International Law and the Use of Force

Cases and Materials

Ralph Janik

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This book introduces key issues on the use of force while also providing a detailed analysis of technological developments and recent legal discussions in the field.

The author examines areas such as support for rebel groups, the concept of humanitarian intervention, the Responsibility to Protect and recent conversations around the fight against the "Islamic State" in a clear and accessible manner, through a thorough presentation of relevant cases and materials.

This book is essential reading for students studying force and its intersection with international law.

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Introduction

International law in general and the *ius ad bellum* in particular are often accused of having only limited value since there is no central power and no enforcement mechanism as we know them from domestic law. Powerful states eager to resort to war for geopolitical, strategic, humanitarian or economic interests will not be held back by legal constraints or negative reactions by other states and international organizations such as condemnations or sanctions.

One may thus rightfully wonder about the value of all the *ius ad bellum*.[1] What is the point of law if no one feels bound to it once push comes to shove, if power plays are all that matter? Is the *ius ad bellum* indeed law "improperly so called", to borrow the famous description by John Austin? Should we rather treat it as a mere opportunity to couch illegitimate behaviour such as acts of aggression, annexations or efforts to overthrow unwanted leaders in legal terms?

At the same time, the glass is also half-full. In the long run, the world has arguably become a more peaceful place (while there is obviously no guarantee that it will remain that way for the foreseeable future).[2] Our thinking has changed fundamentally: war is no longer seen as the continuation of politics by other means as Carl von Clausewitz famously defined it. In contrast to the past, international law textbooks no longer proceed from the assumption that states may resort to war at any time and whenever they deem it necessary for purposes of "self-preservation", violations of treaties or the collection of debt.[3] War is seen as the exception, not the norm. On a side note, no one would doubt the validity of penal law rules on homicide simply because several murders are committed. Why should the situation be different on the international plane?

Today, even great powers usually give in to the pressure to resort to legal arguments when justifying their actions. While the law will usually not prevent states from proceeding to wage war, it is nevertheless decisive when it comes to the reactions by other states. It may be unclear, it may be subject to countless interpretations, it may be perverted by *advocati diaboli*[4]—but, at the end of the day, it's all we have. A common language, even although there may be countless dialects. If the *ius ad bellum* did not already exist, we would have to invent it.

It is the purpose of this book to provide an overview of these rules and the corresponding debates. Original documents ranging from speeches by states' representatives, General Assembly or Security Council resolutions and judgments by the International Court of Justice are introduced and embedded in their broader historical, political and—obviously—legal context. For all the fuss, the world is about the rules governing the use of force; they cannot be as worthless as some tend to suggest.

Notes

1 See Edward Hallett Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (reissued with a new introduction and additional material by Michael Cox, Palgrave 1981/2001). See also Thomas M. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States' (1970) 809 *The American Journal of International Law* 64.
2 See Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Penguin Books 2012).
3 See Chapter 1 on the history of the *ius ad bellum*.
4 See Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretative Method' (2009) 22 *Leiden Journal of International Law* 651.

1 The history of the *ius ad bellum*

Tracing the historic roots of the contemporary legal regime on the use of force is a complex affair. At the end, just like when describing the history of international law as such, it all comes down to the viewpoint and the definitions of *war* and *law*. If one understands war as a violent confrontation between different groups, it is as old as mankind, while some rudimentary legal rules on the use of force were already present in ancient Israelite law, the Greek city-states and Rome.[1]

However, modern thinking on the *ius ad bellum* has started with just war theory, which was slowly but steadily superseded by positivism and the conceptualization of war as a sovereign prerogative. In the early and mid-twentieth century, then, the two world wars paved the way for the Utopian strain of thought we commonly associate with Immanuel Kant's idea of perpetual peace and the corresponding prohibition on using force.

I Just war theory

Just war theory is commonly associated with Augustine, the originator of this thinking, who was later followed by Thomas Aquinas, the school of Salamanca, Hugo Grotius, Alberico Gentili and Cornelis van Bynkershoek—to include just a small sample of the prominent names dealing with war and peace during this period.[2]

Augustine identified the three basic principles for a just war: right authority (*auctoritas*), just cause (*iusta causa*) and the right intention (*recta intentio*).

Auctoritas requires that the war must be waged by a sovereign and legitimate (not in a democratic sense, however) ruler and not by private individuals or groups such as robbers. *Iusta causa* means that there has been a preceding violation of the rights of the party resorting to war. While for Augustine the mere injury was sufficient, Thomas Aquinas further required fault on the part of the wrongdoer and the corresponding need for punishment. The overarching aim is the preservation of peace and justice. The right intention, lastly, requires the old question of bad versus evil—a precondition that may, as Gentili noted, be objectively present on both sides of a war. Hence, it is often difficult to judge who is right and who is wrong, even more so if each party is making this determination for itself. In this sense, Gentili was arguably the first thinker to differentiate between the legal aspects of war on the one hand and metaphysical, theological, moral and ethical assumptions on the other.

Grotius, then, is considered the thinker who transposed just war theory into (early) modern international law. As a witness to the devastating Thirty Years' War ravaging Europe from 1618 to 1648, he emphasized that war should be declared and only resorted to as the *ultima ratio* even if there was a just cause. In so doing, third parties could act as impartial arbitrators. In this regard, he also set out to overcome the problem of determining an

objective standard to distinguish between righteous and non-righteous wars by identifying a list of just causes: self-defense, recovering stolen property and punishment.[3] In addition, he explicitly mentioned conquest and self-imposed tutelage against the will of those affected (violations of the right to self-determination, to put it in contemporary legal terms) as examples of unjust causes. Adding to his thought, Samuel Pufendorf then elaborated on the practical validity of the emphasis on the *ultima ratio* requirement by requiring negotiations. In contrast to Grotius, uninvolved parties should adopt a stance of strict neutrality, e.g. by permitting warring factions to pass through their territory instead of weighing in on the righteousness—the more parties involved in a dispute, the worse.

Christian Wolff, then, can be considered as the first thinker to separate natural law and the notion of justice from positive law as rules created and voluntarily adhered to by states. From then on, legal thinking increasingly shifted towards positivism: *nemo iudex in sua causa* (no state may objectively determine whether its actions are just or not). Natural law has long been criticized for being out of touch with reality. Somewhat finishing the work started by Wolff, Emer de Vattel then can be seen as the undertaker of natural law thinking in inter-state relations. He further solidified the thought of states as moral persons.[4] Wars no longer need to be inherently just since he transposed Hobbes's assumptions on the inherently hostile environment caused by the absence of a central power—the Leviathan—in the state of nature to the international level. States themselves are sovereign to decide to which rules they want to be bound and whether they would wage war or accept the outcome of a war. As such, de Vattel stands right next to Hegel, who not much later explicitly rejected the binding character of international rules altogether, as one of the great "deniers of international law".[5]

II War as a sovereign right

The rise of legal positivism during the nineteenth century led to the abandonment of moral considerations and just war theory. On the one hand, states emphasized their sovereignty and the prohibition of others to meddle in their internal or external affairs. On the other hand, war was generally considered as a prerogative of sovereign states. This contradiction was generally resolved in favour of the latter. Due to the anarchic structure of the international system—the "Hobbesian trap"—writers of this period considered war an inevitable aspect of self-help. The main textbooks from the nineteenth century are particularly instructive in this regard as they often contain specific chapters on the different reasons to wage war, spanning from self-defense or self-preservation to the protection of nationals, wars on "religious grounds" (usually the protection of Christians abroad, in particular in the Ottoman empire) and wars in the name of upholding the balance of power. War was an essentially political matter, not a legal one. Nevertheless, it would be wrong to simply assume, as many did, that there were no legal rules on waging war during the nineteenth and early twentieth centuries at all.[6] Numerous textbooks from this period show that there were indeed certain considerations to be made: above all, the extensive right and duty—towards a state's own population—of self-preservation, which had to be weighed against the robust understanding of sovereignty during this era. Examples of this thinking can be found in Henry Wheaton's *Elements of International Law* from 1836, Robert Phillimore's *Commentaries on International Law* from 1854, W. E. Hall's *Treatise on International Law* from 1895, John Westlake's *International Law* from 1904, and the first edition of Lassa Oppenheim's famous *International Law* textbook from 1905.

Henry Wheaton, Elements of International Law *(Stevens and Sons 1836/1904), excerpts from Chapter II*

Rights of Independence

Of the absolute rights of states, one of the most essential and important, and that which lies at the foundation of all the rest, is the right to self-preservation. It is not only a right with respect to other states, but a duty with respect to its own members, and the most solemn and important which the state owes to then. This right necessarily involves all other incidental rights which are essential as means to give effect to the principal end. . . .

The independent societies of men called states acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in these positive sanctions which are annexed to the municipal code of each distinct society. Each state has therefore a right to resort to force as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each state is also entitled to judge for itself what are the nature and extent of the injuries which will justify such a means of redress.

[416f] The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs in every civilized nation to the supreme power of the State. . . . voluntary or positive law of nations makes no distinction . . . between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted, by the laws of war, to one of the belligerent parties, is equally permitted to the other.

Robert Phillimore, Commentaries on International Law. Vol. I *(T. & J. W. Johnson 1854), CXLIV, CXLVI*

CXLIV. From the first proposition—namely, that States are recognised as moral persons—seem to be more especially derived the rights incident to Independence, which are the following:

1 The right to a Free Choice, Settlement, and Alteration of the Internal Constitution and Government without the intermeddling of any foreign State.
2 The right to Territorial Inviolability, and the free use and enjoyment of Property.
3 The right of Self-preservation, and this by the defence which *prevents* as well as that which *repels* attack.
4 The right to a free development of national resources by Commerce.
5 The right of Acquisition, whether original or derivative, both of Territorial Possessions and of Rights.
6 The right to absolute and uncontrolled jurisdiction over all persons and things *within*, and in certain exceptional cases *without*, the limits of the territory. Under this head may be considered the status of Christians in Mohametan or Infidel countries, not being subjects of those countries, and the question of Extradition of criminals.

CXLVI. The limitations which the abstract rights of one nation may receive in their practical exercise, from the existence of similar rights in another nation, will be considered in a chapter on the doctrine of intervention. . . .

The reason of the thing and the practice of nations appear to have sanctioned this Intervention in the following cases,

I Sometimes, but rarely, in the domestic concerns and internal right of Self-Government, incident, as we have seen, to every State.
II More frequently, and upon far surer grounds, with respect to the territorial acquisitions or foreign relations of other States, when such acquisitions or relations threaten the peace and safety of other States.

In the former case the just grounds of Intervention are

1 Self-Defence, when the Domestic Institutions of a State are inconsistent with the peace and safety of other States.
2 The Rights and Duties of a guarantee.
3 The Invitation of the Belligerent Parties in a civil war.
4 The Protection of Reversionary Right or Interest.

In the latter case the just grounds of Intervention are

5 To preserve the Balance of Power; that is, to prevent the dangerous aggrandizement of any other State by external acquisitions.
6 To protect Persons, subjects of another State, from persecution on account of professing a Religion not recognised by that State, but incidental with the Religion of the Intervening State.

W. E. Hall, Treatise on International Law *(4th edn, Clarendon Press, 1895), pp. 57 and 297*

[page 57] Even with Priority of individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. *A fortiori* it is so with states, which have in all cases to protect themselves, over the If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, which the government of the latter is unable, or professes itself to be unable, to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties.

Whether there is any other right or duty which has priority of the right of independence so long as a state endeavours, or profess that it endeavours, to carry out its international duties is, to say the least of it, eminently doubtful, especially considering that no guarantees exist tending to limit the occurrence of such interference to due occasions, or to secure that it shall be used only for its ostensible objects. The subject will be touched upon elsewhere.

§ 12. When a state grossly and patently violates international law in a matter of serious importance, it is competent repress or to any state, or to the body of states, to hinder the wrong-doing from being accomplished, or to punish the wrong-doer, of law.

Liberty of action exists only within the law. The right to it cannot protect states committing infractions of law, except to the extent of providing that they shall not be subjected to interference in excess of the measure of the offence; infractions may be such as to justify remonstrance only, and in such cases to do more than remonstrate is to violate the right of independence. Whatever may be the action appropriate to the case, it is open to every state to take it. International law being unprovided with the support of an organised authority, the work of police must be done by such members of the community of nations as are able to perform it. It is however for them to choose whether they will perform it or not. The risks and the sacrifices of war with an offending state, the chances of giving umbrage to other states in the course of doing what is necessary to vindicate the law, and the remoter dangers that may spring from the ill-will produced even by remonstrance, exonerate countries in all cases from the pressure of a duty.

[page 297]§ 88. Intervention takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. Prima facie intervention is a hostile act, because it constitutes an attack upon the independence of the state subjected to it. Nevertheless its position in law is somewhat equivocal. Regarded from the point of view of the state intruded upon it must always remain an act which, if not consented to, is an act of war. But from the point of view of the intervening power it is not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war. In the case moreover of intervention in the internal affairs of a state, it is generally directed only against a party within the state, or against a particular form of state life, and it is frequently carried out in the interest of the government or of persons belonging to the invaded state. It is therefore compatible with friendship towards the state as such, and it may be a pacific measure, which becomes war in the intention of its authors only when resistance is offered, not merely by persons within the state and professing to represent it, but by the state through the persons whom the invading power chooses to look upon as its authorised agents.

Hence although intervention often ends in war, and is sometimes really war from the commencement, it may be conveniently considered abstractedly from the pacific or belligerent character which it assumes in different cases. It may also be worthwhile to simplify the discussion of the subject by avoiding express reference to intervention as between different states, all questions relating to the conditions under which such intervention may take place being covered by the principles applicable in the more complex case of intervention in the internal affairs of a single state.

§ 89. It has been seen that though as a general rule lies under an obligation to respect the independence of others, there are rights which may in certain cases take precedence of the right of independence, and that in such cases it may be disregarded if respect for it is inconsistent with a due satisfaction of the superior right. The permissibility of an infringement of the right of independence being thus dependent upon an incompatibility of respect for it with a right which may claim priority over it, the legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it. That this may sometimes be done is undisputed; but the right of independence is so fundamental a part of international law, and respect for it is so essential to the existence of legal restraint, that any action tending to place it in a subordinate position must be looked upon with disfavour, and any general grounds of intervention pretending to be

sufficient, no less than their application in particular case, may properly be judged with an adverse bias.

§ 90. The grounds upon which intervention has taken place, or upon which it is said with more or less of authority that it is permitted, may be referred to the right of self-preservation, to a right of opposing wrong-doing, to the duty of fulfilling engagements, and to friendship for one of two parties in a state.

John Westlake, International Law. Part I: Peace *(Cambridge University Press 1904), pp. 298f, 305*

"When", Rivier says,

> a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. *Primum vivere*. A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the state of which the destinies are confided to it. The government is then authorized, and even in certain circumstances bound, to violate the right of another country for the safety (*salut*) of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse.

[page 299] What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defence. A state may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing it will be acting in a manner intrinsically defensive even though externally aggressive. In attack we include all violation of the legal rights of itself or of its subjects, whether by the offending state of by its subjects without due repression by it, or ample compensation when the nature of the case admits compensation. And by due repression we indent such as will effectually prevent all but trifling injuries (*de minimis non curat lex*), even though the want of such repression may arise from the powerlessness of the government in question. The conscientious judgment of the state acting on the right thus allowed must necessarily stand in the place of authoritative sanction, so long as the present imperfect organization of the world continues. If its legal rights or those of its subjects are concerned, and the necessity is not great and immediate, action on the right to self-preservation will seldom be conscientious unless arbitration has first been offered and refused; and there may be cases of a political kind not wholly unfitted for arbitration.

[page 305] Intervention in the internal affairs of another state is justifiable in two classes of cases. The first is when the object is to put down a government which attacks the peace, external or internal, of foreign countries, or of which the conduct or avowed policy amounts to a standing threat of such an attack. The second is when a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace, external or internal, of its neighbors, whatever the conduct of policy of its government may be in that respect.

Lassa Oppenheim, International Law: A Treatise. Vol. I: Peace *(Longmans, Green, and Co. 1905), §§ 129f*

V Self-preservation

§ 129. From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States.

Although regularly all the States have reciprocally to respect one another's Personality and are therefore bound not to violate one another, certain violations of another State committed by a State for the purpose of self-preservation are, as an exception, not prohibited by the Law of Nations. Thus, self-preservation is a factor of great importance for the position of the States within the Family of Nations, and most writers maintain that every State has a fundamental right of self-preservation. But nothing of the kind is actually the case, if the real facts of the law are taken into consideration. If every State really had a right of self-preservation, all the States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. But such duty does not exist. On the contrary, although self-preservation is in certain cases an excuse recognised by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repulse them. It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. But they remain nevertheless violations and can therefore be repulsed. Self-preservation is consequently an excuse, because violations of other States are in certain exceptional cases not prohibited when they are committed for the purpose and in the interest of self-preservation, although they need not patiently be suffered and endured by the States concerned.

§ 130. It is frequently maintained that every violation is excused as long as it was caused by the motive of self-preservation, but it becomes more and more recognised that violations of other States in the interest of self-preservation are excused in cases of necessity only. Such acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defence, because otherwise the acting State would have to suffer or have to continue to suffer a violation against itself. If an imminent violation or the continuation of an already commenced violation can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified. When, to give an example, a State is informed that on neighbouring territory a body of armed men is being organised for the purpose of a raid into its own territory, and when the danger can be removed through an appeal to the authorities of the neighbouring country, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises and the threatened State is justified in invading the neighbouring country and disarming the intending raiders. The reason of the thing makes it, of course, necessary for every State to judge for itself when it considers a case of necessity has arisen, and it is therefore impossible to lay down a hard and fast rule regarding the question when and when not a State can take recourse to self-help which violates another State. Everything depends upon the circumstances and conditions of the special case.

Lassa Oppenheim, International Law: A Treatise. Vol. II: War *(Longmans, Green, and Co. 1905), §§ 50, 53 and 54 et seq.*

§ 50. Intervention as a means of settling international differences is only a special kind of intervention in general, which has already been discussed. It consists in the dictatorial interference of a third State in a difference between two States for the purpose of settling the difference in the way demanded by the intervening State. This dictatorial interference takes place for the purpose of exercising a compulsion upon one or both of the parties in conflict, and must be distinguished from such attitude of a State as makes it a party to the very conflict. If two States are in conflict and a third State joins one of them out of friendship or from any other motive, such third State does not exercise an intervention as a means of settling international differences, but it becomes a party to the conflict. If, for instance, an alliance exists between one of two States in conflict and a third, and if eventually, as

war has broken out in consequence of the conflict, such third State comes to the help of its ally, no intervention in the technical sense of the term takes place. A State intervening in a dispute between two other States does not become a party to their dispute, but is the author of a new imbroglio, because such third State dictatorially requests those other States to settle their difference in a way to which both, or at least one of them, objects. An intervention, for instance, takes place when, although two States in conflict have made up their minds to fight it out in war, a third State dictatorially requests them to settle their dispute through arbitration. Intervention, in the form of dictatorial interference, must, further, be distinguished from such efforts of a State as are directed to induce the States in conflict to settle their difference amicably by proffering its good offices or mediation, or by giving friendly advice. It is, therefore, incorrect when some jurists speak of good offices and the like as an "amicable" in contradistinction to a "hostile" intervention. . . .

§ 53. As within the boundaries of the modern State an armed contention between two or more citizens is illegal, public opinion has become convinced that armed contests between citizens are inconsistent with Municipal Law. Influenced by this fact, fanatics of international peace, as well as those innumerable individuals who cannot grasp the idea of a law between Sovereign States, frequently consider war and law inconsistent. They quote the fact that wars are frequently waged by States as a proof against the very existence of an International Law. It is not difficult to show the absurdity of this opinion. . . . As States are Sovereign, and as consequently no central authority can exist above them able to enforce compliance with its demands, war cannot always be avoided. International Law recognises this fact, but at the same time provides regulations with which the belligerents have to comply. Although with the outbreak of war all peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties. Thus war is not inconsistent with, but a condition regulated by, International Law. The latter cannot and does not object to the States which are in conflict waging war upon each other instead of peaceably settling their difference. But if they choose to go to war they have to comply with the rules laid down by International Law regarding the conduct of war and the relations between the belligerents and neutral States. That International Law, if it could forbid war altogether, would be a more perfect law than it is at present there is no doubt. Yet eternal peace is an impossibility in the conditions and circumstances under which mankind live and perhaps will have to live forever, although eternal peace is certainly an ideal of civilisation.

§ 54. War is the contention between two or more. States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases. War is a fact recognised, and with regard to many points regulated, but not established, by International Law. Those writers who define war as the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, forget that wars have often been waged by both parties for political reasons only; they confound a possible but not at all necessary cause of war with the conception of war. A State may be driven into war because it cannot otherwise get reparation for an international delinquency, and such State may then maintain that it exercises by the war nothing else than legally recognised self-help. But when States are driven into or deliberately wage war for political reasons, no legally recognised act of self-help is in such case performed by the war. And the same laws of war are valid, whether wars are waged on account of legal or of political differences.

[page 55f] Fanatics of international peace, as well as those innumerable individuals who cannot grasp the idea of a law between Sovereign States, frequently consider war and law inconsistent. They quote the fact that wars are frequently waged by States as a proof against the very existence of an International Law. It is not difficult to show the

absurdity of this opinion. . . . As States are Sovereign, and as consequently no central authority can exist above them able to enforce compliance with its demands, war cannot always be avoided. International Law recognises this fact, but at the same time provides regulations with which the belligerents have to comply.

III The Hague Peace Conferences

Parallel to this somewhat cynical approach towards the inherently war-prone nature of inter-state relations, the nineteenth century saw the emergence of peace societies in the spirit of Immanuel Kant's 1795 *Zum ewigen Frieden* [*On Perpetual Peace*]. The efforts of adherents to this strain of thought (criticized by Oppenheim in the earlier quote) culminated in the 1899 and 1907 Hague Peace Conferences. The first led to the establishment of the Permanent Court of Arbitration and the corresponding rules (Hague I), the Convention (II) with Respect to the Laws and Customs of War on Land and the annexed Regulations respecting the Laws and Customs of War on Land. The Hague Convention on the Pacific Settlement of International Disputes' preamble and its first article express the hopes of the peace movement as follows:

> [the signatory heads of states]
> Animated by a strong desire to concert for the maintenance of the general peace;
> Resolved to second by their best efforts the friendly settlement of international disputes;
> Recognizing the solidarity which unites the members of the society of civilized nations;
> Desirous of extending the empire of law, and of strengthening the appreciation of international justice;
> Convinced that the permanent institution of a Court of Arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result;
> . . .
> TITLE I. ON THE MAINTENANCE OF THE GENERAL PEACE
> ARTICLE 1
> With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

The second Hague Convention from 1899 preamble, then, was somewhat more reluctant and gave in to the prevailing thinking that war could not always be avoided as the signatory powers considered

> that, while seeking means to preserve peace and prevent armed conflicts among nations, it is likewise necessary to have regard to cases where an appeal to arms may be caused by events which their solicitude could not avert.

International law furthermore increasingly moved from a predominantly European affair to become truly universal during the late nineteenth century. Twenty-one more states participated in the Second Hague Conference than in the first. It took place against the backdrop of numerous wars and other violent incidents and an increased armament of states after 1899. States thus did not live up to the spirit of the conventions they had signed up to.

The Second Hague Conference saw the adoption of ten new conventions, among them the Convention (II) on the Limitation of Employment or Force for Recovery of Contract Debts

and the Convention (III) relative to the Opening of Hostilities. The latter was prompted by the Russo-Japanese war and obliged states to issue an explicit previous warning before commencing a war and to notify neutral powers.

The former was much more significant. As a reaction to the nineteenth-century "gunboat diplomacy" by European states and the US against weaker Latin American states, it was signed with the expressed desire to avoid

> between nations armed conflicts of a pecuniary origin arising from contract dents which are claimed from the Government of one country by the Government of another country as due to its nationals.

Its Article 1 thus outlawed armed force for this purpose as long as the debtor did not refuse co-operation with the creditor state. In this sense, it constitutes a significant step towards the treaty restriction of the sovereign right to wage wars.

ARTICLE 1

The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of other country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award.

IV The League of Nations and the inter-war period

The horrors of World War I shuttered the European/Western claim to moral and civilizational superiority.[7] The emphasis on the sovereign prerogative gave way to co-operation, universalism[8] and a first attempt to establish a legal mechanism on the resort to force. States were obliged to first submit a dispute possibly leading to war to arbitration, judicial settlement or enquiry by the League of Nation's Council. They could only commence a war three months after the decision or the Council report (the "cooling-off" period). In addition, Article 10 contained a mutual defense clause which was also understood as obliging the League of Nations members to respect each other's territorial integrity and political independence.[9]

The Covenant of the League of Nations, Articles 10–16

Article 10

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

Article 11

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.

In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

Article 12

The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

Article 13

The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

Article 15

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within 14 days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

Article 16

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their

number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

The 1928 Kellogg-Briand Pact

Many thought that the League of Nations did not go far enough. The mixture of strategic thinking and the idealism of a few statesmen and diplomats—first and foremost, the French foreign minister Aristide Briand, who had taken up the initiative—led to the first universal renunciation of war, the General Treaty for Renunciation of War as an Instrument of National Policy.[10] It was preceded by the 1925 Locarno treaties, which had already given France a security commitment by the United Kingdom in an attempt to secure a guarantee by the US as well. On 27 August 1928, it was signed and ratified by 15 states, a number that soon rose to 63, among them all members of the League of Nations. While this treaty did not prevent the outbreak of World War II, it was referred to in the Nuremberg judgment as a legal basis for the notion of "crimes against peace".[11]

General Treaty for Renunciation of War as an Instrument of National Policy

Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy. Signed at Paris, August 27, 1928; ratification advised by the Senate, January 16, 1929; ratified by the President, January 17, 1929; instruments of ratification deposited at Washington by the United States of America, Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, and Union of South Africa, March 2, 1929; by Poland, March 26, 1929; by Belgium, March 27 1929; by France, April 22, 1929; by Japan, July 24, 1929; proclaimed, July 24, 1929.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.
A PROCLAMATION.

WHEREAS a Treaty between the President of the United States Of America, the President of the German Reich, His Majesty the King of the Belgians, the President of the French Republic, His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Poland, and the President of the Czechoslovak Republic, providing for the renunciation of war as an instrument of national policy, was concluded and signed by their respective Plenipotentiaries at Paris on the twenty-seventh day of August, one thousand nine hundred and twenty-eight, the original of which Treaty, being in the English and the French languages, is word for word as follows:

> THE PRESIDENT OF THE GERMAN REICH, THE PRESIDENT OF THE UNITED STATES OF AMERICA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF

JAPAN, THE PRESIDENT OF THE REPUBLIC OF POLAND THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC,

Deeply sensible of their solemn duty to promote the welfare of mankind;

Persuaded that the time has, come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war a should be denied the benefits furnished by this Treaty;

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

Have decided to conclude a Treaty and for that purpose have appointed as their respective Plenipotentiaries:

THE PRESIDENT OF THE GERMAN REICH:
Dr. Gustav STRESEMANN, Minister of Foreign Affairs;
THE PRESIDENT OF THE UNITED STATES OF AMERICA:
The Honorable Frank B. KELLOGG, Secretary of State;
HIS MAJESTY THE KING OF THE BELGIANS:
Mr. Paul HYMANS, Minister for Foreign Affairs, Minister of State;
THE PRESIDENT OF THE FRENCH REPUBLIC:
Mr. Aristide BRIAND Minister for Foreign Affairs;
HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA:
For GREAT BRITAIN and NORTHERN IBELAND and all parts of the British Empire which are not separate Members of the League of Nations:
The Right Honourable Lord CUSHENDUN, Chancellor of the Duchy of Lancaster, Acting-Secretary of State for Foreign Affairs;
For the DOMINION OF CANADA:
The Right Honourable William Lyon MACKENZIE KING, Prime Minister and Minister for External Affairs;
For the COMMONWEALTH of AUSTRLIA:
The Honourable Alexander John McLACHLAN, Member of the Executive Federal Council;
For the DOMINION OF NEW ZEALAND:
The Honourable Sir Christopher James PARR High Commissioner for New Zealand in Great Britain;
For the UNION OF SOUTH AFRICA:
The Honourable Jacobus Stephanus SMIT, High Commissioner for the Union of South Africa in Great Britain;
For the IRISH FREE STATE:
Mr. William Thomas COSGRAVE, President of the Executive Council;

For INDIA:
The Right Honourable Lord CUSHENDUN, Chancellor of the Duchy of Lancaster, Acting Secretary of State for Foreign Affairs;
HIS MAJESTY THE KING OF ITALY:
Count Gaetano MANZONI, his Ambassador Extraordinary and Plenipotentiary at Paris.
HIS MAJESTY THE EMPEROR OF JAPAN:
Count UCHIDA, Privy Councillor;
THE PRESIDENT OF THE REPUBLIC OF POLAND:
Mr. A. ZALESKI, Minister for Foreign Affairs;
THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC:
Dr. Eduard BENES, Minister for Foreign Affairs;
who, having communicated to one another their full powers found in good and due form have agreed upon the following articles:

ARTICLE I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

ARTICLE II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

ARTICLE III

The present Treaty shall be ratified by the High Contracting Parties named in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as; between the Power thus adhering and the other Powers parties hereto.

It shall be the duty of the Government of the United States to furnish each Government named in the Preamble and every Government subsequently adhering to this Treaty with a certified copy of the Treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such Governments immediately upon the deposit with it of each instrument of ratification or adherence.

IN FAITH WHEREOF the respective Plenipotentiaries have signed this Treaty in the French and English languages both texts having equal force, and hereunto affix their seals.

DONE at Paris, the twenty-seventh day of August in the year one thousand nine hundred and twenty-eight.

FRANK B. KELLOGG
Secretary of State of the United States of America

AND WHEREAS it is stipulated in the said Treaty that it shall take effect as between the High Contracting Parties as soon as all the several instruments of ratification shall have been deposited at Washington;

AND WHEREAS the said Treaty has been duly ratified on the parts of all the High Contracting Parties and their several instruments of ratification have been deposited with the Government of the United States of America, the last on July 24, 1929;

NOW THEREFORE, be it known that I, Herbert Hoover, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the city of Washington this twenty-fourth day of July in the year of our Lord one thousand nine hundred and twenty-nine, and of the Independence of the United States of America the one hundred and fifty-fourth

HERBERT HOOVER
By the President:
HENRY L. STIMSON
Secretary of State
NOTE BY THE DEPARTMENT OF STATE
ADHERING COUNTRIES

When this Treaty became effective on July 24, 1929, the instruments of ratification of all the signatory powers having been deposited at Washington, the following countries, having deposited instruments of definitive adherence, became parties to it: Afghanistan, Albania, Austria, Bulgaria, China, Cuba, Denmark, Dominican Republic, Ethiopia, Egypt, Estonia, Finland, Guatemala, Hungary, Iceland, Kingdom of the Serbs, Croats and Slovenes, Latvia, Liberia, Lithuania, Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Rumania, Russia, Siam, Spain, Sweden, Turkey.

Additional adhesions deposited subsequent to July 24, 1929: Persia, July 2, 1929; Greece, August 3, 1929; Honduras, August 6, 1929; Chile, August 12, 1929; Luxemburg, August 14, 1929; Danzig, September 11, 1929; Costa Rica, October 1, 1929; Venezuela, October 24, 1929.

V The first decades of the UN Charter

The League of Nations is generally considered as a failure. It neither managed to resolve the Abyssinia crisis nor Japan's invasion in Manchuria, let alone the outbreak of the Second World War. The US had never joined it in the first place—ironically enough, Woodrow Wilson, who had been the driving force behind its establishment, lost support at home during his long absence in Europe and could thus not muster a majority in the US Congress[12]—while Germany and Japan had pulled out by the time the USSR finally acceded.

The international community nevertheless gave the thought of a universal political organization aiming at the preservation of international peace and security a second try. The core

weaknesses of the League of Nations—the separation of violations of the territorial integrity and political independence from its sanctions regime, the lack of an outright prohibition of the use of force, the exceptional power of the Council to make binding decisions or the requirement of anonymity—were addressed in the UN Charter.[13] It thus constituted yet another ambitious project to establish an organization resembling the federation of republics as envisaged by Immanuel Kant.[14]

Needless to say, the UN has faced countless challenges ever since its inception in 1945. The Cold War prevented the implementation of the agreement between the UN and its member states to provide the Security Council with its own permanent troops. The veto power largely blocked decision-making throughout its first 45 years.

Nevertheless, this period also saw the adoption of a number of fundamental documents, which will be reproduced in the next chapters. The General Assembly passed resolutions on the possibility of emergency sessions, the definition of *aggression*, and the contours of the prohibition to use force (the Friendly Relations Declaration). The 1975 Helsinki Accords still represent the fundaments of coexistence in Europe including Russia. The ICJ rendered what is still the most important decision on the *ius ad bellum* in the famous 1986 *Nicaragua* case.

VI From the "Liberal World Order" to great power politics

From 1989 onwards, the mood changed. In a "unipolar moment", the US suddenly became the sole superpower.[15] The nuclear sword of Damocles hung a bit lower than it used to. New hope was put on increased co-operation in the United Nations. Francis Fukuyama famously wondered whether the world was witnessing the end of history in the sense that the West had won the ideological battle between communism and liberal, market-based democracies. The 1993 World Conference on Human Rights emphasized that all human rights were "universal, indivisible and interdependent and interrelated".[16] Some scholars suggested the emergence or actual existence of an individual right to democracy.[17] Globalization shifted into the fifth gear with the establishment of the World Trade Organization in 1995.

At the same time, these and other observations must not deflect attention from the many challenges posed during this era. The former socialist states, including Russia as the continuator state of the USSR, faced tremendous difficulties in their economic and political transition process, the marks of which can be felt until this very day. Many governments, first and foremost in Africa, collapsed after they no longer received support in exchange for geopolitical solidarity with one of the two major powers. Ethnic conflicts were not confined to the world's poorest regions as they reached Europe during the dissolution of Yugoslavia and the Balkan wars. The UN went through its darkest hours when it failed to prevent the genocides in Rwanda and later in Srebrenica.

Over time, the dominant idea of a "liberal world order" associated with this era was gradually replaced with the comeback of realism.[18] In hindsight, the Kosovo intervention and the 2003 Iraq War marked the climax of Western dominance. The former prompted Russia's then-new president Vladimir Putin to appeal to Russia's pride and re-establish his country as a dominant actor on the international level. Its assertiveness in Syria and the annexation of Crimea have been cases in point. The decision to attack Iraq, then, has cost the US much of its legitimacy as it not only posed yet another fundamental challenge to

the idea of international co-operation and the Security Council's role as the main forum for international co-operation in matters of international peace and security but also marked a significant split within the West. Meanwhile, the economic and military rise of China has prompted observers and policymakers to wonder whether the Thucydides trap, according to which an established and an emerging global power almost inevitably end up in a conflict, will strike again. Adding the election of Donald Trump, who repeatedly rejected the thought of the US burden and its role as a global referee and policeman to the mix, the world seems to be headed towards European balance of power *Realpolitik*.

What do all these developments mean for the *ius ad bellum*? On the one hand, co-operation is not doomed to fail. Quite the contrary. While great powers demarcate their spheres of influence, the countless additional regional actors provide for a complex web of possible alliances. As such, the United Nations and the UN Charter are more important as points of orientation and minimum yardsticks than ever. To stay relevant, however, the UN's rules need to be constantly adapted to changed conflict scenarios: from the right to self-defense against non-state (terrorist) actors to hybrid warfare and cyberattacks. In the meantime, we can only hope that many of the doomsday scenarios circulating in West will turn out to be the mere result of what may be described as the *Lust am Untergang* (the human desire for demise).

Notes

1 David J. Bederman, *International Law in Antiquity* (Cambridge University Press 2004), Chapter 6. Rudimentary rules on warfare are probably as old as mankind; see Jared Diamond, *The World Until Yesterday: What We Can Learn from Traditional Societies* (Allen Lane 2012).
2 The following elaborations are loosely based on Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33/4 *The American Journal of International Law* 665.
3 See Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press 1999), Chapter 3.
4 Ben Holland, 'The Moral Person of the State: Emer de Vattel and the Foundations of International Legal Order' (2011) 37 *History of European Ideas* 438.
5 Philip Allott, 'The Emerging Universal Legal System' (2001) 3 *FORUM du Droit International* 12. See also Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (1820), § 333.
6 Agatha Verdebout, 'The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis' (2014) 1/2 *Journal on the Use of Force and International Law* 223.
7 Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004), 272.
8 Thomas D. Grant, 'Universality Versus Coherence: Membership, Participation and the Crisis of the League of Nations' (2015) 17 *International Community Law Review* 138.
9 James Brown Scott, 'Interpretation of Article X of the Covenant of the League of Nations' (1924) 18/1 *The American Journal of International Law* 108.
10 Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Allen Lane 2017).
11 International Military Tribunal (Nuremberg), 'Judgment and Sentences, 1 October 1946' (1947) 41/1 *The American Journal of International Law* 172, 216 *et seq.*
12 Stewart Patrick, *The Sovereignty Wars: Reconciling America with the World* (Brookings Institution 2018), 1 *et seq.*
13 Hans Kelsen, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals' (1945) 39/1 *The American Journal of International Law* 45.
14 Carl J. Friedrich, *Inevitable Peace* (Harvard University Press 1948), 33.
15 Charles Krauthammer, 'The Unipolar Moment' (1990) 70/1 *Foreign Affairs* 23.

16 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, www.ohchr.org/en/professionalinterest/pages/vienna.aspx.
17 Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86/1 *The American Journal of International Law* 46; Gregory H. Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539.
18 Walter Russell Mead, 'The Return of Geopolitics' (2014) 93/3 *Foreign Affairs* 69; G. John Ikenberry, 'The End of Liberal International Order?' (2018) 94/1 *International Affairs* 7.

2 The prohibition of the threat or use of force

I Introduction

A Article 2(4) UN Charter

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

Article 2(4) UN Charter sets out a general and universal prohibition of using—or threatening to use—force, the first obligation of this kind. It is binding on and protecting all UN member states. In addition, there is a parallel obligation in customary international law essentially covering all *states*.[1] The prohibition to use force is commonly considered as a peremptory norm (*ius cogens*)[2] and as an *erga omnes* obligation.[3]

The wording of Article 2(4) UN Charter needs to be interpreted in light of the experiences with the 1928 Kellogg-Briand Pact: states and writers occasionally tried to justify their actions as not amounting to war and therefore being in conformity with the general prohibition set out in its Article I.[4] For this reason alone, the reference to "war" has been purposely avoided and replaced with the more general and neutral term "force". Article 2(4) seeks to avoid any legal loopholes: its references to territorial integrity and political independence were included to re-enforce and not, as some proponents of a right to humanitarian intervention suggest, restrict its scope. Thomas M. Franck for example vividly described Article 2(4) as

> an idiot rule pertaining to the use of force. It says, in substance, that states may not initiate the use of armed force against another state. They must exercise restraint, responding only after an actual armed attack on them. This rule, on its face, seems to enjoy a high level of determinacy. And in most instances of conflict, the rule also makes sense. It is fair to a global population concerned about survival of the species. It rests on a simple question of fact: Who struck first?[5]

The question whether article 2(4) requires a minimum level of gravity remains disputed.[6] In any case, non-military actions such as deliberately manipulating the environment so as to harm other states (e.g. spreading fire or deliberately causing an avalanche across a frontier) may only be considered as force in exceptional circumstances.[7] In similar fashion, the prohibition to use of force arguably also extends to so-called cyberattacks reaching a threshold comparable to that caused by military force, e.g. if it leads to a major blackout in a highly populated city.[8]

Article 2(4) applies both to direct and indirect force. Direct force covers all instances where a state—i.e. its organs, usually its armed forces, but also all other groups attributable to it such as paramilitaries or mercenaries embedded in its military apparatus—uses force against one or several other states.

Indirect force, then, refers to military and logistical support, first and foremost arms deliveries, training, or sharing information, to armed groups—be they already present or sent—fighting against governments abroad regardless of whether their actions can be attributed to the supporting state. That being said, it remains unclear which and how many acts are required to bring article 2(4) into play. Indicators can be found in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, commonly known as the Friendly Relations Declaration from 1970. This General Assembly Resolution has been adopted against the historical backdrop of the wars by colonized peoples—or, more precisely, groups fighting in their name—for independence and the proxy wars between the Soviet Union and the United States where both sides supported different domestic actors while avoiding direct military confrontations between each other. As such, it remains one of the key documents on the prohibition of the use or threat of force.

B The Friendly Relations Declaration

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations

The General Assembly, Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which met in Geneva from 31 March to 1 May 1970,

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of Friendly relations and Co-operation among States,

Deeply convinced that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

Considering the desirability of the wide dissemination of the text of the Declaration,

1 Approves the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;

2 Expresses its appreciation to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;

3 Recommends that all efforts be made so that the Declaration becomes generally known. *1883rd plenary meeting, 24 October 1970*

Annex

DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS PREAMBLE

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and cooperation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and cooperation among States and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

Considering that the progressive development and codification of the following principles:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,
(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,
(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,
(d) The duty of States to co-operate with one another in accordance with the Charter,
(e) The principle of equal rights and self-determination of peoples,
(f) The principle of sovereign equality of States,
(g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations, Having considered the principles of international law relating to friendly relations and co-operation among States,

1. Solemnly proclaims the following principles:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues. A war of aggression constitutes a crime against the peace, for which there is responsibility under international law. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression. Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another

State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force. Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence. Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter regime and valid under international law; or
(b) The powers of the Security Council under the Charter. All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States. All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered. States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute. The parties to a dispute have the

duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them. States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the Situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations. International disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as reflecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(a) States shall co-operate with other States in the maintenance of international peace and security;
(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries. The principle of equal rights and self-determination of peoples By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter. Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter. The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter. The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles. Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the

whole people belonging to the territory without distinction as to race, creed or colour. Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country. The principle of sovereign equality of States All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are judicially equal;
(b) Each State enjoys the rights inherent in full sovereignty;
(c) Each State has the duty to respect the personality of other States;
(d) The territorial integrity and political independence of the State are inviolable;
(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States. The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter: Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations. Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law. Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law. Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

General part 2

Declares that: In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles. Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration;

3. Declares further that: The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

C The Helsinki Final Act

The second main document on the prohibition to use force is the 1975 Helsinki Final Act, also known as Helsinki Accords or Helsinki Declaration. This document was adopted by the Conference on Security and Co-operation in Europe established in the wake of the 1968 Soviet invasion of Czechoslovakia to quash the so-called Prague spring. Fearful of a further extension of the Soviet Union's sphere of influence in Europe and possibly a wider conflict, all European states including the members of the Warsaw Pact (except for then-isolated Albania), Canada, and the US decided to negotiate on general principles of international relations including human rights.

The Final Act of the Conference on Security and Cooperation in Europe, 1 August 1975, 14 ILM 1292 (Helsinki Declaration)

The Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973 and continued at Geneva from 18 September 1973 to 21 July 1975, was concluded at Helsinki on 1 August 1975 by the High Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia.

During the opening and closing stages of the Conference the participants were addressed by the Secretary-General of the United Nations as their guest of honour. The Director-General of UNESCO and the Executive Secretary of the United Nations Economic Commission for Europe addressed the Conference during its second stage.

During the meetings of the second stage of the Conference, contributions were received, and statements heard, from the following non-participating Mediterranean States on various agenda items: the Democratic and Popular Republic of Algeria, the Arab Republic of Egypt, Israel, the Kingdom of Morocco, the Syrian Arab Republic, Tunisia.

Motivated by the political will, in the interest of peoples, to improve and intensify their relations and to contribute in Europe to peace, security, justice and cooperation as well as to rapprochement among themselves and with the other States of the world,

Determined, in consequence, to give full effect to the results of the Conference and to assure, among their States and throughout Europe, the benefits deriving from those results and thus to broaden, deepen and make continuing and lasting the process of détente,

The High Representatives of the participating States have solemnly adopted the following:

QUESTIONS RELATING TO SECURITY IN EUROPE

The States participating in the Conference on Security and Co-operation in Europe,

Reaffirming their objective of promoting better relations among themselves and ensuring conditions in which their people can live in true and lasting peace free from any threat to or attempt against their security;

Convinced of the need to exert efforts to make détente both a continuing and an increasingly viable and comprehensive process, universal in scope, and that the implementation of the results of the Conference on Security and Cooperation in Europe will be a major contribution to this process;

Considering that solidarity among peoples, as well as the common purpose of the participating States in achieving the aims as set forth by the Conference on Security and Cooperation in Europe, should lead to the development of better and closer relations among them in all fields and thus to overcoming the confrontation stemming from the character of their past relations, and to better mutual understanding;

Mindful of their common history and recognizing that the existence of elements common to their traditions and values can assist them in developing their relations, and desiring to search, fully taking into account the individuality and diversity of their positions and views, for possibilities of joining their efforts with a view to overcoming

distrust and increasing confidence, solving the problems that separate them and cooperating in the interest of mankind;

Recognizing the indivisibility of security in Europe as well as their common interest in the development of cooperation throughout Europe and among selves and expressing their intention to pursue efforts accordingly;

Recognizing the close link between peace and security in Europe and in the world as a whole and conscious of the need for each of them to make its contribution to the strengthening of world peace and security and to the promotion of fundamental rights, economic and social progress and well-being for all peoples;

Have adopted the following:

1

(a) Declaration on Principles Guiding Relations between Participating States
The participating States,

Reaffirming their commitment to peace, security and justice and the continuing development of friendly relations and co-operation;

Recognizing that this commitment, which reflects the interest and aspirations of peoples, constitutes for each participating State a present and future responsibility, heightened by experience of the past;

Reaffirming, in conformity with their membership in the United Nations and in accordance with the purposes and principles of the United Nations, their full and active support for the United Nations and for the enhancement of its role and effectiveness in strengthening international peace, security and justice, and in promoting the solution of international problems, as well as the development of friendly relations and cooperation among States;

Expressing their common adherence to the principles which are set forth below and are in conformity with the Charter of the United Nations, as well as their common will to act, in the application of these principles, in conformity with the purposes and principles of the Charter of the United Nations;

Declare their determination to respect and put into practice, each of them in its relations with all other participating States, irrespective of their political, economic or social systems as well as of their size, geographical location or level of economic development, the following principles, which all are of primary significance, guiding their mutual relations:

I SOVEREIGN EQUALITY, RESPECT FOR THE RIGHTS INHERENT IN SOVEREIGNTY

The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.

Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its

relations with other States in accordance with international law and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement. They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality.

II REFRAINING FROM THE THREAT OR USE OF FORCE

The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.

Accordingly, the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State.

Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights.

Likewise they will also refrain in their mutual relations from any act of reprisal by force.

No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them.

III INVIOLABILITY OF FRONTIERS

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

IV TERRITORIAL INTEGRITY OF STATES

The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.

The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.

V PEACEFUL SETTLEMENT OF DISPUTES

The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.

They will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law.

For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.

In the event of failure to reach a solution by any of the above peaceful means, the parties to a dispute will continue to seek a mutually agreed way to settle the dispute peacefully.

Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult.

VI NON-INTERVENTION IN INTERNAL AFFAIRS

The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.

They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.

VII RESPECT FOR HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE FREEDOM OF THOUGHT, CONSCIENCE, RELIGION OR BELIEF

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

They will constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in co-operation with the United Nations, to promote universal and effective respect for them.

They confirm the right of the individual to know and act upon his rights and duties in this field.

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.

VIII EQUAL RIGHTS AND SELF-DETERMINATION OF PEOPLES

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.

IX CO-OPERATION AMONG STATES

The participating States will develop their co-operation with one another and with all States in all fields in accordance with the purposes and principles of the Charter of the United Nations. In developing their co-operation the participating States will place special emphasis on the fields as set forth within the framework of the Conference on Security and Co-operation in Europe, with each of them making its contribution in conditions of full equality.

They will endeavour, in developing their co-operation as equals, to promote mutual understanding and confidence, friendly and good-neighbourly relations among themselves, international peace, security and justice. They will equally endeavour, in developing their cooperation, to improve the well-being of peoples and contribute to the fulfilment of their aspirations through, inter alia, the benefits resulting from increased mutual knowledge and from progress and achievement in the economic, scientific, technological, social, cultural and humanitarian fields. They will take steps to promote conditions favourable to making these benefits available to all; they will take into account the interest of all in the narrowing of differences in the levels of economic development, and in particular the interest of developing countries throughout the world.

They confirm that governments, institutions, organizations and persons have a relevant and positive role to play in contributing toward the achievement of these aims of their cooperation.

They will strive, in increasing their cooperation as set forth above, to develop closer relations among themselves on an improved and more enduring basis for the benefit of peoples.

X FULFILMENT IN GOOD FAITH OF OBLIGATIONS UNDER INTERNATIONAL LAW

The participating States will fulfil in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties.

In exercising their sovereign rights, including the right to determine their laws and regulations, they will conform with their legal obligations under international law; they will furthermore pay due regard to and implement the provisions in the Final Act of the Conference on Security and Cooperation in Europe.

The participating States confirm that in the event of a conflict between the obligations of the members of the United Nations under the Charter of the United Nations and their obligations under any treaty or other international agreement, their obligations under the Charter will prevail, in accordance with Article 103 of the Charter of the United Nations.

All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.

The participating States express their determination fully to respect and apply these principles, as set forth in the present Declaration, in all aspects, to their mutual relations and cooperation in order to ensure to each participating State the benefits resulting from the respect and application of these principles by all.

The participating States, paying due regard to the principles above and, in particular, to the first sentence of the tenth principle, "Fulfilment in good faith of obligations under international law", note that the present Declaration does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements.

The participating States express the conviction that respect for these principles will encourage the development of normal and friendly relations and the progress of co-operation among them in all fields. They also express the conviction that respect for these principles will encourage the development of political contacts among them which in time would contribute to better mutual understanding of their positions and views.

The participating States declare their intention to conduct their relations with all other States in the spirit of the principles contained in the present Declaration.

(b) **Matters related to giving effect to certain of the above Principles**

(i) **The participating States,**

Reaffirming that they will respect and give effect to refraining from the threat or use of force and convinced of the necessity to make it an effective norm of international life,

Declare that they are resolved to respect and carry out, in their relations with one another, inter alia, the following provisions which are in conformity with the Declaration on Principles Guiding Relations between Participating States:

- To give effect and expression, by all the ways and forms which they consider appropriate, to the duty to refrain from the threat or use of force in their relations with one another.
- To refrain from any use of armed forces inconsistent with the purposes and principles of the Charter of the United Nations and the provisions of

the Declaration on Principles Guiding Relations between Participating States, against another participating State, in particular from invasion of or attack on its territory.
- To refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights.
- To refrain from any act of economic coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.
- To take effective measures which by their scope and by their nature constitute steps towards the ultimate achievement of general and complete disarmament under strict and effective international control.
- To promote, by all means which each of them considers appropriate, a climate of confidence and respect among peoples consonant with their duty to refrain from propaganda for wars of aggression or for any threat or use of force inconsistent with the purposes of the United Nations and with the Declaration on Principles Guiding Relations between Participating States, against another participating State.
- To make every effort to settle exclusively by peaceful means any dispute between them, the continuance of which is likely to endanger the maintenance of international peace and security in Europe, and to seek, first of all, a solution through the peaceful means set forth in Article 33 of the United Nations Charter.
- To refrain from any action which could hinder the peaceful settlement of disputes between the participating States.

II Case law and Advisory Opinions

The International Court of Justice and other courts have further shaped the content of the prohibition on using force. The single most important decision in this regard was rendered on the US involvement in the Nicaraguan Contra War during the 1980s. The ICJ dealt with the use of force in a number of subsequent cases, ranging from the *Oil Platforms* case between the US and Iran to the proceedings between Serbia and Montenegro and the various NATO states after the Kosovo intervention (where no judgment was rendered due to a lack of jurisdiction) and the *Armed Activities* cases relating to the Second Congo War. Its advisory opinions on the legality of the use or the threat of use of nuclear weapons and Israel's construction of a wall are also highly relevant here.

A The Nicaragua *case*

The *Nicaragua* case goes back to the late Cold War era and US efforts not only to thwart a potential spread of communism in Latin America—the "domino theory" but also to pursue an active strategy of "rollback".[9] After the socialist Sandinistas' 1979 overthrow of Nicaragua's dictator Anastasio Somoza Debayle, a long-standing US ally (his family had ruled the country from 1934 onwards), the US intervened by laying mines and supporting the so-called Contras, a domestic rebel group vying for power. Nicaragua took the case to the ICJ, accusing the US of violations of Nicaragua's airspace and territorial waters while its "intelligence organizations" had "conducted armed actions against Nicaraguan ports,

airfields, fuel storage facilities and other targets, using United States personnel and hired saboteurs of Latin American nationalities" and accompanied mercenaries on their incursions on Nicaragua's territory.[10] For procedural reasons concerning the admissibility of the case, the court outlined the status of the prohibition of the use of force as a norm of customary international law.

As such, in its famous judgment from 27 June 1986, the ICJ held that

- the Contras could not be attributed to the US due to a lack of effective control (paras 109–115) while the US nevertheless had encouraged their violations of international humanitarian law (para. 256),
- the US's mining of Nicaraguan ports constituted (direct) force (paras 213–215 and 227),
- mere financial support for a non-state armed group amounted to a violation not of the prohibition on the use of force but of the non-intervention principle (para. 228),
- arms deliveries and training amounted to unlawful force (paras 228 and 238).

In addition, the Court also went to great lengths to deal with other legal aspects ranging from sovereignty in general, the right to self-defense (since the US tried to justify its actions as exercises of collective self-defense on behalf of El Salvador, Honduras and Costa Rica) and humanitarian intervention to intervention by invitation.[11]

*Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment, ICJ Reports 1986, p. 14, paras 34, 106–115, 175–190, 202–209, 228, 239–243*

34. There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter. . . .

106. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, it is in the Court's view established that the support of the United States authorities for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the United States.

107. To sum up, despite the secrecy which surrounded it, at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support. Indeed, they clearly take responsibility for it, this government aid having now become the major element of United States foreign policy in the region. As to the ways in which such financial support has been translated into practical assistance, the Court has been able to reach a general finding.

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State "created" the contra force in Nicaragua. It seems certain that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis the régime of the Applicant. Nor does the evidence warrant a finding that the United States gave "direct and critical combat support", at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all contra operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

109. What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee, in the Report referred to in paragraph 95 above, was that the contras "constitute[d] an independent force" and that the "only element of control that could be exercised by the United States" was "cessation of aid". Paradoxically this assessment serves to underline, a contrario, the potential for control inherent in the degree of the contras' dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of "humanitarian assistance" as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua's own case, and according to press reports, contra activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand. it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is a fortiori unable to determine that the contra force may be equated for legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras.

111. In the view of the Court it is established that the contra force has, at least at one period. been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless,

adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above. is inherent in the position in which the contra force finds itself in relation to that Government.

112. To show the existence of this control, the Applicant argued before the Court that the political leaders of the contra force had been selected, installed and paid by the United States; it also argued that the purpose herein was both to guarantee United States control over this force. and to excite sympathy for the Government's policy within Congress and among the public in the United States. According to the affidavit of Mr. Chamorro. who was directly concerned, when the FDN was formed "the name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA"; later the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the contra force is merely one aspect among others of the degree of dependency of that force. This partial dependency on the United States authorities, the exact extent of which the Court cannot establish, may certainly be inferred inter alia from the fact that the leaders were selected by the United States. But it may also be inferred from other factors, some of which have been examined by the Court, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.

113. The question of the degree of control of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has. it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes "the spreading of terror and danger to non-combatants as an end in itself with no attempt to observe humanitarian standards and no reference to the concept of military necessity". In support of this, Nicaragua has catalogued numerous incidents, attributed to "CIA-trained mercenaries" or "mercenary forces", of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrion annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide "direct proof of the tactics adopted by the contras under United States guidance and control", the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit, of assassinations in Nicaraguan villages; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the New York Times on 21 October 1984, disclosing that the contras were carrying out assassinations; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

114. In this respect, the Court notes that according to Nicaragua, the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, "stricto sensu, the military and paramilitary attacks launched by the United States

against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States". If such a finding of the imputability of the acts of the contras to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the contras to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. . . .

175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. 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, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence,

is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed. customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question "were . . . regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (ICJ Reports 1969, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.

178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty. For example, if a State exercises its right to terminate or suspend the operation of a treaty on the ground of the violation by the other party of a "provision essential to the accomplishment of the object or purpose of the treaty" (in the words of Art. 60, para. 3 (b), of the Vienna Convention on the Law of Treaties), it is exempted, vis-à-vis the other State. from a rule of treaty-law because of the breach by that other State of a different rule of treaty-law. But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule. Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules. The present dispute illustrates this point.

179. It will therefore be clear that 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. Consequently, in ascertaining the content of the customary

international law applicable to the present dispute, the Court must satisfy itself that the Parties are bound by the customary rules in question; but the Court is in no way bound to uphold these rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying in the present dispute.

180. The United States however presented a further argument, during the proceedings devoted to the question of jurisdiction and admissibility, in support of its contention that the multilateral treaty reservation debars the Court from considering the Nicaraguan claims based on customary international law. The United States observed that the multilateral treaties in question contain legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue, because of the principle of pacta sunt servanda. Accordingly, in the contention of the United States, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties have agreed to conduct themselves in their actual international relations.

181. The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise, and not "susceptible of any compliance or execution whatever" (Northern Cameroons, ICJ Reports 1963, p. 37). The Court does not consider that this is the case. As already noted, on the question of the use of force, the United States itself argues for a complete identity of the relevant rules of customary international law with the provisions of the Charter. The Court has not accepted this extreme contention, having found that on a number of points the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content (paragraph 174 above). However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters.

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and opinion juris of States; as the Court recently observed,

> It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though

> multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.
>
> (Continental Shelf (Libyan Arab Jamahiriya/ Malta), ICJ Reports 1985, pp. 29–30, para. 27)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, inter alia, international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element"—the expression used by the Court in its 1969 Judgment in the North Sea Continental Shelf cases (ICJ Reports 1969, p. 44)—that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use

of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and admissibility the United States asserts that "Article 2 (4) of the Charter is customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that "the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (ILC Yearbook, 1966, Vol. II, p. 247). The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that "indeed it is generally considered by publicists that Article 2. paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law". And the United States concludes:

> In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force are 'modern customary law' (International Law Commission, loc. cit.) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, loc. cit.). There is no other 'customary and general international law' on which Nicaragua can rest its claims.

"It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law—Article 2 (4) of the United Nations Charter". As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that

> In certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule.

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an opinio juris as to the binding character of such abstention. This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an opinio juris respecting such rule (or set of rules), to be thenceforth treated separately

from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of opinion juris can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933). Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, as well as in their international relations in general," (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an opinio juris of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Yearbook, 1966–II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as jus cogens". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of jus cogens". . . .

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (ICJ Reports 1949, p. 35), and international law requires political integrity also to be respected. Expressions of an opinio juris regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the Corfu Channel case, when a State claimed a right of intervention in order to secure evidence

in the territory of another State for submission to an international tribunal (ICJ Reports 1949, p. 34), the Court observed that:

> The alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.
>
> (ICJ Reports 1949, p. 35)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 213 1 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (Official Records of the General Assembly, Twentieth Session, First Committee, A/C.1/SR 1423, p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to "interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations"; or the ratification by the United States of the Additional Protocol relative to Non-Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES.78 and AG/RES. 128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions: first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem—that of the content of the principle of non-intervention—the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty. to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which

must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191). General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

> Evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief. i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*
>
> (ICJ Reports 1969, p. 44, para. 77)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in

such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations. . . .

228. Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in "recruiting, training, arming, equipping, financing, supplying and otherwise encouraging. supporting, aiding, and directing military and paramilitary actions in and against Nicaragua" (Application, para. 26 (a) and (c)). So far as the claim concerns breach of the Charter, it is excluded from the Court's jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force. the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua, by "organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State". and "participating in acts of civil strife . . . in another State", in the terms of General Assembly Resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force. . . .

239. The Court comes now to the application in this case of the principle of non-intervention in the internal affairs of States. It is argued by Nicaragua that the "military and paramilitary activities aimed at the government and people of Nicaragua" have two purposes:

(a) The actual overthrow of the existing lawful government of Nicaragua and its replacement by a government acceptable to the United States; and
(b) The substantial damaging of the economy, and the weakening of the political system, in order to coerce the government of Nicaragua into the acceptance of United States policies and political demands. Nicaragua also contends that the various acts of an economic nature, summarized in paragraphs 123 to 125 above, constitute a form of "indirect" intervention in Nicaragua's internal affairs.

240. Nicaragua has laid much emphasis on the intentions it attributes to the Government of the United States in giving aid and support to the contras. It contends that the purpose of the policy of the United States and its actions against Nicaragua in pursuance of this policy was. from the beginning, to overthrow the Government of Nicaragua. In order to demonstrate this, it has drawn attention to numerous statements by high officials of the

United States Government, in particular by President Reagan, expressing solidarity and support for the contras, described on occasion as "freedom fighters", and indicating that support for the contras would continue until the Nicaraguan Government took certain action, desired by the United States Government. amounting in effect to a surrender to the demands of the latter Government. The official Report of the President of the United States to Congress of 10 April 1985, quoted in paragraph 96 above, states that: "We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government". But it indicates also quite openly that "United States policy toward Nicaragua"—which includes the support for the military and paramilitary activities of the contras which it was the purpose of the Report to continue—"has consistently sought to achieve changes in Nicaraguan government policy and behavior".

241. The Court however does not consider it necessary to seek to establish whether the intention of the United States to secure a change of governmental policies in Nicaragua went so far as to be equated with an endeavour to overthrow the Nicaraguan Government. It appears to the Court to be clearly established first, that the United States intended, by its support of the contras, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely (see paragraph 205 above); and secondly that the intention of the contras themselves was to overthrow the present Government of Nicaragua. The 1983 Report of the Intelligence Committee refers to the contras' "openly acknowledged goal of overthrowing the Sandinistas". Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the contras was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the "Nicaraguan Democratic Force", intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua. The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far reaching. It is for this reason that the Court has only examined the intentions of the United States Government so far as they bear on the question of self-defence.

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the contras in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the contras to "humanitarian assistance" (paragraph 97 above). There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

> The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours—in its international and national capacity—to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.

And that

> "It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress".

243. The United States legislation which limited aid to the contras to humanitarian assistance however also defined what was meant by such assistance, namely:

> "the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death" (paragraph 97 above).

It is also to be noted that. while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be "shared" with the contras. Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the contras, it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being"; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.

*B Armed Activities on the Territory of the Congo (***Democratic Republic of the Congo v Uganda***) paras 148f, 151–153, 160–165*

The Court repeatedly referred to its findings in the *Nicaragua* case in subsequent decisions on matters relating to the use of force.[12] Among these, its judgment on the prohibition of the use of force in the 2005 Armed Activities on the Territory of the Congo case stands out. The Democratic Republic of Congo accused Burundi, Rwanda and Uganda of "acts of armed aggression committed . . . in flagrant breach of the United Nations Charter and of the Charter of the Organization of African Unity" during the Second Congo from 1998 to 2003. Originally, the Democratic Republic of Congo and Uganda had agreed "co-operate in order to insure security and peace along the common border". Yet this consent was neither temporally nor geographically unlimited and the Court thus had to deal with the question whether Uganda's subsequent actions constituted a violation of Article 2(4) UN Charter. Similar to the *Nicaragua* case, it also ruled on the Uganda's support for a non-state armed group, the Movement for the Liberation of the Congo (*Mouvement de Libération du Congo*, commonly abbreviated as MLC) and its leader Jean-Pierre Bemba, later charged and acquitted by the International Criminal Court.[13]

*Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*), Judgment of 19 December 2005, ICJ Reports 2005, p. 168*

FINDINGS OF LAW ON THE PROHIBITION AGAINST THE USE OF FORCE

148. The prohibition against the use of force is a cornerstone of the United Nations Charter. . . .

149. The Court has found that, from 7 August 1998 onwards, Uganda engaged in the use of force for purposes and in locations for which it had no consent whatever. The Court has also found that the events attested to by Uganda did not justify recourse to the use of force in self-defence. . . .

151. The Court recalls that on 9 April 1999 the Security Council determined the conflict to constitute a threat to peace, security and stability in the region. In demanding an end to hostilities and a political solution to the conflict (which call was to lead to the Lusaka Agreement of 10 July 1999), the Security Council deplored the continued fighting and presence of foreign forces in the DRC and called for the States concerned "to bring to an end the presence of these uninvited forces" (United Nations doc. S/RES/1234, 9 April 1999).

152. The United Nations has throughout this long series of carefully balanced resolutions and detailed reports recognized that all States in the region must bear their responsibility for finding a solution that would bring peace and stability. The Court notes, however, that this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda.

153. The evidence has shown that the UPDF [Uganda Peoples' Defence Force, Uganda's armed forces] traversed vast areas of the DRC, violating the sovereignty of that country. It engaged in military operations in a multitude of locations, including Bunia, Kisangani, Gbadolite and Ituri, and many others. These were grave violations of Article 2, paragraph 4, of the Charter.

160. The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of "an organ" of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC's conduct was "on the instructions of, or under the direction or control of" Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 62–65, paras 109–115).

161. The Court would comment, however, that, even if the evidence does not suggest that the MLC's conduct is attributable to Uganda, the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law.

162. Thus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter "the Declaration on Friendly Relations") provides that:

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.
>
> (General Assembly resolution 2625 (XXV), 24 October 1970)

The Declaration further provides that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State" (ibid.).

These provisions are declaratory of customary international law.

163. The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.

164. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court made it clear that the principle of non-intervention prohibits a State "to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State" (ICJ Reports 1986, p. 108, para. 206). The Court notes that in the present case it has been presented with probative evidence as to military intervention. The Court further affirms that acts which breach the principle of non-intervention "will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations" (ibid., pp. 109–110, para. 209).

165. In relation to the first of the DRC's final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.

C The Nuclear Weapons *Advisory Opinion, paras 34–39, 47f, 98–104*

Apart from direct military confrontations, the world has long feared the possibility of nuclear war and what came to be known as "mutually assured destruction" (MAD), i.e. a situation in which two or more nuclear powers annihilate each other (and countless other, uninvolved states, possibly the whole world). The 1968 Non-Proliferation Treaty (NPT) preamble accordingly considered "the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples" and the "belief that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war".

Almost 30 years later, these fears had not fully disappeared, and the General Assembly explicitly referred to the UN Charter when requesting an advisory opinion on the question whether "the threat or use of nuclear weapons [is] in any circumstance permitted under international law".[14] The ICJ assessed the question in terms of both the *ius ad bellum* and the *ius in bello*, along with environmental law and human rights law.

The advisory opinion leaves many questions unanswered. On the one hand, the Court highlighted the devastating impact of nuclear weapons and concluded that the use of nuclear weapons violates fundamental principles of environmental law, human rights law and both "intransgressible"—a term that is now generally understood as implying *ius cogens*[15]—principles of international humanitarian law, i.e. the principle of distinction between civilians and combatants and civilian and military objects and the avoidance of unnecessary suffering.

On the other hand, it could not rule out the legality of using nuclear weapons under extreme circumstances (the passages on the right to self-defense are quoted in Chapter 4, subsections II.B. and III.A.).[16]

In this regard, the Court furthermore emphasized that the obligation to negotiate on disarmament enshrined in Article VI of the NPT was not an obligation of conduct but an obligation of result and that the mere possession of nuclear weapons does not constitute an unlawful threat of force.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226

34. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seised, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

35. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons. The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area.

Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come. . . .

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and use of force. In Article 2, paragraph 4, the threat or use of force against the territorial integrity or political independence of another State or in any other manner inconsistent with the purposes of the United Nations is prohibited. . . .

This prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VI1 of the Charter.

39. These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is

already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter. . . .

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signaled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State—whether or not it defended the policy of deterrence—suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

48. Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter. . . .

98. Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context. In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non Proliferation of Nuclear Weapons, or,

in other words, the vast majority of the international community. Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the Co-operation of all States.

101. Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, "the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction". In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded

> That a further effort should be made to reach agreement on comprehensive and Co-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . . (b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.

The same conviction has been expressed outside the United Nations context in various instruments.

102. The obligation expressed in Article VI of the Treaty on the Non Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". Nor has the Court omitted to draw attention to it, as follows:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international Co-operation, in particular in an age when this Co-operation in many fields is becoming increasingly essential.
>
> (*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46)

103. In its resolution 984 (1995) dated 11 April 1995, the Security Council took care to reaffirm "the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations" and urged

> All States, as provided for in Article VI of the Treaty on the Non Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal.

The importance of fulfilling the obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995. In the view of the Court, it remains

without any doubt an objective of vital importance to the whole of the international community today.

104. At the end of the present Opinion, the Court emphasizes that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all their importance.

D The Wall *Advisory Opinion (2003), paras 86f*

Terrorist activities can also fall within the scope of the *ius ad bellum*. As a reaction to numerous terrorist attacks planned in and emanating from the West Bank, Israel constructed a wall to prevent illicit border crossings. Due to the wall's geographical location and its economic, political and cultural impact on the daily life of Palestinians individually and as a whole, the General Assembly requested an advisory opinion on the "legal consequences from the construction of the wall . . . considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions".[17] When dealing with Israel's status as an occupying power in the West Bank and the applicability of the fourth Geneva Convention, the Court *inter alia* emphasized that forcible territorial acquisitions (annexations) were unlawful. In sum, it concluded that Israel could not rely on the right to self-defense (see Chapter 2, subsection V.A.) as a justification for the wall's effect of violating the Palestinians' right to self-determination.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (hereinafter "resolution 2625 (XXV)"), in which it emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal". As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see I.C.J. Reports 1986, pp. 98–101, paras 187–190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

Notes

1 So-called fragile or failed states and de facto regimes, i.e. entities arguably fulfilling the criteria of statehood—peoples, territory, and a sovereign government—for a certain duration without being internationally recognized, are thus also protected. Non-state armed groups are excluded even if they exercise territorial control. Civil wars are thus neither allowed nor prohibited under international law.

2 See the *Yearbook of the International Law Commission 1966. Volume II*, 247: "The Commission pointed out that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens"; *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi, 13 April 2006, A/CN.4/L.682, para. 374; Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, 31 January 2019, UN Doc A/CN.4/727, 24–30 (as the latter two reports show, however, aggression and the prohibition to use force are not strictly separate since both refer to the "aggressive use of force"). But *cf* James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) *Michigan Journal of International Law* 215. Furthermore, the prohibition of threatening to use force is not considered *ius cogens*; see Michael Wood, 'Use of Force, Prohibition of Threat' *Max Planck Encyclopedia of Public International Law* (June 2013), para. 12.

3 See the ICJ's famous finding in the Case Concerning the Barcelona Traction, Light and Power Company, Limited *(Belgium v Spain)* (Second Phase), ICJ Reports 1970, para. 34: "[erga omnes obligations] derive, for example, in contemporary international law, from the outlawing of acts of aggression". In addition, one should not forget that all *ius cogens* norms also constitute *erga omnes* obligations; see e.g. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (n 1), para. 38.

4 See e.g. Philip Marshall Brown, 'Japanese Interpretation of the Kellogg Pact' (1933) 27/1 *The American Journal of International Law* 100.

5 Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990), 75f.

6 Against such a *de minimis* requirement: Tom Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108/2 *The American Journal of International Law* 159. In favour: Olivier Corten, *The Law Against War* (Hart Publishing 2012), Chapter 2.

7 Albrecht Randelzhofer and Oliver Dörr, "Article 2(4)" in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary: Volume I* (3rd edn, Oxford University Press 2012), 200, 210.

8 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press 2017), 328 *et seq*. But *cf* Dan Efrony and Yuval Shany, 'A Rule Book on the Shelf? Talinn Manual 2.0 on Cyberoperations and Subsequent State Practice' (2018) 112/4 *The American Journal of International Law* 583.

9 See William M. Leogrande, 'Rollback or Containment? The United States, Nicaragua, and the Search for Peace in Central America' (1986) 11/2 *International Security* 89. See also Henry Kissinger, *Diplomacy* (Simon & Schuster 1994), 774, 787, or Jeane J. Kirkpatrick and Allan Gerson, 'The Reagan Doctrine, Human Rights, and International Law' in Louis Henkin, Stanley Hoffmann, Jean J. Kirkpatrick, Allan Gerson, William D. Rogers, and David J. Scheffer (eds), *Right v Might. International Law and the Use of Force* (Council on Foreign Relations Press, New York 1991), 19, 31.

10 International Court of Justice, Pleadings, Oral Arguments, Documents, Case Concerning Military and Paramilitary Activities in and Against Nicaragua *(Nicaragua v United States of America)*, Volume IV, Memorial of Nicaragua (Merits), www.icj-cij.org/files/case-related/70/9619.pdf, 60 *et seq*.

11 These findings can be found in Chapters 4 (subsections II.A, III, and IV.A) 5 and 6 (subsection II.A).

12 See *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, p. 161, paras 34, 35, 37, 40, 43, 51, 60, 64, 74, 76, 107, or Armed Activities on the Territory of the Congo (New Application: 2002) *(Democratic Republic of*

the Congo v Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6, paras 25, 88, 122.

13 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red, 08 June 2018 | Appeals Chamber | Decision.

14 The ICJ had rejected an earlier request by the WHO by stating that this question fell outside its competences.

15 Vincent Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2003) 85/850 *International Review of the Red Cross* 235, 250f.

16 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, paras 96f, 105.

17 ES-10/15, Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, A/RES/ES-10/15, 2 August 2004.

3 The collective security system

I Introduction

Maintaining international peace and security is the primary purpose of the United Nations. UN members are thus called upon to settle their disputes by peaceful means (Articles 2(3) and 33 UN Charter).

Among UN organs, the Security Council has the "primary responsibility for the maintenance of peace and security" (Article 24(1) UN Charter). The General Assembly has a more general competence "to discuss any questions or any matters within the scope" of the UN Charter (Article 10 UN Charter) and to "consider the general principles of co-operation in the maintenance of international peace and security" (Article 11(1) UN Charter) or "discuss any questions relating to the maintenance of international peace and security brought before it by" a UN member, the Security Council or non-UN member states (Article 11(2) UN Charter). As the ICJ held in the *Wall* advisory opinion, "Article 24 refers to a primary, but not necessarily exclusive, competence".[1] Both organs may thus make recommendations on matters relating to international peace and security. In addition, the Security Council may also—in contrast to resolutions by the General Assembly—take binding decisions (Articles 25 and 48 UN Charter). Their adoption needs an affirmative vote by nine members while each of the permanent members—China, France, Russia, the United Kingdom and the United States—has veto power. To exercise it, they have to actually cast a negative vote: the UN Charter's provision on the voting procedure has been interpreted to mean that the mere abstention from the voting or the meeting as such does not prevent the adoption of a resolution.[2]

The UN Charter contains three separate chapters on international peace and security: Chapter VI on the Pacific Settlement of Disputes, the Collective Security system under Chapter VII and Chapter VIII on Regional Arrangements.

Chapter VI stipulates that the Security Council may investigate disputes and make recommendations.[3] In addition, disputes or potentially threatening situations may also be brought to the attention of the General Assembly. To avoid overlaps, however, the General Assembly may not make recommendations if the Security Council is exercising its functions in a given situation unless it "so requests" (Article 12 UN Charter). The interrelationship between these two organs and the precise contours of article 12 UN Charter were addressed by the ICJ in the *Certain Expenses* (see Chapter VII.2) and *Wall* advisory opinions (reproduced below).

Not all disputes are settled peacefully. If the Security Council determines that there exists a "threat to the peace, breach of the peace, or act of aggression", it has the power not only to make recommendations but also to take binding non-forcible measures (like sanctions)

or authorize forcible measures "to maintain or restore international peace and security" (Article 39 UN Charter).[4]

The first of these three notions is the broadest and covers a wide array of situations spanning proliferation and arms control, terrorism, non-international armed conflicts and other situations of gross domestic human rights abuses all the way to privacy. The Security Council has a wide discretion here and focuses not only on inter-state peace—as absence of war—but also on conflict prevention and human security.[5]

A breach of the peace, then, goes beyond the phase of a mere threat: for example, if a direct military confrontation between states has already occurred.

Lastly, aggression overlaps with the notion of breaches of the peace and covers both direct and indirect forms of force. A number of examples were given by the General Assembly in its 1974 resolution on the definition of aggression. This list may also serve as a point of orientation when it comes to other charter articles: an act of aggression also constitutes force and possibly an "armed attack" prompting the right to self-defense.

Over the last decades, the Security Council has gradually expanded the scope of its activities by undertaking many measures not explicitly mentioned in the UN Charter, such as the creation of ad hoc criminal tribunals or, as a reaction to the devastating impact of sanctions on the civilian population—first and foremost in Iraq during the 1990s[6]—imposing targeted sanctions.

Both created a number of legal problems. In connection with the former, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was confronted with the question of whether its establishment had been an *ultra vires* act. In answering this question, the ICTY *inter alia* confirmed that the Security Council—even although it only has decision-making and executive powers—could establish a subsidiary organ with judicial powers.[7]

Targeted sanctions, then, create problems from the perspective of human rights, first and foremost the right to a fair trial and an effective remedy (along with the right to property). Judgments by a domestic courts, the European Court of Human Rights and the European Court of Justice prompted the Security Council to improve its sanctions regime and create an Ombudsperson.[8] While delisting requests are usually accepted—as decisions by the Ombudspersons are automatically adopted unless there is negative consensus—the principal legal problems remain the access to information by petitioners and the fact that the Security Council, as a non-judicial organ, has the final say.[9]

The third chapter of the UN Charter to be discussed here concerns regional arrangements. A universal political organization the size of the UN seems to inevitably cause concerns by being detached from its members and amassing too many powers.[10] The drafters were thus keen on regulating its interrelationship with regional organizations. Taking into account the old principle of subsidiarity, the Security Council shall "utilize" and cooperate with them to resolve disputes (Article 53 UN Charter) whenever appropriate. At the same time, Article 53 emphasizes that enforcement action requires Security Council authorization.[11]

Lastly, a few words are due on Security Council reform. On the one hand, its permanent members are not sufficiently representative of the international community. Neither economically powerful states like Germany or Japan—as the former "enemy states"—nor populous countries like India are represented while there is no permanent seat for an African state.

Furthermore, the Security Council is often and rightly criticized for failing to exercise its functions as it should. Massive human rights violations often remain largely ignored. Fundamentally contradictory interests and views among the permanent members persist, and measures are often obstructed from the outset by the permanent members' veto power whenever their vital interests are at stake.

At the same time, it must not be forgotten that the Security Council is a fundamentally political organ. From a strictly legal perspective, it is not obliged to employ a specific measure or deal with a situation at all, regardless of whether it constitutes a threat to the peace, breach of the peace or act of aggression. Proposals and efforts to regulate and restrict the veto power in cases of mass atrocities have proven futile.[12] It must not be forgotten that the veto was a precondition for powerful states like the US and the USSR to join the UN and accept the Security Council's powers in the first place. It still seems highly unlikely that they will accept any curtailing of this right anytime soon.

II UN Charter Articles

Chapter I: Purposes and Principles

Article 1

The Purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
(3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
(4) To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

(1) The Organization is based on the principle of the sovereign equality of all its Members.
(2) All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. . . .
(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter IV: The General Assembly

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

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 Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Chapter V: The Security Council

Composition

ARTICLE 23

The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great

Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

Each member of the Security Council shall have one representative.

Functions and Powers

ARTICLE 24

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

ARTICLE 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

ARTICLE 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Voting

ARTICLE 27

Each member of the Security Council shall have one vote.

Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

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; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

ARTICLE 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

ARTICLE 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

Chapter VI: Pacific Settlement of Disputes

Article 33

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 48

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Chapter VIII: Regional Arrangements

Article 52

1 Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2 The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3 The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4 This Article in no way impairs the application of Articles 34 and 35.

Article 53

1 The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization

of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2 The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Rep 2004, p. 136 paras 26–28

26. Under Article 24 of the Charter the Security Council has "primary responsibility for the maintenance of international peace and security". In that regard it can impose on States "an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII" and can, to that end, "require enforcement by coercive action" (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962, p. 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, inter alia, under Article 14 of the Charter, to "recommend measures for the peaceful adjustment" of various situations (ibid.).

> [T]he only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.
>
> (ICJ Reports 1962, p. 163)

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that 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. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, inter alia, that the Council remained seised of the matter (Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September–7 December 1949, 56th Meeting, 3 December 1949, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (Official Records of the Security Council, First Year: Second Series, No. 21, 79th Meeting, 4 November 1946, p. 498), in connection with incidents on the Greek border (Official Records of the Security Council, Second Year, No. 89, 202nd Meeting, 15 September 1947, pp. 2404–2405) and in regard to the Island of

Taiwan (Formosa) (Official Records of the Security Council, Fifth Year, No. 48, 506th Meeting, 29 September 1950, p. 5)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seised in order to enable the Assembly to deliberate on the matter (Official Records of the Security Council, Sixth Year, S/PV.531, 531st Meeting, 31 January 1951, pp. 11–12, para. 57). However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council's agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words "is exercising the functions" in Article 12 of the Charter as meaning "is exercising the functions at this moment" (General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/SR. 1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter. The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974

The General Assembly,

Having considered the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330(XXII) of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,[13]

Deeply, convinced that the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security,

1 Approves the Definition of Aggression, the text of which is annexed to the present resolution;
2 Expresses its appreciation to the Special Committee on the Question of Defining Aggression for its work which resulted in the elaboration of the Definition of Aggression;
3 Calls upon all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of

International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;[14]

4 Calls the attention of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determination, in accordance with the Charter, the existence of an act of aggression.

2319th plenary meeting
14 December 1974

Annex

DEFINITION OF AGGRESSION

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial Integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the

protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:[15]

ARTICLE I

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term "State":

(a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
(b) Includes the concept of a "group of States" where appropriate.

ARTICLE 2

The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

ARTICLE 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided

for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

ARTICLE 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

ARTICLE 5

1 No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2 A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3 No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

ARTICLE 6

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.

ARTICLE 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

ARTICLE 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

III Collective security in the Cold War era

The Security Council's failure to adopt measures necessary to maintain or restore international peace and security is nothing new. On the contrary, it was far more inactive in the Cold War era than today: nearly every second draft resolution was vetoed during the 1950s. While this percentage dropped to 16% during the 1970s and 20% during the 1980s, this rate was still much higher than today (in 2018, the veto was used only three times, while 54 resolutions were adopted).[16]

In the first decades, the overwhelming majority of vetoes were cast by the USSR. The US took over the lead after its first veto in 1970. All in all, the Security Council passed only 646 resolutions from 1946 to 1989 (while 189 were vetoed),[17] imposing sanctions only twice (on the apartheid states South Rhodesia and South Africa) while, as will be discussed in the next section, using the collective security system only once and in a questionable manner.

A The "Uniting for Peace" Resolution

The collective security system was first put to the test during the Korean War from 1950 to 1953, where the Security Council managed to pass three decisive resolutions in support of South Korea.[18] These measures were made possible by the absence of the USSR, which would otherwise have protected the interest of its ally North Korea, as a sign of protest against the representation of China by the Taiwan-based Republic of China instead of the mainland's People's Republic of China. Since resolutions of this kind were obviously impossible after the USSR returned to the Security Council in August 1950, the General Assembly—then still dominated by pro-Western and Western states—adopted a resolution (376) on the continued presence of UN forces, thus embedding the US-led operation in the collective security system, to achieve "the establishment of a unified, independent and democratic Government in the sovereign State of Korea". In the follow-up resolution,[19] it gave "a retrospective justification" of the General Assembly's exercise of power in Resolution 376 "as well as embodying an alternative vision of collective security based on the majority (two-thirds) of member states"[20]—the now-famous *Uniting for Peace* resolution. Described as an "epochal action" resulting from the "organic imbecility of the Security Council whereby the Soviets obtained a strangle-hold on the proceedings through the veto and other tactics" immediately after its adoption,[21] this resolution is still relevant as it is often brought into play as a possible alternative legal and diplomatic venue whenever the Security Council is blocked. After all, it established a mechanism to convene emergency special sessions within 24 hours. Ten such sessions have taken place until this day.[22] At the same time, the idea of additional General Assembly enforcement powers never materialized. The General Assembly has no competence to impose sanctions or authorize the use of force.

UNGA Res 377 (V). Uniting for Peace, 3 November 1950

A

The General Assembly,

Recognizing that the first two stated Purposes of the United Nations are:

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the

suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace", and

"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace",

Reaffirming that it remains the primary duty of all Members of the United Nations, when involved in an international dispute, to seek settlement of such a dispute by peaceful means through the procedures laid down in Chapter VI of the Charter, and recalling the successful achievements of the United Nations in this regard on a number of previous occasions,

Finding that international tension exists on a dangerous scale,

Recalling its resolution 290 (IV) entitled "Essentials of peace", which states that disregard of the Principles of the Charter of the United Nations is primarily responsible for the continuance of international tension, and desiring to contribute further to the objectives of that resolution,

Reaffirming the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto,

Reaffirming that the initiative in negotiating the agreements for armed forces provided for in Article 43 of the Charter belongs to the Security Council, and desiring to ensure that, pending the conclusion of such agreements, the United Nations has at its disposal means for maintaining international peace and security,

Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsibilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security,

Recognizing in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security,

Recognizing that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt,

B

1 *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace

and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;

2 *Adopts* for this purpose the amendments to its rules of procedure set forth in the annex to the present resolution;

C

3 *Establishes* a Peace Observation Commission which, for the calendar years 1951 and 1952, shall be composed of fourteen Members, namely: China, Colombia, Czechoslovakia, France, India, Iraq, Israel, New Zealand, Pakistan, Sweden, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay, and which could observe and report on the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security. Upon the invitation or with the consent of the State into whose territory the Commission would go, the General Assembly, or the Interim Committee when the Assembly is not in session, may utilize the Commission if the Security Council is not exercising the functions assigned to it by the Charter with respect to the matter in question. Decisions to utilize the Commission shall be made on the affirmative vote of two-thirds of the members present and voting. The Security Council may also utilize the Commission in accordance with its authority under the Charter;

4 *Decides* that the Commission shall have authority in its discretion to appoint subcommissions and to utilize the services of observers to assist it in the performance of its functions;

5 *Recommends* to all governments and authorities that they co-operate with the Commission and assist it in the performance of its functions;

6 *Requests* the Secretary-General to provide the necessary staff and facilities, utilizing, where directed by the Commission, the United Nations Panel of Field Observers envisaged in General Assembly resolution 297 B (IV);

D

7 *Invites* each Member of the United Nations to survey its resources in order to determine the nature and scope of the assistance it may be in a position to render in support of any recommendations of the Security Council or of the General Assembly for the restoration of international peace and security;

8 *Recommends* to the States Members of the United Nations that each Member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or the General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter;

9 *Invites* the Members of the United Nations to inform the Collective Measures Committee provided for in paragraph 11 as soon as possible of the measures taken in implementation of the preceding paragraph;

10 *Requests* the Secretary-General to appoint, with the approval of the Committee provided for in paragraph 11, a panel of military experts who could be made available,

on request, to Member States wishing to obtain technical advice regarding the organization, training, and equipment for prompt service as United Nations units or the elements referred to in paragraph 8;

E

11 *Establishes* a Collective Measures Committee consisting of fourteen Members, namely: Australia, Belgium, Brazil, Burma, Canada, Egypt, France, Mexico, Philippines, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Venezuela and Yugoslavia, and directs the Committee, in consultation with the Secretary-General and with such Member States as the Committee finds appropriate, to study and make a report to the Security Council and the General Assembly, not later than 1 September 1951, on methods, including those in section C of the present resolution, which might be used to maintain and strengthen international peace and security in accordance with the Purposes and Principles of the Charter, taking account of collective self-defence and regional arrangements (Articles 51 and 52 of the Charter);
12 *Recommends* to all Member States that they co-operate with the Committee and assist it in the performance of its functions;
13 *Requests* the Secretary-General to furnish the staff and facilities necessary for the effective accomplishment of the purposes set forth in sections C and D of the present resolution;

F

14 *Is fully conscious* that, in adopting the proposals set forth above, enduring peace will not be secured solely by collective security arrangements against breaches of international peace and acts of aggression but that a genuine and lasting peace depends also upon the observance of all the Principles and Purposes established in the Charter of the United Nations, upon the implementation of the resolutions of the Security Council, the General Assembly and other principal organs of the United Nations intended to achieve the maintenance of international peace and security, and especially upon respect for and observance of human rights and fundamental freedoms for all and on the establishment and maintenance of conditions of economic and social well-being in all countries; and accordingly
15 *Urges* Member States to respect fully, and to intensify, joint action, in co-operation with the United Nations, to develop and stimulate universal respect for and observance of human rights and fundamental freedoms, and to intensify individual and collective efforts to achieve conditions of economic stability and social progress, particularly through the development of under-developed countries and areas.

IV The post–Cold War era

The late 1980s saw increased hopes for a UN system meeting the expectations of its founders. On the occasion of the 1987 General Assembly, Mikhail Gorbachev, in his function as General Secretary of the central committee of the USSR's communist party, published an article where he noted that

> [o]bjective processes are making our complicated and diverse world ever more interlinked and interdependent, and it is increasingly in need of an apparatus for discussing

> its common problems responsibly at a representative level, a place for collective efforts to balance the various contradictory but real interests of contemporary society, states and nations. It falls to the United nations, by conception and descent, to serve as such an apparatus. We are convinced it is capable of filling the role. . . .
>
> The Charter of the United Nations gives extensive powers to the Security Council. All that is needed is for us to strive together to ensure that it can use them effectively.

Further early signs of improved co-operation can be seen in the rise of "multidimensional" peacekeeping operations, where the UN played a fundamental role in post-conflict societies by tasks such as de-mining, human rights monitoring and electoral observance.[23]

The decisive moment, however, occurred during the Second Gulf War when the Security Council, after condemning Iraq's invasion of Kuwait and demanding a withdrawal, authorized—for the first time in its history—"all necessary measures" to uphold this and other relevant preceding resolutions and "to restore international peace and security in the area" in Resolution 678 of 29 November 1990. When announcing the US war on Iraq on 15 January 1991 after the ultimatum had passed, then–US president George H. W. Bush emphatically spoke of a "new world order" in the following terms:

> This is an historic moment. We have in this past year made great progress in ending the long era of conflict and cold war. We have before us the opportunity to forge for ourselves and for future generations a new world order—a world where the rule of law, not the law of the jungle, governs the conduct of nations. When we are successful—and we will be—we have a real chance at this new world order, an order in which a credible United Nations can use its peacekeeping role to fulfill the promise and vision of the UN's founders.

These resolutions and the high level of international co-operation were made possible by the increased isolation of Saddam Hussein. The Iraq war was an outlier for yet another reason: Ever since the end of the Second World War, the overwhelming majority of conflicts have taken place within and not between states (with varying degrees of outside interference).[24]

In light of these developments, then–UN Secretary-General Boutros Boutros-Ghali's Agenda for Peace report from 1992 noted the erosion of statehood in many countries marked by civil war end interethnic tensions.

Bearing witness of the optimistic spirit of this era, however, he outlined the new possibilities for the UN amid the changed political and economic circumstances, the rise of democracy, the importance of regional organizations and even cautiously advocated to take up the original plan of permanent troops at the disposal of the Security Council.

An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peacekeeping. ***Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, A/47/277—S/24111, paras 8–19, 42–45, 60–65***

I The changing context

8. In the course of the past few years the immense ideological barrier that for decades gave rise to distrust and hostility and the terrible tools of destruction that were their inseparable companions has collapsed. Even as the issues between States north and south grow more acute, and call for attention at the highest levels of government, the

improvement in relations between States east and west affords new possibilities, some already realized, to meet successfully threats to common security.

9. Authoritarian regimes have given way to more democratic forces and responsive Governments. The form, scope and intensity of these processes differ from Latin America to Africa to Europe to Asia, but they are sufficiently similar to indicate a global phenomenon. Parallel to these political changes, many States are seeking more open forms of economic policy, creating a world wide sense of dynamism and movement.

10. To the hundreds of millions who gained their independence in the surge of decolonization following the creation of the United Nations, have been added millions more who have recently gained freedom. Once again new States are taking their seats in the General Assembly. Their arrival reconfirms the importance and indispensability of the sovereign State as the fundamental entity of the international community.

11. We have entered a time of global transition marked by uniquely contradictory trends. Regional and continental associations of States are evolving ways to deepen cooperation and ease some of the contentious characteristics of sovereign and nationalistic rivalries. National boundaries are blurred by advanced communications and global commerce, and by the decisions of States to yield some sovereign prerogatives to larger, common political associations. At the same time, however, fierce new assertions of nationalism and sovereignty spring up, and the cohesion of States is threatened by brutal ethnic, religious, social, cultural or linguistic strife. Social peace is challenged on the one hand by new assertions of discrimination and exclusion and, on the other, by acts of terrorism seeking to undermine evolution and change through democratic means.

12. The concept of peace is easy to grasp; that of international security is more complex, for a pattern of contradictions has arisen here as well. As major nuclear Powers have begun to negotiate arms reduction agreements, the proliferation of weapons of mass destruction threatens to increase and conventional arms continue to be amassed in many parts of the world. As racism becomes recognized for the destructive force it is and as apartheid is being dismantled, new racial tensions are rising and finding expression in violence. Technological advances are altering the nature and the expectation of life all over the globe. The revolution in communications has united the world in awareness, in aspiration and in greater solidarity against injustice. But progress also brings new risks for stability: ecological damage, disruption of family and community life, greater intrusion into the lives and rights of individuals.

13. This new dimension of insecurity must not be allowed to obscure the continuing and devastating problems of unchecked population growth, crushing debt burdens, barriers to trade, drugs and the growing disparity between rich and poor. Poverty, disease, famine, oppression and despair abound, joining to produce 17 million refugees, 20 million displaced persons and massive migrations of peoples within and beyond national borders.

These are both sources and consequences of conflict that require the ceaseless attention and the highest priority in the efforts of the United Nations. A porous ozone shield could pose a greater threat to an exposed population than a hostile army. Drought and disease can decimate no less mercilessly than the weapons of war. So at this moment of renewed opportunity, the efforts of the Organization to build peace, stability and security must encompass matters beyond military threats in order to break the fetters of strife and warfare that have characterized the past. But armed conflicts today, as they have throughout history, continue to bring fear and horror to humanity, requiring our urgent involvement to try to prevent, contain and bring them to an end.

14. Since the creation of the United Nations in 1945, over 100 major conflicts around the world have left some 20 million dead. The United Nations was rendered powerless to deal with many of these crises because of the vetoes—279 of them—cast in the Security Council, which were a vivid expression of the divisions of that period.

15. With the end of the cold war there have been no such vetoes since 31 May 1990, and demands on the United Nations have surged. Its security arm, once disabled by circumstances it was not created or equipped to control, has emerged as a central instrument for the prevention and resolution of conflicts and for the preservation of peace. Our aims must be:

- To seek to identify at the earliest possible stage situations that could produce conflict, and to try through diplomacy to remove the sources of danger before violence results;
- Where conflict erupts, to engage in peacemaking aimed at resolving the issues that have led to conflict;
- Through peace-keeping, to work to preserve peace, however fragile, where fighting has been halted and to assist in implementing agreements achieved by the peacemakers;
- To stand ready to assist in peace-building in its differing contexts: rebuilding the institutions and infrastructures of nations torn by civil war and strife; and building bonds of peaceful mutual benefit among nations formerly at war;
- And in the largest sense, to address the deepest causes of conflict: economic despair, social injustice and political oppression. It is possible to discern an increasingly common moral perception that spans the world's nations and peoples, and which is finding expression in international laws, many owing their genesis to the work of this Organization.

16. This wider mission for the world Organization will demand the concerted attention and effort of individual States, of regional and non-governmental organizations and of all of the United Nations system, with each of the principal organs functioning in the balance and harmony that the Charter requires. The Security Council has been assigned by all Member States the primary responsibility for the maintenance of international peace and security under the Charter. In its broadest sense this responsibility must be shared by the General Assembly and by all the functional elements of the world Organization. Each has a special and indispensable role to play in an integrated approach to human security. The Secretary-General's contribution rests on the pattern of trust and cooperation established between him and the deliberative organs of the United Nations.

17. The foundation-stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress.

The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives. The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.

18. One requirement for solutions to these problems lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or

linguistic. The League of Nations provided a machinery for the international protection of minorities. The General Assembly soon will have before it a declaration on the rights of minorities. That instrument, together with the increasingly effective machinery of the United Nations dealing with human rights, should enhance the situation of minorities as well as the stability of States.

19. Globalism and nationalism need not be viewed as opposing trends, doomed to spur each other on to extremes of reaction. The healthy globalization of contemporary life requires in the first instance solid identities and fundamental freedoms. The sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead.

Respect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States. Our constant duty should be to maintain the integrity of each while finding a balanced design for all. . . .

IV Peacemaking

USE OF MILITARY FORCE

42. It is the essence of the concept of collective security as contained in the Charter that if peaceful means fail, the measures provided in Chapter VII should be used, on the decision of the Security Council, to maintain or restore international peace and security in the face of a "threat to the peace, breach of the peace, or act of aggression". The Security Council has not so far made use of the most coercive of these measures—the action by military force foreseen in Article 42. In the situation between Iraq and Kuwait, the Council chose to authorize Member States to take measures on its behalf. The Charter, however, provides a detailed approach which now merits the attention of all Member States.

43. Under Article 42 of the Charter, the Security Council has the authority to take military action to maintain or restore international peace and security. While such action should only be taken when all peaceful means have failed, the option of taking it is essential to the credibility of the United Nations as a guarantor of international security. This will require bringing into being, through negotiations, the special agreements foreseen in Article 43 of the Charter, whereby Member States undertake to make armed forces, assistance and facilities available to the Security Council for the purposes stated in Article 42, not only on an ad hoc basis but on a permanent basis. Under the political circumstances that now exist for the first time since the Charter was adopted, the longstanding obstacles to the conclusion of such special agreements should no longer prevail. The ready availability of armed forces on call could serve, in itself, as a means of deterring breaches of the peace since a potential aggressor would know that the Council had at its disposal a means of response. Forces under Article 43 may perhaps never be sufficiently large or well enough equipped to deal with a threat from a major army equipped with sophisticated weapons. They would be useful, however, in meeting any threat posed by a military force of a lesser order. I recommend that the Security Council initiate negotiations in accordance with Article 43, supported by the Military Staff Committee, which may be augmented if necessary by others in accordance with Article 47, paragraph 2, of the Charter. It is my view that the role of the Military Staff Committee should be seen in the context of Chapter VII, and not that of the planning or conduct of peace-keeping operations.

PEACE-ENFORCEMENT UNITS

44. The mission of forces under Article 43 would be to respond to outright aggression, imminent or actual. Such forces are not likely to be available for some time to come. Cease-fires have often been agreed to but not complied with, and the United Nations has sometimes been called upon to send forces to restore and maintain the cease-fire. This task can on occasion exceed the mission of peace-keeping forces and the expectations of peace-keeping force contributors. I recommend that the Council consider the utilization of peace-enforcement units in clearly defined circumstances and with their terms of reference specified in advance. Such units from Member States would be available on call and would consist of troops that have volunteered for such service. They would have to be more heavily armed than peace-keeping forces and would need to undergo extensive preparatory training within their national forces. Deployment and operation of such forces would be under the authorization of the Security Council and would, as in the case of peace-keeping forces, be under the command of the Secretary-General. I consider such peace-enforcement units to be warranted as a provisional measure under Article 40 of the Charter. Such peace-enforcement units should not be confused with the forces that may eventually be constituted under Article 43 to deal with acts of aggression or with the military personnel which Governments may agree to keep on stand-by for possible contribution to peace-keeping operations.

45. Just as diplomacy will continue across the span of all the activities dealt with in the present report, so there may not be a dividing line between peacemaking and peace-keeping. Peacemaking is often a prelude to peace-keeping—just as the deployment of a United Nations presence in the field may expand possibilities for the prevention of conflict, facilitate the work of peacemaking and in many cases serve as a prerequisite for peace-building. . . .

VII Cooperation with regional arrangements and organizations

60. The Covenant of the League of Nations, in its Article 21, noted the validity of regional understandings for securing the maintenance of peace. The Charter devotes Chapter VIII to regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action and consistent with the Purposes and Principles of the United Nations. The cold war impaired the proper use of Chapter VIII and indeed, in that era, regional arrangements worked on occasion against resolving disputes in the manner foreseen in the Charter.

61. The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.

62. In this regard, the United Nations has recently encouraged a rich variety of complementary efforts. Just as no two regions or situations are the same, so the design of cooperative work and its division of labour must adapt to the realities of each case with flexibility and creativity. In Africa, three different regional groups—the Organization of African Unity, the League of Arab States and the Organization of the Islamic Conference—joined

efforts with the United Nations regarding Somalia. In the Asian context, the Association of South-East Asian Nations and individual States from several regions were brought together with the parties to the Cambodian conflict at an international conference in Paris, to work with the United Nations. For El Salvador, a unique arrangement—"The Friends of the Secretary-General"—contributed to agreements reached through the mediation of the Secretary-General. The end of the war in Nicaragua involved a highly complex effort which was initiated by leaders of the region and conducted by individual States, groups of States and the Organization of American States. Efforts undertaken by the European Community and its member States, with the support of States participating in the Conference on Security and Cooperation in Europe, have been of central importance in dealing with the crisis in the Balkans and neighbouring areas.

63. In the past, regional arrangements often were created because of the absence of a universal system for collective security; thus their activities could on occasion work at cross-purposes with the sense of solidarity required for the effectiveness of the world Organization. But in this new era of opportunity, regional arrangements or agencies can render great service if their activities are undertaken in a manner consistent with the Purposes and Principles of the Charter, and if their relationship with the United Nations, and particularly the Security Council, is governed by Chapter VIII.

64. It is not the purpose of the present report to set forth any formal pattern of relationship between regional organizations and the United Nations, or to call for any specific division of labour. What is clear, however, is that regional arrangements or agencies in many cases possess a potential that should be utilized in serving the functions covered in this report: preventive diplomacy, peace-keeping, peacemaking and postconflict peace-building. Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.

65. Regional arrangements and agencies have not in recent decades been considered in this light, even when originally designed in part for a role in maintaining or restoring peace within their regions of the world. Today a new sense exists that they have contributions to make. Consultations between the United Nations and regional arrangements or agencies could do much to build international consensus on the nature of a problem and the measures required to address it. Regional organizations participating in complementary efforts with the United Nations in joint undertakings would encourage States outside the region to act supportively. And should the Security Council choose specifically to authorize a regional arrangement or organization to take the lead in addressing a crisis within its region, it could serve to lend the weight of the United Nations to the validity of the regional effort. Carried forward in the spirit of the Charter, and as envisioned in Chapter VIII, the approach outlined here could strengthen a general sense that democratization is being encouraged at all levels in the task of maintaining international peace and security, it being essential to continue to recognize that the primary responsibility will continue to reside in the Security Council.

V From International to Non-International Conflicts: The Kurds in Northern Iraq 1991 and the Conflict in Somalia 1992

Some two and a half years after the Agenda for Peace report, Boutros-Ghali took up his elaborations again in his Supplement to an Agenda for Peace position paper. Written in light

of the devastating impact of the sanctions regime imposed on Iraq, the failed military operation in Somalia and the international community's and with it the UN's failure to prevent the genocide in Rwanda or the "continuing problems with regard to the safe areas in Bosnia and Herzegovina"[25] (see also Chapter 7, subsection IV on peacekeeping). Boutros-Ghali noted "dramatic changes in both the volume and the nature of the United Nations activities in the field of peace and security".[26]

After all, the Security Council increasingly focused on domestic conflicts. The first step in this direction goes back to the late phase of the second Gulf war, when George H. W. Bush—who had decided to stop short of removing Saddam Hussein from power directly—called for a coup d'état:

> There is another way for the bloodshed to stop: and that is, for the Iraqi military and the Iraqi people to take matters into their own hands and force Saddam Hussein, the dictator, to step aside and then comply with the United Nations' resolutions and rejoin the family of peace-loving nations.[27]

While the military remained loyal, the Kurds in the North and the Shia in the South, probably counting on US support, rose up against Hussein.[28] These uprisings were brutally crushed, with some 30,000 people dead by late March 1991 and around 1 million Shia fleeing to Iran and some 500,000 Kurds trapped in the mountains between Iraq and Turkey, which had closed its border over security concerns. As a reaction to their dire situation—UNHCR reported more than 500 daily deaths[29]—in April 1991 the Security Council passed Resolution 688, which condemned the consequences of the repression of the Iraqi civilian population, i.e. the refugee flows it caused and not the repression as such, as a threat to international peace and security "in the region"—an indirect and cautious formulation to calm Russian and Chinese concerns over a possible precedent for an excessive use of Security Council powers. Nevertheless, the Security Council was less reluctant in Somalia, where it went as far as determining that "the magnitude of the human tragedy" caused by the conflict there constituted a threat to international peace and security and authorized "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations".[30] The armed conflicts in Liberia (1992),[31] Angola (1993)[32] and Rwanda (1994)[33] were also dealt with under Chapter VII. In Resolution 940 (1994) on Haiti, the Security Council stretched its powers particularly far when authorizing the use of force to re-establish the democratically elected government of Bertrand Aristide some three years after it had been overthrown by a military junta.[34] Today, it is firmly established that Article 39 UN Charter extends to domestic conflicts regardless of their actual or possible cross-border impacts.[35]

Supplement to an Agenda for Peace Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, 25 January 1995, A/50/60-S/1995/1, paras 66–80, 102–105

E Sanctions

66. Under Article 41 of the Charter, the Security Council may call upon Member States to apply measures not involving the use of armed force in order to maintain or restore international peace and security. Such measures are commonly referred to as sanctions. This legal basis is recalled in order to underline that the purpose of sanctions is to modify

the behaviour of a party that is threatening international peace and security and not to punish or otherwise exact retribution.

67. The Security Council's greatly increased use of this instrument has brought to light a number of difficulties, relating especially to the objectives of sanctions, the monitoring of their application and impact, and their unintended effects.

68. The objectives for which specific sanctions regimes were imposed have not always been clearly defined. Indeed they sometimes seem to change over time. This combination of imprecision and mutability makes it difficult for the Security Council to agree on when the objectives can be considered to have been achieved and sanctions can be lifted. While recognizing that the Council is a political body rather than a judicial organ, it is of great importance that when it decides to impose sanctions it should at the same time define objective criteria for determining that their purpose has been achieved. If general support for the use of sanctions as an effective instrument is to be maintained, care should be taken to avoid giving the impression that the purpose of imposing sanctions is punishment rather than the modification of political behaviour or that criteria are being changed in order to serve purposes other than those which motivated the original decision to impose sanctions.

69. Experience has been gained by the United Nations of how to monitor the application of sanctions and of the part regional organizations can in some cases play in this respect. However, the task is complicated by the reluctance of Governments, for reasons of sovereignty or economic self-interest, to accept the deployment of international monitors or the international investigation of alleged violations by themselves or their nationals. Measuring the impact of sanctions is even more difficult because of the inherent complexity of such measurement and because of restrictions on access to the target country.

70. Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects. They can complicate the work of humanitarian agencies by denying them certain categories of supplies and by obliging them to go through arduous procedures to obtain the necessary exemptions. They can conflict with the development objectives of the Organization and do long-term damage to the productive capacity of the target country. They can have a severe effect on other countries that are neighbours or major economic partners of the target country. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolized by the United Nations, and by rallying the population behind the leaders whose behaviour the sanctions are intended to modify.

71. To state these ethical and practical considerations is not to call in question the need for sanctions in certain cases, but it illustrates the need to consider ways of alleviating the effects described. Two possibilities are proposed for Member States' consideration.

72. The first is to ensure that, whenever sanctions are imposed, provision is made to facilitate the work of humanitarian agencies, work that will be all the more needed as a result of the impact of sanctions on vulnerable groups. It is necessary, for instance, to avoid banning imports that are required by local health industries and to devise a fast track for the processing of applications for exemptions for humanitarian activities.

73. Secondly, there is an urgent need for action to respond to the expectations raised by Article 50 of the Charter. Sanctions are a measure taken collectively by the United Nations to maintain or restore international peace and security. The costs involved in their application, like other such costs (e.g. for peacemaking and peace-keeping activities),

should be borne equitably by all Member States and not exclusively by the few who have the misfortune to be neighbours or major economic partners of the target country.

74. In "An Agenda for Peace" I proposed that States suffering collateral damage from the sanctions regimes should be entitled not only to consult the Security Council but also to have a realistic possibility of having their difficulties addressed. For that purpose I recommended that the Security Council devise a set of measures involving the international financial institutions and other components of the United Nations system that could be put in place to address the problem. In response, the Council asked me to seek the views of the heads of the international financial institutions. In their replies, the latter acknowledged the collateral effects of sanctions and expressed the desire to help countries in such situations, but they proposed that this should be done under existing mandates for the support of countries facing negative external shocks and consequent balance-of-payment difficulties. They did not agree that special provisions should be made.

75. In order to address all the above problems, I should like to go beyond the recommendation I made in 1992 and suggest the establishment of a mechanism to carry out the following five functions:

(a) To assess, at the request of the Security Council, and before sanctions are imposed, their potential impact on the target country and on third countries;
(b) To monitor application of the sanctions;
(c) To measure their effects in order to enable the Security Council to fine tune them with a view to maximizing their political impact and minimizing collateral damage;
(d) To ensure the delivery of humanitarian assistance to vulnerable groups;
(e) To explore ways of assisting Member States that are suffering collateral damage and to evaluate claims submitted by such States under Article 50.

76. Since the purpose of this mechanism would be to assist the Security Council, it would have to be located in the United Nations Secretariat. However, it should be empowered to utilize the expertise available throughout the United Nations system, in particular that of the Bretton Woods institutions. Member States will have to give the proposal their political support both at the United Nations and in the intergovernmental bodies of the agencies concerned if it is to be implemented effectively.

F Enforcement action

77. One of the achievements of the Charter of the United Nations was to empower the Organization to take enforcement action against those responsible for threats to the peace, breaches of the peace or acts of aggression. However, neither the Security Council nor the Secretary-General at present has the capacity to deploy, direct, command and control operations for this purpose, except perhaps on a very limited scale. I believe that it is desirable in the long term that the United Nations develop such a capacity, but it would be folly to attempt to do so at the present time when the Organization is resource starved and hard pressed to handle the less demanding peacemaking and peace-keeping responsibilities entrusted to it.

78. In 1950, the Security Council authorized a group of willing Member States to undertake enforcement action in the Korean peninsula. It did so again in 1990 in response to aggression against Kuwait. More recently, the Council has authorized groups of Member States to undertake enforcement action, if necessary, to create conditions for humanitarian relief operations in Somalia and Rwanda and to facilitate the restoration of democracy in Haiti.

79. In Bosnia and Herzegovina, the Security Council has authorized Member States, acting nationally or through regional arrangements, to use force to ensure compliance with its ban on military flights in that country's air space, to support the United Nations forces in the former Yugoslavia in the performance of their mandate, including defence of personnel who may be under attack, and to deter attacks against the safe areas. The Member States concerned decided to entrust those tasks to the North Atlantic Treaty Organization (NATO). Much effort has been required between the Secretariat and NATO to work out procedures for the coordination of this unprecedented collaboration. This is not surprising given the two organizations' very different mandates and approaches to the maintenance of peace and security. Of greater concern, as already mentioned, are the consequences of using force, other than for self-defence, in a peace-keeping context.

80. The experience of the last few years has demonstrated both the value that can be gained and the difficulties that can arise when the Security Council entrusts enforcement tasks to groups of Member States. On the positive side, this arrangement provides the Organization with an enforcement capacity it would not otherwise have and is greatly preferable to the unilateral use of force by Member States without reference to the United Nations. On the other hand, the arrangement can have a negative impact on the Organization's stature and credibility. There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them. Member States so authorized have in recent operations reported more fully and more regularly to the Security Council about their activities. . . .

VI Conclusion

102. The present position paper, submitted to the Member States at the opening of the United Nations fiftieth anniversary year, is intended to serve as a contribution to the continuing campaign to strengthen a common capacity to deal with threats to peace and security.

103. The times call for thinking afresh, for striving together and for creating new ways to overcome crises. This is because the different world that emerged when the cold war ceased is still a world not fully understood. The changed face of conflict today requires us to be perceptive, adaptive, creative and courageous, and to address simultaneously the immediate as well as the root causes of conflict, which all too often lie in the absence of economic opportunities and social inequities. Perhaps above all it requires a deeper commitment to cooperation and true multilateralism than humanity has ever achieved before.

104. This is why the pages of the present paper reiterate the need for hard decisions. As understanding grows of the challenges to peace and security, hard decisions, if postponed, will appear in retrospect as having been relatively easy when measured against the magnitude of tomorrow's troubles.

105. There is no reason for frustration or pessimism. More progress has been made in the past few years towards using the United Nations as it was designed to be used than many could ever have predicted. The call to decision should be a call to confidence and courage.

VI The 2003 Iraq War and the Crisis of the Collective Security System

After the crisis of peacekeeping during the early and mid-1990s, the next fundamental challenge to the UN in general and the collective security system in particular was posed by two situations in which states had used force without Security Council authorization: the 1999

Kosovo intervention (discussed in Chapter 6, subsection III) and the 2003 Iraq war. The latter is inherently tied to the aftermath of the 9/11 attacks and US president George W. Bush's declaration of a "war on terror". The US then identified Iraq as one of several "rogue states" belonging to what George W. Bush described as an "axis of evil".[36] Relatedly, the 2002 US National Security Strategy declared that the US would not wait for their enemies to become too powerful and act, at an early stage if necessary, for example to prevent them from acquiring weapons of mass destruction. This accusation—it deserves to be mentioned that such weapons were never found in Iraq, while the US itself had armed Hussein with chemical weapons during the Iran-Iraq war—together with alleged ties between his regime and al-Qaeda (which were never proven) and the idea of establishing a stable and functioning democratic state as a reliable US partner in the region provided the rationales behind the US attack. From a legal perspective, then, the war was justified with three arguments.

First, the UK argued that Security Council Resolution 1441 from 8 November 2002, by recalling "that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations", had "revived" the older authorization to use force in Iraq given in Resolution 678 from 29 November 1990.[37]

Second, it was argued that there was a humanitarian imperative to overthrow the oppressive regime of Saddam Hussein.[38]

Third, and as indicated earlier, the US seemingly relied on a very broad understanding of the right to self-defense, i.e. "preventive" self-defense, also referring to the protection of "world peace and security"[39] (see Chapter 4, subsection VI).

All three of these arguments were rejected.

Resolution 678 had been passed in a different context—Iraq's invasion of Kuwait—and was thus no longer relevant; the situation in Iraq in 2003 required a fresh and explicit authorization. If the Security Council had wanted to authorize force against Iraq, it would have done so explicitly (France and Russia had threatened to use their veto power).[40]

Next, while no one disputes the grave daily human rights violations in Iraq under Saddam Hussein, they were not sufficient to justify a humanitarian intervention. More generally, this concept has still not been accepted by the international community as an additional legal basis to use force (see Chapter 6).

Likewise, the right to self-defense only applies in cases of imminent attacks. Attacks that might happen in the distant future are outside its scope.

Needless to say, the US, the UK and their partners were not restrained by these arguments and proceeded to attack and invade Iraq in March 2003. Plunged into yet another deep crisis by this open defiance of the Security Council and the basic tenets of international law,[41] the Secretary-General established the High-Level Panel on Threats, Challenges and Change, which elaborated on the powers and legitimacy of the Security Council under Chapter VII. Taking up these findings, the Secretary-General addressed the interconnectedness of threats and recommended formulating guidelines on the authorization of force: The Security Council should not be replaced but improved.

A More Secure World: Our Shared Responsibility. ***Report of the High-Level Panel on Threats, Challenges and Change, 2 December 2004, A/59/565, paras 193–198, 204–209***

2 Chapter VII of the Charter of the United Nations and external threats

193. In the case of a State posing a threat to other States, people outside its borders or to international order more generally, the language of Chapter VII is inherently broad enough, and has been interpreted broadly enough, to allow the Security Council to

approve any coercive action at all, including military action, against a State when it deems this "necessary to maintain or restore international peace and security". That is the case whether the threat is occurring now, in the imminent future or more distant future; whether it involves the State's own actions or those of non-State actors it harbours or supports; or whether it takes the form of an act or omission, an actual or potential act of violence or simply a challenge to the Council's authority.

194. We emphasize that the concerns we expressed about the legality of the preventive use of military force in the case of self-defence under Article 51 are not applicable in the case of collective action authorized under Chapter VII. In the world of the twenty-first century, the international community does have to be concerned about nightmare scenarios combining terrorists, weapons of mass destruction and irresponsible States, and much more besides, which may conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent. The question is not whether such action can be taken: it can, by the Security Council as the international community's collective security voice, at any time it deems that there is a threat to international peace and security. The Council may well need to be prepared to be much more proactive on these issues, taking more decisive action earlier, than it has been in the past.

195. Questions of legality apart, there will be issues of prudence, or legitimacy, about whether such preventive action should be taken: crucial among them is whether there is credible evidence of the reality of the threat in question (taking into account both capability and specific intent) and whether the military response is the only reasonable one in the circumstances. We address these issues further below.

196. It may be that some States will always feel that they have the obligation to their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of collective Security Council process. But however 56 A/59/565 understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed and expectations about legal compliance are very much higher.

197. One of the reasons why States may want to bypass the Security Council is a lack of confidence in the quality and objectivity of its decision-making. The Council's decisions have often been less than consistent, less than persuasive and less than fully responsive to very real State and human security needs. But the solution is not to reduce the Council to impotence and irrelevance: it is to work from within to reform it, including in the ways we propose in the present report.

198. The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which States are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has. . . .

B THE QUESTION OF LEGITIMACY

204. The effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy—their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.

205. If the Security Council is to win the respect it must have as the primary body in the collective security system, it is critical that its most important and influential decisions, those with large-scale life-and-death impact, be better made, better substantiated and better communicated. In particular, in deciding whether or not to authorize the use of

force, the Council should adopt and systematically address a set of agreed guidelines, going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be.

206. The guidelines we propose will not produce agreed conclusions with pushbutton predictability. The point of adopting them is not to guarantee that the objectively best outcome will always prevail. It is rather to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; to maximize international support for whatever the Security Council decides; and to minimize the possibility of individual Member States bypassing the Security Council.

207. In considering whether to authorize or endorse the use of military force, the Security Council should always address—whatever other considerations it may take into account—at least the following five basic criteria of legitimacy:

(a) Seriousness of threat. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
(b) Proper purpose. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
(c) Last resort. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
(d) Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
(e) Balance of consequences. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

208. The above guidelines for authorizing the use of force should be embodied in declaratory resolutions of the Security Council and General Assembly.

209. We also believe it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them.

In Larger Freedom: Towards Development, Security and Human Rights for All. *Report of the Secretary-General, 21 March 2005, A/59/2005, paras 76–85, 109f, 122–126*

III Freedom from fear

A A VISION OF COLLECTIVE SECURITY

76. In November 2003, alarmed by the lack of agreement among Member States on the proper role of the United Nations in providing collective security—or even on the nature of the most compelling threats that we face—I set up the High-Level Panel on Threats, Challenges and Change. The Panel delivered its report, "A more secure world: our shared responsibility" (A/59/565), in December 2004.

77. I fully embrace the broad vision that the report articulates and its case for a more comprehensive concept of collective security: one that tackles new threats and old and that addresses the security concerns of all States. I believe that this concept can bridge the gap between divergent views of security and give us the guidance we need to face today's dilemmas.

78. The threats to peace and security in the twenty-first century include not just international war and conflict but civil violence, organized crime, terrorism and weapons of mass destruction. They also include poverty, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences. All of these threats can cause death or lessen life chances on a large scale. All of them can undermine States as the basic unit of the international system.

79. Depending on wealth, geography and power, we perceive different threats as the most pressing. But the truth is we cannot afford to choose. Collective security today depends on accepting that the threats which each region of the world perceives as most urgent are in fact equally so for all.

80. In our globalized world, the threats we face are interconnected. The rich are vulnerable to the threats that attack the poor and the strong are vulnerable to the weak, as well as vice versa. A nuclear terrorist attack on the United States or Europe would have devastating effects on the whole world. But so would the appearance of a new virulent pandemic disease in a poor country with no effective health-care system.

81. On this interconnectedness of threats we must found a new security consensus, the first article of which must be that all are entitled to freedom from fear, and that whatever threatens one threatens all. Once we understand this, we have no choice but to tackle the whole range of threats. We must respond to HIV/AIDS as robustly as we do to terrorism and to poverty as effectively as we do to proliferation. We must strive just as hard to eliminate the threat of small arms and light weapons as we do to eliminate the threat of weapons of mass destruction. Moreover, we must address all these threats preventively, acting at a sufficiently early stage with the full range of available instruments.

82. We need to ensure that States abide by the security treaties they have signed so that all can continue to reap the benefit. More consistent monitoring, more effective implementation and, where necessary, firmer enforcement are essential if States are to have confidence in multilateral mechanisms and use them to avoid conflict.

83. These are not theoretical issues but issues of deadly urgency. If we do not reach a consensus on them this year and start to act on it, we may not have another chance. This year, if ever, we must transform the United Nations into the effective instrument for preventing conflict that it was always meant to be by acting on several key policy and institutional priorities.

84. We must act to ensure that catastrophic terrorism never becomes a reality. This will require a new global strategy, which begins with Member States agreeing on a definition of terrorism and including it in a comprehensive convention. It will also require all States to sign, ratify, implement and comply with comprehensive conventions against organized crime and corruption. And it will require from them a commitment to take urgent steps to prevent nuclear, chemical and biological weapons getting into the hands of terrorist groups.

85. We must revitalize our multilateral frameworks for handling threats from nuclear, biological and chemical weapons. The threat posed by these weapons is not limited to terrorist use. The existence of multilateral instruments to promote disarmament and prevent proliferation among States has been central to the maintenance of international

peace and security ever since those instruments were agreed. But they are now in danger of erosion. They must be revitalized to ensure continued progress on disarmament and to address the growing risk of a cascade of proliferation, especially in the nuclear field.

86. We must continue to reduce the prevalence and risk of war. This requires both the emphasis on development outlined in section II above and the strengthening of tools to deliver the military and civilian support needed to prevent and end wars as well as to build a sustainable peace. Investment in prevention, peacemaking, peacekeeping and peacebuilding can save millions of lives. If only two peace agreements had been successfully implemented in the early 1990s—the Bicesse Accords in Angola and the Arusha Accords in Rwanda—we could have prevented the deaths of almost three million people. . . .

B REDUCING THE RISK AND PREVALENCE OF WAR

SANCTIONS

109. Sanctions are a vital tool at the disposal of the Security Council for dealing preventively with threats to international peace and security. They constitute a necessary middle ground between war and words. In some cases, sanctions can help to produce agreements. In others, they can be combined with military pressure to weaken and isolate rebel groups or States that are in flagrant violation of Security Council resolutions.

110. The use of financial, diplomatic, arms, aviation, travel and commodity sanctions to target belligerents, in particular the individuals most directly responsible for reprehensible policies, will continue to be a vital tool in the United Nations arsenal. **All Security Council sanctions should be effectively implemented and enforced by strengthening State capacity to implement sanctions, establishing well resourced monitoring mechanisms and mitigating humanitarian consequences** [emphasis in original**]**. Given the difficult environments in which sanctions are often used and the lessons learned in recent years, future sanctions regimes must also be structured carefully so as to minimize the suffering caused to innocent third parties—including the civilian populations of targeted States—and to protect the integrity of the programmes and institutions involved. . . .

C USE OF FORCE

122. Finally, an essential part of the consensus we seek must be agreement on when and how force can be used to defend international peace and security. In recent years, this issue has deeply divided Member States. They have disagreed about whether States have the right to use military force pre-emptively, to defend themselves against imminent threats; whether they have the right to use it preventively to defend themselves against latent or non-imminent threats; and whether they have the right—or perhaps the obligation—to use it protectively to rescue the citizens of other States from genocide or comparable crimes.

123. Agreement must be reached on these questions if the United Nations is to be—as it was intended to be—a forum for resolving differences rather than a mere stage for acting them out. And yet I believe the Charter of our Organization, as it stands, offers a good basis for the understanding that we need.

124. Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.

125. Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?

126. The task is not to find alternatives to the Security Council as a source of authority but to make it work better. When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion. **I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force** [emphasis in original].

Notes

1 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Rep 2004, 136, para. 26; the full text is reproduced at pp. 67 *et seq*. above.
2 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), advisory opinion of 21 June 1971, ICJ Rep 16, para. 22. See page 72 on the handling of Russia's absence from the Security Council during the first months of the Korean War.
3 Its competence to investigate is broader since it also extends to "any situation which might lead to international friction or give rise to a dispute" (Article 34 UN Charter).
4 See, for a general overview, Nico Krisch, "Article 39" in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012), 1272.
5 See, for a general overview, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004), in particular 133 *et seq*. For a critical account of the Security Council's power to determine a threat to the peace, see Michael Byers and Simon Chesterman, '"You, the People": Pro-Democratic Intervention in International Law' in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press 2000), 259.
6 See Daniel W. Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice' (2011) 13 *International Studies Review* 96.
7 *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, paras 26–40.
8 See Ralph Janik, 'Judicial Dialogue on the 1267 Smart Sanctions Regime' (2012) 17 *Austrian Review of International and European Law* 84.
9 Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2253 (2015), 23 January 2017, S/2017/60. See also Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161 (2014), 14 July 2015, S/2015/533, para. 31.
10 See e.g. the *Bernadotte* advisory opinion, where the ICJ addressed these concerns by emphasizing that the UN's international legal personality is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same

as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Rep 1949, 174, 9.

11 It deserves to be noted that the African Union has challenged the primacy and exclusive role of the Security Council in such matters by including a right "to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances", according to Article 4(h) of its Constitutive Act (see Jean Allain, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergency of the African Union' (2004) 8 *Max Planck Yearbook of United Nations Law* 237, 259 *et seq.*).

12 See the High-Level Panel report, para. 256. A number of states have worked on a Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes, which is supported by some 119 UN members (including the United Kingdom and France); see www.globalr2p.org/media/files/2019-1-1-coc-list-of-supporters.pdf. *De lege ferenda*, Anne Peters argues that an "abusive veto should be treated either as irrelevant so as not to prevent a Council decision, or as illegal" in cases of mass atrocities (Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8 *International Organizations Law Review* 1, 30).

13 Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1).

14 Resolution 2625 (XXV), annex.

15 Explanatory notes on articles 3 and 5 are to be found in paragraph 20 of the Report of the Special Committee on the Question of Defining Aggression (Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1). Statements on the definition are contained in paragraphs 9 and 10 of the report of the Sixth Committee (A/9890).

16 See Security Council Report, 'In Hindsight: The Security Council in 2018' 31 January 2019, www.securitycouncilreport.org/monthly-forecast/2019-02/in-hindsight-the-security-council-in-2018.php.

17 Thomas Schindlmayr, 'Obstructing the Security Council: The Use of the Veto in the Twentieth Century' (2001) 3 *Journal of the History of International Law* 218, 226.

18 Resolutions 82 from 25 June 1950, 83 from 27 June 1950 and 84 from 7 July 1950. For a general overview, see Nigel D. White, 'The Korean War—1950–1953' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 17.

19 Adopted with 52 votes in favour, 5 against (the Soviet members) and 2 abstentions (Argentina and India).

20 Nigel D. White, 'The Korean War—1950–53' in Tom Ruys and Olivier Corten with Alexandra Hofer (eds), *The Use of Force in International Law. A Case-based Approach* (Oxford University Press 2018), 17.

21 L. H. Woolsey, 'The "Uniting for Peace" Resolution of the United Nations' (1951) 45/1 *The American Journal of International Law* 129.

22 For an overview, see www.un.org/en/ga/sessions/emergency.shtml.

23 See Chapter 7 (subsection III) on peacekeeping. See also Benedetto Conforti, *The Law and Practice of the United Nations* (3rd edn, Martinus Nijhoff Publishers 2004), 197 *et seq.*

24 Lotta Themnér and Peter Wallensteen, 'Armed Conflicts, 1946–2012' (2013) 50/4 *Journal of Peace Research* 509; Heidelberger Institut für Konfliktforschung, *Conflict Barometer 2015*, 7, https://hiik.de/konfliktbarometer/bisherige-ausgaben/#ctsc-tab-content-2008-2017.

25 Para. 99; it deserves to be mentioned that the Srebrenica massacre occurred six months after the report.

26 Para. 4.

27 *The New York Times*, 'War in the Gulf: Bush Statement: Excerpts from 2 Statements by Bush on Iraq's Proposal for Ending Conflict' 16 February 1991, www.nytimes.com/1991/02/16/world/war-gulf-bush-statement-excerpts-2-statements-bush-iraq-s-proposal-for-ending.html.

28 Robert Litwak, *Rogue States and US Foreign Policy: Containment After the Cold War* (Woodrow Wilson Center Press 2000), 124.

29 UNHCR, 'Chronology: 1991 Gulf War Crisis' 20 March 2003, www.unhcr.org/subsites/iraqcrisis/3e798c2d4/chronology-1991-gulf-war-crisis.html.
30 Security Council Resolution 794 from 3 December 1992, preamble and para. 10.
31 Security Council Resolution 788 from 19 November 1992: "Determining that the deterioration of the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole".
32 Security Council Resolution 864 from 15 September 1993: "Determining that, as a result of UNITA's [the National Union for the Total Independence of Angola] military actions, the situation in Angola constitutes a threat to international peace and security".
33 Security Council Resolution 918 from 17 May 1994: "Deeply disturbed by the magnitude of the human suffering caused by the conflict and concerned that the continuation of the situation in Rwanda constitutes a threat to peace and security in the region".
34 Security Council Resolution 940 from 31 July 1994. For a critique, see Byers and Chesterman (n 5); Richard Falk, 'The Haiti Intervention: A Dangerous World Order Precedent for the United Nations' (1995) 36/2 *Harvard International Law Journal* 341; Olivier Corten, 'La résolution 940 du Conseil de sécurité autorisant une intervention militaire en Haïti: L'émergence d'un principe de légitimité démocratique en droit international?' (1995) 6/1 *European Journal of International Law* 116.
35 See Chapter 6 (subsections IV–VI) on the Responsibility to Protect.
36 George W. Bush, 'State of the Union Address' 29 January 2002, www.whitehouse.gov/news/releases/2002/01/20020129-11.html: "States like these [Iraq, North Korea and Iran], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world".
37 Foreign and Commonwealth Office Paper, 18 March 2003, reproduced in 52/3 *International and Comparative Law Quarterly* (2003) 812. See also The Report of the Iraq Inquiry. Report of a Committee of Privy Counsellors. Volume V, pp. 22 *et seq*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535419/The_Report_of_the_Iraq_Inquiry_-_Volume_V.pdf.
38 First and foremost by Fernando R. Tesón, 'Ending Tyranny in Iraq' (2005) 19/2 *Ethics & International Affairs* 1.
39 Mr. Negroponte, 4644th Security Council meeting, 8 November 2002, S/PV.4644, 3.
40 *The New York Times*, 'France and Russia Ready to Use Veto Against Iraq War' 6 March 2003, www.nytimes.com/2003/03/06/international/europe/france-and-russia-ready-to-use-veto-against-iraq-war.html.
41 See, among the countless articles written on this subject, Thomas M. Franck, 'What Happens Now? The United Nations After Iraq' (2003) 97/3 *The American Journal of International Law* 607 (see also the other articles in this AJIL agora); Karl Zemanek, 'Is the Nature of the International Legal System Changing?' (2003) 8 *Austrian Review of International and European Law* 3; Gerry Simpson, 'The War in Iraq and International Law' (2005) 6/1 *Melbourne Journal of International Law* 167; Christine Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq' (2002) 13 *European Journal of International Law* 1; Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56/1 *International and Comparative Law Quarterly* 157.

4 Self-defense

I Introduction

Article 51 UN Charter

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

States have an "inherent right" to defend themselves or others (so-called collective self-defense) against armed attacks. This right is enshrined in Article 51 UN Charter as one of the two exceptions to the prohibition of the threat or use of force mentioned in the UN Charter (the other is the UN's collective security system). Due to the all-too-frequent paralysis of the Security Council, it remains the most often invoked justification of states resorting to force.[1]

To be justified, self-defense needs to fulfil a number of criteria: Article 51 explicitly requires the occurrence of an "armed attack" and obliges the defending state to report to the Security Council. In theory, the Security Council should take control of the situation as soon as possible by taking measures that "supersede" those by individual members.[2] The right to self-defense was thus meant to be applicable for the short period between an armed attack and actions under the collective security system only.[3] In practice, the right to self-defense has played a much larger role than originally intended since the Security Council often fails to agree or member states prefer to act unilaterally. One also must not forget that the plan to make permanent troops available to the Security Council never materialized.[4]

Apart from these general observations, several fundamental issues relating to the right to self-defense remain unsolved: the question of whether it may be invoked against attacks by non-state (terrorist) actors, the possibility of preemptive or even preventive strikes and the protection of nationals abroad.

A few general observations on these debates are warranted at this point:

First, the view that states may resort to self-defense against non-state actors (not against the respective government) exercising quasi-governmental authority over a specific territory is increasingly accepted. At the same time, the legality of self-defense against other, clandestine terrorist groups remains highly doubtful. The idea (most forcefully championed by the US and a number of scholars)[5] that self-defense is lawful whenever the state on whose

territory such groups are located is "unable or unwilling" to combat them successfully has been rejected or at least not endorsed by the majority of states. Given that terrorist acts cannot always be successfully averted, weaker states in particular are afraid that powerful countries could argue that they were unable and may thus be attacked.[6] Nevertheless, the invocation of the right to self-defense by the US, the UK and NATO after 9/11 has been generally accepted (arguably because of the close ties between the ruling Taliban, along with their pariah status, and al-Qaeda—the so-called safe haven-doctrine).[7]

Second, although Article 51 UN Charter requires the occurrence of an armed attack, states do not accept the obligation of having to wait for the first shot. While the often-discussed Six-Day War's precedential value in this regard is debatable,[8] the right to preemptive self-defense, i.e. if an armed attack is imminent, is commonly accepted.[9] Preventive self-defense against attacks which could happen in the distant future, however, remains unlawful.

Third, some states and writers endorse the possibility of actions in self-defense to protect nationals abroad if three requirements are met: (1) there exists an imminent danger, (2) the responsible foreign government is either unable or unwilling to protect them and (3) the rescue operation is only minimally invasive, i.e. it does not go beyond what is absolutely necessary.[10] As understandable as this so-called protection of nationals doctrine may be, it has not evolved into an accepted rule of customary international law.[11] It has almost exclusively been adopted by powerful military states, and many states fear that it could be abused as a pretext: Notable examples include the 1983 US invasion of Grenada, which took place even though there had been no clear threat to US nationals living there,[12] and the Russian references to protecting fellow nationals in Georgia prior to the 2003 Russo-Georgian war and upon invading Crimea.[13] As there exists no authoritative document on the protection of nationals doctrine,[14] it will not be further addressed in this chapter.

II Collective self-defense

As stated earlier, states may also request other states to come to their defense. Such a request can be given on an ad hoc basis, or states may enter into a bilateral defense pact[15] or join a larger military alliance where it is typically assumed that an attack against one of its members constitutes an attack against all. Prominent examples of the latter include the North Atlantic Treaty and the North Atlantic Treaty Organization (NATO), the EU's mutual defense clause and the Inter-American Treaty of Reciprocal Assistance (the "Rio Pact"[16]).

A. Mutual defense treaties

Articles 5 and 6 North Atlantic Treaty, 4 April 1949, 34 UNTS 243

ARTICLE 5

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

ARTICLE 6

For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:

- on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France,[2] [now inapplicable] on the territory of Turkey or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
- on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.

Article 42(7) Treaty on European Union, Official Journal C 326, 26/10/2012 P. 0001–0390

7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

Article 3 Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security, 2 September 1947, 21 UNTS 77

1 The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.
2 On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. The Organ of Consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken.
3 The provisions of this Article shall be applied in case of any armed attack which takes place within the region described in Article 4 or within the territory of an American

State. When the attack takes place outside of the said areas, the provisions of Article 6 shall be applied.

4 Measures of self-defense provided for under this Article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security.

B The Nicaragua *case*

The question of collective self-defense was also discussed by the International Court of Justice in the *Nicaragua* case. After all, the US argued it had acted on behalf of El Salvador, Honduras and Costa Rica. The court concluded that collective self-defense in general and under the pertinent treaties (the Charter of the Organization of American States and the Rio Pact) in particular required a specific request by the attacked state. It furthermore held that the absence of a report to the Security Council by itself did not necessarily render an exercise of self-defense unlawful. However, it could well serve as an indicator that the state may not have considered itself the victim of an armed attack.

*Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, paras 196–199, 200, 232–238*

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point: and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 (f), the principle that: "an act of aggression against one American State is an act of aggression against all the other American States" and a provision in Article 27 that:

> Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties

> agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations.

And under paragraph 2 of that Article,

> On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity.

(The 1947 Rio Treaty was modified by the 1975 Protocol of San José, Costa Rica, but that Protocol is not yet in force.)

198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided "on the request of the State or States directly attacked". It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in "the special treaties on the subject".

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked. . . .

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence. . . .

232. The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El

Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request. The Court notes that on 3 April 1984, the representative of El Salvador before the United Nations Security Council, while complaining of the "open foreign intervention practised by Nicaragua in our internal affairs" (S/PV.2528, p. 58), refrained from stating that El Salvador had been subjected to armed attack, and made no mention of the right of collective self-defence which it had supposedly asked the United States to exercise. Nor was this mentioned when El Salvador addressed a letter to the Court in April 1984, in connection with Nicaragua's complaint against the United States. It was only in its Declaration of Intervention filed on 15 August 1984, that El Salvador referred to requests addressed at various dates to the United States for the latter to exercise its right of collective self-defence (para. XII), asserting on this occasion that it had been the victim of aggression from Nicaragua "since at least 1980". In that Declaration, El Salvador affirmed that initially it had "not wanted to present any accusation or allegation [against Nicaragua] to any of the jurisdictions to which we have a right to apply", since it sought "a solution of understanding and mutual respect" (para. III).

234. As to Honduras and Costa Rica, they also were prompted by the institution of proceedings in this case to address communications to the Court; in neither of these is there mention of armed attack or collective self-defence. As has already been noted (paragraph 231 above), Honduras in the Security Council in 1984 asserted that Nicaragua had engaged in aggression against it, but did not mention that a request had consequently been made to the United States for assistance by way of collective self-defence. On the contrary, the representative of Honduras emphasized that the matter before the Security Council "is a Central American problem, without exception, and it must be solved regionally" (S/PV.2529, p. 38), i.e., through the Contadora process. The representative of Costa Rica also made no reference to collective self-defence. Nor, it may be noted, did the representative of the United States assert during that debate that it had acted in response to requests for assistance in that context.

235. There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicative of the view of that State on the question of the existence of an armed attack. At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security Council, the United States has itself taken the view that failure to observe the requirement to make a report contradicted a State's claim to be acting on the basis of collective self-defence (S/PV.2187).

236. Similarly, while no strict legal conclusion may be drawn from the date of El Salvador's announcement that it was the victim of an armed attack, and the date of its official

request addressed to the United States concerning the exercise of collective self-defence, those dates have a significance as evidence of El Salvador's view of the situation. The declaration and the request of El Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The States concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting such an attack, were nevertheless the most accentuated; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador.

237. Since the Court has found that the condition sine qua non required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness. On the question of necessity, the Court observes that the United States measures taken in December 1981 (or, at the earliest, March of that year—paragraph 93 above) cannot be said to correspond to a "necessity" justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity. Whether or not the assistance to the *contras* might meet the criterion of proportionality, the Court cannot regard the United States activities summarized in paragraphs 80, 81 and 86, i.e., those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally on this point, the Court must also observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.

238. Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts listed in paragraph 227 above, and by its assistance to the contras to the extent that this assistance "involve[s] a threat or use of force" (paragraph 228 above).

III The "armed attack" criterion

A The Nicaragua *case, paras 191–195, 229–231, 248f*

Not every violation of the prohibition on the use of force is automatically considered as an "armed attack" in the sense of Article 51. Addressing the US's invocation of collective

self-defense in the *Nicaragua* case, the ICJ had to determine whether "an intermittent flow of arms routed via Nicaragua to the armed opposition in El Salvador"[17] and "certain transboundary military incursions into the territory of Honduras and Costa Rica"[18] imputable to Nicaragua's government amounted to an armed attack. While the Court emphasized that there is no generally accepted definition of this notion,[19] it nevertheless held that states may only defend themselves if the preceding attack meets a certain threshold of severity. On this basis, it denied that these incursions into foreign territory or the mere provision of arms to opposition groups amounted to an armed attack.[20]

Furthermore, it held that not only actions by states themselves but also sending mercenaries or other armed groups as mentioned in Article 3(g) of the UN General Assembly's Resolution on the Definition of Aggression (see Chapter 3, subsection II on the collective security system)—which it classified as customary international law—could constitute an armed attack if their acts reach a certain gravity. Nevertheless, as quoted earlier, the behaviour of the affected states, i.e. the lack of a US report to the Security Council as required by Article 51 UN Charter, the belated declaration and request by El Salvador and the lack of references to being victims of armed attacks by Honduras and Costa Rica led the Court to reject the US invocation of the right to (collective) self-defense.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14*

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their opinio juris as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution:

> Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. States have a duty to refrain from acts of reprisal involving the use of force. Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence. Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is

found: "Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State". In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1 (1)); it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows:

> *The General Assembly Resolves*
>
> 1 To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
> 2 To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
> 3 Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles.

193. The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or "droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the declaration quoted above on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that: "nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful". This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred,

and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack. . . .

229. The Court must thus consider whether, as the Respondent claims, the acts in question of the United States are justified by the exercise of its right of collective self-defence against an armed attack. The Court must therefore establish whether the circumstances required for the exercise of this right of self-defence are present and, if so, whether the steps taken by the United States actually correspond to the requirements of international law. For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.

230. As regards El Salvador, the Court has found (paragraph 160 above) that it is satisfied that between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in that country. The Court was not however satisfied that assistance has reached the Salvadorian armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua. To justify invocation of the right of collective self-defence in customary

international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.

231. Turning to Honduras and Costa Rica, the Court has also stated (paragraph 164 above) that it should find established that certain transborder incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an "armed attack" by Nicaragua on either or both States. The Court notes that during the Security Council debate in March/April 1984, the representative of Costa Rica made no accusation of an armed attack, emphasizing merely his country's neutrality and support for the Contadora process (S/PV.2529, pp. 13–23); the representative of Honduras however stated that "my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population" (ibid., p. 37). There are however other considerations which justify the Court in finding that neither these incursions, nor the alleged supply of arms to the opposition in El Salvador, may be relied on as justifying the exercise of the right of collective self-defence. . . .

248. The United States admits that it is giving its support to the contras in Nicaragua, but justifies this by claiming that that State is adopting similar conduct by itself assisting the armed opposition in El Salvador, and to a lesser extent in Honduras and Costa Rica, and has committed transborder attacks on those two States. The United States raises this justification as one of self-defence; having rejected it on those terms, the Court has nevertheless to consider whether it may be valid as action by way of counter-measures in response to intervention. The Court has however to find that the applicable law does not warrant such a justification.

249. On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 211 above), produce any entitlement to take collective countermeasures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

The "armed attack" threshold remains contested to this very day. After all, it creates a legal gap if actions constitute mere violations of article 2(4) UN Charter without amounting to an armed attack. In his dissenting opinion, Judge Jennings thus doubted that states would accept such a restrictive understanding of the right to self-defense. The Court further left open the question how states may react if they are the victims of armed attacks by non-state armed groups (see also the separate opinions by Judges Simma and Kooijmans in the Armed Activities Case (*DRC v Uganda*) 53). In practice, states indeed often invoke the right to self-defense in comparatively minor incidents. One may thus rather focus on the "armed attack" requirement to assess the proportionality of the counterattack instead of when determining whether a state may resort to self-defense at all:[21]

DISSENTING OPINION OF JUDGE SIR ROBERT JENNINGS (EXCERPTS)

The question of what constitutes "armed attack" for the purposes of Article 51, and its relation to the definition of aggression, are large and controversial questions in which it would be inappropriate to become involved in this opinion. It is of course a fact that collective self-defence is a concept that lends itself to abuse. One must therefore sympathize with the anxiety of the Court to define it in terms of some strictness (though it is a little surprising that the Court does not at all consider the problems of the quite different French text: "où un Membre . . . est l'objet d'une agression armée"). There is a question, however, whether the Court has perhaps gone too far in this direction. The Court (para. 195) allows that, where a State is involved with the organization of "armed bands" operating in the territory of another State, this, "because of its scale and effects", could amount to "armed attack" under Article 51; but that this does not extend to "assistance to rebels in the form of the provision of weapons or logistical or other support" (ibid.). Such conduct, the Court goes on to say, may not amount to an armed attack; but "may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States" (ibid.). It may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement. Accordingly, it seems to me that to say that the provision of arms, coupled with "logistical or other support" is not armed attack is going much too far. Logistical support may itself be crucial. According to the dictionary, logistics covers the "art of moving, lodging, and supplying troops and equipment" (Concise Oxford English Dictionary, 7th ed., 1982). If there is added to all this "other support", it becomes difficult to understand what it is, short of direct attack by a State's own forces, that may not be done apparently without a lawful response in the form of collective self-defence: nor indeed may be responded to at all by the use of force or threat of force, for, to cite the Court again, "States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'" (see para. 211).

This looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like. The original scheme of the United Nations Charter, whereby force would be deployed by the United Nations itself, in accordance with the provisions of Chapter VI1 of the Charter, has never come into effect. Therefore an essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.

B The Oil Platforms *case, paras 51, 63f, 72*

The International Court of Justice further dealt with the "armed attack" criterion in the *Oil Platforms* case between the US and Iran. This case dealt with two US attacks against Iranian-owned offshore oil production facilities during the so-called Tanker War which occurred as part of the 1980–1988 Iran-Iraq War. In both instances, the US relied on the right to self-defense: Prior to the first, a Kuwaiti oil tanker—the *Sea Isle City*—flying a US flag had been struck by a missile while in Kuwaiti waters. The second US attack was a reaction to a mine damaging a US naval vessel—the USS *Samuel B. Roberts*—and injuring ten US sailors. In both incidents, the US—as the victim—had the burden to proof, and it

remained somewhat unclear whether these acts could be attributed to Iran. Furthermore, by assessing the previous—allegedly—Iranian actions together, the ICJ gave support to the so-called accumulation of events theory according to which several small-scale attacks may nevertheless be considered as a single armed attack. Still, it held that the necessary threshold had not been met.[22] Concerning the missile attack, the Court also introduced an intent requirement by arguing that the attack might not necessarily have targeted the *Sea Isle City*. Lastly, the judgment shows that an attack on a foreign ship outside its territorial waters may theoretically trigger the flag state's right to self-defense.

*Case Concerning Oil Platforms (*Islamic Republic of Iran v United States of America*), Judgment of 6 November 2003, ICJ Reports 2003, p. 161*

51. Despite having thus referred to attacks on vessels and aircraft of other nationalities, the United States has not claimed to have been exercising collective self-defence on behalf of the neutral States engaged in shipping in the Persian Gulf; this would have required the existence of a request made to the United States "by the State which regards itself as the victim of an armed attack" (ICJ Reports 1986, p. 105, para. 199). Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the Court observed in the case concerning Military and Paramilitary Activities in and against Nicaragua, it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms" (ICJ Reports 1986, p. 101, para. 191), since "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack" (ibid., p. 103, para. 195). The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence. . . .

63. The United States relies on the following incidents involving United States-flagged, or United States-owned, vessels and aircraft, in the period up to 19 October 1987, and attributes them to Iranian action: the mining of the United States-flagged Bridgeton on 24 July 1987; the mining of the United States-owned Texaco Caribbean on 10 August 1987; and firing on United States Navy helicopters by Iranian gunboats, and from the Reshadat oil platform, on 8 October 1987. The United States also claims to have detected and boarded an Iranian vessel, the Iran Ajr, in the act of laying mines in international waters some 50 nautical miles north-east of Bahrain, in the vicinity of the entrance to Bahrain's deep-water shipping channel. Iran has denied any responsibility for the mining of the Bridgeton and the Texaco Caribbean; as regards the Iran Ajr, Iran has admitted that the vessel was carrying mines, but denies that they were being laid at the time it was boarded, and claims that its only mission was to transport them by a secure route to a quite different area.

64. On the hypothesis that all the incidents complained of are to be attributed to Iran, and thus setting aside the question, examined above, of attribution to Iran of the specific attack on the Sea Isle City, the question is whether that attack, either in itself or in combination with the rest of the "series of . . . attacks" cited by the United States can be categorized as an "armed attack" on the United States justifying self-defence. The Court notes

first that the Sea Isle City was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters.

Secondly, the Texaco Caribbean, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State. As regards the alleged firing on United States helicopters from Iranian gunboats and from the Reshadat oil platform, no persuasive evidence has been supplied to support this allegation. There is no evidence that the minelaying alleged to have been carried out by the Iran Ajr, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the Bridgeton was laid with the specific intention of harming that ship, or other United States vessels. Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a "most grave" form of the use of force (see paragraph 51 above). . . .

72. The Court notes further that, as on the occasion of the earlier attack on oil platforms, the United States in its communication to the Security Council claimed to have been exercising the right of self-defence in response to the "attack" on the USS Samuel B. Roberts, linking it also with "a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf" (paragraph 67 above). Before the Court, it has contended, as in the case of the missile attack on the Sea Isle City, that the mining was itself an armed attack giving rise to the right of self-defence and that the alleged pattern of Iranian use of force "added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response" (see paragraph 62 above). No attacks on United States-flagged vessels (as distinct from United States-owned vessels), additional to those cited as justification for the earlier attacks on the Reshadat platforms, have been brought to the Court's attention, other than the mining of the USS Samuel B. Roberts itself. The question is therefore whether that incident sufficed in itself to justify action in self-defence, as amounting to an "armed attack". The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS Samuel B. Roberts, the Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an "armed attack" on the United States by Iran, in the form of the mining of the USS Samuel B. Roberts.

IV Necessity and proportionality

Furthermore, and as emphasized by the International Court of Justice in the *Nicaragua* case,[23] customary international law imposes three additional requirements for the right to self-defense: necessity, immediacy and proportionality. Necessity means that no reasonable peaceful alternatives to force are available. Immediacy requires a certain temporal nexus between the attack and the response—states can no longer resort to self-defense if the initial attack has been concluded unless further attacks seem likely. The time necessary for preparations, however, must be taken into account. In addition, annexations can be seen as

"ongoing" attacks, even if force is (no longer) involved.[24] Lastly, proportionality is the most contested and difficult criterion.

Three approaches can be identified here:[25] The first and simplest one demands proportionality between the scale and impact of the initial attack and the reaction (which does not mean, however, that the same means have to be employed). However, as Roberto Ago argued in his function as the special rapporteur during the drafting process of the ILC Articles on State Responsibility, states might reject such a restrictive understanding of proportionality and consider themselves unable to adequately defend themselves by using the same level of force as the attacker only. He also elaborated on the need for a flexible approach to proportionality. In addition, Ago also briefly addressed the requirements of necessity and immediacy. Thus, one may also merely require the reaction to be commensurate to the objective sought: namely, to thwart and possibly even forestall armed attacks.[26] Third, and relatedly, one may also apply the reasonable alternatives test as used in connection with domestic self-defense by asking whether a state could have achieved the same result—from an *ex ante* perspective—with less intrusive means. It deserves to be mentioned, however, that these three approaches are not necessarily mutually exclusive. Ideally speaking, states resorting to self-defense adhere to all three understandings of the proportionality requirement.

In addition to the *Nicaragua* case, the ICJ further dealt with the proportionality requirement in the *Nuclear Weapons* advisory opinion and the *Oil Platforms* case.

A Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur—The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1), Yearbook of the International Law Commission *1980. Vol. II(1), paras 119–123*

119. It was noted above that it would be useful to devote some attention to certain questions on which the text of Article 51 of the Charter is silent, but which may be of practical importance for the topic under consideration and for which reference to general international law may also be helpful. Accordingly, the passages which follow refer briefly—although certainly these comments would better appear in the commentary than in the text of the article to be drafted—to certain requirements which are frequently said to be essential conditions for the admissibility of the plea of self-defence in a given case. Reference is made, in particular, to the requirements that the action to be excused must, in the case in question, be "necessary", that it must be "proportional" to the objective which it is supposed to achieve, and that it must take place "immediately". These are, actually, merely three aspects of the same principle which serves as a basis for the effect, attributed to the situation of self-defence, of precluding the wrongfulness of a given conduct: the objective to be achieved by the conduct in question, its raison d'etre, is necessarily that of repelling an attack and preventing it from succeeding, and nothing else.

120. The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognized; hence it requires no further discussion. It should merely be noted that this requirement would be particularly

important if the idea of preventive self-defence were admitted. It would obviously be of lesser importance if only self-defence following the attack was regarded as lawful.

121. The requirement of the *proportionality* of the action taken in self-defence, as we have said, concerns the relationship between that action and its purpose, namely—and this can never be repeated too often—that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself. A limited use of armed force may sometimes be sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, but this is not always certain. Above all, one must guard against any tendency in this connection to consider, even unwittingly, that self-defence is actually a form of sanction, such as reprisals. There must of course be some proportion between the wrongful infringement by one State of the right of another State and the infringement by the latter of a right of the former through reprisals. In the case of conduct adopted for punitive purposes, of specifically retributive action taken against the perpetrator of a particular wrong, it is self-evident that the punitive action and the wrong should be commensurate with each other. But in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the "necessity" and "proportionality" of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale. Within these limits and in this sense, the requirement of proportionality is definitely confirmed by State practice. The occasional objections and doubts expressed about it have been due solely to the mistaken idea of a need for some kind of identity of content and strength between the attack and the action taken in self-defence. It must be emphasized once again that, without the necessary flexibility, the requirement would be unacceptable. As indicated at the beginning of this paragraph, a State which is the victim of an attack cannot really be expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the attack from succeeding and bring it to an end. If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks. If this conviction were to lead to the opposite extreme, that of denying that the requirement of proportionality has any incidence whatsoever on the lawfulness of an armed reaction to self-defence, it might be held to justify acts such as the large-scale murderous bombing of large areas of a State's territory in order to secure the evacuation of a small island wrongfully occupied by its forces. Even in national law, excessive forms of self-defence are punishable. Here too one must keep in mind the distinction between action taken in self-defence proper and a subsequent and separate punitive and retributive action (even if materially alike) that the State which is the victim of the wrong represented by the armed attack takes against the State which did the wrong. Moreover, the limits inherent

in the requirement of proportionality are clearly meaningless where the armed attack and the likewise armed resistance to it lead to a state of war between the two countries.

122. There remains the third requirement, namely that armed resistance to armed attack should take place *immediately*, i.e. while the attack is still going on, and not after it has ended. A State can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier. If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole. At all events, practice and doctrine seem to endorse this requirement fully, which is not surprising in view of its plainly logical link with the whole concept of self-defence.

123. One final question deserves to be touched on: who is to determine whether in a given practical case the conditions are such as to justify invoking self-defence? It seems perfectly evident that a State which considers itself the victim of an armed attack or, in more general terms, of conduct entitling it to react in self-defence against the author of that conduct, should not have to seek anybody's permission beforehand to do so; to maintain the opposite would be to contradict the very essence of the notion of self-defence. If, in certain circumstances, a State considers itself or another State to be the victim of an attack and takes the view that it must therefore use armed force immediately in order to repel it, the extremely urgent situation obviously leaves it no time or means for requesting other bodies, including the Security Council, to undertake the necessary defensive action. There is of course nothing extraordinary in this. Seen from that angle, the situation is the same as when conduct not in conformity with an international obligation is adopted in other circumstances which international law likewise regards as precluding the wrongfulness of the conduct. This does not mean, however, that the State acting in self-defence simply has unilateral discretion to determine outright whether conditions permit it to do so. Other States, first and foremost the State affected by the conduct allegedly adopted in self-defence, may object that the necessary conditions did not exist. A dispute will then arise, the settlement of which is to be sought, in principle, by one of the peaceful means contemplated in Article 33 of the Charter. If the State which acted should be held not to have been entitled to invoke self-defence in justification of its action, the wrongfulness of the conduct it adopted will not be precluded and the State will obviously incur responsibility for that conduct.

B The Nuclear Weapons *Advisory Opinion, paras 40–47, 97*

The ICJ seemingly relied on requiring proportionality between the action and the aim of repelling an attack[27] in the *Nicaragua* case (see para. 237 quoted earlier). After all, it focused on the balance between the US actions and its purported aim of stopping Nicaragua from giving military aid to rebel groups in El Salvador and not on the border incursions of and military support to these groups. In any case, it furthermore held that the US response had come too late to be considered necessary.

In the *Nuclear Weapons* advisory opinion, the Court then held that the proportionality requirement by itself does not necessarily prohibit the use of nuclear weapons—at the end of the day, the Court was unable to determine whether a state may use nuclear weapons if its "very survival would be at stake" and acknowledged the strategy of possessing nuclear weapons as a form of deterrence. Yet the question of whether nuclear weapons could also be used against attacks by other means or at what point in time such a doomsday scenario existed was left unanswered. The advisory opinion thus leaves room open for discussions

as to whether the ICJ indeed relied, as it may be argued, on the "aim of abating the attack being responded to" instead of requiring an "equivalence of scale".[28]

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226

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

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: there is a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law" (I.C.J. Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States have in their written and oral pleadings suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

44. Beyond the conditions of necessity and proportionality, Article 51 specifically requires that measures taken by States in the exercise of the right of self-defence shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of Article 51 apply whatever the means of force used in self-defence.

45. The Court notes that the Security Council adopted on 11 April 1995, in the context of the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, resolution 984 (1995) by the terms of which, on the one hand, it "[t]akes note with appreciation of the statements made by each of the nuclear-weapon States (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265), in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons", and, on the other hand, it "[w]elcomes the intention expressed by certain States that they will provide or support immediate

assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used".

46. Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed inter alia by the principle of proportionality.

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State—whether or not it defended the policy of deterrence—suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal. . . . the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter. when its survival is at stake. Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons. . . .

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

C The Oil Platforms *case, paras 68, 74, 76f*

The *Oil Platforms* case has made matters even more complicated. As stated earlier, the ICJ rejected the US's invocation of the right to self-defense by stating that the oil platforms were not of military importance. Nevertheless, it still assessed the proportionality of the two US counterattacks separately, holding that the first from 19 October, which destroyed one oil platform and caused massive damage to another "might . . . have been considered proportionate" if it had been found to be a necessary response to the missile attack on the *Sea Isle City* tanker and not a mere "target of opportunity".[29] Regarding the second from 18 April 1988, it held that, as part of the US's destruction of Iran's navy ("Operation Praying Mantis"), they had been disproportionate in relation to the damage caused by mining a

US warship. The Court thus seemingly either differentiated on the basis of the means used in the preceding attack (missile or mining) or the nature of the attacked target (merchant versus military vessel).[30]

Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), *Judgment of 6 November 2003, ICJ Reports 2003, p. 161*

68. The Court notes that the attacks on the Salman and Nasr platforms were not an isolated operation, aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated "Operation Praying Mantis", conducted by the United States against what it regarded as "legitimate military targets"; armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft. . . .

74. In its decision in the case concerning Military and Paramilitary Activities in and against Nicaragua, the Court endorsed the shared view of the parties to that case that in customary law "whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence" (ICJ Reports 1986, p. 103, para. 194). One aspect of these criteria is the nature of the target of the force used avowedly in self-defence. In its communications to the Security Council, in particular in that of 19 October 1987 (paragraph 46 above), the United States indicated the grounds on which it regarded the Iranian platforms as legitimate targets for an armed action in self-defence. In the present proceedings, the United States has continued to maintain that they were such, and has presented evidence directed to showing that the platforms collected and reported intelligence concerning passing vessels, acted as a military communication link coordinating Iranian naval forces and served as actual staging bases to launch helicopter and small boat attacks on neutral commercial shipping. The United States has referred to documents and materials found by its forces aboard the vessel Iran Ajr (see paragraph 63 above), allegedly establishing that the Reshadat platforms served as military communication facilities. It has also affirmed that the international shipping community at the time was aware of the military use of the platforms, as confirmed by the costly steps commercial vessels took to avoid them, and by various witness reports describing Iranian attacks. The United States has also submitted expert analysis of the conditions and circumstances surrounding these attacks, examining their pattern and location in the light of the equipment at Iran's disposal. Finally, the United States has produced a number of documents, found on the Reshadat complex when it was attacked, allegedly corroborating the platforms' military function. In particular, it contends that these documents prove that the Reshadat platforms had monitored the movements of the Sea Isle City on 8 August 1987. On the other hand, the forces that attacked the Salman and Nasr complexes were not able to board the platforms containing the control centres, and did not therefore seize any material (if indeed such existed) tending to show the use of those complexes for military purposes. . . .

76. The Court is not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms; and it notes that no such evidence is offered in respect of the Salman and Nasr complexes. However, even accepting those contentions, for the purposes of discussion, the Court is unable to hold that the attacks made on the platforms could have been justified as acts of self-defence. The conditions for the exercise of the right of self-defence are well settled: as the Court observed in its Advisory Opinion on Legality of the Threat or Use of

Nuclear Weapons, "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law" (ICJ Reports 1996 (1), p. 245, para. 41); and in the case concerning Military and Paramilitary Activities in and against Nicaragua, the Court referred to a specific rule "whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" as "a rule well established in customary international law" (ICJ Reports 1986, p. 94, para. 176). In the case both of the attack on the Sea Isle City and the mining of the USS Samuel B. Roberts, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a "target of opportunity", not one previously identified as an appropriate military target (see paragraph 47 above).

77. As to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary in response to the Sea Isle City incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled "Operation Praying Mantis" (see paragraph 68 above). The question of the lawfulness of other aspects of that operation is not before the Court, since it is solely the action against the Salman and Nasr complexes that is presented as a breach of the 1955 Treaty; but the Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, inter alia, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

V Self-defense against non-state actors

Self-defense was traditionally understood as applying between states only. This view was challenged after 9/11. Before then, it was unthinkable that a terrorist group could carry out an attack of such a magnitude. On 12 September 2001, however, the US—for the first (and last) time in history—invoked NATO Article 5. The war in Afghanistan—Operation Enduring Freedom—officially started on 7 October 2001.

After identifying al-Qaeda as the source of the attacks, the US and its allies were left with three options when searching for a legal rationale to justify their response: attribute al-Qaeda to Afghanistan, either by arguing that the Taliban regime had provided them with a safe harbor or by establishing a sufficient "nexus", or argue that the right to self-defense extended to non-state actors. In any event, the US and their allies targeted both the Taliban and al-Qaeda. (relevant press releases are quoted below).

The US could count on the world's sympathy when the Security Council quickly responded by passing a resolution on 12 September which recognized the "inherent right of individual or collective self-defence in accordance with the Charter" in the preambular paragraphs, condemning the attacks and calling on states and the international community to combat terrorism and hold those responsible for 9/11 accountable. On 28 September 2001,

it again reaffirmed the right to self-defense in Resolution 1373 to take further steps and obliging states to undertake numerous efforts—from criminalizing the collection of funds for supporting terrorism to asset freezes, the denial of safe havens, and border controls to prevent the movement of terrorists—to combat terrorism. Since this resolution was not tied to a specific situation but addressed terrorism in general and without a clear timetable, it was a quasi-legislative act: a novelty in the Security Council's practice.[31]

Security Council Resolution 1368 (2001)

Adopted by the Security Council at Its 4370th Meeting, on 12 September 2001

The Security Council,

Reaffirming the principles and purposes of the Charter of the United Nations,
Determined to combat by all means threats to international peace and security caused by terrorist acts,
Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1 *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;
2 *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;
3 *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;
4 *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;
5 *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;
6 *Decides* to remain seized of the matter.

Security Council Resolution 1373 (2001)

Adopted by the Security Council at Its 4385th Meeting, on 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1 *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2 *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3 *Calls* upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;
(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;
(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4 *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5 *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6 *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7 *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8 *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9 *Decides* to remain seized of this matter.

Statement by the North Atlantic Council, NATO Press Release, 12 September 2001

On September 12th, the North Atlantic Council met again in response to the appalling attacks perpetrated yesterday against the United States.

The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.

The commitment to collective self-defence embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism. When the Heads of State and Government of NATO met in Washington in 1999,

they paid tribute to the success of the Alliance in ensuring the freedom of its members during the Cold War and in making possible a Europe that was whole and free. But they also recognised the existence of a wide variety of risks to security, some of them quite unlike those that had called NATO into existence. More specifically, they condemned terrorism as a serious threat to peace and stability and reaffirmed their determination to combat it in accordance with their commitments to one another, their international commitments and national legislation.

Article 5 of the Washington Treaty stipulates that in the event of attacks falling within its purview, each Ally will assist the Party that has been attacked by taking such action as it deems necessary. Accordingly, the United States' NATO Allies stand ready to provide the assistance that may be required as a consequence of these acts of barbarism.

Invocation of Article 5 Confirmed, NATO Press Release, 2 October 2001

Frank Taylor, the US Ambassador-at-Large and Coordinator for Counterterrorism, briefed the North Atlantic Council—NATO's top decision-making body—on 2 October on the results of investigations into the 11 September terrorist attacks against the United States. As a result of the information he provided to the Council, it has been clearly determined that the individuals who carried out the attacks belonged to the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.

At a special press conference, NATO Secretary General Lord Robertson announced that since it had been determined that the attacks had been directed from abroad, they were regarded as an action covered by Article 5 of the Washington Treaty. When the Alliance invoked the principle of Article 5 of the Washington Treaty on 12 September, it stated that it needed to know whether such actions had been conducted from abroad before the Article could become fully operative. This has now been determined, but Lord Robertson explained that, at present, it was premature to speculate on what military action would be taken by the Alliance, be it individually or collectively.

Statement by NATO Secretary General, Lord Robertson, 2 October 2001

This morning, the United States briefed the North Atlantic Council on the results of the investigation into who was responsible for the horrific terrorist attacks which took place on 11 September.

The briefing was given by Ambassador Frank Taylor, the United States Department of State Coordinator for Counter-terrorism.

This morning's briefing follows those offered by United States Deputy Secretary of State Richard Armitage and United States Deputy Secretary of Defense Paul Wolfowitz, and illustrates the commitment of the United States to maintain close cooperation with Allies.

Today's was classified briefing and so I cannot give you all the details. Briefings are also being given directly by the United States to the Allies in their capitals.

The briefing addressed the events of 11 September themselves, the results of the investigation so far, what is known about Osama bin Laden and the Al-Qaida organisation and their involvement in the attacks and in previous terrorist activity, and the links between Al-Qaida and the Taliban regime in Afghanistan.

The facts are clear and compelling. The information presented points conclusively to an Al-Qaida role in the 11 September attacks.

We know that the individuals who carried out these attacks were part of the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taliban.

On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.

I want to reiterate that the United States of America can rely on the full support of its 18 NATO Allies in the campaign against terrorism.

Statement by NATO Secretary General, Lord Robertson, 8 October 2001

Yesterday evening, the United States of America and the United Kingdom began military operations as part of the global campaign against terrorism.

As Secretary General of NATO, I received advance warning. Vice President Dick Cheney telephoned me before the first attacks.

I have just come from a meeting of the North Atlantic Council, which met to review the situation and to reaffirm its full support for these targeted actions. The Permanent Representatives of the United States of America and the United Kingdom briefed the Council.

This operation is not directed against the people of Afghanistan. It is designed to strike against al-Qaida terrorist training camps and military installations of the Taliban regime in Afghanistan.

NATO Ambassadors this morning expressed their full support for the actions of the United States and the United Kingdom, which follow the appalling attacks perpetrated against the United States on 11 September 2001. They reiterated their readiness to provide assistance as required. Specifically, they remain fully committed to implement the eight measures agreed on 4 October at the request of the United States.

In this context and following a specific request from the United States, the Allies today agreed that five NATO AWACS aircraft, together with their crews, will deploy to the United States to assist with counter-terrorism operations. This deployment, which was agreed by acclamation this morning, will allow US aircraft currently engaged in these operations in the United States to be released for operations against terrorism elsewhere.

NATO Ambassadors welcomed France's intention to provide increased support by French AWACS aircraft in Bosnia-Herzegovina as backfill in order to facilitate this NATO deployment.

Yesterday's actions were carried out by two NATO Allies. Other NATO Allies have pledged direct military support as this operation unfolds. The Alliance itself will continue to provide military and other support, to consult on the implications for its security, and to take whatever defensive measures are necessary.

The campaign to eradicate terrorism has reached a new stage. It will be pursued on many fronts with determination and with patience. The Alliance stands ready to play its role. I will be consulting over the next couple of days, first of all with Prime Minister Chrétien in Canada this evening, and I will personally congratulate and commend the offers of support that have been made by Canada at this time and indeed the support that has already been given by this country. And on Wednesday I will be in the White House to meet President Bush. I will be there first and foremost to express sympathy to his nation on the eve of the month's anniversary of these tragic atrocities but also to pledge the whole-hearted support of the entire NATO Alliance for America at this time of need.

A The Wall *Advisory Opinion, paras 138f*

The topic of self-defense against non-state actors occurred again in the context of the conflict between Israel and the Palestinians. As a reaction to the Second Intifada and increased terrorist attacks—many of them suicide bombings—Israel started the construction of a wall at its border with the Palestinian territory. Its precise route and impact have caused an emotional controversy, and on 8 December 2003, the General Assembly—as part of its tenth emergency session[32]—requested an advisory opinion by asking

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

When answering the question, the ICJ also assessed statements by Israel's government justifying the construction as self-defense against these attacks. The Court rejected this invocation since Israel had not been the victim of attacks attributable to or directly carried out by a foreign state. Given that this finding could be interpreted as a rejection of the possibility of relying on self-defense against non-state actors in general, it led to an extensive academic debate,[33] including criticism by some of the judges—Higgins, Kooijmans and Buergenthal—themselves. Upon closer inspection, however, the advisory opinion may also be understood as implying that Israel could not rely on self-defense since the Palestinian territories were occupied and thus under Israeli control. In this sense, the situation was, as the Court emphasized, different from the 9/11 attacks. Israel could thus eventually rely on the rights of an occupying power to maintain order and its own security.[34] The legal/political problem here was that Israel rejects this status for political reasons, i.e. because the exact demarcation between its territory and that of the Palestinians remains contested (although it repeatedly declared that it would voluntarily apply the Fourth Geneva Convention).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136

138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex 1 to the report of the Secretary-General states that, according to Israel: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)". More specifically, Israel's Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter"; the Security Council resolutions referred to, he continued, "have clearly recognized the right of States to use force in self-defence against terrorist attacks", and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations,

until the Security Council has taken measures necessary to maintain international peace and security.

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (200 l), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

SEPARATE OPINION OF JUDGE HIGGINS, PARAS 33–36

33. I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State". There is, with respect, 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. That qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment, I.C.J. Reports 1986, p. 14)*. It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (ibid., p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250–251).

34. I also find unpersuasive the Court's contention that, as the uses of force emanate from occupied territory, it is not an armed attack "by one State against another". I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory—a territory which it has found not to have been annexed and is certainly "other than" Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an uneven-handed sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.

35. In the event, however, these reservations have not caused me to vote against subparagraph (3) (A) of the *dispositif*, for two reasons. First, I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood. Second, even if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution on attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.

SEPARATE OPINION OF JUDGE KOOIJMANS, PARAS 35–36

35. Self-defence—Israel based the construction of the wall on its inherent right of self-defence as contained in Article 51 of the Charter. In this respect it relied on Security Council resolutions 1368 (2001) and 1373 (2001), adopted after the terrorist attacks of 11 September 2001 against targets located in the United States. The Court starts its response to this argument by stating that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State (para. 139). Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point. Resolutions 1368 (2001) and 1373 (2001) recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.

36. The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self-defence can be found in the second part of paragraph 139. The right of self-defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 (2001) and 1373 (2001) refer to acts of international terrorism as constituting a threat to international peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 (2001) and 1373 (2001) and that consequently Article 51 of the Charter cannot be invoked by Israel.

DECLARATION OF JUDGE BUERGENTHAL, PARAS 2–6

2. I share the Court's conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, 1 agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.

3. It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law (see para. 10 below). But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact

on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.

4. This is true with regard to the Court's sweeping conclusion that the wall as a whole, to the extent that it is constructed on the Occupied Palestinian Territory, violates international humanitarian law and international human rights law. It is equally true with regard to the finding that the construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (para. 122). I accept that the Palestinian people have the right to self-determination and that it is entitled to be fully protected. But assuming without necessarily agreeing that this right is relevant to the case before us and that it is being violated, Israel's right to self-defence, if applicable and legitimately invoked, would nevertheless have to preclude any wrongfulness in this regard. See Article 21 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which declares: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations".

5. Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific segments of the wall, their defensive needs and related topographical considerations. Since these facts are not before the Court, it is compelled to adopt the to me legally dubious conclusion that the right of legitimate or inherent self-defence is not applicable in the present case. The Court puts the matter as follows:

> Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.
>
> (Para. 139)

6. There are two principal problems with this conclusion. The first is that the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this case, should not be and is not in fact being assimilated by

the Court to a State. Article 51 of the Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations. . . ". Moreover, in the resolutions cited by the Court, the Security Council has made clear that "international terrorism constitutes a threat to international peace and security" while "reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)" (Security Council resolution 1373 (2001)). In its resolution 1368 (2001), adopted only one day after the 11 September 2001 attacks on the United States, the Security Council invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case (see Thomas Franck, "Terrorism and the Right of Self-Defense", *American Journal of International Law*, Vol. 95, 2001, pp. 839–840).

Second, Israel claims that it has a right to defend itself against terrorist attacks to which it is subjected on its territory from across the Green Line and that in doing so it is exercising its inherent right of self-defence. In assessing the legitimacy of this claim, it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory—whatever the concept of "control" means given the attacks Israel is subjected from that territory—or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defence against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right. To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court's formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.

*B Armed Activities on the Territory of the Congo (***Democratic Republic of the Congo v Uganda***), paras 106–147*

Self-defense is also a pressing issue in connection with transnational armed conflicts. A year after the *Wall* advisory opinion, the ICJ was confronted with Uganda's claim of acting in self-defense against a non-state armed group—the Allied Democratic Forces (ADF)—in the *Armed Activities* case (*DRC v Uganda*). Determining that the attacks against Uganda could not be attributed to the Democratic Republic of the Congo, the Court then rejected Uganda's reference to self-defense since it had not claimed to have been attacked by the DRC as such but by the ADF (at para. 147). In a rare *obiter dictum*, the ICJ also clarified that Uganda's actions would certainly have been disproportionate to the foregoing attacks.

When reading the pertinent passage, the ICJ again seemingly rejected the permissibility of self-defense against non-state armed groups. As Judge Simma emphasized in his separate opinion, however, this would be a misunderstanding. The Court rather refrained from pronouncing on this subject matter altogether by restricting itself to the arguments of the parties. Echoing the criticism raised by Judge Jennings in the *Nicaragua* case, he and Judge Kooijmans thus both criticized the Court for adding to the existing confusion on the pressing issue and missing an opportunity to clarify its jurisprudence.

*Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*), Judgment of 19 December 2005, ICJ Reports 2005, p. 168*

SELF-DEFENCE IN THE LIGHT OF PROVEN FACTS

106. The Court has already said that, on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August 1998 (see paragraph 71 above). The Court has also indicated that with regard to the presence of Ugandan troops on Congolese territory near to the common border after the end of July 1998, President Kabila's statement on 28 July 1998 was ambiguous (see paragraph 51 above). The Court has further found that any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998 (see paragraph 53 above). The Court now turns to examine whether Uganda's military activities starting from this date could be justified as actions in self-defence.

107. The DRC has contended that Uganda invaded on 2 August 1998, beginning with a major airborne operation at Kitona in the west of the DRC, then rapidly capturing or taking towns in the east, and then, continuing to the north-west of the country. According to the DRC, some of this military action was taken by the UPDF alone or was taken in conjunction with anti-government rebels and/or with Rwanda. It submits that Uganda was soon in occupation of a third of the DRC and that its forces only left in April 2003.

108. Uganda insists that 2 August 1998 marked the date only of the beginning of civil war in the DRC and that, although Rwanda had invited it to join in an effort to overthrow President Kabila, it had declined. Uganda contends that it did not act jointly with Rwanda in Kitona and that it had the consent of the DRC for its military operations in the east until the date of 11 September 1998. 11 September was the date of issue of the "Position of the High Command on the Presence of the UPDF in the DRC" (hereinafter "the Ugandan High Command document") (see paragraph 109 below). Uganda now greatly increased the number of its troops from that date on. Uganda acknowledges that its military operations thereafter can only be justified by reference to an entitlement to act in self-defence.

109. The Court finds it useful at this point to reproduce in its entirety the Ugandan High Command document. This document has been relied on by both Parties in this case. The High Command document, although mentioning the date of 11 September 1998, in the Court's view, provides the basis for the operation known as operation "Safe Haven". The document reads as follows:

> WHEREAS for a long time the DRC has been used by the enemies of Uganda as a base and launching pad for attacks against Uganda;
>
> AND WHEREAS the successive governments of the DRC have not been in effective control of all the territory of the Congo;
>
> AND WHEREAS in May 1997, on the basis of a mutual understanding the Government of Uganda deployed UPDF to jointly operate with the Congolese Army against Uganda enemy forces in the DRC;
>
> AND WHEREAS when an anti-Kabila rebellion erupted in the DRC the forces of the UPDF were still operating alongside the Congolese Army in the DRC, against Uganda enemy forces who had fled back to the DRC;

NOW THEREFORE the High Command sitting in Kampala this 11th day of September, 1998, resolves to maintain forces of the UPDF in order to secure Uganda's legitimate security interests which are the following:

1 To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2 To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3 To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
4 To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5 To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces.

110. In turning to its assessment of the legal character of Uganda's activities at Aru, Beni, Bunia and Watsa in August 1998, the Court begins by observing that, while it is true that those localities are all in close proximity to the border, "as per the consent that had been given previously by President Kabila", the nature of Ugandan action at these locations was of a different nature from previous operations along the common border. Uganda was not in August 1998 engaging in military operations against rebels who carried out cross-border raids. Rather, it was engaged in military assaults that resulted in the taking of the town of Beni and its airfield between 7 and 8 August, followed by the taking of the town of Bunia and its airport on 13 August, and the town of Watsa and its airport at a date between 24 and 29 August.

111. The Court finds these actions to be quite outside any mutual understanding between the Parties as to Uganda's presence on Congolese territory near to the border. The issue of when any consent may have terminated is irrelevant when the actions concerned are so clearly beyond co-operation "in order to ensure peace and security along the common border", as had been confirmed in the Protocol of 27 April 1998.

112. The Court observes that the Ugandan operations against these eastern border towns could therefore only be justified, if at all, as actions in self-defence. However, at no time has Uganda sought to justify them on this basis before the Court.

113. Operation "Safe Haven", by contrast, was firmly rooted in a claimed entitlement "to secure Uganda's legitimate security interests" rather than in any claim of consent on the part of the DRC. The Court notes, however, that those most intimately involved in its execution regarded the military actions throughout August 1998 as already part and parcel of operation "Safe Haven".

114. Thus Mr. Kavuma, the Minister of State for Defence, informed the Porter Commission that the UPDF troops first crossed the border at the beginning of August 1998, at the time of the rebellion against President Kabila, "when there was confusion inside the DRC" (Porter Commission document CW/01/02 23/07/01, p. 23). He confirmed that this "entry" was "to defend our security interests". The commander of the Ugandan forces in the DRC, General Kazini, who had immediate control in the field, informing Kampala and receiving thereafter any further orders, was asked "[w]hen was 'Operation Safe Haven'? When did it commence?" He replied "[i]t was in the month of August. That very month of August 1998. 'Safe Haven' started after the capture of Beni, that was on 7 August 1998"

(CW/01/03 24/07/01, p. 774). General Kazini emphasized that the Beni operation was the watershed: "So before that. . . 'Operation Safe Haven' had not started. It was the normal UPDF operations—counter-insurgency operations in the Rwenzoris before that date of 7 August 1998" (CW/01/03 24/07/01, p. 129). He spoke of "the earlier plan" being that both Governments, in the form of the UPDF and the FAC, would jointly deal with the rebels along the border. "But now this new phenomenon had developed: there was a mutiny, the rebels were taking control of those areas. So we decided to launch an offensive together with the rebels, a special operation we code-named 'Safe Haven'". General Kazini was asked by Justice Porter what was the objective of this joint offensive with the rebels. General Kazini replied "[t]o crush the bandits together with their FAC allies" and confirmed that by "FAC" he meant the "Congolese Government Army" (CW/01/03 24/07/ 01, p. 129).

115. It is thus clear to the Court that Uganda itself actually regarded the military events of August 1998 as part and parcel of operation "Safe Haven", and not as falling within whatever "mutual understandings" there had previously been.

116. The Court has noted that within a very short space of time Ugandan forces had moved rapidly beyond these border towns. It is agreed by all that by 1 September 1998 the UPDF was at Kisangani, very far from the border. Furthermore, Lieutenant Colonel Magenyi informed the Porter Commission, under examination, that he had entered the DRC on 13 August and stayed there till mid-February 1999. He was based at Isiro, some 580 km from the border. His brigade had fought its way there: "we were fighting the ADFs who were supported by the FAC".

117. Accordingly, the Court will make no distinction between the events of August 1998 and those in the ensuing months.

118. Before this Court Uganda has qualified its action starting from mid-September 1998 as action in self-defence. The Court will thus examine whether, throughout the period when its forces were rapidly advancing across the DRC, Uganda was entitled to engage in military action in self-defence against the DRC. For these purposes, the Court will not examine whether each individual military action by the UPDF could have been characterized as action in self-defence, unless it can be shown, as a general proposition, that Uganda was entitled to act in self-defence in the DRC in the period from August 1998 till June 2003.

119. The Court first observes that the objectives of operation "Safe Haven", as stated in the Ugandan High Command document (see paragraph 109 above), were not consonant with the concept of self-defence as understood in international law.

120. Uganda in its response to the question put to it by Judge Kooijmans (see paragraph 22 above) confirms that the changed policies of President Kabila had meant that co-operation in controlling insurgency in the border areas had been replaced by "stepped-up cross-border attacks against Uganda by the ADF, which was being re-supplied and re-equipped by the Sudan and the DRC Government". The Court considers that, in order to ascertain whether Uganda was entitled to engage in military action on Congolese territory in self-defence, it is first necessary to examine the reliability of these claims. It will thus begin by an examination of the evidence concerning the role that the Sudan was playing in the DRC at the relevant time.

121. Uganda claimed that there was a tripartite conspiracy in 1998 between the DRC, the ADF and the Sudan; that the Sudan provided military assistance to the DRC's army and to anti-Ugandan rebel groups; that the Sudan used Congo airfields to deliver materiel; that the Sudan airlifted rebels and its own army units around the country; that Sudanese aircraft bombed the UPDF positions at Bunia on 26 August 1998; that a Sudanese brigade of 2,500 troops was in Gbadolite and was preparing to engage the UPDF forces

in eastern Congo; and that the DRC encouraged and facilitated stepped-up cross border attacks from May 1998 onwards.

122. The Court observes, more specifically, that in its Counter-Memorial Uganda claimed that from 1994 to 1997 anti-Ugandan insurgents "received direct support from the Government of Sudan" and that the latter trained and armed insurgent groups, in part to destabilize Uganda's status as a "good example" in Africa. For this, Uganda relied on a Human Rights Watch (hereinafter HRW) report. The Court notes that this report is on the subject of slavery in the Sudan and does not assist with the issue before the Court. It also relied on a Ugandan political report which simply claimed, without offering supporting evidence, that the Sudan was backing groups launching attacks from the DRC. It further relies on an HRW report of 2000 stating that the Sudan was providing military and logistical assistance to the LRA, in the north of Uganda, and to the SPLM/A (by which Uganda does not claim to have been attacked). The claims relating to the LRA, which are also contained in the Counter-Memorial of Uganda, have no relevance to the present case. No more relevant is the HRW report of 1998 criticizing the use of child soldiers in northern Uganda.

123. The Court has next examined the evidence advanced to support the assertion that the Sudan was supporting anti-Ugandan groups which were based in the DRC, namely FUNA, UNRF II and NALU. This consists of a Ugandan political report of 1998 which itself offers no evidence, and an address by President Museveni of 2000. These documents do not constitute probative evidence of the points claimed.

124. Uganda states that President Kabila entered into an alliance with the Sudan, "which he invited to occupy and utilise airfields in northeastern Congo for two purposes: delivering arms and other supplies to the insurgents; and conducting aerial bombardment of Uganda towns and villages". Only President Museveni's address to Parliament is relied on. Certain assertions relating to the son of Idi Amin, and the role he was being given in the Congolese military, even were they true, prove nothing as regards the specific allegations concerning the Sudan.

125. Uganda has informed the Court that a visit was made by President Kabila in May 1998 to the Sudan, in order to put at the Sudan's disposal all the airfields in northern and eastern Congo, and to deliver arms and troops to anti-Ugandan insurgents along Uganda's border. Uganda offered as evidence President Museveni's address to Parliament, together with an undated, unsigned internal Ugandan military intelligence document. Claims as to what was agreed as a result of any such meeting that might have taken place remain unproven.

126. Uganda informed the Court that Uganda military intelligence reported that in August 1998 the Sudan airlifted insurgents from the WNBF and LRA to fight alongside Congolese forces against RPA and RCD rebels. The Court observes that, even were that proven (which in the Court's view is not the case), the DRC was entitled so to have acted. This invitation could not of itself have entitled Uganda to use force in self-defence. The Court has not been able to verify from concordant evidence the claim that the Sudan transported an entire Chadian brigade to Gbadolite (whether to join in attacks on Uganda or otherwise).

127. The Court further observes that claims that the Sudan was training and transporting FAC troops, at the request of the Congolese Government, cannot entitle Uganda to use force in self-defence, even were the alleged facts proven. In the event, such proof is not provided by the unsigned Ugandan military intelligence document, nor by a political report that Uganda relies on.

128. Article 51 of the Charter refers to the right of "individual or collective" self-defence. The Court notes that a State may invite another State to assist it in using force in self-defence. On 2 August 1998 civil war had broken out in the DRC and General Kazini later testified to the Porter Commission that operation "Safe Haven" began on 7–8 August 1998. The Ugandan written pleadings state that on 14 August 1998 Brigadier Khalil of the Sudan delivered three planeloads of weapons to the FAC in Kinshasa, and that the Sudan stepped up its training of FAC troops and airlifted them to different locations in the DRC. Once again, the evidence offered to the Court as to the delivery of the weapons is the undated, unsigned, internal Ugandan military intelligence report. This was accompanied by a mere political assertion of Sudanese backing for troops launching attacks on Uganda from the DRC. The evidentiary situation is exactly the same as regards the alleged agreement by President Kabila with the Sudanese Vice-President for joint military measures against Uganda. The same intelligence report, defective as evidence that the Court can rely on, is the sole source for the claims regarding the Sudanese bombing with an Antonov aircraft of UPDF positions in Bunia on 26 August 1998; the arrival of the Sudanese brigade in Gbadolite shortly thereafter; the deployment of Sudanese troops, along with those of the DRC, on Uganda's border on 14 September; and the pledges made on 18 September for the deployment of more Sudanese troops.

129. It was said by Uganda that the DRC had effectively admitted the threat to Uganda's security posed by the Sudan, following the claimed series of meetings between President Kabila and Sudanese officials in May, August and September 1998. In support of these claims Uganda referred the Court to a 1999 ICG report, "How Kabila Lost His Way"; although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. Reliance is also placed on a political statement by the Ugandan High Command. The Court observes that this does not constitute reliable evidence and in any event it speaks only of the reason for the mid-September deployment of troops. The Court has also found that it cannot rely as persuasive evidence on a further series of documents said to support these various claims relating to the Sudan, all being internal political documents. The Court has examined the notarized affidavit of 2002 of the Ugandan Ambassador to the DRC, which refers to documents that allegedly were at the Ugandan Embassy in Kinshasa, showing that "the Sudanese government was supplying ADF rebels". While a notarized affidavit is entitled to a certain respect, the Court must observe that it is provided by a party in the case and provides at best indirect "information" that is unverified.

130. The Court observes that it has not been presented with evidence that can safely be relied on in a court of law to prove that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda; or that any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda's claim that it was acting in self-defence.

131. The Court has also examined, in the context of ascertaining whether Uganda could have been said to have acted in self-defence, the evidence for Uganda's claims that from May 1998 onwards the frequency, intensity and destructiveness of cross-border attacks by the ADF "increased significantly", and that this was due to support from the DRC and from the Sudan.

132. The Court is convinced that the evidence does show a series of attacks occurring within the relevant time-frame, namely: an attack on Kichwamba Technical School of 8 June 1998, in which 33 students were killed and 106 abducted; an attack near Kichwamba, in which five were killed; an attack on Benyangule village on 26 June, in which

11 persons were killed or wounded; the abduction of 19 seminarians at Kiburara on 5 July; an attack on Kasese town on 1 August, in which three persons were killed. A sixth attack was claimed at the oral hearings to have occurred at Kijarumba, with 33 fatalities. The Court has not been able to ascertain the facts as to this latter incident.

133. The DRC does not deny that a number of attacks took place, but its position is that the ADF alone was responsible for them. The documents relied on by Uganda for its entitlement to use force in self-defence against the DRC include a report of the interrogation of a captured ADF rebel, who admits participating in the Kichwamba attack and refers to an "intention" to obtain logistical support and sanctuary from the Congolese Government; this report is not signed by the person making the statement, nor does it implicate the DRC. Uganda also relies on a document entitled "Chronological Illustration of Acts of Destabilisation by Sudan and Congo Based Dissidents", which is a Ugandan military document. Further, some articles in newspapers relied on by Uganda in fact blame only the ADF for the attacks. A very few do mention the Sudan. Only some internal documents, namely unsigned witness statements, make any reference to Congolese involvement in these acts.

134. The Court observes that this is also the case as regards the documents said to show that President Kabila provided covert support to the ADF. These may all be described as internal documents, often with no authenticating features, and containing unsigned, unauthenticated and sometimes illegible witness statements. These do not have the quality or character to satisfy the Court as to the matters claimed.

135. In oral pleadings Uganda again referred to these "stepped up attacks". Reference was made to an ICG report of August 1998, "North Kivu, into the Quagmire". Although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. It speaks of the ADF as being financed by Iran and the Sudan. It further states that the ADF is "[e]xploiting the incapacity of the Congolese Armed Forces" in controlling areas of North Kivu with neighbour Uganda. This independent report does seem to suggest some Sudanese support for the ADF's activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border.

136. Uganda relies on certain documents annexed by the DRC to its Reply. However, the Court does not find this evidence weighty and convincing. It consists of a bundle of news reports of variable reliability, which go no further than to say that unconfirmed reports had been received that the Sudan was flying military supplies to Juba and Dungu. The Court has therefore not found probative such media reports as the IRIN update for 12 to 14 September 1998, stating that Hutu rebels were being trained in southern Sudan, and the IRIN update for 16 September 1998, stating that "rebels claim Sudan is supporting Kabila at Kindu".

Neither has the Court relied on the (unreferenced and unsourced) claim that President Kabila made a secret visit to Khartoum on 25 August 1998 nor on the extract from Mr. Bemba's book Le choix de la liberté stating that 108 Sudanese soldiers were in the DRC, under the command of the Congolese army, to defend the area around Gbadolite.

137. Nor has the Court been able to satisfy itself as to certain internal military intelligence documents, belatedly offered, which lack explanations as to how the information was obtained (e.g. Revelations of Commander Junju Juma (former commanding officer in the ADF) of 17 May 2000, undated Revelations by Issa Twatera (former commanding officer in the ADF)).

138. A further "fact" relied on by Uganda in this case as entitling it to act in self-defence is that the DRC incorporated anti-Ugandan rebel groups and Interahamwe militia into the FAC. The Court will examine the evidence and apply the law to its findings.

139. In its Counter-Memorial, Uganda claimed that President Kabila had incorporated into his army thousands of ex-FAR and Interahamwe génocidaires in May 1998. A United States State Department statement in October 1998 condemned the DRC's recruitment and training of former perpetrators of the Rwandan genocide, thus giving some credence to the reports internal to Uganda that were put before the Court, even though these lacked signatures or particulars of sources relied on. But this claim, even if true, seems to have relevance for Rwanda rather than Uganda.

140. Uganda in its oral pleadings repeated the claims of incorporation of former Rwandan soldiers and Interahamwe into special units of the Congolese army. No sources were cited, nor was it explained to the Court how this might give rise to a right of self-defence on the part of Uganda.

141. In the light of this assessment of all the relevant evidence, the Court is now in a position to determine whether the use of force by Uganda within the territory of the DRC could be characterized as self-defence.

142. Article 51 of the United Nations Charter provides:

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

143. The Court recalls that Uganda has insisted in this case that operation "Safe Haven" was not a use of force against an anticipated attack. As was the case also in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case,

> Reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised.
>
> (ICJ Reports 1986, p. 103, para. 194)

The Court there found that "[a]ccordingly [it] expresses no view on that issue". So it is in the present case. The Court feels constrained, however, to observe that the wording of the Ugandan High Command document on the position regarding the presence of the UPDF in the DRC makes no reference whatever to armed attacks that have already occurred against Uganda at the hands of the DRC (or indeed by persons for whose action the DRC is claimed to be responsible). Rather, the position of the High Command is that it is necessary "to secure Uganda's legitimate security interests". The specified security needs are essentially preventative—to ensure that the political vacuum does not adversely affect Uganda, to prevent attacks from "genocidal elements", to be in a position to safeguard Uganda from irresponsible threats of invasion, to "deny the Sudan the opportunity to use the territory of the DRC to destabilize Uganda". Only one of the five listed objectives refers to a response to acts that had already taken place—the neutralization of "Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan".

144. While relying heavily on this document, Uganda nonetheless insisted to the Court that after 11 September 1998 the UPDF was acting in self-defence in response to attacks that had occurred. The Court has already found that the military operations of August in Beni, Bunia and Watsa, and of 1 September at Kisangani, cannot be classified as coming within the consent of the DRC, and their legality, too, must stand or fall by reference to self-defence as stated in Article 51 of the Charter.

145. The Court would first observe that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.

146. It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131–135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

147. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.

SEPARATE OPINION OF JUDGE KOOIJMANS, PARAS 16–35

B USE OF FORCE AND SELF-DEFENCE

16. I am in full agreement with the Court that, as from the beginning of August 1998, Uganda could, for the presence of its forces on Congo lese territory, no longer rely on the consent given by the DRC and that its military activities from that time on thus can only be considered in the light of the right of self-defence (Judgment, para. 106).

17. In the preceding months the initially warm relations between the Presidents of the DRC and Uganda had soured. In that same period the frequency and intensity of attacks by Ugandan rebel movements operating from Congolese territory had increased. In fewer than two months five attacks of a serious nature, in which a considerable number of civilians were killed or abducted, had taken place (Judgment, para. 132). A reoccurrence of the chronic instability of the pre-1997 period was, in particular after the outbreak of a rebellion against President Kabila on 2 August, certainly not beyond the realm of possibility.

18. Uganda chose to react by stepping up its military activities on the Congolese side of the border. During the month of August the UPDF successively took the towns and airports

of Beni, Bunia and Watsa, "all in close proximity to the border". I fully agree with the Court when it states that these actions were of a different nature from previous operations along the common border under the informal bilateral agreement (Judgment, para. 110). They were military assaults which could only be justified under the law of self-defence.

19. Uganda has claimed that the Congolese authorities were actively supporting the Ugandan rebels in carrying out their attacks but the Court has not been able to find "satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC". It thus found that these attacks could not be attributed to the DRC and I cannot fault this finding (judgment, para. 146).

20. The Court consequently finds that "[f]or all these reasons . . . the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not present". Then follows, however, a sentence which is not altogether clear:

> Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.
>
> (Judgment, para. 147)

21. Presumably, the Court refers here to the exchange of arguments between the Parties whether the threshold, which the Court had previously determined as appropriate in characterizing support of activities by irregular bands as an attack by the "supporting" *State (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 104, para. 195), was still in conformity with contemporary international law. In the oral pleadings counsel for Uganda contended that

> Armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51. And thus, there is a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States.
>
> (CR 2005/7, p. 30, para. 80)

The DRC for its part denied that the mere acknowledgment that armed groups were present on its territory was tantamount to support.

> To assimilate mere tolerance by the territorial sovereign of armed groups on its territory with an armed attack clearly runs counter to the most established principles in such matters. That position, which consists in considerably lowering the threshold required for the establishment of aggression, obviously finds no support in the *Nicaragua* Judgment.
>
> (CR 2005/12, p. 26, para. 6)

22. The Court does not deem it necessary at this point to deal with these contentions since it has found that the attacks by the rebels

> Did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression adopted on 14 December 1974.
>
> (Judgment, para. 146; emphasis added)

By drawing this conclusion, the Court, however, implicitly rejects Uganda's argument that mere tolerance of irregulars "creates a susceptibility to action in self-defence by neighbouring States".

23. It deserves mentioning, however, that the Court deals in more explicit detail with this issue when considering Uganda's first counterclaim with regard to the period 1994–1997. The Court there says that it "cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities" and that "[t]hus the part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld" (Judgment, para. 301).

24. I agree that in general it cannot be said that a mere failure to control the activities of armed bands present on a State's territory is by itself tantamount to an act which can be attributed to that State, even though I do not share the Court's finding with regard to the first counter-claim. But I fail to understand why the Court said explicitly there what it only said implicitly with regard to the DRC's first claim, notwithstanding that Uganda raised that very same argument when it contested that claim.

25. What is more important, however, is that the Court refrains from taking a position with regard to the question whether the threshold set out in the *Nicaragua* Judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986. The Court thus has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so.

26. But the sentence quoted in paragraph 20 calls for another comment. Even if one assumes (as I am inclined to do) that mere failure to control the activities of armed bands cannot in itself be attributed to the territorial State as an unlawful act, that in my view does not necessarily mean that the victim State is under such circumstances not entitled to exercise the right of self-defence under Article 51. The Court only deals with the question whether Uganda was entitled to act in self-defence *against the DRC* and replies in the negative since the activities of the rebel movements could not be attributed to the DRC. By doing so, the Court does not answer the question as to the kind of action a victim State is entitled to take if the armed operation by irregulars, "because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces" *(Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 103, para. 195) but no involvement of the "host Government" can be proved.

27. The Court seems to take the view that Uganda would have only been entitled to self-defence against the DRC since the right of self-defence is conditional on an attack being attributable, either directly or indirectly, to a State. This would be in line with what the Court said in its Advisory Opinion of 9 July 2004: Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State *(Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p. 194, para. 139; emphasis added).

28. By implicitly sticking to that position, the Court seems to ignore or even to deny the legal relevance of the question referred to at the end of paragraph 26. But, as I already pointed out in my separate opinion to the 2004 Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Article 51 merely

> Conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.
>
> (*I.C.J. Reports 2004*, p. 230, para. 35)

I also observed that this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. In these resolutions the Council called acts of international terrorism, without any further qualification and without ascribing them to a particular State, a threat to international peace and security.

29. If the activities of armed bands present on a State's territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defence.

30. When dealing with the first counter-claim in paragraph 301 of the Judgment, the Court describes a phenomenon which in present-day international relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require. "Just as Utopia is entitled to exercise self-defence against an armed attack by Arcadia, it is equally empowered to defend itself against armed bands or terrorists operating from within the Arcadian territory", as Professor Yoram Dinstein puts it [Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed., 2001, p. 216].

31. Whether such reaction by the attacked State should be called self-defence or an act under the state of necessity [See Oscar Schachter, 'The Use of Force against Terrorists in Another Country', *Israel Yearbook on Human Rights*, Vol. 19 (1989), pp. 225 ff] or be given a separate name, for example "extra-territorial law enforcement", as suggested by Dinstein himself, is a matter which is not relevant for the present purpose. The lawfulness of the conduct of the attacked State must be put to the same test as that applied in the case of a claim of self-defence against a State: does the armed action by the irregulars amount to an armed attack and, if so, is the armed action by the attacked State in conformity with the requirements of necessity and proportionality.

32. As for the first question, I am of the view that the series of attacks which were carried out from June till the beginning of August 1998, and which are enumerated in paragraph 132 of the Judgment, can be said to have amounted to an armed attack in the sense of Article 51, thus entitling Uganda to the exercise of self-defence. Although Uganda, during the proceedings, persistently claimed that the DRC was directly or indirectly involved in these attacks, the finding that this allegation cannot be substantiated and that these attacks are therefore not attributable to the DRC has no direct legal relevance for the question whether Uganda is entitled to exercise its right of self-defence.

33. The next question therefore is: was this right of self-defence exercised in conformity with the rules of international law? During the month of August 1998 Ugandan military forces seized a number of towns and airports in an area contiguous to the border-zone where Uganda had previously operated with the consent of and, according to the Protocol of April 1998, in co-operation with the DRC. Taking into account the increased instability and the possibility of a return to the undesirable conditions of the late Mobutu period, I do not find these actions unnecessary or disproportionate to the purpose of repelling the persistent attacks of the Ugandan rebel movements.

34. It was only when Uganda acted upon the invitation of Rwanda and sent a battalion to occupy the airport of Kisangani—located at a considerable distance from the border area—on

1 September 1998 that it grossly overstepped the limits set by customary international law for the lawful exercise of the right of self-defence. Not by any stretch of the imagination can this action or any of the subsequent attacks against a great number of Congolese towns and military bases be considered as having been necessitated by the protection of Uganda's security interests. These actions moreover were grossly disproportionate to the professed aim of securing Uganda's border from armed attacks by anti-Ugandan rebel movements.

35. I therefore fully share the Court's final conclusion that Uganda's military intervention was of such a magnitude and duration that it must be considered a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter (Judgment, para. 165). I feel strongly, however, that the Court, on the basis of the facts and the arguments presented by the Parties and irrespective of the motives ascribed to them, should have gone further than merely finding that Uganda had failed to substantiate its claim that the DRC was directly or indirectly involved in the attacks by the rebel movements and thus concluding that Uganda was not entitled to self-defence. In the circumstances of the case and in view of its complexity, a further legal analysis of Uganda's position, and the rights ensuing therefrom, would in my view have been appropriate. Thus the Court has forgone a precious opportunity to provide clarification on a number of issues which are of great importance for present-day international society but still are largely obscure from a legal point of view.

SEPARATE OPINION OF JUDGE SIMMA, PARAS 4–15 (FOOTNOTES OMMITED)

2 SELF-DEFENCE AGAINST LARGE-SCALE ARMED ATTACKS BY NON-STATE ACTORS

4. I am in agreement with the Court's finding in paragraph 146 of the Judgment that the "armed attacks" to which Uganda referred when claiming to have acted in self-defence against the DRC were perpetrated not by the Congolese armed forces but rather by the Allied Democratic Forces (ADF), that is, from a rebel group operating against Uganda from Congolese territory. The Court stated that Uganda could provide no satisfactory proof that would have sustained its allegation that these attacks emanated from armed bands or regulars sent by or on behalf of the DRC. Thus these attacks are not attributable to the DRC.

5. The Court, however, then finds, that for these reasons the legal and factual circumstances for the exercise of a right to self-defence by Uganda against the DRC were not present (Judgment, para. 147). Accordingly, the Court continues, it has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces (Judgment, para. 147).

6. Thus, the reasoning on which the Judgment relies in its findings on the first submission by the DRC appears to be as follows:—since the submission of the DRC requests the Court (only) to find that it was Uganda's use of force against the DRC which constituted an act of aggression, and—since the Court does not consider that the military activities carried out from Congolese territory onto the territory of the Respondent by anti-Ugandan rebel forces are attributable to the DRC,—and since therefore Uganda's claim that its use of force against the DRC was justified as an exercise of self-defence, cannot be upheld, it suffices for the Court to find Uganda in breach of the prohibition of the use of force enshrined in the United Nations Charter and in general international law. The Applicant, the Court appears to say, has not asked for anything beyond that. Therefore, it is not necessary for the Court to deal with the legal qualification of either the cross-boundary military activities of the anti-Ugandan groups as such, or of the Ugandan countermeasures against these hostile acts.

7. What thus remains unanswered by the Court is the question whether, even if not attributable to the DRC, such activities could have been repelled by Uganda through engaging these groups also on Congolese territory, if necessary, provided that the rebel attacks were of a scale sufficient to reach the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter.

8. Like Judge Kooijmans in paragraphs 25 ff. of his separate opinion, I submit that the Court should have taken the opportunity presented by the present case to clarify the state of the law on a highly controversial matter which is marked by great controversy and confusion—not the least because it was the Court itself that has substantially contributed to this confusion by its Nicaragua Judgment of two decades ago. With Judge Kooijmans, I regret that the Court "thus has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so" (separate opinion of Judge Kooijmans, para. 25).

9. From the Nicaragua case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors.

10. The most recent—and most pertinent—statement in this context is to be found in the (extremely succinct) discussion by the Court in its Wall Opinion of the Israeli argument that the separation barrier under construction was a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 194, para. 138). To this argument the Court replied that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another. Since Israel did not claim that the attacks against it were imputable to a foreign State, however, Article 51 of the Charter had no relevance in the case of the wall (ibid., para. 139).

11. Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the "Bush doctrine" justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as "armed attacks" within the meaning of Article 51.

12. In his separate opinion, Judge Kooijmans points to the fact that the almost complete absence of governmental authority in the whole or part of the territory of certain States has unfortunately become a phenomenon as familiar as international terrorism (separate opinion of Judge Kooijmans, para. 30). I fully agree with his conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it "would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require".

13. I also subscribe to Judge Kooijmans's opinion that the lawfulness of the conduct of the attacked State in the face of such an armed attack by a non-State group must be

put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality? (Separate opinion of Judge Kooijmans, para. 31).

14. In applying this test to the military activities of Uganda on Congolese territory from August 1998 onwards, Judge Kooijmans concludes—and I agree—that, while the activities that Uganda conducted in August in an area contiguous to the border may still be regarded as keeping within these limits, the stepping up of Ugandan military operations starting with the occupation of the Kisangani airport and continuing thereafter, leading the Ugandan forces far into the interior of the DRC, assumed a magnitude and duration that could not possibly be justified any longer by reliance on any right of self-defence. Thus, at this point, our view meets with, and shares, the Court's final conclusion that Uganda's military intervention constitutes "a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter" (Judgment, para. 165).

15. What I wanted to demonstrate with the preceding reasoning is that the Court could well have afforded to approach the question of the use of armed force on a large scale by non-State actors in a realistic vein, instead of avoiding it altogether by a sleight of hand, and still arrive at the same convincing result. By the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of "aggression", the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations.

C The fight against the so-called Islamic State

Recent developments further confirmed the relevance of and need for an authoritative statement on the right to self-defense against non-state armed groups. However, we have to differentiate between clandestine terrorist groups and those resembling states in the sense that they exercise quasi-governmental authority over a certain territory—one may speak of "quasi–de facto regimes".[35] While the former question remains unresolved and largely circles around the nexus between the affected government—in particular whether it deliberately provides a "safe haven" to terrorists—state practice on the latter tends to affirm this right.

Israel repeatedly referred to Article 51 when conducting military operations against Hezbollah in Lebanon in 2006 and against Hamas in the Gaza Strip (Operations Cast Lead in 2008–2009 and Protective Edge in 2014). In the Security Council meetings on the 2006 Lebanon war, Israel's right to self-defense was not problematized per se.[36] States rather criticized Israel for violating the proportionality requirement since its large-scale military operations went far beyond the preceding attacks. In light of the fact that Hezbollah controlled the border area in the south of Lebanon, one may nevertheless interpret this reaction as further confirmation of the permissibility of (proportionate) self-defense against non-state armed groups somewhat resembling states.[37] In Israel's subsequent wars against Hamas—Operation Cast Lead in 2008–2009 and Operation Protective Edge in 2014—some states reaffirmed Israel's right to self-defense without referring to Article 51, while others rejected this claim altogether. The extent to which these reactions may be read as further confirmations of the permissibility of self-defense against non-state armed groups exercising territorial control must thus be doubted.[38] Similar to the *Wall* advisory opinion, the essential problem here is that Hamas's attacks do not emanate from the territory of a foreign state.[39]

The latest and arguably most substantial confirmation that the right to self-defense also covers "quasi–de facto regimes" can be seen in the international community's response to the

rise of the so-called Islamic State. This heinous terrorist group gained increasing power during the war in Syria and ultimately captured significant portions of Iraqi territory in July 2014. Iraq then requested that the United States support its fight against the "Islamic State". Since this fight extended beyond Iraq's border, however, it could not just be seen as an intervention by invitation. The US thus justified its strikes against the "Islamic State" locations in Syria on the basis of the so-called "unable or unwilling" doctrine. UN Secretary-General Ban Ki-moon seemingly accepted this line of reasoning in his remarks on Syria made on the very same day.

Letter to the United Nations Security Council by Ibrahim al-Ushayqir al-Ja'fari, Minister for Foreign Affairs of Iraq, 20 September 2014

We [Iraq] have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent. The aim of such strikes is to end the constant threat to Iraq, protect Iraq's citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq's borders.

Letter by US Representative to the UN Samantha Power Pursuant to Article 51 of the UN Charter to Secretary-General Ban Ki-moon, 23 September 2014

Excellency,

In Iraq's letter to the United Nations Security Council of September 20, 2014, and other statements made by Iraq, including its letter to the United Nations Security Council of June 25, 2014, Iraq has made clear that it is facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq's people. For these reasons, the Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other counties, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 if the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders. In addition, the United States has initiated military actions Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.

I request that you circulate this letter as a document of the Security Council.

Samantha J. Power
His Excellency
Mr. Ban Ki-moon
Secretary-General of the United Nations
New York, NY

Ban Ki-moon, Remarks at the Climate Summit Press Conference (Including Comments on Syria), 23 September 2014

Good morning, Bonjour.

It is a great pleasure to see you today. Thank you for your commitment in covering climate change discussions.

Ladies and Gentlemen,

Before I focus on climate change, let me just say a few words, with the understanding of the two Presidents. It was not scheduled, but I need to say something about the situation in Syria.

Please note that we will take questions only on climate change.

I am going to say something about the United Nations position on Syria.

Ladies and Gentlemen,

For more than a year, I have sounded the alarm bells about the brutality of extremist armed groups in Syria and the critical threat they pose to Syria and to international peace and security. While the rise of these extremist groups in Syria is a consequence and not a cause of Syria's tragic civil war, there can be no justification for their barbarity and the suffering they impose on the Syrian people.

I welcome the international solidarity to confront this challenge, as demonstrated by the unanimous passage of Security Council Resolution 2170 just a few weeks ago.

Confronting terrorist groups operating in Syria requires a multi-facetted approach. This approach should be designed to address the immediate security risks, to stop atrocity crimes and, over the longer term, to eliminate the conditions in which these groups take root.

I urge the world leaders gathered in New York, especially those participating in tomorrow's Security Council Summit on foreign terrorist fighters, to come together decisively in support of efforts to confront these groups. As the custodian of the principles of the United Nations, I would like to underscore the importance that all measures must be fully in line with the Charter of the United Nations and need to operate strictly in accordance with international humanitarian law.

I have placed the protection of civilians at the top of my agenda. In the case of Syria, there can be no genuine protection if extremist groups are permitted to act with impunity and if the Syrian Government continues to commit gross human rights violations against its own citizens. Protecting the Syrian people requires immediate action, but action that is rooted in the principles of the United Nations.

I regret the loss of any civilian lives as a result of strikes against targets in Syria. The parties involved in this campaign must abide by international humanitarian law and take all necessary precautions to avoid and minimize civilian casualties. I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government.

I think it is undeniable—and the subject of broad international consensus—that these extremist groups pose an immediate threat to international peace and security.

However, only a handful of states, among them the United Kingdom, Canada, Turkey, Australia, Russia and Israel, have subscribed to the "unable or unwilling" doctrine explicitly while a few more arguably endorsed it implicitly.[40] This reluctance may be explained by the fact that terrorist acts cannot always be prevented successfully. Smaller and weaker states in particular are thus afraid that the doctrine could be abused as a pretext. Among more powerful states, France has also refrained from relying on this doctrine, relying instead on the direct threat the "Islamic State" posed to its security in September 2015.[41] The prophetic character of this statement became all

too clear some two months later after the Islamic State killed 130 people in what became known as the Paris attacks. France then reacted by intensifying its efforts against the "Islamic State" and sponsored a Security Council resolution (2249) which called on all UN members

> that have the capacity to do so to take all necessary measures, in compliance with international law . . . to eradicate the safe haven [the Islamic State, the al-Nusra Front, al-Qaeda, and other terrorist groups] established over significant parts of Iraq and Syria.

Although the resolution's somewhat confusing structure and wording neither authorizes the use of force against the "Islamic State" in Syria under the collective security system nor expressly confirms the legality of acting in self-defense,[42] France nevertheless interpreted it as a "guarantee . . . that collective action could now be based on Article 51 of the United Nations Charter".[43] While the issue is still not settled once and for all, the fight against the "Islamic State" remains the most profound sign that the right to self-defense will at least be tacitly accepted in extreme and clear-cut cases—after all, it is responsible for crimes against humanity, war crimes and even genocide[44]—by the majority of the international community.

Security Council Resolution 2249 (2015)

ADOPTED BY THE SECURITY COUNCIL AT ITS 7565TH MEETING,
ON 20 NOVEMBER 2015

The Security Council,

Reaffirming its resolutions 1267 (1999), 1368 (2001), 1373 (2001), 1618 (2005), 1624 (2005), 2083 (2012), 2129 (2013), 2133 (2014), 2161 (2014), 2170 (2014), 2178 (2014), 2195 (2014), 2199 (2015), 2214 (2015) and its relevant presidential statements,

Reaffirming the principles and purposes of the Charter of the United Nations,

Reaffirming its respect for the sovereignty, territorial integrity, independence and unity of all States in accordance with purposes and principles of the United Nations Charter,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed,

Determining that, by its violent extremist ideology, its terrorist acts, its continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic ground, its eradication of cultural heritage and trafficking of cultural property, but also its control over significant parts and natural resources across Iraq and Syria and its recruitment and training of foreign terrorist fighters whose threat affects all regions and Member States, even those far from conflict zones, the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), constitutes a global and unprecedented threat to international peace and security,

Recalling that the Al-Nusrah Front (ANF) and all other individuals, groups, undertakings and entities associated with Al-Qaida also constitute a threat to international peace and security,

Determined to combat by all means this unprecedented threat to international peace and security,

Noting the letters dated 25 June 2014 and 20 September 2014 from the Iraqi authorities which state that Da'esh has established a safe haven outside Iraq's borders that is a direct threat to the security of the Iraqi people and territory,

Reaffirming that Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law,

Reiterating that the situation will continue to deteriorate further in the absence of a political solution to the Syria conflict and *emphasizing* the need to implement the Geneva Communiqué of 30 June 2012 endorsed as Annex II of its resolution 2118 (2013), the Joint Statement on the outcome of the multilateral talks on Syria in Vienna of 30 October 2015 and the Statement of the International Syria Support Group (ISSG) of 14 November 2015,

1 *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks perpetrated by ISIL also known as Da'esh which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinaï, on 12 November 2015 in Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL also known as Da'esh, including hostage-taking and killing, and *notes* it has the capability and intention to carry out further attacks and *regards* all such acts of terrorism as a threat to peace and security;

2 *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Governments of Tunisia, Turkey, Russian Federation, Lebanon and France, and to all Governments whose citizens were targeted in the above-mentioned attacks and all other victims of terrorism;

3 *Condemns* also in the strongest terms the continued gross, systematic and widespread abuses of human rights and violations of humanitarian law, as well as barbaric acts of destruction and looting of cultural heritage carried out by ISIL also known as Da'esh;

4 *Reaffirms* that those responsible for committing or otherwise responsible for terrorist acts, violations of international humanitarian law or violations or abuses of human rights must be held accountable;

5 *Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the Statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria;

6 *Urges* Member States to intensify their efforts to stem the flow of foreign terrorist fighters to Iraq and Syria and to prevent and suppress the financing of terrorism, and urges all Member States to continue to fully implement the above-mentioned resolutions;

7 *Expresses* its intention to swiftly update the 1267 committee sanctions list in order to better reflect the threat posed by ISIL also known as Da'esh;
8 *Decides* to remain seized of the matter.

VI Preemptive and preventive self-defense

The "war on terror" posed yet another fundamental challenge to the scope of the right to self-defense. While states and scholars have been debating whether Article 51 only permitted self-defense against armed attacks which had already occurred for decades, the US attempted to expand its temporal scope even further. In this sense, self-defense should not only be possible in cases of imminent armed attacks—based on the famous Webster formula, under which it is possible to act preemptively only if "the necessity of self-defense was instant, overwhelming, and leaving no choice of means, and no moment for deliberation"—but also to prevent states or terrorist actors from becoming a threat in the distant future. This notion was included in its 2002 US National Security Strategy and served as one of the key rationales behind the 2003 Iraq war.

This argument was then discussed and wholeheartedly rejected in the 2004 High-Level Panel on Threats, Challenges and Change report. At the same time, and contrary to a literal interpretation of Article 51, it endorsed the possibility of preemptive self-defense against imminent attacks.

2002 US National Security Strategy

It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

- In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary. Deterrence was an effective defense. But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.
- In the Cold War, weapons of mass destruction were considered weapons of last resort whose use risked the destruction of those who used them. Today, our enemies see weapons of mass destruction as weapons of choice. For rogue states these weapons are tools of intimidation and military aggression against their neighbors. These weapons may also allow these states to attempt to blackmail the United States and our allies to prevent us from deterring or repelling the aggressive behavior of rogue states. Such states also see these weapons as their best means of overcoming the conventional superiority of the United States.
- Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the

legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction.

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.

We will always proceed deliberately, weighing the consequences of our actions. To support preemptive options, we will:

- build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge;
- coordinate closely with allies to form a common assessment of the most dangerous threats; and
- continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results.

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.

A More Secure World *paras 188–192*

1 ARTICLE 51 OF THE CHARTER OF THE UNITED NATIONS AND SELF-DEFENCE

188. The language of this article is restrictive:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security.

However, a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect

it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.

189. Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just pre-emptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)? Those who say "yes" argue that the potential harm from some threats (e.g., terrorists armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier.

190. The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.

191. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of nonintervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.

192. We do not favour the rewriting or reinterpretation of Article 51.

Notes

1 Oona A. Hathaway, William S. Holste, Scott J. Shapiro, Jacqueline Van De Velde, and Lisa Wang Lachowicz, 'War Manifestos' (2018) 85 *The University of Chicago Law Review* 1139.
2 Leland M. Goodrich and Evard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd edn, World Peace Foundation 1949), 304.
3 See e.g. Hans Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations' (1948) 42/4 *The American Journal of International Law* 783, 793.
4 Charter articles 43–47.
5 See Ashley Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483 or Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106/4 *The American Journal of International Law* 770, 776.
6 Dawood I. Ahmed, 'Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense' (2013) 9 *Journal of International Law and International Relations* 1.
7 See John B. Bellinger III, 'Legal Issues in the War on Terrorism', speech held at the London School of Economics, 31 October 2006, https://2009-2017.state.gov/s/l/2006/98861.htm.
8 John Quigley, *The Six-Day War and Israeli Self-Defense* (Cambridge University Press 2013).
9 *Institut de droit international*, Session de Santiagot—2007, 10A Resolution EN, 27 October 2007, Present Problems of the Use of Armed Force in International Law. A. Self-Defence. Rapporteur M. Emmanuel Roucounas, para. 3. But *cf* James A. Green, 'The *Ratione Temporis* Elements of Self-Defence' (2015) 2 *Journal on the Use of Force and International Law* 97, 116, who notes that he

> is not willing to assert unreservedly that the right of Self-Defence extends to this quite yet, given the notable and continuing opposition to the concept, but all the indications are that if it does not at the present time, it will do so soon.

See also Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press 2017), 228, who forcefully tries to find a middle path by arguing that the earliest lawful moment to resort to self-defense is at an "incipient" stage of the armed attack.

10 See C. H. M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 *Recueil des Cours* 454.
11 Tom Ruys, 'The "Protection of Nationals" Doctrine Revisited' (2008) 13/2 *Journal of Conflict & Security Law* 233.
12 See Christopher C. Joyner, 'Reflections on the Lawfulness of Invasion' (1984) 78/1 *The American Journal of International Law* 131 and ibid.
13 See Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 367, 372f.
14 First and foremost, the ICJ refrained from ruling on this question in the *Tehran Hostages* case. *Case Concerning United States Diplomatic and Consular Staff in Tehran*, judgment of 24 May 1980, ICJ Reports 1980, 3, paras 93f.
15 See e.g. the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, 19 January 1960, 373 *UNTS* 5321.
16 Inter-American Treaty of Reciprocal Assistance, www.oas.org/juridico/english/treaties/b-29.html.
17 Para. 160.
18 Para. 164.
19 Para. 176.
20 Para. 231. One must also bear in mind that the court deplored its lack of information on these incursions and doubted some of the assertions by the US government; see paras 128–164.
21 Tom Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010), Chapter 3.2.
22 For a critique of this judgment, see, first and foremost, James A. Green, 'The Oil Platforms Case: An Error in Judgment?' (2004) 9 *Journal of Conflict & Security Law* 357 or William H. Taft IV, 'Self-Defense and the Oil Platforms Decision' (2004) 29/2 *Yale Journal of International Law* 295.
23 *Nicaragua*, para. 176. See also paras 194, 237, 249 quoted here in full.
24 Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82/5–6 *Michigan Law Review* 1620, 1638f.
25 See Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107/3 *The American Journal of International Law* 563, 566 *et seq.*
26 See also James A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009), 88 *et seq.*
27 Ibid., 92f.
28 Ibid., 93.
29 Para. 76.
30 Green (n 26), 87f.
31 See, among the countless writings on this resolution, Paul C. Szasz, 'The Security Council Starts Legislating' (2002) 96/4 *The American Journal of International Law* 901.
32 UNGA Res ES-10/14, 8 December 2003.
33 See also Sean D. Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99/1 *The American Journal of International Law* 62; Ruth Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense' (2005) 99/1 *The American Journal of International Law*, 52.
34 See, in general, Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018). See also Marko Milanović, 'A Follow-Up on Israel and Gaza' *EJIL: Talk!*, 3 January 2009, www.ejiltalk.org/a-follow-up-on-israel-and-gaza/.
35 Andreas von Arnauld, *Völkerrecht* (3rd edn, C.F. Müller 2016), 499f uses this term since these are not accepted to the same extent as typical de facto regimes such as Somaliland, Northern Cyprus, Taiwan, Abkhazia and South Ossetia. See Jochen A. Frowein, 'De Facto Regime' (March 2013) *Max Planck Encyclopedia of Public International Law*, para. 1.
36 Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018), 213 *et seq.*
37 von Arnauld (n 35).
38 Gray (n 36), 217f.

39 Due to its control over the Gaza Strip's border, airspace and the coast, along with its influence on the economy and the possibility of entering it at any time, Israel is still seen as the occupying power in the Gaza Strip; see *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC12/48, paras 278 *et seq*. As this report further noted, however, the fact that Israel is not directly and permanently present needs to be taken into account when determining its responsibilities as the occupying power. But *cf* Hanne Cuyckens, 'Is Israel Still an Occupying Power in Gaza' (2016) 63 *Netherlands International Law Review* 275, who argues that Israel should not be considered as the occupying power at all but that a different legal framework is necessary here.
40 Elena Chachko and Ashley Deeks, 'Which States Support the "Unwilling and Unable" Test?' *Lawfare*, 10 October 2016, www.lawfareblog.com/which-states-support-unwilling-and-unable-test.
41 Identical Letters Dated 8 September 2015 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General and the President of the Security Council, S/2015/745, 9 September 2015.
42 Dapo Akande and Marko Milanović aptly spoke of the resolution's "constructive ambiguity"; see 'The Constructive Ambiguity of the Security Council's ISIS Resolution' *EJIL: Talk!*, 21 November 2015, www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.
43 Mr. Delattre (France), Security Council meeting 7565, 20 November 2015, S/PV.7565, 2.
44 "They Came to Destroy": ISIS Crimes Against the Yazidis, 15 June 2016, A/HRC/32/CRP.2.

5 Intervention by invitation

I Introduction

States—or, more precisely, governments—may invite or admit foreign states to intervene on their territory: so-called interventions by invitation.[1] As stated in Article 20 of the ILC Articles on state responsibility, valid consent of the affected state is a generally accepted circumstance precluding wrongfulness. In addition, the *Institut de droit international* adopted a resolution on military assistance in situations below the threshold of non-international armed conflicts (riots, mass protests) during its 2011 session.

As both these documents highlight, the concept of interventions by invitation comes with a number of problems: First, the organ making such a request needs to be competent under domestic (constitutional) law. Second, consent may not only be given ad hoc but also in advance.[2] Under certain circumstances, such as a coup d'état, one may argue that such a treaty is invalid *ab initio* since it contradicts the essence of sovereignty[3] or because it would violate Article 2/4 and thus *ius cogens* (assuming the prohibition of using of force enjoys this status; see Chapter 2).[4] Even when rejecting this view, *pro futuro* consent may nevertheless lose its validity once the then-consenting government has effectively been overthrown and replaced by new leadership.[5] In addition, the new government may simply denounce the treaty as soon as it assumes power.[6]

This question is particularly acute after the overthrow of a democratically elected government or in situations of post-electoral violence; on the one hand, there is no unilateral right to "pro-democratic" interventions while it is also debatable whether the mere overthrow of a democratic government is sufficient to constitute a threat to international peace and security.[7] On the other hand, state practice has occasionally relied on the legitimacy criterion instead of effectivity when determining who may consent to foreign interventions. As Reisman succinctly noted, it would be absurd if a military junta could topple a democratically elected government and subsequently ask other (perhaps equally oppressive) states to intervene on their behalf to prevent a re-establishment of the democratic *status quo ante*.[8] Ideally speaking, the Security Council clarifies which entity should be considered as a state's lawful government or to whom governmental authority should be transferred in such situations.[9]

Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001, Article 20

Text Adopted by the International Law Commission at its Fifty-Third Session, in 2001, and Submitted to the General Assembly as a Part of the Commission's Report Covering the Work of That Session (A/56/10).

Article 20. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

COMMENTARY [FOOTNOTES OMITTED]

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty, the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly. But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor. Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of Chapter II. For example, the issue has arisen

whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4. In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to Chapter V as a whole.

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the Savarkar case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest. In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another. Furthermore, where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period. These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has

long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application. In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

Institut de droit international *10th Commission, Sub-group C, Session de Rhodes, 2011 Pleniere, 8 September 2011, Present Problems of the Use of Force in International Law, Military Assistance on Request*

Resolution

The Institute of International Law,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good neighbourliness and friendly relations and co-operation among States;

Recalling in particular the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Res. 2625 (XXV) of 24 October 1970);

Recalling the Resolution of the Institute on "The Principle of Non-Intervention in Civil Wars" (Wiesbaden Session, 1975);

Having regard to existing State practice on military assistance on request;

Recalling the need for strict observance of the principle of non-intervention;

Considering that each State must respect the principle of equal rights and self determination of peoples as expressed in Article 1, paragraph 2, of the Charter of the United Nations;

Recalling further the need for strict observance of the Charter of the United Nations, in particular its Article 2(4) and Article 2(7);

Adopts the following Resolution:

10th Commission—Sub-Group C
PLENIERE
8 September 2011
10 RES-C EN PLENIERE GH/sf 2

Article 1. Definitions

For the purposes of this Resolution:

a) "Military assistance on request" means direct military assistance by the sending of armed forces by one State to another State upon the latter's request.
b) "Request" means a request reflecting the free expression of will of the requesting State and its consent to the terms and modalities of the military assistance.

Article 2. Scope

1 This Resolution applies to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non International Armed Conflicts of 1977.
2 The objective of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory, with full respect for human rights and fundamental freedoms.

Article 3. Prohibition of military assistance

1 Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.
2 Military assistance shall not be provided where such provision would be inconsistent with a Security Council resolution relating to the specific situation, adopted under Chapter VII of the Charter of the United Nations.

Article 4. Request

1 Military assistance may only be provided upon the request of the requesting State.
2 The request shall be valid, specific and in conformity with the international obligations of the requesting State.
3 If military assistance is based on a treaty, an ad hoc request is required for the specific case.
4 Any request that is followed by military assistance shall be notified to the Secretary General of the United Nations.

Article 5. Withdrawal

The requesting State is free to terminate its request or to withdraw its consent to the provision of military assistance at any time, irrespective of the expression of consent through a treaty.

Article 6. Other limits on the provision of military assistance

1 Military assistance shall be carried out in conformity with the terms and modalities of the request.
2 Military assistance shall not be provided beyond the time agreed to by the requesting State, without further agreement thereon.
3 Military assistance shall not constitute a coercive measure in order to obtain from a State the subordination of the exercise of its sovereign rights.

Article 7. Additional obligation of the requesting State

Military assistance shall not be used by the requesting State to circumvent its international obligations.

II Intervention by Invitation in Civil Wars

A closely related question concerns requests by governments during civil wars. Two different viewpoints may be distinguished here:

The first holds that governments may, as outlined here, also ask for foreign assistance to suppress domestic insurrections. Non-state armed groups, in turn, may obviously not ask for outside support on their behalf. This view was most prominently articulated in the *Nicaragua* case when the court debated the various policy arguments raised by the US in support of the Contras. It further held that allowing requests by other entities than the government as legal justifications would fundamentally undermine the non-intervention principle.

In contrast, the *Institut de droit international* (in its 1975 Wiesbaden session) held that peoples not only have the right to fight against colonialism or alien occupation but also against oppressive regimes. Interventions in civil wars would thus violate the right to self-determination. Interventions would only be lawful as a reaction to a previous (unlawful) intervention or if the war in question was of a non-political (terrorist) character.

The Nicaragua *Case, para. 246: Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment, ICJ Reports 1986, p. 14*

246. Having concluded that the activities of the United States in relation to the activities of the contras in Nicaragua constitute prima facie acts of intervention, the Court must next consider whether they may nevertheless be justified on some legal ground. As the Court has stated, the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State—supposing such a request to have actually been made by an opposition to the régime in Nicaragua in this instance. Indeed. it is difficult to see what would remain of the principle of non-intervention in international law if intervention. which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.

Institut de droit international, *Session of Wiesbaden, 1975, The Principle of Non-Intervention in Civil Wars (Eighth Commission, Rapporteur: Mr. Dietrich Schindler)*

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Noting the gravity of the phenomenon of civil wars and of the suffering which they cause;

Considering that any civil war may affect the interests of other States and may therefore result in an international conflict if no provision is made for very stringent obligations of non-intervention;

Considering in particular that the violation of the principle of non-intervention for the benefit of a party to a civil war often leads in practice to interference for the benefit of the opposite party;

Convinced therefore that it is necessary to specify the duties of other States in the event of civil war breaking out in the territory of a given State;

Reserving the study of issues arising from the danger of extermination of ethnic, religious or social groups or from other severe infringements of human rights during civil war,

Adopts the following Resolution:

Article 1. Concept of civil war

1 For the purposes of this Resolution, the term "civil war" shall apply to any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between:

   a) the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State, or
   b) two or more groups which in the absence of any established government contend with one another for the control of the State.

2 Within the meaning of this Resolution, the term "civil war" shall not cover:

   a) local disorders or riots;
   b) armed conflicts between political entities which are separated by an international demarcation line or which have existed de facto as States over a prolonged period of time, or conflicts between any such entity and a State;
   c) conflicts arising from decolonization.

Article 2. Prohibition from assistance

1 Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.
2 They shall in particular refrain from:

   a) sending armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out;
   b) drawing up or training regular or irregular forces with a view to supporting any party to a civil war, or allowing them to be drawn up or trained;
   c) supplying weapons or other war material to any party to a civil war, or allowing them to be supplied;
   d) giving any party to a civil war any financial or economic aid likely to influence the outcome of that war, without prejudice to the exception provided for in Article 3 (b);
   e) making their territories available to any party to a civil war, or allowing them to be used by any such party, as bases of operations or of supplies, as places of refuge, for the passage of regular or irregular forces, or for the transit of war material. The last mentioned prohibition includes transmitting military information to any of the parties;
   f) prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question.

3 a) Third States shall use all means to prevent inhabitants of their territories, whether natives or aliens, from raising contingents and collecting equipment, from crossing the border or from embarking from their territories with a view to fomenting or causing a civil war.
   b) They shall disarm and intern any force of either of the parties to the civil war which crosses their borders, on the understanding that expenses resulting from internment will be charged to the State faced with the civil war. Weapons found with such forces shall be seized and retained by the third State and returned to the State faced with the civil war after the end of the latter.

Article 3. Exceptions

Notwithstanding the provisions of Article 2, third States may:

a) grant humanitarian aid in accordance with Article 4;
b) continue to give any technical or economic aid which is not likely to have any substantial impact on the outcome of the civil war;
c) give any assistance prescribed, authorized or recommended by the United Nations in accordance with its Charter and other rules of international law.

Article 4. Humanitarian aid

1 The forwarding of relief or other forms of purely humanitarian aid for the benefit of victims of a civil war should be regarded as permissible.
2 In cases where the territory controlled by one party can be reached only by crossing the territory controlled by the other party or the territory of a third State, free passage over such territory should be granted to any relief consignment, at least insofar as is provided for in Article 23 of the Geneva Convention of 12 August 1949 on the Protection of Civilians in War-Time.

Article 5. Foreign intervention

Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations.

Notes

1 See Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56/1 *British Yearbook of International Law* 189; Georg Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Springer 1999); Gregory H. Fox, 'Intervention by Invitation' in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 816.
2 Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963), 317 *et seq.*

3 See Ellery C. Stowell, *Intervention in International Law* (John Byrne & Co. 1921), 439–443, who argued that "[n]o state can retain its independent status if it agrees to transfer to another the liberty to interfere for the preservation of a particular form of government". See also Brownlie (n 2), 321 *et seq.*

4 More recently, Brad R. Roth, 'The Illegality of "Pro-Democratic" Invasion Pacts' in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press 2000), 328; David Wippmann, 'Pro-Democratic Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 797, 809.

5 Brownlie (n 2), 321; see also Doswald-Beck (n 1), 250.

6 Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press 2017), 130.

7 Michael Byers and Simon Chesterman, '"You, the People": Pro-Democratic Intervention in International Law' in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press 2000), 259.

8 W. Michael Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78/3 *The American Journal of International Law* 642, 644. See also Oscar Schacter, 'The Legality of Pro-Democratic Invasion' (1984) 78/3 *The American Journal of International Law* 645, 647, who, while rejecting the other arguments made by Reisman in his comment, agreed with his findings on the absurd result of such a mechanical interpretation of Article 2(4).

9 See e.g. the various resolutions on Haiti after the overthrow of Bertrand Aristide from 1991 onwards, the post-election violence in Côte d'Ivoire 2011 (Resolution 1975), after the coup d'état in Mali 2012 (resolution 2085) or, most recently, when The Gambia's former president Yahya Jammeh refused to step down after losing in the 2016 presidential elections (Resolution 2337).

6 Humanitarian intervention and the responsibility to protect

I Introduction

Beginning in the late nineteenth century, countless writers, scholars and politicians have weighed in on the relationship between sovereignty and the idea of using military force to protect fundamental human rights.[1] While it long focused on the Christian minority in the Ottoman Empire by European Christian states, this notion has gradually become a universalist endeavour regardless of any ethnic, religious or other kinship between the protector and the protected.[2] It is difficult to say whether and, if so, at what point in time, humanitarian interventions were generally accepted as a legal basis for military force abroad. What can be said, however, is that these debates were put to rest by the inclusion of the general prohibition of the use of force in article 2(4) UN Charter. Attempts to construe this provision in a manner that allows for interventions on humanitarian grounds have never been universally accepted. Similarly, an additional—customary—exception to the prohibition of the use of force has also never come into being. There is no right to humanitarian intervention in international law. If states want to prevent or stop mass atrocities abroad, they either need the approval of the respective government or the authorization of the Security Council under Chapter VII.

This leads to a fundamental dilemma: on the one hand, many governments fear that human rights could be used as a pretext for other, non-humanitarian goals. On the other hand, this state of the law means that states may never intervene against governments responsible for massive human rights violations if the Security Council members fail to agree due to conflicting interests. Co-operation has its limits. Often enough, the veto power is used to shield allies from outside interference.

This tension between a robust understanding of sovereignty and the need to act in clear-cut situations has led to the formulation of the concept of the Responsibility to Protect. It essentially holds that sovereignty is not an end in itself but conditional. States and governments are not free to do as they please inside their own territory. If they fail to protect their population from genocide, crimes against humanity, war crimes or ethnic cleansing, the international community may take action. In this sense, the focus has shifted away from the intervening states' right to intervene to the responsibility of each and every state owed towards its own people(s) under human rights law and humanitarian law. Nevertheless, it has not resolved the problem of what can be done if the Security Council refrains from taking action. The Responsibility to Protect does not constitute a separate exception to the prohibition of the use of force. Furthermore, there exists only a moral but no legal duty to refrain from using the veto power in cases of mass atrocities. It remains unclear whether the Responsibility to Protect merely constitutes a policy document or may ever lead to any new binding norms.

II From Biafra to Nicaragua

The debate on the interrelationship between article 2(4) UN Charter and the need to take action in cases of massive human rights violations even if the Security Council fails to make a decision is not new. It was first prominently brought to the fore by McDougal and Reisman in the wake of the Biafra conflict. Relying on the UN Charter references to human rights, the Universal Declaration of Human Rights and the Genocide Convention, they argued that the General Assembly—under the Uniting for Peace resolution—could assume the Security Council's powers or that states may even act unilaterally:[3]

> the cumulative effect of the Charter in regard to the basic policies of the customary institution of humanitarian intervention is to create a coordinate responsibility for the active protection of human rights: members may act jointly with the Organization in what might be termed a new organized, explicitly conventional, humanitarian intervention or singly or collectively in the customary or international common law humanitarian intervention. Any other interpretation would be suicidally destructive of the explicit major purposes for which the United Nations was established.

In another article on the Biafra war, they argued that humanitarian interventions were against neither the territorial integrity nor the political integrity of the state where they occurred. Furthermore, by definition, they could not be contrary to the purposes of the United Nations because Article 1 of the UN Charter explicitly mentions "promoting and encouraging respect for human rights and for fundamental freedoms for all". As such,

> [t]he effect of the UN Charter has been to develop a coordinated set of competences. In circumstances in which an authoritative organ of the United Nations or of a relevant regional organization either cannot act or cannot act with sufficient dispatch, individual or coordinated collective non-UN humanitarian intervention is permitted as a substitute for functional enforcement of international human rights.[4]

The 1970s, then, saw three conflicts involving humanitarian elements: the Indo-Pakistani War of 1971, Vietnam's intervention against the Khmer Rouge in 1978–1979 and Tanzania's 1978 intervention against and overthrow of Uganda's gruesome dictator Idi Amin. While all these cases were primarily framed as self-defense, the intervening governments also cited the desperate plight of the respective populations. However, the fact that they did not refer to the notion of humanitarian intervention can be explained by the fact that this legal basis had not been accepted at all during the late 1970s. In addition, the different reactions and, in particular in the case of Vietnam's intervention, condemnations, can be explained with geopolitical alliances rather than with legal considerations.[5]

The Nicaragua *case, paras 263–268*

The ICJ also dealt with—and rejected—the legality of humanitarian interventions in the *Nicaragua* case when it tried to make sense of the various statements by then-US President Ronald Reagan and members of his administration characterizing the Contras as "Freedom Fighters"[6] or on the Sandinistas' political ideology, alliances with other states or human rights. Defending the traditional notion of sovereignty as allowing for different political and ideological systems,[7] it held that there neither existed a right to intervene to change

or establish a certain democratic system—what the Court aptly described as "ideological intervention"—nor a right to humanitarian intervention, i.e. to use force to "monitor and ensure" respect for human rights.

*Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment, ICJ Reports 1986, p. 14*

263. The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken "significant steps towards establishing a totalitarian Communist dictatorship". However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law, to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

264. The Court has also emphasized the importance to be attached, in other respects, to a text such as the Helsinki Final Act, or, on another level, to General Assembly resolution 2625 (XXV) which, as its name indicates, is a declaration on "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention. envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies; the United States not only voiced no objection to their adoption, but took an active part in bringing it about.

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua. Whatever the impact of individual alliances on regional or international political military balances, the Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.

266. The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the 1965 General Assembly Declaration on Intervention" (paragraph 169 above), by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle "of ideological intervention", the definition of which would be discretionary. As stated above (paragraph 29), the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law: it is required to consider on its own

initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a Party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

267. The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser.L/V/ 11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.

268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training. arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

III The 1999 Kosovo intervention

The first intense debate on the legality of humanitarian intervention occurred when NATO decided to intervene militarily against Serbia in 1999. Operation Allied Force, as it was called, proceeded without a Security Council resolution since Russia and China had threatened to use their vetoes. What followed was an extensive exchange of arguments on the limits and understanding of sovereignty. While the NATO member states emphasized the gross human rights violations committed by Serbia during its conflict with the Kosovo Liberation Army, others feared that such unilateral actions would undermine the collective security system. The nature of Operation Allied Force itself also caused criticism due to the imprecise targeting resulting from the high altitude from which the fighter jets operated to escape the Serbian air defense systems.[8]

When debating humanitarian interventions in general, it is often hard to differentiate political and moral arguments. Upon closer inspection, only two NATO member states explicitly justified their participation as humanitarian interventions in a legal sense: the United Kingdom, which had already relied on this legal basis when protecting the Kurds in Iraq (Operation Provide Comfort)[9] and Belgium during the legal proceedings initiated by Serbia at the ICJ. Needless to say, a judgment was never rendered due to a lack of jurisdiction.

Press Statement by Dr. Javier Solana, Secretary-General of NATO, 23 March 1999

Good evening, ladies and gentlemen,

I have just directed SACEUR, General Clark, to initiate air operations in the Federal Republic of Yugoslavia [FRY].

I have taken this decision after extensive consultations in recent days with all the Allies, and after it became clear that the final diplomatic effort of Ambassador Holbrooke in Belgrade has not met with success.

All efforts to achieve a negotiated, political solution to the Kosovo crisis having failed, no alternative is open but to take military action.

We are taking action following the Federal Republic of Yugoslavia Government's refusal of the International Community's demands:

- Acceptance of the interim political settlement which has been negotiated at Rambouillet;
- Full observance of limits on the Serb Army and Special Police Forces agreed on 25 October;
- Ending of excessive and disproportionate use of force in Kosovo.

As we warned on the 30 January, failure to meet these demands would lead NATO to take whatever measures were necessary to avert a humanitarian catastrophe.

NATO has fully supported all relevant UN Security Council resolutions, the efforts of the OSCE, and those of the Contact Group.

We deeply regret that these efforts did not succeed, due entirely to the intransigence of the FRY Government.

This military action is intended to support the political aims of the international community.

It will be directed towards disrupting the violent attacks being committed by the Serb Army and Special Police Forces and weakening their ability to cause further humanitarian catastrophe.

We wish thereby to support international efforts to secure Yugoslav agreement to an interim political settlement.

As we have stated, a viable political settlement must be guaranteed by an international military presence.

It remains open to the Yugoslav Government to show at any time that it is ready to meet the demands of the international community.

I hope it will have the wisdom to do so.

At the same time, we are appealing to the Kosovar Albanians to remain firmly committed to the road to peace which they have chosen in Paris. We urge in particular Kosovar armed elements to refrain from provocative military action.

Let me be clear: NATO is not waging war against Yugoslavia.

We have no quarrel with the people of Yugoslavia who for too long have been isolated in Europe because of the policies of their government.

Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo.

We must also act to prevent instability spreading in the region.

NATO is united behind this course of action.

We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo.

We know the risks of action but we have all agreed that inaction brings even greater dangers.

We will do what is necessary to bring stability to the region.

We must stop an authoritarian regime from repressing its people in Europe at the end of the twentieth century.

We have a moral duty to do so.

The responsibility is on our shoulders and we will fulfil it.

Security Council Meeting 3988 on Kosovo, 24 March 1999

The Security Council meeting immediately after the beginning of the Kosovo intervention saw a clash of different conceptualizations of sovereignty and the legality and morality of intervening with force in the name of human rights. On the one hand, the Netherlands and, even more so, the United Kingdom explicitly defended the legality of the Kosovo intervention. The German and US representatives focused on the exceptional circumstances. Concerning the legality of the action, the latter merely stated his belief "that action by NATO is justified and necessary to stop violence and prevent an even great humanitarian disaster".[10] On the other hand, Russia and China in particular lashed out at NATO for violating the fundamental principles of the UN Charter.[11]

Mr. van Walsum (Netherlands)[12]

In some capitals, our determination to avoid a humanitarian catastrophe in Kosovo has apparently been underestimated. It goes without saying that a country—or an alliance—which is compelled to take up arms to avert such a humanitarian catastrophe would always prefer to be able to base its action on a specific Security Council resolution. The Secretary-General is right when he observes in his press statement that the Council should be involved in any decision to resort to the use of force. If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and what we have available in this case is more than adequate.

Mr. Greenstock (United Kingdom)[13]

In defiance of the international community, President Milosevic has refused to accept the interim political settlement negotiated at Rambouillet, to observe the limits on security-force levels agreed on 25 October, and to end the excessive and disproportionate use of force in Kosovo. Because of his failure to meet these demands, we face a humanitarian catastrophe. NATO has been forced to take military action because all other means of preventing a humanitarian catastrophe have been frustrated by Serb behaviour. We have taken this action with regret, in order to save lives. It will be directed towards disrupting the violent attacks being perpetrated by the Serb security forces and towards weakening their ability to create a humanitarian catastrophe. In the longer term, the International Criminal Tribunal for the Former Yugoslavia, whose mandate extends to Kosovo, will hold those responsible for violations of international humanitarian law accountable for their actions. The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed

acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions. Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.

Mr. Lavrov (Russian Federation)[14]

Those who are involved in this unilateral use of force against the sovereign Federal Republic of Yugoslavia—carried out in violation of the Charter of the United Nations and without the authorization of the Security Council—must realize the heavy responsibility they bear for subverting the Charter and other norms of international law and for attempting to establish in the world, de facto, the primacy of force and unilateral diktat. The members of NATO are not entitled to decide the fate of other sovereign and independent States. They must not forget that they are not only members of their alliance, but also Members of the United Nations, and that it is their obligation to be guided by the United Nations Charter, in particular its Article 103, which clearly establishes the absolute priority for Members of the Organization of Charter obligations over any other international obligations. Attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences. . . . We certainly do not seek to defend violations of international humanitarian law by any party. But it is possible to combat violations of the law only with clean hands and only on the solid basis of the law. Otherwise lawlessness would spawn lawlessness. It would be unthinkable for a national court in a civilized democratic country to uphold illegal methods to combat crime. Attempts to apply a different standard to international law and to disregard its basic norms and principles create a dangerous precedent that could cause acute destabilization and chaos on the regional and global level. If we do not put an end to this very dangerous trend, the virus of illegal unilateral approaches could spread not merely to other geographical regions but to spheres of international relations other than questions of peace and security. The fact that NATO has opted to use force in Kosovo raises very serious questions about the sincerity of the repeated assurances that that alliance was not claiming the role of the world's policeman and was prepared to cooperate in the interests of common European security. In the light of this turn of events, we shall draw the appropriate conclusions in our relations and contacts with that organization.

Mr. Qin Huasun (China)[15]

Today, 24 March, the North Atlantic Treaty Organization (NATO), with the United States in the lead, mobilized its airborne military forces and launched military strikes against the Federal Republic of Yugoslavia, seriously exacerbating the situation in the Balkan region. This act amounts to a blatant violation of the United Nations Charter and of the accepted norms of international law. The Chinese Government strongly opposes this act. The question of Kosovo, as an internal matter of the Federal Republic of Yugoslavia, should be resolved among the parties concerned in the Federal Republic of Yugoslavia

themselves. Settlement of the Kosovo issue should be based on respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and on guaranteeing the legitimate rights and interests of all ethnic groups in the Kosovo region. Recently, the parties concerned have been working actively towards a political settlement of the crisis. We have always stood for the peaceful settlement of disputes through negotiations, and are opposed to the use or threat of use of force in international affairs and to power politics whereby the strong bully the weak. We oppose interference in the internal affairs of other States, under whatever pretext or in whatever form. It has always been our position that under the Charter it is the Security Council that bears primary responsibility for the maintenance of international peace and security. And it is only the Security Council that can determine whether a given situation threatens international peace and security and can take appropriate action. We are firmly opposed to any act that violates this principle and that challenges the authority of the Security Council.

*Legality of Use of Force (***Serbia and Montenegro v Belgium***), verbatim record 1999/15*

The absolute and compelling need for the current armed operation

As regards the intervention, the Kingdom of Belgium takes the view that the Security Council's resolutions which I have just cited provide an unchallengeable basis for the armed intervention. They are clear, and they are based on Chapter VII of the Charter, under which the Security Council may determine the existence of any threat to international peace and security. But we need to go further and develop the idea of armed humanitarian intervention. NATO, and the Kingdom of Belgium in particular, felt obliged to intervene to forestall an ongoing humanitarian catastrophe, acknowledged in Security Council resolutions. To safeguard what? To safeguard, Mr. President, essential values which also rank as jus cogens. Are the right to life, physical integrity, the prohibition of torture, are these not norms with the status of jus cogens? They undeniably have this status, so much so that international instruments on human rights (the European Human Rights Convention, the agreements mentioned above) protect them in a waiver clause (the power of suspension in case of war of all human rights except right to life and integrity of the individual): thus they are absolute rights, from which we may conclude that they belong to the jus cogens. Thus, NATO intervened to protect fundamental values enshrined in the jus cogens and to prevent an impending catastrophe recognized as such by the Security Council. There is another important feature of NATO's action: NATO has never questioned the political independence and the territorial integrity of the Federal Republic of Yugoslavia—the Security Council's resolutions, the NATO decisions, and the press releases have, moreover, consistently stressed this. Thus this is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State. There is no shortage of precedents. India's intervention in Eastern Pakistan; Tanzania's intervention in Uganda; Vietnam in Cambodia, the West African countries'

interventions first in Liberia and then in Sierra Leone. While there may have been certain doubts expressed in the doctrine, and among some members of the international community, these interventions have not been expressly condemned by the relevant United Nations bodies. These precedents, combined with Security Council resolutions and the rejection of the draft Russian resolution on 26 March, which I have already referred to, undoubtedly support and substantiate our contention that the NATO intervention is entirely legal. Allow me to remind the Court of the three features of the intervention which have been noted by the international authorities, in this case the Security Council; there was a humanitarian catastrophe, recognised by the Security Council, imminent danger, i.e., a situation constituting a threat to peace as noted by the Security Council resolution; and the power responsible for this—as is made clear in the three Security Council resolutions—is the Federal Republic of Yugoslavia. The intervention is of a quite exceptional character, prompted by entirely objective criteria. In the circumstances do we need to add another consideration, the tendency in contemporary international law towards a steadily greater protection of minorities? We are accused of encroaching on sovereignty, but the Government of the Kingdom of Belgium would like to quote a passage from a speech given by Mr. Kofi Annan, United Nations Secretary-General, on 30 April last, at the University of Michigan. Mr. Annan said "no Government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples", and headded [sic!] a very important point, "Emerging slowly, but I believe surely is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty". NATO's action has had and still has a further dimension. The aim is to protect a distressed population in the throes of a humanitarian catastrophe, but there is also a need to safeguard the stability of an entire region, for the Security Council resolutions have also noted that the behaviour of the Federal Republic of Yugoslavia in Kosovo was generating a threat to international peace and security by impairing the stability of the whole area. This is a case of a lawful armed humanitarian intervention for which there is a compelling necessity. And, Mr. President, Members of the Court, if we have failed to convince you that what has been taking place is armed humanitarian intervention justified by international law, the Government of the Kingdom of Belgium will also plead, in the alternative, that there is a state of necessity.

IV From Humanitarian Intervention to the Responsibility to Protect

At the end of the day, the Kosovo intervention did not change the prohibition of the use of force. Not even the majority of Western states considered it lawful.[16] As such, the Kosovo intervention was famously qualified as "illegal but legitimate" by the Independent International Commission on Kosovo established by the Swedish government.[17] From a legal point of view, however, the 133 states belonging to the Group of 77 and China[18] rejected the concept of humanitarian intervention by stressing

> the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called "right" of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law. In this context, we request the Chairman of the Group of 77, in conjunction with the Chairman of the Non-Aligned Movement (NAM), through the Joint Coordinating Committee, (JCC), to coordinate consideration of the concept of humanitarian intervention and other related matters as contained in

> the 1999 Report of the United Nations Secretary-General on the work of the Organization. We further stress the need for scrupulously respecting the guiding principles of humanitarian assistance, adopted by the General Assembly in its resolution 46/182, and emphasize that these principles are valid, time-tested and must continue to be fully observed. Furthermore, we stress that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.

Worried about the impact of this divide among the UN members, then-Secretary General Kofi Annan, still influenced by the UN's failure to prevent the genocide in Rwanda, raised the question of the understanding and limits of sovereignty in cases of massive human rights violations and the role of the UN on two occasions—first when presenting his 1999 annual report to the General Assembly and again in his 2000 We the Peoples report.

Secretary-General Presents His Annual Report to General Assembly, Press Release, SG/SM/7136 GA/9596

Following is the text as delivered of Secretary-General Kofi Annan's address today, presenting his annual report to the opening meeting of the United Nations General Assembly:

I am deeply honoured to address this last General Assembly of the twentieth century, and to present to you my annual report on the work of the Organization. The text of the report is before you.

On this occasion, I shall like to address the prospects for human security and intervention in the next century. In light of the dramatic events of the past year, I trust that you will understand this decision.

As Secretary-General, I have made it my highest duty to restore the United Nations to its rightful role in the pursuit of peace and security, and to bring it closer to the peoples it serves. As we stand at the brink of a new century, this mission continues.

But it continues in a world transformed by geo-political, economic, technological and environmental changes whose lasting significance still eludes us. As we seek new ways to combat the ancient enemies of war and poverty, we will succeed only if we all adapt our Organization to a world with new actors, new responsibilities, and new possibilities for peace and progress.

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation.

The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter—has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny.

These parallel developments—remarkable and, in many ways, welcome—do not lend themselves to easy interpretations or simple conclusions.

They do, however, demand of us a willingness to think anew—about how the United Nations responds to the political, human rights and humanitarian crises affecting so much of the world; about the means employed by the international community in situations of need; and about our willingness to act in some areas of conflict, while limiting ourselves to humanitarian palliatives in many other crises whose daily toll of death and suffering ought to shame us into action.

Our reflections on these critical questions derive not only from the events of last year, but from a variety of challenges that confront us today, most urgently in East Timor.

From Sierra Leone to the Sudan to Angola to the Balkans to Cambodia and to Afghanistan, there are a great number of peoples who need more than just words of sympathy from the international community. They need a real and sustained commitment to help end their cycles of violence, and launch them on a safe passage to prosperity.

While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community.

It has cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences.

The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defence of human rights—can only be viewed as a tragedy.

It has revealed the core challenge to the Security Council and to the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand.

The Kosovo conflict and its outcome have prompted a wide debate of profound importance to the resolution of conflicts from the Balkans to Central Africa to East Asia. And to each side in this critical debate, difficult questions can be posed.

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?

Mr. President,

In response to this turbulent era of crises and interventions, there are those who have suggested that the Charter itself—with its roots in the aftermath of global inter-State war—is ill-suited to guide us in a world of ethnic wars and intra-State violence. I believe they are wrong.

The Charter is a living document, whose high principles still define the aspirations of peoples everywhere for lives of peace, dignity and development. Nothing in the Charter precludes a recognition that there are rights beyond borders.

Indeed, its very letter and spirit are the affirmation of those fundamental human rights. In short, it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era; an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.

The sovereign States who drafted the Charter over half a century ago were dedicated to peace, but experienced in war.

They knew the terror of conflict, but knew equally that there are times when the use of force may be legitimate in the pursuit of peace. That is why the Charter's own words declare that "armed force shall not be used, save in the common interest". But what is that common interest? Who shall define it? Who will defend it? Under whose authority? And with what means of intervention? These are the monumental questions facing us as we enter the new century. While I will not propose specific answers or criteria, I shall identify four aspects of intervention which I believe hold important lessons for resolving future conflicts.

First, it is important to define intervention as broadly as possible, to include actions along a wide continuum from the most pacific to the most coercive. A tragic irony of many of the crises that continue to go unnoticed and unchallenged today is that they could be dealt with by far less perilous acts of intervention than the one we witnessed recently in Yugoslavia. And yet, the commitment of the international community to peacekeeping, to humanitarian assistance, to rehabilitation and reconstruction varies greatly from region to region, and crisis to crisis.

If the new commitment to intervention in the face of extreme suffering is to retain the support of the world's peoples, it must be—and must be seen to be—fairly and consistently applied, irrespective of region or nation. Humanity, after all, is indivisible.

It is also necessary to recognize that any armed intervention is itself a result of the failure of prevention. As we consider the future of intervention, we must redouble our efforts to enhance our preventive capabilities—including early warning, preventive diplomacy, preventive deployment and preventive disarmament.

A recent powerful tool of deterrence has been the actions of the Tribunals for Rwanda and the former Yugoslavia. In their battle against impunity lies a key to deterring crimes against humanity. With these concerns in mind, I have dedicated the introductory essay of my annual report to exploring ways of moving from a culture of reaction to a culture of prevention. Even the costliest policy of prevention is far cheaper, in lives and in resources, than the least expensive use of armed force.

Second, it is clear that sovereignty alone is not the only obstacle to effective action in human rights or humanitarian crises. No less significant are the ways in which the Member States of the United Nations define their national interest in any given crisis.

Of course, the traditional pursuit of national interest is a permanent feature of international relations and of the life and work of the Security Council. But as the world has changed in profound ways since the end of the cold war, I believe our conceptions of national interest have failed to follow suit.

A new, more broadly defined, more widely conceived definition of national interest in the new century would, I am convinced, induce States to find far greater unity in the pursuit of such basic Charter values as democracy, pluralism, human rights, and the rule of law.

A global era requires global engagement. Indeed, in a growing number of challenges facing humanity, the collective interest is the national interest. Third, in the event that forceful intervention becomes necessary, we must ensure that the Security Council, the body charged with authorizing force under international law—is able to rise to the challenge.

The choice, as I said during the Kosovo conflict, must not be between Council unity and inaction in the face of genocide—as in the case of Rwanda, on the one hand; and Council division, and regional action, as in the case of Kosovo, on the other.

In both cases, the Member States of the United Nations should have been able to find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.

As important as the Council's enforcement power is its deterrent power. Unless it is able to assert itself collectively where the cause is just and where the means are available, its credibility in the eyes of the world may well suffer.

If States bent on criminal behaviour know that frontiers are not the absolute defence; if they know that the Security Council will take action to halt crimes against humanity, then they will not embark on such a course of action in expectation of sovereign impunity.

The Charter requires the Council to be the defender of the common interest, and unless it is seen to be so—in an era of human rights, interdependence, and globalization—there is a danger that others could seek to take its place.

Let me say that the Council's prompt and effective action in authorizing a multinational force for East Timor reflects precisely the unity of purpose that I have called for today. Already, however, far too many lives have been lost and far too much destruction has taken place for us to rest on our laurels. The hard work of bringing peace and stability to East Timor still awaits us.

Finally, after the conflict is over, in East Timor as everywhere, it is vitally important that the commitment to peace be as strong as the commitment to war.

In this situation, too, consistency is essential. Just as our commitment to humanitarian action must be universal if it is to be legitimate, so our commitment to peace cannot end with the cessation of hostilities. The aftermath of war requires no less skill, no less sacrifice, no fewer resources in order to forge a lasting peace and avoid a return to violence.

Kosovo—and other United Nations missions currently deployed or looming over the horizon—presents us with just such a challenge. Unless the United Nations is given the means and support to succeed, not only the peace, but the war, too, will be lost. From civil administration to policing to the creation of a civil society capable of sustaining a tolerant, pluralist, prosperous society, the challenges facing our peacekeeping, peacemaking and peace-building missions are immense.

But if we are given the means—in Kosovo and in Sierra Leone, in East Timor—we have a real opportunity to break the cycles of violence, once and for all.

Mr. President,

We leave a century of unparalleled suffering and violence. Our greatest, most enduring test remains our ability to gain the respect and support of the world's peoples.

If the collective conscience of humanity—a conscience which abhors cruelty, renounces injustice and seeks peace for all peoples—cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice.

If it does not hear in our voices, and see in our actions, reflections of its own aspirations, its needs, and its fears, it may soon lose faith in our ability to make a difference.

Just as we have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples.

This developing international norm in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community.

Any such evolution in our understanding of State sovereignty and individual sovereignty will, in some quarters, be met with distrust, scepticism, even hostility. But it is an evolution that we should welcome.

Why? Because, despite its limitations and imperfections, it is testimony to a humanity that cares more, not less, for the suffering in its midst, and a humanity that will do more, and not less, to end it.

It is a hopeful sign at the end of the twentieth century.

Thank you.

We the Peoples: The Role of the United Nations in the Twenty-First Century.
Report of the Secretary-General, 27 March 2000, A/54/2000, paras 215–219

IV Freedom from fear

C ADDRESSING THE DILEMMA OF INTERVENTION

215. In my address to the General Assembly last September, I called on Member States to unite in the pursuit of more effective policies to stop organized mass murder and egregious violations of human rights. Although I emphasized that intervention embraced a wide continuum of responses, from diplomacy to armed action, it was the latter option that generated most controversy in the debate that followed.

216. Some critics were concerned that the concept of "humanitarian intervention" could become a cover for gratuitous interference in the internal affairs of sovereign states Others felt that it might encourage secessionist movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions that would aid their cause. Still others noted that there is little consistency in the practice of intervention, owing to its inherent difficulties and costs as well as perceived national interests—except that weak states are far more likely to be subjected to it than strong ones.

217. I recognize both the force and the importance of these arguments. I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?

218. We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.

219. Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle—not even sovereignty—can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.

V From the 2001 ICISS Report to the 2005 World Summit

The challenge to find the right balance between sovereignty and the need to act in cases of mass atrocities was subsequently addressed by the Canadian government and a group of major foundations, which established the International Commission on Intervention and

State Sovereignty (ICISS). Its December 2001 report, co-chaired by Gareth Evans and Mohamed Sahnoun, first coined the concept of the Responsibility to Protect, highlighting the need to prevent, react and rebuild in situations of mass killings or ethnic cleansing. Concerning military interventions in particular, it also listed a number of prerequisites for interventions: namely, right intention, last resort, proportionality, reasonable prospects of success and right authority, i.e. Security Council authorization.

From then on, the Responsibility to Protect found its way into the 2004 High-Level Panel on Threats, Challenges and Change report, Kofi Annan's 2005 In Larger Freedom report and the 2005 World Summit—the largest gathering of heads of states and governments in UN history—a history that "sounds almost like a fairy tale".[19] The latter's paragraphs 138 and 139 set out the generally accepted contours of the Responsibility to Protect by identifying genocide, crimes against humanity, war crimes and ethnic cleansing as causes for actions. It was subsequently reaffirmed in Security Council Resolution 1674 (2006) on the protection of civilians in armed conflict. Lastly, the Secretary-General has issued annual reports on this topic from 2009 onwards. In this first report, he set out the contours of the Responsibility to Protect by identifying three pillars: the responsibility of the state, the duty to assist states in protecting their populations and the subsidiary responsibility of the international community if a state fails to adhere to its core obligations towards its own population.

These documents aside, its practical implementation has been a rollercoaster ride. Various states already felt "buyer's remorse" after the 2005 World Summit.[20] While the Secretary-General's mediation efforts in the post-electoral violence in Kenya 2007 are seen as an early success story,[21] states failed to take decisive action in the crises in Darfur and Somalia.[22]

The Responsibility to Protect. *Report of the International Commission on Intervention and State Sovereignty, December 2001, Core Principles*

Synopsis—the Responsibility to Protect: Core Principles

(1) BASIC PRINCIPLES

A State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
B Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) FOUNDATIONS

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:

A obligations inherent in the concept of sovereignty;
B the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
C specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
D the developing practice of states, regional organizations and the Security Council itself.

(3) ELEMENTS

The responsibility to protect embraces three specific responsibilities:

A The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
B The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
C The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

(4) PRIORITIES

A Prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.
B The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.

The Responsibility to Protect: Principles for military intervention

(1) THE JUST CAUSE THRESHOLD

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

A large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
B large scale "ethnic cleansing", actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

(2) THE PRECAUTIONARY PRINCIPLES

A Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.
B Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.
C Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
D Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

(3) RIGHT AUTHORITY

A There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
B Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.
C The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.
D The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.
E If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are: I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.
F The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation—and that the stature and credibility of the United Nations may suffer thereby.

(4) OPERATIONAL PRINCIPLES

A Clear objectives; clear and unambiguous mandate at all times; and resources to match.
B Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.
C Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.
D Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.
E Acceptance that force protection cannot become the principal objective.
F Maximum possible coordination with humanitarian organizations.

A More Secure World *paras 199–203*

3 Chapter VII of the Charter of the United Nations, internal threats and the Responsibility to Protect

199. The Charter of the United Nations is not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity. It "reaffirm(s) faith in fundamental human rights" but does not do much to protect them, and Article 2.7 prohibits intervention

"in matters which are essentially within the jurisdiction of any State". There has been, as a result, a long-standing argument in the international community between those who insist on a "right to intervene" in man-made catastrophes and those who argue that the Security Council, for all its powers under Chapter VII to "maintain or restore international security", is prohibited from authorizing any coercive action against sovereign States for whatever happens within their borders.

200. Under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), States have agreed that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. Since then it has been understood that genocide anywhere is a threat to the security of all and should never be tolerated. The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.

201. The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community. There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of every State when it comes to people suffering from avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community—with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. The primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions. Force, if it needs to be used, should be deployed as a last resort.

202. The Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security", not especially difficult when breaches of international law are involved.

203. **We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent** [emphasis in the original].

In Larger Freedom *paras 127–135 and para. 7 from the Annex ["For decision by Heads of State and Government"]*

IV Freedom to live in dignity

127. In the Millennium Declaration, Member States stated that they would spare no effort to promote democracy and strengthen the rule of law, as well as respect for all

internationally recognized human rights and fundamental freedoms. In so doing, they recognized that while freedom from want and fear are essential they are not enough. All human beings have the right to be treated with dignity and respect.

128. The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity.

129. When it comes to laws on the books, no generation has inherited the riches that we have. We are blessed with what amounts to an international bill of human rights, among which are impressive norms to protect the weakest among us, including victims of conflict and persecution. We also enjoy a set of international rules on everything from trade to the law of the sea, from terrorism to the environment and from small arms to weapons of mass destruction. Through hard experience, we have become more conscious of the need to build human rights and rule-of-law provisions into peace agreements and ensure that they are implemented. And even harder experience has led us to grapple with the fact that no legal principle—not even sovereignty—should ever be allowed to shield genocide, crimes against humanity and mass human suffering.

130. But without implementation, our declarations ring hollow. Without action, our promises are meaningless. Villagers huddling in fear at the sound of Government bombing raids or the appearance of murderous militias on the horizon find no solace in the unimplemented words of the Geneva Conventions, to say nothing of the international community's solemn promises of "never again" when reflecting on the horrors of Rwanda a decade ago. Treaties prohibiting torture are cold comfort to prisoners abused by their captors, particularly if the international human rights machinery enables those responsible to hide behind friends in high places. A warweary population infused with new hope after the signing of a peace agreement quickly reverts to despair when, instead of seeing tangible progress towards a Government under the rule of law, it sees war lords and gang leaders take power and become laws unto themselves. And solemn commitments to strengthen democracy at home, which all States made in the Millennium Declaration, remain empty words to those who have never voted for their rulers and who see no sign that things are changing.

131. To advance a vision of larger freedom, the United Nations and its Member States must strengthen the normative framework that has been so impressively advanced over the last six decades. Even more important, we must take concrete steps to reduce selective application, arbitrary enforcement and breach without consequence. Those steps would give new life to the commitments made in the Millennium Declaration.

132. Accordingly, I believe that decisions should be made in 2005 to help strengthen the rule of law internationally and nationally, enhance the stature and structure of the human rights machinery of the United Nations and more directly support efforts to institute and deepen democracy in nations around the globe. We must also move towards embracing and acting on the "responsibility to protect" potential or actual victims of massive atrocities. The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service. We must move from an era of legislation to an era of implementation. Our declared principles and our common interests demand no less.

A RULE OF LAW

133. I strongly believe that every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home.

Indeed, the Millennium Declaration reaffirmed the commitment of all nations to the rule of law as the all-important framework for advancing human security and prosperity. Yet in many places, Governments and individuals continue to violate the rule of law, often without consequences for them but with deadly consequences for the weak and the vulnerable. In other instances, those who make no pretence of being bound by the rule of law, such as armed groups and terrorists, are able to flout it because our peacemaking institutions and compliance mechanisms are weak. The rule of law as a mere concept is not enough. New laws must be put into place, old ones must be put into practice and our institutions must be better equipped to strengthen the rule of law.

134. Nowhere is the gap between rhetoric and reality—between declarations and deeds—so stark and so deadly as in the field of international humanitarian law. It cannot be right, when the international community is faced with genocide or massive human rights abuses, for the United Nations to stand by and let them unfold to the end, with disastrous consequences for many thousands of innocent people. I have drawn Member States' attention to this issue over many years. On the occasion of the tenth anniversary of the Rwandan genocide, I presented a five-point action plan to prevent genocide. The plan underscored the need for action to prevent armed conflict, effective measures to protect civilians, judicial steps to fight impunity, early warning through a Special Adviser on the Prevention of Genocide, and swift and decisive action when genocide is happening or about to happen. Much more, however, needs to be done to prevent atrocities and to ensure that the international community acts promptly when faced with massive violations.

135. The International Commission on Intervention and State Sovereignty and more recently the High-level Panel on Threats, Challenges and Change, with its 16 members from all around the world, endorsed what they described as an "emerging norm that there is a collective responsibility to protect" (see A/59/565, para. 203). While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. **I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it.** This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required. In this case, as in others, it should follow the principles set out in section III above [emphasis in the original].

Annex for decision by Heads of State and Government

III FREEDOM TO LIVE IN DIGNITY

7. I urge Heads of State and Government to recommit themselves to supporting the rule of law, human rights and democracy—principles at the heart of the Charter of the United Nations and the Universal Declaration of Human Rights. To this end, they should:

(a) Reaffirm their commitment to human dignity by action to strengthen the rule of law, ensure respect for human rights and fundamental freedoms and promote democracy so that universally recognized principles are implemented in all countries;

(b) Embrace the "responsibility to protect" as a basis for collective action against genocide, ethnic cleansing and crimes against humanity, and agree to act on this responsibility, recognizing that this responsibility lies first and foremost with each individual State, whose duty it is to protect its population, but that if national authorities are unwilling or unable to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect civilian populations, and that if such methods appear insufficient the Security Council may out of necessity decide to take action under the Charter, including enforcement action, if so required;
(c) Support the 2005 treaty event, focusing on 31 multilateral treaties, and encourage any Government that has not done so to agree to ratify and implement all treaties relating to the protection of civilians;
(d) Commit themselves to supporting democracy in their own countries, their regions and the world, and resolve to strengthen the United Nations capacity to assist emerging democracies, and to that end welcome the creation of a Democracy Fund at the United Nations to provide funding and technical assistance to countries seeking to establish or strengthen their democracy;
(e) Recognize the important role of the International Court of Justice in adjudicating disputes among countries and agree to consider means to strengthen the work of the Court. . . .

2005 World Summit Outcome, 16 September 2005, A/60/L.1, paras 138f

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

Security Council Resolution 1674 (2006)

ADOPTED BY THE SECURITY COUNCIL AT ITS 5430TH MEETING,
ON 28 APRIL 2006

The Security Council,

Reaffirming its resolutions 1265 (1999) and 1296 (2000) on the protection of civilians in armed conflict, its various resolutions on children and armed conflict and on women, peace and security, as well as its resolution 1631 (2005) on cooperation between the United Nations and regional organizations in maintaining international peace and security, and further reaffirming its determination to ensure respect for, and follow-up to, these resolutions,

Reaffirming its commitment to the Purposes of the Charter of the United Nations as set out in Article 1 (1–4) of the Charter, and to the Principles of the Charter as set out in Article 2 (1–7) of the Charter, including its commitment to the principles of the political independence, sovereign equality and territorial integrity of all States, and respect for the sovereignty of all States,

Acknowledging that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing in this regard that development, peace and security and human rights are interlinked and mutually reinforcing,

Expressing its deep regret that civilians account for the vast majority of casualties in situations of armed conflict,

Gravely concerned with the effects of the illicit exploitation and trafficking of natural resources, as well as the illicit trafficking of small arms and light weapons, and the use of such weapons on civilians affected by armed conflict,

Recognizing the important contribution to the protection of civilians in armed conflict by regional organizations, and acknowledging in this regard, the steps taken by the African Union, Recognizing the important role that education can play in supporting efforts to halt and prevent abuses committed against civilians affected by armed conflict, in particular efforts to prevent sexual exploitation, trafficking in humans, and violations of applicable international law regarding the recruitment and rerecruitment of child soldiers,

Recalling the particular impact which armed conflict has on women and children, including as refugees and internally displaced persons, as well as on other civilians who may have specific vulnerabilities, and stressing the protection and assistance needs of all affected civilian populations,

Reaffirming that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians,

Bearing in mind its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, and underlining the importance of taking measures aimed at conflict prevention and resolution,

1 *Notes with appreciation* the contribution of the Report of the Secretary General of 28 November 2005 to its understanding of the issues surrounding the protection of civilians in armed conflict, and takes note of its conclusions;

2 *Emphasizes* the importance of preventing armed conflict and its recurrence, and stresses in this context the need for a comprehensive approach through promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law, and respect for, and protection of, human rights, and in this regard, urges the cooperation of Member States and underlines the importance of a coherent, comprehensive and coordinated approach by the principal organs of the United Nations, cooperating with one another and within their respective mandates;
3 *Recalls* that deliberately targeting civilians and other protected persons as such in situations of armed conflict is a flagrant violation of international humanitarian law, reiterates its condemnation in the strongest terms of such practices, and demands that all parties immediately put an end to such practices;
4 *Reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity;
5 *Reaffirms* also its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict in violation of applicable international obligations with respect in particular to (i) torture and other prohibited treatment, (ii) gender-based and sexual violence, (iii) violence against children, (iv) the recruitment and use of child soldiers, (v) trafficking in humans, (vi) forced displacement, and (vii) the intentional denial of humanitarian assistance, and demands that all parties put an end to such practices;
6 *Demands* that all parties concerned comply strictly with the obligations applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as with the decisions of the Security Council;
7 *Reaffirms* that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses, draws attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and "mixed" criminal courts and tribunals and truth and reconciliation commissions, and notes that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims;
8 *Emphasizes* in this context the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law, while recognizing, for States in or recovering from armed conflict, the need to restore or build independent national judicial systems and institutions;
9 *Calls on* States that have not already done so to consider ratifying the instruments of international humanitarian, human rights and refugee law, and to take appropriate legislative, judicial and administrative measures to implement their obligations under these instruments;
10 *Demands* that all States fully implement all relevant decisions of the Security Council, and in this regard cooperate fully with United Nations peacekeeping missions and country teams in the follow-up and implementation of these resolutions;
11 *Calls upon* all parties concerned to ensure that all peace processes, peace agreements and post-conflict recovery and reconstruction planning have regard for the special needs of women and children and include specific measures for the

protection of civilians including (i) the cessation of attacks on civilians, (ii) the facilitation of the provision of humanitarian assistance, (iii) the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons, (iv) the facilitation of early access to education and training, (v) the re-establishment of the rule of law, and (vi) the ending of impunity;

12 *Recalls* the prohibition of the forcible displacement of civilians in situations of armed conflict under circumstances that are in violation of parties' obligations under international humanitarian law;

13 *Urges* the international community to provide support and assistance to enable States to fulfil their responsibilities regarding the protection of refugees and other persons protected under international humanitarian law;

14 *Reaffirms* the need to maintain the security and civilian character of refugee and internally displaced person camps, stresses the primary responsibility of States in this regard, and encourages the Secretary-General where necessary and in the context of existing peacekeeping operations and their respective mandates, to take all feasible measures to ensure security in and around such camps and of their inhabitants;

15 *Expresses* its intention of continuing its collaboration with the United Nations Emergency Relief Coordinator, and invites the Secretary-General to fully associate him from the earliest stages of the planning of United Nations peacekeeping and other relevant missions;

16 *Reaffirms* its practice of ensuring that the mandates of United Nations peacekeeping, political and peacebuilding missions include, where appropriate and on a case-by-case basis, provisions regarding (i) the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation, (ii) the facilitation of the provision of humanitarian assistance, and (iii) the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons, and expresses its intention of ensuring that (i) such mandates include clear guidelines as to what missions can and should do to achieve those goals, (ii) the protection of civilians is given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of the mandates, and (iii) that protection mandates are implemented;

17 *Reaffirms* that, where appropriate, United Nations peacekeeping and other relevant missions should provide for the dissemination of information about international humanitarian, human rights and refugee law and the application of relevant Security Council resolutions;

18 *Underscores* the importance of disarmament, demobilization and reintegration of ex-combatants (DDR) in the protection of civilians affected by armed conflict, and, in this regard, emphasizes (i) its support for the inclusion in mandates of United Nations peacekeeping and other relevant missions, where appropriate and on a case-by-case basis, of specific and effective measures for DDR, (ii) the importance of incorporating such activities into specific peace agreements, where appropriate and in consultation with the parties, and (iii) the importance of adequate resources being made available for the full completion of DDR programmes and activities;

19 *Condemns* in the strongest terms all sexual and other forms of violence committed against civilians in armed conflict, in particular women and children, and undertakes to ensure that all peace support operations employ all feasible measures to prevent such violence and to address its impact where it takes place;

20 *Condemns* in equally strong terms all acts of sexual exploitation, abuse and trafficking of women and children by military, police and civilian personnel involved

in United Nations operations, welcomes the efforts undertaken by United Nations agencies and peacekeeping operations to implement a zero-tolerance policy in this regard, and requests the Secretary-General and personnel-contributing countries to continue to take all appropriate action necessary to combat these abuses by such personnel, including through the full implementation without delay of those measures adopted in the relevant General Assembly resolutions based upon the recommendations of the report of the Special Committee on Peacekeeping, A/59/19/Rev.1;

21 *Stresses* the importance for all, within the framework of humanitarian assistance, of upholding and respecting the humanitarian principles of humanity, neutrality, impartiality and independence;

22 *Urges* all those concerned as set forth in international humanitarian law, including the Geneva Conventions and the Hague Regulations, to allow full unimpeded access by humanitarian personnel to civilians in need of assistance in situations of armed conflict, and to make available, as far as possible, all necessary facilities for their operations, and to promote the safety, security and freedom of movement of humanitarian personnel and United Nations and its associated personnel and their assets;

23 *Condemns* all attacks deliberately targeting United Nations and associated personnel involved in humanitarian missions, as well as other humanitarian personnel, urges States on whose territory such attacks occur to prosecute or extradite those responsible, and welcomes in this regard the adoption on 8 December 2005 by the General Assembly of the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel;

24 *Recognizes* the increasingly valuable role that regional organizations and other intergovernmental institutions play in the protection of civilians, and encourages the Secretary-General and the heads of regional and other intergovernmental organizations to continue their efforts to strengthen their partnership in this regard;

25 Reiterates its invitation to the Secretary-General to continue to refer to the Council relevant information and analysis regarding the protection of civilians where he believes that such information or analysis could contribute to the resolution of issues before it, requests him to continue to include in his written reports to the Council on matters of which it is seized, as appropriate, observations relating to the protection of civilians in armed conflict, and encourages him to continue consultations and take concrete steps to enhance the capacity of the United Nations in this regard;

26 *Notes* that the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict, may constitute a threat to international peace and security, and, reaffirms in this regard its readiness to consider such situations and, where necessary, to adopt appropriate steps;

27 *Requests* the Secretary-General to submit his next report on the protection of civilians in armed conflict within 18 months of the date of this resolution;

28 *Decides* to remain seized of the matter.

Implementing the Responsibility to Protect. *Report of the Secretary-General, 12 January 2009, A/63/677, paras 11f*

11. The provisions of paragraphs 138 and 139 of the Summit Outcome suggest that the responsibility to protect rests on the following three pillars:

Pillar one

THE PROTECTION RESPONSIBILITIES OF THE STATE

(a) Pillar one is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. The latter, I would underscore, is critical to effective and timely prevention strategies. The declaration by the Heads of State and Government in paragraph 138 of the Summit Outcome that "we accept that responsibility and will act in accordance with it" is the bedrock of the responsibility to protect. That responsibility, they affirmed, lies first and foremost with the State. The responsibility derives both from the nature of State sovereignty and from the pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of the responsibility to protect;

Pillar two

INTERNATIONAL ASSISTANCE AND CAPACITY-BUILDING

(b) Pillar two is the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and subregional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system. Too often ignored by pundits and policymakers alike, pillar two is critical to forging a policy, procedure and practice that can be consistently applied and widely supported. Prevention, building on pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect;

Pillar three

TIMELY AND DECISIVE RESPONSE

(c) Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection. Though widely discussed, pillar three is generally understood too narrowly. As demonstrated by the successful bilateral, regional and global efforts to avoid further bloodshed in early 2008 following the disputed election in Kenya, if the international community acts early enough, the choice need not be a stark one between doing nothing or using force. A reasoned, calibrated and timely response could involve any of the broad range of tools available to the United Nations and its partners. These would include pacific measures under Chapter VI of the Charter, coercive ones under Chapter VII and/or collaboration with regional and subregional arrangements under Chapter VIII. The process of determining the best course of action, as well as of implementing it, must fully respect the provisions, principles and purposes

> of the Charter. In accordance with the Charter, measures under Chapter VII must be authorized by the Security Council. The General Assembly may exercise a range of related functions under Articles 10 to 14, as well as under the "Uniting for peace" process set out in its resolution 377 (V). Chapters VI and VIII specify a wide range of pacific measures that have traditionally been carried out either by intergovernmental organs or by the Secretary-General. Either way, the key to success lies in an early and flexible response, tailored to the specific needs of each situation.

12. If the three supporting pillars were of unequal length, the edifice of the responsibility to protect could become unstable, leaning precariously in one direction or another. Similarly, unless all three pillars are strong the edifice could implode and collapse. All three must be ready to be utilized at any point, as there is no set sequence for moving from one to another, especially in a strategy of early and flexible response. With these caveats in mind, some examples of policies and practices that are contributing, or could contribute, to meeting pillars one, two and three are set out in sections II to IV below. The way forward is considered in section V.

In particular, five points are set out in paragraph 71 that the General Assembly may wish to consider in its review of the overall strategy set out in the report. Some initial ideas on early warning and assessment are set out in the annex. Later in 2009, I will submit to the Assembly modest proposals for implementing improvements in the early warning capability of the Organization, as called for in paragraph 138 of the Summit Outcome.

VI The Libya intervention

After several years of relative silence surrounding the Responsibility to Protect, it somewhat abruptly found its way into two Security Council resolutions on the ensuing civil war in Libya and one on the 2010–2011 Ivorian crisis. In all these resolutions, the Security Council implicitly referred to the Responsibility to Protect in the preambular paragraphs.

To a certain extent, Libya both constitutes the heyday and the—for the time being—end of the practical implementation of the Responsibility to Protect. On the one hand, it marked the first Security Council authorization to use force in a non-international armed conflict against the will of the incumbent government.[23] This remarkable step was made possible by the close co-operation with the Organisation of the Islamic Conference and the Arab League, which both had called for the imposition of a no-fly zone, and the tacit acceptance of Russia and China.[24]

On this basis, NATO conducted a seven-month military campaign—Operation Unified Protector—which ultimately led to the end of Muammar al-Gaddafi's 42-year-long despotic reign. Yet the initially euphoric reactions to this result have now dampened.[25] The biggest problem was the lack of a long-term strategy and post-conflict nation-building efforts.[26] Libya has not transitioned towards democracy as hoped for. There is still no central government adhering to the rule of law and guaranteeing human rights (including those of the large number of refugees and migrants trying to cross Libya on their way to Europe).[27] In the words of a September 2016 British Members of Parliament report,[28] the intervention

> was not informed by accurate intelligence. In particular, the [UK] Government failed to identify that the threat to civilians was overstated and that the rebels included a significant Islamist element. By the summer of 2011, the limited intervention to protect civilians had drifted into an opportunist policy of regime change. That policy was not underpinned by a strategy to support and shape post-Gaddafi Libya. The result was

> political and economic collapse, inter-militia and inter-tribal warfare, humanitarian and migrant crises, widespread human rights violations, the spread of Gaddafi regime weapons across the region and the growth of ISIL in North Africa.

The decision to support Libya's armed opposition and the subsequent regime change in Libya sparked a huge controversy among the P-5 in particular while further raising criticism by the other BRICS states[29] and the African Union.[30]

Vladimir Putin drew a comparison with the 2003 US attack on Iraq and described it as a "medieval call for a crusade"[31] on 20 March 2011. A year after the beginning of Operation Unified Protector, then, a spokesman for Vladimir Putin made it clear that "Russia is strictly against a situation when a group of countries can play the role of a global judge, judging whose leader is legal and whose is non-legal" and that the Russians were deeply worried over the possibility of having the Security Council decide "to get rid of wanted or unwanted leaders".[32]

China's government criticized the intervention via the *People's Daily*, the main voice of the Communist Party of China, as a negative example since "NATO abused the Security Council resolution about establishing a no-fly zone, and directly provided firepower assistance to one side".[33]

On the other hand, however, one must not forget the broad wording of Resolution 1973, which neither expressly allowed nor prohibited regime change. NATO and NATO states' leaders thus argued that the overthrow was not the deliberate aim of the intervention but merely a by-product essentially achieved by Libya's armed opposition.[34] As Payandeh succinctly put it,[35]

> the Security Council deliberately authorized military measures knowing that this action would be aimed primarily against the Gadhafi regime and would contribute to the op-position movement. Measures necessary for the protection of civilians and civilian-populated areas might at the same time have promoted regime change in Libya. In light of the Libyan air strikes against civilians, the destruction of the Libyan air force and air defense systems was necessary to protect human rights, but at the same time it significantly weakened the Gadhafi regime. Accordingly, measures were encompassed by Resolution 1973 as long as they were necessary, even though they might have promoted regime change in Libya. The mere fact that the intervening states were at the same time also contributing to the overthrow of Gadhafi or even acting with the political intention of achieving this goal does not render their attacks illegal.

Security Council Resolution 1970

Adopted by the Security Council at Its 6491st Meeting, on 26 February 2011.

The Security Council,

Expressing grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians,

Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,

Welcoming the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya,

Taking note of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011,

Welcoming the Human Rights Council resolution A/HRC/RES/S-15/1 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible,

Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

Expressing concern at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya,

Expressing concern also at the reports of shortages of medical supplies to treat the wounded,

Recalling the Libyan authorities' responsibility to protect its population,

Underlining the need to respect the freedoms of peaceful assembly and of expression, including freedom of the media,

Stressing the need to hold to account those responsible for attacks, including by forces under their control, on civilians,

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Expressing concern for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya,

Mindful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,

Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,

1 *Demands* an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population;

2 *Urges* the Libyan authorities to:

   (a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;

   (b) Ensure the safety of all foreign nationals and their assets and facilitate the departure of those wishing to leave the country;

   (c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and

   (d) Immediately lift restrictions on all forms of media.

3 *Requests* all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country;

ICC referral

4 *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5 *Decides* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

6 *Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

7 *Invites* the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

8 *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

Arms embargo

9 *Decides* that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories, and decides further that this measure shall not apply to:

(a) Supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, as approved in advance by the Committee established pursuant to paragraph 24 below;

(b) Protective clothing, including flak jackets and military helmets, temporarily exported to the Libyan Arab Jamahiriya by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only; or

(c) Other sales or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee;

10 *Decides* that the Libyan Arab Jamahiriya shall cease the export of all arms and related materiel and that all Member States shall prohibit the procurement of such items from the Libyan Arab Jamahiriya by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the Libyan Arab Jamahiriya;

11 *Calls upon* all States, in particular States neighbouring the Libyan Arab Jamahiriya, to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 or 10 of this resolution for the purpose of ensuring strict implementation of those provisions;

12 *Decides* to authorize all Member States to, and that all Member States shall, upon discovery of items prohibited by paragraph 9 or 10 of this resolution, seize and dispose (such as through destruction, rendering inoperable, storage or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of this resolution and decides further that all Member States shall cooperate in such efforts;

13 *Requires* any Member State when it undertakes an inspection pursuant to paragraph 11 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspections, the results of such inspections, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

14 *Encourages* Member States to take steps to strongly discourage their nationals from travelling to the Libyan Arab Jamahiriya to participate in activities on behalf of the Libyan authorities that could reasonably contribute to the violation of human rights;

Travel ban

15 *Decides* that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution or designated by the Committee established pursuant to paragraph 24 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory;

16 *Decides* that the measures imposed by paragraph 15 above shall not apply:

(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where entry or transit is necessary for the fulfilment of a judicial process;

(c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in the Libyan Arab Jamahiriya and stability in the region; or

(d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in the Libyan Arab Jamahiriya and the States subsequently notifies the Committee within forty-eight hours after making such a determination;

Asset freeze

17 *Decides* that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee;

18 *Expresses* its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

19 *Decides* that the measures imposed by paragraph 17 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) To be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) To be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) To be the subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 17 above, and has been notified by the relevant State or Member States to the Committee;

20 *Decides* that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

21 *Decides* that the measures in paragraph 17 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 17 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorization;

Designation criteria

22 *Decides* that the measures contained in paragraphs 15 and 17 shall apply to the individuals and entities designated by the Committee, pursuant to paragraph 24 (b) and (c), respectively;

(a) Involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in the Libyan Arab Jamahiriya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities; or

(b) Acting for or on behalf of or at the direction of individuals or entities identified in subparagraph (a).

23 *Strongly encourages* Member States to submit to the Committee names of individuals who meet the criteria set out in paragraph 22 above;

New sanctions committee

24 *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council (herein "the Committee"), to undertake to following tasks:

(a) To monitor implementation of the measures imposed in paragraphs 9, 10, 15, and 17;

(b) To designate those individuals subject to the measures imposed by paragraphs 15 and to consider requests for exemptions in accordance with paragraph 16 above;

(c) To designate those individuals subject to the measures imposed by paragraph 17 above and to consider requests for exemptions in accordance with paragraphs 19 and 20 above;

(d) To establish such guidelines as may be necessary to facilitate the implementation of the measures imposed above;
(e) To report within thirty days to the Security Council on its work for the first report and thereafter to report as deemed necessary by the Committee;
(f) To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;
(g) To seek from all States whatever information it may consider useful regarding the actions taken by them to implement effectively the measures imposed above;
(h) To examine and take appropriate action on information regarding alleged violations or non-compliance with the measures contained in this resolution;

25 *Calls upon* all Member States to report to the Committee within 120 days of the adoption of this resolution on the steps they have taken with a view to implementing effectively paragraphs 9, 10, 15 and 17 above;

Humanitarian assistance

26 *Calls upon* all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya, and requests the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to this paragraph, and expresses its readiness to consider taking additional appropriate measures, as necessary, to achieve this;

Commitment to review

27 *Affirms* that it shall keep the Libyan authorities' actions under continuous review and that it shall be prepared to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of the Libyan authorities' compliance with relevant provisions of this resolution;
28 *Decides* to remain actively seized of the matter.

Security Council Resolution 1973

Adopted by the Security Council at its 6498th Meeting, on 17 March 2011.

The Security Council,

Recalling its resolution 1970 (2011) of 26 February 2011,
Deploring the failure of the Libyan authorities to comply with resolution 1970 (2011),
Expressing grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties,

Reiterating the responsibility of the Libyan authorities to protect the Libyan population and *reaffirming* that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians,

Condemning the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions,

Further condemning acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel and *urging* these authorities to comply with their obligations under international humanitarian law as outlined in resolution 1738 (2006),

Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

Recalling paragraph 26 of resolution 1970 (2011) in which the Council expressed its readiness to consider taking additional appropriate measures, as necessary, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya,

Expressing its determination to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel,

Recalling the condemnation by the League of Arab States, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that have been and are being committed in the Libyan Arab Jamahiriya,

Taking note of the final communiqué of the Organisation of the Islamic Conference of 8 March 2011, and the communiqué of the Peace and Security Council of the African Union of 10 March 2011 which established an ad hoc High Level Committee on Libya,

Taking note also of the decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya,

Taking note further of the Secretary-General's call on 16 March 2011 for an immediate cease-fire,

Recalling its decision to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court, and *stressing* that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account,

Reiterating its concern at the plight of refugees and foreign workers forced to flee the violence in the Libyan Arab Jamahiriya, *welcoming* the response of neighbouring States, in particular Tunisia and Egypt, to address the needs of those refugees and foreign workers, and *calling on* the international community to support those efforts,

Deploring the continuing use of mercenaries by the Libyan authorities,

Considering that the establishment of a ban on all flights in the airspace of the Libyan Arab Jamahiriya constitutes an important element for the protection of civilians as well as the safety of the delivery of humanitarian assistance and a decisive step for the cessation of hostilities in Libya,

Expressing concern also for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

Welcoming the appointment by the Secretary General of his Special Envoy to Libya, Mr. Abdel-Elah Mohamed Al-Khatib and supporting his efforts to find a sustainable and peaceful solution to the crisis in the Libyan Arab Jamahiriya,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya,

Determining that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1 *Demands* the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians;

2 *Stresses* the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people and *notes* the decisions of the Secretary-General to send his Special Envoy to Libya and of the Peace and Security Council of the African Union to send its ad hoc High Level Committee to Libya with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution;

3 *Demands* that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance;

Protection of civilians

4 *Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council;

5 *Recognizes* the important role of the League of Arab States in matters relating to the maintenance of international peace and security in the region, and bearing in mind Chapter VIII of the Charter of the United Nations, requests the Member States of the League of Arab States to cooperate with other Member States in the implementation of paragraph 4;

No fly zone

6 *Decides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians;

7 *Decides further* that the ban imposed by paragraph 6 shall not apply to flights whose sole purpose is humanitarian, such as delivering or facilitating the delivery

of assistance, including medical supplies, food, humanitarian workers and related assistance, or evacuating foreign nationals from the Libyan Arab Jamahiriya, nor shall it apply to flights authorised by paragraphs 4 or 8, nor other flights which are deemed necessary by States acting under the authorisation conferred in paragraph 8 to be for the benefit of the Libyan people, and that these flights shall be coordinated with any mechanism established under paragraph 8;

8 *Authorizes* Member States that have notified the Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary, and *requests* the States concerned in cooperation with the League of Arab States to coordinate closely with the Secretary General on the measures they are taking to implement this ban, including by establishing an appropriate mechanism for implementing the provisions of paragraphs 6 and 7 above,

9 *Calls upon* all Member States, acting nationally or through regional organizations or arrangements, to provide assistance, including any necessary over-flight approvals, for the purposes of implementing paragraphs 4, 6, 7 and 8 above;

10 *Requests* the Member States concerned to coordinate closely with each other and the Secretary-General on the measures they are taking to implement paragraphs 4, 6, 7 and 8 above, including practical measures for the monitoring and approval of authorised humanitarian or evacuation flights;

11 *Decides* that the Member States concerned shall inform the Secretary-General and the Secretary-General of the League of Arab States immediately of measures taken in exercise of the authority conferred by paragraph 8 above, including to supply a concept of operations;

12 *Requests* the Secretary-General to inform the Council immediately of any actions taken by the Member States concerned in exercise of the authority conferred by paragraph 8 above and to report to the Council within 7 days and every month thereafter on the implementation of this resolution, including information on any violations of the flight ban imposed by paragraph 6 above;

Enforcement of the arms embargo

13 *Decides that* paragraph 11 of resolution 1970 (2011) shall be replaced by the following paragraph:

Calls upon all Member States, in particular States of the region, acting nationally or through regional organisations or arrangements, in order to ensure strict implementation of the arms embargo established by paragraphs 9 and 10 of resolution 1970 (2011), to inspect in their territory, including seaports and airports, and on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, *calls upon* all flag States of such vessels and aircraft to cooperate with such inspections and authorises Member States to use all measures commensurate to the specific circumstances to carry out such inspections.

14 *Requests* Member States which are taking action under paragraph 13 above on the high seas to coordinate closely with each other and the Secretary-General and *further requests* the States concerned to inform the Secretary-General and the Committee established pursuant to paragraph 24 of resolution 1970 (2011) ("the Committee") immediately of measures taken in the exercise of the authority conferred by paragraph 13 above;

15 *Requires* any Member State whether acting nationally or through regional organisations or arrangements, when it undertakes an inspection pursuant to paragraph 13 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspection, the results of such inspection, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

16 *Deplores* the continuing flows of mercenaries into the Libyan Arab Jamahiriya and *calls upon* all Member States to comply strictly with their obligations under paragraph 9 of resolution 1970 (2011) to prevent the provision of armed mercenary personnel to the Libyan Arab Jamahiriya;

Ban on flights

17 *Decides* that all States shall deny permission to any aircraft registered in the Libyan Arab Jamahiriya or owned or operated by Libyan nationals or companies to take off from, land in or overfly their territory unless the particular flight has been approved in advance by the Committee, or in the case of an emergency landing;

18 *Decides that* all States shall deny permission to any aircraft to take off from, land in or overfly their territory, if they have information that provides reasonable grounds to believe that the aircraft contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 and 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, except in the case of an emergency landing;

Asset freeze

19 *Decides* that the asset freeze imposed by paragraph 17, 19, 20 and 21 of resolution 1970 (2011) shall apply to all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the Libyan authorities, as designated by the Committee, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the Committee, and *decides further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the Libyan authorities, as designated by the Committee, or individuals or entities acting on their behalf or at their direction, or entities owned or controlled by them, as designated by the Committee, and directs the Committee

to designate such Libyan authorities, individuals or entities within 30 days of the date of the adoption of this resolution and as appropriate thereafter;

20 *Affirms* its determination to ensure that assets frozen pursuant to paragraph 17 of resolution 1970 (2011) shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

21 *Decides* that all States shall require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities incorporated in the Libyan Arab Jamahiriya or subject to its jurisdiction, and any individuals or entities acting on their behalf or at their direction, and entities owned or controlled by them, if the States have information that provides reasonable grounds to believe that such business could contribute to violence and use of force against civilians;

Designations

22 *Decides* that the individuals listed in Annex I shall be subject to the travel restrictions imposed in paragraphs 15 and 16 of resolution 1970 (2011), and *decides* further that the individuals and entities listed in Annex II shall be subject to the asset freeze imposed in paragraphs 17, 19, 20 and 21 of resolution 1970 (2011);

23 *Decides* that the measures specified in paragraphs 15, 16, 17, 19, 20 and 21 of resolution 1970 (2011) shall apply also to individuals and entities determined by the Council or the Committee to have violated the provisions of resolution 1970 (2011), particularly paragraphs 9 and 10 thereof, or to have assisted others in doing so;

Panel of Experts

24 *Requests* the Secretary-General to create for an initial period of one year, in consultation with the Committee, a group of up to eight experts ("Panel of Experts"), under the direction of the Committee to carry out the following tasks:

(a) Assist the Committee in carrying out its mandate as specified in paragraph 24 of resolution 1970 (2011) and this resolution;

(b) Gather, examine and analyse information from States, relevant United Nations bodies, regional organisations and other interested parties regarding the implementation of the measures decided in resolution 1970 (2011) and this resolution, in particular incidents of non-compliance;

(c) Make recommendations on actions the Council, or the Committee or State, may consider to improve implementation of the relevant measures;

(d) Provide to the Council an interim report on its work no later than 90 days after the Panel's appointment, and a final report to the Council no later than 30 days prior to the termination of its mandate with its findings and recommendations;

25 *Urges* all States, relevant United Nations bodies and other interested parties, to cooperate fully with the Committee and the Panel of Experts, in particular by supplying any information at their disposal on the implementation of the measures decided in resolution 1970 (2011) and this resolution, in particular incidents of non-compliance;

26 *Decides* that the mandate of the Committee as set out in paragraph 24 of resolution 1970 (2011) shall also apply to the measures decided in this resolution;
27 *Decides* that all States, including the Libyan Arab Jamahiriya, shall take the necessary measures to ensure that no claim shall lie at the instance of the Libyan authorities, or of any person or body in the Libyan Arab Jamahiriya, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 1970 (2011), this resolution and related resolutions;
28 *Reaffirms* its intention to keep the actions of the Libyan authorities under continuous review and underlines its readiness to review at any time the measures imposed by this resolution and resolution 1970 (2011), including by strengthening, suspending or lifting those measures, as appropriate, based on compliance by the Libyan authorities with this resolution and resolution 1970 (2011);
29 *Decides* to remain actively seized of the matter.

VII The April 2017 intervention in Syria

While the Security Council resolutions on Libya—not its aftermath—were initially considered as arguably the biggest success of the Responsibility to Protect,[36] the conflict in Syria reminded the world of the limits of co-operation whenever vital national security interests are at stake. Russian-Chinese doubles prevented the adoption of draft resolutions. Referring to the overthrow of Qaddafi, Russia ruled out Security Council action against its long-standing ally from the very beginning, declaring the first draft resolution to be a "unilateral, accusatory bent against Damascus".[37] Likewise, China, while emphasizing that it had no interest in Syria, referred to the sovereignty of Syria and rejected this resolution because it focused "solely on exerting pressure on Syria".[38]

The stances have not changed since then. After a chemical weapons attack allegedly carried out by Assad's forces in August 2013, a US intervention against Assad was thwarted literally at the last minute by Russian diplomatic efforts and pressure on Syria to destroy its chemical weapons arsenal—which has not happened as demanded[39]—and accede to the Chemical Weapons Convention.[40] Back then, Barack Obama's legal adviser Harold Hongju Koh published a blog post in which he referred to earlier interventions, such as the ones from the 1970s and Kosovo,[41] to describe Syria as a possible starting point for the emergence of accepting humanitarian interventions as a legal basis to use force:

> [H]ad President Obama proceeded in Syria as he had threatened, the US would not have been in flagrant breach of international law, but rather, in a legal gray zone. The U.S. and its allies could treat Syria as a lawmaking moment to crystallize a limited concept of humanitarian intervention, capable of breaking a veto stranglehold in extreme circumstances, such as to prevent the deliberate use of forbidden weapons to kill civilians.

At this point in time, Syria had already turned into a strategic quagmire between Assad, along with his allies Iran and Russia, and a large number of different armed groups (some of them described as "moderate", others as "Islamist") receiving weapons and other support from the United Kingdom, France, the US, Qatar, Saudi Arabia and Turkey.[42]

Russia—on the basis of an intervention by Assad—began intervening directly in September 2015. Over the years, the focus then increasingly shifted away from overthrowing Assad to the fight against jihadist groups, first and foremost the "Islamic State".[43]

Donald Trump's decision to strike a Syrian army air base in April 2017 after a chemical weapons attack thus caught many by surprise. After all, he had declared that "our far greater problem is not Assad, it's ISIS"[44] during his election campaign, while Nikki Haley had even publicly hinted at the possibility of accepting Assad a few weeks earlier.[45] Nevertheless, after the sarin gas attack in Khan Sheikhoun on 4 April 2017, Trump declared that the images of the victims had had a profound impact on him and his attitude towards Assad.[46] Announcing the US strikes in his presidential statement from 6 April 2017, Trump nevertheless focused on US security interests as a (seemingly) legal justification:[47]

> It is in this vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons. There can be no dispute that Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention, and ignored the urging of the UN Security Council.

While the US did not offer a distinctive legal rationale, a paper apparently drafted by the Trump administration was circulated outside the government laying out the legal basis for the strikes under domestic and international law.

Marty Lederman, (Apparent) Administration Justifications for Legality of Strikes Against Syria, Just Security, 8 April 2017

The targeted US military action against the Syrian military targets directly connected to the 4 April chemical weapons attack in Idlib was justified and legitimate as a measure to deter and prevent Syria's illegal and unacceptable use of chemical weapons. The US action was only taken after careful consideration of the following:

- Severe humanitarian distress, including the suffering caused by this and other previous unconscionable chemical weapons attacks by the Syrian military;
- Widespread violations of international law by the Syrian government, in particular the repeated use of banned chemical weapons against civilians in direct violation of its obligations under the Chemical Weapons Convention, which it acceded to in 2013, as well as UN Security Council Resolution (UNSCR) 2118, which was adopted by the Security Council under its Chapter VII authority, and which required Syria to cease using chemical weapons and eliminate its chemical weapons program in its entirety;
- Syria's contempt for multiple UNSCRs including UNSCR 1540 and those seeking to give effect to UNSCR 2118, specifically UNSCRs 2209, 2235, 2314, and 2319;
  The recognition in UNSCRs that the proliferation and use of chemical weapons is a serious threat to international security and a violation of international law;
- Syria's indiscriminate use of such banned weapons to kill and inflict other horrific injuries on civilians in violation of the law of armed conflict, which tragically has been something that Syria has shown little respect for;
- Regional destabilization and international security concerns produced by the Syrian government's actions, which include large and growing flows of refugees and the potential proliferation of chemical weapons;

- Widespread international condemnation of the Syrian government's conduct, including its use of chemical weapons;
- A convincing body of reporting that the Syrian Government has committed widespread violations of international law during the conflict;
- The exhaustion of all reasonably available peaceful remedies before using force, including extensive and intensive diplomatic efforts both to end armed conflict in Syria and to eliminate Syria's chemical weapons stockpile;
- The US use of force is necessary and proportionate to the aim of deterring and preventing the future use of chemical weapons by the Syrian government; and
- The US efforts to minimize civilian casualties in the planning and execution of the strike.

VIII The April 2018 intervention in Syria

The situation was somewhat repeated a year later after yet another chemical weapons attack in the Syrian city of Douma prompted the US, this time with the UK and France, to strike multiple targets. The US (just as in 2017) and France did not offer an explicit legal justification.[48] Donald Trump and the French representative to the Security Council both focused on the need to deter the use of chemical weapons. In contrast, the UK government provided an official paper on their position on the legality of the strikes, referring to the legality of (limited) humanitarian interventions in cases of chemical weapons attacks.

International reactions to these strikes were mixed. An extensive survey[49] by Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai and Elvina Pothelet concluded that some 54 percent of the 133 assessed states made no explicit legal claim, while no other states than the interveners themselves explicitly defended the legality of the strikes. Twelve states, among them Syria, Iran, Russia and China, condemned the strikes as illegal. Nevertheless, half the reviewed states expressed their political support for the strikes while such rejections were made by only 22 percent. As such, neither the April 2017 nor the April 2018 strike against Syria changed the law. Preventing or reacting to chemical weapons attacks still does not constitute a legal basis for humanitarian interventions. What the reactions have shown, nevertheless, is that the majority of states tacitly accept or at least refrain from condemning such interventions.

Statement by President Trump on Syria, 13 April 2018

My fellow Americans, a short time ago, I ordered the United States Armed Forces to launch precision strikes on targets associated with the chemical weapons capabilities of Syrian dictator Bashar al-Assad. A combined operation with the armed forces of France and the United Kingdom is now underway. We thank them both.

Tonight, I want to speak with you about why we have taken this action.

One year ago, Assad launched a savage chemical weapons attack against his own innocent people. The United States responded with 58 missile strikes that destroyed 20 percent of the Syrian Air Force.

Last Saturday, the Assad regime again deployed chemical weapons to slaughter innocent civilians—this time, in the town of Douma, near the Syrian capital of Damascus. This massacre was a significant escalation in a pattern of chemical weapons use by that very terrible regime.

The evil and the despicable attack left mothers and fathers, infants and children, thrashing in pain and gasping for air. These are not the actions of a man; they are crimes of a monster instead.

Following the horrors of World War I a century ago, civilized nations joined together to ban chemical warfare. Chemical weapons are uniquely dangerous not only because they inflict gruesome suffering, but because even small amounts can unleash widespread devastation.

The purpose of our actions tonight is to establish a strong deterrent against the production, spread, and use of chemical weapons. Establishing this deterrent is a vital national security interest of the United States. The combined American, British, and French response to these atrocities will integrate all instruments of our national power—military, economic, and diplomatic. We are prepared to sustain this response until the Syrian regime stops its use of prohibited chemical agents.

I also have a message tonight for the two governments most responsible for supporting, equipping, and financing the criminal Assad regime.

To Iran, and to Russia, I ask: What kind of a nation wants to be associated with the mass murder of innocent men, women, and children?

The nations of the world can be judged by the friends they keep. No nation can succeed in the long run by promoting rogue states, brutal tyrants, and murderous dictators.

In 2013, President Putin and his government promised the world that they would guarantee the elimination of Syria's chemical weapons. Assad's recent attack—and today's response—are the direct result of Russia's failure to keep that promise.

Russia must decide if it will continue down this dark path, or if it will join with civilized nations as a force for stability and peace. Hopefully, someday we'll get along with Russia, and maybe even Iran—but maybe not.

I will say this: The United States has a lot to offer, with the greatest and most powerful economy in the history of the world.

In Syria, the United States—with but a small force being used to eliminate what is left of ISIS—is doing what is necessary to protect the American people. Over the last year, nearly 100 percent of the territory once controlled by the so-called ISIS caliphate in Syria and Iraq has been liberated and eliminated.

The United States has also rebuilt our friendships across the Middle East. We have asked our partners to take greater responsibility for securing their home region, including contributing large amounts of money for the resources, equipment, and all of the anti-ISIS effort. Increased engagement from our friends, including Saudi Arabia, the United Arab Emirates, Qatar, Egypt, and others can ensure that Iran does not profit from the eradication of ISIS.

America does not seek an indefinite presence in Syria under no circumstances. As other nations step up their contributions, we look forward to the day when we can bring our warriors home. And great warriors they are.

Looking around our very troubled world, Americans have no illusions. We cannot purge the world of evil, or act everywhere there is tyranny.

No amount of American blood or treasure can produce lasting peace and security in the Middle East. It's a troubled place. We will try to make it better, but it is a troubled place. The United States will be a partner and a friend, but the fate of the region lies in the hands of its own people.

In the last century, we looked straight into the darkest places of the human soul. We saw the anguish that can be unleashed and the evil that can take hold. By the end of the World War I, more than one million people had been killed or injured by chemical weapons. We never want to see that ghastly specter return.

So today, the nations of Britain, France, and the United States of America have marshaled their righteous power against barbarism and brutality.

Tonight, I ask all Americans to say a prayer for our noble warriors and our allies as they carry out their missions.

We pray that God will bring comfort to those suffering in Syria. We pray that God will guide the whole region toward a future of dignity and of peace.

And we pray that God will continue to watch over and bless the United States of America.

Thank you, and goodnight. Thank you.

Mr. Delattre (France), Security Council Meeting 8225, 9 April 2018, p. 12

With this attack the Al-Assad regime is testing yet again the determination of the international community to ensure compliance with the prohibition against chemical-weapons use. Our response must be united, robust and implacable. That response must make it clear that the use of chemical weapons against civilians will no longer be tolerated, and that those who flout that fundamental rule of our collective security will be held accountable and must face the consequences. The Al-Assad regime needs to hear an international response, and France stands ready to fully shoulder its role alongside its partners.

Ultimately, we know that only an inclusive political solution will bring an end to the seven-year conflict, which has claimed the lives of 500,000 people and pushed millions to take the route of exile. That is why France will remain fully committed alongside the United Nations Special Envoy and in line with the Geneva process. However, in the light of this most recent carnage, we can no longer merely repeat words. Without being followed up by deeds, such words would be meaningless. I wish to reiterate here what President Macron has stressed on several occasions: France will assume its full responsibility in the fight against the proliferation of chemical weapons. France's position is clear. It will uphold its commitments and keep its word.

Policy Paper: Syria Action—UK Government Legal Position, published 14 April 2018

1 This is the Government's position on the legality of UK military action to alleviate the extreme humanitarian suffering of the Syrian people by degrading the Syrian regime's chemical weapons capability and deterring their further use, following the chemical weapons attack in Douma on 7 April 2018.

2 The Syrian regime has been killing its own people for seven years. Its use of chemical weapons, which has exacerbated the human suffering, is a serious crime of international concern, as a breach of the customary international law prohibition on the use of chemical weapons, and amounts to a war crime and a crime against humanity.

3 The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention, which requires three conditions to be met:

   (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

   (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

(iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

4 The UK considers that military action met the requirements of humanitarian intervention in the circumstances of the present case:

(i) The Syrian regime has been using chemical weapons since 2013. The attack in Eastern Damascus on 21 August 2013 left over 800 people dead. The Syrian regime failed to implement its commitment in 2013 to ensure the destruction of its chemical weapons capability. The chemical weapons attack in Khan Sheikhoun in April 2017 killed approximately 80 people and left hundreds more injured. The recent attack in Douma has killed up to 75 people, and injured over 500 people. Over 400,000 people have now died over the course of the conflict in Syria, the vast majority civilians. Over half of the Syrian population has been displaced, with over 13 million people in need of humanitarian assistance. The repeated, lethal use of chemical weapons by the Syrian regime constitutes a war crime and a crime against humanity. On the basis of what we know about the Syrian regime's pattern of use of chemical weapons to date, it was highly likely that the regime would seek to use chemical weapons again, leading to further suffering and loss of civilian life as well as the continued displacement of the civilian population.

(ii) Actions by the UK and its international partners to alleviate the humanitarian suffering caused by the use of chemical weapons by the Syrian regime at the UN Security Council have been repeatedly blocked by the regime's and its allies' disregard for international norms, including the international law prohibition on the use of chemical weapons. This last week, Russia vetoed yet another resolution in the Security Council, thwarting the establishment of an impartial investigative mechanism. Since 2013, neither diplomatic action, tough sanctions, nor the US strikes against the Shayrat airbase in April 2017 have sufficiently degraded Syrian chemical weapons capability or deterred the Syrian regime from causing extreme humanitarian distress on a large scale through its persistent use of chemical weapons. There was no practicable alternative to the truly exceptional use of force to degrade the Syrian regime's chemical weapons capability and deter their further use by the Syrian regime in order to alleviate humanitarian suffering.

(iii) In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention to strike carefully considered, specifically identified targets in order effectively to alleviate humanitarian distress by degrading the Syrian regime's chemical weapons capability and deterring further chemical weapons attacks was necessary and proportionate and therefore legally justifiable. Such an intervention was directed exclusively to averting a humanitarian catastrophe caused by the Syrian regime's use of chemical weapons, and the action was the minimum judged necessary for that purpose.

Notes

1 Early references to this idea can be found in Henry Wheaton, *Elements of International Law* (4th English edn as revised by J. Beresford Atlay [without—as Atlay makes it clear in the preface—changes in the original text from 1836], Stevens and Sons 1904), 101–103; Lassa Oppenheim, *International Law: A Treatise: Vol. I. Peace* (Longmans, Green, and Co. 1905), 188; William Edward Hall, *A Treatise on International Law* (4th edn, Clarendon Press

1895), 303f.; Thomas J. Lawrence, *The Principles of International Law* (D. C. Heath & Co. 1900), 132f.; John Westlake, *International Law: Part I. Peace* (Cambridge University Press 1910), 320; Ellery C. Stowell, *Intervention in International Law* (John Byrne & Co. 1921), 63–66; Antoine Rougier, 'La Théorie de L'Intervention d'Humanité' (1910) *Revue générale de Droit International public* 48; Henry S. Hodges, *The Doctrine of Intervention* (The Banner Press 1915), 87. On a side note, the roots of the modern concept of humanitarian intervention can arguably be traced back to Christian just war theory as famously formulated by Thomas Aquinas or the sixteenth and seventeenth-century writings of scholars such as Francisco de Vitoria, Jean Bodin, the anonymous scholar mentioned by Ellery Stowell in his *Intervention in International Law* for writing *Vindiciae contra Tyrannos*, Hugo Grotius and Emer de Vattel; see e.g. Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers, Inc. 1988), 54–56; Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963), 338; Alex Heraclides, 'Humanitarian Intervention in International Law 1830–1939: The Debate' (2014) 16 *Journal of the History of International Law* 26; Stephen C. Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014), 124.

2 See Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press 2000).

3 Myres S. McDougal and W. Michael Reisman, 'Response by Professors McDougal and Reisman' (1969) 3/2 *The International Lawyer* 438, 444.

4 W. Michael Reisman and Myres S. McDougal, 'Humanitarian Intervention to Protect the Ibos' in Richard B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (University Press of Virginia 1973), 167, 179–183.

5 See, generally, Wheeler (n 2), Part Two. See also Peter Hilpold, 'From Humanitarian Intervention to Responsibility to Protect: Making Utopia True' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 462, 463f.

6 *The New York Times*, 'President Reagan Calls Nicaragua Rebels Freedom Fighters' 5 May 1983, www.nytimes.com/1983/05/05/world/president-calls-nicaragua-rebels-freedom-fighters-session-transcript-page-d22.html.

7 See Rein Müllerson, 'Ideology, Geopolitics and International Law' (2016) 15 *Chinese Journal of International Law* 47.

8 See the ICTY's Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal.

9 See Christopher Greenwood, 'Humanitarian Intervention: The Case of Kosovo' (2002) 10 *Finnish Yearbook of International Law* 141, 167f.

10 Mr. Burleigh (United States of America), Security Council meeting 3988, 24 March 1999, S/PV.3988, 5. The US secretary of state emphasized the uniqueness of the situation in Kosovo as follows:

> Let me say, first of all, that everything that we know from having followed the Kosovo issue very carefully is that it was a unique situation sui generis in the region of the Balkans, following on a series of actions that actually began in 1991 back to 1989 with the kinds of actions that Milosevic took. It is a unique situation for the Balkans. And also it is within an area where NATO would function under normal circumstances, and I think it's very important while drawing—as we study the lessons of Kosovo, not to overdraw the various lessons that come out of it. We should be looking at what happens in Kosovo itself.
>
> Secretary of State Madeleine K. Albright, Press Conference with Russian Foreign Minister Igor Ivanov, Mandarin Hotel, Singapore, 26 July 1999, https://1997-2001.state.gov/statements/1999/990726b.html

11 See also the statements by Mr. Martynov (Belarus), Security Council meeting 3988 (n 10), 15:

> Belarus stresses that the use of military force against Yugoslavia without a proper decision of the only competent international body, which is undoubtedly the United Nations Security Council, as well as any introduction of foreign military contingents against the wish of the Government of Yugoslavia, qualify as an act of aggression, with all ensuing

> responsibility for its humanitarian, military and political consequences. Under these circumstances, no rationale, no reasoning presented by NATO can justify the unlawful use of military force and be deemed acceptable. As a United Nations Member, Belarus is extremely disturbed by the fact that the unlawful military action against Yugoslavia means an intentional disregard for the role and responsibility of the Security Council in maintaining international peace and security. Let us take a moment and some courage to look into the face of truth. Ignoring the primary and principal body for collective decision-making on maintaining international peace and security—and, in fact, the system itself, which was created and nurtured as a result of the Second World War—means obstructing the system, signing it off and effectively destroying it, thereby ignoring the lessons of the bloodiest-ever war, which the leaders of the Member countries, and above all the permanent members of the Security Council, a generation ago vowed to respect.

and Mr. Sharma (India), ibid., 15f:

> Kosovo is recognized as part of the sovereign territory of the Federal Republic of Yugoslavia. Under the application of Article 2, paragraph 7, the United Nations has no role in the settlement of the domestic political problems of the Federal Republic. The only exception laid down by Article 2, paragraph 7, would be the "application of enforcement measures under Chapter VII". The attacks now taking place against the Federal Republic of Yugoslavia have not been authorized by the Council, acting under Chapter VII, and are therefore completely illegal. What is particularly disturbing is that both international law and the authority of the Security Council are being flouted by countries that claim to be champions of the rule of law and which contain within their number permanent members of the Council, whose principal interest should surely be to enhance rather than undermine the paramountcy of the Security Council in the maintenance of international peace and security.

12 Mr. van Walsum (Netherlands), ibid., 9.
13 Mr. Greenstock (United Kingdom), ibid., 11f. British Foreign Minister Robin Cook later formulated guidelines on humanitarian intervention in a speech to the American Bar Association meeting in London on 18 July 2000; see the 'United Kingdom Materials on International Law 2000' (2001) 71 *British Yearbook of International Law* 646.
14 Mr. Lavrov (Russian Federation), ibid., 1f.
15 Mr. Qin Huasun, ibid., 12.
16 Select Committee on Foreign Affairs Minutes of Evidence, Memorandum submitted by Jane Sharp, 20 April 2000, https://publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/0011802.htm, para. 5.3.
17 *Independent International Commission on Kosovo, Conflict, International Response, Lessons Learned* (Oxford University Press 2000), 4.
18 Group of 77 South Summit, Havana, Cuba, 10–14 April 2000, Declaration of the South Summit, www.g77.org/summit/Declaration_G77Summit.htm.
19 Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101/1 *The American Journal of International Law* 99.
20 Donald Steinberg, 'Responsibility to Protect: Coming of Age?' (2009) 1 *Global Responsibility to Protect* 432. See also Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone? (2008) 22 *International Relations* 283.
21 Serena K. Sharma, 'The 2007–08 Post-Election Crisis in Kenya' in Julia Hoffmann and André Nollkaemper (eds), *Responsibility to Protect. From Principle to Practice* (Pallas Publications 2012), 27.
22 Alex J. Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24 *Ethics & International Affairs* 143, 160f. See also Alex de Waal, 'Darfur and the Failure of the Responsibility to Protect' (2007) 83 *International Affairs* 1039.
23 Remember that there had not been an effective government in Somalia in 1992.
24 Emirates 24/7, 'OIC Chief backs no-fly zone over Libya' 8 March 2011, www.emirates247.com/news/world/oic-chief-backs-no-fly-zone-over-libya-2011-03-08-1.365480; *Reuters*, 'Arab League Calls on UN to Impose Libya No-Fly Zone' 12 March 2011, www.reuters.com/article/us-libya-arabs/arab-league-calls-on-u-n-to-impose-libya-no-fly-zone-idUSTRE72B1FI20110312. It deserves to be mentioned that the African Union had taken

a more cautious stance on Libya and rejected "any foreign military intervention, whatever its form". Communiqué of the 265th Meeting of the Peace and Security Council, 10 March 2011, PSC/PR/COMM.2(CCLXV), www.peaceau.org/uploads/265th-communique-en.pdf, para. 6.

25 See, e.g., Ivo H. Daalder and James G. Stavridis, 'NATO'S Victory in Libya: The Right Way to Run an Intervention' (2012) 91 *Foreign Affairs* 2 or Dirk Vandewalle, 'After Qaddafi: The Surprising Success of the New Libya' (2012) 91 *Foreign Affairs* 8.

26 Barack Obama notably described the failure to plan for the time after the fall of Qaddafi as the "worst mistake" of his presidency; see BBC, 'President Obama: Libya Aftermath "Worst Mistake" of Presidency' 11 April 2016, www.bbc.com/news/world-us-canada-36013703.

27 See the statement by Bernardino León, Special Representative of the Secretary-General and Head of the United Nations Support Mission in Libya, Security Council meeting 7512, 26 August 2015, UN Doc S/PV.7512, 2 *et seq.* See also the Report of the Secretary-General on the United Nations Support Mission in Libya, 13 August 2015, S/2015/624 and United Nations Support Mission in Libya: Report of the Secretary-General, 7 January 2019, S/2019/19.

28 Special report, Libya: Examination of Intervention and Collapse and the UK's Future Policy Options, www.publications.parliament.uk/pa/cm201617/cmselect/cmfaff/119/11903.htm.

29 E.g. India, Zeenews, 'R2P Selectively Used for Regime Change: India' 22 February 2012, http://zeenews.india.com/news/nation/r2p-selectively-used-for-regime-change-india_759913.html; South Africa, *Mail and Guardian*, 'Zuma Warns Nato Against Libya Regime Change' 26 June 2011, http://mg.co.za/article/2011-06-26-zuma-warns-nato-against-libya-regime-change, quoted in Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2013), 751–752 or Brazil; see Oliver Stuenkel and Marcos Tourinho, 'Regulating Intervention: Brazil and the Responsibility to Protect' (2014) 14/4 *Security & Development* 379.

30 African Union, Seventeenth Ordinary Session, 30 June–1 July 2011, Malobo Equatorial Guinea, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670 (XIX), Assembly/AU/Dec.366(XVII), p. 1, https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf.

31 Reuters, 'Putin Likens UN Libya Resolution to Crusades' 21 March 2011, www.reuters.com/article/us-libya-russia-idUSTRE72K3JR20110321. A few weeks later, Putin also implied that the Libyans should be ruled by monarchic rulers:

> Look at the map of this region, there are monarchies all around. What do you think they are—Danish-style democracies? No. There are monarchies everywhere, and this basically corresponds with the mentality of the people, as well as long-standing practice.
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> *The New York Times*, 'Putin Criticizes West for Libya Incursion' 26 April 2011, www.nytimes.com/2011/04/27/world/europe/27putin.html

32 Channel 4 News, 'Libya One Year On: Russia Regrets' 17 February 2012, www.channel4.com/news/libya-one-year-on-russia-regrets.

33 Reuters, 'China Defends Syria Veto, Doubts West's Intentions' 6 February 2012, www.reuters.com/article/us-china-syria-un/china-defends-syria-veto-doubts-wests-intentions-idUSTRE8150NY20120206. It must be mentioned, however, that the translated version from the website of the *People's Daily* does not contain the quotes as given in that article; see Zhong Sheng, 'Why China Vetoes UN Draft Resolution for Syria Issue' *People's Daily* Online, 8 February 2012, http://english.peopledaily.com.cn/90780/7723539.html.

34 Barack Obama, David Cameron, and Nicolas Sarkozy, 'Libya's Pathway to Peace' *The New York Times*, 14 April 2011, www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html?_r=0; see also the Press conference by NATO Secretary General on the latest developments in Libya and Operation Unified Protector, 21 October 2011, www.nato.int/cps/en/natolive/opinions_79807.htm.

35 Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 53 *Virginia Journal of International Law* 355, 389.

36 See, among others, Thomas G. Weiss, 'RtoP Alive and Well After Libya' (2011) 25/3 *Ethics & International Affairs* 287.

37 Mr. Churkin (Russian Federation), Security Council meeting 6627, 4 October 2011, S/PV.6627, 3. On Syria's strategic importance for Russia, see Roy Allison, 'Russia and China: Explaining Alignment with a Regime in Crisis' (2013) 89/4 *International Affairs* 795.
38 Mr. Li Baodong (China), Security Council meeting 6627, 4 October 2011, S/PV.6627, 5.
39 OPCW Conference of the States Parties Decision Addressing the Threat from Chemical Weapons Use, C-SS-4/DEC.3, 27 June 2018.
40 See the OPCW's website on Syria, www.opcw.org/media-centre/featured-topics/syria-and-opcw.
41 Harold Hongju Koh, 'Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)' *Just Security*, 2 October 2013, www.justsecurity.org/1506/koh-syria-part2/.
42 BBC, 'Who Is Supplying Weapons to the Warring Sides in Syria?' 14 June 2013, www.bbc.com/news/world-middle-east-22906965; France 24, 'France Delivered Arms to Syrian Rebels, Hollande Confirms' 21 August 2014, www.france24.com/en/20140821-france-arms-syria-rebels-hollande; Benedetta Berti and Jonathan Paris, 'Beyond Sectarianism: Geopolitics, Fragmentation, and the Syrian Civil War' (2014) *Institute for National Security Studies Strategic Assessment* 16/4, www.inss.org.il/publication/beyond-sectarianism-geopolitics-fragmentation-and-the-syrian-civil-war/; Faysal Itani and Aaron Stein, 'Turkey's Syria Predicament' Atlantic Council Issue Brief, May 2016, www.atlanticcouncil.org/wp-content/uploads/2016/05/Turkey_s_Syria_Predicament.pdf; House of Commons Defence Committee, 'UK military operations in Syria and Iraq: Second Report of Session 2016–17' 21 September 2016, https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/106/106.pdf, 30; Joost Hiltermann, 'The Syrian Conflict and International Support for Rebel Groups' Written Submission to the Dutch Parliament's Foreign Affairs Committee, International Crisis Group, 28 September 2018, www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/syrian-conflict-and-international-support-rebel-groups.
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44 *The New York Times*, 'Transcript: Donald Trump Expounds on His Foreign Policy Views' 26 March 2016, www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html. Assad, in turn, called Trump a "natural ally" in September 2017, CNN, 'Syrian President: Trump's Pledge to Fight Terror "Promising"' 8 February 2017, www.cnn.com/2017/02/08/middleeast/syria-bashar-al-assad-intv/.
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48 See Marko Milanović, 'The Syria Strikes: Still Clearly Illegal' *EJIL: Talk!*, 15 April 2018, www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/.
49 Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai, and Elvina Pothelet, 'Mapping States' Reactions to the Syria Strikes of April 2018—A Comprehensive Guide' *Just Security*, 7 May 2018, www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/.

7 Peacekeeping

I Introduction

UN peacekeeping evolved as a result of the ambition to act despite the habitual blockade of the Security Council during the Cold War era. It is a broad term encompassing a variety of different types of missions ranging from mere (unarmed) observer missions to the creation of buffer zones all the way to assistance in post-conflict scenarios (election monitoring, disarmament) and the presence of blue helmets during ongoing non-international armed conflicts. Occasionally, the UN and peacekeepers may even be engaged in the administration of territories on their path to full sovereignty.

Peacekeeping is nowhere mentioned in the UN Charter. Its core principles are the consent of the affected parties, impartiality and the limited use of force. As such, peacekeeping does not constitute an exception to the prohibition of the use of force and must not necessarily be established by the Security Council under Chapter VII (although it usually is).

II The early phase of peacekeeping and the "implied powers" doctrine

As stated earlier, peacekeeping is nowhere foreseen or explicitly mentioned in the UN Charter. This did not pose a particular problem during its first years and the unarmed observer missions in the Middle East (UNTSO) and India/Pakistan (UNMOGIP). However, the situation changed due to the rising costs of the first armed peacekeeping operation—UNEF I—after the Suez crisis in 1956 and in the Congo (ONUC) from 1960 onwards.

UNEF I was established by the General Assembly during its first-ever emergency session[1]—the Security Council had been deadlocked due to a double veto by the United Kingdom and France—in November 1956 to create a buffer zone between Israel and Egypt without, as the Secretary-General emphasized to ease concerns over the General Assembly's competences in this regard, affecting the military or political balance between the opposing sides.[2]

ONUC, then, was established by the Security Council but nevertheless stood out as a particularly extensive operation. After all, the Congo had immediately fallen into chaos after gaining independence from Belgium, and the resource-rich Katanga province attempt to secede. Upon receiving a request by Congo's prime minister Patrice Lumumba,[3] the Security

Council first called on the Belgian government—which had sided with the Katanga—to withdraw its troops and decided

> to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of Congo, to provide the Government with such necessary as may be necessary until, through the efforts of the Congolese Government with the technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks.[4]

Attempting to establish order in an anarchic situation inside a newly independent state with once almost 20,000 military personnel and a significant civilian component, ONUC went far beyond earlier peacekeeping operations.[5] In hindsight, it somewhat forecast the problems peacekeeping operations would encounter in conflicts such as Liberia, Somalia and Sierra Leone during the 1990s.[6]

By the beginning of 1963, half the UN members were in arrears in their contributions to these operations.[7] The USSR in particular argued that the costs for UNEF I and ONUC fell outside the scope of UN "expenses" in the sense of Article 17/2 UN Charter. In addition, it also argued that UN members did not have to pay for a peacekeeping operation established by the General Assembly since such tasks fell under the exclusive competence of the Security Council.

To resolve the issue, the General Assembly requested an advisory opinion from the ICJ. The Court concluded that, although peacekeeping was not explicitly mentioned in the UN Charter, Article 17/2 not only covered "administrative" or "regular" expenses but also those necessary to fulfil the purposes of the UN: namely, maintaining international peace and security and, thus, also peacekeeping. The fact that peacekeeping was not explicitly enshrined in the UN Charter did not pose any specific problems since no treaty could foresee all eventualities and subsequent developments within an international organization. The decisive question was whether tasks such as peacekeeping were *implicitly* within the powers of the UN—a question the ICJ affirmed. The Court furthermore emphasized that the Security Council's competence to deal with the maintenance of peace and security was not exclusive and that the General Assembly's lack of enforcement power was not a problem since UNEF I had been established on the basis of both Israel and Egypt.

Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 20 July 1962, ICJ Rep 151

[158] The text of Article 17, paragraph 2, refers to "the expenses of the Organization" without any further explicit definition of such expenses. It would be possible to begin with a general proposition to the effect that the "expenses" of any organization are the amounts paid out to defray the costs of carrying out its purposes, in this case, the political, economic, social, humanitarian and other purposes of the United Nations. The next step would be to examine, as the Court will, whether the resolutions authorizing the operations here in question were intended to carry out the purposes of the United Nations and whether the expenditures were incurred in furthering these operations. Or, it might simply be said that the "expenses" of an organization are those which are provided for in its budget. But the Court has not been asked to give an abstract definition of the words "expenses of the Organization". It has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked. . . .

[162] it has been argued before the Court that one type of expenses, namely those resulting from operations for the maintenance of international peace and security, are not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fall to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter. The argument rests in part upon the view that when the maintenance of international peace and security is involved, it is only the Security Council which is authorized to decide on any action relative thereto. It is argued further that since the General Assembly's power is limited to discussing, considering, studying and recommending, it cannot impose an obligation to pay the expenses which result from the implementation of its recommendations. This argument leads to an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security. . . .

[163] The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor. The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to

> recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations.

The word "measures" implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "decisions" of the General Assembly "on important questions". These "decisions" do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion. of Members, "and budgetary questions". In connection with the suspension of rights and privileges of membership and expulsion from membership under [164] Articles 5 and 6, it is the Security Council which has only the power to recommend and it is the General Assembly which decides and whose decision determines status; but there is a close collaboration between the two organs. Moreover, these powers of decision of the General Assembly under Articles 5 and 6 are specifically related to preventive or enforcement Measures. By Article 17, paragraph 1, the General Assembly is given the power not only to "consider" the budget of the Organization, but also to "approve" it. The decision to "approve" the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, of each Member to bear that part of

the expenses which is apportioned to it by the General Assembly. When those expenses include expenditures for the maintenance of peace and security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security. The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relies especially on the reference to "action" in the last sentence of Article 11, paragraph 2. This paragraph reads as follows:

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the State or States concerned or to the Security Council, or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

* * *

The Court considers that the kind of action referred to in Article II, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or [165] Article 14, except as limited by the last sentence of Article II, paragraph 2. This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VI1 of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the word "action" in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term "action" in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds 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. Such implementation is a normal feature of the functioning of the United Nations. Such

committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.

The Court accordingly finds that the argument which seeks, by reference to Article II, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded. . . .

[167] 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. In determining whether the actual expenditures authorized constitute "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter", the Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an "expense of the Organization". The purposes of the United Nations are set forth in Article 1 of the Charter. The first two purposes as stated in paragraphs 1 [168] and 2, may be summarily described as pointing to the goal of international peace and security and friendly relations. The third purpose is the achievement of economic, social, cultural and humanitarian goals and respect for human rights. The fourth and last purpose is: "To be a center for harmonizing the actions of nations in the attainment of these common ends".

[168]: The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization. If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent. In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".

III The 1990s: a "new breed" of conflicts

However, ONUC remained the big exception until the 1990s. The next decades saw several limited—both short-term and longer term—peacekeeping operations similar to UNEF I, sometimes referred to as the "first generation" of peacekeeping. The second generation, then, started in the late 1980s and consisted of broader mandates to deal with post-conflict scenarios by implementing peace agreements, maintaining law and order, restructuring public security authorities and assisting in the election of new governments or building up democratic institutions. The needs for and of these "multidimensional" peacekeeping operations and the focus on conflict prevention were at the heart of the *Agenda for Peace* report.

An Agenda for Peace *paras 28–33, 46–59*

III Preventive diplomacy

PREVENTIVE DEPLOYMENT

28. United Nations operations in areas of crisis have generally been established after conflict has occurred. The time has come to plan for circumstances warranting preventive deployment, which could take place in a variety of instances and ways. For example, in conditions of national crisis there could be preventive deployment at the request of the Government or all parties concerned, or with their consent; in inter-State disputes such deployment could take place when two countries feel that a United Nations presence on both sides of their border can discourage hostilities; furthermore, preventive deployment could take place when a country feels threatened and requests the deployment of an appropriate United Nations presence along its side of the border alone. In each situation, the mandate and composition of the United Nations presence would need to be carefully devised and be clear to all.

29. In conditions of crisis within a country, when the Government requests or all parties consent, preventive deployment could help in a number of ways to alleviate suffering and to limit or control violence. Humanitarian assistance, impartially provided, could be of critical importance; assistance in maintaining security, whether through military, police or civilian personnel, could save lives and develop conditions of safety in which negotiations can be held; the United Nations could also help in conciliation efforts if this should be the wish of the parties. In certain circumstances, the United Nations may well need to draw upon the specialized skills and resources of various parts of the United Nations system; such operations may also on occasion require the participation of nongovernmental organizations.

30. In these situations of internal crisis the United Nations will need to respect the sovereignty of the State; to do otherwise would not be in accordance with the understanding of Member States in accepting the principles of the Charter. The Organization must remain mindful of the carefully negotiated balance of the guiding principles annexed to General Assembly resolution 46/182 of 19 December 1991. Those guidelines stressed, inter alia, that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality; that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations; and that, in this context, humanitarian assistance should be provided with the consent of the affected country and, in principle, on the basis of an appeal

by that country. The guidelines also stressed the responsibility of States to take care of the victims of emergencies occurring on their territory and the need for access to those requiring humanitarian assistance. In the light of these guidelines, a Government's request for United Nations involvement, or consent to it, would not be an infringement of that State's sovereignty or be contrary to Article 2, paragraph 7, of the Charter which refers to matters essentially within the domestic jurisdiction of any State.

31. In inter-State disputes, when both parties agree, I recommend that if the Security Council concludes that the likelihood of hostilities between neighbouring countries could be removed by the preventive deployment of a United Nations presence on the territory of each State, such action should be taken. The nature of the tasks to be performed would determine the composition of the United Nations presence.

32. In cases where one nation fears a cross-border attack, if the Security Council concludes that a United Nations presence on one side of the border, with the consent only of the requesting country, would serve to deter conflict, I recommend that preventive deployment take place. Here again, the specific nature of the situation would determine the mandate and the personnel required to fulfil it.

DEMILITARIZED ZONES

33. In the past, demilitarized zones have been established by agreement of the parties at the conclusion of a conflict. In addition to the deployment of United Nations personnel in such zones as part of peace-keeping operations, consideration should now be given to the usefulness of such zones as a form of preventive deployment, on both sides of a border, with the agreement of the two parties, as a means of separating potential belligerents, or on one side of the line, at the request of one party, for the purpose of removing any pretext for attack. Demilitarized zones would serve as symbols of the international community's concern that conflict be prevented. . . .

V Peace-keeping

46. Peace-keeping can rightly be called the invention of the United Nations. It has brought a degree of stability to numerous areas of tension around the world.

INCREASING DEMANDS

47. Thirteen peace-keeping operations were established between the years 1945 and 1987; 13 others since then. An estimated 528,000 military, police and civilian personnel had served under the flag of the United Nations until January 1992. Over 800 of them from 43 countries have died in the service of the Organization. The costs of these operations have aggregated some $8.3 billion till 1992. The unpaid arrears towards them stand at over $800 million, which represents a debt owed by the Organization to the troop-contributing countries. Peace-keeping operations approved at present are estimated to cost close to $3 billion in the current 12-month period, while patterns of payment are unacceptably slow. Against this, global defence expenditures at the end of the last decade had approached $1 trillion a year, or $2 million per minute.

48. The contrast between the costs of United Nations peace-keeping and the costs of the alternative, war—between the demands of the Organization and the means provided to meet them—would be farcical were the consequences not so damaging to global

stability and to the credibility of the Organization. At a time when nations and peoples increasingly are looking to the United Nations for assistance in keeping the peace—and holding it responsible when this cannot be so—fundamental decisions must be taken to enhance the capacity of the Organization in this innovative and productive exercise of its function. I am conscious that the present volume and unpredictability of peace-keeping assessments poses real problems for some Member States. For this reason, I strongly support proposals in some Member States for their peace-keeping contributions to be financed from defence, rather than foreign affairs, budgets and I recommend such action to others. I urge the General Assembly to encourage this approach.

49. The demands on the United Nations for peace-keeping, and peace-building, operations will in the coming years continue to challenge the capacity, the political and financial will and the creativity of the Secretariat and Member States. Like the Security Council, I welcome the increase and broadening of the tasks of peace-keeping operations.

50. The nature of peace-keeping operations has evolved rapidly in recent years. The established principles and practices of peace-keeping have responded flexibly to new demands of recent years, and the basic conditions for success remain unchanged: a clear and practicable mandate; the cooperation of the parties in implementing that mandate; the continuing support of the Security Council; the readiness of Member States to contribute the military, police and civilian personnel, including specialists, required; effective United Nations command at Headquarters and in the field; and adequate financial and logistic support. As the international climate has changed and peace-keeping operations are increasingly fielded to help implement settlements that have been negotiated by peacemakers, a new array of demands and problems has emerged regarding logistics, equipment, personnel and finance, all of which could be corrected if Member States so wished and were ready to make the necessary resources available.

PERSONNEL

51. Member States are keen to participate in peace-keeping operations. Military observers and infantry are invariably available in the required numbers, but logistic units present a greater problem, as few armies can afford to spare such units for an extended period. Member States were requested in 1990 to state what military personnel they were in principle prepared to make available; few replied. I reiterate the request to all Member States to reply frankly and promptly. Stand-by arrangements should be confirmed, as appropriate, through exchanges of letters between the Secretariat and Member States concerning the kind and number of skilled personnel they will be prepared to offer the United Nations as the needs of new operations arise.

52. Increasingly, peace-keeping requires that civilian political officers, human rights monitors, electoral officials, refugee and humanitarian aid specialists and police play as central a role as the military. Police personnel have proved increasingly difficult to obtain in the numbers required. I recommend that arrangements be reviewed and improved for training peacekeeping personnel—civilian, police, or military—using the varied capabilities of Member State Governments, of non-governmental organizations and the facilities of the Secretariat. As efforts go forward to include additional States as contributors, some States with considerable potential should focus on language training for police contingents which may serve with the Organization. As for the United Nations itself, special personnel procedures, including incentives, should be instituted to permit the rapid transfer of Secretariat staff members to service with peacekeeping operations. The strength and capability of military staff serving in the Secretariat should be augmented to meet new and heavier requirements.

LOGISTICS

53. Not all Governments can provide their battalions with the equipment they need for service abroad. While some equipment is provided by troop-contributing countries, a great deal has to come from the United Nations, including equipment to fill gaps in under-equipped national units. The United Nations has no standing stock of such equipment. Orders must be placed with manufacturers, which creates a number of difficulties. A pre-positioned stock of basic peace-keeping equipment should be established, so that at least some vehicles, communications equipment, generators, etc., would be immediately available at the start of an operation. Alternatively, Governments should commit themselves to keeping certain equipment, specified by the Secretary-General, on stand-by for immediate sale, loan or donation to the United Nations when required.

54. Member States in a position to do so should make air- and sea-lift capacity available to the United Nations free of cost or at lower than commercial rates, as was the practice until recently.

VI Post-conflict peace-building

55. Peacemaking and peace-keeping operations, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people. Through agreements ending civil strife, these may include disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation.

56. In the aftermath of international war, post-conflict peace-building may take the form of concrete cooperative projects which link two or more countries in a mutually beneficial undertaking that can not only contribute to economic and social development but also enhance the confidence that is so fundamental to peace. I have in mind, for example, projects that bring States together to develop agriculture, improve transportation or utilize resources such as water or electricity that they need to share, or joint programmes through which barriers between nations are brought down by means of freer travel, cultural exchanges and mutually beneficial youth and educational projects. Reducing hostile perceptions through educational exchanges and curriculum reform may be essential to forestall a re-emergence of cultural and national tensions which could spark renewed hostilities.

57. In surveying the range of efforts for peace, the concept of peace-building as the construction of a new environment should be viewed as the counterpart of preventive diplomacy, which seeks to avoid the breakdown of peaceful conditions. When conflict breaks out, mutually reinforcing efforts at peacemaking and peace-keeping come into play. Once these have achieved their objectives, only sustained, cooperative work to deal with underlying economic, social, cultural and humanitarian problems can place an achieved peace on a durable foundation. Preventive diplomacy is to avoid a crisis; post-conflict peace-building is to prevent a recurrence.

58. Increasingly it is evident that peace-building after civil or international strife must address the serious problem of land mines, many tens of millions of which remain scattered in present or former combat zones. De-mining should be emphasized in the terms of reference of peace-keeping operations and is crucially important in the restoration of activity when peace-building is under way: agriculture cannot be revived without

de-mining and the restoration of transport may require the laying of hard surface roads to prevent re-mining. In such instances, the link becomes evident between peacekeeping and peace-building. Just as demilitarized zones may serve the cause of preventive diplomacy and preventive deployment to avoid conflict, so may demilitarization assist in keeping the peace or in post-conflict peace-building, as a measure for heightening the sense of security and encouraging the parties to turn their energies to the work of peaceful restoration of their societies.

59. There is a new requirement for technical assistance which the United Nations has an obligation to develop and provide when requested: support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions. The authority of the United Nations system to act in this field would rest on the consensus that social peace is as important as strategic or political peace. There is an obvious connection between democratic practices—such as the rule of law and transparency in decision-making—and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communities.

IV Peacekeeping in crisis

The concept of peacekeeping faced its biggest crisis during the early and mid-1990s. In the words of the UN itself,[8] the fundamental problem was that

> Missions were established in situations where the guns had not yet fallen silent, in areas such as the former Yugoslavia—UN Protection Force (UNPROFOR), Rwanda—UN Assistance Mission for Rwanda (UNAMIR) and Somalia—UN Operation in Somalia II (UNOSOM II), where there was no peace to keep.
>
> These three high-profile peacekeeping operations came under criticism as peacekeepers faced situations where warring parties failed to adhere to peace agreements, or where the peacekeepers themselves were not provided adequate resources or political support. As civilian casualties rose and hostilities continued, the reputation of UN Peacekeeping suffered.

All three of these failed missions were examined in extensive reports. In Bosnia and Herzegovina, peacekeepers had problems protecting the designated "safe areas" from attacks. The Srebrenica genocide in July 1995 was explained by the fact that the Dutch peacekeepers (Dutchbat, for "Dutch Air Mobile Battalion") were overwhelmed by Serbian forces due to a lack of both manpower and air support while they had also failed to report accordingly.[9] Whereas legal proceedings against the UN for the acts under its command and control were unsuccessful because of its immunity, in July 2019 the Supreme Court of the Netherlands held that the Dutch government was responsible for the events after the fall of Srebrenica and the ensuing deportation of male refugees since

> Dutchbat failed to offer the male refugees in the compound the choice of staying behind there, even though that was possible. As a result, Dutchbat withheld from these male refugees the chance of escaping from the Bosnian Serbs. That was wrongful. The chance that the male refugees, had they been offered this choice, would have escaped the Bosnian Serbs was small, but not negligible. That chance is estimated at 10%. This is why the liability of the State is limited to 10% of the damage suffered by the surviving relatives of these male refugees.[10]

In Rwanda, then, an Independent Inquiry[11] found that

> [t]he overriding failure in the response of the United Nations before and during the genocide in Rwanda can be summarized as a lack of resources and a lack of will to take on the commitment which would have been necessary to prevent or to stop the genocide. UNAMIR, the main component of the United Nations presence in Rwanda, was not planned, dimensioned, deployed or instructed in a way which provided for a proactive and assertive role in dealing with a peace process in serious trouble. . . . The mission's mandate was based on an analysis of the peace process which proved erroneous, and which was never corrected despite the significant warning signs that the original mandate bad become inadequate.

Early warnings by UNAMIR commander Roméo Dallaire had fallen on deaf ears. UNAMIR itself was marked by "poor quality and lack of capacity", logistical problems and confusion over the rules of engagement. The unwillingness of the member states to contribute troops or pull out their peacekeepers as soon as they perceived the situation as too dangerous was also explained by a lack of strategic interest in Rwanda in general and the experiences in Somalia in particular.

As such, the United Nations Operation in Somalia (UNOSOM) revealed the need to connect peacemaking to peacekeeping and peace enforcement. The country was plunged into chaos immediately after the fall of its long-term dictator Siad Barre, and the resulting power vacuum led to disunity among the different warring factions. By 1992, Somalia was considered a "failed state", and the Security Council authorized the use of force not only to protect humanitarian relief deliveries but also to establish and maintain law and order.[12] Given the parallel deployment of peacekeepers and US soldiers, Somalia highlighted "both the need for and the risk of co-operative coexistence between the United States and the United Nations"[13]—after all, the mission ultimately failed after the killing of some 24 peacekeepers from Pakistan and prompted a US military operation, which, in turn, led to 18 US Army Rangers being killed. In light of the images in the US media of dead bodies being dragged through the streets, then-US president Bill Clinton hastily decided to cancel the mission altogether. Soon afterwards, UNOSOM II also came to its end, prompting Boutros Boutros-Ghali to conclude[14] that

> United Nations presence in Somalia was no longer promoting national reconciliation. There was no clear evidence of political will on the part of the warring parties to negotiate a mutually acceptable solution. Agreements reached under United Nations auspices unravelled and security continued to deteriorate, especially in Mogadishu. United Nations peace-keepers and humanitarian convoys were threatened and, in a number of instances, viciously attacked. The Somali leaders did not heed repeated warnings, including from the Council's own special mission in October 1994, that if they did not show a minimum of political will the United Nations presence would have to be reconsidered. In these circumstances, continuation of UNOSOM II could no longer be justified.
>
> 64. The experience of UNOSOM II has thus confirmed the validity of the point that the Security Council has consistently stressed in its resolutions on Somalia, namely that the responsibility for political compromise and national reconciliation must be borne by the leaders and people concerned. It is they who bear the main responsibility for creating the political and security conditions in which peacemaking and peace-keeping can be effective. The international community can only facilitate, prod, encourage and assist. It can neither impose peace nor coerce unwilling parties into accepting it.

> 65. There are also important lessons to be learned about the theory and practice of multifunctional peace-keeping operations in conditions of civil war and chaos and especially about the clear line that needs to be drawn between peace-keeping and enforcement action. The world has changed and so has the nature of the conflict situations which the United Nations is asked to deal with. There is a need for careful and creative rethinking about peacemaking, peace-keeping and peace-building in the context of the Somali operation. Some of my initial conclusions may be found in my recent position paper, the "Supplement to an Agenda for Peace".

Conflicts such as the one in Somalia were—and still are—defined by a variety of key characteristics.[15] In his Supplement to an Agenda for Peace, Boutros Boutros-Ghali highlighted the disorganized structure of armed groups, the lack of distinction between combatants and civilians, disrespect for humanitarian law and human rights and the collapse of state institutions. As such, Boutros-Ghali referred not only to the new challenges for peacekeeping but also to the need for co-operation among military and civilian actors during post-conflict nation-building efforts, and increased financial resources.

Some five years later, a panel chaired by renowned UN diplomat Lakhdar Brahimi issued its report on the lessons learned from the failures of the 1990s. On this basis, he suggested a number of proposals for peacekeeping reform, such as the integration of all institutions and actors involved in conflict prevention and deployment and the increased use of fact-finding missions, a peace-building strategy, "robust mandates" and elaborating on the challenge of UN territorial administration such as in East Timor or Kosovo.

Supplement to an Agenda for Peace, paras 12–15, 20–25, 33–56, 98f

12. The new breed of intra-state conflicts have certain characteristics that present United Nations peace-keepers with challenges not encountered since the Congo operation of the early 1960s. They are usually fought not only by regular armies but also by militias and armed civilians with little discipline and with ill-defined chains of command. They are often guerrilla wars without clear front lines. Civilians are the main victims and often the main targets. Humanitarian emergencies are commonplace and the combatant authorities, in so far as they can be called authorities, lack the capacity to cope with them. The number of refugees registered with the Office of the United Nations High Commissioner for Refugees (UNHCR) has increased from 13 million at the end of 1987 to 26 million at the end of 1994. The number of internally displaced persons has increased even more dramatically.

13. Another feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of national reconciliation and the re-establishment of effective government.

14. The latter are tasks that demand time and sensitivity. The United Nations is, for good reasons, reluctant to assume responsibility for maintaining law and order, nor can it impose a new political structure or new state institutions. It can only help the hostile factions to help themselves and begin to live together again. All too often it turns out that they do not yet want to be helped or to resolve their problems quickly.

15. Peace-keeping in such contexts is far more complex and more expensive than when its tasks were mainly to monitor cease-fires and control buffer zones with the consent of the States involved in the conflict. Peace-keeping today can involve constant danger. . . .

20. A third change has been in the nature of United Nations operations in the field. During the cold war United Nations peace-keeping operations were largely military in character and were usually deployed after a cease-fire but before a settlement of the conflict in question had been negotiated. Indeed one of their main purposes was to create conditions in which negotiations for a settlement could take place. In the late 1980s a new kind of peace-keeping operation evolved. It was established after negotiations had succeeded, with the mandate of helping the parties implement the comprehensive settlement they had negotiated. Such operations have been deployed in Namibia, Angola, El Salvador, Cambodia and Mozambique. In most cases they have been conspicuously successful.

21. The negotiated settlements involved not only military arrangements but also a wide range of civilian matters. As a result, the United Nations found itself asked to undertake an unprecedented variety of functions: the supervision of cease-fires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of their weapons; the design and implementation of de-mining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the design and supervision of constitutional, judicial and electoral reforms; the observation, supervision and even organization and conduct of elections; and the coordination of support for economic rehabilitation and reconstruction.

22. Fourthly, these multifunctional peace-keeping operations have highlighted the role the United Nations can play after a negotiated settlement has been implemented. It is now recognized that implementation of the settlement in the time prescribed may not be enough to guarantee that the conflict will not revive. Coordinated programmes are required, over a number of years and in various fields, to ensure that the original causes of war are eradicated. This involves the building up of national institutions, the promotion of human rights, the creation of civilian police forces and other actions in the political field. As I pointed out in “An Agenda for Development” (A/48/935), only sustained efforts to resolve underlying socio-economic, cultural and humanitarian problems can place an achieved peace on a durable foundation.

III Instruments for Peace and Security

23. The United Nations has developed a range of instruments for controlling and resolving conflicts between and within States. The most important of them are preventive diplomacy and peacemaking; peace-keeping; peace-building; disarmament; sanctions; and peace enforcement. The first three can be employed only with the consent of the parties to the conflict. Sanctions and enforcement, on the other hand, are coercive measures and thus, by definition, do not require the consent of the party concerned. Disarmament can take place on an agreed basis or in the context of coercive action under Chapter VII.

24. The United Nations does not have or claim a monopoly of any of these instruments. All can be, and most of them have been, employed by regional organizations, by ad hoc groups of States or by individual States, but the United Nations has unparalleled experience of them and it is to the United Nations that the international community has turned increasingly since the end of the cold war. The United Nations system is also better equipped than regional organizations or individual Member States to develop and

apply the comprehensive, long-term approach needed to ensure the lasting resolution of conflicts.

25. Perceived shortcomings in the United Nations performance of the tasks entrusted to it have recently, however, seemed to incline Member States to look for other means, especially, but not exclusively, where the rapid deployment of large forces is required. It is thus necessary to find ways of enabling the United Nations to perform better the roles envisaged for it in the Charter. . . .

A PEACE-KEEPING

33. The United Nations can be proud of the speed with which peace-keeping has evolved in response to the new political environment resulting from the end of the cold war, but the last few years have confirmed that respect for certain basic principles of peace-keeping are essential to its success. Three particularly important principles are the consent of the parties, impartiality and the non-use of force except in self-defence. Analysis of recent successes and failures shows that in all the successes those principles were respected and in most of the less successful operations one or other of them was not.

34. There are three aspects of recent mandates that, in particular, have led peace-keeping operations to forfeit the consent of the parties, to behave in a way that was perceived to be partial and/or to use force other than in self-defence. These have been the tasks of protecting humanitarian operations during continuing warfare, protecting civilian populations in designated safe areas and pressing the parties to achieve national reconciliation at a pace faster than they were ready to accept. The cases of Somalia and Bosnia and Herzegovina are instructive in this respect.

35. In both cases, existing peace-keeping operations were given additional mandates that required the use of force and therefore could not be combined with existing mandates requiring the consent of the parties, impartiality and the non-use of force. It was also not possible for them to be executed without much stronger military capabilities than had been made available, as is the case in the former Yugoslavia. In reality, nothing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.

36. International problems cannot be solved quickly or within a limited time. Conflicts the United Nations is asked to resolve usually have deep roots and have defied the peace-making efforts of others. Their resolution requires patient diplomacy and the establishment of a political process that permits, over a period of time, the building of confidence and negotiated solutions to long-standing differences. Such processes often encounter frustrations and set-backs and almost invariably take longer than hoped. It is necessary to resist the temptation to use military power to speed them up. Peace-keeping and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other.

37. In peace-keeping, too, a number of practical difficulties have arisen during the last three years, especially relating to command and control, to the availability of troops and equipment, and to the information capacity of peace-keeping operations.

38. As regards command and control, it is useful to distinguish three levels of authority:

(a) Overall political direction, which belongs to the Security Council;
(b) Executive direction and command, for which the Secretary-General is responsible;
(c) Command in the field, which is entrusted by the Secretary-General to the chief of mission (special representative or force commander/chief military observer).

The distinctions between these three levels must be kept constantly in mind in order to avoid any confusion of functions and responsibilities. It is as inappropriate for a chief of mission to take upon himself the formulation of his/her mission's overall political objectives as it is for the Security Council or the Secretary-General in New York to decide on matters that require a detailed understanding of operational conditions in the field.

39. There has been an increasing tendency in recent years for the Security Council to micro-manage peace-keeping operations. Given the importance of the issues at stake and the volume of resources provided for peace-keeping operations, it is right and proper that the Council should wish to be closely consulted and informed. Procedures for ensuring this have been greatly improved. To assist the Security Council in being informed about the latest developments I have appointed one of my Special Advisers as my personal representative to the Council. As regards information, however, it has to be recognized that, in the inevitable fog and confusion of the near-war conditions in which peace-keepers often find themselves, as for example in Angola, Cambodia, Somalia and the former Yugoslavia, time is required to verify the accuracy of initial reports. Understandably, chiefs of mission have to be more restrained than the media in broadcasting facts that have not been fully substantiated.

40. Troop-contributing Governments, who are responsible to their parliaments and electorates for the safety of their troops, are also understandably anxious to be kept fully informed, especially when the operation concerned is in difficulty. I have endeavoured to meet their concerns by providing them with regular briefings and by engaging them in dialogue about the conduct of the operation in question. Members of the Security Council have been included in such meetings and the Council has recently decided to formalize them. It is important that this should not lead to any blurring of the distinct levels of authority referred to above.

41. Another important principle is unity of command. The experience in Somalia has underlined again the necessity for a peace-keeping operation to function as an integrated whole. That necessity is all the more imperative when the mission is operating in dangerous conditions. There must be no opening for the parties to undermine its cohesion by singling out some contingents for favourable and others for unfavourable treatment. Nor must there be any attempt by troop-contributing Governments to provide guidance, let alone give orders, to their contingents on operational matters. To do so creates division within the force, adds to the difficulties already inherent in a multinational operation and increases the risk of casualties. It can also create the impression amongst the parties that the operation is serving the policy objectives of the contributing Governments rather than the collective will of the United Nations as formulated by the Security Council. Such impressions inevitably undermine an operation's legitimacy and effectiveness.

42. That said, commanders in the field are, as a matter of course, instructed to consult the commanders of national contingents and make sure that they understand the Security Council's overall approach, as well as the role assigned to their contingents. However, such consultations cannot be allowed to develop into negotiations between

the commander in the field and the troop-contributing Governments, whose negotiating partner must always be the Secretariat in New York.

43. As regards the availability of troops and equipment, problems have become steadily more serious. Availability has palpably declined as measured against the Organization's requirements. A considerable effort has been made to expand and refine stand-by arrangements, but these provide no guarantee that troops will be provided for a specific operation. For example, when in May 1994 the Security Council decided to expand the United Nations Assistance Mission for Rwanda (UNAMIR), not one of the 19 Governments that at that time had undertaken to have troops on stand-by agreed to contribute.

44. In these circumstances, I have come to the conclusion that the United Nations does need to give serious thought to the idea of a rapid reaction force. Such a force would be the Security Council's strategic reserve for deployment when there was an emergency need for peace-keeping troops. It might comprise battalion-sized units from a number of countries. These units would be trained to the same standards, use the same operating procedures, be equipped with integrated communications equipment and take part in joint exercises at regular intervals. They would be stationed in their home countries but maintained at a high state of readiness. The value of this arrangement would of course depend on how far the Security Council could be sure that the force would actually be available in an emergency. This will be a complicated and expensive arrangement, but I believe that the time has come to undertake it.

45. Equipment and adequate training is another area of growing concern. The principle is that contributing Governments are to ensure that their troops arrive with all the equipment needed to be fully operational. Increasingly, however, Member States offer troops without the necessary equipment and training. In the absence of alternatives, the United Nations, under pressure, has to procure equipment on the market or through voluntary contributions from other Member States. Further time is required for the troops concerned to learn to operate the equipment, which they are often encountering for the first time. A number of measures can be envisaged to address this problem, for example, the establishment by the United Nations of a reserve stock of standard peace-keeping equipment, as has been frequently proposed, and partnerships between Governments that need equipment and those ready to provide it.

46. An additional lesson from recent experience is that peace-keeping operations, especially those operating in difficult circumstances, need an effective information capacity. This is to enable them to explain their mandate to the population and, by providing a credible and impartial source of information, to counter misinformation disseminated about them, even by the parties themselves. Radio is the most effective medium for this purpose. In all operations where an information capacity, including radio, has been provided, even if late in the day, it has been recognized to have made an invaluable contribution to the operation's success. I have instructed that in the planning of future operations the possible need for an information capacity should be examined at an early stage and the necessary resources included in the proposed budget.

B POST-CONFLICT PEACE-BUILDING

47. The validity of the concept of post-conflict peace-building has received wide recognition. The measures it can use—and they are many—can also support preventive diplomacy. Demilitarization, the control of small arms, institutional reform, improved police and judicial systems, the monitoring of human rights, electoral reform and social

and economic development can be as valuable in preventing conflict as in healing the wounds after conflict has occurred.

48. The implementation of post-conflict peace-building can, however, be complicated. It requires integrated action and delicate dealings between the United Nations and the parties to the conflict in respect of which peace-building activities are to be undertaken.

49. Two kinds of situation deserve examination. The first is when a comprehensive settlement has been negotiated, with long-term political, economic and social provisions to address the root causes of the conflict, and verification of its implementation is entrusted to a multifunctional peace-keeping operation. The second is when peace-building, whether preventive or post-conflict, is undertaken in relation to a potential or past conflict without any peace-keeping operation being deployed. In both situations the essential goal is the creation of structures for the institutionalization of peace.

50. The first situation is the easier to manage. The United Nations already has an entrée. The parties have accepted its peacemaking and peace-keeping role. The peace-keeping operation will already be mandated to launch various peace-building activities, especially the all-important reintegration of former combatants into productive civilian activities.

51. Even so, political elements who dislike the peace agreement concluded by their Government (and the United Nations verification provided for therein) may resent the United Nations presence and be waiting impatiently for it to leave. Their concerns may find an echo among Member States who fear that the United Nations is in danger of slipping into a role prejudicial to the sovereignty of the country in question and among others who may be uneasy about the resource implications of a long-term peace-building commitment.

52. The timing and modalities of the departure of the peace-keeping operation and the transfer of its peace-building functions to others must therefore be carefully managed in the fullest possible consultation with the Government concerned. The latter's wishes must be paramount; but the United Nations, having invested much effort in helping to end the conflict, can legitimately express views and offer advice about actions the Government could take to reduce the danger of losing what has been achieved. The timing and modalities also need to take into account any residual verification for which the United Nations remains responsible.

53. Most of the activities that together constitute peace-building fall within the mandates of the various programmes, funds, offices and agencies of the United Nations system with responsibilities in the economic, social, humanitarian and human rights fields. In a country ruined by war, resumption of such activities may initially have to be entrusted to, or at least coordinated by, a multifunctional peace-keeping operation, but as that operation succeeds in restoring normal conditions, the programmes, funds, offices and agencies can re-establish themselves and gradually take over responsibility from the peace-keepers, with the resident coordinator in due course assuming the coordination functions temporarily entrusted to the special representative of the Secretary-General.

54. It may also be necessary in such cases to arrange the transfer of decision-making responsibility from the Security Council, which will have authorized the mandate and deployment of the peace-keeping operation, to the General Assembly or other intergovernmental bodies with responsibility for the civilian peace-building activities that will continue. The timing of this transfer will be of special interest to certain Member States because of its financial implications. Each case has to be decided on its merits, the guiding principle being that institutional or budgetary considerations should not be allowed to imperil the continuity of the United Nations efforts in the field.

55. The more difficult situation is when post-conflict (or preventive) peace-building activities are seen to be necessary in a country where the United Nations does not already have a peacemaking or peace-keeping mandate. Who then will identify the need for such measures and propose them to the Government? If the measures are exclusively in the economic, social and humanitarian fields, they are likely to fall within the purview of the resident coordinator. He or she could recommend them to the Government. Even if the resident coordinator has the capacity to monitor and analyse all the indicators of an impending political and security crisis, however, which is rarely the case, can he or she act without inviting the charge of exceeding his or her mandate by assuming political functions, especially if the proposed measures relate to areas such as security, the police or human rights?

56. In those circumstances, the early warning responsibility has to lie with United Nations Headquarters, using all the information available to it, including reports of the United Nations Development Programme (UNDP) resident coordinator and other United Nations personnel in the country concerned. When analysis of that information gives warning of impending crisis, the Secretary-General, acting on the basis of his general mandate for preventive diplomacy, peacemaking and peace-building, can take the initiative of sending a mission, with the Government's agreement, to discuss with it measures it could usefully take. . . .

V Financial resources

98. The financial crisis is particularly debilitating as regards peace-keeping. The shortage of funds, in particular for reconnaissance and planning, for the start-up of operations and for the recruitment and training of personnel imposes severe constraints on the Organization's ability to deploy, with the desired speed, newly approved operations. Peace-keeping is also afflicted by Member States' difficulties in providing troops, police and equipment on the scale required by the current volume of peace-keeping activity.

99. Meanwhile, there is continuing damage to the credibility of the Security Council and of the Organization as a whole when the Council adopts decisions that cannot be carried out because the necessary troops are not forthcoming. The continuing problems with regard to the safe areas in Bosnia and Herzegovina and the expansion of UNAMIR in response to genocide in Rwanda are cases in point. In the future it would be advisable to establish the availability of the necessary troops and equipment before it is decided to create a new peace-keeping operation or assign a new task to an existing one.

Report of the Panel on United Nations Peace Operations (the Brahimi Report*), 21 August 2000, A/55/305—S/2000/809, paras 15–28, 48–64, 76–83*

A Experience of the past

15. The quiet successes of short-term conflict prevention and peacemaking are often, as noted, politically invisible. Personal envoys and representatives of the Secretary-General (RSGs) or special representatives of the Secretary-General (SRSGs) have at times complemented the diplomatic initiatives of Member States and, at other times, have taken initiatives that Member States could not readily duplicate. Examples of the latter initiatives (drawn from peacemaking as well as preventive diplomacy) include the achievement of a

ceasefire in the Islamic Republic of Iran-Iraq war in 1988, the freeing of the last Western hostages in Lebanon in 1991, and avoidance of war between the Islamic Republic of Iran and Afghanistan in 1998.

16. Those who favour focusing on the underlying causes of conflicts argue that such crisis-related efforts often prove either too little or too late. Attempted earlier, however, diplomatic initiatives may be rebuffed by a government that does not see or will not acknowledge a looming problem, or that may itself be part of the problem. Thus, long-term preventive strategies are a necessary complement to short-term initiatives.

17. Until the end of the cold war, United Nations peacekeeping operations mostly had traditional ceasefire-monitoring mandates and no direct peacebuilding responsibilities. The "entry strategy" or sequence of events and decisions leading to United Nations deployment was straightforward: war, ceasefire, invitation to monitor ceasefire compliance and deployment of military observers or units to do so, while efforts continued for a political settlement. Intelligence requirements were also fairly straightforward and risks to troops were relatively low. But traditional peacekeeping, which treats the symptoms rather than sources of conflict, has no built-in exit strategy and associated peacemaking was often slow to make progress. As a result, traditional peacekeepers have remained in place for 10, 20, 30 or even 50 years (as in Cyprus, the Middle East and India/Pakistan). By the standards of more complex operations, they are relatively low cost and politically easier to maintain than to remove. However, they are also difficult to justify unless accompanied by serious and sustained peacemaking efforts that seek to transform a ceasefire accord into a durable and lasting peace settlement.

18. Since the end of the cold war, United Nations peacekeeping has often combined with peace-building in complex peace operations deployed into settings of intra-State conflict. Those conflict settings, however, both affect and are affected by outside actors: political patrons; arms vendors; buyers of illicit commodity exports; regional powers that send their own forces into the fray; and neighbouring States that host refugees who are sometimes systematically forced to flee their homes. With such significant cross-border effects by state and non-state actors alike, these conflicts are often decidedly "transnational" in character.

19. Risks and costs for operations that must function in such circumstances are much greater than for traditional peacekeeping. Moreover, the complexity of the tasks assigned to these missions and the volatility of the situation on the ground tend to increase together. Since the end of the cold war, such complex and risky mandates have been the rule rather than the exception: United Nations operations have been given relief escort duties where the security situation was so dangerous that humanitarian operations could not continue without high risk for humanitarian personnel; they have been given mandates to protect civilian victims of conflict where potential victims were at greatest risk, and mandates to control heavy weapons in possession of local parties when those weapons were being used to threaten the mission and the local population alike. In two extreme situations, United Nations operations were given executive law enforcement and administrative authority where local authority did not exist or was not able to function.

20. It should have come as no surprise to anyone that these missions would be hard to accomplish. Initially, the 1990s offered more positive prospects: operations implementing peace accords were time-limited, rather than of indefinite duration, and successful conduct of national elections seemed to offer a ready exit strategy. However, United Nations operations since then have tended to deploy where conflict has not resulted in victory for any side: it may be that the conflict is stalemated militarily or that international pressure has brought fighting

to a halt, but in any event the conflict is unfinished. United Nations operations thus do not deploy into post-conflict situations so much as they deploy to create such situations. That is, they work to divert the unfinished conflict, and the personal, political or other agendas that drove it, from the military to the political arena, and to make that diversion permanent.

21. As the United Nations soon discovered, local parties sign peace accords for a variety of reasons, not all of them favourable to peace. "Spoilers"—groups (including signatories) who renege on their commitments or otherwise seek to undermine a peace accord by violence—challenged peace implementation in Cambodia, threw Angola, Somalia and Sierra Leone back into civil war, and orchestrated the murder of no fewer than 800,000 people in Rwanda. The United Nations must be prepared to deal effectively with spoilers if it expects to achieve a consistent record of success in peacekeeping or peacebuilding in situations of intrastate/transnational conflict.

22. A growing number of reports on such conflicts have highlighted the fact that would-be spoilers have the greatest incentive to defect from peace accords when they have an independent source of income that pays soldiers, buys guns, enriches faction leaders and may even have been the motive for war. Recent history indicates that, where such income streams from the export of illicit narcotics, gemstones or other high value commodities cannot be pinched off, peace is unsustainable.

23. Neighbouring States can contribute to the problem by allowing passage of conflict-supporting contraband, serving as middlemen for it or providing base areas for fighters. To counter such conflict supporting neighbours, a peace operation will require the active political, logistical and/or military support of one or more great powers, or of major regional powers. The tougher the operation, the more important such backing becomes.

24. Other variables that affect the difficulty of peace implementation include, first, the sources of the conflict. These can range from economics (e.g., issues of poverty, distribution, discrimination or corruption), politics (an unalloyed contest for power) and resource and other environmental issues (such as competition for scarce water) to issues of ethnicity, religion or gross violations of human rights. Political and economic objectives may be more fluid and open to compromise than objectives related to resource needs, ethnicity or religion. Second, the complexity of negotiating and implementing peace will tend to rise with the number of local parties and the divergence of their goals (e.g., some may seek unity, others separation). Third, the level of casualties, population displacement and infrastructure damage will affect the level of war generated grievance, and thus the difficulty of reconciliation, which requires that past human rights violations be addressed, as well as the cost and complexity of reconstruction.

25. A relatively less dangerous environment—just two parties, committed to peace, with competitive but congruent aims, lacking illicit sources of income, with neighbours and patrons committed to peace—is a fairly forgiving one. In less forgiving, more dangerous environments—three or more parties, of varying commitment to peace, with divergent aims, with independent sources of income and arms, and with neighbours who are willing to buy, sell and transit illicit goods—United Nations missions put not only their own people but peace itself at risk unless they perform their tasks with the competence and efficiency that the situation requires and have serious great power Backing.

26. It is vitally important that negotiators, the Security Council, Secretariat mission planners, and mission participants alike understand which of these political-military environments they are entering, how the environment may change under their feet once they arrive, and what they realistically plan to do if and when it does change. Each of these must be factored into an operation's entry strategy and, indeed, into the basic decision about whether an operation is feasible and should even be attempted.

27. It is equally important, in this context, to judge the extent to which local authorities are willing and able to take difficult but necessary political and economic decisions and to participate in the establishment of processes and mechanisms to manage internal disputes and pre-empt violence or the reemergence of conflict. These are factors over which a field mission and the United Nations have little control, yet such a cooperative environment is critical in determining the successful outcome of a peace operation.

28. When complex peace operations do go into the field, it is the task of the operation's peacekeepers to maintain a secure local environment for peacebuilding, and the peacebuilders' task to support the political, social and economic changes that create a secure environment that is self-sustaining. Only such an environment offers a ready exit to peacekeeping forces, unless the international community is willing to tolerate recurrence of conflict when such forces depart. History has taught that peacekeepers and peacebuilders are inseparable partners in complex operations: while the peacebuilders may not be able to function without the peacekeepers' support, the peacekeepers have no exit without the peacebuilders' work. . . .

B Implications for peacekeeping doctrine and strategy

48. The Panel concurs that consent of the local parties, impartiality and use of force only in self-defence should remain the bedrock principles of peacekeeping. Experience shows, however, that in the context of modern peace operations dealing with intra-State/transnational conflicts, consent may be manipulated in many ways by the local parties. A party may give its consent to United Nations presence merely to gain time to retool its fighting forces and withdraw consent when the peacekeeping operation no longer serves its interests. A party may seek to limit an operation's freedom of movement, adopt a policy of persistent non-compliance with the provisions of an agreement or withdraw its consent altogether. Moreover, regardless of faction leaders' commitment to the peace, fighting forces may simply be under much looser control than the conventional armies with which traditional peacekeepers work, and such forces may split into factions whose existence and implications were not contemplated in the peace agreement under the colour of which the United Nations mission operates.

49. In the past, the United Nations has often found itself unable to respond effectively to such challenges. It is a fundamental premise of the present report, however, that it must be able to do so. Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect and, in particularly dangerous situations, should not force United Nations contingents to cede the initiative to their attackers.

50. Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement. In some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so. Genocide in Rwanda went as far as it did in part because the international community failed to use or to reinforce the operation then on the ground in that country to oppose

obvious evil. The Security Council has since established, in its resolution 1296 (2000), that the targeting of civilians in armed conflict and the denial of humanitarian access to civilian populations afflicted by war may themselves constitute threats to international peace and security and thus be triggers for Security Council action. If a United Nations peace operation is already on the ground, carrying out those actions may become its responsibility, and it should be prepared.

51. This means, in turn, that the Secretariat must not apply best-case planning assumptions to situations where the local actors have historically exhibited worst-case behaviour. It means that mandates should specify an operation's authority to use force. It means bigger forces, better equipped and more costly, but able to pose a credible deterrent threat, in contrast to the symbolic and non-threatening presence that characterizes traditional peacekeeping. United Nations forces for complex operations should be sized and configured so as to leave no doubt in the minds of would-be spoilers as to which of the two approaches the Organization has adopted. Such forces should be afforded the field intelligence and other capabilities needed to mount a defence against violent challengers.

52. Willingness of Member States to contribute troops to a credible operation of this sort also implies a willingness to accept the risk of casualties on behalf of the mandate. Reluctance to accept that risk has grown since the difficult missions of the mid-1990s, partly because Member States are not clear about how to define their national interests in taking such risks, and partly because they may be unclear about the risks themselves. In seeking contributions of forces, therefore, the Secretary-General must be able to make the case that troop contributors and indeed all Member States have a stake in the management and resolution of the conflict, if only as part of the larger enterprise of establishing peace that the United Nations represents. In so doing, the Secretary-General should be able to give would-be troop contributors an assessment of risk that describes what the conflict and the peace are about, evaluates the capabilities and objectives of the local parties, and assesses the independent financial resources at their disposal and the implications of those resources for the maintenance of peace. The Security Council and the Secretariat also must be able to win the confidence of troop contributors that the strategy and concept of operations for a new mission are sound and that they will be sending troops or police to serve under a competent mission with effective leadership.

53. The Panel recognizes that the United Nations does not wage war. Where enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the Security Council, acting under Chapter VII of the Charter.

54. The Charter clearly encourages cooperation with regional and subregional organizations to resolve conflict and establish and maintain peace and security. The United Nations is actively and successfully engaged in many such cooperation programmes in the field of conflict prevention, peacemaking, elections and electoral assistance, human rights monitoring and humanitarian work and other peace-building activities in various parts of the world. Where peacekeeping operations are concerned, however, caution seems appropriate, because military resources and capability are unevenly distributed around the world, and troops in the most crisis-prone areas are often less prepared for the demands of modern peacekeeping than is the case elsewhere. Providing training, equipment, logistical support and other resources to regional and subregional organizations could enable peacekeepers from all regions to participate in a United Nations peacekeeping operation or to set up regional peacekeeping operations on the basis of a Security Council resolution.

55. Summary of key recommendation on peacekeeping doctrine and strategy: once deployed, United Nations peacekeepers must be able to carry out their mandates professionally and successfully and be capable of defending themselves, other mission

components and the mission's mandate, with robust rules of engagement, against those who renege on their commitments to a peace accord or otherwise seek to undermine it by violence.

C Clear, credible and achievable mandates

56. As a political body, the Security Council focuses on consensus-building, even though it can take decisions with less than unanimity. But the compromises required to build consensus can be made at the expense of specificity, and the resulting ambiguity can have serious consequences in the field if the mandate is then subject to varying interpretation by different elements of a peace operation, or if local actors perceive a less than complete Council commitment to peace implementation that offers encouragement to spoilers. Ambiguity may also paper over differences that emerge later, under pressure of a crisis, to prevent urgent Council action. While it acknowledges the utility of political compromise in many cases, the Panel comes down in this case on the side of clarity, especially for operations that will deploy into dangerous circumstances. Rather than send an operation into danger with unclear instructions, the Panel urges that the Council refrain from mandating such a mission.

57. The outlines of a possible United Nations peace operation often first appear when negotiators working toward a peace agreement contemplate United Nations implementation of that agreement. Although peace negotiators (peacemakers) may be skilled professionals in their craft, they are much less likely to know in detail the operational requirements of soldiers, police, relief providers or electoral advisers in United Nations field missions. Non-United Nations peacemakers may have even less knowledge of those requirements. Yet the Secretariat has, in recent years, found itself required to execute mandates that were developed elsewhere and delivered to it via the Security Council with but minor changes.

58. The Panel believes that the Secretariat must be able to make a strong case to the Security Council that requests for United Nations implementation of ceasefires or peace agreements need to meet certain minimum conditions before the Council commits United Nations-led forces to implement such accords, including the opportunity to have adviser-observers present at the peace negotiations; that any agreement be consistent with prevailing international human rights standards and humanitarian law; and that tasks to be undertaken by the United Nations are operationally achievable—with local responsibility for supporting them specified—and either contribute to addressing the sources of conflict or provide the space required for others to do so. Since competent advice to negotiators may depend on detailed knowledge of the situation on the ground, the Secretary-General should be preauthorized to commit funds from the Peacekeeping Reserve Fund sufficient to conduct a preliminary site survey in the prospective mission area.

59. In advising the Council on mission requirements, the Secretariat must not set mission force and other resource levels according to what it presumes to be acceptable to the Council politically. By self-censoring in that manner, the Secretariat sets up itself and the mission not just to fail but to be the scapegoats for failure. Although presenting and justifying planning estimates according to high operational standards might reduce the likelihood of an operation going forward, Member States must not be led to believe that they are doing something useful for countries in trouble when—by under-resourcing missions—they are more likely agreeing to a waste of human resources, time and money.

60. Moreover, the Panel believes that until the Secretary-General is able to obtain solid commitments from Member States for the forces that he or she does believe necessary to carry out an operation, it should not go forward at all. To deploy a partial force incapable of solidifying a fragile peace would first raise and then dash the hopes of a population

engulfed in conflict or recovering from war, and damage the credibility of the United Nations as a whole. In such circumstances, the Panel believes that the Security Council should leave in draft form a resolution that contemplated sizeable force levels for a new peacekeeping operation until such time as the Secretary-General could confirm that the necessary troop commitments had been received from Member States.

61. There are several ways to diminish the likelihood of such commitment gaps, including better coordination and consultation between potential troop contributors and the members of the Security Council during the mandate formulation process. Troop contributor advice to the Security Council might usefully be institutionalized via the establishment of ad hoc subsidiary organs of the Council, as provided for in Article 29 of the Charter. Member States contributing formed military units to an operation should as a matter of course be invited to attend Secretariat briefings of the Security Council pertaining to crises that affect the safety and security of the mission's personnel or to a change or reinterpretation of a mission's mandate with respect to the use of force.

62. Finally, the desire on the part of the Secretary-General to extend additional protection to civilians in armed conflicts and the actions of the Security Council to give United Nations peacekeepers explicit authority to protect civilians in conflict situations are positive developments. Indeed, peacekeepers—troops or police—who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with "the perception and the expectation of protection created by [an operation's] very presence" (see S/1999/1257, p. 51).

63. However, the Panel is concerned about the credibility and achievability of a blanket mandate in this area. There are hundreds of thousands of civilians in current United Nations mission areas who are exposed to potential risk of violence, and United Nations forces currently deployed could not protect more than a small fraction of them even if directed to do so. Promising to extend such protection establishes a very high threshold of expectation. The potentially large mismatch between desired objective and resources available to meet it raises the prospect of continuing disappointment with United Nations follow through in this area. If an operation is given a mandate to protect civilians, therefore, it also must be given the specific resources needed to carry out that mandate.

64. Summary of key recommendations on clear, credible and achievable mandates:

(a) The Panel recommends that, before the Security Council agrees to implement a ceasefire or peace agreement with a United Nations-led peacekeeping operation, the Council assure itself that the agreement meets threshold conditions, such as consistency with international human rights standards and practicability of specified tasks and timelines;
(b) The Security Council should leave in draft form resolutions authorizing missions with sizeable troop levels until such time as the Secretary-General has firm commitments of troops and other critical mission support elements, including peace-building elements, from Member States;
(c) Security Council resolutions should meet the requirements of peacekeeping operations when they deploy into potentially dangerous situations, especially the need for a clear chain of command and unity of effort;
(d) The Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates, and countries that have committed military units to an operation should have access to Secretariat briefings to the Council on matters affecting the safety and security of their personnel, especially those meetings with implications for a mission's use of force.

D The challenge of transitional civil administration

76. Until mid-1999, the United Nations had conducted just a small handful of field operations with elements of civil administration conduct or oversight. In June 1999, however, the Secretariat found itself directed to develop a transitional civil administration for Kosovo, and three months later for East Timor. The struggles of the United Nations to set up and manage those operations are part of the backdrop to the narratives on rapid deployment and on Headquarters staffing and structure in the present report.

77. These operations face challenges and responsibilities that are unique among United Nations field operations. No other operations must set and enforce the law, establish customs services and regulations, set and collect business and personal taxes, attract foreign investment, adjudicate property disputes and liabilities for war damage, reconstruct and operate all public utilities, create a banking system, run schools and pay teachers and collect the garbage—in a war-damaged society, using voluntary contributions, because the assessed mission budget, even for such "transitional administration" missions, does not fund local administration itself. In addition to such tasks, these missions must also try to rebuild civil society and promote respect for human rights, in places where grievance is widespread and grudges run deep.

78. Beyond such challenges lies the larger question of whether the United Nations should be in this business at all, and if so whether it should be considered an element of peace operations or should be managed by some other structure. Although the Security Council may not again direct the United Nations to do transitional civil administration, no one expected it to do so with respect to Kosovo or East Timor either. Intra-State conflicts continue and future instability is hard to predict, so that despite evident ambivalence about civil administration among United Nations Member States and within the Secretariat, other such missions may indeed be established in the future and on an equally urgent basis. Thus, the Secretariat faces an unpleasant dilemma: to assume that transitional administration is a transitory responsibility, not prepare for additional missions and do badly if it is once again flung into the breach, or to prepare well and be asked to undertake them more often because it is well prepared. Certainly, if the Secretariat anticipates future transitional administrations as the rule rather than the exception, then a dedicated and distinct responsibility centre for those tasks must be created somewhere within the United Nations system. In the interim, DPKO has to continue to support this function.

79. Meanwhile, there is a pressing issue in transitional civil administration that must be addressed, and that is the issue of "applicable law". In the two locales where United Nations operations now have law enforcement responsibility, local judicial and legal capacity was found to be non-existent, out of practice or subject to intimidation by armed elements. Moreover, in both places, the law and legal systems prevailing prior to the conflict were questioned or rejected by key groups considered to be the victims of the conflicts.

80. Even if the choice of local legal code were clear, however, a mission's justice team would face the prospect of learning that code and its associated procedures well enough to prosecute and adjudicate cases in court. Differences in language, culture, custom and experience mean that the learning process could easily take six months or longer. The United Nations currently has no answer to the question of what such an operation should do while its law and order team inches up such a learning curve. Powerful local political factions can and have taken advantage of the learning period to set up their own parallel administrations, and crime syndicates gladly exploit whatever legal or enforcement vacuums they can find.

81. These missions' tasks would have been much easier if a common United Nations justice package had allowed them to apply an interim legal code to which mission

personnel could have been pre-trained while the final answer to the "applicable law" question was being worked out. Although no work is currently under way within Secretariat legal offices on this issue, interviews with researchers indicate that some headway toward dealing with the problem has been made outside the United Nations system, emphasizing the principles, guidelines, codes and procedures contained in several dozen international conventions and declarations relating to human rights, humanitarian law, and guidelines for police, prosecutors and penal systems.

82. Such research aims at a code that contains the basics of both law and procedure to enable an operation to apply due process using international jurists and internationally agreed standards in the case of such crimes as murder, rape, arson, kidnapping and aggravated assault. Property law would probably remain beyond reach of such a "model code", but at least an operation would be able to prosecute effectively those who burned their neighbours' homes while the property law issue was being addressed.

83. Summary of key recommendation on transitional civil administration: the Panel recommends that the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that have transitional administration mandates, to evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use by such operations pending the re-establishment of local rule of law and local law enforcement capacity.

V Peacekeeping today

As of October 2019, there are 14 peacekeeping operations. The categorization into "generations", while helpful from a historic perspective, should not distract from the fact that these are of different types: The United Nations Military Observer Group in India and Pakistan (UNMOGIP) has existed since January 1949 and merely observes the ceasefire between these two states in the state of Jammu and Kashmir. Others, like UNFICYP in Cyprus, UNFOD in Golan and UNIFIL in Lebanon are older and "traditional" in the sense that they are armed and deployed in long-standing, albeit "frozen" inter-state conflicts. UNMIK in Kosovo provides an interim administration and promotes security, stability and respect for human rights. In the Democratic Republic of Congo, the Security Council went as far as authorizing[16] an offensive

> intervention brigade . . . under direct command of the MONUSCO Force Commander, with the responsibility of neutralizing armed groups . . . in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities.

As emphasized by the Security Council, however, this step was undertaken on an "exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping" (these remain impartiality—not to be confused with strict neutrality—consent and the use of force in self-defense or defense of the mandate only). The current principles and guidelines of peacekeeping operations can be found in the so-called Capstone Doctrine.

UN Peacekeeping Operations: Principles and Guidelines—"Capstone Doctrine", para. 3.1 (footnotes omitted)

3.1 Applying the basic principles of United Nations peacekeeping

Although the practice of United Nations peacekeeping has evolved significantly over the past six decades, three basic principles have traditionally served and continue to set United Nations peacekeeping operations apart as a tool for maintaining international peace and security:

- Consent of the parties
- Impartiality
- Non-use of force except in self-defence and defence of the mandate

These principles are inter-related and mutually reinforcing. It is important that their meaning and relationship to each other are clearly understood by all those involved in the planning and conduct of United Nations peacekeeping operations, so that they are applied effectively. Taken together, they provide a navigation aid, or compass, for practitioners both in the field and at United Nations Headquarters.

CONSENT OF THE PARTIES

United Nations peacekeeping operations are deployed with the consent of the main parties to the conflict. This requires a commitment by the parties to a political process and their acceptance of a peacekeeping operation mandated to support that process. The consent of the main parties provides a United Nations peacekeeping operation with the necessary freedom of action, both political and physical, to carry out its mandated tasks. In the absence of such consent, a United Nations peacekeeping operation risks becoming a party to the conflict; and being drawn towards enforcement action, and away from its intrinsic role of keeping the peace. In the implementation of its mandate, a United Nations peacekeeping operation must work continuously to ensure that it does not lose the consent of the main parties, while ensuring that the peace process moves forward. This requires that all peacekeeping personnel have a thorough understanding of the history and prevailing customs and culture in the mission area, as well as the capacity to assess the evolving interests and motivation of the parties. The absence of trust between the parties in a post-conflict environment can, at times, make consent uncertain and unreliable. Consent, particularly if given grudgingly under international pressure, may be withdrawn in a variety of ways when a party is not fully committed to the peace process. For instance, a party that has given its consent to the deployment of a United Nations peacekeeping operation may subsequently seek to restrict the operation's freedom of action, resulting in a de facto withdrawal of consent. The complete withdrawal of consent by one or more of the main parties challenges the rationale for the United Nations peacekeeping operation and will likely alter the core assumptions and parameters underpinning the international community's strategy to support the peace process. The fact that the main parties have given their consent to the deployment of a United Nations peacekeeping operation does not necessarily imply or guarantee that there will also be consent at the local level, particularly if the main parties are internally divided or

have weak command and control systems. Universality of consent becomes even less probable in volatile settings, characterized by the presence of armed groups not under the control of any of the parties, or by the presence of other spoilers. The peacekeeping operation should continuously analyze its operating environment to detect and forestall any wavering of consent. A peacekeeping operation must have the political and analytical skills, the operational resources, and the will to manage situations where there is an absence or breakdown of local consent. In some cases this may require, as a last resort, the use of force.

IMPARTIALITY

United Nations peacekeeping operations must implement their mandate without favour or prejudice to any party. Impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate. The need for even-handedness towards the parties should not become an excuse for inaction in the face of behavior that clearly works against the peace process. Just as a good referee is impartial, but will penalize infractions, so a peacekeeping operation should not condone actions by the parties that violate the undertakings of the peace process or the international norms and principles that a United Nations peacekeeping operation upholds. Notwithstanding the need to establish and maintain good relations with the parties, a peacekeeping operation must scrupulously avoid activities that might compromise its image of impartiality. A mission should not shy away from a rigorous application of the principle of impartiality for fear of misinterpretation or retaliation, but before acting it is always prudent to ensure that the grounds for acting are well-established and can be clearly communicated to all. Failure to do so may undermine the peacekeeping operation's credibility and legitimacy, and may lead to a withdrawal of consent for its presence by one or more of the parties. Where the peacekeeping operation is required to counter such breaches, it must do so with transparency, openness and effective communication as to the rationale and appropriate nature of its response. This will help to minimize opportunities to manipulate the perceptions against the mission, and help to mitigate the potential backlash from the parties and their supporters. Even the best and fairest of referees should anticipate criticism from those affected negatively and should be in a position to explain their actions.

NON-USE OF FORCE EXCEPT IN SELF-DEFENSE AND DEFENSE OF THE MANDATE

The principle of non-use of force except in self-defense dates back to the first deployment of armed United Nations peacekeepers in 1956. The notion of self-defense has subsequently come to include resistance to attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council. United Nations peacekeeping operations are not an enforcement tool. However, it is widely understood that they may use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate. The environments into which United Nations peacekeeping operations are deployed are often characterized by the presence of militias, criminal gangs, and other spoilers who may actively seek to undermine the peace process or pose a threat to the civilian population. In such situations, the Security Council has given United Nations peacekeeping operations "robust" mandates authorizing them to "use all necessary means" to deter forceful attempts to disrupt the political process,

protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order. By proactively using force in defense of their mandates, these United Nations peacekeeping operations have succeeded in improving the security situation and creating an environment conducive to longer-term peacebuilding in the countries where they are deployed. Although on the ground they may sometimes appear similar, robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the Charter. Robust peacekeeping involves the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force at the strategic or international level, which is normally prohibited for Member States under Article 2(4) of the Charter, unless authorized by the Security Council. A United Nations peacekeeping operation should only use force as a measure of last resort, when other methods of persuasion have been exhausted, and an operation must always exercise restraint when doing so. The ultimate aim of the use of force is to influence and deter spoilers working against the peace process or seeking to harm civilians; and not to seek their military defeat. The use of force by a United Nations peacekeeping operation should always be calibrated in a precise, proportional and appropriate manner, within the principle of the minimum force necessary to achieve the desired effect, while sustaining consent for the mission and its mandate. In its use of force, a United Nations peacekeeping operation should always be mindful of the need for an early de-escalation of violence and a return to non-violent means of persuasion. The use of force by a United Nations peacekeeping operation always has political implications and can often give rise to unforeseen circumstances. Judgments concerning its use will need to be made at the appropriate level within a mission, based on a combination of factors including mission capability; public perceptions; humanitarian impact; force protection; safety and security of personnel; and, most importantly, the effect that such action will have on national and local consent for the mission. The mission-wide ROE [Rules of Engagement] for the military and DUF [Directives on the Use of Force] for the police components of a United Nations peacekeeping operation will clarify the different levels of force that can be used in various circumstances, how each level of force should be used, and any authorizations that must be obtained by commanders. In the volatile and potentially dangerous environments into which contemporary peacekeeping operations are often deployed, these ROE and DUF should be sufficiently robust to ensure that a United Nations peacekeeping operation retains its credibility and freedom of action to implement its mandate. The mission leadership should ensure that these ROE and DUF are well understood by all relevant personnel in the mission and are being applied uniformly.

Notes

1 See Chapter 2, subsection IIA.
2 Second and Final Report of the Secretary-General on the Plan for an Emergency International United Nations Force Requested in the Resolution Adopted by the General Assembly on 4 November 1956, 6 November 1956, A/3302, para. 8. See UNGA resolutions 997–1001 (ES-I).
3 Official Records of the Security Council, Fifteenth Year, Supplement for July, August and September 1960, document S/4382.
4 UNSC Res 143 (1960) of 14 July 1960, para. 2.
5 Thomas M. Franck described this as "by far the most ambitious interposition to date in a situation characterized by haphazard decolonization, tribal warfare, and cold war pressures". Thomas M. Franck, 'United Nations Law in Africa: The Congo Operation as a Case Study' (1962) 27 *Law and Contemporary Problems* 632. It should also be mentioned that

then–Secretary-General Dag Hammerskjöld died in a plane crash while on his way to conduct peace negotiations.

6 Marrack Goulding, 'The Evolution of United Nations Peacekeeping' (1993) 69/3 *International Affairs* 451.

7 UN Secretariat, Statement on the Collection of Contributions as at 22 February 1963, ST/ADM/SERE/170.

8 United Nations Peacekeeping, 'Our History', https://peacekeeping.un.org/en/our-history.

9 Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, 15 November 1999, A/54/549, paras 467–497.

10 Supreme Court of the Netherlands, *The State of the Netherlands v Stichting Mothers of Srebrenica et al*, 19 July 2019, ECLI:NL:HR:2019:1284, para. 5.2, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:1284.

11 Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, 15 December 1999, S/1999/1257, 30 *et seq*.

12 Ramesh Thakur, 'From Peacekeeping to Peace Enforcement: The UN Operation in Somalia' (1994) 32/3 *The Journal of Modern African Studies* 387.

13 Ibid.

14 Report of the Secretary-General on the Situation in Somalia Submitted in Pursuance of Paragraph 13 of Security Council 954 (1994), 28 March 1995, S/1995/231, paras 63–65.

15 See also Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford University Press 2012); Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017) or Herfried Münkler, *The New Wars* (Polity 2004).

16 UNSC Res 2098 from 28 March 2013, paras 9 and 12(b).

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