



KFG Working Paper Series • No. 31 • May 2019

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**Securing of Resources as a Valid Reason for Using Force? –  
A Pre-Emptive Defence of the Prohibition on the Use of Force**

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

## KFG Working Paper Series

Edited by Heike Krieger, Georg Nolte and Andreas Zimmermann

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Krieger, Heike, Püschmann, Jonas, Securing of Resources as a Valid Reason for Using Force? - A Pre-Emptive Defence of the Prohibition on the Use of Force, KFG Working Paper Series, No. 31, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin, May 2019.

ISSN 2509-3770 (Internet)

ISSN 2509-3762 (Print)

This publication has been funded by the German Research Foundation (DFG)

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**DFG** Deutsche  
Forschungsgemeinschaft

Online available at <https://doi.org/10.25932/publishup-43573>

## Securing of Resources as a Valid Reason for Using Force? – A Pre-Emptive Defence of the Prohibition on the Use of Force\*

Heike Krieger<sup>1</sup> & Jonas Püschmann<sup>2</sup>

### Abstract:

*A growing demand for natural resources embedded in current changes of the international order will put pressure on states to secure the future availability of these resources. Some political discourses suggest that states might respond by challenging the foundations of international law. Whereas the UN Charter was inter alia aimed at eliminating uses of force for economic reasons, one may observe an on-going trend of securitization of matters of resource supply resulting into the revival of self-preservation doctrines. The chapter will show that those claims lack a normative foundation in the current framework of the prohibition of the use of force. Moreover, international law has sufficient instruments to cope with disputes over access to resources by other means than the use of force. The international community, therefore, must oppose claims that may contribute to normative uncertainties and strengthen already existing instruments of pacific settlement of disputes.*

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\* Sincere thanks to the members of the Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?” for their valuable feedback on this chapter.

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## 1. Introduction

In its 2010 Global Strategic Trends report, the UK Ministry of Defence forecasted that

“[t]he issue of energy security is one in which governments, and defence organizations, will increasingly have to be engaged if states are to maintain their standards of living, and to ensure adequate supplies of natural resources, at reasonable prices. States who perceive that energy security is impacting on national survival are likely to challenge conventional interpretations on the legality of the use of force. However, the cornerstone of the UN Charter, which prohibits the threat, or use, of force in international relations, will remain firmly in place.”<sup>3</sup>

In an ambivalent language the report suggests that, in view of a changing security environment, the prohibition on the use of force may undergo interpretative shifts which threaten to affect its normative strength. The general expectation that the prohibition of the use of force, as well as its steering function, will be undermined in years to come is formulated more explicitly in the 2018 Global Strategic Trends report where it is stated that

“[c]hanges to laws governing the use of force in international relations are [...] expected over the coming decades. [...] The general prohibition on the use of force is almost certain to remain in place, but it may be progressively challenged and narrowed in scope. This could in turn lead to increased tensions and a greater tendency to resort to military action to settle disputes.”<sup>4</sup>

This assessment written for the purposes of strategic government policies reflects current discussions in academic discourse. While most academic observers hold that, despite certain contestations, the prohibition of the use of force remains unchallenged in its legal validity,<sup>5</sup> some point to indications for an erosion of the prohibition. Different strands of challenges intersect, seriously threatening to undermine the prohibition on the use of force. From a legal perspective, such a process of norm erosion consists of various legally relevant phenomena which reduce the legal effects of a prohibition. For example, restrictive readings of the constitutive elements of a prohibition as well as extensive readings of its exceptions may reduce its scope and thereby its legal effects.<sup>6</sup> Pertinent cases concern efforts to establish a broad interpretation of the right of self-defence against non-state actors as an exception to the prohibition on the use of force which threatens to swallow the rule. The same applies to new threats resulting from modern technologies and growing dependency on the cyber-space that have the potential to fundamentally change the

<sup>3</sup> *Development, Concepts and Doctrine Centre (DCDC)*, The DCDC Global Strategic Trends Programme, [https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/GST4\\_v9\\_Feb10.pdf](https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/GST4_v9_Feb10.pdf), 25.04.2019 (107).

<sup>4</sup> *DCDC*, Global Strategic Trends – The Future Starts Today, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/771309/Global\\_Strategic\\_Trends\\_-\\_The\\_Future\\_Starts\\_Today.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771309/Global_Strategic_Trends_-_The_Future_Starts_Today.pdf), 25.04.2019 (130).

<sup>5</sup> See e.g. *Marxsen*, Violation and Confirmation of the law: the intricate effects of the invocation of the law in armed conflict, in: *Journal on the Use of Force and International Law* 2018, 8 – 39; *Gray*, International Law and the Use of Force, 2018, 26 et seqq.; *Henderson*, The Use of Force and International Law, 2018, 47.

<sup>6</sup> Cf. *Krieger/Liese*, A Metamorphosis of International Law?: Value Changes in the International Legal Order From the Perspectives of Legal and Political Science, 2019, 12; *Aust/Payandeh*, Praxis und Protest im Völkerrecht: Erosionserscheinungen des völkerrechtlichen Gewaltverbots und die Verantwortung der Bundesrepublik im Syrien-Konflikt, in: *JZ* 2018, 635 et seqq.

prohibition of the use of force in general as the 2018 UK report predicts.<sup>7</sup> Also, more expansive readings of Art. 39 UN Charter will at least have an indirect impact on Art. 2 (4) UN Charter by potentially opening more and more policy areas to military solutions.

Within the context of global resource allocation and scarcity, another process of erosion of the prohibition of the use of force starts to emerge. Whilst interstate conflicts arguably always had been linked to resources and securing trade, the acquisition of resources had mostly neither been the primary purpose nor been advanced as a legal justification for a conflict. However, the effects of climate change and a rise of global demand for certain resources may render securing natural resources into a primary reason for waging war. For example, UN-Water forecasts a rise of people living in water-scarce areas from 3.6 to 4.8-5.7 billion.<sup>8</sup> At the same time, water resources are rarely a domestic good but to a large extent shared among two or more states requiring long-term cooperation.<sup>9</sup> On the demand side, the expected establishment of “new global players” such as China and India with a fast-growing economy as well as a growing population will increase the need for resources. For strategic sources, such as oil, the existence of a peak in demand is controversially debated, yet expected by many.<sup>10</sup>

While international law has developed frameworks to manage the scarcity of resources through instruments of bi- or multilateral cooperation and peaceful settlement of disputes, where cooperation seems unlikely, violent disputes over territory and investments may rise. According to the 2018 Conflict Barometer of the Heidelberg Institute for International Conflict Research, resources are the second leading cause for conflicts after “system & ideology” with a total number of 62 conflicts ranging from low-intensity conflicts to fully-fledged armed conflicts.<sup>11</sup> Parties to such conflicts may try to justify the use of force to secure “their” resources, challenging traditional understandings of the prohibition of the use of force as the prognosis of the 2010 UK Global Strategic Trends report suggests.

This chapter will examine whether there are indications in state practice and legal discourse for a creeping erosion of the prohibition on the use of force in relation to conflicts over natural resources. It will be shown that the absolute prohibition of the use of force under the UN Charter, *inter alia*, was aimed to ban specifically these types of armed conflicts. In a second step, the chapter will analyse how norm erosion is fostered and will assess such processes against the backdrop of the legal framework of the *ius ad bellum*.<sup>12</sup>

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<sup>7</sup> DCDC, Global Strategic Trends – The Future Starts Today, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/771309/Global\\_Strategic\\_Trends\\_-\\_The\\_Future\\_Starts\\_Today.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771309/Global_Strategic_Trends_-_The_Future_Starts_Today.pdf), 25.04.2019 (130).

<sup>8</sup> UN-Water, The United Nations World Water Development Report 2018, 2018, 3.

<sup>9</sup> International river basins cover 45.3 percent of the earth’s land surface, affect about 40 percent of the world’s population, and account for approximately 80 percent of global river flows, see FAO, Transboundary Waters, <http://www.fao.org/land-water/water/water-management/transboundary-water-management/en/>, 25.04.2019.

<sup>10</sup> The so called “Hubbert's peak” refers to the point at which this production rate is at its highest with demand for the resource rising, and after this it predicts a drop in correlation to the increased demand. Recent forecast by DNV GL, Energy Transition Outlook 2018, 2018, 27: “We predict peak oil in 2023, with gas to follow in 2036. Coal has already peaked.” On the contrary, the IEA, Oil 2019 – Analysis and forecast to 2024, 2019, p. 3: “[...] there is no peak demand on the horizon”.

<sup>11</sup> Heidelberg Institute for International Conflict Research, Conflict Barometer 2018, 2019, 16.

<sup>12</sup> This chapter will limit itself to the *ius ad bellum* framework against state actors, leaving aside especially the *ius ad bellum* relationship to non-state actors and the *ius in bello* framework.

## 2. Banning Resource Conflicts by Banning Measures Short of War

The absolute prohibition of the use of force under the UN Charter and its aim to specifically ban armed conflicts over natural resources must be read against the backdrop of state practice of the late 18<sup>th</sup> and early 20<sup>th</sup> century. Access and securing of resources served, alongside an alleged mission to civilize the world, as an authorization of the use of force towards “non-civilized people”.<sup>13</sup> In the context of colonialization, measures to secure resources and foreign investments without an occupation of territory would have likely been characterized as “police measures” or “measures short of war”.<sup>14</sup> “Measures short of war” were defined as one-sided acts of war in the sense of material armed clashes without the intention of a state of war.<sup>15</sup> In the form of reprisals, they were seen as a form of self-help that allowed the resort to military force against unlawful acts.<sup>16</sup> In the form of necessity they served to protect a fundamental value of a state, in particular its survival.<sup>17</sup> These measures were linked to the overall environment of a developing global economy and the spirit of imperialism prevalent in that era. As an early example, a UK council order of 1795 allowed cruisers to seize and detain all vessels, laden, wholly or in part with corn, flour, meal, and other articles of provisions, which were bound for any port in France, and to send them to ports in the UK where the load could be purchased by the government. The UK justified these measures before a UK-US Maritime Claims Commission, *inter alia*, on the grounds of necessity, since the country was threatened by a scarcity of such resources.<sup>18</sup> Moreover, “Western” countries used armed interventions for the protection of foreign investments in South America and East Asia as “measures short of war”, in the form of armed reprisals against alleged wrongdoings.<sup>19</sup> For instance, the US, in defending its influence over the (South)-American states, followed such an interventionist approach formulated by the former US President *Roosevelt* in the so-called *Roosevelt-Corollary to the Monroe Doctrine*.<sup>20</sup>

After World War I, although the 1928 Briand-Kellogg Pact, in its Art. 1, condemned recourse to war, those measures were not fully outlawed because the pact lacked a definition of self-defence and left its assessment to the invoking state.<sup>21</sup> During the negotiations, the UK expressly made a reservation for actions against interference in “certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety”.<sup>22</sup> The motive for this reservation was to make clear that self-defence covers securing access to India via

<sup>13</sup> *von Bernstorff*, The Use of Force in International Law before World War I, in: EJIL 2018, 245.

<sup>14</sup> *von Bernstorff*, The Use of Force in International Law before World War I, in: EJIL 2018, 241 et seq., 248.

<sup>15</sup> *Neff*, War and the Law of Nations, 2005, 173, 175. 215 et seqq.

<sup>16</sup> *Neff*, War and the Law of Nations, 2005, 226.

<sup>17</sup> *Neff*, War and the Law of Nations, 2005, 240.

<sup>18</sup> *Wheaton*, Elements of International Law, 1916, 724 et seqq.

<sup>19</sup> *von Bernstorff*, The Use of Force in International Law before World War I, in: EJIL 2018, 242.

<sup>20</sup> *Roosevelt*, Annual Message to Congress, 6 December 1904, [www.ourdocuments.gov/doc.php?ash=true&doc=56&page=transcript](http://www.ourdocuments.gov/doc.php?ash=true&doc=56&page=transcript), 25.04.2019.

<sup>21</sup> This is indicated in the travaux préparatoires, see: Note by Mr. Atherton to Sir Austen Chamberlaine from 23rd June 1928, [http://avalon.law.yale.edu/20th\\_century/kbbr.asp#no1](http://avalon.law.yale.edu/20th_century/kbbr.asp#no1), 25.04.2019: “Every nation is free at all times and regardless of treaty provisions, to defend its territories from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defence.”

<sup>22</sup> *Chamberlain*, Note of 19 May 1928, cited after: *Lesaffer*, Kellogg-Briand Pact 1928, in: *Wolfrum*, Max Planck Encyclopedia of Public International Law, 2010, para. 12.

interventions in vital regions such as Egypt, Afghanistan and the Persian Gulf where no other great power should gain influence.<sup>23</sup>

Shortly before and during World War II, the war over resources was finally culminating in the absence of a clear prohibition. Japan argued that it was being economically strangled by US sanctions resulting from its invasion of Manchuria and French Indochina. It claimed that it was left with no other choice than to preserve its military advantage by attacking the US in Pearl Harbor and was therefore justified to wage war in the Pacific.<sup>24</sup> However, the International Military Tribunal for the Far East rejected this justification.<sup>25</sup> Even before, the Assembly of the League of Nations refused to accept that the Japanese invasion of Manchuria in 1931 in reaction to a Chinese economic boycott of Japan could be considered as legitimate self-defence.<sup>26</sup>

The paradigm shift to an absolute prohibition of the use of force was brought about by the drafters of the UN Charter which aimed at limiting self-defence for economic reasons. In the literature it is argued that the drafters had the Axis powers in mind, and the excuse those states had used. Both powers had made self-defence claims in the World War II: Lebensraum in the case of Germany, and access to natural resources in the case of Japan.<sup>27</sup>

Securing access to resources using force against another country would now clearly constitute a violation of the prohibition of the use of force in Art. 2 (4) UN Charter and under customary international law.<sup>28</sup> Art. 2 (4) UN Charter proscribes 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”. The use of military force to acquire economic resources or territory of another state clearly constitutes such a case.<sup>29</sup> The historical exemption for “measures short of war” that do contain uses of force without the intent of occupation is no longer accepted under the UN Charter. “Territorial integrity or political independence” is not to be understood as restricting the application of the use of force, but setting out examples for certain violations.<sup>30</sup> At an early stage, the ICJ strengthened this understanding and rejected arguments for “measures short of war” in the Corfu Channel Case, arguing that

“[...] the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. [Such] [i]ntervention

<sup>23</sup> *McKercher*, The Second Baldwin Government and the United States, 1924–1929: Attitudes and Diplomacy, 1984, 117 et seq. citing an explanation of the motivation by former UK Foreign Minister *Chamberlaine*.

<sup>24</sup> *Röling/Rüter*, The Tokyo Judgement – The International Military Tribunal for the Far East – 29 April 1946 – 12 November 1948, Vol. II, 1977, 616.

<sup>25</sup> *Röling/Rüter*, The Tokyo Judgement – The International Military Tribunal for the Far East – 29 April 1946 – 12 November 1948, Vol. I, 1977, 380 – 381; *Brownlie*, The Use of Force in Self-Defence, in: *Brit. Y. B. Int'l L.* 1961, 220.

<sup>26</sup> *League of Nations*, League of Nations Assembly Report on the Sino-Japanese Dispute, in: *AJIL* 1933, Supplement: Official Documents, 145 – 146.

<sup>27</sup> *O'Connell/Niyatzmatov*, What is Aggression, in: *JICJ* 2012, 193.

<sup>28</sup> ICJ, Judgement, 26.11.1984, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), ICJ Reports 1984, 424 – 425.

<sup>29</sup> See e.g. *Saul/Kinley/Mowbray*, The International Covenant on Economic, Social and Cultural Rights, 2014, 105.

<sup>30</sup> Cf. *Brownlie*, The Use of Force in Self-Defence, in: *Brit. Y. B. Int'l L.* 1961, 235.



would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”<sup>31</sup>

Thereby, the ICJ acknowledged that “measures short of war” were no longer a permissible exception to the prohibition of the use of force and closed the option for unilaterally securing natural resources or protecting trade interests through military means.

Despite the absolute prohibition of the use of force, attempts to justify military intervention on the basis of securing access to resources continued, following the logic of “measures short of war”.<sup>32</sup> In 1956, for example, the nationalization of the Suez Canal resulted in the Suez crisis over securing access to resources through the Suez Canal and finally led to France, the UK, and Israel attacking Egypt. While UN member states accused France and the UK of a flagrant violation of international law<sup>33</sup> both states argued to have a legitimate claim of securing access to resources. They described their intervention as an “emergency police force” to protect the Suez Canal which did not aim at affecting the sovereignty of Egypt.<sup>34</sup> As another case in point, during the Oil Crisis in 1973, the US publicly considered seizing oil fields in the Persian Gulf. In an interview, US State Secretary *Kissinger* replied to a question, whether the US considered the use of military force in response to the embargo:

“I am not saying that there’s no circumstance where we would not use force. But it is one thing to use it in the case of a dispute over price; it’s another where there is some actual strangulation of the industrialized world.”<sup>35</sup>

This response implied that there are military options in case of an “actual strangulation”.

More specifically, scholars currently observe an all-time high of conflicts over water resources under the keyword “water wars”. The term “water wars” usually describes a broad conflict over shared water resources, ranging from a shared ocean, shared rivers or basins to shared groundwater resources. The concept covers military as well as non-military conflicts. Despite criticism that, until now, in modern times, no inter-state conflict had been carried out by military means solely based on access to water,<sup>36</sup> words and behaviour of states suggest the opposite: most recently, tensions arose again between India and Pakistan over withdrawal from the Indus Water Treaty, governing the share of each nation in the transboundary rivers.<sup>37</sup> Moreover, violent conflicts

<sup>31</sup> ICJ, Judgement, 9.4.1949, Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), ICJ Reports 1949, 35.

<sup>32</sup> See e.g. *Brownlie*, The Use of Force in Self-Defence, in: Brit. Y. B. Int'l L. 1961, 213.

<sup>33</sup> See *UNGA*, Record of the Meetings, United Nations General Assembly’s First Emergency Special Session, 1.11.1957, UN Doc. A/PV.562, i.a. paras. 21 (Philippines), 43 (Syria), 186 (Ecuador), 314 (Union of South Africa), 337 (Poland), 352 (Indonesia).

<sup>34</sup> See *UNGA*, Record of the Meetings, United Nations General Assembly’s First Emergency Special Session, 1.11.1957, UN Doc. A/PV.562, para. 201.

<sup>35</sup> See *Willner*, The 1975 Congressional Feasibility Study on “Oil Fields as Military Objectives”, in: The Journal of the Middle East and Africa 2018, 127.

<sup>36</sup> Arguing, the last “real” water war broke out 4500 years ago between the Mesopotamian city-states Lagash and Umma, see: *Water Conflict Chronology List*, <http://www2.worldwater.org/conflict/list/>, 25.04.2019; *Magsig*, International Water Law and the Quest for Common Security, 2015, 20; *Neuber/Scheumann*, Kein Blut für Wasser, in: Internationale Politik 2003, 31 – 38; *Kunig*, Konflikte um das Wasser – Was sagt das Völkerrecht, [https://www.fu-berlin.de/presse/publikationen/fundiert/archiv/2004\\_02/04\\_02\\_kunig/index.html](https://www.fu-berlin.de/presse/publikationen/fundiert/archiv/2004_02/04_02_kunig/index.html), 25.04.2019.

<sup>37</sup> For the latest call in the media to “scrap the Indus Water Treaty” after the armed conflict between India and Pakistan in 2019, see *JhunJhunwala*, Scrap the Indus Water Treaty, <http://www.dailyexcelsior.com/a-leaf-from-history-tribute-to-those-who-saved-ladakh/>, 25.04.2019: “[...] we should consider using water as an instrument

may be expected between Ethiopia and Egypt over the construction of the Grand Ethiopian Renaissance Dam at the Blue Nile. In all those cases, there is a certain discrepancy between the UN Charter regime and the official rhetoric of certain states which may contribute to processes of norm erosion.

### 3. Initiating Processes of Norm Erosion

Processes of norm erosion may, *inter alia*, be initiated by certain argumentative techniques. These techniques include arguments of securitization and legitimacy. Securitization can be described as a process of turning something into an existential threat for a community thereby justifying exceptional measures. Turning a policy field into a matter of national security had been the “key to legitimizing the use of force” because “traditionally, by saying ‘security’, a state representative declares an emergency condition, thus claiming a right to use whatever means are necessary to block a threatening development.”<sup>38</sup>

#### a) Invoking Arguments of Securitization and Legitimacy

In this context, a securitization of access to natural resources arguably takes place. Such a securitization can, for example, be seen in the context of “energy security”. States prepare for resource scarcity in think tanks and official publications by turning it into a matter of national security. For this line of argument, they can rely on well-established perceptions. For instance, already in 1984, the ECJ found that petroleum products are of fundamental importance for the existence of a country and therefore affect public security.<sup>39</sup> Today, many national security strategies predict a rise of conflicts due to water scarcity as well as an increased risk for energy security because resources for energy production are imported from countries considered unstable. The strategies often use language that includes the vague possibility of deploying forces or intervening to secure resources.<sup>40</sup>

Securitization is frequently linked to legitimacy arguments which are related to concepts of self-preservation and preserving defence capabilities when it comes to access to natural resources. In

of war. The total river water available in Pakistan is 145 million acre feet (MAF). Of this the Indus river system provides 113 MAF. India allocated the water of three [...] rivers totalling 80 MAF to Pakistan under the Indus Water Treaty” and *Prakash*, Abrogate Indus Water Treaty, <https://www.thehansindia.com/posts/index/My-Voice/2019-03-06/Abrogate-Indus-Water-Treaty/508347>, 25.04.2019.

<sup>38</sup> *Buzan/Waever/de Wilde*, Security – A New Framework for Analysis, 1988, 21.

<sup>39</sup> ECJ, Judgement, 10.07.1984, *Campus Oil Limited et. al. v Minister for Industry and Energy et. al.*, Case 72/83, ECR 1984, 2751 (para. 34): “It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them.”

<sup>40</sup> See e.g. *Henken*, Knapper werdende Rohstoffe – Eine Quelle für Aufrüstungen und Kriegsplanungen, in: *Österreichisches Studienzentrum für Friedens- und Konfliktforschung*, Von kalten Energiestrategien zu heißen Rohstoffkriegen?, 2008, 203 et seqq.; *NATO*, Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation, [https://www.nato.int/cps/en/natohq/official\\_texts\\_68580.htm](https://www.nato.int/cps/en/natohq/official_texts_68580.htm), 25.04.2019, paras. 13, 15, 19 (indent 13); *Germany*, Weißbuch zur Sicherheitspolitik, 2016, 41, 42, 50; *UK*, National Security Strategy and Strategic Defence and Security Review 2015, 2015, 21, 44; *US*, National Security Strategy, 2017, 22-23; *France*, Defence and National Security Strategy Review 2017, 2017, 29 et seq.; *Russia*, Russian National Security Strategy, <http://www.iieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/Russian-National-Security-Strategy-31Dec2015.pdf>, 25.04.2019, paras. 13, 57, 61; *China*, China's Military Strategy, [http://www.chinadaily.com.cn/china/2015-05/26/content\\_20820628.htm](http://www.chinadaily.com.cn/china/2015-05/26/content_20820628.htm) etc, 25.04.2019.

the literature, it is already claimed that securing resources, in particular water, is a legitimate ground for using force.<sup>41</sup> Based on just war theories, it has been argued in moral terms that

“[g]uided by a broad rationale that a secure state is a morally better alternative to a failed state, which is the presumed outcome of a serious strategic threat, the defence of a resource, even a downstream water supply [...] appears plausible.”<sup>42</sup>

Arguments of “self-preservation” refer to an overall concept of necessity where all means are valid for a state when the very existence of itself and its people are at stake. In this sense, resources such as water are usually tied to the most basic needs of life. Other resources, such as oil, are as well seen to be necessary for manufacturing and transporting goods as well as providing energy.<sup>43</sup> Moreover, in light of the importance of strategic resources, an intervention aimed at the preservation of defence capabilities alludes to a kind of pre-emptive use of force. The rationale behind this argument follows the idea that when a state is deprived of its necessary resources through actions by a third state, this hostile act might aim at lowering the defence capability of the state. As a result, and after a certain time, this third state could then easily take over the other state.<sup>44</sup>

Arguments on the legitimacy of the use of force open space for legal development in this respect. Where states rely on legitimacy arguments they (implicitly) challenge the positive law or claim that under exceptional circumstance the law does not apply to them. Such claims may incite legal developments which aim to reduce the dissonance between legality and legitimacy.<sup>45</sup> However, Art. 2 (4) UN Charter contains an absolute prohibition of the use of force. Since the prohibition is a fundamental principle of international law as *ius cogens*, each exception to it requires high scrutiny to avoid that the prohibition will be deprived of its function. Therefore, one must be cautious about whether existing legal conditions are in general open for broadening exceptions and thereby contributing to processes of norm erosion, even if legitimate grounds could morally justify the use of force. Securing of resources as a legitimate reason for using force may either be justified by a Security Council authorization under Chapter VII (b), as use of self-defence (c) or under the concept of necessity (d).

### **b) UN Security Council Authorization under Chapter VII**

The ability of the UN Security Council to authorize military force in disputes over natural resources is the alternative to unilateral and thus more destabilizing measures by states involved in such a conflict. In the exercise of these powers, Security Council involvement in disputes over natural resources may arise at three different stages of conflict.

<sup>41</sup> Waddington, Reconciling Just War Theory and Water-Related Conflict, in: Int. J. Appl. Philos. 2012, 209.

<sup>42</sup> Waddington, Reconciling Just War Theory and Water-Related Conflict, in: Int. J. Appl. Philos. 2012, 201.

<sup>43</sup> Waddington, Reconciling Just War Theory and Water-Related Conflict, in: Int. J. Appl. Philos. 2012, 201 – 202, but arguing that economic hardships are much slower to drive a population to a breaking point than starvation and dehydration.

<sup>44</sup> Cf. Sinnott-Armstrong, Preventive War, What is it good for?, in: Shue/Rodin, Preemption – Military Action and Moral Justification, 2007, 214.

<sup>45</sup> Marauhn, The International Rule of Law in Light of Legitimacy Claims, in: Krieger/Nolte/Zimmermann, The International Rule of Law - Rise or Decline, forthcoming, quoting: Popovsky, Legality and Legitimacy of International Criminal Tribunals, in: Falk/Juergensmeyer/Popovsky, Legality and Legitimacy in Global Affairs, 2012, 407; on dissonance reduction as a driving force for legal change see Reinold, The Prohibition on the Use of Force: Plus ça change? Toward a theory of global normative change, in: Krieger/Liese, A Metamorphosis of International Law, forthcoming.

### aa) Disputes over Natural Resources

In one scenario, conflicts over resources are already in a state of military conflict or are about to develop into this direction. In such cases, the Security Council is acting within its primary responsibility to preserve peace. A case in point is the conflict over the Heglig oil field between Sudan and South Sudan in 2012.<sup>46</sup> Acting under Chapter VII UN Charter, the Security Council adopted Resolution 2046 in which the Council

“decided that Sudan and South Sudan shall unconditionally resume negotiations, ... in consultation with relevant international partners, but within no more than two weeks from the time of adoption of this resolution, to reach agreement on [...*inter alia*] arrangements concerning oil and associated payments”.<sup>47</sup>

In such a constellation, the Security Council would be the competent body to even authorize the use of force to enforce its resolutions.

In a second scenario, a military conflict is not immediate but a political dispute about the allocation of resources exists. In view of the wide and unspecific concept of “threat” to peace, it remains questionable as to what extent measures under Chapter VII could be taken in such a case. A wide conception of “threat to peace” would involve general threats that entail only a distant risk of leading to armed conflict. In this respect, competencies and functions of the Security Council under Chapter VII UN Charter have constantly been widened. Based on a substantive definition of peace, the Security Council has, *inter alia*, broadened its activities to deal with threats to peace into the early stages of conflict prevention even under Chapter VII. Since Resolution 688, the determination of a threat to peace moves away from direct threat of inter-state military conflict and covers general risks including the illegal exploitation of resources, for example in cases of trade with conflict diamonds.<sup>48</sup> Whilst previous Security Council resolutions clearly dealt with the role of resources in fuelling existing armed conflicts<sup>49</sup>, a wider forward displaced concept of “threat to peace” would be consistent with such a trend.

An early Security Council involvement under Chapter VII may foster multilateral solutions for resource conflicts because it can serve as a back-up for other dispute settlement fora including bilateral negotiations, arbitration or involvement of other actors such as the World Bank offering good services. Coordinated activities between diverse international institutions may thus efficiently bring together reluctant dispute parties.

However, an involvement of the UN Security Council in political disputes over the allocation of natural resources affects the diluted relationship between Chapter VI and Chapter VII UN Charter.<sup>50</sup>

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<sup>46</sup> On the conflict, see *Johnson*, The Heglig oil dispute between Sudan and South Sudan, in: *J. East. Afr. Stud.* 2012, 561 – 569.

<sup>47</sup> *Security Council*, Resolution 2046 adopted on 02.05.2012, UN Doc. S/RES/2046.

<sup>48</sup> Cf. i.a. *Security Council*, Resolution 1173, adopted on 12.06.1998, UN Doc. S/RES/1173, on Angola; 1925, adopted on 28.05.2010, UN Doc. S/RES/1925 on the Democratic Republic of the Congo; 1306, adopted on 05.07.2000, UN Doc. S/RES/1306; 1446, adopted on 04.12.2002, UN Doc. S/RES/1446 on Sierra Leone; 1521, adopted on 22.12.2003, UN Doc. S/RES/1521 and 1903, adopted on 17.12.2009, UN Doc. S/RES/1903 on Liberia.

<sup>49</sup> In the context of armed conflicts in Angola, Liberia, Sierra Leone, Côte d’Ivoire and Cambodia, see *Pertile*, The Changing Environment and Emerging Resource Conflicts, in: *Weller*, The Oxford Handbook on the Use of Force in International Law, 2015, 1091.

<sup>50</sup> Cf. *Krisch*, General Framework, in: *Simma et al*, The Charter of the United Nations. A Commentary, Vol. II, 2012, para. 20 et seq.

Such disputes will, generally, qualify as “dispute [...] likely to endanger the maintenance of international peace and security” under Art. 33 UN Charter or as a “situation which might lead to international friction” under Art. 34 UN Charter. While, in its practice, the UN Security Council has seldom clearly differentiated between separate stages of a conflict, the UN Charter wording assumes that the far-reaching Chapter VII powers depend on the existence of a higher risk of military conflict.

Indeed, in cases of disputes over natural resources, a certain restraint in the exercise of Security Council competences under Chapter VII seems appropriate. On the one hand, it is conceivable that the Security Council could, for example, legislatively appropriate a disputed transboundary water system (even in disregard of existing legal frameworks), place it under neutral control till the dispute is settled or even authorize the use of force to enforce the appropriation.<sup>51</sup> On the other hand, considerations of efficiency should not lose out of sight that other actors are primarily competent to deal with non-military disputes over natural resources. Natural resource management is covered by a State’s permanent sovereignty over natural resources and primarily falls under the legal framework of international trade, development, and energy law. Ensuring equal access to resources through free trade and resulting disputes belong before the dispute settlement bodies of the WTO.<sup>52</sup> The administration of transboundary watercourses does not only concern international environmental law but also development law. The World Bank had, for instance, a major influence on the conclusion of the Indus Water Treaty.<sup>53</sup> Accordingly, Art. 2 (3) and 33 (1) UN Charter stipulate that the competences of the Security Council even in the realm of the pacific settlement of disputes are only subsidiary. This “fundamental policy rule” allocates responsibility for dispute settlement between the parties and the UN.<sup>54</sup> After all, an early involvement of the Security Council may question the efficiency of the various tools of dispute settlement as it might entail the search for a “guilty party” to impose sanctions. This may, in turn, undermine the basis for trustful co-operation required for the allocation and administration of a shared resource and even further escalate the dispute at hand. As demonstrated by the 2012 Heglig oil crisis, Chapter VII powers are best employed to bring reluctant parties together for negotiations within the existing legal frameworks for resource allocation.

### **bb) Root Causes of Armed Conflicts – Securitizing Resource Access before the UN Security Council**

Outside specific conflict scenarios the UN Security Council has dealt with access to resources as a root cause of armed conflict. Addressing root causes of armed conflicts has been part of the general development to extend the preventive powers of the Security Council. Thus, already in 1992, the President of the Security Council issued a note on behalf of its members according to which

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<sup>51</sup> Cf. *Worthen*, Resolving International Water Disputes: Lessons on American and Canadian Federalism, in: *BYU Int’l L. & Mgmt. R.* 2015, 158.

<sup>52</sup> For instance, restrictions on the export of rare earth elements by China had been dealt with by the Dispute Settlement Body of the WTO and finally the report had been implemented by China, see: *WTO*, DS431: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds431\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm), 25.04.2019.

<sup>53</sup> *Zawahri*, Third Party Mediation of International River Disputes: Lessons from the Indus River, in: *International Negotiation* 2009, 292.

<sup>54</sup> *Tomuschat*, Article 33, in: *Simma et al*, *The Charter of the United Nations. A Commentary*, Vol. I, 2012, para. 4.

“the absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”<sup>55</sup>

Other, more generalized risks, such as climate change, drug trafficking as well as health crises, including HIV/AIDS and Ebola, have been addressed in the framework of thematic discussions, statements of the Security Council Presidency or under Arria-Formula meetings.<sup>56</sup> Following the approach to deal with general threats, a securitization of the matter “access to resources” within the Security Council is evolving, even though, until now, no resolution had been passed. States try to address access to natural resources in meetings on “water and peace”<sup>57</sup> or “climate change”<sup>58</sup> as well as on the “role of natural resources as root causes of conflict”<sup>59</sup>. Within the discussions, a wide majority of states would generally welcome to deal with this topic in the Security Council. The chair of the Global High-Level Panel on Water and Peace even stated, that the

“[d]efense of water for the civilian populations by the affected populations themselves is a legitimate form of self-defence and can be legitimately assisted by military means. [...] it should be within the reach of the Security Council to convey a sense of legitimacy to those military actions whose sole purpose is the protection of water sources and installations that are vital for civilian populations.”<sup>60</sup>

Still, dealing with root causes of armed conflicts outside a specific conflict meets strong contestations, in particular by non-Western states. The intensity of such reservations depends on the policy fields concerned.<sup>61</sup>

Strong opposition within the meetings comes from Russia as well as states that can be considered as rising powers in line with their more sceptical view of interventionist policies. Russia,<sup>62</sup> China, and the G-77<sup>63</sup> constantly argue that the topic is out of the scope of the Security Council. Moreover, according to Russia,

“[t]o make natural resources a matter of international security, would [...] shift the focus of international efforts towards a subjective search for ‘guilty parties’ and the subsequent probable imposition of military intervention in the parts of the world concerned.”<sup>64</sup>

This securitization would, in the end, in the view of Russia, enable the matter “being regulated pursuant to the top-down principle and could also harm the interests of countries concerned”, instead of regulation by “mutually acceptable decisions within specialized organizations”.<sup>65</sup>

<sup>55</sup> *Security Council*, Note by the President of the Security Council from 31.01.1992, UN Doc. S/1992/23500, 3.

<sup>56</sup> On the development of the practice of the Security Council, *Krisch*, Article 39, in: *Simma et al*, *The Charter of the United Nations. A Commentary*, Vol. II, 2012, paras. 30 – 32.

<sup>57</sup> *Security Council*, Meeting of 20.12.2017, UN Doc. S/PV.8144; Meeting of 22.11.2016, UN Doc. S/PV.7818.

<sup>58</sup> *Security Council*, Meeting of 25.01.2019, UN Doc. S/PV.8451; Meeting of 20.07.2011, UN Doc. S/PV.6587; Meeting of 17.04.2007, UN Doc. S/PV.5663.

<sup>59</sup> *Security Council*, Meeting of 16.10.2018, UN Doc. S/PV.8372.

<sup>60</sup> *Security Council*, Meeting of 22.11.2016, UN Doc. S/PV.7818, 5.

<sup>61</sup> *Krisch*, Article 39, in: *Simma et al*, *The Charter of the United Nations. A Commentary*, Vol. II, 2012, para. 34.

<sup>62</sup> *Security Council*, Meeting of 16.10.2018, UN Doc. S/PV.8372, 13.

<sup>63</sup> *Security Council*, Meeting of 17/04/2007, UN Doc. S/PV.5663, 13, supported by Russia (p. 17), China and G-77 (p. 24).

<sup>64</sup> *Security Council*, Meeting of 22/11/2016, UN Doc. S/PV.7818, 21.

<sup>65</sup> *Security Council*, Meeting of 06/06/2017, UN Doc. S/PV.7959, 14.

Explicitly referring to processes of securitization, Brazil<sup>66</sup> and India oppose to deal with climate change linked to international peace because, according to India, such a

“securitization [...] has significant downsides. A securitized approach risks pitting States into a competition, when cooperation is clearly the most productive avenue in tackling this threat. Thinking in security terms usually engenders overly militarized solutions to problems that inherently require non-military responses to resolve them. In short, it brings the wrong actors to the table. As the saying goes, if all you have is a hammer, everything looks like a nail.”<sup>67</sup>

In view of the contested nature of such a broad understanding of conflict prevention, the question arises as to which legal and policy limitations exist for aligning the matter of resource allocation with efforts to widen the interpretation of “threat to peace”. From a systematic perspective, the broadening of Security Council competences to deal with root causes of armed conflicts affects the allocation of competences between UN organs. The Security Council’s involvement in issues of resource allocations and scarcity touches upon the relationship between security and development. It thus interferes with the mandate of other UN bodies, in particular the United Nations Economic and Social Council (ECOSOC) and the General Assembly (Art. 60 UN Charter). At first glance, it is hard to deny that the massive effects of environmental degradation and resource scarcity on human life and health suggest considering these phenomena as threats to peace. If a country persisted to use or to stockpile resources in a manner that threatens human lives and livelihoods of other countries, the magnitude of the threat may allow the Security Council to act.<sup>68</sup> Yet, the ECOSOC and the General Assembly offer fora for negotiation which are, in general, more inclusive than the Security Council whose composition is for reasons of its efficiency non-inclusive. Aware of this critical interplay, the approach of the Security Council already is cautious and debates on threats to peace related to development issues try to be as inclusive as possible, allowing otherwise unrepresented states to be present.<sup>69</sup>

For almost 25 years, efforts within the UN and, in particular, in the Security Council were directed at a change from a “culture of reaction to a culture of prevention”.<sup>70</sup> Laudable attempts to address root causes of conflict as well as a focus on the presumed efficiency of the Council made concepts of a subsidiary competence of the Council in terms of conflict prevention look outdated. However, recent Security Council debates indicate that states, in particular from the Global South, re-emphasize the subsidiary role of the Council in conflict prevention as well as the immediacy requirement in line with the traditional understanding of the Security Council as a subsidiary organ of last resort. This ensures that the far-reaching powers of the UN Security Council under Chapter VII are still limited to situations where there is an imminent threat of military conflict.

### **c) Self-Defence to Secure Resources**

The treatment of access to resources and steady supply as a vital interest that is linked to the very existence of states could allow for claims to invoke self-defence. Whereas such claims cannot

<sup>66</sup> *Security Council, Meeting of 20/12/2017, UN Doc. S/PV.8144, 39.*

<sup>67</sup> *Security Council, Meeting of 25/01/2019, UN Doc. S/PV.8451, 43, supported by Russia (p. 16).*

<sup>68</sup> *Knight, Global environmental threats: can the security council protect our Earth?, in: N.Y.U. L. Rev 2005, 1575.*

<sup>69</sup> *Krisch, The Decay of Consent: International Law in an Age of Global Public Goods, in: AJIL 2015, 19.*

<sup>70</sup> *UN Secretary General, Report of the Secretary-General on the work of the Organization, 1999, UN Doc. A/54/1, 7 (para. 61).*

override the existing normativity of self-defence, they can *de facto* influence the interpretation of Art. 51 UN Charter as subsequent state practice (Art. 31 (3) lit. b VCLT).

#### aa) “Resource-War” Scenarios

Scenarios where a certain deprivation of resources had been called an “act of war” or “aggression” constantly re-emerge in international relations. Especially in the context of water, states employ language reminiscent of Art. 51 UN Charter. The construction of a dam leading to a diversion of a river or reduction of the flow is sometimes seen as a ground to allow for the use of force. For instance, Israel’s water plans, especially the National Water Carrier Plan that was designed to carry water from the Jordan River and Sea of Galilee to the Negev, had been considered by the Arab Defence Council in 1960 as “aggressive acts against the Arabs that justify legitimate self-defense by every Arab state”.<sup>71</sup> More recently, since 2016, India openly discusses using “water as a weapon” against Pakistan by cutting off the flow of rivers to Pakistan in reaction to terrorist attacks. Pakistan responded by considering any revocation of the Indus Water Treaty as an “act of war”.<sup>72</sup> As well, in 2016, the Parliamentary Assembly of the Council of Europe declared that the deprivation of water by Armenia towards Azerbaijan in the disputed Nagorno-Karabakh region “must be regarded as ‘environmental aggression’ and seen as a hostile act by one State towards another”.<sup>73</sup> Lastly, Ethiopia’s plans to construct the Grand Ethiopian Renaissance Dam at the Blue Nile, had been heavily criticised by Egypt due to the possibility of a reduction of the flow of the Nile. In 2013, President Morsi declared: “If a single drop of the Nile is lost, our blood will be the alternative. We are not warmongers, but we will never allow anyone to threaten our security.”<sup>74</sup>

#### bb) Art. 51 UN Charter and Non-Traditional Threats

From a legal perspective, Art. 51 UN Charter requires that “an armed attack occurs”. The ordinary meaning of the term “armed” points towards a threat of military and kinetic nature.<sup>75</sup> According to the travaux préparatoires, an “armed attack” was considered a “clear case of aggression”.<sup>76</sup> It is widely accepted and supported by the ICJ that there is a cascading relationship between the use of force and an armed attack. As a minimum, an armed attack would, therefore, involve a certain gravity of the use of force.<sup>77</sup>

A mere deprivation of resources would be non-military in nature. It would first and foremost be considered as an economic measure. Following the travaux préparatoires and subsequent UNGA Resolutions, political or economic force is generally not considered to constitute force in the

<sup>71</sup> *Shemesh*, Prelude to the Six-Day War: The Arab-Israeli Struggle over Water Resources, in: *Israel Studies* 2004 (No. 3), 10.

<sup>72</sup> *The Washington Post*, India wants to use water as a weapon against Pakistan, [https://www.washingtonpost.com/world/2019/02/22/indias-threats-pakistan-offer-hint-future-water-wars/?noredirect=on&utm\\_term=.0b2786fffb2](https://www.washingtonpost.com/world/2019/02/22/indias-threats-pakistan-offer-hint-future-water-wars/?noredirect=on&utm_term=.0b2786fffb2), 25.04.2019.

<sup>73</sup> Art. 3 of Council of Europe’s Parliamentary Assembly Resolution 2085 (2016), Inhabitants of frontier regions of Azerbaijan are deliberately deprived of water, adopted on 26.01.2016.

<sup>74</sup> *Pflanz*, Egypt: ‘all options open’ in Nile dam row with Ethiopia, <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10113407/Egypt-all-options-open-in-Nile-dam-row-with-Ethiopia.html>, 25.04.2019.

<sup>75</sup> *Zemanek*, Armed Attack, in: *Wolfrum*, Max Planck Encyclopedia of Public International Law, 2013, para. 11.

<sup>76</sup> See e.g. *Mori*, Origins of the Right of Self-Defense in International Law, 2018, 225, 229.

<sup>77</sup> ICJ, Judgement, 27.6.1986, Military and Paramilitary Activities (Nicaragua/United States of America), ICJ Reports 1986, 101. The US nevertheless argues, the inherent right of self-defence applies against any illegal use of force, see: *United States Department of Defense*, Law of War Manual, 2016, 47, para. 1.11.5.2.



meaning of Art. 2 (4) UN Charter and would violate other norms of international law, such as the principle of non-intervention (Art. 2 (1), 2 (7) UN Charter). A Brazilian attempt to include “economic measures” into the text of Art. 2 (4) UN Charter had been rejected by two votes to twenty-six at Dumberton Oaks.<sup>78</sup> The same would follow from a systematic interpretation because the UN Charter refers to the term “force” on all other occasions as “armed” force.<sup>79</sup> If then economic coercion would not even amount to a use of force, it would also not amount to an armed attack. Thus, the UNGA’s Definition of Aggression refers to force as “armed force” and does not list “economic aggression”.<sup>80</sup> Correspondingly, a proposal by Bolivia had been rejected within the negotiations to consider as an act of aggression

“unilateral action to deprive a state of the economic resources derived from the fair practice of international trade, or to endanger its basic economy, thus jeopardizing the security of that state or rendering it incapable of acting in its own defence and co-operating in the collective defence of peace”.<sup>81</sup>

Nevertheless, these arguments do not imply that force may not at all be exerted by non-military measures. The focus of the classification cannot solely lie on the means used but must take into consideration the scale and effects of measures. For instance, Art. 54 (1) AP I of the Geneva Conventions prohibits starvation as a method of warfare implying that militarily relevant uses of force are not restricted to weapons. Thus, the ICJ in various decisions held that the “use of force” is not restricted to any specific type of weapons.<sup>82</sup> As “force” cannot be interpreted solely within the context of military means available during the draft of the UN Charter, from a teleological view, it must be assessed whether the measure used is comparable by scale and effects to traditional kinetic weapons.<sup>83</sup> Criteria for such “non-military threats” being similar to military threats by scale and effects had been set up by the expert committee of the Tallinn Manual, assessing, *inter alia*, whether cyber-attacks could amount to a prohibited “use of force”. According to Rule 69 of the “Tallinn-Manual”, non-military operations would constitute a use of force when its scale and effects are comparable to “traditional operations”. Criteria include severity in terms of damage, destruction, harm and death, immediacy of the effects of an attack and directness in terms of the causal connection.<sup>84</sup>

### cc) “Resource-War” Scenarios and Traditional Threats

In view of these criteria, resource-wars involving water and/or resource scarcity and deprivation do not amount to a use of force, let alone an armed attack in view of their exclusive economic or environmental character. Whilst deprivation of economic resources such as water could meet the

<sup>78</sup> *United Nations Information Organisation*, Documents of the United Nations Conference on International Organisation - San Francisco, 1945, Vol. 6, 1945, 335; distinguishing “use of force” and “economic measures”.

<sup>79</sup> Preamble, Art. 41, 42, 43, 44, 45, 46, 47 UN Charter.

<sup>80</sup> See preamble (sixth recital), Art. 1, Art. 3 UNGA Resolution 3314 (1974), Definition of Aggression, adopted on 14.12.1974, UN Doc. A/RES/3314(XXIX).

<sup>81</sup> UNGA, Meeting of the Sixth Committee of the General Assembly on 11.01.1952, UN Doc. A/C.6.L.211, cited in Report by the Secretary General on the Question of Defining Aggression, 03.10.1952, UN Doc. A/2211, 58.

<sup>82</sup> ICJ, Judgement, 27.6.1986, Military and Paramilitary Activities (Nicaragua/United States of America), ICJ Reports 1986, 103 – 104; Advisory Opinion, 8.7.1996, Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 244, para. 39.

<sup>83</sup> *Krieger*, Krieg gegen anonymous – Völkerrechtliche Regelungsmöglichkeiten bei unsicherer Zurechnung im Cyberwar, in: Archiv des Völkerrechts 2012, 9 et seqq.

<sup>84</sup> *Schmitt*, The Tallinn Manual, 2017, 334 – 336.

threshold of severity because water scarcity could arguably lead to the death of many people, one could already be more sceptical when it comes to the deprivation of other economic resources such as oil. Even though deprivation of the latter could in very extreme situations lead to an economic collapse of industrialized countries and in the end, stop the production of means for a country's existence, such resources in most circumstances can be replaced by other resources. Given that resource scarcity is a problem of availability of resources in one's country, availability of such resources on the global market as well as a state's capacity to acquire such resources must be taken into account: The lack of resources supplied from one country will often open the possibility of either to surrogate resources or to diversify the supplying countries. Thus, all the scenarios set out would likely not reach the comparability-threshold to military threats. Lowering the flow of a shared river by the construction of a dam or diversion of rivers – as it is the case in the India/Pakistan or Egypt/Ethiopia conflict – would not reach the immediacy criterion. First, technical means require large preparation and do not take place from one day to another. Secondly, even if a river would have been fully blocked by a dam and diverted, the effect would not be sudden but occur within weeks, leaving time for a peaceful settlement by relevant UN bodies including the involvement of the Security Council.

Even in cases where the deprivation of resources aims at lowering the defence capabilities of a state, it is hard to argue that the aim to lower defence capabilities would amount to an armed attack just because one state denies access to resources to another state (notwithstanding, that the intention is hard to prove). As such, the immediacy criterion underlines the *ultima ratio* character of self-defence. As long as there are still pacific means available, self-defence is impermissible.

#### **d) Necessity and the Use of Force**

If not covered by the invocation of self-defence, the remaining justification to which official statements occasionally refer is the overall state of necessity which allows for the use of force. Processes of securitization at the national level allude to legitimacy arguments which rely on emergency actions to cope with a threat that touches upon vital interests of states. Policy statements and academic literature sometimes argue that the use of force would be permissible when “vital interests” or the very survival of a state are at stake.<sup>85</sup> This is exemplified by Egypt's declaration following plans to build a Dam at the Blue Nil that “all options are open” to stop a reduction of “even one drop of Nile water”.<sup>86</sup> When it comes to other resources than water, the term “economic strangulation” was partly invoked as justification for a use of force. A US-Senate feasibility study in the aftermath of the Oil Crisis was arguing from an international law perspective, that it is indeed hard to justify any seizure of oil fields.<sup>87</sup> Nevertheless, for allies of the US, the study explicitly mentioned the invocation of “self-preservation” to break an embargo by force and finally found that “[t]hose who view law as flexible instruments may find rationalizations”.<sup>88</sup>

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<sup>85</sup> *Yihdego*, The Blue Nile dam controversy in the eyes of international law: Part 3, <http://www.globalwaterforum.org/2013/07/02/the-blue-nile-dam-controversy-in-the-eyes-of-international-law-part-3/?pdf=7408>, 25.04.2019.

<sup>86</sup> Cf. fn. 73.

<sup>87</sup> *Congressional Research Service (CRS)*, Oil Fields as Military Objective: A Feasibility Study, 1975, 9.

<sup>88</sup> *CRS*, Oil Fields as Military Objective: A Feasibility Study, 1975, 9.

In a modern variance, claims of necessity may be bolstered by a state's human rights obligations. The state would justify using force to secure resources by referring to its obligations to provide for its population's basic needs under relevant human rights treaties. For instance, the right to water obliges states, i.a. to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease.<sup>89</sup> To fulfil such obligations towards its population, a state may claim to have no other choice than to use force. Such a line of argument is structurally related to the concept of a Responsibility to Protect or humanitarian intervention and would rely on just war theories mentioned above. However, from the perspective of human rights law, it is hardly conceivable that a positive obligation cumulates into a right to use force against other states to provide adequate resources, if it is at all legally coherent with human rights doctrine. From the perspective of the UN Charter, such an interpretation would conflict with Art. 103 UN Charter. Anyway, such a claim would most likely face the same normative problems as humanitarian interventions in general or a right to invoke necessity.

The right to invoke necessity as a ground for the use of force refers to the idea of self-preservation and relies on an assumed right of existence of states.<sup>90</sup> Whether a State may use force in accordance with the plea of necessity is highly uncertain and subject to a controversial discussion.<sup>91</sup> In contrast to self-defence, the concept of necessity applies even in view of another state's legal behaviour, since it is grounded solely on the telos of self-preservation.<sup>92</sup> The ICJ Advisory Opinion on the use of nuclear weapons may be regarded as an affirmation of a right of a state to survival. In the Advisory Opinion, the ICJ held that

“it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake”.<sup>93</sup>

But even if such a right would exist, it is more than doubtful that necessity could at all justify a use of force in view of the absolute character of Art 2 (4) UN Charter. As the only exception *Bowett*, for instance, refers to the UK's comment on the Declaration of the Rights and Duties of States. In this comment, the UK claims that there may be exceptions where a state is pursuing a course which leads to the “economic strangulation of another state”.<sup>94</sup>

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<sup>89</sup> The right to water is implicitly contained in the right to an adequate standard of living (Art. 11 (1) ICESCR) and to the highest attainable standard of health (Art. 12 (1) ICESCR) as well as the right to life and human dignity (Preamble, Art. 6 (1) ICCPR). For the content of the right to water, cf. i.a. *Committee on Economic, Social and Cultural Rights*, General Comment No. 15 (2002), 2003, UN Doc. E/C.12/2002/11, para. 37, lit. a; *Saul/Kinley/Mowbray*, *The International Covenant on Economic, Social and Cultural Rights*, 2014, 903 et seq.

<sup>90</sup> *Fenwick*, *International Law*, 1934, 146 cited after *Alder*, *The Inherent Right of Self-Defence in International Law*, 2012, 33 (Fn. 43).

<sup>91</sup> Cf. *Schmitt*, *The Tallinn Manual*, 2017, 140.

<sup>92</sup> *ILC*, Addendum – Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur, UN Doc. A/CN.4/318/ADD.5-7, 16.

<sup>93</sup> ICJ, Advisory Opinion, 8.7.1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 263, para. 97.

<sup>94</sup> *Bowett*, *Self-Defence in International Law*, 1958, 110.

The Articles on State Responsibility (ASR) of the International Law Commission (ILC) formulated in its Art. 25 (1) ASR the invocation of necessity as a circumstance precluding wrongfulness.<sup>95</sup> According to Art. 25 (1) (b) ASR, necessity can only be invoked to sacrifice a lesser good to a greater emergency of a state. In this sense, non-compliance with peremptory norms cannot be justified by a state of necessity, as set out in Art. 26 ASR, because in

“view of the compelling reasons which lead to the definitive affirmation of the prohibition of the use of force against the territorial integrity or political independence of any State, it seems [...] unconceivable that the legal conviction of States would today accept “necessity” as justification for a breach of that prohibition and, more generally, for an act covered by the now accepted concept of an “act of aggression”.”<sup>96</sup>

Notwithstanding the existence of a right to self-preservation in the pre-UN Charter era, today, such a notion of self-preservation must be rejected due to the intent to abolish armed reprisals entirely: “Even in instances where a State faces absolute destruction, any forcible response must fall within the requirements of self-defence.”<sup>97</sup> Accordingly, the intention to abolish armed reprisals is reflected in Art. 50 (1) (a) ASR.

A precedent for the reasonableness of rebuffing arguments of self-preservation can be seen in the wide denunciation of Japan's justification for the war in the Pacific which was considered as a far-reaching example for an abusive practice. At the time, a counsel at the Tokyo Trials argued:

“To deprive a nation of those necessary commodities which enable its citizens and subjects to exist is surely a method of warfare not dissimilar to the violent taking of lives through explosives and force because it reduces opposition by delayed action resulting in defeat just as surely as through other means of conventional hostilities. It can even be said of a more drastic nature than the blasting of life by physical force, for it aims at the slow depletion of the morale and well-being of the entire civilian population through the medium of slow starvation.”<sup>98</sup>

The judgement in the Tokyo Trials rejected this argument as non-consistent with Japan's own practice and underlined in this sense the abusive nature of such an excuse:

“The argument is merely a repetition of Japanese propaganda issued at the time she was preparing for her wars of aggression. It is not easy to have patience with its lengthy repetition at this date when documents are at length available which demonstrate Japan's decision to expand to the North, to the West and to the South at the expense of her neighbors was taken long before any economic measures were directed against her and was never departed from.”<sup>99</sup>

<sup>95</sup> Art. 25 (1) ASR: “Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”

<sup>96</sup> ILC, Addendum – Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur, UN Doc. A/CN.4/318/ADD.5-7, 21.

<sup>97</sup> Green, Self-Preservation, in: Wolfrum, Max Planck Encyclopedia of Public International Law, 2009, para. 16.

<sup>98</sup> Taken from a citation of Judge Pal/India in his Dissenting Opinion, cf. *Röling/Rüter*, The Tokyo Judgement – The International Military Tribunal for the Far East – 29 April 1946 – 12 November 1948, Vol. II, 1977, 616.

<sup>99</sup> *Röling/Rüter*, The Tokyo Judgement – The International Military Tribunal for the Far East – 29 April 1946 – 12 November 1948, Vol. I, 1977, 380 et seq.

In sum, a concept of necessity that authorizes the use of force outside the UN Charter regime with regard to a resource necessity is neither supported by state practice nor reasonably compliant with the purposes of an abolishment of the use of force in international relations. Such an argument itself follows the principle of “necessity knows no law” and finds itself outside of any legal contexts of justification.<sup>100</sup>

#### 4. Conclusion

In conclusion, at the level of policy statements, there are some indications that processes of securitization involving the securing of natural resources may contribute to an erosion of the prohibition of the use of force. This risk arises in preparation for crises over access to resources and in statements that invoke self-defence or try to revive the concept of necessity on the grounds of survival of the state. This behaviour is taking place in grey areas of interpretation of international law and therefore needs strong objection by the international community to prevent such arguments from contributing to interpretative shifts on the basis of subsequent state practice or to the creation of exceptions to the prohibition on the basis of customary international law. Following the overall duty of peaceful settlement of disputes and the overall need for enduring cooperation to benefit equally from the shared water resources, states should support the already existing mechanisms of peaceful settlement.<sup>101</sup> The strength and acceptance of exactly those mechanisms bolster and ensure the prohibition of the use of force. In this sense, it is a worrying and destabilising trend that some of these institutions are recently called into question.<sup>102</sup> Nevertheless, with an increasing development of global supply chains by permanent installations, such as pipelines between Russia and Europe or the One Belt, One Road Project by China, one cannot foresee what states are willing to do to protect their investments.

New interpretations of the prohibition of the use of force deterring from traditional interpretations always need to balance community interests in the non-use of force and the legitimate security interests of states.<sup>103</sup> Every new exception questions the function of the prohibition of the use of force as a basic rule of international law and relations. Therefore, one should not risk weakening the prohibition of the use of force. Opening it up could lead to a run over natural resources that entails the inherent danger of abuses. As had been said by *Kofi Annan* with regards to the possibility of pre-emptive attack:

“This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years. [I]f it were to

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<sup>100</sup> Cf. the speech of the Chancellor of the German Empire *Bethmann-Hollweg* at the Reichstag from 4<sup>th</sup> August 1914, justifying the German invasion of Belgium in World War I: “We are in a state of legitimate defense. Necessity knows no law”, cited in: *Editorial Comment*, The Neutrality of Belgium, in: *AJIL* 1915, 709.

<sup>101</sup> For an overview, see *Qureshi*, Dispute Resolution Mechanisms: An Analysis of the Indus Waters Treaty, in: *Pepp. Disp. Resol. L.J.* 2018, 75 et seqq.

<sup>102</sup> After a U.S. campaign to block appointments and reappointments of judges to the WTO Appellate Body only four remained of seven, see *Miles*, World trade's top court close to breakdown as U.S. blocks another judge, <https://www.reuters.com/article/us-usa-trade-wto-judge/world-trades-top-court-close-to-breakdown-as-us-blocks-another-judge-idUSKCN1M621Y>, 25.04.2019.

<sup>103</sup> *Dörr*, Use of Force, Prohibition of, in: *Wolfrum*, Max Planck Encyclopedia of Public International Law, 2015, para. 51.

be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.”<sup>104</sup>

The same holds true for any justification of war over resources. Unilateral use of force leads most certainly to an escalation of conflict and thereby to global instability. If then the argument of instability of regions is used to intervene in another country again to secure access to key resources, one may foresee that the prohibition of the use of force becomes blurry and to the end ineffective.

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<sup>104</sup> *Annan*, The Secretary-General Address to the General Assembly, New York, September 23, 2003, <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>, 25.04.2019.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.