaty interpretation, and subsequently developing customary international law as an element of treaty interpretation.

Modifying Article 2(4) through Subsequently Evolving Custom

The use of subsequently evolving custom to interpret article 2(4) is problematic if it goes further than filling gaps pursuant to article 31(3)(c) of the VCLT and ostensibly *modifies* the interpretation of the treaty. Assuming that changes in custom would also informally modify the treaty is a controversial point that even the ILC did not venture into. The ILC 'has alluded to the possibility that the emergence of a new rule of customary international law may modify a treaty, depending on the particular circumstances and the intentions of the parties to the treaty'.[18] However, draft article 68(c) in the 1966 draft VCLT proposing that the operation of a treaty may be modified '[b]y the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties'[19] gave rise to objections by States,

[16] James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2010) 32 *Michigan Journal of International Law* 215, 241.

[17] International Law Commission, 'Yearbook of the International Law Commission 1996, Vol. 1, Part II: Summary Records of the 18th Session', UN Doc A/CN.4/SER.A/1966 (4 May–19 July 1966) ('1966 Yearbook of the ILC, vol. 1, Part II'), 167, paras. 48–49.

[18] International Law Commission, 'Formation and Evidence of Customary International Law – Elements in the Previous Work of the International Law Commission That Could Be Particularly Relevant to the Topic – Memorandum by the Secretariat' UN Doc A/CN.4/659 (14 March 2013), 34, Observation 27, footnote omitted.

[19] 1966 Yearbook of the ILC, vol. 1, Part II, n. 17, 163.

extensive discussions in the Commission, and was ultimately deleted on the recommendation of the Special Rapporteur, Sir Humphrey Waldock. The basis for the objections related to the complex relationship between custom and treaty law including priority of sources, the problem of inter-temporal law and the objection 'to the idea that a new customary norm should necessarily over-ride a treaty provision regardless of the will of the parties'.[20] Ago noted that the provision conflated two issues, namely, the subsequent practice of the parties in the application of the treaty evidencing their agreement to extend or modify its operation, and a subsequently developing rule of customary international law.[21] In essence, the Special Rapporteur observed that paragraph (c) 'concern[s] the impact on a treaty of acts done outside and not in relation to it'.[22]

In summary, in the event that the customary international law prohibition of the use of force subsequently evolved, this would not automatically change the interpretation of article 2(4) of the UN Charter. In practice, the scope of article 2(4) and the customary prohibition would diverge unless the change in the customary rule was accompanied by subsequent practice *in the application of the treaty* evidencing the agreement of ('all, or nearly all' of)[23] the parties to a new interpretation of article 2(4) in line with the new customary rule, and even then only to the extent that an informal modification of a substantive (as opposed to procedural[24]) rule in the UN Charter is permissible. Informal modification of a treaty is generally problematic, since treaties usually contain formal requirements regarding modification or amendment.[25] Informal modification of the UN Charter is particularly problematic because it circumvents the formal mechanism for amendment set out in the Charter and thus potentially usurps the consent of the treaty parties.[26]

[20] The latter was raised by the UK Government; see *ibid*., vol. 2, 90, para. 12.

[21] 1966 Yearbook of the ILC, vol. 1, Part II, n. 17, 167, paras. 48–49.

[22] *Ibid*., vol. 2, 91, para. 14.

[23] 1966 Yearbook of the ILC, vol. 1, Part II, n. 17, 165, para. 17, intervention of Mr Tunkin with respect to draft article 68.

[24] For example, the practice of UN Security Council abstention votes under article 27(3) of the UN Charter.

[25] Ruys, n. 3, 24–8.

[26] For example, Corten writes: 'In the context of a treaty law, an evolution of the rule prohibiting the use of force would require ratification by at least two thirds of the States parties, including all permanent members of the Security Council, pursuant to articles 108 and 109 of the UN Charter. By definition this onerous procedure is not applicable in the realm of custom.' Corten, n. 14, 34–5.

EVOLUTIVE INTERPRETATION OF ARTICLE 2(4)

Of course, the interpretation of article 2(4) may still evolve over time through subsequent practice, within the limits posed by the text and the peremptory status of the prohibition. The terms of a treaty may be interpreted either in accordance with the circumstances prevailing at the time of its conclusion (contemporaneous interpretation) or in accordance with circumstances prevailing at the time of its application (evolutive interpretation).[27] Whether the interpretation of terms in a treaty changes over time depends on 'whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time'.[28] Indications of the parties' intention at the time of concluding the treaty that the interpretation of terms change over time include the language used in the treaty. For example, '(a) Use of a term in the treaty which is "not static but evolutionary". ... (b) The description of obligations in very general terms, thus operating a kind of *renvoi* to the State of the law at the time of its application.'[29] In other words, the use of a term 'whose meaning is inherently more context-dependent'[30] supports a conclusion that an evolutive interpretation was intended by the treaty parties at the time of its conclusion. The use of 'generic' terms or 'the fact that the treaty is designed to be "of continuing duration"',[31] may also indicate an evolutive interpretation was intended.[32] The subsequent agreements and practice of UN Member States under articles 31 and 32 of the VCLT also assist with determining the presumed intention of the treaty parties upon the conclusion of the treaty with respect to evolutive interpretation.[33]

An evolutive interpretation of the UN Charter is justified by the drafters' intention. The UN Charter was designed to be of continuing duration and to govern changing international circumstances. 'The practical quality of the

[27] Georg Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' UN Doc A/CN.4/660 (19 March 2013) ('Nolte First Report'), 23, para. 54.

[28] International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties', Annexed to UN GA Resolution 73/202, A/RES/73/202 (3 January 2019), draft conclusion 8.

[29] Nolte First Report, n. 27, 23–4, para. 56, citing Final report of Chair of Study Group on fragmentation (Martii Koskenniemi).

[30] *Ibid*., 26, para. 61.

[31] *Ibid*., footnote omitted.

[32] *Ibid*.

[33] International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties', n. 28, draft conclusion 8.

UN Charter as the constitution of the UN and the international community at large provides additional support for considering the Charter to be a "living instrument" which must be "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."'[34] Absent evidence to the contrary, this provides grounds to conclude that the term 'use of force' was intended to be subjected to evolutive interpretation in order to regulate changing circumstances and new uses of force which were not anticipated in 1945. This conclusion is supported by the approach of the ICJ in the *Nicaragua* case, which 'apparently regarded the Charter provisions as dynamic rather than fixed, and thus as capable of change over time through state practice'.[35] As Thilo Rensmann argues: 'The prevailing view today is that the Charter must be interpreted in a purposive-dynamic rather than an originalist-static manner.'[36] In particular, the term 'use of force' in article 2(4) of the UN Charter is very general and must be context dependent since such usages will change over time with, for example, technological developments. An evolutive interpretation of this provision is also supported by the drafter's intention that the prohibition be all-encompassing. Accordingly, when interpreting the term 'use of force' in article 2(4) of the UN Charter, this work will also examine how the term is currently applied, taking into consideration the current context, not only the original interpretation at the conclusion of the UN Charter in 1945.

Evolutive Interpretation versus Treaty Modification

However, one must be careful to distinguish between the following two concepts. The first is an evolutive interpretation of the terms of a treaty justified by the drafter's intention that its interpretation may change over time, which would allow consideration of, inter alia, subsequent agreements and practice that interpret the terms in a way different to the original interpretation at the time of conclusion of the treaty but still within the scope of potential natural meanings attaching to particular terms. A second and markedly different concept is the use of subsequent practice to *amend or modify* the terms of a treaty beyond the scope intended by the parties to the treaty at the time of its conclusion. The difference is that an evolutive interpretation, including one

[34] Thilo Rensmann, 'Reform' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), vol. I, 25, 31–2, MN20, footnotes omitted.

[35] Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008), 9.

[36] Rensmann, n. 34, 31–32, MN20, footnote omitted.

arrived at through the effect of subsequent practice in the application of the treaty, is the result of the process of treaty interpretation and clarifies the meaning of the terms of the treaty within the scope intended by the parties at the time of its conclusion. In contrast, an amendment or modification of the terms of a treaty by subsequent practice – outside the VCLT rules on treaty amendment and modification – alters the treaty terms beyond any potential scope for discretion afforded to the parties by the treaty.

The possibility of treaty modification through subsequent practice was not recognised by States at the Vienna Conference and may be considered to have been rejected with the deletion of draft article 38, which had included this possibility. The ILC Committee on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties has stated that '[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized'.[37] In practice, the line between evolutive interpretation and modification may, however, be a fine distinction,[38] and the ICJ has not set out criteria for making such a distinction.[39] Nolte concludes that '[t]he most reasonable approach seems to be that the line between interpretation and modification cannot be determined by abstract criteria but must rather be derived, in the first place, from the treaty itself, the character of the specific treaty provision at hand, and the legal context within which the treaty operates, and the specific circumstances of the case'.[40]

In addition to the limits on treaty modification via subsequent agreement or practice (which remains highly controversial), there are further limitations on the modification of article 2(4) of the UN Charter through subsequent agreement or practice. These arise from the formal amendment procedure set out in the UN Charter itself, and the potential *jus cogens* nature of the norm. The formal amendment procedure for the UN Charter has a very high procedural threshold that is set out in articles 108 and 109(2) and is rarely used.[41] These rules for formal modification supersede rules of formal treaty amendment or *inter se* modification set out in articles 40 and 41 of the

[37] International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties', n. 28, conclusion 7(3).

[38] Georg Nolte, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' UN Doc A/CN.4/671 (International Law Commission, 26 March 2014) ('Nolte Second Report'), 51, para. 116 with extensive further references at footnote 245. For discussion, see 50 ff.

[39] *Ibid*., 68, para. 165.

[40] *Ibid*.

[41] Rensmann, n. 34, 30, MN14.

VCLT.[42] It is controversial whether the UN Charter may be amended by means other than the formal procedure set out in articles 108 and 109, such as through subsequent practice.[43] Modification of the UN Charter through a subsequent agreement outside of the procedure set out in the UN Charter is problematic due to article 103 of the Charter, which provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[44]

However, maintaining a strict constitutional view that permits only formal amendments to the UN Charter risks delegitimising the United Nations since 'the UN operates on the basis of a number of informally accepted rules' differing from the original framework.[45] 'In consequence the prevailing view assumes that under exceptional circumstances the member States possess the power to override the procedural restraints set forth in Arts 108 and 109.'[46] For example, 'the replacement of the former Soviet Union and the Republic of China (Taiwan) by the Russian Federation and the People's Republic of China without amendment to Art. 23 (1) of the Charter. Counting abstentions as well as affirmative votes as concurring votes under Art. 27 (3) may also be seen as an informal modification'.[47] But these examples relate to the procedural rules of the UN itself, and not to fundamental rules of the international legal order established by the UN Charter, such as the prohibition of the use of force in article 2(4).

[42] Georg Witschel, 'Article 108' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), vol. I, 2199, 2204, MN 8.

[43] Rensmann, n. 34, 32, MN24.

[44] See Stuard Ford, 'Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties' (1999) 4(1) *Journal of Conflict and Security Law* 75, 85.

[45] Rensmann, n. 34, 33, MN25–26.

[46] *Ibid*., 33, MN27–28, footnote omitted.

[47] Witschel, n. 42, 661, MN28:

> In this respect see the interesting remarks by the representative of the Secretary-General of the UN, Mr Stavropoulos, 'The constant practice of the Security Council of not treating the voluntary abstention of a permanent member of the Security Council as a vote against a substantive draft resolution before the Council is customary law. . . . Even if the development relating to voluntary abstentions is looked upon as an interpretation of the Charter by subsequent practice, the result cannot be different and the practice must be recognized as being authoritative'.
>
> (Oral Statement of Mr Stavropoulos, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ, Pleadings, Oral Arguments, Documents, II, 39)

In conclusion, using subsequent practice to interpret the UN Charter in a way that amounts to informal modification of its terms remains controversial; rather, '[i]t is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it'.[48] Finally, if the prohibition of the use of force in article 2(4) is a norm of *jus cogens*, this sets further limits on changes to the rule through subsequent practice, subsequent treaties or the subsequent development of customary international law. This is discussed further below.

JUS COGENS AND THE PROHIBITION OF THE USE OF FORCE

Jus cogens norms are peremptory norms of international law, defined in the VCLT as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[49] Although the existence of *jus cogens* norms is now generally accepted,[50] the substantive content and source of *jus cogens* norms remain subject to debate.[51] The distinguishing feature of *jus cogens* norms is their hierarchical superiority (as they override inconsistent customary international law and treaty), that they are not subject to derogation and that States cannot opt out as a persistent objector. This is sometimes justified on the basis of the moral force of the value that the norm protects.[52] Others such as Hugh Thirlway[53] emphasise the non-derogable nature of the norm as a means of identifying norms of *jus cogens* through State practice.

[48] International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties', n. 28, conclusion 7(3). See Nolte Second Report, n. 38, 51–2 for an outline of the controversial debate to which this provision gave rise.

[49] VCLT, n. 2, art. 53. The Special Rapporteur of the ILC Committee on the Identification of Customary International Law, Sir Michael Wood, noted that: 'The definition in the Vienna Convention is of general application': Wood First Report, n. 1, footnote 43, referring to para. (5) of the commentary to article 26 of the 'Articles on State Responsibility', Yearbook of the International Law Commission (2001), vol. II, p. 85.

[50] Wood First Report, *ibid*., para. 25 with further references.

[51] *Ibid*., para. 25 with further extensive footnotes.

[52] For example, Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006), 50.

[53] Thirlway, n. 10, 154 ff.

Is the Prohibition of the Use of Force Jus Cogens?

The prohibition of the use of force is considered by many to be *jus cogens*,[54] although there is no ICJ ruling directly on this point.[55] The ILC stated in its commentary on the Draft Articles on the Law of Treaties that 'the law of the Charter concerning the prohibition of the use of force' is 'a conspicuous example' of a peremptory norm.[56] The ICJ in the *Nicaragua* case referred to the ILC's statement,[57] which some argue 'may indicate an inclination itself to move in that direction, but it does not constitute a determination to that effect'.[58] Various ICJ judges in their separate and dissenting opinions have declared that the prohibition of the use of force is a peremptory norm.[59] In his fourth report,[60] the ILC Special Rapporteur on the topic of peremptory norms of general international law (*jus cogens*), Dire Tladi, included the prohibition of aggression[61] in an illustrative list of jus cogens norms. Tladi canvassed relevant practice in support of the ILC's recognition of the prohibition of aggression as a peremptory norm, including the 1974 GA Definition of Aggression.[62] The ILC Drafting Committee subsequently adopted a draft

[54] Article 2(4) is 'usually acknowledged' as *jus cogens*: Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), 200, 231–2, MN67–8. See footnote 182 for list of further references in support.

[55] Claus Kreß, 'The International Court of Justice and the Non-Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 561, 571.

[56] International Law Commission, 'Yearbook of the International Law Commission 1966, Vol. II', n. 12, 247, commentary on article 50, para. 1.

[57] *Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* (1986) ICJ Reports 14 ('*Nicaragua* case'), para. 190.

[58] Kreß, n. 55, 571.

[59] For example, *Nicaragua* case, n. 57, Separate Opinion of President Nagendra Singh, 153, Separate Opinion of Judge Sette-Camara, 189; *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment* (2003) ICJ Reports 161 ('*Oil Platforms* case'), Dissenting Opinion of Judge Elarby, para. 1.1, Dissenting Opinion of Judge Al-Khasawneh, para. 9, Separate Opinion of Judge Simma, para. 6; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Reports 136, Separate Opinion of Judge Elarby, para. 3.1.

[60] International Law Commission, 'Fourth Report on Peremptory Norms of General International Law (jus cogens) by Dire Tladi, Special Rapporteur' UN Doc A/CN.4/727 (31 January 2019).

[61] 'As a terminological matter, the . . . report . . . refer[s] to the prohibition of aggression in lieu of the possible alternatives, i.e., the prohibition of the use of force, prohibition of aggressive force and the law of the Charter on the prohibition of force' (*ibid*., para. 62).

[62] *Ibid*., paras. 62–68.

conclusion setting out an illustrative list of 'the most widely recognised examples of peremptory norms of general international law', which lists as the first example 'the prohibition of aggression or aggressive force'.[63] Scholars arguing in favour of the prohibition of the use of force as a peremptory norm run the gamut between the position that the entire *jus contra bellum* is *jus cogens*;[64] that all of article 2(4) is *jus cogens*;[65] that only the prohibition of the use of force (as opposed to threats of force) in article 2(4) is *jus cogens*;[66] to those who take the view that only a narrow core of the prohibition (i.e. aggression) is *jus cogens*.[67]

James Green has criticised the tendency for uncritical conclusions that the prohibition of the use of force is *jus cogens* and pointed out key issues with characterising the prohibition of the use of force as a peremptory norm.[68] There are two main bases for his critique. The first issue concerns the flexibility and uncertain nature of the scope and content of the *jus contra bellum*. Green notes that the content and scope of a peremptory norm on the use of force is very difficult to determine and that, as set out earlier in the chapter, a wide range of possibilities have been put forward by scholars.[69] This is due to the nature of the prohibition of the use of force and its scope: article 2 (4) sets out two prohibitions (on the threat and use of force) and is subject to two exceptions set out in the UN Charter (article 51 and Chapter VII Security Council authorisation) as well as the 'exception' of valid consent. Not all of the concepts are treated in the same way in the legal discourse and practice of States – for example, the difference in treatment of threats of force and uses of force has led some scholars to argue that the prohibition of the threat of force is not even a customary norm, let alone a peremptory one.[70] In addition, each

[63] International Law Commission, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)', Yearbook of the International Law Commission (2022), vol. II, Part Two, conclusion 23.

[64] '[I]f the very prohibition of the use of force is peremptory, then every principle specifying the limits on the entitlement of States to use force is also peremptory': Orakhelashvili, n. 52, 50.

[65] Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press, Paperback ed, 2009), 91: the no-threat rule enjoys peremptory status like the rest of article 2(4); Ruys, n. 3, 27, footnote omitted: 'it appears plausible that both Article 2(4) and Article 51 form part of *ius cogens*.'

[66] Corten, n. 14, 200–12.

[67] For example, Lauri Hannikainen, *Peremptory Norms (*Jus Cogens*) in International Law* (Lakimiesliiton Kustannus, 1988), 354–5.

[68] Green, n. 16.

[69] *Ibid*., 226.

[70] Romana Sadurska, 'Threats of Force' (1988) 82(2) *American Journal of International Law* 239, 249, argues that 'it seems unnecessary for all practical purposes and theoretically dubious to characterize the prohibition of the threat of force as a rule of customary international law';

of these concepts is in turn subject to areas of uncertainty and is informed by or has its origin in different sources of international law. For example, there is continuing uncertainty over the content of the customary international law requirements of necessity and proportionality of self-defence measures,[71] and contested areas of the *jus contra bellum* such as whether there is the right to anticipatory self-defence.[72] This does not necessarily prevent the prohibition of the use of force from having peremptory status but requires either that the norm be framed in a broad way to include either the entire *jus contra bellum*[73] or exceptions to the prohibition of the use of force, or that the *jus cogens* norm be construed restrictively to confine it to the most certain areas (generally, the core of 'aggression').[74] Green argues that 'the inherent uncertainty and flexibility of the prohibition would not seem to be compatible with the conception of peremptory norms as set out in the Vienna Convention on the Law of Treaties'.[75]

The second issue is 'whether there is enough evidence to establish that the prohibition of the use of force is peremptory in nature'.[76] Green argues for a positivist approach to the identification of *jus cogens* norms by examining State practice.[77] This accords with the ILC's indication that 'peremptory norms are formed as a result of a process of widespread acceptance and recognition of such norms *as peremptory* by the international community as a whole'.[78] Green canvasses a range of such practice that does not necessarily bear out the peremptory status of the prohibition of the use of force, observing that 'in notable instances where states have had the opportunity to explicitly affirm the peremptory status of the prohibition, and might reasonably have been expected to do so, there has been a trend toward silence on the issue'.[79] Although most States stayed silent on this point during relevant debates in treaty negotiations, in the Sixth Committee of the General Assembly and the

Green, n. 16, 230. Cf Dissenting Opinion of Judge Weeramantry in *Nuclear Weapons* Advisory Opinion, n. 6, 525, who quotes numerous resolutions and international law documents confirming that threats of force are unlawful under international law.

[71] Green, n. 16, 235.

[72] *Ibid.*, 236.

[73] *Ibid.*, 231.

[74] *Ibid.*, 235.

[75] *Ibid.*, 226.

[76] *Ibid.*, 218.

[77] Thirlway sets out an even more stringent test, noting that 'only a court decision could authoritatively invalidate an agreement between States as contrary to *jus cogens*, and thus demonstrate that the category of *jus cogens* exists' (n. 10, 154, footnote omitted).

[78] International Law Commission, 'Formation and Evidence of Customary International Law', n. 18, 30, observation 23, emphasis added, footnote omitted.

[79] Green, n. 16, 246.

UN Security Council, very rarely has any State actually rejected the *jus cogens* status of the prohibition of the use of force, with nearly all explicit statements on this issue arguing in favour of the peremptory status of the prohibition. 'As such, one may point to a cumulative effect of acceptance across these examples'[80] and the argument could be made that the majority of States have not explicitly affirmed the *jus cogens* nature of the prohibition since it is 'self-evident' or for political reasons.[81] However, Green questions 'whether silence is enough to bestow supernorm status on a rule'.[82]

In conclusion, there is no consensus as to whether and to what extent the prohibition of the use of force is *jus cogens*. The majority position appears to be that the prohibition (or at least a small core of it) is a peremptory norm, however, this position is also subject to powerful critiques. Ultimately, as Green notes, '[t]he only way to reach a firm conclusion on this question is through an extensive and systematic survey of state practice',[83] which is beyond the scope of the present work.

Consequences of Jus Cogens *Nature of the Prohibition*

If the prohibition of the use of force is *jus cogens*, the legal consequences for violation are more stringent. In addition to the consequences of a threat to the peace, breach of the peace or act of aggression set out in Chapter VII of the UN Charter, under customary international law, a prohibited use of force gives rise to international State responsibility and the obligation to cease the unlawful act,[84] make reparation[85] and the right of the victim State to take non-forcible countermeasures.[86] If a use of force in violation of article 2(4) is considered to be a peremptory norm, there are additional consequences of a serious breach of the prohibition, namely, that other States shall co-operate using lawful means to bring the violation to an end, shall not recognise the situation as lawful and shall not render aid or assistance in maintaining the situation.[87] If the entire prohibition of the use of force is *jus cogens*, then even

[80] *Ibid*., 253, footnote omitted.
[81] *Ibid*., 254.
[82] *Ibid*., 255.
[83] *Ibid*., 256.
[84] ILC, 'Draft Articles on Responsibility of State for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the Work of Its Fifty-Third Session' UN Doc A/56/10 (2001), art. 30.
[85] *Ibid*., art. 31.
[86] *Ibid*., art. 22.
[87] *Ibid*., art. 41.

uses of force at the lower boundary of the prohibition in terms of intensity or effects could potentially be a serious breach of a peremptory norm if it 'involves a gross or systematic failure by the responsible State to fulfil the obligation',[88] giving rise to these corresponding consequences.

Furthermore, if the rule in article 2(4) of the UN Charter is *jus cogens*, States cannot legally conclude treaties that are the result of a prohibited threat or use of force or enter into legally binding treaties that conflict with the rule. Under article 52 of the VCLT, '[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. The ICJ held that this reflects customary international law in the *Fisheries Jurisdiction (UK v Iceland)* case.[89] Regarding the second point, article 53 of the VCLT provides that if at the time of the conclusion of a treaty, it conflicts with a *jus cogens* norm, then the treaty is void *ab initio*. One practical example of this is a treaty purporting to provide 'prospective consent to authorize the use of force by one state against another, irrespective or against its will at the moment when force is being used'. If the prohibition of the use of force is *jus cogens*, then this 'constitutes a derogation from the prohibition ... Such consent embodied in a treaty or in a unilateral act would be void for its conflict with *jus cogens* on the basis of Article 53 VCLT and general international law.'[90] This could conceivably encompass standing authorisations under regional collective security agreements, such as article 4(h) of the Constitutive Act of the African Union,[91] which recognises 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[92]

The International Law Commission noted 'a certain overlap in the application of the *jus cogens* provisions of ... the draft articles and Article 103 of the Charter because certain provisions of the Charter, notably those of Article 2,

[88] *Ibid.*, art. 40(2).

[89] *Fisheries Jurisdiction (UK v Iceland), Jurisdiction* (1973) ICJ Reports 3, para. 14.

[90] Alexander Orakhelashvili, 'Changing *Jus Cogens* through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 157, 167, citations omitted.

[91] Organisation of African Unity (adopted 1 July 2000, entered into force 26 May 2001). On article 4(h) of the Constitutive Act of the African Union and article 2(4) of the UN Charter, see Erika de Wet, 'Military Assistance Based on Ex-Ante Consent: A Violation of Article 2 (4) of the UN Charter?' (2020) 93(3–4) *Die Friedens-Warte* 413–29.

[92] On 11 July 2003, a Protocol on the Amendments to the Constitutive Act of the African Union was adopted, which amended article 4(h) to include 'a serious threat to legitimate order'; however, the Protocol has not entered into force.

paragraph 4, are of a *jus cogens* character'.[93] Due to the operation of article 103 of the Charter, the obligations in article 2(4) would prevail over the obligations of UN Member States under any other international agreement in the event of a conflict between the obligations. As noted by the ILC,[94] the difference is that if article 2(4) is *jus cogens*, then a conflicting treaty will be completely void, not merely that the obligation under the UN Charter would prevail over the conflicting obligation. In any case, if the prohibition of the use of force is in fact *jus cogens*, then as Thirlway notes,[95] it is unlikely that States would enter into a treaty that conflicts with this obligation and then later seek to denounce it as void on this basis.

For the purpose of identifying the meaning of a prohibited 'use of force' under international law, the *jus cogens* nature of the norm is relevant to the standard of modification, to which we will now turn.

Modification Standard of the Prohibition of the Use of Force if It Is Jus Cogens

If the prohibition of the use of force is a peremptory norm of international law, then there will be a higher standard applicable for determining whether subsequent State practice (for treaty interpretation) or State practice and *opinio juris* (for customary international law) has modified the scope or content of the norm. This is because a peremptory norm 'can be modified only by a subsequent norm of general international law having the same character'.[96] Notably, the modification standard (i.e. *jus cogens* status of the norm) is only relevant to attempts to make the rule less restrictive, either through interpreting the rule in a way that results in a narrower scope or through new derogations or exceptions to the rule. Making the rule narrower would be inconsistent with the original (peremptory) rule, which means that

[93] International Law Commission, 'Yearbook of the International Law Commission 1966, Vol. II', n. 12, Commentary of Special Rapporteur Waldock on the draft convention on the law of treaties, regarding draft article 37: treaties conflicting with a peremptory norm of general international law (*jus cogens*), 24.

[94] *Ibid*.

[95] Thirlway, n. 10, 154.

[96] VCLT, n. 2, art. 53. The ILC has observed that 'at the present time, a modification of a rule of jus cogens would most probably be effected through a general multilateral treaty': International Law Commission, 'Formation and Evidence of Customary International Law', n. 18, 31, observation 24, footnote omitted.

the new narrow interpretation would also have to be a *jus cogens* rule to override the original broader interpretation.[97]

Conversely, making the rule broader does not contravene the original *jus cogens* norm; the 'new' rule would preserve the original *jus cogens* 'core' of the norm and extend it under either the treaty (through an evolutive interpretation of article 2(4)) or custom (through evolving custom). In order for the part of the rule that extends beyond the original scope to also comprise *jus cogens*, it would have to separately meet the requirements for the development of a *jus cogens* norm; that is, it must also be 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[98] Of course, it is not necessary for an extended scope of the prohibition of the use of force to be *jus cogens*; it is entirely possible for only the original core to be *jus cogens* and for the 'new' part to be an ordinary treaty or customary rule. If the evolved (expanded) interpretation of the prohibition of the use of force did comprise *jus cogens*, then 'any existing treaty which is in conflict with that norm becomes void and terminates'.[99]

CONCLUSION: WHICH SOURCE TO INTERPRET OR APPLY?

Approaches based on analysing State practice and *opinio juris* in order to determine whether and how the prohibition of the use of force in article 2(4) of the UN Charter has evolved or been modified are flawed. Furthermore, since the two rules are identical in content, States do not differentiate between the two in their application of the prohibition and, most importantly, *the rule in article 2(4) is itself the origin of the customary rule*. It is not appropriate to use the customary prohibition to fill gaps in the interpretation of or to modify article 2(4) (unless the customary norm evolves and is used as an element of interpretation of article 2(4)). The preferable approach then to interpret the meaning of a prohibited 'use of force' under international law is to focus on interpreting the treaty.

[97] Cf Corten, n. 14, 210–11, who argues that under article 53 of the VCLT, the only relevant practice is subsequent treaties departing from the peremptory rule, since subsequent State practice that claims an exception or justification 'can influence only the interpretation of the rule, not its status as *jus cogens*'. Corten points out that there is no treaty seeking to derogate from article 2(4), and there are many treaties with saving clauses of the rights and responsibilities under the UN Charter.

[98] VCLT, n. 2, art. 53.

[99] *Ibid.*, art. 64.

There are several implications of choosing to focus on treaty interpretation to discern the meaning and content of a prohibited 'use of force' between States. There is no hierarchy between these different sources of law,[100] and even if the content of the rule under each source of law is currently identical, there are important differences in the application and interpretation of the two different sources of law:

- *Relevance of State practice*: The relevance of State practice differs according to the method being applied. State practice may be relevant firstly to identification of customary international law (when accompanied by an *opinio juris*); secondly, as subsequent practice of the parties in the application of the treaty under article 31 of the VCLT, which establishes their agreement regarding its interpretation; and, thirdly, as other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32 of the VCLT.
- *Relevant State practice*: Georg Nolte notes that '[i]t is . . . not always easy to distinguish subsequent agreements and subsequent practice from subsequent "other relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c)). It appears that the most important distinguishing factor is whether an agreement is made "regarding the interpretation" of a treaty.'[101] Accordingly, the main difference in method is to identify whether the State practice is in the application of article 2(4) of the UN Charter and whether such practice (in combination with other instances of State practice) establishes the agreement of the treaty parties regarding its interpretation.
- *Opinio juris*: Unlike the identification of the scope of the customary prohibition of the use of force, examining the interpretation of article 2 (4) through subsequent practice does not require an analysis of whether acts or omissions are accompanied by an *opinio juris*, but only whether it is in the application of the UN Charter and if it establishes agreement of UN Member States regarding its interpretation.
- *Required density of practice*: The quantitative standard is probably higher for identifying whether subsequent practice in the application of the treaty evidences agreement of the parties regarding its interpretation, as

[100] Thirlway, n. 10, 136.

[101] Nolte First Report, n. 27, para. 115; cf Wood First Report, n. 1, para. 17, which states that 'the dividing lines' between the areas of identification of customary international law and subsequent agreements and subsequent practice in relation to the interpretation of treaties 'are reasonably clear'.

> this will likely require unanimity or near-unanimous agreement of all treaty parties.[102]

Focusing on treaty interpretation to find the meaning of a prohibited 'use of force' has the advantage of avoiding the problems associated with trying to identify an evolution in the customary rule that have been noted by other scholars, such as 'profound divergences' over method,[103] and legal debates regarding the appropriate equilibrium 'not only between "words" and "deeds" but also between "abstract" and "concrete" statements; between the various aspects of density of State practice (uniformity, extensiveness and duration); between the (relatively more influential) practice of powerful States and that of other members of the international community; or between the practice of the Security Council and that of the General Assembly'.[104] A consequence of this approach is that it does not give greater weight to the practice of more militarily powerful States. However, the practice of those more powerful States is more likely to play an influential role as a form of 'other subsequent practice',[105] since those States tend to be more active in the actual use of force and exchange of claims about the use of force, and therefore generate more relevant practice which could play a subsidiary role in interpretation (though one still needs to consider whether such practice indicates how those parties interpret the treaty). Finally, taking the UN Charter provisions as the starting point imposes certain textual constraints on the interpreter[106] and restricts the range of interpretive possibilities to what is offered by the text.

As Andrea Bianchi notes:

> [T]here are good reasons for considering the provisions of the Charter as the starting point of the inquiry on the international legal regulation of the use of force. The first obvious reason is that there is widespread social consensus on this proposition. In most of the debates before the Security Council, in which

[102] 1966 Yearbook of the ILC, vol. 1, Part II, n. 17, 165, para. 17, intervention of Mr Tunkin with respect to draft article 68.

[103] For example, Corten notes:

> On one side of those debates in the extensive approach; it consists in interpreting the rule in the most flexible manner possible. ... On the other side is what can be categorised as the restrictive approach; it advocates a much stricter interpretation of the prohibition so making it much less likely that new exceptions will be viewed as acceptable. Beyond the validity of the basic arguments advanced by both sides, a review of scholarship reveals that the debate is also, and perhaps above all, about method. The most profound divergences arise over the status and interpretation of the customary prohibition on the use of force. (n. 14, 5, footnotes omitted)

[104] Ruys, n. 3, 51.

[105] VCLT, n. 2, art. 32.

[106] Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22(4) *Leiden Journal of International Law* 651, 658.

> issues of the use of force are discussed, reference is primarily made to the law of the Charter. Also in other fora the 'official discourse' on the use of force relies heavily on the central character of the Charter provisions.[107]

This analysis will therefore start with the UN Charter and focus on the subsequent agreement of the parties as well as other practice in the application of the Charter as a supplementary means of interpretation, rather than seeking to identify State practice and *opinio juris* for the purpose of deriving the content of the rule under customary international law.

[107] *Ibid.*, 659 ff.