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CUSTOMARY LAW OF THE USE OF FORCE

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The goal of this study is to discuss a possible existence and application of customary law regulating the use of force in international relations. Even though there is a general ban on the use of force formulated in Art.2(4) of the UN Charter, it seems *prima facie* that there is also some space for customary norms. This was confirmed by the ICJ in the famous *Nicaragua* judgement of 1984/1986. We would like to discuss briefly four following problems:

1. THE UN CHARTER AND CUSTOMARY INTERNATIONAL LAW.

In the pleadings in *Corfu Channel*, the UK presented an argument on alleged customary right to self-protection, intervention and self-defense. The Court rejected the British justification of the Operation Retail, invoking arguments on their incompatibility with international law. Interestingly, the Court did not refer to a standard of the UN Charter, as in that time Albania was not UN member State. It based its argument on a principle of sovereign equality, as the respect for territorial sovereignty is an essential foundation of international relations. As to the intervention, the Court repudiated the British argument on intervention stating that it was suspected to be the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as could not, whatever be the present defects in international organization, find a place in

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international law. The judgment of the ICJ seems to reflect customary law of the time.

Another solution was proposed in the judgment in *military and paramilitary activities of the US in and against Nicaragua* case. Because of the so-called Vandenberg reservation, the Court could not base its judgement upon the UN Charter, and the Treaty of Friendship, Commerce and Navigation between the US and Nicaragua of 21 January 1956 did not provide a sufficient ground for the decision. The judges were willing to pass a judgment, as the case was the first opportunity since the Corfu Channel case to pronounce on the use of force in international law, and in particular on a content of the right to self-defense. The Court referred to customary law. It emphasized that both elements of custom must be present. The *opinio iuris* was regarded as more important than practice, as with respekt to international humanitarian law and human rights law, in particular if the practice is based on ommission (non-action). An evaluation of *opinio iuris* is based on the analysis of the votes by states on the UNGA Declaration of Principles (Resolution 2625) and other international instruments

The ICJ remarks also differences between the regulation of the use of force under the UN Charter and customary international law. The difference concerns the existence of certain formal duties under the Charter (like the obligation to inform the UNSC about the armed attack), but also substantive factors. Legal writing and state practice before 1981 (including military activities of France in Algeria during the national liberation war, a conduct of the US during the Cuban crisis or the Israeli air strike against the Iraqi nuclear plant at Osiraq) suggest that it is very difficult to reconcile a simultaneous binding force of customary international law (based on the Webster formula) and UN Charter. The restrictive approach excluding the preventive or anticipatory self-defense under international law including customary law (with reference to the *Caroline* case – the incident took place a century before the UN Charter was drafted) was confirmed by the ICJ in the *Oil Platform* case.

The judgment in *Nicaragua* case is not really convincing. It does not draw distinction between state practice and *opinio iuris*, it

does not refer to the practice of states which are not UN members (what means that the discussion of state practice is based in fact on the practice in the framework of the UN Charter), and it deprives an institution of denunciation of a treaty of any sense.

It is interesting that in its later advisory opinion on the *Legality of Use of Nuclear Weapons* the Hague Court discussed state practice relying upon refraining from the use of nuclear weapons combined with the policy of deterrment. In this case practice was also considered as an element of *communis opinio iuris*. Such approach allows us to ask a fundamental theoretical question concerning customary international law. Both elements of custom rarely play an equally important role. Is there any logical premise allowing to decide which of two elements is more important in particular circumstances.

Having written that, we have to emphasize that the ICJ is extremely cautious in evaluation of specific forms of the use of force and it is not very eager to unconditionally condemn the states referring to armed force. In recent years a number of cases dealing with the use of force before the ICJ grew up, but the Court continued its policy of abstaining from clear decisions. This policy corresponds with the decisions of political organs of the UN, which usually – except clear situations where the responsibility can easily be attributed to the specific party - demand the parties to stop hostilities, to withdraw military forces and to resolve disputes by peaceful means.

2. CUSTOMARY LAW ON THE USE OF FORCE – ARMED ACTIVITIES NOT REGULATED IN THE UN CHARTER.

It has often been emphasized that September 11 constituted a turning point in the approach of international law towards the use of force. The questions posed read: did the attacks constituted armed attack in the meaning of the Charter? How to evaluate them from the perspective of crimes against international law? Was the US action against Afghanistan a lawful exercise of self-defense? If so, was Afghanistan a right target?

The ICJ confirmed in the *Nicaragua* judgment that there exist various forms of the use of force, of different degree of gravity and different seriousness of violation of law. Not all of them amount to aggression or armed attack. The distinction must be made between the most grave forms of the use of force (which constitute armed attack, or even aggression) from other less grave forms. The same stance was presented by the Court in the *Oil Platforms* case. Moreover, in its earlier judgment in *Tehran Hostages* case the ICJ used an expression "incursion" to define the rescue action of US helicopters and rejected an opinion that the action might have constituted the act of aggression. It emphasized therefore that there are certain forms of the use of force which are not defined in the UN Charter, but which are presumed to be lawful. The same position was confirmed by the resolution of the IDI on the use of force of 2007, and also dominates in legal writing. According to the learned body, an armed attack triggering the right of self-defense must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law. In case of an infringement of boundary regime of lesser intensity (like a transboundary abduction of individual person) the target State may also take strictly necessary police measures to repel the attack. However, a distinction between police measures and self-defense is difficult in practice and certainly it can be estimated on a case by case basis and *ex post*.

The forms of the use of force (military activities) of unclear legality are listed as follows:

- humanitarian intervention;
- intervention upon invitation of the legitimate government concerned;
- armed intervention (including the intervention by region al organization without a prior consent of the Security Council);
- intervention to protect own nationals;
- intervention to support the right to self-determination; this category covers the case of Russian intervention

in Ukraine including the annexation of the Crimea. Corresponding emotions followed the intervention of India in Eastern Pakistan (Bangladesh);

- preventive self-defense;
- coalition of good will, reacting to serious violations of international law.

The discussion on the legality of actions mentioned above reminds in fact another discussion which took place before the WWII. The Covenant of the League of Nations and the Briand-Kellogg Pact banned the war. The states applied an expression "measures short of war" in order to avoid accusations of a violation of the prohibition of war. The catalogue of those measures was quite similar to the one presented above. We suggest that all the forms of the use of force mentioned here could possibly be classified as customary law. Customary law can exist *infra* the UN Charter, *praeter* the Charter and perhaps also *contra* the Charter. In the first situation the particular form of the use of military force requires the consent of the UNSC, while in the latter one force could possibly be applied even without such consent. The present author supports the view that the Security Council should still play the most important (more than primary) role in resolving international conflicts threatening peace and security. Its consent is required in particular with respect to military operations in the framework of the *Responsibility to Protect* activities, which are largely (at least in theory) accepted by the international community.

We do not intend to discuss here the approach of international community to particular forms of the use of force. Interestingly, there is no universally accepted classification of the forms of use of force, and the identification of the forms We limit our discussion to a controversy between the authors of two modern classical monographs on the use of force: Ch.Gray and Th.Franck. The former accepts different forms of the use of force as conform with international law (i.e. conform to the UN Charter and based on customary law), while the latter treats all those military activities as violations of the ban on the use of force, although justified under special circumstances. The reactions of international community

to different cases of the use of force vary from sanctions in cases of the interventions of USSR in Afghanistan or Vietnam in Kampuchea, to critical declarations in cases of the US actions in Dominicana or Granada, to acceptance in cases of interventions of India in Sri Lanka and Tanzania in Uganda. We can add also that the intervention of the NATO connected with the mass and grave violations of human rights and humanitarian law in Kosovo also met critical remarks, and – on the other hand – the Western powers were sharply criticized (i.a. by the OAU) for not having intervened in early stages of Rwanda conflict. We could also refer to a bombing of Iraq by the US, British and French air forces in order to protect Kurds and Shiites. The states involved did not present any justification of their action, which was never condemned by the UN political organs. We can conclude that there is no clear approach of state practice to the use of force. According to the classical formula of the *Lotus* case, this means that no universal customary rules exist, and therefore the use of force should be acceptable. Such interpretation is manifestly contrary to the UN Charter, and in particular undermines a possible character of the prohibition of the use of force as peremptory norm of international law.

3. CUSTOMARY LAW ON THE USE OF FORCE – SUBJECTIVE SCOPE OF APPLICATION.

In Westphalian system states played a dominating role in international relations and international law. This was reflected by the UN Charter which has been drafted by states, manifestly addressed to states and projected for the benefit of states. At the time of its adoption sovereign states were undoubtedly the only fully accepted subjects of international law. During the San Francisco conference (and generally in the preparatory works) no trace of involving non-state actors can be found. A leading role of the states in formation and application of public international law including norms regulating the use of force still remains actual. Such a position is confirmed i.a. by the resolution 2625(XXV) referring exclusively to the obligations of states not to use armed force and to corresponding rights of other states, resolution 3314(XXIX) limiting the aggression

to states and omitting any example of possible aggression by non-state actors, and finally resolution 42/22 imposing the obligation not to use armed force exclusively upon the states. It was directly confirmed in the Final Document of the World Summit, where the heads of states and governments reaffirmed the obligation of all the member states to abstain to the use or threat of force in their international relations. The same instrument emphasized also that the pertinent provisions of the UN Charter are sufficient to avoid all threats against peace and international security, and that there is no need to amend Art.2 al.4 in order to cover also the actions of non-state actors. The High-level Panel on Threats, Challenges and Change also devoted some passages to the non-state actors, stressing that the UN Charter, Geneva Conventions of 1949 and the Statute of the ICC regulated and limited the use of force and conduct of states in case of armed conflict. There is no fully accepted regulation of terrorism (although there are 12 specialized conventions on different aspects of the phenomenon) nor of activities of non-state actors. The members of the panel suggested also that further legislative efforts are still needed within the UN in order to achieve the same level of normative regulation for the non-state actors as for the states.

In the context of the topic discussed here, non-recognized states also known as de facto regimes play a certain role. They can be defined as entities that achieved de facto independence, including territorial control, and were able to maintain it for at least two years; they did not gain general international recognition and were therefore not full members of the international community, and demonstrated a will to gain independence. They must have an organized leadership and political system, government and popular support. They must also be distinguished from other entities which do not meet criteria of statehood, like stateless entities, terrorist or criminal networks, puppet states, peaceful secessionist movements, quasi-states (?) etc. Politically, the unrecognized states will be evaluated also from the perspective of capacity and ability to conduct their foreign policy. Its expression will usually be: a creation of the Ministry of Foreign Affairs including a diplomatic service (that is recognized or not), keeping international relations with a patron state (usually a superpower supporting the seceding

entity), developing relations with great powers and acting towards obtaining different forms of support by international organizations (in particular the UN, EU, IMF, WTO, as well as Unrepresented Nations and Peoples Organization). Some of them were finally recognized as states (Montenegro, Eritrea, Kosovo, East Timor and – with certain reservation of political nature – Taiwan), while the other were not (Abkhazia, South Ossetia, Kurdistan – their status in still undetermined and in a way transitional) or were incorporated again into a parent state (Tamil Eelam, Chechnya, Biafra). Those states usually are not members of the UN nor other international organizations of political character, and their position towards the law of the said organizations can render assistance in evaluation of the customary law-making process. We support a view that in relationship between treaties and custom the practice of non-parties to the treaties concerned is decisive (see *supra*). In accordance with Art.2(6) of the UN Charter, non-recognized states should be bound by the principles of the Charter so far as it is necessary for the maintenance and restoring of international peace and security. Those principles include the ban on the use of force by themselves, but also protected against interference and violence on the part of third states. It is, however, disputable whether the same rule applies to relations between secessionist entities and their parent states, as the latter have not only right, but also duty to protect and possibly restore their territorial integrity.

International organizations is another group of international legal subjects. Their legal personality was finally confirmed by the ICJ in the *Reparation for Injuries* advisory opinion of 1949. There is a number of issues concerning international use of force dealing with international organizations. First general question is whether the scope of their international legal personality corresponds with the one of the states. Even though the ICJ stated that the scope of legal personality of particular subjects/groups of subjects varies, we are of the opinion that in principle all categories of international persons should have the same rights and duties under international law. That means that all the subjects can conclude international treaties or send and receive diplomats from third parties. However, the scope of international agreements concluded by states and international

organizations depends on the specific powers of the organization. From the point of view of the present paper, it would be difficult to imagine an international organization established exclusively in order to wage war. So in principle international organizations do not play any role in the context of *ius ad bellum*. However, if the organization – in accordance with its statute – undertakes military operations, it must respect international humanitarian law. We shall return to this point later.

As to other international actors, except particular subjects of legal personality universally recognized (like the Holy See or the order of Malta), the issue becomes more complicated. The category of non-state actors is not homogenous. It covers NGOs, transnational corporations, legal persons of domestic law, armed groupings, belligerents, national liberation movements, but also private armies or security companies (like South African Executive Outcomes, British Defense System Limited, American Military Professional Resources Incorporated or Blackwater), transnational criminal groups and terrorist organizations. This paper is limited to the activities of armed groupings attempting to exercise their right to self-determination, i.e. national liberation movements and belligerents using the terminology of classical international law. The position of those groups differs from the others, as they can be granted a kind of international legal personality on the basis of the Protocol I to the Geneva Conventions on humanitarian law (1977) and Geneva Convention on Prohibitions aor Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980). It is unclear whether those armed groups are capable to conclude international treaties.

If we agree with the ICJ that the legal personality says nothing about the rights and obligations under international law, it would be difficult to understand why the concept of international legal personality might be useful. Decisive question is whether international subject do possess a common minimum standard of rights and obligations deriving directly from international law, or such common basic rights and obligations do not exist. If we agree that the former approach is connect, then we have also to

indicate basic rights common to all the subjects (including states, organizations, and other non-state actors). The legal personality of the non-state actors makes sense. If we adopt a latter position, the legal personality is in fact of no importance. The present author, contrary to most publicists, supports the latter stance.

Interestingly, the criteria of a possible identification of an armed group for the needs of a military conflict, and from the perspective of possible legal personality correspond with the criteria of statehood. The no-state armed group should consist of a certain (undefined) number of military personnel (collective entity), it must dispose of weapons and use them, it must be permanent, subjected to a certain hierarchy, and it must effectively control a part of territory. However, it lacks stability and it usually is of transitional character. Its existence is strictly connected with the duration of the armed conflict.

The armed groupings acting in the territory of the state concerned will usually be treated as criminal groups or, using a currently fashionable expression, terrorists. They will be subjected to penal jurisdiction of this state and prosecuted by domestic agencies under municipal law. One can imagine a situation that a group of opponents obtains an international recognition (as freedom fighters or secessionist subject entitled to self-determination, or alike) but this does not necessarily mean granting a legal personality or at least international protection against the action by the state of residence.

The situation of armed groups undertaking military actions from abroad is much more disputable. It is logical that the right to self-defense should be recognized in unclear situations. If armed groups cross the border with the neighboring state and attack military posts of the state concerned, it is obvious that the armed forces of the latter state must have a right to resist and to counter-attack. The right is granted even if the attacking group cannot be properly identified. Armed green little men wearing Russian uniform without distinctions allowing an identification exercising military operations in the Crimea, but also in Eastern Ukraine against the Ukrainian sovereign is a good example of the situation described above.

A question can be asked whether it is necessary to provide evidence that the attacking militaries are somehow connected with the neighboring state. Such situation was suggested i.a. by the resolution of the Institut de droit international of 2007. According to the said resolution, in the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle. The IDI considered two situations: (i) If non-State actors launch an armed attack at the instructions, direction or control of a State, the latter can become the object of action in self-defense by the target State. (ii) If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise its right of self-defense in that area against those non-State actors. There is one more possible option: (iii) armed attack by the regime de facto (we agree with M.Kowalski that this situation was fully neglected by the IDI, even if it was the most interesting case). The author referred to three precedents of invoking self-defense against non-state actors/de facto regimes: the conflict between Georgia and Russian Federation of 2008, invoking also South Ossetia and Abkhazia, the armed conflict between Israel and Hamas in 2008/2009, and finally a war following the attack against the WTC in 2001, waged against Taliban exercising control over Afghanistan. Further examples concern the operations by Turkey against Kurds in Iraq in 2008, armed conflict between Rwanda and the DRC in 2004, and the intervention of Colombia against military operations undertaken by the FARC from the territory of Ecuador.

We respectfully disagree with the position of the IDI. In our opinion, from the perspective of self-defense there is no need to identify any links between the group and the state allegedly/presumably supporting it. On the contrary, the said tests play a role in the context of defining aggression or imputing state responsibility for internationally wrongful act, in accordance with Art.9 of the ILC Articles on International Responsibility of States for Wrongful Acts, as endorsed by the General Assembly in its resolution 56/83 of 12 December 2001.Taking into account the letter of Chapter VII of the UN Charter, the possible military action in such situation will not be based upon the decision of particular state(s) based on customary

law, but it will be governed by the UN law and in particular the decisions of the Security Council.

As to the first option provided in the resolution of the IDI, we have important doubts whether mechanisms governing attribution applicable in the law on state responsibility for internationally wrongful acts can be adopted also with respect to self-defense. Art.59 on state responsibility expressly provides that the ARSIWA are without prejudice to the UN Charter; the Commentary of the ILC emphasizes the priority of the Charter over any other international instrument. We omit here a problem of possible hierarchy between ARSIWA and customary law on the use of force.

In order to resolve the problem of the application of the concept of self-defense to non-state actors it is indispensable to precise the content and scope of the right to self-defense. It encompasses a right to repel direct armed attack, but the reaction is limited in space to the territory of the state attacked. It has been already emphasized that the state claiming to act in self-defense is under obligation to refer the case to the Security Council which should decide upon further steps against the perpetrators of the attack/assault. However, if we take seriously the judgment of the ICJ in the *Nicaragua* case, there is no obligation to refer the armed attack to the Security Council, as this agency exists exclusively in the UN law. There is no customary Security Council. The situation of customary self-defense seems highly improbable and the states attacked make a declaration required by the Charter.

The present author agrees with a position presented i.a. by P.M.Dupuy, M.Bothe and O.Corten that accepting the right to self-defense against a terrorist group would amount to granting it a certain degree of international legal personality. In the same time we reject such a possibility to secessionist groups, even if they have legitimate goals. A question could be asked whether the non-state actors can contribute towards creation of customary international law (as such possibility is usually reserved for states), and – on the other perspective – whether they are bound by international customary law prohibiting the use of force. One should also discuss if the fact that the UN Security Council addresses its resolutions to armed groupings does not recognize a certain kind of legal personality.

Examples of resolutions addressed to non-state actors and based upon Chapter VII of the Charter are more and more numerous, starting with resolution 46(1948), addressed to Arab Higher Committee and Jewish Agency in Palestine. Further instruments include e.g. resolution 1193(1998) concerning different groups in Afghanistan, including Taliban, resolution 1270(1999) addressed to armed groups in Sierra Leone, resolution 1822(2008) concerning terrorist activities of Al.-Qaeda and Taliban, resolution 1856(2008), relating to different armed groups in the Democratic Republic of the Congo [including in particular the Congrès national pour la Défense du people (CNDP), Lord's Resistance Army, and Forces Démocratiques de Libération du Rwanda (FDLR)], resolution 1860(2009) addressed to Israel and Hamas, calling to ceasefire, and finally resolution 1701(2006), concerning the situation in Lebanon, calling for cessation of hostilities, disarmament of Hezbollah, and establishing of demilitarized zone in Southern Lebanon. Moreover, thea non-implementation of such resolutions can result in imposing sanctions upon the groups concerned – e.g. resolution 1127(1997) proclaimed sanctions against UNITA (acting in Angola) for non-obeying the peace agreements of Lusaka. Recent examples are resolutions 2170 and 2199. rez.2170 (2014) condemned violations of international humanitarian law and demanded that ISIL, ANF, and all other individuals, groups, undertakings and entities associated with Al-Qaida ceased all violence and terrorist acts, and disarm and disband with immediate effect. Resolution 2199 (2015) imposed some financial measures to fight terrorism, such as asset freezing and closure of all financial sources of terrorism, including illegal drug trade and extraction of natural resources (in particular crude oil) by terrorists. The resolution also noted that the provisions of previous resolutions (including i.a. Resolution 2161) unconditionally ban the payment of ransom to terrorist groups in exchange for hostages. The resolution also condemned the destruction of cultural heritage by ISL and the Al-Nusrah-Front. All those resolutions were adopted on the basis of Chapter VII. We emphasize that the adopting of those resolutions did not amount to the recognition of international legal personality of the addressees, but granted them certain powers to

act in international relations (rights and obligations), without taking any firm position towards their status.

Beyond this rich practice of the Security Council, there is other evidence that the states are willing to accept the right to self-defense against an armed attack by non-state actors. International practice is, however, far from unanimity. There are numerous instruments which limit the self-defense to the attack by state or group of states, like the treaty on collective security concluded among the CIS on 15 May 1992, Pact of the League of Arab States of 22 March 1945, and the Interamerican Treaty on Mutual Assistance of 2 September 1947, UNTS 1948, p.92. Other treaties do not limit the self-defense to states – most of them remain silent on the point of a perpetrator. We quote e.g.Art.5 of the NATO Treaty of 1949, art.29 of the Charter of the OAS, Art.12 of the Charter of the CIS, and recently Art.4(b) of the Pact on Non-aggression and Common Defense of the African Union of 2005 and Art.42(7) of the EU Treaty as amended by the Treaty of Lisbon. The same argument concerning the lack of unanimity can be presented with respect to other examples of state practice.

The lack of homogeneity is an important argument against a possible classification of self-defense against the non-state actors as customary law, as the state practice is neither general nor coherent.

We share doubts expressed by M.Kowalski as to an extensive interpretation of certain resolutions of the UNSC. E.g. the Council stated in the resolution 1373(2001) that the terrorist acts committed against the WTC constitute a threat to international peace and security. This expression is much larger than armed attack. A problem is posed whether terrorist attack can be exercised on a scale comparable with armed attack. However, as we have stressed above, the state victim of the armed attack usually is not in a position to evaluate the scope of military activities by the aggressor. Such evaluation could possibly be made ex post, from the perspective of time lapsed.

The ICJ adopted a firm position that the self-defense cannot be used against non-state actors. We refer here to two decisions of the World Court. In the case of *Wall in the Palestinian territory* Israel brought the argument based on an extensive interpretation

of self-defense, often raised after September 11. The Court rejected this position and stated that Israel could not invoke the right to self-defense against attacks exercised from the territory subjected to the Israeli control. Three judges : R.Higgins, P.Koojmans and T.Burgenthal, expressed the individual opinions that the Court did not take into account the developments of international law after September 11. Their argument was not accepted by the majority opinion. Secondly, we point out the *Armed Activities in the Territory of Congo (DRC v Uganda)*. The Court rejected the right of Uganda to invoke the right of self-defense against the DRC. However, the Court investigated exclusively whether the support of the DRC for anti-Ugandan armed rebel groups amounted to armed attack attributable to the DRC; it did not consider whether the activities of those groups themselves constituted the armed attack. Certain inconsistency can be found in the Court's position as to armed attack. On one hand, it stated that the armed attack could possibly be attributed to the armed rebels and not to military forces of the DRC, and on the other hand it expressly affirmed that it did no pronounce on a possibility of invoking self-defense against the attacks of irregular forces under contemporary international law.

Resolutions 1368(2001) and 1373(2001) of the UN Security Council are often quoted as accepting the right of self-defense against non-state actors. However, both instruments refer to the inherent right of self-defense in accordance with the UN Charter and reaffirm the right to individual and collective self-defense stipulated by the UN Charter. Resolution 1373 reaffirms also that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organizing terrorist activities within its territory directed towards the commission of such acts. Even if the declarations of some states, as well as the one by the NATO member states emphasized that the right to self-defense could be accepted exclusively if clear evidence of involvement of [Afghanistan/Taliban] were presented. Let us remind that the right to self-defense is limited to immediate reaction to an armed attack, and further military actions should be subjected to the UN Security Council decision and control. We should move from the plan of self-defense towards state responsibility.

4. CUSTOMARY NATURE OF INTERNATIONAL HUMANITARIAN LAW AND ITS BINDING FORCE IN RESPECT OF NON-STATE ACTORS.

In principle we have decided not to deal with *jus in bello*, i.e. law concerning the conduct of hostilities. However, we make just one exception concerning international humanitarian law.

A question of possible customary nature of humanitarian law is of utmost importance. Its customary character is not put in question under contemporary international law. However, it is unclear whether non-state actors are bound by its rules. The answer is in principle connected with the issue of their possibile international legal personality, discussed below.

Jurisprudence of the ICJ, in particular the *Nicaragua* judgement and the advisory opinions on the *Wall in the Palestinian Territory* and *Legality or Threat of Use of Nuclear Weapons*, confirmed the customary character of the Hague conventions of 1907 and Geneva conventions of 1949, which constitute a main body of modern humanitarian law. The Court stated that those rules must be observed by all states whether they ratified the conventions or not, as they constitute intransgressible principles of international customary law. Even though the Hague judges refrained from using a notion of *jus cogens*, the emphasis on importance of humanitarian customary law is clear. Similar references can be found in the jurisprudence of the ad hoc criminal tribunals and the European Court of Human Rights.

An authoritative study by the ICRC also confirmed a customary nature of international humanitarian law. The authors listed 161 customary rules, and analyzed state practice and opinio iuris. We should also point out at the Resolution of the IDI (*L'application de droit humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquelles prennent part des entités non-étatiques*), adopted at the session of Berlin in 1999.

However, not all international conventions have been transposed into customary law. Serious doubts exist as to the customary nature of the additional protocols to the Geneva conventions (dated 1977), because of a scarce state practice.

Customary international law is binding upon all subjects of international law. There is no doubt that international organizations are bound by the rules of customary international humanitarian law. However, their binding force is limited to the activities undertaken within the statutory powers of the particular organization, in accordance with the principle of conferred powers as formulated in the advisory opinion on *reparation for injuries suffered in the service of the UN*. As to the UN, political organs

International organisations have international legal personality and can participate in international relations in their own capacity, independently of their member States. In this respect, their practice can contribute to the formation of customary international law. Therefore, this study has included, for example, the UN Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law as relevant practice, in particular because "the instructions in the Bulletin reflect the quintessential and most fundamental principles of the laws and customs of war", even though it is recognised that "the Secretary-General did not consider himself necessarily constrained by the customary international law provisions of the Conventions and Protocols as the lowest common denominator by which all national contingents would otherwise be bound".

We do have also important problems with the binding of force of customary humanitarian law. Most non-state actors cannot be classified as subjects of international law. It is hardly conceivable what is a legal basis of the binding force of humanitarian law. The resolutions of the UN Security Council, even if directed to armed groupings, do not confer legal personality (see above). Moreover, the rules of international customary humanitarian law are not directly applicable, but they require implementation by states. Paradoxically, it might probably be easier to impose an individual criminal responsibility upon direct perpetrators of criminal acts prohibited by international law (if at all...) than to implement international responsibility corresponding with the state responsibility. E.g. references to genocide committed by the Islamic State against Yazidi in Syria, or to war crimes like destruction of Nimrud archeological site in Iraq or destruction of the ruins of ancient Roman town

of Palmyra (in the resolutions of UNESCO) make impression as newspaper titles, but their international legal value is really slender.

CONCLUSIONS

The development of international law on the use of force, in particular the jurisprudence of the ICJ and the state practice, did not modify the law established under the UN Charter. This remark remains actual even if one accepts a simultaneous binding force of the Charter and customary law, according to the suggestion of the Hague Court in the *Nicaragua* case. The ban on the use of force is applicable in transboundary state to state relations. We could say that customary law does not apply to non-state actors because of the lacking international legal personality. On the other hand, states can use armed force against non-state actors, and the scope of their military actions and its qualification depends upon the circumstances. In particular self-defense is admissible, and it does not depend upon attribution of attack to any state. It is disputable, however, whether the intensity of the said military actions by non-state actors is sufficient to amount to armed attack. As already said, we are skeptical as to the international legal personality of non-state actors, and about their possible impact upon customary law-making.