The impact of the coexistence of multiple norms from different sources of international law on change to the *jus ad bellum*

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ABSTRACT

This thesis analyses what would be required as a matter of international law to establish that a change to the jus ad bellum *has occurred; that is, that states are permitted to use force in situations where it was previously unlawful under international law, or are prohibited from using force in situations where that conduct was previously lawful. More specifically, this thesis analyses how the international law norms that regulate the use of force may be modified, given that the* jus ad bellum *comprises multiple international law norms, from different sources of international law, some with distinctive characteristics such as* jus cogens *status, some of which address the same subject matter, and some of which refer to, limit the scope of, or provide exceptions to each other. It is argued that this coexistence of different kinds of international law norms impacts how those norms are modified, and so will affect how the* jus ad bellum *can change.*

The thesis analyses each of the different kinds of norm in the jus ad bellum *in turn, to determine how norms of customary international law, treaty law, and norms with* jus cogens *status may be modified. The thesis then analyses the structure of the* jus ad bellum *and the relationships between the different international law norms and considers how these processes of modification are impacted by the coexistence of different kinds of norms in the* jus ad bellum*. In this way, the thesis seeks to identify what would be required, in terms of the practice,* opinio juris *and/or agreement of states, to demonstrate that a new exception to or limitation on the scope of the prohibition on force has come into existence, or that the content or scope of self-defence and collective security have changed.*

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1. Introduction

> *Good motives on human rights do not justify any government or any court ignoring basic international law requirements […] The methodology of determining what constitutes a new rule of international law is therefore – as this Court is well aware – no straight-forward matter and requires painstaking analysis to establish whether the necessary elements of State practice and* opinio juris *are present.*[1]
>
> *[…] the intervention in northern Iraq 'Provide Comfort' was in fact, not specifically mandated by the United Nations, but the states taking action in northern Iraq did so in exercise of the customary international law principle of humanitarian intervention.*[2]

States frequently make claims that they are using force in accordance with international law.[3] However, while typically expressed as statements as to what the law *is*, state claims to be using force in accordance with international law often amount to an implicit claim that the law on the use of force has *changed*: that certain conduct is now lawful which was not previously accepted to be lawful. The reason for this is not difficult to discern: 'it is tactically less advantageous to argue for a change in the law than to claim that the law has always allowed the actions claimed to be legal by a proponent.'[4] Yet, when correctly analysed as questions of whether the *jus ad bellum* has changed, these claims raise complex issues which have been largely neglected in the scholarship to date.[5]

1. Research question

[1] Brief of the United Kingdom and the Netherlands as *amici curiae*, *Kiobel v Royal Dutch Petroleum Co* (2012), 9, 13.

[2] House of Commons Foreign Affairs Committee, Statement of Mr Aust, Legal Counsellor, UK Foreign and Commonwealth Office (1992), 827–8.

[3] E.g. Identical letters from Turkey to the Secretary-General and the President of the Security Council (2018); Letter from the USA to the President of the Security Council (2020); UK Syria Legal Position (2017).

[4] Kammerhofer (2015), 634.

[5] *Ibid*, 636–7.

The preliminary research question for this thesis is therefore to analyse what would be required as a matter of international law to establish that different changes to the *jus ad bellum* have occurred. In particular, what would be required, in terms of the practice, *opinio juris*, and/or agreement of states, to demonstrate that a new exception to or limitation on the scope of the prohibition on force has come into existence? Or that the content of the right of self-defence or the UN collective security framework has changed? If a state or group of states alleges that a new right of humanitarian intervention has emerged, or that self-defence is now permitted in response to armed attacks that are not yet imminent, what evidence should they be required to produce to support their claim that the law has evolved in this way?

This thesis builds on an existing body of literature which has illuminated how disagreements about the content of the *jus ad bellum* often flow from differing views held by states and scholars as to the correct methods for identifying and interpreting international law norms.[6] The contribution of this thesis is to show that the structure of the *jus ad bellum* means that the methodological challenges of evaluating claims regarding the state of the law go beyond questions of how individual norms change independently and requires an understanding of how different norms from different sources of international law work together to regulate the use of force.

As confirmed by the International Court of Justice's judgments in *Military and Paramilitary Activities in and against Nicaragua*, the prohibition on the use of force does not exist only as a treaty norm in Article 2(4) of the United Nations Charter; there is a

[6] E.g. Byers and Chesterman (2003); Corten (2005); Cannizzaro and Palchetti (2005); Kammerhofer (2016) 3.

customary prohibition on force that exists alongside it.[7] In addition, there is widespread agreement that there is a norm in the *jus ad bellum* which has *jus cogens* status. So if a state is making a claim that, for example, the *jus ad bellum* now permits unilateral humanitarian intervention so that their use of force in such circumstances is lawful, it would be necessary to show not just how Article 2(4) has changed so as now to permit such uses of force, but also that customary international law has undergone a similar change and, potentially, that a *jus cogens* norm has been modified.[8]

Taking these structural factors into account, the research question of this thesis may be further refined: it is to analyse how the international law norms that regulate the use of force may be modified, given that the *jus ad bellum* comprises multiple international law norms, from different sources of international law, some with distinctive characteristics such as *jus cogens* status, some of which address the same subject matter, and some of which refer to, provide exceptions to, or limit the scope of each other. As argued in the following chapters, the coexistence of different kinds of international law norms impacts how those norms are modified, and so will affect how the *jus ad bellum* can change.

While literature exists that addresses the interactions between the different sources of international law,[9] the *jus ad bellum* merits a dedicated analysis of how sources interact in this context. It is not argued here that the international law on the use of force is *sui generis*; the same rules as to the creation and modification of international law norms apply

[7] *Nicaragua* (Jurisdiction), para 73; *Nicaragua*, paras 176, 178.

[8] See Akande and Johnston (2021).

[9] Dinstein (2007); Villiger (1997); Baxter (1970); Bernhardt (1987); Meron (1991); Thirlway (2019), 147–61.

to the law on the use of force as to any other area of general international law. However, certain unusual features of the norms in the *jus ad bellum* – the virtually universal participation in the UN Charter; the provision in Article 103 that obligations under the Charter prevail over those in other agreements; and the presence of a *jus cogens* norm in the *jus ad bellum* – raise specific questions about how the different sources of law may be modified, and how they interact. These questions must be resolved in order to assess claims of change to the law in this area, but also require an analysis of complex legal and conceptual issues which can illuminate interaction and change in the sources of international law generally.

2. Scope, assumptions, and definitions

This thesis is not concerned with resolving ongoing controversies about the current content of the law on the use of force, except to the extent that this may be necessary to answer the question of how the *jus ad bellum* can change. The thesis takes as its starting point the '*Nicaragua* consensus': the view that, by and large, the merits judgment in *Nicaragua* accurately reflected the law at that time.[10] While chapters six and seven suggest that some alleged changes to that framework are unlikely to have occurred, given what would be required to modify the norms of the *jus ad bellum* in this way, the purpose of the thesis is not to provide firm conclusions as to whether or not, for example, self-defence against non-state actors in the absence of *any* involvement by the territorial state is currently permitted under international law, nor to evaluate the lawfulness of particular uses of force by states.

[10] Kammerhofer (2015), 629.

The thesis is anchored in two premises, which underlie the analysis that follows. First, international law is a legal system which contains 'secondary rules' that regulate the creation and modification of international law norms.[11] These secondary rules are commonly referred to as the doctrine of the sources of international law. A 'source' of international law, such as customary international law, refers to a particular process for the creation of international law norms which is regulated by these secondary rules, and should be distinguished from the individual norm itself, such as the customary prohibition on force, which that process generates.[12]

Second, as the ICJ held in *Nicaragua*, 'even if two norms belonging to two sources of international law appear identical in content […] these norms retain a separate existence'.[13] This separate existence means that for a norm from a particular source of international law to be modified, the requirements of the legislative process *specific to that source of law* must be fulfilled. As the ICJ observed: 'Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application';[14] and, by extension, their methods of modification. Therefore, even where international law norms of different sources regulate the same subject matter in the same way, when considering how the law in that area has changed those norms must be disentangled to determine whether the requirements for identification of new customary international law and modification of a treaty norm have been met.

[11] Hart (2012), 94–5. Although cf Hart's sceptical view of whether (in 1961) international law could be considered a legal system. This use of the term 'secondary rules' should be distinguished from its use to refer to e.g. customary international law on state responsibility.

[12] Pellet (2021), 167.

[13] *Nicaragua*, para 178.

[14] *Ibid.*

Throughout this thesis 'change in the *jus ad bellum*' is understood in terms of its outcome: that states are permitted to use force in situations where it was previously unlawful under international law or are prohibited from using force in situations where that conduct was previously lawful. That is, this thesis is concerned with what would be required to bring about an effective change in states' obligations under the primary rules of the *jus ad bellum* as a whole. Where the term 'modification' is used, this refers rather to a change to a particular *jus ad bellum* norm.

In legal writing, the word 'exception' is used to refer to a variety of different concepts. In this thesis, the word exception is used only to refer to a separate legal norm that applies alongside another norm and which operates to exclude from the scope of the latter norm cases to which it otherwise applies. This should be distinguished from the use of the word 'exception' to refer to conduct that falls outside the scope of a norm; a situation that falls within an 'exception' to a norm in this sense simply is not regulated by that norm. This is not referred to in this thesis as an exception to a norm but rather as a limitation on the scope of a norm. It is nevertheless important to note that in both practice and scholarship in the *jus ad bellum* the term 'exception' is commonly used to refer to those situations – self-defence and collective security – in which force may be used lawfully ('the general rule prohibiting force allows for certain exceptions'[15]), without always clarifying whether this is intended to refer to a true exception or a limitation on the scope of the prohibition on force.

[15] *Nicaragua*, para 193.

Finally, this thesis refers to 'norms' of international law throughout, rather than 'rules', so as not to suggest that a distinction is being made between 'rules' and 'principles', nor that this thesis is concerned only with modification of rules of conduct such as the prohibition on force or the right of self-defence. The international law norms whose modification may lead to change in the *jus ad bellum* also include, for example, institutional and procedural provisions of the UN Charter constituting UN collective security organs.

3. Structure of the thesis

The first four substantive chapters of the thesis analyse each of the different kinds of norm in the *jus ad bellum* in turn, to determine how norms of customary international law, treaty law, and norms with *jus cogens* status may be modified. The view taken here is that *jus cogens* is not a separate source of international law; rather *jus cogens* norms are customary international law norms that have acquired *jus cogens* status. However, their distinctive requirements for modification mean that they are analysed as a separate category of norm.

Chapter two analyses how norms of customary international law are identified and how the nature of the customary norm being identified and the context of underlying international law norms in which it is said to be located affect this process. Chapter three then applies this analysis to the identification of customary international law where an identical treaty norm exists alongside the alleged customary norm. Chapter four considers how treaty norms may be modified but, unlike the preceding chapters which consider customary international law in general, focuses on the principal treaty in the *jus ad bellum*: the UN Charter. This is because how a treaty may be modified will depend to a considerable

extent on the nature and terms of the particular treaty. Chapter five identifies the *jus cogens* norm in the *jus ad bellum* and then analyses how *jus cogens* norms may be modified.

Chapters six and seven apply the conclusions from the preceding chapters to consider how these processes of modification are impacted by the coexistence of different kinds of norms in the *jus ad bellum*. Chapter six analyses how new exceptions to or limitations on the scope of the prohibition on force may be created, given that the prohibition exists as a norm of treaty law in Article 2(4) of the Charter as well as a customary *jus cogens* norm. Chapter seven analyses the structure of the two established so-called 'exceptions' to the prohibition on force – self-defence and collective security – and considers how change to their content or scope could occur.

2. Identification of new customary international law

Customary international law is one of the sources of the international law norms that make up the *jus ad bellum*. If one is to know how the *jus ad bellum* can change, knowing how new customary international law norms are identified is an essential step. Customary norms in the *jus ad bellum* are found in many different contexts and their nature – that is, whether they are prohibitive, permissive, prescriptive, and so on – varies. For example, underlying the entire *jus ad bellum* framework is a prohibitive customary norm outlawing the use of force, while the customary right of self-defence takes the form of a permissive customary norm. This chapter therefore seeks to understand how the nature of the customary norm being identified and the context of underlying international law norms in which the new customary norm is said to be located impacts the process by which customary norms are identified. These conclusions will be applied in chapters six and seven to analyse how different changes to the *jus ad bellum* may occur and provides a framework for analysing how *jus cogens* norms can be modified, in chapter five.

Part 1 sets out the 'two-element' test for identification of customary international law and Part 2 analyses how the nature and context of the customary norm being identified impact the application of that test.[16]

1. The test for identification of customary international law

[16] Part 2 of this chapter has been published as Johnston (2021b).

Article 38(1)(b) of the ICJ Statute refers to 'international custom, as evidence of a general practice accepted as law'.[17] Even leaving aside the confusing drafting of that provision,[18] this pronouncement is of little assistance in determining how customary norms are to be identified in practice. Instead, through its jurisprudence the Court has elaborated a two-element approach, distinguishing between state practice and *opinio juris* and elaborating on how each element is to be fulfilled, such as the generality of practice required, and the kinds of evidence that may be consulted.[19]

The two-element test for identification of custom was set out by the ICJ in the *North Sea Continental Shelf* cases: for custom to be established there must be acts that 'amount to a settled practice […] carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[20] This test has been quoted and applied in numerous subsequent decisions of the Court.[21] One looks at the specific instances of practice and extracts a norm from them. Custom is therefore generally identified through an inductive process,[22] although even inductive reasoning will involve some element of deduction, as one cannot identify the relevant practice without some idea of what the alleged norm is.[23]

[17] Statute of the Court, Article 38(1)(b).

[18] ILC, Wood's First Report (2013), para 31.

[19] Tams (2015), 58.

[20] *North Sea* (1969), para 77; see Tams (2015), 58.

[21] ILC, Wood's First Report, paras 57–65; e.g. *Chagos*, para 149.

[22] Talmon (2015), 421.

[23] Kolb (2003), 130.

The Court has stated that practice must include the practice of any specially affected states and, although there must be a certain consistency in the practice,[24] 'absolutely rigorous conformity' is not required,[25] nor must the practice have lasted any particular length of time.[26] However, no precise number of states or incidences of practice is required for a 'general' practice to be shown[27] and the amount of practice required to identify a customary norm has varied across the Court's jurisprudence.[28] As recently expressed by the International Law Commission (ILC), practice must be 'sufficiently widespread and representative, as well as consistent.'[29] Throughout this thesis 'widespread and representative' practice will be used as shorthand to refer to the standard required for the state practice element to be fulfilled.

Since any behaviour by states is potentially the subject of regulation by international law, there is no reason to limit state practice *a priori* to exclude certain kinds of conduct. It is also now accepted that statements, such as diplomatic protests and military manuals, can constitute not only *opinio juris* but also practice in favour of the norm they express.[30] This has the advantage of allowing states to promote changes in custom without

[24] *UK v Norway*, 131, 138.

[25] *Nicaragua*, para 186.

[26] *North Sea*, para 74.

[27] *Ibid*, 134.

[28] Kammerhofer (2004), 530–1.

[29] ILC Custom, Conclusion 8.

[30] ILC Custom, Conclusion 6, commentary para 2; Villiger (2009), 5–6; Akande (2009), 51.

undermining the rule of law by repeatedly breaking existing law.[31] State practice can also include passive conduct.[32]

The two-element approach has recently been reconfirmed by the ILC in its work on the identification of customary international law. The ILC's formulation, which speaks of *opinio juris* as 'acceptance as law' is to be preferred, as it may be that the Court's use of the word 'belief' in the statement from *North Sea* quoted above is responsible for some confusion.[33] The classic objection when one speaks in terms of 'belief' is that in the early stages of custom formation states must act in a certain way in the belief that they are conforming to a customary norm, yet how can they do so when the new custom does not yet exist?[34] This familiar objection seems to hinge on a literal understanding of the word 'belief' which is inappropriate when applied to states. *Opinio juris* cannot be concerned with actual belief as to legality; a state is an abstract concept which does not 'believe' anything. Even if one considers the beliefs of people within a state there are multiple actors who may hold differing beliefs about what the state of the law is, and there are considerable methodological obstacles to reliably discovering what those beliefs are.[35]

What must be involved is acceptance rather than belief, as reflected in the ILC conclusions and the ICJ statute. 'Acceptance' avoids the confusing suggestion that *opinio juris* is something internal and psychological, based on a genuine conclusion as to the state

[31] Akehurst (1975), 8; Chesterman (2001), 63.

[32] Villiger (2009), 9.

[33] Kolb (2003), 138; Bos (1982), 12.

[34] Thirlway (2019), 85.

[35] D'Amato (1971), 34–40; Kolb (2016a), 130; cf Bos (1982), 38.

of the law, and more accurately reflects that what matters is the outward manifestation of the state's position as to what it will tolerate as lawful. It is possible to accept a practice as lawful, or act *as though it is* the law, without anyone believing that it currently is the law, avoiding the problematic result that the first states engaging in a new practice must hold a mistaken view that they are acting lawfully. Further confusion also arises from the use of the term '*opinio juris*' to refer both to the acceptance of *a particular state* that its practice is in conformity with a norm of customary international law, and the general *opinio juris* of states that must be shown for the second element of the test for custom to be fulfilled.

While explicit statements about the content of customary international law can clearly lead an observer to draw a conclusion about what a state has accepted as law, there is no reason why this cannot also result from other statements or even behaviour of states.[36] It is therefore unclear why in principle *opinio juris* should be limited to articulations of the customary norm and cannot, in certain circumstances, also be inferred from state conduct.[37] However, for *opinio juris* to be present there must be acceptance by states that they will act in a similar way in future *for the specific reason* that they are bound to do so by customary international law, not for some other reason such as diplomatic niceties or habit or even because they are so bound under treaty law.[38]

Although some scholars argue that unwritten customary international law norms must be interpreted in the same way as treaty norms,[39] the better view is that for custom

[36] Kammerhofer (2004), 529; Pellet and Müller (2019), para 240.

[37] Cf D'Amato (1971), 74–6.

[38] Bellinger and Haynes (2007), 446–7.

[39] E.g. Mileva and Fortuna (2019).

there is no difference between the interpretation of a customary norm and its identification,[40] nor between its application and its identification. Whether one is identifying the customary norm that exists, determining its contours, or determining if it governs a particular situation, in each case one is examining state conduct to see what norm, if any, can be identified as supported by sufficient state practice and *opinio juris* at a particular time. Similarly, subject to the arguments below about the need to take the context of underlying international law norms into account in the identification process, there is no difference between the identification and modification of norms of customary international law: it is the same process of applying the two-element test to identify which customary norm, if any, is supported by a widespread and representative state practice and *opinio juris*, and the contours of any such norm. For custom, every interpretation is an 'existential interpretation': one which serves to establish or confirm the norm's existence.[41]

2. The nature and context of norms and the identification of customary international law

The ICJ has been consistent in its expression of the view that customary international law is general practice accepted as law.[42] Yet the Court has in certain cases simply asserted that customary norms exist without conducting any analysis of state practice and *opinio juris*.[43]

[40] Gourgourinis (2011), 36; for some authors, interpretation is not applicable to norms of customary international law because of the absence of their expression through written texts, Treves (2010), para 2.

[41] Hollis (2015), 85.

[42] ILC, Wood's First Report, paras 57–65; *Immunities*, para 55.

[43] E.g. in *Nicaragua*, the Court held that common articles one and three of the Geneva Conventions were customary norms, despite a 'complete failure to inquire whether *opinio juris* and practice support' that conclusion, para 218; Meron (2011), 30. See also Talmon (2015); Mendelson (1996), 67.

These cases could charitably be explained as examples of 'elision in judicial reasoning'[44] or simply lack of clarity in the drafting of the Court's judgments. However, more problematic are cases where the Court has engaged in some analysis of state practice and *opinio juris* but still reached an outcome which appears irreconcilable with the two-element test. In some cases, as the two-element approach would predict, an absence of evidence of *opinio juris* leads to a finding by the Court that an alleged norm of customary international law does not exist: the *Colombian-Peruvian Asylum* case, the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, and the *North Sea Continental Shelf* cases. Yet in other cases, there is no clear evidence of *opinio juris* on the part of states participating in the practice, but the Court nevertheless concludes that the alleged customary norm exists: the *Case concerning Right of Passage over Indian Territory* and the *Dispute Regarding Navigational and Related Rights*. In *Military and Paramilitary Activities in and against Nicaragua*, the Court concludes that a customary norm exists apparently based on evidence of *opinio juris* alone.

Scholars have argued that such inconsistencies indicate that 'the Court's openly proclaimed standards for establishing specific customary norms are quite different from how the Court really proceeds.'[45] Others have rejected the two-element test in favour of ambitious alternative accounts of the nature and identification of customary international law.[46] However, it seems that the Court at least still considers itself to be adhering to the two-element test.[47] Support for alternative approaches remains limited to scholarly writings

[44] Akehurst (1975), 32.

[45] Geiger (2011), 674. See also Kelly (2000), 469–70; Choi and Gulati (2016), 146. See also Alvarez-Jímenez (2011), 689; Chan (2016).

[46] Roberts (2001); Kirgis (1987); ILA (2000). Also Goldsmith and Posner (1999); Chinen (2001); Guzman (2005).

[47] *Immunities*, para 55; Tomka (2013), 197.

and they have 'gained no traction with states and no significant following among practitioners'.[48]

This chapter seeks to defend the position that in these cases the Court is indeed doing what it says it is doing and is applying the two-element test for the identification of customary international law, by taking into account how the nature and context of an alleged customary norm can shape that process. Properly understood, these judgments do not undermine the two-element approach but reveal something fundamental about how customary international law should be identified: that how the existence of state practice and *opinio juris* is evaluated may vary depending on the nature of the customary norm under investigation (for example, whether it is a permissive or prohibitive norm) and the context of underlying international law norms in which that alleged norm is located.

It is true that there are many other factors that can account, to some extent, for variation in the Court's jurisprudence, without requiring abandonment of the two-element test. The application of the two-element test will vary depending on the subject matter concerned.[49] The ICJ's jurisprudence spans 72 years – 97 including the Permanent Court of International Justice (PCIJ) – so it is also unsurprising to find that its approach to the two-element test has evolved over time. The Court has shown greater flexibility in the kinds of materials it has accepted as evidence of state practice, accepting that statements as well as conduct may constitute practice.[50] With now nearly 200 states whose practice must be

[48] Wood (2017), 157. UNGA Res 73/203 welcoming and taking note of the ILC's conclusions on identification of customary international law, which reaffirmed the two-element approach, was adopted by consensus.

[49] ILC, Wood's Second Report, para 28. For example, *Immunities*, para 55; Dumberry (2016), 423–4. Cf Kolb (2003), 122.

[50] Tams (2015), 67.

assessed, and especially given the Court's limited fact-finding powers,[51] the Court increasingly relies on its own precedents and work already conducted by the ILC,[52] rather than engaging in a detailed evaluation of practice.[53]

However, this chapter is not concerned with how variations according to chronology or subject matter, or the political context of the various cases, may have impacted the application of the test for custom by the Court. The argument made here is that taking the nature and context of the alleged customary norm into account can explain why in the cases mentioned above, despite applying the same two-element test for custom, the Court's approach has varied. Moreover, this analysis can bring greater clarity and precision to our understanding of how customary international law is identified, and in particular how new customary *jus ad bellum* norms could be identified.

2.1 The nature and context of a customary norm

In practice, the kinds of acts that constitute state practice supporting the existence of an alleged customary norm will normally vary depending on the nature of the norm concerned. This can be shown by considering the kinds of acts required to constitute a practice supporting the existence of 1) permissive norms, for example the right of self-defence; 2) prohibitive norms, such as the prohibition on the use of force by states; and 3) prescriptive norms, such as the duty to render assistance to those in distress at sea. This taxonomy of

[51] Meron (2011), 31–2.

[52] Tams (2015), 73–5; Tomka (2013), 196–8.

[53] Meron (2011), 31.

legal norms is not intended to be comprehensive but reflects the cases analysed below and will be used to demonstrate how the nature of a norm impacts the application of the test for customary international law:

Figure 1.

Alleged customary norm	**Supportive practice**
Permissive norm	*Permitted* conduct *being done*
Prescriptive norm/positive duty	*Required* conduct *being done*
Prohibitive norm/negative duty	*Prohibited* conduct *not being done* (omission)

So, for example, practice in support of some customary norms – prohibitions – will typically consist of omissions. This observation must be qualified, since statements are now accepted to be capable of constituting not only *opinio juris* but also practice in favour of the norm they express.[54] Regardless of the nature of the norm a statement in support can constitute a form of state practice, and so there may be affirmative practice of this kind even when considering the existence of a customary prohibition. However, where such statements are absent, or insufficient to establish the customary norm, the nature of the norm will help identify the kinds of acts that would form a supportive practice.

Of course, how the nature of a norm is characterized is not an objective or neutral question. A prohibition on doing X could conceivably be characterized as a positive duty to do not-X, and vice versa. Similarly, whether a particular customary norm forms an

[54] Villiger (2009), 5–6; ILC Custom, Conclusion 6, commentary para 2.

exception to a more general norm, or even an exception to an exception, is not a static or absolute truth but will depend on how the area of law and particular dispute are analysed.[55] When the identification of customary international law occurs in the context of litigation, much will therefore depend on how the issue is argued by the parties and how the norms involved are ultimately characterized by the Court. This will influence the application of the two-element test by determining what kind of conduct will constitute the supportive state practice that needs to be established, and what conduct will be qualified as practice contrary to the alleged norm.

In cases where there is practice both supportive of and contrary to an alleged customary norm this framing may make all the difference.[56] In the advisory opinion concerning *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, some participants argued that the customary status of the right to self-determination did not entail 'an obligation to implement that right within the boundaries of the non-self-governing territory'. That is, they disputed the existence of a customary *prohibition* on, for example, dividing up a non-self-governing territory so as to maintain part of it under colonial control after independence. However, the Court characterized the question as whether there existed a *permissive* norm, acting as an exception to that prohibition.[57] Given the existing contrary practice where colonial states have failed to respect the territorial integrity of self-governing territories, it may have been difficult to show 'extensive and virtually uniform' supportive practice with respect to that prohibitive

[55] See Methymaki and Tzanakopoulos (2020), 236–7, 240.

[56] Chasapis Tassinis (2020), 256.

[57] *Chagos*, paras 159–60; Chasapis Tassinis (2020), 262–3.

customary norm, especially given its specificity.[58] Yet, when the question becomes one of the existence of a new norm *permitting* interference with the boundaries of a non-self-governing territory, it is much easier for the Court to find that the conduct in question is prohibited because no such permissive customary norm can be shown to exist, in this case due to the clear evidence of contrary *opinio juris*.[59] The body of practice remains the same and the two-element test remains the same, but the characterisation of the nature of the norms in question effectively determines the outcome of the case.

The characterisation of the nature of the norms at issue may also determine which party must bear the burden of establishing that a customary norm exists.[60] In the *Jurisdictional Immunities of the State* case, Italy accepted that under international law states are 'generally entitled to immunity' in respect of *acta jure imperii*.[61] Similarly, in the *Arrest Warrant of 1 April 2000* case, Belgium accepted that that 'Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State'.[62] In both cases, those views were shared by the other party to the dispute and also adopted by the Court in its judgment. Italy and Belgium thus, perhaps unwisely, allowed themselves to be placed in the position of arguing for the existence of permissive customary exceptions to an established norm prohibiting the exercise of jurisdiction, rather than making the dispute a question of whether that prohibitive customary norm establishing

[58] Kolb (2016a), 131.

[59] *Chagos*, para 160.

[60] This is not the result of any formal rules as to allocation of burdens before the ICJ. Rather, if a dispute is characterized as turning on the existence of a particular customary norm, it is the party that wishes to rely on that norm that will need to demonstrate convincingly that evidence sufficient to identify it exists, see Methymaki and Tzanakopoulos (2020), 239.

[61] *Immunities*, para 61.

[62] *Arrest Warrant*, paras 49, 56.

state immunity, relied on by the other parties, exists in the first place.[63] Moreover, where a party must prove the existence of a customary exception, that characterisation alone will render their task more difficult since 'the amount of practice needed to establish a new norm which conflicts with the previously accepted rule is much greater than the amount of practice needed to establish a new rule in vacuo' – or to demonstrate the continued existence of a well-established customary norm despite some contrary practice.[64] In both cases, the Court concluded that there was insufficient practice to support the existence of the exceptions. Indeed, there does not appear to be any case before the ICJ where a party has succeeded in an argument relying on the existence of a customary norm that has been characterized as an exception to an existing customary norm.[65]

The nature of the alleged customary norm – or rather, the nature it is characterized as having by an actor seeking to establish whether the norm exists – will therefore impact the identification of state practice, as in many cases the nature of the norm will determine what conduct must be found to be widespread and representative. In the context of the *jus ad bellum*, this conclusion already suggests that the requirements for change to occur may vary depending on whether it is being claimed that a new permissive customary norm has emerged, or if it is the existence of a customary prohibition on a particular conduct that needs to be established.

2.1(a) The importance of *opinio juris* in identifying customary prohibitions

[63] See Dissenting Opinion of Judge Van den Wyngaert, paras 11–23. Cf Alvarez-Jímenez (2011), 694.

[64] Akehurst (1975), 13; Kolb (2016a), 133; Pellet (2021), 349.

[65] See also the Court's rejection of the existence of a customary exception in *Diallo*, paras 87–9.

Conclusion 3 of the ILC's 2018 conclusions on the 'Identification of customary international law' states that in applying the two-element test, 'regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.' [66] In relation to the nature of the rule, the commentary notes that:

> where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law.[67]

That is, not only will the prohibitive nature of the norm impact what constitutes a supportive state practice, which will normally consist of inaction/omissions, but where the nature of the norm is prohibitive this will impact the identification of the other element, *opinio juris*, as in such cases the identification of the norm is 'more likely' to turn on the evaluation of *opinio juris*. However, if the ILC is also correct in saying that 'the existence of one element may not be deduced merely from the existence of the other',[68] even affirmative state practice cannot lead to any automatic conclusion that such practice is accepted as law. *Opinio juris* accompanying the practice should still need to be demonstrated independently for a customary norm to be identified, regardless of whether the practice consists of omissions or affirmative practice. So, what is it about prohibitions that makes the identification of an *opinio juris* especially important? If *opinio juris* is

[66] ILC Custom, Conclusion 3. From paragraph 5 of the commentary to that conclusion it seems that 'particular circumstances' is intended to refer to the factual circumstances in which the practice occurred.

[67] *Ibid*, Conclusion 3, commentary para 4; also Talmon (2015), 422; Meron (2011), 32. Supportive practice of omissions should be distinguished from silent acquiescence of states in the conduct of others, which is relevant rather to *opinio juris*, see subsection 2.3(a) below; cf Wood's Second Report, para 42.

[68] ILC Custom, Conclusion 3(2), commentary para 8.

always a *sine qua non* for the identification of custom, how is it possible for cases involving prohibitions to be *more likely* to turn on evaluating whether the practice is accepted as law?

This apparent inconsistency in the ILC's position can be explained. When establishing customary prohibitions, evidence of *opinio juris* is particularly important because, in addition to constituting one necessary element of the two-element test, *opinio juris* is needed to determine whether inaction should count as state practice in support of a new customary norm. Without *opinio juris* to indicate that a state was consciously choosing not to act, inaction is ambiguous: the state not acting in a certain way could be doing so because it believes it is prohibited under a new norm of customary international law, but it could be choosing not to act for another reason, or for no reason.[69]

Yet the importance of *opinio juris* in this situation flows from a broader principle and is not limited to prohibitive customary norms, nor even practice involving omissions. Positive action can also be ambiguous as to whether or not it supports a particular customary norm, and in such situations evidence of *opinio juris* will also be particularly important.[70] The ambiguity of the practice means no inference can be made from it as to an acting state's *opinio juris* for the new norm; rather, evidence of that *opinio juris* is needed to clarify the meaning of the practice. Whether practice is ambiguous in this way will depend on both the nature of the customary norm it is alleged to support and the context of underlying international law norms in which the new norm is said to be located.

[69] See Buzzini (2005), 82.

[70] Mendelson (1998), 273. Mendelson sees the role of *opinio juris* in such cases as negative: its *absence* can explain why certain practice *should not* count as practice for custom because it is motivated by comity etc. He also goes further in concluding that, where the practice is not ambiguous, the subjective element does not need to be present, *ibid*, 292. Neither view is adopted here.

2.1(b) The context of the customary norm

The existence of a norm of customary international law must be evaluated in the context of the underlying international law norms.[71] Depending on the context and the nature of the alleged new customary norm, the state practice supportive of the new norm may be consistent or inconsistent with those underlying international law norms. Consider a situation where under international law the position is that certain conduct is *permitted* unless a prohibition can be shown. To establish the prohibitive customary norm the practice required would be *states not doing the act that is permitted by the underlying international law norms* and alleged to be prohibited by the emerging customary norm. In this case, the practice required to establish the new norm is consistent with the underlying international law norms.

However, where the context is that certain conduct is *prohibited* unless the existence of a permissive norm is shown, to establish such a permissive customary norm the practice required would be *states doing the acts that are prohibited under the underlying international law norms* and alleged to be permitted under the emerging norm. In this case, the practice required to establish the new customary norm would be inconsistent with the underlying international law norms. Again, the possibility for state practice to take the form of statements in which states express a view as to the content of customary international law shows that these are not universal truths: a statement by a state that a new customary international law norm exists will not be inconsistent with the

[71] ILC Custom, Conclusion 3, commentary para 3. See *Agreement between the WHO and Egypt*, para 10.

underlying international law norms (except in the unlikely scenario that customary international law prohibits the making of statements about what the law is). However, in the scenarios under discussion here, where state practice for the new norm does not consist only of statements, the practice may be either consistent or inconsistent with the underlying international law norms.

Where practice that would be supportive of an alleged new customary norm is also consistent with an underlying international law norm that exists in the background, the practice will be ambiguous in the sense that it could be supportive of either norm. In this situation, *opinio juris* is particularly important because, without evidence of *opinio juris* for the existence of the new norm, states will be presumed to be acting consistently with the underlying international law norms and the practice may simply strengthen existing customary international law.[72]

Therefore, in many cases, ascertaining the existence of a prohibitive customary norm will, as the ILC observes, 'turn on evaluating whether the inaction is accepted as law'. Without evidence of *opinio juris* to clarify the legal significance, if any, states attach to their omission to perform an act, inaction by states could constitute practice supporting a new customary prohibition on the act concerned, but is equally compatible with the view that under the underlying international law norms states are *permitted* to perform such an act but are not obliged to do so and are merely choosing not to exercise that permission.

[72] Mendelson (1998), 192.

The point is well illustrated by the *Colombian-Peruvian Asylum* case. General customary international law permitted both the state of nationality of an individual alleged to have committed a crime on their territory (the territorial state, Peru), and the state into whose embassy an individual had fled and which was purporting to grant asylum (the asylum-granting state, Colombia) to make their own judgment as to whether or not the alleged crime was a political offence. If the asylum-granting state qualified the alleged crime as a political offence, the territorial state may contest the qualification through dispute-settlement mechanisms, although they need not choose to do so. It is this general permissive norm that provides the backdrop against which the existence of the alleged new customary norm must be assessed. Colombia argued that a new local customary norm recognised the right of the asylum-granting state to make a unilateral and definitive determination as to the nature of the asylum-seeker's offence.[73] In effect, Colombia was alleging the existence of a new customary prohibition which now required territorial states not to challenge the asylum-granting state's qualification. The ICJ was therefore required to decide whether a prohibitive norm existed in the form of local customary international law derogating from a general permissive norm of customary international law.[74]

While Colombia referred to a 'large number of particular cases in which diplomatic asylum was in fact granted and respected' as state practice in support of the norm – that is, a practice of omissions to challenge the asylum-granting state's qualification – it could not produce evidence of *opinio juris* in support of the prohibition.[75] There was no evidence to suggest a new right of unilateral qualification was invoked or 'exercised by the States

[73] *Asylum*, 276.

[74] *Ibid*, 275.

[75] *Ibid*, 277.

granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them'.[76] The Court concluded that Colombia had not shown that the new customary norm was established.[77] There was practice in support of the new prohibition in the form of the omission of territorial states to challenge the asylum-granting state's qualification. However, given its context, this is also consistent with the continuing existence of the permissive customary norm allowing – but not requiring – the territorial state to challenge the qualification by the asylum-granting state. Territorial states may simply be electing not to challenge those qualifications 'merely for reasons of political expediency'. For the inaction to count as state practice in support of the new prohibition, *opinio juris* is needed to remove the ambiguity from the omission.

Of course, often determining what the underlying international law norms are will itself require an evaluation of customary international law and, like the characterization of the nature of a norm, is not a neutral or objective exercise. In litigation the underlying international law norms may be as significant a point of contention among the parties as the evidence for the alleged new customary norm itself. In the PCIJ's *Case of the SS Lotus* the question was whether Turkey had lawfully exercised criminal jurisdiction over the *Lotus*'s French captain, who was prosecuted on arrival in Istanbul for his role in that ship's collision with a Turkish vessel. France argued that, in the context of underlying international law norms whereby states are *prohibited* from exercising jurisdiction extraterritorially, it was for Turkey to establish a *permissive* norm allowing the exercise of

[76] *Ibid.*

[77] *Ibid*, 277–8.

jurisdiction by the non-flag state.[78] The PCIJ disagreed, on the much criticized[79] basis that 'restrictions on the independence of States cannot be presumed'.[80] In the context of an underlying general permission enjoyed by states, it was for France to demonstrate that a *prohibitive* norm of international law had come into existence that would render Turkey's exercise of jurisdiction unlawful. That France was ultimately unsuccessful in this case was, as in *Asylum*, due to a lack of evidence of *opinio juris*: since the omissions of states to exercise jurisdiction were consistent with both the alleged new norm and the underlying international law norms, evidence of *opinio juris* was needed to remove the ambiguity from the practice if the new norm was to be established.[81] It was only 'if such abstention were based on their being conscious of having a duty to abstain' that it would be possible to speak of a customary norm.[82]

However, one cannot simply assume that states enjoy unlimited freedom to act unless a norm of international law imposes a prohibition.[83] Determining the backdrop of underlying international law norms will therefore be a more complex task and will depend on an analysis of the area of international law concerned.[84] For example, in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court, like the PCIJ

[78] France argued that such a permissive norm would take the form of an express or implicit agreement, rather than a norm of general customary international law, *Lotus*, 7.

[79] E.g. Kolb (2016a), 224–32; *Kosovo*, Declaration of Judge Simma, paras 3, 8.

[80] *Lotus*, 18.

[81] ILA (2000), Section 6, commentary.

[82] *Lotus*, 28; ILA (2000), Section 6, commentary; Mendelson (1998), 274.

[83] Brierly (1928), 155–6.

[84] Kolb (2016a), 232–3. It has been suggested that beyond prohibited and permitted acts there is also behaviour that is 'legally neutral' and unregulated under international law, Thirlway (2019). However, this view is not adopted here.

in *Lotus*, took the view that for nuclear weapons to be unlawful it was the existence of a prohibitive customary norm that needed to be established in the context of an underlying general permission. However, rather than assuming that no restrictions on state freedom can be presumed, the Court reaches this conclusion based on an evaluation of practice in the field of arms control, which showed that the illegality of the use of various weapons under international law is formulated in terms of prohibition, against a background where all weapons are otherwise permitted.[85] By contrast, when attempting to establish new customary norms in the *jus ad bellum*, the underlying international law norms will virtually always provide that the use of force by states is prohibited, as since 1945 international law has imposed a comprehensive prohibition on the use of force, both through a quasi-universal treaty and general customary international law, with two so-called 'exceptions' narrowly defined.

The facts analysed in the *Nuclear Weapons* opinion illustrate the ambiguity of omissions as practice establishing prohibitions,[86] and in particular how in such cases it is *opinio juris* that effectively creates a supportive state practice out of inaction.[87] Inaction – consistent non-utilization of nuclear weapons since 1945 – was relied on *both* by states arguing for a new customary prohibition on nuclear weapons and by those arguing for the continued existence of the general permission for states to use those weapons that are not prohibited.[88] In the latter case the states argued that non-use of nuclear weapons was the result of a policy of deterrence, meaning they reserved their right to use nuclear weapons.

[85] *Nuclear Weapons*, para 52.

[86] Mendelson (1998), 274.

[87] See Haggenmacher (1986), 72.

[88] *Nuclear Weapons*, paras 65–6.

In the former, it was argued that states were observing a customary prohibition. Their inaction was consistent with both customary international law norms.

The Court held that since states were 'profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*' the Court did 'not consider itself able to find that there is such an *opinio juris*'.[89] Yet the difficulty seems rather that the participants were in agreement that non-recourse to nuclear weapons reflects an *opinio juris*, but disagree as to what that opinion is. For some it is an acceptance that they are prohibited by international law from using nuclear weapons, while for some it is that although they have chosen not to use nuclear weapons they remain permitted to do so under international law. The problem was therefore that the *opinio juris* of states was divided: some accepted that their practice was governed by the alleged new prohibitive customary norm, whereas others accepted that their practice continued to be regulated by the underlying customary permission. This divided *opinio juris* produced a divided practice, by removing the ambiguity from the omissions of the different groups of states. The statements during the proceedings revealed that some of those omissions were practice that accepted that states were permitted to use nuclear weapons, while others were practice in acceptance of the new prohibition. Taken as a whole, the practice in support of the new prohibitive customary norm was not sufficiently widespread and representative to fulfil the two-element test for identification of customary international law.

[89] *Ibid*, para 67.

The preceding analysis has shown that the importance of *opinio juris* in identifying customary norms of a prohibitive nature results from the ambiguity created by the context, where practice is consistent with more than one customary norm. Yet there is no reason why this reasoning should apply only to situations where the alleged customary norm is a prohibition, or even where the practice in question consists of omissions. There is nothing necessarily ambiguous about omissions. Where the alleged customary norm is *prescriptive* in nature (a positive duty), omissions are not ambiguous: consistent failure to perform the allegedly required conduct would constitute practice clearly contrary to a prescriptive customary norm.[90] Moreover, as shown in Figure 2, affirmative practice can also be ambiguous, in a context where it is consistent with both the underlying international law norms and the alleged new customary norm:

Figure 2.

Alleged customary norm	**Supportive practice**	**Context of underlying international law norms**	
		Permissive norm	**Prohibitive norm**
Prohibitive norm/negative duty	*Prohibited* conduct *not being done*	Consistent *Lotus; Asylum*	N/A
Prescriptive norm/positive duty	*Required* conduct *being done*	Consistent *North Sea*	Inconsistent
Permissive norm	*Permitted* conduct *being done*	N/A	Inconsistent *(Lotus as argued by France)*

[90] See Buzzini (2005), 82. While abstentions may not be sufficient to establish a new customary prohibition, they are 'undeniably important' in determining whether a prohibition already identified continues to exist and be effective, despite some violations, *ibid*, 84.

In *North Sea*, absence of *opinio juris* was fatal to the argument that a prescriptive customary norm existed requiring states to use the equidistance principle in establishing maritime boundaries. The Court quoted the PCIJ's reasoning in *Lotus*, describing it as 'by analogy, applicable almost word for word, *mutatis mutandis*, to the present case'.[91] However, this is not strictly true. Whereas in *Lotus* the conduct in question was an omission – abstention from instituting criminal proceedings – in *North Sea* the conduct was affirmative: incidences where states agreed to draw or did draw boundaries according to the principle of equidistance.[92] The analogy between the two cases is possible because in both the practice supportive of the alleged new customary norm – whether a prohibition or a prescription – is also consistent with the underlying international law norms. In *North Sea*, the performance of the conduct was consistent both with the existence of a prescriptive norm *requiring* states to use the equidistance principle, and the underlying principles of international law absent such a norm, whereby (for non-parties to the 1958 Geneva Convention on the Continental Shelf) such conduct was not required but still permitted.[93] Evidence of *opinio juris* was therefore essential to show that the ambiguous practice supported the alleged new prescriptive norm.

2.2 Cases where state practice appears to be absent

Together, *Lotus*, *Asylum*, *Nuclear Weapons* and *North Sea* show that where practice supportive of a customary norm is consistent with the underlying international law norms,

[91] *North Sea*, para 78.

[92] ILA (2000), Section 6, commentary; Mendelson (1998) 274–5; Bos (1982), 33.

[93] Also *Libya/Malta*, para 44.

evidence of *opinio juris* will be needed to remove the ambiguity from that practice and clarify that states are acting – or not acting – in the belief that they are required to do so by a new norm of customary international law. In these cases, the absence or insufficiency of *opinio juris* was, as the two-element test would predict, fatal to arguments that a customary norm exists. Yet understanding the importance of *opinio juris* in removing ambiguity from practice can also help us understand other cases where the Court has concluded that a customary norm *does* exist. In cases where the Court has appeared to give scant regard to whether sufficient state practice in support of a new customary norm exists, the nature and context of the norm can explain how such cases can be reconciled with the two-element test.

In *Military and Paramilitary Activities in and against Nicaragua*, due to the United States' reservation to its declaration accepting the jurisdiction of the ICJ, the Court needed to identify which of the relevant Charter provisions, if any, reflected norms of customary international law. The Court refers to the two-element test but, in concluding that a customary prohibition on force exists, does not analyse in detail whether there exists sufficient practice supportive of the norm, only making a general reference to 'abstention' from using force by states.[94] Nor does the Court evaluate the extent of practice contrary to the prohibition, only observing that practice need not be in 'absolutely rigorous conformity with the rule'.[95] The Court focuses instead on '*opinio juris* as to the binding character of such abstention' which it finds in General Assembly resolutions, statements by the parties, and references by states to the prohibition on force as *jus cogens*.[96] As a result, the Court

[94] *Nicaragua*, para 188.

[95] *Ibid*, para 186.

[96] *Ibid*, paras 188–90.

has been criticized for not actually applying the two-element test, or presuming the existence of the customary norm based on *opinio juris* alone and then interpreting state practice so as to justify its existence.[97]

However, considering the previous analysis of the nature and context of customary norms and the role of *opinio juris*, the Court's reasoning is not as strained as has been alleged, although the judgment may be criticized for lack of clarity. In establishing prohibitions there is little choice but to begin with an assessment of *opinio juris*, which is essential not only as an element for the identification of custom in its own right, but to identify the state practice element. Where supportive practice consists of abstentions, and where such abstention is permitted by the underlying international law norms, *opinio juris* is essential to remove the ambiguity from the practice.[98] It is the *opinio juris* of states that reveals that their absence of action is a legally relevant practice. In any case, it is not clear that the two-element test requires any particular order of analysis of state practice and *opinio juris*, provided both elements are ultimately found to be present.[99] In this case, the widespread *opinio juris* in support of the customary prohibition, evidenced by the Friendly Relations Declaration, means that the ambiguous abstention of those states from using force is transformed into a widespread practice in support of the prohibition on force. Moreover, if statements by states can constitute practice in support of a customary norm they express, the adoption by states of the Friendly Relations Declaration, with its language

[97] See also e.g. the criticism in Mendelson (1989), 97.

[98] Mendelson (1998), 275–7.

[99] ILC Custom, Conclusion 3, commentary para 9.

recognising the prohibition as an independent norm of custom,[100] constitutes both *opinio juris* and a widespread state practice in support of the customary prohibition.

This analysis also shows that the Court was correct to tolerate the existence of some contrary practice, characterising it as mere breaches of the prohibition on force, which do not undermine the existence of the customary norm.[101] Balanced against the considerable supportive practice of states who do abstain from using force in the acceptance that that conduct is required by law, the Court was justified in concluding that there is nevertheless both a widespread and representative practice and *opinio juris* supporting the existence of a customary prohibition on force. This conclusion is significant for this thesis not only because the existence of the prohibition on force in both customary and treaty law is a significant complicating factor for change in the *jus ad bellum*, but also because the Court's reliance on statements of *opinio juris* combined with widespread abstention provides a model for how new contours of the customary prohibition on force may be identified.

2.3 Cases where evidence of *opinio juris* appears to be absent

The preceding analysis has shown why in some cases *opinio juris* appears to play a particularly important role in identifying customary norms. A proper understanding of the nature and context of an alleged customary norm reveals the dual role of *opinio juris*: as one half of the two-element test and as a means to identify relevant state practice where the context makes conduct ambiguous. Yet what of those cases where a customary norm has been found to exist, apparently without evidence that the *opinio juris* element of the test is

[100] *Nicaragua*, para 188; also *Chagos*, paras 151–5.

[101] Cf D'Amato (1971), 102; Tasioulas (2020), 95.

fulfilled? These cases too can be reconciled with the two-element test if one takes the nature and context of the alleged customary norm into account.

The *Case concerning Right of Passage over Indian Territory* concerned whether a new permissive customary norm had been established granting Portugal 'right of passage' over India's territory between the coast and Portugal's enclaves, and the scope of that norm. The question was treated by the Court as one of the existence of a new permissive norm of local custom that acted as *lex specialis* to general customary principles of territorial sovereignty that prohibit passage over a state's territory without permission.[102] These underlying principles of international law formed the context for the alleged new customary norm and, unless Portugal could show the existence of the new *lex specialis* norm, Portugal's passage without authorisation would be prohibited by them.

Portugal's submissions as to the existence of a local custom alleged that there was an 'unbroken practice' which 'was based, on the part of all concerned, on the conviction that what was involved was a legal obligation (*opinio juris sive necessitatis*)'.[103] That supportive practice consisted of the allegedly permitted conduct – passage across the territory without authorisation – being performed by Portugal. In its judgment, the Court notes the existence of 'a constant and uniform practice' in relation to the free passage of private persons, civil officials and goods. Thus, the state practice element appears to be present. The Court continues:

[102] *Right of Passage*, 43–4.

[103] *Ibid*, 11.

> This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[104]

The Court appears to have leapt from finding a constant and uniform practice existed to a conclusion that it has been accepted as law by both the parties.[105] The *opinio juris* of India is perhaps evidenced by failure to object to Portugal's practice of passage over the years, although the Court does not make this clear. In any case, no positive evidence of Portugal's *opinio juris* is provided. It appears the Court has inferred Portugal's *opinio juris* for the permissive norm from their participation in the supportive practice alone, contrary to the Court's later statement in *North Sea* that 'acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature'.[106]

It is possible that the Court's willingness to find the existence of the norm reflects the context of decolonization in which the decision took place, or that over time the Court has refined the two-element test, developing a more rigorous approach so such inferences would now no longer be tolerated. Yet the *Right of Passage* and *North Sea* judgments occurred in relatively close succession, in 1960 and 1969 respectively. Moreover, an almost identical inference of *opinio juris* on the part of an acting state from their practice alone

[104] *Ibid*, 40.

[105] Bos (1982), 34–5; cf Pellet and Müller (2019), para 238.

[106] *North Sea*, para 76.

can be seen in one of the Court's more recent judgments, not involving decolonization, in the *Dispute Regarding Navigational and Related Rights*.

When considering whether Costa Rica enjoyed a customary right for its fishermen to engage in subsistence fishing, the Court concluded that the permissive norm existed, based on 'the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period.'[107] Nicaragua's *opinio juris* (the reacting state) is again apparently evidenced by failure to object to Costa Rica's practice in support of the new norm. However, the Court does not even discuss the *opinio juris* of Costa Rica (the acting state), which one must assume is inferred from their consistent supportive practice.[108] Again, the Court appears to have inferred the acting state's *opinio juris* from the fact that the state has engaged in a consistent practice in support of the new norm.

Both these cases involve bilateral customs, so it is possible that the situation is more akin to an estoppel or tacit agreement, and it is necessary to be cautious when drawing conclusions about the identification of customary international law more generally. Still, the Court did analyse both cases in terms of customary international law and the dual requirements of state practice and *opinio juris*.[109] The question is therefore: why did the Court not simply say, as in *Asylum*, that there is no evidence that the practice by Portugal and Costa Rica was engaged in 'as a right appertaining to them and respected by the

[107] *Costa Rica v Nicaragua*, para 141.

[108] Alvarez-Jímenez (2011), 703–4.

[109] The ILC Special Rapporteur considers *Right of Passage* to be 'one of the first cases in which the Court elaborated on the methodology for ascertaining customary international law', Wood's Second Report, para 68. The bilateral nature of the norm will of course impact the quantity of practice required, since only two states are involved.

territorial States as a duty incumbent on them' and so conclude that the two-element test had not been met?

2.3(a) Failure to react to practice as evidence of *opinio juris*

So far, the analysis has not considered the *reactions* of other states to practice in support of a new customary norm, but protest and acquiescence are central to the identification of custom.[110] The Court appears to have concluded that *opinio juris* in support of the new norm existed on the part of India and Nicaragua based on their failure to object to the consistent practice of the other party. The possibility that failure to react over time to a practice may serve as evidence of *opinio juris* has been acknowledged by the ILC,[111] and highlights a further way in which context is relevant to the identification of customary international law norms: it impacts our interpretation of the reactions of other states. Where a practice is inconsistent with the underlying international law norms, one is more justified in expecting negative reactions from other states and in drawing conclusions from their absence. Inconsistency of the supportive practice with the underlying norms of international law suggests that the failure of other states to react negatively to that practice should be taken as evidence of their *opinio juris*.

Therefore, a crucial difference between *Asylum* and both *Right of Passage* and *Navigational and Related Rights* is that in the latter two cases both Portugal and Costa Rica's actions in support of the new permissive customary norm would be unlawful under the underlying international law norms: states are generally prohibited from encroaching

[110] Akehurst (1975), 38.

[111] ILC Custom, Conclusion 10(3).

on another state's territory. Where India and Nicaragua had omitted to act it was a failure to protest actions that would have been clearly prohibited by the underlying general international law. Even though they were under no obligation to do so, it would be expected that they would react negatively to any breaches,[112] especially where it is their territory being encroached upon.

This is one way in which the bilateral context of these cases may have made a difference: since there is an even greater expectation that states will react to apparent violations of international law of which they are the victim, India and Nicaragua's lack of response strongly suggests an acceptance that the actions were permitted under the new customary norm.[113] However, even in cases involving general customary norms one may expect some negative reactions from other states in response to an apparent violation of international law against another state.[114] As will be discussed further in chapters five and six, failure to react may also take on greater significance, not only where a state would be the victim of the violation, but where the norm concerned has *jus cogens* status, as is the case for the prohibition on the use of force.

By contrast, in *Asylum* the territorial states were failing to react to qualifications of crimes by asylum-granting states that were *lawful* under the underlying international law norms. Under general international law both states were permitted to make a qualification as to the nature of the crime, even if the territorial state went on to challenge that qualification. As a result, it was not to be expected that the territorial state would object to

[112] Kammerhofer (2004), 529.

[113] See *UK v Norway*, 139.

[114] Wood's Second Report, para 77.

every qualification by an asylum-granting state and so no conclusion could be drawn from their failure to do so. As the Court pointed out, the omission to challenge the qualification could be for several reasons consistent with the underlying international law norms, not necessarily because the territorial state had accepted as law the alleged new customary prohibition on such objections.

2.3(b) Inferring *opinio juris* from state action

The more difficult question concerns the missing *opinio juris* of the acting states, Portugal and Costa Rica. In both cases it appears that the Court has inferred the acting state's *opinio juris* for a new customary norm from the fact that that state has engaged in consistent practice supportive of that new norm.

It is clear that *opinio juris* can, in some circumstances, be inferred from a state's conduct. If a state makes a report to the Security Council under Article 51 UN Charter, this clearly indicates an acceptance that the right of self-defence extends to the kind of situation at hand.[115] The difficulty is where the same conduct by states provides both state practice and *sufficient* evidence of *opinio juris*, and is thereby concluded to be lawful under customary international law. In such a case, there is a clear risk of a circular argument developing, whereby the mere fact an act has been committed leads to the conclusion that it is lawful. Thus, the ILC rightly observes that 'the existence of one element may not be deduced merely from the existence of the other'.[116]

[115] Absence of such a report may indicate the contrary, *Nicaragua*, para 200.

[116] ILC Custom, Conclusion 3(2), commentary para 8.

Yet, while mere adherence to a practice will not suffice to establish *opinio juris*, the fact states have engaged in a practice may contribute, alongside some additional element(s), to a conclusion that *opinio juris* for the practice is present. This avoids the potential problem of 'double counting' the same act as being sufficient to fulfil both elements of the two-element test, but equally avoids the risk of *under-counting* the behaviour of states, which must be able, at least in some circumstances, to contribute to our understanding of whether states accept that international law allows that behaviour.[117] This additional element may be provided by the nature and context of the customary norm being identified, which can explain the reasoning in both *Right of Passage* and *Navigational and Related Rights*, and why it differed from the cases analysed previously.

In *North Sea* the Court was right to observe that acting in a certain way does not of itself demonstrate anything of a juridical nature as the practice in that case was ambiguous. It was consistent with both the underlying international law and the alleged new customary norm. As a result, it would not be possible to conclude based on the practice that the acting state accepts the alleged new prescriptive norm as law. However, this reasoning does not apply to cases where the supportive practice is *inconsistent* with the context of underlying international law, as will be the case when a permissive norm is being identified in the context of an underlying prohibition.

Akehurst has argued that for permissive customary norms 'a claim that States are entitled to act in a particular way can be inferred from the fact that they do act in that way'[118] and it seems natural at least to *presume* that when states act in a certain way they

[117] See Wood's Second Report, para 70, 74.

[118] Akehurst (1975), 37–8.

consider that their behaviour is lawful.[119] By extension, in a situation where states repeatedly act inconsistently with the underlying international law it is reasonable to interpret this as an acceptance that the law has changed. In *Right of Passage* and *Navigational and Related Rights*, in the context of the underlying general customary norms prohibiting entrance onto another state's territory, Portugal and Costa Rica were repeatedly acting in a manner that appears to violate the underlying international law norms. The practice is not ambiguous: it is consistent only with the alleged new customary norm, otherwise the acting state is simply repeatedly breaching existing law. In this context, an inference that a long and constant practice inconsistent with the underlying international law norms is based on the acting state's acceptance that a legal permission to act in this way exists seems justified.

Right of Passage and *Navigational and Related Rights* therefore demonstrate that the nature and context of a customary rule matter both for the inferences one can make about the acting state's *opinio juris*, based on their participation in the practice, and the *opinio juris* of the state acted upon, or in a position to react to the practice. When the nature and context of the alleged norm are taken into account, one can see that the two-element test was met in both cases.

These conclusions are significant for change in the *jus ad bellum*: since the underlying international law will virtually always be a norm prohibiting force, where new customary international law is claimed to exist permitting force in novel circumstances the supporting practice will be inconsistent, as in the cases above. This analysis could therefore

[119] Buzzini (2005), 83.

be seen as suggesting that it is relatively easy to change the *jus ad bellum* in this way, by allowing inferences of *opinio juris* from the actions of states or an absence of reaction. However, the situations in which such inferences may be made are relatively rare and, as discussed in chapters five and six, will depend on the circumstances. Arguments that a long and consistent state practice imply an *opinio juris* on the part of the acting state are limited to contexts where the repeated practice in support of a new customary norm is inconsistent with the underlying international law norms.[120] Not every action inconsistent with those underlying norms will imply an *opinio juris*: isolated examples of inconsistent conduct by a state do not justify the inference of an acceptance that the law has changed and should be 'treated as breaches of that rule, not as indications of the recognition of a new rule.'[121] Moreover, any conclusion that practice is accompanied by *opinio juris* will be negated if the acting state tries to justify their practice by reference to the underlying international law.[122] It could also be that the factual circumstances should prevent any inference of *opinio juris* for a new rule.[123]

In any case, even where an inference is made as to the individual *opinio juris* of the acting state, evidence of the general *opinio juris* of other states must still be found for the two-element test to be fulfilled. Other states reacting negatively to a practice or suggesting

[120] In practice, this situation is only likely to arise when establishing permissive rules in the context of an underlying prohibition. It is unlikely one would ever have to establish the existence of a customary norm prohibiting X in the context of underlying international law imposing a duty to do X, or vice versa.

[121] *Nicaragua*, para 186.

[122] Akehurst (1975), 38.

[123] E.g. in the case of the April 2018 airstrikes against Syria, the US and France provided no legal justification for their actions. No inference of *opinio juris* on the part of those states should take place in such circumstances, first because one of the actors, the UK, did advance a (unconvincing) legal justification: a humanitarian intervention. The silence of its co-actors suggests they did not accept their actions as lawful. Second, the nature of the acts – flagrant violations of the prohibition on force – is such that they call for justification; failure to provide one suggests the states may not accept that what they did as lawful.

it breaches international law would show that, despite the *opinio juris* of the acting state, general *opinio juris* for the norm was not present.[124] However, states should not be expected to express a negative reaction to every incidence of conduct contrary to existing international law or risk their silence being interpreted as acceptance of a new customary rule. It is only where the circumstances generate an expectation of a reaction, for example because the state in question is directly affected by the practice, that a failure to react may evidence acceptance of a new norm.[125]

Finally, *Right of Passage* and *Navigational and Related Rights* highlight the points made earlier about the characterisation of the norms at issue in a dispute. It is possible, in principle, to analyse both cases as instead concerning the identification of new *prohibitive* norms of custom which would prevent India and Nicaragua from obstructing the other party's activities, in a context where the underlying international law norms permit them to restrict access to their territory. Framed in this way, the absence of *opinio juris* would be an insurmountable obstacle for Portugal and Costa Rica's arguments: the territorial states' omission to object to the passage or fishing is consistent with both the alleged prohibitive norm and the underlying international law norms and so constitutes an ambiguous practice from which no inference of *opinio juris* for the new prohibition can be made. Yet, these cases also demonstrate the limits of how a dispute may be characterised: the parties, and indeed the Court, are not completely free to manipulate the nature of a norm to their own advantage. There is a correct analysis, and it will depend on the area of international law in question. If *Right of Passage* really concerned the establishment of a new prohibition on obstructing Portugal's passage, then what underlying international law

[124] See ILC Custom, Conclusion 3, commentary para. 7; Akehurst (1975), 38.

[125] Although not in the context of identifying custom, see *Preah Vihear*, 23.

norm was providing the underlying permission for Portugal's passage? No obvious candidate exists. The customary norm to be identified must be permissive because the established principles of territorial sovereignty and integrity clearly prohibited such encroachments on another state's territory.

3. Conclusion

This chapter has shown how the nature and context of a customary norm impact the identification of customary international law. In situations where state practice does not consist of statements as to the content of customary international law, taking into account the nature of a customary norm, the kinds of acts that constitute practice in support of the norm, and how this interacts with the context of underlying international law norms, brings greater precision to a process that often appears opaque or mysterious. Where the nature of an alleged customary norm is such that practice in support of that norm is consistent with the underlying international law norms in which the alleged norm is located, it will be ambiguous. Evidence of *opinio juris* for the new norm will therefore be essential for the new norm to be identified. By contrast, where practice supporting an alleged customary norm is inconsistent with the context of underlying international law norms, an acting state's *opinio juris* for the new norm may be inferred from their consistent participation in the supportive practice, while the *opinio juris* of other states may be evidenced by their failure to react negatively to that practice. When the nature and context of the customary norms being identified are taken into account in this way, one can see that in the cases above the Court was applying the two-element test of state practice accompanied by *opinio juris*.

Returning to the *jus ad bellum*, one can see that these conclusions will impact the assessment of how change to the law in this area can occur. Identifying a new exception of humanitarian intervention could involve the identification of a new permissive customary norm, against the backdrop provided by the underlying customary prohibition on the use of force. The analysis above would suggest that, in certain circumstances, where a state consistently engages in a practice of using force for humanitarian purposes (performing the conduct prohibited by the underlying international law norm, and allegedly permitted by the new norm), one may infer an *opinio juris* on the part of that state, and moreover that a failure by other states to react negatively to that practice may evidence their *opinio juris* in support of the new permissive norm. By contrast, when evaluating whether the scope of the customary prohibition on force itself extends to prohibit force in a particular situation, it may be necessary to find positive evidence of *opinio juris*, even where states generally abstain from using force in those circumstances.

However, the complexity of evaluating change to the *jus ad bellum* arises from the coexistence of multiple international law norms of different sources of law. The subsequent chapters will analyse not only how other kinds of norms – treaty law norms, and norms with *jus cogens* status – are modified, but also how their presence alongside customary norms in the *jus ad bellum* requires these conclusions to be nuanced. For example, the *jus cogens* status of a customary norm may affect the inferences that may be drawn from state conduct.

The coexistence of customary and treaty law in the *jus ad bellum* means that when customary *jus ad bellum* norms are being identified, the underlying international law norms will almost always include the treaty law of the UN Charter, to which virtually all states

are party. The next chapter will therefore consider how the presence of treaty norms impacts the identification of customary international law. In particular, it will consider how customary international law is identified when ambiguity of practice arises not from consistency with two different customary norms, but with underlying treaty law and an alleged new norm of customary international law.

3. The influence of treaty norms on the identification of customary international law

In the *jus ad bellum*, customary international law exists alongside treaty law, notably the provisions of the UN Charter. In analysing how the *jus ad bellum* can change it is therefore essential to consider how the process for identifying norms of customary international law is impacted by the presence of treaty law. The situation in the *jus ad bellum* is further complicated by the virtually universal participation in the Charter.

1. The influence of treaties on state behaviour that generates custom

In its 1969 judgment in *North Sea*,[126] the ICJ analysed three situations in which a norm contained in a treaty may form part of customary international law: 1) the treaty norm is declaratory of pre-existing custom, also referred to as 'codification;' 2) the treaty norm has crystallised customary international law through the process of its negotiation and adoption; and 3) the treaty norm has generated new customary international law, which has emerged subsequent to its adoption.[127]

The significance for present purposes is that this shows how treaties may shape customary international law without themselves forming state practice and *opinio juris*, by influencing state behaviour. In the second situation analysed in *North Sea*,[128] crystallisation, discussions leading up to the treaty's adoption lead to an acceleration of the

[126] See also *Tunisia/Libya*, para 24.

[127] See the detailed analyses of Baxter (1970) and Dinstein (2007); also Schachter (1989b), 718.

[128] *North Sea*, para 61.

usual process of custom formation by catalysing state practice and *opinio juris*.[129] In the third situation addressed in *North Sea*,[130] emergence of a customary norm from a treaty, the treaty norm stimulates the creation of the customary norm by influencing state behaviour outside the treaty in such a way that a similar customary norm develops.[131] Where a treaty norm has been adopted, the practicality of having a text expressing the rule and the political acceptance developed and evidenced through its adoption – particularly in cases of broad multilateral treaties[132] – may lead non-parties to apply the rule,[133] generating state practice and *opinio juris*.

Despite the Court's statements that the generation of customary norms from treaty norms is 'not to be lightly attained',[134] treaty norms have been recognised as having customary status without a particularly rigorous analysis of state practice and *opinio juris*.[135] In *Nicaragua* there was a 'complete failure to inquire whether *opinio juris* and practice support the crystallization of Articles 1 and 3 [Geneva Conventions] into customary law.'[136] In practice, the existence of a norm as a treaty provision seems to make it more likely that it will be recognised as a customary norm. The text, with its neatly

[129] Dinstein (2007), paras 358–60; *UK v Iceland*, para 52; *Tunisia/Libya*, para 24. See Churchill and Lowe (2017), 17–8; Howard (1981), 332–3.

[130] *North Sea*, para 71; see also VCLT Article 38.

[131] Akehurst (1975), 52; Mendelson (1987), 160; Villiger (1997), 181; Baxter (1970), 73.

[132] See Weisburd (1988), 18–9; Churchill and Lowe (2017), 19; Nordquist et al (2013), Part V, 509; Akehurst (1975), 51.

[133] Schachter (1989b), 721–3.

[134] *North Sea*, para 71.

[135] Schachter (1989b), 721; Tams (2015), 71–3; Tomuschat (1993), 258–9.

[136] Meron (1991), 36; Charney (1987), 160. See *Nicaragua*, Separate Opinion of Judge Ago, para 6; Judge Jennings, Dissenting Opinion, 527.

expressed rule, seems to exert a pull whereby it is easier for actor evaluating the existence of a customary norm to conclude that the norm has attained customary status.

Some argue that this shows there is a different, less stringent test for identifying customary norms from treaty provisions, or with certain subject-matter or moral importance.[137] However, even when finding that such norms form part of custom without evidence of a sufficient supportive practice, courts and tribunals continue to refer to the two-element test and support for alternative approaches is limited.[138] Also, some of these decisions are proper applications of the two-element test, once the nature and context of the customary norm is taken into account.[139]

For those cases where customary norms have been identified but remain difficult to explain as applications of the two-element test, it may be that in relation to humanitarian norms 'the mist of general consensus prevents any pointed controversy about the hard legal issues'.[140] If so, the effect whereby tribunals find it easier to conclude that a customary norm exists where it mirrors an existing treaty norm, at least where 'noble humanitarian principles' are at stake, may be psychological not legal,[141] and such decisions are simply a misapplication of the two-element test and should not be interpreted as evidencing a new, less demanding test.

[137] E.g. *Prisoners of War*, para 31. Also Roberts (2001); Tomuschat (1993) 259; Lillich (1995), 8–9; Wood's First Report, para 68.

[138] See chapter 2, section 2.

[139] See chapter 2, subsection 2.2.

[140] Tomuschat (1993), 260.

[141] See Meron (1987), 361.

2. Treaties as constitutive of customary international law

Yet treaty practice may also be *constitutive* of a customary norm; that is, forming the state practice and *opinio juris* establishing the customary norm. In such cases, the treaty is a formal and material source of the contractual treaty obligation, and simultaneously a material source of the customary norm (its formal source being the widespread and representative state practice and *opinio juris* as a whole).[142]

2.1 Adoption or ratification of a treaty as state practice and *opinio juris*

Generally, ratification of a treaty will not, without more, constitute state practice or *opinio juris* for customary norms identical to its provisions.[143] None of those who support the view that ratification can also provide *opinio juris* for custom 'can explain precisely how the consent to a contractual obligation is able to double as a legal conviction *qua* customary law'.[144] This is not a case of state practice being consistent with more than one norm: the practice of ratifying a treaty is not the same as the conduct required to form a supportive practice for the norm enshrined in the treaty. At most, ratification of a treaty could constitute practice supporting the existence of a customary norm requiring *conclusion of treaties in relation to the norm in question*. There are also practical obstacles: based on ratification alone it would be unclear which of the multiple norms a treaty contains are being accepted as custom.[145]

[142] See GG Fitzmaurice (1958), 157–60.

[143] Jennings (1981), 63; cf IDI (1995), Conclusion 12.

[144] Villiger (2009), 7, 28, but cf his nuanced view on treaties with 'widespread' participation, 156–7; GG Fitzmaurice (1958), 158–60. In some cases, the nature of the treaty being negotiated will strengthen the view that states were only concerned with treaty obligations, see Bernhardt (1987), 277–8.

[145] Villiger (1997), 27.

Moreover, unless it is suggested that the treaty norm not only exists as custom but also has *jus cogens* status, there is nothing to prevent states concluding treaties that derogate from customary international law, so it is difficult to see how conclusion of a treaty containing a particular norm should suggest that that same norm necessarily exists in custom. As the ICJ recognised in *Diallo*, states may conclude a treaty because there are already similar customary norms, or because there are no international law norms regulating the subject and they wish to fill this gap, or because they intend to contract out of conflicting customary norms.[146] The ICJ's statement in *North Sea* that:

> even without the passage of any considerable period of time, it might be that a very widespread and representative participation in the Convention might suffice of itself, provided it included that of States whose interests were specially affected[147]

should therefore not be read as suggesting that ratification of a treaty can itself constitute state practice and *opinio juris*.[148] Such a position would come close to saying that widely ratified treaties are *ipso facto* custom.[149] Moreover, if this were the case, 'one would expect that the mere conclusion of a treaty would freeze customary law as to the matters with

[146] *Diallo*, para 90.

[147] *North Sea*, para 73.

[148] See Dinstein (2007), para 214; in Schachter's view, the Court was here referring to situations where there is also evidence from outside the treaty that the rule is accepted as custom (1989b); Marek (1970), 63; Mendelson (1996), 73-4; Cahin (2007), 94; Tomuschat (1993), 258.

[149] Schachter (1989b), 725.

which the treaty dealt' for so long as states remained party to it; yet this does not seem to be the case in practice.[150]

It is more likely that the Court merely wished to emphasise the lack of any particular time requirement before custom could form,[151] and possibly that in *North Sea* the limited ratification of the convention was reason to doubt whether the equidistance rule had in fact been widely accepted as a method of delimitation.[152] The subsequent paragraph, which discusses the need for 'State practice […] extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved' is difficult to reconcile with an apparent suggestion that mere ratification could be sufficient.[153]

Denunciation of a treaty will provide more useful insight into the state of custom than ratification, suggesting there is not (or no longer) *opinio juris* for any customary norm identical to one in the treaty.[154] Where a treaty norm also exists as custom, denunciation will have no effect on the state's obligation to comply with the customary norm.[155] If states attempt to free themselves from a treaty norm, presumably they believe they will not remain so bound under custom, otherwise the denunciation would serve no purpose.

[150] Weisburd (1988), 11ff.

[151] Akehurst (1975), 50.

[152] Thirlway (2019), 149; similarly *Asylum*, 277. Although there are reasons why a state may choose not to ratify a treaty that it accepts reflects existing custom: procedural or enforcement provisions; other non-codificatory provisions of the treaty to which it objects; or the redundancy of signing up to norms the substance of which it is already bound by or benefits from.

[153] *North Sea*, para 74.

[154] See Villiger (1997), 22; Baxter (1970), 52–3, 63–4.

[155] Dinstein (2007), para 174; Meron (1987), 349.

Although this conclusion must be treated with caution, as the state may be seeking to escape procedural provisions or enforcement mechanisms in the treaty.

This issue is complicated by the ICJ's tendency to refer to the existence of treaty provisions apparently to strengthen its conclusion that similar norms exist in custom, without explaining how the treaties can support such an argument. In *Nicaragua*, for example, the Court concluded that the customary international law on collective self-defence requires a request by the victim state, apparently based only on consideration of the text of the 1947 Inter-American Treaty of Reciprocal Assistance.[156]

In *Nottebohm*, the ICJ considered in which circumstances a state may exercise diplomatic protection on behalf of a national. After examining decisions of international arbitrators and national courts, the Court observed that state practice 'manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. […] *A similar view is manifested in the relevant provisions of the bilateral nationality treaties* concluded between the United States of America and other States since 1868.'[157]

There is no discussion of practice in application of those treaties; only their conclusion. The Court considered itself to be determining the content of customary international law, and its conclusion suggests that the nationality treaties were considered to form part of state practice on the matter.[158] If so, it appears the Court must be using the

[156] *Nicaragua*, paras 197–9; Mendelson (1996), 77.

[157] *Nottebohm*, 22–3 (emphasis added).

[158] *Ibid*, 23.

mere conclusion of bilateral treaties that contain provisions reflecting the alleged customary norm as state practice in support of that norm.[159] Yet this seems directly contrary to the Court's reasoning in *Diallo*: there are many other explanations for the conclusion of such a treaty, besides a belief that it reflects existing custom.[160] Given the other, less problematic, examples of state practice cited by the Court in *Nottebohm*, the better explanation may be that the treaties are being cited as additional persuasive evidence that this understanding of nationality was widely shared. Otherwise, if the Court was indeed invoking the mere existence of these treaties as evidence of a customary norm mirroring their provisions, it was incorrect to do so.

The analysis above does not necessarily apply to codification treaties. A codification treaty may simply express in written form an existing customary norm. However, often there is a clear indication in the text of a treaty that all or some of its provisions reflect customary international law.[161] Such treaties make clear that parties are not merely concerned with their treaty obligations.[162] In such cases, ratification or adoption may provide both *opinio juris* and state practice of states party to the treaty or participating in the conference and voting for the provisions concerned.[163] This is just an extension of the view that statements by states that express an *opinio juris* as to the content of customary international law can also count as state practice. Although contained in a treaty, such declarations are no different from a statement by each of the states concerned that they

[159] Baxter (1970), 37.

[160] Villiger (1997), 189.

[161] Dupuy and Vignes (1991), 74–5. Although see Molitor (1984); Nordquist et al (2013), Part XII, 39.

[162] Jennings (1981), 63.

[163] Baxter (1970), 43; Villiger (1997), 24, 35; a treaty can also make clear that a customary norm does not exist, Mendelson (1987), 161.

accept the rule to be part of customary international law,[164] and their conduct in choosing to adopt the treaty should be counted as practice in favour of the rule it codifies. The same is true for other international instruments, such as resolutions of international organisations.[165]

In these cases, it is not the ratification or adoption of the treaty *per se* that matters – these concern the contractual treaty obligation[166] – but rather the manifestation of what a state accepts as customary international law that is made by endorsing the treaty text. A statement by a state at the drafting conference that it believed a norm in the treaty to reflect custom, even if it later decided not to adopt the final text for an unrelated reason, would have the same effect.[167] A codification treaty therefore does not need to enter into force to count as practice and *opinio juris* for those states which had already adopted or signed.[168] It does not even matter whether the treaty text is an accurate codification of existing customary international law; even if the assertions as to its declaratory nature in the text or *travaux* are incorrect it will still give rise to the state practice and *opinio juris* of those parties that have adopted or ratified it, or made those statements.[169]

[164] *North Sea*, Dissenting Opinion of Judge Morelli, 198; Baxter (1970), 55; Dinstein (2007), para 191.

[165] *Nuclear Weapons*, para 70; *Nicaragua*, para 188; *Chagos*, paras 152–3, 155. This places an important limit on the possibility for resolutions to create 'instant custom', as not every resolution adopted unanimously, by consensus or with a large majority will also use sufficiently normative language to evidence custom. See also Baxter (1970), 43, 70; Dupuy and Vignes (1991), 81; cf the criticism of Mendelson (1989), 93; also Mendelson (1996), 87.

[166] Villiger (1997), 187, 233.

[167] Crawford (2013), 95. This is the process described as 'crystallisation' in *North Sea*.

[168] See *Libya/Malta*, paras 26–34; Mendelson (1996), 76–7.

[169] Akehurst (1975), 47; Weisburd (1988), 23; Baxter (1970), 55; Crawford (2013) 96.

Such statements will not automatically be conclusive as to the state of customary international law, and it will be necessary to show that state practice and *opinio juris* generally is sufficiently widespread and representative. However, if the number of states expressing their acceptance of the treaty norm's existence in customary international law through their negotiation or adoption of the codification treaty meets this threshold, that could be sufficient to identify the identical customary norm.

2.2 Practice in application of a treaty as state practice for identical customary norms

Treaty practice would also be *constitutive* of customary international law where practice in application of a treaty norm simultaneously counts as state practice for the existence of a customary norm. The difficulties that arise in determining whether practice among parties to a treaty should count as state practice for the establishment of a customary norm identical to a norm in that treaty can be explained by the analysis in chapter two: the ambiguity of such a practice, in the sense that it is consistent with more than one international law norm.[170] In this case, the context of underlying international law norms is provided not by existing customary international law but by the treaty norm. Where the alleged customary norm is identical to an existing treaty norm, practice supportive of the alleged customary norm among parties to that treaty will always be consistent with both the underlying law (the treaty norm) and the alleged new customary norm. If the parallel customary norm is to emerge, evidence of *opinio juris* will be necessary to remove the ambiguity from the

[170] Mendelson (1998), 317.

practice and demonstrate that the parties are (also) acting in the belief that their actions are permitted/prohibited/required by custom.

In the absence of any evidence of the treaty parties' acceptance that there is a parallel customary norm, it is to be presumed that those states were simply acting in conformity with their treaty obligations.[171] Not only can no inference be drawn as to their *opinio juris*, but their treaty practice will not count as state practice in support of such a customary norm. However, where there is evidence of *opinio juris* of states parties to the treaty indicating that they accept the norm also exists in customary international law, there is no reason why practice among treaty parties should not simultaneously count as state practice for the purpose of establishing an identical customary norm.[172]

North Sea is sometimes cited as support for the contrary view that practice in application of a treaty can *never* constitute state practice for the purposes of establishing custom.[173] However, this argument has not been repeated by the Court since and 'may perhaps be over-rigorous'.[174] While the Court correctly cautions against too easily concluding that treaties evidence customary international law, and states that from the practice of treaty parties 'no inference could legitimately be drawn as to the existence of a rule of customary international law', this is far from the view that such practice could *never*

[171] Mendelson (1996), 95; Villiger (1997), 14.

[172] Meron (1987), 367; Dinstein seems to take this view, although doubting whether it will be possible to identify such an *opinio juris* in practice (2007), 376–7; Villiger (1997), 154–5; IDI (1995), Conclusion 13. See Tams (2015), 71 fn 101, noting Baxter's paradox is perhaps 'a practical challenge rather than an insurmountable obstacle'.

[173] Dinstein (2007), paras 218–9.

[174] Thirlway (2019), 150; Tams (2015), 71.

contribute towards the establishment of custom.[175] The practice of states party to the Geneva Convention who used the equidistance principle was ambiguous as it was consistent with the existing treaty law norm in Article 6(2) and the alleged identical customary norm. As in cases of practice that is consistent with more than one customary norm – the existing norm and an alleged new norm – no *opinio juris* can be inferred from such a practice and evidence of *opinio juris* therefore becomes essential if the new norm is to be established.

In *North Sea*, no such evidence of *opinio juris* for the alleged customary duty existed.[176] The Court's reference to states that 'shortly became' parties to the Convention together with states parties shows that what mattered when denying the existence of any *opinio juris* was the factual question of the state's motivation for acting in the way that it did, rather than the formal question of whether or not the states were party to the treaty.[177] This suggests that practice by parties should not automatically be excluded in all cases, and can still be relevant where accompanied by *opinio juris* for custom; in such cases, the state's motivation(s) for acting will be clear, regardless of their participation in the treaty.

In the earlier *US Nationals in Morocco* case, the Court was unable to conclude that the US's consular rights were founded on custom as, throughout the whole period in question, the consular jurisdiction of the US and most other states that traded with Morocco 'was in fact based, not on custom or usage, but on treaty rights.' Even if some states 'had

[175] Meron (1987), 367; Mendelson (1998), 304; Meron (1991), 53.

[176] *North Sea*, para 76; although the Court provided no guidance on what *would* suffice as evidence that non-parties had been acting in the application of customary international law, Higgins (1970), 39, 41.

[177] *North Sea*, para 76.

no treaty rights but were exercising consular jurisdiction with the consent or acquiescence of Morocco' the Court found that this is 'not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage.'[178] The Court's brief reasoning here is far from enough to conclude that it took the view that treaty practice could never contribute to the establishment of custom. There are other reasons why in this case the Court could not conclude that the customary norm existed: most obviously a lack of *opinio juris* generally and the practice being insufficiently widespread. The Court's judgment is consistent with the view that practice under a treaty norm can constitute state practice for an identical customary norm provided it is accompanied by *opinio juris*.

The Court's jurisprudence therefore does not support the view that practice among parties to a treaty can never constitute state practice for the formation of a parallel customary rule. This reading of *North Sea* also accords better with the ICJ's later decision in *Nicaragua*. In *Nicaragua,* the Court held that identical norms of customary and treaty law continue to apply separately alongside each other and treaty parties remain bound by the customary norm even in their relations with each other.[179] If this is the case, and treaty parties are simultaneously bound by the identical customary norm, whose application is not excluded by the treaty, then their practice in application of the treaty norm must, logically, also constitute practice in application of the customary norm. Of course, *opinio juris* will still be required to establish that such a parallel customary norm *exists* and the ambiguity of the practice means one cannot infer *opinio juris* from consistent conduct alone. However, this is an evidential question, and provided evidence of *opinio juris* is

[178] *Morocco*, 199–200.

[179] *Nicaragua*, paras 175–6, 179.

present there is no reason not to admit practice among treaty parties as state practice capable of constituting an identical customary norm.[180] Moreover, once it has been established that a parallel customary norm identical to the treaty norm exists, relevant conduct should be treated as practice in application of both norms. So, since it is now well established that the prohibition on force exists both as a norm of custom and in Article 2(4) of the Charter, practice of states using force should generally be treated both as state practice contributing to the continued existence of the customary prohibition, and practice in application of the Charter – unless there is some reason to think that the state is only concerned with one of those obligations to the exclusion of the other.

If practice among treaty parties can, provided evidence of *opinio juris* is present, count as state practice for the identification of identical customary norms, then the paradox identified by Baxter becomes less problematic. Based on a reading of *North Sea* which required the Court to look exclusively at non-party practice to establish whether the treaty norm had become part of custom, Baxter argued that 'as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law *dehors* the treaty'.[181] Yet, faced with precisely this problem in *Nicaragua*, given the quasi-universal nature of the UN Charter, the Court found that several norms contained in the Charter also existed in custom.[182]

[180] Meron (1991), 51–3; Meron (1987), 367.

[181] Baxter (1970), 64; Dissenting Opinion of Judge Jennings, *Nicaragua*, 521.

[182] Albeit it did not indicate how conduct relating to a treaty norm and an identical customary norm can be differentiated, Schachter (1989b), 729; Meron argues that the ICJ must have based its conclusion as to the customary status of Articles 1 and 3 Geneva Conventions on practice of parties to the Conventions, Meron (1991), 37.

Any practice of non-parties will certainly be evidentially significant for the identification of a customary norm identical to one in the treaty as, depending on the context of underlying international law norms, one may be able to infer that if they are acting in a certain way then it must be because they accept they are permitted to do so by customary international law. Such an inference will never be possible for practice by treaty parties. However, even if there were no non-party practice, if the states party to the treaty acted in accordance with its provisions, and provided evidence that they accept that customary international law also requires or permits the same behaviour, then provided the practice was widespread and representative this will suffice to establish the customary norm.

The provision of such evidence of *opinio juris* by treaty parties is not so unusual: states often reaffirm the customary status of the prohibition on the use of force, despite virtually all states being bound by Article 2(4).[183] In *Nicaragua* itself the Court relied on the Friendly Relations Declaration, which supplied evidence of *opinio juris* in addition to interpreting Charter obligations. However, where there is no *opinio juris* on the part of the parties to a quasi-universal treaty, Baxter's paradox will hold, and it will be difficult to identify the state of customary international law outside the treaty.[184]

The difference between practice under and outside the treaty is therefore that in the former case evidence of *opinio juris* is always required before the practice can be taken into account for the purposes of establishing a new customary norm identical to one

[183] E.g. S/2021/247, 62 (UK), 83 (Viet Nam), 20 (Brazil). See also Meron (1987), 367. Cf Crawford (2013), 94.

[184] In such situations 'it might be appropriate to give greater weight to each individual piece of practice' Mendelson (1989), 96.

contained in the treaty, as treaty practice alleged to be supportive of the new customary norm will always be consistent with two different norms. For practice outside the treaty, whether among non-parties or between parties and non-parties, the relationship is not governed by the treaty norm, and whether evidence of *opinio juris* is required will depend on the underlying international law norms, as analysed in chapter two. If no evidence of *opinio juris* of the treaty parties is present then, where participation in a treaty is very broad, establishing new custom based only on the practice and *opinio juris* of the few remaining non-parties will be a challenge.

3. The influence of international organisations on the identification of custom

Finally, in the *jus ad bellum*, the nature of the treaty with which one is primarily concerned – the UN Charter – means one must consider a further means by which a treaty can influence the application of the test for custom: the activity of organs created by the treaty. The Charter influences custom in a different way from other declaratory treaties.[185] Its role as the constituent instrument of an international organisation, in addition to creating substantive norms of conduct, means its institutionalised multilateral diplomacy will generate, through the positions taken by states and views they express, evidence of state practice and *opinio juris* which may impact customary international law.[186]

It is not being suggested that the General Assembly can create new law purely through the adoption of resolutions.[187] Rather, the diplomatic practice of states, their

[185] Cahin (2005), 150.

[186] *Ibid*, 151.

[187] Higgins (1970), 43.

statements and comments, their voting patterns – all this activity, both individually and collectively – will constitute a source of state practice and *opinio juris* for the formation of customary international law.[188] In the course of their day-to-day operations UN bodies will apply and interpret not just their constituent instrument, but also the general international law concepts it contains or refers to.[189] This can be through reformulations or explanations of norms in the abstract, or their application in individual cases.[190] The UN thus acts as a 'forum for state practice by its members'.[191]

4. Conclusion

This chapter has considered how the presence of a treaty can influence the identification of customary international law. The practice leading to the conclusion of a treaty may accelerate the process by which state practice and *opinio juris* establish a customary norm. A treaty provision may also influence state behaviour so that a new, identical customary norm is generated through subsequent state practice and *opinio juris*. In these situations, neither the conclusion of the treaty itself, nor practice in application of the treaty, is *constitutive* of the customary norm.

More complex questions arise due to specific features of the *jus ad bellum*. How is it possible to identify a customary norm that is *identical* to an existing treaty provision? Is this even possible where the treaty in question is virtually universal? Identical norms of

[188] Higgins (1969), 2.

[189] *Ibid*, 3–4; Schachter (1963), 180.

[190] Cahin (2005), 153.

[191] Higgins et al (2017), 414.

custom and treaty, and quasi-universal treaties, present challenges precisely because both cases raise the question of whether, and in what circumstances, practice in application of a treaty can be constitutive of a customary norm.

The mere adoption or ratification of a treaty cannot amount to state practice in support of a customary norm identical to one or more provisions of the treaty. The exception is where the treaty states that it is codifying a customary norm: in this scenario a state's participation in the treaty will count as both state practice and *opinio juris* in support of the identical customary norm.

Practice in application of a treaty provision will not generally count as state practice for the identification of a new, identical customary norm. In such situations a state's conduct, even if consistent with the alleged new customary norm, will also be consistent with the context of underlying international law, here provided by the identical treaty provision by which the acting state is already bound. For a new, identical customary norm to be identified, evidence of *opinio juris* will be required to make clear that the state is not merely implementing its treaty obligation, but also acting in the acceptance that its behaviour is required, or permitted, by customary international law. Where evidence of *opinio juris* is present, there is nothing to prevent practice in application of a treaty norm also counting as state practice for the establishment of a new, identical customary norm. In this way, despite virtually universal participation in the Charter, the Baxter paradox can be escaped: since practice of treaty parties under the treaty can contribute to the formation of an identical customary norm, it does not matter that there is little non-party practice in support of the new customary norm.

The conclusions as to the identification of customary international law reached in this and the preceding chapter will be returned to in chapter six and used to answer the question of how new exceptions to or limitations on the scope of the prohibition on force may be created. However, customary international law is only one piece of the puzzle when considering how the *jus ad bellum* can change. The next chapter will consider how the treaty law norms of the UN Charter may be modified.

4. Modifying the United Nations Charter

Part of the complexity of analysing change to the *jus ad bellum* stems from the fact that the use of force by states is regulated not only by customary norms but also by norms of treaty law contained in the United Nations Charter. If one is to understand how the *jus ad bellum* changes, one must also determine how those Charter norms can be modified. This chapter will briefly address the possibilities for amendment of the Charter before analysing other, more flexible avenues for modification of Charter norms: evolutionary interpretation and interpretation through subsequent practice or agreement. These processes show that there is space for a degree of change – sometimes a considerable amount – to occur without a Charter norm being amended.

Part one analyses the procedures for amendment under Articles 108 and 109 of the Charter. Part two considers the potential for change to the Charter through interpretation of its provisions under the basic rule of interpretation codified in Article 31(1) VCLT, in particular through evolutionary interpretation. However, the changes that may be effected by this means are limited. This part also introduces the concept of a *renvoi* – a reference to an external legal norm. Part three analyses how the Charter may be interpreted through subsequent agreement and practice under the rules codified in Article 31(3)(a) and (b) VCLT. It is argued that for an interpretation reached by subsequent practice or agreement to be taken into account under this rule, it must establish the agreement of all parties to the treaty, and that in any case the agreement of all parties would be required for the kinds of reinterpretations needed to bring about a change in the *jus ad bellum*. While agreements that meet the requirements of Article 31(3)(a) may be rare, as the agreement of all parties to the single act is required, the possibility for the agreement of all parties to take the form

of acquiescence means the context of an international organisation will facilitate the interpretation of its constituent instrument through subsequent practice under the rule in Article 31(3)(b). In part four, concrete examples from practice are used to show that there is no legal limit on the kinds of changes to the Charter that may be effected through Article 31(3)(a) and (b), which may include interpretations departing from the text of the Charter and that some may describe as 'de facto amendments'.[192]

1. Modifying the Charter through formal amendment

The Vienna Convention on the Law of Treaties does not apply to the UN Charter, which was concluded before the VCLT's entry into force, except to the extent its provisions reflect customary international law.[193] In any case, like many international organisations, the Charter departs from Article 39's requirement of amendment by unanimous agreement and contains its own amendment procedures.[194] Article 108 provides that amendments must be adopted by a vote of two thirds of the members of the General Assembly – this has been interpreted to mean two thirds of all members of the General Assembly, not just two thirds of those present and voting, as in Article 18(2) – and then ratified by two thirds of UN Members, including all permanent members of the Security Council (P5).[195] The Charter is relatively unusual in providing that amendments so adopted bind all UN Members, even those who neither voted for the amendment in the General Assembly nor

[192] E.g. Bailey and Daws (1998), 7.

[193] VCLT Article 4. See Dörr and Schmalenbach (2018), 759, 770.

[194] Sands (2011), para 24.

[195] For a detailed account, see Witschel (2012).

ratified it.[196] That is, unless they are one of the P5, who each effectively have a veto over any amendment.[197] Article 109 provides for a slightly different procedure whereby the amendment is adopted by two thirds of a General Conference of the Members, but fails to avoid the 'sting in the tail' of the P5 veto,[198] whose ratification is still required for the amendment to take effect. Articles 108 and 109 impose no substantive limits on the kinds of amendments that can be made to the Charter.

While amendment clauses in multilateral treaties are convenient as the means by which the treaty can be amended are agreed from the outset, the parties may ignore such provisions, provided they can agree on an alternative method by which the treaty is to be amended.[199] However, in the case of the UN Charter, the possibility of concluding a separate agreement to amend the Charter, as well as modifying agreements *inter se* under Article 41 VCLT, is limited by the operation of Article 103.

The Charter has been amended five times.[200] The difficulty of formally amending the Charter is illustrated by the fact that no further amendments to the Charter have been

[196] Klabbers (2018), 77; see Tomuschat (1993), 265. It has been recognised that, exceptionally, a member may withdraw from the UN if 'its rights and obligations as [a Member] were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept', see Witschel (2012), para 41. Cf the amendment provisions of the WTO Agreement. While a small number of provisions may only be amended by 'acceptance of all the Members', other provisions may be amended through less stringent procedures, requiring acceptance by only two-thirds of the members. Where the amendment is 'of a nature that would alter the rights and obligations of the Members' it will only take effect for those members who have accepted it.

[197] See Amerasinghe (2005), 456.

[198] Aust (2013), 235.

[199] Aust (2013), 234–5; Hafner (2013), 120.

[200] UNGA Res 1991 A and B (XVIII) (1963); Repertory of Practice of United Nations Organs, Supplement No 3 (1959–1966), volume 4, Articles 108 and 109, paras 15–8; Repertory of Practice of United Nations Organs, Supplement No 5 (1970–1978), volume 5, Articles 108 and 109, paras 9–12.

made, despite much discussion and occasional moves in this direction.[201] Yet at first sight, it is not clear that the Article 108 and 109 processes should make amendment of the Charter so very difficult to achieve. The requirement of ratification by P5 states is an obstacle to reforms that may negatively affect their interests,[202] but for other amendment proposals the requirement of a two-thirds vote in the General Assembly and ratification by two thirds of the membership is less demanding than the default requirement of the agreement of all parties, as codified in Article 39 VCLT. After all, Articles 108 and 109 make it possible for binding amendments to be adopted over the opposition of one third of the membership.

However, in the politicised atmosphere of the UN, the very resort to the formal amendment process may make reaching agreement on amendment more challenging, as it requires states openly to take a position on the proposed change. As a result, states may feel obliged for political reasons to object to developments which, had they taken place through less visible, more informal processes, they may have been willing to tolerate for the sake of the good functioning of the organisation or to avoid unnecessary expending of political goodwill. Moreover, where a Charter amendment is contemplated it will inevitably become the subject of political and diplomatic horse-trading, both in the sense that members will push for other amendments to be considered now that the subject has been breached, and in that a member's support for amendment may be made conditional on their receiving support in other areas, such as election to a UN organ.[203]

[201] Repertory of Practice of United Nations Organs, Supplement No 10 (2000–2009), volume 6, Articles 108 and 109, para 4; UNGA Res 60/1 (2005), paras 176-7.

[202] Although in practice P5 members have ratified Charter amendments that they initially voted against in the General Assembly, showing the political pressure created by the two thirds majority vote in that organ, Witschel (2012), para 35.

[203] This effect is not confined to the UN Charter, see Barrett (2016), 16.

As a result, where changes to the Charter have taken place, they have largely occurred through means other than the amendment process. Indeed, despite the limited recourse to formal amendment, the UN's development has demonstrated a 'high degree of flexibility'.[204] Given the political sensitivity of the *jus ad bellum*, it seems likely that, should change occur that makes force lawful or unlawful where it had not been so before, it will occur through one of the means set out below.

2. Modifying the Charter through interpretation of treaty terms

The Charter's nature as the constituent instrument of an international organisation means that the application of the rules of treaty interpretation may lead to changes in the content of its treaty norms through increased emphasis on the object and purpose of the treaty and evolutionary interpretation of its terms. However, there are limits to the changes that can be effected by these means.

2.1 The application of the VCLT rules to the UN Charter

For some, the UN Charter is a 'global constitution' and should be interpreted through processes that reflect this constitutional character.[205] However, although appealing to the extent that it captures the Charter's importance in the international legal system, as well as the extraordinary political moment that led to its creation at the end of the Second World War, in practice it does not appear that the Charter functions as a world constitution and

[204] Von Schorlemer (2011), 467.

[205] E.g. Fassbender (2009).

the usefulness of the analogy may be doubted.[206] A related view sees the Charter as the constitution of the UN only, which should be interpreted using the same techniques as domestic constitutions.[207] While the Charter certainly shares some characteristics with national constitutions – both are intended to allocate powers within a system of governance and to exist for a long, if not indefinite period – to start from the premise that the Charter is a constitution and should be interpreted accordingly 'risks presupposing what can only be the result of interpretation'.[208] The Charter is a very important treaty, and the UN is distinctive as the only virtually universal international organisation with a general field of competence, but the starting point must be that it is just a treaty and that it is to be interpreted according to the 'well-established rules of treaty interpretation'.[209] The VCLT does not formulate specific rules for constituent instruments but expressly provides that its provisions apply to such treaties, subject to the rules of the organisation.[210] The rules of interpretation in Article 31 VCLT codify customary international law[211] and are applicable as such to the UN Charter.[212]

Nevertheless, while constituent instruments are treaties and must be interpreted as such, they have specific features which require special consideration in the interpretative process: their character is 'conventional and at the same time institutional' and 'their object

[206] Arangio-Ruiz (1997). Constitutional analogies are also made in relation to UNCLOS, see Koh (1982); ITLOS Advisory Opinion (2015), Separate Opinion Judge Lucky, para 18; Boyle (2005), 566.

[207] This 'constitutionalism' approach to constituent instruments is not confined to the UN, see Peters (2016), 34. E.g. Footer (2011).

[208] Kadelbach (2012), paras 4, 20; Klabbers (2018), 89.

[209] *Nuclear Weapons in Armed Conflict*, para 19.

[210] Article 5 VCLT; Blokker (2016), 954.

[211] *Legality of Use of Force*, para 100; *US – Gasoline*, 17 (Article 31(1) only); Guillaume (2006), 468.

[212] Article 4 VCLT.

is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals'.[213] While each international organisation will be based on the treaty law of its own constituent instrument, customary international law principles of interpretation reflecting these special features have developed which apply to international organisations unless their constituent instrument otherwise provides.[214] As a result, while it is the general rules of treaty interpretation that are applied, the flexibility of those rules allows for their application to take account of the treaty's character as a constituent instrument of an international organisation.[215] The different elements of interpretation will therefore be given greater or lesser emphasis than if it were a multilateral treaty of a purely conventional character.[216]

The ordinary meaning of the Charter's terms may be of limited assistance in interpretation, given the 'generality, indeterminacy, conflicts and inconsistencies of the Charter norms'.[217] The context of a Charter term will be supplied by the provision, article and chapter in which it is found, as well as the structure of the Charter as a whole. Arguably, the context of a Charter term could extend to the UN system as a whole, including the specialised agencies, UN treaties and treaty bodies.[218]

[213] *Nuclear Weapons in Armed Conflict*, para 19; Amerasinghe (2005), 24; Kadelbach (2012), para 5.

[214] Akande (2018), 230.

[215] Blokker (2016), 954–5.

[216] Akande (2018), 237; Amerasinghe (2005), 59; Kadelbach (2012), para 18.

[217] Schachter (1993), 196.

[218] Kadelbach (2012), para 29.

In the interpretation of constituent instruments, emphasis is placed on the object and purpose of the treaty.[219] Even if the constitutional analogy can be stretched too far, constituent instruments of international organisations, like constitutions, are generally concluded with the purpose of regulating the functions of and distribution of competences within the community it governs, and to be in force for a long or indefinite period. If they are not to become irrelevant, they must adapt to changing circumstances.[220]

The object and purpose is usually determined by reference to a treaty's preamble and any general clauses at the beginning of the treaty.[221] In *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* the Court referred to the 'purposes' of the UN in Article 1 of the Charter.[222] Although strictly these refer to the purposes and principles 'of the United Nations' organisation, not of the Charter. The object and purpose of the Charter may be better characterised as the establishment and regulation of a new international organisation intended to constitute a collective security system.

The object and purpose of constituent instruments is taken into account, in particular, through the principle of effectiveness, including the doctrine of implied powers.[223] This 'magical tool' was used by the ICJ in the *Reparation* case to establish that

[219] Klabbers (2018), 83.

[220] Schermers and Blokker (2005), 447. Such arguments are not confined to constituent instruments, Barrett (2016), 5; Boyle (2005), 566. On the many treaties described as 'living instruments' see Barnes (2016), 460–1.

[221] Kadelbach (2012), para 31.

[222] *Certain Expenses*, 167–8.

[223] Akande (2018), 238–9; Amerasinghe (2005), 46; Fassbender (2009), 132–3. Although cf Kadelbach (2012), para 9.

the UN enjoyed legal personality,[224] as well as in later cases to broaden the powers it enjoys under the Charter. The influence of the principle of effectiveness can also be seen in the 'tendency of the principal political organs to adopt an expansive view of their competence and powers when a strong political case is made for their action.'[225] As aspects of the object and purpose of the treaty, these principles can be considered 'primary tools in the process of interpretation'.[226] In this way, the special characteristics of constituent instruments are accommodated within the general rules of treaty interpretation, which are sufficiently flexible to allow this differentiated application.

While these techniques may stretch the link between the consent of the treaty parties at the time of the treaty's conclusion and the interpretation arrived at more than in the case of a regular multilateral treaty, this is not without limits. The purposes of the organisation will act as a limit on the powers that may be implied,[227] and an interpretation emphasising the object and purpose will not be able to ignore the text of the treaty.[228] The articles of the VCLT that deal with interpretation do not simply tell the interpreter what elements they should take into account in that process, but also how much weight should be given to each element in relation to the others.[229] Article 31(1) requires that all the elements set out in that provision be taken into account in arriving at an interpretation: the ordinary meaning of the terms; their context; the object and purpose of the treaty; and the principle of good

[224] Reinisch (2017), 469; *Reparation*, 182.

[225] Schachter (1994), 7.

[226] Amerasinghe (2005), 41, 48.

[227] *Nuclear Weapons in Armed Conflict*, para 25; *Certain Expenses*, 168.

[228] M Fitzmaurice (2008), 114.

[229] Linderfalk (2007), 8.

faith. Each element is to be weighed in the balance and placing greater emphasis on one cannot justify disregarding any of the others.[230]

The *travaux préparatoires* of a treaty are already relegated to a supplementary role in the interpretative process by Article 32 VCLT, and while recourse 'may' be had to them in certain situations, it is not required that they be considered at all.[231] This is consistent with practice interpreting the Charter, which has tended to downplay the drafting history even further,[232] although reference is occasionally made to confirm arguments made on other bases.[233] This limited role for the Charter drafting history is due both to the difficulty in ascertaining a clear intention from the views of the many participants at the San Francisco conference and to the dramatic expansion of UN membership since the Charter was adopted, which undermines the relevance of that original intention of the founding members.[234]

[230] In *Libya /Chad* the Court held that '[i]nterpretation must be based above all upon the text of the treaty.' However, the 'text' of a treaty is not the same as the 'ordinary meaning' of its terms. All the elements in Article 31(1), with the exception of good faith, derive from its text. As indicated by the subsequent sentence, the distinction is rather between those means of interpretation that are derived from the text and '[a]s a supplementary measure […] means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion', para 41.

[231] ILC 1966, Draft Article 27, commentary paras 18–9. Cf sections (2) and (3) of Article 31.

[232] E.g. *Competence of Assembly*, 8; *Certain Expenses*, Separate Opinion Spender, 184–5; Schachter (1994), 7; Amerasinghe (2005), 56–7; Fassbender (2009), 133.

[233] E.g. *Certain Expenses*, 168; *Admission of a State*, Individual Opinion Azevedo; *Competence of Assembly*, Dissenting Opinion Azevedo, Dissenting Opinion Fitzmaurice.

[234] Kadelbach (2012), paras 44–5; *Admission of a State*, Individual Opinion Alvarez, 68; Schachter (1994), 7 Although see Guillaume (2006), 471–2.

Use of practice of the organisation to interpret a constituent instrument is a further example of how the nature of such treaties is respected and allows it to 'fulfil its purposes in changing circumstances'.[235] As the Court stated in *Nuclear Weapons in Armed Conflict*:

> the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, *as well as its own practice*, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[236]

It is well established that practice of the organisation may be referred to in interpreting constituent instruments[237] and the ICJ has since its earliest decisions used international organisation practice for interpretative purposes.[238] However, while some take the view that organisation practice constitutes a means of interpretation additional to the elements listed in Article 31 that is specific to the Charter or to constituent instruments generally, the role played by international organisation practice is correctly analysed as helping establish the agreement of the parties through subsequent practice under Article 31(3)(b) VCLT.[239] This will be discussed in detail in part 3 below. Practice of parties to the treaty or of an international organisation or its organs which does *not* establish the agreement of

[235] Akande (2018), 238; M Fitzmaurice (2008), 117.

[236] *Nuclear Weapons in Armed Conflict*, para 19 (emphasis added).

[237] Blokker (2016), 957; Klabbers (2018), 87

[238] *Reparation*, 179; *South-West Africa* (Advisory Opinion), 137, 142; Kadelbach (2012), para 36; for an example outside the UN, see *Constitution of the Maritime Safety Committee*.

[239] *Nuclear Weapons in Armed Conflict*, para 27; *Whaling*, para 83; cf Blokker (2016), 959.

the parties may still be relevant as a supplementary means of interpretation under Article 32 VCLT.[240]

The recognition that organ practice has a role in interpretation shifts the balance between the members and the organisation.[241] The organisation has its own will, independent of its membership, and it can engage in practice that may not reflect the will of all members but which may nonetheless contribute to the interpretation of that treaty.[242]

2.2 Static and evolutionary interpretation of treaty terms

An evolutionary approach may be employed within Article 31(1) in determining the ordinary meaning of particular terms in the Charter.[243] Whether a term in a treaty is to be interpreted in line with its meaning at the time of its conclusion (contemporaneous or static interpretation), or as having a meaning that evolves so that by the time of its application it may have changed (evolutive or dynamic interpretation), is a question that international tribunals have addressed on a case-by-case basis. The ICJ has sometimes taken an evolutionary approach and sometimes a static approach.[244] Which approach is appropriate is to be determined through an application of the rules of interpretation in Articles 31 and 32 VCLT to the treaty term concerned.[245]

[240] ILC Subsequent Practice, draft Conclusion 12, commentary para 14.

[241] Klabbers (2018), 87.

[242] Blokker (2016), 950.

[243] Bjorge and Kolb (2020), 494.

[244] *Costa Rica v Nicaragua*, Declaration of Judge Guillaume, paras 10–2; Kadelbach (2012), para 14.

[245] Guillaume Declaration, para 9; ILC Subsequent Practice, draft Conclusion 8, commentary paras 5, 9.

In some cases, it will be clear that a term is referring to a concept whose meaning is time-bound and which should therefore be given a static interpretation.[246] For example, 'the states which, having participated in the United Nations Conference on International Organization at San Francisco' will not change over time.[247] Conversely, in some cases it will be clear that a term is to be interpreted using an evolutionary approach because it refers to a concept that by its nature changes over time. For example, the WTO Appellate Body has found that 'the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary".'[248]

The concept of 'the well-being and development' of peoples of mandate territories was held by the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* advisory opinion to be 'by definition evolutionary'. It is by nature a concept that will not be the same from one moment to the next as it depends on the prevailing circumstances, as was the connected legal concept of the 'sacred trust'.[249] The conclusion that this term was evolutionary was not reached based on an analysis of the actual intentions of the parties at the time of conclusion, but rather the presumed intention evidenced in the treaty terms: the parties to the Covenant 'must consequently be deemed to have accepted them' as evolutionary.[250] This obviously raises questions about whether the consent of the treaty parties is undermined by the reliance on deemed intentions, and if

[246] Linderfalk (2007), 75–7.

[247] UN Charter Article 3.

[248] *Shrimp Products*, para 130. Also *China – Publications*, para 396. See Redgwell (2016), 171.

[249] *Namibia*, para 53. Also *South West Africa, Second Phase*, Dissenting Opinion Jessup, 440.

[250] M Fitzmaurice (2008), 108, 118; Higgins (2009), 872; Bjorge and Kolb (2020), 495.

what is going on is better described as 'objective revision' than 'subjective interpretation'.[251] However, while evolutionary interpretations obviously have the potential to depart further from the interpretation the parties may have expected a provision to have at the time they concluded the treaty, the issue is no different in kind from that raised by the VCLT interpretation rules generally, which give little weight to the actual intentions of the parties and focus instead on the 'objectivised' intention as arrived at through the application of the rules in Articles 31–3.[252]

These rules contain their own limits, with the result that even an evolutionary interpretation will not be unconstrained. First, because even if a term's meaning is evolutionary, it must remain the ordinary meaning of the term, and cannot distort or depart from that text. It is of course possible for a treaty term to be given a special meaning that departs from the ordinary meaning of the term 'if it is established that the parties so intended', as foreseen in Article 31(4) VCLT.[253] However, where the term was originally interpreted as having its ordinary meaning it cannot subsequently be given a special meaning, departing from the ordinary meaning, through evolutionary interpretation alone under Article 31(1). This would require the term to be amended, or interpreted through subsequent practice or agreement of all parties as now having a special meaning. Second, even an evolutionary meaning of a term is only one element to be weighed in the balance with each of the other means of interpretation in Article 31(1). The context and object and purpose of the treaty, as well as the principle of good faith, must be taken into account as

[251] French (2005), 297–8; Arato (2015), 207.

[252] Bjorge (2015), 191–2; Bjorge and Kolb (2020), 490. As the Court observed in *Costa Rica v Nicaragua*, evolutionary interpretation is a means of respecting the parties' presumed intention that a treaty term should be given a meaning capable of evolving, para 64.

[253] This is the only reference to the intention of the parties in the 'Interpretation of Treaties' section of the VCLT.

well. Even if one of those elements may be given more emphasis, as with the object and purpose when interpreting a constituent instrument, this cannot justify an interpretation of a treaty provision that entirely disregards one of the other elements; indeed, this could be considered as an aspect of the requirement to interpret the treaty in good faith. Therefore, if the ordinary meaning of a term has undergone a very dramatic and unexpected evolution over time, these other elements may still act as limits on the final interpretation reached.[254]

It is rare that a term will clearly be 'by definition evolutionary' or that a treaty will explicitly make provision for whether a term is to be given a static or evolutionary meaning. The interpretative process will therefore usually involve the application of certain presumptions, which have been developed by the ICJ and other tribunals.[255] In particular, the Court has held that where the parties use a term 'of a generic kind' it is to be presumed that 'its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time'.[256] A generic term is different from a term that is by definition evolutionary: a generic term refers to a category of things, rather than a particular thing or things. In *Aegean Sea Continental Shelf*, the Court gave an evolutionary meaning to the generic term 'rights', such that it was interpreted to include the parties' rights over the continental shelf at the time of adjudication.[257] However, in 1978 the word 'rights' did not mean something different from what it meant in 1928: it was rather the *content* of those rights that had evolved over time.[258]

[254] See Boyle (2005), 568.

[255] Guillaume Declaration, para 15; ITLOS Advisory Opinion, Separate Opinion Judge Lucky, para 19.

[256] *Aegean Sea*, para 77; *Costa Rica v Nicaragua*, para 66.

[257] *Aegean Sea*, para 78.

[258] Linderfalk (2007), 86–7.

This presumption is not, however, to be applied in isolation and other factors may mean that a generic term should nevertheless be understood as having a static meaning.[259] Generic terms may refer to a category the content of which would not change over the life of the treaty, or to a category whose content will change.[260] To determine in which sense the generic term is being used, the treaty provision must be interpreted. The ordinary meaning of the terms is only one element in the interpretative process and the object and purpose of the treaty in particular will have a crucial role in determining whether its terms should be given an evolutionary meaning.[261] Where the other elements point towards a static interpretation this may overcome the presumption raised by use of a generic term; conversely, other factors may strengthen the conclusion reached via the presumption that the term is to be given an evolving meaning. In the ICJ's decision in the *Case concerning rights of nationals of the United States of America in Morocco*, following an analysis of the circumstances of the treaty's conclusion the generic term 'disputes' was held not to have an evolutionary meaning but to have the meaning it had at the time of the treaty's conclusion – covering both civil and criminal disputes – rather than what France submitted was its ordinary meaning at the time of interpretation, limited to civil disputes only.[262] On the other hand, the Court has considered the object and purpose of a treaty and found that the presumption that generic terms are to be given an evolving meaning is strengthened by the fact that the treaty in which they are contained is one concluded 'for a very long

[259] Guillaume Declaration, para 15.

[260] Linderfalk (2007), 78.

[261] M Fitzmaurice (2008), 117–8; Higgins (2009), 873.

[262] *Morocco*, 189.

period'[263] or is 'of continuing duration'.[264] Since the constituent instruments of international organisations are typically concluded for an indefinite duration, their object and purpose, combined with the principle of effectiveness, will often favour an evolutionary interpretation of generic terms.[265]

2.3 *Renvois* to external legal norms

Static and evolutionary interpretation are sometimes referred to as a *renvoi fixe* and a *renvoi mobile* respectively;[266] that is, a fixed or ambulatory reference. However, using the terminology of *renvoi*/reference risks confusion with another meaning of '*renvoi*', which will be preferred here: incorporation of an external legal norm into a treaty. Not every treaty term whose meaning is evolutionary will be a *renvoi* in this sense; for example, 'commerce' is an evolutionary term which does not refer to a legal norm or concept. However, many treaties do contain provisions that refer to other treaties, customary international law, or other international instruments and so 'provide a clear entry-point for other sources of law' into the treaty.[267] In interpreting and applying the treaty, one refers to the external legal norm(s) to determine the ordinary meaning of the term. The Charter contains one of the most well-known examples of a *renvoi* to external legal norms. In its merits judgment in *Military and Paramilitary Activities in and against Nicaragua* the ICJ held that Article 51

[263] *Costa Rica v Nicaragua*, para 66; *Aegean Sea*, para 77.

[264] See also *Gabčíkovo-Nagymaros*, para 140, where the Court appears to suggest that continuing obligations are 'necessarily evolving'; also *Iron Rhine*, para 82.

[265] Although not concerning the constituent instrument of an international organisation, see *Iron Rhine*, para 80.

[266] Guillaume Declaration, para 9.

[267] French (2005), 294.

created a *renvoi* to the customary international law of self-defence.[268] In this case the *renvoi* to the external legal norm(s) is implied, but external legal norms may also be expressly referred to in the treaty text. For example, the VCLT makes six explicit references to the Charter.[269] References to externally created standards also feature heavily in UNCLOS.[270]

The VCLT explicitly provides for 'relevant rules of international law applicable in the relations between the parties' to be taken into account alongside the context in Article 31(3)(c). The impact of this provision on the Charter is limited by the effect of Article 103, which provides that obligations under the Charter prevail over those under other agreements. However, this does not prevent external legal norms being used to elaborate the meaning of Charter terms under Article 31(1), especially where the Charter itself makes a reference.[271] Interpretation of the ordinary meaning of the term will be necessary as a first step in order to determine whether the international law norms referred to are those at the time of the treaty's conclusion (*renvoi fixe*), or at the time of interpretation (*renvoi mobile*).[272] Where terms are interpreted to be a *renvoi fixe*, it will be a case of application of the inter-temporal law doctrine, and the law referred to will be the law at the time of the treaty's conclusion.

[268] *Nicaragua*, para 176. Although the subject of considerable debate, on 'fair and equitable treatment' clauses as references to custom, see Ryan (2011), 929–31.

[269] See also 2004 US Model BIT Article 5(1) and (2), Annex A, referring explicitly to customary law.

[270] Barrett (2016), 20–2. For example, Article 211(5) UNCLOS; see Redgwell (2016), generally and 183; Nordquist et al (2013), Part XII, 21–2.

[271] Kadelbach (2012), para 13; Higgins et al (2017), 418. See the distinction drawn by Paparinskis (2011) between customary norms being taken into account together with the context under 31(3)(c), and reference to customary international law in determining the ordinary or special meaning of a term under 31(1) or 31(4), 78–9. It is the latter that is at issue here.

[272] Linderfalk (2007), 179; ILC 1966, draft Article 27, commentary para 16.

However, some treaty terms will constitute a '*renvoi mobile*': an ambulatory reference to an external legal norm. Generic terms in treaties may include legal concepts which are interpreted to evolve over time to reflect changes in international law. The evolutionary legal term need not be a specific word, such as 'rights' but 'may also encompass more interrelated or cross-cutting concepts'.[273] In *Aegean Sea*, the court considered that terms referring to international law concepts would be particularly likely to have an evolutionary content, given the convention's object and purpose and that it was concluded for an indefinite duration.[274]

In this way, where a treaty contains a *renvoi mobile*, even without amendment there is potential for considerable change to the content of the treaty norms, which will be ambulatory, changing automatically to reflect the changes in the external legal norm(s).[275]

3. Modifying the Charter through subsequent agreement and practice

When interpreting a treaty, an interpreter must follow the applicable rules of interpretation under international law. These will generally be the rules in Articles 31–3 VCLT and the customary norms they codify, although parties to a treaty may depart from these and specify that their treaty shall be interpreted in a different manner. While the basic rule of treaty interpretation in Article 31 leaves a high degree of flexibility for the interpreter, there are limits on the interpretations that may be arrived at through its application.[276] An

[273] ILC Subsequent Practice, draft Conclusion 8, commentary para 18.

[274] *Aegean Sea*, para 77–8.

[275] E.g. *Pope & Talbot*, paras 614–6.

[276] Bjorge (2015), 204.

interpretation that misapplies them, for example by not taking into account one of the elements in Article 31, risks being rejected as incorrect, for example by a judge adjudicating a dispute arising from the treaty, or by the other parties to the treaty.[277] It is for this reason that there are limits to the changes in a treaty norm's meaning that can be effected by evolutionary interpretation or the principle of effectiveness under Article 31(1).

3.1 Interpretation by agreement of all the parties

Such limits do not apply, however, to interpretations by *all* the parties to a treaty. As Crawford writes, it is the parties to the treaty that 'own' the treaty and they can do what they like with it;[278] provided they are all in agreement. If every party to the treaty is in agreement, then they can override the interpretation of a provision that would be reached through the usual rules of treaty interpretation. Interpretations by all the parties are therefore binding in the sense that they definitively determine the content of the binding obligations under the treaty. Interpretations by all the parties are also 'binding' on interpreters in that they are dispositive of the legal question of how the treaty should be interpreted.[279]

[277] E.g. Brower (2006), 362–3.

[278] Crawford (2013), 31; see Boyle (2005), 584; Bjorge and Kolb (2020), 498–9.

[279] There are diverging views as to whether an interpretation reached through agreement of all the parties is decisive and legally binding, or if it is merely one among several factors to be 'taken into account' in interpretation, see Akande and Tzanakopoulos (2018), 947–8. The former view is taken here, although as these authors point out, a subsequent agreement or practice can never be completely decisive since, like the treaty itself, the agreement reached will require interpretation, which will in turn require consideration of the other elements of interpretation.

Article 31(3) VCLT, which along with the rest of Article 31 reflects customary international law,[280] provides:

> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

The position taken here is that the agreement of *all* parties to the treaty is required for subsequent practice or agreement to be taken into account in the interpretation of the Charter under Article 31(3)(a) or (b).[281] This follows from the use of the definite article in both 31(3)(a) and (b): 'agreement between the parties'/'agreement of the parties'. Taking its ordinary meaning, if someone asked you who 'the parties' to a particular treaty are, you would surely reply by listing *all the states that have consented to be bound by that treaty*. This is also how the identical language in Article 39 VCLT ('agreement between the parties') has been understood.[282] Otherwise, the context is not particularly helpful, as the preceding provision, Article 31(2), refers both to 'all the parties' and 'one or more parties', and so does not cast any light on which meaning, if either, is to be given to 'the parties'.

[280] *Legality of Use of Force*, para 100. Cf Gazzini (2020).

[281] Crawford (2013), 30; Linderfalk (2007), 167; Barrett (2016), 18; Boyle (2005), 571; Tams (2019), 126–7.

[282] Sands (2011).

The need for agreement of all parties under Article 31(3)(a) and (b) has been confirmed by the ICJ in its 2014 judgment in the *Whaling* case:

> many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of [Article 31(3)(a) and (b) VCLT][283]

This was also the view of the ILC in its 1966 commentary to Draft Article 27(3)(b) which, virtually unchanged, became Article 31(3)(b) VCLT.[284]

Not only is this the case under general international law but, in the specific context of the Charter, a close reading of the *Certain Expenses* advisory opinion shows that practice establishing agreement among *all* the parties is the standard the Court has applied when interpreting the Charter.[285] The Court has also declined to rely on existing subsequent practice where at least one UN member continued to object to the interpretation it represented.[286] Moreover, if one accepts that the agreement of the parties for the purpose

[283] *Whaling*, paras 46, 83; see also the application of 31(3)(a) by the WTO Appellate Body in *US — Tuna II*, para 371; on 31(3)(b), see *Turkey-Textiles*, paras 9.166–9.

[284] The only difference between the two provisions is that the 1966 ILC draft referred to practice which establishes the 'understanding' of the parties, rather than their 'agreement', ILC 1966, draft Article 27, commentary para 15. Paragraph 27(2) at that time was identical to 31(2) VCLT.

[285] See section 3.3(c).

[286] See section 3.3(d).

of Article 31(3)(b) can be established through their *acquiescence* in subsequent practice, then the examples typically used to support an argument that the agreement of less than all parties suffices to produce binding interpretations of the Charter can be seen to instead support the view taken here, that the agreement of all parties is indeed required.[287]

If an agreement among all the parties or practice establishing such agreement exists then it must be taken into account as part of the process of interpretation under Article 31, since 31(3) forms part of the general rule of treaty interpretation.[288] This also follows from the text of Article 31(3) itself ('shall'). However, since such an interpretation would be agreed by all the parties, it is also for that reason conclusive as to the correct interpretation of the treaty.[289] Thus, even if Article 31 does not establish a hierarchy between its provisions and requires that all three paragraphs must be applied in reaching an interpretation,[290] if there exists an agreement of all parties under 31(3)(a) or (b) as to interpretation of a treaty provision, this could be contrary to the ordinary meaning of the terms, the object and purpose of the treaty, or any other element in Article 31 and would still be not only valid but conclusive as to the interpretation of the provision. Unlike the evolutionary interpretations discussed above, Article 31(3)(a) and (b) – but not 31(3)(c), which does not involve agreement of all parties – thus allow for an interpretation of a provision to be reached that may depart from an interpretation arrived at using the other

[287] See section 3.3(c).

[288] It is not just the basic rule in Article 31(1) that is the 'general rule of interpretation', but Article 31 as a whole, and subsections 31(2) and (3) 'are not discretionary add-ons, but prescriptive and mandatory aspects of the "general rule"', French (2005), 301.

[289] For this reason, in practice the distinction correctly identified by Paparinskis (2011), between the admissibility of and weight to be given to interpretive materials, 77, dissolves in the case of subsequent practice and agreement. By virtue of meeting the requirement for their admissibility under 31(3)(a) or (b) – agreement among all parties – they become conclusive.

[290] ILC 1966, draft Article 27, commentary paras 8–9; Kadelbach (2012), para 10; Abi-Saab (2006), 459.

elements of Article 31, or a previous interpretation through subsequent practice or agreement. Subsequent practice or agreements among less than all the parties may still be relevant as a supplementary means of interpretation under Article 32 VCLT,[291] but there is no requirement to take them into account in the interpretation process as there is with the elements in Article 31, and they will be neither conclusive as to the interpretation of the treaty nor capable of overriding the other elements of interpretation in Article 31.

Interpretation through subsequent agreement and practice under 31(3)(a) and (b) is therefore of particular interest because it creates the possibility of significant change to the Charter, and thus change to the *jus ad bellum* as understood in this thesis. An interpretation of the Charter by a UN organ alone, or a subset of UN members, cannot, for example, go beyond the text of the treaty or purport to impose new obligations on UN members, even through the application of the principle of effectiveness.[292] Even a term which is given an evolutionary interpretation cannot be given a meaning beyond the ordinary – if evolving – meaning of the treaty text and will be limited by the other elements of interpretation in Article 31(1). These are limits imposed by the legal process of interpretation under the VCLT and customary international law. However, a new interpretation of a Charter provision may be arrived at through subsequent practice establishing the agreement of all parties that is inconsistent with the text, context, previous interpretations, and even the object and purpose of the Charter, and it will be conclusive as to the interpretation of that provision.[293] In this way, interpretations by all the parties under 31(3)(a) and (b) may even

[291] ILC Subsequent Practice, Conclusion 4(3).

[292] Amerasinghe (2005), 461. Unless in reaching that interpretation the organ thereby establishes the agreement of all parties; see section 3.2.

[293] See Gardiner (2016), 275. In *Land, Island and Maritime Frontier*, para 380, the Court appeared to suggest that practice under 31(3)(b) could not produce an interpretation contrary to the text, Churchill (2005), 91. However, in that passage the Court was referring to Honduras's invocation of subsequent practice in

be said to allow treaty parties together to deliberately shape the content of their obligations through interpretation.[294]

This is not to deny that in establishing an international organisation states create an entity with its own independent will. Depending on a range of factors, member states may lose, to a varying extent, control over the actions the organisation takes in its everyday functioning.[295] In the UN context, it is clear that the fifteen members of the Security Council, or the General Assembly voting by a two-thirds majority, may take decisions which are not supported by the membership as a whole, including some binding decisions. However, the powers enjoyed by international organisations must be conferred on them by their member states in their constituent instrument or other separate ad hoc agreement,[296] or identified through the doctrine of implied powers.[297] In analysing the possibilities for modification of the Charter, it is this *conferral* of powers through the constituent instrument – in our case the UN Charter – and how the terms of that conferral may be altered, for example to change the circumstances in or procedures by which the Security Council may authorise force, that this chapter is concerned with (as well as modification of substantive *jus ad bellum* norms contained in the Charter). There is nothing inconsistent in saying that, in relation to the constituent instrument all members acting together remain in ultimate control of that treaty and the obligations it creates, while acknowledging that within the

application of a *different* treaty, not the Special Agreement which was being interpreted, see paras 373, 379. In this situation, Article 31(3)(b) should not have been referred to at all.

[294] Roberts (2013).

[295] Sarooshi (1993), 251.

[296] Sarooshi (1993), 18.

[297] *Nuclear Weapons in Armed Conflict*, para 25; Reinisch (2017), 1020.

scope of operation of the powers conferred by that treaty, members may lose control over particular actions of the organisation.[298]

Finally, even if one does not share the view that the rules in Article 31(3)(a) and (b) always require agreement of all parties for subsequent agreement or practice to be taken into account, the kinds of reinterpretations of the Charter that would be required to bring about change in the *jus ad bellum* would in any case need to be interpretations agreed by all the parties. New interpretations that would create new exceptions to the prohibition on force would almost certainly be contrary to the ordinary meaning of the treaty terms and potentially the object and purpose of the Charter. This kind of reinterpretation of the Charter could not be achieved through the general rule, which requires all the elements in Article 31 to be applied in the interpretative process.

The drafting of Article 31 places the elements listed in subsections 31(3)(a), (b) and (c) on the same level as the context – they are to be 'taken into account, together with the context'. Therefore, if they are not conclusive by virtue of establishing the agreement of all the parties, they will at most be of the same weight as the context and so of equal weight to the other elements in the basic rule in 31(1).[299] 'Taken into account' could even suggest that they are to be given less weight than the elements in 31(1).[300] Subsequent practice or agreement of less than all the parties therefore could not, even in an alternative scenario where that meets the requirements of the rules in 31(3)(a) and (b), result in a valid

[298] See Sarooshi (1993), 70–1.

[299] See Paparinskis (2011), 73.

[300] See Tladi (2018).

interpretation contrary to the ordinary meaning of the Charter terms, or its object and purpose, and therefore would be unlikely to bring about change in the *jus ad bellum*.

Yet if agreements or practice under 31(3)(a) or (b) establish the agreement of all treaty parties, they can override any interpretation that would be arrived at using the other elements of Article 31: the unanimous agreement of all parties will be conclusive as to the interpretation of the treaty. Therefore, regardless of whether it is a requirement for *any* interpretation reached through subsequent practice or agreement Article 31(3)(a) or (b), for the kinds of interpretations with which this thesis is concerned – ones which would effectively rewrite the Charter rules on the use of force – the agreement will need to be among all parties to the Charter for such a new interpretation to be valid.

Interpretations through subsequent agreement or practice which establish the agreement of all parties are sometimes described as 'authentic' interpretations of the treaty.[301] However, the terminology of 'authentic' interpretations is not used here as this term is used in a variety of different senses by different writers.[302] What matters for our purposes is whether the interpretation is agreed by all the parties to the treaty, as it is this which makes an interpretation conclusive as to the correct interpretation of the treaty, even where it is inconsistent with the interpretation that would be arrived at under the other rules of interpretation: 'authentic interpretations given by the parties override general rules of interpretation'.[303] The terminology of 'authoritative' interpretations is also avoided as,

[301] E.g. Tams (2019), 127.

[302] E.g. ILC Subsequent Practice, draft Conclusion 3, commentary para 7, takes the view that subsequent agreements and practice under 31(3) are not 'authentic interpretations' but 'authentic means of interpretation' and so do not necessarily have conclusive effect. However, this seems to stem from a concern to remain consistent with the ILC's previous statements, in particular ILC 1966.

[303] Jennings and Watts (1996), 630; cited with approval by the tribunal in *Methanex v USA*, Part II, chap H, para 23; Linderfalk (2007), 170.

besides simply being used as a synonym for 'authentic', 'authoritative' interpretation is sometimes used to refer to the situation where a particular actor is *entitled* to interpret a treaty, but the interpretation they reach is not necessarily conclusive as to the legally correct interpretation of the treaty as it is not made by all parties.

3.2 Interpretation of the Charter by subsequent agreement

Article 31(3)(a) and (b) are concerned with agreements and practice that arise subsequent to the entry into force of the treaty being interpreted.[304] The parties must have taken a position regarding the interpretation of the treaty, as it is this which forms the subject of the agreement.[305] In accordance with its use elsewhere in the VCLT, an 'agreement' for the purpose of 31(3)(a) need not take the form of a treaty or other written agreement, nor does it need to be binding.[306] An agreement could be a decision adopted by a meeting of parties to the treaty.[307] For example, a 2001 consensus decision of states parties to the Law of the Sea Convention extended the deadline for submissions to the Commission on the Limits of the Continental Shelf, effectively amending Article 4 of Annex II to UNCLOS.[308] This flexibility may make it difficult to distinguish an agreement under 31(3)(a) from subsequent practice establishing agreement under 31(3)(b), and the ICJ has on occasion been reluctant to clarify whether it is subsequent practice or agreement that is involved in

[304] Linderfalk (2007), 165.

[305] ILC Subsequent Practice, draft Conclusion 6.

[306] *Ibid*, draft Conclusion 4.

[307] Aust (2013), 213.

[308] Barrett (2016), 17–8; see also Treves (2005), 55, 69.

a particular case.[309] However, the ILC identifies the crucial distinction as being that whereas 'an agreement of the parties can be identified as such, in a common act or undertaking', in the case of subsequent practice it is 'necessary to identify an agreement through separate acts that in combination demonstrate a common position'. While 31(3)(a) 'presupposes a deliberate common act or undertaking by the parties', 31(3)(b) 'encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty that contribute to the identification of an agreement'.[310]

Provided the conditions of 31(3)(a) are met, the agreement may take the form of a resolution or other decision of an organ of an international organisation.[311] For example, the renaming of the 'ECU' as the 'Euro' through the conclusions of the European Council.[312] In the context of the Charter, a subsequent agreement could take the form of a resolution of the General Assembly, the organ in which all UN Members are represented.[313] This is supported by the analysis of the Friendly Relations Declaration by the ICJ in *Nicaragua*.[314] The Court, in holding that the Declaration may contribute to the formation of customary international law, observes that '[t]he effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation"', thereby

[309] E.g. in *Libya/Chad* the Court appears to consider subsequent agreements and practice together as 'subsequent attitudes', paras 66–71.

[310] ILC Subsequent Practice, draft Conclusion 4, commentary paras 9–11. See *CCFT v USA*, paras 184–8, also section 3.3.

[311] Akande (2018), 240–1; ILC Subsequent Practice, draft Conclusion 12, commentary paras 12, 18, 20; Boyle (2005), 572.

[312] ILC Subsequent Practice, draft Conclusion 12, commentary para 12; Hafner (2013), 109.

[313] Higgins et al (2017), 418 fn 38; Gray (2018b), 602.

[314] UNGA Res 2625, Annex, adopted without a vote. See Jimenez de Arachaga (1978), 32; Schachter (1982), 113.

implying that adoption of the resolution could indeed be understood as an elucidation of treaty commitments undertaken in the Charter.[315]

For a new interpretation of the Charter to be reached through either subsequent agreement or practice under the rules codified in Article 31(3)(a) and (b), the agreement must be that of all parties to the Charter. A resolution of the Assembly must therefore be adopted by unanimity or consensus to constitute a subsequent agreement under that provision.[316] In addition, all UN Members must be present and voting, otherwise the adoption of the resolution will not establish the agreement of *all* parties to the Charter.[317] Members which abstain are considered as not voting, and Members may also make a declaration of non-participation, or simply be absent.[318] As a result, examples of General Assembly resolutions that constitute subsequent agreements of all parties are rare.[319] For example, the Universal Declaration of Human Rights[320] was adopted in 1948 at a meeting at which all 58 UN members were present, but the eight abstentions and two non-voting members mean that the resolution did not constitute a subsequent agreement of all the parties under 31(3)(a).[321] However, although it cannot constitute an agreement under

[315] *Nicaragua*, para 188; ILC Subsequent Practice, draft Conclusion 12, commentary para 20.

[316] *Whaling*, para 46. Consensus here also includes decisions 'without a vote', see Schermers and Blokker (2005), §775; on consensus, see Kamto (2007), 59.

[317] See Akande and Tzanakopoulos (2018), 946; also Qureshi's (2015) criticism of *US — Tuna II*, 34. Where a UNGA resolution is adopted without vote it may be difficult to determine whether the resolution constituted a subsequent agreement of all parties at the time of its adoption, as where there is no vote the UN voting records do not state the total number of members present. Non-participation in a vote is also not recorded in the result of the vote or the official voting record, Higgins et al (2017), 361–2.

[318] UNGA Rules of Procedure, Rule 86; Higgins et al (2017), 361.

[319] For the same reasons as given above in relation to Articles 108 and 109, interpretation through a 31(3)(a) agreement may be as difficult to achieve as formal amendment. See Boyle (2005) in the context of UNCLOS, 572.

[320] UNGA Res 217.

[321] Cf Schermers and Blokker (2005), §1255.

31(3)(a), a resolution of an organ which was not adopted with the agreement of all members may, if subsequently accepted by all other members so as to establish their agreement through practice, produce a conclusive interpretation of the treaty through subsequent practice under 31(3)(b).[322]

While adoption by all parties by unanimity or consensus is necessary for a resolution to constitute a subsequent agreement under 31(3)(a), it may still not be sufficient: it must be shown that there was in fact agreement in substance among all parties as to the interpretation in the resolution.[323] It will be important to consider the terms of the resolution and whether or not they actually evidence a common interpretation of the treaty provisions.[324] While it may be presumed that where the parties have adopted a resolution by consensus or unanimity they are in agreement as to an interpretation it contains, this presumption may be rebutted. For example, if in their statements in debate or in their explanations of vote parties make clear that they nevertheless do not accept the interpretation in the resolution, this will clearly negate the existence of an agreement, regardless of the unanimity or consensus vote.[325]

The ILC has taken the view that subsequent agreements *that have the effect of amending or modifying a treaty* are instead subject to Article 39 VCLT, which provides that '[a] treaty may be amended by agreement between the parties', and should be

[322] Akande and Tzanakopoulos (2018), 946–7. See also (concerning a protocol signed or ratified by less than all parties), *Al-Saadoon and Mufdhi v UK*, para 120.

[323] Akande and Tzanakopoulos (2018), 946.

[324] See *US – Clove cigarettes*, para 267.

[325] Akande and Tzanakopoulos (2018), 946.

distinguished from 31(3)(a) interpretative agreements.[326] However, this is based on the flawed premise that interpretations and modifications of treaties are capable of being distinguished, discussed in section 3.3 below. In practice, it is difficult to see how a 31(3)(a) agreement will differ from an agreement to amend the treaty under Article 39 and, in most cases, it is not clear what difference this would make: neither Article 31(3)(a) nor Article 39 impose any requirements of form; both require the agreement of all parties if it is to be binding upon them all; and the value of an interpretative agreement of all parties and a treaty amendment is identical. The only difference would seem to be that Article 39 agreements must themselves be binding treaties (unless the treaty provides otherwise), whereas a subsequent agreement under 31(3)(a) may be binding in itself, but need not be.[327] In practice the distinction will likely turn on the intentions of the treaty parties as to whether they are engaged in interpretation or amendment of the initial treaty. The better view is therefore that a treaty is 'effectively amended' by an Article 31(3)(a) agreement.[328]

However, in the context of the UN Charter the distinction between Article 39 and 31(3)(a) does become relevant, due to Article 103 of the Charter. In normal circumstances, an agreement to amend a treaty under Article 39 VCLT is simply an application of Article 30(3) VCLT: where the parties to two successive treaties relating to the same subject matter are the same, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. Although it is amending the earlier treaty, it is the later treaty that is now the source of conventional obligations among the parties, to the extent they are

[326] ILC Subsequent Practice, draft Conclusion 7, commentary para 21.

[327] Although Article 39 VCLT also uses the word 'agreement', the second sentence of that provision – 'The rules laid down in Part II [Conclusion and Entry into Force of Treaties] apply to such an agreement except insofar as the treaty may otherwise provide' – suggests that the term should here be understood to mean a binding agreement, unless the treaty provides for a different amendment procedure.

[328] Aust (2013), 232.

inconsistent. However, where the earlier treaty is the UN Charter, and as expressly recognised in Article 30(1) VCLT, the rule in Article 30(3) will not operate and the conflicting obligations under the later treaty will not prevail over the Charter obligations. Unless it simultaneously amended Article 103 of the Charter, a subsequent binding agreement of all UN Members that purported to amend the Charter would be of no effect.[329]

However, subsequent agreements under Article 31(3)(a) need not be binding, and therefore need not themselves create any obligations. Moreover, they are in any case not inconsistent with Charter obligations since they are conclusively interpreting what those obligations are, and so do not fall foul of Article 103. As a result, subsequent agreements interpreting the Charter will need to be analysed as such under 31(3)(a), although in practice they have the same effect as an amending agreement under Article 39. Such agreements should be non-binding, such as a resolution of the General Assembly, and UN members would be wise to make clear in the drafting of the instrument that it is interpreting existing Charter obligations.

3.3 Interpretation of the Charter by subsequent practice

In certain cases subsequent practice confirms the initial, formal expression of the parties' will, while in other cases it modifies the text of the treaty or the previously existing legal situation.[330] This thesis is more concerned with the latter case, where subsequent agreement or practice causes the treaty to change over time as parties consent to new interpretations

[329] Cf the use of 'Implementation Agreements' as an alternative method of change to UNCLOS, Barrett (2016), 16–7; Boyle (2005), 565.

[330] Kamto (2007), 127; Amerasinghe (2005), 462–3.

of their obligations.[331] That subsequent practice can go beyond merely confirming or clarifying and produce a new interpretation was confirmed by the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The court held that the initial interpretation of Article 12(1), according to which 'the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda' had 'evolved subsequently' through 'accepted practice' so that it was now 'consistent with Article 12, paragraph 1, of the Charter' for the two bodies to deal with the same matter in parallel.[332]

There is no reason to think 'agreement' in 31(3)(b) means anything different from in 31(3)(a).[333] It is rather that the existence of an agreement is established in a different way. Whereas to show the existence of a 31(3)(a) subsequent agreement the agreement must take the form of a single act by all the parties together, for 31(3)(b) a collection of conduct, comprising multiple different acts by multiple different actors, may be used to demonstrate the existence of the agreement of all the parties.[334] Subsequent practice that establishes agreement under 31(3)(b) may consist of any conduct, including acts and omissions, but it must be conduct 'in the application of the treaty'.[335] Some authors have suggested that the practice must also be 'concordant and consistent',[336] but it is not clear

[331] Kamto (2007), 126; Arato (2013), 307. It is the requirement of agreement and consent that provides the 'meeting of will as a necessary condition for law-making' – it is not the case that through 31(3)(b) practice or fact alone can modify law cf Kammerhofer (2015), 639–40.

[332] *Wall*, para 28.

[333] Crawford (2013), 30.

[334] Kamto (2007), 133.

[335] ILC Subsequent Practice, draft Conclusion 4, commentary paras 17–18.

[336] Sinclair (1984), 137.

why this is necessary so long as it is established that the parties are in agreement; the practice need only be sufficiently coherent to allow the interpreter to identify the particular position on interpretation of the treaty to which the parties are agreeing.[337]

This alleged requirement of consistency may be the result of a misplaced analogy with the requirement of a consistent state practice for the formation of customary international law. Indeed modification of a treaty through subsequent practice is referred to by some as 'customary' or 'quasi-customary'.[338] There is a superficial resemblance between the two processes; however, the differences outweigh the similarities.[339] Customary international law comprises norms of general application, while the norms that result from the 31(3)(b) process remain limited in application to the treaty parties, and there is no practice supporting the existence of special customary international law among restricted groupings defined by a characteristic other than geography. While customary international law is generated by the practice of states, subsequent practice under 31(3)(b) can come from a wider range of actors, as will be discussed below. The *opinio juris* accompanying state practice for custom must be widespread and representative but need not be universal, whereas the subjective element required for 31(3)(b) is both more specific and more demanding: it must be the agreement of the states that are parties to the treaty, and it must be the agreement of all those parties.

[337] Kamto (2007), 130.

[338] E.g. Schermers and Blokker (2005), §232; Witschel (2012), para 10; Buga (2018), 223.

[339] See Kadelbach (2012), para 39.

To suggest that the two processes – formation of custom and interpretation by subsequent practice – are related or share an underlying basis, or that interpretation through 31(3)(b) constitutes a form of customary international law 'of the organisation' or 'treaty-related' custom is incorrect and risks confusion. Indeed, making the analogy with custom risks a further, more fundamental confusion, by wrongly analysing 31(3)(b) as also involving a two-step test. Unlike the test for formation of custom, for which the two elements of state practice and *opinio juris* must each be fulfilled independently, under 31(3)(b) the subsequent practice is only relevant to the extent that it establishes the agreement of all the parties. All that needs to be established for there to be a conclusive interpretation of the treaty is the agreement of all the parties, and thereby their consent to the treaty obligations; practice is just one means by which this may be demonstrated.

An argument is sometimes made that new norms of customary international law can modify treaty norms.[340] However this view, or at least this terminology, is misguided.[341] While such arguments rightly note the lack of hierarchy between the sources

[340] E.g. Dörr and Schmalenbach (2018), 762–3; Churchill (2005), 95–9. In support, Churchill refers to the ICJ's (rather ambiguous) recognition of the Exclusive Economic Zone as a customary concept in *Libya/Malta*, para 33, and argues that 'this new rule of customary law had modified Article 1 and/or Article 2 of the Convention on the High Seas', which requires that this area be treated as high seas. However, as only Malta was party to the Convention the parties had agreed that it was 'not as such applicable in the relations between them' and 'that the dispute is to be governed by customary international law', para 26. It therefore cannot be concluded that the Court viewed the customary norm as having modified the treaty. Malta's commitment to allow freedom of fishing between 12 and 200 miles was only undertaken towards other parties to the 1958 convention, and there was nothing to stop Malta relying on the new customary concept of EEZ vis-à-vis a non-party. Churchill makes a similar argument regarding the ICJ's recognition as custom of a twelve-mile fisheries zone in *UK v Iceland*, para 52. However, Article 2 of the High Seas Convention provides that freedom of the high seas, including fishing, is 'exercised under the conditions laid down by these articles and by the other rules of international law'. This *renvoi* to custom means it is not necessarily inconsistent with the convention for new customary international law to impact the content of that freedom after the treaty's adoption. Cf Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, para 6. In any case, the Court seems to take the view that the case turned on the 12-mile fishery zone applying in relations between Iceland and the UK as a subsequent *lex specialis*, or even estoppel, para 54. See Separate Opinion of Judge Waldock, para 22.

[341] E.g. while much of Buga's analysis of the relationship between the two sources is correct, it is found in a section confusingly entitled 'Treaty Modification by Subsequent Customary Law' (2018), 213.

of international law,[342] they overlook the independence of those sources from each other. It is not a question of hierarchy but of the formal requirements for modification or creation of each source. Each source has its own legislative process and to effect a change in a norm of a particular source its specific requirements must be fulfilled. Crucially, in addition to the differences identified in the preceding paragraph, the subjective element for both sources is specific *to that particular source*: to identify a customary norm the *opinio juris* must be the acceptance that a certain conduct is required *by customary international law*, not by treaty law or some other unspecified norm of international law.[343] Equally, to interpret a treaty norm the agreement of parties must be *as to the interpretation of that treaty*, not some other international law norm of a different source. It is not sufficient that states accept that international law *generally* contains the rule. As a result, fulfilling the requirements for identification or modification of a customary or treaty norm will not necessarily lead to the fulfilment of the other, even where both norms relate to the same subject matter, as the requirements of the two sources do not completely overlap. Moreover, precisely because of the lack of hierarchy between the sources, a norm from one source of international law cannot affect the validity of a norm of another source, even where they conflict. The only customary norms that can modify and even invalidate treaty norms are *jus cogens* norms, which are rightly recognised as exceptional for that reason.

The validity and contours of customary and treaty norms that relate to the same subject matter must therefore be analysed independently, according to the requirements specific to each source of international law. The identification of a new norm of customary international law may lead to the reinterpretation of a treaty norm on the same subject

[342] E.g. Pellet (2021), 342.

[343] Bellinger and Haynes (2007), 446–7.

matter so that the content of the two norms becomes identical, but this will only be the case if the practice of all the treaty parties also establishes their agreement to the new interpretation. Conversely, a new interpretation of a treaty by subsequent practice may generate an identical customary norm, but only if the practice in application of the treaty constitutes or forms part of a state practice that is widespread and representative and, as discussed in the previous chapter, there is evidence not only of the agreement of the treaty parties as to the new interpretation of the treaty norm but of *opinio juris*; that is, that states accept that conduct is *also* required by a norm of customary international law.[344]

Thus, factually change in a customary norm may coincide with change in a similar norm of treaty law and vice versa. However, there is no necessary connection. It is *not* the customary norm that is modifying the (previously conflicting) treaty norm. At most one can say that the new state practice that constitutes the customary norm has influenced the interpretation of the treaty norm by the parties and in this way led to them coming into alignment. Where this does not occur, the conflicting norms will exist side by side, although interpretation of the treaty norm in light of the customary norm through Article 31(3)(c) may reduce the conflict between the two norms, or the conflict may be resolved through the application of the doctrine of *lex specialis*.

3.3(a) Practice in application of the treaty

In the context of the UN, or any intergovernmental organisation, one can distinguish different kinds of practice:

[344] See Akehurst (1976), 276; Czapliński and Danilenko (1990), 40. Also chapter 3, section 2.2.

1. Practice of treaty parties/Members (states) acting outside the institutional context e.g. a state unilaterally using force against another state;
2. Practice of treaty parties/Members (states) acting in their capacity as a member of an organ of the international organisation e.g. when voting or making a statement in one of the organs of the organisation;
3. Practice of organs of the organisation, exercising their competences under the constituent instrument e.g. the adoption of a decision by the Security Council.

The distinction between categories two and three reflects the fact that an international organisation 'occupies a position in certain respects in detachment from its Members'.[345] Nevertheless, it may not be easy to distinguish between the second and third categories of practice, and they will often overlap factually.[346] The adoption of a resolution by the Security Council *qua* organ will also require action by Council members *qua* individual states that are members of that organ, through voting and making statements in the debate.[347] The situations in which action in the context of an organ is an act of the organ itself or of its members acting in their own name will also depend on the rules of the particular organisation concerned.[348] Since the practice must establish the agreement of all

[345] *Reparation*, 179.

[346] ILC Subsequent Practice, draft Conclusion 12, commentary para 22.

[347] As Brölmann (2011) observes, unlike states, activity within international organisations is not 'closed off' but leaves the individual members 'to some extent visible on the general legal plane', 286–7.

[348] The practice of the Organisation for Economic Cooperation and Development (OECD) provides many useful examples of this distinction due to its role as a forum for the development of treaties and other legal instruments which are not themselves acts of the organisation. For example, on 22 May 2019, in the context of the annual meeting of the OECD Council at ministerial level (which certain non-members are also invited to attend), two different instruments were adopted, one 'by the Council' and one 'at the meeting of the Council', although in practical terms both were adopted at the same event, on the same day, in the same room, and with the same actors present. OECD members, acting as the OECD Council, the organisation's governing body, adopted the *OECD Recommendation on Artificial Intelligence*, an act of the organisation; all OECD Members participated in the decision which was adopted by consensus, but the decision was that of the

the treaty parties, it will usually be their practice which is relevant, and the subsequent practice will tend to be that from the first and second categories above.

Article 31(3)(b) does not provide any indication of whose practice is to be taken into account,[349] suggesting that the subsequent practice need not be of the parties to the treaty themselves,[350] and *a fortiori* does not need to include the practice of all parties.[351] The VCLT also does not require that this must be practice of states.[352] As Gardiner notes, '[a] reasonable expectation is that relevant practice will usually be that of those on whom the obligation of performance falls, but obviously this depends on the nature of the obligation and treaty provision in issue'.[353] However, while providing a useful starting point for identifying relevant practice, limiting subsequent practice in application of the treaty *only* to the practice of those implementing the obligation created by the particular treaty norm being interpreted would be too restrictive. Not least because, if this were the case, it is unclear how subsequent practice could ever establish the agreement of all parties as to the interpretation of a treaty provision which does not create obligations for all parties. Similarly, if practice in application of the treaty were limited to practice implementing the provision concerned, it is unclear how subsequent practice could ever reinterpret treaty

Council. Then the Ministers or representatives of all OECD Members, acting this time in their capacity as individual governments, and joined by representatives of five invited non-Member states, adopted the *Declaration on Public Sector Innovation*. Declarations are legal instruments developed within the framework of the OECD but are not acts of the organisation.

[349] Gardiner (2016), 280.

[350] ILC Subsequent Practice, draft Conclusion 4, commentary para 22.

[351] *Ibid*, draft Conclusion 10, commentary para 13; Linderfalk (2007), 167; the WTO Appellate Body, which takes a relatively strict approach to 31(3)(b), has accepted that it may be fulfilled by the affirmative practice of some of the parties provided it is accompanied by the acquiescence of all others, Arato (2013), 314.

[352] Cf Kadelbach (2012), para 36; and Blokker (2016), 959.

[353] Gardiner (2016), 281.

provisions, as for such an outcome to occur the practice would likely need to depart from the previous interpretation of what implementation of that provision entailed.[354] In addition, especially where international organisations are concerned, the practice required may be in exercise of a discretionary power rather than an obligation, and what is required is not a sense of obligation, but 'a sense that the practice or conduct is lawful or not unlawful under the governing provisions of the constitution.'[355] The better view is therefore that practice in application of the treaty is not limited to that of the actor on whom an obligation falls, even if that actor's practice may carry particular weight.[356]

Practice 'in application of the treaty' should be understood more broadly,[357] as encompassing any conduct that demonstrates a party's position as to the interpretation of the treaty.[358] Practice in application of the treaty may even include practice in the application of provisions of the treaty other than the provision being interpreted.[359] Conduct in application of the treaty can include:

> not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at

[354] Cf Churchill (2005), 99. To the extent that inconsistent practice occurs before it has led to reinterpretation of the treaty, it obviously may give rise to the usual consequences for breach of treaty obligations.

[355] Amerasinghe (2005), 51.

[356] *South-West Africa* (Advisory Opinion), 135–6.

[357] Linderfalk (2007), 166–7.

[358] Thus, where the practice does 'not appear to be connected with interpretation of the terms of the […] treaty', it cannot constitute subsequent practice under 31(3)(b), *Kasikili/Sedudu*, paras 73–5.

[359] *Constitution of the Maritime Safety Committee*, 168–9.

> a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements[360]

Fundamentally, what an interpreter is concerned with in applying 31(3)(b) is whether the agreement of all parties has been established, and parties can demonstrate their agreement to an interpretation of the treaty in other ways besides simply implementing the obligations it creates.

3.3(b) Agreement and acquiescence

Interpretation of the constituent instrument will be implicit in measures adopted by organs when exercising their powers under the constituent instrument.[361] Indeed, 'the whole process of consideration in the organ generates a wealth of assertions and observations which are evidence of the attitudes and convictions of the Governments regarding the more specific meaning of the Charter norms'.[362] However, organ practice alone, the third category listed above, cannot produce a conclusive interpretation under Article 31(3)(a) or (b), unless an act of that organ itself fulfils the requirements to constitute a subsequent agreement of all parties, such as the adoption of a resolution by the General Assembly as described above. Organ practice may, however, be relevant as part of the context in which existence of an agreement is established. The reactions of treaty parties to that practice may establish whether they agree to an interpretation of the constituent instrument adopted by

[360] ILC Subsequent Practice, draft Conclusion 4, commentary para 18.

[361] Schachter (1994), 6.

[362] Schachter (1993), 180; Brölmann (2011), 520.

an organ. The question is always whether practice as a whole establishes the agreement of all members as to the particular interpretation of the Charter.[363]

Article 31(3)(b) could be fulfilled if, in response to practice by a UN organ (or even by a subset of UN Members in some other context), the agreement of all parties to the interpretation of the Charter evidenced by the organ practice could be established through their subsequent practice.[364] In this situation, it is not the organ practice that is the 'subsequent practice establishing agreement' for the purpose of Article 31(3)(b). It is the practice of the subset of parties acting as members of that organ, combined with the reaction of all the other treaty parties to that practice – which may be expressed through statements, action to implement a resolution or silent acquiescence, as discussed below – which constitutes the subsequent practice establishing the agreement of all parties to the interpretation. The organ practice is factually relevant, as it is this which generates the reaction of the treaty parties and may be analysed as a supplementary means of interpretation under Article 32 VCLT. However, the agreement must still be that of the parties to the treaty, and it must be the agreement of all the parties.[365]

The point is well illustrated by the *Namibia* Advisory Opinion.[366] The Court had to decide whether the Security Council resolution requesting the opinion, on which two permanent members had abstained, was consequently not validly adopted by an affirmative

[363] See *Certain Expenses*, Separate Opinion Fitzmaurice, 201–2.

[364] ILC Subsequent Practice, draft Conclusion 12, commentary para 8.

[365] *Whaling*, para 83; *Nuclear Weapons in Armed Conflict*, para 27; Amerasinghe (2005), 463.

[366] Cf Fassbender (2009), who considers this an example of the parties circumventing Articles 108 and 109 of the Charter and effecting an amendment under Article 39 VCLT, 137. As noted above, this is inconsistent with Article 103 of the Charter.

vote of nine members including the concurring votes of the permanent members, as required by Article 27(3) of the Charter as drafted. In finding that the resolution had been validly adopted the Court relied on 'the proceedings of the Security Council extending over a long period' including 'presidential rulings and the positions taken by members of the Council, in particular its permanent members'. That is, the practice of the UN organ itself and of a subset of member states acting in the context of that organ. This practice evidenced an interpretation of Article 27(3) of the Charter: the presidential rulings and positions of members 'consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions.'

The practice of the Security Council and/or its fifteen members alone cannot constitute the 'subsequent practice establishing agreement' of all parties that is required to interpret the Charter in a manner contrary to the ordinary meaning of its terms. However, the Court concluded that the interpretation implicit in this practice 'has been generally accepted by Members of the United Nations and evidences a general practice of that Organization'.[367] It is the participation of Security Council members in the practice relating to abstentions combined with *the reaction of the other UN members* to that practice and the organ practice of the Council that constitutes the subsequent practice establishing agreement under 31(3)(b). The Court conspicuously does not speak in terms of 'agreement of all the parties', nor does it provide any explanation of how it reaches its conclusion that the practice 'has been generally accepted by Members'. However, UN practice shows that, well before 1971, all UN Members could be seen to have acquiesced in the interpretation allowing adoption of resolutions despite P5 abstention.[368] While that interpretation of 27(3)

[367] *Namibia*, paras 21–2; Arato (2013), 323.

[368] Amerasinghe (2005), 52.

had been challenged on the basis that it was incompatible with the Charter, such objections were only made in the initial years of the Council's operation.[369] By 1954, long before the Court was called to decide on the matter, the interpretation of 'concurring votes' as including abstentions had been confirmed by a Presidential Ruling – adopted by the Council by consensus[370] – and all five permanent members,[371] and the rule that abstentions are not an obstacle to unanimity as abstaining states are considered rather as 'not voting' had also become well established in the practice of the General Assembly since its first session.[372]

So, while establishing agreement among all treaty parties is a stringent requirement, it is not necessarily an explicit or active expression of agreement by all the parties that is required; their acquiescence will suffice.[373] The practice establishing agreement of all the parties may include their silence 'when the circumstances call for some reaction'.[374] As the Court held in *Nuclear Weapons in Armed Conflict*, the simultaneously institutional and conventional character of constituent instruments deserves special attention when such treaties are being interpreted.[375] The 'cooperative context' of an international organisation clearly constitutes one of the circumstances in which reactions may more readily be

[369] IDI (2019), 139. See statement by the Cuban delegate in debate preceding adoption of Security Council resolutions on North Korea in 1950, UN Doc S/PV.476, 7.

[370] Schermers and Blokker (2005), §1323.

[371] IDI (2019), 143.

[372] Schermers and Blokker (2005), §824; UNGA Rules of Procedure, Rule 86.

[373] Kamto (2007), 134–5; Kadelbach (2012), para 39; Boyle (2005), 571 (on the effect of the 1994 Agreement on the Implementation of Part XI of UNCLOS).

[374] *Preah Vihear*, 23–4; ILC Subsequent Practice, draft Conclusion 10 and commentary paras 13-4; Churchill (2005), 101–3.

[375] *Nuclear Weapons in Armed Conflict*, para 19.

expected and, in certain circumstances, acceptance of the practice of other parties and the position on interpretation that this reflects may be assumed in the absence of evidence to the contrary.[376] Members are engaged in a collective undertaking, have access to documentation about activities of and within the organisation and have the opportunity easily to express their lack of agreement through the organisation's institutions. The fact that in a recent informal Security Council meeting six states felt the need to stipulate expressly that lack of response to another state's Article 51 report should not be taken as acquiescence in the legality of their use of force illustrates the expectations that may otherwise be generated in that context.[377]

At the same time, given the scope of the UN's activities and the volume of documentation produced it would not be reasonable to say that a Member should be deemed to have been aware of everything occurring in the organisation and, in the absence of any adverse reaction, to have accepted it. There are few states with the resources to monitor everything that happens across the UN system.[378] However, where conduct takes place in an organ of which a state is a member, and has been continuing for a sufficient length of time that the member may reasonably be assumed to be aware of it, or has been widely publicised, then in the absence of any objection their acquiescence, and thereby their agreement to an interpretation of the Charter it represents, may be assumed.[379] Thus, where

[376] This assumption appears to underlie the Court's reasoning in *Application of the Interim Accord*, paras 99–101; ILC Subsequent Practice, draft Conclusion 10, commentary paras 8, 21. See also *UK v Norway*, 138–9 (in the context of establishing custom).

[377] S/2021/247, 14 (Austria), 25 (Denmark), 47–8 (Liechtenstein), 50 (Mexico), 51 (Norway), 68 (Russia); although cf 64 (United Kingdom).

[378] See statement of Ireland, *ibid*, 43. Churchill (2005) makes a similar point regarding UNCLOS, 102.

[379] See *EC – Chicken Cuts*, para 272. Liechtenstein and Mexico both cited lack of transparency in the making of Article 51 reports and deficiencies in their circulation to all Members as reasons why 'any silence cannot be taken as acquiescence to particular Article 51 positions put forth in the reporting' S/2021/247, 47–8, 50.

a high-profile General Assembly resolution is clearly purporting to interpret the Charter – as in the case of the Universal Declaration of Human Rights or the Friendly Relations Declaration – failure to object to the interpretation on the part of a member who abstained or did not participate in the vote will quickly be understood as acquiescence in the interpretation it contains.

Where the interpretation is only implicit in conduct, either of Members or of an organ, acquiescence will be less readily inferred. Generally, it seems that failure of other members to react to a single incidence of a conduct by a lone state should not be understood as acquiescence in a new interpretation of the Charter. For example, a single incident of a state purporting to use force in a situation clearly not currently permitted under Article 2(4) would be unlikely to generate an expectation that other members needed to reject the practice. It is clear that what is occurring is a breach of the treaty. However, where such a practice appears to be gaining momentum, as the practice is repeated and participated in by more members, this may create an expectation that other members would object if they considered this to represent a repeated breach of existing Charter obligations, and if not their non-reaction may be understood as acquiescence in the implicit reinterpretation of the treaty. This can be seen in practice, as increasing reliance by states on a purported right of self-defence against non-state actors has generated a reaction, whereby a number of states have recently explicitly rejected such a right.[380] As a result, in practice, the assumption of acquiescence means that a Member wishing to prevent novel conduct leading to an interpretation of the Charter through subsequent practice under the rule in Article 31(3)(b)

[380] S/2021/247, Statements by Brazil, China, Mexico, Syria; 2017 statement by the 32 members of the Community of Latin American and Caribbean States (CELAC), A/C.6/72/SR.1, para 30.

may, in certain circumstances, need to object actively to the conduct and the new interpretation it reflects.[381]

Therefore, while it is argued by some that the interpretation of a constituent instrument based on the practice of organs of an international organisation is a departure from the consent-based VCLT rules,[382] if the subsequent practice establishing agreement is understood rather as the *reaction* of members to the organ practice, and if their agreement may take the form of silent acquiescence, then it is perfectly possible to accommodate examples such as the *Namibia* case within the VCLT. Moreover, in the same way that the institutionalised diplomacy of the United Nations has been shown to accelerate the development of customary international law,[383] the environment of an international organisation seems especially conducive to the interpretation of treaties through subsequent practice, as it allows for both a density of practice applying and interpreting the treaty, and more importantly the tacit awareness and acceptance which can establish the agreement of all the parties through subsequent practice for the purposes of 31(3)(b).[384]

As noted at the outset, the position taken here is that the agreement of *all* parties is the correct legal standard to apply in determining whether an interpretation of the Charter has been arrived at through subsequent practice. Yet it must be acknowledged that in practice it is rare that discussions of Charter interpretation take place in these terms. As Schachter notes, 'interpretation in UN bodies is essentially political in the sense that

[381] Schermers and Blokker (2005), §1155.

[382] Brölmann (2011), 520–1.

[383] See Higgins (1969).

[384] Schermers and Blokker (2005), §1155, §1342.

disputes about interpretation are resolved mainly by what member states desire as a matter of policy'.[385] This is not to say that law and procedure play no role in shaping behaviour or are totally subordinate to power and politics; to the contrary, international law and the law of the Charter, and the legitimacy they generate, have a significant influence over political behaviour within the UN.[386] However, situations such as the *Certain Expenses* or *Namibia* cases where a dispute cannot be resolved through political proceedings and is pushed so far as to become a question of the correct legal interpretation will be the exception. All this has led some to conclude that the required legal standard to produce a binding interpretation of the Charter through subsequent practice is lower than that set out above, and may be satisfied by interpretations reached by less than all UN members, or by UN organs. These arguments are addressed in the following two sections. The better view is that the politicised environment of multilateral diplomacy often obscures the applicable legal standard.

3.3(c) Interpretation through subsequent practice or agreement without the agreement of all parties

It has been suggested that the institutional context of the UN may do more than simply facilitate the fulfilment of the requirements of 31(3)(b); it is argued by some that it may also have modified those requirements so that the process of using subsequent practice to interpret the Charter is less stringent. Arato, for example, notes that in *Certain Expenses* the Court relied on the practice of UN organs to interpret the Charter, in that case the meaning of 'expenses' in Article 17(2). However, he argues that that practice was not

[385] Schachter (1994), 7.

[386] Schachter (1993), 173–4. Cf Petman (2011), 400.

accompanied by the agreement of all UN members as required by 31(3)(b), since a number of the General Assembly resolutions on which the Court apparently relies in its opinion were adopted in the face of opposing votes.[387] It may thus be argued that, in accordance with Article 5 VCLT (and the customary norm it reflects), which provides that the VCLT rules apply to constituent instruments 'without prejudice to any relevant rules of the organization', the established practice of the UN derogates from the requirements of Article 31(3)(b) so that an interpretation of the Charter must take into account not only an agreement of all the parties, but also an agreement of less than all the parties, for example in the form of a majority vote.[388] While it is correct that the relevant rules of an international organisation may derogate from the VCLT rules in this way, this is not the best explanation of what is happening in the UN. The better view is that interpretation of the Charter through subsequent practice or agreement still requires the agreement of all Members, albeit that this may take the form of acquiescence.[389]

In *Certain Expenses* the Court does rely on resolutions adopted by two-thirds majority. However, these resolutions are not being relied on to interpret the Charter. The Court's opinion, although dealing with a variety of different legal questions, is clearly divided into two halves. Despite the Court's protestations to the contrary,[390] the first half of the opinion addresses the abstract question of what may be included within the 'expenses of the organization' in Article 17(2): a question involving the interpretation of the UN Charter. The Court concludes, based on analysis of the text, the drafting history, and the

[387] Arato (2013), 320.

[388] C Peters (2011), 639–41.

[389] See Schachter (1993), 113–4; Jimenez de Arachaga (1978), 32.

[390] *Certain Expenses*, 158.

practice of the organisation, that such expenses can include both the administrative and operational budget[391] and expenses relating to the maintenance of international peace and security.[392] In reaching these conclusions, the Court relies on the practice of the organisation but, contrary to Arato's suggestion, it places great emphasis on the fact that the Financial Regulations,[393] budget items,[394] resolutions,[395] and report[396] relied on were adopted 'with a unanimous vote', 'without a dissenting vote' or 'without opposition'. Indeed, the importance the Court places on the need for practice to evidence the agreement of all Members is demonstrated by the Court's treatment of the relevant budget resolutions that were *not* adopted unanimously. The Court goes out of its way to clarify that the 'adverse votes are attributable to the fact that the resolution included the specification of a controversial item - United Nations Korean war decorations'; that is, it stresses that the adverse vote did not evidence a lack of agreement as to the interpretation of Article 17 of the Charter on which the resolution was based, but was for other reasons.[397]

Turning to the second half, following punctuation to indicate a section break, the opinion continues:

[391] *Ibid*, 159.

[392] *Ibid*, 160–1, 165.

[393] *Ibid*, 159.

[394] *Ibid*, 160.

[395] *Ibid*, 161.

[396] *Ibid*, 161.

[397] *Ibid*, 161.

> The Court has considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions assigned by the Charter to the General Assembly and to the Security Council, with a view to determining the meaning of the phrase 'the expenses of the Organization'. The Court does not find it necessary to go further in giving a more detailed definition of such expenses. The Court will, therefore, proceed to examine the expenditures enumerated in the request for the advisory opinion.

It is clear that from this point onwards the Court is no longer interpreting Article 17(2); it is applying the interpretation reached in the first half of the opinion – the correct meaning of 'expenses of the organisation' – to the facts at hand, that is, the expenditures of the UNEF and ONUC forces. The first half of the opinion interpreted the Charter to show that expenses of the same kind as UNEF and ONUC – operational expenses related to peace and security – were capable of coming within 'expenses of the organisation' in 17(2); the second half of the opinion is concerned with whether they were actually considered to be such expenses by the General Assembly in the exercise of its budgetary powers under Article 17.

It is in relation to this latter question only that the Court relied on resolutions adopted by two-thirds majority.[398] Whether the General Assembly decided to treat the UNEF and ONUC expenses as expenses of the organisation or as costs that should be absorbed by the troop-contributing nations is not a question of interpretation of the Charter but of the General Assembly resolutions concerned. For this interpretative exercise, there

[398] *Ibid*, 174.

would therefore be no need to find the agreement of all UN Members, but only to determine the meaning of resolutions that were validly adopted pursuant to the Assembly's budget powers under Article 17 – and this requires only a two-thirds majority. This difference is further reflected in the language of the opinion which no longer refers to the 'practice' of the General Assembly but simply to how it has 'treated' the expenses of UNEF in the resolutions at hand.[399]

This analysis is confirmed by the Court's discussion of the expenses of ONUC, in which the same distinction can be seen. In determining whether the General Assembly had treated ONUC's expenses as expenses of the organisation, the Court relied on resolutions adopted in the face of opposition.[400] Yet when determining whether the Secretary-General had acted contrary to the Charter in implementing the Security Council resolution that established ONUC – a question requiring interpretation of the Charter and its allocation of competences among the different organs – the Court emphasises repeatedly that all the Security Council and General Assembly resolutions concerned were adopted unanimously or without a dissenting vote.[401] Far from departing from the VCLT standard that establishing an interpretation of the Charter through subsequent practice requires the agreement of all parties, *Certain Expenses* evidences the Court's scrupulous adherence to this rule.

3.3(d) Interpretation by UN organs

[399] *Ibid*, 175.

[400] *Ibid*, 178 (Resolution 1590 (39 for, 11 against, 44 abstentions); Resolution 1619 (54 for, 15 against, 23 abstentions); and Resolution 1732 (67 for, 13 against, 15 abstentions)).

[401] *Ibid*, 176–7.

A further variant of this argument is sometimes made, that the established practice of the UN derogates from the VCLT rules by allowing binding interpretations of the Charter to be made by UN organs, provided they are generally (but not necessarily universally) accepted by UN members. The UN Charter contains no provision as to who should interpret, much less who should provide binding interpretations of, the Charter. The closest is the provision in Article 96 for the General Assembly and other authorised organs and specialised agencies to request non-binding advisory opinions from the ICJ.[402]

The argument that organ interpretations are binding leans heavily on the drafting history of the Charter, despite the limited weight to be given to *travaux préparatoires* when interpreting constituent instruments.[403] During the San Francisco conference, Committee IV/2 recommended no draft text on who should have the power to interpret the Charter but adopted a report, in which it concluded:

> In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers.[404]

[402] See Higgins et al (2017), 12.11.

[403] E.g. *Admission of a State*, 8; *Certain Expenses*, Separate Opinion Spender, 184–5; also Schachter (1994), 7; Amerasinghe (2005), 56–7; Fassbender (2009), 133.

[404] UNCIO, Vol XIII, 668–9.

This seems obvious: an organ must, for the purposes of its everyday functioning, be able to interpret the Charter itself.[405] In doing so they are limited by the general rule of interpretation codified in Article 31 and so cannot, for example, adopt interpretations that are contrary to the text of the Charter. This possibility of auto-interpretation should be uncontroversial; in international law generally, it is primarily individual states that must in the first place interpret and apply norms of international law.[406]

This reasonable and practical observation by the drafters is far from evidencing any intention that UN organs should be able to produce interpretations of the Charter that are binding on all members and all other organs.[407] It seems unlikely the Charter drafters envisaged that, in addition to the specific power to make binding decisions under Article 25, and without express provision in the Charter, interpretations that are *per se* binding on all other UN Members could be made by the fifteen Members of the Security Council, much less by other bodies outside the main political organs, to which the same principle would apply.[408] It cannot be the case that a UN organ's determination of its own powers must be conclusive and final.[409] This is supported by the drafting committee's further observation that 'two organs may conceivably hold and may express or even act upon different views.' The right of auto-interpretation obviously creates a risk that diverging

[405] Akande (2018), 236.

[406] Schermers and Blokker (2005), §1387.

[407] Tzanakopoulos (2011), 113.

[408] See Schachter (1993), 187; cf Amerasinghe (2005), 55, arguing that this is precisely what occurred in *Namibia* and '[i]t must be assumed that there was an implied agreement among all members to this position at the time the constitution was adopted'.

[409] *Certain Expenses*, Separate Opinion Fitzmaurice, 203; Dissenting Opinion Bustamente, 304; Fassbender (2009), 135; cf Osieke (1983).

interpretations will undermine the functioning of the organisation,[410] and even that Members must, at least initially, conform to an interpretation reached by an organ with which they and other organs disagree.[411]

The view that UN organs can conclusively interpret the Charter would also seem to lead to the troubling outcome that the Security Council could never be wrong in its interpretation of its own powers under the Charter, and thus could never act *ultra vires*; a view that has been roundly rejected in scholarship and practice.[412] The Security Council undoubtedly has wide-ranging powers to make Chapter VII decisions that are binding on all members under Article 25 and to make critical determinations of the existence of any threat to the peace, breach of the peace, or act of aggression.[413] However, this is not the same as saying it has *kompetenz-kompetenz* to decide the extent of its own powers; recall the distinction drawn above between the terms of the conferral of powers to organs under the treaty, and the exercise of those powers by organs. As an organ created by the Charter, the Council's competence is limited to those powers granted by states under the treaty,[414] and Chapter VII decisions are only binding to the extent they are valid exercises of those powers under the Charter.[415] The ICJ has stated that each organ must 'in the first place'

[410] Schermers and Blokker (2005), §1387; Kadelbach (2012), para 73.

[411] Klabbers (2018), 86.

[412] E.g. *Tadić*, para 28; Akande (1997), 314–5; Tzanakopoulos (2011), 83.

[413] The Council's discretion on these matters, although not unlimited, may well be very broad. See *Lockerbie*, Dissenting Opinion Weeramantry, 60, 66.

[414] See UN Charter Article 24(1); *Lockerbie*, Dissenting Opinion Weeramantry, 56; *Certain Expenses*, Dissenting Opinion Bustamente, 304; Akande (1997), 315; Tzanakopoulos (2011), 57–8; Franck (1992), 523. Also A/PV.1405, Statement by the USA.

[415] Akande (1997), 335. See *Certain Expenses*, Dissenting Opinion Bustamente, 304; *Lockerbie*, Dissenting Opinion Weeramantry, 66; Tzanakopoulos (2011), 59. There may also be obligations outside the Charter which limit the Council's powers, see generally *ibid*, 69ff; Akande (1997), 317ff.

determine its own jurisdiction, not that they have the last word.[416] Only UN members as a whole can provide a binding interpretation as to the scope of the Council's powers.[417] The Security Council, like any UN organ, can apply the rule in Article 31 to interpret the extent of its own powers under the Charter, but it may be mistaken, including in the purported exercise of its powers under Chapter VII.[418] This is the case regardless of the practical obstacles to obtaining a judicial determination of the (il)legality of Council action.[419]

The Committee continued:

> It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may always be accomplished by recourse to the procedure provided for amendment.[420]

The first sentence quoted above is often interpreted *a contrario* to mean that where an interpretation by an organ is generally acceptable it will have binding force.[421] However, the sentence as written does not seem to be proposing anything so radical; rather, it seems to be providing reassurance that clearly such an interpretation does not have binding force,

[416] *Certain Expenses*, 168. See Akande (1997), 342; Klabbers (2018), 87.

[417] Tzanakopoulos (2011), 117. Even the ICJ's interpretations of the Charter in an advisory opinion will not be binding; in a contentious case they would only bind the parties.

[418] Tzanakopoulos (2011), 59, 68.

[419] See Tzanakopoulos (2011), 110–1.

[420] UNCIO, 668–9.

[421] E.g. Tunkin (1989), 287; IDI (2019), 106. See Schachter (1994), 7.

so in the event that the members do not accept an organ's interpretation they need not fear being bound by it. This analysis is in accordance with the subsequent sentence which contrasts organ interpretations with 'authoritative' interpretations, mentioning only the amendment process. The better interpretation of this statement is therefore that 'an interpretation which is rejected by some […] would be regarded as effective only if the treaty should be amended accordingly'.[422] Nevertheless, some continue to argue that an interpretation of the UN Charter by one of its organs will be 'authoritative' if it is 'generally accepted' and that there is no requirement of unanimous agreement among members in order for a UN organ to produce a conclusive and binding interpretation of the Charter through its subsequent practice.[423] However, this is correct only in the sense that the express, active agreement of all UN members is not necessary for subsequent practice to establish an interpretation of the Charter under 31(3)(b): as argued above, their silent, tacit acquiescence will suffice.[424]

In practice, since an interpretation by an organ will stand until it is reversed by that organ or overruled by a higher interpretative authority,[425] the acquiescence of members in that interpretation may lead to it becoming a binding interpretation through subsequent practice under 31(3)(b). This may create the appearance of – and in practice, differ little from – a situation where generally accepted organ interpretations are *per se* binding. However, it is not correct to say that a binding interpretation may be found under 31(3)(b) where an interpretation is generally accepted by most members but actively or explicitly

[422] Schachter (1993), 187.

[423] IDI (2019), 106–7.

[424] It is in this sense that Kunig (2006) seems to understand 'general acceptance', para 14.

[425] Amerasinghe (2005), 54; Tzanakopoulos (2011), 175.

opposed by even one. It would of course be possible in principle for the established practice of the UN to develop such a rule, which would derogate from Article 31(3)(b) VCLT by modifying the extent of the agreement required among the treaty parties or simply establishing a new rule allowing organs to produce binding interpretations. However, the examples cited to support such a view may be doubted on closer analysis.

The 'Uniting for Peace' resolution[426] is sometimes cited as an example of interpretation through subsequent practice effecting not merely a modification of Article 24 of the Charter but a 'constitutional shift' in the balance between the Security Council and General Assembly, allowing the latter to encroach onto the territory of 'international peace and security', which was the domain of the Council only. This new interpretation of Article 24 of the Charter was reached by an organ and without the agreement of all UN members.[427] However, this argument may be challenged on multiple grounds.

First, care must be taken to ensure that interpretation through subsequent practice does not lead to circular reasoning where the existence of the practice itself is used as a justification for its own lawfulness.[428] Even if Uniting for Peace really was a radical reinterpretation that went beyond the text and structure of the Charter as drafted, it may simply be that at the time resolution 377 was adopted the interpretation of Article 24 which underlay Uniting for Peace was not only not a conclusive or binding interpretation of the Charter, but not an interpretation that could be validly reached by the General Assembly through the application of the rules in Article 31. As Arangio-Ruiz argues, there is a

[426] A/RES/377(V) (52 votes for, 5 against, 2 abstentions, 1 non-voting member).

[427] IDI (2019), 123.

[428] Schermers and Blokker (2005), §1350F.

'tendency to justify in law anything that happens in the UN by assuming too easily either the modification or abrogation of Charter rules'. It must remain possible to find 'that there had been no modification of the law, that the article of the Charter had not disappeared, but that it had suffered, purely and simply, a breach'.[429]

Having said that, an interpretation that is not binding, and even an interpretation which does not comply with Article 31 VCLT, may nonetheless prevail in practice because those UN members who oppose it cannot mount an effective challenge.[430] While in 1950 five members actively disagreed with the view that the Security Council's 'primary' responsibility for peace and security left room for the General Assembly to exercise powers in that field, they lacked the numbers to prevent the General Assembly acting pursuant to its interpretation, since the supporters of the resolution could attain the requisite two-thirds majority for its adoption. For the same reason there was no possibility of seeking an advisory opinion at that time to address the question.[431]

Similarly, if the Security Council were to purport to adopt a resolution under Chapter VII that is based on, for example, an interpretation of its powers under the Charter that is inconsistent with the ordinary meaning of its terms or its object and purpose, and thus *ultra vires*, the resolution would not be binding, even though made under Chapter VII. However, this is separate from the issue of how a state could effectively challenge the validity and bindingness of the resolution, for which the possibilities are limited.[432]

[429] Arangio-Ruiz (1997), 25.

[430] Fassbender (2009), 135.

[431] Although where advisory opinions have been sought on questions of interpretation of the Charter, this has tended not to be by the dissenting minority but by the majority, Schachter (1994), 8.

[432] See Tzanakopoulos (2011), 110ff.

Combined with the presumption of validity of acts of UN organs that fall within the organisation's (very broad) purposes,[433] even where they may be irregular as a matter of the internal structure of the Charter, an objecting state may find itself with no choice but to tolerate interpretations of the Charter which it considers ill-founded, or else risk open disobedience to a procedurally and presumptively valid act of a UN organ.[434] Although this creates a risk that both the measures taken by an organ and eventually the organisation itself may suffer from a lack of legitimacy,[435] over time a disputed interpretation may come to be binding under the rule in 31(3)(b) as the rest of the membership acquiesces in practice applying it.[436] Those who opposed the interpretation when first advanced may find that, the ship having sailed, it is not worth continuing to expend political capital to sustain their objection. However, this does not mean the interpretation was – or should be held in retrospect to have been – binding, or even correct, from the moment it was first advanced.

In any case, it is far from clear that the Uniting for Peace resolution had as radical an impact on the Charter as is often portrayed.[437] While some interpret resolution 377 as asserting a novel power for the Assembly to *authorise* armed force, the Uniting for Peace

[433] *Certain Expenses*, 168; Tzanakopoulos (2011), 120; Kadelbach (2012), para 33.

[434] Some argue that as a last resort a Member could disregard an act it considers to be *ultra vires* and invalid, Amerasinghe (2005), 205; see also Akande (1997), 335; Tzanakopoulos (2011).

[435] Klabbers (2018), 79.

[436] Amerasinghe (2005), 206. For example, in the debates preceding the first post-Cold War Security Council resolutions authorising Members to take enforcement action, Iraq objected that the Council was unable to delegate its authority to states without Charter amendment. Other states objected on the ground that the delegation was excessively broad, see Blokker (2016), 555–6. However, these Members were not able to prevent adoption of Resolutions 665 and 678. The interpretation of Article 42 that allows the Council to authorise members to use force is now no longer challenged and it may be concluded that the practice of the Council and its Members, combined with the (eventual) acquiescence of all other Members has produced a binding interpretation of the Charter.

[437] See Orakhelashvili (2011), 49.

procedure has in practice taken a much weaker form.[438] In practice the most the Assembly has done is establish peacekeeping forces that operate based on consent. As a result, in adopting Resolution 377 the General Assembly set out a procedure for the exercise of powers which perhaps it had not yet exercised, but that it is far from clear it did not already possess under the Charter as drafted: the exercise of its powers of *recommendation* in relation to matters of international peace and security.

Such an interpretation can be accommodated within the text of the Charter and reached simply by applying the rule of interpretation in Article 31(1), so does not require the agreement of all parties to 'override' or disregard any of the interpretative elements. Any UN organ is perfectly entitled to reach such an interpretation when exercising its competences under the Charter. Despite the devotion of considerable time and discussion to the issue in the pleadings,[439] the Court's opinion in *Certain Expenses* does not explicitly address the legality of Uniting for Peace. However, the Court upholds the interpretation of Article 24 on which Uniting for Peace was based and does so on a textual analysis of the Charter.[440] Thus, since the Assembly adopted resolution 377 pursuant to an interpretation of the Charter that it was perfectly entitled to take, it would rather have been for those states opposing that interpretation to show that, despite the text of the Charter, subsequent practice or agreement had previously interpreted Article 24 so as to narrow its meaning, and that 'primary' had indeed been understood, pre-1950, as meaning 'exclusive'. Since

[438] Jimenez de Arachaga (1978), 129. Without mentioning Uniting for Peace, the Court in *Certain Expenses* made clear that authorisation of enforcement action is for the Security Council only, and so inhibited the development of practice in this direction, 163–4.

[439] See *ibid*, Written Statement of the Kingdom of Denmark, 154–5; Written Statement of Canada, 216–8; Verbatim Record 1962/26, Minutes of the Public Hearings held at the Peace Palace, The Hague, from 14 to 21 May and on 20 July 1962, Statement of M Cadieux, 301; Statement of Mr Evensen (Norway), 354; Statement of Mr Chayes (USA), 422–3.

[440] *Certain Expenses*, 163.

they were unable to show this, there was nothing to prevent the General Assembly interpreting Article 24 in accordance with the rule in Article 31(1) to determine its own competence, as foreseen at the time of drafting of the Charter.

Finally, it has already been argued that a close reading of *Certain Expenses*, far from supporting the view that General Assembly resolutions adopted with opposition can conclusively interpret the Charter, instead seems to confirm that an interpretation of the Charter cannot be established through subsequent practice without the agreement of all UN members. This is also true of the Court's approach to Uniting for Peace, and can explain a further oddity of the Court's opinion: that when the Court upholds the interpretation of Article 24 of the Charter on which Uniting for Peace was based it does so – as noted above – through an analysis based on the text of the Charter, not subsequent practice, despite the fact that by 1962 the procedure had been employed on numerous occasions,[441] and despite the court's reliance on practice in other parts of the judgment. This may be explained by the fact that, both at the time of the debate preceding the adoption of the resolution establishing UNEF,[442] and in its oral submissions before the ICJ, the USSR did not merely oppose the stronger reading of Uniting for Peace as allowing authorisation of force, but argued that 'it is not within the competence of the General Assembly to take decisions regarding questions requiring action to maintain international peace and security. Such are the provisions of the Charter.'[443] Therefore, it was clear that at the time UNEF was established there was not even agreement among all members as to the interpretation of

[441] Resolutions 498(V) and 500(V) on Korea; the Second Emergency Special Session (November 1956) on the Situation in Hungary; the Third Emergency Special Session on Lebanon (August 1958); and the Fourth Emergency Special Session on the Democratic Republic of the Congo (September 1960), as well as Resolution 1001-ES-1 itself establishing UNEF at the First Emergency Special Session.

[442] A/PV.567, para 292 (Kuznetzov).

[443] *Certain Expenses*, Verbatim Record, Statement of Mr Tunkin (USSR), 399.

Article 24 of the Charter that would permit the Assembly to establish a consensual force through the Uniting for Peace procedure.

If it were the Court's view that in the UN context the interpretation of a UN organ, coupled with the general – but not unanimous – acceptance of the practice by Members was sufficient to establish a binding interpretation of the Charter, then the USSR's continued objection would be no obstacle. However, if the Court's view was that subsequent practice can establish an interpretation only when coupled with unanimous agreement, and not in the face of even one Member's continued objection, then a textual argument that the Assembly was exercising powers it had always enjoyed under the Charter would be the only available route to finding the validity of the Uniting for Peace procedure, even in its weaker form. This is the approach the Court took.

Practice is only referred to very briefly in this section of the opinion, and it is not in relation to the interpretation of Article 24 but merely to confirm through practice the textual interpretation of 'action' in Article 11(2). The Court notes that 'under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity – action – in connection with the maintenance of international peace and security.'[444] Significantly, in the discussions prior to the establishment of UNEF, the representative of the USSR had explicitly accepted that the Assembly had this power under Uniting for Peace, and urged the General Assembly, *inter alia*, 'to appoint a United Nations commission to supervise the carrying out of the

[444] *Certain Expenses*, 165.

recommendations of the emergency special session', in effect agreeing that this kind of action was possible through Uniting for Peace.[445]

All this is not to say that a practice that is generally but not unanimously accepted by UN members will not have any interpretative value: a resolution supported by nearly all member states will still have a 'high degree of persuasive force' in interpreting existing Charter obligations.[446] Nor should the arguments above be taken as diminishing the importance of organ practice in interpretation of the Charter: the interpretations reached by organs every day in the course of exercising their powers and duties under the Charter have had a very significant impact in the interpretation, and evolution, of the treaty. The point is rather that the interpretations these organs can validly reach (without agreement of all members) are limited to interpretations that can be reached through the application of Article 31 and are not binding in themselves. While this may not make a difference in practice since in most cases members do not object to the interpretation on which an organ bases its action, the correct analysis is that it is only organ practice that is agreed to or acquiesced in by the rest of the membership that *must* be taken into account in interpretation and that can be considered to be conclusive as to the interpretation of a particular provision. Organ practice of less than all the parties remains a supplementary means of interpretation: it is to be used to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 is absurd or obscure. However, unless the agreement of all parties to the organ's interpretation is established, an organ cannot validly interpret the Charter in a manner that departs from the interpretation

[445] A/PV.562, para 75 (Sobolev).

[446] Schachter (1982), 119; Schermers and Blokker (2005), §1255, §1257.

reached through Article 31, and so cannot, for example, validly adopt an interpretation that is inconsistent with the ordinary meaning of the Charter's terms.

This accords with the position taken by the ILC in its draft articles on subsequent practice, which consider that practice or agreements of members of an organisation which do not meet the criteria under Article 31(3) may nonetheless be relevant as a supplementary means of interpretation under Article 31(2).[447] As Tams observes, '[i]n light of the difficulties of establishing a common understanding of all UN members, this "other subsequent practice" is significant.'[448] Schachter gives the example of the resolutions which condemned South Africa for its policy of apartheid, and thereby interpreted Members' obligations under Articles 55 and 56 of the Charter. The opposing votes of South Africa and one or two other states 'did not mean that the resolution was deprived of its evidentiary force as an interpretation of the Charter obligations applicable to all member States'. However, for organ practice to lead to a binding interpretation, it must be accompanied by at least the tacit consent of all member states.[449] A majority interpretation 'will be entitled to weight, but not be binding *ipso jure*'.[450]

Thus, while some have argued that the rules for the interpretation of the constituent instruments of international organisations – and the UN Charter in particular – derogate from the rules in Article 31 VCLT, the better view is that the Court was accurate in its description of its interpretative approach in *Nuclear Weapons in Armed Conflict*. The

[447] ILC Subsequent Practice, draft Conclusion 12, commentary para 14; also Schachter (1993), 188; Kunig (2006), para 14.

[448] Tams (2019), 127.

[449] Kadelbach (2012), para 69.

[450] Schachter (1982), 114 fn 205, 121.

interpretation of the Charter follows 'the principles and rules applicable in general to the interpretation of treaties', including Article 31(3)(b), but the nature, objectives, and practice of the organisation 'deserve special attention when the time comes to interpret these constituent treaties' and will influence how those rules are applied. Indeed, in that opinion the Court clearly rejects the view that a resolution of an organ of an international organisation, adopted by majority vote, could constitute practice under 31(3)(b).[451]

In the practice of the UN weight is given to the practice of UN organs in interpreting the Charter, but not to the extent that this derogates from the general rules codified in the VCLT. Subsequent practice under 31(3)(b) still requires the agreement of all the parties to the treaty, but the context of an international organisation means that there is an increased likelihood of finding agreement through acquiescence, and that practice may take the form of reaction to the practice of an organ. These specificities can thus be accommodated within the application of the general VCLT rules.[452]

3.3 Interpretation or modification?

The question of when change has occurred and how it can be defined is a complex one. Chapter two, which analysed how customary international law changes, argued that the identification, modification and interpretation of customary norms is in reality the same process: interpreting the practice and *opinio juris* of states in order to determine whether the test for identification of a norm of custom is met at the relevant time, and the contours of any such customary norm.

[451] *Nuclear Weapons in Armed Conflict*, para 27.

[452] Cf Gardiner (2016), 285.

With treaty norms, however, it seems that it should be possible to distinguish between the different processes of identification, modification, and interpretation for this source of law. The process of norm-creation and identification is formal and relatively straightforward:[453] the VCLT and customary international law set out criteria by which a valid treaty norm that is binding on the party in question may be identified.

In one sense, the interpretation and the modification of treaties can also be easily distinguished: they refer to two separate processes within the law of treaties, the first regulated by Articles 31–3 VCLT and the latter by Articles 39–41 (and the corresponding customary norms they codify). Yet much ink has been spilled attempting to identify a *conceptual* distinction between interpretations and modifications of treaty provisions.[454] There are clearly cases which can uncontroversially be classified as interpretation or modification. For example, using the ordinary meaning and context to interpret 'the parties' in Article 31(3)(a) VCLT as referring to the states bound by the treaty being interpreted, or a modification to the text of a treaty provision using its formal amendment process, respectively.[455] However, at the boundary between the two categories the distinction is difficult to draw.[456] Moreover, in the case of the Charter, in the absence of systematic and compulsory judicial review within the UN it is unclear who should draw it.[457] Even those

[453] D'Aspremont (2016), 270.

[454] See Arato (2013), 311. Application is best understood as a form of interpretation; see Linderfalk (2007), 12.

[455] Desuetude is another clear case of modification, as any rights and obligations under the provision are entirely extinguished.

[456] Aust (2013), 214; Klabbers (2018), 78 and fn 49; Akehurst (1976), 278.

[457] Kadelbach (2012), para 72.

who draw a conceptual distinction between the two – for example, that modification is only where the substance of the modification of the treaty provision 'conflicts' with the original contents of the provision – concede that the distinction is exceedingly difficult to apply in practice.[458]

Yet the conviction that such a distinction exists, and can sensibly be applied in practice, has generated a further controversy: where a given case falls into the *conceptual* category of interpretation or modification, can it only be effected by the *corresponding legal process* under the law of treaties? That is, if all the parties to a treaty, acting together, wish to give a meaning to a treaty provision, the nature of which is such that it inherently constitutes a modification of that provision, will the parties be unable validly to do so unless they use the correct legal process, that of amendment? In the VCLT rules at least, the legal processes of interpretation and amendment do exist independently of each other, and this distinction between the legal processes cannot simply be ignored or collapsed. Furthermore, even taking into account the diverging views and uncertainty as to where the line is drawn, for those who distinguish between the concepts of interpretation and modification, the kinds of changes to the *jus ad bellum* being considered here, which involve significant changes to Charter obligations, will likely fall on the side of modification.[459]

Attempting precisely to define and distinguish between the *concepts* of interpretation and modification of treaty provisions is not helpful. First, because the distinction is only relevant if it can be shown that it does indeed correspond to, or even

[458] Amerasinghe (2005), 460–1; Buga (2018), 135; Kammerhofer (2015), 646; Gardiner (2016), 275.

[459] E.g. Amerasinghe (2005), 460.

underlies, the limitations of what can be achieved through the various legal processes in the law of treaties. Yet, this is not the case. It is clear that there are limits on the interpretations that can validly be reached by an individual interpreter, such as a tribunal, applying Article 31; these flow from the terms of Article 31(1) and the contours of the customary rule it codifies. However, even if it were possible to draw a conceptual line between an interpretation and a modification of a treaty, it is not clear that there does exist any specific rule of treaty law, either in the VCLT or custom, that provides that *subsequent agreement of all the parties* under 31(3)(a) or (b) can only accomplish interpretation and not modification.[460] The rejection at the 1969 Vienna Conference of a draft article explicitly allowing modification of treaties by subsequent practice does not necessarily mean, as some argue, that states wished to exclude this possibility or considered it impossible, but rather that states did not wish to address the question at that time or in that context.[461] In discussions in the ILC, objections to the article were based more on concerns about how the draft article would cohere with the draft as a whole, rather than a rejection of the principle itself.[462]

In its recent work on subsequent practice, the ILC tentatively concludes that it is 'presumed that the parties to a treaty, by an agreement or a practice in the application of

[460] Although 'this is still an open issue of international law', M Fitzmaurice (2008); cf Alvarez (2013), 126. The discussion here concerns general treaty law and the Charter and should be distinguished from the specific debate about the interpretation/amendment distinction under NAFTA see, e.g. Brower (2006). There the interpretation/amendment distinction defines the limits on the competence of an organ created by NAFTA; the distinction is rather a question of interpretation of NAFTA, not of the definition of those concepts, or any consequences of the distinction between them, in international law generally, see *Pope & Talbot*, para 24.

[461] ILC Subsequent Practice, draft Conclusion 7, commentary para 26; Amerasinghe (2005), 462 and fn 42; Akehurst (1976), 277; cf Alvarez (2013), 126. In the VCLT 'modification' is not used as a synonym for amendment; indeed, Part IV seems to use the two terms to distinguish between a change to the treaty that applies to all the parties (amendment, Articles 39 and 40), and a change to obligations among a more restricted set of parties (modification, Article 41).

[462] Fitzmaurice and Merkouris (2015), 70–1; Buga (2018) 120, 131.

the treaty, intend to interpret the treaty, not to amend or to modify it.' This is not unreasonable – the presumption should be that if parties intended to amend the treaty they would have used the amendment provisions they created for this purpose. However, the ILC's conclusion that '[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized' is difficult to justify, and it is conceded in the commentary 'that there are examples to the contrary in case law and diverging opinions in the literature'.[463] In practice, it has frequently been shown that some legal processes of interpretation have been validly used to effect what, by any plausible definition, could only be described (conceptually) as a modification of a treaty provision.[464] Both before and after the VCLT, international courts and tribunals have used subsequent practice of the parties to justify interpretations that amount to treaty modifications.[465] The jurisprudence of the ICJ (particularly relevant since the analysis here concerns interpretation of the Charter) also does not suggest any general rule to that effect.[466] As a result, knowing whether the act of giving a particular meaning to a treaty provision is correctly categorised (conceptually) as an interpretation or a modification will not assist us in determining whether it has been carried out following a process which makes it legally valid.

Second, and more significantly, the interpretation/modification debate often fails to recognise that in the law of treaties not all interpretations are equal. Article 31 sets out the basic rule of interpretation of treaties, but an interpretation I arrive at through a correct

[463] ILC Subsequent Practice, draft Conclusion 7, commentary para 21; e.g. Aust (2013), 233.

[464] See the examples in subsection 4.1 below.

[465] Arato (2013), 311; Chesterman (2001), 58–9.

[466] ILC Subsequent Practice, draft Conclusion 7, commentary para 35.

application of its provisions will not be a binding or conclusive interpretation of the treaty. Moreover, there are limits to the interpretations that can validly be reached through my application of Article 31: an interpretation of a treaty provision that is incompatible with the ordinary meaning of the text or contrary to its object and purpose would not be a valid interpretation under Article 31. To effect such a change in the content of a treaty provision would require me to seek amendment of the treaty. However, no such limits apply to interpretations arrived at by all the parties, including under Article 31(3)(a) and (b). As interpretations agreed by all parties to the treaty, such interpretations will be not only valid but conclusive as to the interpretation of the provision, even if they run contrary to the ordinary meaning of the text, or the object and purpose of the treaty, as both were previously understood.

This latter point highlights the futility of trying to argue that Article 31(3)(a) or (b) allows for interpretation but not modification, even if it were possible to distinguish between the two concepts. Except for an interpretation contrary to *jus cogens*,[467] an interpretation arrived at by agreement of all the parties is unimpeachable,[468] and this includes the parties' agreement that the new meaning given to the treaty provision is one that may be validly arrived at through a process of interpretation, rather than modification. For example, Hafner, writing in the context of subsequent practice, adopts Kelsen's idea of the 'frame' of legal provisions to distinguish between the concepts of interpretation and modification.[469] The frame contains a range of possible meanings of the norm, and interpretation is the process by which one chooses between these possible meanings,

[467] Amerasinghe (2005), 214.

[468] ILC Subsequent Practice, draft Conclusion 10, commentary para 2; Linderfalk (2007), 170.

[469] Hafner (2013), 114. See also Kammerhofer (2015), 647.

whereas choosing a meaning outside this frame would constitute a modification of the norm. Yet determining the 'frame' of any particular provision will itself require an act of interpretation, and an interpretation arrived at by all the parties under 31(3)(a) or (b) will be conclusive. The law of treaties does not give any particular weight to the *actual, original* intention of the parties, which could fix the 'frame' of the provision and so place a limit on the possible interpretations.[470] Instead, in interpreting a treaty what matters is the parties' presumed intention and the meaning of the terms *as it is determined through the application of Articles 31–3 VCLT at the time of interpretation*.[471] As a result, the 'frame' will not act as a limit on what can be achieved through later interpretations *by all the parties*. If all the parties to the treaty wish to give a provision a particular subsequent interpretation then that same process will have the effect of interpreting the frame of the provision so that the new interpretation must be one of the possible meanings of the provision.

Any interpretation through subsequent practice will require the agreement of all the parties and an individual party (or a group of less than all the parties), even if they no longer consent to be bound, will not be able to free themselves from their obligations under the treaty except by acting in accordance with its provisions, for example, through a withdrawal procedure.[472] Thus, obviously an individual Member is incapable of amending the Charter.[473] However, acting together the parties as a whole are masters of the treaty and will always be able to override its provisions provided they all act collectively, and the

[470] Buga (2018), 142.

[471] ILC Subsequent Practice, draft Conclusion 8, commentary para 9; Kamto (2007), 123; ILC 1966, draft Article 27, commentary para 11.

[472] There are limited exceptions to this principle, notably VCLT Articles 61–4.

[473] *Admission of a State*, Dissenting Opinion Judges Basdevant, Winiarski, McNair and Read, para 19.

members of an international organisation will remain the masters of its constituent instrument.[474] As Schachter writes:

> If [the States parties to the treaty] all agree in a formal resolution that the Charter means what the resolution says it does, that will be regarded as 'authentic' (that is, authoritative) interpretation. It makes little difference that some commentators consider the interpretation as 'really' an amendment of the Charter. However, if the interpretation has less than unanimous support, dissenting States may deny its legal effect.[475]

José Alvarez rejects this position as reflecting 'a state-centric view of international law that should no longer prove persuasive for international lawyers'.[476] However, his objection is a normative one, motivated by concerns about democratic legitimacy, as less formal processes of interpretation may be seen as circumventing amendment provisions which require ratification by national legislatures;[477] it is not an objection based on the international law of treaties. While effecting modifications of a state's treaty obligations through processes of interpretation may cause the government's actions agreeing to the interpretation to be questioned domestically, it will not affect the validity of the interpretation on the international plane. Only where the domestic violation is 'manifest and concerned a rule of [the state's] internal law of fundamental importance', such as a

[474] Blokker (2016), 960.

[475] Schachter (1982), 113–4.

[476] Alvarez (2013), 130.

[477] See *Methanex v USA*, Second Opinion of Professor Sir Robert Jennings, QC (6 September 2001).

constitutional provision, is it possible that a state could claim that its consent to be bound by the new interpretation was invalid.[478]

4. Limits on interpretation through subsequent practice and agreement?

In light of the above, provided all parties are in agreement, there is (with the exception of *jus cogens*) no limit on the interpretations they may agree.[479] Since an interpretation through subsequent practice establishing the agreement of all parties will be conclusive as to the interpretation of the treaty's provisions, it will have the same legal effect as formal amendment and the distinction between modification and interpretation disappears.[480] Any limits on the process of interpretation by subsequent agreement or practice are therefore not legal, but political.[481]

The original intentions of the drafters, even if this is clearly evidenced in the *travaux*, do not impose any legal limit on interpretation through subsequent practice.[482] However, where a treaty has been drafted to provide for a formal amendment process, there is a normative argument to be made that 'creative interpretation' should not be used to undermine or circumvent those procedures.[483] This is particularly the case when the

[478] VCLT Article 46. Although the provision refers to conclusion of treaties, there seems no reason why the rule should not apply by analogy to their amendment and interpretation.

[479] Blokker (2016), 952; cf Fassbender (2009), 140.

[480] Kamto (2007), 133; Buga (2018), 141.

[481] Kadelbach (2012), para 72. See, e.g. debates preceding adoption of UNGA Res 53/30 as to whether a draft resolution amounted to an irregular amendment of the Charter by creating a new category of voting procedure in the Assembly, Repertory of Practice of United Nations Organs Supplement No 9 (Volume VI), Articles 108–9, para 13.

[482] Aust (2013), giving the example of UN Charter Article 27(3), 215.

[483] Aust (2013), 344; ILC Subsequent Practice, draft Conclusion 7, Commentary para 37; Kunig (2006), para 20; Amerasinghe (2005), 460.

amendment procedure in the treaty deliberately departs from the residual rule of amendment by unanimous agreement among all the parties, which is also that required for interpretations under 31(3)(a) and (b). Regardless of its merits, it is clear that the Charter's amendment procedure deliberately allocates the power to amend the Charter among UN Members and organs in a way that departs from the default rule of unanimity and equality of the treaty parties. Therefore, to adopt a significant new interpretation of the Charter through subsequent practice would, it may be argued, circumvent this procedure and, while legally valid, such an interpretation risks illegitimacy.

These arguments would be more persuasive if it were the case, as argued by some, that binding interpretations could be arrived at based on the practice of UN organs alone or without the agreement of all UN members.[484] This would mean that by bringing about *de facto* amendments to the Charter through processes of interpretation, members who would have the power to prevent such a change under the amendment procedure, such as a P5 member or a group of states amounting to more than a third of the General Assembly, would be deprived of this opportunity, and so would potentially be subject to an involuntary change in their obligations under the Charter in a manner which they had not anticipated when they became a UN member. However, as argued above, this is not the case. If interpretations through subsequent practice require the agreement of all parties, then a new interpretation could never be arrived at that would not also be possible – in principle – through the amendment procedures, which require the agreement of less than all the parties. Of course, since agreement may in certain circumstances take the form of presumed acquiescence it is possible that a binding interpretation could be arrived at of which a UN

[484] See Kadelbach (2012), para 37.

member is in fact neither aware nor in favour. However, such situations will be rare, and to prevent such a situation arising a Member would simply need to ensure that, in relation to activities of the organisation of which it could reasonably be assumed to be aware, it expresses its disagreement with any interpretations of the Charter it does not accept. Aside from Article 103, and the mere existence of the amendment procedures, there is no suggestion in the Charter that the parties are barred from modifying the Charter through processes other than those in Articles 108 and 109.[485]

In practice states may take the view that there are limits on the changes that may be effected through interpretation. However, these are not legal limits imposed by the law of treaties, but political positions taken by members. Most significantly, the kinds of interpretations of UN Charter provisions that would be required to change the *jus ad bellum* have already been accepted in the practice of the UN.

4.1 Practice demonstrating interpretations inconsistent with the text of the Charter

Interpretation through subsequent practice will not always involve doing violence to the treaty text.[486] However, subsequent interpretations of the Charter that would lead to, for example, the right of self-defence becoming available even where it is not the case that an 'armed attack occurs' (Article 51), or which would permit regional arrangements to take

[485] On UNCLOS, see Barnes (2016), 468. Cf Alvarez (2013), 128; O'Connell (2005), 21. Cf *Soering v UK*, para 103.

[486] E.g. *Certain Expenses*, 160.

enforcement action even 'without the authorisation of the Security Council' (Article 53), would appear directly inconsistent with the ordinary meaning of the Charter terms.

In Article 31(4) the VCLT recognises that a term may be interpreted to have a meaning that does not correspond to how it is ordinarily used. If it is possible for the treaty parties to give a special meaning to a term at the time of the drafting and conclusion of the treaty, then there seems to be no reason why they could not do so through a subsequent interpretation of a term by all the parties.

In practice, there are numerous examples of interpretation of Charter provisions through subsequent practice contrary to the ordinary meaning of the text. For example, the practice, developed since the 1950s, whereby two states split a two-year term as a non-permanent member of the Security Council, is directly contrary to the text of the Charter.[487] However, since it is now clear that all UN members agree or at least acquiesce in this practice, and the interpretation of Article 23(2) it represents, the inconsistency with the ordinary meaning of 'a term of two years' is no obstacle. In effect, it has subsequently been interpreted by the parties as having a special meaning.

Further examples of departure from the Charter text include the general disregard of the provision in Article 9(2) that Members are limited to five representatives in the General Assembly, and the replacement of formal votes in the General Assembly with adoption by consensus, which is not mentioned at all in the text of Article 18.[488] Similarly,

[487] E.g. during the 2016 elections of non-permanent members, Italy and the Netherlands agreed to split the 2017–18 term, Repertoire of Practice of the Security Council, Supplement 2016–17, 270 fn 3.

[488] See Higgins et al (2017), para 12.12 fn 39.

both ‘permanent observer’ status and peacekeeping operations are creations of interpretation through subsequent practice, neither being mentioned anywhere in the Charter.

The new interpretation may even depart so far from the text as to amount to an effective abrogation of the provision. The references to ‘enemy states’ in Articles 53, 77 and 107 of the Charter were accepted to have become obsolete long before the General Assembly affirmed in a resolution its intention to delete them from the text of the Charter, and despite Members’ continued failure to do so.[489] The ‘desuetude’ of a treaty obligation through contrary practice is generally explained as a form of tacit agreement of the parties that terminates or amends the treaty informally.[490] However, the same effect may be achieved through subsequent practice which in effect interprets the treaty provision as no longer creating any obligation or otherwise having any legal effect.[491] As noted above, the effect of Article 103 is that the Charter cannot be amended or terminated by a subsequent agreement, although it may be interpreted: as a result, the desuetude of these provisions could only have been achieved through interpretation.[492]

That subsequent practice can produce an interpretation contrary to the ordinary meaning of the text is confirmed in the jurisprudence of the ICJ. In most cases, the Court has used subsequent practice to confirm an interpretation arrived at through other means.[493]

[489] UNGA Res 50/52, para 3; Wood (2006).

[490] ILC, Fitzmaurice’s Second Report, 28; Wouters and Verhoeven (2008).

[491] See Akehurst (1976), 277.

[492] See O’Connell (2005), 21.

[493] Amerasinghe (2005), 49; Akande (2018), 238; Blokker (2016), 957.

However, in some cases, the Court has gone much further, using practice to justify very wide-ranging (re-)interpretations of Charter provisions, even where they seem difficult to reconcile with the ordinary meaning of the text of the Charter. In *Namibia*, the Court was called on to interpret Article 27(3), the relevant part of which reads:

> Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members

The Court's conclusion, that 'concurring votes' had been interpreted by subsequent practice to include voluntary abstentions by permanent members seems clearly contrary to the text of the provision. First, affirmative is a synonym for positive, suggesting active agreement that goes beyond an absence of opposition, while to 'concur' means to agree in opinion or coincide with something. Logically it would therefore seem that 'concurring votes' of the permanent members must also be affirmative – that is, positive – votes. This does not seem reconcilable with an abstention, which indicates neither a negative nor positive view.[494] Second, as is made clear later in the text of Article 27(3), an abstention is in any case not a 'vote'. One chooses to 'abstain from voting'; one does not vote for abstention. In the General Assembly a state that abstains is considered as not voting.[495] Therefore, even if 'concurring' could be understood broadly as 'not signify[ing] its objection', as seems to be the reasoning of the Court, it is difficult to see how an abstention can count as a vote. In its brief reasoning on this question, the Court does not even attempt

[494] Schermers and Blokker (2005), §824.

[495] UNGA Rules of Procedure, Rule 86. This is different from non-participation in a vote, see Higgins et al (2017), 361–2.

to engage in a textual analysis that could reconcile the practice with the text of 27(3). Its focus is rather on the general acceptance of the procedure followed for the adoption of resolutions under the provision as a whole. *Namibia* thus confirms that subsequent practice may be used to arrive at interpretations that are inconsistent with the text of the Charter.[496]

In the *Wall* opinion the interpretation arrived at through subsequent practice is also difficult to reconcile with the text of the Charter. Israel had contended that the General Assembly resolution requesting the advisory opinion had not been validly adopted due to Article 12(1), which provides that:

> While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

The Court's opinion is already noteworthy for its finding that subsequent practice had caused the initial interpretation of that provision to be replaced by a new interpretation.[497] However, it also illustrates how interpretations through subsequent practice may deviate from the text of the Charter. As the UN Legal Counsel, cited by the Court, expressed it: 'the Assembly interpreted the words "is exercising the functions" in Article 12 of the Charter as meaning "is exercising the functions at this moment"', imposing a significant qualification that does not appear in the text. The Court then appeared to go even further, finding that 'there has been an increasing tendency over time for the General Assembly

[496] Arato (2013), 323; cf Amerasinghe (2005), 55.

[497] *Wall*, para 27.

and the Security Council to deal in parallel with the same matter' albeit focusing on different aspects of the question: the Security Council on international peace and security, and the General Assembly on humanitarian, social and economic aspects.[498] This interpretation, which in effect subjects the restriction expressed in Article 12(1) to numerous exceptions and conditions, is difficult to reconcile with the clear 'shall not' language of the provision.[499]

It therefore seems that in practice when interpreting the UN Charter there is nothing to prevent an interpretation directly contrary to the text being reached through subsequent practice under 31(3)(b).[500] This accords with the argument above, that there is no legal limit on the interpretations that may be arrived at by all the parties acting in agreement.[501] However, this practice also provides an indication of what UN members will tolerate politically, in terms of what can be achieved through interpretation as an alternative to the formal amendment procedure, and it seems that Members have been happy to accept interpretations which could be characterised as effective amendments of the Charter text.

4.2 Practice demonstrating interpretations altering competences of UN organs

The Charter provisions that make up the *jus ad bellum* consist not only of substantive rules of conduct but also institutional provisions which set out the competences and procedures

[498] *Ibid*.

[499] Arato (2013), 326.

[500] Cf Linderfalk (2007), 169.

[501] For a non-Charter example, see UNCLOS Meeting of States Parties, 2008 Decision, para 1.

of UN organs. UN practice shows that subsequent practice can lead to reinterpretations of those provisions, sometimes dramatically transforming the powers of the organ concerned.

Unlike states, the powers of international organisations are limited: they must be conferred on them by their member states in their constituent instrument or other agreements.[502] These powers may expand through practice.[503] However, the interpretative practice of an organ alone can only modify the manner in which it exercises its functions, it cannot modify or add to the functions an organ has been granted under the Charter, or alter its distinguishing features such as the organ's voting procedures.[504] Since it is through ratification of the constituent instrument that members consent to the organisation exercising the powers thereby conferred on it[505] (expressly or impliedly), it follows that the expansion of those powers requires their consent through amendment of the Charter or interpretation by all the parties. It is clear that subsequent practice has operated in this way to grant new competences to UN organs.[506] For example, the Assembly has adopted declarations since the very earliest days of the UN, despite the absence of any such function in the Charter, and no member has protested against the practice, leading to the acceptance that the Assembly enjoys such a competence under the Charter.[507]

[502] See Sarooshi (1993), 18.

[503] *Ibid*, 1021.

[504] *Namibia*, Dissenting Opinion Fitzmaurice, para 94; *South-West Africa – Voting Procedure*, Advisory Opinion (7 June 1955) [1955] ICJ Reports 67, 75, Separate Opinion Lauterpacht, 109; Akande (2018), 238.

[505] Sarooshi (1993), 43.

[506] Schachter (1993), 187–8.

[507] Amerasinghe (2005), 187–8. See also the examples in Kadelbach (2012), para 53.

The Security Council has through subsequent practice under Article 31(3)(b) VCLT not only modified the manner in which it exercises its functions but dramatically expanded its competences, in particular through broad interpretations of Articles 39 and 41. The Council has interpreted 'measures not involving the use of armed force' under Article 41 to include a wide range of coercive measures,[508] including comprehensive and targeted sanctions; the establishment of international criminal tribunals;[509] boundary demarcation and compensation commissions whose demarcations were to be considered final;[510] and interim and transitional administrations with functions similar to those of a national government.[511] In so doing, the Council has interpreted the list of measures in the second sentence of Article 41 as merely indicative, not exhaustive.

Article 39 and the concept of 'international peace and security' have been interpreted in such a way that, not only is the threat or existence of an international armed conflict not required for a determination to be made, but the Council may exercise its Chapter VII powers in relation to situations that lack any obvious 'international' element.[512] As Chesterman wrote in 2001, 'it now appears to be broadly accepted that a civil war or internal strife may constitute a threat to international peace and security within the meaning of Article 39'.[513] The Council has frequently exercised its Chapter VII powers on the basis that a situation internal to a particular state may have an impact outside its

[508] IDI (2019), 148–60; Kadelbach (2012), paras 61–3; Higgins et al (2017), 991.

[509] UNSC Res 827; UNSC 955.

[510] UNSC Res 687, paras 3–4; UNSC Res 773, para 4; UNSC Res 806, para 1; UNSC Res 833, para 4.

[511] UNSC Res 435; UNSC 1244; UNSC 1272.

[512] See O'Connell (2005), 22.

[513] Chesterman (2001), 129.

borders,[514] and has included global issues unrelated to armed conflict, such as climate change or pandemics, as threats to international peace and security.[515] Such determinations stretch but are ultimately reconcilable with the text of Article 39, since the consequences of internal unrest could be seen to create a risk to *international* peace and security among states in the greater region.[516] These are therefore arguably interpretations that the Council alone is entitled to reach by applying Article 31 to interpret the Charter in the course of exercising its competences. However, in some cases the Council has gone even further and characterised purely internal situations as requiring it to take measures under Chapter VII: an interpretation that it seems cannot be reconciled with the ordinary meaning of 'maintain or restore international peace and security' in Article 39 and so could not be validly reached by the Council alone applying Article 31.

For example, in Resolution 794 the Council determined that 'the magnitude of the human tragedy caused by the conflict in Somalia' constituted such a threat and, acting under Chapter VII, authorised Members to 'use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations'.[517] It seems that at the moment this decision was taken the Council was acting *ultra vires* – a UN organ alone cannot arrogate to itself new powers based on an interpretation of the Charter that cannot be reached through Article 31. It is only the subsequent acquiescence of the rest of the

[514] For example, UNSC Res 217, para 1 (Southern Rhodesia); UNSC Res 418, para 1 (South Africa); UNSC Res 688, para 1 (Iraq); UNSC Res 713, preamble recital 4 (Yugoslavia); UNSC Res 918, preamble recital 18 (Rwanda).

[515] E.g. UNSC Res 2177, preamble para 5; UNSC Res 2532, preamble para 11; De Wet and Wood (2009), para 15.

[516] De Wet (2004a), 175; Chesterman (2001), 151.

[517] UNSC Res 794, preamble recital 3, para 10; Chesterman (2001), 142. Although previous resolutions and debates had noted the destabilising effect on the region, see De Wet (2004a), 157; Kadelbach (2012), para 58.

membership in that decision which made the action lawful.[518] As an agreement of all parties, it can override the ordinary meaning of the terms and so interpret Article 39 in such a way that 'international peace and security' is in effect given a special meaning, including not only international but internal situations, and thereby expanding the competences of the Council.

5. Conclusion

This chapter has sought to fill in a further piece of the puzzle as to how change to the *jus ad bellum* can occur: how can the treaty norms of the UN Charter be modified in such a way that states may use force lawfully where it was previously unlawful, and vice versa? The analysis above has shown that, although changes to the provisions of the UN Charter that regulate the use of force are unlikely to come about through formal amendment, there remains considerable scope for change to *jus ad bellum* obligations through more informal processes of the law of treaties, in particular the evolutionary interpretation of treaty terms and interpretation through subsequent agreement and practice. Interpretations by all the parties under Article 31(3)(a) and (b) VCLT have the potential to go far beyond the mere elucidation or reiteration of existing Charter obligations, and – since all parties must agree – may be used by UN Members to reinterpret those obligations so as to depart from how they had previously been interpreted, even in a manner contrary to the Charter text. The interpretation of treaty terms which have an evolving meaning may also result in a change in the content of Charter obligations. Unlike interpretations under 31(3)(a) and (b), this

[518] There does not appear to have been any objection in principle to this first example of the Council taking measures under Chapter VII in relation to an internal situation, Chesterman (2001), 142, although there was some disagreement as to the precise objective of the operation, see Sarooshi (1993), 212. Council members appear to have been aware of the novelty of what they were doing, see Australia, S/PV.3145, 31.

evolution is not within the control of the treaty parties but will depend on the transformations of the evolutionary term to which the treaty refers.[519] Where an evolutionary term incorporates another source of law into the Charter, it may create the possibility for change to Charter obligations through modification of those external norms.

The preceding chapters have analysed how the two sources of international law that make up the law on the use of force – custom and treaty – may be identified and modified. However, while there are many areas of international law in which customary and treaty norms coexist, at least some of these *jus ad bellum* norms are widely recognised as being norms of *jus cogens*. *Jus cogens* norms are norms from which no derogation is permitted and, crucially for the purpose of this thesis, may only be modified by another norm of the same character. The following chapter will therefore identify which, if any, of the customary or treaty norms in the *jus ad bellum* are norms of *jus cogens*, and analyse how such norms may be modified.

[519] Subsequent agreements and practice may play a role in interpreting a treaty term to determine whether is to be given an evolutionary meaning, so to that extent the treaty parties will be able to exert influence after the treaty's conclusion, ILC Subsequent Practice, draft Conclusion 8.

5. Identifying and modifying the *jus cogens* norm in the *jus ad bellum*

In virtually every area of international law there are norms of customary international law coexisting with norms of treaty law which have identical or similar content. As a result, many of the questions analysed in previous chapters would also arise when one considers change to – for example – the law of the sea. However, besides the distinctive characteristics of the UN Charter, such as Article 103 and its virtually universal membership, the additional, complicating factor in the *jus ad bellum* is the presence of a *jus cogens* norm prohibiting the use of force. Since *jus cogens* norms may only be modified by 'a subsequent norm of general international law having the same character', the presence of a *jus cogens* norm in the *jus ad bellum* will impact how this area of law can change.

While there is widespread agreement as to the existence of a *jus cogens* norm in the *jus ad bellum* which prohibits the use of force, opinions diverge as to the precise scope of that *jus cogens* norm. A narrow ban on aggression, Article 2(4) of the Charter, and even the *jus ad bellum* as a whole have all been suggested as candidates. So long as the *jus cogens* status of the prohibition is being referred to for purely rhetorical reasons, this uncertainty does not cause too many problems. However, if one wants to consider how the presence of a *jus cogens* norm may impact the modification of the *jus ad bellum*, the scope of that *jus cogens* norm must be defined with more precision. This chapter will argue that the *jus cogens* norm in the *jus ad bellum* is the customary norm which prohibits non-consensual uses of force that are neither validly authorised under the UN Charter nor lawful exercises of self-defence.[520]

[520] Parts 1–4 of this chapter have been published as Johnston (2021a).

In demonstrating how this conclusion is reached this chapter will clarify the method by which *jus cogens* norms should be identified in practice. This chapter will also show that the lack of consensus as to the scope of the *jus cogens* norm prohibiting force results from uncertainty as to the structure of the underlying customary and treaty law norms that comprise the *jus ad bellum*. Yet once what it means for a norm to 'permit no derogation' has been clarified, the scope of the *jus cogens* norm in the *jus ad bellum* may be identified without the need to resolve these much more difficult questions of structure. Indeed, the conclusion here as to the scope of the *jus cogens* norm leaves open multiple possibilities as to how the customary and treaty norms setting out the prohibition and its apparent derogations may be analysed. These questions of the structure of the norms comprising the *jus ad bellum* will be addressed in chapter seven.

Part one identifies certain features of the *jus ad bellum* that pose difficulties when identifying the scope of the *jus cogens* norm in this area. Parts two and three analyse the criteria for identification of *jus cogens* norms. Part four then applies this analysis to the *jus ad bellum* to identify the scope of the *jus cogens* norm. Part five analyses how *jus cogens* norms may be modified.

1. Identifying the *jus cogens* norm in the *jus ad bellum*

Referring to the extensive literature on the nature of *jus cogens* norms, Saul rightly observes that '[w]hat is striking […] is the general absence of detailed exploration of the methodological process that should be undertaken to determine whether or not a norm has *jus cogens* status', with scholars instead focusing on justificatory theories for the concept

of *jus cogens*.[521] Similarly, '[t]he most prominent approach to the identification of *jus cogens* norms that is found in judicial practice is to accord a norm the status without further explanation.'[522] The same can be said of the practice of states, which typically assert that a particular norm has *jus cogens* status without setting out any detailed reasoning as to how that particular norm has been identified as *jus cogens*.[523] At most, such statements are accompanied by a vague reference to the importance of the norm, or to a previous judicial decision recognising the norm as having *jus cogens* status.[524] The ILC has also asserted in various outputs that a norm has *jus cogens* status without providing any detailed reasoning in support, most recently in 'a non-exhaustive list of norms previously referred to by the Commission as having peremptory character.'[525]

This thesis is therefore not concerned with adding to the scholarship justifying the existence of *jus cogens* norms in international law. Being based on fundamentally different views about the nature of law, it is not clear that the disagreements as to the nature and purpose of *jus cogens* norms can ever be resolved.[526] Instead, this chapter will set out a methodology for how *jus cogens* norms can be identified in practice, which will then be applied to the *jus ad bellum*. The analysis here is premised on the view that *jus cogens*

[521] Saul (2015), 41. Danilenko (1991), 44.

[522] Saul (2015), 43. E.g. *Congo v Rwanda*, para 64.

[523] E.g. A/C.6/74/SR.25, para 11 (Mexico); A/C.6/74/SR.24, para 67 (USA).

[524] Saul (2015), 39.

[525] ILC *Jus Cogens*, draft conclusion 23, commentary para 2.

[526] See generally Linderfalk (2020a); Hameed (2014), 61. Any generalisation will obscure important differences, but one can broadly divide those writing about *jus cogens* into two groups: those who view *jus cogens* norms as arising due to their content: e.g. the moral importance of the values they protect, see Janis (1987–88); O'Connell (2011). For a 'public order' view of *jus cogens*, see Orakhelashvili (2008), especially 30–1. Cf those who consider the identification of a *jus cogens* norm to be independent of its content and based rather on fulfilment of criteria established by the international legal system, see Linderfalk (2020b), 140–1.

norms are neither a form of natural law nor 'international public order' but like all international law norms arise from the consent and practice of states. A norm of international law – including a norm of *jus cogens* – is identified through the application of secondary rules of the international legal system.

In contemporary international law, the secondary rules governing the creation and effects of *jus cogens* norms derive from the VCLT. Although there were occasional references to *jus cogens* in practice before 1969,[527] it was the inclusion of the concept in the VCLT that solidified its existence in positive international law.[528] As a matter of treaty law the VCLT is binding only on its parties, but Article 53 is now widely accepted as providing the definition and criteria for identification of *jus cogens* norms beyond the VCLT and these may now be considered to be part of customary international law.[529] The language of Article 53 was adopted virtually unchanged by the ILC in 2019 as both the definition and criteria for identification of *jus cogens* norms in its draft conclusions on peremptory norms.[530] Customary international law thus provides two cumulative criteria for the identification of a norm as *jus cogens*:

(a) it is a norm of general international law; and

[527] For example, *Oscar Chinn Case*, Separate Opinion Schücking, 149; *US v Krupp et al*.

[528] De Wet (2004b), 103.

[529] Thirlway (2019), 163; Green (2011), 220. See e.g. *Domingues v US*, 50; *Yusuf v Council and Commission*, para 278; *Jones v Saudi Arabia* [42].

[530] ILC *Jus Cogens*, draft conclusions 2 and 4.

(b) it is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted[531]

The obstacles to identifying the scope of the *jus cogens* norm in the *jus ad bellum* make it a useful lens through which the identification of *jus cogens* norms via the application of these two criteria can be analysed. First, there is an evidential difficulty: while there is widespread acceptance that there is a *jus cogens* norm in the *jus ad bellum* that prohibits force, a variety of different *jus ad bellum* norms have been recognised as *jus cogens* – from the prohibition of aggression;[532] to the prohibition in Article 2(4) of the Charter; to 'the law of the Charter concerning the prohibition of the use of force'[533] which potentially includes not only Article 2(4) but the provisions of Chapter VII allowing for the authorisation of force; to the 'general international law on unilateral use of force as a whole', apparently including those norms regulating self-defence.[534] In some cases the norm identified as *jus cogens* is a norm of treaty law, while in others it is unclear if the norm referred to is a norm of custom, treaty, both, or neither. For example, a norm in the *jus ad bellum* was recognised as *jus cogens* in the memorials of Iran in the case concerning *Oil Platforms* (the 'obligation imposed on all Members under Article 2(4) of the Charter'),[535] Spain in *Fisheries Jurisdiction* ('*la norme impérative qui interdit l'usage et la*

[531] Although the ILC includes 'and which can be modified only by a subsequent norm of general international law having the same character' in (b), in practice the reference to modification does not seem to be considered to form part of the test for identification, Rozakis (1976), 45–6.

[532] ILC *Jus Cogens*, draft conclusion 23, Annex, (a).

[533] ILC 1966, draft Article 50, commentary para 1.

[534] *Oil Platforms*, Sep Op Simma, para 9, although in the subsequent paragraph it seems he is referring only to the prohibition on the threat or use of force as *jus cogens*.

[535] *Oil Platforms*, Memorial of Iran (8 June 1993), para 4.05.

menace du recours à la force'),[536] Nicaragua in *Military and Paramilitary Activities in and against Nicaragua* ('Article 2(4) of the United Nations Charter […] has come to be recognized as *jus cogens*')[537], Yugoslavia in the *Legality of the Use of Force* cases ('the obligation not to resort to the use of force against another State'),[538] and in oral submissions by Canada in *Fisheries Jurisdiction* ('the Charter's prohibition of the use of force – Article 2, paragraph 4 – is a peremptory norm').[539] Part of the problem is that often the *jus cogens* status of the *jus ad bellum* norm is not doing any work: the references to *jus cogens* status appear purely rhetorical, to emphasise the importance of the norm. As a result, it is possible to get away with a certain amount of vagueness as to the source or scope of that *jus cogens* norm.

Thus, while there is widespread agreement that a *jus cogens* norm prohibiting the use of force exists, once one goes beyond the most superficial analysis the precise contours of that norm are unclear. This uncertainty flows from the complex and contested nature of the *jus ad bellum* framework itself. It is difficult to identify the contours of the *jus cogens* prohibition on force in part because it is difficult to identify the contours of the prohibition on force in customary and treaty law. Other widely recognised *jus cogens* norms are relatively straightforward prohibitions of a particular conduct. While there may be uncertainty at the boundaries as to what behaviour qualifies as torture or genocide, the structure of the prohibited norm is clear and once behaviour comes within its scope it is prohibited absolutely, with no exceptions. Moreover, since neither the Convention Against

[536] *Spain v Canada*, Memorial of Spain (28 September 1995), para 4.

[537] *Nicaragua*, para 213.

[538] *Legality of Use of Force*, Memorial of the Federal Republic of Yugoslavia (5 January 2000), para 2.1.1.

[539] *Spain v Canada*, Public Hearing of 17 June 1998, 10am, Submissions of Mr Hankey, Deputy Agent for Canada, para 14.

Torture nor the Convention on the Prevention and Punishment of the Crime of Genocide actually contains a norm prohibiting torture or genocide – rather they contain ancillary obligations to prevent, punish and criminalize that conduct – it is clear that the prohibitive norms being recognised as *jus cogens* must be the general customary norms prohibiting torture and genocide.[540] By contrast, even before one begins to consider the existence of a *jus cogens* norm, the underlying structure of the *jus ad bellum* is already uncertain: are the customary and Charter prohibitions of force identical and if not in what ways do they diverge? Is consent part of the definition of unlawful force or is it somehow operating as a defence?

Further confusion is created by the possibility to analyse the structures of norms that appear to be subject to exceptions, like the prohibition on force, in different ways, which in turn may impact the identification of any *jus cogens* norm. As noted previously, the term 'exception' may be used to refer both to conduct that is simply outside the scope of a particular norm, or it may refer to a separate norm which operates alongside the primary norm to modify its application and, for example, render conduct that would otherwise be unlawful under the primary norm lawful.[541] In this thesis the term exception is used only to refer to this second meaning, of an exception as a separate norm; conduct

[540] Although in its memorial Rwanda noted 'that *the norms codified in* the substantive provisions of the [Genocide] Convention have the status of *jus cogens*', Memorial of Rwanda, *Congo v Rwanda*, para 3.17 [emphasis added], in its judgment the Court states rather that it is 'assuredly the case' that the 'prohibition on genocide' is of *jus cogens* character, *ibid*, para 64.

[541] On one view, an exception refers to conduct that falls outside the scope of a norm and is merely a linguistic construct – there is no difference between the exception, which sets out certain limits of the norm, and the norm itself. See Williams (1988), 278; Dworkin (2013), 41; Hare (1972–73), 6. Another view considers exceptions as separate norms external to the primary norm. Even if only for a sliver of time, the primary norm is applicable to the case which is then excepted by the separate norm creating the exception. See Finkelstein (1999) and Carpentier (2014), 17. However, it is not necessary to analyse all apparent 'exceptions' using the same approach. Based on the context, nature and content of the particular norms in question, some exceptions may be better analysed as negative conditions of the primary norm, others as a separate norm.

that is outside the scope of a norm is not referred to as an exception but rather as a limitation on the scope of the norm.

Thus, does force used pursuant to the right of self-defence fall outside the scope of the customary prohibition, or is it a *prima facie* violation of that norm that is justified by the exception provided by a separate customary right of self-defence? Regarding collective security, does the UN Charter act as *lex specialis* to the customary prohibition on force, thereby providing an exception to that customary norm, or does force authorised under Chapter VII somehow fall outside the scope of that prohibition?[542] In any case, how are these apparent derogations to the prohibition – self-defence, collective security, and consent – to be reconciled with the existence of a non-derogable norm prohibiting force?

The acceptance that a *jus cogens* norm prohibiting force exists in the *jus ad bellum* can help answer some of these structural questions, or at least limit some of the possible options for how the prohibition and the exceptions to or limitations on the scope of that norm are analysed in chapter seven. However, for now the point is that, even were the international community as a whole explicitly and unambiguously to state that the 'prohibition on the use of force' is *jus cogens*, one still could not straightforwardly identify the scope of that *jus cogens* norm.

2. A norm of general international law

[542] These questions will be answered in chapter 7.

The language of Article 53 makes clear that *jus cogens* norms do not constitute a separate source of international law; they arise from an existing norm of 'general international law' which is then recognised as having *jus cogens* status.[543] There are no examples of a *jus cogens* norm being recognised without or before the norm has an independent existence as a norm of positive international law. Although it is difficult to identify precise dates for the emergence of rules of custom or *jus cogens*, it is clear that the rules prohibiting genocide[544] and torture[545] emerged as customary norms before or at least simultaneously with their recognition as *jus cogens* norms. Therefore, to identify a *jus cogens* norm in the *jus ad bellum* it is first necessary to identify an existing norm of general international law on which it could plausibly be based.

Yet none of the sources of international law can easily be reconciled with the characteristics to be displayed by *jus cogens* norms. As Danilenko observes, the international community has recognised the existence of *jus cogens*, but without taking account of the fact that 'in international law there is a glaring gap between the requirements of the idea of *jus cogens* and the possibilities of the existing law-making processes.'[546] It will be argued here that, while in principle a universally ratified treaty could constitute a 'general norm of international law' which could be recognised as having *jus cogens* status,

[543] See Danilenko (1991), 49. Cf Orakhelashvili, who considers *jus cogens* as an autonomous source of international law (2008), 108–111; Janis (1987–88), 363. However, this appears to be a minority view, in addition to being inconsistent with the classic statement of the sources of international law in Article 38(1) ICJ Statute.

[544] In 1951 the prohibition was recognised by the ICJ as custom, *Reservations*, 23. The prohibition of genocide was stated to be a norm of *jus cogens* by Judge *ad hoc* Lauterpacht in 1993, *Genocide*, Separate Opinion Lauterpacht, para 100.

[545] The prohibition on torture was recognised by the ICJ as a norm of *jus cogens* in 2012 in *Belgium v Senegal*, 99. It had been recognised as custom by the ICTY Appeal Chamber in 2000, *Furundžija* (Appeal), para 111.

[546] Danilenko (1991), 47.

in practice all *jus cogens* norms currently in existence must be norms of customary international law.

General principles of law, the source listed in Article 38(1)(c) of the ICJ Statute, do not seem promising as a source of *jus cogens* norms, limited as they are to legal principles common to domestic legal systems, and which do not contain equivalents of, for example, the prohibition on (inter-state) force.[547] Some scholars take the view that 'general international law' could include multilateral treaties.[548] However, treaty-based *jus cogens* is difficult to reconcile with the universality of *jus cogens* norms.[549] For a state that is not party to the relevant treaty, it is unclear what would be the source of the legally binding norm which has *jus cogens* status. *Jus cogens* status makes a norm that is already legally binding non-derogable, it is not a source of law in itself. Yet if *jus cogens* norms are universal, either the *jus cogens* norm must somehow itself constitute a source of law for that non-party state, a view precluded by the language of Article 53 and typically only held by those who take a natural law approach to *jus cogens*, or the treaty norm is somehow binding on a third party as a result of its *jus cogens* status, contrary to the *pacta tertiis* principle and the principle of consent which underpins treaty law.

[547] Thirlway (2019), 185–6.

[548] Alexidze (1981), 255–6; Dinstein (2017), 109; or a combination of different sources, Wolfke (1974), 154–5; Verdross (1966), 61.

[549] The ILC describes *jus cogens* norms as 'universally applicable', ILC *Jus Cogens*, draft conclusion 3. Gaja has argued that the conception of *jus cogens* norms as universal seems 'unjustifiably restricted' due to its exclusion of the possibility of norms that are *jus cogens* within a restricted group of states, such as the Council of Europe, Gaja (1981), 284. While there is nothing in principle to prevent a concept of regional *jus cogens* emerging, in practice the universality of *jus cogens* norms is now widely accepted and frequently acknowledged, and all those norms most commonly stated to be *jus cogens* are norms of general application. E.g. *US v Matta-Ballesteros*, 764 fn 5.

This highlights the more fundamental problem with *jus cogens* treaty norms. *Jus cogens* norms are now accepted as having certain features that limit the role of state consent: a state will be bound by a *jus cogens* norm even where it has not accepted and recognised the norm as having that status, and the persistent objector rule does not apply to *jus cogens* norms.[550] For *jus cogens* norms then to be drawn from that source of international law which is unquestionably rooted in the consent of each party to the creation of each obligation by which they are bound[551] seems difficult to sustain. The consensual nature of treaty norms shapes every aspect of how treaties are created, interpreted and modified. A *jus cogens* treaty norm which somehow bound a third party – or prevented a party from availing of a denunciation or amendment provision to which they consented at the time they became a party to the treaty, without such a change being effected by consensual means of treaty amendment or interpretation – would so distort the nature of treaty norms as consensually agreed obligations that it is difficult to see how such a norm could still sensibly be called a treaty norm. As Judge Dugard has observed, 'the concept [of *jus cogens*] is not to be used as an instrument to overthrow accepted doctrines of international law', such as the principle of consent to jurisdiction[552] – it seems this should be the case *a fortiori* for the foundational principle of consent to treaty obligations.

It is possible to imagine a universal treaty whose provisions were drafted (or interpreted) to create the effects of *jus cogens* and which could potentially constitute a treaty-based norm of *jus cogens*. In the same way as Article 103 of the UN Charter provides that its norms will prevail over conflicting treaty norms, a treaty could provide for

[550] ILC *Jus Cogens*, draft conclusions 7(2) and 14(3).

[551] Thirlway (2019), 37; *Reservations*, 21.

[552] Separate Opinion Dugard, *Congo v Rwanda*, para 6.

conflicting treaties to be treated as invalid, which would be given effect among its parties. Similarly, subsequent practice or agreement of the parties could reinterpret the treaty so that the denunciation clauses were considered obsolete and any amendment clauses meet the Article 53 test for identification of *jus cogens*. In such a case one could perhaps interpret this as acceptance and recognition that the treaty norm no longer permitted any derogation and – since a universal treaty would necessarily embrace the international community as a whole – had become *jus cogens*. The universality and non-consensual characteristics of *jus cogens* norms could thus potentially be created through ordinary operations of treaty law which respect the principle of consent of the parties. However, for now this remains hypothetical. Until such a treaty emerges, *jus cogens* treaty norms remain either impossible or, even if possible in principle, not currently existing in practice. Even the UN Charter falls short of universal ratification[553] and multilateral treaties rarely even attract ratifications from 'the international community of States as a whole'.[554]

In the 1966 commentary to its draft articles on the law of treaties, the ILC stated that 'a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty'.[555] However, this does not necessarily mean that the treaty norm itself would be *jus cogens*. Rather, the widespread agreement on the importance of the norm that would be required for the conclusion of such a treaty would likely lead to the

[553] The Holy See and the State of Palestine are non-member state permanent observers to the UN. Kosovo and Taiwan are non-Members as their statehood remains contested. Switzerland remained a non-Member until 2002.

[554] Danilenko (1991), 63. The 1949 Geneva Conventions and the Convention on the Rights of the Child, both very widely ratified, are two exceptions. However, all contain denunciation clauses, and the provisions of the latter are not among those norms most commonly referred to as having *jus cogens* status; e.g. ILC *Jus Cogens*, draft conclusion 23, Annex. While the 'basic rules of international humanitarian law' are sometimes referred to as norms of *jus cogens*, the continued opposition of some states to the prohibition on belligerent reprisals casts doubt on such claims, see Akande and Shah (2011), 833–4.

[555] ILC 1966, draft Article 50, commentary para 4.

rapid emergence of a parallel customary norm, accompanied by the acceptance and recognition of the international community as a whole required to give it *jus cogens* status. This new customary *jus cogens* norm would then replace the old customary *jus cogens* norm. In practice, therefore, the inability of treaty norms to act as the source of *jus cogens* norms may be of little impact, as any treaty norm which enjoys the widespread support necessary for identification as a *jus cogens* norm will likely also come to exist as a norm of customary international law. Indeed, this seems the best explanation of the effect of Article 2(4) of the UN Charter on custom after 1945.

In its 2019 draft conclusions on *jus cogens* the ILC stated that '[c]ustomary international law is the most common basis for peremptory norms of general international law (*jus cogens*)' but that '[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)'.[556] However, the commentary to the conclusion reveals a greater scepticism about treaty norms as a source of *jus cogens* norms, suggesting that where this does occur it is only through the impact that a treaty may have on customary international law, as described above.[557] To the extent that this represents a change in the ILC's position since 1966, this may simply reflect the fact that treaty law has in practice not served as a source of *jus cogens* norms.[558] It is difficult to think of any suggested *jus cogens* norms which exist only in treaty form and cannot also be said to exist in customary international law.

[556] ILC *Jus Cogens*, draft conclusion 5.

[557] ILC *Jus Cogens*, draft conclusion 5, commentary para 9. See also draft conclusion 13, para 2.

[558] See ILC 1966, draft Article 50, commentary para 3.

The prevailing view holds that 'general international law' in Article 53 refers to general customary international law.[559] It is true that a customary *jus cogens* norm would also not behave in the same way as a regular customary norm, in terms of its modification and the inapplicability of the *lex specialis* doctrine, for example. However, the non-consensual effects of *jus cogens* norms are easier to reconcile with custom as a source, where it is already a more diluted consent to the customary process generally (rather than each customary norm) that is involved.[560] Whether or not they consent to the particular norm or participate in the practice that underlies it, states will be presumed to be bound by a valid customary norm.[561] Only in the eventuality that they can prove they meet the stringent requirements to be a persistent objector can a state claim the norm is not opposable to them, but effective claims of this kind are rare.[562] For a customary norm to be a *jus cogens* norm – which removes the possibility to persistently object to or contract out of the norm – is thus more a difference in degree than in kind. By participating in the international legal system as states, states consent to the possibility that they may be bound by *jus cogens* customary norms to which they have not consented and from which they will not be able to derogate.[563]

Returning to the *jus ad bellum*, one can therefore conclude as a first step that if there is a norm prohibiting force which has *jus cogens* status it must be based on the customary prohibition on force, not Article 2(4) of the UN Charter. While the Charter's membership

[559] Brownlie (2008), 510; Hannikainen (1988), 225; de Hoogh (2015), 1163; Linderfalk (2013), 379.

[560] Byers (1997), 228.

[561] Churchill and Lowe (2017), 9.

[562] Dumberry (2010), 794.

[563] Byers (1997), 228.

includes the overwhelming majority of states it is not universal, and as a result none of the treaty norms contained in the Charter can form the source for a *jus cogens* norm. By 1970 at the latest, however, the discussions in the Sixth Committee regarding the draft Friendly Relations Declaration and the text of the Declaration as adopted by consensus demonstrated that the prohibition on the use of force was considered a norm of customary international law, that bound all states regardless of whether they are UN members.[564] The prohibition's customary status was confirmed by the ICJ in *Nicaragua*[565] and is not seriously contested today. It is this customary norm prohibiting force that must be the source of any *jus cogens* norm in the *jus ad bellum*.

3. Accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted

The second criterion for the identification of *jus cogens* norms is sometimes described as an enhanced form of *opinio juris.*[566] This is perhaps a useful analogy to the extent that both involve acceptance by states that a norm has a particular legal effect – binding as law in the case of ordinary custom, impermissibility of derogation for *jus cogens* – and that this acceptance also constitutes that norm as custom or *jus cogens* respectively. However, describing the second criterion as a form of *opinio juris* also risks confusion. Regardless of the source of the general norm of international law which forms the basis for the substantive *jus cogens* norm, the secondary norms that regulate the identification and

[564] A/2625(XXV), paras 1, 3.

[565] *Nicaragua*, para 188.

[566] E.g. Bos (1984), 246.

effects of *jus cogens* norms must be norms of customary international law.[567] The same is true of treaty law: the secondary norms that govern the identification, interpretation and effects of treaty norms are norms of customary international law (albeit codified in the VCLT for those states that are party). However, identification of a new *jus cogens* norm does not involve the creation of a new norm (or norms) of customary international law which create its *jus cogens* effects.[568] Each *jus cogens* norm is not accompanied by its own bundle of customary norms which, for example, void any treaties conflicting with that norm. Rather, the identification of a new *jus cogens* norm involves the application of secondary customary norms governing the creation of *jus cogens* norms. Those customary norms provide that a norm of general international law is identified as *jus cogens* when it is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' and create certain effects for norms so identified. Acceptance and recognition are thus not a form of *opinio juris* required for the establishment of a new norm of custom, but simply an element that fulfils the requirements of those secondary norms, for them to identify a norm as *jus cogens*.

The acceptance and recognition of a norm as *jus cogens* by the 'international community of States as a whole' need not be universal: a 'very large majority' of states will suffice and no one state has a veto.[569] This tells us *who* needs to do the accepting and recognising; however, the more complicated question is *what* it is that needs to be accepted

[567] See Linderfalk (2013), 378–9.

[568] Cf Linderfalk (2013), 382–3.

[569] This was the view of the Chair of the Drafting Committee at Vienna: 'there was no question of requiring a rule to be accepted and recognized as *jus cogens* by all states. It would be enough that a very large majority did so; that would mean that if one state in isolation refused to accept the *jus cogens* character of a rule, or if that state was supported by a very small number of states, the acceptance and *jus cogens* character of the rule would not be affected' quoted in Hannikainen (1988), 210**.** Support for this view is widespread in doctrine, see Alexidze (1981), 247; Dinstein (2017), 109; Gaja (1981), 283.

and recognised. The most common approach is to interpret 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' as, in effect, 'accepted and recognized by the international community of states as a whole as a *jus cogens* norm'.[570] This is exemplified by the ILC's recent draft conclusions. While draft conclusion 4 ('Criteria for the identification of a peremptory norm of general international law (*jus cogens*)') simply repeats the language of Article 53, in the commentary the second criterion is described as follows: 'the norm must be shown to be accepted and recognized by the international community of States as a whole as having a peremptory character.'[571]

It is this kind of reading of the second criterion for identification of *jus cogens* norms that leads to criticism of the Article 53 definition as circular or tautologous.[572] *Jus cogens* norms are those accepted and recognised as *jus cogens* norms.[573] No information is given as to which norms, with which qualities, should be accepted or recognised as having those effects. One might expect draft conclusion 8, 'Evidence of acceptance and recognition', to break down the second criterion and elucidate what is meant by a derogation, or what it means for a norm to permit no derogation – after all, this is what needs to be accepted and recognised for it to be identified as a *jus cogens* norm. However, the views that need to be held are simply described as acceptance and recognition 'that the norm in question is one from which no derogation is permitted', 'of the non-derogability

[570] For example, Green (2011), 243.

[571] ILC *Jus Cogens*, draft conclusion 4, commentary para 6.

[572] Abi-Saab (1967), 13; Gómez-Robledo (1981), 112; Ruys (2010), 25; Costelloe (2017), 15; Minagawa (1984), 4; cf Kolb (2001a), Titre I, section II, para 36.

[573] See Schwelb (1967), 964.

of such a norm' or 'that a norm has a peremptory character.'[574] There is no analysis of what it means for a norm to permit no derogation or how this manifests in practice: it is simply a synonym for 'is *jus cogens*'.

One consequence of this approach is that it limits evidence of acceptance and recognition to what states *say* they accept as non-derogable: to statements that a norm 'is *jus cogens*', and so on. One cannot look directly at which norms states are actually accepting and recognising as permitting no derogation as it is unclear what this entails. Here the analogy with *opinio juris* for custom is instructive: while *opinio juris* for custom can of course be found in explicit statements by states about the content of customary international law, it can also – as argued in chapter two – be inferred from state conduct that treats the alleged customary norm as legally binding. Yet if 'permits no derogation' is simply understood to mean 'is *jus cogens*', with no independent content of its own, then one cannot know what conduct to look for from which one could infer acceptance and recognition that a norm permits no derogation.

The limitations of relying on statements that a norm 'is *jus cogens*' are well illustrated by the *jus ad bellum* where the statements of states leave it unclear which precise norm is accepted and recognised as *jus cogens* by the international community as a whole. States have frequently recognised the existence of a *jus cogens* norm in the *jus ad bellum*. During discussions in the Sixth Committee leading to the adoption of the Friendly Relations Declaration, numerous states explicitly referred to the prohibition on the use of force as a *jus cogens* norm, while many others used more general language that

[574] ILC *Jus Cogens*, draft conclusion 8 and commentary.

nevertheless implies recognition of *jus cogens* status.[575] The discussions leading to the ILC's draft Articles on the Law of Treaties show that the principle set out in Article 2(4) was accepted as *jus cogens*.[576] The prohibition on the use of force was also recognised as *jus cogens* at the 1969 Vienna Conference, when it was the most frequently-cited example of a norm of *jus cogens*.[577] Discussions leading to the adoption of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,[578] also demonstrated agreement among states as to the *jus cogens* nature of a norm in the *jus ad bellum*.[579] Corten shows convincingly that it is not merely the prohibition on aggression that states recognise as *jus cogens*, but the 'prohibition on force'.[580] However, even so, the contours of the norm recognised as non-derogable remain unclear – does 'force' refer only to non-consensual force? Is force in self-defence excluded from the prohibition's scope?

So, while statements are a valid way of identifying acceptance and recognition of a norm as *jus cogens*, in this case considering statements by states explicitly accepting and recognising a *jus ad bellum* norm 'as *jus cogens*' does not advance us very far beyond our starting point. From the statements it is at least clear that support for the existence of a *jus cogens* norm prohibiting force is very widespread and it is possible to proceed on the assumption that a *jus cogens* norm prohibiting force does exist in the *jus ad bellum*.

[575] E.g. A/6547, 118, para 36; A/6955, 191, para 37; Corten (2008), 300.

[576] *Ibid*, 297–8.

[577] E.g. A/CONF.39/C.1/SR.52, para 18 (Greece), para 31 (Kenya).

[578] A/RES/42/22.

[579] See A/36/41, paras 37, 45, 57, 70, 130, 216; Corten (2008), 301–6.

[580] Corten (2008), 295–303; Helmerson (2014), 189.

Moreover, having analysed the first criterion for identification of *jus cogens* norms, any references to Article 2(4) as *jus cogens* must be understood as referring to the parallel customary norm that prohibits the use of force, not the treaty norm itself. However, to identify precisely the scope of the customary norm in the *jus ad bellum* that is *jus cogens* – the prohibition on force, the prohibition plus the exceptions, or the prohibition on non-consensual force only etc. – a more fine-grained approach is necessary, which looks at the extent to which a norm is accepted and recognised as a norm 'from which no derogation is permitted'.

3.1 No derogation is possible

The first step is to clarify what is meant by 'derogation' in this context. Despite forming the 'keystone' of the Article 53 definition of *jus cogens*,[581] 'derogation' is the subject of terminological confusion,[582] with different writers understanding the term differently.[583]

To say a norm is non-derogable must mean more than that it is legally binding, which is a characteristic of all customary norms. A derogation therefore cannot be the same as a breach of the customary norm. As Tomuschat writes:

> Sometimes, one encounters an understanding to the effect that only rules of *jus cogens* are really endowed with juridically compulsory effect […] such an understanding of *jus cogens* rests on a grave misperception. Each and every rule of

[581] Kolb (2001a), Titre I, section II, para 38.

[582] Kolb (2001b), 505.

[583] E.g. Helmerson (2014), 175; Butchard (2018), 239.

> customary law is binding, and *jus cogens* as a higher-ranking group of legal rules comes into play only when the validity of a treaty is to be evaluated or when it has to be determined whether, by other means, a legal position can be created or maintained that is incompatible with such peremptory rules.[584]

Derogation is thus not concerned with factual conduct that is not in compliance with an obligation of a party that is bound by a norm,[585] but rather with legal or normative acts.[586] As normative acts, derogations can only be made by actors with the power to create new international law norms, whether individually, bilaterally or collectively.

Unsurprisingly given their focus, in the drafting of the VCLT and the ILC work that preceded it the only kind of 'derogation' from *jus cogens* contemplated was a bilateral or multilateral treaty by which two or more states attempt to 'contract out' of the conflicting *jus cogens* norm. Since *jus cogens* norms permit no derogation, Articles 53 and 64 VCLT provide that any such treaties will be void. Some writers continue to take the view that 'the main legal effect of peremptory norms is consequently to sterilise the operation of the *lex specialis* principle'[587] and so protect the norm which has that status from fragmentation or bilateralisation.[588] However, even before the conclusion of the VCLT it was suggested that

[584] Tomuschat (1993), 276.

[585] Sztucki (1974), 68; Zemanek (2006), 1116.

[586] Kolb (2001a), Titre I, Section II, para 47.

[587] Kolb (2016b), 105; see also Zemanek's criticism of Kolb's thesis (2006), 1109–12; Orakhelashvili (2015), 172; Helmerson (2014), 175–6.

[588] Kolb (2001a), Titre I, Section I, para 13.

this might be just one application of a broader concept of derogation,[589] and today derogation is not understood in this narrow sense,[590] as can be seen in the closing phrase of the quotation from Tomuschat above. In particular, since the completion of the ILC's work on state responsibility in 2001, it is clear that the concept of derogation has come to be understood as including, but also going far beyond, the conclusion of conflicting treaties or emergence of special customary regimes. For example, Article 26 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts provides that the invocation of circumstances precluding wrongfulness is excluded in relation to breaches of all *jus cogens* norms.

Today, to say that a *jus cogens* norm permits no derogation is understood rather as meaning that '[i]rrespective of the situation, there will never be a legally valid reason to depart from a rule of *jus cogens*',[591] with 'departing' understood as not performing the conduct (positive or negative) required by the customary norm which has *jus cogens* status. For example, where the *jus cogens* norm is a prohibition, from the court's reasoning in *Jurisdictional Immunities of the State* it seems that a derogating norm will be one that creates a 'direct conflict' with the *jus cogens* norm in relation to 'whether or not the conduct in respect of which the proceedings are brought [that is, conduct accepted to be in breach of norms assumed to have *jus cogens* status] was lawful or unlawful'.[592] There may be many legally valid reasons to depart from a regular customary norm: conduct may fall

[589] E.g. 'A general rule possesses a *jus cogens* character only when individual States are not permitted to derogate from the rule at all—*not even by* agreement in their mutual relations' ILC, Waldock's Fifth Report, 24 (emphasis added); see Ragazzi (1997), 58.

[590] De Hoogh (2015), 1172.

[591] Linderfalk (2012), 12; also e.g. Green (2011), 229.

[592] *Immunities*, para 93.

within an exception created by another customary norm; a treaty may act as *lex specialis*, excluding the customary norm from the relations of the parties; or the law of state responsibility may provide that although there is a breach of that customary norm it is not wrongful. It makes no difference whether the derogating norm purports to make the conduct lawful all things considered, justified, or merely excused. All these examples would constitute derogations from the *jus cogens* norm.

It is not the act contrary to the *jus cogens* norm that constitutes the derogation – for example, the act that constitutes the countermeasure. As factual conduct that constitutes a breach of the *jus cogens* norm. The derogation would be the norm of general customary international law that provides that the wrongfulness of that breach is precluded because it constitutes a countermeasure: that norm is purporting to provide a legally valid reason to depart from the conduct required by the *jus cogens* norm. As the generality of the customary norms of state responsibility demonstrates, derogations are not limited to conflicting *lex specialis*.[593] Where the norm that is being breached is an ordinary customary norm, there is no problem in the customary international law of state responsibility providing a legally valid reason to depart from it in certain circumstances by, for example, taking countermeasures. Customary and treaty norms constantly provide legally valid reasons to depart from the conduct prescribed by the other by creating exceptions or acting as *lex specialis*. It is this combination and interaction of different norms that determine the constellation of legal obligations applicable to a state. It is only for *jus cogens* norms that such derogations are not permitted.

[593] See also *Furundžija* (Trial), para 153.

While the language of Article 53 provides that no derogation is 'permitted' from a *jus cogens* norm, the second criterion is better expressed as providing that no derogation is 'possible'. Attempting to derogate from a *jus cogens* norm is not prohibited and does not of itself lead to responsibility for the states concerned. Rather, a purported derogation to a *jus cogens* norm is invalid. Such a purported derogation may lead to state responsibility – for example, if a state has acted contrary to their obligations under a customary *jus cogens* norm expecting to be able to rely on a treaty excluding its application – but this results from their breach of the customary *jus cogens* norm, not the fact of derogation itself.

Even as the meaning of derogation has expanded, it is important to note that 'the scope of *jus cogens* is not unlimited'.[594] The ICJ's jurisprudence has placed clear limits on the concept and confirmed that *jus cogens* norms do not take precedence over all other norms.[595] In *Immunities*, the ICJ clarified that:

> A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.[596]

It is possible that a procedural norm, such as a norm conferring jurisdiction on a tribunal in relation to a particular norm, could itself acquire *jus cogens* status so that a norm

[594] Separate Opinion Dugard, *Congo v Rwanda*, para 6.

[595] Vidmar (2013), 25.

[596] *Immunities*, para 95. Similarly, *Congo v Rwanda*, para 64.

purporting to provide a legal reason to depart from that procedural rule would constitute a derogation. However, otherwise 'the application of a procedural rule does not amount to derogation from substantive rules of *jus cogens*'.[597]

3.2 Accepted and recognised

With an understanding of what it means for no derogation from a norm to be possible, it is now possible to move beyond the statements of states and use their conduct to identify which norm in the *jus ad bellum* is accepted and recognised by the international community as a whole as being impossible to derogate from. In the same way that states can demonstrate *opinio juris* for custom by condemning breaches of that norm as unlawful or invoking the responsibility of another state, a state can also demonstrate its acceptance that a norm is non-derogable by treating as void purported derogations from that norm by other states, such as a bilateral treaty conflicting with a *jus cogens* norm. It may also be possible – in principle – to infer that a state accepts that derogation from a norm is not possible based on a state's (or states') own behaviour in not attempting to derogate from the norm. Although, as will be discussed below, this may prove more difficult in practice. Derogations are normative acts that purport to create a legally valid reason to depart from the *jus cogens* norm, that is, to perform the conduct prohibited by the customary norm in the case of a *jus cogens* prohibition.[598] Thus, it could be possible for a state to demonstrate its acceptance and recognition that a norm permits no derogation through its behaviour as a *legislator* of international law: by not attempting to create norms that purport to provide

[597] Talmon (2012), 986.

[598] See Memorial of the Federal Republic of Germany (12 June 2009), Written Proceedings, *Immunities*, para 86.

legal reasons to depart from the *jus cogens* norm. This would obviously include not attempting to conclude treaties that conflict with the *jus cogens* norm as well as groups of states refraining from creating regional custom that conflicts with the *jus cogens* norm of general custom.

In addition, since a conflicting *lex specialis* is not the only sense in which derogation is now understood, another general customary norm – such as the rules on circumstances precluding wrongfulness – would derogate from a *jus cogens* norm if it purported to create a legally valid reason to depart from the conduct it requires. As a result, a norm of general customary international law which provides an exception in relation to another general customary norm will derogate from that norm. Where they have created an exception through the process of customary international law states collectively demonstrate their acceptance that derogation from that customary norm is possible – there can be and are legally valid reasons to depart from the conduct it requires. Conversely, where states have created a customary norm but not any derogations from that norm, this could demonstrate their acceptance and recognition that derogation from that norm is not possible. As Byers writes: 'States, quite simply, do not believe that it is possible to contract out of *jus cogens* rules';[599] to which one may add that states simply do not accept it is possible to create a customary norm derogating from that *jus cogens* norm. They 'regard those rules as being so important to the international society of States, and to how that society has come to define itself, that they can conceive of no exceptions to them.'[600]

[599] Although note Byers sees *jus cogens* status as entirely the result of customary processes, Byers (1997), 221. See also ILC *Jus Cogens*, draft conclusion 10, commentary para 1.

[600] Byers (1997), 221.

As a result, part of the difficulty in identifying the *jus cogens* norm in the *jus ad bellum* has been that states have explicitly accepted the prohibition on the use of force as *jus cogens* through their statements, while simultaneously accepting the existence of apparent derogations from that prohibition in the form of the two so-called 'exceptions' and the possibility that a state may validly consent to a use of force on its territory.[601] All these examples appear to provide legally valid reasons for one state to use force against another. If such derogations from the prohibition on force are unquestionably possible, so the argument goes, then it cannot be a norm of *jus cogens*.[602]

To avoid this conclusion that the prohibition on force cannot be *jus cogens*, writers sometimes suggest that it is 'not simply the prohibition of the use of force that is peremptory, but it is also all of the rules on the use of force under international law, including the rules governing self-defence and the rules on forcible action as authorized by the Security Council.'[603] On this view, identification of a norm as *jus cogens* would be like the touch of King Midas that causes *jus cogens* status to spread through every branch of the underlying customary norm and every other customary norm connected to that norm, making it non-derogable in every extremity. Yet, not only would such arguments result in a formulation of the *jus cogens* norm so lengthy and complicated as to be virtually unworkable,[604] but by deducing the scope of the *jus cogens* norm rather than inducing it

[601] Green (2011), 229; Helmerson (2014), 173.

[602] Green (2011), 229.

[603] Green (2011), 230, discussing Orakhelashvili.

[604] See Linderfalk (2008), 867.

from the acceptance and recognition of states, this approach would abandon the Article 53 criteria: a norm is only *jus cogens* if it is accepted and recognised as non-derogable.[605]

In any case, it is not necessary to resort to such convoluted solutions to avoid the conclusion that the prohibition on force cannot be *jus cogens*. The problem with the argument that a general norm subject to apparent derogations cannot be non-derogable is that it assumes that the *jus cogens* norm must be coextensive with the general customary norm that underlies it; or put another way, that the underlying customary norm must be non-derogable in its entirety. On this view, that any of the conduct prohibited by the general customary norm may – for example – be consented to means the norm cannot therefore have *jus cogens* status. It takes an 'all or nothing' approach to *jus cogens* status: the possibility of derogation in relation to some conduct that comes within the scope of that customary norm means the norm as a whole is not non-derogable and so not *jus cogens*. However, there is no necessary shape that the *jus cogens* prohibition on force must conform to, and it need not be the same as the general customary norm on which it is based. All the possibility of consent tells us is that to the extent force may be consented to it is not prohibited by a norm with *jus cogens* status. The possibility of consent or other derogations does not mean that there can be no *jus cogens* prohibition on force; only that it must be narrower than one may initially think. A customary norm may be *jus cogens* in part – that is, to the extent that derogation is not possible – while other aspects of the customary norm will remain susceptible to derogation.[606] All that matters is that the norm to be given *jus cogens* status forms a coherent and intelligible norm in itself (e.g. non-consensual inter-

[605] There are other difficulties with a *jus cogens* norm that includes the right of self-defence and collective security structures, see Butchard (2018), 241–4; Green (2011), 230–2.

[606] Green (2011) makes a similar argument but in relation to the treaty norm in Article 2(4): its prohibition on force may be peremptory but not the prohibition on the threat of force, 228–9.

state force is prohibited), and the fact that it forms part of, or falls within the scope of, a larger non-*jus cogens* customary norm (e.g. inter-state force is prohibited) is no obstacle. There can be a core, narrow *jus cogens* norm, surrounded by a penumbra of derogable customary international law. In such cases, identifying the scope of the *jus cogens* norm becomes a question of identifying where the boundary between derogable and non-derogable customary international law lies.

Most customary norms are subject to multiple derogations, both in the form of treaty law (for example, a treaty that acts as *lex specialis*) and customary international law (for example, another customary norm exists creating an exception to the norm). Customary norms which are not subject to any derogations will be rare, but it is precisely this failure to legislate exceptions and other derogations into existence through the ordinary customary or treaty law processes that may, in principle, provide evidence of the acceptance and recognition of states that such derogations from the norm are not possible.

However, there are difficulties in using the absence of derogations alone to identify the extent to which a norm is accepted and recognised as non-derogable. As discussed in chapter two, when evaluating whether a customary prohibition exists, a state's omission to perform a particular conduct is ambiguous because it may reflect an acceptance (*opinio juris*) that the conduct is prohibited by customary international law, but equally it may result from the state's choice not to exercise a customary permission to perform the conduct.[607] In the same way, failure to create a derogation to a norm may reflect acceptance and recognition that derogation is not possible to this extent, but it may simply be that states

[607] *Lotus*, 277; see chapter 2.

have no interests in creating such a norm, and so a supporting practice has not developed. As a result, one cannot infer solely from the omission to create a derogation that a state considers the norm to be non-derogable to this extent. A further difficulty is presented by the higher quantitative threshold, which requires acceptance and recognition that the norm is non-derogable by the 'international community as a whole'. Even if one can be sure that a state or states accept that a customary derogation from a norm is not possible, all that is required to prevent such a derogating customary norm being established is that those states are sufficient in number to prevent the emergence of a widespread and representative practice and *opinio juris* in support of the derogating norm. Without additional evidence in the form of statements, this will not be enough to establish the acceptance and recognition of the international community as a whole that such a derogation is not possible.

Yet, the opposite deduction – using the existence of derogations to identify the extent to which derogation from the norm *is* possible – does not raise these evidential problems. Where there is a general customary norm that statements from the international community as a whole have identified as having *jus cogens* status, the precise scope of the *jus cogens* norm may thus be identified by starting from the general customary norm which is said to provide the source for the alleged *jus cogens* norm and taking account of all apparent derogations to that general norm in order to identify the precise contours of the norm that is accepted and recognised as non-derogable. Where there is – for example – an established customary derogation from a general norm the widespread and representative practice and *opinio juris* required for the formation of that customary norm means it is impossible that a very large majority of states holds the opposite view, that it is not possible to derogate from the norm to this extent. The scope of a *jus cogens* norm may thus be identified negatively, by looking at the circumstances in which there is or is not a legally

valid reason to depart from the underlying customary norm on which the *jus cogens* norm is said to be based.

This approach therefore deals with the so-called 'exceptions' to the prohibition on force not by including them within the *jus cogens* norm, as in the expansive approach above, but by excluding them from its scope. The existence of apparent derogations to the prohibition on force is not an obstacle to its identification as *jus cogens*, but the key to that process. Starting with the customary prohibition on force as the underlying norm of general international law which has been explicitly recognised by states as *jus cogens* through their statements, one must then take account of all existing derogations to that general norm. To the extent that the norm is subject to derogation, it cannot be accepted and recognised as non-derogable by the international community as a whole, allowing us to identify, by a process of elimination, that part of the general norm from which derogation is accepted and recognised as not possible.

This approach may appear at odds with how one typically thinks of *jus cogens* norms operating: first a norm is identified as *jus cogens*, and from that status certain effects follow, such as the inability to derogate. This approach would turn this on its head. Yet, '[t]he "peremptory" character of a legal norm in general international law is a conclusion, not a premise'[608] and if one accepts that the elements from Article 53 correctly reflect the customary criteria for identifying a norm as *jus cogens* then it is the acceptance and recognition of non-derogability alone that can justify that conclusion.

[608] Costelloe (2017), 17.

The approach suggested above may also appear to render the concept of *jus cogens* rather empty. What is the point of *jus cogens* status if any derogations can simply be explained away as part of the definition of the scope of the norm? However, this is a necessary consequence of any approach to identification of *jus cogens* that accepts that the customary criteria for identification derived from Article 53 VCLT make acceptance and recognition that no derogation is permitted the key to identification of *jus cogens* norms. Unless one adopts a content-based criterion for identification of *jus cogens* norms which sets out, for example, that *jus cogens* norms must protect certain fundamental values – the approach rejected by states at the Vienna conference[609] – the international community of states as a whole, provided it acts collectively, is free to allow any derogations to any norms they please and identify the content of the non-derogable norm in such a way that it imposes no meaningful restriction on the freedom of action of states. There is no necessary content for the norms that states recognise as non-derogable; indeed, there is no obligation for states to identify any *jus cogens* norms at all. The norms recognised as *jus cogens* may tend to be norms that states consider to be of fundamental importance or that carry particular moral weight, but this is not necessary for a norm to acquire *jus cogens* status.

Instead, and significantly for the purpose of this thesis, the value of a norm's *jus cogens* status lies in its impact on modification of the non-derogable norm once identified. Just as in many domestic systems the only protection from abrogation for entrenched rights is a more onerous process of change, whatever the *jus cogens* norm is, no new derogation can be created until the *jus cogens* norm is validly modified. Until that occurs, individual states, or even groups of states that fall short of a 'very large majority' will neither be able

[609] Rozakis (1976), 74–6.

to derogate from nor modify the contours of an existing *jus cogens* norm, for example by creating new derogations or altering its scope through the ordinary customary process.[610]

4. The structure of the *jus ad bellum*

Applying the methodology above to the *jus ad bellum*, it leads to the conclusion that the *jus cogens* norm in the *jus ad bellum* must be the customary norm which prohibits non-consensual force that does not fall within either of the two established so-called 'exceptions': collective security and self-defence. Starting from the general customary prohibition on force, an apparent derogation from that norm exists in the form of authorisation by the Security Council, acting under Chapter VII of the UN Charter. If such uses of force were prohibited by a *jus cogens* norm, the Charter would be purporting to provide a legally valid reason to depart from the *jus cogens* norm and, presumably, must be void through the operation of either the customary rule codified in Article 53 VCLT or, depending on the time at which the prohibition on force attained *jus cogens* status, the customary norm codified in Article 64 VCLT. Yet the UN Charter not only purports to provide a legally valid reason for using force in its text (as interpreted through subsequent practice) but these provisions have been applied on multiple occasions without the validity of the Charter in whole or in part ever being called into question. The universal acceptance, including by the 193 UN member states, that it is possible for such a treaty to be valid means that the opposite view – that a norm prohibiting the use of force when authorised under the Charter is non-derogable – cannot be accepted and recognised by the international community as a whole. Such uses of force must fall outside the scope of the

[610] Dinstein (2017), 114.

jus cogens prohibition on force. Moreover, they help define the scope of that *jus cogens* norm, by demonstrating the limits of the norm that can be accepted and recognised as non-derogable.

Turning to self-defence, it is not a treaty that constitutes the apparent derogation from the customary prohibition but the customary right of self-defence.[611] If force in self-defence were prohibited by the *jus cogens* prohibition on force, a customary right of self-defence would be a norm purporting to provide a legally valid reason to depart from that *jus cogens* norm. Either the customary norm of self-defence would be invalid or, more likely, like the right of self-help it would have disappeared from customary international law as a customary prohibition on force in self-defence came to be identified as *jus cogens*.[612] Yet since the customary right of self-defence unquestionably exists,[613] one must conclude that the *jus cogens* prohibition on force does not extend to a prohibition on force in self-defence. The universal acceptance that the right of self-defence exists in customary international law means the prohibition on force cannot be accepted and recognised by the international community as a whole as non-derogable to the extent it includes force used in self-defence within its scope. Such uses of force must be outside the scope of the *jus cogens* prohibition.

Importantly, these conclusions are without prejudice to the analysis of the underlying structure of the customary and treaty norms in the *jus ad bellum*, which is a

[611] The relationship between Article 51 of the Charter and customary international law is analysed in detail in chapter 7. For present purposes, what matters is that Article 51 acts as limit on the scope of Article 2(4) of the Charter only, with the broader customary right of self-defence acting as an exception to the customary prohibition.

[612] *Corfu Channel*, 35.

[613] *Nicaragua*, para 176.

much more complex question than the scope of the *jus cogens* norm and is addressed in chapter seven. The definition of the *jus cogens* norm above is compatible with more than one analysis of the structure of the *jus ad bellum*. For example, given that a state may consent to the use of force by another state and this will render that use of force lawful,[614] consensual force cannot be prohibited by a *jus cogens* norm. This does not tell us how consent to the use of force operates: consensual force may simply not constitute prohibited force for the purposes of the underlying customary prohibition on force,[615] so that in this regard the scope of the customary and *jus cogens* prohibitions are identical. Alternatively, both consensual and non-consensual uses of force may be prohibited by the customary norm, so consensual force is *prima facie* prohibited by the customary prohibition but consent acts as a circumstance precluding wrongfulness or defence for breaches of that prohibition.[616] Either way, with regard to the scope of the *jus cogens* norm their position is the same: it cannot prohibit consensual force. The general customary norm may be *jus cogens* in part or to a certain extent: just because conduct falls outside the scope of the *jus cogens* part of that prohibition does not mean it is not prohibited by the derogable customary norm. Put another way, if a particular type of conduct is regarded as being lawful 'all things considered' it cannot be prohibited by a *jus cogens* norm; but this does not tell us – nor is it necessary to know in order to identify the scope of the *jus cogens* norm – anything more about why that conduct is lawful 'all things considered'. It could be perfectly legal *ab initio*, or *prima facie* unlawful but justified or excused.

[614] Provided certain conditions are met, it is widely accepted that a state may lawfully take actions that would otherwise amount to a violation of the prohibition on force, such as sending troops onto another state's territory, where the latter state has consented to that intervention. See e.g. ILA (2018), 18–20; *DRC v Uganda*, para 149.

[615] Helmerson (2014), 177–8; ILC State Responsibility, Article 26, commentary para 6.

[616] Paddeu (2020).

Turning to the so-called 'exceptions' to the prohibition on the use of force, this conclusion as to the scope of the *jus cogens* norm also leaves open different possibilities as to the underlying structure of the UN collective security framework in customary and treaty law – and indeed whether it is truly an exception to the customary prohibition on force. Force authorised under the Charter may be prohibited by the customary prohibition on force, with the Charter acting as *lex specialis* among UN members. In this case, the Charter derogates from the customary prohibition on force. Alternatively, force authorised under the Charter may simply fall outside the scope of the prohibition on force which, for example, prohibits unilateral force only.[617] In this case, the Charter would not derogate from the customary prohibition, nor would it be a true exception, as such uses of force are simply not prohibited by that customary norm, even *prima facie*. The question of the structure of the UN collective security framework and whether it constitutes an exception to and/or a limitation on the scope of the prohibition on force in customary international law and/or Article 2(4) is analysed in detail in chapter seven; the point is simply that this does not need to be resolved here for us to conclude that the scope of the *jus cogens* norm in the *jus ad bellum* does not extend to a prohibition on force authorised under the Charter. Either the Charter provides a legally valid reason to perform conduct prohibited by the customary prohibition on force, in which case that norm cannot be non-derogable to that extent; or such uses of force were never prohibited by the customary prohibition on force in the first place, in which case they could never fall within the scope of the *jus cogens* prohibition, which is based on that general norm.

[617] See Helmerson (2014), 182–6.

Similarly, the conclusion above does not resolve the question of the structure of the right of self-defence and whether it constitutes an exception to or limitation on the scope of the customary prohibition on force, much less its relationship with Articles 51 and 2(4) of the Charter. Force used in self-defence may simply not qualify as prohibited force under customary international law and so fall outside the scope of both the customary and *jus cogens* prohibitions.[618] On the other hand, force used in self-defence may be a *prima facie* breach of the customary prohibition which is then made lawful by the operation of a separate customary norm that creates a right of self-defence. In the latter case, self-defence would be a true exception to the customary prohibition which would be *jus cogens* in part – to the extent that force is permitted in self-defence it is not non-derogable. In either case, the scope of the *jus cogens* prohibition on force will not extend to force used in self-defence.

In this way, the derogations from the customary prohibition on force identify which part of that norm is non-derogable. Once the meaning of derogation is clarified, it follows that any force that is regarded as lawful 'all things considered' cannot be prohibited by a *jus cogens* norm. Depending on the structure of the underlying norms, either the derogation defines the limits of the underlying customary prohibition on force itself, or it demarcates the boundary between that part of the customary prohibition that is derogable and that which is non-derogable. In either case, the apparent derogations are used to identify the scope of the *jus cogens* norm. However, this reveals that identifying the scope of the *jus cogens* norm in the *jus ad bellum* is relatively straightforward when compared with the more complex question of the structure of the underlying customary and treaty norms that

[618] Butchard (2018), 262–4; Helmerson (2014), 176–7.

make up the *jus ad bellum*, in particular the structures of the right of self-defence and the UN collective security framework and their respective relationships to the prohibitions in treaty and custom. This is addressed in chapter seven.

Many authors have reached a similar conclusion as to the scope of the *jus cogens* prohibition on force while attempting to square the circle of a *jus cogens* norm that is subject to apparent derogations.[619] However, few have considered how this interface between the non-derogable norm and the norms regulating uses of force that fall outside its scope operates. This raises the difficult question of the level of abstraction with which that boundary is defined, and in turn how the content of the *jus cogens* norm is defined.

This question will be analysed in detail in relation to both self-defence and collective security in chapter seven. However, for now it suffices to note that the fact that the derogations to the general customary norm are used to identify the scope of the *jus cogens* norm does not necessarily mean that the definition of the *jus cogens* norm must mirror in every detail the contours of those derogating norms. If that were the case, and if the extent to which force may lawfully be used in self-defence determines the limits of the *jus cogens* norm, then the requirements of necessity and proportionality, the definitions of armed attack and imminence, indeed every element of the right of self-defence, must be reflected in the definition of the *jus cogens* norm.[620] At its boundary with self-defence the *jus cogens* prohibition would be like a negative image of the customary right. The same

[619] Orakhelashvili (2008), 72; Kolb (2015), 98–9; Dinstein (2017), 111; Akande and Tzanakopoulos (2017), 214 fn 3; also, perhaps, Corten (2008), 296, 609.

[620] See Green (2011), 232–4.

would also apply to any other derogation which is being used to identify the scope of the non-derogable norm, such as authorisation of force under the Charter or consent.

Such an approach risks absurd consequences, as the definition of the *jus cogens* norm becomes so long and complex as to be unworkable.[621] Moreover, this does not really correspond with how one thinks about legal norms in practice. It seems implausible that the acceptance and recognition of states that a norm is non-derogable could extend to every detailed element of the customary prohibition on which it is based. What is more likely is that the *jus cogens* norm is defined at a higher level of abstraction and prohibits force that is not a lawful exercise of self-defence, however that is defined by the customary international law of self-defence at a particular time. In this way, the scope of the *jus cogens* norm may be ambulatory: it tracks changes in the customary international law of self-defence as it evolves. What matters is the conclusion as to lawfulness that is reached through the application of the body of law that regulates self-defence – or validity of consent to force, or the collective security provisions of the Charter.

This conclusion has interesting implications for the modification of *jus cogens* norms. Article 53 VCLT provides that a *jus cogens* norm 'can be modified only by a subsequent norm of general international law having the same character'. While *jus cogens* norms are not immutable, they may only be modified through their replacement by another *jus cogens* norm in accordance with the process for the identification of *jus cogens* norms. That is, the two criteria must be fulfilled, including the acceptance and recognition of the new contours of the *jus cogens* norm by a very large majority of states. However, if the *jus*

[621] *Ibid*, 234.

cogens norm only prohibits uses of force which are concluded to be unlawful through application of the customary right of self-defence, this suggests that there can be a certain amount of change to the customary norms comprising the right of self-defence without this amounting to a modification of the *jus cogens* norm, with the more demanding requirements that this entails.

An important constraint is placed on this flexibility by the scope of the *jus cogens* norm. If the change to customary international law were so significant that it goes beyond modification of the *content* of self-defence and modifies the *jus cogens* norm itself that provides the outer boundaries of that ambulatory right, then the requirements for modification of a *jus cogens* norm would need to be fulfilled, not merely those of customary international law. For example, an attempt to transform self-defence into a broader doctrine of self-help. Thus, it is essential to identify with as much precision as possible the scope of the norm accepted and recognised as *jus cogens*, as this will determine how much and what kinds of change may be tolerated before it amounts to a modification of the *jus cogens* norm.

Drawing these kinds of distinctions and determining the level of abstraction at which the *jus cogens* norm is identified and its limits expressed requires detailed analysis of the acceptance and recognition of states as well as the structure of the relevant *jus ad bellum* norms. This is undertaken in chapter seven. For now, one can observe that the content of the *jus cogens* norm may most easily be determined by examining how modifications to that norm have occurred in practice, as can be seen if one turns to the other so-called 'exception' to the prohibition on force. Since 1945, Article 27(3) of the UN Charter has been interpreted to allow force to be authorised by Security Council decisions

adopted with the abstention of a permanent member. This modification of the collective security system as drafted in the text of the Charter resulted from the interpretation of that provision through subsequent practice of UN members.[622] Although the practice was likely accepted by UN members long before it was confirmed by the Court's 1971 advisory opinion, even by 1971 only 132 states were parties to the Charter – far from the 'very large majority', even of those states in existence at that time, which would be required to modify the *jus cogens* prohibition on force.[623] This suggests that the limitation on the scope of the *jus cogens* norm constituted by collective security exists at a level of abstraction above the detailed procedural requirements for the functioning of the Security Council as set out in the text of the Charter as drafted. That is, the *jus cogens* norm must have prohibited 'force not validly authorised by the Security Council' or perhaps 'force not validly authorised under the Charter', whatever that happens to be at the time, not 'force not authorised by a decision of the Security Council made by an affirmative vote of nine members including the concurring votes of the permanent members'.[624] That specific change to the Security Council decision-making process must not have entailed a modification of the *jus cogens* norm.

In this way, an 'ambulatory' approach to defining the scope of the *jus cogens* norm can help account for the 'notoriously flexible' nature of the *jus ad bellum*, despite the presence of a *jus cogens* norm at its heart.[625] Not only that, but this may explain how the prohibition on the use of force can be identified as a *jus cogens* norm while key elements

[622] *Namibia*, paras 21–2. See chapter 4, section 3.3.

[623] See discussion in section 5.2(b) below regarding the difficulties with acquiescence in change to a *jus cogens* norm.

[624] See the possibilities suggested by Helmerson (2014), 182–6.

[625] Green (2011), 237.

of the *jus ad bellum*, such as the existence and scope of the alleged rights of anticipatory or pre-emptive self-defence, remain contested by states.[626] It would indeed be difficult to frame a definition of a *jus cogens* norm that accounted for this uncertainty. However, if the definition of the *jus cogens* norm is only concerned with the conclusion as to the lawfulness of a use of force under the customary international law of self-defence, not with the elements that establish that lawfulness, then this problem does not necessarily arise. The debate can continue at the level of custom while the *jus cogens* prohibition remains unchanged.[627]

5. Modifying *jus cogens* norms

The previous section considered the possibility that changes to the *jus ad bellum* could occur without modification of the *jus cogens* norm. However, some changes to the *jus ad bellum* may go beyond what can be accommodated by these 'ambulatory' limits on the scope of the *jus cogens* norm. For example, the creation of a new customary or treaty norm exception to the prohibition on force that provides a valid legal reason to perform conduct currently prohibited by the *jus cogens* norm, or a modification of the scope of the *jus cogens* norm through its restriction to no longer prohibit a particular category of force. This section will therefore analyse how a customary *jus cogens* norm, and in particular a customary *jus cogens* prohibition, may be modified.

Given the very widespread support a norm must enjoy before it is identified as a *jus cogens* norm, modification of that norm or the loss of its *jus cogens* status will be

[626] *Ibid*, 234–6.

[627] Cf *ibid*, 241.

unlikely.[628] Perhaps for this reason, modification of *jus cogens* norms has not yet been the subject of detailed study.[629] Article 53 VCLT provides that a *jus cogens* norm 'can be modified only by a subsequent norm of general international law having the same character'. This is generally understood to mean that while *jus cogens* norms can change, they may only be modified through their replacement by another *jus cogens* norm in accordance with the process for the identification of *jus cogens* norms.[630] This accords with the customary nature of *jus cogens* norms, for which the processes of identification and modification are the same.

However, as for customary international law this apparent simplicity belies the complexity of how modification of *jus cogens* norms will take place in practice. As Orakhelashvili observes, '[t]he modification of a norm can mean different things: it can refer to the development or expansion of the scope of the norm; it might as well refer to the abolition or replacement of the norm.'[631] The analysis below will therefore focus on three distinctions that must be made when thinking about how *jus cogens* norms may be modified.

First, as Orakhelashvili observes, the *jus cogens* norm may be expanded or it may be restricted. In the former case, where the *jus cogens* norm is a prohibition the scope of the new, broader prohibitive *jus cogens* norm will encompass the pre-existing *jus cogens* norm. The conduct previously prohibited by a *jus cogens* norm remains prohibited by a *jus*

[628] Byers (1997), 228.

[629] Although see Dinstein (2007), 402ff; Orakhelashvili (2015); and Linderfalk (2020a), at chapter 4.

[630] Minagawa (1984), 27. ILC *Jus Cogens* does not analyse the modification process in detail but appears to support this view, draft conclusion 14, commentary para 6.

[631] Orakhelashvili (2008), 127.

cogens norm, in addition to the new conduct prohibited by the expanded *jus cogens* norm. Conversely, where the *jus cogens* prohibition is restricted, the scope of the new prohibitive *jus cogens* norm is narrower than the pre-existing *jus cogens* norm and so some conduct previously prohibited by a *jus cogens* norm is no longer prohibited by a *jus cogens* norm. Recalling the analysis in chapter two, whether the modification expands or restricts the *jus cogens* norm will influence whether the practice, *opinio juris* and the alleged new *jus cogens* norm itself are consistent or inconsistent with the existing *jus cogens* norm.

Second, it is important to distinguish between the general customary norm on which the *jus cogens* norm is based and the *jus cogens* norm itself, which are not necessarily coextensive. The modification of the *jus cogens* norm may involve a modification of the underlying norm of general international law on which the *jus cogens* norm is based, or there may be no change to customary international law and it may be that a change to the *jus cogens* norm occurs because a different, existing customary norm comes to be accepted and recognised as non-derogable.

Third, the modification of the *jus cogens* norm may occur through statements of states only, or it may occur entirely or partly through their practice. The process by which a particular modification of a *jus cogens* norm may occur will vary depending on these three factors.

5.1. Expansion of a *jus cogens* norm

5.1(a) No change to customary framework

An example of expansion of a *jus cogens* norm in the *jus ad bellum* would be: customary international law prohibits all uses of force including acts of aggression (understood here as meaning particularly grave illegal uses of force). Initially only the prohibition on aggression is recognised as having *jus cogens* status. The acceptance and recognition of the international community as a whole then changes, with the result that the customary prohibition on the use of force as a whole comes to be accepted and recognised as *jus cogens*. This transformation, or one similar to it, has occurred in practice, as following adoption of the Charter a customary prohibition on force emerged that mirrored the scope of Article 2(4), and it came to be recognised as non-derogable.

In this case, the process of modification/expansion of the *jus cogens* norm is relatively straightforward: it is the identification of a new *jus cogens* norm, as the customary prohibition on *uses of force other than aggression* comes to be accepted and recognised as non-derogable. As with the identification of *jus cogens* norms generally, one can look at what states *say* is non-derogable: acceptance and recognition of the new broader scope of the *jus cogens* norm could be manifested by states referring to the 'prohibition on the use of force' as *jus cogens* rather than the prohibition on aggression only.[632] One could also look at the norms states *apply* as being non-derogable, by condemning or not giving effect to purported derogations to the prohibition on force by others. For example, rejection of a customary right of self-help,[633] or treaties purporting to create a right to use force.[634] In principle, one can also look at the norms states *observe* as being non-derogable, by not

[632] See Corten (2008), 299–307.

[633] E.g. *Corfu Channel*, Reply submitted by the Albanian Government according to Order of the Court of 28 March 1948 (20 September 1948), para 154.

[634] E.g. allegations in 1963 that the 1960 Treaty of Guarantee between Cyprus, Greece, Turkey and the UK was invalid because it conflicts with the *jus cogens* rule prohibiting the threat or use of force as formulated in Article 2(4) of the Charter, Schwelb (1967), 952. For a recent reaffirmation, see S/2020/689.

purporting to create derogations to the norm themselves. However, as noted above, states omitting to create purported derogations from the prohibition on uses of force other than aggression is consistent with both the starting position (only the prohibition on aggression is *jus cogens* and states are simply choosing not to create derogations from the customary prohibition on force, although they remain able to do so) and the alleged expansion of the *jus cogens* norm. Without some additional evidence that a very large majority of states accept that such derogations are not possible this would not be sufficient to infer acceptance and recognition of the expanded scope of the *jus cogens* norm.

With expansion of the *jus cogens* norm there is no effect on the pre-existing narrower *jus cogens* prohibition on aggression, which remains non-derogable, albeit it now forms part of a broader *jus cogens* norm. The new acceptance and recognition by states that the prohibition on force more broadly is non-derogable would not be inconsistent with the *jus cogens* status of the prohibition on aggression, nor would the new *jus cogens* norm derogate from the previously existing *jus cogens* norm.

5.1(b) Change to customary framework

Consider a second example: the kinds of acts which are considered under customary international law to amount to 'force' for the purposes of the prohibition are limited to 'direct' uses of force and do not include the sending of armed bands to conduct attacks on another state's territory. That customary prohibition on the use of force is accepted and recognised as a *jus cogens* norm in its entirety. State practice and *opinio juris* then evolve so that acts of 'indirect force' are now considered under customary international law to be prohibited uses of force.

In this case, the customary norm which is the source of the *jus cogens* norm is being modified. The customary prohibition on direct force is being expanded to apply to conduct not previously regulated by that norm. As noted in chapter two, when one speaks of modification of a customary norm what is meant is that the test for identification of custom is now fulfilled in relation to a new or different customary norm. Expanding a customary prohibition thus requires a new widespread and representative practice of states *not doing* conduct currently *permitted* by existing customary international law. Since that new practice is also consistent with the previous interpretation of custom, and thus ambiguous, for the existing customary prohibition to be expanded that new state practice of states not conducting indirect uses of force must be accompanied by evidence of their *opinio juris* accepting that abstention from such acts is now required by customary international law.

Assuming both elements of the test for identification of custom are met, this situation could be analysed in two ways. First, as the creation of a new customary prohibition on indirect uses of force, alongside the existing customary *jus cogens* prohibition on direct uses of force. In this case, the *jus cogens* norm would not be modified. However, where states treat the state practice in support of the new customary norm as being in application of an existing customary norm that they already accept and recognise as non-derogable (the prohibition on force, which states now accept as covering both direct and indirect force), it may be inferred that they accept and recognise that derogation from the new, broader iteration of that norm is also not possible.[635] In this case, the situation may

[635] In chapter 2 it was argued that the modification, application and identification of customary norms are the same process. This is still the position here. However, it may be that where states through their *opinio juris* accept a new practice as being regulated by an existing customary norm, the customary norm identified will likely be characterised as a modified version of a previously existing customary norm. Where the new practice closely resembles conduct within the scope of the existing customary norm, this process may even be characterised as an application of that existing norm.

be analysed not as the creation of a new customary prohibition (on indirect force), but as the expansion of the existing customary *jus cogens* norm. When indirect attacks were recognised as prohibited by customary international law in the Definition of Aggression, this was treated by states as an expansion of the existing *jus cogens* customary prohibition on the use of force, not as the creation of new and separate customary prohibition.[636] From this one may deduce that states considered that the new customary prohibition on indirect uses of force is also non-derogable.

Where states continue to recognise the customary prohibition on force as non-derogable it may be assumed that their acceptance and recognition also extends to the new, broader interpretation of that norm that includes the new practice, without states needing to demonstrate specifically that no derogation is permitted from the prohibition on indirect uses of force that it now encompasses.[637] Where the *opinio juris* of states identifies the new state practice as being regulated by an existing *jus cogens* norm, the broader customary norm will have *jus cogens* status in its entirety. In effect, identifying practice as being prohibited by an existing *jus cogens* norm is simply another way for states to evidence their acceptance and recognition that the prohibition on that practice is non-derogable.

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[636] A/RES/3314(XXIX), adopted without a vote, makes clear that acts of aggression – including indirect attacks – are uses of force for the purposes of both the Charter and customary prohibitions, para 3, Annex, Articles 1, 3. That indirect uses of force were therefore considered to fall within the scope of the existing *jus cogens* prohibition is clear from Article 5(1). Although Article 6 provides that 'Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful' this is best understood – given the ongoing debate about a possible new exception to or limitation on the scope of the prohibition that would permit the use of force to support self-determination struggles – as clarifying that the resolution does not provide any new reason to use force, not that it has no effect on the meaning of the existing so-called 'exceptions'. This also emerges clearly from the statements of delegates prior to the definition's adoption, see A/9619 e.g. statement of the USA, 24.

[637] Although some states did explicitly recognise the *jus cogens* nature of the prohibition on force, as newly defined in Resolution 3314. See statement of Colombia, *ibid*, 28.

This may appear to allow for modification of a *jus cogens* norm through fulfilment of the test for identification of a regular customary international law norm only. However, as with the definition of the limits of the *jus cogens* norm, all depends on how the *jus cogens* norm is defined by the acceptance and recognition of the international community of states as a whole. If states accept and recognise that a norm that prohibits 'force' is non-derogable, and the customary definition of prohibited 'force' evolves to include indirect uses of force, there is no change to what states are accepting and recognising as non-derogable. Their acceptance and recognition does not extend to every detail of what constitutes the definition of force. However, if practice of states demonstrated that only the norm that prohibits 'direct force' was previously accepted and recognised as non-derogable, for indirect force to be prohibited by the *jus cogens* norm would require both the identification of a new customary international law prohibition on indirect force and its acceptance and recognition as a norm from which no derogation is permitted, to modify the *jus cogens* norm.

Where the threshold for identification of a new *jus cogens* norm is not met, the previously existing *jus cogens* norm will not be expanded and the result will be a general customary norm that is *jus cogens* in part: in this case, a core, non-derogable prohibition on direct uses of force accompanied by a derogable customary prohibition on indirect uses of force. The new customary prohibition on indirect force does not derogate from or otherwise impact the existing *jus cogens* norm prohibiting direct force and so there is no obstacle to its identification as a valid norm of customary international law; but nor is the widespread and representative state practice and *opinio juris* in support of such a customary prohibition sufficient to identify that part of the customary prohibition on force that prohibits indirect force as non-derogable.

Therefore, in all cases when a *jus cogens* norm is successfully modified in such a way as to expand the *jus cogens* norm, whether the customary framework is modified or not, the test for identification of a *jus cogens* norm must be met. However, there are different ways in which acceptance and recognition that the expanded customary norm is non-derogable may be manifested. If the *opinio juris* of states accepts that new conduct (indirect force) is now prohibited by a previously existing *jus cogens* customary norm (the *jus cogens* prohibition on force), then this will manifest their acceptance and recognition that that new conduct is prohibited by a norm from which no derogation is permitted. There has been no modification of the scope of the *jus cogens* norm, even if its detailed definition and the kinds of conduct that come within its scope may have expanded: those changes occur below the level of abstraction at which the *jus cogens* norm is defined. Alternatively, expansion of a *jus cogens* norm may occur through the identification of a new customary norm, which is then subsequently or simultaneously accepted and recognised as non-derogable.

5.2. Restriction of a *jus cogens* norm

In the situations described above the new statements and practice required to establish the existence of the broader *jus cogens* norm were consistent with the previously existing *jus cogens* customary prohibition, addressing conduct outside its scope. However, where the *jus cogens* norm is modified to become narrower this will not be the case, complicating the modification process. Consequently, and as can be seen from the fact that the two examples below are hypotheticals, restriction of a *jus cogens* norm will be more difficult to achieve in practice.

5.2(a) No change to customary framework

A (hypothetical) example of such a transformation would be a situation where the prohibition on force was *jus cogens*, and the acceptance and recognition of the international community as a whole changes so that only the narrower prohibition on aggression is now recognised as non-derogable: the opposite transformation to that described in section 5.1(a). Here there is no change to the underlying customary international law. Both acts of aggression (grave illegal uses of force) and other uses of force remain prohibited by customary international law throughout. In such cases, what needs to be shown is an acceptance and recognition that derogation is now possible from that part of the customary norm that is claimed to have lost its *jus cogens* status – in the example given, the customary prohibition on *uses of force other than aggression.* As with *opinio juris* for a new norm of custom, this does not require the first states recognising the new, narrower scope of the *jus cogens* norm to be mistaken; all that is required is their manifestation of an acceptance and recognition that derogation is now possible, not a genuine belief.

Manifestation of that acceptance and recognition through statements by states – for example, explicitly recognising the prohibition on aggression only as *jus cogens* – is unproblematic.[638] A statement that 'the prohibition on force other than aggression is not *jus cogens*' or even 'derogations from the prohibition on force other than aggression are permitted' would not constitute either a violation of or a derogation from the *jus cogens* prohibition on force. That customary norm does not regulate statements, and the statements

[638] Byers (1997), 228.

are not purporting to provide a legally valid reason to depart from that prohibition – they merely acknowledge that such a reason could exist.

Statements recognising a narrower *jus cogens* norm would thus not be 'invalid' for the purposes of evaluating the acceptance and recognition of the international community as a whole merely because they are inconsistent with the existing acceptance of the scope of the *jus cogens* norm. However, they would have no legal effect on the scope of the *jus cogens* norm until the threshold for identification of a *jus cogens* norm is met. It is only if the acceptance and recognition of the new, narrower contours of the non-derogable norm became so widespread that it was shared by the international community as a whole, that is, a very large majority of states, that this would bring about a change in the scope of the *jus cogens* norm. Unless and until that threshold is reached the statements recognising the new scope of the *jus cogens* norm will have no effect. The existing, broader *jus cogens* norm will remain non-derogable and any purported derogation from that norm will be invalid.

This acceptance and recognition that derogation is possible does not need to take the form of an explicit statement by a state as to a norm's non-derogable status. That acceptance (or its absence) can be manifested by states through their participation in the ordinary processes for the formation of new international law norms – such as the conclusion of treaties – where those norms amount to derogations from a customary norm. However, when states manifest their acceptance and recognition of the new, narrower scope of a *jus cogens* norm through their conduct, in how they apply and observe the customary norms concerned, further complications arise.

As with identification of a new customary permission against the backdrop of an underlying a customary prohibition, what would be required to demonstrate that derogations from a norm are now accepted as possible would be the creation and acceptance as valid of derogations that would not be possible under the currently existing law. This requires those 'first mover' states recognising the narrower scope of the *jus cogens* norm through their conduct to run certain risks. The situation is analogous to that of the states performing the first incidents of state practice establishing a new customary permission, whose conduct will be inconsistent with the existing customary prohibition and therefore at risk of being viewed as an internationally wrongful act. Unless and until the test for identification of a new *jus cogens* norm is fulfilled and the international community as a whole accepts and recognises the new scope of the *jus cogens* norm, any state purporting to create a derogation runs the risk that their purported derogation (for example, a bilateral treaty contracting out of the norm) will be treated as invalid.[639] The invalidity of the derogation – for example, a treaty conflicting with the *jus cogens* norm being treated as void – will not in itself entail international responsibility for the state(s) concerned.[640] However, if the state has also acted inconsistently with the *jus cogens* customary norm in the expectation that it will be able to rely on that derogation as a legally valid reason for its departure, the invalidity of the derogation may lead to state responsibility for the acting state as a result of its breach of the customary norm with *jus cogens* status.[641]

This risk will not arise where the international community of states as a whole acts simultaneously to recognise the new, narrower scope of the *jus cogens* norm. If a 'very

[639] Orakhelashvili (2008), 129.

[640] Costelloe (2017), 181.

[641] See *ibid*, 79.

large majority' of states were to conclude a treaty that derogated from a previously existing *jus cogens* norm, their acceptance and recognition that such a derogation is possible – demonstrated through their conclusion of the treaty – would itself bring about a change in the scope of that *jus cogens* norm (and potentially even its complete abrogation, were the effect of the treaty to completely exclude the norm from the parties' *inter se* relations) so that the treaty would not be invalid.[642] The effect of *jus cogens* status is to raise the *quantitative* threshold for the creation of new derogations from that norm, which requires not merely the fulfilment by those states creating the derogating norm of the normal processes for the creation of conventional or customary norms, but the participation of a 'very large majority' of states in those processes, if they are to be effective. Only this level of participation in the treaty will demonstrate the acceptance and recognition of the international community of states as a whole that such a derogation from that general norm is now possible – otherwise the purported derogation will both be invalid and have no effect on the scope of the *jus cogens* norm. By extension, an amendment to or new interpretation of a treaty provision derogating from a *jus cogens* norm could, provided it also met the criteria to identify the new, narrower scope of the *jus cogens* norm, also modify the *jus cogens* norm to allow for its own validity.[643] In this way, one can see that the ILC's statement that a *jus cogens* norm may be modified by a multilateral treaty is correct,[644] even if the treaty norm itself is not a source of *jus cogens*.

5.2(b) Change to customary framework

[642] Meron (1986), 184 fn 150; Dinstein (2007), 403; Buzzini (2005), 98 fn 49.

[643] This possibility is analysed further in chapter 6.

[644] ILC 1966, draft Article 50, commentary para 4.

Since a *jus cogens* norm must be based on a norm of general international law, if a restriction of the underlying customary norm is successful this will necessarily involve a change in the scope of the *jus cogens* norm, which would lose part of its customary foundation and so become narrower. An example of such a change would be the restriction of the scope of the (*jus cogens*) customary prohibition on force to no longer prohibit force for unilateral humanitarian intervention.[645] However, the *jus cogens* status of that customary norm will render identification of new customary international law more demanding.

The effect of *jus cogens* status is to raise the quantitative threshold of participation required for the creation of a new derogation. The ordinary customary process will not suffice; it must include the acceptance and recognition by the international community as a whole of the new contours of the *jus cogens* norm. In practice, this means that to restrict the scope of the underlying customary norm which has *jus cogens* status, a widespread and representative state practice in support of the new customary norm will need to be accompanied by the *opinio juris* of a very large majority of states. By accepting that a customary norm permitting force in – for example – situations of humanitarian intervention

[645] Force for the purpose of humanitarian intervention could also be made lawful through the creation of a new (customary or treaty) norm – an exception – which made lawful certain uses of force that fall within the scope of the customary prohibition on force. Assuming such uses of force were previously prohibited by a *jus cogens* norm this would require a modification of the scope of the *jus cogens* norm as, to the extent that such an exception existed, the customary prohibition on force would no longer be non-derogable. Where this derogating exception is a treaty norm, while the scope of the *jus cogens* prohibition would be modified, there would be no change to the underlying customary international law framework. This situation should therefore be analysed under section 5.2(a) above. Where the derogating exception is a customary norm (like e.g. the right of self-defence), the analysis of how that customary norm can be identified will be the same as the discussion here of how the customary prohibition may be restricted. Both will involve a practice inconsistent with the existing *jus cogens* customary norm. The distinction between a separate customary norm creating an exception and a limitation on the scope of the customary prohibition will be found in the *opinio juris* of states.

exists as law, states must accept that the customary norm prohibiting force is derogable at least to that extent.

To restrict the scope of an existing prohibitive customary norm is in effect to replace part of that prohibition with a new permissive customary norm. As a result, the practice required to establish the new, narrower scope of the customary prohibition will be inconsistent with the existing prohibition. It will be a practice of performing conduct prohibited by the underlying customary international law. Practice inconsistent with a *jus cogens* norm constitutes a breach of that norm, it is not a derogation and so, even if it were possible for an individual incident of practice to be somehow 'invalid', practice contrary to the existing *jus cogens* customary norm may still be counted as state practice to fulfil the test for identification of a new customary norm.[646] The *opinio juris* of an individual state also does not purport to provide a legally valid reason to depart from the conduct prohibited by the *jus cogens* norm, and so is not a derogation in itself. As a result, that *individual* state's *opinio juris* supporting the new customary norm contrary to the existing *jus cogens* norm will also not be invalid.

However, where the underlying international law norm is a *jus cogens* customary norm, it seems this must prevent any inference of *opinio juris* in support of a new customary norm derogating from the *jus cogens* norm on the part of a state participating in practice. In chapter two it was argued that where a consistent state practice is inconsistent with the underlying international law norms – as is the case where a permissive customary norm is

[646] Cf Orakhelashvili (2015) and Dinstein (2007), 402. When the ICJ in *Nicaragua* considered how practice contrary to the (*jus cogens*) customary prohibition on the use of force should be analysed, it gave no indication that practice or *opinio juris* contrary to a *jus cogens* norm should be treated differently or as 'invalid' for the purposes of establishing a new customary norm, para 186.

replacing a prohibition – one may infer a supportive *opinio juris* on the part of a state participating in that practice. However, this inference would not be justified where the prohibitive customary norm in question is accepted and recognised as one from which no derogation is possible. It seems odd to *presume* a state's acceptance that a new customary norm exists that would amount to a derogation from a norm that is currently accepted and recognised as non-derogable. Surely the presumption should be that, since there can be no legally valid reason to depart from a *jus cogens* norm, the acting state must not accept that its conduct that departs from the *jus cogens* norm can be lawful, and accepts that the practice is simply a breach of the existing customary norm. This is only a presumption and can of course be rebutted, but it means that states wishing to establish a new customary derogation, or otherwise change the customary *jus cogens* norm, will need to provide additional, explicit evidence of their *opinio juris* accompanying their practice in support of the new customary norm.[647]

As recognised by the ILC, '[a] rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)'.[648] In the commentary to that draft conclusion, the ILC explains this on the basis that *jus cogens* norms 'are hierarchically superior to other norms of international law and therefore override such norms in the case of conflict.'[649] Yet one does not need to resort to ideas of hierarchy to explain this result: a customary norm that purports to provide a legally valid reason for conduct departing from an existing *jus cogens* norm would

[647] Similarly, where a state acts inconsistently with a treaty provision by which it is bound, one will not be able to infer that this is an implicit claim as to a new interpretation of that provision where that new interpretation would derogate from a *jus cogens* norm; such a claim must be made explicitly. See the discussion in chapter 6, section 1.1.

[648] ILC *Jus Cogens*, draft conclusion 14.

[649] *Ibid*, draft conclusion 14, commentary para 3.

constitute a derogation and be invalid on that basis. Even if there were widespread and representative state practice, accompanied by *opinio juris*, to establish the new permissive customary norm derogating from or narrowing the scope of the existing *jus cogens* customary prohibition, it could not constitute a valid norm of customary international law. At the moment the customary norm crystallised, it would be invalidated by the conflicting *jus cogens* norm. The idea that the hierarchical superiority of *jus cogens* norms means they can 'override' norms that 'conflict' with them in a broader sense than is understood by 'derogation' has in any case been rejected by the ICJ.[650]

In practice, however, it is unlikely that a situation will arise where the *jus cogens* norm must 'override' a new, conflicting customary norm. The interplay between the nascent customary norm and the existing *jus cogens* norm, and the impact on the *opinio juris* of states is more complex. Until the *jus cogens* prohibition is recognised as non-derogable by the very large majority of states required to allow for the existence of the new permissive customary norm, states will likely – as Byers says – be 'unable to conceive of' any such derogations being legally valid, inhibiting the emergence of *opinio juris* to establish a conflicting customary norm. One example of this is that *jus cogens* norms 'generate strong interpretative principles which will resolve all or most apparent conflicts',[651] so that where a non-*jus cogens* norm appears to conflict with a *jus cogens* norm, it is most likely that the conclusion that the non-*jus cogens* norm is invalid will be 'circumvented through interpretation'.[652] The deterrent effect of the existence of a *jus cogens* norm means states will be unlikely to accept that even a widespread and

[650] See text accompanying fns 594–7 above.

[651] ILC State Responsibility, Article 26, commentary para 3.

[652] Costelloe (2017), 83–5.

representative new state practice can be in conformity with customary international law if it is contrary to an existing *jus cogens* norm. As a result, in most cases it is not that a conflicting customary norm will be immediately invalidated by the *jus cogens* norm; rather, it will be very difficult for that customary norm to become established unless there is a prior change in the acceptance and recognition of the international community as a whole to admit that such a derogation to the *jus cogens* norm is now possible.

It has already been noted above that the individual *opinio juris* on the part of the acting state cannot be inferred even from their consistent participation in practice in support of a new customary norm that would derogate from a *jus cogens* norm. When it comes to establishing the general *opinio juris* required to fulfil the second element of the test for identification of custom, which must be shared by a very large majority of states if the *jus cogens* norm is to be modified, the presence of the *jus cogens* norm will also impact the inferences one can make about the *opinio juris* of reacting states based on their silence or non-reaction, as analysed in chapter two. While it is generally to be expected that other states will object to another state acting inconsistently with a *jus cogens* norm, this does not mean their failure to react should too readily be interpreted as *opinio juris*/acceptance of a new customary derogation. Given that *jus cogens* norms are accepted and recognised by the international community as a whole as not permitting any derogation, it again seems odd to *presume* from a state's inaction that they accept that a new customary norm exists that would in effect amount to a derogation from that *jus cogens* norm. The deterrent effect of *jus cogens* norms on the emergence of a contrary *opinio juris*, and the interpretative effects of *jus cogens* norms, are further reasons against any inference of *opinio juris* where practice is inconsistent with a *jus cogens* norm. The same is true when evaluating whether the non-reaction of treaty parties to practice in application of the treaty, which is contrary

to a *jus cogens* norm, should be treated as their acquiescence in a new treaty interpretation that would derogate from that *jus cogens* norm.[653]

Where the requisite 'very large majority of states' express their general *opinio juris* for the new customary derogation explicitly these complications will not arise. Yet opportunities for the international community as a whole to manifest its *opinio juris* simultaneously and explicitly are rare. The deterrent effect of *jus cogens* status on any emerging contrary *opinio juris* means modification of a *jus cogens* norm is unlikely to occur through incremental change. Rather, a swift and significant shift in the *opinio juris* of the international community of states as a whole, such as the political consensus at the end of the Second World War which led to the drafting of the UN Charter, will be more likely to create the conditions for modification of a *jus cogens* norm. The ability of discussions in an inclusive forum like the General Assembly to build consensus, and allow for *simultaneous* expression of the acceptance and recognition necessary to modify a *jus cogens* norm, means this may be the most likely means by which modification of a *jus cogens* norm will occur in practice.

6. Conclusion

To understand how the *jus ad bellum* can change, it is necessary to identify the *jus ad bellum* norm which has *jus cogens* status, and to know how *jus cogens* norms can be modified. This chapter has argued that the *jus cogens* norm in the *jus ad bellum* is the customary norm which prohibits non-consensual uses of force that are neither validly

[653] The expectation of a response will depend on the circumstances; the factors that impact these inferences are therefore discussed in more detail in chapter 6, in the specific context of the *jus ad bellum*.

authorised under the UN Charter nor lawful exercises of self-defence. This follows from the necessarily customary nature of *jus cogens* norms, since there are currently no universal treaties in existence which could form the source for a *jus cogens* norm of treaty law. It has been argued that today for a norm to 'permit no derogation' means that there can be no norm that purports to provide a legally valid reason to depart from the conduct prescribed by the *jus cogens* norm. In the same way that *opinio juris* for custom may be inferred from the conduct of states applying and observing a customary norm, not just their explicit statements as to the content of customary international law, the acceptance and recognition of the international community as a whole that a norm is non-derogable (or the lack thereof) may be evidenced, not just by their statements that a norm 'is *jus cogens*', but by their conduct in accepting or rejecting as invalid purported derogations, and their creation of derogations from customary norms through ordinary international law-making processes. Since it is clear that the international community as a whole accepts that there is a *jus cogens* norm that prohibits force, the existence of apparent derogations from the customary prohibition on force may be used to identify the extent to which that norm is accepted and recognised as non-derogable.

It is not necessary to resolve the difficult questions regarding the structure of the customary and treaty norms regulating self-defence and collective security to identify the scope of the *jus cogens* norm, at least at this relatively high level of abstraction. These questions will be addressed in chapter seven, where the contours of the *jus cogens* norm in the *jus ad bellum* will be identified more precisely. It is sufficient to know that to the extent that conduct is lawful 'all things considered' it cannot be prohibited by a *jus cogens* norm. However, it was suggested that the 'ambulatory' nature of the limits to the scope of the *jus cogens* norm in the *jus ad bellum* may allow some space for change to the content of the

right of self-defence and the Charter provisions on collective security without the *jus cogens* norm itself being modified.

Jus cogens norms may be modified, but when analysing the process by which that can occur it is important to consider whether the *jus cogens* norm is being expanded or restricted, if there is a change to the underlying norms of customary international law, and if the acceptance and recognition of the new scope of the *jus cogens* norm by the international community as a whole is being manifested through their statements alone or inferred from conduct. As for customary norms, the process of modification of a *jus cogens* norm is the same as that for identification of a *jus cogens* norm. *Jus cogens* norms may be modified through the ordinary processes of customary or treaty law; however, the effect of *jus cogens* status will be to raise the quantitative threshold of participation for those processes, to require the participation of a 'very large majority' of states if a new *jus cogens* norm is to be identified successfully, and to limit the circumstances in which *opinio juris* for new customary international law may be inferred.

This chapter concludes the analysis of how the different kinds of norms that comprise the *jus ad bellum* can change: customary international law, treaty law, and *jus cogens* norms. While these chapters have necessarily addressed some issues of the interaction of different sources of law, they have focused on how each kind of norm is modified in isolation. However, the complexity of analysing change in the *jus ad bellum* arises from the fact that these different norms exist side-by-side, regulating the same subject matter, and referring to, providing exceptions to, or limiting the scope of each other. Depending on the kind of change, for an effective change to the obligations of states under the *jus ad bellum* to occur, the simultaneous modification of norms from more than one

source of law may be required. The subsequent chapters will therefore bring together the analysis in chapters two to five and apply those conclusions to determine how new exceptions to or limitations on the scope of the prohibition on force may be created (chapter six), and how change to the content of the existing so-called ‘exceptions’ of self-defence and collective security may occur (chapter seven).

6. Creating new exceptions to or limitations on the scope of the prohibition on force

In addition to Article 2(4) of the UN Charter, the use of force by states in their international relations is prohibited by customary international law.[654] Given the existence of these identical treaty and customary norms, and the *jus cogens* status of the latter, how can new exceptions to or limitations on the scope of the prohibition be created? The previous chapters have analysed how customary, treaty and *jus cogens* norms change individually; to answer the question of how new exceptions or limitations may be created, this chapter will bring this analysis together and consider how these processes of change are impacted when these different norms coexist, regulating the same subject matter.

The areas of divergence between the customary and Charter norms regulating the use of force identified by the Court in *Nicaragua* were confined to the more detailed regulation of self-defence in customary international law, and certain institutional provisions relating to collective security which exist only on the 'treaty-law plane of the Charter'.[655] When it comes to the prohibition on uses of force other than in cases of self-defence or collective security – and so the kinds of uses of force that a new exception to or limitation on the scope of the prohibition would be purporting to render lawful – the content of both norms is essentially the same.[656] Even though the Charter remains the *lex specialis* in terms of parties – being less than universal, and not 'general' – there is no divergence between the content of the two norms, either in the sense of a conflict or of one being a more specific application of the other, that could trigger the application of the *lex specialis*

[654] *Nicaragua* (Jurisdiction), para 73; *Nicaragua*, para 178; Dörr (2019), para 1.

[655] *Nicaragua*, paras 176, 188.

[656] Dörr (2019), para 10; *Nicaragua*, para 181; cf Dörr and Randelzhofer (2012), paras 65–6.

principle so as to give priority to the treaty.[657] Thus, 'customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.'[658] Moreover, 'the States in question are *bound* by these rules *both* on the level of treaty-law and on that of customary international law'.[659] Therefore, for a new exception to be created it will need to be shown that the customary *jus cogens* prohibition and the treaty prohibition have both been modified to allow for this new legal basis for the use of force.[660] Otherwise, even if states were permitted under one of those norms to use force in new circumstances, unless the other norm underwent a corresponding modification, states would still be prohibited by the more restrictive norm. That is, there would be no effective change in what they are permitted to do under international law.

The view taken here is that it is not impossible to create new exceptions to or limitations on the scope of the prohibition on the use of force; indeed, if there is sufficiently widespread political will among states such a change could be achieved rather quickly. However, the coexistence of multiple identical norms from different sources of law impacts how the processes of modification discussed in the previous chapters operate. The analysis below shows that, due to this complex structure, the prohibition on force has a certain 'resilience' to change.[661] When it comes to creating new exceptions to or limitations on the

[657] See Bernhardt (1987), 271.

[658] *Nicaragua*, para 179. See also IDI (1995), Conclusion 10; Dinstein (2007), 396; Bernhardt (1987), 271; Jennings and Watts (1996), 429.

[659] *Nicaragua*, para 178 (emphasis added); Dinstein (2007), 351.

[660] See Tams (2019), 107.

[661] See Kammerhofer (2015), 627, in the context of self-defence.

scope of the prohibition, the need to modify both the UN Charter and a customary *jus cogens* norm renders such a change difficult both conceptually and in practice.

As noted in chapter five, what is called an 'exception' in legal writing may take different forms. Whether a new 'exception' to the prohibition takes the form of a true exception to that prohibition or an alteration to the scope of that prohibition in customary or treaty law to exclude certain types of force from falling within it does not have a significant impact on the analysis below.

Part 1 analyses how the existence of the prohibition on force both as a norm of treaty law and a customary *jus cogens* norm affects how the subjective element – *opinio juris* for custom and agreement of the parties to new treaty interpretations – may be demonstrated. Part 2 considers how the different quantitative thresholds for changes to the different kinds of norm discussed in the previous chapters – the number of states that must participate in the law-making process – impact the creation of new exceptions to or limitations on the scope of the prohibition on force. Part 3 analyses how the presence of a *jus cogens* norm in the *jus ad bellum* impacts the sequence in which changes to the various norms in the *jus ad bellum* must occur if a new exception or limitation on scope is to be created.

That no new, third so-called 'exception' to the prohibition on force has emerged since 1945 testifies to the stringency of these requirements. While support for an alleged new exception to or limitation on the scope of the prohibition which allows force for

humanitarian intervention remains extremely limited,[662] in the 1960s and 70s the existence of an alleged new exception to or limitation on the scope of the prohibition, allowing the use of force to support peoples implementing their right of self-determination, was supported by a significant number of states. In 1961, General Assembly resolution 1514 recognised that '[a]ll peoples have the right to self-determination'.[663] It is also now accepted that in certain circumstances a people's right to self-determination may be implemented by its 'emergence as a sovereign independent state'.[664] Scholars and states sought to extrapolate from these rights and argued for what amounted, in effect, to a new exception to or limitation on the scope of the prohibition on the use of force.[665] Not only would a people subject to alien domination be entitled to use force to vindicate their right to self-determination but other states would lawfully be able to provide them with military support in that struggle.[666] Absent the existence of the claimed exception to/limitation on the prohibition on the use of force, the provision of such military assistance would,

[662] Only a few states have clearly indicated that they accept the existence of a legal right of humanitarian intervention. See UK Syria Legal Position (2017); *Legality of Use of Force*, Public sitting held on Monday 10 May 1999, at 3 pm, at the Peace Palace, VR 1999/15, Intervention of M. Ergec, Agent for Belgium, 16. Many more states have explicitly rejected that position, see G77 Declaration (2000).

[663] A/RES/1514, paras 1–2.

[664] A/RES/1541, Principles I, IV, V; *Chagos*, para 156.

[665] It is not clear whether it was considered to be a purported new exception to or limitation on the scope of the prohibition on force; in any case, this does not affect the analysis here. See the characterisation by the representative of Syria during discussions leading to the adoption of the Definition of Aggression: 'the only intentions justifying the use of force which his delegation could accept were those permitted by the Charter and United Nations practice. They were self-defence against an armed attack, enforcement action under the control of the United Nations and the liberation of an oppressed people in pursuit of the right of self-determination' A/AC.134/SR/67-78, 42.

[666] E.g. statement by Uganda in discussions preceding adoption of the Definition of Aggression: 'dependent peoples were entitled, in pursuing their struggle, to seek and to receive support from other States; such support could consist of arms or personnel. […] Such a case should, he thought, be regarded as an exception to the principle that any armed attack constituted aggression' A/AC.134/SR/73. See also Zambia in discussions preceding adoption of the Friendly Relations Declaration, A/C .6/SR.1178, para 13. For some, the right to seek forcible assistance derived rather from the dependent people's right of self-defence against the colonial state, see Gray (2018a), 69; Corten (2010), 136–7.

applying the law as stated by the ICJ in *Nicaragua*, amount to a breach of that prohibition by the assisting state against the colonial state.[667]

Despite widespread support among socialist and non-aligned states for the view that dependent peoples could seek forcible assistance in their self-determination struggles, as well as significant practice of states providing assistance to anti-colonial armed resistance groups,[668] there remained a group of states – notably colonial powers such as the UK and France – who were resolutely opposed to that view.[669] The existence of this minority of opposing states was sufficient to prevent any new exception to or limitation on the prohibition on force emerging, which would allow such support to self-determination struggles.[670] Throughout this chapter, this example will be used to illustrate the impact of multiple norms on the processes of change in the *jus ad bellum* when creating new exceptions to or limitations on the scope of the prohibition on force.

1. Determining the existence of the subjective element

The first way in which the structure of the *jus ad bellum* impacts the processes of change of the different kinds of norm, as analysed in the preceding chapters, relates to how the existence of the subjective element may be determined. The existence of identical treaty

[667] *Nicaragua*, para 195.

[668] Roth (1999), 214. Corten (2010) casts doubt on the precedential value of this practice, 142–7.

[669] E.g. Statement by the UK, A/AC.134/SR.1-24; Corten (2010), 140–1; Roth (1999), 213.

[670] Corten (2010), 141. Cf Roth's (1999) conclusion that 'the prevalence of state practice of rendering military assistance to liberation movements, the General Assembly's pronouncements favouring it and the utter lack of collective *opinio juris* opposing it, one can only conclude that such assistance does not constitute' an illegal use of force, 215. However, it is submitted that, taking into account how the various sources of law change, and in particular the factors identified in this chapter, this is not the correct conclusion to be drawn from the practice.

and customary norms, as well as the *jus cogens* status of that customary norm, affect the circumstances in which one can infer *opinio juris* or agreement to a new treaty interpretation from the action or inaction of states. In this way, the structure of the *jus ad bellum* makes a *qualitative* difference to the kind of practice (broadly understood as including state practice, *opinio juris* and treaty practice) needed to establish a change in the law and requires the analysis in chapters two, three and four to be nuanced. The inability in certain circumstances to infer acquiescence in a new treaty interpretation, or acceptance that conduct prohibited by an existing *jus cogens* norm is lawful, from state conduct alone means that in some cases the agreement or *opinio juris* required to demonstrate the emergence of a new exception to or limitation on the scope of the prohibition on force must be expressed explicitly.

1.1. Inferring the subjective element from state action

Due to the virtually universal participation in the Charter, any practice that could support the identification of new contours of the customary prohibition on force, or the existence of a new customary exception, will almost always be among states who are all UN members. In principle, if a use of force were employed by a UN member against a non-Member this would count both as practice in application of the Charter prohibition on force and as state practice capable of contributing to the establishment of a new exception to or limitation on the scope of the customary prohibition. The obligation imposed on UN members by Article 2(4) is not based on reciprocity: it prohibits members from using force in their relations with 'any state' and therefore the reaction of other UN members to a use of force by a member against a non-member could in principle establish their agreement as

to a new interpretation of that treaty provision.[671] However, the non-member target state is also protected by the customary prohibition on force, which is the only relevant law applicable between UN members and non-members.[672] The treaty and customary norms are in this case not exactly overlapping as the non-UN member is only subject to the customary norm: this is what makes clear that the practice is also relevant to customary international law. The use of force by the UN member would therefore count both as practice in application of the Charter and as an instance of state practice for the purposes of establishing customary international law.

Of course, since the UN Charter is very widely ratified the possibilities for such practice to arise are extremely limited.[673] The only two non-member state observers to the UN are the Holy See and the State of Palestine. The likelihood of relevant practice occurring involving this very small group is remote. Moreover, in the UN context the situation is complicated further because typically where an entity has not become a party to that treaty it is precisely because their statehood is contested.[674] So they may not be considered a non-party state for the purposes of custom by some states, and in consequence whether they are even protected by the customary prohibition on the use of force (especially vis-à-vis the state(s) contesting their statehood, which seems the most likely aggressor) will also be contested.[675] Any state practice relevant to change in the *jus ad bellum* will therefore

[671] Dörr and Randelzhofer (2012), para 29.

[672] See Dinstein (2007), 407.

[673] Baxter (1970), 73; also Dinstein (2007), 378.

[674] E.g. in the cases of Kosovo, Taiwan, and the State of Palestine.

[675] Although note the Definition of Aggression attempts to prevent such arguments being used to deprive entities whose statehood is contested of the protection of the *jus ad bellum*, Article 1, Explanatory Note; see also Corten (2010), 151–2.

almost certainly be among UN members. It seems this should make it difficult to identify the existence of a new customary exception to or limitation on the scope of the prohibition on force: how would one know the practice was relevant to customary international law outside the Charter, and not simply states acting pursuant to their rights and obligations under the treaty?

It is not the case that practice under a treaty can *never* amount to state practice in support of new customary international law. In chapter two it was argued that where a state consistently acts contrary to the context of underlying international law norms, in certain circumstances one can infer from that conduct an acting state's *opinio juris* for a new customary norm under which that conduct would be lawful and the practice can count towards establishment of the new customary norm. Chapter three argued that this reasoning also applies where the underlying international law norm is a treaty norm, which binds the state performing the relevant practice.

Practice that would support the existence of a new customary exception to or limitation on the scope of the prohibition on force would be inconsistent with the prohibition on force in Article 2(4). So, in principle, when customary international law begins to diverge from the treaty prohibition to create a new exception or limitation one should be able to infer an acceptance on the part of any states consistently engaging in the practice that they are permitted to act this way under customary international law and, even though that practice is among treaty parties, it may count towards identification of a new customary norm.

By contrast, if the Charter is modified before custom – for example, if it were amended to create an exception to or limitation on the scope of the prohibition in Article 2(4) allowing force for the purpose of, say, humanitarian intervention – in that scenario it will be more difficult to show a corresponding change in customary international law. If UN members act consistently with the Charter, the assumption would be that they are simply acting pursuant to their new right under the treaty. Even generally, 'the utmost caution' must be exercised when inferring *opinio juris* from the silence of states in the *jus ad bellum*,[676] but in these circumstances it becomes impossible: without evidence of the *opinio juris* of UN members it is not possible to infer that they are taking any position with regard to their obligations outside the treaty.

Where a state's practice is consistent with both the underlying international law norms and a possible new customary norm, an inference of *opinio juris* on the part of the acting state will not be possible and evidence of their *opinio juris* will be required if that practice is to count towards identification of a new customary norm. Evidence of *opinio juris* identifies the conduct not merely as practice in application of an existing treaty obligation, but as also supporting a new, identical customary norm. In such circumstances, as argued in chapter two, *opinio juris* is essential, not only to fulfil one element of the test for identification of custom, but to remove ambiguity from a practice that is also consistent with another norm, besides the alleged new customary norm.

Therefore, for a new customary exception to or limitation on the scope of the customary prohibition to be established where the Charter has already been modified to

[676] Corten (2010), 21; Lewis, Modirzadeh and Blum (2019).

create a new exception to or limitation on the scope of Article 2(4), there will need to be evidence – for example in the form of statements – that states participating in the practice are also acting that way in the belief that that conduct is in accordance with customary international law. If this evidence of *opinio juris* for custom is present, then there is no reason why practice among treaty parties cannot also count as state practice constituting a new, identical customary exception to or limitation on the scope of the customary prohibition.[677]

However, this analysis, based on the conclusions reached in chapters two and three, must be adapted to take account of the structure of the *jus ad bellum*. In the first scenario, where a new customary exception to or limitation on the scope of the customary prohibition is diverging from the Charter, states will not just be acting inconsistently with Article 2(4), but contrary to the *jus cogens* customary norm in the *jus ad bellum*, as identified in chapter five. Any new customary exception to the customary prohibition, or limitation of its scope to exclude a particular category of force, will involve restriction of the *jus cogens* norm. A new, legally valid reason to use force – a derogation from the customary prohibition – is being established where none existed before.

As argued in chapter five, it is possible for the *opinio juris* of the international community of states as a whole to restrict the scope of a *jus cogens* norm by accepting and recognising the possibility of a new customary derogation from the underlying customary norm on which it is based. States can *express* their *opinio juris* that a new derogation to an existing *jus cogens* norm can or does exist and this will neither be invalid as a derogation

[677] That is, evidence of *opinio juris* is essential for practice among treaty parties to count as state practice for custom. Cf IDI (1995), Conclusion 13.

nor in itself give rise to state responsibility. However, given that *jus cogens* norms are accepted and recognised by the international community as a whole as not permitting any derogation, it seems odd to *infer* from a state's silence their acceptance that they are acting lawfully and that a new customary norm exists that would in effect amount to a derogation from that *jus cogens* norm. That is, to presume they hold a view directly contrary to that held by the very large majority of states, and likely also previously held by that acting state.

In this scenario then, the analysis in chapter two needs to be nuanced: where a state's conduct is inconsistent with an existing *jus cogens* customary norm, it seems one should *not* infer *opinio juris* on the part of that acting state, even from a consistent practice inconsistent with existing law. Unless there is evidence of the acting state's *opinio juris* for the new customary norm that derogates from the *jus cogens* norm – whether a new customary exception or the identification of new customary international law limiting the prohibition's scope – the presumption will rather be that the state (or states) accept that they are acting in violation of the *jus cogens* norm. For the same reason, where a state acts contrary to its existing treaty obligations, that should not be taken as an implicit claim to reinterpret those provisions where that new interpretation would amount to a derogation from a *jus cogens* norm: the claim to be acting lawfully must be made explicitly, or the state will be assumed to be acting in breach both of its treaty obligations and the customary *jus cogens* norm.

The inability to infer acceptance that conduct prohibited by an existing *jus cogens* norm is lawful from that conduct alone means that this *opinio juris* must be expressed by the state concerned. Finding such evidence of *opinio juris* will require close analysis of the

wording used in statements made by individual states or texts adopted in UN organs.[678] However, in the *jus ad bellum* generally and in discussions in UN organs in particular, states frequently make reference to the customary or *jus cogens* (and thus by implication customary[679]) nature of the prohibition on force, and in such cases it will be clear they are not simply referring to their treaty obligation in Article 2(4).[680]

Where this evidence of *opinio juris* is present, since statements may not only evidence *opinio juris* but also constitute state practice,[681] in some cases this evidence of *opinio juris* will not only allow other conduct to be qualified as state practice but may be sufficient to lead to the identification of new customary international law. This may result in a simultaneous change to the customary and treaty prohibitions on force. If one considers the scenario where a new interpretation of the Charter through subsequent agreement arises as a result of an explicit statement of the new, narrower contours of the prohibition on force in Article 2(4), such as in a General Assembly resolution, this statement may count as both *opinio juris* and state practice of the states making the statement, for example, the states that adopt the resolution.[682]

However, this will only be the case if the wording of the resolution, or the circumstances of its adoption such as statements in the preceding debate, make clear that the adopting states are also taking a position as to what they accept as customary

[678] Dinstein (2007), 377.

[679] See *Nicaragua*, para 190.

[680] E.g. S/2021/247, 62 (UK), 83 (Viet Nam), 20 (Brazil).

[681] ILC Custom, Conclusion 6 and commentary para 2.

[682] Cf Dinstein (2007), 307.

international law, and thereby evidence their *opinio juris* for the correspondingly narrower scope of the customary prohibition.[683] This is the same analysis applied to the Friendly Relations Declaration by the Court in *Nicaragua*. The wording of that resolution made clear that the Members of the General Assembly adopting the resolution were not only interpreting the relevant Charter provisions, but that they considered its contents to 'constitute basic principles of international law', addressed to 'every state' not merely UN members.[684] In cases of interpretation of the Charter through subsequent agreement, where the wording of the resolution expresses *opinio juris*, the two norms will therefore evolve together. Given the Charter's virtually universal nature, the state practice and *opinio juris* of all members will amount to practice that is 'widespread and representative'.[685]

A further example, not directly concerning the use of force, is provided by UNGA Resolution 1514, which declared self-determination – previously only recognised as a 'principle' in Article 1(2) of the Charter – to be a 'right' enjoyed by all peoples.[686] The 'normative character' of the wording, which is not limited to UN members only ('All peoples have the right to self-determination […] All States shall observe faithfully and strictly the provisions of […] the present Declaration'), demonstrates that adopting states were taking a position, not merely as to the interpretation of Charter obligations, but also as to the state of customary international law.[687] The resolution therefore provides evidence

[683] See Dinstein (2007), 306.

[684] A/RES/2625, Annex, paras 1–2; *Nicaragua*, para 188.

[685] As will be discussed in the subsequent subsection on quantitative thresholds for change, this will also constitute practice of 'a very large majority of states' sufficient to modify the *jus cogens* norm, thus allowing for the identification of the narrower customary prohibition.

[686] Thornberry (1994), 178.

[687] See also statement of the UK, A/PV.947, para 47.

of *opinio juris* of those states adopting the resolution in support of a customary right of self-determination, which also *qua* statement constitutes their state practice. Although not adopted consensually or unanimously, the resolution was adopted with 89 votes in favour, none against, nine abstentions (primarily remaining colonial powers), and one member not voting, demonstrating (given the size of the international community of states at that time) a widespread and representative state practice and *opinio juris* in support of the customary right.[688] As the ICJ concluded in the *Chagos Islands* advisory opinion, the resolution 'has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption'.[689]

1.2. Inferring the subjective element from an absence of reaction

Similar concerns arise when one considers the ways in which the *reactions* of states to conduct by other states can demonstrate the existence of the subjective element. The onerous amendment procedure in the UN Charter and the political obstacles to it being employed mean that any modification of Charter provisions will likely occur through subsequent practice establishing the agreement of all parties. While this is a demanding threshold to meet, as argued in chapter four the possibility of establishing the agreement of all UN members through their silent acquiescence means such modifications can and do occur in practice.

[688] As the Court observes, the abstaining states were motivated by disagreement as to the implementation of the right of self-determination or the belief that the resolution mischaracterised their own administration of their non-self-governing territories, rather than objection to its very existence, *ibid*, paras 50–2 (UK), para 105 (Portugal); *Chagos*, para 152.

[689] *Chagos*, para 156.

Yet any interpretation of the Charter that would create a new exception to Article 2(4) or limit its scope to exclude force for humanitarian intervention from that prohibition, whether in a draft resolution or implicit in practice of UN members, would be purporting to derogate from the customary *jus cogens* norm in the *jus ad bellum* (assuming it had not yet been modified). The *jus cogens* prohibition is a norm from which it is accepted and recognised that there can be no derogation. Therefore, while states can express their acceptance that derogation is now possible from a *jus cogens* norm, again it seems strange to infer from a state's absence of reaction that they acquiesce in and thereby agree to a treaty interpretation that would derogate from a non-derogable norm. On this view, as in the case of inferring *opinio juris* from a state's conduct contrary to a *jus cogens* norm, where a new treaty interpretation would be contrary to a *jus cogens* norm the analysis in the preceding chapters needs to be nuanced. While it was argued that in principle the silence or inaction of other UN members may qualify as acquiescence establishing agreement to a new interpretation of the Charter for the purposes of Article 31(3)(b), in the context of creating a new exception to the prohibition on force it seems that silence should *not* be taken to amount to acquiescence in a new interpretation of the UN Charter that would be contrary to the existing *jus cogens* norm prohibiting force, and express agreement of the treaty parties should be required.[690]

If this view is correct, the structure of the *jus ad bellum* would have a significant impact on the analysis of treaty law in chapter four and, in practice, would render the process by which new exceptions to or limitations on the scope of Article 2(4) may be created considerably more difficult. In chapter four it was argued that silent acquiescence

[690] See Buzzini (2005), 94–5, 98 (referring to *erga omnes* and *jus cogens* norms).

in subsequent practice has allowed quite significant modifications of UN Charter norms to occur informally, without requiring UN members to take a public position on controversial issues in debates or votes. If agreement to new interpretations that would derogate from the *jus cogens* prohibition – as any new exception to or limitation on the scope of Article 2(4) must do – needs to be explicit, then this practical advantage is lost. As in the case of interpretation through subsequent agreement, or formal Charter amendment, for interpretation through subsequent practice to occur UN members would need to *express* their position in favour of the proposed modification of the Charter. Unless there was explicit, unanimous agreement among all Members as to the new interpretation, interpretations contrary to the text or object and purpose of the Charter could not be valid. Politically, this seems difficult to achieve.

However, in chapter four it was the *expectation of a response* that meant a UN member's non-reaction should be treated as acquiescence. In this context of making inferences based on the *reactions* of states, rather than inference from state action as discussed above, the argument that there can be no inference of the subjective element where it supports a new derogation from a *jus cogens* norm therefore needs to be balanced against the expectation that other states would object to claims or behaviour that are contrary to an existing *jus cogens* norm.[691] In these circumstances, an absence of reaction to practice implementing a purported new treaty interpretation contrary to *jus cogens*, or to a claim that the treaty should be interpreted in this way, could suggest that since states do not negatively react to such conduct, the inference should instead be that states do not see anything problematic about claiming or relying on the existence of the new derogation, and

[691] *Ibid*, 95.

therefore that the previously existing *jus cogens* norm has been modified.[692] On this view, it *is* appropriate to infer acquiescence, and thus agreement, from the silent (non-)reactions of other states, even where – indeed, precisely because – the claimed interpretation of the treaty would be contrary to a previously existing *jus cogens* norm.

These two arguments – one weighing for and one against inferring agreement from the silence of reacting states – are finely balanced.[693] It is true that Article 41 of the ILC's Articles on State Responsibility provides that 'No State shall recognise as lawful a situation created by a serious breach [by a State of an obligation arising under a peremptory norm of general international law].[694] However, this simply raises the same question: does non-reaction to an apparent breach of a *jus cogens* norm amount to recognition of its lawfulness?[695]

Generally, it seems that acquiescence should less readily be inferred from silence where a new treaty interpretation would derogate from a *jus cogens* norm. However, the correct inference to be drawn in a particular situation will depend on the wider context: how many states are participating in the practice supportive of a new exception to or limitation on the scope of the prohibition or making claims to be able to derogate from the *jus cogens* norm, and how many states have already expressed support for or opposition to the new interpretation?[696] For example, in 2018 the UK invoked a purported legal basis of

[692] *Ibid*, 97.

[693] *Ibid*, 96.

[694] ILC State Responsibility, Article 41. See Buzzini (2005), 97.

[695] In any case, even if there is such an obligation on states to actively condemn or reject conduct contrary to a *jus cogens* norm, it would only apply to situations of 'gross or systematic failure' to fulfil the obligation under the *jus cogens* norm.

[696] See Churchill (2005), 101.

humanitarian intervention to justify its use of force against Syria, in the form of air strikes conducted jointly with the US and France.[697] While some states reacted by explicitly condemning the strikes as illegal,[698] many more did not. Even though the conduct of the UK, US and France constituted a flagrant breach of a *jus cogens* norm, and even though the UK was effectively claiming that it was possible to derogate from that norm in circumstances in which such a derogation has not been accepted and recognised to exist by the international community as a whole, it does not seem correct to infer from this silence that those other states were *acquiescing* in what is presumably, on the part of the UK, a claimed new interpretation of Article 2(4) under which such uses of force are not prohibited.[699] Given that the new interpretation is so far from attaining the unanimous agreement necessary to interpret the Charter through subsequent practice, there should be no expectation that other Members will or must actively object to one UN member's eccentric interpretation of one of its provisions.[700] The broader context, in which a substantial group of states has already clearly rejected such an interpretation in a previous statement, is also an important factor in assessing the meaning to be drawn from their later lack of reaction.[701]

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[697] UK Syria Legal Position, para 3.

[698] E.g. 2018 China Statement.

[699] Although rather vague as to what is meant by the 'legal basis' of humanitarian intervention, the UK's explicit assertion of the legality of its action in Syria shows it does not accept it was acting in breach of the Charter and so one may interpret this as an implicit claim of reinterpretation, even though contrary to a *jus cogens* norm.

[700] See Churchill's (2005) persuasive arguments on this point in the context of UNCLOS, 101–3.

[701] G77 Declaration (2000), para 54.

Therefore, whereas in principle the practice of only a small number of treaty parties, accompanied by the silent acquiescence of the rest of the membership will, as argued in chapter four, be sufficient to reinterpret the Charter through subsequent practice, where that new interpretation is contrary to a *jus cogens* norm, greater participation in the practice that evidences the interpretation or more explicit support for the interpretation should be required before the silence of other states is interpreted as acquiescence. To take the opposite view – that the expectation of negative reaction to a breach or claimed derogation from a *jus cogens* norm is so strong that an absence of reaction should in all cases be taken as acquiescence – would produce the perverse result that *jus cogens* norms are easier to change than non-*jus cogens* norms, where the expectation of reaction to their breach or reinterpretation would not be so strong.[702]

Where significant numbers of UN members are participating in a practice that evidences a new interpretation of the Charter contrary to an existing *jus cogens* norm, or are explicitly advancing such an interpretation, so that it appears to be gaining momentum which may in time lead to modification of the *jus cogens* norm, then other states may need to express their objection to the new interpretation or risk their silence being taken as acquiescence in an increasingly widespread view.[703] Indeed, one can see in practice that, as an increasing number of states purport to use force pursuant to a claimed right of pre-emptive or preventive self-defence, other UN members have felt compelled to object explicitly to such an interpretation of Article 51.[704]

[702] Buzzini (2005), 96.

[703] E.g. Buzzini, 104.

[704] See statement by the Non-Aligned Movement (2014) S/2014/573, para 26.5.

Similar factors impact the identification of customary international law, when assessing whether the silence or non-reaction of other states to a practice should be interpreted as contributing to a general *opinio juris* in support of a new norm. However, such considerations are less significant in the formation of customary international law. As argued in chapter four, the agreement of all parties alone suffices to reinterpret a treaty provision. Practice is simply being one way of establishing its existence and since the practice of only a small subset of parties can lead to a new interpretation, acquiescence has the potential to play a very significant role in changing Charter obligations. By contrast, for the formation of new customary international law there will always need to be a widespread and representative practice in support of any new norm and while there may be circumstances in which a state's non-reaction to practice inconsistent with the underlying international law rules may allow an inference of *opinio juris* in support of a new customary norm on their part (for example, where they are the victim of an apparent breach of international law), the expectation of a reaction will rarely be as strong, or applicable to as many states simultaneously, as in the context of an international organisation.

To summarise and conclude on this section: where a new customary norm would derogate from an existing *jus cogen*s norm, a state's *opinio juris* in support of that new norm may not be inferred from their participation in the supportive practice, even where they have consistently acted contrary to existing law. Evidence of their *opinio juris* must be present or they will simply be presumed to be acting in violation of the *jus cogens* norm. Similarly, where a state acts inconsistently with a treaty provision by which it is bound, one will generally not be able to infer that this is an implicit claim as to a new interpretation of that provision, where that new interpretation would derogate from a *jus cogens* norm; such a claim must be made explicitly. Turning to the reactions of states, the silence of other

treaty parties in response to a claimed new interpretation of a treaty provision should less readily be understood as acquiescence where that new interpretation would derogate from a *jus cogens* norm. Unless there is already a substantial practice and/or number of statements in support of the new derogation, silent states should not be assumed to accept that such a derogation from that norm is now possible, nor that such conduct is lawful under customary international law.

2. Differing quantitative thresholds for modification of different norms

Chapters two to five analysed the processes of change for norms of customary international law, treaty law, and norms with *jus cogens* status. In each case, the number of states that need to participate in the process in order for a norm to be successfully identified or modified varies: identification of new customary international law requires 'widespread and representative' state practice and *opinio juris*; interpretation of the Charter through subsequent practice or agreement requires agreement of all UN members; modification of a *jus cogens* norm requires acceptance and recognition by the 'international community of states as a whole'. Some of these quantitative requirements are higher than others. When identical norms from different sources must be modified, these thresholds are layered on top of each other, and it is the source that requires the highest quantity of participation by states that will act as the limiting factor. Consequently, when one considers how the structure of the *jus ad bellum* impacts the process of creating a new exception to or limitation on the scope of the prohibition, it is not the identification of new customary international law, nor even modification of the *jus cogens* norm that will pose the greatest obstacle to change in the *jus ad bellum*, but the need to secure unanimous agreement of all UN members to a new interpretation of the Charter.

2.1. The presence of a *jus cogens* norm raises the quantitative threshold for identification of custom

As argued in chapter five, the presence of a *jus cogens* norm raises the quantitative threshold for identification of new customary international law. To modify a customary *jus cogens* norm not only 'widespread and representative' *opinio juris*, but the *opinio juris* of a 'very large majority of states' will need to be demonstrated in order for the 'international community of states as a whole' to accept and recognise the new scope of the *jus cogens* norm.[705] Therefore, to create either a new customary exception derogating from the *jus cogens* customary prohibition on force, or to exclude a particular category of force from the scope of that customary *jus cogens* prohibition, would require widespread and representative state practice accompanied by the *opinio juris* of a very large majority of states. In this way, the structure of the *jus ad bellum* impacts the process for the identification of customary international law.

Returning to the right to use force in self-determination struggles, one can see how this more demanding quantitative requirement will be difficult to fulfil in practice when controversial new bases for the use of force are concerned. Once General Assembly resolutions begin to mention, even euphemistically, a possible right to use force to support self-determination, the voting patterns change from that seen with Resolution 1514. Paragraph ten of Resolution 2105, adopted in 1965, provides that the Assembly:

[705] See the remarks of the Chair of the Drafting Committee at the Vienna Conference: 'there was no question of requiring a rule to be accepted and recognised as jus cogens by all states. It would be enough that a very large majority did so', quoted in Hannikainen (1988), 210; also ILC *Jus Cogens*, Conclusion 7(2) and commentary paras 5–6.

> Recognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all states to provide material and moral assistance to the national liberation movements in colonial territories.[706]

Even with the ambiguous terms 'struggle' and 'legitimacy' replacing 'force' and 'legality',[707] and the text primarily targeting the actions of Portugal and South Africa for criticism, this resolution was adopted with only 74 votes for, six against, 27 abstentions and ten members not voting.[708] Significantly, even some states who voted for the resolution explicitly stated in their explanations following the vote that had each paragraph been voted on separately they would have abstained in the case of paragraph ten.[709]

The case illustrates the difficulty of modifying the *jus ad bellum* to create new exceptions to or limitations on the scope of the prohibition: support for the new exception or limitation, while significant – potentially encompassing a majority of UN members – never reached the level that could modify a *jus cogens* norm. Even if it were argued that the language of the resolution evidenced *opinio juris*, and that this practice of over 70 states was at the time sufficiently widespread and representative to establish a new customary norm – either in the form of a restriction on the scope of the prohibition or a new customary right that derogates from it – such a change would require modification of the *jus cogens*

[706] A/RES/2105, para 10.

[707] Gray (2018a), 69.

[708] A/PV.1405, para 190.

[709] *Ibid*, paras 192 (Venezuela), 204 (Argentina).

norm in the *jus ad bellum*, and the opposition of at least six other states would be sufficient to prevent the emergence of the necessary 'very large majority'.

2.2. The ability of a single UN member to prevent interpretations of the Charter through subsequent practice or agreement

Turning to the prohibition on force in treaty law but staying with Resolution 2105; with not even two-thirds of UN members in agreement as to the substance of paragraph ten there was no possibility of using that subsequent practice to establish an interpretation of Article 2(4) excluding such uses of force from its scope. In chapter four, it was argued that for subsequent agreement or practice to lead to a new interpretation of the UN Charter the agreement of all parties to the Charter is required. It was also argued that, even if one does not take the view that agreement of all parties is always required for subsequent agreements or practice to be taken into account in interpretation of a treaty under the rules in Articles 31(3)(a) and (b) VCLT, a reinterpretation of the Charter that creates a new exception to or limitation on the scope of Article 2(4) would still require the agreement of all parties. The kinds of reinterpretations that would be required to create a new exception to or limitation on the scope of Article 2(4) would have to be interpretations that are contrary to the ordinary meaning of the treaty terms and potentially the object and purpose of the Charter. This kind of reinterpretation of the Charter would require the agreement of all parties: if every party to the treaty is in agreement, then they can override the interpretation of a provision that would be reached through the usual rules of treaty interpretation. For example, they could depart from the ordinary meaning of a term and give it a completely different, special meaning.[710]

[710] See chapter 4, section 3.1.

Therefore, even if the wording and voting pattern of Resolution 2105 had evidenced the state practice and *opinio juris* of 'a very large majority of states' and so been able to modify the customary *jus cogens* norm, this still would not be sufficient to establish a new interpretation of Article 2(4) and UN members would still be prohibited under the Charter from availing of their new right under customary international law. Any change to the *jus ad bellum* that purports to create a new exception to or limitation on the scope of the prohibition will require the modification of the scope of Article 2(4) and thus the agreement of all UN members to reinterpret Article 2(4). This is rendered even more challenging by the conclusion in the preceding subsection: that this agreement of all parties may be more difficult to establish through silent acquiescence.

Since the agreement of all members is required, if even one UN member continued to object to the lawfulness of the use of force for, say, humanitarian intervention under the Charter, this would prevent the modification of Article 2(4) by interpretation through subsequent practice or agreement: force for humanitarian intervention would remain prohibited under the Charter. Of course, where the new, more permissive version of the customary prohibition has already been accepted by the 'very large majority of states' necessary to modify a *jus cogens* norm, it is unlikely that a majority of UN members will be willing to take action, for example in the General Assembly, to censure a state exercising that right for its violation of the Charter. However, this is rather a question of enforcement; as a matter of treaty law such acts would be in violation of the Charter.

As a result, rather than the need to modify a *jus cogens* norm, the limiting factor when changing the *jus ad bellum* to create a new exception to or limitation on the scope of the prohibition on force is the requirement that all UN members agree to a new interpretation of a Charter provision. The non-participation of some states in practice, and even their active objection to the lawfulness of the practice under custom, does not prevent the formation of a new customary norm, provided the practice is widespread and representative. Even the absence of acceptance and recognition on the part of one or perhaps two states does not prevent the identification or modification of a *jus cogens* norm. Yet a minority of dissenting UN members – indeed, even a single dissenting member – is in a much stronger position when it comes to preventing a new interpretation of the Charter, given the different thresholds of participation required by each kind of norm.[711] Interpreting Article 2(4) in a manner inconsistent with its text and the object and purpose of the Charter, which strictly limits the use of unilateral force, would require the agreement of all parties to the treaty to be established.

Considering things from the opposite perspective, where the Charter *has* been interpreted through subsequent practice or agreement to restrict the scope of Article 2(4) and exclude a certain category of force from that prohibition, this will necessarily modify the scope of the *jus cogens* norm to match. As argued in chapter five, by purporting to create a derogation to a norm that was previously considered non-derogable, a state demonstrates its acceptance that such a derogation is possible. This includes participation in the amendment and interpretation of treaty norms: by voting for an amendment to or accepting a new interpretation of a treaty provision that would cause it to derogate from a

[711] See Dinstein (2007), making the same point regarding desuetude through subsequent practice, 413.

jus cogens norm, a state demonstrates its acceptance and recognition that such a derogation is possible. If not, why bother trying to modify the treaty, since any such change would be invalid? While its *jus cogens* status will protect the customary prohibition and invalidate purported derogations by individual states or groups of states so long as that status persists, if the 'international community of states as a whole' accepts and recognises that the purported derogation is possible this will effectively modify and restrict the scope of the *jus cogens* norm.

Given the virtually universal participation in the Charter, agreement of all UN members to a more restrictive interpretation of Article 2(4) which recognised a new category of force as lawful could not only fulfil the requirements to modify the customary prohibition to match (assuming evidence of *opinio juris* was present), as discussed above, but would also simultaneously establish the acceptance and recognition of the international community as a whole as to the new, more restricted contours of the *jus cogens* norm.[712] A 'very large majority' of states would have accepted and recognised that such a derogation from the customary prohibition is now possible. In this context then, the requirements for modification of treaty law and the requirements for modification of *jus cogens* are not added to each other, rendering modification of the norm doubly difficult, but subsumed within each other: if one test is met then the other will also be fulfilled. Moreover, this will have a practical effect on the circumstances in which UN members may lawfully use force,

[712] Dinstein (2007), 403 and Meron (1986), 184 fn 150 make similar points regarding a binding multilateral treaty. It is correct that, in the same way as the General Assembly resolutions analysed here, a multilateral treaty providing for a new exception to a customary *jus cogens* norm could have the effect of removing *jus cogens* status from part of the *jus cogens* norm and creating a new derogation, if a 'very large majority' of states were party. This would demonstrate their acceptance and recognition that the customary prohibition is now derogable to that extent. However, in the *jus ad bellum* the difficulty is that such a treaty will fail to modify the prohibition on force in the Charter, as Article 103 will give Article 2(4) priority over any other treaty obligation for UN members. General Assembly resolutions avoid this trap by being non-binding and interpreting existing Charter obligations, see chapter 4, section 3.2.

even under the parallel customary prohibition. Even if evidence of *opinio juris* is not present and the customary prohibition is not modified, the scope of the *jus cogens* norm having been restricted by the agreement of all UN members, the Charter will be able to derogate validly from the customary norm prohibiting force which previously had *jus cogens* status, to the extent that force is recognised as lawful by the new treaty interpretation. The newly interpreted treaty norm, validly derogating from that part of the customary norm which no longer has *jus cogens* status, will act as *lex specialis* to the customary prohibition on force and so UN members can use force in accordance with the new, narrower interpretation of Article 2(4) without violating any obligation under customary international law.

3. *Jus cogens* and problems of timing

3.1. Change to the *jus cogens* norm must precede or accompany changes to other norms

When analysing creation of new exceptions to or limitations on the scope of the prohibition on the use of force one is necessarily concerned with changes that will require modification of the *jus cogens* prohibition on force as identified in chapter five. Whether it takes the form of a new limitation on the scope of the *jus cogens* customary prohibition, or a new separate legal norm operating as a true exception to the prohibition, in both cases the new norm will derogate from a prohibition that is currently recognised as non-derogable. For example, an alleged new right of humanitarian intervention – whether it results from a new interpretation of the Charter, a new permissive customary norm, or a restriction on the

scope of the customary prohibition on force – will derogate from the *jus cogens* norm by purporting to provide a new, legally valid reason to use force contrary to that prohibition.[713]

This creates certain problems of timing when attempting to create a new exception to or limitation on the scope of the prohibition on force. Unless the identification of new customary international law or modification of the Charter occurs after or simultaneously with the restriction of the scope of the *jus cogens* norm, the change to custom or treaty will be invalid. A new customary norm cannot come into existence if it conflicts with the existing *jus cogens* norm.[714] If the quantitative threshold is not met – if there is not evidence of the *opinio juris* of a very large majority of states accepting that, for example, force for humanitarian intervention is now lawful under customary international law – then the new customary exception or the new restriction on the scope of the customary prohibition cannot be established.

Similarly, the UN Charter, although a very important treaty, is still subject to the rule codified in Article 53 VCLT: a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. This rule must apply to new treaty amendments and new interpretations of existing treaties, not just their conclusion. The principle underlying the rule is that no treaty law norm can come into existence – or, as demonstrated by Article 64 VCLT, continue to exist – where it is contrary to a *jus cogens* norm, as this would amount to a derogation from that norm. Therefore, if the Charter were

[713] In the latter case, the derogation is the new permissive customary international law that replaces part of the existing customary prohibition, narrowing its scope. Once established that permissive custom no longer constitutes a derogation, because there is no longer any customary norm prohibiting that conduct to derogate from.

[714] ILC *Jus Cogens*, draft Conclusion 14(1).

to be amended or interpreted in such a way that a use of force currently prohibited by the *jus cogens* norm (such as the use of force for humanitarian intervention) were made lawful under the Charter, that amendment or that new interpretation would be invalid. Even if all the requirements under treaty law for such a modification to occur were fulfilled, the content of Article 2(4) would remain the same and force for humanitarian intervention would remain unlawful both under the Charter and the customary *jus cogens* prohibition on force.

The practical impact of this latter point is limited by the argument made above, that where the Charter is interpreted by agreement of all parties this will be sufficient to simultaneously modify the *jus cogens* norm to match. Where the Charter is interpreted to exclude a certain category of force from the scope of Article 2(4), this 'acceptance and recognition of the international community of states as a whole' that such a derogation is possible will simultaneously modify the scope of the *jus cogens* norm. However, if the scope of Article 2(4) were to be restricted through an amendment to the Charter, adopted by the bare two-thirds majority required by Article 108 or 109, then absent any additional evidence that a 'very large majority' of states accepted such a derogation was possible, the amendment would be invalid as conflicting with a *jus cogens* norm.

The conclusion that a Charter amendment could be void even when it had secured sufficient support among UN members to be adopted in accordance with the requirements of Articles 108 or 109 may seem problematic. For example, where all but, say, five UN Members have voted in favour of and ratified a Charter amendment modifying Article 2(4), including the P5, it is highly implausible to think that in practice that amendment would be treated as invalid. This is because, although it must be correct that a treaty amendment that

purports to derogate from a *jus cogens* norm is void, in practice other factors will limit the impact of this conclusion. As discussed in chapter five, *jus cogens* norms have strong interpretative effects. As the ILC puts it: 'Where it appears that there may be a conflict between a peremptory norm of general international law and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.'[715] Therefore where a Charter amendment is adopted that appears to derogate from the *jus cogens* prohibition, unless its text is so unambiguous that it cannot be understood any other way, it will likely be interpreted so as not to conflict with the *jus cogens* norm and will not be considered void.

This effect can be seen in practice. Article 4(h) of the Constitutive Act of the African Union appears to be a provision granting the AU a treaty-based right of humanitarian intervention in the territory of its member states. The treaty therefore appears to conflict with the *jus cogens* norm in the *jus ad bellum*. The interpretation and impact of this provision are discussed in detail in chapter seven. However, for present purposes, it can be observed that more than 20 years after its conclusion, the AU continues to function and nobody has seriously suggested that its constituent instrument is void. This appears to be, at least in part, because the text of Article 4(h) can be interpreted in such a way that it is not purporting to provide a legal basis for acts contrary to a *jus cogens* norm. Although, if the AU were to start implementing the provision in a manner clearly inconsistent with the existing *jus cogens* prohibition on force, that interpretation may change. If a Charter amendment apparently conflicting with the *jus cogens* prohibition were adopted, it is likely

[715] ILC *Jus Cogens*, Conclusion 20. This should not, however, be understood as a 'special' effect unique to *jus cogens* but simply the correct application of the rule codified in VCLT Article 31(3)(c) in a context where a *jus cogens* norm is present.

one would see a similar interpretative effect, and the amendment would not necessarily be considered void.

3.2. Prior restriction of the customary *jus cogens* norm will not modify the Charter

As the ILC foresaw in 1966,[716] multilateral treaty practice seems the most likely means for a *jus cogens* norm to be identified or modified. International organisations and drafting conferences provide a forum in which 'a very large majority' of states can manifest their acceptance and recognition that a norm is non-derogable, or that a norm now permits a particular derogation. However, as discussed above, it is also possible for the *jus cogens* prohibition on force to be modified through the process of identification of customary international law. If a widespread and representative state practice, for example, of states using force for humanitarian intervention, were accompanied by the *opinio juris* of 'a very large majority of states' this would be sufficient to restrict the scope of the customary prohibition which acts as the source of the *jus cogens* norm, so that it now excludes force for humanitarian intervention from its scope.

The difficulty is that, as discussed in chapter four, subsequent contrary custom cannot, by itself, modify treaty norms.[717] UN member states using force for humanitarian intervention would still – despite the change to the customary *jus cogens* norm – remain in violation of their stricter treaty obligation under Article 2(4).[718] In this scenario one might

[716] ILC 1966, draft Article 50, commentary para 4.

[717] See chapter 4, section 3.3; also Danilenko (1995), 860.

[718] See Dinstein's (2007) discussion of the relationship between the Chemical Weapons Convention and customary international law, 393–4.

ask whether the legal effects of the new, more restricted *jus cogens* prohibition on force can help bring about an effective change in states' obligations under the *jus ad bellum*. That is, could the ability of *jus cogens* norms to invalidate conflicting treaty norms remove the obstacle posed by Article 2(4) of the Charter, without the requirements for modification of treaty law needing to be fulfilled, and thereby allow UN member states to use force for humanitarian intervention as permitted under customary international law without falling foul of their treaty obligation?

No. In this scenario there would be no conflict between Article 2(4) and the modified *jus cogens* norm that would cause the Charter to become void, or even generate strong interpretative effects reconciling the two norms. As argued in chapter five, the *jus cogens* norm in the *jus ad bellum* is a prohibition. A new customary 'right' of humanitarian intervention would therefore take the form of a liberty created by the abrogation of the *jus cogens* prohibition on forcible humanitarian intervention. That is, the new *jus cogens* norm simply would not prohibit, or even regulate at all, forcible humanitarian intervention. A change in customary international law to permit – that is, remove the customary *jus cogens* prohibition on – forcible humanitarian intervention would therefore not bring Article 2(4) into conflict with the *jus cogens* norm, as in this scenario the treaty norm is broader and *more restrictive* than the *jus cogens* prohibition. It is only if the new 'right' of humanitarian intervention took the form of a *positive customary duty* to exercise force in such circumstances and, crucially, that duty had also itself attained *jus cogens* status, that there could be a conflict between Article 2(4) and a *jus cogens* norm, causing the treaty prohibition to give way.

As a result, even where the customary *jus cogens* norm has previously been modified to permit force for the purposes of humanitarian intervention, modification of the Charter in accordance with one of the methods in chapter four would still be required to allow UN members to avail of this new permission in practice. Where the 'international community as a whole' was already in agreement as to the new scope of the customary *jus cogens* norm, there may well be sufficient political will to secure an amendment of the Charter. Otherwise, the agreement of all UN members to an interpretation of Article 2(4) which excludes force for humanitarian intervention will need to be secured. Again, regardless of which path one chooses to create a new exception to or limitation on the scope of the prohibition on force, it seems that it is not the presence of a *jus cogens* norm that will act as the limiting factor on change to the *jus ad bellum*, but the demanding requirements of treaty law that must be fulfilled to modify the Charter.

4. Conclusion

The analysis above has not attempted to map comprehensively the various avenues by which a new exception to or limitation on the scope of the prohibition on force could be created. Any such change to the *jus ad bellum* will, if it is to make a practical difference to what states may or may not do under international law, require change to the treaty and customary *jus cogens* prohibitions on force. This chapter therefore analyses how the coexistence of these identical norms impacts the processes of change analysed in the preceding chapters and what this means for the creation of new exceptions to or limitations on the scope of the prohibition on force.

This analysis shows that the need to modify both treaty and customary *jus cogens* norms makes a difference to the *nature* of the practice required; to the *quantity* of practice required; and to the *timing* with which each norm is modified. When creating a new exception to or limitation on the scope of the prohibition on force, a state's *opinio juris* for new customary international law, or a claim to be reinterpreting the Charter, cannot be inferred from the fact that it acts inconsistently with the underlying international law norms where that includes a *jus cogens* norm. Similarly, caution must be shown in interpreting silence or an absence of reaction as *opinio juris* or acquiescence in a new treaty interpretation that amounts to the modification of a *jus cogens* norm. Second, the *jus cogens* status of the prohibition on the use of force means that for the contours of that customary norm to change not merely 'widespread and representative' *opinio juris* but the *opinio juris* of a 'very large majority' of states must be shown. Nevertheless, it is the requirement of unanimous agreement of all UN members to interpret the Charter through subsequent practice or agreement that in most cases will act as the limiting factor on the creation of new exceptions or limitations. These two factors rendering change to the *jus ad bellum* more difficult are also mutually reinforcing: the higher quantitative thresholds cannot necessarily be fulfilled by tacit acceptance or acquiescence but may require evidence of *opinio juris* or express agreement. Finally, the *jus cogens* prohibition must be modified to allow for the existence of a new exception or limitation prior to or simultaneously with change to the customary and treaty norms, or any purported modifications of those other norms will be invalid.

Returning once more to the use of force to support self-determination struggles, it is instructive to consider how the inability to meet these requirements for change in the law affected practice in the United Nations, where the debate largely played out, and how that

practice in turn influenced the *jus ad bellum*. Throughout the 1970s and 1980s, when General Assembly resolutions even hinting at such an interpretation of Article 2(4) were pushed to a vote, even if there was a sufficient majority to adopt the resolution, none were able to attain the unanimous agreement that would be necessary to interpret the Charter through subsequent agreement or practice or even the 'very large majority' required to modify a *jus cogens* norm, due to the continued opposition or abstention of the Western states.[719] In the explanations of votes that followed, not only did states who abstained express their lack of agreement with support for the legitimacy of armed struggle and the provision of assistance to such struggles,[720] but even some states who voted in favour of the resolutions expressed similar doubts, demonstrating the lack of agreement in substance.[721]

The 1970 Friendly Relations Declaration had focused on the relatively uncontroversial duty of the colonial state to refrain from using force against people with a right of self-determination. Provision that 'such people are entitled to seek and to receive support *in accordance with the purposes and principles of the Charter*' essentially bracketed the contentious question of what the Charter should correctly be interpreted as permitting.[722] Yet in using language that was sufficiently vague and ambiguous to secure consensus, and by omitting references to controversial issues where there was disagreement

[719] See A/RES/2621(XXV) (86 for, 5 against, 15 abstentions, 20 non-voting); A/RES/3070(XXVIII) (97 for, 5 against, 28 abstentions, 5 non-voting); A/RES/37/43 (120 for, 17 against, 6 abstentions, 14 non-voting); A/RES/35/227, para 6 (114 for, 0 against, 22 abstentions, 18 non-voting).

[720] E.g. A/35/PV.111, para 16 (Finland); para 27 (Belgium); para 61 (Australia); para 68 (Ireland); para 83 (Netherlands).

[721] *Ibid*, para 25 (Uruguay); para 51 (Fiji); para 92 (Peru).

[722] A/RES/2625, Principle 5(5) [emphasis added]. Also A/RES/3314, Article 7.

as to whether the law had or should be changed,[723] these resolutions effectively strengthened the status quo, reinforcing the existence of the prohibition on force with only two so-called 'exceptions'. The effect of the consensus adoption of the Declaration was, given its declaratory wording, to constitute or confirm many of its provisions as custom.[724] Given the declaratory restatement of the prohibition on force in Principle One it is difficult to support the view that the ongoing debate about the existence of the new exception, and the considerable practice and *opinio juris* in support of it, had somehow destabilised that customary prohibition so that its continuing existence was called into question.[725] Even as states argued in favour of the new exception, in their statements they reinforced their acceptance of the continued existence of the prohibition.[726]

The failure of any new exception for force used for self-determination to emerge thus illustrates the difficulty of changing the *jus ad bellum* in this way. The high quantitative thresholds for modification of the Charter and a *jus cogens* norm pose serious obstacles to change where an alleged new exception to the prohibition on force remains controversial. With the onus on those claiming the law has changed,[727] ambiguous language that can accommodate both the established and alleged new state of the law will not suffice

[723] See Gray (1994), 38.

[724] Thornberry (1994), 181.

[725] Such arguments are based on the proposition – not adopted here – that in situations of an unsuccessful attempt to change a customary norm, where significant practice contrary to a rule may be present and yet be insufficient to establish a new norm, a 'gap' may emerge during the time that the old norm is too weak to be maintained but the new norm is not yet strong enough to be established, see Kolb (2003), 140; R-J Dupuy (1974), 81; Tomuschat (1999), 211–3.

[726] The situation therefore clearly falls within the Court's dictum in *Nicaragua*: if a state appeals 'to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule', para 186.

[727] Dörr (2019), para 36.

to demonstrate that such a change has occurred. Despite most UN Members likely supporting the existence of the new exception to or limitation on the prohibition permitting forcible assistance to self-determination movements at one time, 'in the absence of any position of the "international community of States as a whole" to the contrary, we remain bound by the rules such as set out in the UN Charter and the major resolutions adopted for interpreting their most relevant provisions.'[728]

[728] Corten (2010), 148.

7. The structure of the existing so-called 'exceptions' to the prohibition on force and change to their content and scope

Chapter six analysed how the structure of the *jus ad bellum* affects the creation of new exceptions to or limitations on the scope of the prohibition on force. This chapter focuses on the established so-called 'exceptions' to the prohibition – self-defence and collective security – and analyses their structure. That is, it seeks to define with more precision the contours of the various customary, treaty, and *jus cogens* norms that together constitute and define the right of self-defence and the UN collective security framework and analyses how they exist in relation to each other. For example, to what extent are the customary and treaty law norms identical and in which ways do they diverge; to what extent does a norm of one source give content to another; and to what extent, if at all, do the norms regulating the right of self-defence and the UN collective security framework have *jus cogens* status.

Unlike chapter six, which analysed how it is necessary to modify multiple norms of different sources to create a new exception to or limitation on the scope of the prohibition on force, this chapter identifies areas in which change may occur to the content of the right of self-defence or the UN collective security framework through the modification of one source of law alone. This is possible in part due to the existence of references or '*renvois*' between norms of different sources which allow the content of a norm to change without the formal requirements for modification of that source being fulfilled.

Part one addresses the structure of the right of self-defence. It analyses how Article 51 excludes and then incorporates the customary international law of self-defence into the Charter; how the rules of treaty law nevertheless limit the kinds of changes to the content

of Article 51 that can occur through that *renvoi*; and, developing the analysis in chapter five, identifies with greater precision the scope of the *jus cogens* norm in the *jus ad bellum*. It should be stressed that the objective is not to determine the existing contours of the right of self-defence in international law, nor to evaluate whether particular changes have in fact taken place, but rather to determine what would be required for various changes in the law to come about.

Part two then analyses the structure of the so-called 'exception' of collective security. It concludes that force that is lawful under the collective security provisions of the Charter falls outside the scope, not only of Article 2(4), but also of the customary prohibition on force. It is argued that collective security treaties, including but not limited to the UN Charter, cannot operate as a form of prior consent to force. As a result, new collective security mechanisms cannot be created simply through the conclusion of treaties purporting to grant such a consent. The part then seeks to identify with more precision the limits on the scope of the customary and *jus cogens* prohibitions on force at their boundary with collective security.

1. Change to the content of the right of self-defence and its limits

Although questions of structure and the sources of law tend to be neglected in scholarship on the *jus ad bellum*,[729] some of the existing literature on self-defence has grappled with the structure of the international law norms in this area and its consequences for the methodology used in identifying what the law is and how it may change. Ruys devotes a

[729] Kammerhofer (2015), 636–7.

chapter of his monograph on self-defence to methodological questions arising from the structure of the law of self-defence. Ultimately, however, his conclusion seems to give excessive weight to customary processes as, even though the Charter provides a starting point, he considers that its provisions may be modified by conflicting subsequent customary international law.[730] As explained in chapter four, this view is not adopted here.

After analysing the co-existence of custom and the Charter and rightly criticising the preference often given to discussion of customary international law, Tams concludes that the scope of self-defence should instead be addressed as a question of treaty law.[731] However, this seems to result from his rejection of the view that Article 51 is 'merely a *renvoi* to extra-Charter law', and that terms like 'armed attack' and 'occurs' therefore provide guidance as to the content of the right of self-defence 'as treaty law' only. As argued further below, this is not the best explanation of the structure of the law of self-defence.[732]

Van Steenberghe's analyses of the law of self-defence also consider the structure of the sources in the *jus ad bellum*, observing that self-defence is regulated both by customary and conventional norms, and asking whether in evaluating change to the law of self-defence one should 'differentiate the evolution of the various aspects of that law according to the formal source upon which they rest?'[733] Yet, contrary to the central

[730] Ruys (2010), 29. Ruys makes some other methodological choices that differ from those made here, notably subscribing to a distinction between interpretation and modification of treaty norms, and analysing both elements of the two-element test for custom together as one category of 'customary practice', 52.

[731] Tams (2019), 106–7.

[732] Not least because it is directly contrary to the view of the ICJ in *Nicaragua* that at least the definition of armed attack 'is not provided in the Charter, and is not part of treaty law' but is to be found in customary international law, paras 176, 191.

[733] Van Steenberghe (2015), 88; see also Van Steenberghe (2010).

argument of this thesis, not to mention the ICJ's judgment in *Nicaragua*,[734] Van Steenberghe argues that it is *not* necessary to distinguish between conventional and customary aspects and that:

> it seems only necessary to show that three general conditions are fulfilled to assert the evolution of the law of self-defence through state practice: namely that this practice is relevant (i.e. followed in the application of the law of self-defence), general and constant, without seeking to differentiate between conventional and customary practice[735]

This conclusion appears to be based on the arguments that distinguishing between the sources 'would be very difficult to put into practice' and that 'the conditions upon which customary and conventional law may evolve through state practice do not seem that dissimilar'. The preceding chapters have demonstrated the extent to which the latter point is inaccurate while the former point, though undoubtedly true, hardly seems a valid reason not to at least attempt the correct method of legal analysis.

Van Steenberghe goes on to argue that claims both as to the existence of a right of self-defence against non-state actors and anticipatory self-defence 'are a matter of interpretation rather than of modification' of 'the law of self-defence'.[736] Arguments that the 'law on self-defence' has changed through 'interpretation' alone have become more

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[734] *Nicaragua*, para 178.

[735] Van Steenberghe (2015), 91–2. Tladi (2019) expresses a similar view, 48.

[736] Van Steenberghe (2015), 94.

prevalent since 2001.[737] Yet, if all the norms governing self-defence have been dissolved into a formless mass called 'the law of self-defence', what exactly is it that is being interpreted and what does this mean? And what makes this a question of interpretation rather than modification if this is not to be answered by reference to the nature and requirements of a particular source of international law? This is precisely the question analysed at length in the previous chapters of this thesis. To gloss over the complexity of the structure of self-defence overlooks many difficult legal questions, from the hierarchy of sources to the ability of treaty practice to contribute to the formation of customary international law.[738]

By contrast, Green analyses two 'conceptions' of self-defence, one rooted in customary international law and the other in the Charter, 'that in some instances coincide and at others diverge'.[739] Green's analysis is to be preferred as it correctly takes account of the independence of the norms of the different sources of law from each other. That is, as this thesis has argued, while it may be necessary to have regard to more than one source of law where multiple norms simultaneously regulate an aspect of the *jus ad bellum*, when it comes to considering how those norms change they must be disentangled and care must be taken to ascertain whether the requirements for modification of each source have been fulfilled. Green's analysis maintains the important distinction between norms of different sources while observing that the use of force in self-defence is not simply regulated by separate sets of customary and treaty norms: many fundamental aspects of self-defence are *jointly* regulated by both treaty and customary norms. They are 'conjoined or merged,

[737] See Kammerhofer (2015), 645–7.

[738] See Scobbie (2020), 164–71; De Hoogh (2016), 40.

[739] Green (2009), 129–30, 134–5.

meaning that one cannot function without the other' and thus they must be considered together when determining the content of the law and whether there has been a change to states' obligations.[740] The distinction between the sources of law in the *jus ad bellum* of course does not exclude the possibility that the same material practice may contribute to the simultaneous modification of more than one norm from more than one source.

1.1 The customary international law of self-defence

1.1(a) The exclusion of customary international law

Considerable ink has been spilled analysing the extent to which – if at all – a broader customary right of self-defence survived the adoption of the Charter.[741] This persisting customary right, so goes the argument, is not so narrowly confined as the right of self-defence contained in Article 51 of the Charter and may be relied on in situations other than 'if an armed attack occurs'.[742]

Yet even in the immediate post-Charter period there was reason to doubt that any broader doctrine of self-help or self-preservation persisted.[743] In the 1949 *Corfu Channel* case the Court (albeit not in those terms) applied a comprehensive customary prohibition on the use of force which covers even limited interventions such as the UK's 'evidence-gathering' activities and rejected a defence of 'self-protection or self-help', instead

[740] *Ibid*, 129–30; Dinstein (2007) describes the general phenomenon, 383.

[741] See summary in Ruys (2010), 54–5.

[742] Bowett (1958); Franck (2002), 131–2. See Gray (2018a), 243.

[743] Brownlie (1963), 255.

qualifying the UK's actions as a violation of Albania's territorial sovereignty.[744] The case involved one UN Member and one non-Member and so was governed by customary international law only, not the treaty law of the Charter. In this sense, *Corfu Channel* can be seen as foreshadowing the later *Nicaragua* case, in which a jurisdictional restriction allowed the application of customary international law only. If a broader customary right had survived the adoption of the Charter and subsisted in cases not governed by the treaty, one would expect it to have been available in the *Corfu Channel* case. Yet it appears that, even if the Charter regime did not reflect customary international law at the time of its adoption, it had quickly had a profound effect on customary international law on the use of force, which by 1949 had come to mirror its provisions.[745]

In any case, today the significance of this debate is limited. A customary right of self-defence cannot in itself justify a breach of the treaty prohibition in Article 2(4),[746] and the virtually universal participation in the UN Charter means that any situation of self-defence will almost always be governed by Article 51, with customary international law applicable only to the extent it is not inconsistent with that *lex specialis* among UN Members.[747] As a matter of treaty interpretation, in the context of the other Charter provisions regulating force, '[t]he picture that emerges is that of a comprehensive regime,

[744] *Corfu Channel*, 35; also Dissenting Opinion Krylov, 77.

[745] Although Brownlie (1963) has shown convincingly that the content of the customary right of self-defence at the time of adoption of the Charter was already quite close to the right set out in Article 51, 274–5; also Brownlie (2002), 6; Corten (2010), 410.

[746] Kammerhofer (2015), 641; Corten (2010), 401–1; Tams (2019), 106.

[747] Some writers take the view that through Article 103 the UN Charter claims priority, not only over conflicting agreements, but also over conflicting customary international law. This view is not taken here – the text of Article 103 is clearly referring to conflicting treaties, see Dinstein (2017), 418. However, in practice the operation of the *lex specialis* rule, as well as the inability of conflicting customary international law to modify treaty norms (see chapter 4; also Green (2009), 132) means that for UN Members obligations under the Charter will prevail over customary international law (with the exception of customary *jus cogens* norms).

consisting of an absolute ban on the unilateral use of force by States'.[748] It is highly implausible to interpret Article 51 and the Charter more broadly as not excluding all other non-Charter bases for the unilateral use of force. Brownlie's comments regarding the argument that the reservations of the 'right of self-defence' or 'legitimate self-defence' by parties to the Kellogg-Briand Pact extended to a broader right seem equally applicable to the argument that broader rights of self-help or self-preservation persist alongside the Charter:

> The legal character and effectiveness of the Pact would be completely undermined if the variety of excuses to be found in the earlier doctrine on self-preservation and necessity were to be permitted. The principle of effectiveness, and also that of fulfilling obligations in good faith, militate against an interpretation that would reduce the Pact to a pompous futility.[749]

Thus, in the unlikely event that there is any broader subsisting customary international law right of self-preservation or self-help, in virtually all cases this will be inapplicable as it is excluded by the Charter's more specific regulation of those matters in Article 51.[750]

1.1(b) The incorporation of customary international law

[748] Ruys (2010), 59; Franck and Patel (1991), 64.

[749] Brownlie (1963), 240.

[750] '[…] where the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all?', Brownlie (1963), 273; Corten (2010), 400–1.

Yet the Charter does not definitively exclude all customary international law. Instead, it expressly incorporates certain elements of the customary international law of self-defence back into Article 51. That provision contains one of the most well-known examples of a *renvoi* to external legal norms,[751] although it is not always described in those terms.[752] In its merits judgment in *Nicaragua*, the ICJ held that:

> On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' (in the French text the 'droit naturel') of individual or collective self-defence[753]

In this way, the Charter refers to the customary international law on self-defence to provide at least some of the content of Article 51.[754] The clearest illustration of this *renvoi* from Article 51 to customary international law is provided by the criteria of necessity and proportionality. As Green observes, 'it is uncontroversial that the criteria of necessity and proportionality still apply today, irrespective of the fact that they are nowhere to be found

[751] See Dinstein (2017), 388–91; also chapter 4, section 2.3.

[752] E.g. van Steenberghe (2010), 185; Akande and Johnston (2021), 687–8.

[753] *Nicaragua*, para 176.

[754] The view taken here is that the customary right of self-defence acts as a true exception to the customary prohibition on force; thus, in principle, uses of force in self-defence are *prima facie*, for a sliver of time, prohibited by the customary prohibition, before then being made lawful by operation of the exception. The same view appears to be taken by Corten (2010), 402. However, the right of self-defence, to the extent that it therefore constitutes a derogation from the customary prohibition on force, must act as a limitation on the scope of the *jus cogens* prohibition on force. That is, force in self-defence falls outside the scope of the *jus cogens* norm, which in that respect is narrower than the customary norm which is its source.

in the Charter'.[755] It is customary international law only, not treaty law, that sets out in greater detail these conditions of the right of self-defence.[756]

A *renvoi* must be distinguished from the situation where a treaty simply omits to regulate an issue, leaving it subject to regulation by existing customary international law alone. That is not what is going on here: situations where a UN Member wishes to invoke the right of self-defence as an exception to Article 2(4) fall squarely within the scope of the treaty norm in Article 51, and it is then *by operation of that treaty provision* that customary international law is applied. The customary international law of self-defence is first excluded through operation of the *lex specialis* rule, which gives priority to the more specific treaty law regulating the same subject matter,[757] but then re-applied by the treaty, through the *renvoi*.[758] The situation is thus jointly and simultaneously regulated by treaty law and customary international law.

As the Court pointed out in *Nicaragua*, and confirmed in *Oil Platforms*, 'armed attack' as a trigger for the right of self-defence exists as a matter of customary international law,[759] and the view taken here is that the *renvoi* to customary international law in Article

[755] Green (2009), 132; stated explicitly by the ICJ, *Nuclear Weapons*, para 41.

[756] *Nicaragua*, para 176; *Oil Platforms*, para 76; *Nuclear Weapons*, para 41; Green (2009), 132; Gray (2018b), 14; Cahin (2005), 157.

[757] Whether Article 51 is seen as conflicting with a broader customary right of self-defence (and therefore overruling or setting aside those norms as between UN Members), or simply as a more specific application of that general standard, as the *lex specialis* (both *rationae personae* and *rationae materiae*) it is the treaty norm that will be applied as governing relations among UN members, see ILC Fragmentation, paras 88–92. However, any more general customary rule remains in the background, *ibid*, para 102; *Nicaragua*, para 176. Also IDI (1995), Conclusion 11; Dinstein (2017), 404–5.

[758] As a result, since Article 51 enjoys priority over other agreements due to Article 103 of the Charter, the same applies to the customary international law of self-defence applied through the Charter. See Barrett (2016) on incorporation of external rules in UNCLOS, 23; Redgwell (2016), 176.

[759] *Nicaragua*, paras 194–5; *Oil Platforms*, para 51.

51 encompasses the whole phrase 'inherent right of self-defence if an armed attack occurs'. That is, the requirement that an 'armed attack occurs' is a condition of the customary right being referred to, as well as a requirement of treaty law. Really, the inclusion of 'if an armed attack occurs' in the reference made by Article 51 is unnecessary: response to a prior use of force or 'attack' is inherent in the post-1945 concept of self-defence. Indeed, it is the defining characteristic of that right, which distinguishes it from related (now obsolete) concepts such as self-help or self-protection.[760] To act in self-defence *is* to act in response to an armed attack. It is therefore logical that the whole phrase 'inherent right of self-defence if an armed attack occurs' should be taken to define the *renvoi*, and not broken up into separate requirements.

The question, however, is to customary international law *at which time* does this *renvoi* refer? The Court, although it characterises the term as a 'reference', does not make clear whether this is a *renvoi fixe* or *renvoi mobile*.[761] Since the *renvoi* is made from treaty to custom, determining its scope is a question of treaty interpretation. If one applies the criteria discussed in chapter four, it seems that 'the inherent right of individual or collective self-defence if an armed attack occurs' in Article 51 is a treaty term that should be given an evolutionary meaning.[762] Although qualified by 'inherent', if this is correctly understood as referring only to the source of the right in customary international law, rather than natural law concepts,[763] then this does not affect the generic nature of the word 'right' nor suggest that it is by its nature time-bound or immutable. The term is found, as in the case of *Aegean*

[760] See Brownlie (1963), 241, 250, 252.

[761] See chapter 4, section 2.3.

[762] Ruys (2010), 22; Brownlie (2002), 7.

[763] *Nicaragua*, para 176.

Sea, in a treaty that is of 'continuing duration', and whose object and purpose is that of a constituent instrument of an international organisation: both features which strengthen the presumption that the term should be given an evolutionary meaning. Moreover, the object and purpose of the Charter – that of establishing a universal collective security system and comprehensive regulation of the use of force – would be seriously undermined by an interpretation that would lead to two diverging bodies of law regulating self-defence.[764]

Thus, what qualifies as a lawful use of force for the purpose of Article 51 of the Charter is determined by the customary international law of self-defence existing at the time the use of force took place. As the requirements of the customary right of self-defence evolve in accordance with state practice and *opinio juris*, the contours of Article 51 also evolve, as does the content of states' obligation under Article 2(4), without the requirements for modification of those provisions *qua* treaty norms needing to be fulfilled.

1.2. The limits imposed by treaty law

This reference to customary international law in Article 51 creates considerable potential for the content of that treaty norm to change – making force lawful or unlawful where it had not been so before – even without amendment of the Charter or a new interpretation by all parties. The definition of armed attack for the purpose of Article 51, and the content of the conditions of necessity and proportionality, can evolve through the operation of

[764] That is, the still evolving customary international law and the customary international law of 1945 applied through a *renvoi fixe* in the Charter.

customary processes alone, without also requiring modification of the treaty norm. However, this is not without limits.[765]

The text of Article 51 itself explicitly modifies and restricts the customary right of self-defence that it incorporates.[766] Most obviously, Article 51 imposes a temporal limit on the customary right, which may only be exercised 'until the Security Council has taken measures necessary to maintain international peace and security'. This condition is imposed on the right of self-defence itself, unlike the second sentence of Article 51 which creates a separate reporting obligation under the Charter which does not affect the lawfulness of the force used in self-defence.[767] As a result of this temporal restriction, the right of self-defence under Article 51 is necessarily narrower than under customary international law.[768]

The more significant question is how – if at all – the words 'if an armed attack occurs' in Article 51 act as a limit imposed by the Charter on the customary international law incorporated through the *renvoi*. Even if the whole phrase 'inherent right of self-

[765] These limits imposed by treaty law on changes to Article 51 are rarely discussed, De Hoogh (2016), 23–4. Although see Corten (2010), 407ff; Tams (2019), 111–2.

[766] Akande and Johnston (2021), 687; Brownlie (1963), 273; Butchard (2018), 244; see the discussions within the US delegation to the San Francisco conference, quoted in Haque (2020).

[767] *Nicaragua*, para 200.

[768] It is this divergence between the treaty norm and the general customary norm that triggers application of the *lex specialis* principle, giving priority to the treaty among UN members, see Bernhardt (1987), 271. Where a state's use of force is lawful under Article 51, one can conclude that it will necessarily be lawful under the customary prohibition of force and the exception created by the customary right of self-defence, since it is to this law that Article 51 refers. Given the more limited scope of the right of self-defence under Article 51, as compared with the scope of the customary right of self-defence as an exception to the customary prohibition, in rare situations a use of force in self-defence could be unlawful under the Charter but lawful under customary international law. E.g. where a state no longer enjoys the right to use force in self-defence under the Charter because the Security Council has taken measures necessary to maintain international peace and security. However, the practical importance of such possibilities is minimal given the virtually universal membership of the Charter.

defence if an armed attack occurs' constitutes a *renvoi* to custom, whatever that may be at a particular time, the possible evolutions in customary international law that can be incorporated through this mechanism are not unlimited. As noted in chapter four, even evolutionary interpretations of treaty terms – including a *renvoi mobile* to an external legal norm – operate under and are therefore constrained by the rules codified in Article 31 VCLT. The treaty term may be given an evolutionary meaning, but it must still be the 'ordinary meaning' of the term. The evolution cannot be so great that it goes beyond the limits of what the ordinary meaning of the words can accommodate. This would require evidence that the treaty parties had, in accordance with Article 31(4) VCLT, at the time of conclusion intended to give the term a special meaning; or, alternatively, amendment of the Charter, or an agreement (or practice establishing such an agreement) among all parties to the Charter as to a new subsequent interpretation of the provision that departs from the interpretation reached through Article 31.

Thus, while the content of the right of self-defence in Article 51 may depend on customary international law as it changes over time, as determined by the *renvoi* to the external legal norm, it must still fit within the ordinary meaning of the terms of that provision. An 'attack' must be some sort of hostile act against the victim state, while 'armed' would seem to require that attack to involve forcible military action.[769] Moreover, logically the ordinary meaning of 'occurs' cannot include 'does not occur', nor can an evolutionary interpretation entirely abrogate the phrase 'if an armed attack occurs'. While the definition of what *qualifies* as an armed attack exists only in customary international

[769] See Tams (2019), 112–3.

law,[770] the treaty norm requires that *something* must occur that qualifies as an armed attack.[771]

To the extent that customary developments cannot be accommodated by the ordinary meaning of the treaty terms – for example, if the customary right of self-defence were to develop in such a way as to permit force in a situation where an armed attack has *not* occurred – the incorporation will fail, and those evolutions in customary international law will not be automatically reflected in the content of Article 51. The 'pipe' created by the *renvoi* is too narrow to fit the broader customary right[772] – the *renvoi* will only incorporate that part of the customary international law of self-defence that applies 'if an armed attack occurs'. Any customary right to use force in self-defence other than where an armed attack occurs is not caught by the treaty reference.

Even within the constraints imposed by the ordinary meaning of the terms of Article 51, there is plenty of scope for evolution in the customary concept of armed attack, which will be reflected in the content of the treaty norm through the *renvoi*. However, for UN Members, without modification of the Charter there is no escaping the requirement that an armed attack (as defined in custom) must occur. This does not mean that the *jus ad bellum* could never change in such a way that the armed attack requirement disappears, only that

[770] *Nicaragua*, para 176.

[771] Gray (2018b), 14; also Green (2009), 115.

[772] The metaphor of the 'conduit pipe' was employed by the majority judgment in the UK Supreme Court case of *R (Miller) v Secretary of State for Exiting the European Union* e.g. para 65. In that case it was held that the 1972 European Communities Act makes a *renvoi* to European Union law, which was thereby made an independent source of domestic UK law, para 80. That is, it is not just the 1972 statute that was the source of EU rights and obligations in UK law, but EU law itself. In the same way, the Charter's *renvoi* makes the customary international law of self-defence directly applicable to cases falling under Article 51; it is not merely a 'short-cut to law-making' whereby only the treaty norm applies, cf Kammerhofer (2015), 642.

it cannot take place by means of Article 51's *renvoi* to customary international law. For UN members to be able to avail of such a new, broader customary right of self-defence, either Article 51 would need to be amended so that its language can accommodate a right of self-defence other than 'if an armed attack occurs', or all UN members would need to interpret that phrase through their subsequent practice or agreement so as to give it a special meaning that differs from the ordinary meaning of the terms.

A further limitation on the customary international law incorporated through the *renvoi* is that, in accordance with Article 31(1), the interpretation of Article 51 must also take into account the context of the treaty terms and the object and purpose of the Charter, which must be weighed equally alongside the ordinary meaning of the terms.[773] This could perhaps be understood as preventing an interpretation of Article 51 which, through the evolution of customary international law, would, for example, lead to a result which conflicts with or renders absurd the values and purposes set out in the Charter preamble and Chapter I. It is to these provisions of the Charter that reference is typically made in determining that treaty's object and purpose.[774] However, a treaty's object and purpose does not need to be explicitly stated in its text, and indeed the provisions in Chapter I of the Charter set out the purposes and principles of the United Nations organisation, not of the Charter treaty itself. The object and purpose of the Charter is better characterised as the establishment of a new international organisation, in particular an international organisation which would provide the basis for a new collective security system and thus, necessarily, enjoy a monopoly on the use of force; that is what the drafters hoped to achieve

[773] Tladi (2019), 48.

[774] See chapter 4, section 2.1.

in concluding that treaty and it is by reference to this object and purpose that the Charter's provisions should be interpreted.[775]

1.2(a) Anticipatory and pre-emptive self-defence

This chapter uses the term 'anticipatory self-defence' to refer to the situation where force is used in response to a specific armed attack which has not yet occurred but is imminent.[776] Imminence is here understood to mean imminent *in time*. Situations where force is used in self-defence when an attack has begun but not yet impacted its target (the 'missiles in the air' scenario) is not considered as requiring the adoption of a doctrine of anticipatory self-defence, but as falling squarely within the right of self-defence. In such situations an armed attack is 'occurring' even if it is not yet complete. 'Pre-emptive' (sometimes called 'preventive') self-defence refers to situations where no armed attack has occurred nor is any armed attack imminent.[777] This includes more recent expressions of the doctrine which, although couched in the language of 'imminent' threats, are clearly intended to allow the use of force against armed attacks which are not imminent in the temporal sense in which this concept has traditionally been understood, and so are correctly categorised as claims as to the existence of a right of pre-emptive self-defence.[778]

[775] See Tladi (2019), 29.

[776] Cf Corten (2010), 413–4.

[777] Cf Corten (2010), who uses 'preventive' self-defence to refer to any use of force against a *threat* of armed attack, imminent or otherwise (thus including what is here described as 'anticipatory' self-defence), 406–7.

[778] E.g. Wilmshurst et al (2006), Principle D; Bethlehem (2012). See Gray (2018a), 248, 252–3; Scobbie (2020), 174–5.

An evolution in customary international law which saw the emergence of a right to act in self-defence against an *imminent* armed attack could be accommodated through the *renvoi* in Article 51. In this way, an evolution in the customary international law of self-defence could lead to the emergence of a right of anticipatory self-defence, lawful under customary international law and the Charter, without modification of the Charter. Customary international law may evolve in such a way that either the term 'armed attack', or what it means for an armed attack to 'occur', comes to include the commission of certain acts that previously would have been considered merely preparatory to an armed attack. An expansion of either the customary definition of 'armed attack' or what it means under custom for such an attack to 'occur' so as to include the acts immediately before the attack is launched – such as loading missiles onto a rocket, preparation of bomber jets, and so on – would stretch but could certainly be accommodated within the ordinary meanings of those words.[779] This change in the content of customary international law would therefore be reflected in the content of Article 51 through the *renvoi*: the customary definition has evolved, but that evolutionary meaning is still within the ordinary meaning of those terms.

However, as noted above, in a scenario where customary international law evolves to recognise a right of self-defence in situations other than where 'an armed attack occurs', treaty law places a limit on the corresponding changes to the content of Article 51 that can take place through the *renvoi*. Such a right would stretch the terms of Article 51 further than their ordinary meaning permits. Indeed, the language of Article 51 poses two obstacles to arguments for pre-emptive self-defence: first, that it is difficult to see how 'armed attack'

[779] Again, this thesis takes no position on whether such a right does now exist. Franck (2002) observes based on the drafting history of the Charter that 'it is beyond dispute that the negotiators deliberately closed the door on any claim of "anticipatory self-defence"', 50, and it is unclear whether the existence of a right of anticipatory self-defence in customary international law can now be demonstrated, see Corten (2010), 431–2; cf Green (2009), 105.

could encompass 'no armed attack' or a mere *threat* or *risk* of an attack, much less when a specific, threatened attack cannot be identified by reference to a possible time or location. Second, it is equally difficult to see how 'occurs' could come to mean either 'does not occur' or 'might occur'. Such an evolution in the customary international law of self-defence could not be automatically reflected in the interpretation of Article 51 as this is inconsistent with the ordinary meaning of the terms of the *renvoi*.[780] Such a change would require a corresponding modification of that treaty norm through amendment or interpretation of the Charter by the agreement of all members.

This argument may be further strengthened when one takes into account the other elements in Article 31(1) VCLT, as the object and purpose of the Charter and the context of Article 51 make it difficult to accommodate evolutionary interpretations of the 'inherent right of self-defence if an armed attack occurs' which would considerably expand the situations in which UN members are permitted to use force unilaterally.[781] Regarding the context, the distinction between an actual use of force and the mere threat of force is already clearly drawn in the Charter, notably in Article 2(4). From Chapter VII, and the difference in language between Articles 39 and 51, it is also clear that responsibility for dealing with mere 'threats' to the peace lies only with the Security Council.

As discussed further in the subsequent subsection, arguments that expansive conceptions of self-defence conflict with the object and purpose of the Charter can be difficult to sustain, given that right to use force unilaterally already exists in the treaty. However, Article 51 is one element of a collective security scheme created by a treaty

[780] See Corten (2010), 408.

[781] See Corten (2010), 411–2.

designed to comprehensively restrict unilateral uses of force, and grant a monopoly on the use of force to the international organisation it established. Self-defence is a backstop, allowing states temporary permission to use force unilaterally until the organisation's collective security structures have had time to act.[782] Arguably, given this collective security purpose, to suggest that Article 51 allows states to act unilaterally to pre-empt possible threats of force against them is as absurd as to suggest that the right of self-defence under domestic criminal law grants individuals the right to usurp the role of law enforcement agencies and pre-emptively use force against an individual that they suspect may one day commit a possible future assault against them.

Thus, for Article 51 to change to encompass a right of pre-emptive self-defence, not only would there have to be a modification of the customary international law of self-defence, but there would need to be an amendment or new interpretation of the UN Charter by all members, as only by these means can a treaty provision be given an interpretation that is incompatible with the ordinary meaning of the terms and/or the object and purpose of the treaty. Although the purpose of this thesis is not to assess whether such changes have in fact occurred, it is doubtful that there is widespread and representative state practice and *opinio juris*, much less agreement among all UN members, that could establish the existence of a right of pre-emptive self-defence.[783]

1.2(b) Self-defence against non-state actors

[782] Tladi (2019), 84; Corten and Dubuisson (2002), 75.

[783] E.g. S/2021/247, 23-4 (China); 2014 statement by the Non-Aligned Movement, which opposes and condemns 'the adoption of the doctrine of pre-emptive attack […] which is inconsistent with international law' S/2014/573, para 26.5; and generally Corten (2010), 420–7.

Arguments that the right of self-defence may be exercised in response to an armed attack by a non-state actor would appear not to face the same obstacles flowing from the text of Article 51, which provides no indication as to who the author of an armed attack must be. As Judge Higgins has observed, 'there is nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State';[784] equally, the provision does not definitively include acts by non-state actors within the concept of armed attack.

As a result, whether the definition of armed attack encompasses acts by non-state actors with or without attribution to or involvement by another state must be a matter for customary international law. As Corten observes, at least regarding the question whether 'armed attack' can apply to a use of force by a non-state actor, 'an affirmative answer has been evident for decades'.[785] Disagreement exists rather as to the extent to which, if at all, state involvement with that attack or with the non-state actor's activities is also required.

It seems that following adoption of the Charter the concept of 'armed attack' did come to be understood as limited to acts attributable to states, or at least with the 'substantial involvement' of a state.[786] The Definition of Aggression, adopted by consensus by the General Assembly in 1974, included only acts 'by a State' or the sending of armed bands 'by or on behalf of a State' or with a state's 'substantial involvement' as acts of aggression.[787] This also seems to be the predominant view in the scholarship – certainly

[784] *Wall*, Separate Opinion of Judge Higgins, para 33; Declaration of Judge Buergenthal, para 6; also Tams (2019), 114; Schachter (1989a), 311.

[785] Corten (2017).

[786] See Green (2009), 48.

[787] A/RES/3314(XXIX), Article 3; Corten and Dubuisson (2002), 56–62.

before 2001.[788] This view is supported by practice almost immediately following adoption of the Charter: the Rio Treaty provides that 'an armed attack *by any State* against an American State shall be considered as an attack against all the American States'.[789] This practice is particularly significant as not only does the article go on to say that any action in response will be 'in the exercise of the inherent right of individual or collective self-defense recognised by Article 51 of the Charter of the United Nations', but it was precisely this kind of regional defence arrangement that Article 51 was inserted into the Charter to accommodate.[790] In 1982, Israel's claim to be acting in self-defence against the PLO on the territory of Lebanon was rejected by the General Assembly, which adopted (by 127 votes to 2 with no abstentions) a resolution of which the preamble expressed alarm at 'Israel's acts of aggression against the sovereignty of Lebanon'.[791] The US's claims to be acting in collective self-defence of El Salvador against Nicaraguan insurgents received a cool reception in the Security Council.[792] The assumption that an armed attack must be attributable to a state or with a state's 'substantial involvement' in order to trigger the right of self-defence also appears in the Court's reasoning in *Nicaragua*, which takes the Definition of Aggression as setting out those 'most grave forms' of the use of force that constitute an armed attack.[793] The Court in *Nicaragua* also found that this requirement that

[788] E.g. Corten (2010), 164; Dörr (2019), para 40; Judge Kooijmans in his Separate Opinion in *Wall* accepts that 'this has been the generally accepted interpretation for more than 50 years' although nevertheless criticises the majority for not taking into account the Security Council's recognition of international terrorism as a threat to international peace and security, para 35; similarly *DRC v Uganda*, Separate Opinion Simma, para 11; Green (2009), 47–8.

[789] Rio Treaty, Article 3 (emphasis added).

[790] That is, the Rio Treaty provides an institutional framework for how its parties implement their right of collective self-defence, but the legal basis under the *jus ad bellum* for any force used under those arrangements is still provided by Article 51 and the customary right of self-defence it incorporates. See generally Butchard (2018), 250–1; Haque (2019).

[791] A/RES/ES-7/5, preamble para 3. See Franck (2002), 58–9

[792] *Ibid*, 60–1.

[793] *Nicaragua*, para 195. This was confirmed in later judgments, see Tladi (2019), 56–7.

non-state groups be sent 'by or on behalf of' a state or at least with a state's 'substantial involvement' reflected customary international law at that time.[794]

However, while it is clear from the Court's judgment in *Nicaragua* that attribution of a non-state actor's acts to a state, through the effective control test, will permit the exercise of the right of self-defence against that state – since the sending is 'by or on behalf of' that state – what can constitute 'substantial involvement' is less certain. A state does not, according to the Court, commit an armed attack by merely providing 'assistance to rebels in the form of the provision of weapons or logistical or other support',[795] yet whether there is a form of assistance greater than this but short of effective control and attribution that could constitute an armed attack by one state against another is not addressed.

The so-called 'unwilling or unable' doctrine is one attempt to fill the 'gap' created by the *Nicaragua* judgment and identify a trigger, below effective control and attribution, which would allow one state to use force in self-defence on the territory of another.[796] There are plenty of objections that can be made to the doctrine.[797] However, it is not enough merely to object that using force against an armed attack by a non-state actor in such circumstances would amount to a use of force against the territorial state: if the right of self-defence in Article 51 does indeed extend to such a situation, then any such use of force will necessarily not involve a violation of Article 2(4), or the customary prohibition on

[794] *Nicaragua*, para 195.

[795] *Nicaragua*, para 195.

[796] Wilmshurst et al (2006), Principle F. See Deeks (2012); Lubell (2010), 25ff.

[797] In particular, the doctrine can appear as a licence for militarily more powerful states to intervene at will against states unable to resist them, see Gray (2018b), 19; Gray (2018a), 243–6 and fn 258; Scobbie (2020), 177; Brunnée and Toope (2018), 281; von Bernstorff (2016); Christakis (2017), 20–2.

force.[798] To fall within the right of self-defence is by definition not to violate (all things considered) the prohibition on force.

The question is rather: what is the correct view as to the scope of the right of self-defence? Just because a need for attribution to or substantial involvement by a state was the position under customary international law in the past does not mean that the definition of armed attack cannot evolve over time.[799] Equally, it is not enough to object that 'the "unable or unwilling" doctrine is not consonant with the object and purpose of the Charter and the over-arching principle of collective security merely because it contemplates the unilateral extra-territorial use of force by states'[800]: this *kind* of force is exactly what Article 51, even in its most restrictive interpretation, contemplates.[801] Rather, the argument would need to be that, *as a matter of degree*, the 'unwilling and unable' doctrine goes too far, taking it beyond the permissible unilateral force that is compatible with the Charter's object and purpose, and so cannot be incorporated through the *renvoi*.[802] Such an argument is possible, but difficult when the Charter clearly admits that in principle unilateral force in self-defence is permissible.[803]

Since there is no textual obstacle, and arguments relying on the object and purpose of the Charter do not appear dispositive, change to the right of self-defence to include a

[798] Tams (2019), 111.

[799] Tams (2019), 119.

[800] Scobbie (2020), 177.

[801] Tams (2019) 121.

[802] See the arguments made by Tladi (2019), 61–6.

[803] Tams (2019) 123.

right to respond to armed attacks by non-state actors in the absence of any state involvement, or with less than substantial involvement, could therefore occur, it would seem, through the identification of new customary international law alone. As discussed above, an evolution in the customary definition of 'armed attack' would be automatically reflected in the content of Article 51 through the *renvoi*.[804] There would be no need to amend the Charter or establish the agreement of all parties to a new interpretation of Article 51 since, as noted at the outset, the terms of Article 51 are agnostic as to the perpetrator of an armed attack. However, this conclusion should not be misunderstood as meaning that such a change can be (or has been) easily achieved; the test for identification of new customary international law will still need to be fulfilled. Arguments that in Resolutions 1368 and 1373 the Security Council 'deemed' attacks by non-state actors to amount to an armed attack for the purposes of Article 51, or 'formally endorsed' that view, therefore misunderstand what is necessary for such a change to occur.[805]

While it is not the purpose of this thesis to determine the present content of the right of self-defence, it is far from clear that such an evolution in customary international law has occurred. The US itself recently noted that only 19 states have referred to or identified non-state actors in their Article 51 notifications since 11 September 2001.[806] A number of

[804] Tams also takes the view that self-defence against non-state actors 'turns on the understanding of the term "armed attack"', 105.

[805] Statements by the UK, Australia, India, Turkey, S/2021/247, 63, 39; also Wood (2007), 6. In any case, although both UNSC resolutions reaffirmed the right of self-defence in their preambles, they did not characterise the 9/11 attacks as an armed attack, nor did they make any reference to either the presence or absence of state involvement in those attacks, S/RES/1368; S/RES/1373; see De Hoogh (2016), 35. Indeed, the Taliban government's harbouring of Bin Laden and Al Qaeda – i.e. state involvement – was later used as a key justification for the US and UK invasion, Byers (2002), 408–9; and the first strikes of Operation Enduring Freedom also targeted Taliban military sites in Afghanistan, Scharf (2016), 42; Tladi (2019), 68–9. See also Corten and Dubuisson (2002), 54.

[806] S/2021/247, 30.

states have explicitly rejected the view that it is possible to invoke the right of self-defence against a non-state actor without the territorial state's consent, and some dispute that the right of self-defence is available at all against an attack by a non-state actor.[807] Practice of states using force on another state's territory in response to an attack by a non-state actor has received 'at best "mixed" and at worst "negative" reaction'.[808] Recent practice by states using force on Syrian territory in response to ISIS also does not reveal a consistent or common position as to the legal basis under the *jus ad bellum*.[809] Overall, it seems unlikely that there exists the widespread and representative state practice that would be required to change the customary international law definition of armed attack in this way.

1.3. The limits imposed by the *jus cogens* norm

Chapter five concluded that the *jus cogens* norm in the *jus ad bellum* is the customary norm that prohibits uses of force that do not fall within either of the two established so-called 'exceptions' to the prohibition on force: self-defence and collective security. This conclusion was reached by using these existing derogations from the customary prohibition on force to identify, by process of elimination, the extent to which that general customary norm permits no derogation. These existing derogations thus define the limits of the *jus cogens* prohibition on force.

[807] E.g, *ibid*, statements by Brazil, China, Mexico, Syria. The statement by Russia seemed to suggest that self-defence is only available where a state 'directs and supports' an attack by a non-state actor; the 2017 CELAC statement, while not explicitly condemning the use of force in self-defence against terrorists as illegal, seems to support this view, A/C.6/72/SR.1, para 30.

[808] Tladi (2019), 73.

[809] Christakis (2017); Corten (2017), 16.

To identify the contours of that *jus cogens* norm in the *jus ad bellum* with greater precision, it is necessary to identify the level of abstraction at which that *jus cogens* norm is defined in relation to each of those existing derogations. If the *jus cogens* norm is defined at a relatively high level of abstraction at its boundary with the right of self-defence, the content of the *jus cogens* norm may as a result be ambulatory, as certain changes to the content of the right of self-defence may occur without that requiring modification of the *jus cogens* norm. It is only when the change to the law of self-defence is so significant that it goes beyond a change to the mere content of that right and modifies its scope, which in turn defines the limit of the *jus cogens* norm, that the test for identification of a new *jus cogens* norm must be met.

This section picks up on this conclusion and argues that the limit of the *jus cogens* norm at its boundary with self-defence is correctly expressed as prohibiting all uses of force other than force in the exercise of 'the right of self-defence against an armed attack'. That is, the *jus cogens* norm is concerned only with the conclusion as to lawfulness that is reached through the application of the body of (customary and treaty) law that regulates self-defence, and *jus cogens* status does not extend to the norms that regulate in more detail the conditions of lawful self-defence.

Defined in this way, while changes to the definition of necessity and proportionality and changes to the definition of 'armed attack' may occur through normal treaty law and customary processes, and would have no impact on the scope of the *jus cogens* norm which exists at a level of abstraction above these more detailed requirements, any change that removed 'armed attack' as a trigger, and purported to extend the right of self-defence to allow the use of force in reaction to anything other than an armed attack, would amount to

a modification of the *jus cogens* prohibition on force and so require the test for identification of a new *jus cogens* norm to be met. The scope of the *jus cogens* norm is therefore, in this respect, coextensive with the limit imposed by treaty law, as the terms of Article 51 also cannot accommodate a change in customary international law that would remove the requirement that an armed attack occur. For the *jus ad bellum* to change so that the right of self-defence is available where an armed attack has *not* occurred it would need to be shown that – in addition to the identification of new customary international law establishing a right of self-defence in such circumstances, and modification of Article 51 as a matter of treaty law – the new, narrower scope of the *jus cogens* prohibition on force had been accepted and recognised by the international community of states as a whole.

This conclusion as to the precise scope of the *jus cogens* norm at its boundary with self-defence is reached through an analysis of how the right of self-defence and the *jus cogens* prohibition on force emerged over time. Even if customary international law in 1945 did permit the use of force for self-protection and self-help, as well as self-defence against an armed attack, the complete disappearance of the rights of self-help and self-preservation in the years following 1945, as discussed above in relation to *Corfu Channel*, evidenced not only the comprehensiveness of the new prohibition on force in Article 2(4) and customary international law, but also the emerging *jus cogens* character of that prohibition. As Tams writes, over time 'the consolidation of the Charter regime led to a more streamlined discourse, in which self-defence became central' and previously accepted alternative justifications for the use of force, such as necessity, hot pursuit and armed reprisals were effectively abandoned.[810] As other, previously valid derogations ceased to

[810] Tams (2019), 99–100. E.g. rejection of the existence of a right of intervention or self-help in *Corfu Channel*, Reply submitted by the Albanian Government according to Order of the Court of 28 March 1948 (20 September 1948), para 154.

be seen as part of international law, the norm that came to be accepted and recognised as non-derogable was a comprehensive prohibition on force with only the two so-called 'exceptions' still accepted as valid legal reasons to use force: the right of self-defence and collective security.

As argued in chapter five, since the customary prohibition on force is accepted and recognised as a *jus cogens* norm, these remaining derogations from the customary prohibition on force reveal the limits of the norm which currently has *jus cogens* status. To try and restore previously existing derogations which have ceased to be recognised as valid legal reasons to use force, or to expand the right of self-defence to allow force in situations broader than 'if an armed attack occurs', would therefore be to try and modify the *jus cogens* norm currently accepted and recognised by the international community as a whole.

It has already been observed that the concept of armed attack is central to the right of self-defence that has become established in post-Charter customary and treaty law.[811] As the Court has said, it is the 'condition *sine qua non*' required for exercise of the right of self-defence.[812] As Brownlie wrote in 1963, both before and after the Second World War 'the right of self-defence is almost without exception associated with the idea of reaction against the use of force' and '[t]o assert that the right of self-defence justifies action in the face of other threats to the interests of states is to revert to the vague and obsolete right of self-preservation or the doctrine of self-help'.[813] It is the feature of being in reaction to a prior use of military force – an 'attack' or 'armed attack' – that characterises the right as

[811] Although cf Green (2009), 109.

[812] *Nicaragua*, para 237; Green (2009), 25–7.

[813] Brownlie (1963), 255; Ruys (2010), 54; Cahin (2005), 149.

one of self-defence, and distinguishes it from broader doctrines of self-help and self-preservation.[814] The importance of the armed attack criterion, and its centrality to self-defence, was further strengthened by the ICJ's *Nicaragua* judgment, which placed the concept at the centre of its reasoning on the issue, and which has influenced state practice since 1986.[815] To seek to expand the right of self-defence to situations where there is *no* armed attack would transform its nature so dramatically that this would require modification of the *jus cogens* norm; in effect, it would no longer be a 'right of self-defence'. A change that would remove the requirement of an armed attack therefore could not be accommodated within the scope of the existing right of self-defence whose outer limits define the scope of the *jus cogen*s norm.

It is undeniably difficult to draw a clear line between a significant change to the *definition* of armed attack, and a change that would *remove* the armed attack requirement and so require modification of the *jus cogens* norm. One could conceivably argue that a change to permit force pursuant to the supposed right of pre-emptive self-defence claimed by some states would not remove the armed attack requirement but merely change the definition of armed attack (to include a risk or threat of attack), and so although greater in scale is identical in kind to the recognition that force may be used in self-defence in response to armed attacks by non-state actors, or in response to an imminent armed attack.

However, it is submitted that a line can sensibly be drawn and that such strained arguments must be rejected. At some point, a change to a definition becomes so great that one is no longer talking about the same concept, and it is clear that such a 'redefinition' of

[814] See Green (2009), 115.

[815] Green (2009), 63, also 123–8.

armed attack would cause the right of self-defence to collapse back into the obsolete rights of self-help or self-preservation. Moreover, as argued above in relation to the limits imposed by the text of Article 51 as a matter of treaty law, both as a matter of logic and language it seems absurd to say that the concept of the occurrence of a particular event can also encompass the mere threat or risk of that event occurring.

To expand the right of self-defence to add a right to respond to 'emerging threats before they are fully formed'[816] or where there is no specific evidence of where or when a possible attack will occur or what precise form it will take[817] – that is, to create a right of pre-emptive self-defence – must therefore require the acceptance and recognition of the international community as a whole. Unlike the recognition that force may be used in self-defence in response to armed attacks by non-state actors, or in response to an imminent armed attack, these proposed changes to the *jus ad bellum* would, in effect, entirely remove the requirement that there be an armed attack at all. Indeed, the purpose of such an expanded right of self-defence is precisely to *prevent* an armed attack from ever occurring. That is, if that view is adopted, the right could be exercised lawfully without an armed attack ever having even begun to occur. For such a change to the *jus ad bellum* to take place, the *jus cogens* prohibition on force would have to be narrowed, so that the prohibition on the use of force in situations other than reaction to an armed attack is now also accepted and recognised as being either subject to derogation in the form of the broader rights to use force in response to other threats, or as excluding such conduct from the scope of the customary *jus cogens* prohibition on force altogether.

[816] USA National Security Strategy (2002).

[817] UK Attorney General's Speech; see Scobbie (2020), 175; Gray (2018a), 235.

This is of course in addition to the necessary amendment or interpretation of the Charter and identification of new customary international law discussed above, which will both be ineffective unless accompanied or preceded by a corresponding change in the *jus cogens* norm. That is, not only would there have to be a widespread and representative state practice and *opinio juris* in support of the broader customary right of pre-emptive self-defence, as it is custom that gives content to Article 51, but this practice (or, for example, an agreement in the form of a General Assembly resolution) must also establish the agreement of all UN members to a corresponding interpretation of Article 51 that is not limited to 'if an armed attack occurs'. If the *opinio juris* supporting the broader customary right was shared by 'a very large majority' of states this will also suffice to modify the customary *jus cogens* norm. Where the necessary modification of the Charter takes the form of the explicit agreement of all UN members (which encompasses a 'very large majority of states') as to the broader interpretation of Article 51, then this would also simultaneously modify the scope of the *jus cogens* prohibition.

To conclude on self-defence: as the Court confirmed in *Nicaragua*, all UN Members are bound both by the prohibition in Article 2(4), whose scope is limited by the right of self-defence in Article 51, and by the customary prohibition on the use of force, to which the customary right of self-defence provides an exception. To modify the situations in which a UN Member state may lawfully use force in self-defence it is therefore necessary to modify both customary international law and the Charter. Otherwise, the ability of a state to use force will remain limited to whatever the most restrictive of those norms happens to permit. However, certain modifications of the customary international law of self-defence will be automatically reflected in the content of Article 51 through operation of the *renvoi* and will not require the amendment or interpretation of the Charter. For

example, for the requirements of necessity and proportionality or the *definition* of armed attack to change it is sufficient to show a widespread and representative state practice and *opinio juris*. However, the customary international law that can be incorporated through the *renvoi* is limited by the rules of treaty interpretation. The evolutionary interpretation of the terms of Article 51 must still take account of their ordinary meaning and the object and purpose of the Charter. Some changes to the right of self-defence – for example, to remove the requirement that an 'armed attack occur' – will therefore still require modification of both sources of law. Finally, it is the characteristic of being in response to an armed attack that defines the scope of the right of self-defence *qua* limitation on the scope of the *jus cogens* norm. As other reasons for resort to unilateral force came to be recognised as unlawful, reflecting the increasing acceptance that no such derogations from that prohibition were permitted, force in response to a prior grave use of force came to be accepted as the only reason for a state lawfully to use force unilaterally, demonstrating the limits of that non-derogable norm. Any change that purported to expand the right of self-defence to allow force to be used in situations other than where an 'armed attack occurs' would engage the boundary between the right of self-defence and the *jus cogens* prohibition, requiring modification of that *jus cogens* norm, and thus that the change be 'accepted and recognised by the international community of states as a whole'.

2. Change to the content of the UN collective security framework and its limits

This part will analyse the structure of the other established so-called 'exception' to the prohibition on the use of force – force used pursuant to the collective security structures of the UN Charter – and how this impacts change to the *jus ad bellum*. First, the place of the treaty law prohibition on force in Article 2(4) within the UN Charter system will be

analysed. Section 2.2 will then consider how the treaty-based collective security structures of the Charter act as a limit on the scope of the customary prohibition on force. Finally, building on the analysis in chapter five, section 2.3 will identify the scope of the *jus cogens* prohibition on force at its boundary with collective security, which acts as a limit on the scope of that non-derogable norm.

In a broad sense, the Charter and the United Nations as a whole constitutes a system of collective security.[818] However, the argument here is only concerned with that part of the UN collective security system that involves the use of force. Under Article 42 the Council may 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security' or, as shown by recent practice, authorise the use of force by UN Members.[819] The General Assembly also has the power under Article 11(2) to discuss and make recommendations on matters of international peace and security.

2.1. Collective security in treaty law

As noted above, the term 'exception' can refer to two different concepts: the situation where certain conduct falls entirely outside the scope of a norm, or the situation where a separate norm (a true exception) applies alongside another norm, rendering lawful conduct that would, for example, otherwise be prohibited by that latter norm. Confining discussion for now to the treaty law of the UN Charter, it can be seen that collective security falls within the first category: force that is lawful under Article 42 of the Charter must fall

[818] See Sarooshi (1999), 5; Orakhelashvili (2011), 15.

[819] See Higgins et al (2017), para 26.42.

outside the scope of the prohibition on force in Article 2(4). This conclusion is based both on the drafting history of the Charter and interpretation of its text.

In the first Dumbarton Oaks proposal for the text of what became Article 2(4) the only qualification on the prohibition on force was 'in any manner inconsistent with the purposes of the Organization',[820] making clear from the outset that the prohibition 'maintains the possibility of states using force on behalf of the Security Council, as per the Charter'.[821] At the San Francisco conference, statements by delegates also demonstrated their acceptance that 'action by the Organization', that is, action under the enforcement provisions of what became Chapter VII, is lawful, and not affected by Article 2(4).[822]

As discussed in chapter four, the drafting history of the Charter is of limited weight in interpreting its provisions. However, this conclusion is supported by the rules of treaty interpretation: it does not make sense for conduct to be prohibited by one provision of a treaty and then made lawful by another provision *of the same treaty*.[823] If Article 2(4) is considered in the context of the Charter as a whole, and in light of the UN's purpose 'to take effective collective measures for the prevention and removal of threats to the peace',[824] the correct interpretation of Article 2(4) must be that such collective measures involving the use of force are not caught by its prohibition. This relationship between two provisions

[820] Dumbarton Oaks Proposals for a General International Organisation, Doc 1, G/1, 3 UNCIO 1, 3, para 4.

[821] Butchard (2018), 247. See also Brierly (1946).

[822] Report of Committee I to Commission I, 6 UNCIO 459; Butchard (2018), 248–50.

[823] If two provisions of a treaty do appear to create conflicting obligations, leading to a result which is manifestly absurd or unreasonable, this is precisely the situation in which recourse may be had to the *travaux preparatoires*, VCLT Article 32.

[824] UN Charter Article 1(1).

of the same treaty must be distinguished from the situation where a separate treaty or customary norm acts as a true exception to a treaty norm: in that case, conduct could be prohibited under Treaty A but then made lawful all things considered through the operation of a rule in Treaty B (for example, a bilateral treaty acting as *lex specialis* for the parties concerned) or a customary norm (for example, by qualifying the conduct as a lawful countermeasure). However, in this case where the rule and the apparent 'exception' are found in the same treaty, the Charter must be interpreted as a seamless whole, creating a coherent set of obligations for its parties. It is for this reason that Article 51 is also best characterised as a limitation on the scope of Article 2(4), rather than a true exception.[825]

Thus, Article 2(4) prohibits all force not otherwise lawful under the Charter and force under Article 42 falls outside the scope of Article 2(4). This is the case even though the Charter collective security arrangements now function in a manner that was unforeseen at the time the Charter was drafted and that is not provided for explicitly in the text of the Charter.[826] From this analysis flows another, more general conclusion: where force is made lawful by another provision of the Charter it must fall outside the scope of the prohibition on the use of force in Article 2(4). So, if a provision of the Charter were to be amended or reinterpreted to provide a new basis for the lawful use of force under the Charter, this will necessarily entail a corresponding restriction of the scope of Article 2(4) to exclude such uses of force from its scope.

[825] As is also confirmed by the drafting history, see Butchard (2018), 249.

[826] Today, 'no one contests the lawfulness of the principle of military intervention authorised by the Security Council', Corten (2010), 312; De Wet (2004a), 257. Although cf Krisch (2012), paras 11, 13. The question whether the Security Council may in principle authorise force under Article 42 is obviously separate from the question of what the limits on such authorisations must be and the appropriate degree of control to be retained by the Council, see Sarooshi (1999), 19–20; Blokker (2000), 552–5.

Chapter four considered the requirements for modification of the Charter as a matter of treaty law only. The subsequent subsections will complete this analysis by considering first, how changes to the Charter's collective security structures may impact the customary prohibition on force, and second, what limits are placed on modification of the Charter by the existence of a *jus cogens* norm in the *jus ad bellum*.

2.2. Collective security as a limit on the scope of the customary prohibition on force

The previous subsection analysed the treaty law prohibition on force only. Yet the prohibition on the use of force exists also as a norm of customary international law, and when states use force pursuant to an authorisation under Article 42 they are not considered to be in breach of the customary prohibition on force. That is, Security Council authorisation is also accepted to be a so-called 'exception' to the customary prohibition on force. The question is: how can those treaty norms operate as an 'exception' to a customary prohibition?

There are two possibilities: first, that customary international law prohibits all force, including force under Article 42, but through the Charter UN members have contracted out of that customary norm. The Charter acts as a *lex specialis* and a true exception to the customary prohibition, under which force used by one Member against another, if consistent with the Charter, is lawful. On this view, there is a difference in scope between the treaty law prohibition on force in Article 2(4) and the more comprehensive customary prohibition which additionally prohibits force authorised under Article 42.

Alternatively, the customary prohibition, developing after 1945 to mirror the treaty provision in Article 2(4), reflects the scope of the treaty prohibition and force that is lawfully authorised by the Security Council also falls outside the scope of the customary prohibition on force. The collective security provisions of the Charter would not constitute a true exception to the customary prohibition on force, as force authorised under those provisions simply falls outside its scope.

Although the virtually universal nature of the Charter reduces the significance of this question in practice, as virtually all states are subject to the treaty law of the Charter, understanding which characterisation of the scope of the customary prohibition is correct is still important as it will have consequences for how the UN collective security framework is structured and its relationship with the customary prohibition, and how they both can change. Of course, recalling chapter five, regardless of which analysis of the structure of the customary prohibition on force is correct, force used pursuant to an Article 42 authorisation must fall outside the scope of the *jus cogens* prohibition on force: conduct that is lawful all things considered cannot be prohibited by *a jus cogens* norm. The contours of the *jus cogens* prohibition on force at its boundary with collective security will be dealt with in subsection three.

2.2(a) *Renvois* from customary international law to treaty

If the Charter is acting as *lex specialis* for UN members, by which they contract out of the customary prohibition on force to the extent that force is permitted under the Charter, then the mechanism for how this exception to the prohibition on force operates is clear. Even if the customary prohibition does prohibit such uses of force, that part of the customary norm

cannot be *jus cogens* since force authorised by the Security Council is accepted as lawful under international law, all things considered. Therefore, there is no obstacle to the conclusion that a group of states have excluded that derogable customary norm from their relations *inter se*.

However, the view that force authorised under the Charter falls outside the scope of the customary prohibition requires further explanation. The collective security provisions of the Charter do not need to exist as norms of customary international law in order to act as a limit on the scope of a general customary norm.[827] It is well established that international organisations enjoy objective international legal personality, which is opposable even against non-Members.[828] This must derive 'from the effect that customary international law (which is binding on all States) ascribes to their characteristics.'[829] Similarly, customary international law can not only recognise the existence of a treaty regime and ascribe consequences to it,[830] but also use it to determine the scope of obligations under a customary norm – even for non-parties to the treaty – without those rules themselves forming part of customary international law.[831] This extends to decisions made by bodies established under a treaty regime. For example, the customary international law freedom of fishing includes a concomitant duty to take conservation measures when

[827] Cf Helmerson (2014), 183.

[828] *Reparation*, 185.

[829] Akande (2018), 234.

[830] E.g. boundary treaties represent 'a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*', *1998 Eritrea–Yemen Award*, para 153; *Libya/Chad*, paras 72–3. These effects on non-parties can only be produced by customary international law.

[831] In the *SS Wimbledon* case the Court recognised the 'objective and permanent' regime of the Kiel Canal under the Versailles Treaty, which affected Germany's obligations under the customary international law of neutrality even in relation to Russia, a non-party to the treaty, M Fitzmaurice (2002), 86.

fishing on the high seas.[832] What measures are necessary to fulfil this customary duty are determined, at least in part, by the conservation measures adopted by regional and subregional fisheries organisations and arrangements created pursuant to the UN Fish Stocks Agreement. This is the case even where the fishing state is not a party to the resulting regional or subregional agreement.[833]

In this way, even if the Charter's collective security provisions do not form part of custom, customary international law can take account of decisions validly made by the Security Council under Article 42 of the Charter in defining the limits of the obligation to refrain from force under the customary norm. Non-members would not be bound to implement those decisions nor would they become bound by the Charter, but they could not deny the fact of their existence nor their effect on customary international law. In effect, this constitutes a *renvoi* from customary international law to the treaty, although the unwritten nature of customary international law means the reference obviously cannot be explicit. In the same way that the reference to the 'inherent right' of self-defence in Article 51 is ambulatory (its content changes automatically to mirror changes in customary international law), the scope of the customary prohibition is also ambulatory, as it changes to reflect decisions lawfully made under Article 42 that make certain uses of force lawful.

It is submitted that this is how the UN collective security framework should be analysed: not as a true exception to the customary prohibition on force but as a limit on its scope, as force authorised by the Security Council falls entirely outside the scope of both

[832] *Germany v Iceland*, 64; *UK v Iceland*.

[833] Borg (2012), 52–4; it has also been argued that non-parties to UNCLOS may have legal obligations to recognise the recommendations and interpretations of the Commission on Limits of the Continental Shelf under Article 76, McDorman (1995), 183–5.

the customary and treaty law prohibitions on force. Intuitively, it would be strange to consider force authorised by the Security Council as a *prima facie* violation of the customary prohibition on force, especially in light of the conclusion above that such uses of force fall outside the scope of Article 2(4). It has already been observed that the adoption of the Charter had a profound impact on customary international law, as a customary prohibition on force mirroring the comprehensive prohibition in Article 2(4) emerged rapidly after 1945. Given this shared origin of the customary and treaty prohibition on force, it makes sense that the customary prohibition should mirror the scope of Article 2(4) also in relation to force pursuant to collective security.[834]

This is all very well as a matter of deduction. However, there are certain obstacles to using practice to confirm that force lawfully used under Article 42 falls outside the scope of the customary prohibition on force. States do not tend to express their views on the detailed contours of *jus ad bellum* norms, much less on abstract conceptual questions as to their structure.[835] If a state characterises particular conduct (its own or by another state) as lawful or unlawful, they will almost certainly be referring to the legality of that conduct under international law *all things considered*, and so it is not possible to tell if their view is that the conduct was prohibited but made lawful by an exception, or that it never even fell within the scope of the prohibition. The inconsistent and imprecise way in which the word 'exception' is employed by states and scholars further obscures the structure of *jus ad bellum* norms.

2.2(b) Authorisation of force against non-UN Members

[834] Helmerson (2014), 186.

[835] See Paddeu (2021), 665.

There is, however, one key difference between the two alternative conceptions of the scope of the customary prohibition on force which may be evaluated based on state practice, and which can be used to confirm the reasoning above as to whether force authorised under Article 42 falls outside the scope of the customary prohibition. If force authorised under Article 42 is prohibited by the customary prohibition on force but the Charter acts as *lex specialis* for UN Members under which such uses of force are lawful, then it should not be possible for the Security Council lawfully to authorise force against a non-UN Member. Non-Member states would be protected against all uses of force by the customary prohibition on force and the treaty norms of the Charter would not be binding as between the non-Member state and the UN Member state(s) using force against them. However, if force authorised under Article 42 falls outside the scope of the customary prohibition on force altogether, the scope of which is in this respect identical to Article 2(4), the Council may lawfully authorise force even against states that are not party to the Charter.[836]

There appears to be only one example of the Security Council authorising force against a non-UN Member. In June 1950, in response to the invasion of North Korean forces across the 38th parallel, the Security Council, in the absence of the USSR,[837] adopted Resolution 83, in which it:

[836] Cf Helmerson (2014), 186. This is not the same question as whether non-UN Members are themselves *bound to implement* Security Council decisions under Chapter VII, such as those creating sanctions regimes: they clearly are not, see *Namibia*, para 126. Prior to joining the UN in 1973 and 2002 respectively, the Federal Republic of Germany and Switzerland made clear that they complied with Chapter VII decisions on a purely voluntary basis, and not as the result of any legal obligation, De Wet (2004a), 98. This must be correct: the opposite view would be contrary to the rule in Article 34 VCLT that treaties do not create obligations for third states without their consent.

[837] The USSR had been boycotting the Security Council, in protest against the nationalist government being allowed to occupy the 'Republic of China' seat, instead of the People's Republic of China, the communist regime, which now controlled virtually all of mainland China. The USSR returned to the Council in August 1950. See Stueck (2008), 435–6.

> Recommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.[838]

It is not impossible to use a single incident of practice to draw conclusions about the scope of the customary prohibition on force. The analysis here is not trying to establish the existence (or otherwise) of a customary norm – the prohibition on the use of force clearly exists as a norm of customary international law – but rather trying to determine its scope of application in relation to a rarely-occurring boundary case. Therefore, it is not necessary to demonstrate a widespread and representative practice and it is possible to draw conclusions about the scope of that norm based on an analysis of the practice and *opinio juris* of states when such situations have occurred. In any case, given the very limited opportunities for practice involving non-Members to arise due to the virtually universal nature of the Charter, it is arguable that slightly more weight may be placed on individual incidents of such practice than might otherwise be the case.[839]

The majority view today is, correctly, that the Korean War was the first example of the Security Council using its power under Article 42 to authorise Members to take enforcement action.[840] This is also the view of the UN Secretariat.[841] Some scholars argue that Resolution 83 is better understood as a mere endorsement of Members taking action

[838] S/RES/83(1950).

[839] Mendelson (1998), 96.

[840] Higgins et al (2017), 26.100; Blokker (2000), 543; Sarooshi (1999), 167ff; Bailey and Daws (1998), 374–5; Franck (2002), 24; Franck and Patel (1991), 66; White and Tsagourias (2013), 110.

[841] UN Juridical Yearbook 2003, Part 2, Chapter VI, 553–4.

to support South Korea in the exercise of its right of collective self-defence.[842] However, while the term 'armed attack' is used in the preamble of Resolution 83, the debates preceding and subsequent to the adoption of that resolution do not support this view.[843] It is clear that the Council members considered themselves to be acting, not to endorse action in collective self-defence, but in the exercise of the Council's own responsibility to respond to a breach of the peace.[844]

Other scholars have suggested that, even if the US-led intervention was a UN-authorised enforcement action, the Korean conflict was a civil war.[845] If this view were correct, this would not be a case of the Security Council authorising the use of force against a non-Member state: as an intervention at the invitation of the government of the Republic of Korea any force on the territory of Korea would be consensual and so outside the scope of the prohibition on the use of force altogether.[846]

The political situation in 1950, complicated by Cold War divisions, makes it difficult to assess the status of North Korea at that time; indeed, North Korea did not receive widespread recognition as a state until its admission to the UN in 1991.[847] Yet, while both regimes continued to claim to be the legitimate government for the whole of the Korean

[842] Krisch (2012), para 4; Dinstein (2017), para 469; Rostow (1991), 508.

[843] E.g. S/PV.473, 7, 8, 12, 14. See White (2018), 31; Gray (2018a), 267.

[844] E.g. the US delegate stated that '[i]t is the plain duty of the Security Council to invoke stringent sanctions to restore international peace' S/PV.474, 4; see also Republic of Korea, *ibid*, 7–8; and statement by Cuba, *ibid*, 12.

[845] White (2018), 23, 30; also Sarooshi (1999), 168. Although ultimately White concludes that the intervention was 'a lawful exercise of enforcement powers under Chapter VII by the Security Council', 32.

[846] Corten (2010), 277. On consent see subsection 2.2(c) below.

[847] Jennings and Watts (1996), 134–5.

peninsula, it is arguable that 'by 1950 the 38th parallel had already developed into a *de facto* State border'.[848] Both the Democratic People's Republic of Korea and the Republic of Korea, although each unrecognised by states in the opposing ideological bloc,[849] possessed a permanent population; a defined territory; a government; and the capacity to enter into relations with (at least some) other states.[850] The view taken here is therefore that they both should be considered as states at the time of the outbreak of the Korean War – at least to the extent that both were bound and protected by the customary prohibition on force.[851] Even if the customary prohibition on force was not yet as well established, nor its contours understood in the same detail as it is today, by 1950 the principle that the use of force by one state against another is prohibited certainly existed as a matter of customary international law.[852]

What is therefore striking about the debates surrounding the adoption of Resolution 83 is the complete absence of any discussion of whether the Council was able to authorise enforcement action against a non-Member state. Even Yugoslavia, which voted against Resolution 83, did not advance any argument that the Council was not empowered to adopt

[848] Constantin (2015), para 6.

[849] On 9 September 1948 the Democratic People's Republic of Korea was proclaimed in the Soviet zone, and recognised by other Soviet-aligned states, *ibid*, para 1. In December that year the General Assembly adopted a resolution in which it 'Declares that there has been established a lawful government (the Government of the Republic of Korea) having effective control and jurisdiction over that part of Korea where the Temporary Commission was able to observe […] and that this is the only such government in Korea' A/RES/195(III), para 2 (48 votes in favour, six Soviet-bloc states voting against, one abstention and three members absent).

[850] Montevideo Convention Article 1. In the case of the UK, although the government declined to recognise North Korea until 1991, UK courts had in more than one case recognised North Korea as 'a foreign State' for the purpose of certain UK legislation. See e.g. Brownlie (1970), 214.

[851] See the explanatory note to Article 1 Definition of Aggression. See generally Henderson (2013), 393–4.

[852] See discussion of *Corfu Channel* in subsection 1.1(a) above; and generally Brownlie (1963).

a resolution authorising enforcement action against a non-Member.[853] The USSR argued that the resolution 'had no legal force' but on the basis that it had not been properly adopted due to the absence of the USSR from the Council and the representation of China by the nationalist government, not that the Council was unlawfully authorising force against a non-party to the Charter.[854]

The question of whether the Security Council could lawfully authorise the use of force against a non-member state has also 'been surprisingly little discussed' in scholarship.[855] De Wet takes the view that it is 'unlikely that the Security Council had the legal competence to authorise the use of force against North Korea' as a non-Member but concludes that this does not necessarily mean that the force used was illegal as '[a] military response was justifiable in terms of the right to individual and collective self-defence'.[856] However, the fact that one can in hindsight concoct an alternative legal justification is beside the point: at the time, although neither the legal basis for the Council's resolution under the Charter nor the legal status of North Korea at the time were entirely clear, the best explanation of the practice seems to be that the Council believed itself to be authorising military enforcement action against what was then a non-Member state.

[853] Those Members which abstained (Egypt and India) claimed they were not able to obtain instructions on the matter from their governments, due to the time difference with New York, S/PV.474, 15–6. The USSR was absent.

[854] S/PV.476, 2. This is perhaps explained by the fact that Soviet bloc states were still advancing the position that the DPRK was the legitimate government for the entire peninsula and that the UN was not permitted to interfere as the war was thus an internal situation, see White (2018), 24. Similarly, on the Western side, the failure to address North Korea's status as a non-Member state is likely due to the policy of non-recognition of the DPRK by Western states at that time. See Potter (1950).

[855] Constantin (2015), para 6.

[856] De Wet (2004a), 276; Constantin (2015), para 6.

At the time, Kunz argued that the fact '[t]hat North Korea is not a Member of the United Nations is, under Article 39 and Article 2, paragraph 6, […] legally irrelevant'.[857] Writing in 1952, Lauterpacht also appears to treat North Korea and South Korea as independent states[858] and takes the view that 'the Charter confers upon the Security Council the right to take action – subsequent to such a finding [of a breach of the peace or act of aggression] – against both Member and non-Member states,'[859] including the 'right and the duty of the United Nations to enforce, also as against non-Member states, the prohibition of resort to war and aggression'.[860] Again, this argument appears to be based on the text of Articles 2(6) and 39 of the Charter.[861]

It is significant that contemporary international lawyers noted North Korea's non-Member status. However, it is not clear how Article 39 provides any support for the proposition that the Council may authorise force against them, and even if Article 2(6) obliges UN Members to 'ensure that states which are not Members of the United Nations act in accordance with these Principles', this does not change the fundamental point – as valid in 1950 as today – that no treaty can create obligations for a non-party without their consent.[862] Lauterpacht raises but does not really answer the 'question as to the extent to

[857] Kunz (1950). Kunz goes on to note that the Security Council's call in Resolution 82 for a cessation of hostilities is 'binding', yet does not explain how a Council resolution, whose binding force comes from Article 25 of the Charter, could bind either North Korea or the Republic of Korea, both non-Members. See, in a similar vein, Potter (1950), 711–2.

[858] Lauterpacht (1952), 119 ('the hostilities between North Korea and South Korea – neither of which was a member of the United Nations'), 224.

[859] *Ibid*, 652; also 166.

[860] *Ibid*, 120.

[861] Also possibly Article 33(2), *ibid*, 119–20, 149, 166. Interestingly, in his Dissenting Opinion in *Nicaragua*, Judge Jennings seems to take the view that Article 2(6) had the 'revolutionary' effect of creating obligations for non-Members derived from the Charter, 521–2.

[862] See *Reparation*, Dissenting Opinion Krylov, 218–9.

which that provision [Article 2(6)] imposes legal obligations upon non-Member States, as well as the question whether in so far as it purports to impose such obligations, it is compatible with accepted principles of international law'.[863] Even if, from the internal point of view of the law of the Charter, binding among its members, the Council has the competence to authorise force against a non-Member, this is not sufficient to explain the legality of that force as a matter of general international law or from the perspective of a non-party. North Korea has no obligation to comply with the Charter provisions and the Charter does not govern the legal relations between North Korea and the UN members using force against it. It simply cannot be correct as a matter of treaty law that these provisions provide a legal basis for UN members to use force against a non-party to the Charter.

The answer must therefore be found in general customary international law. If the use of force by UN members against North Korea was lawful, as it seems generally accepted to be, and if it was an enforcement action authorised under Article 42 rather than collective self-defence or intervention by invitation, as also seems the case, then North Korea cannot have consented to that force through the Charter nor contracted out of the protection of the customary prohibition on force to that extent. The only explanation for the lawfulness of the force must be that customary international law does not prohibit such uses of force at all. The Security Council must be able lawfully to authorise the use of force even against non-UN members and the customary prohibition on force must not prohibit such force. Non-members are not bound by the Charter but nor are they protected by the customary prohibition on force from uses of force authorised under that treaty. Some

[863] Lauterpacht (1952), 119.

support for this conclusion can be found in later practice: no UN member has attempted to avoid being subjected to forcible measures by the Security Council by withdrawing from the UN.[864] The fact the Council has never subsequently authorised force against a non-Member is explained both by the fact that the Council was immediately paralysed for the duration of the Cold War following the return of the USSR in August 1950 and that by the time the Cold War ended the UN's membership had become virtually universal.[865]

Therefore, while this thesis still takes the view that the Charter is a treaty like any other, it must be acknowledged that it enjoys a unique position as compared with other treaties, its collective security provisions being recognised by general customary international law as helping define prohibited force.[866] This 'objective' nature of the Charter, with the ability of the Security Council to authorise force even against non-Members (unlikely as this may be in practice), results not from any 'constitutional' nature of the Charter, but from ordinary operations of general customary international law, which has given the Charter its place at the centre of the post-1945 *jus ad bellum*.

2.2(c) The role of consent

The conclusion that the Security Council may lawfully authorise force against non-Members also appears to exclude the argument sometimes made that collective security

[864] See Schermers and Blokker (2005), §1450, although the ability of states to withdraw from the Charter is not entirely clear and there are also pragmatic reasons for a state to remain a UN member despite being subject to sanctions. The only state to have purported to withdraw from the UN was Indonesia in 1965, but this was not an attempt to avoid being subject to enforcement action, see Higgins et al (2017), 8.42–3.

[865] Also, even if the UNSC could lawfully authorise force against a non-Member, there would certainly be concerns raised about the legitimacy of any such proposed action.

[866] See Helmerson (2014), 186.

under the UN Charter operates as a form of prior consent to force.[867] On this view, in the same way that one state may consent to an intervention by another state on its territory that, absent their consent, would constitute a violation of the prohibition on force,[868] consent to force taken or authorised by the Security Council would be granted by states through their ratification of the Charter.[869] Since the prohibition on force contains 'an "intrinsic" consent element' and 'does not apply in certain cases where one State has consented to the use of force on its territory by another State'[870] then – so the argument goes – force authorised by the Security Council would simply fall outside the scope of the prohibition on force by virtue of its consensual nature.[871] From the perspective of the prohibition on force, there would be no difference in kind between one state moving its troops into the territory of another following an ad hoc agreement between the two whereby the territorial state grants its consent in that particular case, and a forcible Security Council enforcement action: as consensual force both cases would fall entirely outside the scope of the prohibition on force. Yet if the Security Council may lawfully authorise force against non-parties to the Charter, as argued above, this cannot be correct: it cannot be the consent of the target state

[867] E.g. Butchard (2018), 258.

[868] ILC State Responsibility, Article 26, commentary para 6; Corten (2010), 249; Doswald-Beck (1985); S/RES/387(1976), preamble para 4; see also the implicit recognition in A/RES/3314, Article 3(e).

[869] Consent in the *jus ad bellum* sense of consensual force is not to be confused with state consent *in the sense of treaty law*, as UN Members have of course consented to be bound by the Charter. Similarly, the argument that the Charter provides prior consent to force (the prohibition on force applies between UN members generally but force authorised under the Charter is consensual and so falls outside its scope) should also be distinguished from the argument that the Charter acts as *lex specialis* to the customary prohibition (the prohibition on non-consensual force does not apply as between UN members in relation to force under the Charter because it is displaced by its more specific provisions). Consent as an intrinsic part of the primary rule prohibiting force (which we are concerned with here) should also be distinguished from consent as a general circumstance precluding wrongfulness.

[870] ILC, Crawford's Second Report, para 242; Corten (2010), 252–4. On consent as an element of the primary rule prohibiting force rather than a secondary rule, see Christakis and Mollard-Bannelier (2004).

[871] This is one argument made by Kuwali (2011) regarding the legal basis for Article 4(h) of the Constitutive Act of the African Union, 131. The Constitutive Act is analysed in section 2.3(b) below.

that explains why such uses of force are lawful, as they could not have consented to such a use of force through the Charter.

Even absent the analysis above arguing that the Security Council may lawfully authorise force against non-Members, there are reasons to doubt whether consent to force could provide a legal basis for collective security under the Charter, or indeed under any other treaty.[872] In particular, it is not clear that the existing doctrine of ad hoc consent to force/intervention by invitation, with its various safeguards and conditions for consent validly to be granted, could accommodate a system whereby states grant an open-ended prior consent to force to be used against them by unspecified states, at an unspecified future time (or multiple times), for a very broad possible range of reasons, with no possibility to withdraw or modify that consent, and regardless of their will at the time of the intervention.[873] The nature of a consent to force granted through ratification of the Charter would be so ill-defined and open-ended that it is difficult to see how it could be considered to constitute meaningful consent by a state to the force that is eventually used against it, perhaps decades later.[874] How can a state be considered to have consented to a use of force (or any breach of international law) where it does not know – and cannot specify – its time, duration, form or scale? For example, even if an original UN member's initial ratification of the Charter in 1945 could be understood as consent to force 'taken' by the Security Council using UN standing forces, could this extend to force used by Member states authorised by the Council?

[872] See generally Lieblich (2013), 194ff.

[873] See Walter (2012), para 37.

[874] In *DRC v Uganda* the Court observed that the consent by the DRC 'was not an open-ended consent' and was restricted in terms of time, geographic location and objectives, but gives no indication as to whether an 'open-ended consent' is possible, para 52.

In particular, it is difficult to reconcile an account of the UN collective security system as being based on consent with the right of a state to withdraw its consent to force;[875] a right that it seems cannot be waived.[876] If a state's ratification of the Charter is viewed as consent to the potential use of force on its territory in future under the treaty's collective security provisions, it seems there is no practical possibility for a state to withdraw that consent. The Charter contains no denunciation clause and, even assuming that the Charter is subject to denunciation or withdrawal under the rule in Article 56 VCLT,[877] this is subject to a twelve-month notice period.[878] Thus, in a situation where a UN member state was subject to force pursuant to authorisation under Article 42, it would likely be unable to withdraw its consent to the Charter in time to have any meaningful impact on the forcible activities taking place on its territory. The *de facto* withdrawal of consent by a UN Member state that is subject to forcible measures under Chapter VII also does not seem to be treated as having any effect on either the Security Council's power to authorise force under Chapter VII or the legality of the force under the *jus ad bellum*.[879] For example both Iraq and Libya resisted the Chapter VII-authorised military actions against them in 1991 and

[875] See Corten (2010), 274; Christakis and Mollard-Bannelier (2004), 136. E.g. *DRC v Uganda*, para 47; A/RES/1622, para 2.

[876] ILC Summary Record of the 2588th Meeting, para 40 (Crawford): 'If a State consented in advance to the use of force in its territory and then withdrew its consent, recourse to force became wrongful, even if the State had withdrawn its consent ill-advisedly. He did not think, however, that a State was entitled to waive its right to withdraw its consent to the use of force in its territory by another State.' Corten (2010) concludes that this view is supported by 'established practice, the UN having reaffirmed on several occasions the right of any State to require the withdrawal of foreign troops stationed in its territory', 274. Cf Lieblich, 202, 206–7.

[877] See Higgins et al (2017), 8.45–6.

[878] VCLT Article 56(2).

[879] In *DRC v Uganda* the Court held that 'prior authorization or consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary', para 47. However, it is not clear if this is a general principle or due to the absence of formality in the initial grant of consent in that case.

2011 respectively, yet the lawfulness of the force authorised under Article 42 was never in doubt.[880]

Finally, if it were accepted that consent to force (as an element of the primary rule prohibiting force) could provide a legal basis for collective security systems, it is unclear what would remain in this context of the principle that one state cannot dispense another from the obligation to comply with a *jus cogens* norm, itself a consequence of the inability to derogate from a *jus cogens* norm.[881] The distinction between ad hoc consent by one state to intervention by another which brings the situation outside the scope of the prohibition on force (permissible, as an 'intrinsic element' of the definition of prohibited force) and a purported consent which entirely displaces or excludes that norm from the relations between the two parties (impermissible derogation from a *jus cogens* norm) is already a fine one. If consent in the former sense could also encompass an open-ended prior consent to multiple forcible interventions in unspecified circumstances, this distinction would surely dissolve: the states purporting to grant such a consent among themselves, for example through a collective security treaty, would in effect be purporting to entirely exclude the prohibition on force from their relations *inter se* and replace it with the provisions of the treaty. Such a treaty would be invalid as a purported derogation from a *jus cogens* norm.[882] For such an arrangement to be possible would require not merely a

[880] Helmerson (2014), 181–2. Cf the speed with which the UNEF peacekeeping force was withdrawn following withdrawal of consent by the United Arab Republic, A/6730. Helmerson argues that limiting consent to force to ad hoc consent better aligns with the object and purpose of the prohibition on force, as force based on ad hoc consent is less likely to be actively resisted by the target state and so lead to inter-state conflict.

[881] It is noteworthy that those who analyse collective security mechanisms as operating through a form of consent tend to take a narrower view of the scope of the *jus cogens* norm, e.g. Abass (2004), 198ff (viewing consent as a circumstance precluding wrongfulness).

[882] Corten (2010), 253; Orakhelashvili (2015), 167; Dinstein (2017), para 349; Christakis and Mollard-Bannelier (2004), 135; Roth (1999), 190.

modification of the scope of the *jus cogens* prohibition on force, but for that norm to lose its *jus cogens* status entirely.

In addition, if consent were advanced as the basis on which collective security treaties other than the UN Charter could allow other organisations to authorise force, this would be problematic not only as a purported derogation from the *jus cogens* prohibition, but due to the priority claimed by the Charter in Article 103. UN Members using force against each other pursuant to a purported consent granted in another treaty would still, from the perspective of their obligations under the Charter, be acting in violation of Article 2(4), which cannot be set aside by their agreement.

The better analysis is therefore that, as argued above, the prohibition, both as a norm of treaty law and of customary international law, does not prohibit force lawfully authorised by the Security Council[883] and that only ad hoc consent to the use of force, on a case-by-case basis, is possible.[884] Clauses in which a state purports to grant another state a unilateral right of intervention against itself have practically disappeared from contemporary treaty practice: 'States do not invoke treaties as a legal basis for justifying military intervention conducted against the will of another State expressed at the time of the intervention.'[885]

[883] Corten (2010) also appears to take the view that the lawfulness of force authorised by the Security Council is a question of the scope of the prohibition on force, rather than derogation by consent, 256.

[884] Corten (2010), 259. See also IDI (2011), Article 4(3). A treaty cannot create an obligation for a state to submit to a military intervention, but it may create a framework for intervention, provided the intervening state still must seek the consent of the target state at the moment of intervention, Christakis and Mollard-Bannelier (2004), 136.

[885] Corten (2010), 257; Christakis and Mollard-Bannelier (2004), 135. See also S/2020/689.

What do these conclusions mean for change in the *jus ad bellum*? First, the inability of states to grant a valid general prior consent to force means that new collective security mechanisms cannot be created simply through conclusion of a new treaty purporting to have that effect. Such treaties cannot be viewed as creating new categories of consensual force that falls outside the prohibition, and instead must be analysed either as alleged expansions of the existing limitation on the scope of the prohibition constituted by the UN collective security framework, or as a *lex specialis* that, by derogating from the customary *jus cogens* prohibition on force, will require modification of that norm to be valid. Both possibilities are considered below in the context of the African Union Constitutive Act. Second, if the power of the Security Council under the Charter to authorise force falls outside the scope of the customary prohibition on force this means that the *content* of this UN collective security framework may be modified through processes of treaty law alone, as analysed in chapter four. As a result of the *renvoi* from custom to the Charter, customary international law is only interested the conclusion as to lawfulness under the Charter that is reached through the application of those treaty norms. Modification of, for example, the procedures by which the Council authorises force can occur without the need to identify new customary international law.

However, these modifications can only occur within the limits of the customary *renvoi*. That is, in the same way that an evolution in the customary international law of self-defence that eliminated the 'armed attack' requirement would go beyond the limits of the *renvoi* created by Article 51 and require modification of that treaty norm, there may be some modifications of the Charter collective security provisions that would engage the limits of the customary *renvoi*. That limitation on the scope of the customary norm, as an apparent derogation from the customary prohibition on force, also defines the limits of the

jus cogens norm. As a result, force authorised under modified Charter provisions which went beyond the ambulatory changes that could be accommodated by the *renvoi* would not only be in violation of customary international law, but the purported modification of those Charter norms would also be invalid as conflicting with a *jus cogens* norm. The key question, therefore, is to define the limits of the customary *renvoi* with more precision, which is also in effect to identify with more precision the scope of the *jus cogens* prohibition at its boundary with collective security. These questions are addressed in the next subsection.

2.3. Collective security as a limit on the scope of the *jus cogens* prohibition on force

The question raised in chapter five regarding the precise definition of the *jus cogens* norm remains to be answered. Does the *jus cogens* norm prohibit all force except 'force not validly authorised by the Security Council under Article 42', or perhaps 'force not validly authorised under the Charter', whatever that happens to be at the time, or even 'force not authorised by a decision of a collective security organisation'?

Determining the level of abstraction at which the *jus cogens* norm is identified and its limits expressed requires an analysis of the acceptance and recognition of the international community of states as a whole. If the customary prohibition on force generally is accepted and recognised as a *jus cogens* norm, then to determine the precise contours of that *jus cogens* norm one must identify the scope of those derogations from that customary norm that have been accepted and recognised as permissible by the international community as a whole. In practice then, to determine the scope of the *jus cogens* prohibition on force in terms of how it defines force that is excluded from its scope because it is lawful

under the existing apparent derogation of collective security, one needs to define the scope of the unwritten *renvoi* from custom to the Charter. This is not as straightforward as determining the scope of the *renvoi* from Article 51 to custom because, customary international law being unwritten, there is no explicit reference in a text to interpret. Instead, the scope of the *renvoi* must be identified as precisely as possible from practice.

2.3(a) Changing the procedures by which force may lawfully be authorised under the Charter

At the more specific end of the spectrum, it is clear that the definition of the limit of the customary *jus cogens* prohibition at its boundary with collective security does not extend down to reflect all the detailed institutional and procedural requirements for the Security Council to adopt valid resolutions authorising force. That is, the *jus cogens* norm does not prohibit 'force not authorised by a decision of the Security Council made by an affirmative vote of nine members, each only having one vote, including the concurring votes of the permanent members, and provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting…' and so on. The conditions and procedures for the Security Council to take or authorise forcible action under the Charter can therefore change through treaty law only and this is reflected in the content of the customary *jus cogens* prohibition through the operation of the *renvoi*. Indeed, these procedures have changed considerably since the Charter was drafted in 1945, through the subsequent practice of a subset of UN members combined with the acquiescence of the rest of the membership in that practice. Examples already discussed include the interpretation of Article 42 to include a power to authorise the use of force by UN members; contrary to the text of Article 27(3) decisions (including resolutions authorising force) may

be taken despite the abstention of a permanent member; and the concept of 'international peace and security' which now includes situations which have no obvious international element.

An illustration of why these changes do not involve modification of the customary *jus cogens* norm is provided by the assumption by the Russian Federation of the USSR's permanent seat on the Security Council following the latter's dissolution in 1991. The text of the Charter in Article 23(1) refers specifically to 'the Union of Soviet Socialist Republics', meaning such a change in Council practice would require either amendment of the Charter or its interpretation through the subsequent practice or agreement of all members. Indeed, it appears that this was a case of subsequent practice establishing agreement of all UN members through their silent acquiescence: the practice of the Russian Federation was 'immediately accepted by the US, and there appears to have been a lack of adverse reaction by any other member state or any UN organ'.[886]

This change was also a modification of the conditions under which the Security Council may lawfully authorise force under the collective security provisions of the Charter. As argued in chapter four, acquiescence in the practice of a single member – or even the fifteen members of the Council – will suffice to establish the agreement of all parties to an interpretation of a treaty. However, as argued in chapter six, where a new interpretation of the Charter is contrary to a *jus cogens* norm greater participation in the practice that evidences the interpretation, or more explicit support for the new interpretation, is required before the silence of other states can be interpreted as

[886] Higgins et al (2017), 3.09.

acquiescence in an interpretation that would purport to derogate from a *jus cogens* norm. Similarly, while the identification of a new customary norm can modify a *jus cogens* norm if the *opinio juris* in support of it is shared by the international community as a whole, the *opinio juris* of states participating in the practice must be explicit, and *opinio juris* may only be inferred from the non-reaction of other states where participation in the supportive practice is sufficiently widespread that one is justified in inferring acceptance of modification of a *jus cogens* norm.

This is precisely what would have been required if this change to the conditions in which the Security Council can authorise force had involved a modification of the scope of the *renvoi* from the customary *jus cogens* prohibition on force to the Charter, or a modification of the scope of the *jus cogens* norm to allow the Charter to derogate from the customary prohibition. Yet this change occurred through silent acquiescence in the practice of one, or perhaps two, states; that is, the ordinary treaty law process. This change to the procedures by which the Council may authorise force must have been reflected in the scope of the customary *jus cogens* prohibition through the existing terms of the *renvoi* from customary international law to the Charter, and those procedures must not form part of the definition of the *jus cogens* norm, which must be expressed at a higher level of abstraction.

At the broader end of the spectrum the definition of the limit of the customary *jus cogens* prohibition is not so clear. Based on the conclusion of the previous subsection, *at a minimum* force lawfully authorised by the Security Council under Article 42 must fall outside the scope of the *jus cogens* prohibition: not only because conduct that is lawful all things considered cannot be prohibited by a *jus cogens* norm, but because if there is no customary prohibition on force authorised under Article 42 then there is no norm of general

international law on which such a *jus cogens* prohibition could be based. The scope of the customary prohibition on force could therefore be the same as the scope of Article 2(4) and 'force lawfully authorised by the Security Council under Article 42' both falls outside *and defines the limit of* the customary *jus cogens* norm.

If that were the case, then even if that limit on the scope of the customary prohibition is ambulatory in the sense that the definition of prohibited force under the customary norm reflects changes in what is considered to be 'force lawfully authorised by the Security Council under Article 42' over time (whether as a result of new Security Council decisions authorising force or modifications of the Charter as just described) it must have limits. To change the scope of that *renvoi*, and purport to expand it to exclude force other than 'force lawfully authorised by the Security Council under Article 42' from the customary prohibition would require that customary *jus cogens* norm to be modified. Such a purported change would no longer involve only a change to the ambulatory content of that derogation but by changing the terms of the *renvoi*, and expanding the existing derogation, it would engage the derogation/prohibition boundary and so require the test for modification of a customary *jus cogens* norm to be met.

This is one possible definition of the customary *jus cogens* prohibition at its boundary with collective security. However, the *renvoi* from the customary norm to the Charter could also be broader; that is, the limit on the scope of the customary *jus cogens* norm may be expressed at a higher level of abstraction and *includes but is not limited to* 'force lawfully authorised by the Security Council under Article 42 of the Charter'. As Helmerson suggests, the collective security limitation on the customary *jus cogens* norm could exclude force that, *inter alia*: 'has been authorised by the UNSC'; or 'has been

authorised by collective security organs'; or even 'force that is based on a treaty'.[887] That is, in the latter two cases force authorised by the Security Council under Article 42 falls outside the scope of the customary *jus cogens* prohibition by virtue of it falling within a broader category of excluded force, such as force authorised under a collective security mechanism/a treaty. If that is true then, by extension, force authorised under *other* collective security mechanisms or treaties, not only the UN Charter, would also fall outside the scope of the *jus cogens* prohibition on force and so could provide a new basis for the lawful use of force without requiring that *jus cogens* norm to be modified. For example, it would be sufficient to use processes of treaty law alone to establish a new collective security mechanism which could authorise force as this could validly derogate from the non-*jus cogens* customary prohibition on force authorised by bodies other than the Security Council.

The limit on the scope of the customary *jus cogens* prohibition could, for example, be correctly expressed as the exclusion of force 'lawfully authorised under the Charter', regardless of which UN organ has the competence under the Charter to grant that authorisation. It was concluded above that the detailed procedures and conditions with which the Security Council and its members must comply to authorise force under the Charter may be modified without any need to modify the customary *jus cogens* prohibition. This argument would simply extend this reasoning to argue that changing the *jus ad bellum* to allow authorisation of force by another collective security organ *within* the UN, under the Charter, would also not require modification of that *jus cogens* norm. Arguably, the reinterpretation of Article 27(3) could be viewed as already having authorised a new UN

[887] Helmerson (2014), 184–5.

collective security organ to authorise force: the Security Council voting by an affirmative vote of nine members including the concurring votes *or abstentions* of the permanent members. If this is the case, then by the same logic why should an interpretation of the Charter allowing the General Assembly to authorise force not also be reflected in the content of the customary *jus cogens* prohibition through its *renvoi* to the Charter, without requiring modification of either customary international law or the *jus cogens* norm?

The difficulty with this argument is that the level of abstraction at which the *jus cogens* norm is identified and its limits expressed must be determined based on what the international community of states as a whole has accepted and recognised as possible derogations to the customary prohibition on force, and at present the only way force may be lawfully authorised under the Charter is through the Security Council's powers under Article 42. As argued in chapter five, given the virtually universal recognition that the customary prohibition on force is *jus cogens*, one may only conclude that a particular type of force is not within the scope of the *jus cogens* prohibition where the international community as a whole has accepted and recognised that there exists a valid legal reason to perform that conduct. While the continuing lack of agreement about the particular article of Chapter VII under which the Council acts when authorising force means it cannot be firmly concluded that 'under Article 42' forms part of the definition of the limit on the scope of the customary or *jus cogens* norm, the practice and statements of states make clear that the power to authorise force under the Charter is currently confined to the Security Council only, acting under Chapter VII.[888] The view taken here is therefore that, until there

[888] Most recently, all those states which mentioned collective security as a limitation on the prohibition on force referred either to the Council itself or Chapter VII, which sets out powers of the Council. E.g. S/2021/247, statements of Brazil ('authorization under Chapter VII'), China, Estonia ('when the UN Security Council so decides'), France ('Security Council decisions authorizing the use of force'), Liechtenstein ('authorized by the Security Council under Chapter VII'), Mexico, Peru, Russia, Tunisia ('Article 42'), Viet

is evidence that a very large majority of states have accepted otherwise, the correct expression of the limit on the scope of the customary *jus cogens* prohibition on force at its boundary with collective security is 'force lawfully taken or authorised *by the Security Council* under the Charter'. That is, the customary *jus cogens* norm is in this respect virtually coextensive with Article 2(4).

In any case, whether the *jus cogens* norm excludes only force authorised by the Security Council from its scope, or excludes all force lawfully authorised under the Charter, will make little difference in practice. Modification of the Charter to allow an organ other than the Security Council to authorise force would most likely occur through the subsequent agreement of all the parties or subsequent practice establishing the agreement of all parties. Since 'all UN members' necessarily includes the 'international community as a whole', if this change did require the *jus cogens* norm to be modified the agreement of all parties to the Charter would be sufficient to do so and would allow the Charter to derogate from the customary prohibition to that extent.

For example, if all UN members were to express their agreement to an interpretation of the Charter whereby Resolution 377 was understood as granting the General Assembly the power to authorise force, even in the absence of any other legal basis under the *jus ad bellum*, this would be necessary to modify the Charter but also sufficient to simultaneously modify the scope of the *jus cogens* norm so as to allow the Charter to derogate from the customary prohibition to that extent. Alternatively, if all those UN members also provided evidence of their *opinio juris* that force authorised by the Assembly was lawful under

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Nam ('the Security Council's authorization'). Also A/RES/2625, Principle 1(10); A/RES/3314, preamble para 2; A/RES/42/22, para 27. See Corten (2010), 334, 345–6.

custom, for example through the inclusion of a reference to the customary prohibition on force in their statement, the same result could be achieved by modifying the scope of the *renvoi* from custom to the Charter, by identifying the customary *jus cogens* prohibition as now excluding force lawfully authorised by both the Security Council and the General Assembly, or even any force lawfully authorised under the Charter, from its scope. Thus, as argued in chapter six, since the test for modification of a *jus cogens* norm is effectively subsumed within the test for modification of the Charter, in practice it does not make a difference which changes to the allocation among UN organs of the power to authorise force would also require modification of the *jus cogens* norm.

2.3(b) Authorisation of force under a collective security treaty other than the UN Charter

As international law currently stands there does not appear to be any existing derogation from the prohibition on the use of force – that is, there is no legally valid reason to use force – pursuant to an authorisation from a collective security mechanism other than the UN Security Council. This is the case for bodies both inside *and outside* the UN system. Thus, as Helmerson rightly argues, the strongest argument against broader conceptions of the limitation on the scope of the *jus cogens* prohibition on force is simply that, other than the UN Charter, no treaty or collective security mechanism currently exists which is accepted as able to authorise the lawful use of force under general international law.[889] Expanding the scope of the limitation on the customary prohibition constituted by the UN collective security framework so as to allow collective security mechanisms outside the

[889] Helmerson (2014), 185.

UN to authorise force will therefore require a modification – specifically, a restriction – of the *jus cogens* prohibition on force, in addition to the necessary modification of customary and treaty law.

The 'assumption is that the [United Nations] Organization has a monopoly on the use of force'.[890] As has been pointed out based on the drafting history of the Charter, Article 51 was understood in 1945 as the sole deviation from the Security Council's monopoly on the use of force under the Charter and would allow regional arrangements to use force in collective self-defence without first seeking Council authorisation.[891] Otherwise, regional organisations are prohibited by Article 53(1) from taking enforcement action without authorisation from the Security Council; although really this provision simply reaffirms the application of the prohibition in Article 2(4) when states are participating in regional arrangements.[892] Despite much scholarly debate, no convincing argument has been made that this framework has changed so that regional organisations (or indeed any other organisation or treaty-based mechanism) can now authorise *and so render lawful under the jus ad bellum* a use of force which would otherwise be prohibited by the customary prohibition.

Various interventions by regional organisations since the end of the Cold War have been invoked to argue that such organisations may lawfully use force that is authorised under their internal law and procedures without authorisation from the Security Council.

[890] Brownlie (2008), 738.

[891] Butchard (2018), 250; Akehurst (1967), 176.

[892] White and Tsagourias (2013), 131. Also Akehurst (1967), 195.

Typically, this is characterised as a reinterpretation of Article 53(1) through practice.[893] Such arguments are made almost exclusively by scholars rather than states and there is not much *opinio juris* to support such a view. For example, the interventions of ECOWAS in Liberia and Sierra Leone are sometimes argued to be precedents for the use of force by a regional organisation without Security Council authorisation (or perhaps with *ex post facto* authorisation).[894] However, such arguments strain the facts and ignore the legal positions taken by the parties: the ECOWAS force in Liberia was considered at the time to be a peace-keeping force, present with the consent of the government;[895] as was the ECOMOG operation in Sierra Leone.[896] Generally, regional organisations have rarely if ever claimed a right to use force without Security Council authorisation.[897]

In those situations where a claim *has* been made that a regional organisation can use force in the absence of Security Council authorisation, such claims have been rejected by a significant number of UN Member states with the result that both an interpretation of the Charter through the practice or agreement of all members and identification of new customary international law are out of the question. For example, in Grenada in 1983 the US appears to have claimed that under the Charter regional arrangements may use force autonomously. However, if this was the claim being made, it was rejected by a large number of UN member states.[898] In 1999, the US seems to have claimed regarding NATO's

[893] E.g. Franck (2002), 162; Deen-Racsmány (2000).

[894] Franck (2002), 155–62.

[895] S/21485, 3; S/RES/788, para 9; Corten (2010), 372–8; Lieblich, 197.

[896] S/RES/1181, para 5; Corten (2010), 380.

[897] *Ibid*, 337.

[898] *Ibid*, 338.

military intervention in Kosovo that no Security Council authorisation was needed. However, not only was this intervention widely condemned as an unlawful use of force, but other NATO members invoked a variety of different legal bases, including that the action *was* implicitly authorised by the Security Council, with the result that the incident cannot be viewed as providing support for the view that regional organisations may use or authorise force without authorisation of the Council.[899] In its Ministerial statements the Non-Aligned Movement continues to mention regional action 'in accordance with Chapter VIII'[900] and adopted the following declaration in 1998:

> While reaffirming that the primary responsibility for international peace and security rest with the United Nations, the Heads of State or Government stressed that the role of regional arrangements or agencies, in that regard, should not in any way be substituted for the role of the United Nations, or circumvent the full application of the guiding principles of the United Nations and international law.[901]

The various resolutions adopted by the General Assembly on the use of force also contain nothing that could be construed as an interpretation of the Charter allowing regional arrangements to use force without Security Council authorisation.[902]

Some scholars have viewed Article 4(h) of the Constitutive Act of the African Union as a dramatic development in this regard, challenging the existing Charter system

[899] *Ibid*, 339–40, 356, 358–9.

[900] E.g. Non-Aligned Movement (2019), para 380.

[901] Non-Aligned Movement (1998), para 99.

[902] Corten (2010), 346–7.

and potentially creating a conflict between a treaty and a *jus cogens* norm.[903] Article 4(h) sets out the following principle in accordance with which the Union will function:

> 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[904]

Such arguments assume that all force not authorised by the Security Council, or at least under the UN Charter, is prohibited by the *jus cogens* norm in the *jus ad bellum*; by purporting to provide a legally valid reason to use force in this manner the Constitutive Act would constitute a derogation from that *jus cogens* prohibition. The difficulty with this argument is that, if that is the case, under the rule in Article 53 VCLT not just Article 4(h) but the entire Constitutive Act must be void. Yet, more than 20 years after its adoption, the African Union, of which it is the constituent instrument, continues to exist and function in accordance with the Act's provisions and nobody has seriously contended in practice that the treaty is void.

[903] Constitutive Act of the African Union. See, e.g. de Wet (2015); Lieblich (2013), 199–200; Pellet (2021), 324. It has also been suggested that the 1999 ECOWAS Protocol 'was the first time an international organization has formally codified the rather problematic doctrine of humanitarian intervention as well as legalizing the use of force to restore or prevent an overthrow of a democratically elected government', Abass (2000). For example, Article 40 of the Protocol provides that 'ECOWAS shall intervene to alleviate the suffering of the populations and restore life to normalcy in the event of crises, conflict and disaster'; see also Article 22(c). Cf 2001 SADC Protocol. While Article 11(3)(c) contemplates the taking of enforcement action against a state party in cases of conflict between or within SADC member states, 11(3)(d) explicitly provides that this shall be 'only with the authorisation of the UN Security Council'. See generally Svicevic (2021).

[904] Article 4 of the 2003 AU Protocol added a further ground: 'as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council'.

Should one conclude from this that, 55 states having (apparently) successfully derogated from the prohibition on force in this way (53 at the time of the treaty's adoption in 1999), the *jus cogens* norm *never* extended to prohibit uses of force authorised by a collective security mechanism outside the UN, which must have been prohibited only by a derogable customary norm? If uses of force authorised only by the African Union are not prohibited by the *jus cogens* norm, one must deduce that the limit on the scope of that norm at its boundary with collective security is expressed at a higher level of abstraction than one had previously thought: it is not merely 'force authorised by the Security Council' or even 'under the Charter' that is excluded from its scope, but something broader. While significant, the number of participating AU states does not come close to the 'very large majority' that would be required to modify the *jus cogens* norm by indicating through their participation in the Constitutive Act that they now accepted and recognised the customary prohibition on force to be derogable only to the extent required to admit the validity of a treaty containing Article 4(h). That is, the Constitutive Act cannot itself have modified the scope of the *jus cogens* norm in the *jus ad bellum* to allow for its own existence and exclude that particular derogation from the scope of the *jus cogens* prohibition. Instead – so the argument would go – the *jus cogens* norm, pre-1999, must have excluded *all force authorised by a collective security mechanism* from its scope. This was why it would be possible for only 53 states to create a new derogation from the prohibition on force: the Constitutive Act did not derogate from a *jus cogens* norm but from the derogable part of the general customary prohibition on force.

That is one possible argument. However, the better view is that the situation is more complicated: the absence of any serious claims that the Constitutive Act is void due to conflict with a *jus cogens* norm reflects rather the ambiguity of Article 4(h) itself and the

positions the AU and its members have taken since it was adopted. Aside from the omission to mention the Security Council or Chapter VIII, and perhaps the choice of the word 'right', there is nothing in the text of Article 4(h) to indicate that it is necessarily asserting a power to use force without Security Council authorisation. Significantly, the 2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union, which deals with the implementation of the principles set out in the Constitutive Act, reaffirms the UNSC's 'primary responsibility for the maintenance of international peace and security' and that recourse will be had to the United Nations 'in keeping with the provisions of Chapter VIII of the UN Charter'.[905]

The 2005 Ezulwini Consensus has also been much discussed for its statement that:

> The African Union agrees with the [High Level Panel on Threats, Challenges and Change] that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action.[906]

While the assertion that the Council can authorise force by regional organisations *ex post facto* is striking, such a proposition does still assume a need for Security Council authorisation. The document also contains an intriguing characterisation of the so-called 'exceptions' to the prohibition on force:

[905] 2002 AU Protocol, Article 17(1) and (2).

[906] Ezulwini Consensus, para B.i).

> any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act, should be prohibited.[907]

While this may be viewed as an assertion that Article 4(h) can substitute the Security Council's authorisation role, it would be strange to claim that the Council has therefore entirely vanished from the picture. Surely any new power of authorisation under Article 4(h) would be in addition to the existing role of the UN, rather than entirely displacing it? The better view is likely, as Corten argues, that Article 4(h) was intended to grant the AU competence to intervene in its member states in the circumstances listed, and that where such force is authorised by the Security Council or otherwise lawful, such as through consent, it is Article 4(h) that will empower the Union to act as a matter of its own internal law.[908]

The AU's subsequent practice, while not excluding the possibility that Article 4(h) may be purporting to derogate from a *jus cogens* norm which prohibits all force not in self-defence or authorised by the Security Council, provides little support for that view: '[a]ll the military operations thus far carried out by the AU occurred on the invitation of the recognized government and sometimes also with the consent of rebel groups.'[909] Article 4(h) has only been invoked on two occasions, once in circumstances unrelated to the use of force, to support the trial of former President of Chad Hissene Habré, and once in relation to the crisis in Burundi in 2015. In the Burundi case, following months of escalating violence the AU's Peace and Security Council adopted a communiqué in which it 'Decides

[907] Ezulwini Consensus, para B.ii)

[908] Corten (2010), 342.

[909] De Wet (2004a), 327.

[…] to authorize the deployment of an African Prevention and Protection Mission in Burundi (MAPROBU)'.[910] The communiqué gave the government of Burundi 96 hours in which to confirm 'its acceptance of the deployment of MAPROBU' but then continued:

> […] Council decides, in the event of nonacceptance of the deployment of MAPROBU, to recommend to the Assembly of the Union […] the implementation of article 4(h) of the Constitutive Act relating to intervention in a Member State in certain serious circumstances.[911]

However, this apparently bold invocation of the AU's right to authorise force against a member absent their consent at the time of the intervention is undermined, first, by a paragraph later in the communiqué in which the Council 'requests the UN Security Council to adopt, under Chapter VII of the UN Charter, a resolution in support of the present communiqué', which could be read as an acknowledgement of the need for the Council to use its Chapter VII powers to provide an authorisation for MAPROBU to use force absent Burundi's consent.[912] Second, despite Burundi's refusal to consent to the presence of the MAPROBU force,[913] the AU failed to follow through on its threat. When the Peace and Security Council met at the level of heads of state and government in January 2016 to discuss the issue, the majority of AU members 'now deemed it inappropriate to send troops to Burundi without the government's consent and agreed it was prudent not to force the

[910] AU Communiqué, para 13(a)(i).

[911] *Ibid*, para 13(c)(iv). Under the procedure established by Article 4(h) Constitutive Act and Article 7(1)(e) 2002 Protocol, the right to intervene is 'pursuant to a decision of the Assembly' that is made on the recommendation of the Peace and Security Council.

[912] AU Communiqué, para 15.

[913] Al Jazeera (2015).

issue'.[914] While there were undoubtedly also political and practical reasons why the AU decided not to proceed with the deployment of MAPROBU in these circumstances, the incident does not suggest a strong conviction among AU members that Article 4(h) had provided them with a clear legal right to use force against Burundi without Security Council authorisation.

Finally, as a matter of treaty law, Article 103 of the UN Charter provides that obligations under the Charter prevail over obligations under any other international agreement. Thus, until there is evidence that AU states intend to disregard this provision of the Charter, an interpretation of Article 4(h) that takes into account the other 'relevant rules of international law applicable in the relations between the parties' under Article 31(3)(c) VCLT would conclude that its claimed right of intervention must be subordinated to the obligation under Article 53(1) of the Charter to seek prior Security Council authorisation for any such intervention.[915] Taking into account these interpretive elements beyond the text, an interpretation of the Constitutive Act that applies the VCLT rules would conclude that it does not conflict with the *jus cogens* prohibition on force.

All of these factors, it is submitted, have created sufficient doubt as to whether the AU Constitutive Act conflicts with a *jus cogens* norm to prevent any serious arguments that it is void, especially when balanced against the political and practical consequences of invalidating the constituent instrument of a major regional organisation. It is not (yet) clear whether the treaty 'contemplates acts prohibited by *jus cogens*'.[916] One therefore cannot

[914] Wilén and Williams (2018), 693.

[915] Corten (2010), 342–3.

[916] Orakhelashvili (2008), 135.

conclude from the continuing validity of the Constitutive Act that a group of states has been accepted and recognised as able to derogate from the customary prohibition on force to this extent and that the *jus cogens* norm in the *jus ad bellum* excludes any force authorised by a collective security mechanism, even those outside the UN, from its scope. As yet, there is no evidence that the international community as a whole has accepted and recognised either that the fact that force is authorised or taken by a collective security organisation outside the UN constitutes a valid legal reason to use force under the *jus ad bellum* in the same way that authorisation by the Security Council renders a use of force lawful, or that the prohibition on force may be derogated from through the creation of new collective security mechanisms for the authorisation of force outside the UN. Such uses of force must currently be prohibited by the customary and *jus cogens* prohibitions on force.

To change the *jus ad bellum* so that force taken or authorised by a collective security organisation outside the UN is lawful – whether by narrowing the scope of the customary *jus cogens* prohibition on force or derogating from the customary prohibition by treaty – would therefore require the modification of that *jus cogens* norm. This could be achieved, for example, through the adoption by a 'very large majority' of states of a multilateral treaty purporting to derogate from the prohibition on force along the lines of Article 4(h). By accepting and recognising the customary prohibition as derogable to that extent the international community as a whole would simultaneously modify the scope of the *jus cogens* norm to accommodate the treaty's existence. However, unless this were also accompanied by a modification of Articles 103 or 53(1) of the Charter, those states would, from the perspective of the Charter, nevertheless remain in violation of their obligation under Article 2(4).

3. Conclusion

This chapter has analysed the structure of the two existing so-called 'exceptions' to the prohibition on force, and sought to show how change to their content and scope could occur. In both cases, a norm from one source of international law refers to a norm of another source in order to provide all or part of its content. Article 51 refers to the customary international law of self-defence to give content to the treaty provision; customary international law recognises certain decisions made under the Charter collective security system as determining the contours of the customary prohibition on force. These *renvois* create pockets of flexibility in the *jus ad bellum*, where modification of a norm from only one source brings about a corresponding change in another *jus ad bellum* norm of a different source, with the result that there is a change to the situations in which states may lawfully use force. Although not strictly a *renvoi*, the expression of the limits of the *jus cogens* norm at a level of abstraction higher than the detailed requirements of the customary international law of self-defence and the provisions of the Charter also creates a certain degree of leeway within which those norms may be modified without needing to fulfil the test for modification of a *jus cogens* norm. The chapter thus shows that, at least in relation to some aspects of the content of the right of self-defence and the UN collective security framework, change in the *jus ad bellum* may occur more readily than when attempting to create new exceptions to or limitations on the scope of the prohibition itself.

This chapter has also sought to answer the question raised by chapter five: at its boundaries with self-defence and collective security, at what level of abstraction does the limit of the *jus cogens* norm in the *jus ad bellum* exist? The *jus cogens* norm in the *jus ad bellum* can now be defined more precisely: it is the customary norm that prohibits the use

of force, other than force lawfully used in self-defence if an armed attack occurs and force lawfully taken or authorised by the Security Council under the Charter. Any change to the *jus ad bellum* that would modify *this* norm would require the test for identification of a new *jus cogens* norm to be met. By identifying with as much precision as possible the contours of the *jus cogens* prohibition on force at its boundaries with these two bodies of law, this chapter has shown the limits of the flexibility created by the *renvois*.

Where more than one norm of more than one source, or the *jus cogens* norm, must be modified, many of the issues discussed in chapter six reappear, and will render change to the *jus ad bellum* more difficult. For example, when a change to the customary international law of self-defence would also require a modification of the terms of the *renvoi* set out in Article 51 to be effective, the high quantitative threshold for interpretation of the Charter through subsequent practice or agreement will act as a limiting factor. Where a change requires the scope of the customary *renvoi* to the collective security provisions of the Charter to be modified, to modify the customary *jus cogens* norm the necessary *opinio juris* must be shared by a 'very large majority' of states. In any situation where the *jus cogens* norm is being modified, this change will need to precede or be simultaneous with the modification of the other norms.

8. General conclusion

This thesis has sought to answer the question of how the international law norms that regulate the use of force may be modified. To do so, it has analysed how customary international law is identified and how this process is impacted by the presence of identical treaty norms; how the UN Charter may be modified through amendment and interpretation; and how *jus cogens* norms may be modified. It has identified the *jus cogens* norm in the *jus ad bellum* and proposed an analysis of how the norms in the *jus ad bellum* are structured.

The analysis in the preceding chapters allows one to draw the following conclusions about how these norms may be modified in such a way as to bring about an effective change in the circumstances in which states may lawfully use force under international law. The structure of the *jus ad bellum* does make a difference to how the international law norms that regulate the use of force may be modified. The creation of new exceptions to or limitations on the scope of the prohibition on force is rendered more difficult by the coexistence of identical treaty and customary *jus cogens* norms prohibiting the use of force, and the need to modify both to bring about an effective change in states' obligations. The *jus cogens* norm must be modified prior to or simultaneously with customary or treaty law. The norm whose modification requires the highest quantitative participation by states will act as the limiting factor on change in the *jus ad bellum*, requiring the practice or acceptance/*opinio juris* of more states than would be required to – for example – identify a new norm of customary international law alone. This limiting factor will not be, as one might expect, the need to modify the *jus cogens* norm in the *jus ad bellum*, but the requirement of unanimous agreement of all UN members to interpret the Charter through subsequent practice or agreement. In certain circumstances, the requirements for

modification of those norms cannot be fulfilled by tacit acceptance or acquiescence but may require evidence of *opinio juris* on the part of states or express agreement of parties to the Charter. Thus, while it is not impossible to create new exceptions to the prohibition on force, it will not be easily achieved.

When it comes to self-defence and collective security, the analysis above has identified changes to the *jus ad bellum* which would require modification of only one kind of international law norm. Such changes could occur relatively easily, as they avoid the obstacles created by the coexistence of multiple identical norms, although the requirements for identification of customary international law or modification of treaty law would still need to be fulfilled. Certain changes to the conditions of necessity and proportionality, and even the expansion of the right of self-defence to include response to an armed attack by a non-state actor where there is no attribution to a state, could occur through identification of new customary international law alone. However, a change that removed the requirement that an armed attack occur would not only require identification of new custom and modification of the Charter but engage the limits of the *jus cogens* prohibition. In this situation, the same obstacles as for the creation of new exceptions to or limitations on the scope of the prohibition would re-emerge.

The collective security provisions of the UN Charter do not act as *lex specialis* to the customary prohibition on force, nor as a form of prior consent to force. Instead, force lawfully taken or authorised by the Security Council under the Charter falls outside the scope of both the customary and *jus cogens* prohibitions, which in this respect are coextensive. As a result, being below the level of abstraction at which the limits of those norms are defined, modifications of the Charter which would change the circumstances in

or procedures by which the Council may authorise force would not require either identification of new customary international law or modification of the *jus cogens* norm. However, a purported change to the *jus ad bellum* which would allow another UN organ, or a non-UN collective security organ, to authorise force would be purporting to change those limits and restrict the scope of that *jus cogens* prohibition. As a result, such a change would also face the obstacles to change posed by the coexistence of identical treaty and customary *jus cogens* norms which arise in the case of new exceptions to or limitation on the scope of the prohibition.

Going beyond the research questions posed at the outset, it is also now possible to make some more general observations based on the analysis above. First, the inferences that may be drawn about what states accept as law or agree to as an interpretation of a treaty, and how those inferences may be affected by the surrounding context, emerges as a theme running through the thesis. Chapters two, three and four reached conclusions about the circumstances in which such inferences may be drawn from conduct; chapters five and six then demonstrated how these conclusions must be nuanced to take account of the coexistence of multiple international law norms.

Where the context includes a *jus cogens* norm, it does not seem sensible to infer *opinio juris* of an acting state from its participation in practice inconsistent with the underlying international law norms, as that would be to presume that the state has accepted that derogation is possible from a norm accepted and recognised by the international community as a whole as non-derogable. While it is certainly possible for a state to express such an *opinio juris*, and indeed this is one means by which *jus cogens* norms may be modified, it seems that the *presumption* at least should be reversed. Where practice

supporting an alleged customary norm is inconsistent with an underlying *jus cogens* norm, the acting state should be presumed, in the absence of any clear evidence of their view as to the state of the law, to accept that it is simply acting in breach of that *jus cogens* norm. For the same reason, where a state acts inconsistently with a treaty norm by which it is bound, in the absence of a clear claim by the acting state(s) to that effect, this should not be presumed to be an attempt to reinterpret that provision through practice where the new interpretation would derogate from a *jus cogens* norm.

Turning to the reactions of other states, the situation is more complicated. It seems odd to *infer* from a state's non-reaction to practice its *opinio juris* that a new customary norm exists that would derogate from an existing *jus cogens* norm. While there may be an expectation that states react negatively to violation of a *jus cogens* norm, it would be bizarre to conclude from this that as a rule one should more readily infer acceptance from the non-reaction of other states, effectively rendering *jus cogens* norms easier to change than regular customary international law.

This dilemma about the inferences to be drawn from conduct inconsistent with a *jus cogens* norm becomes even more acute in the context of treaty law, as acquiescence plays a significant role in modification of the Charter through the establishment by subsequent practice of the agreement of all parties to new interpretations of that treaty. Where a new treaty interpretation would be purporting to derogate from a *jus cogens* norm, again one is faced with the difficulty that, on the one hand, practice purporting to establish a new treaty interpretation that would derogate from a *jus cogens* norm should surely generate a greater expectation of a negative reaction, since a very large majority of states currently accept that no such derogation is possible. Yet on the other hand, it would clearly

go too far to conclude that the expectation of negative reaction to a claimed derogation from a *jus cogens* norm is so strong that an absence of reaction should more readily be taken as acquiescence in a new treaty interpretation.

Ultimately, the thesis concludes that, whether for *opinio juris* or acquiescence in treaty interpretations, there is no hard and fast rule that can be identified. The correct inference to be drawn from a state's absence of reaction in a particular situation will depend on the wider context, in particular the number of states participating in the practice contrary to the *jus cogens* norm, and the statements (if any) that other states have already made about the state of the law.

Second, as stated in the introduction, this thesis is anchored in the view that even where international law norms of different sources regulate the same subject matter in the same way, when considering how the law in that area has changed their separate existence means those norms must be disentangled to determine whether the requirements for modification of each norm have been met. The analysis above has not challenged this view; however, it has revealed how in practice the relationship between the customary and treaty prohibitions on force is more complex. While the Court's famous description of identical treaty and customary norms in *Nicaragua* as having 'parallel' existences is certainly correct as regards the *formal* requirements of each source of law, the *material* sources of both norms will often consist of the same practice by states. The creation of the conventional prohibition in Article 2(4) took place through the formal conclusion of a treaty, but its subsequent interpretation may be based on practice in application of that treaty that establishes the agreement of the parties: conduct which, as argued in chapter three, may also count as state practice and *opinio juris* constituting the identical customary prohibition.

The converse is equally true. State practice in support of a customary norm may be able to influence the interpretation of a treaty norm regulating the same subject matter as practice in application of the treaty under the rule in Article 31(3)(b) VCLT, provided agreement among all the parties as to a new interpretation of the treaty is established by this practice. In this way, one can see that the Court's metaphor of 'parallel' lines is not quite accurate: by definition, parallel lines never touch and are separated by clear space whereas, as a result of these shared material sources, the identical customary and conventional prohibitions on force are closely intertwined, even fused. Thus, while this thesis has considered how, conceptually, the treaty and customary prohibitions might come to diverge, in reality it is unlikely that practice under one norm will differ significantly from the other. Any divergence is likely to occur only as a result of the differing thresholds for modification of each norm.

Finally, it would be naïve to conclude a thesis about the law on the use of force without acknowledging that the *jus ad bellum* has been shaped by power relations, and that the power of the state(s) using or being subjected to force too often influences compliance with and enforcement of that law.[917] Nevertheless, applying legal doctrines rigorously can perhaps go some way towards mitigating these distortions. One obvious, practical step that can be taken is, when identifying customary international law, to seek and evaluate a genuinely widespread and representative range of state practice and *opinio juris*, not simply that of a handful of militarily powerful developed states who tend to be the ones using force and whose views about international law tend to be most widely reported. In doing so, the

[917] The literature is extensive; see e.g. Martineau (2016); Tzouvala (2015); Heathcote (2012); Kennedy (2012).

correct inferences to be drawn as to the views of the many states who neither participate in practice nor express any reaction will be essential.

Demanding that the legal requirements for identification or modification of international law norms in the *jus ad bellum* are met, and rejecting claims as to the state of the law that disregard or misapply these standards, is another potential means to mitigate the effects of factual inequality among states.[918] States, including those with the capacity to violate international law without fear of the consequences, should, at the very least, be held to the rules they themselves have created, through legal processes to which they have consented, and to which they frequently reaffirm their commitment to comply. This is the case even, and perhaps especially, in circumstances where those prohibitions and conditions frustrate their ability to exercise that power as they wish. By clarifying the standards by which claims by states to be using force in accordance with international law should be evaluated, it is hoped that this thesis can make a modest contribution to this aim.

[918] That is, it is not merely an exercise in 'line-drawing', Kennedy (2012), 161, but rather is to enter the 'field of battle', Corten (2009), 43.

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