

## PART II

# Elements of Prohibited Force

### INTRODUCTION

Having unentangled the relationship between the UN Charter and the customary prohibition of the use of force in Part I and thus determined that the most suitable approach to identifying the meaning of prohibited force is to focus on treaty interpretation, Part II will carry out a textual analysis of article 2 (4) of the UN Charter to identify the elements of prohibited force.

Some argue that due to the special nature of the UN Charter, different rules should apply to its interpretation than to other treaties.<sup>1</sup> However, whatever its unique character within the international legal system, the UN Charter is a multilateral treaty, 'and as such subject to the general law of treaties'.<sup>2</sup> Article 5 of the Vienna Convention on the Law of Treaties<sup>3</sup> (VCLT) confirms that '[t]he present Convention applies to any treaty which is the constituent instrument of an international organization . . . without prejudice to any relevant rules of the organization'.<sup>4</sup> The approach set out in article 5 of the

<sup>1</sup> See, for example, Stefan Kadelbach, 'Interpretation of the Charter' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), vol. I, 7, 73–4, who identifies four approaches to interpreting the UN Charter: classical positivism, international constitutionalism, critical approach challenging the first two approaches, and a pragmatic approach combining aspects of positivism with constitutionalism and critical approach.

<sup>2</sup> Georg Witschel, 'Article 108' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), vol. I, 2199, 2204, MN8, footnote omitted.

<sup>3</sup> *Vienna Convention on the Law of Treaties 1969* (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331 ('VCLT').

<sup>4</sup> Article 5 of the VCLT is considered to reflect customary international law, although the evidence to support this is limited and the ICJ has not yet pronounced itself on this question. However, 'it has been generally recognized that the rules of the Vienna Convention regarding treaty interpretation are applicable to constituent instruments of international organizations, but always "without prejudice to any relevant rules of the organization" . . . If it is understood in this broad and flexible sense it is clear that article 5 does reflect customary international law.'

VCLT was confirmed by the International Court of Justice (ICJ) in the *Nuclear Weapons Advisory Opinion*, in which it held that: 'From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply.'<sup>5</sup> The ICJ has held more specifically with respect to the UN Charter that '[o]n the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics'.<sup>6</sup>

The starting point for interpreting article 2(4) of the UN Charter is therefore to apply the process set out in the VCLT. The general rule of interpretation and the rule on supplementary means of interpretation are set out in articles 31 and 32 of the VCLT, which both apply as rules of customary international law.<sup>7</sup> Article 31(1) of the VCLT sets out the general rule of interpretation as follows: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' According to article 31(3) of the VCLT:

There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

Georg Nolte, 'Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' UN Doc A/CN.4/683 (International Law Commission, 7 April 2015) ('Nolte Third Report'), 32–3, paras. 83–85.

<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226, para. 19.

<sup>6</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion* [1962] ICJ Reports 151, 157; see also Nolte Third Report, n. 4, 9.

<sup>7</sup> International Law Commission, 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties Text of Draft Conclusions 1–5 Provisionally Adopted by the Drafting Committee at the Sixty-Fifth Session of the International Law Commission' UN Doc A/CN.4/L.813 (May 24, 2013) ('ILC'); Georg Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' (International Law Commission, 19 March 2013), 6, para. 8, footnotes omitted.

This work will thus apply the following principles to the interpretation of a prohibited ‘use of force’ under article 2(4) of the UN Charter:

- focus on a textual interpretation of article 2(4) by looking at the ‘ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’;<sup>8</sup>
- take into account ‘subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions’ and ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’, together with ‘any relevant rules of international law applicable in the relations between the parties’;<sup>9</sup>
- where appropriate, consider preparatory work of the UN Charter and ‘other subsequent practice’ as a supplementary means of interpretation;<sup>10</sup> and
- examine how the term ‘use of force’ is currently interpreted and applied by States.

Part II will apply these principles to a textual analysis of article 2(4), including subsequent agreements of States, to identify the elements of prohibited force.

<sup>8</sup> VCLT, n. 3, art. 31(1).

<sup>9</sup> *Ibid.*, art. 31(3). A ‘subsequent agreement’ is ‘an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions’ (ILC (2013), n. 7, draft conclusion 4, para. 1). ‘Subsequent practice’ is ‘conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty’ (draft conclusion 4, para. 2.). Such conduct includes tacit consent and pronouncements such as declarations and other official statements.

Decisions by a court or tribunal on the interpretation of a treaty (such as the ICJ interpreting the UN Charter) do not count as ‘subsequent practice’ for the purpose of treaty interpretation and instead ‘constitute special means for the interpretation of the treaty in subsequent cases, as indicated, in particular, by article 38 (1) (d) of the Statute of the International Court of Justice’: Nolte Third Report, n. 4, 7, para. 17.

<sup>10</sup> VCLT, n. 3, art. 32.

