1

How and When Did the Customary Prohibition of the Use of Force Emerge?

The Status of the Customary Norm Pre-1945

INTRODUCTION

The question of whether the prohibition of the use of force is identical under the UN Charter and customary international law is fundamental to deciding the approach to take to discover the meaning of prohibited force under international law. If they differ in some way, then it would be necessary to adduce the content under each source separately. Even if the customary and treaty prohibitions of the use of force are presently identical in scope and content, the current relationship between the two is especially relevant to potential future changes in the prohibition under both treaty and custom,[1] as we shall see later in Chapter 3. In particular, there are significant differences in the way that the rule may evolve through subsequent practice in the application of the treaty versus evolution of custom, as well as limits to such changes including the constraints of informal treaty modification and the peremptory nature of the prohibition. For these reasons, it is essential to commence our enquiry by examining the relationship between the treaty (UN Charter) and customary prohibitions of the use of force: are they indeed identical, what is their present relationship, and which should we interpret or apply to discover the meaning of prohibited force under international law? The starting point for this enquiry is the origin of the customary rule: how and

[1] ILC Rapporteurs Sir Michael Wood and Georg Nolte delineate the effect of treaties on the formation of customary international law (as part of the topic of identification of customary international law) from the role of customary international law in the interpretation of treaties (as part of the topic of subsequent agreement and subsequent practice in relation to interpretation of treaties): Georg Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' UN Doc A/CN.4/660 (19 March 2013), para. 7.

when did it actually emerge, and what is its relationship to article 2(4) of the UN Charter?

THE *NICARAGUA* CASE

Before we continue, let us first address and dispense with the case that is often proffered as the answer to these questions: the *Nicaragua* case. Certainly, the International Court of Justice (ICJ) in the *Nicaragua* case affirmed that there is a customary prohibition of the use of force.[2] However, as we shall see, the Court did not actually hold that the content of the customary prohibition is identical to the prohibition in article 2(4), and its assertion of how and when the customary norm emerged is problematic.

In the *Nicaragua* case, the ICJ found that it had jurisdiction to determine the dispute on the basis of customary international law only, and not the UN Charter due to the US reservation to the Court's jurisdiction.[3] In its judgment on the merits, the Court indicated its view that the principles of the non-use of force and of the right to self-defence were already present in customary international law before the Charter and that these parallel (and largely identical) customary rules 'developed under the influence of the Charter'. The Court held:

> [S]o far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations.[4]

[2] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment* (1984) ICJ Reports 392, para. 73.

[3] *Ibid.*: 'Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.'

[4] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* (1986) ICJ Reports 14 ('*Nicaragua* case (Merits)'), para. 181. Judge Schwebel in his Dissenting Opinion also acknowledged that 'it is generally accepted . . . that Charter restrictions on the use of force have been incorporated into the body of customary international law, so that such States as Switzerland, the Koreas, and diminutive

However, the ICJ did not explicitly hold that the prohibition under each source of law was identical, and its analysis in identifying the parallel customary rule has been rightly criticised. The Court was rather obtuse about whether the prohibition of the use of force in article 2(4) is exactly the same in customary international law. It stated:

> The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content.[5]

The Court re-states this point in the following paragraph, holding that '[t]he areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content'.[6] Claus Kreß argues that despite the ICJ's statements, subsequent parts of the judgment show that it has interpreted customary international law and article 2(4) 'in a largely identical manner'.[7] Furthermore, since in the *Armed Activities* case, the ICJ referred to the 'principle' of the non-use of force in international relations without citing its source,[8] Kreß concludes that it is based on 'essentially identical rules of treaty and customary law existing alongside each other'.[9] However, this finding was far from explicit, and other scholars have noted that the ICJ seems to treat the two as identical in substance without much analysis.[10]

States are bound by the principles of Article 2 of the Charter even though they are non-members' (para. 95), although he disagreed with the position that Member States of the UN should be treated as being bound only by customary international law when in fact the UN Charter applied between them.

5 *Ibid.*, para. 175.

6 *Ibid.*, para. 176.

7 Claus Kreß, 'The International Court of Justice and the Non-Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 561, 568, citing the *Nicaragua* case, paras. 181, 188.

8 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Reports 168, para. 345(1).

9 Kreß, n. 7, 569, though he notes the Dissenting Opinion of Judge Jennings in the *Nicaragua* case, which disputes this view.

10 See, for example, Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), 200, 230 MN65.

The ICJ has also been criticised for its reasoning in identifying the parallel customary prohibition of the use of force. Despite its frequent references to the need to evaluate the existence of a general practice accepted as law in order to identify a rule of customary international law and its holding that '[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice',[11] Christine Gray notes that '[the Court] was criticized for inferring *opinio juris* from General Assembly resolutions and for not undertaking a wide survey of practice'.[12] The Court also failed to clearly distinguish between practice in the application of the treaty and State practice and *opinio juris* under customary international law. It noted that Nicaragua and the USA 'accept a treaty-law obligation to 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'.[13] The Court correctly held that it 'has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention'.[14] Oscar Schachter observes that '[j]ust how the Court could tell whether practice since 1945 by the treaty parties relative to the use of force was "customary" rather than treaty is not made clear.'[15] The Court also relied on multilateral conventions such as the UN Charter and the Charter of the Organization of American States to ascertain the content of the customary rule without further explanation.[16]

These deficiencies in the judgment and the fact that the Court left open whether the customary and UN Charter prohibitions of the use of force are actually identical mean that the *Nicaragua* case is not the end of the road in our quest to discover whether the prohibition is identical under each source of law, and their present relationship. The rest of Part I will examine this question afresh.

[11] Nicaragua case (Merits), n. 4, para. 184.

[12] Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008), 8–9, footnote 30. However, she notes that 'as the Court said, the parties were in agreement that Article 2(4) was customary law. It was not surprising that the Court's inquiry into customary international law was relatively brief'.

[13] *Nicaragua* case (Merits), n. 4, para. 188.

[14] *Ibid*.

[15] Oscar Schachter, 'Entangled Treaty and Custom' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), 717, 719.

[16] *Nicaragua* case (Merits), n. 4, para. 183.

HOW AND WHEN DID THE CUSTOMARY PROHIBITION OF THE USE OF FORCE EMERGE?

There are four possibilities for how and when the current customary prohibition of the use of force between States arose.[17] The first possibility is that the customary rule developed prior to the UN Charter and that article 2(4) was declaratory of that pre-existing custom. The second possibility is that article 2(4) crystallised a rule of customary international law that was by 1945 already in the process of formation. The third possibility is that article 2(4) gave rise to a new rule of customary international law in the usual way, that is, through subsequent State practice and *opinio juris* (the two-element approach). The fourth possibility is that article 2(4) gave rise to a new customary rule from its own impact, due to its 'fundamentally norm-creating character' 'accepted as such by the opinio juris' and a sufficient number of ratifications and accessions to imply a 'positive acceptance of its principles' and 'extensive and virtually uniform' State practice.[18] The following discussion will canvass the first of these two possibilities and examine the status of the customary norm prior to 1945. Chapter 2 will then focus on the status of the customary norm in the UN Charter era and whether it is currently identical to the rule in article 2(4) of the Charter.

THE STATUS OF THE CUSTOMARY NORM PRE-1945

Article 2(4) as Declaratory of Pre-existing Customary International Law?

The first possibility is that article 2(4) was declaratory of a customary international law rule prohibiting the use of force between States that pre-dated the 1945 UN Charter. If article 2(4) was merely declaratory of such a customary rule, then the customary rule would continue to be in force alongside the Charter. For a pre-existing rule of customary international law prohibiting the use of force in the same terms as article 2(4) to have arisen prior to 1945, the requirements of a general practice accepted as law must have been present prior to that date. This was not the case. Rather, article 2(4) of the UN Charter was a significant new legal development.

[17] This work takes the position that any pre-existing custom that was inconsistent with the later treaty provision in article 2(4) of the UN Charter was thereby superseded, at least with respect to the parties to that treaty, which in this case, is nearly all States.

[18] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment* (1969) ICJ Reports 3 ('*North Sea Continental Shelf Cases*').

Pre-Charter Era

Prior to 1945, there were legal developments restricting the right to resort to war between States, but this fell short of outlawing 'use of force'. The historical trajectory of the prohibition of the use of force has, broadly speaking, traced a liberal attitude towards war, in which rulers were absolutely free to resort to war, to the development of a moral discourse on war in the form of just war theory, which gave an account of the conditions under which resort to war was righteous.[19] Just war doctrine has its roots in Roman law and the early writings of Saint Augustine, and came to fruition during the Middle Ages.[20] Prior to the twentieth century, there was no international legal regulation of the use of force between States.[21] The Hague Peace Conferences of 1899 and 1907 were the first attempts to restrict such freedom to resort to force and included modest restrictions.[22]

During the inter-war period (November 1918 to September 1939), efforts to restrict legal resort to war between States intensified. The two most notable international instruments during this period were the Covenant of the League of Nations,[23] and the 1928 Kellogg–Briand Pact (General Treaty for Renunciation of War as an Instrument of National Policy).[24] The Covenant of the League of Nations required peaceful dispute settlement between States and provided for a system of collective security and sanctions.[25] The League Covenant of 1919 contained exceptional qualifications on the right to resort to war. 'Resort to war in violation of the Covenant was illegal but the content of the illegality was *prima facie* the violation of a treaty obligation.'[26] However, the Covenant did not prohibit war if dispute settlement was unsuccessful, after

[19] For an early comprehensive account of the prohibition of the use of force, see Ian Brownlie, *International Law and the Use of Force by States* (Clarendon, 1963). For a concise overview of the historical development of the outlawing of war, critiquing the overly simplified treatment of this development by many scholars, see Randall Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 35, who argues that the just war tradition continued to influence the law in the modern era and explains how many features of the current *jus contra bellum* have a basis in this tradition.

[20] Lesaffer, n. 19, 37.

[21] Randelzhofer and Dörr, n. 10, 204, MN4.

[22] *Ibid*., 204, MN5.

[23] *Covenant of the League of Nations 1919* (adopted 28 April 1919, entered into force 10 January 1920).

[24] *Treaty between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy* (concluded 27 August 1929, entered into force 24 July 1929) 94 LNTS 57 ('*Kellogg–Briand Pact*').

[25] Articles 10, 12, 13 and 15.

[26] Brownlie, n. 19, 66.

a cooling-off period, and 'it did not restrict use of force other than war and aggression'.[27] From 1919, there were a number of international instruments variously declaring aggressive war/wars of aggression as an international crime (e.g. the Draft Treaty of Mutual Assistance, which never entered into force; the 1925 Sixth Assembly resolution: 'war of aggression' is 'an international crime'; the 1927 Eighth Assembly resolution: 'wars of aggression are ... prohibited'). But this 'just affirmed existing international law' and 'did not go beyond the [League] Covenant'.[28] The 1928 Resolution of the Sixth International Conference of American States also considered and resolved that aggression is 'illicit and as such declared as prohibited', but there remained the problem of a lack of definition.

The turning point which galvanised the emerging international law prohibiting recourse to war was the 1928 Kellogg–Briand Pact: the General Treaty for Renunciation of War. The parties to the Pact 'condemne[d] 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'.[29] '[W]ar in violation of the Paris Pact was equated to aggression, triggering the obligations of third states under Article 10 of the Covenant.'[30] The Pact did not provide for sanctions, though violation did have consequences, for example, liability for damages, a right of intervention and no rights arising from a war in violation of the Pact.[31] Ian Brownlie notes, '[t]he treaty was of almost universal obligation since only four states in international society as it existed before the Second World War were not bound by its provisions'.[32]

It is controversial whether these legal developments amounted to the creation of a customary rule prohibiting force that was merely replicated later in article 2(4) of the UN Charter. Brownlie took the position that these multilateral treaties – together with a multitude of bilateral treaties during this time period reflecting similar provisions, various statements by States demonstrating an acceptance of the legal nature of the obligation to refrain from recourse to force in international relations (though it seems that these

[27] Lesaffer, n. 19, 52 with extensive footnotes. See also Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens, 1950), 708: 'The Covenant of the League of Nations did not forbid war under all circumstances. The Members of the League were allowed to resort to war against one another under certain circumstances, but only "for the maintenance of right and justice."'

[28] Brownlie, n. 19, 73.

[29] Article 1.

[30] Lesaffer, n. 19, 53, footnote omitted.

[31] *Ibid.*, 52, citing Neff.

[32] Lesaffer, n. 19, 75, footnote omitted.

statements really emphasise that the legal obligation stems from the Pact and the League Covenant) and State practice – support the conclusion that at least by 1939, resort to war was illegal unless in self-defence.[33] However, he acknowledges that '[t]here was no general agreement on the precise meaning of the terms used in instruments and diplomatic practice relating to the use of force. This still creates serious difficulty but it is absurd to suggest that because there is a certain degree of controversy the basic obligation does not apply to the more obvious instances of illegality.'[34]

Many of the legal developments referred to earlier in the chapter did not explicitly prohibit 'force', but 'war', which may have been a broader term. 'Whether "war" in the Pact was used in its technical meaning and all other uses of force were excluded was and remains a matter of contention among international lawyers.'[35] Brownlie argues that '[t]he subsequent practice of parties to the Kellogg-Briand Pact leaves little room for doubt that it was understood to prohibit *any substantial use of armed force*'.[36] Randall Lesaffer believes that Brownlie's view is too 'rosy' a picture, since State practice post-World War II 'indicates that states still considered themselves to have a right to resort to war and formally declare war in the case of prior aggression by an enemy. Moreover, the Covenant and the [Kellogg–Briand] Pact had left the door wide open for an alternative strategy to resort to force rather than war, primarily in the guise of self-defence.'[37]

The UN Charter Era

After the conclusion of World War II, a new era of international law was ushered in with the advent of the UN Charter in 1945, and, in particular, its cornerstone provision in article 2(4) prohibiting the 'use of force' between States. As Hans Kelsen notes, '[t]he Charter of the United Nations goes much

[33] Brownlie, n. 19, 110.

[34] *Ibid*., 111.

[35] Lesaffer, n. 19, 53, citing Brownlie, n. 19, 84–92. See Carrie McDougall, 'The Crimes against Peace Precedent' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), 49, 55–58 for a discussion of the pre-World War II legal understanding of 'war' according to Brownlie, and an analysis of the interpretation of 'war of aggression' by the Nuremberg and Tokyo Tribunals: 'at the very least it can be said that in the pre-war era there were multiple meanings of the term "war", not all of which had an agreed definition.'

[36] Brownlie, n. 19, 88, emphasis added and footnote omitted. Cf Kelsen, n. 27, 708, who argued that 'The Briand-Kellogg Pact outlawed war as an instrument of national policy; consequently, war as an instrument of international policy and especially a war waged by one state against a state which has violated the Pact was not forbidden'.

[37] Lesaffer, n. 19, 53–4.

farther than its predecessors. It obligates the Members of the United Nations not only not to resort to war against each other but to refrain from the threat or use of force and to settle their disputes by peaceful means (Article 2, paragraphs 3 and 4).'[38] The prohibition of a 'use of force' in article 2(4) was therefore a significant legal development in comparison to earlier international law existing at that time, which prohibited resort to 'war'.[39]

This view is also supported by statements made during the drafting of the Vienna Convention on the Law of Treaties, with respect to draft article 36. The draft article, entitled 'coercion of a State by the threat or use of force', provided that '[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.' In the discussion of the draft provision, the Netherlands and the United States raised the question of its retroactive applicability. The United States noted that:

> The traditional doctrine prior to the League Covenant was that the validity of a treaty was not affected by the fact that it had been entered into under the threat or use of force. With the Covenant and the Pact of Paris, this traditional doctrine came under attack; with the Charter it was overturned. In the view of the United States Government, *it was therefore only with the coming into effect of the Charter* that the concept of the illegitimacy of threats or uses of force in violation of the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, was accepted.[40]

This view was affirmed by Sir Humphrey Waldock and cited by Judge Jennings in the *Nicaragua* case: 'The illegality of recourse to armed reprisals or other forms of armed intervention not amounting to war was not established beyond all doubt by the law of the League, or by the Nuremberg and Tokyo Trials. That was brought about by the law of the Charter.'[41]

[38] Kelsen, n. 27, 708.

[39] Judge Jennings took this position in his Dissenting Opinion in the *Nicaragua* case (Merits), n. 4, 520:

> It could hardly be contended that these provisions of the Charter [articles 2(4) and 51] were merely a codification of the existing customary law. The literature is replete with statements that Article 2, paragraph 4, – for example in speaking of 'force' rather than war, and providing that even a 'threat of force' may be unlawful – represented an important innovation in the law.

[40] International Law Commission, 'Yearbook of the International Law Commission 1966, Vol. II' (1966), A/CN.4/SER.A/1966/Add.l, Observations and Proposals of the Special Rapporteur, 16.

[41] Dissenting Opinion, *Nicaragua* case (Merits), n. 4, 520, citing Waldock, *106 Collected Courses, Academy of International Law* (The Hague, 1962-II), 231.

Conclusion

Article 2(4) of the UN Charter did not merely codify an existing customary prohibition of the use of force but was rather a significant legal development which went beyond the existing laws of the time in order to found a new international legal order in the aftermath of World War II. In terms of how this position squares with the pronouncements of the majority judgment in the *Nicaragua* case, it must be recalled that the Court did not state that a rule of customary international law pre-existed the Charter but rather that the customary international law *principle* pre-existed the Charter and subsequently developed into a rule of customary international law under the Charter's influence. Although it is not clear what legal meaning a customary international law 'principle' has given that this category is not recognised in article 38(1) of the Statute of the International Court of Justice, if it is understood as meaning that a legal zeitgeist was developing towards a stricter regulation of the use of force between States culminating in the prohibition set out in article 2(4) of the UN Charter, this is consistent with the historical narrative of the inter-war period outlined earlier in the chapter.

Article 2(4) as Crystallising a Rule of Customary International Law in the Process of Formation?

Another possibility for the formation of the customary prohibition of the use of force is that it was starting to emerge prior to the UN Charter and crystallised *as a result* of the negotiation and drafting of article 2(4). The process of crystallisation of a customary rule occurs when 'the law evolve[s] through the practice of States on the basis of the debates and near-agreements' revealing 'general consensus' during the treaty negotiation process that the rule in question is of a customary nature.[42] This process of 'State practice ... developing in parallel with the drafting of the treaty' is more likely to occur when the treaty negotiations and drafting take place over a long period of time,[43] as occurred with the new concept of the exclusive economic zone developed during the Third United Nations Conference on the Law of the Sea (1973–1982) and its acceptance by States as customary international law

[42] *Fisheries Jurisdiction (UK v Iceland), Merits, Judgment* (1974) ICJ Reports 3, para. 52.

[43] International Law Association Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (ILA, 2000), 49.

prior to the adoption and entry into force of the 1982 UN Convention on the Law of the Sea in 1994.[44]

However, article 2(4) of the Charter arguably did not 'crystallise' a rule of customary international law in the process of formation, because any pre-existing customary limitations on recourse to force were significantly broadened by the advent of article 2(4), and the process of drafting was not accompanied by meaningful State practice 'developing in parallel with' this radical change in the law. First of all, the relevant period for crystallisation of a customary rule – the period of treaty negotiation and drafting prior to signing of the UN Charter – was extremely brief 'due to the special circumstances occasioned by the war'.[45] 'The constitutive instrument of the UN was conceived, negotiated, drafted, signed, and ratified in four phases, corresponding closely with events of the war . . . it was only towards the end of the first phase and at the beginning of the second phase [the summer of 1944] that a diplomatic exchange of ideas was set in motion.'[46] The UN Charter was then adopted on 25 June 1945 and entered into force on 24 October of the same year.

Furthermore, the term 'use of force' in article 2(4) was deliberately chosen by the drafters of the UN Charter to go beyond the earlier (failed) attempts to outlaw 'war' in the League Covenant and the Kellogg–Briand Pact, which had left open the possibility for States to claim that no war had been formally declared or officially recognised and that forcible measures fell short of war and were therefore permissible.[47] Of course, this gap between the pre-Charter prohibition of war and the prohibition of 'use of force' in article 2(4) is not itself an obstacle to crystallisation of any nascent customary prohibition, but it brings into stark relief that State practice (i.e. 'the reactions of Governments to the negotiations and consultations during the work in progress'[48] or 'repeated

[44] Michael Wood, 'Third Report on Identification of Customary International Law' UN Doc A/CN.4/682 (ILC, 27 March 2015) ('Wood Third Report'), para. 38. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment* (1985) ICJ Reports 13, para. 34, the ICJ recognised that 'the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law'.

[45] Wilhelm G Grewe and Daniel-Erasmus Khan, 'Drafting History' in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002), vol. I, 1, MN 3.

[46] *Ibid.*, MN3, 4 and 6.

[47] See Robert C Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (University of North Carolina Press, 1990) regarding the intention of Charter drafters to 'settle the discussion on the extent of the prohibition of "war"' by changing the term 'resort to war' to threat or use of force, cited in Lesaffer, n. 19, 54.

[48] Yoram Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 *Recueil des cours: Collected Courses of the Hague Academy of International Law* 243, 358.

practice by the States concerned'[49]) did not parallel this radical legal development in the treaty during the brief negotiation process.

In particular, the reaction of States to article 2(6) of the UN Charter during the drafting process clearly illustrates that they did not already accept the rule in article 2(4) as a binding rule of customary international law during the period of drafting and negotiation. Article 2(6) provides that the United Nations 'shall ensure that states which are not Members of the United Nations act in accordance with [the Principles in article 2] so far as may be necessary for the maintenance of international peace and security'. The *travaux préparatoires* for this provision indicate that the delegates did not believe that they were imposing a customary obligation onto non-Members but rather that they were seeking a way to impose *treaty* obligations on non-treaty parties for the purpose of maintaining international peace and security as part of the new international order. The Report of the Rapporteur of the relevant Subcommittee of the San Francisco Conference stated:

> The vote was taken on the understanding that the association of the United Nations, representing the major expression of the international legal community, is entitled to act in a manner which will insure the effective co-operation of non-Member states with it, so far as that is necessary for the maintenance of international peace and security.[50]

Furthermore, as Kelsen highlights:

> In the discussion of this paragraph at the 12th meeting of Committee I/I (U.N.C.I.O. Doc. 810, I/I/30, p.7) 'The Delegate of Uruguay asked for a clarification of the meaning of this paragraph. He asked how a non-Member could be brought within the sphere of the Organisation and how the Organisation could impose duties upon non-Members. The Rapporteur replied that the paragraph was intended to provide a justification for extending the power of the Organisation to apply to the actions of non-Members, but that the wording might have to be reconsidered if it were not clear. ... The Australian Delegate agreed that this was a difficult

[49] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment* (1982) ICJ Reports 18, Dissenting Opinion of Judge Oda, para. 23: 'It is however possible that, before the draft of a multilateral treaty becomes effective and binding upon the States Parties in accordance with its final clause, some of its provisions will have become customary international law through repeated practice by the States concerned.' But note the caution in the *North Sea Continental Shelf Cases*, n. 18, para. 76, that practice consistent with a treaty by States parties before a treaty enters into effect is not necessarily evidence that the rule in question is a customary norm, since those States are presumably 'acting actually or potentially in the application of the Convention'. Further on this point, see the discussion in Chapter 2.

[50] Report of Rapporteur of Subcommittee I/I/A to Committee I/I of the San Francisco Conference (U.N.C.I.O. Doc 739, I/I/A/19 (a), p. 6), cited in Kelsen, n. 27, 110, footnote 9.

> provision to enforce but that it was an essential one. The Organisation would have to see that everything possible would be done to suppress an aggressor.'[51]

During the discussions regarding article 2(6), States did not refer to a customary obligation to refrain from the use of force but, to the contrary, showed consternation about the legal basis for imposing this obligation in the UN Charter onto non-Member States. This could only be the case if States did not already accept that it was a binding rule of customary international law at the time of drafting the UN Charter. This weighs strongly against any crystallisation of a customary prohibition of the use of force *in statu nascendi* during the drafting and conclusion of article 2(4) of the UN Charter. Although the *travaux préparatoires* relating to article 2(6) are evidence that at the time of drafting and negotiation of the UN Charter, the prohibition of the use of force in article 2(4) was not accepted as a customary rule by States, it is evidence that States sought to establish a *new* customary rule *through the impact of the UN Charter*. This nuanced distinction illustrates that although crystallisation of an emerging customary rule and the development of a new customary rule triggered by a new treaty rule are 'distinct processes, in a given case, they may shade into one another'.[52] The significance of article 2(6) for the generation of the customary prohibition of the use of force is discussed further in Chapter 2.

CONCLUSION

Since article 2(4) of the UN Charter was more restrictive than pre-existing customary international law, it was not declaratory of pre-existing customary international law. For the reasons set out earlier, nor did it crystallise customary international law in the process of formation. Therefore, the customary rule prohibiting recourse to force between States must have arisen *after* the Charter entered into force. This is consistent with the finding of the ICJ in the *Nicaragua* case, as the Court did not posit that article 2(4) was declaratory of pre-existing customary international law but that the principle of the prohibition already existed under customary international law and subsequently developed under the influence of the Charter. There are two possibilities for the way this process occurred: either the new rule of customary international law developed in the usual way (State practice accompanied by an *opinio juris*), or article 2(4) gave rise to a new rule of customary international law through its own impact. These possibilities are discussed in Chapter 2.

[51] *Ibid.*
[52] Wood Third Report, n. 44, para. 35.