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# Implications of the Diversity of the Rules on the Use of Force for Change in the Law

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## Abstract

*This article analyses the structural conditions within the jus ad bellum that affect whether and how that law changes. In particular, it examines how the diversity of the rules that form the law relating to the use of force affects the development of rules permitting the use of force to protect human rights. After noting some areas where it has been argued that aspects of the law relating to use of force have changed as a result of evolving state practice, it identifies a number of obstacles to accepting the argument that changes to customary international law can affect the law on the use of force in the UN Charter. It is argued that, unlike with self-defence, changes to customary international law would not automatically lead to changes in the Charter prohibition of the use of force. Since any rule permitting humanitarian intervention would create a new exception to the Charter prohibition of the use of force and to a norm of jus cogens, that change cannot occur on the basis of custom alone. Changes to interpretations of the UN Charter and to a jus cogens norm will be required, and such changes must occur in line with the rules regarding how such norms change. Finally, the article considers one concrete possibility for a change to the jus ad bellum that would allow humanitarian intervention without UN Security Council approval: approval of such a use of force by the UN General Assembly under the 'Uniting for Peace' Resolution of 1950. Leaving aside the political and practical challenges of achieving such change, the section explores the conceptual challenges that would need to be overcome.*

The preceding contributions to this symposium have highlighted that, even before one begins to analyse the extent to which support exists in practice for a rule permitting forcible humanitarian intervention, the structure of the law on the use of force

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presents certain obstacles which arguments in favour of such a rule must overcome. Arguments based both on the law of state responsibility and the primary *jus ad bellum* rules are confronted with the difficulties posed by the presence of a *jus cogens* norm prohibiting the use of force; the comprehensive prohibition of force by the UN Charter in addition to customary international law; and the priority claimed by that treaty in Article 103. To the ethical and practical complexity of linking the legality of resort to force with the protection of human rights is thus added the legal complexity of demonstrating that multiple international law norms, drawn from different sources of international law, and with differing requirements for their identification or modification, have changed to permit the use of force for humanitarian purposes.

This article analyses these structural conditions within the *jus ad bellum* that affect whether and how that law changes. In particular, it examines how the diversity of the rules that form the law relating to the use of force affects the development of rules permitting the use of force to protect human rights. After noting in Section 1 some areas where it has been argued that aspects of the law relating to use of force have changed as a result of evolving state practice, Section 2 identifies a number of obstacles to accepting the argument that changes to customary international law can affect the law on the use of force in the UN Charter. Section 3 then argues that despite these structural obstacles, it is nevertheless possible for the *jus ad bellum* to change on the basis of changing state practice. For example, the reference in Article 51 of the Charter to the ‘inherent right’ of self-defence provides a dynamic reference to customary international law such that changes to that law are relevant to an analysis of the Charter provisions on self-defence. However, it is also argued in this section that, unlike with self-defence, changes to customary international law would not automatically lead to changes in the Charter prohibition of the use of force. Section 4 then explores the argument that even if state practice (and *opinio juris*) favouring the use of force for the protection of human rights were to be more extensive than it currently is, since any rule permitting humanitarian intervention would create a new exception to the Charter prohibition of the use of force and to a norm of *jus cogens*, that change cannot occur on the basis of custom alone. Changes to interpretations of the UN Charter and to a *jus cogens* norm will be required, and such changes must occur in line with the rules regarding how such norms change. Finally, Section 5 considers one concrete possibility for a change to the *jus ad bellum* that would allow humanitarian intervention without UN Security Council approval: approval of such a use of force by the UN General Assembly under the ‘Uniting for Peace’ Resolution of 1950. Leaving aside the political and practical challenges of achieving such change, the section explores the conceptual challenges that would need to be overcome.

## 1 The Diversity of the Rules on the Use of Force

It was around the time of the 50th anniversary of the United Nations that literature began to emerge suggesting that we might think of the UN Charter as a constitution

for international society.<sup>1</sup> Whether one agrees with that characterization or not, the Charter shares at least some features with constitutions. It aims to lay down an overarching framework for the community to which it applies and is intended to be an abiding document in terms of duration. This immediately raises questions about whether the document can continue to regulate new and unforeseen challenges. This is particularly true of the Charter rules relating to the use of force.

One can think of at least four areas where it has been argued that rules of the UN Charter ought to be changed (or have been changed, depending on one's point of view) to meet new challenges. First, it has been argued that the rules relating to use of force *by the UN Security Council* acting under Chapter VII have changed in the time between the adoption of the Charter and now. The Council is now seen to possess the competence both to act with regard to internal situations and to prevent or put an end to humanitarian crises.<sup>2</sup> Arguably, the drafters of the Charter did not foresee this role for the Council and had their minds mainly on Council action in inter-state conflicts.<sup>3</sup>

Second, there have been arguments about the legality of the use of force by states in anticipation of an armed attack. This is the debate about anticipatory or pre-emptive self-defence. While Article 51 of the UN Charter provides that nothing shall impair the inherent right of individual or collective self-defence 'if an armed attack occurs',<sup>4</sup> some have argued that the 'victim state' does not need to have suffered the armed attack before the right to self-defence can be exercised.<sup>5</sup>

Third, there is the debate about whether the right of self-defence can be exercised in response to armed attacks by non-state actors.<sup>6</sup> While there is nothing in the text of Article 51 of the UN Charter that specifies that the right of self-defence only exists in relation to an armed attack that comes from a state,<sup>7</sup> in 1986 the International Court of Justice (ICJ) in the *Military and Paramilitary Activities in and against Nicaragua* case held that the right of self-defence exists in response to armed attacks that are attributable to another state.<sup>8</sup> One interpretation of the ICJ's judgment is that self-defence

<sup>1</sup> For example, Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 529; Schwindt, 'Interpreting the United Nations Charter: From Treaty to World Constitution' 6(2) *UC Davis Journal of International Law and Policy* (2000) 193.

<sup>2</sup> See, for example, E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), at 157; S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), at 129.

<sup>3</sup> Chesterman, *supra* note 2, at 130.

<sup>4</sup> Charter of the United Nations and Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 51.

<sup>5</sup> For example, United States of America, National Security Strategy (September 2002), Introduction, available at <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nssintro.html> (last visited 24 February 2021); United Kingdom, Attorney General's speech at the International Institute for Strategic Studies (11 January 2017), available at <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies> (last visited 24 February 2021).

<sup>6</sup> See, for example, Van Steenberghe, 'Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?', 23(1) *Leiden Journal of International Law (LJIL)* (2010) 183; De Wet, 'The Invocation of the Right to Self-defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution', 32(1) *LJIL* (2019) 91.

<sup>7</sup> Separate Opinion of Judge Higgins, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 207, at para. 33.

<sup>8</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, at para. 195.

can therefore *only* be exercised with respect to an armed attack originating from a non-state actor where the non-state actor was sent by a state, or a state had substantial involvement in the acts of that non-state actor.<sup>9</sup> This view seems to have reflected state practice at the time, especially as was set out in the UN General Assembly's 1974 Resolution on the Definition of Aggression.<sup>10</sup> That resolution was adopted by consensus. However, since 11 September 2001 a number of states have taken the view that self-defence can be exercised in response to attacks by non-state actors even where the attack by that non-state actor is not attributable to a state. It was on this basis that the US and other states took action in Afghanistan against Al Qaeda in 2001,<sup>11</sup> and it was also on this basis that a coalition of states has taken action in Syria against ISIS.<sup>12</sup> In 2018, Turkey claimed to be acting in the exercise of this right when it invaded Kurdish areas of Syria.<sup>13</sup>

Fourth, there are the debates around the permissibility of the use of force by states, acting individually or collectively, but without UN Security Council authorization, for the purpose of stopping or preventing a humanitarian catastrophe. These are the debates about whether there is a rule permitting 'humanitarian intervention'. Although the UN Charter does not include such a rule, a few states now maintain that such a rule exists<sup>14</sup> and scholars continue to debate whether such a rule should exist.<sup>15</sup>

<sup>9</sup> See also the Court's later pronouncement in the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that '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', Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at para. 139.

<sup>10</sup> Definition of Aggression, GA Res. 3314 (XXIX) (14 December 1974) UN Doc. A/RES/3314(XXIX), Annex, Article 3(g).

<sup>11</sup> See Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946; Letter dated 7 October 2001 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, UN Doc S/2001/947.

<sup>12</sup> UK, Memorandum to the Foreign Affairs Select Committee, Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-2016: The Extension of Offensive British Military Operations to Syria (November 2015), available at <https://www.parliament.uk/globalassets/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf> (last visited 5 March 2021), 15; Interview with Minister of Defence, Jean-Yves Le Drian, 'La France attaquera des « centres de formation de combattants étrangers » en Syrie' *Le Monde* (18 September 2015) [https://www.lemonde.fr/proche-orient/article/2015/09/18/jean-yves-le-drian-il-existe-des-centres-de-formation-des-combattants-etrangers-en-syrie\\_4762295\\_3218.html](https://www.lemonde.fr/proche-orient/article/2015/09/18/jean-yves-le-drian-il-existe-des-centres-de-formation-des-combattants-etrangers-en-syrie_4762295_3218.html) (last visited 5 March 2021).

<sup>13</sup> Identical letters dated 20 January 2018 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, UN Doc S/2018/53.

<sup>14</sup> 'Syria Action – UK Government Legal Position' (14 April 2018) available at <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> (last visited 5 March 2021); ICJ, *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Public sitting held on Monday 10 May 1999, at 3.00 p.m., at the Peace Palace, VR 1999/15, Intervention of M. Ergec, Agent for Belgium, 16.

<sup>15</sup> See, for example, O'Meara, 'Should International Law Recognise a Right of Humanitarian Intervention?', 66(2) *International and Comparative Law Quarterly (ICLQ)* (2017) 441; H.H. Koh, *The Trump Administration and International Law* (2018), 131–132.

In each of these four areas – Security Council authorization; anticipatory or pre-emptive self-defence; self-defence against non-state actors; and ‘humanitarian intervention’ – it may be argued that the rules as envisaged in 1945, or as articulated at some later point since then, have required change to meet new challenges. The arguments as to whether these rules have changed almost always go straight to analysing whether state practice today or over time is such that we should consider that a new rule has emerged.<sup>16</sup> Or those arguments are more evaluative and consider whether the rule *should* change to reflect a perceived need or to cure a perceived deficiency. Less attention is usually paid to the question of *how* these rules can change. This question is important, indeed critical, because of the structure of the law on the use of force, which comprises multiple rules from different sources of international law that regulate the same subject matter.

The first reason why the structure of the law in this area has important implications for *how* the rules might change is that the rules relating to the use of force are embedded in a treaty instrument with a difficult amendment procedure. The UN Charter provides two avenues for its amendment, both of which involve a two-step process.<sup>17</sup> Article 108 provides that amendments must be adopted by a vote of two thirds of the members of the General Assembly – this has been interpreted to mean two thirds of all members of the General Assembly, not just two thirds of those members present and voting<sup>18</sup> – and then ratified by two thirds of UN Members, including all the permanent members of the Security Council. Article 109 provides for a slightly different procedure whereby the amendment is adopted by two thirds of a General Conference of the Members established for the purpose of reviewing the Charter, but fails to avoid the ‘sting in the tail’ of the P5 veto,<sup>19</sup> whose ratification is still required for the amendment to take effect.

Second, in the *Nicaragua* case, the International Court of Justice confirmed that the prohibition of the use of force in Article 2(4) of the Charter and the right of self-defence under Article 51 are also to be found in customary international law.<sup>20</sup> This might lead one to think that because these are rules of customary international law, they will change in the usual way that customary international law changes over time and in accordance with evolving state practice. Indeed, in the debates about the four issues above, it is typical to see extensive reference to state practice over time with the suggestion (often implicit) being that as practice changes so will the rules. However, when one stands back to think about the structure and position of the rules in question – the diverse nature of those rules – it becomes clear that the issue of how they may or may not have changed is not that simple. As the Court confirmed in *Nicaragua*, customary law continues to exist and apply separately alongside even identical treaty

<sup>16</sup> For an assessment of the literature and of the practice, see Heller, ‘The Illegality of Genuine Unilateral Humanitarian Intervention’ *European Journal of International Law (Int. J. Int’l L.)* (2021) 613.

<sup>17</sup> For a detailed account of the Charter amendment procedures, see Witschel, ‘Article 108’, in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* (3rd ed., 2012).

<sup>18</sup> Witschel, *ibid.*, at para. 14.

<sup>19</sup> A. Aust, *Modern Treaty Law and Practice* (2013), at 235.

<sup>20</sup> *Nicaragua*, *supra* note 8, at paras 188, 193–194.

provisions.<sup>21</sup> Conversely, even if the rules relating to the use of force by states are contained in customary international law, they remain nonetheless treaty rules.

A third structural feature complicating analysis of how the rules relating to the use of force might change is that these rules are not just rules in any treaty. These are rules in the UN Charter, which in Article 103 claims that ‘obligations under the present Charter shall prevail’ over Members’ obligations under any other international agreement.

As a result, there are structural problems when one analyses alleged changes to these rules by reference to evolving state practice alone. State practice may be used in two different ways in order to support an argument that international legal rules have changed. Practice may be used to underpin an argument that customary international law has changed. Here of course we need a general state practice plus *opinio juris*.<sup>22</sup> Alternatively, under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) and the customary rule it reflects,<sup>23</sup> subsequent practice in application of the treaty may be used in the interpretation of treaty rules where it establishes the agreement of all the parties as to the interpretation of the treaty.<sup>24</sup>

Three out of the four areas highlighted above, where claims of change have been made, deal with the law relating to the use of force by states, rather than by the Security Council. In those three areas it is impossible to say that practice currently establishes the required agreement of the parties to the UN Charter as to the interpretation of the treaty, in the sense of Article 31(3)(b) VCLT. One need only think about the debates about anticipatory self-defence or self-defence in response to attacks by non-state groups, where it is clear that states have differing views of the law.<sup>25</sup> As a result, usually the claim is that practice has established a new customary rule or changed customary law. Yet this leads to the question about the relationship between customary changes and the UN Charter.

<sup>21</sup> *Ibid.*, at para. 179; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, 26 November 1984, ICJ Reports (1984) 392, at para. 73.

<sup>22</sup> See International Law Commission (ILC), Draft Conclusions on Identification of Customary International Law, with Commentaries, A/73/10, 2018, Conclusions 2, 8, 9.

<sup>23</sup> The VCLT does not apply to the UN Charter, which was concluded before the VCLT’s entry into force, except to the extent that its provisions are also found in customary international law, see Vienna Convention on the Law of Treaties (1969) 1166 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980), Article 4. Article 31(3) VCLT, along with the rest of Article 31, reflects customary international law; *Legality of Use of Force, (Serbia and Montenegro v Belgium)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Reports (2004) 279, at para. 100.

<sup>24</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, 31 March 2014, ICJ Reports (2014) 226, at para. 83.

<sup>25</sup> See, for example, Statement by China, Open Arria Formula Meeting ‘Upholding the Collective Security System of the UN Charter: The Use of Force in International Law, Non-state Actors and Legitimate Self-defence’ (24 February 2021), UN Doc S/2021/247, Annex II, 23. See more generally, Haque, ‘Self-Defence Against Non-State Actors: All Over the Map: Insights from UN Security Council Arria-Formula Meeting’, *Just Security*, 24 March 2021; M. O’Connell, C. Tams and D. Tladi, *Self-Defence Against Non-State Actors* (2019); Brunnée and Toope, ‘Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?’, 67 *ICLQ* (2018) 263; Bethlehem, ‘Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors’, 106 *American Journal of International Law* (2012) 770.

## 2 Obstacles to Customary Law Changes to the Law on the Use of Force

There are three obstacles to accepting that customary law changes can affect the law on the use of force in the Charter. First, though some take the view that new customary international law can modify a conflicting treaty rule,<sup>26</sup> the better view is that customary rules cannot themselves change treaty law. While such arguments rightly note the lack of hierarchy between the sources of international law, they overlook the independence of those sources from each other. Each source of international law has its own particular legislative process, and to effect a change in a norm of a particular source requires fulfilling its particular requirements. Thus, to identify a customary norm, the *opinio juris* must be the acceptance that a certain conduct is required *by customary law*, not by treaty law, or some other unspecified norm of international law.<sup>27</sup> Equally, to interpret a treaty norm through subsequent practice, the agreement of parties must be *as to the interpretation of that treaty*, not some other international law norm of a different source. It is not sufficient that a state accepts that international law generally should contain the particular rule. As a result, fulfilling the requirements for identification or modification of a customary or treaty norm does not *ipso facto* lead to the modification of the other, even where both norms relate to the same subject matter, as the requirements of the two sources do not completely overlap.

Moreover, precisely because of the lack of hierarchy between the sources, a norm from one source of international law cannot affect the validity of a norm of another source, even where they conflict. The only customary norms that can modify (and even invalidate) treaty norms are *jus cogens* norms, which are rightly recognized as exceptional for that reason.

Therefore, even if the customary international law rules on the use of force were to change – for example to allow force for humanitarian purposes – this would not necessarily change the treaty rules in the Charter to match. It would need to be shown that the requirements for change to the treaty norm, for example through interpretation by subsequent practice, had also been met. It is possible that the same material practice of states could meet the requirements for change of both sources, but this cannot be automatically assumed. The ordinary presumption is therefore that, through the operation of the *lex specialis* principle, treaty rules will prevail over custom – unless there is an indication that the parties intend to abandon the treaty provision. This means that the treaty or the treaty provision has fallen into desuetude.<sup>28</sup>

The second obstacle to accepting that customary law changes can affect the law on the use of force in the Charter derives from Article 103 of the UN Charter, which provides that obligations under the Charter prevail over obligations under other

<sup>26</sup> For example, I. Buga, *Modification of Treaties by Subsequent Practice* (2018), at 213.

<sup>27</sup> Bellinger and Haynes, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law', 89 (866) *International Review of the Red Cross* (2007) 443, at 446–447.

<sup>28</sup> See Akehurst, 'The Hierarchy of the Sources of International Law', 47(1) *British Yearbook of International Law* (1976) 273, at 276.

agreements. This is not a rule that relates directly to the relationship between the Charter and customary law. Instead, it indicates that parties may not enter into a treaty which would derogate from or amend their Charter obligations except by way of amendment to the Charter itself. Nevertheless, if the parties cannot change their Charter obligations expressly by treaty, it would be incongruent with, and totally defeating of, Article 103 if they could amend the Charter implicitly, by custom.

The third obstacle is that the prohibition of the use of force – or at least aspects thereof – are considered to be rules of *jus cogens*: peremptory norms of international law from which no derogation is permitted.<sup>29</sup> One consequence of the fact that some aspects of the prohibition are *jus cogens* is that it can only be modified by another norm of the same character.<sup>30</sup>

The bar therefore seems to be set very high for change to the rules relating to the use of force. There are good reasons for this. These rules reflect some of the fundamental features of the post-World War II legal system. Indeed, the prohibition of the use of force is the ‘cornerstone’ of the UN Charter framework.<sup>31</sup>

### 3 Change to the Rules on the Use of Force through State Practice

Despite the structural features of the law relating to the use of force which suggest that, conceptually, change to this law is difficult, change is and has been possible in order to meet new challenges. Furthermore, it is possible that such change occurs through evolution in state practice.

There are occasions when subsequent practice has legitimately been used to interpret the Charter under the rule in Article 31(3)(b) VCLT as opposed to forming new custom. This is particularly the case with regard to the UN collective security scheme under Chapter VII. There, we have seen practice of the Council that has been accepted, implicitly or even explicitly, by the membership as a whole and which interprets the Charter in new ways. The interpretation of the concept of ‘threat to the peace’ to include internal matters or humanitarian challenges is a good example here.<sup>32</sup> This re-interpretation has opened the door to the Council acting on numerous occasions for the purpose of protection of civilians or in internal

<sup>29</sup> See *Nicaragua*, *supra* note 8, at para. 190; International Law Commission, Text of the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the Commission on first reading with commentaries, ‘Report of the International Law Commission on the work of its seventy-first session’, A/74/10 (2019) 141, Annex. See generally, Johnston, ‘Identifying the *Jus Cogens* Norm in the *Jus Ad Bellum*’, 70 *ICLQ* (2021) 29.

<sup>30</sup> VCLT, Article 53.

<sup>31</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 148.

<sup>32</sup> For example, in Resolution 794 the Council determined that ‘the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance’, constituted a threat to international peace and security, SC Res. 794, 3 December 1992, UN Doc S/RES/794, preamble recital 3.



situations.<sup>33</sup> That practice was explicitly endorsed by the membership of the UN in the provisions of the World Summit Outcome Document of 2005 dealing with responsibility to protect.<sup>34</sup> That General Assembly resolution, adopted by heads of states and governments, by consensus, expressed support for actions by the Security Council to help to protect populations from international crimes. Whatever the correct interpretation of Article 39 and of Chapter VII of the Charter was in 1945, there is now subsequent practice establishing the agreement of the parties to the Charter, which must be taken into account under the rule codified in the Vienna Convention on the Law of Treaties in interpreting the Charter.<sup>35</sup> Similarly, Article 27(3) of the Charter has been interpreted through subsequent practice of UN members so that, contrary to what the ordinary meaning of the terms of that provision would suggest, the abstention of a permanent member does not constitute a bar to the adoption of resolutions by the Security Council.<sup>36</sup> The practice of the Council and its Members, combined with the acquiescence of other UN Members in that practice, established the agreement of all the parties to the treaty to that new interpretation of the provision.

Despite the points made above, changes to customary law are not irrelevant to the law on the use of force. In particular, changes in customary law are relevant to change to the right of self-defence under Article 51 of the Charter. The text of Article 51 refers to the 'inherent right' of self-defence. In the *Nicaragua* case, the ICJ accepted that this reference to an inherent right is a reference to a customary international law right.<sup>37</sup> This is not a static reference to custom; that is, it is not simply a reference to custom as it was in 1945, but rather a dynamic reference to custom. In other words, it is a reference to the customary law of self-defence as it changes over time.<sup>38</sup> What Article 51 is saying in short is that despite the prohibition of the use of force, states may act in accordance with the customary right of self-defence, while adding some procedural obligations that must be fulfilled.<sup>39</sup> The customary law of self-defence is preserved by the Charter and that is why we have regard to the requirements of

<sup>33</sup> For example, SC Res. 217, 20 November 1965, at para. 1 (Southern Rhodesia); SC Res. 418, 4 November 1977, at para. 1 (South Africa); SC Res. 688, 5 April 1991, at para. 1 (Iraq); SC Res. 713, 25 September 1991, preamble recital 4 (Yugoslavia); SC Res. 918, 17 May 1994, preamble recital 18 (Rwanda).

<sup>34</sup> '2005 World Summit Outcome', GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005, at paras 138–139.

<sup>35</sup> It is not just the basic rule in Article 31(1) that is the 'general rule of interpretation', but Article 31 as a whole, and subsections 31(2) and (3) 'are not discretionary add-ons, but prescriptive and mandatory aspects of the "general rule"', French, 'Treaty Interpretation and Extraneous Legal Rules', 55 *ICLQ* (2005) 281, at 301.

<sup>36</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, at paras 21–22.

<sup>37</sup> *Nicaragua*, *supra* note 8, at para. 176.

<sup>38</sup> See T. Ruys, 'Armed Attack' and Article 51 of the UN Charter (2010), at 22. This 'black hole theory' of Article 51 has been criticized by Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence', in M. Weller (ed.) *The Oxford Handbook of the Use of Force in International Law* (2015), 642.

<sup>39</sup> Notably the obligation in Article 51 that '[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council'.

necessity and proportionality, though these are not to be found in the Charter text. In this way, as the customary law of self-defence changes, the Charter accommodates those changes since the Charter rule on self-defence is given content by the customary law on self-defence. It is this dynamic reference to custom that allows the law of self-defence to change and that makes it legitimate to debate the implications of the practice around self-defence against non-state actors.

However, caution must be exercised in taking this methodology of assessing custom outside the law of self-defence to other areas of the law relating to the use of force – particularly when one is thinking of somehow changing the prohibition of the use of force or the UN collective security scheme. There, one would need a different methodology or concept of change: not identification of new customary international law, but practice that establishes the agreement of the parties as to the interpretation of the Charter. Though the ICJ pointed to the identity of custom and the Charter rules on force, both in relation to the prohibition in Article 2(4) and the self-defence exception in Article 51,<sup>40</sup> it is important to realize that the relationship between custom and treaty is not the same in both cases. As just shown, in the case of Article 51, the identity of custom and treaty arises because the treaty rule preserves customary rules of self-defence. In the case of the prohibition of the use of force, the identity of the rules arises not because the treaty itself says anything about custom but because custom has come to mirror the treaty.<sup>41</sup> There is no intrinsic link between the two norms. A change in the customary rule would not in and of itself change the treaty prohibition. That prohibition would remain unchanged unless it were to be amended or interpreted differently using the rules of treaty interpretation.

#### 4 Possibilities for the Emergence of a Rule Permitting Unilateral Force for Humanitarian Purposes

The main significance of the point that any change to the customary prohibition of the use of force does not change the treaty prohibition is to be seen with regard to the arguments around humanitarian intervention. A new customary rule permitting humanitarian intervention would have to create a new exception to the prohibition of the use of force. Recall that this prohibition has three dimensions:

- It exists as a customary rule;
- It exists as a treaty rule in Article 2(4) of the UN Charter; and
- A rule prohibiting the use of force has the status of *jus cogens*.

There is much debate as to the implications of practice regarding the use of force for humanitarian ends for the doctrine of humanitarian intervention.<sup>42</sup> Some, notably the UK government, argue that the use of force for humanitarian purposes is now

<sup>40</sup> *Nicaragua*, *supra* note 8, at para. 181.

<sup>41</sup> *Ibid.*

<sup>42</sup> See, for example, Heller, *supra* note 16; De Beer and Tladi, 'The Use of Force against Syria in Response to Alleged Use of Chemical Weapons by Syria: A Return to Humanitarian Intervention?', 79 *ZaōRV* (2019) 205; Greenwood, 'International Law and the Nato Intervention In Kosovo', 49(4) *ICLQ* (2000) 926;

permitted under international law.<sup>43</sup> Others have argued more recently that the silence by many states or their failure to condemn the airstrikes conducted by the United States of America, United Kingdom and France in 2018, and the US alone in 2017, in response to the use of chemical weapons in Syria means that even if the law has not changed, it is in the process of changing, or at least that it is not as clear as it once was.<sup>44</sup> In his contribution to this symposium, Heller has argued, persuasively, that there is not enough state practice and *opinio juris* to establish an ordinary customary exception to the prohibition of the use of force contained in Article 2(4).<sup>45</sup> However, much of the debate seems to assume that the creation of an exception to the customary rule can change the treaty prohibition. Even if there was much more practice than we see now, this would not affect the treaty prohibition to be found in Article 2(4). While some have argued that Article 2(4) should be interpreted as not prohibiting the use of force for humanitarian purposes,<sup>46</sup> this is not the interpretation of that provision that would be arrived at using the ordinary rules of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, nor is it how this provision has generally been interpreted.<sup>47</sup> Thus, even if a customary rule permitting humanitarian intervention could be shown to exist – which based on the current state of practice is very doubtful<sup>48</sup> – virtually all states would still be bound by their treaty obligation as UN Members not to use force in situations other than self-defence or authorization under Chapter VII.

The argument that customary law could create an exception to this prohibition in the Charter would have dramatic implications for the primacy of the UN Charter. If

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Franchini and Tzanakopoulos, 'The Kosovo Crisis – 1999', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018); Gazzini, 'Intervention in Iraq's Kurdish Region and the Creation of the No-Fly Zones in Northern and Southern Iraq – 1991–2003', in Corten *et al.*, *ibid*; Stromseth 'Rethinking Humanitarian Intervention: The Case for Incremental Change', in J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dimensions* (2003).

<sup>43</sup> 2018 UK Government Legal Position, *supra* note 14, at para. 3. The 2018 Legal Position states that 'The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention'. No detail is provided as to what form this claimed legal basis may take; for example, whether it would constitute a new customary rule providing a right to use force, or a claim that force in such circumstances is no longer prohibited by customary law and/or Article 2(4). Either way, the points made here about the structure of the *jus ad bellum* and its impact on possible change to the law apply. In 1992, when giving oral evidence to the House of Commons Foreign Affairs Committee, the FCO Legal Counsellor stated with regard to the UK intervention in Northern Iraq (the 'no-fly zones') that 'the states taking action in northern Iraq did so in exercise of *the customary international law principle of humanitarian intervention*' (emphasis added), suggesting it may be an alleged new customary rule permitting the use of force that is being invoked, Marston (ed.), 'UK Materials on International Law 1992', 63(1) *British Yearbook of International Law* (1992) 615, at 827–828, Statement of Mr. Aust.

<sup>44</sup> For example, Borda, 'The Precedent Set by the US Reprisal Against the Use of Chemical Weapons in Syria', *EJIL:Talk!* (1 May 2017).

<sup>45</sup> Heller, *supra* note 16.

<sup>46</sup> For example, Brenfors and Petersen, 'The Legality of Unilateral Humanitarian Intervention – A Defence', 69(4) *Nordic Journal of International Law* (2000) 449, at 466–467.

<sup>47</sup> See I. Brownlie, *Principles of Public International Law* (7th ed., 2008), at 732.

<sup>48</sup> See Heller, *supra* note 16, at 628.

it were possible to create an exception to Article 2(4) through the identification of new customary law alone, one might ask whether it is also possible to develop a customary international law exception to other obligations imposed on UN members by the Charter. In the context of the imposition of sanctions by the Security Council, there have been states that have refused to comply with sanctions for one reason or another.<sup>49</sup> Could an exception develop, under custom, to the obligation for states to comply with sanctions imposed under Charter VII of the Charter, assuming there were sufficient practice along particular lines? Presumably some of the states that seem to argue that custom can change the prohibition of the use of force in the Charter would take the view that such a customary rule could not do this for one or more of the reasons given in the preceding section: the inability of customary rules to modify treaty provisions, and the effect of Article 103.

All this does not mean that it is impossible for the law to be developed to permit states to use force for humanitarian purposes without Security Council authorization. However, it does mean that for a new customary international law rule permitting unilateral humanitarian intervention to have a practical effect on the situations in which UN member states could lawfully resort to force, it would also need to be shown that the treaty law obligation in Article 2(4) had undergone a corresponding change. This could be through the formal Charter amendment process or, more likely, through the reinterpretation of that provision by subsequent practice establishing the agreement of all the parties. However, since it is clear that many, if not most, states parties to the UN Charter do not take the view that Article 2(4) excludes unilateral uses of force for humanitarian purposes from its scope,<sup>50</sup> it is evident that this test has not yet been met.

We also need to consider the implications of the existence of a *jus cogens* norm prohibiting the use of force. Of course, and as discussed further in Section 5, the precise contours of the *jus ad bellum* norm which has *jus cogens* status remain a subject of debate.<sup>51</sup> One of us has argued that the *jus cogens* norm is the customary norm which prohibits non-consensual force that does not fall within either of the two apparent exceptions: authorization under the UN Charter and self-defence.<sup>52</sup> Others have taken the view that only the prohibition on aggression is *jus cogens*.<sup>53</sup> However, the meaning of

<sup>49</sup> See A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (2011).

<sup>50</sup> See, for example, the statement of 16 April 2018 by the spokesperson of the Foreign Ministry of China: ‘the use of force against Syria on the ground of “punishing or retaliating against the use of chemical weapons” does not conform to international law, neither does the use of force on the ground of unilateral “humanitarian interference” bypassing the Security Council’, available at <https://www.justsecurity.org/wp-content/uploads/2018/04/China-Syria-strikes-2018.pdf> (last visited 3 March 2021), as well as the practice of eight other states detailed by Gurmendi Dunkelberg *et al.*, ‘Mapping States’ Reactions to the Syria Strikes of April 2018’, *Just Security* (7 May 2018); also the 2000 Declaration by the G77: ‘We reject the so-called “right” of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law’, Declaration of the South Summit, April 2000, at para. 54, available at [https://www.g77.org/summit/Declaration\\_G77Summit.htm](https://www.g77.org/summit/Declaration_G77Summit.htm) (last visited 3 March 2021).

<sup>51</sup> For an argument as to how to determine the content of the *jus cogens* norm in this area, see Johnston, *supra* note 29.

<sup>52</sup> *Ibid.*

<sup>53</sup> International Law Commission’s Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), A/74/10 (2019) 141, Draft Conclusion 23, Annex, (a).

'aggression' and the scope of such a prohibition are uncertain.<sup>54</sup> It may simply be a way of referring to the prohibition of such force as is not permitted by the *jus ad bellum*, or it may be regarded as the prohibition of force of particular scale and effect, and, in that latter sense, narrower than the prohibition of the use of force contained in Article 2(4) of the Charter. On the latter view, the prohibition of aggression may be regarded as the prohibition of such force as would amount to an armed attack that would justify the use of force in self-defence.<sup>55</sup> However, whatever view one takes, unless one considers that the subjective purpose or motive of the state using force is relevant to the characterization of force as aggression, humanitarian intervention could not *ipso facto* be excluded from the prohibition of aggression. After all, as shown by Heller in this symposium, on the traditional view, humanitarian intervention is not permitted by international law.<sup>56</sup> Moreover, the fact that force is for humanitarian purposes would not mean that it does not reach whatever gravity, scale and effect is required for aggression (and indeed to achieve its purposes it might well have to reach such gravity threshold).

Thus, any new rule purporting to provide a legal basis for the use of force for humanitarian intervention would derogate from the *jus cogens* prohibition in the *jus ad bellum* in its present form, in the sense that it would purport to permit conduct currently prohibited by that norm. It is therefore difficult to see how a rule of customary international law permitting humanitarian intervention could come into existence in the first place: no rule of custom can come into existence if it comes into conflict with a peremptory norm of international law.<sup>57</sup> For there to be a customary rule permitting humanitarian intervention, it would have to be shown that the *jus cogens* prohibition of the use of force had been modified to accommodate the existence of that rule. As stated in Article 53 VCLT, norms of *jus cogens* can only be modified by other norms of *jus cogens*. Therefore, not only would it have to be shown that requirements of state practice and *opinio juris* for the identification of a new customary rule permitting humanitarian intervention had been met, and for the corresponding change to the Charter, but it would also need to be demonstrated – either before or simultaneously with the emergence of the new rule of custom – that the international community of states as a whole had accepted and recognized that the *jus cogens* norm no longer prohibited such uses of force.

## 5 Possibilities for the Lawful Use of Force for Humanitarian Purposes Authorized by the General Assembly

The preceding section considered a change to the *jus ad bellum* that would permit unilateral uses of force for humanitarian purposes, in the sense of force not authorized under the UN collective security structures. However, a further possibility of breaking

<sup>54</sup> See Akande and Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in C. Kreß and S Barriga (eds), *The Crime of Aggression: A Commentary* (2017) 214, at 216–218; Broms, 'The Definition of Aggression', 154 *Recueil des cours de l'Académie de droit international de la Haye* (1977), at 236–361.

<sup>55</sup> See Akande and Tzanakopoulos, *supra* note 54, at section 6.3.3 and Broms, *supra* note 54, at 346.

<sup>56</sup> Heller, *supra* note 16, at 628.

<sup>57</sup> ILC Conclusions on *Jus Cogens*, *supra* note 29, Conclusion 14.

the stranglehold of the UN Security Council on the use of force for humanitarian purposes is for that force to be authorized by the UN General Assembly under the ‘Uniting for Peace’ Resolution of 1950.<sup>58</sup> That resolution provides that:

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>59</sup>

In that resolution the UN General Assembly arrogated to itself the power to recommend collective measures, including the use of armed force, to maintain international peace and security. Whether the General Assembly does indeed have this power is ultimately to be traced back to the UN Charter and its allocation of powers among the different UN organs, rather than to this resolution. Article 11(2) of the UN Charter provides that:

The General Assembly may discuss any questions relating to the maintenance of international peace and security ... and ... may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both.

That article also says that its provisions are subject to Article 12 which provides that the General Assembly may not make any recommendations while the Security Council is exercising its functions in relation to a dispute or situation. However, more recent UN practice, the legality and effect of which have been confirmed by decisions of the ICJ,<sup>60</sup> suggests that matters may be dealt with in parallel by the Security Council and the General Assembly, and that the Assembly may make recommendations on questions concerning international peace and security.

Thus, the question is whether force used pursuant to a General Assembly resolution recommending force would be deemed not to be a breach of the prohibition of force under Article 2(4) in the same way that a Council resolution authorizing force would have that effect. This is an interpretation of the Charter that it is open for UN member states to take. If there were to be agreement among all UN Members on this principle, that agreement would be an important point to be taken into account in the interpretation of the treaty.

Of course, as the preceding discussion has shown, the complexity of the law regulating the use of force means that a reinterpretation of the Charter is not the end of the matter. As international law currently stands, it is not only Article 2(4) that prohibits uses of force recommended by the General Assembly, but also customary international law. Since the customary and treaty prohibitions exist independently, even if

<sup>58</sup> GA Res. 377(V), UN Doc A/RES/377(V), 3 November 1950.

<sup>59</sup> *Ibid.*, at para. 1.

<sup>60</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 9, at para. 28; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, at para. 41.

the Charter were to be interpreted so that force authorized through 'Uniting for Peace' was no longer considered a breach of Article 2(4), this interpretation of the Charter would not automatically change customary international law to match. Force lawfully authorized by the General Assembly under the Charter would, in principle, still be in violation of UN Members' obligation not to resort to force under the customary prohibition. However, the same subsequent practice of UN Members that established their agreement to the new interpretation of the Charter could also effect the equivalent change in customary international law, allowing UN Members to use force pursuant to a General Assembly recommendation without violating the customary prohibition on force. Since statements by states can constitute state practice,<sup>61</sup> if the wording of statements or a General Assembly resolution that established UN Members' agreement to that new interpretation of the Charter were also to evidence their acceptance (*opinio juris*) that uses of force recommended by the General Assembly were permitted under customary law,<sup>62</sup> such practice could, provided it was sufficiently widespread and representative, simultaneously change the customary prohibition on force to permit such uses of force.

One could also argue that, even if the customary prohibition of force did not change, the treaty rule as newly interpreted would simply prevail over the customary prohibition to the extent that they conflict, acting as *lex specialis* for parties to the Charter. However, this logic does not apply to the extent that the customary prohibition of the use of force is also a *jus cogens* norm. Rather, a provision of the Charter which was interpreted so as to provide a legal basis for conduct currently prohibited by the *jus cogens* prohibition on force would constitute a derogation from that *jus cogens* norm. By analogy with a new treaty amendment conflicting with *jus cogens*, which would presumably be void under Article 53 VCLT, the new interpretation of Article 2(4) that purported to allow force recommended by the General Assembly would be invalid.

Assuming the *jus cogens* norm in the *jus ad bellum* prohibits any force that does not fall within either of the two existing exceptions, changing the *jus ad bellum* so that uses of force recommended by the General Assembly were now lawful would also appear to require modification of a *jus cogens* norm. The possibility for the General Assembly to recommend the use of force for humanitarian purposes, and the corresponding exclusion of such uses of force from the scope of the *jus cogens* prohibition, would therefore have to be accepted and recognized by the international community of states as a whole. This identification of the new scope of the *jus cogens* norm would have to either precede or occur simultaneously with the changes to the UN Charter and the customary prohibition. Otherwise, the change in custom would not be effective since no rule of custom can come into existence if it comes into conflict with a *jus cogens* norm

<sup>61</sup> ILC Conclusions on identification of customary international law, *supra* note 22, Conclusion 6 and Commentary para. 2.

<sup>62</sup> As in *Nicaragua*, when 'with all due caution' the Court deduced *opinio juris* in support of the customary prohibition on force from the wording of the Friendly Relations Declaration, *supra* note 8, at para. 188; see also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 95, at paras 152–153.

and, as noted above, any change to the Charter to conflict with that *jus cogens* norm would also be ineffective. Although the test for identification of a *jus cogens* norm is a demanding threshold to meet, this does not seem impossible. Interpretation of the Charter through subsequent practice or agreement already requires the agreement of all UN Members.<sup>63</sup> This would certainly encompass a ‘very large majority’ of states, which is how the term ‘international community of states as a whole’ has generally been understood.<sup>64</sup> For example, the same resolution of the General Assembly that could constitute an agreement among all parties as to the new interpretation of the Charter could – again, depending on its wording and the participation in its adoption – provide a means for the ‘international community as a whole’ to evidence its acceptance and recognition of the new, modified scope of a *jus cogens* norm.

Yet, it may be that no change to either customary international law or the *jus cogens* prohibition on force is necessary for the General Assembly’s powers to change in this way. In the same way that the reference to the ‘inherent right’ of self-defence in Article 51 is dynamic,<sup>65</sup> and the content of that exception to Article 2(4) changes as the customary law on self-defence changes without requiring change to the treaty provision, the collective security exception to the customary and *jus cogens* prohibitions may also be dynamic. The exception to the prohibition could be ‘force lawfully authorized under the Charter’, and that would include whatever is so interpreted by UN Members to be at a particular time. The content of the exception to the customary and *jus cogens* prohibitions would track the changes in the treaty law, without the test for identification of new customary international law or *jus cogens* needing to be fulfilled each time.

Whether such a mechanism could accommodate a change in the *jus ad bellum* by which force recommended by the General Assembly becomes lawful depends on how broad this dynamic exception is established to be. It is true that as the rules relating to authorization of force by the Security Council have changed since adoption of the Charter – for example, through interpretation of Article 27(3) of the Charter by subsequent practice to allow force authorized by decisions adopted with the abstention of a permanent member, as discussed above – the kinds of force excepted from the customary and *jus cogens* prohibitions have expanded in parallel. However, this may be because the exception to the customary and *jus cogens* prohibitions on force covers any ‘force lawfully authorized under the Charter’ or it may be that the exception only covers any ‘force lawfully authorized by the Security Council’. Both constructions would be broad enough to accommodate the reinterpretation of Article 27(3) to change the procedure by which the Council may validly adopt a resolution authorizing force. However, if the exception to the customary and *jus cogens* prohibitions covers only those uses of force authorized by the Security Council itself, interpreting the

<sup>63</sup> See *Whaling in the Antarctic*, *supra* note 24, at para. 83.

<sup>64</sup> See the remarks of the Chair of the Drafting Committee at the Vienna Conference: ‘there was no question of requiring a rule to be accepted and recognised as *jus cogens* by all states. It would be enough that a very large majority did so’, quoted in L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988), at 210.

<sup>65</sup> See text accompanying footnotes 37–39.



Charter so that force recommended by the General Assembly is also lawful would be such a significant change to the collective security arrangements under the Charter that it would go beyond just a change in the *content* of the dynamic collective security exception and require a change to the *outer limits* of the exception; that is, it would engage the exception/prohibition boundary and require change to both the customary and *jus cogens* prohibitions.

As Federica Paddeu observes in her contribution to this symposium, conceptual questions of this kind are difficult to answer by reference to the practice and *opinio juris* of states, which rarely express views on abstract questions of this kind.<sup>66</sup> In practice, it is likely to be through the reactions of states to attempts to change the law on the use of force in this manner that the scope of the collective security exception to the customary and *jus cogens* prohibitions of the use of force may be determined. If subsequent practice establishing agreement among UN Members as to the interpretation of the Charter were viewed as sufficient for such uses of force to be considered lawful, then we may conclude that such a change comes within the scope of the dynamic collective security exception. If not, it may be that something extra – *opinio juris* for the corresponding change in custom, or evidence of the acceptance and recognition of the new scope of the *jus cogens* norm – is required for the law to change in this way.

The absence of practice since 1950 where ‘Uniting for Peace’ has been used to authorize force without the consent of the territorial state may well suggest that such a change cannot be brought about through reinterpretation of the Charter alone.<sup>67</sup> However, it is more likely that there are other, practical and political explanations besides the conceptual argument that such a change also requires changes to the customary and *jus cogens* prohibitions on force that have not yet occurred. There may simply not be agreement among all UN Members as to the interpretation of the Charter that would allow the General Assembly to authorize force in this way. The ‘Uniting for Peace’ resolution was adopted in the face of opposition from several UN Members and its legal effects are still disputed today. The failure of UN Members to avail of this possibility for the General Assembly to authorize force does not necessarily reflect their view that this remains prohibited by customary international law or a *jus cogens* norm, but it may simply be due to political or policy concerns about employing new legal bases for the use of force or disrupting the balance of powers between UN organs.

## 6 Conclusion

The purpose of this symposium is to examine the relationship between the law on the use of force and human rights. This includes contributions that bring new perspectives to the enduring debates concerning the legality and wisdom of using force to protect human rights. The analysis above has sought to show that claims that international

<sup>66</sup> Paddeu, ‘Humanitarian Intervention and the Law of State Responsibility’, 32 *Eur. J. Int’l L.* (2021) 649, at 665.

<sup>67</sup> On the practice, see O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), at 332–333.

law has changed to permit the use of force for humanitarian purposes face significant obstacles, which are often ignored by arguments based on evolving state practice alone. These obstacles flow from the complex structure of the law on the use of force itself, in which the prohibition of the use of force exists as a norm of customary international law, a treaty norm in Article 2(4) of the UN Charter and a norm of *jus cogens*. Arguments that rely on developments in state practice to claim that the law on the use of force has changed must clarify what role that practice is playing. While widespread and representative state practice accompanied by *opinio juris* may be sufficient to show that certain aspects of the law of self-defence have changed, thanks to the dynamic reference from Article 51 of the Charter to customary international law, the same methodology cannot be applied to changes to the prohibition on force itself. Even if there is sufficient state practice and *opinio juris* to demonstrate the emergence of a customary exception to the prohibition of the use of force – something that is far from clear at the present time – that will not *ipso facto* (as the Human Rights Committee might put it) change the treaty law prohibition on force in Article 2(4) of the Charter. Moreover, if the prohibition of the use of force has *jus cogens* status, it may only be modified by another norm of the same character, so that the new scope of that prohibition will also need to be ‘accepted and recognised by the international community as a whole’.

Nevertheless, the analysis above has also suggested a number of possible avenues for change to the *jus ad bellum*, which could allow force to be used lawfully for humanitarian purposes without Security Council authorization. A degree of flexibility of this kind is welcome. If the Charter framework is to retain its central role in the regulation of the use of force and international peace and security into the future, it must be possible to change those rules to fit changing circumstances. However, this cannot justify claims that the law has changed based on vague invocations of state practice alone. In analysing change to the law in this area, the diversity of the legal rules and the demanding requirements for their modification, as analysed here, cannot be overlooked.

State practice can bring about a change in the content of a treaty provision, provided it establishes the agreement of all parties to the new interpretation. If such practice were to be present, and the emergence of the new customary rule accompanied by a corresponding reinterpretation of Article 2(4), in principle a new customary rule permitting humanitarian intervention could have the effect of allowing states to use force in such circumstances – but this would be subject to the prior or simultaneous identification of the new, narrower scope of the *jus cogens* prohibition on force. It may also be possible for force to be used lawfully for humanitarian purposes pursuant to a recommendation by the General Assembly under the ‘Uniting for Peace’ resolution, if such an interpretation of the UN Charter were to be agreed by all UN Members. Such uses of force would still remain in violation of the parallel customary prohibition on force, unless and until that customary norm underwent a corresponding change. Again, it seems such a change would also require the prior or simultaneous identification of the new, narrower scope of the *jus cogens* prohibition on force. However, previous practice involving the powers of the Security Council suggests that the collective

security exception to those customary and *jus cogens* prohibitions may be dynamic, and that customary law tracks changes in the treaty law of the UN Charter. If this is the case, it is possible that a change in the *jus ad bellum* allowing the General Assembly to authorize force could occur without either the test for modification of customary or *jus cogens* norms needing to be met.

