THE VIRGINIA-GEORGETOWN MANUAL CONCERNING THE USE OF FORCE UNDER INTERNATIONAL LAW

RULES AND COMMENTARIES ON *JUS AD BELLUM*

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PRESS

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The Virginia-Georgetown Manual Concerning the Use of Force Under International Law: Rules and Commentaries on Jus Ad Bellum.

First published in 2024 by West Point Press
Taylor Hall, Building 600, Swift Road, West Point, NY 10996

Printed in the United States of America

ISBN: 978-1-959631-11-8 (paperback)
ISBN: 978-1-959631-12-5 (ebook)
LCCN: 2024943860

Cover design by Matthew Merrill
Interior design by Andy Meaden meadencreative.com

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INTRODUCTION

A. Overview

There is no subject more fundamentally important to the maintenance of global security than that of *jus ad bellum* — the rules and procedures for assessing the permissibility of a State's resort to force in its international relations. That is, when is it lawful for a State to use force in the international arena?

Despite its importance, however, efforts to develop a comprehensive and detailed articulation of the rules of *jus ad bellum* have been incomplete. Work to consolidate this body of law has been undertaken by several international law groups, particularly the International Law Association, under the leadership of Sir Michael Wood.[1] These efforts, however, have not always sought to replicate the approach adopted for manuals codifying aspects of the *jus in bello* (the law of armed conflict, also called international humanitarian law); that is, articulating Rules

1 International Law Association, Committee on the Use of Force, *Final Report on Aggression and the Use of Force* (2018). *See also* Institut de Droit International, *Bruges Declaration on the Use of Force* (2003); Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence, 55 Int'l & Comp. L.Q.* 963 (2006).

with Commentaries.[2] This project has aimed to emulate the approach employed for these manuals.

In 2018, two of the most universally recognized authorities on the law applicable to the use of force, Professor Yoram Dinstein and Professor John Norton Moore, made the decision to undertake a comprehensive restatement of contemporary *jus ad bellum* law. Based on the efforts of a Working Group composed of international experts, brought together by Professors Dinstein and Moore, this initiative has culminated in the formulation of the present "Virginia-Georgetown Manual on the Law Concerning the Use of Force: Rules and Commentaries on *Jus ad Bellum*" (the Manual).

B. Context

Among the key challenges of preparing a *jus ad bellum* manual is the nature of the law in this area.

Early efforts by the international community to address this basic issue occurred in the context of the 1919 League of Nations Covenant and the 1928 Kellogg-Briand Pact. Contemporary rules controlling the use of force are set forth in the 1945 United Nations (UN) Charter. Accordingly, the Background section of this Manual will review the principal history of efforts to develop substantive rules governing *jus ad bellum*, as well as the centrality of the UN Charter today.

As that discussion suggests, this is an area in which both treaty law – in the form of the UN Charter – and customary international law figure heavily as sources of international law. However, the UN Charter

2 *See, e.g.,* International Institute of Humanitarian Law, San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald-Beck ed., 1995); Program on Humanitarian Policy and Conflict Research at Harvard University, Manual on International Law Applicable to Air and Missile Warfare (2009). Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence, 55 Int'l & Comp. L.Q.* 963 (2006) did adopt Rules, but with a scope limited to self-defense. Notable mention should also be made of the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Michael N. Schmitt ed., 2017), which includes use of force among its discussion of rules applicable to cyber operations.

provisions are often brief and vague. They have not been interpreted or applied in a uniform or consistent manner by the UN Security Council or by individual Member States.

Further, determining the content of *jus ad bellum* is complicated by uncertainty as to whether a principle has crystallized as a customary international legal rule. While an inherent, customary right of self-defense has long been recognized as preexisting the Charter, the concepts of "aggression," "armed attack," and "self-defense," especially, have been consistently debated, and the parameters of these principles have undoubtedly evolved.

Numerous States have issued White Papers and other forms of documentation that have spoken to their understanding of the specific meaning of these rules to justify a particular resort to the use of force. Likewise, the scholarly literature in the *jus ad bellum* is vast. Positions in this area are, however, often informed by views about what the law should be, rather than a close consideration of rules of treaty interpretation or the doctrinal expectations of customary international law (themselves imprecise).

The lack of clarity in this critical area of the law does not serve global security. And, while there may never exist unanimous agreement within the international community as to precisely when, where, and how a State might use force, it is clear that a consensus has evolved among an ever-growing majority of States regarding the governing use-of-force norms. It is, accordingly, in this context that the drafters of this Manual have made a concerted effort to set forth Rules, which, in their view, objectively assess the existing international agreements and demonstrated State practices and opinions generating these norms.

C. The Process

1. Initial Drafting

In March 2018, Professors Dinstein and Moore met in Charlottesville, Virginia and made the decision to work toward the publication of a statement of the rules applicable to the use of force by States in the 21st century. It was also determined that this project would be undertaken—and funded by—the Center for National Security Law (CNSL) at the University of Virginia (UVA) School of Law. As the first step in this process, a small Planning Group (Planning Group members are identified at Paragraph E) met in Charlottesville in November 2018. Over a two-day period, the Planning Group identified specific topics that were to be dealt with in the Manual, as well as international experts to address each subject.

In early December, the co-chairs of the Project (Professors Dinstein and Moore) issued invitations to these individuals to become members of a working Group of Experts that would undertake this initiative, requesting that each produce a research paper dealing with one of the topics identified by the Planning Group. (The Group of Experts is identified at Paragraph E.)

Participants were advised to address the rules of international law that apply in their area, defended to the greatest extent possible with reference to primary sources (treaties, UN Security Council Resolutions, State practice etc.), rather than sources of a secondary nature (books and scholarly articles). Additionally, in synthesizing the content of their papers, each author was requested to determine specific Rules applicable to their subject (a minimum of five; a maximum of ten).

The first meeting of the Group of Experts occurred from 24-26 June 2019, in Charlottesville, Virginia, at the CNSL. Over a three-day period, the Group of Experts discussed, in detail, approximately half of the papers prepared, formulating Rules for each of the topics discussed, as well as accompanying Commentary. These Rules and Commentaries were then

consolidated and formatted as the first portion of a Draft Manual, later provided to the Group of Experts for review and comment.

A second meeting of the Group of Experts took place from 11-13 November 2019, at which the member comments regarding the initial, partial draft of the Manual were assessed, the remaining expert papers were discussed, and topic-specific Rules and Commentaries related to these papers were drafted.

At the close of this session, the Project co-chairs named a Drafting Committee (DC) (identified in Paragraph E), tasked with producing a consolidated draft of the Manual that would then be circulated to the Group of Experts for further review and comment.

The Manual DC met at the CNSL, from 22-24 January 2020, and developed a Draft Manual incorporating all of the previous work accomplished by the Group of Experts. This draft was distributed to these experts in late January 2020, with a 15 March 2020 deadline for comments established. While a second DC meeting was scheduled to occur in April 2020, this, and several subsequently planned DC sessions were thwarted by the ensuing COVID pandemic. It was not until 25-27 April 2022, well over two years later, that the DC was able to convene.

Upon the closure of the CNSL as a stand-alone entity at the UVA Law School in 2020, support for the Manual project was quickly assumed by the Georgetown Law Center on National Security, Washington, DC. Accordingly, it was this Center that hosted and provided administrative support for not only the April 2022 DC session, but for all the in-person committee meetings that followed. While both of these Centers were instrumental in the production of this Manual, as reflected in its name, the Manual's titling is not meant to indicate a formal endorsement of the Manual by either of the law schools housing these Centers.

In the succeeding months, the DC produced a second draft Manual, taking into consideration all comments previously provided by the Group of Experts. This draft was then forwarded to these experts for yet another review. Additionally, Professor Gabriella Blum, the Rita E. Hauser Professor of Human Rights and Humanitarian Law, Harvard

Law School, an accomplished international law scholar, was called upon to conduct a Peer Review of the Draft Manual. Professor Blum's review contributed substantially to the Manual's development. It should not, however, be viewed as a formal endorsement of the Manual.

2. Verification and Finalization

The repeated drafting and redrafting of the Manual served to provide the DC with insight into the Manual's omissions and, in some cases, its lack of clarity. Thus, following the input of the Group of Experts and the Peer Review, the DC further revised the Manual in a session occurring from 24-25 August 2022. During this process, the committee addressed the identified omissions and uncertainties by crafting new and revised Rules and Commentaries.

This revision of the Manual obliged the DC to undertake a careful reconsideration of the Rules, as a whole, to ensure that they remained true to the purpose of reflecting a real-world application of international norms. Accordingly, to verify their work, the DC met with a number of government and organizational representatives in May 2023, to solicit their views on the Manual's content. Participation by these representatives was expressly not intended to indicate government or institutional approval, endorsement, or authorization, in whole or in part, of the Rules and accompanying Commentary of this Manual. Nevertheless, the DC profited significantly from its extensive discussions with the representatives concerned and identified a number of potential revisions to the Manual that would serve to make it a more productive and user-friendly document.

The DC then worked, over the following months, to produce a draft of the Manual that would reflect both a thorough consideration of the previously noted recommendations made by government and organizational representatives, as well as a testing of the draft Rules against the original guiding principle of the Manual: a reliance on primary sources. In its original conception, the Manual was to be designed as a lean, concise document. Rules were to be supported by

primary sources, but with limited footnoting. However, following the May 2023 meeting with government experts, the DC specifically sought to enhance the Manual's references to State practice,[3] or to the practices or conclusions of international tribunals or organs, in those areas in which its consultation with the above-noted government representatives had indicated that certain Rules and Commentaries required revision or enhanced explanation. Accordingly, readers will now find detailed footnoting associated with those Rules and Commentaries that generated the most extensive discussion over the course of the drafting process.

Following this August 2023 re-draft of the Manual, Professor Dinstein made the decision to withdraw from the Manual project. His death several months thereafter was a significant loss to the field of international law. He was an intellectual giant and will be sorely missed by all who knew and worked with him. Suffice it to say that his wisdom and unsurpassed knowledge of this particular area of the law contributed immeasurably to the Manual's development. During its final deliberations in 2024, the DC worked to finalize Rules and Commentaries that they determined would best reflect Professor Dinstein's vision and expertise.

The redrafted Rules and Commentaries were recirculated to the Group of Experts for final comments. With these comments in hand, a final product was then agreed upon at a meeting of the DC held in Charlottesville, Virginia from19-20 February 2024.

The result is the "Virginia-Georgetown Manual on the Law Concerning the Use of Force: Rules and Commentaries on the *Jus ad Bellum*."

3 "State practice" in the context of this Manual refers to state positions on the legal matter at issue. It is not intended to refer to a broader meaning of "state practice" in discussions of the components of customary international law.

D. The Role of the Manual's Rules and Commentaries

This Manual reflects the reasoned views of the members of the Drafting Committee, as informed by the assessments of the Group of Experts and other commentators involved in this project. While no contention is made that the Manual has binding force, it must again be emphasized that it is intended to reflect an objective assessment of the existing law (*lex lata*) of the *jus ad bellum*.

It is hoped that this Manual can serve as a ready and valuable reference for government representatives, both civilian and military, as well as for academics. It sets forth, in a structurally efficient and comprehensive manner, the legal issues associated with each of the lawful categories of the use of force deemed permissible within the context of the UN Charter and customary international law. Toward this end, its Rules and Commentaries offer succinct statements and explanations for the positions taken by the Manual's drafters on each identified instance of a lawful resort to force. In those rare instances in which consensus could not be achieved, this is noted.

This Manual, as a whole, may not be embraced as a restatement of *jus ad bellum* law by those who harbor varied views on this subject. A discussion of these different perspectives is welcomed, especially if it comes in the form of a detailed critique of the Rules and Commentaries, rather than in that of a simple reversion to general objections lacking any meaningful specificity. A broad, clearly articulated consensus within the international community regarding the contemporary rules regulating the use of force — rules equally applicable to every State within that community — is essential.

Since the advent of the Charter, there have occurred more than 30 major armed conflicts and countless lesser uses of force and acts of terrorism. No knowledgeable observer wants to turn back the clock to the pre-Kellogg-Briand and pre-Charter days of legally unconstrained

uses of force. The Charter, in prohibiting the use of force, but preserving the right of individual and collective defense, is a core fundament of a stable international order. Indeed, a strong and effective right of defense is an essential element in realizing the first Purpose of the Charter, as set out in Article 1(1), that of "suppression of acts of aggression." This Manual is dedicated to achieving a more peaceful world served by these core Charter principles.

E. Participants in the Production of the Manual

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- John Norton Moore (United States)
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The Drafting Committee also acknowledges and thanks the two anonymous peer reviewers organized by West Point Press.

BACKGROUND

A. An Overview History of *Jus ad Bellum*

At the beginning of the 20th Century, States began slowly to place legal limits on the authority of States to use force in international relations. Thus, the Hague Conference in 1907 adopted a Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. The Covenant of the League of Nations, adopted after World War I, placed a variety of procedural restrictions as to how states could resort to force. But, the most important early *jus ad bellum* development was the Treaty of Paris (Kellogg-Briand Pact) of 27 August 1928. Pursuant to this French-United States initiative, driven by the horrors of World War I a decade earlier, the parties pledged not to resort to war as an instrument of national policy. Thus, Article 1 of the Treaty of Paris provides:

> 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.

This Treaty contained no article supporting the right of individual or collective defense. Instead, correspondence exchanged by the negotiators makes it clear that the Treaty did nothing to impair the inherent right of

defense. The representative of the United States, which had drafted the initial text, said: "There is nothing in the American draft of an anti-war treaty to restrict or impair in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion, and it, alone, is competent to decide whether circumstances require recourse to war in self-defense."[4]

In the interwar period, there was no fixed definition of self-defense, although state practice tended to hew to a limited set of circumstances justifying self-defense (an attack or invasion, for instance), as opposed to older and broader concepts of more preventative defensive wars. One formula rediscovered in scholarly writings was that articulated by US Secretary of State Daniel Webster in the 1837-1842 dispute over the destruction by the British of the American steamboat *Caroline* on the US side of the Niagara River, across from Upper Canada. In correspondence with the British authorities, Webster wrote that: "It will be for [the British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive."[5] This Webster formula would come to dominate understandings of self-defense in the post-Second World War period, as it embraced concepts of necessity and proportionality-concepts now accepted as customary international law limits on self-defense that are consistent with the Charter. Significantly, many jurists also came to regard the *Caroline* affair as the index case for "anticipatory" self-defense: defense exercised prior

4 For a reference to the above quotes in the diplomatic correspondence concerning the Pact of Paris, *see* Quincy Wright, *The Meaning of the Pact of Paris*, 27 Am. J. Int'l. L. 39, 42-43 (1933).

5 Letter from Daniel Webster to Henry Stephen Fox (Apr. 24, 1841), *in The Trial of Alexander McLeod, Circuit Court, 5th Judicial District of the State of New York (Oct. 4, 1841), in* 2 Gould's Stenographic Reporter 365, 369 (Marcus T.C. Gould ed., 1841).

to the blow of an armed attack.[6]

During this post-war period, the world moved from the League of Nations to the United Nations. Not surprisingly, the final draft of the Dumbarton Oaks Proposal, preparatory to the San Francisco Conference establishing the United Nations, drew heavily on the Kellogg-Briand model. While expanding the prohibition on the use of force as an instrument of national policy from "war" to "threat or use of force," like Kellogg-Briand, the draft proposal for the United Nations said nothing about defense or other lawful uses of force. Rather, as with the Pact of Paris, defense and other uses of force consistent with the purposes of the organization were viewed as implicit in the draft of Article 2(4) of the Charter. As will be discussed below, in connection with the *travaux* of the use of force provisions of the UN Charter, Article 51 of the Charter was added to assuage the concerns of Latin American States and assure them that their existing right of collective defense under regional arrangements (at that time the Act of Chapultepec) would remain unimpaired.

B. The Centrality of the United Nations Charter

As this overview history demonstrates, the UN Charter, adopted in 1945 at the conclusion of World War II, today governs the lawfulness of the initiation or use of force in international relations. This law is referred to by international law experts as the law of *jus ad bellum* and is the subject of this Manual. *Jus ad bellum* is to be differentiated from the law applicable to conduct during hostilities, referred to as *jus in bello*. While arrangements such as the North Atlantic Treaty Organization (NATO) or the Rio Treaty can prescribe additional treaty restrictions for State parties, affecting obligations, procedures, or consent for the parties, they cannot override the central Charter norms. Article 103 of

6 In fact, an "armed attack" was well underway on the territories of Upper Canada, launched by insurgents operating from the United States, by the time the *Caroline* was destroyed. For an examination of the *Caroline* incident and the evolution of self-defense in international law, see Craig Forcese, Destroying the Caroline: The Frontier Raid that Reshaped the Right to War (2018).

the UN Charter provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The Charter is supplemented by customary international law, especially in the area of self-defense. The Charter recognizes the existence of an inherent right to self-defense in Article 51. This right, however, is supplemented by the requirements of customary international law, in so far as they are not inconsistent with the Charter. Thus, though the Charter does not specifically mention the customary law requirements of "necessity" and "proportionality," it is well accepted that these principles of customary law are not inconsistent with the Charter and apply to uses of force by States, as specified in this Manual.

It is also further worth noting that the core Charter prohibition on the use of force is, today, customary international law; indeed, it is a peremptory norm of customary international law (*jus cogens*). This means that, in the words of Article 53 of the Vienna Convention on the Law of Treaties, it is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

These matters are addressed in the Rules of this Manual.

C. United Nations Charter Texts and Interpretive Rules

Due to the importance of the Charter, the balance of this introduction focuses on the question of its interpretation. Interpretation of the meaning of the Charter with respect to use of force issues, as with other issues, begins with the principally relevant text of the Charter, reproduced below. But, if the textual language is "ambiguous or obscure," recourse may then be had to supplementary means of interpretation, including the *travaux préparatoires* or "negotiating history" of the treaty. As is spelled

out in Article 32 of the authoritative Vienna Convention on the Law of Treaties:[7]

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 [including the terms of the treaty in their context], or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Thus, for example, any textual ambiguity inherent in giving a meaning to the combined use of force provisions of the Charter should properly examine the "circumstances of [the Charter's] conclusion" and the "preparatory work of the treaty" with respect to these articles.

The most critical texts for analyses of the lawful categories of use of force under the UN Charter, other than those concerning peacekeeping actions by the General Assembly, are Articles 2(4), 39, 41, 42, 51, 52(1), 53(1), and 54. The full texts of these relevant Charter articles are set forth as an annex to this Manual.

It is useful, however, to reproduce here the language of Articles 2(4) and 51. Article 2(4) provides:

> 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.

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7 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. It is, of course, the case that the UN Charter predates the Vienna Convention. However, its rules are widely regarded as customary international law. An interpretation methodology centered on text, with the prospect of consideration of negotiating history when faced with uncertainty, appears to have been an accepted practice in the mid-20th century. Interpretation approaches also took into account subsequent practice establishing the agreement of the parties regarding a treaty's interpretation. *See* International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, 2 Y.B. Int'l L. Comm'n 187, 220-23 (1966).

Article 51 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.[8]

It is important to note that there are several inherent textual ambiguities in the text of the use of force provisions of the Charter which are crucial to understanding the meaning of these provisions. First, there is a semantic ambiguity in the meaning of the phrase "against the territorial integrity or political independence" added to Article 2(4) at the behest of the Australian Delegation at the founding San Francisco Conference. Does this phrase mean that, to violate this provision, use of force must seek to alter a frontier or remove political independence? Or does it mean that any unconsented presence on the territory of a foreign state would violate this provision? That is, does this phrase provide a specific example clarifying that the most historically concerning threats in illegal use of force – altering a frontier or removing political independence – are banned? Or does the phrase provide a condition qualifying all uses of force?

Second, there is a syntactic ambiguity as to the relationship between Articles 2(4) and 51 (on self-defense). Does Article 2(4), negotiated in Commission I, Committee 1 on the Purposes and Principles of the Charter, dominate if in conflict with Article 51? Or does Article 51, negotiated in Commission III, Committee 4 on Regional Arrangements,

8 The equally authentic French-language version of Article 51 reads as "agression armée," translating as "armed aggression" rather than "armed attack."

dominate if in conflict with Article 2(4)? Moreover, these Articles would seem inherently in conflict with respect to the scope of individual and collective defense, since Article 2(4) is the Article in the Charter banning the use of force. Use of force not in violation of this provision is not in violation of the Charter. Further, Article 51, though negotiated for the current Chapter VIII of the Charter with respect to regional arrangements, is now located in Chapter VII dealing with "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."

Additional syntactic and semantic ambiguities are inherent in the language of Article 51 itself. For instance, if the right of individual or collective self-defense is an "inherent" or "natural" right, as set out in Article 51, can it be limited by the subsequent phrase in Article 51, "if an armed attack occurs"? Further, does the language in Article 51 of "if an armed attack occurs" mean "if, and only if, an armed attack occurs," or is it simply a critically important example as to when the right of self-defense is preserved – that of the occurrence of an armed attack. Finally, what is the significance of the difference, in the equally authentic French and English versions of Article 51, between the French use of "armed aggression" ("agression armée") and the English use of "armed attack"?

These semantic and syntactic ambiguities in the text of the Charter have led to two significantly different traditions in interpreting the use of force provisions of the Charter. On the one hand, a tradition followed by highly qualified international publicists from the time of the Charter looks to Article 2(4) of the Charter and interprets that provision as not limiting the preexisting right of self-defense. This tradition notes that the use of force provisions were negotiated in Committee 1, Commission I, dealing with the "Preamble, Purposes and Principles" of the Charter, which centrally included the scope of the ban on the unilateral use of force. It was this negotiation which produced Article 2(4) of the Charter. Article 51 was both precipitated by and thought about in the context of its relation to collective defense through regional arrangements. In addition, Committee I, Commission I stressed in its final report that:

"[t]he use of arms in legitimate self-defense remains admitted and unimpaired." Further, the text itself of Article 51 describes the right of individual and collective self-defense as "inherent."

On the other hand, a view held by other highly qualified international publicists interprets the use of force provisions of the Charter restrictively. This tradition focuses on the language in Article 51 of "if an armed attack occurs" as restricting the scope of the pre-Charter right of self-defense. A starting point for many in this tradition is the belief that the "if an armed attack occurs" language of Article 51 is of such sufficient clarity that no resort to *travaux* is permissible. And, this tradition tends to view the language of "against the territorial integrity or political independence of any state" in Article 2(4) as not just a ban on altering territorial boundaries or removing political independence, but rather as a condition qualifying all uses of force. This tradition sometimes also invokes a specific discussion within the United States delegation at the San Francisco Conference which some feel casts doubt on the right of anticipatory defense.[9]

Significantly, the black-letter Rules in this Manual have been agreed across this doctrinal divide and take into account 75 years of the practice of States and the Security Council itself. It might be noted, however, that the wide contemporary acceptance of a right of interceptive defense (at a very early stage of an armed attack) or anticipatory defense (in settings of imminent threat) seems to be accepted by adherents of both traditions, despite, at least in the case of anticipatory defense, its textual conflict with the restrictive tradition emphasis on the "if an armed attack occurs" language of Article 51. Some adherents to the restrictive tradition also argue for a lawful right of humanitarian intervention, despite its textual conflict with their restrictive reading of Article 2(4).

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9 This reference to records of private discussions within the United States Delegation to San Francisco is not really *travaux* as this concept is most widely understood, as true *travaux* must have been accessible to all the original negotiating parties. *See* Young Loan Arbitration (Belg., Fr., Switz., U.K., U.S. v. F.R.G.), 59 I.L.R. 495, 544 (Arb. Trib. Agrmt. German Ext. Debts 1980) ("It must first be stressed that the term [*travaux preparatoires*] must normally be restricted to material set down in writing – and thereby actually available at a later date. ... A further perquisite if material is to be considered as a component of *travaux preparatoires* is that it was actually accessible and known to all the original parties.").

Under the Vienna Convention on the Law of Treaties, Charter interpreters may also consider any subsequent practice in the application of the Charter which "establishes the agreement of the parties regarding its interpretation."[10] The decisions of the International Court of Justice (ICJ), insofar as they are interpreting the UN Charter, may also, in practice, constitute an influential source of understanding of treaty rules.

As set forth in Article 92 of the Charter, the ICJ is: "the principal judicial organ of the United Nations." At the time of preparation of this Manual, the ICJ has decided five major *jus ad bellum* cases. Insofar as these cases reflect the *jus ad bellum* law of the UN Charter or customary international law, they are incorporated in this Manual. It should be understood, however, that, except between the parties to each of these cases, ICJ decisions have no binding force. This is as true for use-of-force cases as for all other categories of ICJ decision. Thus, the Charter itself provides in Article 94(1) that the Charter's obligation for member States to comply with a decision of the ICJ applies only "in a case to which [the member State] is a party." Further, Article 59 of the Statute of the International Court of Justice (the Statute) additionally provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Article 38(1)(d) of the Statute—completing the listing of the law to be applied by the ICJ following the Article 38(1)(a), (1)(b) and (1)(c) listing of conventions, custom, and general principles of law recognized by civilized nations—includes judicial decisions as a source of law, along with "the teachings of the most highly qualified publicists." With respect to both of these categories set out in (1)(d), the Article states they are "subsidiary means for the determination of rules of law." In addition, the provisions concerning amendment of the UN Charter, which, of course, include amendment of the use-of-force provisions at the core of the Charter, contain no provisions for amendment by judicial decision. Instead, as provided in Article 108 of the Charter, amendments of the Charter, including change in the use-of-force provisions, would require ratification by *two-thirds* of

10 Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

the members of the General Assembly and *all* permanent members of the Security Council.

Nevertheless, decisions of the ICJ are looked to as an indication of how the Court might decide future cases. And, in this regard, unanimous decisions of the Court are more likely to have an enduring impact. Further, the Court's decisions may also substantially influence an understanding of the rules of customary international law.

The decisions of the ICJ have influenced State and scholarly understanding regarding the meaning of the use-of-force provisions of the Charter. Still, one reality underlying this influence is that, typically, these use-of-force decisions have reflected a divided Court.

D. The *Travaux Préparatoires* of the United Nations Charter

The final portion of this Background section will provide a summary of the most relevant UN Charter *travaux préparatoires*, responding in part to some of the interpretive challenges discussed above.

Just as with the 1928 Kellogg-Briand Pact, it was understood that the prohibition on force in Article 2(4) of the UN Charter did not ban individual or collective self-defense. Initial drafts contained no Article 51 or reference to the right of defense, following the example of Kellogg-Briand. Thus, the final draft of the Dumbarton Oaks Proposal, that is the final draft of the preparatory conference for the United Nations, provided:

> *Paragraph 4, Section II*
>
> All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the organization.[11]

11 Paragraph 4 of Section II, as modified by the Australian proposal, became Article 2(4) of the UN Charter in the last minutes of the San Francisco Conference.

It is important, in assessing the *travaux* of the Charter, to understand that the principal discussion concerning lawfulness of the use of force occurred in Committee 1 of Commission I (Committee I/1), dealing with the purposes and principles of the United Nations. This is the discussion which produced Article 2(4) of the Charter. Indeed, it was initially assumed that Article 2(4) would be the only provision in the Charter concerning both the ban on the use or threat of force as a modality of change (or force as an instrument for conducting foreign policy) and implicitly retaining the lawfulness of defense and other uses of force not "inconsistent with the purposes" of the United Nations.

The discussion in Committee I/1, in turn, was based on the final draft of the Dumbarton Oaks preparatory conference noted above. Note the generalized nature of this formulation, which was heavily influenced by the position of the United States with respect to the final draft, and which was focused only on whether the use of force was "inconsistent with the purposes of the organization." The only significant change to this formulation in Committee I/1 was an addition suggested by Australia, adding the phrase "against the territorial integrity or political independence," so that the final Article 2(4) provided: "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." This addition, according to the head of the Australian delegation, H.V. Evatt, was intended to clearly include "the most typical form of aggression . . . [thus placing] the aggressor clearly in the wrong at the bar of the United Nations." Subsequently, the Deputy Prime Minister of Australia stated that: "The application of this principle should insure that no question relating to a change of frontiers or an abrogation of a state's independence could be decided other than by peaceful negotiation. It should be made clear that if any state were to follow up a claim of extended frontiers by using force or the threat of force, the claimant

would be breaking a specific and solemn obligation under the Charter."[12] That is, the purpose of the Australian addition was to make clear that aggression for the purpose of altering territorial integrity or removing political independence, the two principal use-of-force concerns, was covered by the Article 2(4) ban. There is no evidence that the purpose of this language was to, *ipso facto*, ban any unconsented "presence" on the territory of a State. With respect to the right of defense, Commission I, Committee 1, stressed in its final report that "[t]he use of arms in legitimate self-defense remains admitted and unimpaired." Further, subcommittee I/1/A, responsible for drafting an acceptable proposal for what was adopted as Article 2(4), reported that "it was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished."[13]

The discussion leading to Article 51 took place in Committee 4 (dealing with Regional Arrangements), which was a subcommittee of the broader Commission III dealing with the Security Council. Unlike Committee 1 of Commission I, Commission III (and its subcommittees) dealt with the "Security Council" and was not charged with the "Purposes and Principles" of the Charter. As such, the discussion leading to Article 51 was a discussion focused on the relationship between regional arrangements and the Security Council, rather than one focused on the right of defense under the Charter. As just noted, the right of individual and collective defense was accepted as implicit in Article 2(4) and had been dealt with in Committee 1 of Commission I. Article 51 emerged in Committee 4 of Commission III as an initiative of the American States in view of their recently concluded Act of Chapultepec, a predecessor to the collective Rio Treaty for the American States. These States were simply seeking to clarify that their Act of Chapultepec regional defense system would be consistent with the UN Charter and that their right of individual and collective defense would not be taken away by the

12 U.S. Dep't of State, The United Nations Conference on International Organization, San Francisco, California, April 25 to June 26, 1945: Selected Documents 270 (1946).

13 U.N. Conference on International Organization, April 25 – June 26, 1945, *Report of Rapporteur of Subcommittee I/1/A to Committee I/1*, U.N.C.I.O. Doc. 739, I/1/A/19(a) (June 1, 1945).

Security Council. Subsequently, a Coordination Committee placed the Article at the end of the current Chapter VII of the Charter, a Chapter primarily dealing with Security Council authority in dealing with "Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Article 51 was placed at this location primarily because of the inclusion in Article 51 of conditions concerning the relationship of that Article with the Security Council. Another view at the time as to the proper final location of the Article was that, given that it was drafted in connection with the relationship between the Council and regional arrangements, it should be placed in the current Chapter VIII of the Charter dealing with such arrangements. There is no express indication in the *travaux* that Article 51 was drafted to represent the entire right of defense under the Charter, a core issue which was within the province of Committee 1 of Commission I.

In summary, there is no indication in the *travaux* that delegates to the San Francisco Conference discussed, within the Conference sessions, narrowing the customary right of self-defense, banning any customary right of anticipatory self-defense, banning the customary right of use of force for the protection of nationals, or banning whatever preexisting right of humanitarian intervention might have existed at the time. The Charter, however, was clearly intended to broaden the Kellogg-Briand ban on use of force as an instrument of national policy by adding a ban, as well, on the "threat" of use of force.

RULES AND COMMENTARIES

Section I: Application

Rule 1

(a) For the purposes of these Rules, a "State" is deemed to be an entity objectively meeting the criteria of statehood under international law; namely, that it possesses:

i) land territory;

ii) a permanent population;

iii) a Government; and

iv) independence, in the sense that it has the capacity to enter into foreign relations.

Commentary

- The four criteria of statehood are clear, and they are authoritatively enumerated, e.g., in the 1933 Montevideo Convention.[14] These four criteria may be considered integral aspects of customary international law.

14 Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

- It cannot be denied that, in practice, there are numerous controversies regarding the statehood of specific entities, such as Kosovo. However, such disputes, like all other disputes in the international arena, must be settled by peaceful means.
- Recognition of an entity as a State is regarded by international law as declaratory in nature. That is to say, recognition by itself does not create States, and lack of recognition does not deprive entities of their statehood.
- The fact that the specific boundaries of a State are contested by other States does not affect its status as a State.

(b) The State comprises:

i) all organs defined as part of the State under its internal law, whether exercising legislative, executive, judicial or any other functions of a central Government, or of a territorial unit of the State; and

ii) other entities exercising elements of governmental authority under the law of the State, while they exercise that authority.

These organs and entities are defined by the internal law of the State, and thus comprise the State in law (the *de jure* State).

Commentary

- As noted by the International Law Commission (ILC) in the commentary on Article 4 of the Articles on State Responsibility, State organs comprise "all the individual or collective entities which make up the organization of the State and act on its behalf."[15]
- Article 5 provides that "the conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the

15 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 4*, 2 Y.B. Int'l L. Comm'n 47 (2001) (Commentary).

governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." Additionally, Article 9 contains related rules for conduct carried out in the absence or default of the official authorities.

(c) Even if they are not part of the *de jure* State within the meaning of paragraph (b), other entities may be equated with State organs when the entity acts in complete dependence on the State, or when they are merely an instrument of that State. These entities constitute part of the State in fact (the *de facto* State).

Commentary

- Putatively non-State entities may be considered part of a State by operation of international law.
- In the specific context of the conduct of non-State militias, the ICJ has noted circumstances when the entity is, in essence, a *de facto* organ of the State due to its relationship of complete dependence on the State.[16]
- The level of control required to meet this standard of complete dependence is a high one, and will be reached only in exceptional circumstances.[17]

(d) Even if they are not part of the *de jure* or *de facto* State within the meaning of paragraphs (b) or (c), the conduct of entities is attributable to the State when:

i) these entities act on the instructions of, or under the direction or control of, the State in carrying out the conduct;

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16 Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 43, ¶ 392 (Feb. 26). *See also* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 109 (June 27).

17 Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 43, ¶ 393 (Feb. 26).

ii) the State acknowledges and adopts the conduct as its own; or

iii) other Articles in the International Law Commission's Articles of State Responsibility apply to attribute such conduct to the State.

Commentary

- A distinction must be drawn between circumstances when international law conflates a putative non-State entity with the State on a *de facto* basis in paragraph (c) of this Rule, and circumstances when, although the entity remains a non-State entity, its precise conduct in question becomes "attributable" to the State.[18]
- There is some basis to envisage the existence of a bespoke, special rule for attribution in the *jus ad bellum.*[19] It remains uncertain, however, that this special standard exists.
- In the absence of any clear basis to conclude that the *jus ad bellum* contains its own special rule on attribution, attribution in the *jus ad bellum* is to be determined by general customary international law. The ILC's Articles of State Responsibility describe circumstances in which international law will attribute to a State the precise conduct of entities which are not part of a

18 Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 43, ¶ 396 (Feb. 26).

19 In its judgment in the *Nicaragua* case of 1986, the International Court of Justice observed that an armed attack included, not simply the conduct of a State's own organs, 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.'" *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14 at para 195, citing the Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX). It also invoked the following standard from UN General Assembly Resolution 2625: "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." *Ibid* at paras 191 and 228, citing *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) (24 October 1970).

State under its internal law.

- Article 8 provides that "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions, or under the direction or control, of that State in carrying out the conduct."
- However, in relation to the law of armed conflict, there existed a sharp debate between the International Criminal Tribunal for the former Yugoslavia (ICTY) (in the *Tadic* case) and the ICJ (in the *Nicaragua* case,[20] the *Armed Activities* case of 2005,[21] and the *Genocide* case of 2007[22]) as to whether the standard of attribution to the State requires "effective control" of the actual on-going conduct of the entity in question (the ICJ view), or whether simply overall control of the entity would suffice (the ICTY view). The ILC, in Article 8 of its Articles on State Responsibility of 2001,[23] supports the view of the ICJ, adopting "effective control" as the standard for attribution more generally in the rules of State responsibility.
- This concept of "effective control" over entities is, therefore, the most likely candidate for customary international law.

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20 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27).

21 Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 160 (Dec. 19).

22 Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 43, ¶ 400 (Feb. 26).

23 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2 Y.B. Int'l L. Comm'n 47 (2001) (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)).

- Further, it cannot be dismissed that other rules of State responsibility may also apply in the *jus ad bellum* context. For instance, Article 11 of the ILC Articles of State Responsibility also provides that "conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if, and to the extent that, the State acknowledges and adopts the conduct in question as its own."
- Other rules of attribution may arise when, for example, an insurrectional movement becomes the Government of an existing State or establishes a new State.[24]

(e) For the purposes of these Rules, the term, "Non-State Actor" (NSA), is used to describe a person or group of persons that is not a part of the *de jure* or *de facto* State referenced in paragraphs (b) or (c) and whose conduct at issue is not attributable to the State under paragraph (d).

Commentary

- The term "Non-State Actor" (NSA), as used in these Rules, refers to true non-State entities, that is, entities that are not part of the *de jure* or *de facto* State. As used in these Rules, conduct that is attributed to a State is considered the actions of a State, even if conducted by a non-State entity. Accordingly, that entity is an emanation of the State for the purposes of that conduct and not an NSA, as this term is used in these Rules.
- The term, NSA, is a portmanteau term. It does not matter whether NSAs are referred to as "irregulars," "paramilitaries," "guerrillas," "partisans," "terrorists," "bandits," "marauders," "freedom fighters," "Jihadists," an "insurgency," or by any other designation. The use of any of these tropes may indicate how a particular NSA is regarded in the subjective eye of

24 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 10*, 2 Y.B. Int'l L. Comm'n 47 (2001).

the beholder. Objectively speaking, however, the term NSA embraces all types of actors (regardless of nationality) – whatever their motive (political, ideological, ethnic, religious, etc.) – as long as they are not operating on behalf of a State.

- The *jus ad bellum* Rules applicable to NSAs are set forth in **Section XII**.

Rule 2

For the purposes of these Rules, a State's *jus ad bellum* obligations are owed by the *de jure* and *de facto* State referenced in Rule 1(b) and (c). In addition, the conduct of other entities that is attributable to the State under Rule 1(d) may make that State responsible for violations of the *jus ad bellum*.

Commentary

- Frequently, States resort to the use of surrogates to use force. As this Rule underscores, efforts to disguise such conduct cannot relieve the State of its full responsibility.
- A State cannot claim that its State organs or persons exercising its governmental authority have exceeded their jurisdiction in using force. Article 7 of the ILC Articles on State Responsibility provides that "the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

Section II: Article 2 of the United Nations Charter

Rule 3

(a) Disputes between States must be solved by peaceful means in accordance with the obligation of Article 2(3) of the United Nations Charter.

Commentary

- Article 2(3) provides "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."
- The Charter's prohibition of the use of force in Article 2(4) is interlinked with an obligation to settle disputes between States by peaceful means.
- It is also noted that customary international law imposes an obligation that States not interfere in the sovereign affairs of other States, as every State has an "inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."[25] An intervention that falls short of use of force, but which is, nevertheless, sufficiently coercive, may violate international law. Further, a non-consensual exercise of "enforcement" jurisdiction on the territory of another State violates international law, absent some other permissive rule in international law.[26]

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25 G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) (widely regarded as reflecting customary international law).

26 S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) at para. 45 ("Now the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.").

(b) Article 2(4) of the United Nations Charter requires that "[a]ll 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."

Commentary

- The origin of this provision of the UN Charter is discussed in the Background section of this Manual.
- The prohibition of the use of force in international relations, as set forth in Article 2(4) of the Charter, is the capstone of the Charter's system.
- The Rule in Article 2(4) concerns use of force in a State's international relations. It does not, for instance, govern a use of force against an NSA operating on a State's own territory. See also **Rule 37** and Commentary.
- Generally speaking, for the purposes of these Rules, references to the "use of force" include threats of use of force. A "threat" of use of force is the signaling by a State of a use of force that would itself be unlawful under Article 2(4) or its customary equivalent. Thus, 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." [27]
- As discussed in **Section VII**, a use of force includes an "armed attack" as that term is used in Article 51 of the UN Charter. Whether every use of force is an armed attack is not agreed among States. But every armed attack is a use of force.
- The prohibition of the use of force under Article 2(4) relates

27 Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8).; Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 47 (Nov. 6).. *See also* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 227 (June 27) (rejecting the argument that troop maneuvers outside a State's borders constitute, in their own right, a threat of use of force against that State).

to all types of use of force in international relations. There is no categorical definition of "force" for the purposes of Article 2(4). In the final analysis, force means (at a minimum) coercive conduct producing destructive physical consequences, usually through violence.

- However, not every coercive act taken by one State on the territory of another is a use of force. This Manual does not resolve the doctrinal debate as to how to define *de minimis* incidents that fall below the threshold of Article 2(4).[28] However, a *de minimis* threshold is consistently observed, in general, as a matter of State practice.[29]
- Coercive abductions, for example, are not (alone, without more coercive action) regarded in State practice as uses of force. Nor is enforcement action taken by a State against another State's vessels a use of force, at least when taken in accordance with multilateral international treaties (such as the UN Convention on the Law of the Sea (UNCLOS)) or customary international law. A leading illustration for the application of this Rule would be lawful measures taken by States under UNCLOS to enforce, e.g., coastal State fishery rights.[30]
- Likewise, territorial intrusions by a State into the territory of another State will not always be regarded by States as a use of force, even if wrongful as a matter of general international law and conducted by military assets. For instance, a surveillance overflight, without more, is not itself a use of force or even a

28 For instance, the European Union's Independent International Fact Finding Mission on the Conflict in Georgia suggested in a footnote that several military incidents could fall below the Article 2(4) threshold. These included, controversially, "the targeted killing of single individuals." Independent International Fact-Finding Mission on the Conflict in Georgia, 2 *Report 242, n.49* (2009)..

29 The Group of Experts could not agree on a *de minimis* threshold standard, but did conclude that State practice indicates a belief among States that such a threshold, albeit undefined, does exist.

30 *See, e.g.,* M/V Saiga (No. 2) (St. Vincent v. Guinea), 1999 ITLOS Rep. 10, 61-62 (Int'l Trib. L. of the Sea 1999)..

threat of use of such force.[31]

- The exertion of economic or political pressure on a State does not amount to use of force, as contemplated in Article 2(4). Over the years, there have been attempts, especially by developing States, to contend that economic pressure exerted by developed States is equivalent to use of force. Arguments have also been made that deliberate economic actions dramatically affecting the entire international community, arguments made in response to a sweeping Organization of the Petroleum Exporting Countries (OPEC) oil embargo, could justify the use of force in response. However, such claims have not gained traction.
- In sum, it is not possible to define, definitively and categorically, "use of force." This reality explains the approach adopted in **Rule 6**. Largely speaking, however, it was agreed that use of force that results in human casualties or non-trivial physical damage to property falls within the range of Article 2(4). Article 2(4) also reaches recourse by a State to means that, in the usual course, are at a scale and have a nature such that they will generally have the effects associated with use of force, in terms of casualties or physical property damage.
- In this last respect, there are occasions in which the threshold of Article 2(4) is crossed, even absent conduct in which

31 In its *Nicaragua* judgment, the ICJ characterized US reconnaissance overflights of Nicaragua as violations of the latter's sovereignty. They were not, however, viewed as among the US activities amounting to a use of force. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 292 (June 27). In 1960, the Soviet government labeled US spy plane overflights in Soviet airspace a form of "aggression." Most other State members of the UN Security Council (and three permanent members—the United Kingdom, France and then-republican China) rejected the view that spy plane overflights amounted to a use of force or aggression. U.N. SCOR, 15th Sess., 858th mtg., U.N. Doc. S/PV.858 ¶¶ 25 and 66 (May 24, 1960); U.N. SCOR, 15th Sess., 881st mtg., U.N. Doc. S/PV.881 ¶ 80 (Nov. 15, 1960). Maritime intrusions are also not always conflated with the use of force, even if they violate law of the sea obligations. Indeed, the ICJ seems not to have regarded the temporary intrusion of a British naval vessel conducting mine sweeping in the territorial sea of Albania a form of force: The Court did "not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania." Corfu Channel (U. K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9)..

the State causes human casualties or damage to property. For instance, in its judgment in the *Nicaragua* case, the ICJ concluded that a State equipping and training (as opposed to financing) an insurgency operating on another State's territory violated the prohibition on use of force.[32] Further, the Article 2(4) threshold will be crossed by an invasion that is not opposed by a victim State and that does not cause human casualties or property damage. The absence of such effects does not change the fact that a use of force has occurred. Likewise, a missile fired at a State that misses its target and does not cause casualties or serious property damage may still constitute a use of force. Again, the forceful character of the State conduct depends on the scale and nature of the coercive conduct, rather than on the serendipity of a missed target or an inactive defense. See also Commentary on **Rule 26** with respect to invasions or hostile intrusions, as well as to missiles that fail to strike their targets.

- The use of force prohibited in Article 2(4) imposes an obligation on States not to use force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." There is no clear basis to conclude force can be used against the territorial integrity or political independence of a State or in a manner contrary to the purposes of the United Nations by accident or by negligence. Thus, this prohibition does not cover instances of accidental conduct due to human error or technical malfunction that produces consequences even of the

32 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 228 (June 27).

scale and effects of a use of force.[33] That said, at times, a victim State may not accept that the forcible action was accidental. Likewise, a use of force that is deliberately directed at another State, but produces unintended consequences in a third State, remains a use of force.

(c) For the purposes of these Rules, and except as otherwise noted, a reference to the type of force barred by Article 2(4) (that is, "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations") shall be referred to as force directed at a State's "territory or other safeguarded interests."

Commentary

- The phrase "against the territorial integrity or political independence of any state" was viewed by the framers of the Charter as illustrating an important example of the prohibition of use of force, as set out in Article 2(4). The phrase was added to the text to reassure States that the fundamental indicia of sovereignty would be respected. See the Background Section of this Manual.
- Attention should be drawn, however, to the more comprehensive phrase appearing in Article 2(4): "or in any other manner inconsistent with the Purposes of the United Nations."
- For ease of drafting, the Rules in this Manual fuse the concepts of "territorial integrity or political independence of any state"

33 An example is NATO's accidental bombing of the Chinese embassy in Serbia in 1999. China characterized the act as an "attack" that violated China's "sovereignty," the Vienna Convention on Diplomatic Relations, and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents—all of which amounted to a war crime. During the Security Council debates, other States (such as Iraq and Cuba) characterized the incident as a use of force, expressing doubt that NATO struck the embassy by accident. The position of those States who viewed the incident as accidental was different, however. For instance, the Netherlands urged that, because the Embassy was not deliberately targeted, it was an accident that did not constitute "an attack on the integrity of the country concerned." *See* U.N. SCOR, 54th Sess., 4000th mtg., U.N. Doc. S/PV.4000 (May 8, 1999)..

and "principles and purposes of the United Nations" into a single construct that includes all of the categories of use of force barred by Article 2(4): "territory or other safeguarded interests." The content of "other safeguarded interests" is discussed further in paragraph (e).

(d) The territory of a State consists of its land and maritime territory, as well as its airspace, over which the State exercises sovereignty.

Commentary

- States exercise sovereignty over land and maritime territories and the accompanying air space.
- The territorial land mass of a State can be demarcated on the ground, and this is often the case in practice, although there are also many disputes over precise delimitation or delineation (especially in uninhabited areas).
- Maritime spaces included in the definition of territory are internal waters, territorial seas, and archipelagic waters (including their beds and subsoils).
- The air space of a State extends over both its land and maritime territory, up to the point where outer space begins.
- The use of force prohibition set forth in Article 2(4) covers all forcible attempts to contest or alter States' boundaries, whether on land, maritime territories, or in accompanying airspace.
- Force used against any artificial island, installation or structure (such as a drilling rig), under the jurisdiction of a State – consistent with its sovereign rights or jurisdiction – in a maritime area, is encompassed within Article 2(4)'s use of force prohibition.[34]

34 Delimitation of Maritime Boundary (Guy. v. Surin.), 30 R.I.A.A. 1, ¶ 445 (Perm. Ct. Arb. 2007) (characterizing Suriname's naval conduct against a Guyanese oil rig and drilling ship in a disputed maritime zone as a "threat of use of force").

(e) For the purposes of these Rules, the expression "other safeguarded interests" encompasses:

i) vessels and aircraft flagged to or registered in a State; and

Commentary

- Vessels and aircraft pass between States, and through and above the High Seas, and thus a vessel or aircraft affiliated with one State may be outside of that State's territory. Nevertheless, force directed by a State against these vessels and aircraft may engage Article 2(4).[35]
- Generally speaking, the determinative criterion of affiliation for the purposes of these Rules (which concern the *jus ad bellum)* is an aircraft's or vessel's registration or entitlement to fly a national flag.[36]
- The related standard applicable to space objects, and the application of *jus ad bellum* to these objects, is a complex topic of emerging and unsettled State practice. Accordingly, this Manual does not address this subject.

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35 In addition to various forms of coercive conduct on a State's territory, the General Assembly's definition of aggression includes attacks "by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State." G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).. Since aggression constitutes a form of use of force, a similar standard applies to Article 2(4). Likewise, international tribunals have suggested that force directed at ships and maritime installations constitutes a use of force. See Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 195 (Nov. 6) (suggesting the mining of a single military vessel may trigger a right to self-defense and, by implication, is a serious use of force amounting to an armed attack); Delimitation of Maritime Boundary (Guy. v. Surin.), 30 R.I.A.A. 1, ¶ 445 (Perm. Ct. Arb. 2007) (characterizing Suriname's conduct against a Guyanese oil rig and drilling ship as a "threat of use of force"). *See also* ARA Libertad (Arg. v. Ghana), 2012 ITLOS Rep. 332, ¶ 94 (Int'l Trib. L. of the Sea 2012) ("warship is an expression of the sovereignty of the State whose flag it flies"); Detention of Three Ukrainian Naval Vessels (Ukraine v. Russ.), 2019 ITLOS Rep. 193, ¶ 33 (Int'l Trib. L. of the Sea 2019) (separate opinion of Judge Gao) ("the firing of target shots against a naval vessel is therefore tantamount to use of force against the sovereignty of the State whose flag that vessel flies").

36 Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 63 (Nov. 6). (to be equated to an armed attack on the State, an attack on a ship requires that it be flying that State's flag, regardless of ownership).

ii) embassies, consulates, military bases and other official State installations located in a foreign State in a manner consistent with international law.

Commentary

- Foreign States' embassies and consulates are inviolable in the sense that agents of the receiving State may not enter them without consent, and the premises enjoy various forms of immunity from local jurisdiction.
- Foreign States may also lawfully operate military bases or other installations on the territory of another State, typically with the consent of the territorial State.[37]
- State conduct of the scale and effect amounting to a use of force directed at these extraterritorial emanations of a State engages Article 2(4).[38]

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37 For instance, the United States regarded an armed attack against the "United States Temporary Mission Facility and Annex in Benghazi, Libya" as justifying a forcible defensive response under Article 51. See Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/417 (June 17, 2014). *See also* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998) ("armed attacks against United States embassies and United States nationals").

38 In addition to various forms of force on a State's territory, the General Assembly's definition of aggression includes attacks "by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State." G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974). No geographic limitation is imposed on this prohibition. Since aggression is a form of use of force, it follows that such attacks also amount to a use of force. *See also* Independent International Fact-Finding Mission on the Conflict in Georgia, 1 *Report ¶ 26* (2009) (suggesting that an armed attack on a military base within a foreign territory can be an armed attack). In relation to embassies, there appear to have been few instances of the use of force against embassies attributable to foreign States. Still, following the Tehran hostage taking, the ICJ appeared willing to consider the actions of individuals ultimately attributable to Iran as an "armed attack" (and implicitly, therefore, a serious use of force), although it did not develop this position. United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3, ¶¶ 57, 64, 91 (May 24). Following the 1999 NATO bombing of the Chinese embassy in Serbia, the Security Council debate focused on whether the bombing was accidental. There is no indication, however, that States would have regarded an *intentional* bombing as something other than a use of force. *See* U.N. SCOR, 54th Sess., 4000th mtg., U.N. Doc. S/PV.4000 (May 8, 1999).

Rule 4

(a) The Article 2(4) prohibition on the use of force is also part of modern customary international law.

Commentary

- Article 2(4) is now regarded as reflecting a cardinal rule of customary international law, binding even on States that are not Members of the United Nations.[39]
- Consequently, in the Commentary below, all references to the Article 2(4) prohibition of the use of force are intended to also describe the standard applicable in customary international law.

(b) The core prohibition on the use of force has also acquired the status of a peremptory norm (*jus cogens*) under general international law.

Commentary

- In using "core prohibition," the Manual acknowledges that the *jus cogens* norm also embraces the exceptions permitting the use of force (self-defense and UN Security Council authorization), as well as the notion that consensual use of force remains outside the Article 2(4) (and customary equivalent) prohibition. None of these uses of force could be undertaken in a manner inconsistent with the Purposes of the United Nations.
- The peremptory standing of the core of the prohibition of the use of force has been recognized from the early days of the acceptance of the *jus cogens* construct in the context of the preparation of the Vienna Convention on the Law of

39 This was the view taken by both the disputing States in the ICJ's *Nicaragua* case, and ultimately adopted by the ICJ (in its Judgment of 1986) after canvassing State practice and *opinio juris*. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 188 (June 27).

Treaties.[40] Moreover, States have regularly recognized the prohibition on the use of force as peremptory.[41]

- "Peremptory" has the meaning found in Article 53 of the Vienna Convention on the Law Treaties.[42] See the Background Section of this Manual. That is, a treaty is void if it conflicts with a peremptory norm. In practice, this means that States cannot, by binding international agreement, agree that force may be used against their territorial integrity or political independence, or in any other manner contrary to the Purposes of the United Nations.

(c) A sufficiently serious violation of the prohibition on the use of force breaches an obligation owed to the international community as a whole (*erga omnes*).

Commentary

- *Erga omnes* obligations are ones in which "all States can be held to have a legal interest in their protection."[43]
- The *erga omnes* nature of the prohibition on aggression, a serious violation of the prohibition on the use of force, was recognized in the ICJ's first discussion of the concept of *erga omnes*.[44]
- The exercise of collective self-defense in response to an armed attack (see **Section XI**) reflects one form of response to a violation of this *erga omnes* norm.

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40 International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, 2 Y.B. Int'l L. Comm'n 187, 247 (1966) ("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"). See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27) (citing this position with seeming approval).

41 See, e.g., the State positions taken in the Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. U.N. General Assembly, Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, *Report*, U.N. Doc. A/37/41 (July 27, 1982).

42 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

43 Barcelona Traction, Light, and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 32, ¶ 33 (Feb. 5).

44 *Id.* ¶ 34 (listing "outlawing of acts of aggression" as the first in an illustrative list of *erga omnes* norms).

- It must be understood that the *erga omnes* nature of an obligation may impose duties on States, such as an obligation not to recognize the illegal situation stemming from the violation of the *erga omnes* Rule and an obligation to discontinue aid or assistance that maintains the illegal situation.[45] Thus, as a concomitant of the *jus ad bellum*, States may not recognize the acquisition of territory through aggression.[46] This duty does not, however, prescribe the means available to States to meet this obligation or oblige all States to respond in the same way to the violation.

Rule 5

The use of force between States prohibited by Article 2(4) of the United Nations Charter does not become lawful because the State resorting to force:

i) Declines to recognize the sovereignty of another entity satisfying the criteria of statehood set forth in Rule 1;

Commentary

- Another State cannot relieve itself of its obligation to abstain from the use of force by denying that the entity in question is a State, when that entity meets the criteria of statehood listed in **Rule 1**.
- The Article 2(3) obligation to settle disputes peaceably extends to boundaries or portions of foreign States, including disputed land and sea boundaries, disputed islands, and divided nations. Indeed, armed attacks initiated in settings where an attacking State rejects a defending State's territorial claims have presented one of the greatest challenges to the law of the Charter.

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45 Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 200, ¶ 159 (July 9).

46 This longstanding obligation is expressed emphatically in General Assembly Resolution A/RES/3314 (1974), Article 5(3) (definition of "aggression").

ii) Does not recognize the land or maritime boundaries of the State under attack;

Commentary

- In keeping with the obligation to settle disputes by peaceful means, States may not resort to the use of force in order to impose a re-demarcation of boundaries.[47] Refusal of recognition of the land or maritime boundaries (whether *de jure* or *de facto*) of another State cannot relieve a State of its obligation to comply with Article 2(4).[48]

iii) Has historical claims to portions of that State; or

Commentary

- For the purposes of the prohibition of the use of force set out in Article 2(4), it is irrelevant whether any State's claims over the territory (in whole or in part) of another State are based on genuine historical ties or links. Like all disputes between States, a dispute concerning the status of a territory in light of historical ties or links must be settled by peaceful means, in keeping with Article 2(3). These historical claims did not justify, e.g., the Iraqi aggression against Kuwait in 1990.
- This Rule on "historical" claims does not apply to instances in which a claiming State has been dispossessed of the territory in issue by reason of an invasion and occupation violating the *jus ad bellum*. See **Rule 26**.

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47 G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970). ("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.") This Declaration is widely regarded as encapsulating customary international law. *See also* Jus ad Bellum, Ethiopia's Claims 1-8 (Ethiopia v. Eri.), 26 R.I.A.A. 1, ¶ 10 (Perm. Ct. Arb. 2004) (in a case concerning territory peacefully administered by a State for many years, concluding "the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes").

48 *See, e.g.,* Delimitation of Maritime Boundary (Guy. v. Surin.), 30 R.I.A.A. 1, ¶ 445 (Perm. Ct. Arb. 2007) (characterizing Suriname's naval conduct against a Guyanese oil rig and drilling ship in a disputed maritime zone as a "threat of use of force").

iv) Does not recognize the Government of that State.

Commentary

- Article 2(4) governs the use of force in relations between States. It binds States, regardless of the status of the Government in the State subject to attack. This is true, regardless of whether the Government of a State being attacked is recognized as legitimate by the attacking State.
- This issue may be complicated by circumstances in which a parallel "Government" purports to consent to the use of force on a State's territory. See **Section IV** for the circumstances in which "consent" exists.

Section III: An Overview of the Lawful Categories of the Use of Force under the United Nations Charter

Rule 6

The following are categories of the use of force in international relations that do not violate the prohibition of the use of force set forth in Article 2(4) of the Charter, or its customary equivalent:

i) **Measures taken by an intervening State with the consent of the territorial State;**

ii) **Measures taken pursuant to, and in conformity with, an authorization made by the United Nations Security Council (acting under Chapter VII of the Charter);**

iii) **Measures taken by regional arrangements lawfully acting in accordance with Chapter VIII of the Charter, and pursuant to and in conformity with a binding decision of the United Nations Security Council;**

iv) **Measures taken in the exercise of individual or collective self-defense;**

v) **Measures taken to rescue nationals abroad.**

Commentary

- The Commentary on **Rule 3** establishes several considerations relating to the threshold or meaning of "force," as that term is used in Article 2(4).
- However, listing, precisely and definitively, all uses of unlawful force between States in breach of Article 2(4), is perhaps an impossible (and unwise) undertaking. In lieu of compiling a comprehensive list of unlawful uses of force, this Manual adopts the practice of listing general categories of the lawful use of force by States (i.e., use of force measures that are not in

breach of Article 2(4)). These general categories are listed in subparagraphs (i)-(v) of the present Rule.

- Forcible measures taken in the course of an intervention by consent in a territorial State are dealt with in **Section IV**. These measures are not subject to the *jus ad bellum* and, thus, must logically be addressed first.
- Measures taken in conformity with binding decisions of the Security Council are discussed in **Section V** of these Rules.
- Measures taken by regional arrangements are the subject of **Section VI**.
- Measures taken in individual or collective self-defense, in response to an armed attack, are examined in **Sections VII to XIII**.
- Measures taken for the rescue of nationals abroad are considered in **Section XIV**.
- While not included in these categories of lawful use of force, there has been a long-standing debate as to the lawfulness of the use of force by States for humanitarian reasons; for example, to end an on-going genocide. At present, only a few States support such a right. While the United Kingdom in particular has proposed criteria, a principal concern shared by both sides in this debate is the lack of agreed standards for limiting any such right, if it exists. See further, **Section XV**.

Section IV: Force Used on the Territory of a State with the Consent of that State

Rule 7

(a) Valid consent by a territorial State to the use of force within its territory or against its other safeguarded interests by a foreign State exempts this use of force from the *jus ad bellum*, to the extent that the action taken:

i) Remains within the limits of the consent given; and

ii) Does not amount to a use of force against the safeguarded interests of a third State.

Commentary

- As the ILC observes in the Articles on State Responsibility, "[v]alid 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."[49]
- Moreover, valid consent by a State to the use of force by another State within its territory changes the legal character of that force, inasmuch as it means that such use of force does not violate Article 2(4) of the Charter or its customary equivalent.
- As recognized by the Security Council, it is the "inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States."[50] In the *Nicaragua* case, the ICJ observed that "intervention is allowable at the request of the government."[51]

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49 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 20*, 2 Y.B. Int'l L. Comm'n 47 (2001).

50 S.C. Res. 376, U.N. Doc. S/RES/376 (Oct. 17, 1975) (condemning South African aggression in Angola).

51 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 246 (June 27).

- Thus, it is generally recognized that the use of force by a foreign State, with the consent of the constitutional Government of the territorial State, against, e.g., an insurgent organized armed group, does not constitute a breach of the Article 2(4) prohibition of the use of force.
- State consent may concern its territory and other safeguarded interests. An example of the latter is permission for another State to use force to board a vessel flagged by the consenting State.
- The consensual use of force by an intervening State must be confined within the parameters of the consent provided by the territorial State. As concluded in the "Definition of Aggression" Resolution adopted, by consensus, by the UN General Assembly in 1974, aggression includes: "[t]he 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."[52]
- Further, a territorial State cannot deny the international legal rights of other States by purporting to exempt the application of Article 2(4) and its customary equivalent to that other State's safeguarded interests within the territorial State's territory. See **Rule 3** for the definition of "safeguarded interests."
- For example, the territorial State's consent to an armed attack by a foreign State on the armed forces of a third State lawfully within the territorial State, or an armed attack on that third State's embassy, does not make lawful a use of force (including an armed attack) violating the *jus ad bellum*.

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52 G.A. Res. 3314 (XXIX) art. 3(e), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

- Indeed, a State aiding or assisting the wrongful action of another State may be internationally responsible for that action.[53] Further, under the "Definition of Aggression" Resolution adopted by consensus by the UN General Assembly in 1974, aggression includes: "[t]he 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."[54]
- Consent to use of force may interact with other legal bases for use of force, including Security Council authorizations and the right to self-defense, producing multiple (and potentially different) legal bases for the use of force.[55]

(b) Even when *jus ad bellum* rules are inapplicable because of the territorial State's valid consent, the foreign State must still observe other applicable rules of international law when using force within the territorial State. Consent does not relieve the foreign State of:

i) Any rules of international law applicable to the foreign State when acting on the territory of the territorial State; or

ii) The rules of international law applicable to the territory of the territorial State.

Commentary

- A territorial State may consent to another State's use of force on its territory against, e.g., an organized armed group or other NSA engaged in an insurgency against the territorial State.

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53 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 16*, 2 Y.B. Int'l L. Comm'n 47 (2001).

54 G.A. Res. 3314 (XXIX) art. 3(f), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

55 Canada, Operational Law Manual 12-4, n.4 (2007) ("IFOR/SFOR operations occurred both under the authority of SCR 1031 (1995), as well as the consent of the relevant states, as expressed through the Dayton Accord and the SOFA between the relevant states and NATO.") Note also that the use of force on the territory of Afghanistan authorized by the Security Council after 2002 included references to "close consultation" with the Afghan government. *See, e.g.,* S.C. Res. 1623, U.N. Doc. S/RES/1623 (Sept. 13, 2005).

- Even if consent of the territorial State means that the use of force is not subject to the *jus ad bellum,* that consent cannot render lawful conduct that would be unlawful under international law if committed by the territorial State itself. Nor does consent relieve the foreign State of non-*jus ad bellum* international rules that apply to it.
- Thus, the territorial State cannot authorize violations of the *jus in bello* (law of armed conflict) or international human rights rules applicable on its territory (or that have extraterritorial reach and therefore bind the foreign State).[56] For instance, the territorial State cannot authorize, e.g., a foreign State to engage in activities amounting to genocide.
- See **Rule 56** on the other rules of international law applicable independently of the *jus ad bellum*.

Rule 8

(a) For the purposes of these Rules, "valid consent" must be granted by either:

Commentary

- As the ILC notes in the Articles on State Responsibility, "[i]n order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be 'valid.'" This is a question to be answered with reference to national and international law. 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 this lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion

56 *See, e.g.,* Canada, Operational Law Manual 12-4 (2007) ("Consensual intervention in full-fledged civil wars has less clear support at international law, as these situations may raise concerns relating to whether the correct lawful authority has given its consent and whether an intervention would conflict with the right of self-determination.")

or some other factor."[57]

i) The Government of the territorial State under that State's law; or

Commentary

- The identification of the Government of a State entitled to issue such an invitation, or to grant consent, will be principally dependent upon the domestic law of that State which authorizes the person giving consent to do so. This may not always be a clear issue.[58]
- There are instances where "consent" is issued by an NSA purporting to be the Government.[59] However, consent by a dissident "Government" is readily rejected as a justification for use of force.[60]
- There has been debate (and uncertainty) concerning whether "effectiveness" must attach to a Government before it can consent to the use of force, with effectiveness tied to control over territory. There is State practice of interventions following concurrences and interventions stemming from administrations lacking control over a State's territory.[61]

ii) The authority recognized as the Government of the territorial State under a binding UN Security Council Resolution.

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57 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 20*, 2 Y.B. Int'l L. Comm'n 47 (2001) (Commentary).

58 During the US intervention in Grenada in 1983, for instance, there were questions concerning the Governor General's capacity to invite intervention under the domestic law of Grenada.

59 U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/PV.2932 at 11 (Aug. 2, 1990) (Iraq claiming that its 1990 invasion of Kuwait was invited by the "Free Provisional Government of Kuwait").

60 The international community did not accept Iraq's claims, *ibid.*, as illustrated by the resulting Security Council resolutions prompted by Iraq's invasion of Kuwait. *See, e.g.,* S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 2, 1990).

61 *See, e.g.,* Letter from the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2011/646 (Oct. 17, 2011).

Commentary

- This exception occurs when the Security Council, in a binding Resolution under Chapter VII of the Charter (see **Section V**), has recognized an authority as the Government of a State.[62] In such circumstances, the resolution is decisive, irrespective of the domestic law of the territorial State.

(b) To be valid, the consent must be clear, unequivocal, and freely given.

Commentary

- The ILC, in its Articles on State Responsibility, observes: "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."[63] Thus, "freely given" means that consent has not been procured by coercion of the State's Government through acts or threats against Government officials or through the threat or use of force in violation of Article 2(4) of the Charter.
- There are some notorious examples in which consent to interventions by foreign States has been falsely contrived.[64] It is therefore crucial to accentuate that any valid consent must be clear, unequivocal, and freely given.

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62 *See, e.g.,* S.C. Res. 2216, U.N. Doc. S/RES/2216 (Apr. 14, 2015) (referring to the "legitimate government of Yemen").

63 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 20*, 2 Y.B. Int'l L. Comm'n 47 (2001) (Commentary).

64 *See, e.g.,* U.N. SCOR, 11th Sess., 746th mtg., U.N. Doc. S/PV.746 (Oct. 28, 1956) (Soviet Union claiming its invasion of Hungary was at the invitation of the Hungarian government); U.N. SCOR, 23d Sess., 1441st mtg., U.N. Doc. S/PV.1441 (Aug. 21, 1968) (Soviet Union claiming its invasion of Czechoslovakia was by invitation of the Czechoslovak government).

- While valid consent must be express and not presumed, State practice does not imply any requirement that consent be provided in any specific form or that the valid consent be public.[65]
- There is State practice of States consenting to intervention through preexisting treaties.[66] It may be, however, that this treaty consent must also be supported by a more specific request prior to an actual intervention that would otherwise be inconsistent with the *jus ad bellum*. It is to be recalled that any treaty inconsistent with a peremptory norm is of no effect. The prohibition on use of force is a peremptory norm. See **Rule 4(b)**. Further, the treaty consent must also meet the requirements of being clear, unequivocal, and freely given.[67]

(c) The territorial State may make its valid consent subject to conditions that must be observed by the foreign State.

Commentary

- The State issuing valid consent remains sovereign. Consent to intervention may be subjected by the territorial State to conditions that must be observed by the foreign State. As the ILC observes, consent remains valid only "to the extent that

65 *See* Canada, Operational Law Manual 12-4 (2007) ("At times an agreement or an arrangement between states [amounting to consent] can be done rather informally and routinely, particularly those relating to short-term positioning or transit though airspace or territorial waters.").

66 For an example of such a treaty, see Traité destiné à adapter et à confirmer les rapports d'amitié et de coopération entre la République Française et la Principauté de Monaco art. 4, Fr.-Monaco, Oct. 24, 2002, J.O., March 3, 2006 ("The French Republic may, at the request or with the approval of the Prince, enter and reside in the territory of the Principality of Monaco the forces necessary for the security of the two States. However, this request, or this approval, is not required when the independence, sovereignty or integrity of the territory of the Principality of Monaco are threatened in a serious and immediate manner and the regular functioning of public authorities is interrupted.") (unofficial translation). For an example of treaty-based consent to an intervention being invoked by a State, see, e.g., U.N. SCOR, 19th Sess., 1136th mtg., U.N. Doc. S/PV.1136 (June 18, 1964) (Turkey's intervention in Cyprus).

67 *See, e.g.,* U.N. SCOR, 19th Sess., 1097th mtg., U.N. Doc. S/PV.1097 (Feb. 25, 1964) (Cyprus contesting the Turkish interpretation of a treaty basis for intervention as inconsistent with Article 2(4)).

the act remains within the limits of that consent."[68]

- It is for the territorial State to determine whether failure by the foreign State to comply with any of the conditions imposed invalidates the consent.

(d) The territorial State may withdraw its valid consent at any time.

Commentary

- The issuance of invitation or consent to foreign intervention does not tie the hands of the territorial State indefinitely: it may withdraw that invitation or consent at any time.
- The territorial State need not give any reason for withdrawing its consent.
- A reasonable period should be allowed to enable the foreign State to remove its forces from the territorial State.
- Reasonable conditions may be imposed upon the foreign State during this period.

Rule 9

NSAs are not sovereign, do not have rights under the *jus ad bellum,* and cannot consent to the use of force on a State's territory. A foreign State must observe fully the *jus ad bellum* in using force on the territory of a territorial State in support of an organized armed group or other NSA operating against the incumbent Government of that territorial State. Thus, a foreign State may only use force in this manner when it is:

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68 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 20*, 2 Y.B. Int'l L. Comm'n 47 (2001). *See also,* G.A. Res. 3314 (XXIX) art. 3(e), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974) (definition of "aggression," observing that States may impose "conditions" on the consensual forcible presence of the forces of another State); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 52 (Dec. 19) (noting that the putative consent in that matter was not "open-ended" and was subject to conditions).

i) authorized to do so by a binding UN Security Council Resolution; or

ii) acting in individual or collective self-defense against the other State.

Commentary

- An NSA is not a State and exercises no sovereignty over territory. It cannot consent to use of force on the territory of a State, even when it exercises effective control over that territory.[69]
- A foreign State can forcibly intervene in support of an organized armed group or other NSA acting against the incumbent Government of the territorial State only when consistent with the *jus ad bellum*, that is, authorized by the Security Council (in a binding Chapter VII Resolution) or when exercising the right of individual or collective self-defense.

69 G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) ("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 .... 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"); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 162 (Dec. 19) (regarding these provisions as declaratory of customary international law); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 246 (June 27) ("[I]t 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 interna1 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.").

Section V: Measures Taken Pursuant to an Authorization of the Security Council Acting Under Chapter VII of the United Nations Charter

Rule 10

The Security Council is vested by the Charter of the United Nations with the primary responsibility for the maintenance or restoration of international peace and security.

Commentary

- Under Article 24(1) of the Charter, Member States "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."
- The Security Council's mandate under the Charter is to maintain or restore international peace and security. International peace and security are maintained before they are breached, while they are restored thereafter.
- In its 1962 *Advisory Opinion on Certain Expenses of the United Nations*,[70] the ICJ held that—although, under Article 24(1), the responsibility of the Council respecting the maintenance of international peace and security is "primary," rather than exclusive—only the Council possesses the power to impose explicit obligations of compliance.
- The responsibility of the Council under the Charter is accompanied by exceptional competence and powers enabling it to maintain or restore international peace and security.

70 Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 163 (July 20).

Rule 11

Under the Charter, only the Security Council has the power to adopt decisions that are binding on all Members of the United Nations in matters relating to international peace and security.

Commentary

- Under Article 25 of the Charter, Members of the United Nations "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
- By joining the United Nations Organization and accepting this key provision of the Charter, Member States agree to be bound by the Council's decisions in matters relating to international peace and security.
- The Security Council is the only organ empowered under the Charter to issue binding decisions in matters relating to international peace and security. This is an exclusive power, and there is no substitute for the Council when—as often happens—it is paralyzed by the use or threat of a veto by a Permanent Member.
- The Council's failure to act in specific circumstances does not mean that its power to adopt binding decisions can be arrogated by any other organ of the United Nations. Nor is it possible to shift the primary responsibility for the maintenance of international peace and security from the Council to the General Assembly.
- The General Assembly has a secondary role to play in matters pertaining to the maintenance and restoration of international peace and security. Although it can concern itself with such matters, its powers are confined to the adoption of recommendations (in contradistinction to binding decisions). Even the familiar General Assembly Resolution 377 (V) of

1950,[71] "Uniting for Peace," specifying that the Assembly will consider a matter of international peace and security when the Security Council fails to act, is limited to the issuance of recommendations.

- The Security Council's power to adopt binding decisions does not mean that all of its resolutions are automatically binding. Most Council resolutions—even when they are adopted with a view to maintaining or restoring international peace and security—constitute mere recommendations. However, if a recommendation of this nature is ignored by a State, there does exist the possibility that its conduct could lead to a binding Council decision in the future.
- Binding decisions of the Council, related to the maintenance or restoration of international peace and security, may be declaratory in nature; they may carry economic or other non-forcible sanctions; they may provide for additional measures; and—most significantly—they may initiate or authorize the use of force.
- It is important to bear in mind that the Council is, by definition, a political, rather than a judicial organ. It is composed of Member States, and its decisions are inevitably linked to political considerations that are not necessarily motivated by legal considerations.
- It is also the case that the Security Council is not obliged to place a matter on its agenda or to make a decision, even when faced with a threat or breach of international peace and security or an act of aggression.
- As a non-judicial body, the Council is not required to set forth reasons for its decisions.

71 G.A. Res. 377 (V), U.N. Doc. A/RES/377(V) (Nov. 3, 1950).

Rule 12

The principal role of the Security Council in the domain of the *jus ad bellum* is manifested in its power to adopt a binding decision, and—having determined (pursuant to Article 39) that a breach of the peace, a threat to the peace, or an act of aggression has occurred—authorize the use of force under Chapter VII of the Charter.

Commentary

- Article 39 of the Charter states: "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."
- In its practice, the Council consistently avoids a determination of the existence of an "act of aggression." A determination of the existence of a "breach of the peace" is generally reserved for exceptional situations (such as the Korean War and the Gulf War 1990/91). For the most part, the Council resorts to a determination of the existence of a "threat to the peace," even when the so-called threat has clearly become a reality. This is a marginal matter, inasmuch as—no matter how the Council categorizes the activities in question: either an act of aggression, a breach of the peace, or a threat to the peace—the Council is vested by the Charter with the power to set in motion exactly the same measures.
- The Council has determined the existence of a "threat to the peace" in numerous instances of internal strife, violations of human rights, the overthrow of a Government by a military junta, etc., when international peace and security are only indirectly (and perhaps peripherally) the point at issue. Clearly, a situation constitutes a "threat to the peace" whenever the Council deems it to be so, and it is entirely up to the Council,

provided that it is acting consistently with the Purposes and Principles of the Charter, to determine when supposedly internal matters endanger international peace and security. It bears noting, also, that the Security Council is constituted by the Charter and is therefore limited by it (see also **Rules 14 and 15**).

- The Council occasionally determines that general phenomena, rather than specific situations, constitute a "threat to the peace." A leading example is Resolution 1377 (2001),[72] adopted by a special meeting of the Council on a Ministerial level after 9/11, which declared that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century."
- A determination by the Council of the existence of a breach of the peace, a threat to the peace or an act of aggression is binding, *per se*, on Member States, even if the Council subsequently proceeds to adopt a mere recommendation (as distinct from a binding decision) concerning the measures that have to be taken in response.
- Although binding, a determination by the Council of the existence of a breach of the peace, a threat to the peace or an act of aggression—when standing alone—does not mean that the Council has decided, by implication, to authorize the use of force. If the Council wishes to authorize the use of force, it must say so, either in the same resolution or in a follow-up resolution.
- The power of the Security Council to initiate or authorize the use of force (in response to a breach of the peace, threat to the peace, or an act of aggression) forms a clear-cut Charter exception to the general prohibition of the use of force in international relations under Article 2(4) of the Charter.

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72 S.C. Res. 1377, U.N. Doc. S/RES/1377 (Nov. 12, 2001). See also Resolution 1373 (2001), in which the Council affirmed the same position before acting under Chapter VII.

Rule 13

When acting in accordance with the Principles and Purposes of the United Nations and pursuant to Article 24(2) of the Charter, the discretion of the Security Council in deciding how to ensure the maintenance or restoration of international peace and security is very broad.

Commentary

- The Security Council is constituted by the Charter, and is therefore limited by it. However, the Charter provides wide discretion to the Security Council on matters of international peace and security.
- There is no equivalence between the wide discretion of the Security Council (under Chapters VII and VIII) and the more limited powers of individual States exercising the right of individual or collective self-defense (under Article 51 of the Charter and customary international law).
- There is no indication in the practice of the Security Council that its powers are limited by the considerations of necessity and proportionality associated with the right of self-defense (and discussed in **Section IX**).
- Considering that the principal Purpose of the United Nations—under Article 1(1) of the Charter—is to maintain international peace and security, and to take effective collective measures to that end, the discretion of the Council in assessing what measures are required for this crucial task in a given situation is very broad.
- That said, State national contingents participating in a Council-authorized enforcement measure may be subject to their own national or treaty obligations or policies limiting the force they may use.

Rule 14

To be valid, all Security Council resolutions must have been adopted in compliance with the voting procedure established in the Charter and, particularly, must not have been vetoed by any of the five Permanent Members.

Commentary

- The voting procedures of the Council are set out in Article 27 of the Charter (as amended). Resolutions of the Council are adopted by an affirmative vote of at least nine of its fifteen Members, but this is subject to the veto power of any one of the five Permanent Members of the Council (the US, UK, France, Russia, and China). The practice of the Council indicates that only a negative vote amounts to a veto: abstention and absence from a vote do not.[73]
- As spelled out in Article 27(3), the veto power can be exercised by a Permanent Member in decisions adopted under Chapter VII, even when it is a party to a dispute. Thus, the fact that a Permanent Member is a Party to a dispute does not affect its entitlement to veto the adoption of a Council resolution.

Rule 15

A valid decision of the Security Council, adopted under Chapter VII of the Charter in keeping with the voting procedures described in

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73 Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 22 (June 21) ("The proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.")

Rule 14, is not subject to review on the facts by any other organ of the United Nations (including the ICJ).

Commentary

- There is no provision in the UN Charter for "judicial review" of Security Council actions. The ICJ has not addressed whether its role as the chief judicial organ of the United Nations includes the competency to judicially review the merits of Security Council resolutions.[74]
- Article 39 of the Charter assigns the Council the role of determining the "existence of any threat to the peace, breach of the peace, or act of aggression." Even the ICJ cannot gainsay, on the facts, a valid resolution made by the Security Council under Chapter VII. In particular, a determination by the Council that a concrete situation constitutes a threat to the peace is non-reviewable, on the facts, by the Court.
- Nevertheless, the Council's decisions—to be binding—must be legally valid under the Charter. See **Rule 14**. Thus, while there may arise instances when the ICJ might act to determine the legal validity of a resolution passed by the Council under the Charter, this eventuality has not yet occurred.

Rule 16

The Security Council is empowered to initiate the use of force directly under Article 42 of the Charter, but this requires special agreements with Member States under Article 43—enabling the Council to deploy the armed forces of such Member States. However, no such agreements have been concluded.

74 This question was a possible issue in *Libya v. U.K.*, but was not addressed. Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 114 (Order of Apr. 14).

Commentary:

- In principle, the UN Charter entitles the Council to initiate the use of force.
- Article 42 of the Charter proclaims: "Should the Security Council consider that measures provided for in Article 41 [not entailing the use of force] 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 or security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."
- In brief, under Article 42, the Council may exert force either on a limited or on a comprehensive scale**.** However, the Council is not empowered by the Charter to enlist armed forces directly; it must use the armed forces of Member States.
- Under Article 43, United Nations Members are obligated to make available to the Council the necessary armed forces; however, this duty is subject to the condition that this will be done "in accordance with a special agreement or agreements."
- As no special agreements pursuant to Article 43 have ever been concluded, Article 42 has never been activated by the Council to enable the direct use of force by the United Nations.
- The non-use of Article 42 of the Charter in this fashion was addressed by the Secretary-General of the United Nations, B. Boutros-Ghali, in his "Agenda for Peace" (1992). However, the Council did not act upon the Secretary-General's recommendation to initiate negotiations aimed at concluding special agreements under Article 43.
- The Military Staff Committee (established under Article 47 of the Charter, with a view to assisting the Council on the employment and command of armed forces placed at its disposal) has, consequently, been unable to fulfill its mandate.

Rule 17

Notwithstanding the absence of special agreements with States under Article 43, the Security Council may still authorize the use of force by Member States, or a regional arrangement referred to under Article 53(1) of the Charter (Chapter VIII). In its practice, the Security Council has authorized the use of force by: regional organizations; Member States nationally or through regional or international organizations; or Member States nationally or through ad hoc coalitions.

Commentary

- The Council has authorized the use of force, using the form of words noted in **Rule 21**, in approximately 170 instances since 1990.[75] This practice may be divided into four categories. The Council has authorized forcible measures by:

    a. regional organizations;[76]
    b. Member States nationally or through regional or

75 This number includes a large number of resolutions renewing an original authorization permitting force.

76 S.C. Res. 2134, U.N. Doc. S/RES/2134 (Jan. 28, 2014) (EU, Central African Republic); S.C. Res. 1778, U.N. Doc. S/RES/1778 (Sept. 25, 2007) (EU, Chad and CAR); S.C. Res. 1671, U.N. Doc. S/RES/1671 (Apr. 25, 2006) (EU, Democratic Republic of Congo); S.C. Res. 2613, U.N. Doc. S/RES/2613 (Dec. 21, 2021); S.C. Res. 2568, U.N. Doc. S/RES/2568 (Mar. 12, 2021); S.C. Res. 2563, U.N. Doc. S/RES/2563 (Feb. 25, 2021); S.C. Res. 2520, U.N. Doc. S/RES/2520 (May 29, 2020); S.C. Res. 2472, U.N. Doc. S/RES/2472 (May 31, 2019); S.C. Res. 2431, U.N. Doc. S/RES/2431 (July 30, 2018); S.C. Res. 2415, U.N. Doc. S/RES/2415 (May 15, 2018); S.C. Res. 2372, U.N. Doc. S/RES/2372 (Aug. 30, 2017); S.C. Res. 2395, U.N. Doc. S/RES/2395 (Dec. 21, 2017); S.C. Res. 2298, U.N. Doc. S/RES/2298 (July 22, 2016); S.C. Res. 2232, U.N. Doc. S/RES/2232 (July 28, 2015); S.C. Res. 2182, U.N. Doc. S/RES/2182 (Oct. 24, 2014); S.C. Res. 2124, U.N. Doc. S/RES/2124 (Nov. 12, 2013); S.C. Res. 2093, U.N. Doc. S/RES/2093 (Mar. 6, 2013); S.C. Res. 2036, U.N. Doc. S/RES/2036 (Feb. 22, 2012); S.C. Res. 2011, U.N. Doc. S/RES/2011 (Oct. 12, 2011); S.C. Res. 1948, U.N. Doc. S/RES/1948 (Nov. 18, 2010); S.C. Res. 1910, U.N. Doc. S/RES/1910 (Jan. 28, 2010); S.C. Res. 1863, U.N. Doc. S/RES/1863 (Jan. 16, 2009); S.C. Res. 1831, U.N. Doc. S/RES/1831 (Aug. 19, 2008); S.C. Res. 1801, U.N. Doc. S/RES/1801 (Feb. 20, 2008); S.C. Res. 1772, U.N. Doc. S/RES/1772 (Aug. 20, 2007); S.C. Res. 1744, U.N. Doc. S/RES/1744 (Feb. 20, 2007) (African Union, Somalia); S.C. Res. 2084, U.N. Doc. S/RES/2084 (Dec. 19, 2012); S.C. Res. 2073, U.N. Doc. S/RES/2073 (Nov. 7, 2012); S.C. Res. 2072, U.N. Doc. S/RES/2072 (Oct. 31, 2012) (Member states of the African Union, Mali); S.C. Res. 2127, U.N. Doc. S/RES/2127 (Dec. 5, 2013) (African Union, Central African Republic).

international organizations;[77]

c. Member States nationally or through ad hoc coalitions;[78]

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77 S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). *See also* S.C. Res. 2658, U.N. Doc. S/RES/2658 (Nov. 2, 2022); S.C. Res. 2628, U.N. Doc. S/RES/2628 (Mar. 31, 2022); S.C. Res. 2604, U.N. Doc. S/RES/2604 (Nov. 3, 2021); S.C. Res. 2549, U.N. Doc. S/RES/2549 (Nov. 5, 2020); S.C. Res. 2496, U.N. Doc. S/RES/2496 (Nov. 5, 2019); S.C. Res. 2443, U.N. Doc. S/RES/2443 (Nov. 6, 2018); S.C. Res. 2384, U.N. Doc. S/RES/2384 (Nov. 7, 2017); S.C. Res. 2315, U.N. Doc. S/RES/2315 (Nov. 8, 2016); S.C. Res. 2247, U.N. Doc. S/RES/2247 (Nov. 10, 2015); S.C. Res. 2183, U.N. Doc. S/RES/2183 (Nov. 11, 2014); S.C. Res. 2123, U.N. Doc. S/RES/2123 (Nov. 12, 2013); S.C. Res. 2074, U.N. Doc. S/RES/2074 (Nov. 14, 2012); S.C. Res. 2019, U.N. Doc. S/RES/2019 (Nov. 16, 2011); S.C. Res. 1948, U.N. Doc. S/RES/1948 (Nov. 18, 2010); S.C. Res. 1895, U.N. Doc. S/RES/1895 (Nov. 18, 2009); S.C. Res. 1845, U.N. Doc. S/RES/1845 (Nov. 20, 2008); S.C. Res. 1785, U.N. Doc. S/RES/1785 (Nov. 21, 2007); S.C. Res. 1772, U.N. Doc. S/RES/1772 (Aug. 20, 2007); S.C. Res. 1639, U.N. Doc. S/RES/1639 (Nov. 21, 2005); S.C. Res. 1575, U.N. Doc. S/RES/1575 (Nov. 22, 2004); S.C. Res. 1551, U.N. Doc. S/RES/1551 (July 9, 2004); S.C. Res. 1491, U.N. Doc. S/RES/1491 (July 11, 2003); S.C. Res. 1423, U.N. Doc. S/RES/1423 (July 12, 2002); S.C. Res. 1357, U.N. Doc. S/RES/1357 (June 21, 2001); S.C. Res. 1305, U.N. Doc. S/RES/1305 (June 21, 2000); S.C. Res. 1247, U.N. Doc. S/RES/1247 (June 18, 1999); S.C. Res. 1174, U.N. Doc. S/RES/1174 (June 15, 1998); S.C. Res. 1088, U.N. Doc. S/RES/1088 (Dec. 12, 1996); S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995) (Authorizing Member States to use all necessary means in support of EU and NATO mission, Bosnia and Herzegovina); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (Member States acting nationally or through regional organizations or arrangements, Libya); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1815, U.N. Doc. S/RES/1815 (June 2, 2008) (Member States and regional organizations cooperating in suppressing piracy, coast of Somalia); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (Member States and international organizations, Kosovo); S.C. Res. 1037, U.N. Doc. S/RES/1037 (Jan. 15, 1996); S.C. Res. 981, U.N. Doc. S/RES/981 (Mar. 31, 1995); S.C. Res. 908, U.N. Doc. S/RES/908 (Mar. 31, 1994) (Member States acting nationally or through regional organizations, Croatia); S.C. Res. 958, U.N. Doc. S/RES/958 (Nov. 19, 1994); S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993); S.C. Res. 816, U.N. Doc. S/RES/816 (Mar. 31, 1993) (Member States acting nationally or through regional organizations, Bosnia and Herzegovina).

78 S.C. Res. 2120, U.N. Doc. S/RES/2120 (Oct. 10, 2013); S.C. Res. 2069, U.N. Doc. S/RES/2069 (Oct. 9, 2012); S.C. Res. 2011, U.N. Doc. S/RES/2011 (Oct. 12, 2011); S.C. Res. 1943, U.N. Doc. S/RES/1943 (Oct. 13, 2010); S.C. Res. 1833, U.N. Doc. S/RES/1833 (Sept. 22, 2008); S.C. Res. 1776, U.N. Doc. S/RES/1776 (Sept. 19, 2007); S.C. Res. 1707, U.N. Doc. S/RES/1707 (Sept. 12, 2006); S.C. Res. 1623, U.N. Doc. S/RES/1623 (Sept. 13, 2005); S.C. Res. 1563, U.N. Doc. S/RES/1563 (Sept. 17, 2004); S.C. Res. 1510, U.N. Doc. S/RES/1510 (Oct. 13, 2003); S.C. Res. 1444, U.N. Doc. S/RES/1444 (Nov. 27, 2002); S.C. Res. 1413, U.N. Doc. S/RES/1413 (May 23, 2002) (Member States of the ISAF, Afghanistan); S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) ("multinational forces", Iraq); S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004); S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003) (Member States participating in the Multinational Interim Force in Haiti); S.C. Res. 1497, U.N. Doc. S/RES/1497 (Aug. 1, 2003) (Member States participating in the Multinational Force in Liberia); S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (Member States participating in a multinational force to restore peace and security in East Timor); S.C. Res. 1080, U.N. Doc. S/RES/1080 (Nov. 15, 1996) (Member States, Great Lakes Region of Africa); S.C. Res. 940, U.N. Doc. S/RES/940 (July 29, 1994) (Member States formed as a multinational force, Haiti); S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994) (Member States, Rwanda); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (Member States, Somalia); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (Member States, Iraq-occupied Kuwait).

d. UN missions (see **Rule 20**).

In exceptional circumstances, it has authorized the use of force by UN missions, while also authorizing the use of force by a specified Member State in support of the mission.[79]

- Article 53(1) of the Charter enables the Security Council, "where appropriate," to utilize "regional arrangements or agencies for enforcement action under its authority." As Article 53(1) proclaims: "... no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." See **Section VI**. This provision relates to any nonconsensual use of force by a regional organization; it does not pertain to fully consensual peacekeeping operations. See **Rule 20**.
- The Security Council has very occasionally also pointed to Chapter VIII in resolutions in which it is acting under Chapter VII. In its practice, the Council has sometimes also authorized an ongoing use of force by a regional organization, following the organization's initial use of force (see **Section VI**).
- It is rare for the Council to authorize the use of force by Member States, nationally, without further references to multinational entities or coalitions.[80] Typically, Security

79 This circumstance has arisen in connection with three missions, authorizing use of force by MINUSMA (Mali), MINUSCA (Central African Republic) and UNOCI (Côte d'Ivoire), and also "French forces." Mali: S.C. Res. 2531, U.N. Doc. S/RES/2531 (June 29, 2020); S.C. Res. 2480, U.N. Doc. S/RES/2480 (June 28, 2019); S.C. Res. 2423, U.N. Doc. S/RES/2423 (June 28, 2018); S.C. Res. 2364, U.N. Doc. S/RES/2364 (June 29, 2017); S.C. Res. 2295, U.N. Doc. S/RES/2295 (June 29, 2016); S.C. Res. 2227, U.N. Doc. S/RES/2227 (June 29, 2015); S.C. Res. 2164, U.N. Doc. S/RES/2164 (June 25, 2014); S.C. Res. 2100, U.N. Doc. S/RES/2100 (Apr. 25, 2013). CAR: S.C. Res. 2301, U.N. Doc. S/RES/2301 (July 26, 2016); S.C. Res. 2217, U.N. Doc. S/RES/2217 (Apr. 28, 2015); S.C. Res. 2149, U.N. Doc. S/RES/2149 (Apr. 10, 2014). Côte d'Ivoire: S.C. Res. 1609, U.N. Doc. S/RES/1609 (June 24, 2005); S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004). The Council followed this same pattern in relation to the earlier African Union mission in the Central African Republic. S.C. Res. 2127, U.N. Doc. S/RES/2127 (Dec. 5, 2013).

80 The exceptional cases appear to have arisen early in the post-Cold War period. *See* S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994) (Member States, Rwanda); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (Member States, Somalia); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (Member States, Iraq-occupied Kuwait).

Council resolutions have invoked Chapter VII in authorizing the use of force by regional organizations or Member States acting individually or in coalition. For instance, Security Council Resolution 1973 (2011), concerning Libya, authorized Member States "acting nationally or through regional organizations or arrangements . . . to take all necessary measures" to achieve the international peace and security objectives articulated in the Resolution.[81]

- The Council's authorization to use force must be express and not merely implied (see **Rule 21** for the wording preferred by the Council).
- The Council may change or terminate an authorization to use force, may include limitations and conditions on the use of force, and may limit the authorization to prescribed periods (which may be renewed). It is, indeed, typical for the Council to specify the purposes for which force can be used, set out in the resolution. The Council usually does not authorize the use of force for a general purpose, such as restoring international peace and security.[82]

Rule 18

When acting under Chapter VII, the Security Council may authorize or initiate the use of force even in the absence of an "armed attack," as that term is used in Article 51 of the Charter. The Council may act, therefore, in a manner that would be considered anticipatory or preventive in the context of the right to self-defense.

Commentary

- A "threat to the peace" is a much broader concept than an

81 S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). *See also* S.C. Res. 2658, U.N. Doc. S/RES/2658 (Nov. 2, 2022) (in relation to Bosnia and Herzegovina).

82 An exception is S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) ("all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions *and to restore international peace and security in the area*").

armed attack referenced in Article 51 of the Charter, inasmuch as the former is not conditioned on any actual use of force. Hence, when there exists a "threat to the peace," the Council may act in anticipation of a future breach of the peace (even if the threat is not imminent), a privilege that the Charter does not confer on any individual State or group of States acting unilaterally.

- The Council's entitlement to act preventively is derived not only from Chapter VII of the Charter, but also from Article 1(1), which—in listing the Purposes of the United Nations—refers explicitly to the taking of "effective collective measures for the prevention and removal of threats to the peace."

Rule 19

The Security Council may initiate or authorize the use of force, acting under Chapter VII, regardless of any exercise of individual or collective self-defense by States acting on their own or in coalition.

Commentary

- The Council, acting under Chapter VII, may decide on enforcement measures, independently of any action taken by States exercising the right of individual or collective self-defense (although the Council may always impose on those States a ceasefire).
- The two legal regimes of enforcement action (initiated or authorized by the Security Council) and individual or collective self-defense (exercised by States acting on their own) may exist simultaneously and must be analyzed separately from one another (see **Section XIII**).

Rule 20

Action authorized by the Security Council under Chapter VII of the Charter is different from consensual peacekeeping operations. The Council does, however, now regularly authorize enforcement actions in UN peacebuilding operations.

Commentary

- The Charter refers repeatedly to "enforcement action" or "enforcement measures" authorized by the Security Council. The terms are not defined, but should be interpreted as including use of force authorized by the Security Council under Chapter VII.[83]
- Peacekeeping undertaken with the consent of the territorial State would generally not be an enforcement measure or action taken under Chapter VII.
- Still, consensual peacekeeping operations may sometimes involve the use of force for force protection purposes.[84] Further, many peacekeeping operations authorized by the Council, since the beginning of the century, have been given robust mandates. Here, the Council has regularly invoked Chapter VII. These robust mandates of peacekeeping forces cross the bounds of an enforcement action, in which the Security Council authorizes the use of force in support of the mission's

83 *See* U.N. Charter art. 2, para. 7 (referring to "enforcement measures under Chapter VII").

84 U.N. SCOR, 70th Sess., 7567th mtg., U.N. Doc. S/PRST/2015/22 (Nov. 25, 2015) ("The Security Council reaffirms the basic principles of peacekeeping: consent of the parties, impartiality, and non-use of force, except in self-defense and defense of the mandate.").

mandate.[85]

85 Democratic Republic of Congo: S.C. Res. 2666, U.N. Doc. S/RES/2666 (Dec. 20, 2022); S.C. Res. 2612, U.N. Doc. S/RES/2612 (Dec. 20, 2021); S.C. Res. 2556, U.N. Doc. S/RES/2556 (Dec. 18, 2020); S.C. Res. 2502, U.N. Doc. S/RES/2502 (Dec. 19, 2019); S.C. Res. 2463, U.N. Doc. S/RES/2463 (Mar. 29, 2019); S.C. Res. 2409, U.N. Doc. S/RES/2409 (Mar. 27, 2018); S.C. Res. 2348, U.N. Doc. S/RES/2348 (Mar. 31, 2017); S.C. Res. 2277, U.N. Doc. S/RES/2277 (Mar. 30, 2016); S.C. Res. 2211, U.N. Doc. S/RES/2211 (Mar. 26, 2015); S.C. Res. 2147, U.N. Doc. S/RES/2147 (Mar. 28, 2014); S.C. Res. 2098, U.N. Doc. S/RES/2098 (Mar. 28, 2013); S.C. Res. 1925, U.N. Doc. S/RES/1925 (May 28, 2010) (MONUSCO, Democratic Republic of Congo); S.C. Res. 1906, U.N. Doc. S/RES/1906 (Dec. 23, 2009); S.C. Res. 1856, U.N. Doc. S/RES/1856 (Dec. 22, 2008); S.C. Res. 1756, U.N. Doc. S/RES/1756 (May 15, 2007); S.C. Res. 1649, U.N. Doc. S/RES/1649 (Dec. 21, 2005); S.C. Res. 1565, U.N. Doc. S/RES/1565 (Oct. 1, 2004); S.C. Res. 1493, U.N. Doc. S/RES/1493 (July 28, 2003) (MONUC, DRC); S.C. Res. 1494, U.N. Doc. S/RES/1494 (July 30, 2003) (Interim Emergency Multinational Force, DRC). South Sudan: S.C. Res. 2677, U.N. Doc. S/RES/2677 (Mar. 15, 2023); S.C. Res. 2625, U.N. Doc. S/RES/2625 (Mar. 15, 2022); S.C. Res. 2567, U.N. Doc. S/RES/2567 (Mar. 12, 2021); S.C. Res. 2514, U.N. Doc. S/RES/2514 (Mar. 12, 2020); S.C. Res. 2459, U.N. Doc. S/RES/2459 (Mar. 15, 2019); S.C. Res. 2406, U.N. Doc. S/RES/2406 (Mar. 15, 2018); S.C. Res. 2392, U.N. Doc. S/RES/2392 (Dec. 14, 2017); S.C. Res. 2327, U.N. Doc. S/RES/2327 (Dec. 16, 2016); S.C. Res. 2326, U.N. Doc. S/RES/2326 (Dec. 15, 2016); S.C. Res. 2304, U.N. Doc. S/RES/2304 (Aug. 12, 2016); S.C. Res. 2302, U.N. Doc. S/RES/2302 (July 29, 2016); S.C. Res. 2252, U.N. Doc. S/RES/2252 (Dec. 15, 2015); S.C. Res. 2241, U.N. Doc. S/RES/2241 (Oct. 9, 2015); S.C. Res. 2223, U.N. Doc. S/RES/2223 (May 28, 2015); S.C. Res. 2187, U.N. Doc. S/RES/2187 (Nov. 25, 2014); S.C. Res. 2155, U.N. Doc. S/RES/2155 (May 27, 2014); S.C. Res. 2109, U.N. Doc. S/RES/2109 (July 11, 2013); S.C. Res. 2057, U.N. Doc. S/RES/2057 (July 5, 2012); S.C. Res. 1996, U.N. Doc. S/RES/1996 (July 8, 2011); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006) (UNMISS, South Sudan). Central African Republic: S.C. Res. 2659, U.N. Doc. S/RES/2659 (Nov. 14, 2022); S.C. Res. 2605, U.N. Doc. S/RES/2605 (Nov. 12, 2021); S.C. Res. 2552, U.N. Doc. S/RES/2552 (Nov. 12, 2020); S.C. Res. 2499, U.N. Doc. S/RES/2499 (Nov. 15, 2019); S.C. Res. 2448, U.N. Doc. S/RES/2448 (Dec. 13, 2018); S.C. Res. 2387, U.N. Doc. S/RES/2387 (Nov. 15, 2017); S.C. Res. 2301, U.N. Doc. S/RES/2301 (July 26, 2016); S.C. Res. 2217, U.N. Doc. S/RES/2217 (Apr. 28, 2015); S.C. Res. 2149, U.N. Doc. S/RES/2149 (Apr. 10, 2014) (MINUSCA, Central African Republic); S.C. Res. 1861, U.N. Doc. S/RES/1861 (Jan. 14, 2009) (MINURCAT, CAR). Mali: S.C. Res. 2640, U.N. Doc. S/RES/2640 (June 29, 2022); S.C. Res. 2584, U.N. Doc. S/RES/2584 (June 29, 2021); S.C. Res. 2531, U.N. Doc. S/RES/2531 (June 29, 2020); S.C. Res. 2480, U.N. Doc. S/RES/2480 (June 28, 2019); S.C. Res. 2423, U.N. Doc. S/RES/2423 (June 28, 2018); S.C. Res. 2364, U.N. Doc. S/RES/2364 (June 29, 2017); S.C. Res. 2295, U.N. Doc. S/RES/2295 (June 29, 2016); S.C. Res. 2227, U.N. Doc. S/RES/2227 (June 29, 2015); S.C. Res. 2164, U.N. Doc. S/RES/2164 (June 25, 2014); S.C. Res. 2100, U.N. Doc. S/RES/2100 (Apr. 25, 2013) (MINUSMA, Mali). Sudan: S.C. Res. 2550, U.N. Doc. S/RES/2550 (Nov. 12, 2020); S.C. Res. 2497, U.N. Doc. S/RES/2497 (Nov. 14, 2019) (UNIFSA, Abeyi). Haiti: S.C. Res. 2466, U.N. Doc. S/RES/2466 (Apr. 12, 2019); S.C. Res. 2410, U.N. Doc. S/RES/2410 (Apr. 10, 2018); S.C. Res. 2350, U.N. Doc. S/RES/2350 (Apr. 13, 2017) (MINUJUSTH, Haiti). Côte d'Ivoire: S.C. Res. 2284, U.N. Doc. S/RES/2284 (Apr. 28, 2016); S.C. Res. 2226, U.N. Doc. S/RES/2226 (June 25, 2015); S.C. Res. 2162, U.N. Doc. S/RES/2162 (June 25, 2014); S.C. Res. 2112, U.N. Doc. S/RES/2112 (July 30, 2013); S.C. Res. 2062, U.N. Doc. S/RES/2062 (July 26, 2012); S.C. Res. 2000, U.N. Doc. S/RES/2000 (July 27, 2011); S.C. Res. 1933, U.N. Doc. S/RES/1933 (June 30, 2010); S.C. Res. 1739, U.N. Doc. S/RES/1739 (Jan. 10, 2007); S.C. Res. 1609, U.N. Doc. S/RES/1609 (June 24, 2005) (Côte d'Ivoire, UNOCI). Sierra Leone: S.C. Res. 1562, U.N. Doc. S/RES/1562 (Sept. 17, 2004) (UNAMSIL, Sierra Leone). Burundi: S.C. Res. 1545, U.N. Doc. S/RES/1545 (May 21, 2004) (ONUB, Burundi). East Timor: S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (UNTAET, East Timor).

Rule 21

(a) In Council practice, the binding character of a decision made under Chapter VII is usually indicated by: a Preambular paragraph in the resulting resolution indicating that the Council is "acting under Chapter VII of the Charter" and an Operative paragraph in which the Council generally uses the expression "decides" or "authorizes" with respect to specific measures.

Commentary

- For many years, the question as to whether the Council intended a resolution to be binding under Chapter VII could be controversial. However, since 1990, the Council has tended to utilize a formula of words reflected in this Rule. It should be noted, nevertheless, that this pattern is not a formal requirement. There are other ways in which the Security Council might issue a binding authorization to use force, including that of simply so stating.
- At present, when the Council adopts a binding decision, the resolution now consistently includes, as a last Preambular paragraph, the words: "Acting under Chapter VII of the Charter of the United Nations." For example, in Resolution 1973 (2011),[86] the Council authorized the use of force to enforce a no-fly zone in Libya. The Preamble specified that the Council was "[a]cting under Chapter VII of the Charter of the United Nations." The Resolution's operative paragraphs specified that the Council: "*[d]ecides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians" (Paragraph 6) and "*[a]uthorizes* 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,

86 S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary" (Paragraph 8).

- The adoption by the Council of a binding decision under Chapter VII occurs through the Operative paragraphs. This does not mean that every Operative paragraph in the resolution is necessarily binding as such: it depends upon the mandatory or hortatory language used by the Council in the respective paragraph. Hortatory paragraphs (that is, exhortation) use such expressions as "urges" or "calls upon."

(b) Authorization of the use of force by the Council in an Operative paragraph is usually communicated by the use of the term "all necessary means" (or "measures").

Commentary:

- When the Council decides to authorize the use of force, it prefers avoiding this outright locution. Instead, it generally employs the euphemism "all necessary measures" (or "means")[87] in a paragraph in which it uses the expression "decides" or "authorizes."[88]
- For example, in Paragraph 8 of Resolution 1973 (2011),[89] cited above, the Council authorized: "*all necessary measures* to enforce compliance with the ban on flights."

Rule 22

Given Article 25 and Article 103 of the Charter, binding decisions of the Security Council adopted under Chapter VII of the Charter need not be consistent with other non-Charter treaty provisions or other non-peremptory rules of international law.

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87 Of these two terms, "measures" appears to be more common, but "means" is also used frequently.

88 Of these two terms, "authorizes" now appears to be the standard.

89 S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (emphasis added).

Commentary

- Article 103 of the Charter prescribes: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
- The power of the Security Council to override a treaty provision in a binding decision adopted under Chapter VII was acknowledged by the ICJ in the 1998 *Lockerbie* case.[90]
- It is not clear that Article 103 may equally override any international legal customary norms. Still, Article 25 specifies that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 25 does not confine this obligation to only those instances when a Council resolution is consistent with customary international law. Indeed, it is inevitable that Council resolutions authorizing use of force constitute an exception to otherwise applicable rules of customary international law: a State authorized by Council resolution to use force on the territory of another State would otherwise violate, at a minimum, the customary international law rule of sovereignty.
- It does seem likely that the Council cannot act in breach of *jus cogens*, e.g., by authorizing the perpetration of genocide.[91]

90 Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J. 9 (Feb. 27).

91 Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 325 (Order of Sept. 13) (separate opinion of Judge Lauterpacht).

Section VI: Measures Taken by Regional Arrangements Lawfully Acting in Accordance with Chapter VIII of the United Nations Charter

Rule 23

Under Chapter VIII of the Charter, any regional arrangement, subject to its constitution, is legally capable of undertaking enforcement action authorized by the Security Council. A regional arrangement may also participate in the exercise of a right of collective self-defense.

Commentary

- Article 53 of the Charter provides that the "Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority."
- Regional arrangements may also constitute effective instruments facilitating the engagement of States in collective self-defense measures, provided that such action is carried out in a manner consistent with the Charter.
- The instrument constituting a regional arrangement may prescribe conditions supplemental to those found in the Charter on the exercise of collective self-defense. They cannot, however, expand the right of collective self-defense: States exercising collective self-defense through a regional arrangement remain bound by the Charter and by peremptory customary rules governing the use of force.

Rule 24

The Charter encourages the Security Council to utilize regional arrangements for taking enforcement action under the Council's authority.

Commentary

- As noted, Article 53 of the UN Charter states that the "Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority." There is, however, no obligation that enforcement measures authorized by the Security Council under Chapter VII of the Charter be conducted through such organizations.
- In practice, the "Council's authority" for taking enforcement action is Chapter VII. The Council very occasionally invokes Chapter VIII in a resolution containing enforcement measures, but seemingly always does so in association with an invocation of Chapter VII.
- For example, in Resolution 1973 (2011) relating to Libya, the Council authorized "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" at issue in that resolution. The Council recognized Chapter VIII, but only as the basis for "request[ing] the Member States of the League of Arab States to cooperate with other Member States."[92]

92 S.C. Res. 1973, ¶¶ 4-5, U.N. Doc. S/RES/1973 (Mar. 17, 2011). *See also* S.C. Res. 1464, ¶ 9, U.N. Doc. S/RES/1464 (Feb. 4, 2003) (the Council, acting under Chapter VII, "authorizes Member States participating in the ECOWAS forces in accordance with Chapter VIII together with the French forces supporting them to take the necessary steps to" among other things, protect civilians); S.C. Res. 1132, ¶ 8, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (the Council imposes measures under Chapter VII and also acts under Chapter VIII to authorize "ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation [certain] of the provisions of this resolution"); S.C. Res. 917, ¶ 10, U.N. Doc. S/RES/917 (May 6, 1994) (the Council imposes measures under Chapter VII and also acts under Chapter VIII to call upon Member States to aid in the application of the enforcement measures).

Rule 25

(a) Enforcement action undertaken by regional arrangements requires the authorization of the Security Council.

Commentary

- Nothing in the Charter permits a regional organization to usurp the primary responsibility, authority, and powers of the Security Council as regards the maintenance of international peace and security.
- Article 53 of the Charter specifies that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council" (except in relation to enemy States in World War II, a qualification that is no longer relevant).
- On the face of it, Article 53 of the Charter can be read to preclude retroactive authorization by the Security Council ("no enforcement action shall be taken ... without the authorization of the Security Council"), but the Council has occasionally extended an authorization to use force to Member States, after an initial use of force by Members of a regional organization that the Council did not authorize.[93] In other instances, it has commended efforts to restore peace and security by a regional organization (without invoking Chapter VII or then authorizing the further use of force).[94]

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93 *See, e.g.,* S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (authorizing use of force by "Member States and relevant international organizations" for listed purposes, following the NATO-led air war, Kosovo).

94 S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 1, 1992) (ECOWAS, Liberia); S.C. Res. 1162, U.N. Doc. S/RES/1162 (Apr. 17, 1998); S.C. Res. 1181, U.N. Doc. S/RES/1181 (July 13, 1998); S.C. Res. 1260, U.N. Doc. S/RES/1260 (Aug. 20, 1999); S.C. Res. 1231, U.N. Doc. S/RES/1231 (Mar. 11, 1999); S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 19, 1999); S.C. Res. 1289, U.N. Doc. S/RES/1289 (Feb. 7, 2000) (ECOWAS, Sierra Leone). *See also* S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (authorizing ECOWAS to "ensure strict implementation" of an arms embargo, after a broader initial use of force by ECOWAS in Sierra Leone).

(b) For the purposes of this Rule, enforcement actions include the use of force, but do not include:

i) Measures taken in collective self-defense; or

Commentary

- As a general principle, measures of collective self-defense exercised under Article 51 of the Charter do not require prior authorization of the Security Council (see **Section XIII**). This general principle applies also when the collective self-defense measures are taken by a regional arrangement.

ii) Measures taken with the consent of the State or States involved.

Commentary

- When a regional arrangement uses forcible measures within the territory of a member State, with its consent, such measures do not qualify as "enforcement" action (requiring Security Council authorization) for the purposes of the present Rule.
- For the concept of State consent, see **Section IV**.

Section VII: Self-Defense against Armed Attacks

Rule 26

(a) The prohibition on the use of force includes a prohibition against committing an "armed attack" (in the sense of Article 51 of the Charter and customary international law).

Commentary

- An "armed attack" is a form of unlawful use of force. Like "use of force," it is not defined in the UN Charter. As discussed below, States are divided as to whether every use of force also constitutes an armed attack, as well as to when the threshold for an armed attack has been reached.
- That said, an armed attack, at a minimum, encompasses acts of "aggression" (a term used in Article 39 of the Charter), as defined in the "Definition of Aggression" Resolution adopted by consensus by the UN General Assembly in 1974.[95]
- The following paragraphs enumerate forms of armed conduct which are treated as armed attacks by the general practice of States, regardless of their views on whether there is a general threshold for "armed attack." This list is not exhaustive. As discussed below, the assessment of a use of force as an armed attack is contextual.

95 G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974). The ICJ has referenced the Resolution's definition of "aggression" in its discussion of "armed attack." Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 146 (Dec. 19). Note also that the French version of "armed attack" in Article 51 of the UN Charter uses the expression "aggression armée." *See also* Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 (as amended, relying on the General Assembly definition, and using it as an exemplar of "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.").

(b) An "armed attack" consists of the deliberate use of force against a State, however committed, that normally includes one or more of the following actions:

Commentary

- To constitute an "armed attack", the harmful conduct must be deliberate, as opposed to accidental or negligent.[96] See also **Rule 3(b)** (Commentary) on the use of force.
- The means of the armed attack do not matter. An armed attack can take place on land, at sea, in the air, in outer space, or in the cyber domain.[97]
- For example, armed attacks on land may be conducted by ground forces entering the territory of a foreign State or by long-distance use of artillery or missiles. Armed attacks by sea include: (i) the mining of international waterways; and (ii) attacks—whether directed or indiscriminate—against shipping or aviation exercising their rights to freedom of navigation or overflight. Armed attacks in the air can be conducted by bombings, strafing, or missile attacks.

i) The invasion of, or hostile intrusion into, the territory of another State and any resulting occupation;

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96 The ICJ has implied that an armed attack requires conduct "aimed specifically" at the attacked State, or at least a "specific intention of harming" that State or its protected interests. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6). U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 137, U.N. Doc. A/76/136 (July 13, 2021) ("Some of the factors States should evaluate in assessing whether an event constitutes an actual or imminent use of force/armed attack in or through cyberspace include the ... intent of the actor (recognizing that intent, like the identity of the attacker, may be difficult to discern, but that hostile intent may be inferred from the particular circumstances of a cyber activity), among other factors.").

97 *See, e.g.,* Position Paper, Netherlands, On the Application of *International Law in Cyberspace 8* (2019) ("It is clear, however, that an armed attack does not necessarily have to be carried out by kinetic means."); Position Paper, Switzerland, On the Application of International Law in Cyberspace, 4 (2021) ("an armed attack does not necessarily have to involve kinetic military action or the use of weapons because the means by which an attack is perpetrated is not the decisive factor.").

Commentary

- The General Assembly's 1974 "Definition of Aggression" Resolution includes as "aggression": "[t]he 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." "Aggression" also includes: "[t]he blockade of the ports or coasts of a State by the armed forces of another State." [98]
- For the purpose of this Rule, the term, "hostile intrusion," is used, rather than the General Assembly's use of "attack"—to avoid confusion in connection with this Rule's speaking to the meaning of an "armed attack." Blockades of coastal State ports or coasts fall within the term, "hostile intrusion."
- The difference between an invasion and hostile intrusion is a matter of scale and effect. Invasion is usually perceived as full-scale and *en masse*—and of longer duration than a hostile intrusion.
- In keeping the broader notion that the harmful effects of the armed attack must be deliberate, the intrusion referred to in this Rule must be hostile. No armed attack is committed when, as happens frequently, intrusions into the territory of another State are made by State organs (e.g., for law enforcement purposes) absent any hostile intent.
- A hostile intrusion can take place through a broad spectrum of activities that are not acknowledged by the attacking State. These may involve the attacking State's own forces (acknowledged or not) or the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries."[99]

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98 G.A. Res. 3314 (XXIX) art. 3(a), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

99 G.A. Res. 3314 (XXIX) art. 3(c) and (g), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

See **Rule 1(c) and (d)** for when a State's role in relation to the conduct of nominally non-State entities results in that State being responsible for the conduct. Hostile intrusions of this sort are described in various ways, such as "indirect aggression," "proxy warfare," "secret warfare," "shadow wars," or "State-supported terrorism." The term used is of no consequence.

- An invasion or hostile intrusion into the territory of another State can occur on land, by sea, or in the air.
- To constitute an armed attack, an invasion or hostile intrusion need not result in physical damage or injury. A blockade, for example, may not result in physical damage. Further, an invasion or hostile intrusion still constitutes an armed attack, even if not met by resistance. The Nazi invasion of Denmark in 1940 and the Russian invasion of Crimea in 2014 are leading illustrations of this fact.
- An invasion may consist of a forcible occupation or annexation of a foreign State or a significant portion thereof.
- The General Assembly's 1974 "Definition of Aggression" Resolution observes that: "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."[100] An unlawful annexation of occupied territory is not made lawful simply because the occupying Power holds a referendum (without the consent of the territorial State) that purportedly endorses such an annexation.

ii) A use of force against a State causing, or liable to cause, human casualties or significant physical damage to—or destruction of—property within the territory or other safeguarded interests of a State; or

100 G.A. Res. 3314 (XXIX) art. 5, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

Commentary

- It is important to bear in mind that the construct of "territory or other safeguarded interests," as defined in **Rule 3,** is not used in these Rules as a strict geographic marker, but as a shorthand to capture the range of potential State targets against which force must not be used under Article 2(4). An armed attack (for instance, against a foreign embassy or military base) can take place outside the attacked State's physical territory, within a third State, or even within the attacking State itself.
- There is a division of State opinion as to whether any use of force in violation of Article 2(4) (see **Rule 3**) constitutes an armed attack, or whether, to constitute an armed attack, there must have occurred a use of force of some gravity (as measured

by its scale and effects).[101]

- Regardless of the approach taken, State treatment of uses of force as an "armed attack" is highly contextual. There is no State practice clearly demarcating, for instance, small-scale border hostilities from armed attacks. Moreover, small-scale uses of force may, based on the context, be regarded by a State as an armed attack.[102]

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101 The ICJ has expressed the view that "armed attack" is a sufficiently grave use of force. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶¶ 191 and 195 (June 27) ("[I]t will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."; "…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."). It did not, however, provide precise guidance on thresholds. *See also* Jus ad Bellum, Ethiopia's Claims 1-8 (Ethiopia v. Eri.), 26 R.I.A.A. 1, ¶ 11 (Perm. Ct. Arb. 2004) ("Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter."). The United States rejects this approach. U.S. Dep't of Defense, *Law of War Manual § 1.11.5.2* (2016) ("The United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force."). Other States view "armed attacks" as requiring a use of force gravity threshold. *See, e.g.,* Position Paper, Germany, On the Application *of International Law in Cyberspace 15* (Mar. 2021) ("Germany acknowledges the view expressed in the ICJ's Nicaragua judgment, namely that an armed attack constitutes the gravest form of use of force."); France, *Droit international appliqué aux opérations dans le cyberspace 7-8* (2021) ("Every use of force does not, however, amount to an armed attack in the sense of article 51 of the Charter of the United Nations, notably where its effects are limited, reversible or do not reach a certain gravity." [translated]); Position Paper, Finland, On the Application of *International Law in Cyberspace 6* (2020) (noting that under the Charter, there is a "distinction between armed attack as a particularly serious violation of the Charter, on the one hand, and any lesser uses of force, on the other".); Position Paper, Netherlands, On the Application of *International Law in Cyberspace 8* (2019); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 69, U.N. Doc. A/76/136 (July 13, 2021). *See also* G.A. Res. 3314 (XXIX) art. 2, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974) (suggesting that a use of force may not itself amount to aggression because of insufficient gravity: "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.").

102 On this point, see Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6) (where the Court did "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"). The United States has treated as armed attacks uses of force producing a limited number of casualties, at least when those casualties were officials or otherwise tied to the US government. *See* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/417 (June 17, 2014) (the United States Ambassador to Libya and three other Americans were killed).

- Notwithstanding these difficulties in defining, precisely, the lower threshold of "armed attack," this threshold would be met when there is a use of force reaching the gravity of that identified in this Rule, that is, one causing or liable to cause human casualties or significant physical damage to—or destruction of—property within the territory or other safeguarded interests of a State.[103]
- The reference to "significant" physical damage or destruction of property in this Rule does not denote a specific degree of property damage, but simply signals that an armed attack does not result from conduct producing mere token or trifling damage to property.
- The reference to "liable to cause" signals that a physical use

103 As noted, whether the use of force constitutes an armed attack requires a contextual analysis. In the context of cyber activity, for instance, Germany, observes that "[m]alicious cyber operations can constitute an armed attack whenever they are comparable to traditional kinetic armed attack in scale and effect .... Physical destruction of property, injury and death (including as an indirect effect) and serious territorial incursions are relevant factors. The decision is not made based only on technical information, but also after assessing the strategic context and the effect of the cyber operation beyond cyberspace." Position Paper, Germany, On the Application *of International Law in Cyberspace 15* (Mar. 2021). *See also* France, *Droit international appliqué aux opérations dans le cyberspace 9* (2021) (declaring that a cyberattack constitutes an armed attack where its effects and scope reach a gravity comparable to physical use of force and observing that this would depend on a contextual analysis, while also noting: "A cyberattack could be considered an armed attack from the point where it causes substantial human losses or considerable physical or economic damage."); Position Paper, Finland, On the Application of *International Law in Cyberspace 6* (2020) ("It is obvious that the attack must have caused death, injury or substantial material damage, but it is impossible to set a precise quantitative threshold for the effects, and other circumstantial factors must be taken into account in the analysis, as well."). *See also* Position Paper, Italy, *On International Law and Cyberspace 8* (2021) (armed attack reaches a threshold "resulting in physical damage of property, human injury or loss of life"); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 70, U.N. Doc. A/76/136 (July 13, 2021) ("A number of factors may be taken into consideration, such as the severity of the consequences (the level of harm inflicted), immediacy, directness, invasiveness, measurability, military character, State involvement, the nature of the target (such as critical infrastructure) and whether this category of action has generally been characterized as the use of force. This list is not exhaustive."); Position Paper, Poland, On the Application of International Law in Cyberspace 5 (2022) ("[D]eath or injury of people or damage or destruction of property of significant value may be considered an armed attack."); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 137, U.N. Doc. A/76/136 (July 13, 2021) ("Although this is necessarily a case-by-case, fact-specific inquiry, cyber activities that proximately result in death, injury, or significant destruction, or represent an imminent threat thereof, would likely be viewed as a use of force / armed attack.").

of force may amount to an armed attack even if, in fact, it does not ultimately result in injurious effects, so long as it was directed at producing these effects.[104] For example, a missile intercepted before it strikes its target, or one that misses its intended target in a foreign State's territory and falls harmlessly into the ocean, may still be regarded by the target State as an armed attack.

- As noted, to constitute an "armed attack," the conduct must be deliberate, as opposed to accidental or negligent.[105] For example, a missile that is fired accidentally and crashes in a foreign State because of a technical malfunction does not constitute an armed attack, even if it causes injury. Of course, it is not always clear whether such a crash is accidental or not, and the target State may interpret what has happened differently from the State launching the missile. Moreover, even if the accidental or negligent act is not an "armed attack" enabling self-defense, the launching State may be internationally responsible for any injurious effects under other rules of international law.
- In accordance with emerging State practice, a cyber operation will constitute a use of force amounting to an armed attack if its scale and effect is analogous to that caused by a physical

104 General Assembly Resolution 3314 (XXIX) includes as "aggression" acts capable of having an injurious effect, even without suggesting that they do actually produce such an effect. *See* G.A. Res. 3314 (XXIX) art. 3(d), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974) ("An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State"); *id.* at art. 3(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").

105 The ICJ has implied that an armed attack requires conduct "aimed specifically" at the attacked State, or at least reflecting a "specific intention of harming" that State or its protected interests. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6).. *See also* Position Paper, Netherlands, On the Application of *International Law in Cyberspace 9* (2019) ("The burden of proof for justifiable self-defence against an armed attack is a heavy one. The government shares the conclusion of the CAVV and the AIV that 'No form of self-defence whatever may be exercised without adequate proof of the origin or source of the attack and without convincing proof that a particular state or states or organised group is responsible for conducting or controlling the attack.' States may therefore use force in self-defence only if the origin of the attack and the identity of those responsible are sufficiently certain. This applies to both state and non-state actors.").

armed attack.[106]

- Scale and effect considerations include "such factors as interference with critical infrastructure or functionality, severity and reversibility of effects, the immediacy of consequences, the directness between act and consequences, and the invasiveness of effects."[107]
- Thus, cyber operations can cause human casualties or physical damage (e.g., by shutting down life-support devices or opening dike sluices and causing flooding), in which cases their scale and effect is similar to those of a kinetic attack. However, it is important to bear in mind that not every cyber intrusion reaches this threshold, equating to an armed attack for purposes of self-defense.
- There is some State support for the position that cyber operations severely impeding the functionality of vital infrastructure, whether public or private, may amount to an armed attack, even in the absence of human causalities or

106 *See, e.g.,* N. Atl. Treaty Org., *Allied Joint Doctrine for Cyberspace Operations* ¶¶ *3.6-3.7* (2020). *See also* Australia, Dep't of Foreign Affairs and Trade, *Australia's International Cyber Engagement Strategy 90 (*2017).; Submission of Australia to the 2021 Group of Government Experts on Cyber (May 28, 2021); Canada, International Law Applicable in Cyberspace ¶¶ 45-46 (Apr. 22, 2022), https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx; Position Paper, Finland, On the Application of *International Law in Cyberspace 6* (2020); Kersti Kaljulaid, President of Estonia, Address at the 11th International Conference on Cyber Conflict (May 29, 2019); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 30, U.N. Doc. A/76/136 (July 13, 2021); Position Paper, Germany, On the Application *of International Law in Cyberspace 15* (Mar. 2021); France, *Droit international appliqué aux opérations dans le cyberspace* 8 (2021); Position Paper, Netherlands, On the Application of *International Law in Cyberspace 8* (2019); Position Paper, New Zealand, *The Application of International Law to State Activity in Cyberspace 7-8* (2020); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 69, U.N. Doc. A/76/136 (July 13, 2021); Position Paper, Sweden, On the Application of International Law in Cyberspace (2022); Position Paper, Switzerland, On the Application of International Law in Cyberspace 4 (2021); United Kingdom, *Cyber and International Law in the 21st Century* (2018); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 137, U.N. Doc. A/76/136 (July 13, 2021).

107 N. Atl. Treaty Org., *Allied Joint Doctrine for Cyberspace Operations* ¶ 3.7 (2020).

physical damage.[108]

- The vital infrastructure of a State includes its critical network of utilities (such as its electrical grid and water processing facilities), as well as its banking and financial system, transportation network, and principal medical facilities. This list is not exhaustive.
- This position on vital infrastructure may have merit *de lege ferenda*, especially in extreme cases; however, currently, the articulated opinions of States on this issue are divided.[109]

iii) Uses of force that cumulate to reach the scale and effects listed in paragraphs (i) or (ii) and reflect a pattern of ongoing armed activity.

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108 France, *Droit international appliqué aux opérations dans le cyberspace 8* (2021) (considering that an armed attack may occur when a cyber intrusion causes a failure of critical infrastructure with significant consequences or is likely to paralyze through breakdowns all the activity in a State, cause technological or ecological catastrophes, and create many victims); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 70, U.N. Doc. A/76/136 (July 13, 2021) ("[T]he use of crypto viruses or other forms of digital sabotage against a State's financial and banking system, or other operations that cause widespread economic effects and destabilisation, may amount to the use of force in violation of Article 2(4). A cyber operation that severely damages or disables a State's critical infrastructure or functions may furthermore be considered as amounting to an armed attack under international law."); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 84, U.N. Doc. A/76/136 (July 13, 2021) ("In Singapore's view, it is also possible that, in certain limited circumstances, malicious cyber activity may amount to an armed attack even if it does not necessarily cause death, injury, physical damage or destruction, taking into account the scale and effects of the cyber activity. An example might be a targeted cyber operation causing sustained and long-term outage of Singapore's critical infrastructure."); Position Paper, Costa Rica, *On the Application of International Law in Cyberspace 11* (July 21, 2023) ("Examples of cyber operations potentially constituting armed attacks are those causing significant loss of life and destruction of critical infrastructure.").

109 *See, e.g.,* Position Paper, Finland, On the Application of *International Law in Cyberspace 6* (2020) ("A question has also been raised, whether a cyberattack producing significant economic effects such as the collapse of a State's financial system or parts of its economy should be equated to an armed attack. This question merits further consideration."); Position Paper, Netherlands, On the Application of *International Law in Cyberspace 9* (2019) ("At present there is no international consensus on qualifying a cyberattack as an armed attack if it does not cause fatalities, physical damage or destruction yet nevertheless has very serious non-material consequences.").

Commentary

- Uses of force may singly reach the scale and effect of an armed attack, or may cumulate to constitute an armed attack.[110]
- Some States have concluded that cyber activities may cumulate to reach the scale and effects of a use of force (and armed attack), either alone or in conjunction with physical activities.[111]

(c) Except as provided elsewhere in these Rules, State conduct amounting to an armed attack under this Rule remains an armed attack when motivated by an effort to support an insurgency against an incumbent Government in a foreign State.

Commentary

- The legal character of the State's conduct is not changed by its political motivation.[112]
- Further, as noted in **Rule 9**, an NSA cannot consent to the use of force on the territory of a State.
- However, intervention in support of an insurgency is not unlawful if authorized by the Security Council or if carried out as a component of the exercise of the right of individual or collective self-defense.

(d) An armed attack may occur if launched or carried out by one State against another from within the territory of a third State, or from outside of a State.

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110 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 231 (June 27) (suggesting that forceful incidents may be considered "singly or collectively"); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 146 (Nov. 6) (preparing to consider whether attacks cumulatively amounted to an armed attack); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 146 (Dec. 19) (leaving open the prospect that a series of small scale attacks could cumulate to form an armed attack).

111 *See, e.g.,* France, *Droit international appliqué aux opérations dans le cyberspace* 9 (2021)..

112 G.A. Res. 3314 (XXIX) art. 5(1), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974) ("No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.").

Commentary

- Armed attacks may originate from outside a State's territory. Thus, an armed attack may originate from naval vessels or aircraft in, on, or above international waters. An armed attack may also originate from within the territory of another State.
- When a third State colludes, its acts of assistance may themselves reach the level of an armed attack. The 1974 General Assembly Resolution defining "aggression" includes: "[t]he 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."[113]
- A State's knowing aid and assistance to the attacking State makes it internationally responsible for that attacking State's armed attack.[114]
- In such circumstances, the attacked State can lawfully exercise measures of self-defense against the armed attack within the territory of the third State, without its consent.[115]

113 G.A. Res. 3314 (XXIX) art. 3(f), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

114 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 16*, 2 Y.B. Int'l L. Comm'n 47 (2001).

115 *See, e.g.,* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2021/614 (June 29, 2021) (justifying as self-defense forcible measures taken against non-State entities attributed to Iran in Syria).

Section VIII: Response to an Armed Attack, Generally

Rule 27

As an armed attack amounts to a serious violation of the peremptory norm prohibiting the unlawful use of force in international relations, every State is obliged to cooperate to bring it to an end through lawful means, to refuse to recognize as lawful the situation caused by it, and to abstain from providing aid or assistance in maintaining this situation.

Commentary

- An armed attack is a serious violation of the peremptory norm (reflected in Article 2(4) of the Charter) prohibiting the use of force (see **Rule 4**).
- This Rule replicates the principle reflected in the ILC's Articles on State Responsibility. Faced with a serious breach of a preemptory norm, States must not only cooperate to bring the violation to an end. They also have a "duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches ... and, secondly, not to render aid or assistance in maintaining that situation."[116]

Rule 28

(a) Faced with an armed attack, there is a right of States in customary international law and under Article 51 of the Charter to use forcible measures in individual or collective self-defense.

Commentary

116 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 41*, 2 Y.B. Int'l L. Comm'n 47 (2001). (Commentary).

- Irrefutably, there is a right to engage in individual or collective self-defense against an armed attack under both Article 51 of the Charter and customary international law.
- The right of self-defense may not be exercised unless a State is faced with an armed attack.[117] See **Section X** on the question of "imminence" and armed attacks.
- A lawful response to an armed attack in self-defense may extend to the territory of the attacking State. As noted in the Commentary to **Rule 26(d)**, defensive measures may also extend to the territory of a third State allowing its territory, placed at the disposal of another State, to be used for the armed attack, or which has otherwise provided knowing aid and assistance to the attacking State.[118]
- In this regard, applicable regional arrangements and collective defense treaties may supplement, although not contradict, the requirements of the Charter. See also **Rule 23**.

(b) Forcible measures meeting the standards of lawful self-defense are not themselves an unlawful use of force or an armed attack.

Commentary

- The exercise of the right of individual or collective self-defense is inextricably linked to the occurrence of an armed attack to which it responds. See **Rule 26**.
- The persistence of an armed conflict following the initiation of forcible measures in self-defense does not mean that those forcible measures are no longer defensive.

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117 In fact, the ICJ has found on two occasions that a State's putative use of forcible defensive measures against a second State was not justified because there was no armed attack attributable to that second State. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19).

118 G.A. Res. 3314 (XXIX) art. 3(f), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974); ILC, Responsibility of States for Internationally Wrongful Acts, Article 16.

- This right to self-defense is a clear-cut exception to the obligation not to use force set forth in Article 2(4) of the Charter and customary international law. The ILC's Articles on State Responsibility provide that "[t]he 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."[119] In its commentary, the ILC observed "a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4."[120]
- When the use of force in the exercise of the right of individual or collective self-defense is lawful in the sense of meeting the rules in this Manual, it cannot constitute an armed attack and cannot be subject to a purported counter-use of self-defense. That is, there is no right to self-defense against the legitimate exercise of self-defense.

119 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 21*, 2 Y.B. Int'l L. Comm'n 47 (2001).

120 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 21*, 2 Y.B. Int'l L. Comm'n 47 (2001) (Commentary). *See also* Jus ad Bellum, Ethiopia's Claims 1-8 (Ethiopia v. Eri.), 26 R.I.A.A. 1, ¶ 17 (Perm. Ct. Arb. 2004) (rejecting the view that a declaration of a right to self-defense amounts to a "declaration of war").

Section IX: The Principles of Necessity and Proportionality

Rule 29

In the exercise of the right of individual or collective self-defense faced with an armed attack, States are bound by the requirements of necessity and proportionality.

Commentary

- The UN Charter does not enumerate all of the requirements for the lawful exercise of self-defense. Other requirements exist in customary international law.
- The requirements of necessity and proportionality in the exercise of the right of individual or collective self-defense are not mentioned explicitly in Article 51 of the Charter, but they are incontrovertible, considering customary international law.[121]
- These requirements are sometimes attributed to U.S. Secretary of State Daniel Webster's distillation in the 1837-1842 *Caroline* dispute: "It will be for [the British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of United States at all, did nothing unreasonable or excessive."[122]

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121 The ICJ has, for instance, repeatedly invoked these two principles as components of self-defense. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶¶ 176, 194, 237 (June 27); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 43 (Nov. 6); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 147 (Dec. 19).

122 McLeod and Maine, 1837-1842, at 156, 159 (Kenneth Bourne ed., 1986).

- It must be emphasized that the necessity and proportionality of defensive measures may be affected by UN Security Council resolutions. See **Section XIII**.

Rule 30

In keeping with the requirement of necessity, forcible measures taken in the exercise of the right of individual or collective self-defense can be resorted to only when, and for so long as, other means will not be effective in achieving the goal of ending the armed attack, including any occupation.

Commentary

- Forcible defensive measures must be directed at the effect of ending the armed attack, including any occupation.
- The necessity requirement is captured in Daniel Webster's 1842 distillation of "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."
- Forcible measures with an aim unrelated to the goals of self-defense do not meet the standard of necessity and are not self-defense. Retaliatory forcible measures, for example, are not self-defense.[123] These measures are not necessary to end the armed attack, since an armed attack no longer exists.
- The condition of necessity means that States may have recourse to forcible measures of self-defense in those circumstances in which there is no other "choice of means"; that is, non-forcible means will not end the armed attack, including any

123 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 237 (June 27) (necessity did not exist where forcible 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 ... 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.").

occupation.[124]

- Of course, much depends on whether an interval of time is realistically available, when faced with an armed attack. However, when a viable opportunity exists to pursue non-forcible measures in response to an armed attack, it must be pursued.
- Necessity includes a related consideration of immediacy; that is, the measures taken in self-defense must be pursued within a reasonable time after the occurrence of an armed attack.
- A delayed response to a completed attack risks being perceived as a retaliation, and not a lawful forcible defensive measure. An element of necessity does not exist if an armed attack has passed and is not persisting.
- However, the concept of immediacy must be understood in a flexible manner. There is no specific expiry date attached to the requirement of immediacy. It must be recognized that an effective response to an armed attack by way of self-defense may require time for adequate logistical preparations. Thus, delay caused by fruitless negotiations or the need to marshal forces to respond to a persisting armed attack (including an occupation) does not detrimentally affect the permissible time afforded to respond to an armed attack.

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124 *See, e.g.,* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2021/614 (June 29, 2021) (discussing necessity and proportionality, and observing that the forcible defensive measures were "taken after non-military options proved inadequate to address the threat, with the aim of de-escalating the situation and preventing further attacks. It was conducted together with diplomatic measures, including consultation with Coalition partners."); Peter Henry Goldsmith, U.K. Attorney-General, Statement to the House of Lords, (Apr. 21, 2004), *in* 660 HANSARD col. 370 (urging that necessity requires that force be used only as a last resort); George Brandis, Att'y Gen., Austl., The Right of Self-Defence against Imminent Armed Attack in International Law, Lecture at the T.C. Beirne School of Law, University of Queensland (April 11, 2017) ("The requirement of necessity means that the State must have no other reasonably available option in the circumstances to protect itself from the imminent attack, other than to use force in self defence."); Position Paper, Netherlands, On the Application of *International Law in Cyberspace* (2019) ("invoking the right of self-defence is justifiable only 'provided the intention is to end the attack, the measures do not exceed that objective and there are no viable alternatives.'").

- If relatively prolonged (albeit unsuccessful) negotiations are underway concerning a possible non-forcible termination of the armed attack, this would affect the timetable of the ultimate exercise of self-defense measures. The State invoking the right of self-defense cannot be blamed for any temporal delay in action caused by a fruitless attempt to avoid the need to resort to forcible measures.
- In the cyber context, States may need to consider the prospect that passive cyber security measures may suffice to stave off a cyber armed attack.[125]
- The requirement of immediacy must not be confused with "imminence." Immediacy is a requirement that must be met following an armed attack. Imminence is a condition of anticipatory self-defense (see **Section X**).

Rule 31

To meet the requirement of proportionality, forcible defensive measures must be limited to that which is required to restore the security of the State by stopping the armed attack, including any occupation.

Commentary

- Forcible defensive measures must be of a scale and scope that does not exceed that required to end the armed attack, including any occupation.
- Armed attacks can obviously differ in character, scale and effects. The forcible defensive response must be proportionate,

125 U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 137, U.N. Doc. A/76/136 (July 13, 2021). ("Before resorting to forcible measures in self-defense against an actual or imminent armed attack in or through cyberspace, States should consider whether passive cyber defenses or active defenses below the threshold of the use of force would be sufficient to neutralize the armed attack or imminent threat thereof.").

bearing in mind the diverse dimensions of armed attacks.[126]

- Proportionality does not mean that the scale of the forcible measure must match that of the armed attack. Rather, proportionality requires a link between the scale of the forcible measure and the goal of stopping the armed attack, including any occupation. The standard is not met when a State takes forcible measures that exceed in scale what is required to meet this goal, as measured by (for instance) its targets.[127]
- In many instances, simply repelling an armed attack will constitute a sufficiently proportionate response to such an attack. Yet, there is State practice suggesting that additional forcible measures may be taken to ensure that the attacked State is secured from an armed attack that is suppressed (or whose effects have already arisen), but not necessarily terminated. For the purpose of evaluating proportionality, a pattern of past small armed attacks may be considered cumulatively in deciding what is required to stop the armed

126 George Brandis, Att'y Gen., Austl., The Right of Self-Defence against Imminent Armed Attack in International Law, Lecture at the T.C. Beirne School of Law, University of Queensland (April 11, 2017) (in the context of anticipatory self-defense, noting that "[p]roportionality, meanwhile, acts as a restraint to ensure that any use of force in self-defence corresponds to the gravity of the imminent attack sought to be repelled.").

127 Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 76-77 (Nov. 6) (the scale of the defensive response exceeds the putative armed attack, which was executed as part of a more extensive operation and included "targets of opportunity"); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 147 (Dec. 19) ("...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."). *See also* Independent International Fact-Finding Mission on the Conflict in Georgia, 1 *Report* ¶ *21* (2009) (concluding forcible measures purportedly taken in self-defense were not "even remotely commensurate with the threat" purportedly defended against); Independent International Fact-Finding Mission on the Conflict in Georgia, 2 *Report 271* (2009) (listing considerations related to measuring proportionality).

attack.[128]

- Proportionality does not impose fixed geographic constraints on the State exercising the right of self-defense.[129] In particular, a State invaded by another State does not have to exercise self-defense measures solely within its own territory, so long as these forcible measures meet the ultimate objective of ending the armed attack and restoring the defending State's security.
- Moreover, there are some exceptionally critical situations in which the armed attack may be of such magnitude that the proper response—as occurred in World War II—will be a demand for unconditional surrender and regime change. It is necessary to recall that the Charter was adopted by the Allied countries in World War II before that war had ended, and the Allied objective in that war was "unconditional surrender."

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128 Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946, (Oct. 7, 2001) (United States use of force in Afghanistan after 9/11 described as an act of self-defense, responsive to an "ongoing threat" and "designed to prevent and deter further attacks on the United States."); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/947, (Oct. 7, 2001) (the war in Afghanistan was designed to "avert the continuing threat of attacks"). *See also* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/417 (June 17, 2014) ("Following a painstaking investigation, the United States Government ascertained that Ahmed Abu Khattalah was a key figure in those armed attacks. The investigation also determined that he continued to plan further armed attacks against United States persons."); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998) (In relation to the Al Qaeda embassy bombings in Tanzania and Kenya, "in response to these terrorist attacks, and to prevent and deter their continuation… we have convincing evidence that further such attacks were in preparation from these same terrorist facilities"); Position Paper, Netherlands, On the Application of *International Law in Cyberspace* (2019) ("'The proportionality requirement rules out measures that harbour the risk of escalation and that are not strictly necessary to end the attack or *prevent attacks in the near future*.'" (emphasis added)).

129 Canada, Operational Law Manual 13-4 (2007) ("Military responses in self-defence are not limited to the geographic location in which the armed attack occurred or within any pre-determined time frame. Rather, the geographic and temporal parameters of a response are defined by the principles of necessity and proportionality.").

Rule 32

To be lawful, defensive forcible measures need not emulate the means used in the armed attack. Forcible defensive measures may involve either kinetic (physical) or non-kinetic (such as cyber) operations, regardless of whether kinetic or non-kinetic means are used in the armed attack.

Commentary

- There is no State practice suggesting that either necessity or proportionality requires that there be parity of means between the forcible defensive measures and the armed attack.[130] Thus, defensive forcible measures need not be of the same type or use the same means as the force used in the armed attack. Defending States are free to select whatever means of force they deem appropriate, whether kinetic (physical) or cyber, subject to the requirements of necessity and proportionality. A State may respond to a kinetic armed attack by cyber means and vice versa.[131]

130 Independent International Fact-Finding Mission on the Conflict in Georgia, 2 *Report 272* (2009) ("The defending state is not restricted to the same weapons or the same number of armed forces as the attacking state.").

131 U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 30, U.N. Doc. A/76/136 (July 13, 2021); *id.* at 70; Position Paper, Poland, On the Application of International Law in Cyberspace 5 (2022); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 137, U.N. Doc. A/76/136 (July 13, 2021).

Section X: Anticipatory Self-Defense

Rule 33

A State may resort to forcible defensive measures when an armed attack occurs, including once an attacker initiates specific and identifiable conduct that will culminate in the harmful effects constituting an armed attack, such as the launching of a missile.

Commentary

- Article 51 invokes a right of self-defense when an "armed attack occurs."
- There is no basis to conclude from State practice, however, that a State must wait for the harmful effects of an armed attack to occur before acting in self-defense; that is, a State may act when an attacker has initiated the use of force comprising the armed attack, even when the harmful effects have not materialized. This action may be viewed as a form of "interceptive" self-defense.

Rule 34

There is State practice supporting the view that a State may respond with forcible measures to the threat of an armed attack when that threat is imminent. However, the precise meaning of "imminent" remains a matter of debate.

Commentary

- Defensive measures in response to threatened armed attacks must be distinguished from the interceptive self-defense discussed in **Rule 33**. With interceptive self-defense, the attacker has already initiated an armed attack through conduct that will culminate in harmful effects constituting an armed attack. In the case of anticipatory self-defense, the putative attacker has engaged in conduct that will not, in itself,

culminate in harmful effects constituting an armed attack. However, it may be inferred from its behavior that such a specific and identifiable armed attack is imminent.[132] Thus, this anticipatory form of self-defense applies when conduct that will culminate in harmful effects constituting an armed attack has not yet been initiated, but will be initiated imminently.

- State practice reflects an acceptance of the lawfulness of resort to defensive force when a State is faced with an "imminent" armed attack.[133] Considerable uncertainty exists, however, concerning the concept of "imminence."
- Some States appear to accept a form of imminence that pertains only to an initiated forcible action, where *only* the injury remains imminent;[134] that is, the circumstances set out in **Rule 33**.
- Other States have asserted a broader right of anticipatory self-defense tied to imminence in a temporal sense; that is, when

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132 Independent International Fact-Finding Mission on the Conflict in Georgia, 2 *Report* 254 (2009) (imminent armed attack must be "objectively verifiable" and concrete); France, *Droit international appliqué aux opérations dans le cyberspace 9 (*2021 (discussing a right to respond in self-defense against an imminent cyberattack of sufficient gravity, where it is "certain"); George Brandis, Att'y Gen., Austl., The Right of Self-Defence against Imminent Armed Attack in International Law, Lecture at the T.C. Beirne School of Law, University of Queensland (April 11, 2017) ("[T]here must be a reasonable and objective basis for determining that an attack is imminent. And this view can only be formed on the basis of all available evidence when the assessment is made.").

133 *See, e.g.,* N. Atl. Treaty Org., *Allied Joint Doctrine for Cyberspace Operations* ¶ 3.14 (2020) ("An armed attack or imminent armed attack can trigger the right to exercise self-defence."); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 7, 2015) ("a precision air strike against an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling," although also tied to collective self-defense of Iraq); Letters from the Permanent Representative of Turkey to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/127 (Feb. 22, 2015) ("Facing an imminent threat from the terrorist organization" Daesh).

134 Position Paper, Germany, On the Application *of International Law in Cyberspace 16* (Mar. 2021) ("In Germany's view, art. 51 UN Charter requires the attack against which a State can resort to self-defence to be 'imminent'. The same applies with regard to self-defence against malicious cyber operations. Strikes against a prospective attacker who has not yet initiated an attack do not qualify as lawful self-defence.").

the forcible conduct is about to be initiated.[135]

- There also now exists some State practice suggesting that certain contextual considerations—apart from temporal imminence—may justify anticipatory self-defense. For instance, there has been some suggestion, beginning near the start of the Charter era, that the concept of "armed attack occurs" must take into consideration the threat posed by a prospective nuclear strike.[136] Other contextual considerations include whether the defending State faces a last feasible window of opportunity, even if there remains a gap of time between that window and the actual initiation of the armed attack.[137] Additionally, some States have embraced the "Bethlehem Principles," which propose a broader list of considerations:
    - the nature and immediacy of the threat;
    - the probability of an attack;

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135 *See, e.g.,* France, *Droit international appliqué aux opérations dans le cyberspace* 8 (2021). (discussing self-defense in a cyber context and discussing "imminence" as an armed attack about to be launched).

136 Chester I. Barnard, J. R. Oppenheimer, Charles A. Thomas, Harry A. Winne & David E. Lilienthal, A Report on the International Control of Atomic Energy 164 (1946) ("an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons." Now, it was "important and appropriate" to include "not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action" as an "armed attack."); U.S. Atomic Energy Commission, *First Report of the Atomic Energy Commission to the Security Council, December 30, 1946*, 1(2) Int'l Org. 389, 395 (1947) (a violation of atomic arms controls "might be of so grave a character as to give rise to the inherent right of self-defence" under Article 51); Canada, Operational Law Manual 13-3 (2007) ("the nature of launching a weapon of mass destruction (WMD), when contrasted with firing of a rifle, will be considered in the determination of imminence.").

137 U.S. Dep't of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force 8* (Nov. 8, 2011); Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing 45*, 2015-16, H.L. Paper 141, H.C. 574; George Brandis, Att'y Gen., Austl., The Right of Self-Defence against Imminent Armed Attack in International Law, Lecture at the T.C. Beirne School of Law, University of Queensland (April 11, 2017) ("'[A] state may act in anticipatory self-defence against an armed attack when the attacker is clearly committed to launching an armed attack, in circumstances where the victim will lose its last opportunity to effectively defend itself unless it acts. This standard reflects the nature of contemporary threats, as well as the means of attack that hostile parties might deploy.'").

- whether the anticipated attack is part of a concerted pattern of continuing armed activity;
- the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of a mitigating action; and
- the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.[138]

- These contextual considerations have not been agreed upon, however, even among those States who accept the concept of anticipatory self-defense.
- The circumstantial background suggesting an imminent armed attack may include intelligence reports and other indicia signaling that a specific and identifiable armed attack is imminent. Interpretation of this information requires judgment, however. A State that misjudges the situation may face condemnation, as well as counter-claims that its putative use of force was improper (and was itself an unlawful use of force), in that there was no armed attack.

138 *See* George Brandis, Att'y Gen., Austl., The Right of Self-Defence against Imminent Armed Attack in International Law, Lecture at the T.C. Beirne School of Law, University of Queensland (April 11, 2017).; Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 Int'l L. Studies 235, 239 (2016) ("When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors, including those identified by Sir Daniel Bethlehem."); Jeremy Wright, U.K. Attorney General, *The Modern Law of Self-Defence*, Speech at the International Institute for Strategic Studies (Jan. 11, 2017) ("It is my view, and that of the UK Government, that these are the right factors to consider in asking whether or not an armed attack by non-state actors is imminent and the UK Government follows and endorses that approach."). The Bethlehem Principles were set out in Daniel Bethlehem, *Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 Am. J. Int'l L. 769 (2012).

Rule 35

A State may not use force in self-defense simply on the basis that its use of force will preempt the realization of a threat that is non-imminent. Such a use of force would be unlawful under the Charter and customary international law.

Commentary

- Force used when faced with a non-imminent threat is sometimes called "preemptive" or "preventive" defense, although the vocabulary used to describe such a use of force varies.
- The difference between anticipatory and preemptive self-defense is that a State invoking the right of self-defense, preemptively, points merely to a prospective attacker's presumed intent and means, rather than its actual conduct suggestive of an imminent armed attack.
- While there exists no consensus on the meaning of "imminent" (or that anticipatory self-defense is lawful), even those States supporting the existence of the right to engage in anticipatory self-defense against imminent threats agree that there is a point beyond which a threat is too nascent to be imminent.[139] Force used against these non-imminent threats is unlawful.

139 *See, e.g.,* George Brandis, Att'y Gen., Austl., The Right of Self-Defence against Imminent Armed Attack in International Law, Lecture at the T.C. Beirne School of Law, University of Queensland (April 11, 2017) ("Australia, however, does *not* adhere to any doctrine of socalled 'preemptive' self-defence. Preemptive use of force is an entirely different thing from the use of force in anticipation of an imminent threat. The former is not an accepted application of the principle of self-defence; the latter, for the reasons I've explained, clearly is."); Position Paper, France, *International Law Applied to Operations in Cyberspace 7* (2021) ("In exceptional circumstances, France allows itself to use pre-emptive self-defence in response to a cyberattack that "has not yet been triggered but is about to be, in an imminent and certain manner, provided that the potential impact of such an attack is sufficiently serious". However, it does not recognise the legality of the use of force on the grounds of preventive self-defence.").

Section XI: Collective Self-Defense

Rule 36

(a) Collective self-defense is the defense of a State by one or more third States, regardless of whether or not these States are acting under the auspices of a preexisting collective self-defense agreement.

Commentary

- Collective self-defense means that one or more third States, not themselves the direct victims of an armed attack and regardless of geographic proximity, resort to forcible measures in response to an armed attack.
- Collective self-defense is an important component of deterrence against armed attacks and constitutes a necessary protection for smaller States.
- Collective self-defense treaties are common. The preeminent examples are those of the Rio Treaty of 1947[140] and the North Atlantic Treaty of 1949.[141] However, the right of collective self-defense does not result exclusively from such a treaty. It exists independently and is rooted in customary international law and Article 51 of the Charter.

(b) Generally, a State or States may engage in collective self-defense only with the consent of the State facing an armed attack. However, the consent of the attacked State need not be expressed overtly.

140 Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.

141 North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

Commentary

- This Rule expresses the ordinary practice of States, whereby an attacked State requests that other States (especially allies) come to its assistance by exercising collective self-defense. There does not appear to be an instance of the exercise of collective self-defense that was not preceded by a request for assistance.
- State practice does not support a specific form requirement for this request. In the *Nicaragua* case, the ICJ pronounced that the exercise of collective self-defense is contingent upon the attacked State having declared itself to have been attacked and having requested the exercise of collective self-defense. The ICJ held that this was a customary rule of international law, looking to only the procedural requirements of the Rio Treaty of 1947.[142] However, the universality of this statement of the law is not confirmed by the North Atlantic Treaty of 1949,[143] which includes no analogous process prerequisite to the exercise of collective self-defense.
- Although States exercising collective self-defense often point to acts constituting armed attacks in justifying their forcible measures, State practice does not appear to prescribe the existence of a formal declaration by the attacked State that an armed attack has occurred as a prerequisite to the exercise of collective self-defense. It is clear, however, that, factually, there must exist evidence of a State requesting assistance when faced

142 *See* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 196 (June 27).. The Rio Treaty is found as the Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.

143 North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

with an armed attack.[144]

(c) The exercise of collective self-defense may be agreed in advance, as in the context of a collective self-defense treaty.

Commentary

- Collective self-defense may be invoked spontaneously, when a State is faced with an armed attack. However, the exercise of collective self-defense may also be agreed upon in advance by States, when they regard themselves as potential targets of an armed attack (either at large or in a specific region of the world).
- Typically, consent to the exercise of collective self-defense against future armed attacks is incorporated in treaties of alliance. Such treaties are concluded on the basis of the precept that an armed attack against one State Party is to be considered an armed attack against all.
- For example, Article 5 of the North Atlantic Treaty reads (in part): "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered

144 *See* Letter from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 20, 2014) (requesting military aid in response to Daesh, with no reference to an armed attack, but enumerating the security threats). States then invoking collective self-defense in support of Iraq discussed the threat posed by Daesh, but did not appear to require some sort of formal declaration—only Iraq's request for aid. *See, e.g.,* Letter from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations Addressed to the President of the Security Council, S/2016/132 (Feb. 10, 2016); Letter from the Permanent Representative of Norway to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016); Letters from the Permanent Representative of France to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 8, 2015). The United States, the United Kingdom and Canada did refer to armed attacks, but without tying this fact to a formal declaration requirement by Iraq. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014); Letters from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 25, 2014); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015).

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."[145]

- The Rio Treaty reads in Article 3(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."[146]
- Any collective self-defense treaty must be consistent with Article 51 of the Charter. See also **Rule 23**.

145 North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, 343.

146 Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.

Section XII: Armed Attacks by Non-State Actors (NSAs)

Rule 37

States have the right to engage in individual, as well as collective, self-defense against an armed attack by an NSA that exhibits an international (foreign) element; that is, the attack is being instigated, directed, or conducted from abroad.

Commentary

- It is to be recalled that an NSA is defined in **Rule 1(e)** as "a person or group of persons that is not a part of the *de jure* or *de facto* State referenced in [Rule 1] paragraphs (b) or (c) and whose conduct at issue is not attributable to the State under paragraph (d)." In this last respect, NSAs are to be distinguished from non-State entities under the effective control of a State.
- The notion that an NSA may commit an armed attack justifying forcible defensive measures has been controversial, in part because of ambiguous statements made by the ICJ. The ICJ 2004 *Advisory Opinion on the Wall* (after reproducing Article 51 and noting, without demur, Security Council Resolutions 1368 and 1373 discussed below), declared: "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."[147]
- However, it must be underscored that the text of Article 51 refers to an armed attack "against" a UN Member. It does not say that the armed attack must be carried out "by" a State. Thus, as correctly observed by Judge R. Higgins in her Separate

147 Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9).

Opinion, there is nothing in the text of Article 51 stipulating that the right of self-defense "is available only when an armed attack is made by a State."[148] Similar criticism was articulated in the Separate Opinion of Judge Kooijmans and in the (dissenting) Declaration of Judge T. Buergenthal.[149]

- It is true that some States conclude that NSAs may not commit "armed attacks," at least without meeting other threshold criteria.[150] On the other hand, there is considerable State practice strongly supporting the view that armed attacks in the sense of Article 51 can be carried out by NSAs acting on their own initiative against a State, at least when such acts originate

148 *Id.* at 215.

149 *Id.* at 230, 242.

150 *See, e.g.,* France, *Droit international appliqué aux opérations dans le cyberspace* 9 (2021). (France does not recognize that a non-State entity may commit an armed attack, where its actions are not attributable to a State. That said, it is prepared to treat an NSA acting like a "quasi-State," such as Daesh, as a State for purposes of the right of self-defence.). Among those opposed to the notion that NSAs may commit armed attacks, see Brazil, described in U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 20, U.N. Doc. A/76/136 (July 13, 2021); the Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace was unanimously adopted by the Peace and Security Council of the African Union on January 29, 2024, pursuant to P.S.C. Communiqué 1196, 1196th mtg. (Jan. 29, 2024) ("The prohibition on the threat or use of force addresses States in their international relations. Therefore, this rule and the exceptions thereto do not apply to the conduct of non-State actors that is not attributable to States. Accordingly, the African Union affirms that the right of self-defense is triggered solely if an armed attack is attributable to a State according to the applicable rules of customary international law of State responsibility.").

from outside that State's territory.[151]

151 *See, e.g.,* Letter from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2018/1022 (Nov. 13, 2018); Letters from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2018/53 (Jan. 20, 2018) ("Daesh and the PKK/KCK Syria affiliate, PYD/YPG"); Letter from the Permanent Representative of Egypt to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2017/456 (May 27, 2017) ("terrorist organizations"); Letters from the Permanent Representative of Turkey to the United Nations Addressed to the Secretary-General and the President of the Security, U.N. Doc. S/2017/350 (Apr. 25, 2017) (PKK/PYD/YPG); Letter from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2017/256 (Mar. 24, 2017) (Daesh); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2017/124 (Feb. 8, 2017) (Daesh); Letter from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/739 (Aug. 24, 2016) (Daesh); Letter from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 7, 2016) (Daesh); Letter from the Permanent Representative of Norway to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations Addressed to the President of the Security Council, S/2016/132 (Feb. 10, 2016) (Daesh); Letter from the Permanent Representative of Denmark to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 11, 2016) (Daesh); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) (Daesh); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015) (Daesh); Letters from the Permanent Representative of France to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 8, 2015) (Daesh); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 7, 2015) (Daesh); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015) (Daesh); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015) (Daesh); Letters from the Permanent Representative of Qatar to the United Nations Addressed to the Secretary-General and the President of the Security Council, S/2015/217 (Mar. 26, 2015) (Daesh); Letters from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 25, 2014) (Daesh); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) (Daesh); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/417 (June 17, 2014) ("Libyan militant group Ansar al-Sharia-Benghazi"); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946, (Oct. 7, 2001) (Al-Qaeda); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/947, (Oct. 7, 2001) (Al-Qaeda); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/1005 (Oct. 24, 2001) (Al-Qaeda); Letter from the Permanent Representative of France to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/1103 (Nov. 23, 2001) (Al-Qaeda); Letter from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/1104 (Nov. 23, 2001) (Al-Qaeda); Letter from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/1127 (Nov. 29, 2001) (Al-Qaeda); Letter from the Permanent Representative of New Zealand to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2001/1193 (Dec. 18, 2001) (Al-Qaeda); Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/381 (Apr. 18, 2001) (MKO); Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, U.N. Doc. S/1996/602 (July 29, 1996) ("terrorist groups"/ "armed groups"); Letter from the Permanent Representative of Poland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2002/275 (Mar. 15, 2002) (Al-Qaeda).

- Of particular note, as well, is the fact that the Security Council—both in Resolution 1368 (2001) (adopted a day after the Al-Qaeda attacks of 9/11 against the US) and in Resolution 1373 (2001)—explicitly recognized, in this context, "the inherent right of individual or collective self-defense in accordance with the Charter" in relation to an armed attack that had been committed by an NSA.[152]
- The day after 9/11, the North Atlantic Council also agreed (subject to a determination, subsequently made, that an armed attack had actually been directed from abroad against the United States) that this attack fell within Article 5 of the 1949 North Atlantic Treaty, which prescribes that an armed attack against one or more of the Allies in Europe or North America shall be considered an armed attack against all. Importantly, this was the first time in the history of NATO that Article 5 was invoked by the Council.[153] A parallel decision was also taken by the Organ of Consultation of the Organization of American States (OAS).[154]
- In 2015, the Security Council's Resolution 2249 (2015) concerning Daesh did not invoke Chapter VII and authorize a use of force against that NSA. It did, however, emphatically "call upon Member States that have the capacity to do so to take all necessary measures, in compliance with international

152 S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

153 *Invocation of Article 5 Confirmed*, NATO Update (N. Atl. Treaty Org., Brussels), Oct. 2, 2001.

154 Org. of Am. States [OAS] Permanent Council Res. 796, 23d mtg., OAS Doc. CP/RES. 796 (1293/01) (Sept. 19, 2001) (condemning the events of 9/11 in a resolution whose preamble included the following passage: "RECALLING the inherent right of the United States and each of the other Member States to act in the exercise of the right of individual and collective self-defense recognized by Article 51 of the Charter of the United Nations"); Org. of Am. States [OAS] Permanent Council Res. 797, 24th mtg., OAS Doc. CP/RES. 797 (1293/01) (Sept. 19, 2001) (convoking the Inter-American Treaty of Reciprocal Assistance); Org. of Am. States [OAS] Consultation of Ministers of Foreign Affairs Res. 1, 1st plen. Sess., 23d mtg., OAS Doc. RC.23/RES.1/01 (Sept. 21, 2001) (addressing the events of 9/11 in a resolution "RECOGNIZING the inherent right of individual and collective self-defense in accordance with the Charters of the Organization of American States and the United Nations").

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 ...."[155]

- There is no consistent State practice suggesting that these sorts of resolutions are required for the exercise of self-defense against NSAs. For instance, States employed forcible defensive measures against Daesh in Iraq and Syria, both before and after the issuance of Resolution 2249. Some States have, however, pointed to Security Council resolutions on the threat posed by an NSA when they have reported forcible defensive measures undertaken under Article 51.[156]
- In State practice, exercises of individual or collective self-

155 S.C. Res. 2249, ¶ 5, U.N. Doc. S/RES/2249 (Nov. 20, 2015).

156 Letter from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 7, 2016) (mentioning S/RES/2249); Letter from the Permanent Representative of Norway to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016) (mentioning S/RES/2249); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations Addressed to the President of the Security Council, S/2016/132 (Feb. 10, 2016) (mentioning S/RES/2249); Letter from the Permanent Representative of Denmark to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 11, 2016) (mentioning S/RES/2249); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) (mentioning S/RES/2249); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015) (mentioning S/RES/2249); Letters from the Permanent Representative of France to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 8, 2015) (mentioning S/RES/2170, 2178 and 2199); Letter from the Permanent Representative of France to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/1103 (Nov. 23, 2001) (Al-Qaeda) ("in accordance with the exercise of the inherent right of individual or collective self-defence (Article 51 of the Charter), referred to in Security Council resolution 1368 (2001), and in response to the encouragement addressed to Member States by the Council in paragraph 5 of its resolution 1378 (2001)"); Letter from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/1104 (Nov. 23, 2001) ("We fully support Security Council resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001, which affirm the inherent right of individual and collective self-defence and call upon all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these appalling acts of violence."); Letter from the Permanent Representative of New Zealand to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2001/1193 (Dec. 18, 2001) ("New Zealand fully supports in particular Security Council resolutions 1368 (2001) and 1373 (2001), which reaffirm the inherent right of individual and collective self-defence and call upon all States to work together to bring to justice the perpetrators, organizers and sponsors of the terrorist attacks.").

defense against NSAs appear to have involved organized entities with a capacity to engage in sustained violence—for example, Al-Qaeda, Daesh,[157] Hamas,[158] and Hezbollah.[159] These entities, at the time of the defensive measures, also appear to have controlled territory within, or were in a relationship with, the territorial State that provided them considerable autonomy.

- In State practice, where forcible measures directed at NSAs have been justified as self-defense, the NSA's armed attack has originated from outside the defending State, or at least along its border region.[160] From a *jus ad bellum* standpoint, an armed attack by an NSA must include a cross-border element—from one State to another—or from areas not within the territory of any State. In other words, generally speaking, if an armed attack by an NSA (however massive in scale) is instigated, directed or conducted against a target located in a given State, from within that State's own territory, the *jus ad bellum* will not come into play, and responsive forcible measures taken by

157 *See supra* note 151.

158 Letters from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2010/21 (Jan. 12, 2010); Letters from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2009/6 (Jan. 4, 2009); Letters from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/2008/816 (Dec. 27, 2008); Letters from the Chargé d'affaires a.i. of the Permanent Mission of Israel to the United Nations Addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. A/60/382, S/2005/609 (Sept. 26, 2005).

159 Letters from the Chargé d'affaires a.i. of the Permanent Mission of Israel to the United Nations Addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. A/58/837, S/2004/465 (June 8, 2004) (suggesting support by Iran, and thus perhaps that the entity was not an NSA as the term is used in these Rules).

160 *See supra* note 151.

the State are not governed by Article 2(4) or Article 51.[161]

- Some States have concluded that self-defense is available for cyber armed attacks conducted by NSAs.[162]

Rule 38

(a) Under customary international law, every State has a duty to prevent its territory from being used as a base of hostile operations taken by an NSA against any foreign State's territory or other safeguarded interests.

Commentary

- A State has the duty to refrain from organizing, instigating, assisting, or participating in acts of insurgency or terrorism conducted in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when these acts involve a threat or use of force.
- This Rule is a more detailed manifestation of the broader rule that States must not knowingly allow their territories to be used for acts violating the rights of other States.[163] In the 1949 *Corfu Channel* case, the ICJ pronounced the general principle that every State is under an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States."[164]

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161 There has been at least one instance in which a State has invoked Article 51, when faced with an insurgency within its own borders. However, the States to which this claim was addressed seemed to rely on a request for assistance by that Government, creating ambiguity as to whether the force used was undertaken in collective self-defense or predicated upon the consent to the use of such force by the territorial State. Letters from the Permanent Representative of Qatar to the United Nations Addressed to the Secretary-General and the President of the Security Council, S/2015/217 (Mar. 26, 2015) (responding to a request from the Yemen Government in relation to the activities of Houthi militias within Yemen).

162 Position Paper, Italy, *On International Law and Cyberspace 9* (2021); Position Paper, Poland, On the Application of International Law in Cyberspace 6 (2022); U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 137, U.N. Doc. A/76/136 (July 13, 2021).

163 Corfu Channel (U. K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

164 *Id.*

- With respect to the specific topic of the use of force, it is useful to note the consensus 1970 General Assembly Friendly Relations Declaration: "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."[165] In the Armed Activities case of 2005, the ICJ held that this provision of the Friendly Relations Declaration is declaratory of customary international law.[166]
- Further, the ICJ's 2005 *Armed Activities* judgment alludes to an obligation of a State to not acquiesce in forcible activities by an NSA within its territory—directed against another State—as one of "vigilance."[167] Failure to meet this obligation of vigilance entails State responsibility under international law; however, it does not, by itself, constitute an armed attack justifying the invocation of the right of individual or collective self-defense.[168]

(b) This duty requires that the State concerned take all adequate measures to prevent and rectify the unlawful use of its territory by an NSA against any foreign State.

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165 G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) (emphasis added).

166 Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 162 (Dec. 19).

167 *Id.* ¶¶ 246, 300.

168 On this point, see Brazil, in U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 20, U.N. Doc. A/76/136 (July 13, 2021) ("...the territorial state should adopt measures, in good faith and within its capabilities, to cease the action and ensure accountability. If it fails to do so, this omission might constitute an internationally wrongful act, thus entailing this state's international responsibility. According to customary international law, in this case, the victim state is entitled to remedies, to be pursued only through peaceful means.").

Commentary

- Under the rules of State responsibility, there is an obligation to cease the commission of an internationally wrongful act and to make reparation for the injury caused by that act. A wrongful act may include an omission.[169]
- In the specific context of the *jus ad bellum*, when a State becomes aware that its territory is being used by an NSA for the purpose of conducting an armed attack against another State, the territorial State's obligation is to do its utmost to prevent and suppress this unlawful activity. The ICJ has made reference to a requirement to take "adequate measures" to meet this duty.[170]

Rule 39

A State may exercise its right of self-defense within another State when this territorial State is unable or unwilling to prevent an NSA, operating in its territory, from engaging in armed attacks against the State exercising its self-defense right.

Commentary

- This Rule addresses those situations where no valid consent (within the meaning of **Section IV**) has been given by the territorial State to the use of force against an NSA by the attacked State. This consent would remove the need for a State using forcible measures to rely on self-defense as the basis for this use of force. This Rule also applies when the valid consent provided by the territorial State is limited, such that the force it consents to is insufficient to halt the armed attacks emanating

169 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries arts. 2, 30-31*, 2 Y.B. Int'l L. Comm'n 47 (2001).

170 Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 246 (Dec. 19) ("The Court finds that there is sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources.").

from its territory, or when the consent by the territorial State is withdrawn. See **Rule 41(b)** for the obligation of the State employing forcible measures to seek the consent of the territorial State prior to taking defensive forcible measures on the territory of that State.

- It is to be recalled that in the *Caroline* dispute, viewed as especially influential in shaping the customary international law of self-defense, the British government justified its actions on the basis that the United States was "unwilling or unable" to prevent insurgents, operating from US territory, from engaging in an armed attack on Canada.[171]
- There is now considerable State practice supporting the proposition that, faced with an armed attack, a State may resort to forcible self-defense measures against an NSA within a foreign territory when the territorial State is unwilling or unable to prevent the armed attack, even in the absence of

171 Letter from Sir George Arthur to Lord Glenelg (Dec. 17, 1838), *in* 1 Sir George Arthur, *The Arthur Papers* 456 (Charles Sanderson ed., 1957) ("the [US] authorities were either unwilling or unable to prevent aggression against Canada"). *See also* Letter from U.K. Ambassador Fox to U.S. Secretary of State Forsyth (Dec. 29, 1840), *in Papers Related to the Arrest of Mr. McLeod in the State of New York 9-10 (1840) (on file with the U.K. National Archives).* (urging that the "place where the vessel [Caroline] was destroyed was nominally, it is true, within the territory of a friendly Power; but the friendly Power had been deprived, through overwhelming piratical violence, of the use of its proper authority over that portion of its territory.")

consent.[172] This view is not, however, universally shared.[173]

- There is no consensus definition of "unwilling" or "unable." The expression has been used most often in circumstances when the territorial State lacks effective control over the region of its territory from which the NSA is operating, particularly in the case of Daesh-occupied Syria[174] and in parts of Iraq where the Government asserted no effective control.[175]

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172 *See, e.g.,* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2021/202 (Feb. 27, 2021); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015); Letter from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015). States do not always use the expression "unwilling or unable," but rely on factual circumstances when a territorial State has failed to suppress an armed attack from an NSA emanating from its territory. *See, e.g.,* Letter from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2020/1165 (Dec. 3, 2020). Alternatively, they may invoke circumstances when a State lacks effective control over the territory from which the armed attack emanates. Letter from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 7, 2016); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015).

173 *See especially* U.N. General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States* 20, U.N. Doc. A/76/136 (July 13, 2021) (Brazil)..

174 Letter from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015) ("The Government of Syria has, by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks."); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015) ("the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory"); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) ("the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks").

175 Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, U.N. Doc. S/1996/602 (July 29, 1996) ("As you are aware, owing to prevailing circumstances, the Government of Iraq is not in a position to exercise effective control over its territory in the northern part of that country"); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1995/605 (July 24, 1995) ("As Iraq has not been able to exercise its authority over the northern part of its country since 1991 for reasons well known ...").

- Some States have explicitly invoked the absence of effective control by the territorial State over the territory from which the NSA is operating as the circumstance justifying their forcible measures against the NSA in the territorial State.[176] This position is consistent with circumstances in which a State is "unable" to take the required effective measures against an NSA because it does not possess the necessary military capabilities to do so or when conditions (such as terrain or distance) preclude such measures.
- It is to be recalled, however, that when (faced with the armed attacks of 9/11) defensive measures were directed against Al Qaeda in Afghanistan, there was no preoccupation with whether the *de facto* Taliban Government lacked effective control over the territory from which Al-Qaeda operated. That Government still manifested, however, a failure to suppress the armed attack. This conduct reflected a political "unwillingness" to do so, independent of any actual inability.
- It will not always be clear to a defending State as to whether the territorial State's failure to prevent an armed attack stems from unwillingness, inability, or both. For instance, the territorial

176 Letter from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 7, 2016) ("ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not, at this time, exercise effective control. In the light of this exceptional situation, States that have been subjected to armed attack by ISIL originating in that part of the Syrian territory, are therefore justified under Article 51 of the Charter to take necessary measures of self -defence."); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) ("ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory are, therefore, justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic."); Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, U.N. Doc. S/1996/602 (July 29, 1996) ("As you are aware, owing to prevailing circumstances, the Government of Iraq is not in a position to exercise effective control over its territory in the northern part of that country."); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1995/605 (July 24, 1995) ("As Iraq has not been able to exercise its authority over the northern part of its country since 1991 for reasons well known ...").

State's lack of effective control over a portion of its territory may be by choice, rather than by an eventuality forced upon it.

- The critical factor is that the territorial State has failed to prevent an NSA from using the State's territory to engage in armed attacks.[177]
- The inability or unwillingness to take the required effective measures against an NSA can arise either through the taking of no action or through inadequate action.
- Inability or unwillingness does not stem from the fact that the territorial State chooses to suppress an armed attack by an NSA in a manner that is not favored by the attacked State. The key consideration is the end result, i.e., whether the measures taken against the NSA are effective in halting the armed attack.

Rule 40

The right of self-defense against an NSA may be exercised by defending States, either individually or collectively. When a defending State has a right to act in individual self-defense, faced with an armed attack mounted by an NSA from within the territory of another State, third States may exercise collective self-defense, upon the request of that defending State.

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177 *See supra* note 174. *See also* Letters from the Chargé d'affaires a.i. of the Permanent Mission of Israel to the United Nations Addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. A/58/837, S/2004/465 (June 8, 2004) ("The failure of the Government of Lebanon to restore peace and security, ensure the return of its effective authority and prevent cross-border attacks from its territory in grave violation of these obligations is the direct cause of instability in the area and of the necessity for Israel to take measures in self-defense."); Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/381 (Apr. 18, 2001) ("The Islamic Republic of Iran expects the Government of Iraq to take appropriate measures in conformity with the rules and principles of international law ... to put an end to the use of its territory for cross-border attacks and terrorist operations against the Islamic Republic of Iran, which would render unnecessary measures in self-defence in accordance with Article 51 of the Charter of the United Nations.").

Commentary

- Where a right of self-defense exists, the fact that it is exercised against an NSA does not alter the ordinary rules of *jus ad bellum* applicable to collective self-defense, discussed in **Section XI**.
- Collective self-defense against armed attacks conducted by an NSA has involved coalitions of States. The most recent example is that of the coalition response to Daesh in Syria and Iraq in 2015. Likewise, State coalitions employed defensive forcible measures against Al-Qaeda in Afghanistan in 2001.[178]

Rule 41

(a) As with all exercises of self-defense, the exercise of individual or collective self-defense by a defending State against an NSA, within the territory of another State, must meet the general conditions of necessity and proportionality, as set forth in Section IX.

Commentary

- States often describe their defensive measures against an NSA

178 *See* many letters cited *supra* note 151.

as being necessary and proportionate.[179]

- Self-defense exercised against an NSA naturally differs from that of ordinary self-defense, when the adversary is a State. Indeed, the "unwilling or unable" concept may properly be considered a subset of the requirement of "necessity."
- Still, there exists no difference between these disparate forms of self-defense, insofar as the customary requirements of observing the conditions of necessity and proportionality (set out in **Section IX**) are concerned.

(b) Consistent with the general requirements stipulated in Section IX, "necessity" and "proportionality", in this context, require that:

i) There exists no effective alternative to the non-consensual forcible measures taken against an NSA within the territory of a foreign State. Consequently,

179 *See, e.g.,* Letter from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 7, 2016); Letter from the Permanent Representative of Norway to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations Addressed to the President of the Security Council, S/2016/132 (Feb. 10, 2016); Letter from the Permanent Representative of Denmark to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 11, 2016); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015); Letter from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 7, 2015); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015); Letters from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 25, 2014); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014); Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/381 (Apr. 18, 2001) ("limited and proportionate"); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998).

prior to the exercise of such self-defense measures, the defending State is usually obliged to seek the consent of the foreign State to engage in forcible measures against the NSA. However, the obligation to seek consent is not required if circumstances indicate that seeking such consent would be futile or self-defeating.

Commentary

- Necessity presupposes that there is no viable alternative to non-consensual forcible measures of intervention against an NSA within the territory of another State.
- A State cannot be said to be unable or unwilling to prevent an NSA's armed attack if it is unaware of the use of its territory by the NSA. In practice, it is expected that, if necessary, the attacked State will alert the territorial State to the activities of the NSA within its borders.
- The consent of the territorial State to the use of any forcible measures within its territory against an NSA is generally to be sought, first, in order to establish the necessity of self-defense, unless circumstances indicate that an attempt to obtain such consent would be manifestly futile or self-defeating.[180]

ii) The persistence of armed attacks by NSAs is anticipated, so that the non-consensual forcible measures taken by a defending State qualify as defensive, rather than punitive measures.

Commentary

- The measures taken in self-defense, within the territory of a foreign State, must be pursued by the defending State within a reasonable time after the occurrence of an armed attack undertaken by an NSA.

180 On these points, see Principles 11 and 12 of the "Bethlehem Principles" to which some States look. *See supra* note 138.

- As per the Commentary on **Rule 30**, this concept of immediacy must be understood in a flexible manner. As a condition to the exercise of non-consensual self-defense measures against an NSA within the territory of a foreign State, immediacy is not necessarily measured in days or even weeks. In particular, an effective response to an armed attack by an NSA operating within a foreign territory may require time for adequate preparations.
- Necessity presupposes an expectation of persisting armed attacks by an NSA from within the territory of the foreign State. The aim of the forcible (non-consensual) measures taken by the attacked State must be to stop armed attacks, rather than as punishment for past conduct.
- Any expectation as to what an NSA might do in the future is a matter of reasonable assessment. This can be predicated only on an analysis of information reasonably available at the time.
- It should be observed, in this regard, that a State's prognostication is subject to critique by other entities, and accusations may well be made that the putative defensive measures, themselves, constituted an armed attack, in that they were not justified by the existence of an armed attack.

iii) Non-consensual forcible defensive measures taken against an NSA within the territory of a territorial State must be directed against the apparatus and infrastructure of the NSA, as distinct from other persons, entities, facilities, and installations of the territorial State.

Commentary

- The fact that an NSA launches an armed attack against one State, from within the territory of another, does not mean that the territorial State is itself engaged in the armed attack, even when it is unable or unwilling to suppress the NSA's armed

attacks.

- Measures of individual or collective self-defense taken against an NSA must therefore be exclusively directed against it and not intentionally extended to the people, entities, facilities, and institutions of the territorial State.
- Necessity is met when forcible measures taken against an NSA in another State's territory are directed at, e.g., disrupting units of the NSA on the move from one location to another; targeting the military leadership of the NSA; and releasing hostages and other detainees held by the NSA. It also exists when force is directed at destroying infrastructure, such as bases, compounds, command posts, training areas, weapons caches, and hideouts used by the NSA.
- However, measures of self-defense taken against an NSA within the territory of a foreign State are not necessary when not directed at the NSA (and its infrastructure).
- States engaged in defensive forcible measures against an NSA on the territory of another States have repeatedly underscored that the measures are directed at the NSA—not the territorial

State.[181]

- The immunity granted to the facilities and installations of the territorial State presumes that they are not part of the NSA support infrastructure; that presumption may not always apply on the facts of specific cases.
- Proportionality does not necessarily require that measures taken by the intervening State against an NSA be restricted to only the border areas of the foreign State.
- There exist no inherent geographical limits on non-consensual actions taken against an NSA. It is true that, in the ICJ's *Armed Activities* case of 2005, the ICJ found fault with cross-border operations undertaken "many hundreds of kilometers

181 Daesh: Letter from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2017/256 (Mar. 24, 2017) ("Furthermore, it aims at maintaining the territorial integrity and political unity of Syria."); Letter from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/739 (Aug. 24, 2016) (Turkey is "unequivocally committed to the territorial integrity and political unity of Syria."); Letter from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 7, 2016) ("Those measures are directed against the so-called 'Islamic State in Iraq and the Levant' and not against the Syrian Arab Republic."); Letter from the Permanent Representative of Norway to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016) ("The measures are directed against ISIL, not against the Arab Republic of Syria."); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) ("These measures are directed against ISIL, not against the Syrian Arab Republic."); Letter from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015) ("These operations are not directed against Syria or the Syrian people, nor do they entail support for the Syrian regime."); Letter from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015) ("the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory"; "These military actions are not aimed at Syria or the Syrian people, nor do they entail support for the Syrian regime."); Letters from the Permanent Representative of Turkey to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/127 (Feb. 22, 2015) ("Turkey respects the territorial integrity of Syria."); Others: Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/381 (Apr. 18, 2001) (not be "construed as infringing the territorial integrity of Iraq. The Islamic Republic of Iran respects Iraq's territorial integrity and looks forward to promoting friendly relations with its neighbour."); Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, U.N. Doc. S/1996/602 (July 29, 1996) ("Iran reiterates, once again, its respect for the territorial integrity of Iraq.").

from Uganda's border".[182] However, that case turned on its facts. State practice suggests that a cross-border strike by an intervening State may be launched against an NSA, wherever it is based or can be reached, irrespective of the distance from the territorial State's borders.

Rule 42

(a) Forcible measures, undertaken in lawful individual or collective self-defense by a defending State against an NSA, within the territory of another State without its consent, do not constitute an armed attack against the territorial State. The territorial State does not, therefore, possess a right of self-defense against the defending State.

Commentary

- A territorial State, unwilling or unable to suppress an armed attack by an NSA from within its territory, must not forcibly impede self-defense measures taken by the defending State consistent with the standards set out in these Rules. The latter is resorting to such forcible measures only because the territorial State has failed to do what it is obligated to do, namely, to engage in such suppressive measures itself. Having failed in this obligation, the territorial State cannot compound that failure by impeding the lawful exercise of self-defense against the NSA by the defending State.
- Thus, when the right of self-defense is lawfully exercised against an NSA within the territory of another State, that territorial State must not use force to resist the forcible defensive measures taken against the NSA by the defending State.
- If the territorial State's armed forces intentionally open fire on those of the defending State properly exercising measures

182 Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, 233 (Dec. 19).

of self-defense, the territorial State thereby engages in its own armed attack (or participates in the NSA's armed attack) against the defending State, thus subjecting itself to the exercise of self-defense by the defending State.

(b) In the event of armed hostilities between the armed forces of the two States, the identity of the State in breach of the *jus ad bellum* will be determined by the question of which of the two States committed an armed attack against the other.

Commentary

- An armed attack may arise as the result of armed hostilities occurring between the armed forces of the defending State and the territorial State.
- It is possible that, although these hostilities occur within its own territory, the armed attack would be committed by the territorial State, inasmuch as its armed forces have attempted to impede the lawful operations of a defending State exercising its right of self-defense against the NSA (and, as has been noted previously; there is no right of self-defense against the legitimate exercise of self-defense).
- On the other hand, the defending State's forcible measures must observe the principles of necessity and proportionality. Should its use of armed force exceed these standards, the defending State may itself commit an armed attack against the territorial State.
- Thus, should the armed forces of the defending State (which are to operate only against the NSA and its infrastructure) nevertheless attack the armed forces of the territorial State (not itself engaged in an armed attack against the defending State), this action would constitute an armed attack by the putatively defending State.

(c) **In the event that a defending State deliberately directs force against persons, entities, facilities, and installations of a territorial State that do not form a part of the NSA and its broader infrastructure and apparatus, the defending State, itself, then commits an armed attack against the territorial State, even in the absence of armed hostilities occurring between the armed forces of the territorial and defending States.**

Commentary

- Again, the principles of necessity and proportionality must be looked to in order to determine whether the use of force by the defending State is defensive in nature or is, instead, unlawful and constitutes an armed attack. The limits of lawful self-defense would be exceeded if the defending State, when engaged in hostilities against an NSA, deliberately assaults the local civilian population and/or civilian objects with no ties to the NSA.

Rule 43

If an armed attack by an NSA is assisted directly by a supporting State in the form of the provision of weapons, munitions, or other military supplies that itself amounts to an armed attack, a defending State may exercise its right of self-defense to halt the provision of such supplies, even should these self-defense measures occur within the territory of the supporting State.

Commentary

- It is to be recalled that when a third State colludes in the armed attack by another State on a territorial State, that third State's acts of assistance may themselves reach the level of an armed attack. In such circumstances, the attacked State can lawfully exercise measures of self-defense against the armed attack within the territory of the third State, without its consent. See

Rule 26(d).

- No weapons, munitions or military supplies may be supplied by any State to an NSA carrying out an armed attack against one State from within the territory of another. The 1970 General Assembly Friendly Relations Declaration provides: "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."[183] See **Rule 38(a)**.
- When such weapons, munitions or military supplies are provided, nevertheless, the defending State—in exercising its right of self-defense—may take defensive forcible measures to halt or disrupt the provision of such supplies, even within the territory of a foreign State, if the latter takes no action to do so. The application of this Rule is contingent upon the assumption that the provision of weapons, munitions, or military supplies to an NSA within the territory of a foreign State amounts to an armed attack and is ongoing. Armed measures taken against a supporting State that merely serve to punish that State for its past provision of such support are not permitted.

183 G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970).

Section XIII: The Relationship between Self-Defense and Security Council Measures

Rule 44

(a) A State acting in self-defense may unilaterally conclude that use of force against it qualifies as an armed attack within the meaning of Article 51 of the Charter or customary international law.

Commentary

- States are entitled to determine, as a factual matter, whether an armed attack has occurred. There is no requirement that this factual assessment must first be endorsed by the Security Council or by any other body.

(b) When the right of individual or collective self-defense is exercised in response to an armed attack, the State exercising self-defense does not require prior approval by the Security Council.

Commentary

- Article 51 of the Charter proclaims: "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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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."

- By referring to an "inherent" right of the State invoking the right of individual or collective self-defense in response to an armed attack, the text makes it clear that no prior approval by the Security Council is required for the exercise of such a right. Further, the text of Article 51 specifies that the right to self-defense persists "until the Security Council has taken the measures necessary to maintain international peace and security." This text also makes it clear that the Security Council need not give prior approval to any defensive measures.
- The role of the Security Council in the domain of individual or collective self-defense, therefore, usually comes into play at a later stage in the self-defense process (See **Section V**).
- The exercise of the right of individual or collective self-defense by States in response to an armed attack does not diminish the powers of the Security Council to maintain or restore international peace. However, though the powers of the Council are unaffected by the exercise of self-defense, they generally come into play in a second-phase manner; that is to say, after forcible measures have already been taken by a State (or States).

Rule 45

(a) A State invoking the right of individual or collective self-defense shall report immediately its invocation of such a right to the Security Council.

Commentary

- Article 51 of the Charter specifies that "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council."
- While the required reporting is to take place "immediately," there is little State practice establishing what this term means, precisely.

- The reporting requirement applies to the initial recourse to the use of force in individual or collective self-defense. There is no obligation to periodically report further as hostilities progress.
- It bears noting that Article 51 imposes no form requirement for the report to be submitted to the Council. In other words, there is no fixed template that must be followed by the State(s) concerned.
- As noted, the duty to report to the Security Council following an act of forcible self-defense does not imply a requirement that authorization be obtained from the Council prior to the invocation of this right of self-defense.
- Moreover, a failure to meet this duty does not render an exercise of self-defense unlawful. See paragraph (d).

(b) In case of collective self-defense, reporting can take place by States either individually or collectively.

Commentary

- As noted, Article 51 of the Charter contains no form requirements for the reporting of self-defense measures to the Security Council.
- Accordingly, there is no Charter obligation that collective self-defense measures be reported collectively. State practice does not support such a proposition. Normally, the reporting of self-defense measures to the Council is done by individual States, even in those instances when such measures are based on collective self-defense.

(c) The reporting to the Security Council must be detailed enough to establish that the reporting State is, or will be, taking self-defense measures.

Commentary

- A report to the Security Council by a State invoking the right of individual or collective self-defense may be relatively brief. State practice suggests that this is usually the case. Still, the report must explain that the State concerned believes that it is responding to an armed attack. Some reports have described the specifics of the armed attack.[184] That said, the report need not reveal operational or intelligence data.
- Article 51 provides that States are to report the "measures" taken in self-defense. While there has been State practice of States providing Article 51 reports containing succinct details regarding the nature of their defensive forcible actions,[185] this has not been a consistent practice. Moreover, there has been little State practice of States assessing their conduct against the requirements of self-defense, such as necessity and proportionality. That said, States have sometimes asserted that these standards have been met.[186]

(d) The failure to report measures said to be taken in individual or collective self-defense does not disqualify these actions as self-defense measures, although the absence of such reporting may diminish the credibility of a State's claim to self-defense.

Commentary

- The consequences of a failure to report, to the Security Council, measures of individual or collective self-defense,

184 *See, e.g.,* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2021/614 (June 29, 2021); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2021/202 (Feb. 27, 2021).

185 *See, e.g.,* Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2021/614 (June 29, 2021); Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2021/202 (Feb. 27, 2021).

186 *See, e.g.,* letters cited *supra* note 179.

arose in the 1986 *Nicaragua* case.[187] While it is true that such a failure may sometimes be viewed as indicating that even the State resorting to forcible measures did not view the circumstances existing at the time of its actions as giving rise to a right of self-defense,[188] Article 51 does not make the reporting requirement to the Council a prerequisite to the lawful exercise of self-defense. Moreover, a failure to issue such a report does not invalidate the forcible measures taken.

Rule 46

The Security Council may, among other things, assess whether the reported measures of self-defense conform with the Charter.

Commentary

- A State's competence to determine the existence of an armed attack does not mean that this determination cannot be questioned or criticized. Other States may raise questions and voice criticisms.
- More significantly, the Security Council—in exercising its responsibility and authority under Chapter VII of the Charter (see **Section V**)—is empowered to scrutinize the unilateral determination by a State that an armed attack has occurred.
- It must be recalled that Article 51 of the Charter states that an exercise of the right of self-defense "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."

187 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 200 (June 27) (concluding that there is no customary international law requirement obliging reporting and that it is not a condition of the exercise of self-defense).

188 *See* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, ¶ 200 (June 27); Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 145 (Dec. 19); Jus ad Bellum, Ethiopia's Claims 1-8 (Ethiopia v. Eri.), 26 R.I.A.A. 1, ¶ 11 (Perm. Ct. Arb. 2004).

- This Council scrutiny might include an assessment of the invocation of the right of self-defense; that is, in assessing the measures reported, the hands of the Council are not tied by a unilateral assessment of the situation by the reporting State.
- The Council can thus assess the ostensible self-defense actions taken by a State and may, in fact, determine, in a binding manner, that a State purporting to exercise self-defense is, in reality, the aggressor.[189] In this regard, the Security Council has, in some instances, condemned defensive measures that breach cease-fires.[190]
- That said, it is relatively uncommon for the Council to engage with State Article 51 reports. Further, the Council is not generally inclined to conduct a review of a State's unilateral determination of the occurrence of an armed attack and the invocation of a right of self-defense in response.[191] The Council usually prefers to call for—or impose—a cease-fire without addressing potentially controversial factual issues.

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189 Note that the UN General Assembly, in defining "aggression", also indicated that "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." G.A. Res. 3314 (XXIX) art. 2, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

190 These resolutions have been focused on Israeli conduct. *See* S.C. Res. 111, U.N. Doc. S/RES/111 (Jan. 19, 1956) (condemning Israeli forcible conduct against Syria described by Israel as defensive as a "flagrant violation of the cease-fire provisions of its resolution"); S.C. Res. 248, U.N. Doc. S/RES/248 (Mar. 24, 1968), S.C. Res. 256, U.N. Doc. S/RES/256 (Aug. 16, 1968), S.C. Res. 265, U.N. Doc. S/RES/265 (April 1, 1969), S.C. Res. 270, U.N. Doc. S/RES/270 (Aug. 26, 1969) (condemning Israel).

191 Exceptions, again, have focused on Israeli conduct: S.C. Res. 228, U.N. Doc. S/RES/228 (Nov. 25, 1966), S.C. Res. 279, U.N. Doc. S/RES/279 (May 12, 1970), S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981), S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985) (censuring or condemning Israeli action described by Israel as defensive). *See* Dataset, Program on Int'l Law & Armed Conflict, Harvard Law School, Catalogue of Communications to the UNSC of Measures Taken by Member States in Purported Exercise of the Right of Self-Defense, 1945-2018 (2019), https://docs.google.com/spreadsheets/d/1zVxjrzX7Vhawu2MZBQCeaWI-ZlLn8nEJa_RJQdUxu14/edit#gid=0.

Rule 47

(a) The Council may, at any time, respond to an ongoing armed conflict by adopting a recommendation or a binding decision, based on its responsibility to restore international peace and security.

Commentary

- Article 51 of the Charter specifies that an exercise of the right of self-defense "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."
- Given its Charter authority and responsibility to maintain or restore international peace and security, the Council may—at its discretion—adopt recommendations or (more significantly) binding decisions, with a view to terminating an armed attack.

(b) Recommendations adopted by the Security Council, under either Chapters VI or VII, do not limit the exercise of either individual or collective self-defense.

Commentary

- Binding resolutions adopted by the Security Council under Chapter VII of the Charter are the exception, rather than the rule. More often than not, the Council adopts resolutions (mostly under Chapter VI, but also under Chapter VII) which consist merely of non-binding recommendations for action. As indicated in **Section V**, even binding resolutions may include some hortatory operative paragraphs.
- While recommendations adopted by the Council are not binding, it must be considered that a failure to heed the Council's recommendation may lead, in due course, to a binding Council decision and possible sanctions.

- If the Council responds to an ongoing armed conflict, this will often be in the form of a cease-fire resolution. A cease-fire resolution adopted by the Council may constitute a mere recommendation to desist from hostilities, or to agree to a cease-fire.[192] The Council may make these recommendations even in circumstances in which it recognizes the existence of a right to self-defense.[193]
- As long as the Council has not adopted a binding resolution restricting the freedom of action of a State invoking the right of individual or collective self-defense, that State may continue to act at its discretion (subject to the Rules governing self-defense discussed in **Sections VII** to **XIV**).

Rule 48

Security Council measures taken under Chapter VII and measures of individual or collective self-defense can occur simultaneously.

Commentary

- It is important to stress that, even when the Security Council acts under Chapter VII of the Charter, this action may exist in parallel with the continuation of measures taken in the exercise of the right of individual or collective self-defense.
- As discussed in **Rule 49**, the Council's resolutions have occasionally acknowledged the existence of a right to self-

192 *See, e.g.,* S.C. Res. 859, U.N. Doc. S/RES/859 (Aug. 24, 1993) (calling for a ceasefire and cessation of hostilities in Bosnia and Herzegovina); S.C. Res. 233, U.N. Doc. S/RES/233 (June 6, 1967) (calling on a cease-fire between Israel and Egypt); S.C. Res. 479, U.N. Doc. S/RES/479 (Sept. 28, 1980) (calling for an end to hostilities between Iran and Iraq); S.C. Res. 258, U.N. Doc. S/RES/258 (Sept. 18, 1968) (insisting that a cease-fire between Israel and Egypt be observed); S.C. Res. 164, U.N. Doc. S/RES/164 (July 22, 1961) (calling for a cease-fire between France and Tunisia); S.C. Res. 108, U.N. Doc. S/RES/108 (Sept. 8, 1955) (calling for a ceasefire between Israel and Egypt); S.C. Res. 92, U.N. Doc. S/RES/92 (May 8, 1951) (calling for a ceasefire between Israel and Egypt).

193 *See, e.g.,* S.C. Res. 1234, U.N. Doc. S/RES/1234 (Apr. 9, 1999) (recalling "the inherent right of individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations" and demanding "an immediate halt to the hostilities").

defense, while also imposing measures under Chapter VII.[194] For instance, during the 1990-91 Gulf War, the Council (acting under Chapter VII) imposed, on Iraq, economic sanctions in Resolution 661 (1990), while expressly affirming the right of self-defense (exercised by Kuwait and its coalition partners).[195]

Rule 49

The possibility of the simultaneous exercise of individual or collective self-defense and measures taken under Chapter VII exists if:

(a) The scope of the lawful forcible defensive measures taken under individual or collective self-defense and the measures taken under Chapter VII differ; or

Commentary

- There may exist a profound difference in the thrust and scope of any binding measures taken by the Security Council in the exercise of its Chapter VII powers, as compared to the unilateral measures taken by States in the exercise of their individual or collective right of self-defense. Thus, to return to the leading example of Security Council Resolution 661 (1990), no overlap existed between the economic sanctions imposed on Iraq by the Security Council and the measures of forcible self-defense resorted to by the coalition partners of Kuwait (invoking their right to collective self-defense).

(b) The Security Council has endorsed, or has accepted the continuation of, individual or collective self-defense

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194 *See, e.g.,* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (events of 9/11).

195 S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 2, 1990) ("Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."). *See also* S.C. Res. 546, U.N. Doc. S/RES/546 (Jan. 6, 1984) (demanding that South Africa cease aggression in Angola, while, at the same time, reaffirming "the right of Angola, in accordance with the relevant provisions of the Charter...and, in particular, Article 51, to take all measures necessary to defend and safeguard its sovereignty, territorial integrity and independence").

forcible defensive measures taken in parallel with the measures taken under Chapter VII.

Commentary

- Apart from Resolution 661 (1990), it is useful to cite Security Council Resolution 1373 (2001).[196] In this Chapter VII Resolution (one of a series of resolutions adopted in response to the Al-Qaeda terrorist attack of 9/11), the Council decided to take a number of practical mandatory measures to prevent and suppress the financing of terrorist acts, while explicitly reaffirming the inherent right of individual or collective self-defense as recognized by the Charter.

Rule 50

In the case of the simultaneous exercise of individual or collective self-defense and measures taken under Chapter VII, the State or States acting in self-defense must make every effort not to interfere, directly or indirectly, with the measures undertaken or ordered by the Security Council under Chapter VII.

Commentary

- Given the possible simultaneous exercise of the right of individual or collective self-defense and enforcement measures taken by the Security Council under Chapter VII, it is important to emphasize the obligation of the State(s) resorting to self-defense to avoid interfering (directly or indirectly) with the mandatory measures imposed by the Council. When these measures happen to conflict, the powers of the Security Council under Chapter VII must prevail.

196 S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

Rule 51

(a) Subject to Rule 52, when the Security Council orders a cease-fire as a binding measure under Chapter VII, this decision suspends any right of the further exercise of individual or collective self-defense that is inconsistent with that cease-fire.

Commentary

- Under Article 39 of the Charter, the Security Council determines "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 51 of the Charter prescribes that self-defense measures "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." It also specifies that the exercise of the right of self-defense is not affected "until the Security Council has taken measures necessary to maintain international peace and security."
- The Council has the power to issue a binding decision—under Chapter VII of the Charter (which opens with Article 39 and closes with Article 51)—imposing a cease-fire. A binding cease-fire of this nature compels all Parties to halt military operations. Thus, once imposed, a cease-fire order overrides the invocation of the right of individual or collective self-defense by any State. The State exercising self-defense must thus desist from taking any further forcible measures that are inconsistent with the cease-fire imposed by the Council.
- The Council rarely issues a resolution addressing a cease-fire that uses language making clear its intent as to whether the

obligation is binding. It most often "calls upon" Parties, rather than "demanding" action of them, and it does not always invoke Chapter VII.[197]

(b) Other binding measures taken by the Security Council under Chapter VII, of either a military or non-military nature, terminate the right of individual or collective self-defense only if such measures are effective in maintaining international peace and security by ending an armed attack.

Commentary

- Article 51 prescribes that individual or collective self-defense measures may be exercised "until the Security Council has taken measures necessary to maintain international peace and security." However, controversy often arises as to whether measures taken by the Council (if any) have triggered this requirement.
- This "until" clause applies when the Council's measures provide a full restoration of peace and security through an adequate response to the armed attack that prompted the right of self-defense.[198] However, the Council has the authority to conclude that measures that it has taken have put an end to the continued exercise of the right of self-defense.
- In many instances, the Council takes measures—with a view to maintaining or restoring international peace and security—without necessarily impinging upon the continued exercise of self-defense. In other words, the Council's ordained measures may be pursued in parallel with the exercise of the right of individual or collective self-defense. If the Council regards any on-going self-defense measures as incompatible with its own

197 One apparent exception is S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (acting under Chapter VII, "[d]emands an immediate end to the violence" in Libya).

198 Canada, Operational Law Manual 13-4 (2007) (Security Council measures in relation to the 1990-1991 Gulf War or the post-9/11 response "would have to have eliminated the threat in order for the limitation contained in the 'until clause' to come into effect.").

measures, and therefore wishes to terminate them, it must issue a binding cease-fire order.

- This said, even in the absence of a binding cease-fire resolution, the Council may impose limitations on State action. For instance, the Council may impose on belligerent Parties mandatory sanctions, such as an arms embargo.[199] Article 41, forming part of Chapter VII of the Charter, empowers the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions" concerning the restoration or maintenance of international peace and security.

Rule 52

(a) The exercise of the right of self-defense is not exhausted by a temporary cease-fire in the hostilities, whether agreed upon by the Parties or determined by the Security Council. The attacked State possesses the right to resume forcible defensive measures when an armed attack persists due to a breach of the cease-fire or its expiration.

Commentary

- Temporary cease-fires in hostilities, whether agreed upon by the Parties to an armed conflict or imposed by the Security Council, are very common phenomena and are often motivated by reasons other than resolving the armed conflict (for example, humanitarian evacuations of a civilian population).
- It is thus emphasized that a temporary cease-fire does not exhaust the exercise of the right of self-defense when the armed attack persists. For instance, a temporary cease-fire during an armed conflict sparked by an invasion does not mean that the

199 *See, e.g.,* S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011) ("Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to" Libya).

defending State relinquishes its right of self-defense against that invasion, upon the expiry of the cease-fire.

(b) However, if a permanent cease-fire has brought about an end to hostilities, a State faced with resumption of the use of force by another State will have to assess whether a new armed attack has occurred, permitting the exercise of new forcible defensive measures.

Commentary

- There are instances of States contending that a renewal of hostilities has occurred, as the result of a cease-fire breach,[200] and occasionally citing cease-fire breaches in justifying their renewed military actions as self-defense measures.[201]
- However, when hostilities are renewed between States after a peace treaty or permanent cease-fire (such as an armistice), the consequence of that forcible activity must be assessed against the standard of "armed attack" before a State can claim the right to engage in forcible self-defense. For example, a breach of the 1953 armistice agreement, in place between North and South Korea, could not, alone, justify forcible self-defense measures if the breach did not amount to an armed attack.
- It is to be recalled that an ongoing dispossession of territory by reason of an invasion and occupation constitutes an armed attack.
- In case of a breach of a permanent cease-fire established by the Security Council, its terms must be observed by the Parties.

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200 *See, e.g.,* Letter from the Permanent Representative of Jordan to the United Nations Addressed to the Secretary-General, U.N. Doc. S/9211 (May 16, 1969); Letter from the Permanent Representative of Eritrea to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2000/592 (June 16, 2000); Letter from the Permanent Representative of the Democratic Republic of the Congo to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2002/198 (Feb. 25, 2002); Letter from the Permanent Representative of the Democratic Republic of the Congo to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2002/217 (Feb. 28, 2002).

201 Letter from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2014/730 (Oct. 11, 2014) (conveying letter from Pakistan).

One view is that the victim of a cease-fire breach may regard the cease-fire as terminated if the Council determines that a material breach of it has occurred. Another view is that an aggrieved Party may resume hostilities, unilaterally, in response to a material breach of a cease-fire, even absent explicit involvement by the Council.[202]

202 The Group of Experts could not agree on this point.

Section XIV: Measures Taken to Rescue Nationals Abroad

Rule 53

A State may intervene forcibly in the territory of another State to rescue its nationals who are at imminent risk of death or serious bodily harm, due to their foreign nationality, when the territorial State is either the source of that risk or is unwilling or unable to effectively deal with the situation generating that risk.

Commentary

- While forcible measures taken to rescue nationals abroad can be lawful in the circumstances set forth in this Rule, opinions vary as to the legal justification for such measures.[203] One view is that the measures must be predicated on the exercise of the right of self-defense, a view reflected in at least some State practice.[204] Another view is that such measures are excluded from the application of the basic prohibition of the use of force set forth in Article 2(4) of the Charter.[205]
- Evacuations of nationals by foreign States in situations where they have been placed in danger—regardless of whether the

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203 The Group of Experts could not agree on this matter.

204 *See, e.g.,* U.K. Ministry of Defence, *Non-Combatant Evacuation Operations anx. 3B,* ¶ *3B.2* (3d ed. 2023) ("States have a right to exercise individual or collective national self-defence under international law in respect to their own nationals at risk of death or serious harm in a foreign state where the state authorities involved are incapable of protecting them (Article 51 of the UN Charter)."); Alan Kessel, *At the Department of Foreign Affairs and International Trade in 2008-9*, 47 Can. Y.B. Int'l L. 411, 412 (2009) ("The right of states to use force in the protection of nationals abroad flows from the universally accepted principle of international law that injury to a state's national may be considered injury to the State itself; as such, it is properly accommodated within the inherent right to self-defence, including as exercised against non-state actors. The right arises in situations where nationals are at risk of death or grave injury, and the 'host' (territorial) state is unwilling or unable to secure their safety, or otherwise take necessary action in compliance with its obligations under international law.").

205 This position was taken by the legal advisor to the US State Department. Abraham Sofaer, *The Legality of the United States Action in Panama*, 29 Colum. J. Transnat'l L. 281, 291 (1991) (reproducing a speech given during a period when Mr. Sofaer was the legal advisor).

consent of the territorial State has been given—are a matter of routine. Yet, this Rule does not deal with the issue of evacuations as such. The question raised here is whether a State may use force to rescue its nationals abroad without the consent of the territorial State.

- This Rule does not address the use of force to rescue nationals who are imperiled, not because of their foreign nationality, but because of other circumstances existing in the territorial State, such as an overall breakdown of the State. One view is that force can also be used to effectuate rescue in these separate circumstances, without the consent of the territorial State, a position reflected in at least some State practice.[206]
- An individual's nationality, generally defined in the internal legislation of a State, must be based on an "effective" connection with the rescuing State (as established at the time when citizenship is granted). Birth to parents with the State's nationality, or birth within that State's territory, constitutes an effective connection.
- Where an individual acquires a State's nationality by naturalization, effective connection depends upon the considerations enumerated by the ICJ in the *Nottebohm* case.[207] However, there are varying opinions as to whether an effective connection, as discussed in the *Nottebohm* case, must be maintained for purposes of the exercise of the rescue of nationals abroad.[208]

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206 *See, e.g.,* U.K. Ministry of Defence, *Non-Combatant Evacuation Operations anx. 3B*, ¶ *3B.2* (3d ed. 2023) ("Where there has been a breakdown in law and order and a coherent government no longer exists (or where such government exists, but it is unable or unwilling to protect British nationals) intervention to evacuate British nationals may be justified on the grounds of national self-defence (Article 51 of the UN Charter).")

207 Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 24 (Apr. 6).

208 The Group of Experts could not agree on this point.

- Dual nationality is a common phenomenon, and the "effective" connection of an individual may pertain to more than one State (for instance, when a person is born within the territory of one country to parents of a foreign nationality).
- In cases of dual nationality, each State of nationality has the right to intervene in order to rescue its nationals who are at imminent risk within the territory of a third State.
- A question does exist as to whether this Rule also applies in cases when the dual nationality comprises that of the rescuing State and the territorial State in which force is being used.[209]
- Once a rescuing State undertakes an operation to rescue its own nationals who are at risk within the territory of another State, it can also rescue nationals of third States.
- Moreover, a rescuing State need not act alone: it may act in concert with other States rescuing their respective nationals. Also, in multinational operations of this nature, it is not required that each participating State rescue only its own nationals.

Rule 54

(a) The use of force for the protection of nationals must be exercised in conformity with the requirements of necessity and proportionality.

Commentary

- The requirements of necessity and proportionality are associated with the right of self-defense (see **Section IX**). While one view noted above is that the use of force for the rescue of nationals abroad does not fall within the Article 2(4) prohibition on the use of force; nevertheless, forcible measures undertaken to rescue nationals abroad are constrained by the

209 The Group of Experts could not agree on this point.

requirements of necessity and proportionality.[210]

(b) The presence of the armed forces of a rescuing State in the territory of another State should be limited to the time necessary to effect the rescue of the nationals concerned.

Commentary

- In keeping with the requirement of necessity, the presence of a rescuing State's forces engaged in rescuing nationals at risk from within the territory of another State is limited to the length of time required for the achievement of this purpose.

(c) Whenever possible, a rescuing State should seek the consent of a territorial State for the rescue of the intervening State's nationals who are at risk in that territorial State.

Commentary

- The rescue of nationals at risk abroad presupposes the necessity of recourse to forcible measures within the territory of another State in order to bring the rescue to fruition. However, whenever possible, the rescuing State should first seek consent for its activities from the territorial State.

210 While the Group of Experts could not arrive at agreement on the legal basis for the rescue of nationals, they did agree that it would be limited as described in this Rule.

Section XV: Humanitarian Intervention

Rule 55

(a) The protection of the human rights of persons in the territory of a State remains the responsibility of that State.

Commentary

- Every State is responsible for protecting the human rights of persons within its territory. Breaches of human rights law do not alter the *jus ad bellum*.

(b) The requirement that all United Nations Members refrain from the threat or use of force against the territorial integrity or political independence of any State does not preclude intervention occurring on humanitarian grounds (such as in situations of genocide or other large-scale killings, war crimes, ethnic cleansing, and crimes against humanity), when the Security Council authorizes such interventions (pursuant to Chapter VII) by Member States, ad hoc coalitions of Member States, or regional organizations.

Commentary

- As concluded by the General Assembly 2005 World Summit Outcome,[211] the Members of the United Nations indicated—under the heading "Responsibility to Protect"—that they were "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 are manifestly failing to protect their population from genocide, war crimes, ethnic cleansing, and crimes against humanity."

211 G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

- There is limited support in State statements for the position that humanitarian intervention is permissible in certain exceptional circumstances, even in the absence of authorization by the Security Council. The United Kingdom has supported such an interpretation of the Charter on exceptional humanitarian grounds.[212] However, this approach is contested by many other States and has very little support in actual State practice.[213]
- Even those who support the lawfulness of unilateral humanitarian intervention would subject such intervention to strict criteria. No agreed criteria exist. However, the United Kingdom has suggested three requirements:
    - 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;
    - It must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
    - The proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e., the minimum necessary to achieve that end and for no other purpose).[214]

212 Foreign Affairs Committee, Global Britain: The Responsibility to Protect and Humanitarian Intervention app., 2017-19, H.C. 1719.

213 Independent International Fact-Finding Mission on the Conflict in Georgia, 2 *Report* 284 (2009) ("Under international law as it stands, humanitarian interventions are in principle not admissible and remain illegal.").

214 Foreign Affairs Committee, Global Britain: The Responsibility to Protect and Humanitarian Intervention app., 2017-19, H.C. 1719.

Section XVI: Obligations under Other Rules of International Law

Rule 56

All Parties to an armed conflict, including the State or States exercising individual or collective self-defense, must comply with the applicable *jus in bello* and other rules of international law that continue to apply, independently of their obligations under *jus ad bellum*.

Commentary

- The Rules in this Manual deal with the subject matter of the *jus ad bellum*. They do not attempt to set forth the circumstances under which other applicable rules of international law are relevant, in whole or in part, during application of the *jus ad bellum*.
- It bears repeating that State obligations under the UN Charter when force is authorized by the Security Council may prevail over non-Charter treaty provisions or other non-peremptory rules of international law. See **Rule 22**.
- Further, as the ILC's Articles on State Responsibility make plain, "[t]he 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."[215]
- Still, it must be constantly borne in mind that when an armed conflict occurs, the *jus in bello* (the law of armed conflict) comes into play automatically, regardless of the *jus ad bellum* basis for the use of force. Likewise, other rules of international

215 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 21*, 2 Y.B. Int'l L. Comm'n 47 (2001).

law may continue to apply.[216] Thus, the content of other rules of international law may need to be considered by States in using force, including in the exercise of self-defense.[217]

216 *See* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 21*, 2 Y.B. Int'l L. Comm'n 47 (2001) (Commentary) ("As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.").

217 Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 30 (July 8) (Concluding that environmental treaties could not have been "intended to deprive a State of the exercise of its right of self-defence under international law," but that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.").

ANNEX: RELEVANT PROVISIONS OF THE UNITED NATIONS CHARTER

Article 2(4) provides:

> 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 39 provides:

> 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 41 provides:

> 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 provides:

> 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 51 provides:

> 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 necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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.[218]

Article 52(1) provides:

> Nothing in the present Charter precludes the existence of regional

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218 The equally authentic French-language version of Article 51 reads as "agression armée," translating as "armed aggression" rather than "armed attack."

> 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.

Article 53(1) provides in relevant part:

> 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 . . . .

Article 54 provides:

> 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.

In addition to these most critical texts, other articles of the UN Charter are also of importance in understanding the relationship of the Charter to international agreements, customary international law, and decisions of the ICJ. These include Articles 92, 94(1), 103, and 108 of the Charter, and Articles 38 and 59 of the Statute of the ICJ, which Statute, according to the "Introductory Note" to the Charter, as well as Article 92 of the Charter, is "an integral part" of the Charter.

Article 92 provides:

> The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute . . . and forms an integral part of the present Charter.

Article 94(1) provides:

> Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

Article 103 provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 108 provides:

> Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 38 of the Statute of the ICJ provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognized by civilized nations;
    d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

Article 59 of the Statute provides:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

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