Addendum to

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A Concise Introduction to International Law

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In the light of the recent dramatic events occurring on the international stage, the present Addendum contains a section "in defence" of international law. In highly troublesome and dramatic times, international law is wrongly put in the dock for shortcomings that should rather be attributed to international politics and society. Furthermore, given the increasing number of international conflicts plaguing the international society, especially with regard to Ukraine and Gaza, there is a pressing need to examine the ban on the use of force and the law of armed conflicts, that the following pages aim to explore, still in concise terms.

1. In defense of international law

1.1. *Law and society*

When a State is invaded, a people persecuted, other massive breaches of human rights take place, a major environmental incident occurs, or a basic international collective interest is left unheeded, international law is put in the dock. In the general perception, the UN – which is, in fact, an integral part of the international legal system – is also regarded as a culprit.

This widespread perception is flawed because it conflates cause and effect. No less than in any legal system, international law is but the result of the social and political process. The **law is the product of society and politics**, not the other way around. That is to say that good law, in principle, does not necessarily make an unruly society better. This is no less true in the international society than in domestic systems. Domestic constitutions are often the result of a civil strife, or of a major political process of constitutional reform, often acrimonious, which finally provides fundamental legal protection to the basic socio-political values of the prevailing faction. The wider and the more **homogenous** the social sectors represented by such prevailing faction, the smoother the legal process, as opposed to the scenery characterised by a highly **fragmented**, or polarised, thus conflictual, society. The smoothness of the legal process produced by a homogenous society will consist of the easy production of legal rules governing social and political relations in that society, such rules reflecting the generally shared social and political values. And such smoothness would be complemented by **spontaneous compliance** with the law,

intended as the process of authoritative decision-making, *i.e.* **law-making**, **adjudication** and **enforcement**.

From such a social and political perspective of international law, the latter can be seen from at least two perspectives. Firstly, as a set of **rules creating rights and corresponding obligations** in combination with functional rules providing for an authoritative system of judicial application of the law, as well as for legal means for its enforcement; secondly, as a **thermometer of the state of health of the international society**.

While the rest of the book will prevailingly illustrate international law from the former perspective, the remaining part of the present section will follow the latter. And from such a perspective, the *raison d'être* of international law will be defended against the backdrop of the contemporary turmoil in the international society, where, whilst the majority of international legal rules are **silently complied** with as a matter of daily routine, its key rules aimed at ensuring international peace and security are often abused, misused, or simply infringed upon, as a **consequence, rather than the cause**, of the poor state of health of the international society.

If it were not enough to read and watch the media on a daily basis to appreciate the degree of the contemporary state of acute **global malaise** in the international society, one may recall the strong view expressed by Shivshankar Menon – an international relations scholar, a former diplomat and a National Security Advisor of India – on the August 2022 issue of the prestigious international relations journal *Foreign Affairs*. He argues that '[t]he world (…) is adrift', [1] emphasising how '[m]ajor powers exhibit what may be called "revisionist" behaviour, pursuing their own ends to the detriment of the international order and seeking to change the order itself'. [2] Against this

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[1] S Menon, 'Nobody Wants the Current World Order. How All the Major Powers – Even the United States – Became Revisionists' in Foreign Affairs (22 August 2022).

[2] *Ibidem*.

backdrop, Menon's forecast is gloomy. One according to which 'the powers will probably muddle along from crisis to crisis as their dissatisfaction with the international [political] system and with one another grows, in a form of motion without movement'. [3]

As passionately expressed by the current UN Secretary-General António Guterres:

> '[I]ndeed, divides are deepening. Divides among economic and military powers. Divides between North and South, East and West. We are inching ever closer to a Great Fracture in economic and financial systems and trade relations; one that threatens a single, open internet; with diverging strategies on technology and artificial intelligence; and potentially clashing security frameworks.' [4]

However, as anticipated, it would be wrong and simplistic to argue that the highly critical political and social situation of our day should be attributed to international law. Rather, the problem lies in the politically divisive attitudes of nation-states in their foreign and domestic policies, as well as in the increasing polarization of **cultural, social and political divisions** at the national level in many countries. Whilst social and cultural diversity represents an immense potential asset in any society, lack of dialogue and competing attitudes by the diverse social components are ever more leading to disruptive social and political outcomes **on the domestic level** in many nations. The widening chasm between rich and poor adds to domestic instability around the world, rendering populations ever more vulnerable to economic and financial criminality. [5]

Since such a divided and divisive scenario, so widespread among

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[3] *Ibidem*.

[4] 'Secretary-General's address to the General Assembly' (19 September 2023).

[5] As the UN Secretary General has recently underlined, 'divides are also widening within countries. Democracy is under threat. Authoritarianism is on the march. Inequalities are growing. And hate speech is on the rise. In the face of all these challenges and more, compromise has become a dirty word', *ibidem*.

nation-states around the world, is inevitably projected **on the international level**. Accordingly, international cooperation – especially through international multilateral institutions – is undermined, as a means and a framework for international law-making and dispute settlement. This is the situation that has creepingly been producing itself over the last two decades. And now it seems to be exploding. The contemporary international political crisis and its impact on international law fall within the framework for analysis anticipated at the outset of the present Section, and so lucidly expressed by one of the most illustrious international lawyers of the last century, **Louis Henkin**, who stressed how '[t]he **health of the law** (...) will depend largely on the **health of the society**, on its ability to contain explosive forces and mobilize creative ones for general welfare'. [6]

This approach supports the contention that the current difficulties around the effectiveness of key international legal rules are but a reflection of the contemporary **lack of political capacity, or willingness**, by the most powerful components of the international society to engage in international cooperation. The latter represents a necessary means for the promotion of international peace and security and the indispensable framework within which to collectively address the global challenges that individual states, however powerful, cannot solve alone – from **climate change to migration flows, demographic growth, pandemics, poverty, use of cyber space and of increasingly advanced digital technology, and the finite character of vital natural resources**, amongst others.

Just like in any national society, when the law is often infringed upon or misapplied, this is hardly because its legal rules are bad law, but because of the social, ethical and political circumstances prevailing in that country at any given point in time. Imagine a country plagued by organised crime, drug cartels and corruption, money laundering and terrorism. When an innocent population is raided by criminal gangs, the national financial system is under-

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[6] L Henkin, *How Nations Behave* (2nd edn, Columbia UP) 44.

mined by widespread financial crimes, and law-abiding business falls victim of blackmail, this can seldom be said to be the fault of the rules of criminal law and procedure in that particular country. Consequently, criminal law reform can hardly be, in and of itself, the solution to the problem. And where appropriate legislation is lacking, again, the problem is a political one, to the extent that there is no sufficient identity of views, or political will, among lawmakers for new suitable legislation to be adopted.

In essence, **good law cannot change a troublesome society**, whereas an orderly and homogeneous society can make good law, which normally becomes effective mostly by way of spontaneous compliance, or through effective enforcement legal mechanisms which are regarded by the society at large to be authoritative and legitimate. But, as already stressed, we are living in times of increasingly divided and polarised societies, inevitably producing authority and legitimacy crisis in many nation-states and, consequently, on the international level.

The latter point is reminiscent of the assessment made more than a century ago by **Friedrich de Martens** – the great Russian lawyer and diplomat who was one of the fathers of the two Peace Conferences of 1899 and 1907 [7] – in which he stressed how

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[7] The first Hague Conference was held from 18 May to 29 July 1899 and led to the adoption of the *Convention (I) for the Pacific Settlement of International Disputes* (adopted 29 July 1899; entered into force 29 December 1900), the *Convention (II) with Respect to the Laws and Customs of War on Land* (adopted 29 July 1899; entered into force 4 September 1900) and the *Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864* (adopted 29 July 1899; entered into force 4 September 1900). The second Hague Conference was held from 15 July to 17 October 1907 and led to the adoption of other 13 conventions on both *jus ad bellum* and *jus in bello*. On the historical relevance of the two Hague Conferences, see B Baker, 'Hague Peace Conferences (1899 and 1907)' in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2009); Y Dauded (ed), *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la Paix: colloque La Haye, 6-7 septembre 2007* (Nijhoff 2008).

> '(…) the flaws of international law (…) are only the inevitable consequence of the imperfections and instability that characterise the domestic legal system that has prevailed in all states to date.' [8]

This statement still holds true. And the traditional conception of international law as 'the collective expression of sovereign wills' [9] sits increasingly uncomfortably in today's divided world ever more characterised by nationalistic unilateralism and cross-regional antagonistic alliances.

1.2. *Breaches of the law and its effectiveness*

Having special regard to key international rule on the prohibition on the use of force, it is of some, though, meagre, consolation to note that those who act in breach of the ban in question resort to diplomatic language aimed at legally justifying their conduct. The two main justifications recurrently invoked are **self-defence** and **humanitarian intervention** in connection with allegations of genocide. As we shall see more in detail in the following pages, both arguments have been invoked by Russia – concerning its attack and ongoing use of force against **Ukraine** – and, in different variations, by Israel with regard to the military operations in **Gaza**, still underway at the time the present book is going to press. From a legal – and political com-

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[8] F de Martens, *Traité de droit international* (Vol I, Libraire Marescq 1883) 287 (English translation by the present author). The original text reads as follows: 'On doit nécessairement reconnaître que les défectuosités du droit international (…) ne sont que la conséquence inévitable des imperfections et de l'instabilité qui caractérisent l'ordre intérieur ayant prévalu jusqu'à ce jour dans tous les États'.

[9] It is noteworthy that this approach to international law was emphasised after the end of the Cold War, in the 1990s, a time when political globalisation seemed to bring about the reduction, if not the demise, of national sovereignty (see O Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1998) 36 Columbia Journal of Transnational Law 7). See also C Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International-Law?' (1993) 4 European Journal of International Law 447.

munication – perspective, this attitude renders the disputes arising from the events in question akin to domestic litigation of a criminal law character, where assessment of the facts of the case are key.

The legal relevance of such a self-justificatory attitude is highly significant, and should not be taken for granted. It may help appreciating the point, by contrast, to recall the stand taken at the inception of the US presidency of George Bush Jr in January 2001, based on the US self-perception at the time as the sole superpower. This stand was characterised by the pursuit of a **hegemonic design**. Under the ideological impulsion of ultra-conservative circles of the kind of the Heritage Foundation and of governmental advisors like John Bolton – then Under Secretary of State and US Ambassador to the UN – later also National Security Advisor to the Trump presidency, the US advocated for the abrogation of the *UN Charter* Chapter VII and customary law constraints on the use of force for the US only,[10] in terms reminiscent of the Brezhnev doctrine of limited sovereignty of the USSR satellite countries.[11] The stand advanced by the US Government then consisted in the fact that exceptions to the *Charter* and customary ban would apply to the US under a hegemonic design aimed at administering some kind of *Pax Americana* reminiscent of the imperial *Pax Romana*.[12] It has been

[10] DF Vagts, 'Hegemonic International Law' (2001) 95 American Journal of International Law 843; DE Álvarez, 'Hegemonic International Law Revisited' (2003) 97 American Journal of International Law 873; M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP 2003); N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Power' (2005) 16 European Journal of International Law 369; R Wolfrum, 'Reflections on the Development of International Treaty Law under the Auspices of the United States Hegemony and Globalization' (2005) 8 Austrian Review of International and European Law 221.

[11] RA Jones, *The Soviet Concept of 'Limited Sovereignty' from Lenin to Gorbachev: The Brezhnev Doctrine* (MacMillian 1990).

[12] J MacDonald, *When Globalization Fails: The Rise and Fall of* Pax Americana (Farrar, Straus and Giroux 2015); MT Berger, 'From Pax Romana to Pax Americana? The History and Future of the New American Empire' (2009) 46 International Politics 140.

argued, including by the present author, that at a time of imminent transition of the world balance of power, obviously in favour of new emerging powers, it was ill advised to try and unilaterally dismantle the international legal framework.[13] For the latter could provide a rules based **context for containment** of the inevitably explosive factors inherent in any transitional and adjustment processes.

Interestingly, despite the fact that the world can be said to be on fire today more dangerously than two decades ago, none of the actors currently involved in international conflict objects to the pivotal rules on the ban on the use of force or genocide. As the ICJ observed in its landmark case on the *Military and Paramilitary Activities in and against Nicaragua* between Nicaragua and the US

> '(…) for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as a recognition of a new rule. If a state acts *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.'[14]

Few years later, having regard to the effectiveness of the international customary rule on the prohibition of torture, despite negative record in a number of countries in this field, former President of the ICJ Dame Rosalyn Higgins argued as follows:

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[13] AM Tanzi, 'Divergenze transatlantiche e diritto internazionale' in G Gozzi and P Manzini (ed), *L'Occidente e l'ordine internazionale* (Giappichelli 2008) 9; F Fukuyama, *After the Neocons: America at the Crossroads* (Profile Books 2006).

[14] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) (Judgment) [1986] ICJ Rep 14, 98.

> 'The reason that the prohibition on torture continues to be a requirement of customary international law, even though widely abused, is not because it has a higher normative status that allows us to ignore the abuse, but because *opinio juris* as to its normative status continues to exist. No state, not even a state that tortures, believes that the international law prohibition is undesirable and that it is not bound by the prohibition. A new norm cannot emerge without both practice and *opinio juris*; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*.' [15]

1.3. *Reform?*

Despite the above partial consolation coming from legal reasoning, the question inevitably remains as to the need for and the chances of success for a reform design.

In the early 1990s, after the collapse of the USSR, the world order radically changed bringing **new engagement in international cooperation** through multilateral institutions. The political declaration issued at the end of the G7 Summit held in London in July 1991 is telling to that effect. *Inter alia*, it read as follows

> 'We believe the conditions now exist for the United Nations to fulfil completely the promise and the vision of its founders. A revitalised United Nations will have a central role in strengthening the international order. We commit ourselves to making he UN stronger, more efficient and more effective in order to protect human rights, to maintain peace and security for all and to deter aggression. We will make preventive diplomacy a top priority to help avert future conflicts by making clear to potential aggressors the consequences of their actions. The UN's role in peacekeeping should be reinforced and we are prepared to support this strongly'. [16]

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[15] R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994) 22.

[16] http://www.g7.utoronto.ca/summit/1991london/political.html.

In line with the above, the UN Security Council – meeting at the level of Heads of state or of Government in 1992 – unanimously assessed new threats to international peace and security falling within its exclusive competence.[17] It mandated the then Secretary-General, Boutros Boutros-Ghali, to produce a propositive study on the means to counter such threats, including possibly new legal tools pertaining to the **UN collective security system** under Chapter VII of the *Charter*. Curiously, in the ensuing document called *An Agenda for Peace*, the recipe to respond to new and old threats did not suggest creating any new legal setting but, rather, implementing the existing collective security legal framework under Chapter VII of the *Charter*, as originally envisaged. Namely, a legal framework that could never be put into effect due to the veto by one, or more, of the five permanent Members of the Security Council. The revival of the collective security system under the *Charter*, which vests the exclusive responsibility in the Security Council, actually occurred thanks to the newly found international political situation in which no veto would block the system. However, this harmonious scenery was short-lived due to the revival of old divisions.

Today, the question of reforming the international legal framework is emerging from various quarters, but the situation is completely different from the 1990s, possibly the reverse. One is not thinking in terms of revision of the basic international rules of conduct, such as the ban on the use of force or on genocide, but of those governing the **composition and functioning of international institutions**, such as the UN Security Council, the WB, or the IMF. Recently, UN Secretary General Guterres, next to passionately advocating the need for reform, conceded to 'have no illusions. Reforms are a question of power', further adding:

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[17] Especially, those from non-state actors, with special regard to terrorism, and from the environment (UNSC, *The Responsibility of the Security Council in the Maintenance of International Peace and Security*, UN Doc S/PV.3046 (31 January 1992). For a comment, see Tanzi (fn 13).

> 'I know there are many competing interests and agendas. But, the alternative to reform is not the status quo. The alternative to reform is further fragmentation. It is reform or rupture. We have all the tools and resources to solve our shared challenges. What we need is determination.' [18]

Against the backdrop of a world set on fire, ignited from innumerable quarters in the pursuit of countless conflicting interests, it is for international lawyers and civil society to address the basic questions to *politics* as to 'what vision [governments around the globe] have for the future of the world order, what they are doing to secure it, and what cost they are willing to bear to try to achieve it'. [19]

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[18] 'Secretary-General's address to the General Assembly' (fn 4).

[19] IW Brunk and M Hakimi, 'Russia, Ukraine, and the future World Order' (2022) 116 American Journal of International Law 687, 697. Against a foreign relations communication policy by the Chinese superpower ostensibly in favour of multilateralism, policy observers like Menon are rather blasé about the current chances to find genuine determination towards multilateral governance: 'As the old order disintegrates and the new one struggles to be born, the advantage lies with states that clearly understand the balance of forces and have a conception of a cooperative future order that serves the common good. Unfortunately, the capacities of many major powers have diminished, and many of their leaders exhibit little interest in foreign affairs, managing crises, or solving transnational problems, precisely when widespread revisionism makes crises more likely and dangerous. As a consequence of their contentious domestic politics, none of the significant revisionist powers, each of which wishes to change the international system, has a compelling vision of what that change might be' (fn 1). Others, like Sir Daniel Bethlehem, whilst provoking a deep reflection over the needed adjustments for international law to fit future needs with his visionary proactive enquiry, realistically concedes to the fact that at present 'we cannot rely on the multilateral. We need also to conceive of, and take forward, a workable model of variable geometry where we do multilaterally what can be done multilaterally but are also prepared – proactively, not simply as a last resort – to do regionally or bilaterally or thematically or sectorally what can be done by such means, even if the effect of such action may only be to move the issue partway forward' (D Bethlehem, 'Project 2100 – Is the International Legal Order Fit for Purpose?' in EJIL: Talk! (29 November 2022)).

2. The ban on the use of force and its limitations

2.1. *The formation of the customary ban on the use of force in inter-state relations*

In Chapter 6, we saw how, until the beginning of the 20th century, the use and threat of the use of force have been considered as lawful means of dispute settlement. It was recalled how their ban was initially adopted partway following a piecemeal approach to its outright prohibition. The most visible initial step of the process was associated to the adoption of the ***Convention Respecting the Limitation of the Employment of Force for Recovery of Contract Debts*** at the Second Hague Peace Conference in 1907.[20] The latter came as a reaction to the naval blockade and threat of cannonade on Venezuela by Germany, Italy and the United Kingdom between 1902 and 1903 for the recovery of unpaid credit from public bonds.[21]

It was only after the occurrence of the humanitarian catastrophe of the First World War (1914-1918) that prohibiting the use of force between nations was considered in more comprehensive terms by the international society. Namely, within the framework of the **Covenant of the League of Nations**, the precursor of the United Nations. Under Article 11 of the Covenant the negotiating states acknowledged that war and the threat of war was 'a matter of con-

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[20] B Baker, 'Hague Peace Conferences (1899 and 1907)' in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2009).

[21] W Benedek, 'Drago-Porter Convention (1907)' in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2007).

cern to the whole League', while Article 12 basically prohibited going to war against another Member State of the League without prior resort to arbitral or judicial means of peaceful settlement, and not before three months would elapse since the succumbing Member State had not complied with the judgment, or award, on the dispute in question.

In its innovative nature at the time, this normative setting presented at least three shortcomings. First, given precisely its innovative character – thus, lacking customary nature at the time – the ban would be binding only on states parties to the Covenant. Secondly, confining the wording of Article 11 to prohibiting 'war' could lead to legal uncertainties and abuses by states claiming to resort to uses of force short of war. Thirdly, the above-mentioned conditions laid down in Article 12 provided the suspension of the right to use force, rather than the outright ban. Namely, until after a third party adjudicative means of dispute settlement has exhausted and three months of non-compliance with the judgment, or award, had passed. Another way to look at Article 12 would be under the configuration of a form unilateral forcibl enforcement of international judgments, or awards, which nowadays is absolutely prohibited.

Those shortcomings have been addressed by the international society in the course of time. A spill over from the merely conventional setting of the Covenant to customary law would occur through a more ample geometry of conventional practice, including by states that were not parties to the Covenant. One may recall the landmark ***Kellogg-Briand Pact*** of 1928,[22] between France, Germany and the US in which, more comprehensively, 'they condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it, as an instrument of national policy in their relations with one another'. This international instrument was complemented by the ***Montevideo Convention on the Rights and Duties of States***, adopted in 1933 within the framework of the Conference of Ameri-

[22] R Lesaffer, 'Kellog-Briand Pact (1928)' in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2010).

can States, including the US.[23] The Convention outlawed wars of aggression, requiring compulsory peaceful settlement of disputes, and the non-recognition of any territorial acquisition attained by the use of force.

It is worth noticing that both Conventions feature the participation of the US, which never became a party to the Covenant of the League of Nations, despite the latter having been masterminded by the US President Woodrow Wilson inspired by enlightened internationalist pacifism. The US engagement with multilateralism propounded under his presidency was soon reversed by a new President – Warren Gamaliel Harding – together with the advent of a new isolationist Republican majority in the US Congress.

In line with the reasoning put forward above in Chapter 1, Section 1, the above conventional instruments could not prevent the horrors of the Second World War. However, the cumulative effect of such conventional instruments, boasting the participation by states from different regions of the world, was considered instrumental in the identification, if not formation, of the international **customary ban on use of force**, already before that War. And this provided legal ground for the application of the crime of aggression by the Nuremberg and Tokyo Tribunals which tried the German and Japanese leaders, respectively, including for the crime of aggression.

As a matter of practice and *opinio juris*, one may recall that the *Kellog-Briand Pact* was relied upon in the diplomatic instruments of condemnation of the Italian aggression on Ethiopia in 1935, as well as of the Nazi invasion of the then Czechoslovakia in 1938 and of Poland in 1939, as well as of the Soviet invasion of Finland in 1939.

Similarly, the Montevideo Convention has been considered a living instrument all along. As observed by the ICJ in the 1986 Judgment in the *Nicaragua v US* case

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[23] *Montevideo Convention on the Rights and Duties of States* (adopted 26 December 1933; entered into force 26 December 1934).

> 'As regards the United States in particular, the weight of an expression of opinio juris can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on the Rights and Duties of States (26 December 1933).' [24]

The formation of the customary rule on the prohibition of the use of armed force in inter-state relations was corroborated and perfected by the UN Charter, with special regard Article 2, paragraph 4:

> '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.'

Here, the ban is not confined to acts qualifying as war, as in the Covenant of the League of Nations, which could lend itself to abuses of the kind referred to above. It is also noteworthy that the expression 'against the territorial integrity or political independence of any state', added during the *travaux* upon a proposal by Norway, was meant to enhance the ban, rather than to qualify it restrictively.

A consistent set of authoritative statements emerging from international diplomatic and jurisprudential practice – especially, **UN GA resolutions and ICJ judgments and Advisory Opinions** – have corroborated such an extensive interpretation. As observed by the ICJ in the same *Nicaragua v US* case

> 'A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4 of the Charter of the United Nations may

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[24] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) (Judgment) [1986] ICJ Rep 14, 100.

> be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law.' [25]

In the same direction, the Court, after referring to the landmark 1970 UN GA 'Friendly Relations' Resolution (2625-XXV) in the middle of the Cold War, observed that

> 'The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.' [26]

Next to the customary nature of the ban in question, subsequent practice and *opinio juris* can also be found which are instrumental in determining the contents of the ban, further to the obvious circumstance of an outright act of aggression. Again, the *Nicaragua* case was particularly helpful, since the Claimant's complaints referred to allegations that the Respondent was financing, training and arming irregular forces. The Court reached the conclusion that similar conduct – despite falling short of an act of direct aggression – would breach the ban on the use of force, again, relying on the above mentioned 'Friendly Relations' Resolution, with special regard to the following language

> 'Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.' [27]

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[25] *Ibidem*, 100-101.

[26] *Ibidem*, 99-100.

[27] UN General Assembly, Res. 2625 (XXV) of 24 October 1979, referred to

2.2. *Self-defence*

Article 51 of the UN Charter reads as follows:

> '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.'

It is generally recognised that self-defence can be exercised individually, by the state which suffers an armed attack, or collectively by third states, upon consent, including a request, by the victim state. One may recall that when Iraq invaded Kuwait in August 1990, the latter asked the US and allied countries to intervene, and the UN Security Council could, exceptionally easily, reach the necessary cohesion among the five Permanent Members to authorise such intervention. [28]

An example of consent and engagement to collective self-defence – provided *ex ante* with respect to the occurrence of an armed attack – is offered by Article 5 of the Washington Agreement of 1948 which established NATO, as follows

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in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) (Judgment) [1986] ICJ Rep 14, 101.

[28] See DW Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?' (1991) 40 International and Comparative Law Quarterly 366; KH Kaikobad 'Self-Defence, Enforcement Actions and the Gulf Wars, 1980-88 and 1990-91' (1992) 63 British Yearbook of International Law 299.

> 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked […] including [with] the use of armed force.'

Reverting to Article 51 of the UN Charter – with special regard to the language whereby '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence' –, it is to be read in conjunction with Article 2, paragraph 4, of the Charter, with respect to which it represents an obvious exception. This explains the configuration of self-defence as a **circumstance precluding wrongfulness** as anticipated in Chapter 5, Section 2.1.2. Self-defence is precisely meant to represent an exceptional circumstance which justifies the use of force. [29]

As it emerges from the expression **'inherent right'** (*droit naturel*, *derecho immanente*), here the Charter has codified a customary rule through a form of incorporation (of customary law) by reference. This language imports into the Charter the inevitable complications flowing from the unwritten nature of customary law, which involve difficulties in assessing, on a case-by-case basis, the lawfulness of conduct carried out upon claims of self-defence.

As a glaring example of such difficulties, one may refer to the dramatic dispute ensuing from the follow up of the statement by President Putin in February 2022 before launching the so-called 'Special military operation' invading **Ukraine**, as follows

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[29] O Schachter, 'Self-Defense and the Rule of Law' (1989) 83 American Journal of International Law 259; C Greenwood, 'Self-Defense' in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2011); Y Dinstein, *War, Aggression and Self-defence* (6th edn, CUP 2017) 197; C Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 120.

> '[I]n accordance with Article 51 of Part 7 of the UN Charter, with the sanction of the Federation Council of Russia and in pursuance of the treaties of friendship and mutual assistance ratified by the Federal Assembly on 22 February this year with the Donetsk People's Republic and the Luhansk People's Republic, I decided to conduct a special military operation. Its goal is to protect people who have been subjected to bullying and genocide by the Kiev regime for eight years.' [30]

To the same effect, mention may be made to statements by the Prime Minister of Israel in relation to the Israeli military operations in **Gaza** in response to the terrorist attack launched by Hamas on 7 October 2023. [31]

From the legal perspective of most politically sensible matters, the difficulties in question focus on the assessment of the legal requisites legitimising the use of force in self-defence, such as **proportionality**, including with regard to the duration, modes and aims of the use of force under the factual circumstances of any given case. The wording 'until the Security Council has taken measures necessary to maintain international peace and security' in Article 51, in combination with the obligation for the self-defending state to report immediately to the Security Council, suggests two things. First, the short duration, in principle, of the legitimising effect of self-defence. Namely, until the Security Council is seized of the matter – by the State, or States, acting in individual or collective self-defence – and has taken action or, in any case, as long as the armed attack has been repelled. Second, that the objective power of assessment of compliance with the requirements in point in any given case was envisaged by the drafters of the Charter to be vested

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[30] English translation of Putin's declaration of war on Ukraine on the webpage of *The Spectator* (24 February 2022).

[31] See, in particular, 'Statement by Prime Minister Benjamin Netanyahu' (7 October 2023) and 'PM Netanyahu Meets with Bulgarian PM Nikolay Denkov' (6 November 2023).

primarily with the **Security Council**, rather than the ICJ. That is, **political control rather that judicial** over the matter. The intentions of the drafters have been realized only in the few and short periods of time when the Security Council could function without being blocked by the veto of the P5.

Under the present international political circumstances of conflictual polarisation, no Security Council assessment could be made, nor collective action endorsed, in relation to the invocation of self-defence by Russia in Ukraine, because of the obvious prospective veto by Russia. The same situation presented itself with regard to the use of self-defence by Israel in Gaza, due to the prospective **veto** by the US and the UK.[32]

2.3. *The issue of humanitarian intervention*

While self-defence is an established legal institution of customary international law, the formation of a general rule of international law exceptionally permitting military intervention in a foreign state aimed at protecting innocent people – so-called '**humanitarian intervention'** – is controversial and has been contested whenever invoked.

When NATO countries argued the 'humanitarian intervention' justification for their use of force in 1999 against the Former Republic of Yugoslavia to put an end to the human rights abuses that were then being perpetrated against the ethnic Albanian population in **Kosovo**, the Russian Federation, with support from China and Namibia, proposed in the Security Council a draft-resolution aimed at condemning the military operation. And the proposal was rejected by 12 votes against.[33] Most of the delegations casting a negative

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[32] For comments on the issue, see A Nollkaemper, 'Three Options for the Veto Power After the War in Ukraine' in EJIL: Talk! (11 April 2022).

[33] UN Doc. SC/6659, 26 March 1999.

vote argued that the use of force was justified under the circumstances to the extent that it was carried out in pursuit of aims of the UN Charter. It is worth noting how Russia condemned the NATO military operation which was based on legal arguments very similar to those advanced by Russia itself with regard to its 2022 military operations in Ukraine, still ongoing at the time this book is going to print. [34]

The Court has not so far expressed its stance in clear-cut terms as to whether the ban on the use of force – in its customary configuration, as evidenced by the Charter provision in point – encompasses a humanitarian intervention exception, or not. One would make the case that the ICJ's cautious jurisprudential attitude on the point at issue may also be due to the ambiguity in the arguments pleaded by the parties before the Court – including by intervening states, as third parties interested in the interpretation of the conventions to which they are parties and represent the applicable law – with rare, though relevant, exceptions. [35] This fluid state attitude may be attributed to the wish to avoid making statements that could be used against them when in the future they might wish to consider the option to adopt forms of humanitarian intervention, under exceptional political and humanitarian circumstances.

However, it is worth recalling that the Government of Ukraine – in its last case filed before the ICJ against Russia in February 2022 – did not actually follow a similar caution in asking the Court to assess the wrongfulness of the use of force by Russia and its abusive interpretation of the Genocide Convention. [36] This approach was

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[34] *Ibidem*.

[35] See, for example, the position taken by the US in the *Legality of Use of Force* case, according to 'the actions of the Members of the NATO Alliance find their justification in a number of factors', including a 'humanitarian catastrophe' (*Legality of Use of Force* (Yugoslavia v the United States of America) (Provisional Measures) (Verbatim Record of Public sitting of 11 May 1999) 10).

[36] *Allegations of Genocide under the Convention on the Prevention and Pun-*

aimed at obtaining the interpretation and application by the ICJ of the rules on the use of force considered by counsel for Ukraine as incidental to the interpretation and application of the Genocide Convention in light of the factual circumstances of the case.

In its decision on Ukraine's request for provisional measures the Court confined itself to stating that conduct preventing or punishing the crime of genocide should be carried out in compliance with the fundamental principles of the UN Charter.[37] Clearly, the ban on the use of force under Article 2, paragraph 4, features first among such principles. In its Judgment of 2 February 2024 on Russia's preliminary objections, however, the Court declined to entertain Ukraine's claim for the part which concerned the request for a finding that Russia's use of force is a wrongful abuse of the Convention, since it found that this matter would be beyond the four corners of its jurisdictional competence under the Genocide Convention.[38] It stated as follows

> '[A]ssuming – for the sake of argument – that […] by launching the "special military operation", the Russian Federation sought to implement its obligations under the Convention, and that the acts in question are contrary to international law, it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to the recognition of States and the use of force. These matters are not governed by the Genocide

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ishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States intervening) (Application instituting proceedings).

[37] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v Russian Federation) (Provisional Measures) (Order) [2022] ICJ Rep 211, 225. See, similarly, also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) (Judgment) [2007] ICJ Rep 43, 221.

[38] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v Russian Federation: 32 States intervening) (Preliminary Objections) (Judgment) [2024].

Convention and the Court does not have jurisdiction to entertain them in the present case.' [39]

2.4. *The use of force and the UN framework*

2.4.1. *The Security Council*

As anticipated, only under exceptionally favourable international political circumstances – namely, the cohesion among the five Permanent Membrs of the Security Council – has the Security Council authorised Member States to use force under **Chapter VII of the Charter** in the past, including with reference to self-defence as a means for the reestablishment of international peace and security.

The first glaring example of this was in relation to the **Iraqi invasion of Kuwait** in 1990. Having then the Communist regime in the former USSR just collapsed – with the new Russian Federation relying on Western assistance in affording the political, economic and administrative transition to a new liberal regime – the Security Council could find an **unprecedented cohesion** among its Member States, which could allow it to take action under the collective security system under Chapter VII of the Charter.

Accordingly, first, the Council enjoined Iraq to withdraw, [40] then, due to non-compliance by Iraq, it adopted economic and political sanctions [41] and, eventually, issued an ultimatum in November 1990, [42] whereby it authorised Member States 'to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions' if Iraq would not comply by January 1991. Since Iraq did not do so, a coalition of Member States led by the US gave effect to resolution 660 using force against Iraq, successfully.

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[39] *Ibidem*, 56.

[40] UN Security Council, Res. 660 (1990) of 2 August 1990.

[41] UN Security Council, Res. 661 (1990) of 6 August 1990.

[42] UN Security Council, Res. 678 (1990) of 29 November 1990.

Interestingly, in the preamble of the second of the above series of resolutions, the Security Council, while exercising its collective security prerogatives, restated the principle of self-defence as follows

> '*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.' [43]

It is noteworthy that the letter of the Charter does not expressly contemplate the power for the Security Council to authorise member States to use force, while rather providing for it to establish – and avail itself of, when needed – armed forces to be provided by Member States and operated under its political and military control. [44] Obviously, during the Cold War, which began soon after the establishment of the UN there was no way that those provisions could be given effect, with NATO Admirals and Generals operating together with their counterparts from the Warsaw Pact. That accounts for the practice of the **Security Council delegating the use of force** to Member States, instead of disposing of its own military forces.

This accounts for the practice of so called ***peace-keeping operations*, or *blue helmets***. [45] The latter should not be conflated with operations involving the use of force authorised or requested by the Security Council. The former are deprived of forcible enforcement function, are not equipped with heavy weaponry, and are usually set up only for purposes of monitoring and assisting in the maintenance of a truce as buffer forces, often supporting police or civil functions in areas plagued by previous international or civil conflicts.

The initial Security Council practice authorising the use of force

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[43] UN Security Council, Res 661 (1990) of 6 August 1990, pp 6.

[44] UN Charter, Articles 43ff.

[45] M Bothe, 'Peacekeeping Forces' in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2016).

in combination with self-defence has evolved in favourable political times, even stretching to the extent of authorising the use of force against states which had not engaged directly in acts of aggression, but hosted terrorist organisations, like Al-Qaeda in Afghanistan.

With the come-back of major political divisions, among the Permanent Members of the Security Council, at the end of the first decade of the 21st Century the Council would, again, become unable to authorise the use of force by its members by certifying the existence of the preconditions for its exercise, including self-defence and its proportionate exercise.

2.4.2. *The General Assembly and the ICJ*

Confronted with the paralysis of the Security Council, at the beginning of the life of the UN, on the occasion of the war between North and South Korea in 1950, the argument has been propounded by the Western powers to the effect that, when the Security Council was blocked by a veto (generally, by the USSR) with respect to a crisis threatening international peace and security, the General Assembly could residually exercise the otherwise exclusive competence of the Security Council, thus, authorising the use of force. [46]

While this proposal was aimed at introducing an **unwritten constitutional modification of the Charter**, it was short-lived. It never reached customary status, for it was objected to by the USSR and its allied delegations, and it was soon abandoned by its very initiators, the Western delegations, when they started losing the majority in the UN General Assembly.

The **General Assembly** still adopts **resolutions** pertaining to the use of force when the Security Council is paralysed. When it so happens, one is to consider that, first, the resolution in question inevitably cannot be supported by unanimity, since the recalcitrant members of the Security Council are also members of the General

[46] See UN General Assembly, Res. 377 (V) of 3 November 1950.

Assembly; second, under the Charter, General Assembly resolutions, as such, fall short of legal bindingness. Depending on the numeric support received by delegations, and on their contents and clarity of language, they may represent legally relevant authoritative political statements. They may affect the **political legitimacy** of the conduct in question – enhancing or undermining it – as a form of social control, but cannot be considered to be legally decisive.

Having regard to **the role of the ICJ**, it may occur that it exercises its jurisdiction over situations pertaining to the use of force and self-defence. However, this is rare due to the consensual nature of the jurisdiction of the Court. States – particularly the mighty ones which are more easily subject to involvement in situations concerning the use of force, with special regard to collective self-defence – have proven wary about accepting the Court's jurisdiction over issues concerning their use of force, thus, over the core of their national security. The Permanent Members of the Security Council have traditionally conceived the latter as vested with the power to exercise political control over situations involving the use of force, on an exclusive basis. And, as we have seen above with regard to the Judgment on jurisdiction in the *Allegations of genocide* case between Ukraine and Russia, the Court is not willing to extend its jurisdictional competence to issues concerning the use of force, even where such issues and the relevant rules may be incidental, if not ancillary, to the main subject matter before it. [47]

Aside from judgments on the merits in cases involving the use of force and self-defence – and from the ICJ's jurisdictional competence thereto, especially where the use of force does not represent the main claim – one is to consider also the Court's power to indicate **provisional measures**. Article 41 of the ICJ Statute reads as follows

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[47] Above (fn 20).

> '1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.'

An issue pertinent to the present discussion pertaining to disputes involving the use of force is whether the Court could order provisional measures which may impinge upon the right of self-defence under Article 51 of the Charter. Indeed, according to Article 92 of the UN Charter, the ICJ Statute 'forms an integral part of the present Charter'. Accordingly, the exercise of the judicial function should be carried out in full alignment with the Charter provisions. Besides, it will be recalled that under Article 51, 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence'.

In its Order on provisional measures of 16 March 2022 in the *Ukraine v Russia* case, based on the assertion of its *prima facie* jurisdiction in the case, the Court ordered Russia to 'immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine' and to 'ensure that any military or irregular armed units which may be directed or supported by it (…) take no steps in furtherance of the military operations'. [48] In the light of the above considerations of consistency requirements between the exercise of the Court's function and the Charter, with special regard to Article 51 in this particular case, evidently the Court proceeded on the basis of the consideration that Russia could not carry out its military operation in self-defence, if not abusively, as it could not be said to have suffered an armed attack from Ukraine. The fact that in its Judgment of 2 February 2024 on Russia's preliminary objections the Court declined its jurisdiction on this particular matter does not deprive the ordered measure in question of its legally binding force. And if not reversed by the Court before its final judgment on the

[48] *Allegations of Genocide* (Provisional Measures) (fn 18) 231.

merits, the fact that the measure in question has not been complied with by Russia could provide the legal basis for awarding **compensation**, if requested in the merits phase by Ukraine. Such request would not represent an inadmissible recharacterization of Ukraine's main claim – so called *mutatio libelli* –, aside from falling within the framework of the binding decisions adopted by the Court in the same case.

In its Order on provisional measures of 26 January 2024 in ***South Africa v Israel***, the Court did not order the **cease fire** requested by South Africa.[49] And this can be taken as a recognition of the right to self-defence against the attack suffered on 7 October. At the same time, the Court addressed the **modes of the military operations** conducted by Israel in self-defence, including to the effect that Israel must ensure that its military do not commit acts in breach of the Genocide Convention and enable the provision of the basic services and humanitarian assistance to the Palestinian People in the Gaza Strip.[50]

Still on the role of the ICJ in the matter of the use of force, it is worth mentioning that it may occur, and it has occurred, that the Court is seized of legal questions pertaining to the use of force within the framework of its **advisory competence**. This may happen upon request by the General Assembly or other UN organs or specialised agencies. The Court's advisory jurisdiction, differently from its contentious jurisdiction, is meant to have the Court addressing and elucidate general questions of international law, rather than settling disputes. Whilst the Court has always tried to stick to its mandate, it is inevitable that different states, or groups of states, may favour dif-

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[49] For the request, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel) (Application instituting proceedings and request for the indication of provisional measures) 82-83.

[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel) (Provisional Measures) (Order) [2024] 24-26.

ferent interpretations of the thorny legal issues before the Court in any given advisory case. This will inevitably involve contentious elements in advisory proceedings, eventually leaving some states content with the opinion of the Court, others unsatisfied with it.

Suffice to recall the Advisory Opinions on the *Legality of the Threat or Use of Nuclear Weapons* of 1996,[51] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004,[52] or the request pending at the time the present book is going to press, on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, filed by the UN General Assembly on 19 January 2023.

ICJ advisory opinions are not legally binding, as such. Though, just as it was observed above with regard to General Assembly resolutions – and all the more so, given the authoritative legal expertise in the Court's composition – they may be considered as authoritative statements of the law, still way short of definiteness.

2.5. *International Humanitarian Law or the laws of warfare (*jus in bello*)*

Just as there are rules on the legality of the use of force by states (***jus ad bellum***), there are also rules on how force may be used (***jus in bello***).[53] The latter body of rules, also known as IHL or 'the law of

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[51] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

[52] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

[53] M Sassòli, 'Ius ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?' in M Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines - Essays in Honour of Yoram Dinstein* (Brill 2007) 248.

armed conflict', imposes constraints on the conduct of hostilities in all types of armed conflicts, and it is equally **addressed to states and their military**.[54] The aim of its rules is to contain suffering and destruction by regulating the behaviour of belligerents and protecting **civilians** from the horrors of warfare.[55] IHL aims to protect not only civilians from being targeted by direct military activities but also civil works, installations, cultural objects, and the environment.[56]

In order to grasp the scope of this body of international law, it is essential to introduce the definition of armed conflict. According to the ICTY:

> '[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[57]

The first situation describes an '**international armed conflict**', whereas the second one describes a '**non-international armed conflict**'. IHL applies not only to international armed conflicts within the boundaries set by Chapter VII of the UN Charter, but also to confrontations between governmental forces and armed groups within the territory of a state, or between armed groups in a domestic context, reaching a threshold of seriousness whereby the confrontations qualify as '**civil war**'.

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[54] HP Gasser, 'International Humanitarian Law' in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (online edn, OUP 2015).

[55] See O Hathaway *et al*, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883, 1895.

[56] With regard to the environment, see ILC, 'Draft principles on protection of the environment in relation to armed conflicts' (2022) II(2) Yearbook of the International Law Commission.

[57] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70.

Although the codification of IHL dates back to the second half of the 19th century, constraints on the conduct of hostilities have a long history. Before Grotius and Rousseau, ancient Greek philosophers had already discussed the ethical limitations of warfare. [58]

The 1859 **Battle of Solferino** represented a landmark event for the development of IHL in its modern configuration. After this atrocious battle, Henry Dunant conceived the foundation of the International Committee of the Red Cross (ICRC), formerly known as the Committee of the Five, in Geneva. In 1863, at the request of the US President Abraham Lincoln, Francis Lieber wrote the famous 'Instructions for the Government of Armies of the United States in the Field' (also known as the *Lieber Code*).

Despite Cicero's quote '*inter arma silent leges'* ('when weapons speak, the law is silent'), the 'laws of war' have been heavily regulated. Given the increasing number of conflicts we are witnessing, it is crucial to safeguard human beings from the consequences of violence, regardless of the 'justness' or 'legality' of war. Indeed, most of the provisions of IHL are considered an integral part of *jus cogens*.

Coming to the **modern codification** of the rules of armed conflict, two main strands can be distinguished. The former was developed during the already mentioned two **Hague Peace Conferences of 1899 and 1907**, which resulted in the respective Hague Conventions. They address the rights of prisoners of war, the conduct of hostilities and belligerent occupation. It is worth noting the inclusion of the so-called *Martens Clause* in the Preamble of the 1899 Hague Convention, according to which:

> 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection

[58] See E de Vattel, *The Law of Nations* (Liberty Fund 2008 [1758], T. Nugent trans.) Book III.

> and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.' [59]

The second set of rules can be found in the **four Geneva Conventions** for the Protection of War Victims of 1949. [60] They address the laws of armed conflict which are aimed at protecting those who do not take an active part in combat. The most innovative element of these Conventions can be found in Article 3, which is one of the provisions common to all four conventions. [61] This provision provides a minimum level of protection for victims of international and non-international conflicts alike. [62]

Furthermore, **two Additional Protocols** to the Geneva Conventions were concluded in 1977. One updates the law applicable in international armed conflicts (Protocol I) and the other one applies to non-international armed conflicts (Protocol II). States parties to the four Geneva Conventions are not necessarily also parties to the two Additional Protocols.

It is also worth noting that the prevailing view suggests that also states that are not parties to the Conventions in question are bound

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[59] The Marten Clause was then redrafted in 1977 by Additional Protocol I Article 1.

[60] See the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* ('Geneva Convention I'), the *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* ('Geneva Convention II'), the *Geneva Convention relative to the Treatment of Prisoners of War* ('Geneva Convention III') and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* ('Geneva Convention IV') (adopted 12 August 1949; entered into force 21 October 1950).

[61] The four Geneva conventions of 1949 comprise a few 'common provisions', *i.e.* provisions that are laid down in identical form in all four conventions.

[62] J Klabbers, 'The Law of Armed Conflict' in J Klabbers (ed), *International Law* (CUP 2013) 208.

by their provisions to the extent that they are **evidentiary of customary law**, or of **general principles of law**.

In the *Corfu Channel* case, the ICJ spoke of 'elementary considerations of humanity, even more exacting in peace than in war'.[63] In the *Nicaragua v US* case, the ICJ noted that Article 3 of the Geneva Conventions reflects those 'elementary considerations of humanity'.[64] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ affirmed that international customary law is an independent source of legal rules to draw from during armed conflict.[65]

The principle of **proportionality** and the principle of **distinction** are also fundamental to IHL.[66] The former aims to balance the force used with the military goal pursued: 'attacks are prohibited when the expected losses or destruction would be excessive in relation to the concrete and direct military advantage anticipated'.[67] The principle of proportionality is intertwined with, or even absorbs, that of **military necessity**. According to the latter, military action is to be intended to hit enemy military targets in the pursuit of military gains and collateral damage to civilians should not be excessive, or unnecessary, with respect to military goals. The principle of distinction requires a clear differentiation to be made between the civilian population and objects, and combatants and military objects.[68]

A final word on the relationship between **international human**

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[63] *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits) [1949] ICJ Rep 4, 22.

[64] *Military and Paramilitary Activities* (fn 8) 114.

[65] *Legality of the Threat* (fn 32) 256.

[66] See JD Ohlin, 'The Basic Structure of Jus in Bello' in L May (ed), *Just War and International Legal Theory* (CUP 2018).

[67] Art. 57 (2) (a) (iii) Additional Protocol I.

[68] Art. 48 Additional Protocol I.

rights law and international humanitarian law, which is characterised by both distinction and complementarity.

As mentioned, IHL applies specifically to situations occurring in time of armed conflict, whether international or non-international in nature. International human rights law applies at all times, in peace as well as in times of armed conflict. Both legal regimes share the fundamental objective of protecting human life and dignity, but they operate in different contexts and have distinct legal frameworks and mechanisms. While each body of law has its specific context and detailed provisions, their convergence in the shared objective of protecting human life and dignity underlines the importance of understanding and applying both legal frameworks coherently. This integrated approach is essential for ensuring comprehensive protection for individuals in both peace time and in time of conflict, reflecting the dynamic and interconnected nature of contemporary international legal obligations.

At the outset of the present Section it was stressed that IHL is equally **addressed to states and their military**. It flows from this premise that systemic breaches of IHL engage the international responsibility of the state for which the military in question fight. Here, the State is responsible for lack of prevention and punishment, let alone ordering, material conduct contrary to IHL. At the same time, the military undertaking such conduct engage international criminal responsibility of personal nature. International criminal law issues are addressed in the next Section.

3. International criminal law and justice

In the previous Section we have been dealing with international rules addressed to states. As anticipated, their violations, therefore, engage the **international responsibility of the states concerned**. Any internationally wrongful act of a state is inevitably the result of a conduct carried out by state organs, whether commissive or omissive in nature. Usually, in time of peace, the conduct of state organs is relevant under international law only for purposes of attributing such conduct to the state they belong to, such state conduct qualifying as an internationally lawful or wrongful act. However, breaches of international obligations stemming from international rules on the use of force, genocide or those belonging to the body of IHL, may involve the **international criminal responsibility of the individual** organs in question. Whilst the attribution to the state – for purposes of its international responsibility – of conduct of its officials which may be internationally criminal does not pre-empt the individual criminal responsibility of the officials in question, the attribution of individual criminal responsibility at the latter, in turn, does not pre-empt the international responsibility of the state. That would be precisely the case in relation to a war of aggression or genocide.

It is with such circumstances in mind that the ILC provided in Article 58 of ASR that '[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State'.[69] Indeed, in the commen-

[69] ILC, 'Draft Articles on Responsibility of States or Internationally Wrong-

tary to the above provision the ILC explained the rationale of the above provision as follows:

> 'Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.' [70]

This reasoning was corroborated and plainly applied by the ICJ, especially in the 2007 *Bosnia v Serbia* Judgment. The Court, while observing that

> 'Contracting Parties to the [Genocide] Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III' [71]

and emphasising that, accordingly,

> 'the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III' [72]

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ful Acts, with Commentaries' (2001) II(2) Yearbook of the International Law Commission 25, 142.

[70] *Ibidem*, 142-143.

[71] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) (Judgment) [2007] ICJ Rep 43, 114.

[72] *Ibidem*.

also acknowledged that

> 'the concepts used in paragraphs (b) to (e) of Article III, and particularly that of 'complicity', refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals.' [73]

Against the above backdrop, we shall now address **international criminal law** intended as the body of international rules whose obligations are addressed to individuals, and which, in turn, provide for **individual international criminal responsibility**.

Accordingly, those elements of municipal criminal law which, because of their extra-territorial application, may evoke 'international aspects' to it, will not be addressed. The same applies to inter-state judicial cooperation instrumental in the exercise of the national criminal jurisdiction of the co-operating states, such as through extradition treaties, or treaties on the gathering of evidence concerning facts occurred abroad.

The (core) crimes falling under international criminal law as it will be addressed in the present Section are **war crimes, crimes against humanity**, **genocide** and **aggression**. Based on the premise that contemporary international law does not contemplate **state criminal responsibility**, the assessment of the individual responsibility for the crimes in question is **separate** and **independent** from the assessment of the international responsibility of a state arising out of the same circumstances. That is to say that an accused may be acquitted of a charge of genocide, or aggression (international crime), even where the state he/she was acting for may be found internationally responsible for a breach of the international prohibition of genocide or aggression (international wrongful act in violation of a *jus cogens* obligation).

This does not depend only on the fact that the international adjudicative bodies jurisdictionally competent to prosecute individuals

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[73] *Ibidem*.

for international crimes **are different** from those competent to decide on the responsibility of states cases. A certain military official may make an 'on the ground' decision that amounts to an act of genocide contravening all governmental instructions. Conversely, a certain military official may be acquitted of the charge of genocide, not having taken part in any way in the military operations decided by his/her Government with the aim of destroying an ethnic group, or parts of it.

It is worth recalling that, for instance, while the ICTY did convict for the crime of genocide a number of perpetrators belonging to the Serbian Army, including General Mladić,[74] for the 1995 Srebrenica massacre, the ICJ, in the 2007 judgment in the *Bosnia v Serbia* case, found that Serbia was not internationally responsible for the act of genocide in breach of the *Convention on the Prevention and Punishment of the Crime of Genocide*.[75] However, the ICJ found that Serbia had infringed the international obligations to prevent the acts of genocide in question, as well as to punish its perpetrators.[76]

International criminal law as we know it today originates from the customary rules providing criminal jurisdictional competence for states to arrest and try suspects of crimes that were considered the concern of the international community of nations, so-called ***crimina juris gentium***. Initially, such crimes comprised only **piracy** as a threat to international navigation and trade. By the end of the 19th century and through the 20th century, slavery and slave trade, torture and hijacking were, in different forms, added to the list.

Suspicion that an individual has committed an international

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[74] ICTY, *Prosecutor v Ratko Mladić*, Case No IT-09-92-T, Judgment (22 November 2017).

[75] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43, 215.

[76] *Ibidem*, 237.

crime affords states the power to exercise their criminal jurisdiction – *i.e.*, **universal jurisdiction** – also when lacking the traditional nationality or territoriality connections with the crime in question. The states under whose jurisdiction a suspect of such crimes is to be found are under an obligation either to prosecute or to extradite the suspect in question (***aut dedere***, ***aut judicare***).

Against the background of the horrors of the Second World War, during which most heinous crimes were committed against enemy armies and populations, but also against national civilians and ethnic groups, aggression, war crimes, genocide and crimes against humanity were added to the list of international crimes. The path for the codification of such core crimes within the UN has not been straight and smooth.

The Statutes of the Nuremberg and Tokyo Tribunals set the first stepping stone, but formally they lacked universal legal force, since they consisted of treaties concluded by the winning powers. That is why the UN General Assembly in 1946, in one of its first resolutions,[77] endorsed the principles set out in the Nuremberg and Tokyo Statutes. At the same time, it requested and set in motion the codification of the rules and principles in point. While the multilateral *Convention on the Prevention and Punishment of the Crime of Genocide* was successfully adopted in 1948, the ILC embarked on the preparation of a comprehensive code, which was blocked in the shallows of the Cold War mainly over the disagreements on the definition of aggression. Despite the adoption of UN General Assembly Resolution 3314(XXIX) of 14 December 1974 containing the definition of aggression, the project for the code in question did not make much of a headway.

Following the usual and dramatic pendulum way by which History proceeds, it was only in the midst of the horrors occurring in the Balkans and in Africa in the early 1990s that the codification process was revived. In 1993, the UN Security Council established

[77] UN General Assembly, Res 95(I) of 11 December 1946.

the ICTY [78] and in 1994 the ICTR. [79] The resolutions setting up the two international criminal tribunals also contained the relative Statutes, which set out and defined the crimes falling under their jurisdictional competence. Those Statutes, together with the *Draft-Code of Crimes against the Peace and Security of Mankind*, which had been finalised by the ILC in 1996, [80] paved the way for the negotiations that led to the adoption of the *Rome Statute* and the establishment of the ICC in 1998.

The *Rome Statute* provides a carefully crafted set of definitions of the crimes falling under the jurisdiction of the ICC, the element of crimes, the preconditions to the exercise of jurisdiction and admissibility, the general principles of criminal law which it will apply, the penalties and its rules of procedure. It also establishes the Assembly of States Parties (Part 11) for review of the Rome Statute every seven years, next to the usual procedure for amendments.

It was within such legal-diplomatic context that later agreement on the thorny definition of the crime of aggression was reached (2010), but could not be found for the addition of important new crimes, such as terrorism.

The jurisdiction of the ICC is of a **complementary nature** (Article 17 of the *Rome Statute*). Namely, the ICC may proceed only when the state having otherwise (primary) jurisdictional competence over a suspect under the Statute is 'unwilling or unable' to prosecute.

It is to be noted that the *Rome Statute* has not been ratified by important states, such as the PRC, India, Russia and the US. As said, both the US and Russia had indeed signed the *Rome Statute*, but later, by issuing an *ad hoc* statement, denied their intention to ratify it, respectively in 2002 and 2016. [81]

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[78] UN Security Council, Res 827 of 25 May 1993.

[79] UN Security Council, Res 955 of 8 October 1994.

[80] ILC, 'Draft-Code of Crimes against the Peace and Security of Mankind, with Commentaries' (1996) II(2) Yearbook of the International Law Commission 15.

[81] Chapter 3, Section 3.1.1.

As for Russia in particular, apart from the symbolic relevance of a similar statement,[82] under Article 18(a) of the VCLT, the latter implies that Russia is no longer bound under the principle of good faith not to undertake conduct that might frustrate the object and purpose of the *Rome Statute*, for instance as a permanent Member of the Security Council, or not cooperating with states that are parties to the Statute.

[82] 'Russia Withdraws Signature From International Criminal Court Statute' in *The Guardian* (16 November 2016).