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THE IMPACT OF (THE ABSENCE OF) RECOGNITION ON THE USE OF FORCE

O IMPACTO DO (OU DA AUSÊNCIA DE) RECONHECIMENTO NO USO DA FORÇA

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Abstract: The impact of (the absence of) recognition of an entity as a State on the application of the prohibition to use force relates to the personal scope of application of the prohibition to use force. So far, it has not been analysed in-depth, many writings focusing rather on the possibility to invoke self-defence against non-state actors. Referring to the explanatory note to article 1 of resolution 3314 as interpreted by existing practice (notably the Russian-Ukrainian War), the authors argue against the possibility to invoke any (absence) recognition as a valid justification to use of force.

Keywords: Recognition, Statehood, Use of force, Self-Defense

Resumo: O impacto do (não) reconhecimento de uma entidade como Estado na aplicação da proibição do uso da força diz respeito ao âmbito subjetivo de aplicação da proibição do uso da força. Até à data, não foi analisado em profundidade, há vários trabalhos que optam em vez por se centrar na possibilidade de invocar a legítima defesa contra actores não estatais. Referindo-se à nota explicativa do artigo 1 da Resolução 3314, tal como interpretado pela prática internacional (nomeadamente no contexto da guerra russo-ucraniana), os autores argumentam contra a possibilidade de se invocar qualquer reconhecimento (ou ausência dele) como justificação válida para o uso da força.

Palavras-chave: Reconhecimento, Estadualidade, Uso da força, Legítima defesa

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1. Introduction

On November 13, 1903, the United States of America formally recognized the self-proclaimed "Republic of Panama" (Turk, 1974; Mellander, 1971). This recognition took place only a few days after Panama, which was then a province of Colombia, unilaterally declared independence, in the context of an internal conflict. It paved the way to the conclusion of a treaty related to the construction of an interoceanic canal, allowing the US to deploy troops and to exercise jurisdiction in the zone. Panama was then recognized as a State by several others and the Republic of Colombia eventually renounced to protest the secession of the northern part of its territory.

More than one century later, similar events gave rise to an entirely different reaction in the international society. Following the beginning of what Russia called a "special military operation" against Ukraine in February 2022, the condemnation of the Russian operations has been overwhelming, and came from a large variety of actors, among which, the UN General Assembly (UNGA), the UN Secretary General, numerous international organisations and States as well as international law scholars, either individually or collectively, through international law societies.[2] A simple survey of these condemnations shows a general rejection of all grounds that could be invoked in support of the legality of Russia's military operation against Ukraine. More particularly, the Russian legal position was formulated in the letter sent to the United Nations Security Council (UNSC) on 24 February 2022, the day that intervention in Ukraine began,[3] and was reiterated in a letter sent to the International Court of Justice (ICJ) on 7 March 2022 in the context of the proceedings instituted by Ukraine.[4] In the letter sent to the Court, Russia clearly asserts that the right to self-defence enshrined in article 51 of the UN Charter and customary international law is the only legal basis for the intervention.[5] In the letter sent to the UNSC, Russia further explains that it launched the intervention

> in accordance with Article 51 (Chapter VII) of the Charter of the United Nations, [...] pursuant to the treaties on friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, as ratified by the Federal Assembly on 22 February this year.[6]

2. For detailed references to the condemnations of the Russian military operation in Ukraine see Corten, Koutroulis (2023).

3. Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-general. 24 February 2022. UN Doc S/2022/154.

4. *Allegations of Genocide* case: Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case. 7 March 2022. Available at https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf.

5. *Ibid*: para 15.

6. Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-general. 24 February 2022. UN Doc S/2022/154: 6.

Indeed, it is important to remember that in May 2014, in the wake of the annexation of Crimea by Russia, the authorities of the Donetsk and Luhansk oblasts had organised referenda in their respective territories which resulted in a 90% vote in favour of "self-rule".[7] Following these results the two separatist regions proclaimed their independence but were not recognised by any State, including the Russian Federation.[8] On 21 February 2021, the President of the Russian Federation recognised the two separatist entities as independent states and concluded with them treaties of friendship, cooperation, and mutual assistance.[9] On the basis of those agreements, Russian troops were deployed in the territories of the two separatist regions, in order to "maintain the peace", as the representative of the Russian Federation stated in the relevant discussion that took place in the UNSC:

> In accordance with the agreements signed with them [i.e. the two separatist republics] today and on the basis of their appeals, the armed forces of the Russian Federation will perform functions of maintaining peace on the territories of the Luhansk People's Republic and the Donetsk People's Republic.[10]

On the day of the invasion, the Russian Federation representative invoked once again the agreements signed with the two separatist regions. The reference to the "peace maintaining" function of the troops — untenable in view of the circumstances — was dropped and the agreements were linked to the invocation of the right to self-defence under article 51 of the UN Charter:

> The leadership of the Luhansk and Donetsk People's Republics have asked us to provide military support in accordance with the bilateral cooperation agreements concluded at the time as their recognition. This is a logical step and the consequence of the actions of the Ukrainian regime. […] That decision [i.e. to launch the "special military operation"] was made in accordance with Article 51 of the Charter of the United Nations, […] and pursuant to the Treaty of Friendship and Mutual Assistance signed with the Donetsk and Luhansk People's Republics.[11]

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7. Ukraine rebels hold referendums in Donetsk and Luhansk. 11 May 2014. BBC News. Available at: https://www.bbc.com/news/world-europe-27360146.

8. Ukraine separatists declare independence – Leaders of eastern Donetsk and Luhansk regions declare independence after claiming victory in Sunday's self-rule vote. 12 May 2014. Al Jazeera. Available at: <https://www.aljazeera.com/news/2014/5/12/ukraine-separatists-declare-independence>; Ministry of Foreign Affairs of France. Understanding the situation in Ukraine since 2014. Available at : https://www.diplomatie.gouv.fr/en/country-files/ukraine/situation-in-ukraine-what-is/understanding-the-situation-in-ukraine-since-2014/.

9. Russian Federation: President of Russia. Address by the President of the Russian Federation. 21 February 2022. Available at: http://en.kremlin.ru/events/president/news/67828; Russian Federation: President of Russia. Signing of documents recognizing Donetsk and Lugansk people's Republics. 21 February 2022. Available at: http://en.kremlin.ru/events/president/news/67829; UNSC Verbatim Record. 21 February 2022. UN Doc S/PV.8970: 11.

10. UNSC Verbatim Record. 21 February 2022. UN Doc S/PV.8970: 12.

11. UNSC Verbatim Record. 23 February 2022. UN Doc S/PV.8974: 12; The same argument was reiterated in Russia's intervention before the UNGA; UNGA Verbatim Record. 28 February 2022. UN Doc A/ES-11/PV.1: 7.

As it has been stated above, the Russian military operation has been widely condemned as a violation of the UN Charter. There is therefore no doubt that the construction according to which a State can recognise a separatist entity as a State and then attempt to justify its military actions as an exercise of the recognised entity's right to collective self-defence has been rejected as well.[12]

Despite the rejection of the argument put forth by the Russian Federation in this specific precedent, the Russian position raises a more general question relating to the impact of recognition on the application of the prohibition to use force. Is *jus contra bellum* completely impervious to recognition or are there cases where recognition could affect the application of article 2(4) of the UN Charter? The recent tensions between Serbia and Kosovo[13] or between China and Taiwan[14] are situations illustrative of the stakes behind this question. For example, would the prohibition to use force apply to a military operation conducted by Serbia in Kosovo or by China in Taiwan?

The impact of (the absence of) recognition of an entity as a State on the application of the prohibition to use force relates to the personal scope of application of the prohibition to use force. In this respect, particularly since the September 11 attacks and the "war against terror", the debate has been dominated by the question of whether the right of self-defence can be exercised against armed groups, overshadowing other aspects of the *ratione personae* application of article 2(4) of the UN Charter such as the one identified here.[15] Taking a cue from the view put forth by the Russian Federation in the specific context of the military intervention against Ukraine, we will thus look more closely into whether and to what extent *jus contra bellum* is influenced by recognition first by examining the relevant texts, namely the UNGA resolution 3314(XXIX) and the discussions relating to its adoption (II), and then by analysing some precedents (III). On that basis, we will envisage how article 2(4) of the UN Charter deals with entities whose statehood is contested and how it would apply to resorts to force involving such entities, like the ones of Kosovo or Taiwan mentioned above (IV).

12. See Corten, Koutroulis (2023).

13. Kosovo and Serbia are on the verge of conflict again. The Economist. 20 December 2022. Available at: https://www.economist.com/europe/2022/12/20/kosovo-and-serbia-are-on-the-verge-of-conflict-again; Kosovo: Serbia puts troops on high alert over rising tensions. BBC News. 27 December 2022. Available at: https://www.bbc.co.uk/news/world-europe-64099388.

14. China reaffirms threat of military force to take Taiwan: AlJazeera. 10 August 2022. Available at: https://www.aljazeera.com/news/2022/8/10/china-reaffirms-threat-of-military-force-to-take-taiwan; China will never renounce right to use force over Taiwan, Xi says. Reuters. 16 October 2022. Available at: https://www.reuters.com/world/china/xi-china-will-never-renounce-right-use-force-over-taiwan-2022-10-16/; China renews threat against Taiwan as island holds drills. Associated Press. 11 January 2023. Available at: https://apnews.com/article/taiwan-politics-china-government-germany-88cd9b9fcead9d5dba0e8ea364f4dac6.

15. This question has somehow eluded the attention of most main doctrinal works dedicated to *jus contra bellum*, who do not deal specifically and in detail with the application of *jus contra bellum* to entities whose statehood is disputed, with the notable exception of Corten (2021: 158-65).

2. Adoption of Resolution 3314: the formal irrelevance of recognition for the application of the prohibition to use force

It is useful to start this enquiry into the *ratione personae* scope of the prohibition to use force by recalling the text of Article 2(4) of the UN Charter which reads as follows:

> *All Members* shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of *any state*, or in any other manner inconsistent with the Purposes of the United Nations. [16]

As the terms of the provision indicate, the addresses of the prohibition are states which are members to the UN; however, even states which have not joined the organization are protected by it. In other words, from a strictly textual perspective, the "active" aspect of the prohibition's personal scope is narrower that its "passive" one. The adoption by the UNGA in 1970 of what is known as the Friendly Relations Declaration has however confirmed that the prohibition is addressed to "every State" irrespective of whether it is a member of the UN or not. [17] This has been repeated in article 1 of the definition of aggression annexed to UNGA resolution 3314 (XXIX) and its explanatory note. The article reads as follows:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.
>
> Explanatory note: In this Definition the term "State":
>
> (a) Is used *without prejudice to questions of recognition or to whether a State is a member of the United Nations* [...] [18]

It is therefore clear that the subjects to which the prohibition to use force applies, from both an active and a passive perspective, do not necessarily have to be members to the UN but they do have to be states. However, the *jus contra bellum* texts do not deal with the question of when an entity fulfills the necessary conditions for it to become a State, which is left to other rules of public international law. The only thing specified in first sentence of the explanatory note to article 1 of resolution 3314, is that recognition does not affect the existence of an act of aggression, and by extension the application of the prohibition to use force.

16. UN Charter, Article 2(4).

17. UNGA Res 2625 of 24 October 1970. UN Doc A/RES/2625(XXV): Annex "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". Preamble and first principle; see also Ruys (2010: 16-17).

18. UNGA Res 3314 of 14 December 1974. UN Doc A/RES/3314(XXIX): Annex "Definition of Aggression", Art. 1 (emphasis added).

The preparatory discussions of resolution 3314 give some insight as to the origins of this clause. [19] They reveal that the final drafting of the explanatory note is the result of a compromise. On the one hand, the proposal to assimilate political entities to States was broadly rejected. On the other hand, the notion of State was largely defined, which explains the exclusion of the criteria of recognition or of a UN membership.

The starting point is the proposal on the definition of aggression made by a group of six Western States (Australia, Canada, Italy, Japan, US and UK) according to which

> [a]ny act which would constitute aggression when committed by or against a State likewise constitutes aggression when committed by a State or other political entity delimited by international boundaries or internationally agreed lines of demarcation against any State or other political entity so delimited and not subject to its authority. [20]

The reference to "other political entities" and the proposal to apply to them the prohibition to use force sparked a heated debate. Some States accepted the idea that "entities which were not generally recognized as States or whose status in international law could be questioned in some other way" would be subject to *jus contra bellum*. [21] The States supporting this approach were ready to broaden the personal scope of application of the prohibition to use force to "entities that were not States or were not generally recognized as States" [22]. The US explained that this clause concerned entities

> whose claims to statehood might not be universally recognized, or which might not even make an unqualified claim to that status [...] it should be made clear, for example, that a rebellious dependent Territory might become an aggressor against its neighbours even though its claims to statehood were not universally recognized or were even universally denied. [23]

19. See generally, Corten (2021: 159-61).

20. Report of the Special Committee on the question of defining aggression. 24 February – 3 April 1969. UNGA Official records; 24th session; Supp no. 20. UN Doc A/7620: para 11.

21. *Ibid*., para 23. The representative of the US explained that "[t]here ware at present certain political entities whose status in international law was more or less widely contested or subject to certain reservations, but the essential rights and obligations of international law and of the Charter concerning the use of force applied to them too"; A/AC.134/SR.10 (17 June 1968) in UNGA, 1968 Special Committee on the question of defining aggression, A/AC.134/SR.1-24 (30 September 1968), 121.

22. A/AC.134/SR.11 (18 June 1968) in A/AC.134/SR.1-24 (30 September 1968), 131 (Canada). Australia also asserted that the provisions of the Charter extended to non-State entities and that "it was important specifically to cover that aspect in the definition of aggression", A/AC.134/SR.18 (1 July 1968) in *ibid.*, 131. See also United Arab Republic, A/AC.134/SR.22 (5 July 1968) in *ibid.*, 248.

23. A/AC.134/SR.19 (2 July 1968) in A/AC.134/SR.1-24, 199. The US representative further explained that he "has not been concerned with political entities universally acknowledged as not being States" but he "had in mind certain political entities whose status in international law was in dispute, but which claimed statehood, with or without qualification, their claim being either supported or not supported by one or more other States"; he added that "[c]ertain political entities whose status in international law was disputed but which controlled territory might be in fact in a position to use force against a territory which under international law was situated outside their frontiers

In a subsequent meeting, faced with the objections voiced by many states as to the inclusion of such entities in the scope of the prohibition to use force, the representative of the US gave concrete examples:

> As to the argument that only States could be victims or perpetrators of aggression, it was self-evidently wrong. […] [I]f an entity not recognized by any States as being a State, but exercising governmental authority, however unlawfully, attacked one of its neighbours, would it be said that there was no aggression because the aggressor was not a State? If a State in the Middle East, a Member of the United Nations widely recognized as a State, were to attack its neighbours which had not recognized it as a State, would those neighbours be stopped from alleging aggression because of their non-recognition? [24]

As the discussions advanced, further specific examples were given. Making the link between the suggested clause and the exercise by colonies of their right to self-determination, Guyana was the first to critically highlight "the implications entailed" by the clause "for the colonies of Rhodesia, Mozambique and Angola.". [25] The US invoked the resolutions adopted on Katanga and Southern Rhodesia as proof that "the United Nations had widely interpreted the concept of a "State" and the obligations incumbent on entities whose statehood was challenged". [26] Italy referred to "divided countries such as Korea, Viet-Nam and China" adding "countries like the German Democratic Republic or Israel which were not universally recognized as States" as well as "Rhodesia, which was recognized as a State by no one but still exercised authority over a territory." [27]

The ambiguity of the term "other political entities", the different nature of the illustrations and examples given, as well as the link to the application of the definition of aggression to colonies and national liberation movements that were fighting in the exercise of their right to self-determination dominated — and to a large extent obscured — the debate. The exchanges between the members of the Special Committee on the question of defining aggression reveal how difficult it was for the participants to delimitate the

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and was not under their authority"; A/AC.134/SR.20 (3 July 1968) in *ibid*., 221-2. As one of the sponsors of the draft, Italy specified that "[t]he reference to political entities which were not States, i.e., which were not recognized as such by certain countries, was intended to put them on the same footing as States so that they could not try to evade the application of the definition", A/AC.134/SR.46 (26 March 1969) in UNGA, Special Committee on the question of defining aggression – 2nd Session, A/AC.134/SR.25-51 (26 June 1969), 196. Italy further insisted that the entities covered by the proposal were the ones "which were delimited by international boundaries or internationally agreed lines of demarcation", A/AC.134/SR.55 (16 July 1970) in UNGA, Special Committee on the question of defining aggression – 3rd Session, A/AC.134/SR.52-66 (19 October 1970), 21.

24. A/AC.134/SR.59 (22 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 68.

25. A/AC.134/SR.56 (17 July 1970) in *ibid.*, 29.

26. A/AC.134/SR.65 (28 July 1970) in *ibid.*, 151.

27. A/AC.134/SR.66 (29 July 1970) in *ibid.*, 159. See also A/AC.134/SR.85 (9 February 1971) in UNGA, Special Committee on the question of defining aggression – 4th Session, UN Doc A/AC.134/SR.79-91 (7 June 1971), 45: "the concept of political entities […] would have the advantage of making it possible to qualify as aggression an act committed by a political entity with the objective characteristics of a State, which, having come into being in a manner condemned by the United Nations, could not be recognized as a State by that Organization."

scope of the notion of "political entities" and — either in good or in bad faith — to even understand what exactly they were discussing about. [28]

Be that as it may, most of the States rejected the reference to "other political entities", arguing that "any definition of aggression strictly in conformity with the Charter should necessarily exclude any geopolitical entity not envisaged by the provisions of the Charter – in short, all entities which were not States". [29] According to the latter view,

> [t]he term "State" should be retained, in keeping with the framework and language of the Charter, without prejudice to the possibility of its interpretation in a broader sense, that is, not requiring that the "State" concerned should be totally and unanimously recognized by all member States of the United Nations. [30]

The representative of Cyprus clearly made the distinction between unrecognized States and entities other than States:

> In the case of entities other than States, the use of force was a question which came under the Commission on Human Rights or was covered by Article 11 of the Charter and did not involve the definition of aggression. On the other hand, the fact that some States were not universally recognized did not mean that they did not exist as States, that they were not bound to observe the principles of the Charter or that, in consequence, the definition of aggression did not apply equally to them. [31]

In the same vein, for the USSR, any definition of aggression must be based on the premise that only full subjects of international law, that was to say States, acted in the international arena. [32] Accordingly, "a definition which was made to apply to political entities without statehood would be

28. See, for example, the extensive discussion in A/AC.134/SR.65 (28 July 1970) and A/AC.134/SR.66 (29 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 147-66.

29. A/7620, para 24. Along similar lines, Bulgaria asserted that "the term "State" was sufficiently wide in meaning to cover all entities to which the definition should apply", A/AC.134/SR.57 (20 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 46. See also USSR, A/AC.134/SR.58 (21 July 1970) in *ibid.*, 50; Yugoslavia, A/AC.134/SR.58 (21 July 1970) in *ibid.*, 61.

30. A/7620, para 60. See also Ecuador: "Most, if not all, of the entities which were described as political entities were genuine sovereign States. The fact that they were not recognized by some governments did not alter their status as such", A/AC.134/SR.58 (21 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 54.

31. A/AC.134/SR.32 (10 March 1969) in A/AC.134/SR.25-51 (26 June 1969), 43. See also Guyana: "a definition of aggression in the strict Charter sense must necessarily exclude any geo-political entity not contemplated in the provisions of the Charter – in short, all non-state entities", A/AC.134/SR.33 (12 March 1969) in *ibid.*, 54; Iran: aggression "should be concerned with the use of force in relations between States, although it might, conceivably, take account of political entities which were de facto possessed of the characteristics of States and which had received a certain amount of de jure recognition by other States" (emphasis in the original), A/AC.134/SR.41 (24 March 1969) in *ibid.*, 134;

32. A/AC.134/SR.58 (21 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 50; see also A/C.6/SR.1206 (26 October 1970) para 6.

unacceptable to the Soviet Union also, for reasons of principle".[33] This position was taken up by all Socialist countries,[34] by the Non-Aligned States[35] and even certain Western States.[36] Understandably, the United States then renounced to the introduction of the concept of "political entity" into the definition of aggression.[37]

By contrast, there was broad agreement that recognition was not a constitutive element of statehood. On this point, USSR stated that "[t]he definition of aggression should be based on the concept of the State without invoking the recognition of States as a criterion."[38] Along similar lines, Ecuador asserted that "statehood did not depend on recognition. The constitutive features of the State were specific and sufficient to establish statehood. Political entities which possessed all those features were true subjects of law."[39] Syria affirmed that "the definition of aggression should

33. A/AC.134/SR.65 (28 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 148; see also A/AC.134/SR.65 (28 July 1970) in *ibid.*, at 148; see also Romania, A/AC.134/SR.65 (28 July 1970) in ibid.

34. Ukraine, A/C.6/SR.1207 (27 October 1970) para 42 and A/C.6/SR.1274 (3 November 1971) para 26; Belarus, A/C.6/SR.1270 (28 October 1971) para 44; Czechoslovakia, A/C.6/SR.1273 (2 November 1971) para 43; Poland, A/C.6/SR.1275 (3 November 1971), 170, para 7; Romania, A/C.6/SR.1207 (27 October 1970) para 25 and A/AC.134/SR.86 (10 February 1971) in UNGA, Special Committee on the question of defining aggression – 4th Session, A/AC.134/SR.79-91 (7 June 1971); and Bulgaria, A/AC.134/SR.86 (10 February 1971) in *ibid*.

35. Iraq, A/C.6/SR.1202 (16 October 1970) para 16; Yugoslavia, A/AC.134/SR.58 (21 July 1970) in A/AC.134/SR.52-66 (19 October 1970); Cyprus, A/AC.134/SR.60 (22 July 1970) in A/AC.134/SR.52-66 (19 October 1970) and A/C.6/SR.1209 (28 October 1970), para 29); Uganda, A/C.6/SR.1203 (20 October 1970) para 10; Mexico, A/C.6/SR.1203 (20 October 1970) para 16; Haiti, A/C.6/SR.1203 (20 October 1970) para 38; Iran, A/C.6/SR.1203 (20 October 1970), para 44; Algeria, A/C.6/SR.1205 (22 October 1970), para 42; Cuba, A/C.6/SR.1206 (26 October 1970), para 68 and A/C.6/SR.1167 (3 December 1969), para 45 and A/C.6/SR.1273 (2 November 1971) para 31; Central African Republic, A/C.6/SR.1208 (27 October 1970), para 16; Ghana, A/C.6/SR.1269 (27 October 1971), para 5 and A/AC.134/SR.65 (28 July 1970) in A/AC.134/SR.52-66 (19 October 1970); Iraq, A/C.6/SR.1271 (1 November 1971), para 17; Syria, A/C.6/SR.1272 (2 November 1971), paras 15 and 17); Zambia, A/C.6/SR.1276 (4 November 1971), para 25; Cameroon, A/C.6/SR.1206 (26 October 1970), para 31; Gabon, A/C.6/SR.1205 (22 October 1970), para 34; Madagascar, A/C.6/SR.1206 (26 October 1970), para 72; Sudan, A/C.6/SR.1272 (2 November 1971), para 52; and Afghanistan, A/C.6/SR.1275 (3 November 1971), para 13; Chile, A/C.6/SR.1271 (1 November 1971), para 33 and A/C.6/SR.1167 (3 December 1969),para 9; Peru, A/C.6/SR.1274 (3 November 1971), para 18; Colombia, A/C.6/SR.1272 (2 November 1971), para 43; Guyana, A/AC.134/SR.33 (12 March 1969) in A/AC.134/SR.25-51 (26 June 1969) and A/AC.134/SR.56 (17 July 1970) in A/AC.134/SR.52-66 (19 October 1970). See also El Salvador, A/C.6/SR.1272 (2 November 1971), para 28; and Costa Rica, A/C.6/SR.1276 (4 November 1971), para 3 (both countries are not members of the Non-Aligned Movement).

36. According to France, "The provisions of Article 2(4) of the Charter and of Chapter VII governed only the use of force by one State against another [...]", A/AC.134/SR.17 (28 June 1968) in A/AC.134/SR.1-24, 162 ; see also A/C.6/SR.1441 (19 November 1973), para 46; see also Greece, A/C.6/SR.1270 (28 October 1971), para 19 and A/C.6/SR.1348 (2 November 1972), para 27.

37. A/AC.134/SR.65 (28 July 1970) in A/AC.134/SR.52-66 (19 October 1970).

38. A/AC.134/SR.66 (29 July 1970) in *ibid.*, 164; Ghana also stated that "[t]he idea that the recognition or non-recognition of a State by certain particular States should be the basis for determining whether or not that State existed was not acceptable to his delegation." A/AC.134/SR.37 (18 March 1969) in A/AC.134/SR.25-51, 98.

39. A/AC.134/SR.66 (29 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 163. See also Guyana: "The membership of the United Nations included States whose statehood

not involve the criterion of the recognition of States. The fact that a State had not been recognized by other States, as in the case of Israel, should not prevent the application of enforcement action against that State." [40] Mexico rejected the idea according to which "the legal existence of a State could be placed in doubt simply because it was not recognized by a majority of members of the international community." [41]

In light of the positions expressed and agreement on the point about recognition, the issue was referred to unofficial consultations. In the context of an informal negotiating group created in order to deal with several questions relating to the definition of aggression that were pending before the Special Committee on the question of defining aggression, it was agreed to add to the general part of the definition the following text:

> In this definition, the term "State" is used without prejudice to questions of recognition or to whether a State is a member of the United Nations and includes the concept of a "group of States". [42]

This text became, with very slight adjustments, the final text of the explanatory note.

As it was shown above, several different scenarios hide behind this general statement according to which recognition is not a prerequisite for the existence of a State and therefore for the application of the prohibition to use force in both its active and its passive dimension. These scenarios will be identified and examined in light of the practice in the application of the *jus contra bellum* rules. This practice reveals that the conflicts involving non-state political entities are not regulated by *jus contra bellum*, even if the (absence of) recognition can play a role in distinguishing between such political entities and "true" states.

3. Precedents of conflicts involving political entities: the inapplicability of *jus contra bellum* in practice

Beyond the debates that took place in the UN about the definition of aggression, practice reveals a general reluctance to apply Article 2(4) to conflicts involving a State and a political entity that does not meet the criteria of the statehood. In this situation, the entity is generally not

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was not universally recognized. The recognition of a State, in his opinion, was purely declaratory and not constitutive. The fact that a number of States had recognized the existence of a country was not proof of that State's existence as a State", A/AC.134/SR.66 (29 July 1970) in *ibid.*, 163; Algeria: "the definition should refer only to political entities which qualified as States under the concept of statehood implied in the Charter. Recognition was not a prerequisite for statehood", A/AC.134/SR.86 (10 February 1971) in A/AC.134/SR.79-91 (7 June 1971), 56.

40. A/AC.134/SR.66 (29 July 1970) in A/AC.134/SR.52-66 (19 October 1970), 165; see also 166: "any authority which publicly assumed the attributes of a State, even if it was not recognized as a State, could, if necessary, be held responsible for any acts of aggression committed by it, and the absence of recognition should not be used by that State as an excuse for possible aggression.".

41. A/AC.134/SR.82 (4 February 1971) in A/AC.134/SR.79-91 (7 June 1971), 21.

42. Report of the Special Committee on the question of defining aggression. 31 January – 3 March 1972. UNGA Official records; 27th session; Supp no. 19. UN Doc A/8719: 15.

recognized as a State, or is only recognized by a (small) minority of States. Still, the (absence) of recognition is not the criterion justifying the (in)applicability of *jus contra bellum*. It must rather be considered as a sign of how fragile the statehood of the entity concerned is. In the following lines, we will turn to various precedents confirming this thesis, ranging from the aftermath of the Charter's adoption to recent conflicts: the Korean war (1950-1953), the break-up of Yugoslavia (1991-1992), Abkhazia and South Ossetia (2008) and Nagorno Karabakh (2020).

3.1. The Korean War (1950-1953)

One first example is the 1950-1953 Korean War.[43] At first sight, this precedent concerned a conflict, internal to a State that was not a UN Member, between the governmental authorities in Seoul and irregular forces located in the North and supported by China and the USSR. Against this background, a certain ambiguity characterized the positions taken by States.

On the one hand, despite the fact that at the time North Korea was not considered as a State, both the UNSC and the UNGA referred to an "armed attack" committed by "forces from North Korea" against the Republic of Korea, while the UNSC qualified the attack as a "breach of the peace", recommending to UN Member States to assist the Republic of Korea "as may be necessary to repel the armed attack and to restore international peace and security in the area."[44] These findings and the views expressed have been interpreted as testifying to the application of article 2(4) to North Korea's resort to force and of article 51 to the Republic of Korea's reaction (Alexandrov, 1996: 252-63; Kunz, 1951: 139; Kleczkowska, 2019: 330-2).

On the other hand, the intervening states did not invoke self-defence to justify their military operation in Korea. They rather seemed to refer to both the consent given by the only UN-recognized government of Korea at the time[45] and to the resolutions adopted by the General Assembly recommending support to this government. This view was strongly contested by the USSR and its allies. These States considered that the Western military operations were equivalent to a prohibited intervention in the internal affairs of Korea, which was still considered as a unitary state, even though their views differed as to whether it was represented by the government in the North or in the South.

All in all, the positions expressed during the Korean precedent were so ambiguous that it seems difficult to establish, on the basis of this precedent, a rule prohibiting force between States and non-State entities (Corten, 2021: 161-2). It can rather be concluded that no State explicitly argued that *jus contra bellum* applied inside the Republic of Korea.

43. For a full presentation of the precedent and the views adopted, see White (2018).

44. UNSC Res 82 of 25 June 1950. UN Doc S/RES/82 (1950): preambular paras 3, 4; UNSC Res 83 of 27 June 1950. UN Doc S/RES/83 (1950): preambular para 1 and para 1; UNSC Res 84 of 7 July 1950. UN Doc S/RES/84 (1950): preambular paras 1 and 2 and para 1; UNGA Res 376 of 7 October 1950. UN Doc A/RES/376 (V): preambular para 3.

45. UNGA Res 195 of 12 December 1948. UN Doc A/RES/195 (III).

3.2. The break-up of Yugoslavia (1991-1992)

The conflicts in the context of the dissolution of the former Yugoslavia also gave rise to interesting debates which can give useful insight on the issue under analysis. Indeed, and as in the Korean conflict, they reveal a reluctance to apply *jus contra bellum* as long as some of the parties cannot be considered as States. This particular example illustrates that even when political entities are recognized by a minority of States, *jus contra bellum* does not automatically apply. The situation changes only when those entities are universally recognized. This universal recognition, materialized by the admission to the UN, is however *not* presented as the formal condition triggering the applicability of the use of force rules enshrined in the Charter. As will be understood in the following lines, for this applicability, what matters is the "objective" existence of the new State.

As a brief reminder of the facts, following the organization of referendums, the parliaments of Croatia and Slovenia proclaimed the independence of the two Republics on 25 June 1991.[46] Following the report of the "Badinter Commission" and the unilateral recognition by Germany in December 1991, came the recognition by other members of the European Community in January 1992,[47] resulting in recognition by more UN member States[48] before they joined the UN in 22 May 1992.[49] As for Bosnia-Herzegovina, its referendum was held on 1 March 1992, and was followed by the recognition by the European Community member States and the US in 6 April 1992, the admission as a state member of the Conference on Security and Cooperation in Europe on 4 May 1992,[50] and finally the admission as a UN member on 22 May 1992.[51] For the purposes of applying the prohibition to use force, the admission of these three States to the UN marks the point from which their statehood cannot be contested. But what about the active hostilities between the three entities and the forces of the amputated Yugoslavia that took place before the admission? Aside from Slovenia, Croatia and Bosnia-Herzegovina were actively involved in a prolonged confrontation with the Yugoslav forces and with each other which had started before their admission to the UN. For the purposes of our analysis, it is thus important to identify whether this resort to force was considered as being regulated by, and possibly a violation of, article 2(4) of the UN Charter.

A review of the resolutions adopted before the 22 May 1992 by the UNSC with respect to the conflicts in question shows that no reference to articles 2(4) or 51 of the UN Charter has been made. The Council only asserted that the situation in Yugoslavia constituted a "threat to international peace and

46. UNSG. Application of the Republic of Croatia for admission to membership in the United Nations: Note by the Secretary-General. UN Doc A/46/912 – S/23884; 7 May 1992: 2; See Republic of Slovenia. 10 Years of Independence: Path to Slovene State. Available at http://www.slovenija2001.gov.si/10years/path/.

47. See Pellet (1991).

48. *Ibidem*.

49. UNGA Res 46/238 of 22 May 1992. UN Doc A/RES/46/238 (Croatia); UNGA Res 46/236 of 22 May 1992. UN Doc A/RES/46/236 (Slovenia).

50. UNSG. Application of the Republic of Bosnia and Herzegovina for admission to membership in the United Nations: Note by the Secretary-General. UN Doc A/46/921 – S/23971. 19 May 1992: 2.

51. UNGA Res 46/237 of 22 May 1992. UN Doc A/RES/46/237.

security".[52] Negotiations among the Yugoslav republics on the future form of their co-existence were ongoing, in some cases alongside hostilities.[53]

During the discussions held in the UNSC on 25 September 1991, the predominant view was that the conflict was internal and that the invocation of Chapter VII of the Charter through the use of a "threat to international peace and security" was either premature or justified by the international effects the conflict risked producing.[54] No State treated the resort to force by the Yugoslav forces explicitly as a violation of article 2(4) of the UN Charter, but some states referred to the "unacceptability of any modification of frontiers through the use of force",[55] calling for "the strict observance of the prohibition on the use of force" and for "no changes by force of the borders between the Yugoslav republics".[56] Absent any specific qualification of the frontiers as international, this statement obviously regards internal delimitations.

The content of the positions transmitted to the UNSC previous to the adoption of its 27 November 1991 resolution is similar,[57] with the European Community member States generally rejecting "the use of force to change established borders, whether internal or external".[58] Hungary and Poland expressed a more ambiguous position in asserting that

52. UNSC Res 713 of 25 September 1991. UN Doc S/RES/713 (1991): preambular para 4; UNSC Res 721 of 27 November 1991. UN Doc S/RES/721 (1991): preambular para 4; UNSC Res 724 of 15 December 1991. UN Doc S/RES/724 (1991): preambular para 3; UNSC Res 727 of 8 January 1992. UN Doc S/RES/727 (1992): preambular para 3; UNSC Res 740 of 7 February 1992. UN Doc S/RES/740 (1992): preambular para 5; UNSC Res 743 of 21 February 1992. UN Doc S/RES/743 (1992): preambular para 5. See Corten (2021: 140-141).

53. See the description of the situation in UNSC. Report of the Secretary-general pursuant to paragraph 3 of Security Council resolution 713 (1991). UN Doc S/23169 (25 October 1991).

54. UNSC Verbatim Record. 25 September 1991. UN Doc S/PV.3009: 21 (Belgium), 27 (Ecuador), 29-32 (Zimbabwe), 33 and 36 (Yemen), 37-38 (Cuba), 46 (India), 49-50 (China), 53 (USSR), 57 (UK), 58-59 (US), 64 (Zaire).

55. *Ibid*., 22 (Belgium).

56. *Ibid.*, 26 (Austria). See also *ibid*., 26 (Ecuador), 56 (UK: "the use of force is unacceptable, […] any change of borders by force is unacceptable"), 59 (US).

57. See the declarations on Yugoslavia adopted at the informal meetings of Ministers for Foreign Affairs of the European Community member States on 5 and 6 October 1991, annexed to S/23114. 7 October 1991: 2 and 3; "Declaration on the situation in Yugoslavia" annexed to UN Doc S/23181 (30 October 1991): 2-3; UNSC. Letter dated 7 October 1991 from the Permanent Representative of Bulgaria to the United Nations addressed to the Secretary-General: annex "Declaration issued by the Government of Bulgaria". A/46/531 – S/23117. 7 October 1991: 2: "The Bulgarian Government considers the use of military force for solving disputed issues and for redrawing the internal borders between the republics to be totally unacceptable"; UNSC letter dated 26 November 1991 from the Permanent Representative of Czechoslovakia to the United Nations addressed to the President of the Security Council. UN Doc S/23248. 26 November 1991.

58. "Declaration on Yugoslavia, issued at The Hague on 18 October 1991, annexed to UN Doc S/23155. 21 October 1991: 2. Along the same general lines, see "Declaration on Yugoslavia (Extraordinary EPC Ministerial meeting, Rome, 8 November 1991), annexed to UN Doc S/23203. 8 November 1991: 2: "the use of force and a policy of fait accompli to achieve changes of borders is illusory and will never be recognized by the Community and its member States" (underlined in the original); "Declaration on Yugoslavia" by the Council of Ministers of the Western European Union, annexed to UN Doc S/23236. 22 November 1991: 2: "under no circumstances will territorial changes brought about by force be recognized. […] the stationing of peace-keeping forces must

> 1. The armed activity of the federal armed forces on the territory of Croatia and the aggression against Croatia are acts prohibited under international law, particularly by the Charter of the United Nations.
>
> 2. Croatia is suffering from a massive and grave violation of the law relating to armed conflicts.
>
> 3. The armed conflict on the territory of Croatia does not constitute an internal affair, but rather an armed action against aspirations of nations based on their right to self-determination. [59]

In this case, the reference to the law of armed conflicts and the "aspirations of nations based on their right to self-determination" could discourage readers from interpreting the mention of the UN Charter and the word "aggression" as an invocation of *jus contra bellum*. What is sure is that neither Article 2(4) nor Article 51 of the Charter were invoked.

Even when the situation deteriorated in Bosnia Herzegovina in March and April 1992, that is before its admission as a UN member State, the UNSC avoided invoking articles 2(4) and 51 of the UN Charter. [60] The member States of the European Community which had already recognized Bosnia-Herzegovina denounced the violation of its sovereignty and territorial integrity but stopped short of explicitly claiming that there had been a violation of article 2(4) of the UN Charter. [61]

At this stage, it can be observed that *jus contra bellum* is not mentioned as regulating the relations between a State and political entities seeking to secede, even by the minority of third States that recognized them. For what reason? Probably because those secessionist entities did not meet the criteria necessary to become a State in international law. More particularly,

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not in any way sanction the seizure of territory by force." See also, UNSC. Report of the Secretary-General pursuant to Security Council resolution 721 (1991). UN Doc S/23280. 11 December 1991: 8, para 25: "The Conference [on Yugoslavia] has also, with the agreement of its participants, ruled out any changes in external or internal borders by means of force"; UNSC. Further Report of the Secretary-General pursuant to Security Council resolution 721 (1991). UN Doc S/23592. 15 February 1992: 5, para 18: "the principle that the internal boundaries of Yugoslavia cannot be changed by force or without the consent of the parties concerned."

59. "Statement by the Prime Minister of the Republic of Poland and the Prime Minister of the Republic of Hungary on the continuation of attacks against the Republic of Croatia and in particular against her capital, Zagreb, by the deferral armed forces (People's Army of Yugoslavia), issued at Warsaw on 8 October 1991", annexed to UN Doc S/23136. 10 October 1991: 2.

60. UNSC Note by the President of the Security Council. UN Doc S/23842. 24 April 1992.

61. Statement on Bosnia-Hercegovina adopted by the European Community and its member States on 11 April 1992, annex to UN Doc S/23812. 14 April 1992: 2. See also the statement adopted on 16 April 1992 annexed to UN Doc S/23830. 22 April 1992: 2. In a letter addressed to the UNSC, Austria and Hungary transmitted a declaration adopted on 15 April 1992 by the CSCE participating States condemning "the violation by Serbian irregular forces and by the Yugoslav National Army of the independence and territorial integrity of [...] Bosnia-Hercegovina" UNSC. Letter dated 24 April 1992 from the Representatives of Austria and Hungary addressed to the President of the Security Council. UN Doc S/23840. 24 April 1992: 2. See also UNSC. Letter dated 26 April 1992 from the Permanent Representative of Hungary to the United Nations addressed to the President of the Security Council. UN Doc S/23845. 26 April 1992: 2.

in the context of a continuing conflict with the Yugoslavian authorities, it was more than questionable that the "independence" criterion could be considered as fulfilled. The absence of explicit reference to *jus contra bellum* could be an indication that such doubts persisted even for States that took the political step of formally recognizing the secessionist entities as States.

Significantly, the situation began to change when Yugoslavia renounced to oppose to the independence of its (former) republics. On 27 April 1992 the republics of Serbia and Montenegro adopted a declaration announcing the formation of the Federal Republic of Yugoslavia as a successor State to the Socialist Federal Republic of Yugoslavia and affirming that they were ready to "fully respect the rights and interests of the Yugoslav Republics which declared independence" and that "[t]he recognition of the newly formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled." [62]

Following the adoption of this declaration, Egypt referred to the bombardment of Sarajevo by the Yugoslav army as "acts of aggression", even if it did without explicitly citing article 2(4) of the UN Charter. [63] In similar lines, the Non-Aligned Movement also "called for the full respect of the territorial integrity of Bosnia-Herzegovina". [64] On 15 May 1992, the UNSC made for the first time a reference to the territorial integrity of Bosnia-Herzegovina demanding that "all forms of interference from outside Bosnia and Herzegovina … cease immediately, and that Bosnia and Herzegovina's neighbours take swift action to end such interference and respect the territorial integrity of Bosnia and Herzegovina." [65]

Other States however remained more reserved and general in their comments and refrained from any reference to violations of territorial integrity, let alone of article 2(4) of the UN Charter. [66]

Unsurprisingly, the tone changes after 22 May 1992. Although there is still no mention of a violation of article 2(4) of the UN Charter, in the discussion that led to the adoption of resolution 757 of 30 May 1992, there was no room for doubting the international character of the conflict in Bosnia-Herzegovina. [67]

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62. Declaration – the representatives of the people of the Republic of Serbia and the Republic of Montenegro, annex to UN Doc S/23877. 5 May 1992: 2.

63. Statement issued by the Ministry of Foreign Affairs of Egypt – 6 May 1992, annexed to UN Doc S/23905. 12 May 1992: 2.

64. Press communiqué issued at the conclusion of the Ministerial meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries at Bali, Indonesia, from 14 to 16 May 1992, annexed to UN Doc A/47/225 – S/23998. 26 May 1992: 6, para 14.

65. UNSC Res 752 of 15 May 1992. UN Doc S/RES/752 (1992): preambular para 6 and para 3. See also UNSC Res 757 of 30 May 1992. UN Doc S/RES/757 (1992): preambular paras 3, 4 and 17.

66. Message from the president of the Sixth Islamic Summit Conference addressed to the Secretary-General, annexed to UN Doc S/23854. 29 April 1992: 2; UNSC. Letter dated 4 May 1992 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General. UN Doc S/23874. 4 May 1992: 2; see also "Declaration on recent events in Sarajevo" adopted by the European Community and its member States on 5 May 1992 annexed to UN Doc S/23892. 8 May 1992: 2; "Declaration on Bosnia and Herzegovina" adopted by the European Community and its member States on 11 May 1992 annexed to UN Doc S/23906. 12 May 1992: 2.

67. UNSC Verbatim Record. 30 May 1992. UN Doc S/PV.3082: 6-7 (Cape Verde), 10 (China), 14-16 (Hungary), 18 (Ecuador), 28-30 (Venezuela), 33-34 (US), 36-38 (Russian Federation). Bosnia-Herzegovina, Slovenia and New Zealand affirm that the actions of

Contrary to the UNSC, the UNGA was more vocal in accepting the application of *jus contra bellum* in the situation in Bosnia-Herzegovina. In its resolution 46/242, adopted on 25 August 1992, the Assembly reaffirmed "the inherent right of the Republic of Bosnia and Herzegovina to individual or collective self-defence in accordance with Article 51 of the UN Charter". [68] Several States that expressed themselves before the UNGA referred either directly or indirectly to the prohibition to use force in international relations as applicable to this situation, without however specifying whether they considered that the violation of the prohibition had begun before 22 May 1992 or not. [69] Finally, the reserved positions adopted prior to the admission of the relevant States to the UN is a clear indication of the reluctance on behalf of the States to accept accepting that article 2(4) applies to entities whose statehood is subject to doubt. It is only when the secessionist entities obviously met the criteria required to become a State that the situation changed. The birth of a new "Federal Republic of Yugoslavia", as it implied a renouncement to the independence of Slovenia, Croatia, and Bosnia-Herzegovina, can be considered as a turning point. The admission of the UN, without being considered as a condition as such, marked the completion of this process.

3.3. Abkhazia and South Ossetia (2008)

Another precedent of resort to force between a State and contested entities is the 2008 conflict in Georgia, in the aspect pertaining to the hostilities between Georgian troops and the separatist regions of Abkhazia and South Ossetia. [70] The *de facto* parliament of South Ossetia had proclaimed the independence of the region on 29 May 1992, with a view to be unified with Russia. However, despite multiple appeals, the Russian authorities had not recognized the independence of the breakaway region before the 2008 conflict. [71] The situation of Abkhazia was similar: no State, including Russia, had recognized Abkhazia as an independent State. [72] In view of the above, it

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the Serbian army amount to acts of aggression; while Slovenia and New Zealand are vague as to the beginning of the aggression, Bosnia-Herzegovina asserts it was a victim of this aggression "by 15 May 1992"; UNSC. Letter dated 27 May 1992 from the Minister for Foreign Affairs of Bosnia and Herzegovina addressed to the President of the Security Council. UN Doc S/24024. 27 May 1992: 1; UNSC. Letter dated 27 May 1992 from the Minister for Foreign Affairs of the Republic of Slovenia addressed to the Secretary-General. UN Doc A/47/234 – S/24028. 28 May 1992: 2; UNSC. Letter dated 29 May 1992 from the Permanent Representative of New Zealand to the United Nations addressed to the Secretary-General. UN Doc S/24034. 29 May 1992: 2.

68. UNGA Res 46/424 of 25 August 1992. UN Doc A/RES/46/242: preambular para 16. The resolution was adopted by 136 votes in favour, 1 against (Yugoslavia) and 5 abstentions (Ghana, Lesotho, Malawi, Namibia, Russian Federation), UNGA Verbatim Record. 25 August 1992. UN Doc A/46/PV.91. 1 September 1992: 76.

69. UNGA Verbatim Record. 24 August 1992. UN Doc A/46/PV.90. 31 August 1992: 8 (Qatar), 23 (Morocco), 24-25 (Bahrein), 27 (Sudan), 31 (Indonesia), 38 (Libya), 42-43 (Saudi Arabia), 74-75 (Czechoslovakia), 82 (Bangladesh), 97 (Oman), 98-100 (Kuweit); UNGA Verbatim Record (25 August 1992) UN Doc A/46/PV.91 (1 September 1992), 3-5 (Peru), 9-10 (Afghanistan), 13 (Colombia), 21 and 23 (Jordan), 26 (Ecuador), 28 (United Arab Emirates), 31-32 (Algeria), 36 (Nigeria), 37-38 (Djibouti), 47 (Costa Rica), 49 (Azerbaijan), 51-52 (Organization of Islamic Conference), 56 (Palestine), 81 (Bolivia).

70. For an overview of the facts see Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG): Report. September 2009. volume II: 199 ff.; Gray (2018).

71. *Ibid.* IIFFMCG: Report, 72.

72. *Ibid*., 129.

was not possible for Russia to ground its intervention against Georgia on the consent of the South Ossetian and Abkhazian authorities either as an intervention by invitation or as collective self-defence; indeed the Russian Federation did not invoke any of these arguments.[73] But given the fact that it was Georgia who started the hostilities, by launching an attack against the capital of South Ossetia, could it be affirmed that, by doing so, it violated *jus contra bellum* and article 2(4) of the UN Charter?

Although this is what the experts of the Independent International Fact-Finding Mission on the Conflict in Georgia argued, this view is unpersuasive in light of the fact that articles 2(4) and 51 were not invoked by any State as being directly applicable to Georgia's resort to force against the two entities. Even South Ossetia and Abkhazia themselves, although they characterised the military operations by Georgia as an "aggression", did not explicitly invoke the UN Charter and referred only to the cease-fire agreements concluded by the parties.[74] It is true, and this was a factor that motivated the Fact-Finding Mission in their assertion, that the military operations conducted by Georgia, could be denounced as a violation of particular agreements concluded by the parties of the civil war, or Security Council resolutions that were adopted according to Chapter VII of the Charter. However, that does not mean that Article 2(4) as such, which was not cited by the Security Council or evoked in those agreements, was violated (Corten, 2021: 164-5).[75] Finally, this precedent confirms that, as long as an entity cannot be considered as a State, it cannot be protected by the rule enshrined in Article 2(4) of the UN Charter.

3.4. Nagorno Karabakh (2020)

The 2020 hostilities between Azerbaijan and Armenia relating to Nagorno Karabakh offer a similar precedent. Following the proclamation of independence by Nagorno Karabakh as the "Republic of Artsakh" on 2 September 1991,[76] the entity has remained unrecognized by all States, including Armenia. Despite this absence of recognition, Armenia and the Nagorno Karabakh authorities argued that Azerbaijan — who in their view was the first to launch the attack — had committed an act of aggression.[77] In a letter transmitted to the UN by Armenia, the Ministry of Foreign Affairs of the Republic of Artsakh claims that the Azerbaijani attack "constitute[s] an act of aggression against the Republic of Artsakh, which, in accordance with the provisions of the Charter of the United Nations, exercises its

73. *Ibid.*, 437–8.

74. *Ibid.*, 506 and 518–22 (South Ossetia), 531–2 and 547–57 (Abkhazia).

75. See also Gray, (2018: 726); Henderson, Green (2008: 133 ff.); Dubuisson, Lagerwall (2009: 455–64); Corten (2010: 53–60); Koutroulis (2015: 619–20).

76. Armenia: Minister of Foreign Affairs. Statement of the MFA of Armenia on the occasion of the 30th anniversary of the proclamation of the Republic of Artsakh. 2 September 2021. Available at: https://www.mfa.am/en/interviews-articles-and-comments/2021/09/02/mfa_statement_artsakh/11054.

77. Statement dated 27 September 2020 by the Ministry of Foreign Affairs of the Republic of Artsakh and Statement dated 28 September 2020 by the Ministry of Foreign Affairs of the Republic of Armenia on the Azerbaijani Aggression against Artsakh, annexed to UN Doc A/75/366 – S/2020/955. 29 September 2020; Statement by the Foreign Ministry of the Republic of Armenia on the statement of the Foreign Ministry of Turkey (11 October 2020) and Ministry of Foreign Affairs of the Republic of Artsakh, Statement on continuing violations of the humanitarian truce by Azerbaijan (12 October 2020), annexed to UN Doc A/75/530 – S/2020/1008. 13 October 2020: 2-3.

inherent right to self-defence".[78] It is however significant that Armenia does not take up the explicit invocation of the "provisions of the UN Charter", nor does it mention a collective exercise of Nagorno Karabakh's right to self-defence under article 51.[79] Azerbaijan, which accused Armenia of starting the conflict, denounced an aggression by the Armenian State as such and invoked its right to self-defence against this State, visibly refusing to recognize any autonomy to the forces of Nagorno Karabakh and equating them to Armenian forces.[80]

In view of the abovementioned precedents and preparatory discussions to the explanatory note, it seems clear that political entities that cannot be considered as States are not protected by the prohibition enshrined in Article 2(4) of the UN Charter. At the same time, that does not mean that recognition does not have any impact whatsoever. As previously mentioned, recognition can obviously be relevant as a sign that the conditions necessary to become a State are met: when an entity is admitted in the UN, it must undoubtedly be considered as a State; when it is only recognized by a minority of States (or even not recognized at all), this absence of recognition is a sign that significant doubts persist as to whether the entity fulfills the objective conditions of statehood, namely the one of "independence" which is the most problematic in such cases. But what are the other consequences that can be deduced, taking into account other precedents than those examined above?

4. Recognition: formally irrelevant but substantially influential

To assess the possible impact of recognition in situations characterized by the absence of a universal recognition, different situations must be distinguished: UN Members not universally recognized, non-member observer States in the UN, and other non-universally recognized States including Kosovo and Taiwan.

4.1. UN Members not universally recognized

Both the discussions leading to the adoption of the explanatory note and the relevant precedents show that membership to the UN is a key element for the application of the prohibition to use force.

78. Statement dated 27 September 2020 by the Ministry of Foreign Affairs of the Republic of Artsakh, annexed to UN Doc A/75/366 – S/2020/955. 29 September 2020: 4.

79. Statement dated 28 September 2020 by the Ministry of Foreign Affairs of the Republic of Armenia on the Azerbaijani Aggression against Artsakh, annexed to UN Doc A/75/366 – S/2020/955. 29 September 2020: 2.

80. UNGA – UNSC. Letter dated 27 September 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. UN Doc A/75/357 – S/2020/948. 28 September 2020; UNGA – UNSC. Letter dated 1 October 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. UN Doc A/75/379 – S/2020/965. 16 October 2020; UNGA – UNSC. Letter dated 3 October 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. UN Doc A/75/492 – S/2020/977. 16 October 2020; UNGA – UNSC. Letter dated 4 October 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. UN Doc A/75/487 – S/2020/973. 16 October 2020.

The German Democratic Republic and Israel are examples that were mentioned during the discussions relating to the adoption of the explanatory note of resolution 3314. As these discussions clearly show, there was general agreement that such cases would be covered by the prohibition to use force in international relations. Indeed, even the States that were hostile to the inclusion of a reference to "political entities" in the definition of aggression did not contest the fact that cases like the one of Israel and the German Democratic Republic were fully covered by the definition of a "State" and thus by *jus contra bellum*. As evoked earlier, the example of Bosnia-Herzegovina is also telling in this respect: membership to the UN is the Rubicon that, once crossed, makes it impossible to contest an entity's statehood, and hence the application of the prohibition to use force to it. In this respect, as it was clearly stated in the discussions on the clause (a) of the explanatory note, for States that are members to the UN, the absence of recognition by other States — in particular by the opposing belligerent party — will not have any impact whatsoever on the application of article 2(4) of the UN Charter. In this scenario, the application of the prohibition is accepted even by the States which have refused to recognize their adversary as a State. Indeed, the opposite approach would open too wide a path to abuses: it would suffice for a State wishing to attack another State to withdraw its recognition in order to avoid being bound by the prohibition to use force.

4.2. Non-member observer States in the UN

That being said, as it was previously mentioned and as the explanatory note makes clear, membership to the United Nations is not a condition for the application of the prohibition to use force. The simplest and most uncontroversial application of this rule is with respect to entities whose statehood is not contested but which, for some reason, are not (yet) members to the UN. An example in this respect are entities who have a non-member observer State status in the UN, like Palestine.[81] Leaving aside the political context of this specific case, on a general level, acquiring the status of an observer State to the UN implies an affirmative pronouncement on behalf of the UNGA about the quality of the relevant entity as a *state*. More plainly put, the fact that an entity is not (yet) a fully-fledged member State to the UN but is just an observer State does not mean that it is not a State. Austria, Finland, Italy, Japan, and Switzerland were all permanent observer states to the UN before they were accepted as member states.[82] No one would challenge the application of Article 2(4) of the UN Charter to all these

81. UNGA Res 67/19 of 29 November 2012. UN Doc A/RES/67/19: para 2. Although it may appear theoretical, the same can be said for the Holy See, who also has an observer state status in the UN; UNGA Res 58/314 of 1 July 2003. UN Doc A/RES/58/314: preambular para 1 and para 1. The Holy See is an entity without a territory, whose international legal personality can "best be conceived as 'unique', *sui generis*"; Ryngaert (2011: 838). It does however have an army: the Pontifical Swiss guard, "a military body made up of Swiss citizens, whose main task is to constantly monitor the safety of the Person of the Supreme Pontiff and of his residence"; see "Pontifical Swiss Guard – Institution, nature and dependence". Available at: https://www.vatican.va/content/romancuria/en/guardia-svizzera-pontificia/corpo-della-guardia-svizzera-pontificia/profilo.html. Should this guard be ordered to launch an attack against the Italian armed forces, or should the Italian armed forces launch an attack on members of the guard, *jus contra bellum* would apply. It is significant in this respect that the Holy See is a party to the treaty on the non-proliferation of nuclear weapons, to a number of disarmament treaties and to the 1949 Geneva Conventions and the 1977 additional protocols thereto (UNGA Res 58/314: para 2).

82. "About Permanent Observers". Available at: https://www.un.org/en/about-us/about-permanent-observers.

States at the time on the grounds that they were "merely" observer States to the UN. In this case, both parts of the explanatory note to article 1 of resolution 3314 can deploy their combined effect: *jus contra bellum* will apply to a State which is not a member to the UN (but simply an observer) without prejudice to the fact that some of the UN member States may refuse to recognize the State in question.

4.3. Other non-universally recognized States

Aside from the above, as the Ukraine conflict and the other precedents show, the real challenge lies with the application of *jus contra bellum* to cases where no link to the UN exists and where the statehood of the relevant entity is truly in question.

The logic of the explanatory note is that statehood must be examined objectively and not subjectively. In other words, it is the factual reality that will determine the applicability of *jus contra bellum* and not the subjective views of the parties involved in the conflict. This principle cuts both ways, that is both in favour and against applying *jus contra bellum*:

(a) firstly, article 2(4) of the UN Charter will apply to an entity that fulfills the criteria of statehood even if that entity is not recognized by its adversary; in this scenario, the absence of recognition will not prevent *jus contra bellum* from applying to a situation where the belligerents are indeed States;

(b) secondly, and conversely, article 2(4) will not apply to an entity that does not fulfill the criteria of statehood even if that entity is recognized by the other belligerents as a state; in this case, the presence of recognition will not make *jus contra bellum* applicable to a situation where one of the two sides is not a state.

In practice, however, this objective analysis has its limits. It is interesting to note in this respect that in all the precedents that were examined above, no reference was made by any State to the explanatory note to article 1 of resolution 3314 (XXIX). As it is logical, the positions that the States which are involved or interested in a conflict put forward in respect of the application of international law to that conflict will be influenced by recognition. Thus, States that have recognized a disputed belligerent entity as a State will be more inclined to accept the applicability of *jus contra bellum* to that entity than the ones who contest its statehood.

For example, should there be a resort to force between the armed forces of the Republic of Cyprus and those of the auto-proclaimed "Turkish Republic of Northern Cyprus" (TRNC), it would come as no surprise if Turkey — the only State who recognizes the TRNC as a State — claimed that the military operation violated Article 2(4) of the UN Charter and that the TRNC had a right to self-defence under Article 51 of the Charter. Following the same logic, the Republic of Cyprus, who considers the northern part of the island as occupied territory and the TRNC authorities as being controlled by Turkey, would refuse to consider TRNC as a distinct entity in regard to which *jus contra bellum* would apply separately; it would probably claim to be exercising its own right to self-defence only against Turkey, similarly to the position adopted by Azerbaijan with respect to the authorities of Nagorno Karabakh.

In reality, in most cases of disputed entities there is an interference by a third State which prevents the main conditions for the existence of a state to be fulfilled in the first place. So, from an objective perspective — of, for example, an international judge that will be called upon to determine whether article 2(4) has been violated — the strong links existing between Armenia and Nagorno Karabakh, Russia and South Ossetia, and Abkhazia, Russia and Transnistria, or Turkey and the TRNC, shed serious doubts into whether these entities are sufficiently sovereign in order to be objectively considered as States. Simultaneously, from the subjective perspective of, for example, the territorial State concerned who either launches (like Georgia in 2008 against South Ossetia) or suffers (like Ukraine in 2014 and 2022) an attack, the dependence of these entities from the State that supports and sustains them facilitates the invocation of *jus contra bellum* by the victim State against the supporting State directly (by Azerbaijan against Armenia, by Georgia against Russia, by Moldova against Russia, or by Cyprus against Turkey). In both approaches, the disputed entity is bypassed and becomes invisible in terms of the *ratione personae* application of *jus contra bellum*.

4.4. The Kosovo case

This leaves us with the cases where no such link exists between the disputed entity and a third State. Kosovo may be a first example, albeit with some qualifiers. If an attack is launched by Serbia against Kosovo, the situation will be similar to the one of Bosnia-Herzegovina in April 1992: Kosovo is not a UN member (or observer) State. It has proclaimed independence and obtained the recognition of several third States, but its statehood is still contested not only by the "parent" State (i.e. Serbia) but also by several third States.

If the positions adopted by States in regards to the late 1991 – early 1992 hostilities in Bosnia are any indication, then a claim for the application of *jus contra bellum* will not easily prevail. It is true that Kosovo's situation is much more stable than the one of Bosnia-Herzegovina in 1992 and it is more plausible to claim that the criteria for statehood are met in 2023 Kosovo than in early 1992 Bosnia-Herzegovina. Yet, an additional element complicating the evaluation of the Kosovo case is the fact that at the roots of its creation lies the 1999 NATO bombing campaign against Serbia which is a violation of the prohibition to use force in international relations (Franchini, Tzanakopoulos, 2018: 594-622). The distinguishing feature of Kosovo with respect to entities like the RTCN, Nagorno Karabakh, South Ossetia, or Donetsk and Lugansk is that in Kosovo there is no ongoing aggression or occupation on behalf of the States which intervened against Serbia in 1999, so there is no room for Serbia to invoke its right to self-defence. However, this does not necessarily mean that Kosovo can be considered as a State protected by the prohibition to use force in international relations. Indeed, the violation of article 2(4) of the UN Charter could prevent the recognition of Kosovo as a State in the name of *ex injuria jus non oritur* and the ensuing obligation not to recognize a situation that is the result of a grave breach of a peremptory norm of public international law.[83] This obligation does not only refer to the formal recognition of Kosovo as a State. It extends to its consideration as a State that would be the direct subject of rights in public

83. UNGA Res 56/83 of 12 December 2001. UN Doc A/RES/56/83: Annex, Articles on the Responsibility of States for internationally wrongful acts, article 41, para 2: "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation." On the *ex injuria jus non oritur* principle, see generally Lagerwall (2016).

international law aiming at protecting an illegally acquired sovereignty, like the right to be the subject of Article 2(4) of the UN Charter and be protected from a resort to force.

The 2010 advisory opinion handed down by the ICJ does not oppose this reasoning since it only dealt with the narrow question of whether the declaration of independence was in violation of applicable rules of international law,[84] explicitly excluding from the scope of the opinion the question "whether or not the declaration has led to the creation of a State or the status of the acts of recognition".[85] On the contrary it seems to confirm the narrow reading of the personal scope of application of Article 2(4). Indeed, the Court asserted that the scope of the principle of territorial integrity enshrined in Article 2(4) of the UN Charter and in the Friendly Relations Declaration "is confined to the sphere of relations between States",[86] and cannot therefore be violated by a declaration adopted by the "representatives of the people of Kosovo."

Yet, some of the positions adopted in the context of the dissolution of the former Yugoslavia indicate a reluctance to accept the use of force in order to resolve these situations, as it is shown by the appeals for no changes by force of the borders between the Yugoslav republics.[87] But the statements made at the time seemed more influenced by political considerations than by a conviction to apply an existing legal rule (Delcourt, Corten, 1998; Delcourt, 2003: 222-225; Christakis, 2001: 208 ff.). As shown above, what is sure is that the majority of views expressed with respect to the hostilities in Yugoslavia did not explicitly accept the application of article 2(4) of the Charter to the breakaway republics before the birth of the new Federal Republic of Yugoslavia on 27 April 1992 or even the admission to the UN on 22 May 1992.

All in all, the Kosovo case appears particularly difficult to address: on the one hand, several arguments plead against the applicability of *jus contra bellum*; on the other, it can be expected that, if force were used by Serbia, many States and institutions would possibly condemn such behaviour by referring to the non-use of force international law. Of course, most of the condemnations would probably be pronounced by States that have recognized Kosovo as a State. But it cannot be excluded that others would also denounce a use of force in such a (hopefully improbable) scenario.

4.5. The Taiwan case

84. ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, advisory opinion of 22 July 2010. ICJ Reports 2010: 425-6, para 56. The Court found that the authors of the declaration "did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim declaration" (*ibid.*, 447-8, para 109) and that the declaration did not violate any applicable rules of international law (*ibid.*, 453, para. 123(3)).

85. *Ibid.*, 424, para 51.

86. *Ibid.*, 437, para 80.

87. See *supra* notes 54 ff..

The case of Taiwan can be analysed in a similar way.[88] On the one hand, China has been consistent in considering Taiwan as part of its territory.[89] On the other, several States have asserted that Taiwan "meets all the prerequisites for statehood."[90] In 2005, China adopted a legislation according to which in case of any attempt "to cause the fact of Taiwan's secession from China [...] the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity."[91] The US position with respect to Taiwan is ambiguous: despite close links including the sustained selling of arms and military equipment, the US has refrained from formally recognizing Taiwan as a State.[92] Recently, the US has asserted that it would come to Taiwan's defense should China attack, although the extent of this pledge is not unambiguous either.[93]

In view of the above, if China does decide to resort to force against Taiwan, it is certain that it will not consider its operations as regulated by *jus contra bellum*. Whether the US will indeed assist Taiwan militarily on the basis of Article 51 of the UN Charter remains to be seen. It has been suggested that in case China attacks Taiwan, the US could proceed to formal recognition of Taiwan as a State and then resort to military action that would be lawful

88. See generally the analysis and references in Corten (2021: 164).

89. Ministry of Foreign Affairs of the People's Republic of China, Statement of 2 August 2022. Available at: https://www.fmprc.gov.cn/eng/zxxx_662805/202208/t20220802_10732293.html: "There is but one China in the world, Taiwan is an inalienable part of China's territory, and the Government of the People's republic of China is the sole legal government representing the whole China." See also, Permanent Mission of the People's Republic of China to the UN, Letter by Ambassador Wang Yingfan, Permanent Representative of China to the United Nations, to the Secretary-General Regarding the Proposed Item of the So-called "Taiwan's Representation in the United Nations". 9 August 2002. Available at: http://un.china-mission.gov.cn/eng/zt/twwt/200208/t20020809_8414212.htm: "the question of Taiwan is a purely internal matter of China and a question for the Chinese people themselves to solve."

90. UNGA: 53rd session. Need to review the General Assembly resolution 2758 (XXVI) of 25 October 1971 owing to the fundamental change in the international situation and to the coexistence of two Governments across the Taiwan Strait: Letter dated 8 July 1998 from the representatives of Burkina Faso, El Salvador, the Gambia, Grenada, Liberia, Nicaragua, Sao Tome and Principe, Saint Vincent and the Grenadines, Senegal, Swaziland and Solomon islands to the United Nations addressed to the Secretary-General. UN Doc A/53/145. 8 July 1998. See also UNGA: 57th session. Request for the inclusion of a supplementary item in the agenda of the fifty-seventh session: Question of the representation of the Republic of China (Taiwan) in the United Nations: Letter dated 1 August 2002 from the representatives of Burkina Faso, Chad, El Salvador, the Gambia, Grenada, the Marshall Islands, Nicaragua, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Solomon Islands and Swaziland to the United Nations addressed to the Secretary-General. UN Doc A/57/191. 20 August 2002.

91. Anti-Secession Law, adopted at the Third Session of the Tenth National People's Congress. 14 March 2005: article 8. Available at: https://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/d-cn20050426 01/d-cn20050426 01en.pdf.

92. See Fisher (2020: 109-11 and 144).

93. The White House. Remarks by President Biden in CNN Town Hall with Anderson Cooper. 21 October 2021. Available at: https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/10/22/remarks-by-president-biden-in-a-cnn-town-hall-with-anderson-cooper-2/; "President Joe Biden: The 2022 60 Minutes interview". CBS News. 22 September 2022. Available at: https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/: "Scott Pelley: But would U.S. Forces defend the island? President Joe Biden: Yes, if in fact there was an unprecedented attack." CBS News specifies that "After our interview a White House official told us U.S. policy has not changed. Officially, the U.S. will not say whether American forces would defend Taiwan."

under the collective exercise of Taiwan's right to self-defence (Fisher, 2020: 145). As the previous analysis and the reactions to Russia's recognition of Donetsk and Lugansk show, it is highly doubtful that recognition will be the decisive argument in making such a resort to force lawful under *jus contra bellum*. The legality of the resort to force on either side will revolve around the question of whether Taiwan is a State not on whether the States involved in the conflict have recognized Taiwan as a State.

5. Concluding remarks

The explanatory note to article 1 of resolution 3314 is a plea for objectivity. Its essential feature is that the application of *jus contra bellum* depends on whether an entity can objectively be considered as having the attributes of the State rather than on whether the belligerent parties subjectively consider that it does or does not have them. However, in reality, the positions expressed by the parties to the conflict will necessarily be influenced by their own subjective view about the statehood of the entity in question. It will thus be difficult for this objective analysis to be materialized from the subjects of public international law themselves.

Finally, looking for guidance in the object and purpose of the *jus contra bellum* does not necessarily always lead to conclusive results. It may be argued that extending the scope of Article 2(4) of the UN Charter to cover entities whose statehood is disputed, would have a pacifying effect on international relations, since the resort to force in such situations — essentially by "parent" States — will be outlawed. This view is based a lot on the deterrent effect of the applicability of Article 2(4) of the UN Charter. However, the application of the principle implies the application of its exceptions. Indeed, as it was mentioned above, artificial constructions like the one suggested by the experts of the international fact-finding mission for the conflict in Georgia are unpersuasive. In other words, if the deterrent effect does not work and there is a resort to force after all, the application of *jus contra bellum* would mean that the disputed entity will be entitled to exercise its right to self-defence not only individually but also collectively, thereby broadening the number of belligerent States. Such collective exercise of the right to self-defence would end up having the opposite result than the one initially desired since it would internationalise the conflict even further. This is a risk that those advocating in favour of a broad interpretation of the personal scope of application of *jus contra bellum* should be ready to take..[94]

94. See Corten (2010: 35-61).

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