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Baxter's Paradox and the Customary Prohibition of the Use of Force

INTRODUCTION

As we excluded in Chapter 1 the first two possibilities for the emergence of the customary prohibition of the use of force (pre-existing custom and crystallisation), let us now turn to the remaining two options for how the customary norm emerged after the advent of the UN Charter in 1945. This brings us into the realm of Baxter's paradox and the imaginative alternative proposed by the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*. This chapter accordingly explores the challenges of separately adducing the content of the parallel customary prohibition of the use of force in the presence of the parallel near-universal treaty obligation in article 2(4). Delving into these theoretical issues is not only an intriguing intellectual exercise but, as we saw in Chapter 1, fundamental to discerning the relationship between the customary and Charter prohibitions of the use of force, and in turn, the appropriate method for interpreting the meaning of prohibited force under international law (i.e. whether to focus on custom, the treaty or some combination of the two). The conclusions drawn from this chapter lay the foundation for the method that will be applied in the rest of the book to uncover the meaning of prohibited force in international law.

CHALLENGES OF THE TWO-ELEMENT APPROACH

The third option for how the customary prohibition of the use of force emerged is also the mainstream approach[1] to establishing the existence and

[1] Alternative approaches to the identification of custom have been proposed, for example, a sliding scale of State practice and *opinio juris*, such that 'a clearly demonstrated and strong *opinio juris* reduces (or even eliminates) the need to show general practice'. Oscar Schachter, 'Entangled Treaty and Custom' in Yoram Dinstein (ed), *International Law at a Time of*

content of a rule of customary international law, namely, the two constituent element approach: a general practice that is accepted as law.[2] This was the approach of the ICJ in the *North Sea Continental Shelf Cases*, when it held:

> [T]wo conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. 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*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[3]

The two-element approach has been adopted by the International Law Commission (ILC) Committee on the Identification of Customary International Law.[4] The ILC Committee stated that each element must be separately ascertained by assessing the evidence for each element.[5] The ILC Committee Special Rapporteur clarified that 'the existence of one element cannot be deduced from the existence of the other'.[6]

Although this is the widely accepted approach to the identification of customary international law, it is uniquely difficult to apply to the customary

Perplexity: Essays in Honour of Shabtai Rosenne (Martinus Nijhoff Publishers, 1989), 717, 733. In relation to lack of uniform State practice and frequent violations of the prohibition of the use of force, Schachter argues that the higher normative status of the rule explains the continuity of the rule as custom and that since this is an area of international law where breach is likely, this is a reason to lower the requirements of uniform practice (732–5). A related argument is set forward by Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95(4) *American Journal of International Law* 757, referring to a sliding scale that takes into consideration the moral importance of the norm. See also Bin Cheng's argument that 'international customary law has in reality only one constitutive element, the *opinio juris*': 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 36.

[2] See Michael Wood, 'Fourth Report on Identification of Customary International Law' UN Doc A/CN.4/695 (ILC, 6 March 2016) ('Wood Fourth Report'), 5, para. 15.

[3] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment* (1969) ICJ Reports 3, para. 77; affirmed in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* 1986 ICJ Reports 14 ('*Nicaragua* case'), para. 207.

[4] International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, Yearbook of the International Law Commission (2018), vol. II, Part Two, UN Doc A/73/10, draft conclusion 2 ('ILC Draft Conclusions on Identification of Customary International Law').

[5] *Ibid.*, draft conclusion 3(2).

[6] International Law Commission, 'Identification of Customary International Law: Statement of the Chair of the Drafting Committee, Mr. Mathias Forteau' (ILC, 29 July 2015) (2015 Statement of Chair), 3.

prohibition of the use of force due to the presence of the parallel and near-universal treaty obligation in article 2(4) of the UN Charter. The main issue is that it is difficult to identify sufficient relevant State practice and *opinio juris* outside the treaty. Whether such practice and *opinio juris* 'counts' depends primarily on the extent to which conduct connected with a treaty is considered as relevant State practice or serves as evidence of an *opinio juris*. It also depends on the significance of verbal acts (including silence) and inaction as 'practice', and of UN General Assembly resolutions as evidence of *opinio juris*. Finally, it depends on the relative weight to be given to practice versus *opinio juris*. Establishing evidence of the customary rule and its content thus depends on a number of theoretical issues that remain unsettled or over which significant controversy exists. These factors taken together render it a highly fraught and complicated exercise to determine exactly when the customary prohibition of the use of force arose, as well as to identify the scope of the customary prohibition in a process distinct from the application and interpretation of article 2(4) of the UN Charter.

Non-treaty Practice

The first challenge in determining the scope of the customary prohibition of the use of force is that there is insufficient relevant State practice outside the UN Charter. Although usually 'the conduct of parties to a treaty in relation to *non-parties* is not practice under the treaty, and therefore counts towards the formation of customary law',[7] article 2(4) of the UN Charter prohibits Member States of the United Nations from using force not only against each other but against any State, including non-Member States. This means that the only relevant practice outside the UN Charter is that of non-UN Member States.[8]

[7] International Law Association Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (ILA, 2000) ('ILA 2000 Report'), 47, commentary to section 24. See also Michael Wood, 'Third Report on Identification of Customary International Law' UN Doc A/CN.4/682 (ILC, 27 March 2015) ('Wood Third Report'), para. 41.

[8] The International Law Association Committee on Formation of Customary (General) International Law suggests that new customary international law was generated through extension via replication in the practice of *non*-States parties of the treaty obligations in articles 2(4) and 51 of the UN Charter. However, this seems to contradict what it wrote elsewhere in the same report about the customary rule arising out of the impact of the Charter, and the report does not state what that practice outside the treaty consisted of. ILA 2000 Report, n. 7, 46, commentary (a) to section 24.

It is true that there is some potentially relevant practice by non-UN Member States. For instance, prior to becoming Members of the United Nations (i.e. before the UN Charter became directly binding on them), some States have declared their acceptance of the principles of the UN Charter including the prohibition of the use of force in article 2(4). In 1951, prior to becoming a Member of the United Nations in 1956, Japan 'declar[ed] its intention ... in all circumstances to conform to the principles of the Charter of the United Nations' and 'accept[ed] the obligations set forth in Article 2 of the Charter of the United Nations, in particular the obligations ... 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'.[9] Prior to their membership of the United Nations, the Federal Republic of Germany and the German Democratic Republic also both agreed to settle their disputes exclusively by peaceful means and to refrain from the threat or use of force in accordance with the UN Charter.[10] Similarly, Switzerland accepted the obligations in the UN Charter prior to becoming a Member of the United Nations in September 2002.[11] To this may be added instances of non-UN Member States refraining from the threat or use of force. The legal relevance of silence and inaction to the identification of a customary rule is discussed later in this chapter.

However, there are two problems with concluding that the conduct of non-States parties to the UN Charter (i.e. States that are not Members of the United Nations) that is consistent with the obligation in article 2(4) is evidence of the existence of the rule in customary international law. First, such conduct must still be accompanied by an *opinio juris*. The ICJ in the *North Sea Continental Shelf Cases* held that no inference could be drawn from State practice by non-parties to a convention which was consistent with a principle set out in it, since it did not *in itself* constitute evidence of an *opinio juris*.[12] But the second and main problem is that there is hardly any such relevant

[9] *Treaty of Peace with Japan* (signed at San Francisco on 8 September 1951, entered into force 28 April 1952), 1952 UNTS 46, preamble and art. 5(ii).

[10] *Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic* (*Grundlagenvertrag*) *and Supplementary Documents* (signed at Berlin on 21 December 1972), art. 3.

[11] Letter dated 20 June 2002 from the President and the Chancellor of the Swiss Confederation on behalf of the Swiss Federal Council addressed to the Secretary-General, UN Doc A/56/1009–S/2002/801 (24 July 2002). Switzerland accepted these obligations a few months before joining the United Nations.

[12] *North Sea Continental Shelf Cases*, n. 3, para. 76.

practice due to the nearly universal nature of the UN Charter. This renders difficult the identification of relevant practice by non-parties to the UN Charter, which in any case due to their relatively small number could hardly be described as a 'general practice'. Since UN membership has grown over time, there have been periods in which a considerable number of States (including newly independent States) were not yet Members.[13] But it is not their practice that is usually cited in support of the argument that the prohibition has formed a rule of customary international law due to widespread practice and *opinio juris*. As noted by Judge Sir Robert Jennings in his dissenting opinion in the *Nicaragua* case:

> [T]here are obvious difficulties about extracting even a scintilla of relevant 'practice' on these matters from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself.[14]

This was the paradox identified by RR Baxter:

> [T]he proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty.[15]

Clearly, the ICJ in the *Nicaragua* case (decided subsequent to Baxter's famous pronouncement) 'did not accept this reasoning, although it did not indicate how conduct relating to a treaty rule and to an identical customary law rule can be differentiated'.[16] James Crawford also noted that 'State practice requires that the Baxter paradox hold – that is, that treaty participation is not enough. Custom is more than treaty, more even than a generally accepted treaty … [yet] the coexistence of custom and treaty suggests that the Baxter paradox is not actually a genuine paradox.'[17] Hugh Thirlway also argues that Baxter's paradox is not really a paradox but

[13] See www.un.org/en/about-us/growth-in-un-membership.
[14] *Nicaragua* case, n. 3, 532, footnote omitted.
[15] RR Baxter, 'Treaties and Custom' (1970) 129 *Recueil des cours: Collected Courses of the Hague Academy of International Law* 25, 64.
[16] Schachter, n. 1, 726–7.
[17] James Crawford, *Chance, Order, Change* (Martinus Nijhoff Publishers, 2013), 107, 110.

> [i]t has merely a counter-intuitive element: one would expect that the more States show allegiance to a developing rule of law, by ratifying a treaty embodying it, the more easily it could be shown to have become a general customary rule. It states, or represents, in dramatic form a fact which is inconvenient for the development of international law, and its consistent application. There is no need to seek a 'solution' to the paradox, but rather a way of palliating that inconvenience.[18]

There are proposals to address this *de lege ferenda*,[19] but *de lege lata*, it remains unclear how one can identify the scope of the parallel customary prohibition separately to article 2(4) of the UN Charter. It squarely raises the question of how post-treaty practice (such as treaty ratification, frequent repetition of a rule in multiple treaties and conduct by States parties to a treaty consistent with their treaty obligations) is to be taken into account in the formation of the customary rule. These issues are examined later.

Conduct Referable to the Treaty

Since there is virtually no potentially relevant State practice with respect to the prohibition of the use of force completely outside the UN Charter (essentially, only the practice of non-UN Member States, which we have seen earlier is extremely limited), the next questions are, first, whether State practice in compliance with a treaty obligation may count as relevant practice for the purpose of identifying a rule of customary international law; and second, whether and how we can determine if such practice in compliance with a treaty obligation is motivated by a belief in a legal obligation outside the treaty.

Does Conduct Consistent with Treaty Obligations Count as Practice?

The ICJ in the *North Sea Continental Shelf Cases*[20] confirmed that State practice consistent with the treaty by States parties should not be given weight for the purpose of identifying a customary rule. In that case, the ICJ

[18] Hugh WA Thirlway, 'Professor Baxter's Legacy: Still Paradoxical?' (2017) 6(3) *ESIL Reflection* 1.

[19] For example, Thirlway suggests that

> one may introduce some adjustments into the classic analysis of custom-making: thus Crawford proposes, as we have seen, the adoption of a presumption of *opinio juris* from the simple fact of widespread participation in a law-making convention, and that account be taken of the attitude towards the relevant rule adopted by States who are committed to it in its convention form.
>
> (*Ibid.*)

[20] *North Sea Continental Shelf Cases*, n. 3, para. 76.

discounted practice consistent with the treaty by States parties, even before the treaty entered into effect, since they were presumably 'acting actually or potentially in the application of the Convention'. With respect to State practice consistent with treaty obligations, '[c]onduct which is wholly referable to the treaty itself does not count for this purpose as practice';[21] 'in principle ... what States do in pursuance of their treaty obligations is *prima facie* referable only to the *treaty*, and therefore does not count towards the formation of a *customary* rule'.[22] Conduct referable to the treaty is not relevant 'practice' unless accompanied by an *opinio juris* outside the treaty, since on its own it does not provide evidence that a State is applying customary international law. It will require something additional to show that the conduct is not merely referable to the treaty but indicates that State's belief about a customary legal obligation; this would usually require a verbal statement to show the State was not merely applying the treaty.

Are Acts in Compliance with Treaty Obligations Evidence of *Opinio Juris*?

Treating conduct of States parties to a treaty consistent with their treaty obligations as evidence of *opinio juris* for the existence of a customary rule is also problematic for the same reason explained earlier: on its own, State conduct in compliance with a treaty obligation is not evidence of a belief that the conduct is required by customary international law since the conduct is referable to the treaty.

Treaty Ratification and Repetition of a Rule in Multiple Treaties

In addition to the forms of practice described earlier, a plethora of multilateral treaties affirm the obligation to refrain from the threat or use of force, such as the UN Convention on the Law of the Sea, which provides in article 301 that '[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations'.[23] Do these treaty ratifications and repetition of the rule in multiple treaties count as *opinio juris*? The ILC 'has found that the frequent enunciation of a provision in international treaties did not

[21] ILA 2000 Report, n. 7, 46.
[22] *Ibid*. See also Wood Third Report, n. 7, para. 41 with further references.
[23] *United Nations Convention on the Law of the Sea 1982* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 ('UNCLOS').

necessarily indicate that the provision had developed into a rule of customary international law'.[24] Similarly, draft conclusion 11, paragraph 2 of the ILC Committee on the Identification of Customary International Law provides that '[t]he fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law'.[25] However, 'in some cases it may be that frequent repetition in widely accepted treaties evinces a recognition by the international community as a whole that a rule is one of general, and not just particular, law. . . . But the test remains qualitative rather than quantitative.'[26] The ILC has previously relied upon treaty practice in assessing *opinio juris* for the purpose of identifying a rule of customary international law,[27] including with respect to the prohibition of the use of force, by referring to paragraphs (1) and (5) of the commentary to draft article 49 on the law of treaties (which mention the prohibition of the use of force in article 2(4) of the UN Charter).[28]

Christian Tams notes that '[a]s regards the context, the Court has been unwilling to compartmentalise State conduct as belonging to one particular source of law only. Notably . . . it has regularly relied on the participation of States in treaties.'[29] Tams notes that '[a]ccording to Pellet, this in fact "might be the most important and frequent aspect of practice"'.[30] The Court in the *Nicaragua* case considered the actual treaty commitments to a rule prohibiting the use of force as themselves evidence of the parties expressing recognition of the validity of the rule as binding under customary international law:

> 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

[24] *Ibid.*, 33–4, footnote omitted. See also ILA 2000 Report, n. 7, principle 25.
[25] ILC Draft Conclusions on Identification of Customary International Law, n. 4.
[26] ILA 2000 Report, n. 7, 48, commentary to section 25.
[27] See International Law Commission, 'Formation and Evidence of Customary International Law – Elements in the Previous Work of the International Law Commission That Could Be Particularly Relevant to the Topic – Memorandum by the Secretariat' UN Doc A/CN.4/659 (14 March 2013), 14, commentary to Observation 7, para. 23, and 21–2, commentary to Observation 12, para. 29, with extensive examples cited in footnotes.
[28] ILC, 'Yearbook of the International Law Commission 1966, Vol. II' UN Doc A/CN.4/SER.A/1966/Add.l (1966), p. 246, cited in footnote 85 of ILC Secretariat Memorandum, *ibid.*, 22.
[29] Christian J Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14(1) *The Law and Practice of International Courts and Tribunals* 51, 68, footnote omitted.
[30] *Ibid.*, 68, footnote 90.

> expressed recognition of the validity thereof as customary international law *in other ways*.[31]

For instance, the Court held that the US ratification of the 1933 Montevideo Convention on Rights and Duties of States, 'Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force' was evidence of the US *opinio juris*.[32] In other words, the Court viewed the ratification of a treaty containing the obligation to refrain from the use of force in international relations as evidence that the ratifying State accepted that such obligations in the treaty were already binding as a matter of customary international law.

However, to classify treaty ratification or the repetition of a treaty provision in a number of treaties as evidence of *opinio juris* regarding the existence of a customary rule requires further evidence that the States parties to the treaty believe that the treaty provision is also a customary rule; by ratifying a treaty, the parties to the treaty arguably intend to accept a *treaty* obligation.[33]

Verbal Acts

Verbal Acts as Practice

Although acts connected with a treaty when carried out by States parties to that treaty do not necessarily carry weight as State practice for the purpose of identifying a rule of customary international law, verbal acts by States may in some cases constitute 'general practice'. This is particularly relevant to our enquiry because most forms of practice with respect to the prohibition of the use of force between States in international law are verbal acts – statements, declarations, exchanges of claims and counter-claims – rather than physical acts such as the actual employment of inter-State force.[34] Unlike physical acts, many verbal acts explicitly refer to the customary nature of the rule. For example:

- UN General Assembly resolutions such as the 1970 Friendly Relations Declaration (discussed further below) and 1987 General Assembly Resolution 42/22. The latter resolution held that

[31] See *Nicaragua* case, n. 3, para. 185, emphasis added.
[32] *Ibid*., para. 189.
[33] For scholarly views for and against this position, see Michael Wood, 'Second Report on Identification of Customary International Law' UN Doc A/CN.4/672 (22 May 2014) ('Wood Second Report'), 25.
[34] This point is also made by the ILA Committee in general about customary international law: ILA 2000 Report, n. 7, 14.

> *[e]very 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 from acting 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* of the Charter of the United Nations and entails international responsibility.[35]

The final sentence implies that the prohibition is a rule of customary international law in addition to a treaty rule in the Charter. The resolution went on to declare that '[t]he principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance'.[36] The significance of UN General Assembly resolutions as verbal acts is discussed further below.

- 1975 Helsinki Final Act (declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe). The ICJ in the *Nicaragua* case described the effects of the Act as follows: 'the participating States undertake to "refrain in their mutual relations, as well as in their international relations in general," ... 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.'[37] The Pact of Bogota (the American Treaty on Pacific Settlement) also requires the contracting parties to 'refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies';[38]
- State representations before the ICJ have asserted the customary international law nature of the prohibition, notably, for example, Nicaragua and the United States in the *Nicaragua* case;[39]
- In the 1990 Charter of Paris for a New Europe, participating countries, '[i]n accordance with [their] obligations under the Charter of the United Nations and commitments under the Helsinki Final Act, ... renew[ed] [their] pledge to refrain from the threat or use of force against the

[35] UN General Assembly, *Resolution 42/22: Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, UN Doc A/Res/42/22 (18 November 1987) (adopted without a vote), para. 1, emphasis added.

[36] *Ibid.*, para. 2.

[37] *Nicaragua* case, n. 3, para. 189.

[38] Cited in Dissenting Opinion of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226 ('*Nuclear Weapons* Advisory Opinion'), 525.

[39] *Nicaragua* case, n. 3, paras. 187–8.

> territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the principles or purposes of those documents'.[40]

Despite early debates about whether verbal acts count as State practice as well as physical acts,[41] it is the dominant view in scholarship and jurisprudence that verbal acts do indeed count as State practice.[42] The ILC acknowledges that '[p]ractice may take a wide range of forms. It includes both physical and verbal acts'[43] including 'conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference'.[44]

The ILA Committee on Formation of Customary (General) International Law in its 2000 report also acknowledged that '[v]erbal acts, and not only physical acts, of States count as State practice'.[45] The ILA Committee argued that '[t]here is no inherent reason why verbal acts should not count as practice, whilst physical acts (such as arresting individuals or ships) should. For voluntarists, this must necessarily be so: both forms of conduct are manifestations of State will'.[46] Verbal acts recognised by the ILA Committee as forms of State practice were extensive:

> Diplomatic statements (including protests), policy statements, press releases, official manuals (e.g. on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt – all of which are frequently cited as examples of State practice – are all forms of speech-act.[47]

Although it is recognised that verbal acts constitute a form of State practice, it is still 'necessary to take account of the distinction between what conduct counts as State practice, and the weight to be given to it'.[48] Some argue that verbal acts carry more weight (e.g. the position explained by ILA), while others

[40] *Charter of Paris for a New Europe 1990*, Organization for Security and Co-operation in Europe, 21 November 1990, 5.
[41] See Wood Second Report, n. 33, 19, footnote 84 for extensive references to scholarship.
[42] *Ibid.*, 20.
[43] 'ILC Draft Conclusions on Identification of Customary International Law', n. 4, draft conclusion 6, para. 1.
[44] *Ibid.*
[45] ILA 2000 Report, n. 7, 14.
[46] *Ibid.*, 14, citation omitted.
[47] *Ibid.*, 14, footnote omitted.
[48] *Ibid.*, 13.

argue that physical acts carry more weight ('talk is cheap').[49] The weight to be given to verbal versus physical acts will depend on the circumstances of the case. Furthermore, the weight to be given to any particular conduct, whether verbal or physical, is arguably less a matter of weight in terms of the objective element of customary international law but goes towards the strength of evidence of an accompanying *opinio juris*. This is the underlying objection to accepting verbal acts as State practice, because verbal acts may not demonstrate the same commitment of the State to a position regarding the legality of an act under customary international law – a matter of *opinio juris*.

There is some debate as to whether double counting of verbal practice is permitted – that is, whether the same verbal acts may count as both State practice and evidence of *opinio juris*[50] – but it is widely accepted that this is permitted so long as both elements (State practice and *opinio juris*) are found to be present.[51] This approach is advantageous, since 'verbal acts generally provide explicit evidence of *opinio juris* unlike physical acts',[52] given that a belief underlying a physical act may need to be inferred.[53] 'It cannot be assumed that the implication of a state's physical acts is a belief that the act is lawful.'[54] Since verbal acts may be intended to promote a State's preferred direction of legal developments (*lex ferenda*) rather than reflect its belief as to the actual state of the law (*lex lata*), caution is required when assessing verbal acts as evidence of an *opinio juris*.[55]

Do UN General Assembly Resolutions Count as Evidence of *Opinio Juris*?

One form of verbal act has particular relevance for our enquiry into the customary international law status of the prohibition of the use of force and its scope: UN General Assembly resolutions. UN General Assembly resolutions and other 'resolution[s] adopted by an international organization or at an intergovernmental conference may provide evidence for determining the

[49] *Ibid*., for a discussion and critique of this view.
[50] See, for example, Roberts, n. 1.
[51] 2015 Statement of Chair, n. 6, 4. For a different view, see the ILA 2000 Report, n. 7, 7; Mary Ellen O'Connell, 'Taking *Opinio Juris* Seriously: A Classical Approach to International Law on the Use of Force' in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Martinus Nijhoff Publishers, 2005), 9, 16.
[52] O'Connell, *ibid*., 15.
[53] ILA 2000 Report, n. 7, 14.
[54] O'Connell, n. 51, 15.
[55] *Ibid*., 16.

existence and content of a rule of customary international law, or contribute to its development'.[56]

In the *Nicaragua* case, the sources that the Court considered to be evidence of an *opinio juris* that the prohibition of the use of force is a rule of customary international law were primarily General Assembly resolutions, and in particular the 1970 Friendly Relations Declaration:

> 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.[57]

However, Judge Roberto Ago in that case criticised the Court's approach to identification of customary international law, stating:

> There are, similarly, doubts which I feel bound to express regarding the idea which occasionally surfaces in the Judgment (paras. 191, 192, 202 and 203) that the acceptance of certain resolutions or declarations drawn up in the framework of the United Nations or the Organization of American States, as well as in another context, can be seen as proof conclusive of the existence among the States concerned of a concordant *opinio juris* possessing all the force of a rule of customary international law.[58]

In the *Nuclear Weapons* Advisory Opinion, the Court noted the necessity of examining whether an *opinio juris* exists with respect to the normative character of the resolution:

[56] ILC Committee provisionally adopted conclusions, draft conclusion 12(2). The ILA Committee in its 2000 Report, n. 7, 55, para. 28 also takes the position that 'resolutions of the United Nations General Assembly may in some instances constitute evidence of the existence of customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law. But as a general rule, and subject to Section 32, they do not ipso facto create new rules of customary law'.

[57] *Nicaragua* case, n. 3, para. 188.

[58] *Ibid.*, Separate Opinion of Judge Ago, para. 7.

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[59]

This highlights that there is no automatic equating a State voting in favour of a resolution with that State's belief in the normative character of the resolution. States may have other (especially political) reasons for voting the way that they do. 'Importantly, "[a]s with any declaration by a state, it is always necessary to consider what states actually mean when they vote for or against certain resolutions in international fora". As States themselves often stress, the General Assembly is a political organ in which it is often far from clear that their acts carry juridical significance.'[60]

Furthermore, it is important to take into account that unless the language of the resolution makes clear otherwise, such resolutions are usually non-binding.[61] However, with the appropriate caution, UN General Assembly resolutions may indeed provide important evidence of *opinio juris* when the context, content and language of the resolution justify such a conclusion. Especially since the General Assembly is 'a forum of near universal participation',[62] resolutions that are unanimous or passed by consensus are a particularly important source of evidence of *opinio juris* regarding the state of international law on a given topic, provided that they are not merely taken at face value but analysed with due care to identify whether the reasons for voting reflect a belief in the normative character of the resolution.

One particular example of a UN General Assembly resolution that serves as strong evidence of *opinio juris* that the content of the customary prohibition of the use of force is identical to article 2(4) of the UN Charter is Resolution 2625 (XXV), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ('Friendly Relations Declaration'). The UN

[59] *Nuclear Weapons* Advisory Opinion, n. 38, para. 70.

[60] Wood Third Report, n. 7, 33, footnotes with extensive citations omitted.

[61] See, for example, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), 434–5, cited in Wood Third Report, n. 7, footnote 117.

[62] See, for example, Wood Third Report, n. 7, 9, para. 25, noting that this was suggested in the Sixth Committee and concurring.

General Assembly adopted this resolution by consensus on 24 October 1970 on the occasion of the twenty-fifth anniversary of the United Nations.

In the Friendly Relations Declaration, the UN General Assembly proclaimed:

> 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.[63]

Principle 1 of the Declaration proclaims:

> 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.

In addition to comprising a subsequent agreement of UN Member States on the interpretation of article 2(4), the ICJ relied on the Friendly Relations Declaration in the *Nicaragua* case as an indication of States' *opinio juris* on the existence and content of the customary prohibition of the use of force[64] due to its references to 'all States',[65] 'principle',[66] 'every State',[67] 'a violation of international law and the Charter'[68] and the statement that '[t]he principles of the Charter which are embodied in this Declaration constitute basic principles of international law'.[69]

The 1970 Friendly Relations Declaration is therefore strong evidence of *opinio juris* regarding the customary prohibition of the use of force and its content. However, although the Declaration and the other verbal acts set out earlier in the chapter refer to and confirm the customary nature of the prohibition of the use of force, they are less useful for identifying the precise scope of the customary rule and if it is identical to article 2(4) of the UN Charter. This is because these types of verbal acts that refer explicitly to

[63] Friendly Relations Declaration, para. 1(1).
[64] *Nicaragua* case, n. 3, para. 191.
[65] Friendly Relations Declaration, 10th preambular paragraph.
[66] *Ibid.*, Principle 1.
[67] *Ibid.*
[68] *Ibid.*, Principle 1, para. 1.
[69] *Ibid.*, para. 3.

customary international law are by their nature general and abstract rather than in response to specific incidents.

Silence and Inaction as State Practice and Evidence of Opinio Juris

A final category of potentially relevant practice for the identification of the scope and content of a customary international law rule prohibiting the use of force is silence and inaction, which presents further challenges. Much State practice that may be relevant is that of omission: refraining from the use of force in particular situations, refraining from characterising an act by another State as a use of force, and lack of protest. This section will look at the significance of silence and inaction for the identification of a rule of customary international law: is it relevant that States seem to refrain from making claims about 'marginal' forcible actions under the *jus contra bellum* framework? Is it enough that States generally refrain from using force against each other (inaction as relevant practice), coupled with an *opinio juris*?

This work uses the overarching category of 'omission' to describe both inaction and silence.[70] Within this broad category, one may distil two different types of omission. The first type is omission which may constitute *State practice*. The second type is omission in response to another State's conduct, which may constitute evidence of *opinio juris* regarding the legality of the other State's conduct through acquiescence. Collecting examples of inaction is senseless without an idea of what type of conduct is in fact being abstained from, and the categories of inaction are limited only by the imagination of the person identifying such examples. As such, to narrow the universe of all forms of State inaction to something meaningful for a legal analysis, the types of inaction that may be relevant to State practice fall into the following categories: inaction accompanied by explicit verbal statements that such conduct would be unlawful; abstention from types of forcible conduct whose legality is disputed; and inaction in circumstances where the expectation or possibility is raised for a particular State to act, such as where it is called on to do so or has previously asserted a right to so act, or where some States have taken that type

[70] A note on terminology: Tom Ruys refers to 'omission' (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) *American Journal of International Law* 159, 167–71); Olivier Corten discusses the significance of 'silence' (Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010), 35–8.) and Sir Michael Wood uses the term 'inaction' in his reports but notes that inaction is 'also referred to as passive practice, abstention from acting, silence or omission' (Wood Third Report, n. 7, para. 19.).

of action but similar conduct is not adopted by other States. Collecting data relating to omission as potential evidence of *opinio juris* regarding the prohibition of the use of force under customary international law is more straightforward, since such silence or inaction will be in response to conduct of another State – either through a potential or actual threat or use of force, or official claims regarding the legality of certain conduct. For this category, one would need to identify forcible acts by States as well as verbal practice asserting the legality of forcible conduct and examine the response (or non-response) of third States. Under certain circumstances discussed in this section, inaction and silence may constitute State practice and evidence of *opinio juris* for the purposes of identifying a rule of customary international law. However, due to the nature of inaction and silence, they are often ambiguous and will require something more in order to be construed as evidence of such. In assessing whether inaction or silence in the face of forcible conduct or legal claims is evidence of an *opinio juris* regarding the legality of the conduct in question, one should consider whether the silent/inactive State had knowledge of the conduct, the capacity to respond, whether its interests are affected and if there is any evidence regarding the reasons for its silence or inaction.[71]

Omission as State Practice

Omission may count as State practice when inaction comprises abstention from conduct (such as the use of force) or silence in the form of refraining from asserting legal claims. According to Wood, this is a form of relevant State practice for the purpose of identifying a rule of customary international law, as long as it is accompanied by an *opinio juris*.[72] Omission as State practice is distinguished from omission as evidence of *opinio juris* in that the former comprises abstention from asserting original legal claims to act in a particular manner under customary international law, whereas the latter is in response to another State's conduct and may be interpreted as acquiescence in the legality of such.

Inaction as Practice

Inaction (in the sense of abstaining from physical action) has been variously characterised as a potential form of State practice, or as evidence of *opinio juris*.[73] For inaction to count as relevant State practice giving rise to a rule of

[71] 2015 Statement of Chair, n. 6, 10; Wood Third Report, n. 7, 8, para. 22.
[72] Wood Third Report, n. 7, para. 20.
[73] Wood Second Report, n. 33, para. 42 (with extensive further references at footnote 124); ILA 2000 Report, n. 7, 15.

customary international law, it must be general and accompanied by an *opinio juris*.[74] Examples of inaction that have been accepted as State practice include 'refraining from exercising protection in favour of certain naturalized persons; abstaining from the threat or use of force against the territorial integrity or political independence of any State; and abstaining from instituting criminal proceedings in certain circumstances'.[75]

In the *North Sea Continental Shelf Cases*, the ICJ cited and followed the *Lotus* case,[76] in which the Permanent Court of International Justice (PCIJ) held:

> Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstance alleged ..., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, ... there are other circumstances calculated to show that the contrary is true.[77]

The clear problem is that in certain cases (such as the PCIJ *Lotus* decision), mere abstention can be too ambiguous to be treated as 'a precedent capable of contributing to the formation of a customary rule'.[78] The ILA Committee states in its commentary that when conduct 'is not clearly referable to an existing or potential legal rule' (such as ambiguous omission), it should not count as a precedent unless there is additional evidence explaining that it occurred due to an *opinio juris* that the conduct abstained from would be unlawful under customary international law (as distinguished from other reasons for a State to abstain from conduct such as 'lack of jurisdiction under municipal law; lack of interest; or a belief that a court of the flag State is a more convenient forum').[79]

Silence as Practice

Just as inaction may be a form of practice if accompanied by the required *opinio juris*, silence in certain circumstances can also be a form of State practice if it is 'general'. The forms of silence referred to here are those that

[74] Wood Third Report, n. 7, para. 20.
[75] *Ibid.*, para. 20, footnotes omitted.
[76] *North Sea Continental Shelf Cases*, n. 3, paras. 77–8.
[77] *SS Lotus Case (France v Turkey)* [1927] PCIJ Series A, No 10 (7 September 1927), 28.
[78] ILA 2000 Report, n. 7, 15–16, section 17(iv).
[79] *Ibid.*, 36–7.

are not in response to the acts or claims of other States, since that is rather evidence of *opinio juris* (see later in the chapter). One example is given in Wood's Second Report: that of the dissenting opinion of Judge Read in the *Interpretation of Peace Treaties* case ('The fact that no State has adopted this position [that a State party to a dispute may prevent its arbitration by the expedient of refraining from appointing a representative on the Commission] is the strongest confirmation of the international usage or practice in matters of arbitration which is set forth above')[80]; although Wood lists this as an example of inaction as evidence of *opinio juris*, it seems to in fact comprise an instance of State practice through omission, rather than acquiescence in the practice of other States.

Omission as *Opinio Juris*

The second type of omission is *inaction* in response to the conduct of another State, or *silence* in the form of lack of verbal protest (which could include a failure to invoke a violation of article 2(4) or a failure to invoke a right to use force in self-defence in response to the original act). Such silence may be evidence of an *opinio juris* that the act does not fall within the scope of the prohibition of the use of force, such as acquiescence in the legal claims made by another State through that other State's practice (including verbal practice). Wood goes so far as to note that '[i]naction by States may be central to the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence'.[81] Drawing this conclusion with respect to particular incidents requires the same caution as mentioned earlier, since silence in itself is also ambiguous. Hence, the often stated requirement of the State failing to act, or remaining silent, in the face of an expectation that it act or in other circumstances that indicate an *opinio juris*.

Inaction as *Opinio Juris*

The ILC's draft conclusion 10(3) on forms of evidence of acceptance as law (*opinio juris*) provides thus:

> Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.[82]

[80] Wood Second Report, n. 33, footnote 279, citing *Interpretation of Peace Treaties (second phase), Advisory Opinion* (1950) ICJ Reports, 221, 242.
[81] Wood Second Report, n. 33, para. 42, footnote omitted.
[82] ILC Draft Conclusions on Identification of Customary International Law, n. 7.

The accompanying statement of the Committee Chair[83] explains as follows:

> The first condition is temporal. To be considered as expressing *opinio juris*, the failure to react needs to be maintained over a sufficient period of time, assessed in light of the particular circumstances. This condition is referred to by the expression 'over time'. Second, paragraph 3 indicates that, in order for inaction to qualify as acceptance as law, the State must be in a 'position to react'. This formulation is broad enough to cover the need for knowledge of the practice in question, but also other situations that might prevent a State from reacting, such as political pressures. Thirdly, it is also necessary that the circumstances called for some reaction. The Drafting Committee shared the view that States could not be expected to react to each instance of practice by other States. Attention is drawn to the circumstances surrounding the failure to react in order to establish that these circumstances indicate that the State choosing not to act considers such practice to be consistent with customary international law.

The main point is that inaction (failure to take action or to make verbal statements) in response to the acts of other States may be interpreted in certain circumstances as acquiescence in the practice of those other States – in other words, as giving rise to something similar to estoppel, so that the other States rely on the position apparently taken by the silent State vis-à-vis the act that it did not respond to. It is taken as given that the silent State has accepted the (implicit) assertion of legality of the acts taken by the first State, whose position may subsequently be relied on by that State as well as other States. This complies with the consent model of customary international law. Hence, the requirements that the silent State must have been aware of the conduct that it has not responded to and that there should be a reasonable expectation that it respond to that conduct, for example, that its interests are affected.

Silence as Evidence of *Opinio Juris*

Both inaction and silence through failure to respond to acts by other States may be a form of acquiescence. Under certain circumstances, silence in response to forcible acts by other States may be evidence of an *opinio juris* that those acts are not unlawful. There must either be evidence that the silence was actually motivated by an *opinio juris* or else the silence must have been in circumstances that give rise to an inference that the silent State acquiesces in the active State's legal claims/actions. In the former case (of an *opinio juris*), the question is whether the silent State had an *opinio juris* that

[83] 2015 Statement of Chair, n. 6, 10.

the relevant conduct was lawful. A factor that may indicate this is that the conduct affected its interests.[84] In the latter case (of acquiescence), it is relevant to ask: did the silent State act in a way calculated to or that does reasonably give rise to the perception that it was acquiescing in the relevant conduct?[85] In both cases, these factors will be relevant: first, the silent State must have knowledge of the conduct of the other State and, second, the silence must not be mainly motivated by extra-legal considerations.[86]

In sum, this section has espoused the following dichotomy: 'original' inaction or silence as State practice (i.e. not in direct response to conduct or claims by another State) if general and accompanied by an *opinio juris* that such inaction/silence is either required or not prohibited by customary international law as the case may be, and silence and inaction in response to acts of other States as evidence of an *opinio juris* that such acts are lawful, that is, acquiescence. Ultimately, just as with other (i.e. active) conduct with respect to the prohibition of the use of force, in the absence of an explicit statement that a State is applying the customary rule, it will be hard or even impossible to discern whether the silence or inaction is referable to article 2(4) of the UN Charter. In other words, even if one determines that a particular State's inaction (abstention from conduct including the assertion of legal claims) or silence (acquiescence in the conduct or legal claims of another State) has legal significance as practice with respect to the prohibition of the use of force, such conduct may be explained as compliance with the treaty obligation in article 2(4) of the UN Charter (and therefore relevant as subsequent practice in the application of the treaty) rather than evidence of the rule of custom or of an *opinio juris*. Therefore, on their own, silence and inaction, as well as active conduct that is in compliance with a State's obligations under article 2 (4) of the UN Charter, are insufficient to separately identify the existence and scope of the customary prohibition of the use of force.

[84] Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22(4) *Leiden Journal of International Law*, 651, 664: 'It would be but logical to think that states would react to acts affecting their own interests. . . . All the more so in the light of the erga omnes character of the prohibition of the use of force.'

[85] In his study of the prohibition of the threat of force, *The Threat of Force in International Law* (Cambridge University Press, 2009), Nikolas Stürchler does not treat silence as either approval or protest, since it could reflect 'indifference, neutrality or indecision' (110, footnote omitted). Stürchler argues that most States do not react by filing protests or conveying approval of potential violations of the UN Charter. 'It turns out that, at least in threat-related cases, the assumption that silence equals approval is empirically false' (257, footnote omitted).

[86] See Ruys, n. 70, 167–71.

Conclusion

The main evidence that establishes the existence of the customary prohibition falls into the following categories: treaty-related practice (which may include inaction) and verbal acts, including UN General Assembly resolutions. In particular, the 1970 Friendly Relations Declaration is strong evidence of *opinio juris* regarding the customary prohibition of the use of force and its content. To determine whether such evidence 'counts' towards establishing a general practice established as law raises fundamental issues, which have been highlighted earlier in the chapter. This makes it challenging to identify not only how and when the customary prohibition emerged, but the same difficulties present themselves when attempting to identify the content of the customary prohibition instead of interpreting article 2(4) of the UN Charter.

THE 'OWN IMPACT' OF ARTICLE 2(4)

Given these challenges, the fourth way for the prohibition in article 2(4) to have given rise to a rule of customary international law – through the UN Charter's 'own impact'[87] – is both appealing and pragmatic. This process is an 'exceptional case' in which 'it may be possible for a multilateral treaty to give rise to new customary rules (or to assist in their creation) "of its own impact" if it is widely adopted by States and it is the clear intention of the parties to create new customary law'.[88] The ICJ in the *North Sea Continental Shelf Cases* considered the possibility for a rule of customary international law to arise from the 'own impact' of a treaty, noting:

> [I]t clearly involves treating that Article as a norm-creating provision which has *constituted* the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*,

[87] Interestingly, Thirlway does not mention this 'own impact' argument: Hugh WA Thirlway, *The Sources of International Law* (Oxford University Press, 2014). The ILC's draft conclusions on the identification of a rule of customary international law also do not mention this possibility. The draft conclusions simply set out the two-element approach and merely state: 'A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule … has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law' (ILC Draft Conclusions on Identification of Customary International Law, n. 7, draft conclusion 11(1)(c)). The accompanying commentary states that 'the words "may reflect" caution that, in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content' (para. 2).

[88] ILA 2000 Report, n. 7, 50, rule 27.

> so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.[89]

The ILA Committee on Formation of Customary Law in its 2000 Report offered the following justification for the Court's pronouncement:

> [T]the consent of States to a rule of customary law, whilst not a necessary condition of their being bound, is a *sufficient condition*. In other words, if States indicate *by any means* that they intend to be bound as a matter of customary law, being bound will be the consequence, so long as their intention is clear. They can evince that intention by a public statement, for instance. That being so, there is no a priori reason why they cannot instead evince it through, in conjunction with, or subsequent to, the conclusion of a treaty, *provided that it is their clear intention to accept more than a merely convention norm*.[90]

This way of creating custom is to be distinguished from the ordinary customary process triggered by a new treaty rule, because the latter entails 'a gradual build-up of customary law through the "traditional" process whereby the pool of States engaging or acquiescing in a practice gradually widens',[91] whereas under the 'own impact' process, the treaty itself generates the customary rule because States manifest their clear intention for it to do so. This also overcomes the problems discussed earlier with treating conduct connected with the treaty as relevant State practice or evidence of an *opinio juris* for the purposes of the two-element approach to the identification of a customary rule. The ILA Committee 2000 Report states that the prohibition of the threat or use of force in article 2(4) is a rare example of a treaty giving rise to a new customary rule of its own impact.[92]

In the *North Sea Continental Shelf Cases*, the ICJ set out the following requirements for this process to occur. First, the treaty provision must be 'of **a fundamentally norm-creating character** such as could be regarded as forming the basis of a general rule of law'.[93] The prohibition in article 2(4) can clearly be considered to meet this requirement, given that it has been

[89] *North Sea Continental Shelf Cases*, n. 3, para. 71.
[90] ILA 2000 Report, n. 7, 51–2.
[91] *Ibid.*, 53–4.
[92] *Ibid.*, 52.
[93] *North Sea Continental Shelf Cases*, n. 3, para. 72, emphasis added.

recognised as the 'cornerstone' of the international legal order and is widely regarded as a norm of *jus cogens* (discussed in Chapter 3). In the *North Sea Continental Shelf Cases*, the ICJ found that the article in question in that case was not of a fundamentally norm-creating character for three reasons, namely, that the rule was subject to a 'primary obligation'; that it was subject to a legally uncertain exception of 'special circumstances' and 'the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule'; and third, the treaty permitted reservations to the article in question.[94] The problems identified by the Court in that case apply somewhat to article 2(4): it is subject to an exception of article 51 self-defence and Chapter VII enforcement measures, and there are 'very considerable, still unresolved controversies as to the exact meaning and scope' of the prohibition and its exceptions.[95] However, unlike that provision, it is not permitted to make reservations to article 2(4) and it is not subject to other primary obligations. Furthermore, the UN Charter itself is designed as a fundamentally important legal document aimed at universal adherence, and article 2(4) holds a central place within it. The rule in article 2(4) can therefore be considered to meet this requirement.

Second, the treaty provision must be '**accepted as such by the opinio juris**' – that is, accepted that it is of a fundamentally norm-creating character. As set out earlier in the chapter, there is ample evidence of an *opinio juris* that the prohibition of the use of force set out in article 2(4) is binding on all States as a matter of customary international law. Article 2(6) of the UN Charter, which extends the obligations in article 2 to non-UN Member States, could also be viewed as evidence of an *opinio juris* that through article 2(4), States intended to create a *new* rule of customary international law binding on all States. Since the obligation in article 2(4) was not already a rule of customary international law at the time of the establishment of the UN Charter (as argued in Chapter 1), then article 2(6) appears to create a treaty obligation for non-parties.[96] Kelsen recognised this when he stated that '[f]rom the point of view of existing international law, the attempt of the Charter to apply to

[94] *Ibid*., para. 72. The Court stated that 'the faculty of making reservations to article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention'.

[95] *Ibid*.

[96] Interestingly, draft article 59 of 1966 draft VCLT (treaties providing for obligations for third States) does not mention article 2(6) of the UN Charter: International Law Commission, 'Yearbook of the International Law Commission 1966, Vol. II', n. 28, 68.

states which are not contracting parties to it must be characterised as revolutionary'.[97] Hence, '[i]n Article 2, paragraph 6, the Charter shows the tendency to be the law not only of the United Nations but also of the whole international community, that is to say, to be general, not only particular, international law'.[98]

Of course, it is problematic to take the position that treaty parties could create obligations for non-parties without their consent,[99] but as Stefan Talmon notes:

> The controversy has largely been mitigated by the fact that the principles enunciated in Art. 2(1) to (4) are today generally accepted as forming part of customary international law and some, such as the principle on the prohibition of the use of force in Art 2 (4), are even considered *ius cogens* and, as such, are binding on members and non-members alike.[100]

The controversy is also avoided if it is considered that rather than directly seeking to impose a treaty obligation on non-treaty parties, the inclusion of article 2(6) in the UN Charter may indicate that the parties wished to create more than a conventional obligation through the establishment of the UN Charter. This position holds that non-UN Member States are bound by the prohibition only indirectly through the UN Charter (since they could be subject to enforcement action/sanctions for failing to comply with the relevant principles), but the source of their legal obligation is customary international law. Regardless of the significance attributed to article 2(6) of the Charter, at any rate at least by the time of the 1970 Friendly Relations Declaration (which declared the obligation in article 2(4) as applying to all States), an *opinio juris* was shared among States that the prohibition of the use of force was a rule applicable to all States and not only to UN Member States, that is, as a matter of customary international law.

Third, there must be a **sufficient number of ratifications and accessions** to imply a 'positive acceptance of its principles': 'a very widespread and representative participation in the convention might suffice of itself, provided it

[97] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens, 1950), 110. This was referred to by Judge Jennings in his Dissenting Opinion in the *Nicaragua* case (n. 3, 532, footnote omitted): 'Kelsen would hardly have used the word "revolutionary" if he had thought of it as depending upon a development of customary law.'

[98] Kelsen, n. 97, 109.

[99] See VCLT, arts. 34 and 35.

[100] Stefan Talmon, 'Article 2 (6)' in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), vol. I, 252, 255, MN6, footnote omitted.

included that of States whose interests were specially affected.'[101] This suggests that the Court views participation in the convention through ratifications and accessions as a form of State practice for the purpose of identifying a rule of customary international law, which appears problematic, since without more, the parties by ratifying or acceding to the treaty are only accepting a conventional obligation and it does not indicate a belief that the rules expressed in the treaty are legally binding under customary international law.[102] In any case, the UN Charter was signed by fifty-one founding Member States in 1945 and presently enjoys near-universal ratification, and accordingly meets this criterion.

Fourth, '**State practice**, including that of States whose interests are specially affected, should have been both **extensive and virtually uniform** in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'[103] This is also problematic because as explained in Chapter 1, mere compliance with a treaty obligation does not provide evidence of an *opinio juris* that the obligation is also one of customary international law. However, it appears that this requirement is directed at ensuring the practice is 'sufficiently widespread and representative'.[104] It is difficult to apply this criterion to an obligation to refrain from conduct (i.e. the 'use of force'), and it is unfortunately true that there have been many instances of States resorting to force against one another since 1945. However, States resorting to force in violation of article 2(4) do not usually acknowledge this but rather justify their conduct by appealing to exceptions such as the right of self-defence in article 51. As the ICJ recognised in the *Nicaragua* case, perfect compliance is unnecessary for a rule to be established as customary and that '[i]f 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'.[105] Furthermore, as set out in Chapter 1, the obligation to refrain from the use of force has since been reproduced in many multilateral and bilateral treaties, resolutions of the UN General Assembly and other international organisations, accepted unilaterally by States which were not at the time Members of

[101] *North Sea Continental Shelf Cases*, n. 3, para. 73, emphasis added.
[102] See discussion in Chapter 1.
[103] *North Sea Continental Shelf Cases*, n. 3, para. 74.
[104] ILA 2000 Report, n. 7, 53–4 on the point regarding a treaty giving rise to customary international law of its own impact.
[105] *Nicaragua* case, n. 3, para. 186.

the United Nations and is frequently recognised as a cornerstone of the international legal system.

Therefore, the fundamentally norm-creating character of the treaty obligation in article 2(4), its acceptance as such in the *opinio juris* (including possibly due to the effect of article 2(6)), the near-universality of the UN Charter and the extensive and virtually uniform State practice with respect to the prohibition of the use of force set out in that article may be considered to fulfil the criteria set out by the ICJ in the *North Sea Continental Shelf Cases* for a treaty provision to give rise to a new rule of customary international law 'of its own impact.'

CONCLUSIONS: ARE THE CHARTER AND CUSTOMARY PROHIBITIONS OF THE USE OF FORCE IDENTICAL?

As the previous sections have argued, the customary prohibition of the use of force arose from article 2(4) of the UN Charter, either as a result of the normal process for the creation of a new rule of customary international law (with the challenges and caveats noted earlier) or exceptionally from the impact of the UN Charter. Due to the way the customary rule arose, it is likely to have been identical in content to the prohibition of the use of force in article 2(4) of the UN Charter at its inception and the two rules continue to exist in parallel.[106] States do not differentiate between the content or application of the prohibition under each source of law. Furthermore, States have not modified the customary prohibition by asserting claims that it is either narrower or broader than article 2(4). There are no statements to the effect that States differentiate between the application of the customary international law and article 2(4) treaty rules that this author is aware of. As a result, the content of the prohibition of the use of force under customary international law and article 2(4) of the UN Charter have not diverged from one another.

However, it is still possible that the scope and content of the prohibitions under each source of law could differ in some way due to the embedded nature of article 2(4) within the UN Charter and its explicit references to other

[106] In the *Nicaragua* case, the ICJ affirmed that when the content of treaty and customary rules are identical, they both continue to exist and apply. *Ibid*., paras. 177 and 179. (Green notes: 'Given that the UN Charter has been almost universally ratified, it would be difficult to see an alternate customary regime concerning the use of force as *overriding* the Charter provisions, though it may help to interpret them or augment them with provisions not provided for in the document (such as the requirements of necessity and proportionality).' James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009), 132–3, footnote omitted.

provisions which may contain requirements not applicable to the customary rule. For example, article 2(4) refers to the Purposes of the United Nations. The customary prohibition could be narrower if it does not contain an obligation to refrain from the threat or use of force *inconsistent with the Purposes of the United Nations*, except insofar as those purposes are also principles of customary international law or general international law (i.e. logically inherent to the international legal system itself). On the other hand, the Friendly Relations Declaration and other documents mentioned earlier regarding the prohibition constituting customary international law also mention the Principles and Purposes of the UN Charter, which seems to indicate that a use of force inconsistent with those Purposes and Principles is also a violation of customary international law. In any case, it is difficult to conceive of a use of force inconsistent with such Purposes but not against the territorial integrity or political independence of another State, rendering this possible difference moot.

Another way that the prohibition of the use of force in the UN Charter could be broader than the customary prohibition would be if the procedural limitations to the self-defence exception to the prohibition set out in article 51 do not apply (or do not apply to the same degree) under customary law. For example, it is possible that at least non-UN Member States have a right of self-defence under customary international law which is not procedurally curtailed by the UN Security Council reporting requirement and the limit imposed on the right to self-defence 'until the Security Council has taken measures necessary to maintain international peace and security' set out in article 51, with the result that there may be greater scope to use force under customary law than under the UN Charter. But this does not affect the finding that the content of the prohibition of the use of force under custom and article 2(4) of the UN Charter are identical, because the self-defence exception to the prohibition of the use of force (either under article 51 or custom) is better understood for this purpose, not as a carve-out clause that affects the scope of the prohibition itself but a circumstance precluding wrongfulness of acts that would otherwise fall within its scope.

Even if the content is identical, the *scope of application* of the customary prohibition could differ from article 2(4) in respect of the subjects of the rule. It has been argued by Albrecht Randelzhofer and Oliver Dörr that unlike article 2(4) of the UN Charter, which only applies between States, under customary international law, international organisations (IOs) capable of conducting military operations are also bound by the prohibition, such as NATO, the EU, ECOWAS and the United Nations, and that many IOs already state this in their own constituting documents and ad hoc declarations,

although this does not extend to individuals or groups.[107] This author is not aware of any State practice that has adopted the interpretation that non-State entities are *directly* bound by the prohibition of the use of force under customary international law and article 2(4) of the UN Charter from such IO declarations, although it is not excluded that the law could in future develop in this direction.

In conclusion, the prohibition of the use of force in article 2(4) of the UN Charter and under customary international law are likely to be presently identical in scope, although the possibility remains for future divergence. Chapter 3 will examine the consequences of this for the relationship between the treaty and customary rule, and the appropriate method for ascertaining the meaning of prohibited force under international law.

[107] Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), 200, 213, MN30–31.